

# Judicial Conscience and Natural Rights: A Reply to Professor Ledewitz\*

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*In our Spring 1987 issue, Professor Jaffa authored an essay in which he posited that the fundamental principles of equality and other tenets of natural law expressed in the Declaration of Independence were originally intended to be the principles of the Constitution of 1787. Professor Jaffa asserted that while the Framers believed in the "law of nature and nature's God," many contemporary constitutional thinkers, including fellow conservatives Chief Justice William Rehnquist and Attorney General Edwin Meese, do not. Thus, Jaffa argued, those conservatives "who today most aggressively appeal to the doctrine of original intent are among its most resolute antagonists." In a responsive article, Professor Bruce Ledewitz, described what he considered to be a gap in Jaffa's essay "between the consciousness of the Framers and the practice of judicial review today." According to Professor Ledewitz, Jaffa provided no insight into how today's judges, by relying on the principles of the "Declaration of Independence whether they believe in self-evident truths or not," might actually resolve disputes concerning the implications of equality, liberty, and the pursuit of happiness. For Professor Ledewitz, the ultimate question is, "What sort of jurisprudence would result from a modern commitment to the natural law principles of the Declaration of Independence?" A question, he asserted, Jaffa did not expressly resolve. In the following essay, Professor Jaffa rejoins Professor Ledewitz in this timely and provocative exchange.*

I am grateful to Professor Ledewitz for the kind words with which he both prefaces and concludes his critique. There are, I should add, many welcome expressions of agreement in between. I am heartened to believe that we are not going to talk past each other, and that continued—but candid—discussions of our differences will not so much intensify those differences, as expand the areas of agreement between us.

Let me begin with footnote one of Professor Ledewitz's article. In it he says that my paper "does not deal with all of the problems that the original intent position . . . faces. Such questions as 'who counts as a framer,' 'what is the relevance of the ratification process?' or even 'why should intention matter

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in the first place?" do not occupy him. . . ."<sup>1</sup>

According to Professor Ledewitz, I dealt "primarily with a much narrower question, how well do the self-professed advocates of original intent understand the intellectual and political presumptions of the generation they accept as Framers?"<sup>2</sup>

Professor Ledewitz says that it was appropriate for me to have limited myself to a question of manageable scale. He says that his reply will be similarly limited, "but from a different, one might say left-wing, perspective."<sup>3</sup> Professor Ledewitz says, also correctly, that he senses a sympathy on my part with what Attorney General Meese, Chief Justice Rehnquist, and Judge Robert Bork are attempting to accomplish.<sup>4</sup> Yet he generously concedes that I have approached "the politically charged field of constitutional interpretation with the trustworthy attitude of the scholar, rather than that of the advocate."<sup>5</sup>

It is true that I addressed myself primarily to conservatives—primarily because I share with them an *a priori* commitment to the idea of "original intent" jurisprudence. I set out to prove—as Professor Ledewitz agrees that I have proved—that their jurisprudence does not, in the most important respect, correspond with the intent of those who framed and those who ratified the Constitution. I felt these conservatives would be obliged by their own premises to "alter or abolish" whatever was manifestly inconsistent with the intent to which they professed themselves to be committed.

But "a man convinced against his will is of the same opinion still."<sup>6</sup> I am well aware that however great is the obligation of men to their premises, they are seldom as attached to those premises as they are to their conclusions, whether or not those conclusions actually follow from the premises. My larger purpose, however, was to illuminate the profound break with the thought of the Founding Fathers, which is represented by the "mainstream" of American conservatism (including most particularly, neo-conservatism). The legal positivism of those

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1. Ledewitz, *Judicial Conscience and Natural Rights: A Reply to Professor Jaffa*, 10 U. PUGET SOUND L. REV. 449, 449 n.1 (1987) [hereinafter Ledewitz].

2. *Id.*

3. *Id.*

4. *Id.* at 449.

5. *Id.*

6. S. BUTLER, HUDIBRAS pt. ii, ch.2, line 847 (J. Wilders ed. 1967) ("He that complies against his will is of the same opinion still.").

such as Rehnquist has much in common with Calhoun. It has nothing in common with the political philosophy—or jurisprudence—of a Jefferson or a Madison. What Ledewitz fails to notice, however, is that the Brennanite (or left-wing) perspective that he shares is one that is basically the same as that of the conservatives, with whom he mistakenly thinks he differs. For what is most important about left and right wing jurisprudence today is not that they are of the right or of the left, but that they are “result oriented.” Their so-called principles are not in their premises, but in their conclusions. They differ in the particulars of their “value judgments,” but not in the subjectivity of that which they propose as the ground of constitutional law. Calling their subjective preferences “traditional morality” on the one hand, or “human dignity” on the other, does not make their preferences any more than “value judgments,” or less subjective. If the basis of law is believed to be subjective, however, then the basis of law is believed to be will, not reason. The goal or perfection of the law, according to the whole tradition of western civilization, is that it should be, in Aristotle’s words, “reason unaffected by desire.”<sup>7</sup> This is what law means according to the natural rights and natural law teaching of the Declaration of Independence. But law that rests upon nothing but “value judgments” is desire unaffected by reason.

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Professor Ledewitz is mistaken in supposing that I did not deal with “‘who counts as a framer,’” or “‘what is the relevance of the ratification process.’”<sup>8</sup> The political philosophy of natural rights and natural law, expressed in virtually all of the great documents of the Revolutionary and Founding period—but quintessentially in the Declaration of Independence—was the common ground for both the Framers and the Ratifiers. It is in the rejection of this common ground that we see the common ground of both the left and right today. Professor Ledewitz, in his delight at my exposure of the inconsistencies of present-day conservatism, fails to notice that the same inconsistencies characterize his own “left-wing perspective.”

Professor Ledewitz is also mistaken in supposing that I did not address the question of “why should [original] intention

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7. ARISTOTLE, *POLITICS* Book 3, ch. 16, § 5 (E. Barker trans. 1972) (“Reason free from all passion.”).

8. Ledewitz, *supra* note 1, at 449 n.1.

matter in the first place."<sup>9</sup> I pointed to the fact that Madison and Jefferson agreed that the principles of the Declaration of Independence are the principles of the Constitution.<sup>10</sup> But I also argued, notably but not exclusively in Appendix B,<sup>11</sup> that the principles of the Declaration are the true principles of the rule of law and the ground of political justice. Original intention ought then to govern because "ought" refers to what is right or just. But these principles, being governed in their application by "the dictates of prudence," do not of themselves determine the conclusions which the people of the United States or their representatives should draw from them. They are a necessary, but not a sufficient condition for just judgment. Professor Ledewitz is thus correct when he writes that I am not "proposing to consult the Framers on the specific issues that come before the Supreme Court today."<sup>12</sup>

It is the essence of prudence, to which the Founding Fathers appealed, that it be directed to the particular circumstances to which it is to be applied. Our circumstances are not identical to those of two hundred years ago. (Neither, of course, are they altogether different.) Justice Brennan, and his partisans, have a field day in denouncing the utility of any appeal to the opinions of the Framers. But in this denunciation, they—like their conservative adversaries—fail to distinguish between principles and the prudent or wise application of principles. This is because their conception of principles is always, at bottom, the belief that principles are "value judgments." But "value judgments" are essentially non-rational, and the ends of prudence are, and must be, essentially rational. Hence, properly understood, the very idea of "value judgments" as the principles or ends of law excludes the idea of prudence.

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Professor Ledewitz seems to accept, for the most part, that my interpretation of "original intent" is historically authentic. But he cannot accept the authority of that intention because he

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9. *Id.*

10. Jaffa, *What Were the "Original Intentions" of The Framers of the Constitution of the United States?*, 10 U. PUGET SOUND L. REV. 351, 355 (1987) [hereinafter Jaffa].

11. Jaffa, *supra* note 10, app. B. at 415 ("Are These Truths Now, Or Have They Ever Been Self-Evident? The Declaration of Independence and the United States of America on their 211th Anniversary.").

12. Ledewitz, *supra* note 1, at 452.

believes that in its decisive respect, the thought of the present is wiser than the thought of the past. He agrees—as do I—with Aristotle's dictum that what is intrinsically desirable is not the old but the good.<sup>13</sup> I believe that Professor Ledewitz is justified, as any man is justified, in arguing for the superiority of one idea over another. He would be justified, for example, in arguing that the central idea of the *Communist Manifesto* ("that all history is the history of class struggle")<sup>14</sup> is a wiser and better ground for political understanding than the central idea of the Declaration of Independence ("that all men are created equal"). Ledewitz would not be justified, however, if his argument was based on the premise that the *Communist Manifesto* was written later than the Declaration, or that the *Manifesto*, as a by-product of the historical school, was intrinsically superior to the Declaration because the latter reflected the anachronistic belief in eternal categories. In truth, nothing should be more thoroughly discredited today, in the eyes of intelligent human beings, than any such belief in progress.

Both National Socialism and Marxism-Leninism (International Socialism) justify themselves on this ground. As I pointed out in my earlier article,<sup>15</sup> however, Alexander Stephens, in his Cornerstone Speech of April 1861, justified the Confederate States of America as a form of government superior to all others because it was based upon the newly discovered scientific truth of Negro inferiority. This alleged scientific truth (which Stephens compared, among other things, to Harvey's discovery of the circulation of the blood) had replaced the "old" doctrine of human equality in the Declaration of Independence.<sup>16</sup>

I do not mean to argue for one or another version of the *reductio ad Hitlerum*. Hitler, or Stalin, or Stephens must be refuted. We are not entitled to say that they are wrong, however, because we have different "value judgments." That an argument leads to conclusions that we do not like does not mean that it is a bad argument. I believe, however, that the opinions and actions of Hitler, Stalin, and Stephens can be

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13. ARISTOTLE, *POLITICS* Book 2, ch. 8, § 21 (E. Barker trans. 1972) ("All men, as a rule, seek to follow, not the line of tradition, but some idea of the good . . .").

14. K. MARX & F. ENGELS, *MANIFESTO OF THE COMMUNIST PARTY* (Germany 1848).

15. Jaffa, *supra* note 10, at 393.

16. *Id.* at 103 (citing A. STEPHENS, *THE POLITICAL HISTORY OF THE GREAT REBELLION* 103 (E. McPherson ed. 1865)).

proved wrong by arguments founded upon the doctrines of the Declaration of Independence—doctrines which are consistent with reason and experience, and which are intrinsically truthful and just.

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Professor Ledewitz imagines a dialogue in which I exhort Chief Justice Rehnquist to abide by the self-evident truths of the Declaration of Independence. But the Chief Justice would reply to me, says Professor Ledewitz, that

there are no "self-evident truths," that there is no accessibility to a divine intention for humankind, and, thus, no endowed rights. . . . [Furthermore] Chief Justice Rehnquist would say that if people disagree about these matters, discussion must be closed. At the point of disagreement, there is nothing more than subjective preference, which may or may not be backed by power.<sup>17</sup>

And again:

Professor Jaffa associates the Framers with a . . . view, [according to which] political science and law are capable of uncovering a "true understanding" of the individual and her [sic] relation to society. There are principles, "truths 'applicable to all men and all times,'" that Chief Justice Rehnquist must accept if he wishes to interpret the constitution in accordance with original intent.

It is not clear how Professor Jaffa would like Chief Justice Rehnquist to respond to his position. If the Chief Justice examines modern philosophy, history, anthropology and, yes, even science, as well as his own being and concludes that this claim about eternal truth is incoherent, an echo of a less sophisticated time, he can hardly will himself to believe otherwise. Professor Jaffa obviously agrees with the Framers that their views are self-evident. But Professor Jaffa knows he is addressing an audience in which no one else is persuaded.<sup>18</sup>

Professor Ledewitz next cites John Hart Ely, who asks "what would we do with a constitutional provision protecting ghosts?"<sup>19</sup>

How could we who know that there are no such things attempt to interpret the Constitution as if we did believe in

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17. Ledewitz, *supra* note 1, at 453-54 (citation omitted).

18. *Id.* at 455.

19. *Id.* (citing J. ELY, DEMOCRACY AND DISTRUST 38-40 (1980)).

ghosts and apply the implications of ghost-belief? Such an undertaking would be self-defeating. Because we do not believe in ghosts, an appropriate application of a ghost provision would be beyond us.<sup>20</sup>

And Chief Justice Rehnquist—for whom Professor Ledewitz now speaks unreservedly—like John Hart Ely, “does not believe in the ghost of natural law. . . .”<sup>21</sup>

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I believe, with Jefferson, that “Almighty God hath created the mind free.”<sup>22</sup> Hence, I do not believe a man or woman—not even a law professor or a Supreme Court Justice—may be expected to believe anything of which he or she is unpersuaded. I can, therefore, only hope to persuade them of what reasonable men and women ought to be persuaded of. I can only marvel, however, that someone can at one and the same time deny that there are self-evident truths, and yet speak of the accessibility, or inaccessibility, of such truths “for humankind.” For assertion of the self-evidence of the proposition “that all men are created equal” means nothing more nor less than what Professor Ledewitz himself means when, answering on behalf of the Chief Justice, he speaks of what is accessible or inaccessible “for humankind.” What is that “humankind?” Is it not the human species, distinguished from the non-human? How is it that Professor Ledewitz can speak of this humankind without argument or evidence that there is such a thing? To speak thus is to assume that his meaning is self-evident.

I would remind Professor Ledewitz of the interlocutor described in my essay who denied that there were any self-evident truths and, consistent with this denial, denied that he knew that he was not a dog.<sup>23</sup> Here we come to the real meaning of the logical positivists when they speak of the ghosts of natural law. These ghosts are not the immaterial realities of Gothic novelists (or Gothic theologians). To paraphrase a famous cartoon character, “We have met these ghosts and they are us!”<sup>24</sup> This positivism denies the reality of the knowledge

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20. Ledewitz, *supra* note 1, at 455.

21. *Id.*

22. T. Jefferson, *A Bill for Establishing Religious Freedom enacted by the General Assembly of Virginia January 16, 1786, reprinted in THE COMPLETE JEFFERSON* 946 (S. Padover ed. 1943).

23. Jaffa, *supra* note 10, at 418.

24. Walt Kelly's “Pogo.”

that we ourselves exist, and have identities in an external reality—a nature of which human nature is a part. In this nihilistic dispensation—where the ground of thought becomes an infinite regress—we ourselves thus become imaginary creatures of our own imaginations!

Recently, the entire nation, from the President of the United States, to every farm or factory worker, clerk, or shoe salesman, held its breath while rescue teams worked around the clock to save an eighteen month old girl who had fallen to the bottom of an abandoned well. Why this tremendous concern for this tiny bundle of earth, air, fire, and water? A puppy or a kitten might also have been an object of concern, but not to the same degree or magnitude. "One touch of nature makes the whole world kin."<sup>25</sup> It was the *nature* of the child that brought the entire country together as if it were a single family. After all, none of us knew her as an individual. Some of us believed that her's was an immortal soul loved by God. But whether or not we believed that God loved her, we knew that we did. Why? Does Professor Ledewitz really believe that the evidence of such experience, which is the root in the ground of natural law, is something to be put aside as unscientific, a kind of superstitious hang-up? We know, of course, that human beings can be dehumanized to the point that they can kill human children as if the children were microbes. The minions of Hitler, Stalin, and Pol Pot did so in great genocidal convulsions. But when we speak of dehumanization, we imply a norm in nature by which we can recognize and characterize what is degenerate and immoral.

By the logic of this debased philosophical positivism, whatever is not "verifiable" by "scientific" canons is not known at all. But we should consider that all scientific verification presupposes pre-scientific categories. The scientist who verifies a hypothesis by experimental means presents his evidence to another scientist. In doing so he must believe in the reality of his own existence and that of his fellow scientist. But he makes no attempt to verify the truth of his own identity—as man and scientist—in the way he attempts to verify the hypothesis that is the subject of his experiment. In fact, such a demonstration of his own existence is an impossibility.<sup>26</sup>

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25. W. SHAKESPEARE, *TROILUS AND CRESSIDA*, Act III, sc. iii, line 175.

26. I will not now reconstruct the technicalities of this argument, but refer the



Every attempt at demonstration presupposes the existence of the demonstrator.

Our own existence is a self-evident truth. There can be no evidence stronger than that which is implicit in the assumption that enables us to consider evidence. Without the assumption of the reality of our own existence, without the assumption of the reality of our individual identities—which means our existence as individuals of a species—all rationality would be impossible. Scientific rationality is a sub-species of human rationality, but it has no life, or being, apart from that pre-scientific rationality which is the condition of its existence.

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Professor Ledewitz says that Chief Justice Rehnquist, examining the claims of the Declaration of Independence to “eternal truth” in the light of modern philosophy and modern social science, must conclude that such claims are “incoherent, an echo of a less sophisticated time.”<sup>27</sup> But it is modern philosophy and modern social science which would lead Chief Justice Rehnquist to believe that all moral judgments are “value judgments.” It is modern philosophy and modern social science that, on the Chief Justice’s own premises, would require a judge to enforce Nazi law once the judge was satisfied that the “original intention” of the legislator had been to enshrine Nazi “value judgments” into law. It is mere accident, and nothing in the nature of law itself, as I believe the Chief Justice himself understands the nature of law, that places his judicial skills in the service of Jefferson’s—and not of Hitler’s, or Stalin’s, or Pol Pot’s—“value judgments.” I would remind Professor Ledewitz that it is also modern philosophy and modern social science which prevent an otherwise intelligent human being from knowing that he is a human being—and not a dog. But it is precisely because some disciples of logical positivism do not know that they are not dogs and that other disciples of that same positivism do not know that, for example, black men are not monkeys, and that Jews are not termites. Professor Ledewitz concludes that I, in indulging in exhortations of the canons of a by-gone age, am “addressing an audience in which no one else is persuaded.”<sup>28</sup>

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reader to the title essay of H. JAFFA, *THE CONDITIONS OF FREEDOM: ESSAYS IN POLITICAL PHILOSOPHY* (1975).

27. Ledewitz, *supra* note 1, at 455.

28. *Id.*

It may seem strange to Professor Ledewitz, but it is nonetheless true, that I have unfailingly persuaded student audiences for all of the 43 years of my teaching career that they really do know that they are not dogs, that black men are not monkeys, and that Jews are not termites. And I have not only persuaded them that such knowledge is genuine knowledge, but that the ground of such knowledge is what Abraham Lincoln called, “[A]n abstract truth, applicable to all men and all time.”<sup>29</sup> I have, moreover, found that it is relatively easy to persuade students of this—that is, if they are young enough and have not been duped by the superstitions of the relativism, positivism, and nihilism, which are the reigning modes of thought in this new dark age. Once they have been persuaded—as my anonymous (but genuine) interlocutor was—that it is sophisticated to say that you do not know that you are not a dog, then the task of persuasion is much more difficult. Difficult—but not impossible. In the long run, we all have a much greater interest in being thought human, than in being thought sophisticated. I certainly do not despair of persuading Professor Ledewitz.

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Professor Ledewitz asks:

[W]hat sense does this call for a return to the “true” understanding of original intent make when addressed to people who, in good faith, find original intent to be gibberish? Here we would expect Professor Jaffa to show that the Framers’ views are true and that modern critics of natural rights are wrong. He avoids this effort, however. Perhaps he feels that, as a historian, it is not his place.<sup>30</sup>

On the contrary, I have consistently argued—as I do here—that the Framers’ intent is authoritative for no other reason than because it is true. What did Professor Ledewitz think I meant when I showed that “the modern critics of natural rights” could not discover any epistemological foundation for their own humanity—for that which distinguished them “from the beasts of the field that perish?”<sup>31</sup> What did he think I was doing when I argued, with Lincoln, that for the positive law to

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29. Letter to Henry L. Pierce & Others (April 6, 1859), *reprinted in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 374-76 (R. Basler ed. 1953) [hereinafter COLLECTED WORKS].

30. Ledewitz, *supra* note 1, at 456-57.

31. Jaffa, *supra* note 10, at 418.

treat a black man as a chattel was against the natural law, because a black man possessed a rational will which a chattel cannot possess?<sup>32</sup> I was not making this argument as a historian. While I am a student of history, my vocation is that of a political scientist. I turned to Lincoln's argument not as a historical curiosity, but because it revealed more clearly than any other single example the disjunction of positive law and natural law ("original intention") within the Constitution itself. And while Lincoln's argument conceded a prudential obligation to the positive law arising from "necessity," it pointed to the contrary obligation arising from "freedom."<sup>33</sup>

Among the fundamental texts of my vocation is Aristotle's *Nicomachean Ethics*, wherein he asserts that we are inquiring not "in order to know what virtue is, but in order to become good. . . ."<sup>34</sup> Right action, morally and politically, is the end or purpose of political science. Nothing I have ever written has been unrelated to this end. The only explanation I can imagine for Professor Ledewitz's misunderstanding is that looking to the past for wisdom is alien to him. I grant that it ought to be alien to anyone who is justifiably confident of the wisdom of the present. However, I see little justification for such confidence. The subjective confidence of the lunatic is no less than that of the philosopher; indeed, many lunatics have imagined that they were philosophers! And in this age in which the most radical subjectivity is certified by those called philosophers (or social scientists), the distinction between lunatics and philosophers tends to vanish. We should never forget that both Hitler and Stalin demanded public recognition for themselves as the undisputed source of philosophic wisdom in their regimes.

What then passes for wisdom with Professor Ledewitz? Oddly enough, while rejecting my use of it, Professor Ledewitz himself patronizes natural law. As I have already pointed out, this is implicit in his appeal to "humankind." However, in the following statement he clearly establishes himself as the true representative of "the tradition of natural law":

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32. *Id.* at 417.

33. See W. Churchill, *On the Necessity of a Scholarship of the Politics of Freedom*, reprinted in INTRODUCTION TO STATESMANSHIP: ESSAYS IN HONOR OF SIR WINSTON SPENCER CHURCHILL 1-9 (H. Jaffa ed. 1981).

34. ARISTOTLE, *NICOMACHEAN ETHICS* Book 2, ch. 2, line 27 (M. Ostwald trans. 1962).

Self-conscious emulation is not natural law. Nor is it true to the Framers' intent. It is an archaeological dig into the remnants of natural law. It is an attempt to hold human understanding still at a certain point in time. Neither a judge nor a legal thinker can be true to the tradition of natural law unless it lives in her. Merely to appeal to equality without commitment to the reality of equality, its self-evident quality, is to celebrate the shell without the substance.<sup>35</sup>

One must marvel at how Professor Ledewitz can speak of the ghost of the natural law doctrine of the Declaration of Independence at one moment and of the self-evident reality of its substance at the next! But there is not a word of the foregoing with which I am not in complete agreement. In the sequel, however, Professor Ledewitz writes:

The problem for Professor Jaffa is that he wishes to be true to an original intent that is revolutionary in its call for natural justice, but also wants to restrict carefully the implications of original intent.

Professor Jaffa takes pains to insulate himself from what he calls judicial activism. His methods of limitation are first, fidelity to the text; second, opposition to judicial "evolutionary conscience"; and third, the requirement of corporate judicial action.<sup>36</sup>

According to Professor Ledewitz, these negative techniques "interfere with an attempt to practice the constitutional tradition bequeathed to us by the Framers."<sup>37</sup>

It is good to know that the question is not *whether*, but *how* we should go about having a constitutional jurisprudence of original intent! Professor Ledewitz makes the issue of capital punishment the centerpiece for his discussion of my "negative techniques." He argues that the Constitution is no more presumptively in favor of capital punishment than it is in favor of slavery.

According to Professor Jaffa, though the Constitution promotes slavery in several respects, it is not a pro-slavery document. Slavery is a prudent compromise, not a matter of genuine constitutional principles. The genuine principle is said to be human equality as demonstrated by the Declaration of Independence.

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35. Ledewitz, *supra* note 1, at 458.

36. *Id.*

37. *Id.* at 459.

But the Declaration of Independence also proclaims the unalienable right of human persons to "life." One may say that the calculated taking of human life is presumptively disfavored under the Declaration of Independence, just as slavery clearly is disfavored.

The fifth amendment no more turns the Constitution into a pro-death penalty document than the fugitive slave provision turns the Constitution into a pro-slavery document. . . . The genuine principle of the Constitution is "life," just as surely as it is "equality."<sup>38</sup>

Professor Ledewitz is, however, simply wrong in his premises. The rights proclaimed in the Declaration are rights which we are bound to respect in others only to the extent that others respect them in us. The right to life which we are bound to respect is, as such, a right of innocent life. The right of a murderer—or tyrant—is not on a level with that—for example—of an unborn child. Professor Ledewitz should reflect on the fact that the Declaration was issued in the midst of a war—a just war—in which the "one people" who made the Declaration were taking the lives of some of those who would forcibly deprive them of the enjoyment of their natural rights. That "the great principle of self-preservation" was "the transcendent law of nature and of nature's God,"<sup>39</sup> as James Madison declared in the forty-third *Federalist*, and that this might justify the taking of human life, was axiomatic for the Founding Fathers. Locke's *Second Treatise of Civil Government*, the very text of which resonates in the Declaration, defines "political power" to be "a right of making laws with penalties of death, and consequently all less penalties. . . ."<sup>40</sup> Locke says, moreover, that we ought, when our "own preservation comes not in competition. . . to preserve the rest of mankind, and may not, *unless it be to do justice on an offender*, take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb or goods of another."<sup>41</sup>

I challenge Professor Ledewitz to find a document of the thought of those who framed, and those who ratified, the Constitution, disagreeing with the foregoing definition of legitimate power—a definition derived from the right to life. I

38. *Id.* (footnote omitted).

39. THE FEDERALIST No. 43, at 287 (J. Madison) (Bicentennial ed. 1976).

40. J. LOCKE, SECOND TREATISE OF GOVERNMENT 4 (T. Peardon ed. 1952) [hereinafter LOCKE, SECOND TREATISE].

41. *Id.* at 6 (emphasis supplied).

challenge him to find anywhere a denial of the right, under certain circumstances, of doing justice to an offender by taking away the offender's life.<sup>42</sup> Moreover, to cite Locke is not "an archaeological dig."<sup>43</sup> Ledewitz has himself cited the Declaration as authority for the Constitution. And Madison and Jefferson, in the same correspondence in which they agreed upon the Declaration as the guide to the principles of the Constitution, also agreed upon Locke's *Second Treatise* (together with Sidney's *Discourses on Government*) "for the general principles of liberty and the rights of man, in nature and society."<sup>44</sup> Moreover, Madison and Jefferson agreed that these doctrines were approved by the American people.<sup>45</sup> Translated into a more contemporary idiom, they are the doctrines still approved—and I would say rightly approved—by the American people. Professor Ledewitz's argument that the principles of

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42. Professor Ledewitz asserts that "the eighth amendment was viewed at the time of its introduction and criticized as an invitation to abolish capital punishment." Ledewitz, *supra* note 1, at 459. This, he says "is the gist of the celebrated objection of Representative Livemore of New Hampshire during consideration of the proposed eighth amendment." Ledewitz then quotes Livemore: "[I]t is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel?" *Id.* at 459 n.36 (quoting ANNALS OF CONG. 754 (J. Gales ed. 1789)). We observe that Ledewitz's only witness is one who is anxious *not* "to be prevented" from inflicting "these punishments." Where is the witness who wants these punishments to be prevented? As Professor Ledewitz himself notes, there are no such witnesses against capital punishment, among the generation of the Founders, as there are against slavery. *Id.* at 460. He thinks, however, that we should be bound by the principles of the Declaration, rightly understood, even when the Founders did not understand them rightly. *Id.* But it is the Founders, and not Professor Ledewitz, who understood those principles rightly. His citation does not constitute a shred of evidence that those who adopted the eighth amendment believed that it would authorize the Supreme Court to abolish capital punishment. Of course, Congress—or state legislatures—might do so as an exercise of legislative power. Certainly, changing opinions by the people as to what constitutes "cruel and unusual punishments" might be the occasion for changes in the law. Professor Ledewitz knows, however, that popular support for capital punishment is today probably as strong as at any time in our history. Consider the 1972 constitutional initiative in California sanctioning the death penalty, which was passed by a majority of 67.5% of the voters, and consider as well the rejection in 1986 by 66.16% of the voters of Chief Justice Rose Bird. (Official statements of the vote by the Secretary of State of California.) Justice Bird's defeat has been almost uniformly attributed to her "nullification" of the death penalty initiative, by voting to reverse every death sentence that came before her on appeal. For Justice Brennan, or Professor Ledewitz, to maintain that the Supreme Court, on its own authority, might abolish capital punishment, in opposition to the express language of the Constitution—in the fifth and fourteenth amendments—is simply unacceptable.

43. Ledewitz, *supra* note 1, at 458.

44. Letter from Jefferson to Madison (1825), reprinted in 19 WRITINGS OF THOMAS JEFFERSON 460-61 (A. Lipscomb ed. 1903).

45. *Id.*

the Declaration, which we all agree condemn slavery, condemn capital punishment is simply without foundation. Hence, his attempt to ground an objection to capital punishment in the "original intent" of the Constitution—seen as an expression of the principles of the Declaration of Independence—is without foundation.

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Concerning my objections to Justice Brennan's (or anyone else's) "evolutionary conscience"<sup>46</sup> superseding the words of the Constitution in the interpretation of the Constitution, Professor Ledewitz says:

Professor Jaffa accuses liberal jurisprudence of dismissing the insights of the Framers in the name of new insights said to be based on science.

*The heart of this critique is valid.* The Framers proposed eternal principles based on an unchanging human nature created by God. Liberal and radical left-wing legal thinkers today reject all such conceptions as epistemologically naive. This is as true of main line consensus thinkers like Owen Fiss, and Harry Wellington, as it is of the Conference on Critical Legal Studies.<sup>47</sup>

I am glad that Professor Ledewitz and I stand together here. I take it as evidence that he recognizes, as I do, that the worst tyrannies of human history—notably those of Hitler and of Stalin—rested on assertions of scientific validity, as well as a denial of the moral relevance of "an unchanging human nature." And, as I have shown from Alexander Stephens' "Cornerstone Speech," this was also true of the "positive good" defense of slavery in the ante-bellum South. Proceeding from this point, however, Professor Ledewitz appears to impute to me the opinion that because there are "eternal principles" there is no such thing as new knowledge!<sup>48</sup> It would be very strange indeed, for someone who holds both Aristotle and Jefferson in the regard that I do, to deny, as he implies, that "the insights of science are as entitled to a hearing as any other claim to truth."<sup>49</sup> Of course, the assertion that something is "new knowledge" does not make it such. There is always at least ten thousand times as much new quackery as there is

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46. Jaffa, *supra* note 10, at 385.

47. Ledewitz, *supra* note 1, at 461 (emphasis supplied) (citations omitted).

48. Ledewitz, *supra* note 1, at 463.

49. *Id.*

new knowledge. Professor Ledewitz writes that "modern science teaches us [that] developmental biology proclaims the fetus to be our young brother or sister in the human family."<sup>50</sup> With great respect, I submit that, while the "proclamation" is true, it does not emanate directly from the evidence supplied by modern science, or from developmental biology. It is true only in the light of an assumption brought to that evidence. That assumption—which is contradicted by the theory of evolution, in any of its contemporary versions—is the permanent moral significance of the distinction of species.

I would be the last one to exclude any evidence from any source that might assist in legislating wisely on the extraordinarily difficult question of abortion. Professor Ledewitz and I seem to largely agree that it was a judicial atrocity, unsurpassed since *Dred Scott*,<sup>51</sup> for the Supreme Court in *Roe v. Wade*<sup>52</sup> to set aside the legislative protection of innocent human life provided by the laws of the states. Professor Ledewitz's discussion of the need for prudential morality in dealing with the question of abortion is nothing less than a brief for denying courts jurisdiction over what is clearly a legislative question. But the right of innocent human life to the protection of law—the first of the rights proclaimed in the Declaration<sup>53</sup>—is the ground of the legislative prudence that we both call for.

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Professor Ledewitz's call for "[n]ew learning" extends, he says,

to new insights into older practices with which the Framers were familiar. A good example is the view of the Framers that private property is the "product of a man's labor." It is no secret that high on the political/legal agenda of the Neo-Lockeans . . . is an attack on the New Deal and the Welfare State in the name of the Framers' commitment to individual property rights . . . . But Marxism, as well as the lessons of an interconnected industrial society, should have taught us something about the role of property. Property is never a matter of individual right alone. Property is a social product. This knowledge shapes our understanding of natural

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50. *Id.*

51. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

52. *Roe v. Wade*, 410 U.S. 113 (1973).

53. The Declaration of Independence para. 1 (U.S. 1776) ("Among these are life, liberty, and the pursuit of happiness.").



rights.<sup>54</sup>

Let us observe, first of all, that Neo-Lockeanism is not the same thing as the Lockeanism of the Founding Fathers. I cannot speak for the Neo-Lockeans mentioned by Professor Ledewitz. However, many of those going under that description place an overriding emphasis upon individual freedom, defined merely as doing what one likes, without regard to objective norms of human behavior. In this, they are very far from recognizing the moral claims that were paramount for a Washington, a Jefferson, or a Madison. Jefferson once wrote: "Independence can be trusted nowhere but with the people in mass. They are inherently independent of all but moral law."<sup>55</sup> This qualification, however, was fundamental.

For Locke himself, the law of reason, which was the law of nature, was a moral law. In Locke's comprehensive understanding of property, the claims of property and the claims of morality coincide. Adultery, no less than murder, theft, perjury, and covetousness, are offenses against property. Samuel Johnson was very much the Lockean in replying to Boswell's query, as to why chastity in the female was so much more important than chastity in the male: "Because, sir, all our laws of property depend upon it."<sup>56</sup> The humor in this remark should not detract from its seriousness. Marx's hatred of private property reflected a hatred of morality as an enemy of human freedom. In this, Marx had much in common with the Neo-Lockeans and, in general, with present-day libertarianism.

Professor Ledewitz thinks that we should have learned from Marxism and an "interconnected industrial society" that "property is never a matter of individual right alone."<sup>57</sup> Property, he says, is a social product.<sup>58</sup> In fact, the labor theory of value is something Marx simply took over from John Locke. The link between economy and society (and polity) is to be found in the division of labor, a leading argument of Plato's *Republic*,<sup>59</sup> but one Marx certainly learned from Adam Smith, if not from Smith's predecessors. Once civil society is formed—according to Locke, no less than Marx—property is

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54. Ledewitz, *supra* note 1, at 463-64.

55. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819).

56. J. BOSWELL, *LIFE OF SAMUEL JOHNSON*, L.L.D. (1952).

57. Ledewitz, *supra* note 1, at 464.

58. *Id.*

59. PLATO, *THE REPUBLIC* Book 2, 369 B-E (P. Shorey trans. 1930) [hereinafter PLATO, *REPUBLIC*].

“never a matter of individual right alone.” In joining with others to protect his natural rights, each individual surrenders to civil society, acting by the majority, the right to regulate property in whatever way shall best contribute to the common good. What that way is becomes a matter of legislative prudence. Marx’s “contribution” was his alleged discovery that the common good is best served by the total abolition of private property. If Marx had demonstrated—or if experience had shown—that the regulation of private property for the common good was best served by its abolition, then indeed we would have something to learn from him.

But Professor Ledewitz should bear in mind that for Marx the abolition of private property extends to everything—including family. If he has any doubts on this point, let him re-read the *Communist Manifesto*. Marx knew—as did Socrates in Plato’s *Republic*—that the indefeasible basis of private property within civil society, no less than within the state of nature, was the pleasure and pain felt by individual bodies and the souls thereof. The generation of children, although a social act, is also the ground of indefeasible individualism. Property and family are indissolubly linked. Men and women care more for their own children than for good children—however much they may wish their own children to be good. The argument for the prudence of having property remain essentially private in civil society, according to Locke,<sup>60</sup> is that the property will thereby be better cared for and more industriously increased.<sup>61</sup> For both Locke and Aristotle, the argument for private property is for the advantage of the common good—not solely for the good of individuals. I know of nothing in either theory or practice to contradict this judgment. To quote Sir Winston Churchill, “The inherent vice of capitalism is the unequal sharing of blessings; the virtue of socialism is the equal sharing of miseries.” Or, as John Locke put it:

There cannot be a clearer demonstration of anything [viz., of the connection between private property and productive labor and the common good] than several nations of the Americans [that is to say, the pre-colonial Red Indians] are of this, who are rich in land and poor in all the comforts of life, whom nature having furnished as liberally as any other people with the materials of plenty . . . yet for want of

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60. LOCKE, SECOND TREATISE, *supra* note 40, at ch. 5, “Of Property.”

61. See also Aristotle’s critique of THE REPUBLIC. ARISTOTLE, POLITICS Book 2.

improving it by labor, have not one-hundredth part of the conveniences we enjoy. And a king of a large and fruitful territory there feeds, lodges, and is clad worse than a day-laborer in England.<sup>62</sup>

Except for the status of communism's "kings,"<sup>63</sup> these words could apply today to the comparison between communist and capitalist societies. The Lockean argument for private property has always relied upon its comparative benefits to the poorest members of society. When James Madison wrote in the famous tenth *Federalist* that "the first object of government" was the "protection of different and unequal faculties of acquiring property,"<sup>64</sup> he was faithfully reflecting the teaching of John Locke. In this, however, he was arguing for a widespread and diverse ownership of property (in an "extended republic") as a necessary condition of democratic constitutionalism. It should hardly be necessary to say at this time that collective ownership of property means such a monopoly of economic power as to make democratic government an impossibility. I do not, therefore, think that there is any wisdom to be gained from Karl Marx concerning the nature of property.

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In what I regard as his decisive argument, Professor Ledewitz makes a determined effort to enlist me—as I have always wished to enlist him—in a crusade for justice, as understood within the framework of the natural rights and natural law doctrines of the American Founding. He writes:

Perhaps Justice Brennan is not committed [as Professor Ledewitz concedes he ought to be] to original intent. Accordingly, Justice Brennan's search for an evolving consensus may in fact be subject to Professor Jaffa's criticism that it represents arrogant subjectivity. [It is!] But for Professor Jaffa to criticize generally the idea of individual access to truth is an appalling irony. Professor Jaffa believes and is totally committed to the proposition that all men are endowed by their Creator with certain unalienable rights. Now how did this idea come to Professor Jaffa? Certainly, as he admits, the elites of our time do not believe it. Philoso-

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62. *Id.* at 25.

63. Communism, no less than Democracy or Monarchy, has its Kings: the upper echelons of the Communist Party and the bureaucracy see to it that its highly privileged members are supplied with western goods and services denied to at least 95% of their society.

64. THE FEDERALIST No. 10, at 55 (J. Madison) (J. Cooke ed. 1982).

phers reject it. Liberal and conservative jurisprudence reject it. It may be that most Americans still believe in inherent rights, but that traditional belief may be fading under the pressure of positivism and modernity. If the day should come that no one else takes the idea seriously that man has inherent rights given by God, would Professor Jaffa then abandon it? No. *Because it is true*. Why then should a Justice of the Supreme Court interpreting fundamental rights be subject to a numbers test?<sup>65</sup>

Professor Ledewitz may rest assured that the "appalling irony" of which he writes is altogether imaginary. Never have I "criticized . . . the idea of individual access to truth." In a famous passage, which I often quote, George Washington in 1783 wrote: "The foundation of our empire [viz., forms of government] was not laid in the gloomy ages of ignorance and superstition; but at an epoch when the rights of mankind were better understood and more clearly defined, than at any other period."<sup>66</sup>

Washington did not mean that "the rights of mankind" were then perfectly understood. He himself was then pressing urgently toward the formation of "a more perfect union." But, of course, Washington did imply that in the "gloomy ages of ignorance and superstition" free government would be impossible. In such times, mankind's only options are among forms of despotism. If then "the day should come" of which Professor Ledewitz speaks, constitutional government would be an impossibility. And that day may indeed not be far distant if, as Professor Ledewitz says, "the elites of our time do not believe" in the doctrine of the rights of man, if "[p]hilosophers reject it," and if "[l]iberal and conservative jurisprudence reject it."<sup>67</sup> These new dark ages may be darker than any which have preceded them and more impervious to the light of reason. "No light but only darkness visible," Milton's Satan said of Hell.<sup>68</sup> It is far more difficult to attack superstitions masquerading as science, than superstitions masquerading as faith.

When Professor Ledewitz asks why a Supreme Court Justice, interpreting fundamental rights, should be "subject to a numbers test,"<sup>69</sup> what he is really asking is why a Supreme

65. Ledewitz, *supra* note 1, at 466 (citations omitted) (emphasis added).

66. 10 WRITINGS OF GEORGE WASHINGTON 265 (W. Ford ed. 1891).

67. Ledewitz, *supra* note 1, at 466.

68. MILTON, PARADISE LOST (1667).

69. Ledewitz, *supra* note 1, at 466.

Court Justice should be subject to the principles of free government, as those principles are set forth in the Declaration of Independence and embodied in the Constitution. Professor Ledewitz should consider how the Constitution itself represents not “numbers,” but fundamental rights. Because “all men are created equal,” the “just powers” of government are derived “from the consent of the governed.” And just as every human being counts, every human being has a right to be counted. Having the right to be counted means having the right to be part of the political process—a process which is primarily and essentially legislative. The principle of majority rule—the “numbers test” which Professor Ledewitz unwittingly disparages—arises from the principle of human equality. That those who live under society’s law make the laws under which they live is an essential implication of the doctrine of the Declaration of Independence. When judges take it into their hands to act as legislators they are introducing an element of despotism into government as surely as if they were kings or dictators.

Majority rule—the use of “numbers” in the political process—arises from the unanimous consent by which civil society is understood to be constituted. In understanding this argument one cannot have too frequent recurrence to fundamental principles. As the Massachusetts Bill of Rights tells us, “All men are born free and equal.”<sup>70</sup> Because of this natural freedom and equality,

[t]he body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good.<sup>71</sup>

Majority rule—the *lex majoris partis*—arises from, and is a practical surrogate for, the unanimity by which the body politic is first formed. Jefferson, in his inaugural address, called the right of the majority to rule “sacred” because it is the necessary means for implementing the rights with which all men have been equally endowed by their Creator.<sup>72</sup> But majority

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70. Massachusetts Bill of Rights art. I (1780), reprinted in H. COMMAGER, 1 DOCUMENTS OF AMERICAN HISTORY 107 (9th ed. 1973) [hereinafter COMMAGER].

71. *Id.*

72. Jefferson’s First Inaugural Address (March 4, 1801), reprinted in 1 COMMAGER, *supra* note 70, at 187.

rule is a qualitative, no less than a quantitative principle.

All too will bear in mind this sacred principle that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights which equal law must protect, and to violate would be oppression.<sup>73</sup>

Jefferson did not expect that the will of the majority would always be right and reasonable. The Jefferson whose words we have just quoted had been elected President largely because of his (and Madison's) indictment of the Alien and Sedition Acts as unconstitutional.<sup>74</sup> And the political process, as a means of correcting the unconstitutional enactments of one constitutional majority, was vindicated by a new, and as Jefferson believed, more just, constitutional majority.<sup>75</sup> Certainly the Jefferson who had called the slaves "one half the citizens" of his native state<sup>76</sup> knew that the Constitution was very far from the equal protection of the rights of minorities. But the recourse of oppressed minorities was either to the political process, or to the right of revolution. In the case of slavery, one might say that neither recourse was genuinely available to the slaves themselves. This, however, is not how Jefferson looked at the matter. In the *Notes on Virginia*,<sup>77</sup> he predicted that unless the problem of slavery was dealt with on the basis of the principles of the Declaration, there would be a civil and servile war, in which God would take the side of the slaves.<sup>78</sup>

Indeed, I tremble for my country when I reflect that God is just; that his justice cannot sleep forever; that considering numbers, nature and natural means only, a revolution of the wheel of fortune, an exchange of situation is among possible events; that it may become probable by supernatural interference. The Almighty has no attribute which can take side with us in such a contest.<sup>79</sup>

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73. *Id.*

74. The Kentucky and Virginia Resolutions of 1798, reprinted in 1 COMMAGER, *supra* note 70, at 178-83. The Kentucky Resolution, drafted by Jefferson, and the Virginia Resolution, drafted by Madison, were drafted as a protest to the Alien and Sedition Acts.

75. 1 COMMAGER, *supra* note 70, at 187 (Jefferson's inaugural address).

76. T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA, reprinted in THE COMPLETE JEFFERSON 667 (S. Padover ed. 1943).

77. *Id.*

78. *Id.* at 677.

79. *Id.*

The right of revolution, we see, is an ever present element of political public opinion in a free society founded and maintained on the basis of the principles of the Declaration. That "firm reliance upon the protection of divine Providence" with which the Declaration concludes is something that all mankind, including the American slaves, were equally entitled to. Jefferson warned that the very Providence which supported their cause in the Revolution would be against them in any struggle over slavery.<sup>80</sup> "I tremble for my country when I reflect that God is just" was repeated many times by Lincoln in his antislavery speeches in the 1850s.<sup>81</sup> It explains why Lincoln ended his Cooper Union speech with "Let us have faith that right makes might, and in that faith, let us, to the end, dare to do our duty as we understand it."<sup>82</sup>

Jefferson's prediction of a civil war was uncanny. Yet one would also have to say that that prediction, as an element of the policy of Abraham Lincoln, went a long way to bring about the crisis it predicted, and to lift the cause of the Union and emancipation to victory. Lincoln's second inaugural address<sup>83</sup> (perhaps the greatest political speech in the history of mankind with its interpretation of the Civil War as a divine punishment for the sin of slavery) is also a Jeffersonian interpretation of the right of revolution. From this interpretation we see how consciousness of the right of revolution can become an active element in the political process by which opinions favorable to human freedom are brought to bear upon that very process.

The antislavery cause finally prevailed because a constitutional majority elected an antislavery president. Professor Ledewitz should reflect that in the crisis brought on by that election, it was the proslavery faction, buoyed and driven by a decision of the Supreme Court,<sup>84</sup> that revolted against the principles of the right of revolution! Professor Ledewitz's idea that the Justices of the Supreme Court should look directly to the idea of natural justice to decide what is constitutional, would pervert the very essence of the right of revolution.<sup>85</sup> The right

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80. *Id.*

81. See, e.g., 3 COLLECTED WORKS, *supra* note 29, at 220 (Lincoln's reply in the Galesburg, Illinois Debate).

82. 3 COLLECTED WORKS, *supra* note 29, at 550.

83. 8 COLLECTED WORKS, *supra* note 29, at 332.

84. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

85. Ledewitz, *supra* note 1, at 464-70.

of revolution resides in the people as a whole. As Madison makes plain in the forty-third *Federalist*, the Constitution itself is an expression of the right of revolution.<sup>86</sup> To suggest that this exertion of the authority of the people resides in their agents, chosen to carry out certain high but limited functions, is absurd. Above all, it is absurd because in the name of equal natural rights it denies the right of self-government in and through the consent of the governed. The words of Locke are of the highest authority here:

[F]reedom of men under government is to have a standing rule to live by, common to every one of that society and made by the legislative power erected in it, a liberty to follow my own will in all things where the rule prescribes not, and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man . . . .<sup>87</sup>

The “arbitrary will of another man” is not less arbitrary for being the will of a judge. It is no less arbitrary when intrinsically or naturally right, if it is imposed without that process—the legislative process—whereby the consent of the governed enters into the making of the laws that the governed are to live under.

“Our government rests in public opinion,” declared Lincoln, “Whoever can change public opinion can change government practically so much.”<sup>88</sup> The heart of the governmental process is the process of forming opinion. If the opinion of the public is simply and unequivocally unfavorable to the rights of man under the laws of nature and of nature’s God, there is no possibility of free government. But the public’s opinion may be committed to the institution of such a government—as ours was at the time of the Founding, and as it is today—without being fully aware of what is logically and morally implied in that commitment. But let us reflect that this commitment, however perfect or imperfect, is always of a two-fold character. It is on the one hand a commitment to “these ends,” viz., “to secure these rights” with which all men have been equally “endowed by their Creator.”<sup>89</sup> On the other hand, it is equally

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86. THE FEDERALIST, No. 43, at 287, (J. Madison) (Bicentennial ed. 1976) (“the safety and happiness of society are the objects of which all political institutions aim, and to which all such institutions must be sacrificed”).

87. LOCKE, SECOND TREATISE, *supra* note 40, at ch. 15.

88. 2 COLLECTED WORKS, *supra* note 29, at 385.

89. The Declaration of Independence para. 2 (U.S. 1776).



a commitment to secure these rights by "the consent of the governed." Logically, equal rights and consent of the governed are reciprocals. Practically, they are in tension with each other, and may sometimes be in flat opposition.

In the crisis over slavery, the seceding states characteristically took their stand on "the consent of the governed." They withdrew their consent to remain in a Union in which a constitutional majority held in moral abhorrence an institution—chattel slavery—that they believed to be vital to their safety and welfare.<sup>90</sup> They did not see that the principle of consent, by which they justified the action they were taking, itself had no validity apart from the principle of equality, whose authority they denied!

I am sure that Lincoln's opposition to slavery is well known to Professor Ledewitz. Perhaps less well known is his opposition to abolitionism. Professor Ledewitz's call for judicial activism, however, directly parallels the abolitionist's call before, and during, the Civil War for direct federal action to abolish slavery. Lincoln held that there was no federal jurisdiction, authorized by the Constitution, for federal action against the domestic institutions of any state. That is to say that Lincoln did not believe that in ratifying the Constitution, the citizens of the several states granted the federal government authority over their domestic institutions.<sup>91</sup> To employ the power of the federal government to alter or abolish any of the domestic institutions of the slave states would have been usurpation of power never consented to—it would be government without the consent of the governed. The abolitionists, in their appeal to equality, would have disregarded the requirement of consent which followed from it. The proslavery secessionists asserted their right to be governed only with their own consent, and denied the equality which justified that right. The error of the one side was to appeal to equality and ignore consent. That of the other was to appeal to consent and ignore equality.

In January 1838, Lincoln gave a speech, "On the Perpetuation of Our Political Institutions," to the Young Men's Lyceum

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90. See, e.g., 1 COMMAGER, *supra* note 70, at 371-74.

91. On the relationship of Lincoln's views to those of the abolitionists, with accompanying documentation, see H. JAFFA, *EQUALITY AND LIBERTY* ch. 7 (1965). See also H. JAFFA, *THE CONDITIONS OF FREEDOM* ch. 6 (1975).

of Springfield, Illinois.<sup>92</sup> Its muted theme is the danger to the future of the republic from the presence of slavery. A less muted theme is the danger arising from those supremely able and ambitious human characters, who are of "the family of the lion or the tribe of the eagle."<sup>93</sup> Lincoln speaks of the dangers of "an Alexander, a Caesar, or a Napoleon."<sup>94</sup> This triumvirate consisted of the great destroyers of republics. They were men of the greatest political genius, who used that genius to rise to power by espousing the claims of the people. Having used that power to destroy the enemies of the people—and their own enemies—they then established absolute despotisms, surpassing in evil anything they had overcome. Lincoln saw clearly, with a clairvoyance given to few men, that the power which might destroy slavery in the United States might destroy freedom at the same time. Lincoln's life was dedicated to placing American slavery "in the course of ultimate extinction."<sup>95</sup> But it was dedicated to securing freedom for the slaves without destroying the freedom of the free. Judicial activism may appear to be a "soft" form of authority, compared to that of a Napoleon. (Or, I might add, of a Lenin or a Hitler, who were also essentially Caesarian demagogues.) It is well to remember that the greatest tyrannies in the world today, and some of the worst of all time, are called "people's republics." Napoleon also represented his authority to be that of the rights of man. But he saw these rights as the ground, not of government by consent of the governed, but of "enlightened despotism." But whether enlightened or not, the rule of a Napoleon—or of unelected judges usurping legislative authority—is still despotism.

James Madison, speaking in the fifty-first *Federalist* about the means of preventing tyranny of the majority, says that there

are but two methods of protecting against this evil: the one by creating a will in the community independent of the majority, that is, of society itself; the other by comprehending in the society of so many separate descriptions of

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92. I have written at length about this speech in my book, H. JAFFA, *CRISIS OF THE HOUSE DIVIDED* 182-232 (1975).

93. Address by President Abraham Lincoln, Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1831), reprinted in 1 *COLLECTED WORKS*, *supra* note 29, at 114.

94. *Id.*

95. The most famous appearance of this phrase is in the exordium of the *House Divided* speech. 2 *COLLECTED WORKS*, *supra* note 29, at 461.

citizens as will render an unjust combination of a majority of the whole very improbable . . . .<sup>96</sup>

Of course, tyranny of the majority is to be prevented by the whole system of constitutional government, in which an independent judiciary is a vital element. But one alternative is firmly excluded: "a will in the community independent . . . of the society itself."<sup>97</sup> It is precisely such a will that Professor Ledewitz advocates; an uncontrolled will to discover rights (whether natural or otherwise) to be vindicated, and one that imposes judicial remedies for alleged violations of those rights, without any consent by those governed by those remedies.

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Professor Ledewitz writes:

Many of our greatest cases rely on such moral insights by the Court [viz., that there is "conduct . . . condemned by any civilized conscience"]. *Brown v. Board of Education's* condemnation of segregation laws can be defended, if one is interested in doing so, by its stabs at history and by the words "equal protection" in the constitutional text. But Professor Jaffa is on sounder ground in asserting that segregation laws were "utterly inconsistent with the ends of free government and hence of the Constitution." . . . And he is right.<sup>98</sup>

While I am loathe to disclaim a compliment, Professor Ledewitz utterly mistakes me, the Constitution, and the principles of the Declaration of Independence. *Brown* was a correct decision, but the opinion accompanying it was so devoid of principled constitutionalism as to lay the groundwork of future evils as grave as any it was directed against. It is altogether a disservice to the cause of human freedom for Professor Ledewitz to speak patronizingly of making "stabs" at the history, or at the "words . . . in the constitutional text,"<sup>99</sup> as if such exercises were merely academic or theoretical. It was precisely this unprincipled approach that made such a judicial monstrosity of Chief Justice Warren's majority opinion in *Brown*. For consider, the heart of Warren's opinion was an affirmative answer to the question: "Does segregation of chil-

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96. THE FEDERALIST No. 51, at 339 (J. Madison or A. Hamilton) (Bicentennial ed. 1976).

97. *Id.*

98. Ledewitz, *supra* note 1, at 467 (footnote omitted).

99. *Id.*

dren in public schools solely on the basis of race . . . deprive the children of the minority group of equal educational opportunities?"<sup>100</sup> In support of his affirmative answer to this question, Warren cited dicta by the lower court that "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children. . . . [T]he policy of separating the races is usually interpreted as denoting the inferiority of the [N]egro group. A sense of inferiority affects the motivation of a child to learn."<sup>101</sup> Warren concluded then that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority."<sup>102</sup> Then follows the famous footnote citing those ethically neutral, "value free" psychologists and sociologists who, according to Warren, constituted "modern authority" for the moral substance of the Constitution.<sup>103</sup>

I wonder if Professor Ledewitz has reflected upon the resemblances between the foregoing opinion of Earl Warren and Alexander Stephens' "Cornerstone Speech," in which Stephens contended that the Confederate Constitution of 1861 was superior to the United States Constitution of 1787 because it was based upon the "modern authority" which declared that slavery was in the best interests of the Negroes as well as of the whites.<sup>104</sup> I wonder whether Professor Ledewitz has reflected how easily a future court might overrule *Brown* on the same ground that Warren here (ostensibly) overrules *Plessy*—namely, on the ground that still newer and later experiments in psychology testify to the advantages of segregation to both races. Suppose that we are confronted with a situation in which black children are a majority, and white children a minority. Suppose the attorneys for the white children "prove" on the basis of a new round of "doll tests" that integration causes "a sense of inferiority" in the white children. Suppose circumstances arise in which the blacks themselves demand segregation as best fitting their sense of what

100. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

101. *Id.* at 494 (quoting the lower court, 98 F. Supp. 797 (D. Kan. 1951) (finding VIII of the district court ruling filed with the opinion, but not reported in 98 F. Supp. 797).

102. *Id.* at 494.

103. *Id.* at 494 n.11.

104. A. Stephens, *Cornerstone Speech*, reprinted in *POLITICAL HISTORY OF THE GREAT REBELLION* 104 (E. McPherson ed. 1865).

makes them feel dignified? This last question is not merely hypothetical. It is not long since the demand for black dormitories and black studies centers racked the universities.

I myself was on the losing side of a faculty vote to resolve a confrontation in which it was alleged that ours had been a white college giving a white education. This, incidentally, was not the accusation of the blacks, but the *nostra culpa* of the white faculty. It was contended by both whites and blacks that "equal opportunity" meant that blacks were entitled to an institutional structure providing black dormitories, and a curriculum featuring black history, black literature, black economics, etc., taught by black instructors. In short, it was demanded that equal rights dictated an education equally segregated—socially and intellectually—as that which guilty whites had so long enjoyed.

The test, in the light of *Brown*, was not what was objectively right or wrong, pursuant to the Constitution, but how black people were made to feel. The authority of science could support any conclusion since science has turned out to be the method of discovering how people feel—although it can also be the method of discovering how to make people feel what you want them to feel. The Warren Court could have reached the opposite conclusion that it reached in *Brown* merely by ordering as a remedy (instead of desegregation) a psychological conditioning (or "brainwashing") program designed to overcome feelings of inferiority. I can assure Professor Ledewitz that it was well within the competence of the psychologists upon whom Warren relied to have come up with such a program had they been directed to do so: a program which would—on the premises—have made segregated schools perfectly constitutional. In fact, contrary to common opinion, Warren's opinion for the Court did not, in the most important respect, reverse *Plessy* at all. To have done so, it would have had to adopt Justice Harlan's dissenting opinion in that case, in which he held that the Constitution was color blind.<sup>105</sup> Warren's opinion was based upon the subjective feelings of black people, rather than upon their objective rights as human beings.<sup>106</sup>

How should *Brown* have been decided? A brief "stab at history" and a consideration of what, in the light of history,

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105. *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1895) (Harlan, J., dissenting).

106. On this subject, see Erler, *Sowing the Wind: Judicial Legislation and the Legacy of Brown v. Board of Education*, 8 HARV. J.L. & PUB. POL'Y 399 (1985).

“equal protection” ought to be understood to mean will carry us a long way. Consider the first sentence of the fourteenth amendment: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>107</sup> The thirteenth amendment<sup>108</sup> had overruled those aspects of Taney’s opinion in *Dred Scott* that concerned slavery and property in slaves. But it had not overruled that part of the opinion which declared that a Negro, whether free or slave, could not be a citizen of the United States.<sup>109</sup> In completing the reversal of *Dred Scott*, the fourteenth amendment must be understood to reverse as well the reasoning upon which Taney depended. At the center of that reasoning was his assertion that, for the purpose of interpreting the Constitution of the United States, the proposition “that all men are created equal” was not to be understood to include members of the Negro race. It was his understanding that Negroes were excluded from the rights enunciated in the Declaration of Independence which authorized Taney, in his own mind, to say that according to the Constitution, Negroes were “so far inferior, that they had no rights which the white man was bound to respect; and that the [N]egro might justly and lawfully be reduced to slavery for his benefit.”<sup>110</sup> In short, the intention of the fourteenth amendment was the completion of the reversal of Taney’s opinion for the Court in *Dred Scott*. Hence, the “equal protection” clause of the fourteenth amendment must be read in the light of the unequivocal constitutional inclusion of black men and women into the proposition of universal human equality. This is just another way of saying that the Constitution is color blind, as Mr. Justice Harlan (but not Chief Justice Earl Warren) truly said. This would have been the just ground for outlawing school segregation.

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Professor Ledewitz wishes my critique of our “exhausted constitutional tradition” to be the occasion to “take the rights of persons seriously,” and to be the occasion for the “strength-

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107. U.S. CONST. amend. XIV, § 1.

108. *Id.* (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

109. *Dred Scott*, 60 U.S. at 423.

110. *Id.* at 407.

ening of free government as law's obligation."<sup>111</sup> We cannot, he says,

avoid asking about the rest of the rights of man: about economic rights—to shelter, food, clothing, and education; about social rights—to wear religious clothing and to love a person of the same sex; and about corporate rights—to prevent the police from lying to attorneys and to bar unconstitutional actions by our government.<sup>112</sup>

Let me begin here by saying that there is no difference between us on the general question of whether or not the courts should "bar unconstitutional actions by our government." Even here, however, one must recognize the distinction between those questions bearing on the rights of persons, which are subject to litigation, and those that are not. President Lincoln denied—rightly, I believe—the right of Chief Justice Taney to issue a writ of *habeas corpus* when Lincoln had suspended the use of that writ.<sup>113</sup>

Let us suppose that in 1941, a taxpayer filed a suit requesting an injunction against President Roosevelt to prevent the transfer of 50 destroyers to the British Navy. A court would have to be insane to take such a case, although Roosevelt himself knew (as did Lincoln) that what he was doing might be considered an impeachable offense. These constitutional questions are so clearly political questions that they cannot be resolved in the courts.

When Professor Ledewitz speaks of "economic rights" as being among "the rest of the rights of man," he simply misunderstands the natural rights doctrine. There are no "economic rights" which are "unalienable" in the sense of those mentioned in the Declaration of Independence. A government devoted to securing "these rights"—those mentioned in the Declaration of Independence—is one which will give great security to private property. This security has always proved to be the greatest incentive for the production, and hence of the availability, of "shelter, food, clothing, and education." There just is no way in which the law can declare a right to economic goods, and thereby make these goods available.

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111. Ledewitz, *supra* note 1, at 470.

112. *Id.*

113. 4 COLLECTED WORKS, *supra* note 29, at 430 (Lincoln's message to Congress in special session July 4, 1861).

*Glendower.* I can call spirits from the vasty deep.

*Hotspur.* Why, so can I, or so can any man;  
But will they come when you do call for  
them?<sup>114</sup>

A court of law (or the court of Caesar) decreeing that the people shall be supplied with cabbages or doctorates is like Owen Glendower calling spirits from the vasty deep. What reason is there to think that they will come? The problem of the Soviet economy to this day is that, as the typical worker says, "we do imaginary work for imaginary wages."

When Lenin decreed his New Economic Policy in 1921, he unleashed the productive capacities of the Russian peasants. Not only did they enjoy an unprecedented prosperity in the later 1920's, but the Soviet Union enjoyed an abundant food supply.<sup>115</sup> When Stalin decreed the collectivization of agriculture, he guaranteed that for some 60 successive years there would be poor harvests in the Soviet Union!<sup>116</sup> What is the point of guaranteeing food if there is no food (as was the case in the Ukraine in 1931)? What is the point of guaranteeing medical care and education, if the one is rotten, and the other is nothing but propaganda (except in the case of the sciences needed to maintain the military power of the regime)? The Soviet Union is an outstanding example of what happens when a government treats "economic rights" as if they were "human rights." The end result is no respect for human rights and poverty for the masses. By this I do not mean to say that there should not be an entitlement to economic welfare. We have many examples of such around us: social security, unemployment insurance, student loan programs, etc. I personally am opposed to anything that might be called socialized medicine, but the question of how to optimize the health care of the American people is certainly a proper political and legislative concern. The point here, however, is that it is a political and legislative concern. It is not a judicial concern. Every so called "economic right" involves a levy upon the resources of society. The exercise of such rights requires taxes. Courts of law, no more than the

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114. W. SHAKESPEARE, *HENRY IV, PART I*, Act 3, sc. i, lines 55-57.

115. Lectures of Richard Pipes, Professor of Russian History at Harvard, at Pomona College (1985).

116. *Id.*



courts of kings, may levy taxes. That is what the American Revolution was all about!

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Professor Ledewitz asks:

Why . . . is Professor Jaffa so certain that governments have been given authority to kill their prisoners through capital punishment? While I acknowledge that opinions differ, it is clear to me that killing a citizen in a prison cell is utterly inconsistent with the ends of free government.<sup>117</sup>

But Professor Ledewitz's premises are altogether mistaken. Someone convicted of first degree murder is *not* a citizen. Here is how John Locke—and all of the Founding Fathers, and I myself—understand this question:

[F]or, by the fundamental law of nature, man being to be preserved as much as possible when all cannot be preserved, the safety of the innocent is to be preferred; and one may destroy a man who makes war upon him . . . for the same reason that he may kill a wolf or a lion, because such men are not under the ties of the common law of reason, have no other rule but that of force and violence, and so may be treated as beasts of prey, those dangerous and noxious creatures that will be sure to destroy him whenever he falls into their power.<sup>118</sup>

I cite only two examples from recent crimes in the Los Angeles area. In neither case was there capital punishment, although I for one believe there should have been. In one case, a man kidnapped, raped, and strangled a two-year old girl. In another, two men, working together over a two-year period, abducted, raped, and strangled at least 17 young women. In the latter case, the young men tape recorded their victims' death agonies to amuse themselves during the otherwise boring intervals between murders. To call such persons "citizens" is technically inaccurate, as well as being a travesty upon the meaning of words. Locke makes it clear that what unites us as human beings, in respect for each other's rights, is the possession and the use of reason.<sup>119</sup> That is ultimately why we may lay claim to the right to be governed with our own consent. But those who, not by mere words, but by deadly deeds, refuse

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117. Ledewitz, *supra* note 1, at 468.

118. LOCKE, SECOND TREATISE, *supra* note 40, at 16.

119. *Id.* at 5 ("The state of nature has a law to govern it . . . and reason which is that law.").

to abide by the law of reason, have thereby placed themselves outside the bounds of humanity, and of the rights of humanity. This, I believe, is the essence of the idea of rights and the laws of nature.

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Finally, I come to Professor Ledewitz's strange notion that among the rights to be enunciated and enforced by the judiciary is the right "to love a person of the same sex."<sup>120</sup> I presume he does not mean by this the love of a father for his son, or a son for his father, or of mothers and daughters, or brothers and sisters. Nor do I think he has in mind the love of friends celebrated by Aristotle in the ninth book of the *Nicomachean Ethics*. I presume that he means sexual love, that is, sodomy and lesbianism. If so, I can assure him that these are unnatural acts and, being unnatural, the very negation of anything that could be called a right according to nature. The very root of the meaning of nature is generation. What marks off one species from another is the ability of individuals of opposite sexes to generate new individuals of the same species. Marriage is possible, therefore, only between men and women, members of the species *homo sapiens*. To conceive of marriage apart from the possibility of the generation and regeneration of human society is *contra naturam*. Incest and sodomy both represent vices that strike at the root of the family, and at the human institutions that represent the moral, no less than the physical self-preservation of mankind.

To deny the relevance of nature as a standard in this most fundamental of all respects is to deny its relevance in all other respects as well. Why do we regard the slaughter of beasts for food lawful, but not the slaughter of other human beings? Why do we regard it moral to make of beasts beasts of burden? Why do we not speak of enslaving horses or mules? What ground do we have to condemn slavery, except that it violates the order of nature by treating men as if they were beasts? But using men as if they were beasts is no more against the order of nature than using men as if they were women, or women as if they were men. Nor is such use less unnatural for being voluntary. Human beings have been and can be persuaded to accept slavery, whenever they can be persuaded that natural distinctions are no longer to be thought the basis of moral distinctions. Nor is there any difference here between

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120. Ledewitz, *supra* note 1, at 470.

the moral understanding of reason and of revelation. In the first chapter of Genesis, the Bible tells us that "God created man in his own image, in the image of God he created him; male and female he created them."<sup>121</sup> By this it is implied, I believe, that the creative power of God, no less than the generative power of nature, resides in the distinction between male and female. And if nature is the ground of all our rights, as the Declaration of Independence affirms, then maleness and femaleness is the ground of nature.

In 1779, Jefferson drafted "A Bill For Proportioning Crimes And Punishments."<sup>122</sup> Like many other measures that Jefferson advanced in this period, it was designed to promote the cause of general reform and improvement in civil society. In the bill, Jefferson speaks out against the promiscuous use of capital punishment, which, he says, "should be the last melancholy resource against those whose existence is become inconsistent with the safety of their fellow citizens. . . ."<sup>123</sup> More generally, he observes that

[t]he experience of all ages and countries hath shown, that cruel and sanguinary laws defeat their own purpose, by engaging the benevolence of mankind to withhold prosecutions, to smother testimony, or to listen to it with bias, when, if the punishment were only proportioned to the injury, men would feel it their inclination, as well as their duty, to see the laws observed.<sup>124</sup>

In this humane temper, Jefferson nonetheless proposed in his bill that "Whosoever shall be guilty of rape, polygamy, or sodomy with man or woman, shall be punished, if a man, by castration, if a woman, by cutting through the cartilage of her nose a hole of one half inch in diameter at the least."<sup>125</sup>

Whatever one may think of the proportionality of the punishments, I see no reason to doubt—more than Jefferson did—the criminality of the offenses, one more than another, under "the laws of nature and of nature's God."

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121. *Genesis* 1:27.

122. T. Jefferson, *A Bill For Proportioning Crimes And Punishments*, reprinted in *THE COMPLETE JEFFERSON* 90-102 (S. Padover ed. 1943).

123. *Id.* at 91.

124. *Id.* at 91-92.

125. *Id.* at 96.