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CONTRACTUALIST IMPARTIALITY IN THE AMERICAN STRUGGLE FOR JUSTICE: A COMMENT ON PROFESSOR ALLEN'S "SOCIAL CONTRACT THEORY IN AMERICAN CASE LAW"

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How, if at all, does social contract theory interpretively clarify American public and private law? Dean Allen's article takes as its starting point the premise that some form of social contract theory underlies the founding of the American constitutional republic, and then inquires into how that theory can be useful in understanding the later development of American case law. She gathers a broad range of case law in various domains and makes many pointed observations, both constructive and critical, about the role social contract theory ostensibly plays in those decisions, including some dissents. Her critical points include concerns that some forms of social contract theory were used to rationalize injustices (e.g., slavery in the antebellum period), and even today, such theories are sometimes insufficiently self-conscious about their role in the uncritical naturalization of injustice.

My comment starts from doubts about both the over-inclusiveness and under-inclusiveness of Dean Allen's methodology of selecting cases for examination and then explores some critical consequences of her failure to identify and explore many examples of the role of contractualism in advancing the struggle for justice under American public law. Important among these examples are the struggles against religious intolerance, racism, sexism, and homophobia.

I begin by noting a methodological concern about Dean Allen's selection of data points for her inquiry. Her methodology of selection, as I understand it, consisted of searching case law (as data points) for terms of expressions like "social contract," "state of nature," "John Rawls's *A Theory of Justice*," and other similar items. This is a familiar and reasonable technique for conventional legal research guided by the well accepted doctrinal categories into which areas of substantive public and private law are organized (for example, strict liability or negligence standards in the law of torts). Dean Allen's inquiry, though, is meta-interpretive, seeking larger patterns of normative argument (associated with social contract theory) that organize and explain case law in and across numerous substantive areas of public and private law. There are, of course, no well accepted substantive categories of doctrine ("social contract," or "state of nature") available for such an inquiry, and it may be a somewhat misleading guide to conduct a

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review of relevant data points on this model.

In order to see this critique clearly, we need to understand the substance of social contract theory. In the form of such theory prominently associated with the work of John Rawls, contractualism offers both an abstract test for acceptable normative principles and a substantive argument about how those principles should be understood and elaborated.[1] The path-breaking importance of Rawls's contractualism was its proposal, on this basis, of a reasonable defense of substantive principles of justice that were pointedly anti-utilitarian.

Until Rawls, the dominant moral and political philosophy in Britain and America had been utilitarianism; moral and political matters were, on this view, to be evaluated in terms of whether they led to the greatest aggregate of pleasure over pain of all sentient creatures. The consequence was that, in principle, the pains or deprivations of a few would be acceptable to the extent that a greater net aggregate of pleasure over pain was secured. Rawls's argument was that such a substantive principle could not be reasonably justifiable to all, consistent with the contractualist test because, *inter alia*, alternative principles would better secure basic human interests against the kinds of sacrifice that utilitarian aggregation would otherwise require. Such alternative principles included a principle guaranteeing a greatest equal liberty of certain basic rights (including rights of conscience, speech, and intimate life) consistent with a like liberty of all. The anti-utilitarian normative force of this principle was shown by the fact that its normative demands fully applied even when utilitarian aggregation would otherwise require that they yield.

Social contract theory had, of course, existed in diverse historical forms before the publication of Rawls's *A Theory of Justice* in 1971.[2] These forms expressed quite diverse substantive political positions, including Thomas Hobbes's defense of monarchical absolutism[3] and John Locke's argument for constitutional democracy.[4] Some of these positions, including that of Locke, were implicitly utilitarian;[5] none of them defended anything remotely as demanding, as a principle of social and economic justice, as Rawls's difference principle.[6] Rawls's contractualism made such an original

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1. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971); *cf.* DAVID A.J. RICHARDS, A THEORY OF REASONS FOR ACTION (1971).

2. *See also* JOHN RAWLS, POLITICAL LIBERALISM (1996).

3. *See* THOMAS HOBBES, LEVIATHAN (Michael Oakeshott ed., Collier-MacMillan Publishers 1960) (1651).

4. *See* JOHN LOCKE, *Second Treatise of Government, in* LOCKE'S TWO TREATISES OF GOVERNMENT 285 (Peter Laslett ed., Cambridge University Press 1960) (1690).

5. *See* JOHN COLMAN, JOHN LOCKE'S MORAL PHILOSOPHY (1983) (discussing this point).

6. *See* RAWLS, *supra* note 1, at 75-83 (roughly requiring, within the constraints of the equal liberty principle, that the distribution of economic goods be judged in terms of making worst off classes better off than any alternative distribution).

contribution to moral and political philosophy because it interpreted contractualism in a new way—one that was not only pointedly anti-utilitarian and clearly committed to a distinctive rights-respecting form of constitutional democracy (centering on the protection of the inalienable right to conscience), but also one that espoused a social democratic role of the state in securing the basic interests of the most disadvantaged classes.[7]

Thus, the interpretive relevance of Rawls's contractualism to American public and private law cannot be reduced to the labels of traditional social contract theory, which his contractualism not only reconceives but also contests in significant ways. The interpretive question is not engaged by a method that depends on labels like "social contract" or "state of nature." The point is not that these labels hinder conveyance of the anti-utilitarian, social democratic principles of Rawls's contractualism, but that such principles may better interpretively clarify American law without being bound by such labels (including "John Rawls's *A Theory of Justice*"). The labels are likely to be both seriously over-inclusive (identifying data points that do not reflect the relevant forms of contractualist argument) and under-inclusive (no such labels being invoked though the underlying pattern of argument is importantly contractualist).

Any overview of the sort Dean Allen undertakes should be clear on two points: first, it should identify the substantive normative character of the contractualist moral and political philosophy that one is investigating; and second, it should explain the relevant tests by which one judges whether a body of law is interpretively clarified in light of such a philosophy. To address the first point, one needs more than labels; one needs to explore the character of the philosophical claims that are being distinctively made (for example, as in the case of Rawls's contractualism, its anti-utilitarian character defined by the derivation of a substantive principle of equal respect for basic human rights that enjoys priority over arguments of utilitarian aggregation). To address the second point, one needs a perspective on interpretation founded in general legal interpretation.[8]

Two plausible tests for the adequacy of a theory of legal interpretation regarding a body of case law are, first, that the theory fit the line of authoritative case law in a certain substantive domain over time, and

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7. I limit my discussion here to the distinctive structure and principles of Rawls's contractualism as the theory that has pivotally transformed the way in which political philosophy is understood. A fuller discussion would include later developments of contractualist argument that, while accepting the rights-respecting feature of his account, challenge some aspects of Rawls's views, in particular, his social democratic conception of economic redistribution. For one such development, *see* DAVID GAUTHIER, MORALS BY AGREEMENT (1986).

8. *See* RONALD DWORKIN, LAW'S EMPIRE (1986); *see also* DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986) [hereinafter RICHARDS, TOLERATION] (applying this methodology to issues of American Constitutionalism).

second, where the case law is indeterminate or in some tension, that the theory elucidate how the case law should be understood and developed in terms of the excavation of the more abstract values or background rights that organize a body of law.[9] The relevance of contractualist political philosophy to legal interpretation is particularly important in the second test to the extent that such philosophy better elucidates the nature and weight of such background rights, and affords a better guide as to how case law should be elaborated.

We can only assess whether contractualism meets this interpretive test by investigating whether its structure of argument clarifies the background rights implicit in a body of law and, on this basis, assists us in understanding and evaluating how case law has developed and should continue to develop. If contractualism meets this test in some domain, it will be a valid interpretive theory because it better clarifies the nature and weight of the relevant principles of law. Nothing in the appearance of labels guarantees the existence of such contractualist argument. We need not labels but an interpretive methodology that calls for the detailed exploration of structures of legal argument, examining whether such argument rests on the identity and weighting of considerations in the way that contractualism requires. Contractualism has plausible and illuminating interpretive uses to the extent it helps us identify and weigh considerations in legal argument that other interpretive approaches cannot reasonably explain.

It may be helpful to illuminate the force of this interpretive method by considering at least one example of its contractualist application mentioned several times by Dean Allen— namely, my use of contractualism in the interpretation of central substantive doctrines of American public law. There are now four books in print that illustrate the character of this approach: *Toleration and the Constitution*;[10] *Foundations of American Constitutionalism*;[11] *Conscience and the Constitution*;[12] and, most recently, *Women, Gays, and the Constitution*.[13] The closer examination of their approach not only casts light on how the interpretive contribution of contractualism should be understood, but also shows, as a related matter, how contractualism can reasonably deal with several of the objections that Dean Allen makes to it.

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9. *See* DWORKIN, *supra* note 8; RICHARDS, TOLERATION, *supra* note 8.

10. *See* Richards, TOLERATION, *supra* note 8.

11. *See* DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (1989) [hereinafter RICHARDS, FOUNDATIONS].

12. *See* DAVID A.J. RICHARDS, CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS (1993) [hereinafter RICHARDS, CONSCIENCE].

13. *See* DAVID A.J. RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION: THE GROUNDS FOR FEMINISM AND GAY RIGHTS IN CULTURE AND LAW (1998) [hereinafter RICHARDS, WOMEN, GAYS AND THE CONSTITUTION].

The first of these, *Toleration and the Constitution*, sought to excavate a structure of argument common to three important contemporary substantive doctrines of judicially enforceable public law principles: religious liberty, free speech, and constitutional privacy. My use of contractualism here was to make interpretive sense both of the historical centrality to the American conception of constitutional rights of conscience, speech, and intimate life and of how the scope of protection of these rights has been and should be developed in contemporary circumstances. Contemporary contractualist theory afforded a good interpretive understanding of these matters because it explains, better than alternative normative theories, two crucial features of these constitutional developments: first, why certain basic human rights have reasonably been accorded a higher level of constitutional protection from state abridgment; and second, the heavy burden of secular justification constitutionally required to legitimately abridge such basic rights. It was neither a necessary nor sufficient condition of the validity of this approach that any particular forms of words was used in the relevant case law and other materials examined. The interpretive force of that account, to the extent it has force, derives from the way in which it shows how contemporary contractualist theory advances understanding of how basic rights of American constitutional law had, as a matter of principle, been reasonably elaborated in contemporary circumstances.

It is certainly true that both *Toleration and the Constitution* and the next work, *Foundations of American Constitutionalism*, used contemporary contractualist philosophy to clarify the historical role that forms of social contract argument played in framing both substantive doctrines[14] and the broad ambitions of American constitutionalism.[15] But, these historical matters were given an interpretive sense in the terms and from the perspective of contemporary contractualist theory, drawing on principles and distinctions (deontological versus utilitarian argument) not available to some previous contractualist philosophers. Nothing in the validity of this interpretive construction turned on the use of any form of words in the materials examined, but rather on the ways in which the account advanced deeper understanding of the rights-based principles implicit in those materials and their progressive elaboration over time.

Foundations of American Constitutionalism and the two works that followed (*Conscience and the Constitution* and *Women, Gays, and the Constitution*) increasingly explored the interpretive significance for American constitutionalism of a distinction between two quite different roles for contractualism in American public argument. These were noted by

14. *See* RICHARDS, TOLERATION, *supra* note 8, at chs. 4-5.
15. *See generally* RICHARDS, FOUNDATIONS, *supra* note 11.

Dean Allen: the difference between the role of contractualism as a justification for revolution, and its use in the interpretation of the constitution established in the wake of that revolution. In particular, one use of contractualism is of some concern to Dean Allen, namely, the use of debased forms of social contract argument in the antebellum period to rationalize both American slavery and racism. Dean Allen's point, while valid as far as it goes, should be seen in a larger perspective on the history of American constitutionalism. Such a perspective suggests that, on balance, contractualism was among the most pivotally important normative resources that have energized and empowered the progressive rights-based emancipation of African-Americans and other unjustly treated groups, making possible a dissenting moral discourse that has recurrently challenged and transformed constitutional discourse on grounds of justice.

To understand this matter, it is necessary to distinguish two quite different roles that contractualism has played in American public life. First, there is contractualism as an abstract political theory of legitimate government—requiring that any political order must, as a condition of its legitimacy, respect the basic human rights of all and mobilize political power to pursue aims of justice and public good. When governments seriously fail to respect conditions of legitimate government and supply no adequate remedies for injustice, resistance and revolution may be justified in order to secure a form of government that better meets these conditions of legitimacy. Contractualism, thus understood, is a normative theory of revolutionary constitutionalism.

But second, in the light of and as a response to such revolutions, contractualism, as a normative theory of revolutionary constitutionalism, has been domesticated, sometimes corruptly, to rationalize American constitutional institutions in ways that are inconsistent with its true normative demands as a theory of revolutionary constitutionalism. During the periods of such corruption, the force of contractualism is often seen not in dominant political and constitutional institutions, but in dissenting movements that, on contractualist grounds, challenge the legitimacy of such dominant institutions.

Dean Allen mentions the importance of such revolutionary constitutionalism at the time of the American Revolution and the resulting founding of the United States Constitution, but I believe an equally important and probably even more legitimate expression of such revolutionary constitutionalism underlay the Civil War and its culminating constitutional manifestations, the Reconstruction Amendments. *Foundations of American Constitutionalism* made such an argument about the founding; and *Conscience and the Constitution* offered a comparable argument about abolitionist dissent leading to the Civil War and Reconstruction Amendments. In both cases, I argued that an increasingly decadent form of constitutionalism (the British Constitution, or the

antebellum Constitution as interpreted by the Supreme Court led by Chief Justice Taney[16]) was challenged on contractualist grounds of revolutionary constitutionalism: both forms of constitutionalism, condemning rights-denying institutions for either unfair representation or slavery without affording reasonable remedy, failed to observe the minimal conditions of political legitimacy and thus might be revolutionarily challenged (the American Revolution in the one case, the Civil War in the other) in order to establish a form of constitution that was more legitimate (that is, better secured equal respect for the basic rights of all persons and harnessed political power to ends of justice and the public good).

The ambition of the Constitution of 1787, as amended by the Bill of Rights of 1791, was to establish a constitutional order more legitimate in this sense than the British Constitution under which the colonies had previously been ruled. Nothing struck antebellum Americans opposed to slavery as more appalling than that Britain (in contrast to the United States) should have abolished the West Indian institution of slavery as early as 1833.[17] The British Constitution, once condemned as illegitimate by American revolutionaries on grounds of its betrayal of human rights, now appeared to abolitionist Americans to be a shining example of constitutional decency, which shamed America. Thus, radical abolitionists such as Garrison and Phillips could now plausibly condemn the United States Constitution as "a covenant with death and agreement with hell" and urge disunion.[18]

Lincoln rejected the disunionism of the radical abolitionist view of the Constitution. His dramatic reentry into national politics was triggered, however, by his response in similar spirit to the Kansas-Nebraska Act of 1854 (repealing the prohibition of slavery in the territories), which had been engineered by Senator Stephen Douglas of Illinois.[19] Douglas justified the repeal on the basis of the principle of popular sovereignty, the right of people in the territories to democratically decide on the issue of slavery. For Lincoln, as for the many Americans he and others mobilized in forming the Republican Party,[20] it was plausible to admit that the Constitution protected slavery in the states and even that it empowered Congress to pass the Fugitive Slave Act of 1850.[21] His explosion of rage at the Kansas-Nebraska

16. *See* Dred Scott v. Sanford, 60 U.S. 393 (1856); *see also* RICHARDS, CONSCIENCE, *supra* note 12, at 54-57 (discussing Lincoln's cogent criticism of the decision).

17. RICHARDS, CONSCIENCE, *supra* note 12, at 52-53.

18. *Id.* at 53.

19. *See id.* at 52.

20. *See* WILLIAM E. GIENAPP, THE ORIGINS OF THE REPUBLICAN PARTY, 1852-1856 (1987).

21. Many political abolitionists, however, balked at this later claim. *See, e.g.*, RICHARD H. SEWELL, BALLOTS FOR FREEDOM: ANTISLAVERY POLITICS IN THE UNITED STATES, 1837-1860, at 236 (1976).

Act (which implausibly protected slavery in the territories) reflected a sense, similar to the sentiments of the radical abolitionists, that American political indifference to slavery expressed a loss of faith in the promise of American constitutionalism and humiliated America before the world, especially the European world:

> This *declared* indifference, but as I must think covert *real* zeal for the spread of slavery, I can not but hate. I hate it because of the monstrous example of slavery itself. I hate it because it deprives our republican example of its just influence in the world—enables the enemies of free institutions, with plausibility, to taunt us as hypocrites—causes the real friends of freedom to doubt our sincerity, and especially because it forces so many really good men amongst ourselves into an open war with the very fundamental principles of civil liberty—criticising the Declaration of Independence, and insisting that there is no right principle of action but *self-interest*.[22]

For Lincoln, growing public acceptance of the rights skepticism of Calhoun (who had on such grounds criticized the Declaration of Independence[23]), now supported by northern politicians in the name of a majoritarian interpretation of democracy (popular sovereignty), reflected a further deepening of the crisis of constitutional morality that he had predicted in 1838 in his address to the Young Men's Lyceum.[24] Douglas was precisely the kind of talented anti-constitutional Jacksonian politician that Lincoln had so prophetically described.

Douglas had based the Kansas-Nebraska Act on the political principle of popular sovereignty,[25] reserving to the Supreme Court of the United States the ultimate interpretive issue of the scope of Congressional constitutional powers over the territories. In *Dred Scott v. Sanford*,[26] the Supreme Court of the United States adopted Calhoun's view that Congress

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22. Abraham Lincoln, "Speech on Kansas-Nebraska Act," delivered at Peoria, Illinois, on October 16, 1854, *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1832-1858, at 315 (Don E. Fehrenbacher ed., 1989).

23. *See* RICHARDS, CONSCIENCE, *supra* note 12, at 32, 37, 39.

24. *See* RICHARDS, CONSCIENCE, *supra* note 12, at 50-51 (commenting on Lincoln's address).

25. *See* Stephen A. Douglas, *The Dividing Line Between Federal and Local Authority. Popular Sovereignty in the Territories*, HARPER'S NEW MONTHLY MAG., Sept. 1859, 519 (exemplifying Douglas's strained attempt to justify popular sovereignty as a sound interpretation of the American constitutional tradition). *See generally* ROBERT W. JOHANNSEN, STEPHEN A. DOUGLAS (1973).

26. *See* 60 U.S. 393 (1856).

could not constitutionally forbid slavery in the territories,[27] and also held that blacks "had no rights which the white man was bound to respect."[28]

Chief Justice Taney's opinion for the Court was self-consciously originalist: "[the Constitution] must be construed now as it was understood at the time of its adoption."[29] But Taney's appeal—in a style of originalism above factionalized politics that self-consciously imitated *The Federalist* No. 49[30]—was itself the ultimate triumph of the factionalized reading of the Founders that Lincoln so feared. Calhoun's rights skepticism triumphed in *Dred Scott* with a vengeance, giving a reading both of the powers of Congress and of the rights of black Americans that Justice Curtis showed in his dissent to be without solid basis in history, precedent, or text.[31] Lincoln's anxieties now extended not only to ambitious politicians without constitutional scruples, but to the institution that proponents of the theory of Union had historically supposed to be the most pivotally important of national deliberative institutions, the Supreme Court of the United States itself.[32] If the Supreme Court could so willfully distort the memory of the Founders, the time had come to challenge American institutions—on the ground of America's revolutionary constitutionalism—for failure to protect the basic rights of the person.

Lincoln rose to make this challenge in the Lincoln-Douglas debates[33]—"one of the most important intellectual discussions of the slavery question that occurred during three decades of almost uninterrupted controversy."[34] Lincoln certainly believed and argued cogently that *Dred Scott* was wrongly decided,[35] but the burning issue of public reason that he

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27. *See* JOHN C. CALHOUN, SPEECH ON THE OREGON BILL, *reprinted in* THE WORKS OF JOHN C. CALHOUN 479-512 (Richard K. Cralle ed.) (1854) (explaining Calhoun's views).

28. *Dred Scott*, 60 U.S. at 407.

29. *Id.* at 426.

30. *See* THE FEDERALIST No. 49, at 338-43 (James Madison) (Jacob E. Cooke ed., 1961); *see also* RICHARDS, FOUNDATIONS, *supra* note 11, at 4, 102, 132-34, 149, 168, 288, 290.

31. *See Dred Scott*, 60 U.S. at 564 (Curtis, J., dissenting); *see also* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978) (for the authoritative contemporary discussion of the background and fallacies of the opinion).

32. *See* RICHARDS, CONSCIENCE, *supra* note 12, at 42-57 (discussing more fully the theory of Union).

33. *See* THE LINCOLN-DOUGLAS DEBATES OF 1858 (Robert W. Johannsen ed., 1965).

34. DAVID M. POTTER, THE IMPENDING CRISIS, 1848-1861, at 331 (Don E. Fehrenbacher ed., 1976); *see also* HARRY V. JAFFA, CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES (1954); POTTER, *supra*, at 328-55; DAVID ZAREFSKY, LINCOLN DOUGLAS AND SLAVERY: IN THE CRUCIBLE OF PUBLIC DEBATE (1990) (for excellent commentary and analysis).

35. *See* Abraham Lincoln, ADDRESS AT COOPER INSTITUTE, NEW YORK CITY, (Feb. 27, 1860), *reprinted in* DON E. FEHRENBACHER, ABRAHAM LINCOLN: SPEECHES AND WRITINGS 111-30 (1989) (stating Lincoln's most expansive historical defense of this view). For the Lincoln-Douglas debates, see LINCOLN-DOUGLAS DEBATES, *supra* note 33, at 54-67, 145-59, 197-200, 255, 279-81,

placed unforgettably before the conscience of the nation was the enormity of the abandonment of the rights-based morality of American revolutionary constitutionalism implicit in the majoritarianism of Douglas and the originalism of Taney:

> When he [Douglas] invites any people, willing to have slavery, to establish it, he is blowing out the moral lights around us. When he says he "cares not whether slavery is voted down or voted up"—that it is a sacred right of self-government—he is, in my judgment, penetrating the human soul and eradicating the light of reason and the love of liberty in this American people.[36]

The consequence of such a view was grotesque distortion not only of the history of American revolutionary constitutionalism (for example, Douglas's[37] and Taney's[38] claim that Jefferson could not have meant the Declaration of Independence to apply to black Americans),[39] but also of the essential moral meaning of the Declaration that "there is no just rule other than that of moral and abstract right!"[40] The interpretive consequence of such crippling rights skepticism would be preparation of the public mind of the nation for a "new Dred Scott decision, deciding against the right of the people of the States to exclude slavery"[41]; for, "to prepare the public mind for this movement, operating in the free States, where, there is now an abhorrence of the institution of slavery, could you find an instrument so capable of doing it as Judge Douglas? or one employed in so apt a way to do it?"[42]

Lincoln's point was cogent. Such a decision would be as interpretively wrong as *Dred Scott* itself, but its acceptability would be prepared, just as *Dred Scott* was prepared, by the further elaboration of the rights skeptical subversion of American constitutional morality by politicians like Douglas and judges like Taney, both products and instruments of Jacksonian

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301-02, 320-22.

36. *See* Abraham Lincoln, *in* LINCOLN-DOUGLAS DEBATES, *supra* note 33, at 67 (first debate, Ottawa, Aug. 21, 1858).

37. *See* Stephen Douglas, *in* LINCOLN-DOUGLAS DEBATES, *supra* note 33, at 215-16 (delivered at Galesburg debate, Oct. 7, 1858); *see also* Douglas, *supra* note 25, at 521, 522, 527, 529 (exemplifying Douglas's attempt to argue that popular sovereignty was implicit in American revolutionary constitutionalism).

38. *See Dred Scott*, 60 U.S. at 409-10.

39. *See* Abraham Lincoln, *in* LINCOLN-DOUGLAS DEBATES, *supra* note 33, at 219-20 (delivered at Galesburg, Oct. 7 1858).

40. *Id.* at 221.

41. *Id.*

42. Abraham Lincoln, *in* LINCOLN-DOUGLAS DEBATES, *supra* note 33, at 233.

democracy.[43] Lincoln concluded the debates starkly:

> That is the issue that will continue in this country when these poor tongues of Judge Douglas and myself shall be silent. It is the eternal struggle between these two principles—right and wrong—throughout the world. . . . The one is the common right of humanity and the other the divine right of kings. . . . It is the same spirit that says, "You work and toil and earn bread, and I'll eat it." No matter in what shape it comes, whether from the mouth of a king who seeks to bestride the people of his own nation and live by the fruit of their labor, or from one race of men as an apology for enslaving another race, it is the same tyrannical principle.[44]

Lincoln made his appeal to the revolutionary foundations of American constitutionalism within the framework of the constitutional institutions of deliberative public argument that he cherished. Though he lost the election for the Senate of 1858,[45] he became a national figure and won the Presidency in 1860, in part because of such arguments.[46] He made clear in his first inaugural address—consistent with the constitutional theory of union—that he believed secession to be unconstitutional and the South's claim to a moral-right of revolution to be frivolous.[47]

The election of 1860 had been conducted as a form of majority rule embedded in constitutional institutions according full protection for "[a]ll the vital rights of minorities, and of individuals."[48] A democratic election, conducted within such a framework, was politically and constitutionally legitimate, and must be respected.[49] The South must now abide by the fair rules of the game and could not justly or constitutionally withdraw because it had fairly lost one play. Lincoln had argued to the American people that their politicians and judges had so betrayed their constitutionalism that their rights were not adequately protected. That was a revolutionary claim made in the context of democratic elections, and his success indicated that other forms of revolutionary action were not yet necessary. In fact, some of the

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43. *See generally* ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON (1945) (explaining some of the egalitarian merits of Jacksonian democracy).

44. Abraham Lincoln, *in* LINCOLN-DOUGLAS DEBATES, *supra* note 33, at 319 (delivered at Alton on Oct. 15, 1858).

45. *See generally* DON E. FEHRENBACHER, PRELUDE TO GREATNESS: LINCOLN IN THE 1850s (1962).

46. *See* LINCOLN-DOUGLAS DEBATES, *supra* note 33, at v-vi.

47. *See* Abraham Lincoln, "First Inaugural Address" (delivered Mar. 4, 1861), *reprinted in* II ABRAHAM LINCOLN, *supra* note 22, at 219-20.

48. *Id.* at 219.

49. *See generally* DAVID M. POTTER, LINCOLN AND HIS PARTY IN THE SECESSION CRISIS (1942) (discussing Lincoln's views and actions during this period).

more pessimistic abolitionists were right. America, in the face of a Southern sectional intransigence that now sought to entrench its violations of human and constitutional rights behind the wall of the Confederacy beyond any possibility of remedy by United States constitutional institutions,[50] was ripe for revolutionary action in the name of the rights-based Constitution. The Civil War, the Second American Revolution and the resulting Reconstruction Amendments, would be publicly justified in such terms.[51]

During the antebellum period, the public mind of the nation had been prepared for Lincoln's arguments not by dominant constitutional institutions, which often tried to silence such discussion,[52] but by a complex movement of moral and eventually political protest, the abolitionist movement, a movement examined in depth in *Conscience and the Constitution*.[53] During a period of increasingly dominant and politically and judicially successful constitutional decadence like antebellum constitutionalism, the abolitionist movement not only kept alive contractualist ideals of revolutionary constitutionalism (demanding respect for universal human rights), but it also developed an increasingly profound analysis of how democratic political power, under an ostensibly rights-based republican constitution, corruptively entrenched and rationalized structural injustice.[54]

To understand the political force of such structural injustice, we need, following the radical abolitionists who pioneered the analysis of structural injustice,[55] to understand its roots as a reaction to the contractualist demands of the argument of toleration. The argument for toleration was an American elaboration of the argument for universal toleration that had been stated, in variant forms, by Pierre Bayle and John Locke.[56] The context and motivations of the argument were those of radical Protestant intellectual

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50. *See generally* EMORY M. THOMAS, THE CONFEDERATE NATION: 1861-1865 (1979) (discussing Confederate constitutionalism); *see also* DON E. FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH (1989).

51. RICHARDS, CONSCIENCE, *supra* note 12, at ch. 4 (extensively defending this point).

52. *See id.* at 78.

53. *See id.* at ch. 3.

54. *See generally* RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION, *supra* note 13 (discussing the development of the conditions of structural injustice as integral to anti-Semitism, racism, sexism, and homophobia). By structural injustice, I mean institutions and practices (like American slavery and its underlying ideological support, racism) that, first, deprived a class of persons of basic human rights (conscience, speech, intimate life, and work) on wholly inadequate grounds and, second, rationalized such injustice in terms of dehumanizing stereotypes whose force depended, in a vicious circularity, on the constraints imposed by the abridgment of basic human rights, including abridgment of the speakers and speech that might most reasonably contest such stereotypes.

55. *See* RICHARDS, CONSCIENCE, *supra* note 12, at 80-89 (fully discussing this point).

56. *See* RICHARDS, TOLERATION, *supra* note 8, at 89-128 (examining the argument in Locke and Bayle and its Ameican elaboration notably by Jefferson and Madison).

and moral conscience reflecting on the political principles requisite to protect its enterprise against the oppressions of established churches, both Catholic and Protestant.

That enterprise arose both from a moral ideal of the person and the need to protect that ideal from a political threat that had historically crushed it. The ideal was of respect for persons in virtue of their personal moral powers both to assess and pursue ends rationally and to adjust and constrain pursuit of ends reasonably in light of the identical status of persons as bearers of equal rights. The political threat to this ideal of the person was the political idea and practice that the moral status of persons was not determined by the responsible expression of their own moral powers, but specified in advance of such reflection or the possibility of such reflection by a hierarchical structure of society and nature in which they were embedded. That structure, classically associated with orders of being,[57] defined roles and statuses in which people were born, lived, and died; it further tended to exhaustively specify the responsibilities of living in light of those roles.

The political power of the hierarchical conception was shown not only in the ways in which people behaved, but in the ways in which it penetrated into the human heart and mind, framing a personal, moral, and social identity founded on roles specified by the hierarchical structure. The structure—religious, economic, political—did not need to achieve its ends by massive coercion precisely because its crushing force on human personality had been rendered personally and socially invisible by a heart that felt and mind that imaginatively entertained nothing that could render the structure an object of critical reflection. There could be nothing that might motivate such reflection (life being perceived, felt, and lived as richly natural).

In light of the moral pluralism made possible by the Reformation, liberal Protestant thinkers like Bayle and Locke subjected the political power of the hierarchical conception to radical ethical criticism in terms of a moral ideal of the person having moral powers of rationality and reasonableness; the hierarchical conception had subverted the ideal, and, for this reason, distorted the standards of rationality and reasonableness to which the ideal appealed. Both Bayle and Locke argued as religious Christians. Their argument naturally arose as an intramural debate among interpreters of the Christian tradition about freedom and ethics. An authoritative Pauline strand of that tradition had given central weight to the value of Christian freedom.[58] That tradition, like the Jewish tradition from which it developed, had a powerful ethical core of concern for the development of moral

57. *See generally* ARTHUR O. LOVEJOY, THE GREAT CHAIN OF BEING (1964).

58. *See* RICHARDS, TOLERATION, *supra* note 8, at 86-87.

personality; Augustine of Hippo had interpreted the trinitarian nature of God, in whose image we are made, on the model of moral personality, that is, the three parts of the soul (will, memory, and intelligence).[59] Indeed, the argument for toleration arose from an internal criticism by Bayle of Augustine's argument for the persecution of the heretical Donatists; to wit, Augustine had misinterpreted central Christian values of freedom and ethics.[60] The concern was that religious persecution had corrupted ethics and, consequently, the essence of Christianity's elevated and simple ethical core of a universal brotherhood of free people.

The argument for toleration was a judgment of and response to perceived abuses of political epistemology. The legitimation of religious persecution by both Catholics and Protestants rendered a politically entrenched view of religious and moral truth the measure of permissible ethics and religion, including the epistemic standards of inquiry and debate. By the late seventeenth century (when Locke and Bayle wrote), there was good reason to believe that politically entrenched views of religious and moral truth (resting on the authority of the Bible and associated interpretive practices) assumed essentially contestable interpretations of a complex historical interaction among Pagan, Jewish, and Christian cultures in the early Christian era.[61]

The Renaissance awareness of Pagan culture and learning reopened the question of how the Christian synthesis of Pagan philosophical and Jewish ethical and religious culture was to be understood. Among other things, the development of critical historiography and techniques of textual interpretation had undeniable implications for Bible interpretation.[62] The Protestant Reformation both assumed and further encouraged these new modes of inquiry, and also encouraged the appeals to experiment and experience that were a matrix for the methodologies associated with the rise of modern science.[63] These new approaches to thought and inquiry had made possible the recognition that there was a gap between the politically entrenched conceptions of religious and moral truth and inquiry and the kinds of reasonable inquiries that the new approaches made available. The argument for tolerance arose from the recognition of the disjunction between the reigning political epistemology and the new epistemic methodologies.

The crux of the problem was this. Politically entrenched conceptions of truth had, on the basis of the Augustinian legitimation of religious

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59. *See id.* at 85-88.

60. *See id.* at 89-95.

61. *See id.* at 25-27.

62. *See id.* at 125-26.

63. *See generally* PURITANISM AND THE RISE OF MODERN SCIENCE: THE MERTON THESIS (I. Bernard Cohen ed., 1990) (providing a recent review of the question).

persecution, made themselves the measure both of the standards of reasonable inquiry and of *who could count* as a reasonable inquirer after truth. But, in light of the new modes of inquiry available, such political entrenchment of religious truth was seen often to rest on the degradation of reasonable standards of inquiry and on the self-fulfilling degradation of the capacity of persons to conduct such inquiries reasonably. In order to rectify these evils, the argument for tolerance forbade, as a matter of principle, the enforcement by the state of any such conception of religious truth. The scope of legitimate political concern must, rather, rest on the pursuit of general ends like life and basic rights and liberties. The pursuit of such goods was consistent with the full range of ends free people might rationally and reasonably pursue.[64]

A prominent feature of the argument for tolerance was its claim that religious persecution corrupted conscience itself—a critique we have already noted in the American abolitionist thinkers who assume the argument. Such corruption, a kind of self-induced blindness to the evils one inflicts, is a consequence of the political enforcement at large of a conception of religious truth that immunizes itself from independent criticism in terms of reasonable standards of thought and deliberation. In effect, the conception of religious truth, though perhaps having once been importantly shaped by more ultimate considerations of reason, ceases to be held or to be understood and elaborated *on the basis of reason.*

A tradition, that loses its sense of reasonable foundations, stagnates and depends increasingly for allegiance on question-begging appeals to orthodox conceptions of truth and the violent repression of any dissent from such conceptions as a kind of disloyal moral treason. The politics of loyalty rapidly degenerates, as it did in the antebellum South's repression of any criticism of slavery, into a politics that takes pride in widely held community values *solely* because they are community values. Standards of discussion and inquiry become increasingly parochial and insular; they serve only a polemical role in the defense of the existing community values and are indeed increasingly hostile to any more impartial reasonable assessment in light of independent standards.[65]

Such politics tends towards forms of irrationality in order to protect its now essentially polemical project. Opposing views relevant to reasonable public argument are suppressed, facts distorted or misstated, values disconnected from ethical reasoning, indeed deliberation in politics denigrated in favor of violence against dissent and the aesthetic glorification of violence. Paradoxically, the more the tradition becomes seriously

64. *See* RICHARDS, TOLERATION, *supra* note 8, at 119-20.

65. *See generally* JOHN HOPE FRANKLIN, THE MILITANT SOUTH 1800-1861 (1956); BERTRAM WYATT-BROWN, HONOR AND VIOLENCE IN THE OLD SOUTH (1986); *cf.* W.J. CASH, THE MIND OF THE SOUTH (1941).

vulnerable to independent reasonable criticism (arguably, increasing in rational need of such criticism), the more it is likely to generate forms of political irrationality (including scapegoating of outcast dissenters) in order to secure allegiance.

I call this phenomenon the paradox of intolerance. The paradox is to be understood by reference to the epistemic motivations of Augustinian intolerance. A certain conception of religious truth was originally affirmed as true and politically enforced on society at large because it was supposed to be the epistemic measure of reasonable inquiry (i.e., more likely to lead to epistemically reliable beliefs). But the consequence of the legitimation of such intolerance over time was that standards of reasonable inquiry, outside the orthodox measure of such inquiry, were repressed. In effect, the orthodox conception of truth was no longer defended on the basis of reason, but was increasingly hostile to reasonable assessment in terms of impartial standards not hostage to the orthodox conception. Indeed, orthodoxy was defended as an end in itself, increasingly by non-rational and even irrational means of appeal to community identity and the like.

The paradox appears in the subversion of the original epistemic motivations of the Augustinian argument. Rather than securing reasonable inquiry, the argument now has cut off the tradition from such inquiry. Indeed, the legitimacy of the tradition feeds on irrationalism precisely when it is most vulnerable to reasonable criticism, contradicting and frustrating its original epistemic ambitions (thus, the sense of paradox in such self-defeating epistemic incoherence).

The history of religious persecution amply illustrates these truths; and, as the abolitionists clearly saw, no aspect of that history more clearly so than Christian anti-Semitism. The relationship of Christianity with its Jewish origins has always been a tense one.[66] The fact that many Jews did not accept Christianity was a kind of standing challenge to the reasonableness of Christianity, especially in the early period (prior to its establishment as the church of the late Roman Empire) when Christianity was a proselytizing religion that competed for believers with the wide range of religious and philosophical belief systems available in the late Pagan world.

In his recent important studies of anti-Semitism,[67] the medievalist Gavin Langmuir characterizes as anti-Judaism Christianity's long-standing worries

66. *See* JOHN G. GAGER, THE ORIGINS OF ANTI-SEMITISM: ATTITUDES TOWARD JUDAISM IN PAGAN AND CHRISTIAN ANTIQUITY (1983) (discussing the early Christian period). The classic general study is LEON POLIAKOV, THE HISTORY OF ANTI-SEMITISM vol. 1 Richard Howard trans. (New York: Vanguard Press, 1965); vol. 2 Natalie Gerardi trans. (New York: Vanguard Press, 1973); vol. 3 Miriam Kochan trans. (New York: Vanguard Press, 1975); vol. 4 George Klin trans. (Oxford: Oxford University Press, 1985).

67. *See* GAVIN I. LANGMUIR, TOWARD A DEFINITION OF ANTISEMITISM (1990); GAVIN I. LANGMUIR, HISTORY, RELIGION, AND ANTISEMITISM (1990).

about the Jews because of the way the Jewish rejection of Christianity discredited the reasonableness of the Christian belief system in the Pagan world. Langmuir argues that the Christian conception of the obduracy of the Jews and the divine punishment of them therefore were natural forms of anti-Judaic self-defense, resulting in the forms of expulsion and segregation from Christian society that naturally expressed and legitimated such judgments on the Jews.[68] In contrast, Langmuir calls *anti-Semitism proper* the totally baseless and irrational beliefs about ritual crucifixions and cannibalism of Christians by Jews that were "widespread in northern Europe by 1350";[69] such belief led to populist murders of Jews usually (though not always) condemned by both church and secular authorities. The irrational nature of anti-Semitism proper requires, Langmuir suggests, a distinguishing name—chimeria—that stems from the Greek root meaning "fantasies, figments of the imagination, monsters that, although dressed syntactically in the clothes of real humans, have never been seen and are projections of mental processes unconnected with the real people of the outgroup."[70]

Langmuir also suggests, as does R.I. Moore,[71] that the development of anti-Semitism proper was associated with growing internal doubts posed by dissenters in the period between 950-1250. The doubts questioned the reasonableness of certain Catholic religious beliefs and practices (for example, transubstantiation) and the resolution of such doubts by the forms of irrationalist politics associated with anti-Semitism proper (often centering on fantasies of ritual eating of human flesh that expressed the underlying worries about transubstantiation). The worst ravages of anti-Semitism illustrate the paradox of intolerance, which explains the force of the example for abolitionists. Precisely when the dominant religious tradition gave rise to the most reasonable internal doubts, these doubts were displaced from reasonable discussion and debate into blatant political irrationalism based on chimeria against one of the more conspicuous, vulnerable, and innocent groups of dissenters.

Langmuir's distinction between anti-Judaism and anti-Semitism proper is an unstable one. Both attitudes rest on conceptions of religious truth that are unreasonably enforced on the community at large. Certainly, both the alleged obduracy of the Jews and their just punishment for such obduracy were sectarian interpretations of the facts and not reasonably enforced at large. Beliefs in obduracy are certainly not as unreasonable as beliefs in cannibalism; and segregation is not as evil as populist murder or genocide.

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68. *See* LANGMUIR, TOWARD A DEFINITION OF ANTISEMITISM, *supra* note 67, at 57-62.

69. *Id.* at 302.

70. *Id.* at 334.

71. *See, e.g.*, R.I. MOORE, THE FORMATION OF A PERSECUTING SOCIETY: POWER AND DEVIANCE IN WESTERN EUROPE 950-1250 (1987).

But, both forms of politics are, on grounds of the argument for tolerance, unreasonable in principle. More fundamentally, anti-Judaism laid the corrupt political foundation for anti-Semitism. Once it became politically legitimate to enforce at large a sectarian conception of religious truth, reasonable doubts about such truth were displaced from the reasonable discussion and debate they deserved and into the irrationalist politics of religious persecution. In the Christian West, the Jews have been the most continuously blatant victims of that politics, making anti-Semitism "the oldest prejudice in Western civilization . . . ."[72]

The radical criticism of political irrationalism implicit in the argument for toleration, once unleashed, could not be limited to religion proper, but was naturally extended by John Locke to embrace politics generally.[73] Reflection on the injustice of religious persecution by established churches was generalized into a larger reflection on how political orthodoxies of hierarchical orders of authority and submission (for example, patriarchal political theories of absolute monarchy like Filmer's[74]) had been unreasonably enforced at large. In both religion and political theory, political enforcement of one view not only degraded standards of argument to the exclusive measure of the orthodox one; it also retained hold on political power by stunting people's capacity to know, understand, and give effect to their inalienable human rights of reasonable self-government. The generalization of the argument for tolerance naturally suggested the political legitimacy of some form of constitutional democracy as a political decision procedure more likely to secure a reasonable politics that respected human rights and pursued the common interests of all persons alike.[75]

The argument for tolerance was motivated by a general political skepticism about enforceable political epistemologies. Such politics enforced at large sectarian conceptions of religious, moral, and political truth at the expense of denying the moral powers of persons to assess these matters in light of reasonable standards and as reasonable persons. The leading philosophers of tolerance thus tried to articulate some criteria or thought experiment in terms of which such sectarian views might be assessed and debunked from a more impartial perspective. Bayle suggested a contractualist test for such impartiality: abstracting from our native prejudices born from the customs in which we were raised, we should ask ourselves "Is such a practice just in itself? If it were a question of

72. LANGMUIR, TOWARD A DEFINITION OF ANTISEMITISM, *supra* note 67, at 45.

73. *See* RICHARDS, TOLERATION, *supra* note 8, at 98-102; RICHARDS, FOUNDATIONS, *supra* note 11, at 82-90.

74. *See* Robert Filmer, *Patriarcha* (1680), *reprinted in* PATRIARCHA AND OTHER WRITINGS 1-68 (Johann P. Sommerville ed.) (1991).

75. *See* RICHARDS, FOUNDATIONS, *supra* note 11, at 78-97.

introducing it in a country where it would not be in use and where he would be free to take it up or not, would one see, upon examining it impartially that it is reasonable enough to merit being adopted?"[76]

Bayle's use of a contractualist test was generalized by Locke into a comprehensive contractualist political theory.[77] Though Locke is not clear on the point, contractualism has nothing to do with history; nothing in the argument turns on the actual existence of a state of nature, nor on ultimate epistemological skepticism. Neither Locke nor Bayle were moral, political, or religious skeptics; they were concerned, rather, by the unreliable appeals to politically enforceable conceptions of sectarian truths, and they articulated a thought experiment of abstract contractualist reasonableness to assess what might legitimately be enforced through law. Bayle's use of a contractualist test made this point exactly: abstracting from your own aims and the particular customs of your society, what principles of legitimate politics would all persons reasonably accept? The test is, of course, very much like Rawls's abstract contractualist test in the absence of knowledge of specific identity, and serves exactly the same political function.[78]

Such a contractualist test assumes that persons have the twin moral powers of rationality and reasonableness in light of which they may assess human ends—their own and others'.[79] The principles of prudence enable us to reflect on the coherence and completeness between our ends and the more effective ways to pursue them, subject to principles of epistemic rationality. The principles of moral reasonableness enable us to regulate the pursuit of our ends in light of the common claims of all persons to the forms of action and forbearance consistent with equal respect for our status in the moral community. These self-originating powers of reason enable us to think for ourselves not only from our own viewpoint but also from the moral point of view that gives weight to the viewpoints of all others.

Reason—epistemic and practical—can have the power that it does in our lives because it enables us to stand back from our ends, to assess critically how they cohere with one another and with the ends of others, to reexamine and sometimes revise such judgments in light of new insights and experience, and to act accordingly. Reason can only reliably perform this role when it is itself subject to revision and correction in light of public standards that are open, accessible, and available to all. Public reason—a resource that enables all persons to better cultivate their moral

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76. PIERRE BAYLE, PHILOSOPHICAL COMMENTARY 30 (Peter Lang ed., Amie Godman Tannenbaum trans., 1987).

77. *See* RICHARDS, FOUNDATIONS, *supra* note 11, at 82-90; RICHARDS, TOLERATION, *supra* note 8, at 98-102.

78. *See generally* RAWLS, *supra* note 1.

79. *See* RICHARDS, *supra* note 1 (describing these powers more fully).

powers—requires a public culture that sustains high standards of independent, critically tested and testable, revisable argument accessible to all. In order to perform the role that it should play in the exercise of our internal moral powers, public reason cannot be merely or even mainly polemical. It must afford sufficient public space within which we may comfortably express what doubts we may have about our ends, lives, and communities, and deliberatively discuss and resolve such doubts.[80]

Respect of our capacity for reason, thus understood, requires a politics that respects the principle of tolerance. Forms of traditional wisdom that have a basis in public reason will not be politically disallowed by the principle. The principle, however, does deny that convictions of sectarian truth *can be enforced through law solely on that basis*. The principle thus limits the force in *political* life of convictions that draw their strength solely from the certainties of group loyalty and identification that tend most to self-insulate themselves from reason when they are reasonably subject to internal doubts, consistent with the paradox of intolerance.

Nothing in the account suggests that religious views or even convictions about truth of dominant religions are unreasonable, but only that certain facts of political psychology about human nature in politics lead to a kind of political corruption of the religious enterprise as an inquiry into ultimate truth. Exercises of political power enforcing views of religious truth tend not to do so on the basis of reason. Indeed, consistent with the paradox of intolerance, precisely when the tradition may need most to entertain, discuss, and resolve reasonable doubts about its truth, it tends to make war on its reasonable doubts by the despicable forms of political irrationalism exemplified by the history of religious persecution.

Contractualism, thus understood as a hypothetical test for public reason in politics, must tend in the nature of its enterprise to identify the more abstract features that characterize our moral powers as reasoning agents. Because the motivation of the entire enterprise is the degree to which the idea and practice of hierarchical orders of authority have been permitted to subvert our moral powers of rationality and reasonableness, the reclamation of such powers requires a demanding test of political legitimacy that constrains and limits political power in the ways that we have good reason, in light of our historical experience, to believe require limitation in order to do justice to the reasonable demands of our moral natures.

Contractualism offers us such a test, asking us to think hypothetically in abstraction from our current particular ends and situations about the more general features of living a rational and reasonable life and what

80. *See* ONORA O'NEILL, CONSTRUCTIONS OF REASON (1989) (discussing all these points); *see also* Immanuel Kant, *An Answer to the Question: "What is Enlightenment?"*, *in* KANT'S POLITICAL WRITINGS 55 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991) (stating "The *public* use of man's reason must always be free . . . .").

constraints on politics are required in order for all persons to be secure in living such a life. The idea of general goods, resources, or capacities—all familiar in the contractualist literature—are corollaries of such a test;[81] they identify the kind of abstract features of living a life that reasonable persons, in the contractualist choice situation, would regard as properly subject to a distributive principle of a just politics. The principle of tolerance is one such principle, concerned with the foundational ideas that make possible both a politics of reason and a conception of political community that dignifies the capacity for reasonableness of all persons to be self-governing moral agents.

The argument for tolerance, as the normative background of central constitutional principles of religious liberty, free speech, and privacy,[82] demands first, that basic human rights be extended to all persons, and second, that such rights only be abridged to serve a *compelling* secular justification. The forms of structural injustice (including, as I have argued,[83] not only religious intolerance and racism, but sexism and homophobia) violate both these requirements. The rationalization of such injustice, in a constitutional republic otherwise committed to the argument for toleration, requires, as the radical abolitionists saw, the unjust enforcement at large of a political epistemology whose force rests on the abridgment of the basic human rights of a class of persons on wholly inadequate grounds. To accomplish this end, the enforcement of the political epistemology limits the scope of both speech and speakers to the measure of sectarian views supportive of the epistemology. In effect, public debate does not include the views and speakers who might reasonably challenge the dominant orthodoxy. Drawing on the history of religious intolerance that the abolitionists took so seriously,[84] I argued that such politics tends to forms of irrationality to protect its now essentially polemical project. Opposing views relevant to reasonable public argument are suppressed, facts distorted or misstated, values disconnected from ethical reasoning—indeed deliberation in politics denigrated in favor of violence against dissent and the aesthetic glorification of violence. "Paradoxically, the more the tradition

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81. *See generally* RAWLS, *supra* note 1; RICHARDS, *supra* note 1; AMARTYA SEN, THE STANDARD OF LIVING (1987); Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981); Ronald Dworkin, *What Is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1 (1987); Ronald Dworkin, *What Is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1 (1987) (discussing contractualism and other theories, generally); T.M. Scanlon, *Preference and Urgency*, 72 J. OF PHIL. 655 (1975).

82. *See generally* RICHARDS, TOLERATION, *supra* note 8 (describing this defense more fully).

83. *See generally* RICHARDS, CONSCIENCE, *supra* note 12; RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION, *supra* note 13 (describing this defense more fully).

84. *See* RICHARDS, CONSCIENCE, *supra* note 12, at 59-73 (discussing this premise more fully).

becomes seriously vulnerable to independent reasonable criticism (indeed, increasingly in rational need of such criticism), the more it is likely to generate forms of political irrationalism (including scapegoating of outcast dissenters) in order to secure allegiance . . ." (exemplifying the paradox of intolerance).[85]

Conscience and the Constitution was largely preoccupied with understanding the radical abolitionist analysis of the structural injustice of racism and the role that analysis should play in understanding the provisions of the Reconstruction Amendments that sprung therefrom.[86] African-Americans were, on this analysis, the scapegoats of southern self-doubt about slavery in the same way European Jews had been the victims of Christian doubt. Frederick Douglass, the leading black abolitionist, stated the abolitionist analysis with a classical clarity:

> Ignorance and depravity, and the inability to rise from degradation to civilization and respectability, are the most usual allegations against the oppressed. The evils most fostered by slavery and oppression are precisely those which slaveholders and oppressors would transfer from their system to the inherent character of their victims. Thus the very crimes of slavery become slavery's best defence. By making the enslaved a character fit only for slavery, they excuse themselves for refusing to make the slave a freeman.[87]

In effect, such structural injustice was rationalized in terms of an ostensible natural fact, race, whose force in fact depended on structural injustice. Such naturalization of injustice rendered invisible and unspoken the cultural construction of such injustice and the associated ethical responsibilities of acknowledging and rectifying such injustice. Such a vacuum of reasonable discourse was, instead, filled by unjust stereotypes both of race and gender that effectively dehumanized African-Americans. The long struggle against American cultural racism (including the attack on racial segregation) thus importantly included growing recognition of the cultural construction of American racism.[88]

Any critical understanding of this history and its pivotal importance for the moral growth of American public law requires us to take seriously the two ways in which such moral growth has traditionally been resisted, namely, the originalism of Chief Justice Taney and the majoritarianism of

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85. *Id.* at 66-67.

86. *See id.* at ch. 5 (attempting an admittedly under-developed analysis of gender and sexual preference).

87. *The Claims of the Negro Ethnologically Considered, in* THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 2:295 (Philip S. Foner ed., 1975).

88. *See* RICHARDS, CONSCIENCE, *supra* note 12, at 160-70.

Stephen Douglas. Accordingly, our interpretive responsibilities today must, in light of that history, include critical resistance to the two ways in which continuing progress is often resisted today, whether the originalism of Bork[89] or the qualified majoritarianism of John Hart Ely.[90] We need as much now as ever the responsible concern with and articulation of normative judgments, as a matter of principle, of the progressive moral meaning of basic, universal human rights in contemporary circumstances. Any evasion of this interpretive responsibility (whether originalism or majoritarianism) fails to take seriously the contractualist demands of American constitutionalism.

In my most recent work, *Women, Gays, and the Constitution*, I extended my earlier interpretive analysis of structural injustice to include gender and sexual preference as well. To this end, I examined in some interpretive depth the roots of such analysis in a minority (the abolitionist feminists) within a dissenting minority (the abolitionists), and the ways in which Walt Whitman elaborated this analysis to include homosexual love. The abolitionist feminists thus extended the radical abolitionist analysis of racism to include, "on the same platform of human rights,"[91] sexism as well. The common structural injustice turned, first, on the abridgment of basic human rights and, second, the rationalization of such injustice on inadequate grounds, including, in both cases, a similar naturalization of injustice in terms of the unjust enforcement of dehumanizing stereotypes of race or gender. Such a theory of moral slavery, as I (following the abolitionist feminists) call it,[92] was extended by Whitman and others to include issues of sexual preference.[93] In all these cases, a cultural history abridges basic human rights; and such abridgment is rationalized on inadequate grounds (the naturalization of injustice in terms of an unjust cultural stereotype of race, or gender, or gendered sexuality).[94] Homosexuals occupy, in contemporary American politics, very much the role of populist scapegoat of self doubt about structural injustice that

89. *See generally* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) (typifying Bork's views). For criticism, *see generally* David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373 (1990); *see also* RICHARDS, FOUNDATIONS, *supra* note 11, at 202-47, 288-89.

90. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (exemplifying Bork's views). For criticism, see RICHARDS, CONSCIENCE, *supra* note 12, at 9-12, ch.8.

91. RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION, *supra* note 13, at 261 (quoting Sarah M. Grimke, *Letters on the Equality of the Sexes and the Condition of Women, in* THE PUBLIC YEARS 234). *See also id.* at 42, 302.

92. *See* RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION, *supra* note 13, at 4, 66-67, 90-94, 105-06, 113-14, 130-31, 142, 160, 178, 180, 182, 261-63, 275, 321, 467.

93. *See id.* at ch. 6.

94. *See generally id.*

African-Americans and women occupied in the antebellum period. In particular, reasonable doubts about the degree to which gender roles in public and private life have been squared with the demands of justice are suppressed by the irrational scapegoating of a traditionally stigmatized minority because they challenge such gender roles; in effect, their claims for the basic human rights of intimate life and to be free of unjust gender discrimination, now liberally extended to heterosexual men and women, are parodied as attacks on "family values." Against this background, the need for their protection, on grounds of basic constitutional principle, is, I argue, all the more exigent.[95]

This general perspective puts in a quite different light Dean Allen's worries about the role decadent forms of social contract theory may play or have played in the rationalization of injustice. As we have seen, the political force of structural injustice familiarly rationalizes itself by decadent inversions of both fact and theory, and contractualism is no more exempt from this than any other normative theory. Such decadence, though, cannot be the measure of more impartial and critically self-conscious uses of such theory, particularly in light of the significant role contractualist theory has played and continues to play in the most important dissenting movements of progressive moral emancipation in our history as a people (including the struggle of African-Americans, women, and gays and lesbians).

It is an important feature of these dissenting movements that they are critically concerned with precisely what worries Dean Allen in decadent forms of social contract theory—namely, the degree to which structural injustice is naturalized. Indeed, as we have seen, the ethical impulse of contractualism was its insistence of the need for more impartial tests of the justifiability of political power growing out of concern with the degree to which illegitimate abuses of such power corrupted conscience itself. Contractualism, properly understood, has thus played a powerful role in the identification and understanding of structural injustice; what unifies the concern with structural injustice in all its domains is the way in which putatively natural facts (race or gender or gendered sexuality) have been supposed to rationalize such injustice. Contractualist theory, properly understood and elaborated, has indispensably assisted in recognizing and remedying this problem by its development of reasonable tests for the existence of such unjust cultural patterns (including their dependence on the corruption of public reason) and the corresponding responsibility to rectify them. It is indeed one of the best normative tools we have available in our tradition for understanding and evaluating the continuing role played in our culture by the populist naturalization of structural injustice.

We need more attempts like Dean Allen's to take seriously the role of

95. *See id.* at chs. 6-8.

social contract theory in American law. I have not disagreed with many of her analyses of particular cases, which cluster in other areas of law than those that have been my concern here. Indeed, I share many of her views and concerns. But, her interpretive approach is, I have suggested, problematic in two ways. It includes cases (in which "social contract," etc. happen to occur) that are not plausibly connected to contractualism, and fails to include cases which are deeply contractualist. The latter problem includes failure to examine and consider a range of important cases in the struggle for justice in the United States. For this reason, some of Dean Allen's criticisms of contractualism fail to take into account and give weight to some compelling counterexamples. To do justice to these difficulties, an interpretive approach must be, I have suggested, both more philosophical and more historical. On the one hand, an investigation of the contractualist foundations of a body of law must bring to its interpretive inquiry an articulate sense of the distinctive philosophical claims of contractualism. On the other, the interpretation must, as I have suggested, take a broad historical perspective on its subject matter, including the periods of political decadence marked by their betrayal of contractualist principles. Such historical study enables us to understand the morally progressive role of contractualist impartiality in challenging such decadence, and the ways in which its challenge has been and continues to be resisted (originalism and majoritarianism).

We should be concerned, as Dean Allen cautions us, about the abuses of theory in law, in particular, when such theory serves to rationalize injustice. We need also to be clear, on the basis of a longer interpretive perspective on American constitutional history, about the nature, weight, and uses of a demanding moral perspective like contractualist impartiality. As we have seen, it has repeatedly assisted us in recognizing and remedying the evils of structural injustice (scapegoating victims of injustice) that have often been most invisible to our sometimes complacent, self-congratulatory politics. These evils persist. The moral demands of contractualist impartiality (including its skepticism about the enforcement through law of sectarian political epistemologies) are, correspondingly, much needed to combat the illegitimate force of such populist prejudice in our politics.