Natural Right and the Constitution: Principle as Purpose and Limit

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NATURAL RIGHT AND THE CONSTITUTION: PRINCIPLE AS PURPOSE AND LIMIT

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I. INTRODUCTION

There is much truth to the common opinion that Brown v. Board of Education\(^1\) was the Supreme Court’s finest moment. A unanimous Court, with a firm belief in the justice of its project, commenced, in the face of many hostile local majorities and, at the very least, an apathetic national government, an assault on one of the central pillars of the American version of apartheid. The Court, as it had never done before, became the only branch of our national government that seriously undertook to fulfill the promise of equal rights under law made to all Americans in our Declaration of Independence. The Court’s courageous action was one of the catalysts of the civil rights revolution that eventually engaged the majority of the American people and led Congress to enact the statutes that destroyed Jim Crow. The majority of the nation rightly honored, and still honor, this achievement.

In years since Brown, however, from, it seems, every political perspective, the Court’s work, or at least parts of it, has received not honor, but scorn. For example, the deluge of commentary about the Court’s latest abortion decision\(^2\) has been dominated by partisans declaring how their opponents are evil, ignorant, or both.\(^3\) Sometimes, these insults take the form of broadsides lambasting the opponent’s substantive beliefs about abortion; sometimes they take the form of learned philippics about how the opponent’s method of constitutional interpretation is contrary to any approach a person of good faith would take.\(^4\)

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4. See, e.g., Thousand Cuts, supra note 3; Eastland, supra note 3; and
Unfortunately for the Court and the legitimacy of our political institutions, these bilious exchanges are not limited to the pages of unread law reviews and long disposed of newspaper op-ed columns. We can read these inflamed “dialogues” in the pages of the U.S. Reports. In *Casey*, for example, one justice, in criticizing the majority opinion, unsubtly raised the specter of Nazism, arguing “The Imperial Judiciary lives. [The majority presents a] Nietzschean vision of us unelected, life-tenured judges—leading a Volk who will be ‘tested by following,’ and whose very ‘belief in themselves’ is mystically bound up in their ‘understanding’ of a Court that ‘speak[s] before all others for their constitutional ideals.’” This justice concluded that the abortion issue should “be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.”

Not to be outdone, the other side viewed itself as the repository of all virtue. For example, one Justice claimed he “fear[ed] for the darkness” because those on the Court who disagreed with him on the rightness of the Court’s decision in *Roe v. Wade* are “anxiously await[ing] the single vote necessary to extinguish the light.” This justice contended his colleagues’ view of liberty was “stunted” and “cramped” and that these colleagues treated litigants seeking to vindicate liberty claims as “outcasts.” This justice dismissed the idea that the liberty to abort one’s unborn child should need to “seek refuge at the ballot box”; he concluded that “our country since its founding has recognized that there are certain fundamental liberties that are not to be left to the whims of an election.”

Have we become so inured to this kind of polarization that we consider it normal? I fear we have. In our recent thinking and debates about constitutional interpretation, we have accepted the notion that there is an irreconcilable antagonism between the protection of rights and the preservation of democracy, or what I prefer to call consent. Worse yet, we believe that the Founders shared this perspective and structured the Constitution so that each of these “interests” would be in perpetual conflict. We believe that the Constitution is arranged both to allow the elective branches (as well as

Hentoff, *supra* note 3.


6. *Id.* at 2873.


8. *See*, e.g., *Casey*, 112 S. Ct. at 2844 (Opinion of Justice Blackmun).

9. *Id.* at 2853.

10. *Id.* at 2854.
the states) to do all that they can to implement the people's desires, no matter what they might be, and to allow the courts to step in and protect fundamental rights when they are convinced the state has violated or failed to protect these rights. Thus, in our politics, we believe that we will always have a bitter struggle between the partisans of rights and the partisans of democracy. The vicious attacks in Casey are just a reflection of this belief.

I reject this vision of the Constitution. It is not the constitution that the Founders bequeathed us and, more importantly, it is not a good constitution. The Founders, despite their deep belief, drawn from their understanding of human nature and knowledge of ancient and modern history, that it was exceedingly difficult to both protect rights and preserve government by consent, did not believe that these goods were ultimately irreconcilable. Indeed, the theory of our regime, as expressed in the Declaration of Independence and implemented in the Constitution, is that both the form of our government—government by consent—and the end of our polity—the securing of the rights to life, liberty, and the pursuit of happiness—are derived from the principle that all men are created equal. Thus, the overriding principle of justice we Americans seek to uphold requires both the protection of rights and government by consent.

Because this principle, this principle of natural right, requires us to establish a government that both secures rights and operates by consent, we cannot accept the premise that the two pillars of our polity are ultimately irreconcilable. Such a resolution dooms our nation to a form of perpetual civil war in which one side attempts to encourage the expansion of rights through judicial power and the other contends that all value choices should be made through the electoral process.

In this paper, I will first discuss the nature of our flawed conception of the Constitution. I argue our current controversies over the supposed unavoidable conflict between rights and consent have their genesis in the abandonment by modern proponents of rights, both "liberal" and "conservative," of the Founders' definition of rights. They instead have substituted their own broader and infinitely expansive notions of political rights. These proponents' desire to have their claims to rights vindicated by the courts have led them to disdain those constitutional limits and structures that permit the implementation of these rights only through obtaining the consent of their fellow citizens. The proponents of rights, thus, see their noble vision of rights thwarted by the narrow-minded institutions of democ-

racy.

In contrast to this position, the Founders believed that the securing of natural, but limited, rights to life, liberty, and the pursuit of happiness was the end of the regime. The same principle of natural equality that requires this end also requires the means to this end. Thus, the vindication of these rights not only does not conflict with government by consent, but it must be accomplished through the process of consent.

The Founders understood how difficult it was to vindicate the natural rights of individuals through a system based on consent of the governed. It is precisely this difficulty that inspired them to devise the complex, form-laden system that today’s political theorists find so inconvenient. Once this system is subverted by the desire to enforce “rights” that the system was not designed to protect through judicial review, the bitter conflict between rights and consent appears.

In the second part of my paper, I will discuss Abraham Lincoln’s effort before the Civil War to persuade his fellow citizens that the principles of our polity required the government to do all it could to secure the natural rights of blacks. Lincoln’s elucidation of the doctrine of natural rights and the theory of the Constitution instituted to protect these rights leads us to a correct understanding of how rights and consent can, and must be, reconciled in our regime.

II. THE PROBLEM

How did we come to believe that rights and consent are in unremitting conflict? I think the problem lies in modern conceptions of rights. To understand, however, why modern rights conceptions are a problem under our regime, we must first understand the nature of the rights explicated in the Declaration of Independence and protected by the Constitution.12 As Nathan Tarcov has aptly stated:

The form of our rights is that they are primarily rights to do, keep, or acquire things and corresponding rights not to have things done to us or taken from us. This form contrasts, therefore, with alternative conceptions of rights to have things done or given to one . . . . Securing rights in this conception is a matter of providing security for enjoyment or pursuit, not of providing the desired objects of the rights themselves.13

12. There are many excellent accounts of the relationship between the Declaration and the Constitution. Two of the finest are HARRY V. JAFFA, CRISIS OF THE HOUSE DIVIDED (1958) and GARY J. JACOBSOHN, THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION (1986).
13. NATHAN TARCOV, AMERICAN CONSTITUTIONALISM AND INDIVIDUAL RIGHTS, IN HOW DOES THE CONSTITUTION SECURE RIGHTS? (Robert A. Goldwin & William
The rights, therefore, protected by the Constitution are fundamental, but limited. They allow you only to pursue happiness; happiness is not given to you.

The rights are so limited because they are the only rights consistent with a government based on consent. The Founders linked rights with consent because, following John Locke, they believed that the first axiom of politics was that all men are created equal. This principle of natural equality did not mean that all people had a right to equal possessions or that each person was equally right on moral questions. What the Founders meant by equality was that no man had the inherent right to govern another. In Jefferson’s words, “the palpable truth” is that “the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred ready to ride them.” Thus, each man has the right to govern himself without interference from others.

The reality of a harsh natural world and an at least as harsh human nature, however, requires that some government be instituted to protect humans from one another and to allow for the formation of mutually beneficial relations among members of society. Thus, a person must agree to cede his right of self-preservation to the government. No rational person, however, would give up this right without a guarantee that the state would, in turn, secure his rights to life, liberty, and property—the essentials of a free life.

Once government is established, however, these rights do not remain absolute claims upon society. They are transformed from natural into civil rights. This change does not mean that citizens are any less entitled to these rights; it means, though, that for the sake of the securing of all citizens’ rights, a citizen agrees that his rights may be limited with his consent. This is the meaning of Constitution’s two due process clausres; the state may take or deprive a person of his life, liberty, or property with due process. Thus, a citizen agrees to establish a government to secure his rights and even authorizes it to limit his rights when necessary to achieve the ends of the regime. In return, however, he insists that the government must operate, in some manner, by the consent of the governed.

A constitution devoted to implementing this theory of natural rights has difficulty in vindicating a set of “substantive” rights or, to paraphrase Tarcov, a right to be given something (as compared with

A. Schambra eds., 1985).
14. JAFFA, supra note 12, at 314.
a right to acquire it), because this could very well entail *taking* this
good from others. Very few people *consent* to having their rights
taken away or limited to provide goods to others. Thus, a govern-
ment that requires consent must generally limit the rights it secures
to those rights that can be secured without infringing upon the
equally important rights of others. Each person can, and should,
possess the right not to be killed, to be free from bodily restraint,
and to keep the fruits of his labor.

This theory is the foundation of our scheme of constitutional
government. It has the advantage of establishing a distinct and limited
role for government that secures the opportunity for happiness and
allows citizens the latitude to determine for themselves, whether individ-
ually or through private associations, what constitutes the best
kind of society. The Constitution then allows citizens to effectuate
their vision of social justice by obtaining the consent of their citi-
zens. The Constitution does set very important limits to this pursuit
for social justice; no matter what you believe is right, you must first,
before enforcing this vision, obtain the consent of your fellow citi-
zens so that they can protect their rights to life, liberty, and the
pursuit of happiness.¹⁷

A possible disadvantage of this regime is that there must always
be a gap between social justice as an ideal and the reality of the
society. This gap is due to the requirement of consent. Necessarily
imperfect human beings, with their tendency to prefer their interest to
the common good, however defined, will frequently refuse to consent
to laws or to practices that, in the opinion of others, make society
more just. As free persons, they have that right. You must *persuade*
them to consent to your proposal for progress. As Harvey C.
Mansfield, Jr. explains:

The right of consent presupposes that each adult is worthy of being
taken seriously as a rational creature capable of choice, hence worthy
of being persuaded and not taken for granted. His dignity requires that
his consent be sought through persuasion, and neither ignored nor

¹⁷. It is true, of course, that by basing the regime on the principle of natu-
ral equality, the Founding documents express a particular philosophy of social
justice. It must be remembered, however, given the requirement of consent, that
the Constitution could not implement this vision fully. The vision of a society in
which all persons' rights to life, liberty, and the pursuit of happiness are fully
secured constitutes an aspiration that we Americans must constantly attempt to
realize. This is the lesson of the Civil War and the Civil Rights movement. We
must also remember that this vision, at least to the extent that it would be im-
posed politically, is to a great degree a limited one. It, for example, says nothing
about what is the best way for a human being to live his life. See JACOBSOHN,
*supra* note 12 *passim*. 
presumed.\textsuperscript{18}

This need to obtain consent should not be seen, though, as a frustrating obstacle to justice. It is, rather, the spur to the citizenry to become actively involved in the effort to build a just society and, thus, preserve and exercise their own freedom. As Mansfield remarks, “A free society is necessarily imperfect; if it became perfect, citizens would no longer have to exert themselves to be free.”\textsuperscript{19}

Clearly, in a society of any reasonable size, this process of obtaining consent of the governed must be a complex one. No government could survive for any period if it had to obtain the consent of every citizen before an action could be taken. Thus, in practice, some form of majority rule is required. A constitution that seeks to implement the principle of natural equality must allow for majority rule, but must also ensure that the rights to life, liberty, and the pursuit of happiness are secured. For as the Declaration of Independence so eloquently reminds us, when the regime does not secure these rights, “it is the Right of the People to alter or to abolish it, and to institute new Government.”\textsuperscript{20}

A rudimentary knowledge of human nature, as well as a familiarity with the history of our nation, informs us that the danger that the majority will attempt to divest the minority of their rights is not inconsiderable. As one look at The Federalist Papers will tell you, the Founders were well aware of the danger of majority factions. Madison contended that the “instability, injustice, and confusion” caused by faction have “been the mortal diseases under which popular governments have everywhere perished.”\textsuperscript{21}

How does a regime, then, provide for majority rule (or, as the Founders called it, republican government) and for the protection of rights? If you listen to today’s proponents of broad rights and a general judicial license to enforce them, you would believe that the Constitution has a provision that says “The Supreme Court shall review every law and decide if it unduly infringes a person’s rights.” If the Founders believed this was the best method for securing the natural rights to life, liberty, and the pursuit of happiness, they could have chosen it. They did not do so.

\textsuperscript{18} MANSFIELD, supra note 16, at 95.

\textsuperscript{19} Id. at 97. This need of active participation in the process of persuading one’s fellow citizens to realize the aspirations of a good society is the beginning of the answer to those theorists who maintain that the emphasis of our regime on protecting the individual rights of citizens slights the fostering of the community needed to live a good life.

\textsuperscript{20} THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

\textsuperscript{21} THE FEDERALIST No. 10 at 77 (James Madison) (Clinton Rossiter ed., 1961).
Indeed, they could not have made such a choice because it would have defeated the entire purpose of the government they were attempting to fashion. What is the purpose of constructing a government based on consent if to achieve its purpose, the securing of rights, you must hand ultimate and unlimited authority to a small, politically unaccountable group of individuals? This would be a cure worse than the disease.  

Even if they could justify to themselves the use of such an unrepugnant contrivance, the Founders knew that this judicial panacea would never work. They knew that any security for rights must rest on an enlightened public opinion. As they themselves acknowledged regarding slavery, if the people were determined to deprive someone or a group of their rights, no court could stop them. The best that could be hoped for was a government that would protect rights that were already grounded in the people's consent and one that would facilitate the fulfillment of the aspirations contained in our principles as public opinion became more cognizant of the need for the securing of the rights of all citizens.

The Founders therefore did not put themselves in the hands of the Supreme Court; in Madison's words, they instead sought "a republican remedy for the diseases most incident to republican government." This remedy is the subject of The Federalist Papers: the forms and processes of the Constitution. We, of course, cannot here describe all the forms the Founders devised to ensure, as best as possible, that republican rule would result in the securing of rights. They include the separation of powers; the provision of checking powers, such as the veto, to the different branches; the enumeration of powers of the federal government; federalism; the division of the legislature into separate branches with different terms and electoral districts; the concept of representation; the idea of the extended republic; and a written constitution with explicit limits on the government and judicial review to enforce these limits.

22. I am not saying that judicial review is not an important feature of the constitutional scheme. As Hamilton teaches us in Federalist #78, the judiciary must enforce the provisions of the Constitution because they are law and must be given the same effect as any other law. The Federalist No. 78 at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961). I would also contend, contrary to Judge Robert Bork and Chief Justice William Rehnquist, that the provisions of the Constitution, as well as the general structure and purpose of the document, must be read in light of the natural rights principles of the Founders. The Constitution is not a positivist document. What I am saying, though, is that the Constitution does not contain vague review provisions that allow the Court to engage in moral philosophizing and then attempt to enforce its interpretation of "rights" or "equality" against the elected branches and the states.

23. Id. at 84.

24. Most advocates for broad judicial authority to divine and enforce sub-
The Founders hoped that the end result of these complicated forms would be the relative security of the rights to life, liberty, and the pursuit of happiness. They did not seek to secure other kinds of rights; they believed that securing these would be difficult enough. They also did not believe that they needed an unelected Council of Revision to exercise plenary review over the results of the people’s consent and decide which laws did not pass muster. They believed that the constitutional system they devised would enable the citizenry to safely exercise their right to consent.

Has this system worked? I think any fair observer would have to admit that, given the Constitution’s longevity and the nation’s prosperity, the regime has served its purposes well. While there are some doubters, who, for example, would claim that the rights to property have become insecure, even they would have to admit that we have not had the kind of expropriation of the property of the rich by the poor that doomed previous republics and filled the Founders with dread. We also have not suffered, despite some suppression of dissent at times of crisis, widespread political arrests and political killings, both real concerns at the time of the Founding. One can argue, in fact, that we have not even had any serious attempts at such deprivations of rights.

The success of this unprecedented experiment in popular rule must be attributed to the establishment of a viable federal system, featuring an effective national government, limited in scope and controlled by various mechanisms of popular consent and complex procedural forms. No one, I trust, would give the Supreme Court credit for the relative security of these once natural, now civil, rights.

So why, then, given the apparent success of the regime, are we trapped in the midst of a bitter and seemingly unresolvable struggle over the meaning of the Constitution? Why does one side accuse the other of allowing the deprivation of fundamental rights in the name of a democratic process that does not adequately protect these rights? Why does the other side respond that the Constitution has little to do with rights, and everything to do with democracy? Are we missing something here?

_Statutory rights locate the constitutional warrant for this power in the Fourteenth Amendment. The better scholarship concerning the Amendment, however, demonstrates that the Framers of the Reconstruction Amendments did not intend to destroy the essential scheme of the original Constitution. They wished to perfect it by giving the national government, particularly Congress, the authority to correct undesirable state actions and policies, as Madison proposed to the Constitutional Convention. See Michael P. Zuckert, _Book Review_, CONST. COMM. 149 (Winter 1991); Michael P. Zuckert, _Congressional Power under the Fourteenth Amendment: The Original Understanding of Section Five_, 3 CONST. COMM. 123 (Summer 1986)._
I think what we are witnessing is the result of an attack on the theory and the constitutional forms of the Founding that has been raging since at least the late 19th century. This attack has come from both the left and the right, from both those who believe that concepts of rights should govern our regime and from those who believe the idea of rights is an unhelpful concept, and from both those who feel the judiciary should take a strong role in making policy and from those who believe legislatures should be the main policymakers. These attackers have two things in common: first, a belief that the Founders’ definition of the end of government as the securing of the natural rights to life, liberty, and the pursuit of happiness is obsolete and, second, an impatience with the various complex constitutional forms the Founders devised to secure natural rights and which now prevent the implementation of their visions of social justice.

Today, by far the most prominent and the most influential of the critics of the Founders’ Constitution are the academics, politicians, and judges, including former Supreme Court Justice William Brennan, who believe that the rights protected by the Constitution must evolve over time and must be defined in the context of contemporary moral philosophy. The methods used by members of this coterie to integrate their views into the Constitution vary somewhat: Ronald Dworkin chooses to define terms used in the Constitution, such as liberty and equal protection, so broadly that he can bring contemporary versions of these moral concepts into constitutional interpretation; Thomas Grey, on the other hand, believes that the Constitution facilitates society’s moral evolution by protecting unwritten rights that are recognized by contemporary moral thinkers. Either way, the result is the same; the Constitution, to serve today’s society, must recognize a multitude of rights that the most enlightened contemporary thinkers believe are necessary to establish social justice.

27. While the theorists I will discuss are generally considered liberal, the attempt to bring modern notions of rights into the Constitution is not solely the province of the Left. Richard Epstein, for example, contends that the Takings clause of the Fifth Amendment to the Constitution provides that the state, with very narrow exceptions, may regulate the property of citizens only for a public purpose and only if it is prepared to compensate the citizen for the lost value. This interpretation of the Takings provision, if it were ever accepted, would provide citizens with a far more extensive right to property (or, perhaps more accurately, exemption from regulation) than was ever recognized by the Founders. It would lead, for example, to the restriction of progressive taxation and the invalidation of most land-use, welfare, and labor regulations. As with the liberals,
When the details of some of these definitions of social justice are examined, it is apparent why these views of justice are not likely to be adopted through the constitutional forms of consent designed to secure rights to life, liberty, and property. Dworkin, for example, following John Rawls, has argued that government is morally obligated as a matter of principle, not policy, to ensure a relatively equal distribution of goods. This "right" to substantive equality obviously is far broader than the right to property the Founders sought to protect. Just as obviously, any attempt to establish such a right to equality will be severely hampered by the complex republican forms of the Constitution; after all, few people will likely consent to the redistribution of their property.

Because their just society is unlikely to be adopted through the constitutional process, these modern theorists disdain the forms of the Constitution. The core of their theory of government is a profound distrust of the constitutional system based on consent. One of the most respected of these theorists, Michael Perry, has candidly expressed this distrust:

In any recent generation, certain political issues have been widely perceived to be fundamental moral issues as well . . . . In twentieth-century America, there have been several such issues: for example, distributive justice and the role of government, freedom of political dissent, racism and sexism, the death penalty, human sexuality. Our electorally accountable policymaking institutions are not well suited to deal with such issues in a way that is faithful to the notion of moral evolution . . . . Those institutions, when finally they confront such issues at all, tend simply to rely on established moral conventions and to refuse to see in such issues occasions for moral reevaluation and possible moral growth.29

The Constitution, therefore, must be interpreted to prevent government by consent because these decisions may not provide for the "moral evolution" these thinkers desire. As Dworkin explains: "The constitution makes our conventional political morality relevant to the question of validity; any statute that appears to compromise that morality raises constitutional questions, and if the compromise is serious, the constitutional doubts are serious also."30 The effect of this definition of constitutionalism is to convert these thinkers' substantive vision of justice into rights that can be enforced against the

Epstein's constitution attempts to secure a lot more rights than the one crafted by the Founders. See Richard A. Epstein, Takings (1985).
28. See discussion in Jacobsohn, supra note 12, at 54-55.
constitutionally formed majority by the judiciary, rather than into a policy that must be adopted by them.

In sum, this attempt to implement a sweeping vision of social justice through the process of constitutional interpretation introduces a fundamental antagonism between rights and consent that does not exist under the Founders’ Constitution. I am not arguing that these ideas concerning justice cannot be implemented under the Constitution. Many of them can be. My contention is that they must be consented to by the people, not imposed upon the people by judges. For our system to function as it was designed, no matter how just the cause, social policies must be adopted through the mechanisms of consent. There is no better teacher for why this is so than Abraham Lincoln.

III. THE LINCOLNIAN APPROACH

As did the Founders, Abraham Lincoln unceasingly insisted that the defining principle of the regime is that all men are created equal. This equality was defined by Lincoln as that of equal natural rights—the rights to life, liberty, and the pursuit of happiness. Lincoln realized that the Founders did not at once grant all people these rights, but instead “meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit.” Lincoln defined progress for the American polity as how close it comes to realizing the ideal of natural equality. The Founders, by articulating the ideal of equality:

meant to set up a standard maxim for free society which should be familiar to all: constantly looked to, constantly labored for, and even, though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence and augmenting the happiness and value of life to all people, of all colors, every where.

Lincoln was fated to contend with the most destructive conflict over the principles of natural rights in our history, the question of

31. There can be little doubt, however, that if the provisions of the Constitution, such as the contracts and the takings clauses, are properly interpreted in the light of natural rights principles of the Founding, the constitutional scheme, without the obtaining of consent to amendments, makes it exceedingly difficult to implement certain schemes of social justice, including severe wealth redistribution. This should be no surprise, because the Constitution was designed to protect against the expropriation of wealth of one group in society by another.
33. Id.
slavery. In contrast to the views of many in the South and North, Lincoln did not doubt that blacks were included in the Declaration. He declared that "there is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence, the right to life, liberty, and the pursuit of happiness."  

Slavery, then, the systemic deprivation of these rights, is an offense against the principle of equality and an offense against the American polity. Approval and even indifference to the spread of slavery is hateful and cheats us of our real progress as a nation 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.  

The acceptance of slavery not only jeopardizes our commitment to freedom, but it is also the most serious threat to the Union, "the only one that has ever endangered our Republican institutions." The only time when slavery has not caused discord is when it has "remained quiet where it was. We have had difficulty and turmoil whenever it has made a struggle to spread itself where it was not."  

Most importantly to our constitutional scheme, if one denies the principle of natural equality, republican government is deprived of its source of legitimacy. For as Lincoln states:

If A. can prove, however conclusively, that he may, of right, enslave B.—why may not B. snatch the same argument, and prove equally, that he may enslave A?—

You say A. is white, and B. is black. It is color, then; the lighter, having the right to enslave the darker? Take care. By this rule, you are to be slave to the first man you meet, with a fairer skin than your own . . . .

But, say you, it is a question of interest; and, if you can make it your interest, you have the right to enslave another. Very well. And if he can make it his interest, he has the right to enslave you.  

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34. Id. at 52-53.
35. Id. at 50-51.
36. Id. at 236.
37. Id. at 313.
38. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 222-223 (Roy P.
The protection of the natural rights of blacks, then, is not an act of altruism; it is necessary for the preservation of republican government. One cannot simply delegate the question of whether or not to protect a group's rights to individuals or local majorities to decide as their interests require. The regime as a whole must take an interest in the securing of rights for if these rights are not secure the local majorities cannot legitimately govern. The question at stake in the slavery controversy is the viability of popular government, or in Lincoln's words, "the eternal struggle between... two principles... [t]he one is the common right of humanity and the other [is] the divine right of kings."\(^{40}\)

No person and certainly none of the modern rights theorists would disagree that slavery is wrong and inconsistent with any conception of democracy. After all, the rights deprived by the institution of slavery are exactly the rights the regime was founded to protect; they are not broad rights derived from contemporary moral theory. So how should slavery be attacked? If one takes the modern theorists at their word, their first line of attack would be to challenge slavery in the Supreme Court as slavery is clearly unconstitutional under any reasonable definition of justice. (Many abolitionists shared a similar opinion.) If provided with a favorable ruling, the federal government then, as during the Civil Rights movement, must use force to enforce that decision. After all, the modern theorists might say, isn't that exactly what happened in the Civil War?

This was not Lincoln's way. Lincoln understood better than anyone that the very rights the polity was founded to protect were being systematically deprived and that action had to be taken to hold the regime to its principles. Lincoln, however, knew that, under the Constitution, these rights could be secured only through consent. The reconciliation of the end of equal rights and necessary means of consent is not a simple task. On the contrary, Lincoln, throughout his public life, but most eloquently at Gettysburg, underscored the problematic nature of republican government—government of the people, by the people, and for the people.

Popular government is difficult to preserve because people, being imperfect, often violate or desire to violate the rights of others for

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39. In reaction to the excesses of the modern rights proponents, some scholars and jurists, like Robert Bork and William Rehnquist, have tended to defer so far in favor of the elected branches and have so ridiculed the notion that the Constitution is grounded in a theory of natural rights that one sometimes believes that they wish to resurrect Stephen Douglas's argument that moral questions are best answered by local majorities. This exhumation would be unfortunate.

40. **DEBATES, supra** note 32, at 319.
their own benefit, thus endangering the basis of the regime. Once, however, you force these people to respect others’ rights, you risk depriving them of their right to consent. Slavery is a perfect illustration of this problem. Local majorities desire to violate the natural rights of a group of people. Allow them to do so, and popular government is defeated by the deprivation of rights. If you step in and override their decision, one has dispensed with the consent of the governed.

The statesman must, then, reconcile the requirement to secure natural rights and the necessity of government by consent in the face of the fact that human beings’ self-interest often leads them to deprive another person of his rights. To Lincoln, the solution lay in the forming of public opinion. As he put it, “Our government rests in public opinion. Whoever can change public opinion, can change the government, practically just so much.” 41 The statesman in a republican government must mold public opinion so that the public accepts the preeminence of the principle of equality, even if the acceptance of that principle works against self-interest.

Before the Southern rebellion forced a military solution, Lincoln attempted to effect this change in public opinion by using the forms and processes of the Constitution. Assuming, as did Madison, the inevitability that local majorities would act unjustly, Lincoln believed that the Constitution required the national government to identify and, at least, mitigate evils that threaten the principle of equality. The national government, the principal agent of the polity based on natural equality, has a responsibility to see that this principle is not violated, within the limits of consent.

This recognition of these limits means that we must accept the inequality which public opinion is not yet willing to rectify. Lincoln openly stated, for example, that blacks cannot be made the political and social equals of whites, because, even if his own feelings admitted of this possibility, “we well know that those of the great mass of white people will not.” 42

This violation of the principle of equality, while we recognize it is a violation, must be suffered. It must be suffered because we are a government of consent, as well as rights, and in such a regime, “[a] universal feeling, whether well or ill-founded, cannot be safely disregarded.” 43 The national government, however, within these limits, possesses the responsibility to legislate in accordance with the principle of equality.

41. COLLECTED WORKS, supra note 38, at 385.
42. DEBATES, supra note 32, at 51.
43. Id.
Lincoln envisioned that the national government, working through the forms of the Constitution, would attack slavery by establishing that, no matter what legal protections it currently possessed, national policy was in favor of curbing it. Lincoln believed that "public opinion . . . [on] any subject, always has a 'central idea', from which all its minor thoughts radiate." The object of Lincoln's national policy was to make clear that the central idea of the polity is the natural equality of man. The obvious method of accomplishing this goal is the passage of legislation embodying that principle.

The Lincoln proposal for dealing with slavery was based on the premise that slavery was a "disturbing element" in the regime and "a moral, a social and a political wrong" because it violated the principle of equality. Once one determined it was wrong, with due attention paid to the existing constitutional guarantees for slavery, Lincoln explained that we should "deal with it as with any other wrong, in so far as we can prevent its growing any larger, and so deal with it that in the run of time there may be some promise of an end to it."

Lincoln, therefore, despite its obvious injustice, did not seek to ban slavery, either through prohibitory legislation or judicial decree. He instead planned to use the constitutional process of consent to limit slavery as much as possible while establishing the principle that slavery is wrong. Once this principle was recognized as the national policy regarding slavery, Lincoln maintained that slavery would be placed "in the course of ultimate extinction." Lincoln believed that, once Southerners understood that the majority of Americans thought slavery a grievous wrong, popular opinion in the slave-holding states would turn to abolition. Only after this shift in public opinion took place did Lincoln believe that it was feasible and, under principles of our system, just to eliminate slavery.

In sum, Lincoln, like the Founders, would reject the modern rights theorists' notion that there exists an inherent opposition between rights and consent. Our polity is based on the principle that the two must be reconciled. Thus, when faced with the all too likely gap between our aspirations and reality, Lincoln would not, and could not, turn to the courts to enforce justice on a recalcitrant citizenry. He instead teaches us that our constitutional system provid-

44. COLLECTED WORKS, supra note 38, at 385.
45. DEBATES, supra note 32, at 254.
46. Id.
47. Id. at 14.
48. Indeed, it was the very kind of judicial overreaching called for by today's rights theorists that helped to undermine Lincoln's attempt to peacefully resolve the slavery controversy through the political process. See Dred Scott v.
ed us with sufficient tools to form an enlightened public opinion. Only by working through the mechanisms, procedures, and forms devised by our Founders can we possess both legacies of a free people, secured rights, and government by consent.

IV. CONCLUSION

I am disheartened by the immense chasm separating us regarding the meaning of the Constitution. What these fundamental disagreements say to me is that we have lost sight of the true nature of our polity and are now arguing over which partisan reinterpretation of the Constitution we are going to accept. The partisan nature of our constitutional debates has caused citizens to question the legitimacy of Court decisions and have encouraged them to view the Court as just another political body. This development hampers the ability of the Court to perform its true function, the relatively impartial interpretation of the law, including the Constitution.

It may be urged against me that the Court must take on the task of discerning and implementing ideas of moral justice because no other part of the regime is doing so. I freely concede that the other parts of the regime have neglected this essential duty. It is the unconscionable abdication of the Congress, the President, the states, and, ultimately, the people from the project of securing rights and constructing a good regime that has allowed the Court to step into the breach.

I contend that we cannot permit the Court to do our work indefinitely. For one thing, it is not doing a particularly good job in governing us. Most importantly, the Court can never be the institution in which the answers to society’s important questions are ultimately reached. As Lincoln, once again, so eloquently stated, “A majority, held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people.”49

We therefore must attempt to restore the Constitution as devised and implemented by the statesmen who preceded us. The essence of this system is that the people, through the forms and processes of the Constitution, must determine the kind of society they wish to live in. These forms and processes are designed so that the people’s reason, not will, govern the decisions of the polity. We must relearn that, despite Justice Brennan’s assertions to the contrary, the Constitution

Sanford, 60 U.S. 393 (1856).
is not a series of vague general principles waiting to be filled in by justices (or anyone else, for that matter). It is, rather, a complex, wonderfully well-crafted system of government that requires that all the actors in the system—the executive, legislature, judiciary, states, and the people—perform their functions. Once one part of the system breaks down, it becomes difficult for the other parts of the regime to fulfill their duties. The best explanation of this truth is George Anastaplo’s Dizzy Dean metaphor.\(^{50}\) Dizzy Dean was a legendary pitcher whose career was ruined when he broke his toe. Obviously, the broken toe itself was not a serious injury. When Dean, however, tried to pitch before his toe was healed, his pitching motion was altered, causing him to suffer a career-ending arm injury. The Constitution, I contend, has a broken toe; in truth, it has several, the most important of which is the citizens’ lack of what used to be called republican virtue. We have ceased to govern ourselves; we are now ruled by something called “the government.” The result of these breakdowns is a fundamental alteration of our regime: the attempted imposition of substantive ideals of justice through judicial decree. This alteration has helped to cause our “sore arm”: the bitter rift in our society regarding fundamental principles of justice.

To bind up the nation’s wounds, we must religiously commit ourselves to resolving our conflict over fundamental principles through the mechanisms of consent contained in the Constitution. Does this mean the Court has no role to play in resolving this dispute? On the contrary, it is an indispensable part of the regime. It must ensure that each part of the regime stays within its constitutional bounds, and that the rules of the game, including the prohibitions against violation of rights contained in provisions such as the Bill of Rights, the contracts clause, and the ex post facto clause, are strictly followed. The Court must not be “restrained”; rather, it must be more active in enforcing, for example, the separation of powers, federalism, and other structural components of the Constitution. If the Court does its job and leaves us to do ours, perhaps we shall once again believe our polity is worth the last full measure of devotion.

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