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Altogether Fitting and Proper

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ALTOGETHER FITTING AND PROPER

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A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR. By *Harry V. Jaffa*. Rowman & Littlefield Publishers, Inc. 2000. Pp. 549. \$35.00.

A NEW BIRTH OF FREEDOM¹ is the long-delayed sequel to CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE LINCOLN-DOUGLAS DEBATES,² published in 1959. I first read CRISIS OF THE HOUSE DIVIDED shortly after beginning to teach constitutional law in 1976. This book fundamentally changed how I viewed American politics and it continues to influence my teaching and writing to this day. It was through this book that I began to understand the importance of the Declaration of Independence as the statement of first principles for the American regime.³

The Declaration expresses the basic tension in American politics between equality and self-government. The natural equality of all people⁴ is the basis upon which the consent of the governed is grounded. Government derives its just powers from the consent of the governed. But governmental power is not an end in itself. It is instituted to secure the rights of life, liberty, and the pursuit of happiness. The securing of these rights is to be accomplished through democratic, i.e., majority, rule. The problem is that the majority may choose to deny the equality of those in the minority. That is, the underlying basis for majority rule—the natural equality of citizens—may be denied by the majority, even though this is inconsistent with its own justification for governance. The solution, however, is not easy because the enforcement of equality without regard to consent nullifies the principle of consent.

The tension within the Declaration was also reflected in the politics of the American founding. Despite the Declaration's statement of equality and Jefferson's own stirring condemnation of the slave trade,⁵ there was

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1. HARRY V. JAFFA, A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR (2000) (hereinafter A NEW BIRTH OF FREEDOM).

2. HARRY V. JAFFA, CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE LINCOLN- DOUGLAS DEBATES (1973) (hereinafter CRISIS OF THE HOUSE DIVIDED).

3. *Id.* at 227-28, 331-32.

4. For a discussion of whether the phrase "all men are created equal" was intended by Jefferson and the other Founders to include women, see Jonathan K. Van Patten, *The Enigma of the ERA*, 30 S.D. L. REV. 8, 9 (1984).

5. JAFFA, CRISIS OF THE HOUSE DIVIDED, *supra* note 2, at 242-43. See also THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA 3 (1997). Jefferson, though a slave-owner himself, was particularly troubled by the existence of slavery:

toleration of the institution of slavery at the time of its drafting. The Founders may be acquitted of the charge of hypocrisy, however, if it is understood that they believed that slavery was wrong⁶ and that the principles stated in the Declaration “had placed the institution [of slavery] far along the road toward ultimate extinction.”⁷ Political prudence requires that the actualization of fundamental principles be achieved with the consent of the governed. The tension of the Declaration could not be resolved within existing political realities and the ensuing Constitution of 1787 therefore represented a compromise between slavery and principle, a resolution that acknowledged both equality and consent.⁸ In this sense, the Founding was incomplete.⁹

The tension inherent in the Declaration was at the core of the debates between Stephen Douglas and Abraham Lincoln. Douglas broke the tension by rejecting equality and embracing consent, then known by the phrase “popular sovereignty.”¹⁰ Lincoln, on the other hand, did not succumb to the abolitionist temptation, which was to break the tension in favor of equality and to reject popular sovereignty.¹¹ Instead, he embraced the tension and both denounced slavery and its extension to new territories, while he respected the laws that sanctioned slavery where it already existed.¹² Lincoln’s embrace of the principles of the Declaration is especially apparent in this reply to Douglas:

The doctrine of self-government is right—absolutely and eternally right, but it has no just application, as here attempted. Or perhaps I should say that whether it has such application depends upon whether the negro is not or is a man. If he is not a man, why in that case, he who is a man may, as a matter of self-government, do just as he pleases with him. But if the negro is a man, is it not to that extent a total destruction of self-government, to say that he too shall not

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

THOMAS JEFFERSON, WRITINGS, NOTES ON VIRGINIA, Query 18, at 289 (Merrill Peterson ed. 1984).

6. See WEST, *supra* note 5, at 10-14. See also HERBERT STORING, SLAVERY AND THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC, THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 217 (1979):

The Founders understood quite clearly that Negroes, like men everywhere, were created equal and were endowed with unalienable rights. They did not say that all men were actually secured in the exercise of their rights or that they had the power to provide such security, but there was no doubt about the rights. Far from it being true that “negroes were never thought of except as property,” not only Negroes but slaves were frequently spoken of and treated as persons. All of the Constitutional provisions relating to slaves, for example, refer to them as persons.

Id.

7. JAFFA, CRISIS OF THE HOUSE DIVIDED, *supra* note 2, at 307.

8. *Id.* at 330-31.

9. *Id.* at 225.

10. *Id.* at 330-31.

11. *Id.* at 199-201.

12. *Id.* at 294-96.

govern himself? When the white man governs himself that is self-government; but when he governs himself, and also governs another man, that is more than self-government—that is despotism. If the negro is a man, why then my ancient faith teaches me that “all men are created equal;” and that there can be no moral right in connection with one man’s making a slave of another.

Judge Douglas frequently, with bitter irony and sarcasm, paraphrases our arguments by saying: “The white people of Nebraska are good enough to govern themselves, but they are not good enough to govern a few miserable negroes!” Well I doubt not that the people of Nebraska are, and will continue to be as good as the average of people elsewhere. I do not say the contrary. What I do say is, that no man is good enough to govern another man, without that other’s consent. I say this is the leading principle—the sheet anchor of American republicanism.¹³

For Lincoln, the principles of the Declaration were true, not just true for a time or true in the sense of being politically useful, but true for all times and for all people. The truth of the equality principle, however, had to properly be understood:

I think the authors of that notable instrument [i.e., the Declaration] intended to included all men, but they did not intend to declare all men equal in all respects. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal—equal in “certain inalienable rights, among which are life, liberty, and the pursuit of happiness.” This they said, and this they meant. They did not mean to assert the obvious untruth, that all men were enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact, they had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for a free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and therefore constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.¹⁴

Lincoln, in fact, praised the Founders for their vision on the slavery issue:

The assertion that “all men are created equal” was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration, not for that, but for future use. Its authors meant it to be, thank God, it is now proving itself, a stumbling block to those who in after times might seek to turn a free people back into the hateful paths of despotism. They knew the proneness of prosperity to breed tyrants, and they meant when such should reappear in this fair land and commence their vocation they should

13. *Id.* at 347-48.

14. *Id.* at 315-16.

find left for them at least one hard nut to crack.¹⁵

The truth of the Declaration may be universal, but there is no guarantee that truth will prevail. This is the principal significance of the Lincoln-Douglas debates. Although the American regime had been founded upon “self-evident truths,” their continued authority was at risk. “The long political duel between Stephen A. Douglas and Abraham Lincoln was above all a struggle to determine the nature of the opinion which should form the doctrinal foundation of American government.”¹⁶ The genius of *CRISIS OF THE HOUSE DIVIDED* is not only to show the underlying nature of the respective opinions, but also to demonstrate how these opinions remain the essential basis of modern American politics. While Stephen A. Douglas’s political views have fallen into disrepute, his principles are alive and well.¹⁷

CRISIS OF THE HOUSE DIVIDED dealt with Lincoln’s early political development and culminated with an analysis of the Lincoln-Douglas debates. In *A NEW BIRTH OF FREEDOM*, Professor Jaffa follows Lincoln’s development through an extended analysis of the Gettysburg Address. He also turns his focus from the “soft” voice of modernity in the form of Stephen Douglas to the “hard” voice of modernity in the form of John C. Calhoun. It may seem highly unusual to equate the reactionary politics of Calhoun, a defender of slavery as a positive good, with modern political thought, but Jaffa is insistent upon the connection:

The Southern argument for secession rested upon the Southern argument for state rights. The Southern argument for state rights rested upon the separation of state rights from natural rights. The separation of state rights from natural rights corresponded exactly, in Calhoun’s mind, with the denial of any constitutional standing to the principles of the Declaration of Independence. Since this denial by Calhoun is shared by virtually all of the legal profession today, including nearly all members of the Supreme Court, I thought it particularly important to subject it to rigorous examination. In doing so, I believe I have vindicated not only Lincoln’s rejection of the Southern state rights dogma but also the intrinsic validity of the natural rights of the Declaration of Independence, encompassing the proposition that all men are created equal. I hope thereby to promote a climate of opinion in which the alienation from the principles of the Founding Fathers may be overcome, so that we may once again understand the true measure of Lincoln’s greatness and through him repossess our inheritance of the genuine blessings of liberty.¹⁸

The assertion that most members of the Supreme Court share a common ground with John C. Calhoun may be astonishing, but Jaffa

15. *Id.* at 321-22.

16. *Id.* at 308.

17. For example, the politician who purports to be “personally opposed” to a particular practice and yet is unwilling to “impose” his or her views on others is giving a modern voice to Douglas’s popular sovereignty doctrine.

18. JAFFA, *A NEW BIRTH OF FREEDOM*, *supra* note 1, at xiii-xiv.

demonstrates this proposition in a most persuasive, if not exhaustive, manner. Long identified with conservative political causes,¹⁹ Jaffa does not play favorites as he makes Chief Justice Rehnquist one of his principal targets.²⁰

Jaffa begins this volume with a study of the views of Lincoln's intellectual predecessor, Thomas Jefferson. Jefferson believed that despotism and tyranny were synonymous with slavery.²¹ Slavery is taxation without representation carried to its ultimate extreme.²² The problem of slavery, in Jefferson's mind, was resolved by the Northwest Ordinance, which prohibited slavery in the Northwest Territory.²³ The optimistic consensus reflected in Jefferson's views, however, had evaporated substantially by the Election of 1860.²⁴ Lincoln's situation could be described in an extended and vivid medical metaphor:

Lincoln characterized slavery as a cancer that could not immediately be excised without causing the patient to bleed to death. Like any cancer, however, it could not be permitted to spread without also causing the death of the patient. In medically diagnostic terms, Lincoln proposed preventing the extension of slavery into any new territories (from which new states might be formed). Once slavery was irreversibly confined to the states where it already existed, he thought measures could be pursued within those states for the gradual reduction and elimination of this cancer. What those measures might be, he did not at once propose. Under the pressure of events, all his efforts had to be concentrated upon preventing the growth of the malignancy. Indeed, at the center of his task was the necessity of convincing his fellow countrymen that slavery was indeed a morally pathological condition, as opposed to a matter of moral indifference (as Douglas held) or a positive good (as the disciples of John C. Calhoun maintained). For Lincoln, the criterion for distinguishing between healthy and diseased bodies politic was the difference between despotic and free government recognized by

19. Professor Jaffa was the writer of Barry Goldwater's memorable proposition at the 1964 Republican Convention: "I would remind you that extremism in defense of liberty is no vice. And let me remind you also that moderation in the pursuit of justice is no virtue." HARRY V. JAFFA, *AMERICAN CONSERVATISM AND THE AMERICAN FOUNDING* 49 (1984).

21. According to Jaffa,

[O]riginal intent, in Rehnquist's sense of the term, had its source, not in the thought of the Revolution or of the Founding, but in the repudiation of that thought by John C. Calhoun. In Calhoun's rejection of the Declaration of Independence, in his substitution of prescriptive historical right for natural right, we find a constitutional jurisprudence that places safeguards for slavery on the same moral level as any other constitutional safeguards. Although Lincoln and his party never denied the moral obligation to implement fully the legal guarantees of slavery in the Constitution, they insisted nevertheless upon a distinction between the Constitution's promises and its principles. . . . The echo of Calhoun in the words of the present chief justice is evidence that the Confederacy is alive and well and that the Union victory at Appomattox has not been accompanied by any ascendancy of the principles of the Gettysburg Address.

JAFFA, *A NEW BIRTH OF FREEDOM*, *supra* note 1 at 90.

21. *Id.* at 22.

22. *Id.* at 26.

23. *Id.* at 68.

24. *Id.* at 71.

the Declaration of Independence. This difference, in Lincoln's understanding, was as surely grounded in nature as the difference between health and disease in the human body.²⁵

The analysis of the Gettysburg Address shows Lincoln's attempt to complete the Founding by resolving the tensions of the Declaration. Contrary to his Southern as well as modern day critics, Lincoln did not resolve the tension through despotic measures.

The evil of slavery lay not only in slavery itself but also in the temptation to abandon the rule of law in adopting a Caesarian solution to the problem of slavery. It was Lincoln's determination to deal with slavery only by constitutional means that made his task so extraordinarily difficult.²⁶

In steering a course between despotism and abdication, Lincoln's leadership took the nation from the tension (one might even say flaws) of the Declaration, through a bloody Civil War where the wealth accumulated through the lash was dissipated by the sword, to a new birth of freedom. That Lincoln's legacy was quickly squandered and has only begun to be recovered, albeit imperfectly, with the modern Civil Rights movement is part of the tragedy of American history. It is Jaffa's intention that Lincoln, and thereby also the Founding, be properly understood so that we may recover the means to self-government through implementation of the principles of the Declaration. Professor Jaffa has promised yet a third volume on "the triumph and tragedy of the war years."²⁷ The principal document in this study will almost certainly be Lincoln's Second Inaugural Address. The Christ-like figure who was shot on Good Friday made his most profound statement on political and divine judgment, redemption, and healing in this Address. In Professor Jaffa's hands, this study should be most illuminating.

25. *Id.* at 74.

26. *Id.* at 116.

27. *Id.* at xiv.

