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BOOK REVIEW

EQUALITY AS A CONSERVATIVE PRINCIPLE

by Harry V. Jaffa*

THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION. By Willmoore Kendall and George W. Carey. Baton Rouge: Louisiana State University Press. 1970. Pp. xi, 163. \$6.00.

So whatever you wish that men would do to you, do so to them; for this is the law and the prophets.

—Jesus

As I would not be a *slave*, so I would not be a *master*. This expresses my idea of democracy. Whatever differs from this, to the extent of the difference, is no democracy.

—Abraham Lincoln

1.

That Conservatism should search for its meaning implies of course that Conservatism does not have the meaning for which it is searching. This might appear paradoxical, since a Conservative is supposed to have something definite to conserve. Unfriendly critics sometimes suggest that what we Conservatives conserve, or wish to conserve, is money. But since many of us, like Socrates, live in thousand-fold poverty, this is manifestly untrue. Yet our plight might be said to resemble that of a man with a great hoard of gold or diamonds. Suppose such a man suddenly awoke to find that his treasure was no longer precious, and that it held no more meaning for the rest of the world than sand or pebbles. How strange the world would look to that man! How strange that man would look to the world, vainly clinging to his pile of rubbish.

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In today's political vocabulary, Conservatism is contrasted with Liberalism and Radicalism. In this strange world, however, I cannot imagine Liberalism or Radicalism searching for meaning. Liberalism and Radicalism are confident of their meaning, and the world is confident of their confidence. Yet once upon a time, a Liberal was thought to be more diffident. He was someone who recognized the fallibility of human reason and its susceptibility to the power of the passions. He tended therefore to be tolerant of human differences. A liberal regime was one in which such differences were in a sense institutionalized. James Madison's extended republic embracing a multiplicity of factions, in which no faction might become a majority or impose its will upon a majority, is the classic instance in the modern world of such a regime. But the New Liberal is committed to policies which tend not to recognize the propriety of differences. Consider the rigidity of such slogans as "one man, one vote," "racial balance," "affirmative action," "guaranteed income," "war on poverty," "generation of peace." All these imply a degree of certainty as to what is beneficial, which makes those who doubt appear to be obscurantists or obstructionists, standing in the way of welfare either out of stupidity or out of a vested interest in ill fare.

The only significant differences I can see between today's Liberals and today's Radicals concern means rather than ends. How often during the "troubles" of the late 1960's did we hear the Liberals deplore the Radicals' violence, telling them that they should "work within the system"? How often did we hear these same Liberals praise the Radicals for their "idealism," asking only that they learn patience? But the Radicals made a great deal more sense. If their ideals were so praiseworthy, then a system which obstructed their fulfillment was blameworthy. And why work within a blameworthy system for praiseworthy ends?

Liberalism and Radicalism both reject the wisdom of the past, as enshrined in the institutions of the past, or in the morality of the past. They deny legitimacy to laws, governments, or ways of life which accept the ancient evils of mankind, such as poverty, inequality, and war, as necessary—and therefore as permanent—attributes of the human condition. Political excellence can no longer be measured by the degree to which it ameliorates such evils. The only acceptable goal is their abolition. Liberalism and Radicalism look forward to a state of things in which the means of life, and of the good life, are available to all. They must be available in such a way that the full development of each individual—which is how the good life is defined—is not

merely compatible with, but is necessary to, the full development of all. Competition between individuals, classes, races, and nations must come to an end. Competition itself is seen as the root of the evils mankind must escape. The good society must be characterized only by cooperation and harmony. The Old Liberalism saw life as a race, in which justice demanded for everyone only a fair or equal chance in the competition. But the New Liberalism sees the race itself as wrong. In every race there can be but one winner, and there must be many losers. Thus the Old Liberalism preserved the inequality of the Few over and against the Many. It demanded the removal of artificial or merely conventional inequalities. But it recognized and demanded the fullest scope for natural inequalities. But the New Liberalism denies natural no less than conventional inequalities. In the Heaven of the New Liberalism, as in that of the Old Theology, all will be rewarded equally. The achievement of the good society is itself the only victory. But this victory is not to be one of man over man, but of mankind over the scourges of mankind. No one in it will taste the bitterness of defeat. No one need say, "I am a loser, but I have no right to complain. I had a fair chance." The joys of victory will belong to all. Unlike the treasures of the past, the goods of the future will be possessed by all. They will not be diminished or divided by being common. On the contrary, they will for that very reason increase and intensify. No one will be a miser—or a Conservative.

I have intimated that what is today called Conservatism—the New Conservatism—may in fact be the Old Liberalism. Indeed, it may be the Old Radicalism as well. Leo Strauss used to delight in pointing out that the most conservative or even reactionary organization in the United States was called the Daughters of the American Revolution. Certainly, if American Conservatism has any core of consistency and purpose, it is derived from the American Founding. The uncertainty as to the meaning of American Conservatism is, as we shall see, an uncertainty as to the meaning of the American Founding. But this uncertainty does not arise from any doubt as to the status of the Revolution. So far as I know, there has never been any Benedict Arnold Society of American Patriotism. Nor do American Conservatives meet, either openly or secretly, to toast "the King (or Queen) across the water." The status of feudalism and monarchy are for American Conservatives exactly what they are for American Liberals or Radicals. Perhaps the best description of the *Ancien Regime* from the American point of view is still that of Mark Twain in *A Connecticut Yankee in King Arthur's Court*.

American Conservatism is then rooted in a Founding which is, in turn, rooted in revolution. Moreover, the American Revolution represented the most radical break with tradition—with the tradition of Europe's feudal past—that the world had seen. It is true that the American revolutionaries saw some precedent for their actions in the Whig Revolution of 1689. But that revolution at least maintained the fiction of a continued and continuous legality. The British Constitution that resulted from the earlier revolution may have had some republican elements. But the American constitutions—state and federal—that resulted from the later revolution had *no* monarchical or aristocratic elements. They were not merely radically republican, but were radically republican in a democratic sense.¹ The sovereignty of the people has never been challenged within the American regime, by Conservatives any more than by Liberals or Radicals.

The regime of the Founders was wholly devoted to what they understood as civil and religious liberty and was in that sense a liberal regime. But the Founders understood themselves to be revolutionaries, and to celebrate the American Founding is therefore to celebrate revolution. However mild or moderate the American Revolution may now appear, as compared with subsequent revolutions in France, Russia, China, Cuba, or elsewhere, it nonetheless embodied the greatest attempt at innovation that human history had recorded. It remains the most radical attempt to establish a regime of liberty that the world has yet seen.

2.

What were the principles of the American Revolution? What are the roots of the American Founding? One would think that after nearly two hundred years this question could be easily answered. Never did men take more pains to justify what they were doing at every step of the way than did the patriots of the Revolution. Never was the fashioning of a plan of government better documented than that hammered out in Philadelphia in the summer of 1787. Never was such a plan more fully debated before adoption than that which came before the several ratifying conventions. Never was an actual regime, as distinct from a hypothetical one, so enshrined in theoretical reasoning as was the constitution of 1787 in the *Federalist Papers*. And yet the matter is unresolved.

1. On the difference between the Whiggery of the English and American Revolutions, see H.V. JAFFA, *EQUALITY AND LIBERTY: THEORY AND PRACTICE IN AMERICAN POLITICS* ch. 6 (1965) [hereinafter cited as *EQUALITY AND LIBERTY*].

Our perplexity that this should be so is less surprising when we reflect that the course of American history for more than "four score and seven years" was one of deep-seated controversy, culminating in one of the bitterest wars of modern times. Until the resort to arms, these conflicts almost always took the form of debates as to the meaning of the Founding. And the Founding documents, and their principal glosses, were invariably cited on both sides in these debates. In more respects than one, American history and Jewish history resembled each other. Mid-century British liberals, like their American counterparts, were also divided. In 1861 Lord Acton wrote an essay entitled *Political Causes of the American Revolution*,² in which he expressed no doubt that the Confederacy was fighting for the same principles of independence for which Washington had fought. But Lord Acton's countryman, John Stuart Mill, in another essay written shortly afterwards,³ was just as sure that Lincoln's government was fighting to preserve these same principles. That the contestants appealed to the same political dogmas—even as they read the same Bible and prayed to the same God—only intensified the struggle. As sectarians of the same faith, they fought each other as only those fight who see their enemies as heretics.

American Conservatism today is still divided, not surprisingly, along lines which have divided Americans since before the Civil War. Sir Winston Churchill once said that the American Civil War was the last great war fought between gentlemen. Certainly Churchill had in mind the patriotism and the gallantry of men like Lee, Jackson, and Davis on the Confederate side, and Lincoln, Grant, and Sherman on the side of the Union. But I think he also had in mind the dignity of the principles that both sides held, and the tragedy inherent in the possibility that these same principles should seem to speak differently to men of equal integrity and devotion.

But gentlemanship, like patriotism, is not enough. Not Jefferson Davis or, for that matter, John C. Calhoun—surely one of the most intelligent men who ever lived—saw as deeply into the meaning of the American principles as Abraham Lincoln. And so—to borrow a phrase from the late Willmoore Kendall—let us have no foolishness about both sides being equally right. That the South lost the war on the battlefield does not in the least mean that it lost the argument.

2. 5 THE RAMBLER (New Series), May, 1861, at 17 (reprinted in *ESSAYS ON FREEDOM AND POWER* 171 (G. Himmelfarb ed. 1955)).

3. THE CONTEST IN AMERICA (1862) (reprinted from *FRASER'S MAGAZINE*, Feb.-May, 1862).

From Alexander Stephens to Willmoore Kendall, its champions have lost none of their fervor. So far are they from admitting defeat, that, on the contrary, they repeatedly proclaim victory.

In a recent book entitled *The Basic Symbols of the American Political Tradition*, Kendall, together with George Carey, takes the position that the arch-heretic, the man who "derailed" our tradition, was Abraham Lincoln. According to Kendall and Carey, all the Liberal and Radical demands, which would today transform constitutional into totalitarian government, are imperatives of Equality. And the power of this idea, or the power which the Radicals and Liberals have derived from it, stems from a misinterpretation or misapplication of the Declaration of Independence. According to Kendall and Carey, the Declaration is not the central document of our Founding, nor is it the true source of the symbols of the Founding. Nor does the expression of the doctrine of Equality in the Declaration mean what Abraham Lincoln said it meant, nor what the Liberals and Radicals of today wish it to mean. Nothing in our pre-Revolutionary past, or in the constitution-building period of the Revolutionary generation, justified making Equality the end or goal to be secured by the American regime. Equality as an end became the official principle of the regime only by a retrospective interpretation of "four score and seven years," an interpretation enshrined by Abraham Lincoln at Gettysburg. The Gettysburg Address, say Kendall and Carey, was a rhetorical trick. It made the victory of the Union armies the occasion for an official transformation of our constitutional, Conservative revolutionary past, into a sanction for a Radical-Liberal revolutionary future.

3.

Now we maintain that the truth about these matters is almost the exact opposite of what Kendall and Carey say it is. We believe that the Declaration of Independence is the central document of our political tradition, not because of any trick played by Abraham Lincoln, but because it is the most eloquent, as well as the most succinct, statement of the political teaching of all the great documents of the period. The sentiments of the Declaration are not unique to it. Jefferson was the draftsman of a representative assembly, and his gift lay in finding memorable phrases that articulated the thoughts that everyone wished expressed. The doctrine of Equality, which is indeed the key to all the thoughts in the Declaration, is also to be found in at least seven of the bills of rights accompanying the original state constitutions.⁴ It is im-

4. See text accompanying notes 37-38 *infra*.

plied if not expressed in the Declaration of the First Continental Congress (1774) and in the Declaration of the Causes and Necessity of Taking Up Arms (1775). Kendall and Carey believe that the idea of Equality dropped out of sight when the constitution of 1787 came to be written, and that the constitutional morality of the *Federalist Papers* has nothing to do with it. They are dead wrong on both counts. The idea of Equality, as expressed in the Declaration, is the key to the morality of "the laws of nature and of nature's God." It is this natural law which the Constitution—and the regime of which the Constitution is a feature—is designed to implement. The abandonment of the idea of Equality is perforce an abandonment of that morality and that constitutionalism. It is perforce an abandonment of the "ought" for the "is." It would be an abandonment of that higher law tradition which is the heart of that civility—and that Conservatism—which judges men and nations by permanent standards. As we propose to demonstrate, the commitment to Equality in the American political tradition is synonymous with the commitment to those permanent standards. Whoever rejects the one, of necessity rejects the other, and in that rejection opens the way to the relativism and historicism that is the theoretical ground of modern totalitarian regimes.

4.

Basic Symbols is replete with references to the "enormous impact on American scholarship and thinking"⁵ of Lincoln's alleged "derailment" of the American political tradition. Yet Kendall and Carey do not provide a single example of that "derailed" scholarship. The central role of Equality in American life and thought was asserted long ago by Alexis de Tocqueville in his *Democracy in America*, written in the 1830's. Lincoln grew up in the Jacksonian America that Tocqueville had observed, and it is hardly surprising that he responded powerfully to what was already the most powerful force in the world in which he moved. That the Gettysburg Address somehow transformed the *ethos* of American life—and of American scholarship—would have required a demonstration that Kendall and Carey nowhere attempt. It would have required an analysis of Lincoln's reasoning on Equality, in its theoretical and practical bearings, pointing out how and why this was a new way of understanding Equality and how this new way had affected others. That is to say, it would have required evidence that Equality was now understood differently because of Lincoln and that

5. P. 156.

the way Equality was now understood was not because of an inheritance from pre-Lincolnian egalitarianism, or from that inheritance modified by any of the other countless writers on the subject.

In fact, the only work which has ever attempted a full analysis of the theoretical and practical meaning of Equality in Lincoln's political thought is my *Crisis of the House Divided*.⁶ In it I pointed out that American historical scholarship, insofar as it had perceived the impact of Equality upon Lincoln's policies in the 1850's, had thoroughly rejected it. Indeed, in the field of Lincoln scholarship, as distinct from popular writing, *Crisis of the House Divided* was, as far as I know, the first book in the Twentieth Century to take a distinctly favorable view of Lincoln's policies in the 1850's. Since its publication in 1959, Don E. Fehrenbacher's *Prelude to Greatness: Lincoln in the 1850's* (1962), has made a powerful addition to this point of view.

The seven hundred years' providential march of Equality, of which Tocqueville wrote,⁷ has certainly continued, as Tocqueville predicted it would. Many of its effects have been bad, as he also predicted. Tocqueville was much influenced in his view of Jacksonian America by the American Whigs he met—by the party of Adams, Clay, and Webster. He never met a young follower of these men named Abraham Lincoln. Yet Lincoln's articulation of the Whig critique of a demagogic egalitarianism, expressed particularly in his Lyceum (1838)⁸ and Temperance (1842)⁹ speeches, contains remarkable parallels to Tocqueville. Certainly Lincoln and Tocqueville saw the threat to the nation from slavery and racial difference in very similar ways. To impute an indiscriminate egalitarianism to Lincoln, as Kendall and Carey do, is as absurd as to impute it to Tocqueville.

Vaguely imputing Lincolnian effects to American scholarship, *Basic Symbols* nowhere comes to grips with the character of Lincoln's thought. Nor does it ever allude to the articulation of that thought in *Crisis of the House Divided*. This is all the more remarkable, in that Kendall not only had read *Crisis*, but had published a lengthy review

6. H.V. JAFFA, *CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES* (1959) (reprinted in 1973, Univ. of Wash. Press) [hereinafter cited as *CRISIS*].

7. 2 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 34-35, 99-103, 215-21, 226-27, 304-05 (H. Reeve ed. 1945).

8. 1 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 108-15 (R. Basler ed. 1953) [hereinafter cited as *LINCOLN*].

9. *Id.* at 271-79.

of it in *National Review*,¹⁰ which he reprinted in *The Conservative Affirmation*.¹¹ Had he thought ill of it, we could understand his passing over it later. But in fact he praised it extravagantly. We believe it to be the most generous review ever written about a book with which the reviewer so thoroughly disagreed. We feel obliged to quote it at some length now, not because of the praise, but because of the disagreement. We do so, moreover, because it seems to us to explain a missing link in *Basic Symbols*' polemic against Lincoln. *Basic Symbols* is silent not only about the actual reasoning in Lincoln's thought about Equality, but also about the great subject that occasioned nearly everything Lincoln said and wrote about Equality: slavery. So far as I can recall, the word "slavery" never occurs in *Basic Symbols*. Yet *Basic Symbols* wrestles with Equality on every page—like Jacob wrestling with the Angel of the Lord, we are tempted to say. To do so, without once mentioning slavery, would be like a critique of Hamlet that never mentions the ghost. Fortunately, Kendall does mention slavery in his review of *Crisis of the House Divided* and enables us thereby to form a juster view of what he says about Equality in *Basic Symbols*.

Kendall states, quite correctly, that "The central problem of *Crisis of the House Divided* is the status in the American political tradition of the 'all men are created equal' clause of the Declaration of Independence."¹² He adds that

. . . Jaffa's Lincoln (and Jaffa) sees it as the indispensable presupposition of the entire American political experience; either you accept it as *the* standard which that experience necessarily takes as its point of departure, or you deny the meaning of the entire American experience. As for the status of Abraham Lincoln *vis-à-vis* the Signers and Framers, Jaffa's Lincoln sees the great task of the nineteenth century as that of affirming the cherished accomplishment of the Fathers by *transcending* it. Concretely, this means to construe the equality clause as having an allegedly unavoidable meaning with which it was always pregnant, but which the Fathers apprehended only dimly.¹³

According to Kendall, the question which is "tacit, but present on every page of the book,"¹⁴ is the question

10. Kendall, Book Review, 7 NAT'L REV. 461 (1959) [hereinafter cited as Book Review].

11. W. KENDALL, *THE CONSERVATIVE AFFIRMATION* 249-52 (1963).

12. Book Review, *supra* note 10, at 461.

13. *Id.*

14. *Id.*

whether the Civil War was, from the standpoint of natural right and the cause of self-government, the "unnecessary war" of the historians of the past fifty or sixty years, or a war that *had* to be fought in the interest of freedom for all mankind.

Jaffa's answer to the question is that the war did indeed have to be fought—once the South had gone beyond slaveholding . . . to assert the "positive goodness" of slavery, and so to deny the validity of the equality-clause standard as the basic axiom of our political system. . . . And, *within the limits* to which he for sound reasons of strategy confines himself, Jaffa's case for that answer seems to this reviewer as nearly as possible irrefragable.

His readers will, therefore, be well-advised to keep a sharp lookout *for those limits*, lest Jaffa launch them, and with them the nation, upon a political future the very thought of which is hair-raising: a future made up of an endless series of Abraham Lincolns, each persuaded that he is superior in wisdom and virtue to the Fathers, each prepared to insist that those who oppose this or that new application of the equality standard are denying the possibility of self-government, each ultimately willing to plunge America into Civil War rather than concede his point

. . . .

The limits I speak of are set by the alternatives that Jaffa steadfastly—plausibly but steadfastly—refuses to consider, namely: that a negotiated solution might have been worked out in terms of compensating the Southerners for their slaves and attempting some sort of radical confrontation of the Negro problem, and that the Southerners were entitled to secede if the issue was to be drawn in Lincoln's terms.¹⁵

In his concluding paragraph, Kendall declared:

The idea of natural right is not so easily reducible to the equality clause, and there are better ways of demonstrating the possibility of self-government than imposing one's own views concerning natural right upon others.¹⁶

5.

What are those "limits" which Kendall so earnestly warned my readers to beware? We confess to having been completely unaware of them. If they have served any reasons of strategy the reasons are Kendall's, not ours. These limits turn out, upon inspection, to be certain "alternatives" that we are "plausibly but steadfastly" supposed to have refused to consider. But there is a simple explanation why we did not

15. *Id.* at 461-62.

16. *Id.*

consider them in *Crisis of the House Divided*. That book was an interpretation of the Lincoln-Douglas debates, which we viewed as embracing the principal issues dividing the American people between the Mexican War and the Civil War. The Preface to *Crisis* stated plainly that it was intended as the first of two volumes. The topics Kendall said we had avoided belonged plainly to the second volume, to the period after Lincoln's election in 1860. There was then no strategy behind our alleged refusal other than a chronological division within my subject.

Although that second volume has not yet appeared, there is a survey of the great issues of Lincoln's presidency in my essay, *The Emancipation Proclamation*.¹⁷ In it I faced squarely enough the issues Kendall said I had avoided in *Crisis*. Kendall knew therefore that if the case for Lincoln was, "as nearly as possible irrefragable" within the hypothetical limits he had assigned to it, it was just as irrefragable despite them. He and Carey simply refused to face that argument in *Basic Symbols* and preferred instead to pretend that it did not exist. We shall see why.

6.

What then were the proposals that Kendall said that Jaffa—he really meant Lincoln—had refused to consider, that might justly have prevented the Civil War? First, "that a negotiated solution might have been worked out in terms of compensating the Southerners for their slaves"¹⁸ Second, that there might have been "some sort of radical confrontation of the Negro problem."¹⁹ And third, that the South should have been allowed "to secede if the issue was to be drawn in Lincoln's terms."²⁰

What in the world did Kendall mean by a "negotiated solution"? Many attempts at compromise were made in the winter of 1860-1861, the most famous of which bore the name of Senator Crittenden of Kentucky. Many long books have been written about these efforts, and we propose to write another one—but not now. Suffice it to say that Lincoln would not consent to any compromise which involved conceding to the South the right to extend slavery into federal territories. However, under existing federal law—*i.e.*, under the Supreme Court's

17. In 100 YEARS OF EMANCIPATION 1 (R. Goldwin ed. 1963) (reprinted in EQUALITY AND LIBERTY, *supra* note 1, at 140).

18. Book Review, *supra* note 10, at 462.

19. *Id.*

20. *Id.*

ruling in the case of *Dred Scott*²¹—there was no legal inhibition in 1861 against any slaveowner actually taking slaves into any federal territory open to settlement. Moreover, there was no immediate prospect that that ruling would change. Nor could there be any Republican or anti-slavery majority in either house of Congress, unless the Southern members absented themselves. It was against fears of the *future* that secession took place, and it is hard to know what compromise Kendall wished Lincoln to endorse that presumably would have made him the statesman of Kendallian consensus. Lincoln himself thought that nothing would satisfy the South at that juncture except a complete reversal on the slavery question by the most moderate and conservative of the anti-slavery leaders. They must cease saying slavery is wrong and that it should be restricted to those states where it was now lawful and must say instead that it is right and should be extended to wherever slaveowners could carry it. Did Kendall believe that, in a free society, men could be asked to declare against their deepest convictions?

Kendall speaks of “compensating the Southerners for their slaves.”²² By this I presume he intends some scheme of compensated emancipation. But given the state of parties and of political opinion in 1860-1861, such a proposal is wildly anachronistic. It would resemble a proposal today that *detente* with the Soviet Union be pursued by a plan for buying up the Soviet state industries and returning them to free capitalistic enterprise. Kendall seems not to recognize that the issues which divided Americans on the eve of the Civil War had no direct or immediate reference to slavery in the states where it existed, but had solely to do with the *extension* of slavery. In his inaugural address, Lincoln said—repeating a passage from an earlier speech—“I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.”²³ For more than a generation, John C. Calhoun had drilled the South in the lesson that they must never, never, never, never, by the remotest inference, concede the slightest federal jurisdiction over the domestic institution of slavery. For example, they must not concede federal power over slavery even in the District of Columbia, because it had been carved out of slave states. Nor must they admit the right of Congress to receive abolition-

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

22. Book Review, *supra* note 10, at 462.

23. 4 LINCOLN, *supra* note 8, at 263.

ist petitions even for the purpose of rejecting them. Nor must they admit the right even of the federal post to deliver abolitionist literature in the states that outlawed it. While Lincoln certainly did not share these extreme views, he was nonetheless sympathetic with the difficulties of the white South in dealing with what he called the "necessities" of the actual presence of slavery amongst them. It was just because he estimated those necessities so justly that Lincoln would not consider any compromise that carried slavery into lands where it was not already rooted. But to have proposed emancipation in 1860 or 1861, would have been regarded as an act of bad faith. Far from being an instrument of negotiation or compromise, as Kendall seems to think, it would have been a firebrand.

7.

We digress briefly here to consider the actual plans of emancipation that Lincoln put forward at different times in his career—although not in the secession crisis of 1860-1861. We do so, among other reasons, because they demonstrate the absurdity of a myth that Kendall and Carey assiduously promote, that Lincoln was somehow the spiritual father of the New Deal, of the expanded presidency of the twentieth century, and of the welfare state. Lincoln took almost no part in the formulation of what we might call the "domestic legislation" of his presidency. The Republican Party over which he presided sponsored a great deal of new legislation, dealing with a national banking system, promoting a national railroad system, providing homestead legislation, providing the land grants that led to the great system of state universities, and providing new tariffs for the growing manufacturing industries of the North, and so on. Lincoln signed these bills into law as a matter of course. Most of them were basically Whig measures which he had long endorsed. They were the foundation of that ebullient capitalism later called the age of the "robber barons." Lincoln himself was almost wholly occupied with the prosecution of the war. Any expansions of federal authority attributable to Lincoln stemmed from his interpretation of his constitutional duty "that the Laws be faithfully executed" and from his authority, "in Cases of Rebellion or Invasion," as commander-in-chief. These were crisis powers, they were *not* expansions of the commerce clause, of the general welfare clause, or of any of those enumerated powers by which *Congress* has in the twentieth century added to the powers of the presidency. Lincoln did very little, if anything, to expand the powers of the federal government *per se*. What he did under the war powers did *not* set precedents for an ex-

panded peace time role of the presidency in particular, or for the federal government in general. In fact, much of Lincoln's long struggle against the Congressional Radicals was a struggle to keep Congress from assuming powers over persons and property that Lincoln did not believe the federal government possessed. As long as the executive exercised them, as incidents of the war powers, they did not become permanent additions to federal jurisdiction.

Ever since Lincoln had been a Whig Congressman during the Mexican War he had supported the idea of emancipation for the District of Columbia. Although he believed that Congress had full sovereignty over all aspects of slavery in the District, he was opposed to outright abolition. The plan that had his support had these three elements. First, the abolition had to be gradual. (The plan that he proposed during the Civil War would have allowed up to thirty-seven years for its accomplishment.) Second, it had to be authorized, not only by Congress, but also by a majority of the qualified voters of the District. (Does this sound like Kendall's Lincoln, "imposing his own view concerning natural right upon others"?) And third, compensation had to be made to the owners of the slaves emancipated.

When Lincoln came to propose a national plan for emancipation in December, 1862, it possessed all these elements of voluntarism. To insure that this was so, Lincoln insisted that the authorizing legislation be incorporated in a series of constitutional amendments. These amendments would provide that the federal government be enabled to indemnify those states which had voluntarily adopted systems of gradual, compensated emancipation. The federal government would not, under Lincoln's plan, require the states to adopt such plans. But it would facilitate their doing so, by assuming all or most of the financial burden of such plans. But true to his inaugural pledge that the Constitution did not authorize *any* federal jurisdiction over slavery in the *states*, Lincoln required an amendment to the Constitution even to pay money to enable the states to do more conveniently what they might wish to do about slavery. It is worth noting that Lincoln's proposal would not have provided any precedent for the innumerable federal grant-in-aid programs of the twentieth century. By requiring a constitutional amendment to permit the federal government to pay money to the states for one particular specified purpose, Lincoln would not—to repeat—have done anything to expand federal jurisdiction over the domestic institutions or internal commerce of any state.

But why did Lincoln propose any scheme of emancipation during the war? The answer to this is that Lincoln's inaugural pledge could not

be maintained in the face of a war it did not contemplate. By September of 1862 Lincoln was convinced that he had to strike at slavery if the war was to be won and the Union preserved. Every slave who deserted his Confederate master weakened the Confederate economy that much. Every white Southerner who had to stay on farm or factory could not take his place in the Confederate firing line. As we have seen, Lincoln did not believe that either he or the Congress possessed any lawful power over slavery in the states, and whatever powers he possessed over enemy contraband did not apply to loyal owners. The terms of the Emancipation Proclamation included a careful enumeration of all those states and parts of states that were in rebellion against the authority of the United States. The Proclamation had no effect in Delaware, Maryland, Kentucky, Missouri, and large parts of Virginia and Louisiana. Lincoln knew, and told the Congress, that slavery was doomed everywhere in the United States, if it was doomed anywhere. The process of war was breaking up the entire social and police system, upon which the peculiar institution depended. Lincoln's system of emancipation was the only way he knew to prevent loyal slaveholders from ultimately suffering the same fate as disloyal ones. And there is no doubt in my mind that, had Lincoln's plan been adopted, and had Lincoln survived the war, he would have attempted to secure some indemnification for loyal slaveholders behind the Confederate lines. Lincoln always thought of slavery as a national moral responsibility, even if the legal responsibility was limited by state rights. He did not think that a man who had sold a slave had the right to keep his money, while the man who bought him might rightfully have his purchase confiscated. The confiscation of private property during the war troubled Lincoln deeply, for the same reason that slavery troubled him. For what was slavery itself but a denial of the foundation of all property rights, by the confiscation of the right that a man had in himself and in the fruits of his own labor?

We have told the story of the Emancipation Proclamation in our essay of that name.²⁴ We mention now only that Lincoln failed to secure the passage of his plan through the Congress. His failure stemmed from his inability to persuade the border slave state Congressmen to support it. Although the border slave states had now sealed their fidelity to the Union with their blood, they were as stubborn as their Confederate brethren in refusing any step that might, in their own minds, and however indirectly, admit the wrongfulness of slavery. There was

24. See note 17 *supra* and accompanying text.

both a guilt and a pride which seems to have infected all who had been immediately touched by the peculiar institution. They would not take the most obvious measures in their own interest, if by so doing they might seem to cast a reproach upon their own past. Kendall and Carey's inability even to mention slavery in a book dominated by that subject testifies that the power of that reproach has not yet ceased. But the thirteenth amendment, necessary as it proved to be, ended the legal existence of slavery in the United States in a way which Lincoln never desired. But the failure to achieve a better way cannot be made a matter of reproach to him.

8.

Among the alternatives that Kendall said that Jaffa—and Lincoln—had refused to consider was “some sort of radical confrontation of the Negro problem.”²⁵ But this is just as nebulous as the proposal of a “negotiated solution” to the sectional crisis. If it means anything, it means facing the social and political consequences of eventual and complete emancipation. But of course there had been a great deal of contemplation of this possibility. And the South had concluded, because of it, that emancipation must never come. The North had also concluded, because of it, that slavery must never be extended. The free state settlers in the territories had no wish to meet Negroes there, free or slave. And the slave South believed that unless slavery were to expand, it would eventually contract, and that emancipation would come as an economic, if not as a political, necessity. And so there was a steady hardening of positions on both sides.

In the decade before the Civil War the laws governing slavery had grown steadily harsher. It became impossible in many states for owners to free slaves, even if they wished to do so. Many of the slaves that such owners wished to free were of course their own children. There are countless stories—not all of them invented by Harriet Beecher Stowe—of the deathbed agonies of men whose children were security for their debts and who would be sold “down the river” after their demise. Because of fear of this, some wealthy New Orleans families sent their mulatto children to France. The laws also became stringent in forbidding teaching slaves to read, in forbidding their congregating except under strict supervision, in forbidding association between slaves and free Negroes, and in forbidding free Negroes from crossing state lines. Free states also had laws forbidding free Negroes

25. Book Review, *supra* note 10, at 462.

from entering. But above all, the South had decided, in the wake of the Wilmot Proviso controversy, that new slave states must, from time to time, be added to the Union, to balance the growing power of the free states within the federal structure. However impossible such balance might be in the House, it must at least be preserved in the Senate. Ironically enough—from the viewpoint of Kendall and Carey—Southern orators constantly appealed to Equality. They said the South must have Equality with the North, the slave states must have Equality with the free states. To have less than Equality meant degradation and—yes—slavery. And to that they would never submit. But if there were to be new slave states, slaveholders must enter the territories during their formative period and control the drafting of the state constitutions with which the new states would apply to Congress for admission. But as time and experience showed, the legal right of entrance was not enough. Slavery was a fragile institution. Stray slaves were not like stray cattle. They had heads as well as legs, and it required an enormously complicated system of slave patrols, of police regulations integrated into a pro-slavery society, to keep slaves working in their places and to make slavery economically viable. And so the doctrine developed that came to quintessential expression in Taney's opinion in the case of *Dred Scott*.²⁶ That opinion held not only that every slaveholder had a constitutional right to migrate with his slaves to any federal territory that was open to settlement, but also that the sole power that Congress had over the subject of slavery was the power *coupled with the duty* to protect the slaveowner in the exercise of his rights. It was this demand, for a federal slave code for the territories, that broke up the Democratic National Convention in Charleston, in 1860. It was this that brought about the sectional crisis in its final form. Whether Kendall was simply ignorant of the history of the period, or only pretended to be so, we do not know. But in no just sense was it "Lincoln's terms" which determined the crisis of 1860. Secession actually began when the Southern radicals walked out of the Democratic Convention. And they walked out when *Stephen A. Douglas*, and his supporters in the Democratic Party, refused to countenance the demand for a federal slave code. The demand for a federal slave code had exactly the same status in the North that a demand for emancipation would have had in the South. No politician could survive one moment who gave it a moment's countenance.

The Civil War came then not, as Kendall seems to suppose, merely

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

because the Republican Party, a free-soil party, had elected Abraham Lincoln president. Lincoln wished to have federal law forbid slavery in federal territories. In this he differed from Douglas, who wished to permit the settlers to decide for themselves whether they would have freedom or slavery. But by 1860 the South had rejected Douglas as completely as they had rejected Lincoln. In some ways he was more hated, as they regarded him a traitor to their cause. Nothing less than "affirmative active" guaranteeing slavery in the territories would have kept the South in the Charleston Convention; nothing less would have averted secession after Lincoln's election.

We come finally to Kendall's assertion that the South was "entitled to secede if the issue was to be drawn on Lincoln's terms."²⁷ We have just seen that it was not Lincoln who drew the terms of the issue. Even if one wishes—however extravagantly—to place all responsibility in the North, it was the Northern Democracy no less than the Republicans who shared it. And the overwhelming majority of Democrats, led by Douglas, opposed secession as much as Lincoln. We might argue the case against secession in the familiar terms of national supremacy versus state rights. We might easily demonstrate why the "national" interest of the North made inconceivable the surrender of the navigation of the Mississippi to a foreign power and why the land-locked mid-west in particular—the section from which Lincoln came—could never contemplate the alliance of an independent and hostile Confederacy with British Canada. But we think the issue is simpler even than these obvious political considerations.

In his inaugural address, Lincoln pointed out that the two sections could not, physically speaking, separate. Political separation, far from solving any problems, would make them all more acute. The fugitive slave law, now imperfectly enforced, would then not be enforced at all. The foreign slave trade, now imperfectly suppressed, might be openly revived. But above all, what would be done about the territories? The territories belonged to the United States. Would the South surrender its share in them in quitting the Union? If so, why secede? Would the North, recognizing the Confederacy, agree to divide the territories? If so, why not cease to resist the extension of slavery—and in particular the extension below 36 degrees 30 minutes, the Missouri Compromise line, as in the Crittenden Compromise—and keep the seceding states in the Union? In short, it would have been senseless for Lincoln to have resolutely opposed the extension of slavery and then

27. Book Review, *supra* note 10, at 461-62.

to have agreed to secession—as Kendall proposes. For secession, had it succeeded, would have emancipated the South from nearly all restrictions upon the extension and perpetuation of slavery. Unless the South was willing to fight the North for the territories, it made no sense for them to secede. Unless the North was willing to fight against secession, it made no sense to stand firm against the extension of slavery into the territories. To agree to secession, after not agreeing to slavery extension, would only have made the war much harder to win, without making it any less necessary. Surely Kendall must have seen that. There is no doubt that Lincoln did!

9.

According to Kendall and Carey, the supreme “symbol” of the American political tradition is the virtuous people, or the representatives of the virtuous people, deliberating under God. We have no quarrel with this formulation, as far as it goes. We prefer, on the whole, to speak of the principles of the tradition, rather than its symbols. We propose to prove by the American political tradition, that a people become a people only by virtue of the principle of Equality. Here we would point out that it was this same American people, deliberating according to the laws laid down in the Constitution, laws to which all equally had consented, that elected Abraham Lincoln President of the United States. No violence was used in this election, unless it was in the South, where there were no electors for Lincoln. No one has ever been entitled to take office according to the canons of consensus laid down by Kendall and Carey, if it was not Lincoln. Did he not appeal to the “basic symbols” precisely in their sense when he spoke these fateful lines on March 4, 1861?

Why should there not be a patient confidence in the ultimate justice of the people? Is there any better, or equal hope, in the world? . . . If the Almighty Ruler of nations, with his eternal truth and justice, be on your side of the North, or on yours of the South, that truth, and that justice, will surely prevail, by the judgment of this great tribunal, the American people.²⁸

Was not the decision of the seceding states, to break up the government, rather than submit to Lincoln’s election, a defiance of the virtuous people, deliberating according to the rules of the Constitution, and under God? Was not that election a decision by a constitutional majority, in which all rights of constitutional minorities had been care-

28. 4 LINCOLN, *supra* note 8, at 270 (footnotes omitted).

fully preserved? Had not Lincoln sworn an oath, before God and the people, to "take Care that the Laws be faithfully executed" and to "preserve, protect, and defend the Constitution"? How can Kendall—how can anyone—call Lincoln's fidelity to that oath, incorporating as it does all that is sacred to the American political tradition, "imposing one's own view concerning natural right upon others"?²⁹

Kendall thought that Jaffa would "launch [his readers] and with them the nation upon a political future the very thought of which is hair-raising . . ."³⁰ This future would be made up

of an endless series of Abraham Lincolns, each persuaded that he is superior in wisdom and virtue to the Fathers, each prepared to insist that those who oppose this or that new application of the equality standard are denying the possibility of self-government, each ultimately willing to plunge America into Civil War rather than concede his point . . .³¹

My readers will by now perceive that this is good Confederate caricature suitable for declamation—after playing "Dixie"—at a meeting decorated by the stars and bars. The warning strikes me as somewhat extravagant, given the number of my readers and the magnitude of the intellectual demands that Kendall says my book puts upon them. Kendall's premise seems to be that Lincoln—or anyone—who opposed American slavery thereby favored each and every "application of the equality standard." But this standard, we are also told, leads to "the cooperative commonwealth of men who will be so equal that no one will be able to tell them apart."³² In short, it will lead to the modern totalitarian slave state. Kendall's case against Lincoln then comes down to this: Lincoln's opposition to slavery leads to slavery.

Now, even if this were not self-contradictory, we would have the right to ask, why is the slavery to which Lincoln leads us worse than that which he helped to end? But of course, we are faced here with a play on words, or a confusion of two meanings of Equality. Lincoln never sought, or believed in, an equality of *condition*. What he did believe in was an equality of *rights*. Over and over again, he denied that he thought that men were equal in wisdom, virtue, or ability, or that they should all have the same rewards. Lincoln said in 1858:

Certainly the negro is not our equal in color—perhaps not in many other respects; still, in the right to put into his mouth the bread that his

29. Book Review, *supra* note 10, at 461-62.

30. *Id.* at 462.

31. *Id.*

32. *Id.*

own hands have earned, he is the equal of every other man In pointing out that more has been given [to] you, you cannot be justified in taking away the little which has been given [to] him. All I ask for the negro is that if you do not like him, let him alone. If God gave him little . . . that little let him enjoy.³³

Surely no simpler nor more eloquent appeal ever was made to the principles of natural justice. Equality here meant nothing more than the equal right of all men to be treated justly. In his message to Congress of July 4, 1861, Lincoln defined the cause of the Union. It was, he said, to maintain in the world

that form, and substance of government, whose leading object is, to elevate the condition of men—to lift artificial weights from all shoulders—to clear the paths of laudable pursuit for all—to afford all, an unfettered start, and a fair chance, in the race of life.³⁴

Kendall and Carey refer repeatedly to Lincoln having “curious” notions of what Equality meant which, they say, “even his worshippers cannot deny.”³⁵ But, curiously enough, they give no explanation whatever of this assertion. One of the speeches which they list as supporting this contention is the one from which we have just quoted. Is giving everyone an *unfettered* start and a fair chance what is “curious”? Is not this the idea behind the Statue of Liberty? Is it curious that we should be proud to call ourselves the land, not of the slave, but of the free? Have we not been the Promised Land for countless millions who have fled from persecution and oppression in the Egypt of the Old World? Was it not always an anomaly for the Promised Land itself to have slavery? And is not Abraham Lincoln himself the very most “basic symbol” within the American political tradition of personal self-reliance, of bootstrap individualism? In this connection we cannot refrain from telling one of our favorite Lincoln stories. A visitor came into his office in the White House one day to find him blacking his boots. “Why, Mr. President,” the astonished man exclaimed, “do you black your own boots?” “Whose boots do you think I black?” growled Lincoln.

10.

We observed that Kendall and Carey never, to our knowledge, mention slavery in *Basic Symbols*. But the following passage seems to elevate Inequality to the status we had thought belonged to its opposite.

33. 2 LINCOLN, *supra* note 8, at 520.

34. 4 LINCOLN, *supra* note 8, at 438.

35. Pp. 14, 156.

Is the American political tradition [they ask] the tradition of the textbooks, which indeed situates the "all men are created equal" clause at the center of our political experience, or is it the tradition of American life as it is actually lived and thus a tradition of inequality?³⁶

Here Kendall and Carey confuse the "is" with the "ought" of a political tradition. "Life as it is actually lived" should refer not only to what people *do*, but also to the ethical norms or imperatives by which they understand the meaning of what they do. Kendall and Carey refer repeatedly to the American people as being a Christian people. Would they identify Christians solely by their observance of the golden rule, *i.e.*, only by their lives as they are "actually [*i.e.*, selfishly] lived"?

Kendall, we noted, thinks that Lincoln (and Jaffa) points us toward a state of society in which men are "so equal that no one will be able to tell them apart." Yet were not all slaves equally denied the privileges of freedom, without regard to age, sex, virtue, or intelligence? Did they not all receive the same "wages," regardless of how much or how little they worked? Kendall and Carey speak—inaccurately—of the Declaration of Independence as referring to a Christian people. Christianity is a revealed religion. But in its references to "self-evident" truths and to "Nature" and "Nature's God," the Declaration certainly has reference to natural, not to revealed theology. Still, the moral commands of the Decalogue are held by many Christians to be knowable by unassisted human reason as well as by Biblical revelation. And American slavery was as much an institutionalized denial of the moral claims of the Ten Commandments as Hitler's concentration camps or the Gulag Archipelago. Since slaves were legally chattels, they could make no legal contracts, including marriage. How could children honor their fathers and mothers, when the fathers and mothers were not lawfully married, when they had no lawful power over their children, and when they could not acquire any of the property which is at the foundation of family life? How could the prohibition against adultery be regarded, when there was no lawful distinction between fornication and adultery? How could chastity be a virtue for those who had no lawful power over their own bodies? How could prohibitions against covetousness and theft be addressed to those who could possess no property and all the fruits of whose labor were taken from them? How could slaves regard the injunction against bearing false witness, when their testimony could never be given in court against white men? And did not the example of Moses, who had killed a slave

36. Pp. 14-15 (emphasis added).

master, justify any one in striking down another who obstructed his path to freedom?

American slavery treated all men of a certain class as having their worth determined by their membership in that class. This is equally the root of contemporary totalitarianism. To be elevated, or regarded as worthy, because one is white, proletarian, or Aryan, or to be degraded and scorned as a Negro, a capitalist, or a Jew, does not involve any ultimate distinction of principle. Kendall's denunciation of the "cooperative commonwealth" of those whose identities are lost in "equality" is utterly stultified by his refusal to condemn American slavery and by his condemnation of Lincoln for condemning it.

The "real" American political tradition, say Kendall and Carey, is not one of Equality. Except in the form of a rhetorical question, they do not positively assert that it is one of Inequality. Putting together their various formulations, *the* "basic symbols" of our tradition are—or is—the representative assembly (or assemblies) of the virtuous people deliberating under God. (There is the same difficulty with singular and plural here, as in the case of The United States.) We have no quarrel with the emphasis they place upon deliberation, or upon the need for morality and religion among the institutions of a *free* people. We think there is a fundamental misunderstanding implied in their case for legislative supremacy among the three branches of government. We think they confuse the supremacy of legislation, conceived as an act of the sovereign people in its constitution-making role, and legislation as an exercise of the ordinary powers of government provided by the Constitution. But this difference arises from the far more fundamental difference we have, concerning what it is that makes discrete individuals into a sovereign people, and hence what it is that authorizes any people to institute government, "laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." Kendall and Carey assume the existence of the people, and never ask what it is, from the viewpoint of the Founding Fathers, that entitled the American people to consider themselves as sovereign. But the answer to that question, as we propose to demonstrate, is Equality.

The Declaration of Independence, of course, affirms it to be a self-evident truth, "that all men are created equal." Within short intervals during the Revolution, the people of the several states adopted new constitutions. Most of these contained preambles, bills or declarations of rights, which gave the "foundation of principles" upon which they were to erect the "forms" of government they thought most likely to

effect their safety and happiness. For example, Virginia stated "That all men are by nature equally free and independent"; Pennsylvania, "That all men are born equally free and independent"; Vermont, "That all men are born equally free and independent"; Massachusetts, that "All men are born free and equal"; New Hampshire, that "All men are born equally free and independent"; Delaware, "That all government of right originates from the people [and] is founded in compact only" ³⁷ Maryland also said "that all government of right originates from the people, [and] is founded in compact only" ³⁸

Now we contend that all these statements of principle, where they are not verbally identical, all mean one and the same thing. It will be observed that Virginia, Pennsylvania, Vermont, and New Hampshire say "equally free and independent." Massachusetts says "free and equal." Clearly, "equal" and "independent" mean the same thing. Also, "born" and "by nature" mean the same thing. Delaware and Maryland vary this language slightly by saying that rightful government is "founded in compact only." This expression, we shall see, means simply that government is the result of an agreement by men who were originally, or by nature, or born, equally free and independent. Jefferson's "created equal" is simply the most succinct formulation of this commonly understood doctrine.

Willmoore Kendall devoted the last years of his life to an extraordinary effort to read John Locke out of the American political tradition. That there was a compact theory much older than the American, he knew. That Socrates had appealed to one, he knew from the *Crito* of Plato. But he didn't trust the Old Pagan, as "The People versus Socrates Revisited" showed. With a great swoop, he lighted finally upon the Mayflower Compact. Here he found at last, if not a compact theory, at least a compact. No matter, if the Pilgrims didn't have a theory, Kendall would supply it to them! The important thing was that there was not a word in the Mayflower Compact about Equality, and there was something—not much, but something—about "advancing the Christian faith." So Kendall labelled his second chapter in *Basic Symbols* "In the Beginning: The Mayflower Compact," and tried to prove that the Founding Fathers—who were now, in fact, the Founding Great-great-great-great-Grandsons—had always meant substantially what the men of the Mayflower Compact had meant. That is to say, they had meant what they would or could or should have meant if they

37. SOURCES OF OUR LIBERTIES 311-82 (R. Perry ed. 1964).

38. *Id.* at 346.

too had been born before John Locke. But all this effort was in vain. While we would never contend that there are *no* non-Lockean elements in the Founding, or that the Founding Fathers always interpreted the Lockean elements in a Lockean manner, Locke is nonetheless there. The primary appeals to principles in the Revolution are Lockean. The principle of limited, constitutional government, by which the Fathers rejected despotism and by which they constructed their own governments, were fundamentally Lockean. Without understanding this, no other aspects of the Revolution, or of the American political tradition, are intelligible.

The spirit of Locke's political teaching is conveyed well by the opening sentence of his *First Treatise*: "Slavery is so vile and miserable an estate of man, and so directly opposite to the generous temper and courage of our nation, that it is hardly to be conceived that an Englishman, much less a gentleman, should plead for it."³⁹ The major part of that treatise is devoted to a refutation of Sir Robert Filmer's *Patriarcha* (1680), a work which attempts to found absolute monarchy upon a title derived from Adam. Locke demonstrates the absurdity of such a title, not to mention the difficulty of finding its rightful possessor! But consider the language of the Continental Congress, in the Declaration of the Causes and Necessity of Taking Up Arms, July 6, 1775:

If it was possible for men, who exercise their reason to believe, that the divine Author of our existence intended a part of the human race to hold an absolute property in, and an unbounded power over others . . . the inhabitants of these colonies might at least require from the parliament of Great Britain some evidence, that this dreadful authority over them, has been granted to that body.⁴⁰

Did ever a great revolution in human affairs ever begin with such sarcasm? Can one not hear the very accents of Locke's *First Treatise* as he rakes old Filmer over the coals? One thinks, for example, of Sir Robert's derivation of kingly power from paternal power, citing the Biblical injunction to honor one's father. To this Locke retorted with evident glee that the Bible speaks of honoring one's father *and mother* and asks why Sir Robert does not find queenly as well as kingly authority in such injunctions. But the Continental Congress, in rejecting the proposition that any part of the *human race* (not merely Englishmen *vis-à-vis* Englishmen) might hold a right of property in any other

39. J. LOCKE, *TWO TREATISES OF GOVERNMENT* 7 (T. Cook ed. 1947) [hereinafter cited as *TWO TREATISES*].

40. *DOCUMENTS OF AMERICAN HISTORY* 92 (H. Commager ed. 1963) [hereinafter cited as *DOCUMENTS*].

part, clearly condemned in principle *all* slavery. And this they might do, only if, in their right to non-despotic rule, *all men are equal*.

In his attack on Filmer, Locke characterizes his "system" in this "little compass." "[I]t is," says Locke, "no more but this":

*That all government is absolute monarchy.*⁴¹

"And the ground he builds on is this":

*That no man is born free.*⁴²

Robert A. Goldwin observes that "Locke's own political teaching may be stated in opposite terms but with similar brevity . . ."⁴³ Goldwin's first Lockean proposition is this:

*All government is limited in its powers and exists only by the consent of the governed.*⁴⁴

And, says Goldwin, the ground Locke builds on is this:

*All men are born free.*⁴⁵

The argument for absolute monarchy—or despotism, for they are the same—is grounded in Locke in the proposition that no man is born free. The argument for limited government (or constitutional government, for they are the same) is grounded in Locke in the proposition that all men are born free. But we shall see that in Locke—and *in the nature of things*—the proposition that all men are born free is itself an inference from the proposition that all men are born equal. The equality of all men by nature and the freedom of all men by nature differ as the concavity of a curved line differs from its convexity. The two are distinguishable, but inseparable.

Let us now turn to the famous passage in *The Second Treatise*, in which Locke considers "what state all men are naturally in."⁴⁶ It is, he says,

a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man.⁴⁷

But it is also, he continues,

[a] state . . . of equality, wherein all the power and jurisdiction is re-

41. TWO TREATISES, *supra* note 39, at 8.

42. *Id.*

43. HISTORY OF POLITICAL PHILOSOPHY 451 (L. Strauss & J. Cropsey eds. 1972).

44. *Id.*

45. *Id.*

46. TWO TREATISES, *supra* note 39, at 121.

47. *Id.*

reciprocal, no one having more than another; there being nothing more evident than [meaning thereby that it is self-evident] that creatures of the same species and rank . . . should also be equal one amongst another without subordination and subjection⁴⁸

We would re-phrase Locke's argument as follows: there is no difference between man and man as there is between man and, for example, dog, such that one is recognizable as the other's natural superior. And if men are not *naturally* subordinate, one to another—as all the brute creation are *naturally* subordinate to man—then they are *naturally* not in a state of government, or civil society. They are, instead, *naturally* free and independent, or *born* free and independent. But they are born free and independent, *because* they are born—or created—equal.

There can be no question—and Kendall and Carey do not question—that the just powers of government in the American political tradition are derived from the consent of the governed. Kendall and Carey treat consent however as if it were an ultimate and not a derived principle. But that is not the way Locke or the Founders treated it. They derived it from man's natural freedom and equality. It is the recognition of Equality which not only gives rise to consent, but also which provides consent with a positive content of meaning. Kendall and Carey, by allowing consent to stand alone, as if it were an ultimate principle, have no basis for saying what it is to which men might reasonably consent. In 1854, Lincoln quoted his notable antagonist thus:

Judge Douglas frequently, with bitter irony and sarcasm, paraphrases our argument by saying: "The white people of Nebraska are good enough to govern themselves, *but they are not good enough to govern a few miserable negroes!!*"

Well, I doubt not that the people of Nebraska are, and will continue to be as good as the average of people elsewhere. I do not say the contrary. What I do say is, that no man is good enough to govern another man, *without that other's consent.*⁴⁹

Kendall and Carey, like Douglas, do not see that the people's right to give their consent is itself derived from the equality of *all* men and therefore limits and directs what it is to which they may rightfully consent. Their view leads to the conclusion that whatever any particular people may be persuaded by demagogues to agree or consent to, becomes "right." Calling the people "virtuous" and saying that they de-

48. *Id.*

49. 2 LINCOLN, *supra* note 8, at 266.

liberate "under God" may become a mere cloak for vice and hypocrisy, as our examination of the ethics of slavery showed.

That men are by nature free and equal is the ground simultaneously of political obligation—of consent as the immediate source of the just powers of government—and of a doctrine of limited government and of an ethical code. Because man is by nature a rational being, he may not rule other rational beings as if they were mere brutes. Because man is not all-wise or all-powerful, because his reason is swayed by his passions, he may not be a judge in his own cause, and he may *not* therefore rule other men despotically. Men do not need the consent of brute creation to rule over it. Nor does God need the consent of men rightfully to exercise his Providential rule over them. Man is the in-between being, between beast and God, "a little lower than the angels." Consent is that ground of obligation which corresponds with this "in-betweenness." It is the contemplation of this universe, articulated as it is into the intelligible hierarchy of beast, man, and God, which not only brings consent as a principle into view, but also enlightens it, and brings it thereby into harmony with "the Laws of Nature and of Nature's God." To repeat, the proposition that all men are created equal implies an understanding of man, in the light of the universe, in the light of the distinction between the human and the subhuman on the one hand, and of the human and the superhuman on the other. As we have already observed, it does *not*, for this reason, ignore the very important differences between man and man. On the contrary, it is for the sake of those differences that it denies any man the right to rule others, *as if* those others were beasts. And there are no standing rules, and impartial judges, to govern the differences between slaves and their owners and masters. For the rule of a master to be a matter of right, the master would have to differ from the servant, as God is supposed to differ from man. Whatever one's beliefs as to the *existence* of Divinity, it is evident—or self-evident—that no man possesses that power or wisdom which we suppose that God—if He exists—possesses. While not supposing for a moment that the Founders did not believe in the actual existence of God, their assumptions about Equality—which include assumptions about the subhuman and the superhuman—are independent of the validity of any particular religious beliefs. In the decisive respect, their assumptions are not assumptions at all, but observations of a world in which the difference between men and beasts provides a clear and distinct idea of what the Divine nature, in its politically relevant aspects, must be.

Kendall and Carey suppose that the constitutional morality of *The*

Federalist has nothing whatever to do with Equality. That they are wrong becomes clear the moment one understands that the proposition that all men are created equal is not about man alone, but about man, God, and Nature; and that Nature implies the difference between the human and the sub-human, as well as that between the human and the super-human. Consider the famous passage of Madison's in the fifty-first *Federalist*:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.⁵⁰

Here the very nature of the problem that constitutionalism is meant to solve is determined by the meaning of Equality.

But does not constitutionalism imply an ethics as well as a politics? Do we not recognize that the equality of all men by nature, leading as it does to civil society, is the justification for the *inequalities* of civil society? Do we not thereby see that officials are but men and must live under the laws that they make and administer? (Abraham Lincoln: "The master not only governs the slave without his consent; but he governs him by a set of rules altogether different from those which he prescribes for himself."⁵¹) Do we not recognize that *our* consent makes *their* acts lawful, and that in obeying them, we are not deferring to our superiors in nature, but only to the principle of authority that is in ourselves? Is it not this that makes obedience not demeaning (not slavish), but dignified, and sometimes even noble? But still further, does not Equality, which makes *our* consent necessary to the laws *we* obey, oblige us to recognize the *same* rights in *other* men? Does it not also tell us that we may not consider other men mere means to our ends—as we may consider the brute creation—or as we may be considered by a Divine Providence whose power and wisdom so far transcends our own? (Are we not taught by Revelation that God does *not* consider us as mere means, but that this is not necessary to his being, but represents the miracle of His grace?) Do not all the totalitarian slave states of our time rest upon theoretical propositions in which race or class differences delude some men to consider themselves superhuman? And does not this delusion lie at the root of their bestial-

50. THE FEDERALIST 337 (Modern Library ed. 1937) [hereinafter cited as THE FEDERALIST].

51. 2 LINCOLN, *supra* note 8, at 266.

ity? Is it not this that makes them think that, for the sake of the classless society, or the thousand-year Reich, everything is permitted to them? Surely Abraham Lincoln was right when he said that the doctrine of human equality was "the father of all moral principle [amongst] us."⁵²

11.

There is a tendency among Conservatives to identify Equality with some species of socialism or—in Kendall's words—with "the cooperative commonwealth of men who will be so equal that no one will be able to tell them apart." But the doctrine of Equality, in particular in its Lockean sense, is essential to the defense of the institution of private property in the modern world. For the doctrine of Equality holds that what men are by nature, that is, prior to civil society, determines what purposes civil society may rightfully serve. It is this that determines what rights are inalienable, and what rights may—or must—reasonably be surrendered to society. It was axiomatic for the Founders that the rights of conscience were never surrendered to civil society, and that therefore civil society might never rightfully enact laws in matters that were wholly and exclusively matters of conscience. It took more than a generation after the Revolution to uproot all the colonial laws which, directly or indirectly, "established" religion, by giving one or another religious belief the assistance of law. Moreover, the determined way in which men like Jefferson and Madison acted to get rid, not only of religious establishment in all its forms, but also of such vestiges of feudal law as primogeniture and entail, proves how little regard they had for that colonial past Kendall tried to make the ground of the American political tradition.

Primogeniture and entail were anachronisms on the American scene. They were essentially limitations upon the right of a man to control his own property and to dispose of it at his pleasure. They were props of aristocracy, inimical to the spirit both of democracy and of capitalism. They were, so to speak, elements of a "Tory socialism." But Locke had taught that men were by nature property-acquiring animals. He had taught that both life and liberty became valuable and were themselves natural rights, above all because they culminated in the possession and enjoyment of property. No one in America who heard the Declaration of Independence read out for the first time had any doubt that pursuing happiness meant primarily, as Virginia had already put

52. *Id.* at 499.

it, "acquiring and possessing property." It was because the Parliament of Great Britain had appeared to assert a right to tax the colonists without their consent by making laws and statutes "in all cases whatsoever," that they had revolted. But men like George Washington—as vigorous a land speculator as ever lived—were driven into rebellion in part by their inability to get the government at Westminster to grant patents and titles to the land they had surveyed in such places as the Ohio valley. Government, in their view, existed to facilitate the acquisition and enjoyment of private property. Such property might be taxed—with their consent—so that the government might be able to protect that same property. But it might not tax them to render nugatory, in any manner or sense, their efforts *in* acquiring and possessing property. The principle of Equality, far from enfranchising any leveling action of government, is the ground for the recognition of those human differences which arise *naturally*, but in *civil society*, when human industry and acquisitiveness are emancipated. We saw that Madison reflected the doctrine of Equality, when he attributed the need for constitutional government, and constitutional morality, to the difference between men and angels. But he reflected it no less when, in the tenth *Federalist*, he put as the "first object of government," the protection "of different and *unequal* faculties of acquiring property" ⁵³ In his *Second Treatise*, Locke had put the origin of property in human labor. It was the natural right—the equal right—which each man had to his own body, and therefore to the labor of that body, that was the ultimate foundation of the right to private property in civil society. How can Kendall and Carey not have seen, as Lincoln saw, that the denial of Equality was the denial of the principle upon which private property, as well as every other personal freedom, rested? Nothing illustrates better Lincoln's egalitarianism, and his attitude toward property, than the following message, which he sent to a meeting of the Workingmen's Association in New York, during the Civil War:

Let not him who is houseless [wrote Lincoln] pull down the house of another; but let him labor diligently and build one for himself, thus by example assuring that his own [house] shall be safe from violence when built. ⁵⁴

Surely here is the wisdom of Solomon and of a just and generous Conservatism.

53. THE FEDERALIST, *supra* note 50, at 55 (emphasis added).

54. 7 LINCOLN, *supra* note 8, at 259-60.

12.

We turn finally to two myths propagated by Kendall and Carey which, it seems to us, have been stumbling blocks for American Conservatives—particularly for those who have forgotten their American history. According to *Basic Symbols* it was Lincoln who somehow invented a “constitutional status” for the Declaration and, by his enumeration of “four score and seven years” in the Gettysburg Address, spuriously caused the occasion for Independence to become that of our birth “as a nation.” What was established on July 4, 1776, they say, was not a nation, but only “a baker’s dozen of new sovereignties.”⁵⁵ In short, what the thirteen colonies did that day was not merely to declare themselves independent of Great Britain, but to declare themselves independent of each other. Here is Lincoln, taking up that claim, in his message to Congress, July 4, 1861.

Therein [that is, by the Declaration of Independence] the “United Colonies” were declared to be “Free and Independent States”; but, even then, the object plainly was not to declare their independence of *one another*, or of the *Union*; but directly the contrary, as their mutual pledge, and their mutual action, before, at the time, and afterwards, abundantly show.⁵⁶

How can Kendall and Carey revive this old Confederate propaganda without even alluding to the “abundant” evidence with which Lincoln had refuted it?

However indeterminate the character of American federalism may have been at that early date, there can be no question but that the thirteen former colonies, now states, remained united, and always, before the rest of the world, assumed the character of a single person. Passing over the pledge of unity in the Declaration itself, and the further pledge in the Articles of Confederation that the Union shall be perpetual, we would direct attention to Article VI of the Constitution. It declares that “All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.” Thus the United States “before the Adoption of this Constitution,” the United States “under the Confederation,” and the United States “under this Constitution,” are all *the same United States*. According to Article VI, the one from which the many were formed—according to *et pluribus unum*, the motto of the United States—did not result from the Constitu-

55. Pp. 88, 90.

56. 4 LINCOLN, *supra* note 8, at 433 (footnotes omitted).

tion. But if the Constitution did not cause the Union, then the Union (that is the Union of the People of the United States) must have caused the Constitution. But if the Union as a sovereign entity had an origin before 1787, when else can it have been except on July 4, 1776? If the Declaration gave birth to the Union which gave birth to the Constitution, it must itself have *constitutional status*.⁵⁷ And so it always has had in the statutes of the United States. Lincoln was of course perfectly correct in what he said at Gettysburg, and elsewhere, upon this topic.

But is it proper to refer to the Union which came into being in 1776 as a *nation*? Certainly neither Union nor nation were fully formed—any more than any other infant—at birth. But Thomas Jefferson, writing to James Madison, on August 30, 1823, referred without hesitation to a meeting that had taken place the previous month, as “an anniversary assemblage of the nation on its birthday.”⁵⁸ I would venture to doubt whether anyone can find any expression by any American statesman during the first fifty years following independence that contradicts the opinion that July 4, 1776, was the birthday of *the nation*. These were the formative years of Lincoln’s life. He grew up, strange to say, believing what Jefferson said about our being a nation, just as he grew up believing Jefferson when he wrote “that all men are created equal.”

We come now to Kendall and Carey’s contention that Equality, which had admittedly (and unfortunately) loomed so large in the Declaration, had somehow disappeared when the Constitution, and the federal bill of rights, came to be written. Our readers will readily perceive that this alleged omission *is* an omission, only if the Declaration itself lacked *constitutional status*. But we have just proved that it *does* have that *status*. The Declaration authorized each of the thirteen states separately, and all of them collectively, to “institute new Government” such as to them “shall seem most likely to effect their Safety and Happiness.” The statement of principles in the Declaration of Independence properly accompanied a revolutionary change in political allegiance. It also properly accompanied a dissolution of one social compact and the formation of another (or others). There was a good deal of contemporaneous discussion as to whether the dissolving of the political allegiance of the colonists to the British crown also constituted a dissolution of the social compact among themselves. According to James Madison, “The question was brought before Congress at its first session by Doctor Ramsay, who contested the election of William Smith; who,

57. DOCUMENTS, *supra* note 40, at 100 (editor’s note).

58. A CASEBOOK ON THE DECLARATION OF INDEPENDENCE 32 (R. Ginsberg ed. 1967).

though born in South Carolina, had been absent at the date of independence. The decision was, that his birth in the Colony made him a member of society in its new as well as its original state."⁵⁹ We can easily imagine some Tories, who were driven out of the country, contesting this decision! In any event, there was no such revolutionary change as occurred in 1776, in the interval between 1776 and 1787. The absence of a new declaration of principles in 1787, far from indicating that the Framers had forgotten the old one, is a sign that they remembered it perfectly. Had they changed their minds about those principles in any way, a new one might have been indicated. But they had not changed their minds, and the country that ratified the Constitution understood perfectly that the principles of 1776, as expressed not only in the national Declaration of Independence, but also in all the state declarations accompanying the state constitutions, governed the new Constitution as well.

The principles of the Declaration are not, however, merely presupposed in the Constitution. They are present in the very first words of the Constitution as those words were understood by those who drafted and adopted it. "We the People of the United States," implies the existence of a *compact* in precisely the sense in which Delaware and Maryland used that term in their declarations of rights. In the debates on nullification, in the early 1830's, speakers on all sides of that difficult question, prefaced their remarks by saying that compact was the basis of all free government. In one of his last writings, an essay on "Sovereignty," Madison affirmed as a matter of course "that all power in just and free governments is derived from compact."⁶⁰ By compact, he said, he meant "the theory which contemplates a certain number of individuals as meeting and agreeing to form one political society, in order that the rights, the safety, and the interest of each may be under the safeguard of the whole."⁶¹ "The first supposition" of such an agreement, said Madison, "is that each individual being previously independent of the others, the compact which is to make them one society must result from the free consent of *every* individual."⁶² If then the people of the United States, who ordained the Constitution of the United States, are a free people, they must have been formed into civil

59. 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 392 (R. Worthington ed. 1884).

60. *Id.* at 391.

61. *Id.*

62. *Id.* at 392.

society by the free consent of *every* individual. But that would not be possible unless every individual, then and since, forming part of the people of the United States, like all mankind, in the original and originating sense, had been by the laws of nature and of nature's God, "created equal."

