

THE HIGHER LAW BACKGROUND OF THE CONSTITUTION: JUSTICE CLARENCE THOMAS AND CONSTITUTIONAL INTERPRETATION

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In his eighteenth year on the bench, Justice Clarence Thomas is the most important but unfortunately least understood sitting justice on the Supreme Court. His belief that a justice should be bound by the original intent of those who framed the Constitution is not particularly revolutionary or his conviction that the Constitution is important because it is the touchstone of the grand experiment that is the United States.¹ Justice Thomas's importance, however, derives from his belief that the Constitution can only be properly interpreted by viewing it in light of the Founder's natural law principles found in the Declaration of Independence. Appeals to natural law principles have consistently shown up in Thomas's opinions and dissents while serving on the bench.

In *Kelo v. New London* (2005), a case which involved the constitutionality of the government's power of eminent domain to transfer private land to another owner for the basis of future economic development, Justice Thomas based his ruling on the

original understanding of property rights that underlies the Takings Clause of the Fifth Amendment.² In his dissent Justice Thomas stated that the "Framers embodied that principle in the Constitution, allowing the government to take property not for 'public necessity,' but instead for 'public use.'"³ This principle, however, relies on the fact that the "Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from 'tak[ing] property from A. [511] and giv[ing] it to B.'"⁴ In this remarkable dissent, Justice Thomas relied not only on the Framers' intent, but as a part of that intent, he clearly appealed to the Founders' conceptions of natural rights and natural law which underlie the Constitution.

Justice Thomas's seemingly traditional beliefs have, however, unfortunately cast him out of many legal circles and academic discussions. Law academia and politicians alike have denigrated and rejected Thomas's views on the relationship between the Constitution and the Declaration of Independence. Contrived controversies stemming from his dislike of affirmative action programs and his supposed "extreme" views of the Constitution seem to

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¹ Clarence Thomas, "Virtue of Practical Wisdom," Speech to the Claremont Institute. February 9, 1999, http://www.claremont.org/publications/pubid.524/pub_detail.asp. Accessed 7 November 2008.

² U.S. Constitution, 5th Amendment, Takings Clause reads: "nor shall private property be taken for public use, without just compensation."

³ *Kelo v. New London*, 545 U.S. 469 (2005), 505.

⁴ *Ibid.* at 511-512.

be the consensus of opinion held by many of the general public. These opinions are the result of interests groups and politicians who worked vehemently against Thomas's confirmation to the Supreme Court in the fall of 1991.

Watching these displays on parade on national television, the public fell into either of two groups: they either viewed Justice Thomas as a liar and a man who denounced his own race by his opposition to affirmative action or they saw that he was unjustly castigated during the hearings; those with the latter view saw Thomas as another potential "conservative" voice on the Court, along with Justices Antonin Scalia and William Rehnquist, who would counterbalance the "liberal" justices of the Court. This analysis, while it may be true in some respects, is surely not adequate for a man who has become increasingly important in American law.

Once Thomas was confirmed to the Supreme Court, these partisan opinions did not simply vanish. Six months into his first term, the *New York Times* published a piece entitled "The Youngest, Cruellest Justice." The story, above all, highlighted Justice Thomas's dissent in *Hudson v. McMillian*, a case that involved the beating of a black prisoner by a prison guard, did not qualify as cruel and unusual punishment under the Eighth Amendment. Inside the piece debates over differing methods of constitutional interpretation or discussion on the history of Eighth Amendment jurisprudence were not to be found; the *Times* never thought it reasonable to look at the Constitution or Thomas's own constitutional arguments.

Many of his detractors also pointed to his supposed use of affirmative action in getting into Holy Cross and Yale and his complete resistance to affirmative action programs once on the Court. His strong dissents, especially in *Grutter v. Bollinger*, an affirmative action case involving the

constitutionality of a quota system set by the Michigan Law School, add even more strength to this perception. Numerous books such as *Supreme Discomfort: The Divided Soul of Clarence Thomas*, *Strange Justice: The Selling of Clarence Thomas*, and *The Nine: Inside the Secret World of the Supreme Court* have tried to paint Thomas as an angry and conflicted man who is not comfortable with his own race—a kind of wolf in sheep's clothing.

In 2004, when appearing on *Meet The Press*, then Senate Minority leader Harry Reid was asked if he would vote for Justice Thomas if President Bush elevated him to the position of Chief Justice because of the recent departure of former Chief Justice William H. Rehnquist. Senator Reid responded that Thomas's opinions are "poorly written" and that overall, he is simply "an embarrassment to the Supreme Court."⁵ From reading Senator Reid's opinions, one would think that Justice Thomas writes his opinions in crayons and colored pencils.

In a public forum at the Saddleback Church in California, when asked which Supreme Court Justice would he have not nominated, Democratic Presidential candidate Barack Obama responded with Justice Clarence Thomas. Senator Obama then said that even though he disagreed with Justice Scalia's opinions he did not "think [that] there's any doubt about his intellectual brilliance" because the two may happen to disagree over constitutional interpretation.⁶ This is nothing more than a restatement of the commonly held belief that Justice Thomas is simply not smart enough to think

⁵ Thomas L. Krannawiter, "Defending Thomas," December 13, 2004. http://www.claremont.org/publications/precepts/id.79/precept_detail.asp. Accessed 28 December 2009.

⁶ Barack Obama, "Transcript of Saddleback Forum Debate," August 16, 2008. <http://transcripts.cnn.com/TRANSCRIPTS/0808/16/se.02.html>. Accessed 4 November 2008.

for himself and follows in Justice Scalia's shadow—an opinion that has been present years before President Obama stepped into the national political landscape in 2002. While Justice Thurgood Marshall served on the Court no one ever suspected that Justice William Brennan, who held very similar views on the Constitution, secretly wrote all of his opinions for him.

These opinions are nothing more than old partisan claims and clichés by those who simply do not share Thomas's views. These opinions greatly overlook Thomas's contributions to the Constitution and overall, to the restoration of American natural law principles. Thomas's natural law approach, which is in the tradition of Thomas Jefferson, Abraham Lincoln, Frederick Douglass, and the Founders, is the recognition of the underlying higher laws of the Constitution. Justice Thomas discovered the natural law principles of the Founding, or perhaps re-discovered those principles, while he was head of the Equal Employment Opportunity Commission (EEOC).

As chairman, it was important to Thomas that the EEOC have a foundation behind its policies. In 1982 President Reagan nominated Thomas to head the EEOC and get it “off of the front pages of the newspapers.”⁷ Thomas knew that given his “heterodox view and Reagan administration's poor reputation on civil rights,” he would face skepticism and criticism for his actions while chairing the EEOC.⁸ Thomas, tired of putting his faith into quotas and empirical science, was in search of a principled goal, a higher ideal than simply maintaining a place of mostly liberal ideas and failing budgets.⁹ He found what he was looking for when he discovered

the natural law principles of the Founding era. The discovery of those principles, however, was not so much a discovery of something new but a re-discovery of what Thomas had witnessed while growing up in Pin Point, Georgia.¹⁰

Thomas realized his grandfather, whom he affectionately called Daddy since the age of six, instilled in him virtues and ideas which were not to be found in the elite circles of Washington. Thomas's grandfather, who he later would call “the greatest man he ever knew,” taught him self-reliance, hard work, and the importance of education which he later found to be greatly lacking in the nation's capital.¹¹ These principles, which he had held with him since childhood, were as true in 1986 as they were when his grandfather taught them in 1956. Thomas came to find that these immutable and universal principles which his grandfather instilled in him were also underlying the charter of this government: the United States Constitution.

During the second term of Thomas's chairmanship at the EEOC, he discovered the great importance of natural law principles. Thomas stated in his memoir:

I led my staffers (especially Ken Masugi and John Marini) in discussions of the natural-law philosophy with which the Declaration of Independence, America's first founding document, is permeated. “All men are created equal,” Thomas Jefferson had written in 1776. “They are endowed by the creator with certain unalienable Rights.” That's natural law in a nutshell: if all men are created equal, than no man can own another man, and we can only be governed by our consent. How,

⁷ Clarence Thomas, *My Grandfather's Son*. (New York: HaperCollinsPublishers Inc., 2007), 149.

⁸ *Ibid.* at 149

⁹ *Ibid.* at 152,153.

¹⁰ *Ibid.* at 188.

¹¹ *Ibid.* at 28

then, could a country founded on those principles have permitted slavery and segregation to exist? The answer was that it couldn't—not without being untrue to its own ideals. We debated at length the implications of natural-law thinking, and speculated on how it might apply to cotemporary political discussions. These arguments stimulated my mind in a way that no discussion of current events could possibly hope to equal.¹²

The natural law principle of human equality stated in the Declaration of Independence meant that man is equal in his natural rights, among those being the rights to life, liberty, and the pursuit of happiness because of the simple fact that he is man. If all men are created equal, then it is also recognized that there is an inherent inequality: man is neither God nor beast. The natural law principle of equality forms the rational basis of why it is unjust for one man to own another man. The Founders' understanding of equality, from which liberty can be fully realized, was what intrigued Thomas. No country had ever been founded upon such principles of truth. Thomas realized, however, that because those principles were still true as they were in 1776, they were still applicable to the current day political landscape.

Using natural law principles as a guide, Thomas asked the question that every American should ask: what does the Constitution mean? Even if one disagrees with Justice Thomas, the American public should read his opinions and take seriously what he has to say. Thomas expects that because he himself has the American people in mind when he writes his opinions. Every American, whether they are interested in politics or not, has a responsibility as a

citizen to know their government and the higher law philosophies—espoused in the Declaration of Independence—that underlie that government.

Abraham Lincoln used an aphorism to describe the proper relationship between the Constitution and the Declaration of Independence. For Lincoln, the Declaration was an “apple of gold” which was framed in the Constitution, a “picture of silver.”¹³ The apple was not made for picture; the picture was made to better preserve and protect the apple. Lincoln's belief on the proper relationship between the Constitution and Declaration of Independence perfectly encapsulates Thomas's view on constitutional interpretation. For Thomas, the Constitution is the framework of American government but to properly view that framework, one needs to view it as the Founders' recognized: being grounded upon the immutable principles set in the Declaration.

This question should be very important to Americans: that is how should a Supreme Court Justice interpret the Constitution? This thesis will explore Clarence Thomas's natural law foundations as a justice of the Court. More importantly, I will show the distinction between Justice Thomas's principled interpretation and the interpretations of other contemporary justices who have or do currently serve on the Court. By using Clarence Thomas's understanding of *Dred Scott v. Sandford* (1857) I hope to show the intellectual and philosophical gap between him and those who reject a natural law based jurisprudence. More importantly, I hope to show Justice Thomas's dedication to the Founders' original intent as fulfilled in the Declaration of Independence.

¹² *Ibid.* at 188

¹³ Abraham Lincoln, *Abraham Lincoln: His Speeches and Writings*, Roy P. Basler ed., (Cleveland, Ohio: Da Capo Press, 2001), 513. “Fragment: The Constitution and the Union” [1860?].

Judicial Philosophies of the Court

Chief Justice John Marshall's landmark opinion in *Marbury v. Madison* (1803) declared that the Supreme Court held the power of judicial review as part of the Judicial Power granted by Article III of the Constitution. Marshall did not mean to assert that the Supreme Court was the final arbiter of the Constitution, which was asserted by the Court in *Cooper v. Aaron* (1955), but that the Court had the power to decide on the constitutionality of the laws passed by the legislature. According to the Chief Justice's opinion, the Constitution is the Supreme Law of the land, and any law which ran counter to the Constitution was not law and thus, was considered to be null and void.¹⁴ Since the Constitution is the Supreme Law, the chief justice reasoned that under the Judicial Power, the judiciary holds the power to protect the Constitution and prevent any bad laws from being binded on the people. This reasoning implies that because the Court has power to protect the Supreme Law, it must therefore be able to interpret that law with which it is their sworn duty to protect.¹⁵ The judiciary must then know and study everything about the Constitution they are called to interpret. This poses a question of great importance to all Americans: how should a Supreme Court justice interpret the Constitution?

While no justice of the Court has ever been in absolute agreement regarding constitutional interpretation, there are groups which justices tend to fall under; those two methods are either the "living Constitution" approach or an originalist approach. Before an adequate description of those two methods can be made, we must begin with the overall choice of interpretivism or non-interpretivism.

Hardly any justice has ever fallen into the non-interpretivist group because this calls for strict adherence to the words of the Constitution and nothing more. A non-interpretivist (which will be called herein a strict constructionist) judge is one who looks only at the language of the text. Justice Hugo Black is the only justice in recent history whose jurisprudence most closely resembles that of a strict constructionist. Justice Black, who was known as an absolutist in his interpretation of the Constitution, famously declared that the freedom of speech clause in the First Amendment protected virtually all kinds of speech.¹⁶

Republican Presidents and presidential hopefuls especially like to use the term strict constructionist when describing their perfect justice. Former President Bush stated that he was looking to appoint strict constructionist justices in the mold of Justices Scalia and Thomas.¹⁷ When applying the example of freedom of speech, however, it would seem that this non-interpretive way of looking at the Constitution is not what conservatives want in a justice. Conservatives, who rail against the expanding powers of the judiciary, would not want to open up the broad and general language of the Constitution by including ideas that the Framers were against. The Founders used prudence and reason to write the Constitution, and logically, prudence and reason should be used to interpret the instrument of the people.

The two major interpretivist approaches are either "living Constitution" or

¹⁴ *Marbury v. Madison*, 1 Cranch 137 (1803), 177.

¹⁵ *Ibid.* at 177.

¹⁶ David M. O'Brien, *Constitutional Law and Politics Vol. One: Struggle for Power and Governmental Accountability*, Sixth Edition, (New York, NY: W.W. Norton & Company, 2005), 77.

¹⁷ Harry V. Jaffa and Ralph A. Rossum, "The Disputed Question," http://www.claremont.org/publications/crb/id.1241/article_detail.asp, Accessed 19 March 2009.

an originalist approach. The “living Constitution” method requires a justice to interpret the Constitution in light of principles and problems facing society in the current day. Since the Constitution is not static, it must evolve and change as the people evolve and change. Justices using this method look to the understanding of the texts by mainly using current social science, psychological findings, empirical evidence, or breakthroughs in international law. Justice William J. Brennan, perhaps the most famous proponent of the “living Constitution” approach, looked at the visions of “human dignity” in the Constitution and tried to apply those visions to the text of the Constitution. The rulings of this type of justice may seem out of place today only because society has not yet caught up to their ideas on humanity as they see presented in the Constitution, but in their eyes, a future majority will ultimately vindicate their interpretations.

In 1985, Justice Brennan clearly laid out his views on how the Constitution should be interpreted in a speech at Georgetown University. He stated that “[a] augmented by the Bill of Rights and the Civil War Amendments, this text is a sparkling vision of the supremacy of the human dignity of every individual.”¹⁸ As a justice of the Court, the ultimate question for Brennan is what the Constitution means not only in the context of the problems of today but what it should mean in the future. For Justice Brennan, the Constitution “was not intended to preserve a preexisting political society but to make a new one, to put in place new principles that the prior political community has not sufficiently recog-

nized.”¹⁹ According to Justice Brennan, we must re-shape the values held by the Founders around current values the citizens of the United States now hold; what may have good or true during the Founding period might not be good today because of advancements in human evolution, human understanding, and morality. Implicitly in this reasoning is the rejection of universal principles and instead, Justice Brennan is in favor of legal positivism, a results-based jurisprudence, which is based on his prior acceptance of historicism, a theory which holds history as the ground of right and wrong.

Justice Brennan also took time to discount the theory of originalism, in particular the validity of an original intent approach. Under Justice Brennan’s reasoning, no one can accurately gage the intent of the Founders; whatever principles they might have held are now forever stuck in political ambiguity in the form of compromise. It would be simply “arrogance cloaked as humility” to try and discern a single group of principles or intentions to which the Founders completely agreed upon.²⁰ Justice Brennan’s influence has been great not only upon the current Court but on the American people as a whole.

The jurisprudence of originalism can be split up into two different groups. In the first group called text and tradition, or original understanding, justices look at the text and the traditions of the American people who gave the exercise of their powers to create those texts. Tradition should be a central point, because tradition is what the law was meant by the people when it was passed.²¹ Concerning original intent, Justice Antonin Scalia stated that he

¹⁸ William J. Brennan, “Address to the Text and Teaching Symposium,” Georgetown University (October 12, 1985, Washington, D.C.) in Mary P. Nichols and David K. Nichols *Readings in American Government*, Seventh Edition, (Dubuque, IA: Kendall-Hunt Publishing Company, 2004), 382.

¹⁹ *Ibid.* at 382.

²⁰ *Ibid.* at 379.

²¹ Antonin Scalia, “A Theory of Constitutional Interpretation,” Remarks at The Catholic University of America, (Washington D.C., October 18, 1996).

“does not care whether the framers of the Constitution had some secret meaning in mind when they adopted its words.”²² The intent of the Framers does not mean anything because the Constitution is a public document that is not bound to any private or secret intention.²³ For Justice Scalia, the Constitution is a statute and should likewise be interpreted as one.

Justices who use an original intent approach try and discern what the original intent of the Framers was. These jurists can find the Founders’ original intentions in books such as James Madison’s *Notes on the Federal Convention*, *The Federalist*, letters of correspondence between the Founders, or, most importantly, in the natural law principles of the Declaration of Independence. These justices regard the Founders’ intentions as the touchstone because those intentions tell judges the purpose of American government.

Underlying this approach, however, there is—as can be expected—disagreement on what the original intent of the Founders was. Under an original intent interpretation, which documents should be held with greater weight and exactly whose intent should be followed—the intent of the Framers who signed the Constitution, the ratifiers at the state legislatures, or the people themselves? Professor Harry Jaffa summed up this problem by stating that original intent jurisprudence tells justices how to interpret the Constitution, but it does not tell what the original intent of the Founders was.²⁴

Most justices who believe in the correctness of original intent have, however, lost a crucial guide needed in order to understand the Founder’s intent. That

missing key element is the Declaration of Independence; without that document, this method of jurisprudence can never be on solid intellectual or moral grounding.

The Founders’ recognition of immutable natural rights and their ideas on the relationship between equality and consent of the governed are keys to fully understanding the true intent of the Constitution. Without a natural law understanding, original intent jurisprudence can never truly discover the original intent of the Founders, because without a basis in natural law, there is no way to distinguish the principles from the compromises in the Constitution. How would one balance the compromises with slavery and the principle of equality presented in the Fifth Amendment? A natural law understanding informs us of the injustice of all forms of slavery, and it is also in this understanding that one can realize why the Founders viewed the judiciary as the least dangerous branch of the Federal government.²⁵ Using this method, words such as equality and liberty are not subjected to evolving ideas of society, and those words are not simply based up to each justice’s conceptions of what they may think those words mean.

It is important to remember that these justices who believe in a natural law approach to original intent do not interpret the Declaration of Independence in light of the Constitution; this would be a breach of the limited power which was granted to them by the people. These judges also have to be philosophers which can lead into problems if they are not firmly grounded in natural law thinking. They either have to be the best thinkers on natural law or students

²² *Ibid.*

²³ *Ibid.*

²⁴ Harry V. Jaffa, *Original Intent and the Framers of the Constitution: A Disputed Question*, (Washington D.C.: Regnery Publishing Inc., 1994), 15.

²⁵ Alexander Hamilton, *The Federalist*, Jacob E. Cooke ed., (Hanover, NH: Wesleyan University Press, 1961), 523. The judiciary “may be truly said to have neither Force nor Will, but merely judgment.”

of the best teachers of natural law.²⁶ In the current Court, the only justice who has a natural law understanding of the Constitution is Justice Clarence Thomas. His understanding of why natural law is required for a correct interpretation will be the main focus of the following chapters.

Before exploring the reasons for the rejection of natural law and Justice Thomas's counter argument to those views, we must explore what natural law meant to the Founders and those philosophers who most influenced the Founding.

The Origins of Natural Law

In a letter that Thomas Jefferson wrote to Henry Lee, Jefferson described the philosophers who had the most influence on the Founding. Those philosophers were Aristotle, Cicero, Locke, and Sidney.²⁷ Locke and Aristotle will be examined on the basis of their fundamental agreements on the existence and traits of a natural law. It is important to remember that while Locke and Aristotle did not agree in many points, they did agree in the "common sense" of the subject.²⁸ It is in Aristotle and John Locke that we can find the philosophical foundations for the Founders' conceptions of natural law.

For Aristotle, there exists universal principles which are true regardless of history or society. In the *Nicomachean Ethics*, Aristotle stated that the "proper function of man, then, consists in an activity of the soul in conformity with a rational principle."²⁹ The rational principle is what sets man apart from animals. By the term

rational principle, Aristotle meant that men have logos, or a rational part of the soul. The rational part of the soul is distinct from the non-rational portion which is comprised of the passions, i.e., love, anger, and fear. Animals only have this part of the soul on which they act instinctually. We must qualify this with the observation that while both man and animals have the ability of voice, man alone has the ability of speech.³⁰ Speech, however, would be useless if man did not have reason to go with such ability; man, apart from other animals, alone has knowledge of the differences between good and evil, what is just and unjust, and from this men can communicate about the just and unjust. Man must then have the ability of reason for a purpose; the purpose for reason is to differentiate between what is good and what is bad so that the good will be followed. This alone, however, is not sufficient because man also needs the ability of good judgment, or prudence, to do the most just act when accorded with a choice.

Reason points man towards certain principles and foundations. These foundations are set in nature and it is the task of man to search for those principles and act according to those principles in the best manner possible. Concerning natural justice or natural right, Aristotle stated that "[w]hat is by nature just has the same force everywhere and does not depend on what we regard or do not regard as just."³¹ For Aristotle, there are such principles that are true no matter what one may subjectively think is right or wrong, because "there are some things that are just by nature and others not by nature."³² These principles of nature cannot be changed and cannot be

²⁶ Jeffrey Sikkenga, "Lest We Forget: Clarence Thomas and the Meaning of the Constitution," *On Principle*, Vol. 6 No. 6, (December 1998).

²⁷ Thomas Jefferson to Henry Lee, May 8, 1825.

²⁸ *Ibid.*

²⁹ Aristotle, *Nicomachean Ethics*, Martin Ostwald, trans., (Upper Saddle River, NJ: Prentice Hall, 1999), 1098a7 pg. 17.

³⁰ Aristotle, *The Politics*, Carnes Lord, trans., (Chicago: The University of Chicago Press, 1984), 1253a8-18 pg. 37.

³¹ Aristotle, *Nicomachean Ethics*, Martin Ostwald, trans., (Upper Saddle River, NJ: Prentice Hall, 1999), 1134b18 pg. 131.

³² *Ibid.* at 1134b30 pg. 131.

voted up or down because the regime did not put those principles in place. Principles that are by convention, principles or laws which man creates as part of a society, are differentiated by Aristotle from natural principles which exist regardless of the existence of any society. Principles of natural justice or natural right are true no matter who is in power, whether kings or dictators, and no matter the time or place in history.

This idea was summarized by Thomas Jefferson in the phrase “all men are created equal, that they are endowed by their Creator with certain unalienable Rights” in the Declaration of Independence. It must be emphasized that all men, not some, are created equal in their equal natural rights which they hold by nature. Neither gender nor race invalidates this foundational principle on which the United States has been built upon.

Aristotle’s teachings on natural justice seem to present a problem when he gives the example regarding the man who is right handed by nature but who can learn to be ambidextrous by habituated practice.³³ On the surface this seems to indicate that man should learn to overcome natural justice, that circumstance may even dictate one to do this. Aristotle is, however, not at all claiming relativism. Men may choose to use either the left or the right hand to best accomplish the ends set by nature; the ends are set by nature but prudence determines the best means to fulfilling those ends. Man must always do what is just by nature but the means man chooses to fulfill those ends must be just as well. For example, this is the reason why Aristotle defines virtue, or acting in accordance with justice, as acting in the right way, at the right time, toward the right people, by the right means, and for the right reasons. There is a just way to act in

³³ *Ibid.* at 1134b34 pg. 131.

light of the circumstances and the natural principles one is trying to reach. The example that perfectly illuminates Aristotle’s meaning is the problem of slavery and the American Founding. The natural law principle at stake in dealing with slavery is the principle that all men are created equal—regardless of race, religion, or social class—and have an equal natural right to liberty. The Founders understood that the realization of this principle required the right or most prudent means to achieve this just end set by nature.

In the Founding era, all the Founders mutually agreed on the unjustness of slavery and that it was a heinous institution which was subversive to the laws of nature.³⁴ The Founders, however, did not have the power under the Federal government—neither under the Articles of Confederation nor the Constitution—to eradicate slavery in the places which it had already taken hold. By using prudence, they came to the conclusion that by grounding their regime upon the idea of equality, slavery could be eradicated forever. Though slavery existed by convention and was against nature, the Founders ultimately took the most just action and put principles into the first organic law of the United States—the Declaration of Independence—which, if adhered to, would wipe the institution of chattel slavery out of human existence. Benjamin Franklin perfectly captured these Aristotelian principles of justice and prudence when he stated that “[s]lavery is such an atrocious debasement of human nature, that its very extirpation, if not performed with solicitous care, may sometimes open a source of serious evils.”³⁵

³⁴ Harry V. Jaffa, *A New Birth of Freedom*, (Oxford: Rowman & Littlefield Publishers, Inc., 2000), 370-72.

³⁵ *History of the Negro Race in America from 1619 to 1880*, George W. Williams, ed., (New York: G.P. Putnam's Sons, 1883), 431.

If the Founders had not compromised on slavery another country, forever out of the control of the United States, would have been formed on the continent on the basis of inequality. Importantly, just as the left hand could learn to be as strong as the right hand, this does in no way change the ultimate justness or unjustness of a principle.

Slavery, by nature is always unjust no matter what form it may disguise itself. For Aristotle, as for Abraham Lincoln, the unjust act would have been to offer no compromise, thus offer no hope to eliminate slavery by way of constitutional means. The correctness of this argument will be examined at a later point in greater detail. For now, it can be concluded that Aristotle meant through this example that man must use prudence to determine the most just way to accomplish the ends as presented by nature.

Although Jefferson admitted in his letter that Aristotle's teaching on natural justice had an influence on American political principles, most Americans at the time took their bearings more directly from John Locke, who wrote extensively on the law of nature, or natural law. In 1664 Locke, who at the time was Censor of Moral Philosophy at Oxford, gave a series of lectures on the origin, purposes, and importance of the law of nature.³⁶ These essays provide an important and deep insight into Locke's overall thought concerning the law of nature.

Locke began the first essay by stating that God's presence can be seen everywhere, and he assumed that no one would deny this "provided he recognizes either the necessity for some rational account of our life, or that there is a thing

³⁶ Leo Strauss, *What Is Political Philosophy?*, (Chicago: The University of Chicago Press, 1988), 197.

that deserves to be called virtue or vice."³⁷ The fact that reason exists provides for the existence of a higher being who has imparted us with reason. For Locke, reason is the means to finding the law of nature.

For Locke, there exist certain moral principles which all men accept, or should reasonably accept, unanimously.³⁸ From this definition, the law of nature and positive law of societies are differentiated. To make this point even more concrete Locke quotes Hugo Grotius, another philosopher in Locke's time who was deeply concerned with the study of the law of nature. Grotius stated that "whatever depends on convention is highly distinguished from things natural," because those things of convention "often change and are different in different places."³⁹ Locke also pointed out that men in different times and different places have asserted similar certain truths; the source of this unity of thought is due to the dictates of reason and the common nature of man.⁴⁰ From this agreement in the minds of men, Locke concluded that a law of nature must exist.

Locke stated that the law of nature "can be described as being the decree of the divine will discernable by the light of nature and indicating what is and what is not in conformity with rational nature, and for this reasoning commanding or prohibiting."⁴¹ This statement indicates that the law of nature is not innately known in the hearts of men because reason does not establish or

³⁷ John Locke, *Locke: Political Essays*, Mark Goldie, ed., (Cambridge, NY: Cambridge University Press, 2006), 81.

³⁸ *Ibid.* at 83.

³⁹ Hugo Grotius, *De Jure Belli ac Pacis*, Prolegomenon, §30 in John Locke John Locke, *Locke: Political Essays*, Mark Goldie, ed., (Cambridge, NY: Cambridge University Press, 2006), 84.

⁴⁰ John Locke, *Locke: Political Essays*, Mark Goldie, ed., (Cambridge, NY: Cambridge University Press, 2006), 84.

⁴¹ *Ibid.* at 82.

pronounce this law; reason is the means to finding these laws set by God.⁴²

In summary, Locke saw that the law of nature has three basic precepts. The law of nature is the decree of a superior will, or God.⁴³ The law of nature lays down what is and what is not to be done, which Locke noted is “the proper function of a law.”⁴⁴ Lastly, the law of nature binds men and creates an obligation or duty to be fulfilled.⁴⁵ The law of nature is therefore differentiated from positive law because although it cannot be known by all men in the same capacities, it is available to all men because “it can be perceived by the light of nature alone.”⁴⁶ For Locke, the light of nature meant “nothing else but that there is some sort of truth to the knowledge of which a man can attain by himself and without the help of another, if he makes proper use of the faculties he is endowed with by nature.”⁴⁷

Man has a duty to use his reason to think about the truth of his own knowledge. For the Founders, the belief in the Lockean idea of self-evident truths is seen in the Declaration. For them, as it was for Locke, man had to hear arguments or witness something whereby he would employ his reason to interpret those sensory details. Once reason acquired a certain truth, it could not deny the validity of that truth, because those truths are self-evident and unalienable.

In the essays Locke also differentiated between what is natural right and natural law. Locke stated that natural right “is grounded in the fact that we have free

use of a thing, whereas law is that enjoins or forbids the doing of a thing.”⁴⁸ This distinction is very important to remember. Natural right is the principle that man has the ability to use things—like liberty—freely. Natural right is, however, not absolute. If it were, it would grant men the ability to break the laws of nature. Natural law sets the limit on one’s use of natural right. For example, natural law forbids human slavery because it tramples on men’s natural right to equality and liberty. Natural law sets limits on the natural rights which all men have by nature; the reciprocal of this is that natural rights are individual rights which all men share by nature and have equal ability to use.

From these conceptions, we now turn to the writings of some of the leading Founders to show their general agreement with the principles of Aristotle and Locke. From examining a few writings, we can assess the Founders’ overall sentiments on the principles of natural law.

In a letter entitled “The Farmer Refuted” Alexander Hamilton took to task a farmer whose beliefs mirrored those of Thomas Hobbes. The farmer, who had previously written to Hamilton, indicated that he believed, like Hobbes, that in a state of nature man is “perfectly free from all restraint of *law* and *government*.”⁴⁹ Hamilton, in his critical analysis of the farmer’s arguments, laid out his views of the natural rights of man.

For Hamilton, man is restrained in a state of nature by the immutable and eternal laws of nature. Men have supposed that God, from where we stand in relation to him and to the things below us, “has constituted

⁴² This is a break with the philosophy of Thomas Aquinas who said that the law of nature was imprinted on the hearts of men.

⁴³ John Locke, *Locke: Political Essays*, Mark Goldie, ed., (Cambridge, NY: Cambridge University Press, 2006), 83.

⁴⁴ *Ibid.* at 83.

⁴⁵ *Ibid.* at 83.

⁴⁶ *Ibid.* at 83.

⁴⁷ *Ibid.* at 89.

⁴⁸ *Ibid.* at 82.

⁴⁹ Alexander Hamilton, “The Farmer Refuted,” February 23, 1775. in *The Founders’ Constitution*, Philip B. Kurland and Ralph Lerner, eds., Volume 1, Chapter 3, Document 5, (Indianapolis: Liberty Fund, 2000) (Emphasis in Original).

an eternal and immutable law, which is, indispensably, obligatory upon all mankind, prior to any human institution whatever.”⁵⁰ This is what Hamilton called the law of nature. The faculty of reason, which God has bestowed upon mankind, serves as a safeguard for the continued security of the law of nature.⁵¹ This law also serves as the foundation for man’s natural rights which were granted to him by the Supreme Being. Hamilton asserted that even in a state of nature, “no man had any *moral* power to deprive another of his life, limbs, property or liberty; nor the least authority to command, or exact obedience from him.”⁵²

Hamilton then attacked the farmer’s argument from the side of government. For a just government to be established, there must be a voluntary compact between the rulers and those who are to be ruled.⁵³ This is critical because the security of the rights of those who are to be ruled is the only foundation for a just government. To usurp more power than the people have given is a complete violation of the law of nature because every man has a right to his own personal liberty.⁵⁴ The presence of natural law means that there is a moral code with or without the existence of government. Just government—government of consent—is built directly on the recognition of every man’s equal natural rights which extend as far as the barrier erected by natural law.

James Wilson also believed, as Hamilton did, that legitimate government was built upon the pre-existing structures of the law of nature. Wilson, a signer of the Declaration of Independence and the Constitution, was a Founder who worked towards educating the public in the natural law philosophies which provide the

foundations for the government of the United States. In a lecture entitled “Of the Law of Nature” Wilson enunciated his ideas on the law of nature.

Wilson assumed that no one could deny that “our Creator has a supreme right to prescribe a law for our conduct, and that we are under the most perfect obligation to obey that law.”⁵⁵ We can know that there is a law specifically by reasoning what would happen if there was no law. Reason is thus available to men for the purpose of trying to figure out the will of God which He has imparted on to man, i.e., the law of nature.⁵⁶ Without this law of nature, Wilson contended that human nature would drag men down to the depths of their own fallen nature; ingenuity would devolve into cunning and man’s “art would be employed for the purposes of malice.”⁵⁷ From this basis, man can conclude, by way of reason and of divine revelation—what man can have knowledge of and what man can have faith in—that there is a law of nature present in the world.

The law of nature is immutable, universal, and its foundations are set in nature.⁵⁸ The law of nature “has an essential fitness for all mankind, and binds them without distinction.” It is important to note that Wilson qualifies his statements on the law of nature by stating that it binds all men everywhere. Distinctions by nature, such as the color of one’s skin, are arbitrary because the application of the law of nature rests on the entirety of mankind. Nature has not appointed natural leaders over men; implicit is the idea of the falseness of all forms of slavery, like the divine right of kings, which

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ James Wilson, “Of the Laws of Nature,” *The Collected Works of James Wilson*, Vol. 1, Kermit and Mark Hall, eds., (Indianapolis: Liberty Fund, 2007).

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

men have imposed on each other throughout the history of the world.

Wilson then pointed to Cicero, another philosopher who indirectly influenced the Founding, as an authority on the law of nature.⁵⁹ Cicero stated that the law of nature is “a true law, conformable to nature, diffused among all men, unchangeable, eternal. By its commands, it calls men to their duty: by its prohibitions, it deters them from vice.”⁶⁰ Cicero, like Wilson, too believed that a law of nature existed that was available to all men. For Cicero, this law is eternal and it has set commands on all men; by commanding what men are obligated to do, it also commands men what is not to be done.

Wilson believed that the application of the law of nature into positive law was going to take time because of human nature—only in this sense can the law of nature be labeled as progressive. The law of nature points towards the highest capabilities which man can achieve. “This law,” Wilson stated, “will not only be fitted, to the cotemporary degree, but will be calculated to produce, in future, a still higher degree of perfection.”⁶¹ This idea is perfectly captured in the statement that the Constitution was established to “form a more perfect Union.” Although the highest good may not be able to be achieved in this life, the Founders sought to put natural law principles in the Constitution so that the people could attain the highest degree of justness attainable in this life.

From these conceptions, we can conclude that the Founders’ beliefs on natural law were of central importance to the foundation of the *novus ordo seclorum*. It would seem that in order to fully understand the United States, one needs to study not only the actions but the beliefs of those men who founded this country. It would be logical to also assume that these beliefs need to be understood and studied in order to serve in the government that is grounded on these universal and immutable principles. Justices of the Supreme Court, who are called to interpret the Constitution, should not only be fully aware of the Founders’ natural law principles but those principles should serve as a foundation for their jurisprudence. As we proceed, this will unfortunately be found to not be the case. In fact, common belief resides on a rejection of these principles in favor of legal positivism and historicism—the absolute antithesis of the moral principles which form the bedrock of the United States. Rejection of Founding principles began in the early twentieth century under the direction of Justice Oliver Wendell Holmes.

⁵⁹ Thomas Jefferson to Henry Lee, May 8, 1825.

⁶⁰ Cicero in James Wilson, “Of the Law of Nature,” *The Collected Works of James Wilson*, Vol. 1, Kermit and Mark Hall, eds., (Indianapolis: Liberty Fund, 2007).

⁶¹ James Wilson, “Of the Law of Nature,” *The Collected Works of James Wilson*, Vol. 1, Kermit and Mark Hall, eds., (Indianapolis: Liberty Fund, 2007).

Justice Holmes' Influence on the Supreme Court

In 1918, Justice Oliver Wendell Holmes Jr. published a work which became the single most influential writing on American jurisprudence. Justice Holmes' essay "Natural Law," which appeared in the *Harvard Law Review*, concerned the Court's traditional reliance on natural law. Instead of being grounded in natural law, Justice Holmes argued that the Court should reexamine their traditional thinking. In the essay Holmes proposed a new jurisprudence which completely rejected any universal principles and instead rested on skepticism and the belief in a complete separation of morality and the law in order to curb judicial activism. Today, virtually every justice on the court, no matter the judicial philosophy, shares Justice Holmes' rejection of a jurisprudence based on the Founders' understandings of natural law.

Justice Holmes begins his essay by stating that natural law is pursued by two different groups; the philosopher in the constant struggle "to prove that truth is absolute" and the jurist in "search for criteria of universal validity."⁶² Both professions are trying to find a universal truth, because all men want their actions to be justified on a single, objective truth; men want to "have an absolute guide."⁶³ When Holmes was young truth was nothing more than "the majority vote of that nation that could lick all others."⁶⁴ It is important to note that Holmes did not contend that a majority vote made something right or just, but that this is simply the way in which a sense of justice is found through the political

process in America. Holmes then looked at World War I to prove his larger point.

In the Great War, men fought and killed each other because their beliefs were too far from one another and could not be reconciled. Who is to say that our beliefs are no more right than those of our enemy? We may be certain of our beliefs but as Holmes points out, "we have been cocksure of many things that were not so."⁶⁵ This fact goes to the heart of the problem of natural law.

Holmes contended that those jurists who believe in natural law are "in that naïve state of mind that accepts what has been familiar and accepted by all men everywhere."⁶⁶ The use of natural law is simply a reliance on childhood "early associations and temperament."⁶⁷ Men hold on to their "dogmatic preferences" because they are simply trapped by what they are most familiar with in life.⁶⁸ To prove this hypothesis, Holmes uses the famous aphorism that just because he used to love granite rocks and barberry bushes, these objects are not intrinsically good.⁶⁹ Holmes loved those objects as a child out of simple arbitrary preference, nothing more. Just because men think that there may be principles which are universally true does not make it true just based on a claim. Natural law then is simply a preference based on subjective ideas individuals want to believe to be true.

For Holmes, America's constitutional republic is built on the foundation that the majority determines the positive laws of society. He understood that the political society is built around the Lockean idea of the social contract. Holmes, however, broke away from Locke's teachings of a pre-existing law of nature. In Holmes' mind

⁶² Oliver Wendell Holmes, "Natural Law," 32 *Harvard Law Review* 40 (1918), from <http://teachingamericanhistory.org/library/index.asp?documentprint=1438>. Accessed 2 February 2009.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

prior to that contract, nothing exists because everything stems from positive laws of society. The basis for legitimate government rests on the idea that the will of the majority must prevail in every case—no matter what decision the majority may make because their decision is ultimately irrelevant. It is up to each society to determine for itself the definition of good and bad, just and unjust. Each society makes their own positive laws—which become rights—that they think are best.

Much of Holmes' thought relies on skepticism of all universal truth. Interestingly, Holmes uses objects like granite rocks and barberry bushes to prove a point on something which, at its core, is completely moral. Contrary to the beliefs of Justice Holmes, it is doubtful that granite rocks and barberry bushes know the difference between right and wrong. According to Justice Holmes, justices should judge by interpreting the law without any moral foundation whatsoever. These justices would never, however, be able to claim the superiority of their own rulings over the private rulings of any individual. They can only recognize that men have different value judgments and that no one man's conscious thought can be superior. Though this thought seems very persuasive and true, it is nothing more than a blatant contradiction of the Founders' thought and a rejection of the Constitution and the Declaration of Independence.

The Declaration of Independence states that there are such universal self-evident truths which Holmes says are impossible. The fact that men are equal to each other in natural rights is certainly true everywhere. How could Holmes reasonably contend that the principle of equality means nothing? Was not Abraham Lincoln's entire political philosophy built on an appeal to the natural law principle of equality enshrined in the Declaration of Independence? Opposed

to Holmes, the entire Founding generation and the philosophers who influenced them had a teleological base and believed in natural law. The ideas on equality presented in the Declaration of Independence are the basis for any government that wishes to call itself legitimate. Contrary to the British monarchy, the Founders built a government opposed to slavery imposed by divine right, the idea that God has chosen natural rulers of men. Certainly the millions of Americans who fought in the American Revolution and the Civil War thought those words of the Declaration meant something. Justice Holmes's contention is completely at odds with the whole of American history.

Instead of relying on equality in natural rights as the basis of legitimate government, Holmes relies on the will of the majority. Out of the majority comes the creation of everything in a political society. Adolph Hitler, Saddam Hussein, and Fidel Castro were democratically elected by the majority so does this then make their rule legitimate?

The Declaration of Independence clearly refutes this claim. The Declaration of Independence relies on the principle of human equality, that every man has natural rights given by God, not created by man, and that this must be recognized *a priori* before any legitimate government can be formed. The truth of human equality—that every man has certain rights which are derived from nature—is simply true just based on the claim itself. Justice Holmes, whose skepticism seems to only reach what he has rejected, sees that no further examination is needed simply because to even claim such things are wrong.

Oddly enough Justice Holmes never discusses the obvious in his own theory. Why should the people be bound to his interpretation of the Constitution? Even more, why should we be bound to the Congress or the President's interpretation?

Those views expressed would be simply value judgments by a minority which could never be found to be more true or false than any other view. If morality is determined by the majority then why should the national government be involved in any constitutional discussion? By dismissing the Founders and their beliefs in great principles and truths, Holmes rests his belief on relativism and legal positivism.

This thought resurfaced again in a piece published in the *Texas Law Review* by former Chief Justice William H. Rehnquist. In "A Notion of the Living Constitution" Rehnquist criticizes those who adhere to doctrine of the "living Constitution" and he replaces that method of jurisprudence with his own. To support his judicial philosophy, Justice Rehnquist directly cites Justices Holmes' piece, "Natural Law," where he states the following on Justice Holmes's critique on natural law:

Beyond the Constitution and the laws in our society, there simply is no basis other than the individual conscience of the citizen that may serve as a platform for the launching of moral judgments. There is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience, and vice versa. Many of us necessarily feel strongly and deeply about our own moral judgments, but they remain only personal moral judgments until in some way given the sanction of law.⁷⁰

Justice Rehnquist then goes on to quote Justice Holmes's aphorism on granite

⁷⁰ Oliver Wendell Holmes, "Natural Law," in William H. Rehnquist, "The Notion of a Living Constitution," *54 Texas Law Review* 4, (May 1976), 413.

rocks and barberry bushes. The genius of American government, according to Rehnquist, is predicated on the importance of the democratic majority. If enough people feel "deeply upon a question as a matter of conscience they will seek out others of like view."⁷¹ Those people will then turn to an elected representative so that their views may become "embodied into positive law."⁷²

It is important to note that Rehnquist, like Justice Holmes, never thought it acceptable to think that it was the right of judges to impose their own views of morality upon the public, because these actions would be nothing more than judicial activism which would abrogate the power granted to judges by the people. For these justices, "morality" is injected into previously neutral ideas by the vote of the majority. This means that only the will of the majority is what is required to give something the sanction of law. Whatever the majority rules is good so there can never be any bad laws. Implicit in this logic is the idea that the majority can never choose what is bad for them because since they are the strong, they would never put something into law which would go against their own interests. Sheer force, which stems from the general will, is the driving power behind laws in America. Reason, in the eyes of both Rehnquist and Holmes, is therefore divorced from judging.⁷³ Reason then has nothing to do with judging in this constitutional republic. This idea contradicts the statements of the Founders on the place that reason should hold.

Alexander Hamilton wrote in Federalist No. 1 that the United States was founded by "reflection and choice" rather

⁷¹ *Ibid.* at 413.

⁷² *Ibid.* at 414.

⁷³ Harry V. Jaffa, *Original Intent and the Framers of the Constitution: A Disputed Question*, (Washington D.C.: Regnery Publishing Inc., 1994), 90.

than by “accident and force,” the foundation of all previous governments.⁷⁴ For Hamilton, reason is what separated the United States from all previous governments. All governments before 1776 rested on the Machiavellian principle of fortune. Fortune determined who ruled, how they ruled, what government would be formed, and what kind of society would be created. Contrary to Justices Holmes and Rehnquist, Leo Strauss noted that the United States was “to be the first government in the world which was founded in explicit opposition to Machiavellian principles.”⁷⁵ Reason, not reliance on fortune or what is required by necessity, was the key foundation in the making of this country. The Founders certainly knew the consequences of their choices when they signed the Declaration of Independence. There were months of deliberations in the making of both the Articles of Confederation and the Constitution. The Constitution itself proclaims that it was created to “form a more perfect Union.” This statement makes it clear that the Founders used reason so that promise would become grounded in reality. For Holmes and Rehnquist to claim that reason should not be a part of their decision making is at complete odds with the entire history of the United States.

In the former chief justice’s view there is no way to determine that anyone can have superior moral judgments. According to Rehnquist, the American majority, which is unencumbered by reason, determines the goodness of a shared moral judgment—or in this case a value judgment—which is what makes that judgment “good.” According to the former chief justice morals “take on a

certain rightness or goodness.”⁷⁶ It is important to note that Rehnquist stated that morals only *take on* some kind of worth—even when adopted by a majority they are not intrinsically good or bad. If all value judgments of every society are equal, those value judgments then mean nothing. Whatever rightness or goodness the society chooses is only an illusion of morality since it is impossible, in the eyes of Justice Rehnquist, for anything to have any intrinsic morality.⁷⁷ Justice Rehnquist himself surely believed in the distinction between right and wrong but he assumed that there was no way to demonstrate right and wrong by using reason.⁷⁸

This begs the question why should society even attempt to be moral? Being devoid of any type of real morality based on reason, the collective will of the society is essentially nothing more than sheer force. Force, which is used by the strong—being the majority—is the bedrock of the United States. The interest of the strong is what drives American democracy according to Justice Rehnquist.

According to the thought of Justice Rehnquist and Holmes human equality of the Declaration of Independence must not be subjectively true; equality is only a value judgment which may or may not be true depending on the regime; equality is something to which men may or may not believe as they wish, and it also may or may not be good depending on the political society. If the majority does not believe it, it follows that that value judgment is simply not true.

⁷⁴ Alexander Hamilton, *The Federalist*, Jacob E. Cooke ed., (Hanover, NH: Wesleyan University Press, 1961), 3.

⁷⁵ Leo Strauss, *Thoughts on Machiavelli*, (Chicago: University of Chicago Press, 1978), 13.

⁷⁶ William H. Rehnquist, “The Notion of a Living Constitution,” *54 Texas Law Review* 4, (May 1976), 412.

⁷⁷ Harry V. Jaffa, *Original Intent and the Famers of the Constitution: A Disputed Question*, (Washington D.C.: Regnery Publishing Inc., 1994), 87.

⁷⁸ *Ibid.* at 83.

Since the Constitution is basically comprised of value judgments what about those who do not share the value judgments of the majority?⁷⁹ May they simply break away from the Constitution based on their own value judgments? The strong in society may not believe in those value judgments and so in turn, may they enslave the weaker if they so choose? The South certainly did not believe in the value judgments of the Declaration of Independence and so they seceded. Using Justices Rehnquist and Holmes' skepticism of any morals outside of the majority, why then should the Constitution—again simply an illusion of morality—even be followed? In the future, the evolution of human moral understanding is going to progress far upon anything that we know now so why should we think that any decision currently being made is good for the majority?

Equality and the differences in the Declaration between tyranny and republican government are only value judgments to which the Founders subscribed. Then it must be concluded that the value judgments of Nazis or of the Stalinist Russia are all morally equal to the Declaration since morals only “take on” some kind of intrinsic worth depending on what is best for every regime. The truths of equality, reason, and the source of our natural rights, grounded in nature and not being dependant on the subjectivity of a king, are only value judgments according to the former justices of the court. As shown, this was certainly not the thought of the Founders nor is there any reasonable connection with the philosophic thought which created this constitutional republic.

Judge Robert Bork, who is most publicly known as President Reagan's failed judicial nominee in 1987, has been a conservative icon for decades. Conservatives hearken to Bork because of his devotion to

finding the Founder's original intent and because Judge Bork's preference is to interpret the straight text of the Constitution rather than his own opinions and feelings. Judge Bork's jurisprudence, however, can be traced back not to the Founders but to Justice Oliver Wendell Holmes.

While Judge Bork does not deny the existence of natural law—unlike Justices Holmes and Rehnquist—he points to natural law as the source of the problems of today's society.⁸⁰ In Bork's understanding, the Founding was inherently flawed because the principles of the Founding—most notably the Founders' conceptions of liberty—are inherently flawed.⁸¹ The seeds of the Founders' natural law concepts of equality and liberty found in the Declaration of Independence have directly caused the rise of sixties radicalism, and from those principles have stemmed the newly found rights to abortion and contraception. Natural law principles are thus flawed because Bork implies that the natural law views the Founders held, i.e., the natural law principles of equality and liberty, were completely without license and were therefore absolute.

Judge Bork views the principles of natural rights through the same lens that historicist scholars and academics view America's founding principles—principles that constantly evolve and grow as history moves forward. By using this framework, Judge Bork has mischaracterized natural law into something that it is not: a virtual bottomless well from which any right can be drawn. Judge Bork has unfortunately taken his detractors' premise as the basis for his own constitutional interpretation. Properly understood, equality, which is the bedrock of the United States, provides that

⁷⁹ *Ibid.* at 88.

⁸⁰ Robert H. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline*, (New York: HarperCollins Publishers Inc., 1996), 58.

⁸¹ *Ibid.* at 58.

all men are free and equal in certain natural rights that they have by nature. The liberty to exercise those rights is not without limit. Men cannot abridge another's rights nor break the positive laws of society without consequence. The natural rights of the minority cannot be infringed upon by the majority. This thought is completely self-evident in the straight text of the Declaration of Independence.

In his influential book, *The Tempting of America*, Judge Bork writes that "there is no objectively 'correct' hierarchy to which the judge can appeal."⁸² Since judges disagree on morality, there must be no true universal principles—the exact position of Justice Holmes and Rehnquist—to which the judge can appeal without overstepping their constitutional bounds. Judge Bork, like Justices Rehnquist and Holmes, believes in the existence of individual morality but, like them, he divorces law from morality since, in his mind, there is no objective correct hierarchy to which a judge can appeal. For Judge Bork, any extra-constitutional measures—like recognizing the Founders' views on natural law—are nothing more than blatant judicial activism.

Judge Bork's logic is the following: on the basis that there is disagreement follows that there is no objective moral hierarchy which a judge can appeal to and apply that does not result in judicial activism. Diversity of opinion therefore seems to imply a complete rejection of any universal principle. Leo Strauss wrote on the problem that diversity poses in his classic book *Natural Right and History*:

By proving that there is no principle of justice that has not been denied somewhere or at some time, one has not yet proved that any given denial

was justified or reasonable. Furthermore, it has always been known that different notions of justice obtain at different times and in different nations. It is absurd to claim that the discovery of a still greater number of such notions by modern students has in any way affected the fundamental issue.⁸³

In this paragraph, morality can be inserted where Strauss talks of justice and the same lesson can be learned. Diversity on the basis of diversity does not mean that universal morality has been proven false. As Strauss points out, diversity simply makes it harder to find those moral principles which were once collectively realized by most. Being content with diversity as diversity is nothing more than relativism.

Judge Bork, continuing from this logic, writes that unless there is some moral hierarchy the "judge must let the majority have its way."⁸⁴ Issues where the Constitution is silent are put to a vote and the "majority morality prevails."⁸⁵ The majority morality is simply a value judgment because as Bork even points out, the judge must always give way to the majority. On what basis is a majority's value judgment superior to the minority other than sheer numbers? For Bork it must follow that the majority is stronger and thus creates and abolishes the rights of society as a whole. The majority, simply on the basis that they are a majority, somehow gives their shared value judgment some illusion of morality—a doctrine strikingly similar to that of Justices Holmes and Rehnquist. Contrary to Judge Bork's understanding there is a moral hierarchy to

⁸² Robert H. Bork, *The Tempting of America: The Political Seduction of the Law*, (New York: Touchstone, 1990), 258.

⁸³ Leo Strauss, *Natural Right and History*, (Chicago: University of Chicago Press, 1954), 10.

⁸⁴ See Footnote #82.

⁸⁵ See Footnote #82.

which all Americans—even judges—can appeal: the Declaration of Independence.

For many, the government is the source of rights; the right to healthcare and a right to a minimum wage are looked upon as rights that people hold. This thought does not stem from the beliefs and principles the Founders held. They believed that man does not derive his rights from either the government or from the Constitution. Man has rights outside of the political society; political societies are formed so that rights can be better protected. Natural law, from which natural rights are derived, is present outside of the political society prior to the social compact. Positive laws of society are aimed at the best way to implement natural law principles.

Robert Bork's understanding that natural law is part of the growth of judicial activism has unfortunately taken hold of many legal conservatives. While conservatives rail against judicial activism and the growing power of the judiciary, they mischaracterize natural law as one of the main causes of judicial usurpation, because they agree with historicists on the claim that equality and liberty of the Founding era was completely without safeguards of any kind. In a tragic irony, many conservatives reject the central principles of Founding thought and instead rely on sheer force, relativism, and legal positivism.

Lastly Justice Antonin Scalia—like Justice Rehnquist and Judge Bork—also agrees with the legal positivist arguments of Justice Holmes. In a speech entitled “A Theory of Constitutional Interpretation” Justice Scalia states the following on the dangers of natural law:

What binds the biases of judge? Prevents him from simply implementing his own prejudices? What is the standard? And the fact is, I have never heard another one that has a snowball's chance in hell of ever

being adopted by more than two people. What are you going to use? The philosophy of Plato? Natural law? That's handy. That will tell judges what to do. Some suggest the philosophy of John Raule. Public opinion polls? Is that what you want? What do you want to use? If you don't take what I suggest, what is the standard? The answer is, there isn't any.⁸⁶

For Justice Scalia, natural law is no more useful than the philosophy of a hobo living on a street corner. Original understanding, the only true fixed basis for judging, is the only reasonable method for interpreting the Constitution.

Justice Scalia though does not seem to notice the larger question that he himself has presented: what is the original understanding of the people? Without the aid of the natural law of the Declaration of Independence, the original understanding of the people who formed the Constitution would seem to indicate that slavery was defended—that maybe it was in fact a good idea. Evidence for this fact lies in our own Constitution which has safeguards for slavery in three specific places. Against the promises of equality found in the Declaration, slavery would appear to rest on the same ground as equality. The Founders would then be nothing more than hypocrites, going against their principles they themselves affirmed when they signed their lives and sacred honor to create the United States. If the traditions of the people suggest both slavery and equality, those traditions provide nothing more than mere shadows onto the subject. Instead of being grounded in immutable principles of nature, Justice

⁸⁶ Antonin Scalia, “A Theory of Constitutional Interpretation,” Remarks at the Catholic University of America, (Washington D.C. October 18, 1996).

Scalia grounds himself in tradition and history.

Tradition certainly does not say anything about morality. As seen in United States history, not all traditions are good. It is for this reason Aristotle suggested that men should seek the good, not just the traditional.⁸⁷ Blindly following tradition also completely abrogates reason from choice. Can one say that it is therefore reasonable to follow a bad tradition? Was American chattel slavery at all reasonable? On what basis was chattel slavery eventually rejected and for that matter, why are any traditions rejected at any point throughout history? Surely no man could ever reasonably make the claim that based on tradition chattel slavery is somehow right or just.

John C. Calhoun, however, was that man who claimed that slavery was right and just. In his senate speech on the Reception of Abolition Petitions in 1837, Calhoun stated that he did not want anyone to understand that he was “admitting, even by implication, that existing relations between the two races in the slaveholding States is an evil—far otherwise; I hold it to be a good.”⁸⁸ For Calhoun, slavery “[b]e it good or bad, it has grown up with our society and institutions.”⁸⁹ Since slavery is a tradition, which Calhoun here divorces from morality, it must continue to be safeguarded and protected on that basis. Calhoun’s opinion, which gained popularity in the South, was nothing more than a rejection of natural law principles which provide the philosophic framework for the Constitution; above all, his position was a rejection of the natural

law of equality as stated in the Declaration of Independence.

One wonders how Justice Scalia would arrive to a reasonable conclusion on the wrongness of chattel slavery. Without any moral grounding in any principles accessible by reason, there is ultimately no way to articulate the wrongness of slavery.

Justice Scalia’s statements on the workings of American democracy are as follows:

It just seems to me incompatible with democratic theory that it's good and right for the state to do something that the majority of the people do not want done. Once you adopt democratic theory, it seems to me, you accept that proposition. If the people, for example, want abortion the state should permit abortion. If the people do not want it, the state should be able to prohibit it.⁹⁰

Implicit in this statement is the worry that unelected justices will usurp the power of the people. In Justice Scalia’s reasoning it is the majority of the people that make policy decisions, not unelected justices. Justice Scalia is absolutely correct in determining that the Supreme Court has greatly expanded their own power, especially in the twentieth century, but the growing usurpation of power does not follow from the fact that judges are unelected.

Since the very inception of the Constitution, judges have always been unelected and made independent from the people. The Founders reasoned that the judicial branch was supposed to be the non-political and most independent of the three branches of government. They knew that

⁸⁷ Aristotle, *Nicomachean Ethics*, Martin Ostwald trans., (Upper Saddle River, NJ: Prentice Hall, 1999), 1094a3 pg. 3.

⁸⁸ John C. Calhoun, “Senate Speech on Reception of Abolition Petitions” February 6, 1837. <http://www.teachingamericanhistory.org/library/index.asp?document=71>. Accessed 12 March 2009.

⁸⁹ *Ibid.*

⁹⁰ Antonin Scalia, “Speech to the Georgian University,” (Rome, Italy 1996), from Harry Jaffa, *Storm Over the Constitution*, (Lanham, MD: Lexington Books, 1999), 115.

government rests on public opinion, and judges were insulated specifically against the ebb and flow of public opinion. The cause of the growth of usurpation of the powers granted in Article III of the Constitution can be attributed to the fact that judges no longer feel the need to believe in natural law. Natural law provides a framework from which judges can work—not create or invent new rights; it also provides the law with a moral core. While judges should be completely neutral when interpreting the Constitution, it does not follow that the law they are called to interpret should be neutral as well. When one reads the Declaration of Independence, one finds that those principles enumerated by the Founders are all intrinsically moral.

For Justice Scalia, the majority, seemingly without any regard to minority rights, gets to run amok. The majority gets to make whatever law they feel is right at the time—no matter what law that may be. Just like Justices Holmes and Rehnquist, right and wrong, just and unjust are never mentioned or given consideration because those distinctions do not truly mean anything. The rights of the minority are also never mentioned by Justice Scalia. Without regard to minority rights one wonders if Justice Scalia's version of democracy is democracy at all. Under this understanding, the people are the source of their rights—in a sense, they are their own Creator. There is nothing *a priori* to the collective will of the majority. This is completely refuted by the straight text of the Declaration itself.

The Declaration of Independence clearly states that legitimate government is one of *just* powers founded by the consent of the governed. The consent of the governed rises from the fact that in nature, the people who give their consent are equal in their natural rights. The equality of the natural rights of the people is thus a prior condition of the legitimacy of majority rule. Without

this foundation, any government which does not have this distinction is despotic and tyrannical.

The conclusion for the previously discussed justices and judges is that the Declaration of Independence, the underlying principles of the Constitution, is simply false. Justices who are legal positivists or historicists cannot believe in the Declaration of Independence whose truths come from reason and revelation. The purpose of the Declaration of Independence is to guard against the many forms of tyranny and despotism in the world. The Declaration implicitly tells of the falseness of the idea of divine right; it boldly states that there is no mediator between man and God. God does not grant rights through a king; man, even before entering into a political society, already possesses self-evident and unalienable rights. Ultimately those justices reject any logical basis for any of the previous statements to be true. One wonders what the Founders would have thought of this complete rejection of principles they called self-evident.

Opposed to the beliefs examined in this chapter are the beliefs of Justice Clarence Thomas, a man who is not a disciple of the political thought of Justice Holmes or John C. Calhoun. Justice Thomas believes in the Founders' ideas of natural law as found in the Declaration of Independence. Like Abraham Lincoln, Justice Thomas found that natural law is the best guide available to interpret the Constitution because without the Declaration of Independence, the Constitution cannot in any reasonable way be interpreted. The original intentions of the Founders can never be recovered without a basis in the philosophy of those who founded this country. As chairman of the EEOC and as an associate justice of the Supreme Court, Clarence Thomas has used natural law principles to form his judicial foundation.

The Natural Law Foundation of Justice Thomas

SEN. HATCH:

Now when you are talking about natural law, you are talking about equality.

JUDGE THOMAS:

That all men are created equal, that's the basis.

SEN. HATCH:

That's right, and you're taking that from the Declaration of Independence.

JUDGE THOMAS:

That's right.⁹¹

In Justice Thomas's view natural law is the idea that "human nature provides the key to how men ought to live their lives."⁹² Natural law is a set of moral laws that bind men together under a common nature. The moral principles to which the Founders' appealed—the truths of equality and liberty as presented in the Declaration of Independence—are all parts of their overall belief in natural law. The reliance on the "laws of Nature and of Nature's God" is how those self-evident truths can be found—namely being through reason and revelation. Thomas asserted that the higher law traditions of the Founders require that men must acknowledge the individual freedom of every human person; it is only from this prior recognition that the "just powers of the government" can be derived.⁹³ This also

limits the majority to decisions which are just and which do not infringe on the rights of the minority. From this recognition comes a limited government, majority rule through recognition of the equal rights of all, and separation of powers. These principles underlying the Constitution are built on the assertions of the Founders in the Declaration of Independence which recognize the difference between just and tyrannical government.

In the following excerpt, Justice Thomas, countering the views of the jurists in the previous chapter, echoes sentiments very similar to Leo Strauss on the problem that diversity and relativism pose in the current day:

Reasonable minds can certainly differ ... that does not mean that there is no right or correct answer; that there are no clear, eternal principles recognized and put into motion by our founding documents. This was the mistake of the legal realists, and it continues to be the mistake of the critical theorists: law is something more than merely the preferences of the power elites writ large. The law is a distinct, independent discipline, with certain principles and modes of analysis that yield what we can discern to be correct and incorrect answers to certain problems.⁹⁴

Justice Thomas understands that the basis to legitimate government, the basis to true liberty, is grounded upon the ultimate truth of the principle of equality. The natural law principle of equality, properly understood, limits liberty by erecting barriers which men are not to break. Diversity does not shatter any principle or truth. It does not invalidate anything

⁹¹ Orrin Hatch, "The Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States," September 10, 1991, <http://www.gpoaccess.gov/congress/senate/judiciary/sh102-1084pt1/44.pdf>. Accessed 15 February 2009.

⁹² Clarence Thomas, "Why Black Americans Should Look To Conservative Policies," Speech at the Heritage Foundation, June 18, 1987, 8.

⁹³ The Declaration of Independence.

⁹⁴ Clarence Thomas, "Judging" 45 U. Kan. L. Review. 1, (1996), 6.

because diversity explains nothing more than differences of opinion, *not the truth of an opinion*. Truth is not whatever the majority may deem it to be at a certain time, and law is something more than an arbitrary value judgment of the majority.

Justice Thomas contends that a natural law approach “allows us to reassert the primacy of the individual, and establishes our inherent equality as a God-given right.”⁹⁵ For Thomas, the prior condition for any legitimate government rests on the belief in human equality. This rises out of the fact that men have certain natural rights, which were granted to him by God, and that government was therefore instituted to better protect those natural rights men hold by nature. Implicit in this understanding is the idea that men cannot create natural rights, and the government does not grant natural rights to men; men may only create political rights by the consent of those who entered into the same social contract. Men therefore have a duty and an obligation to not infringe on the natural rights of others. Natural law sets the highest good that man should strive towards and sets in place prohibitions which he should not break.

Without this nation being grounded on equality, no legitimate government could have been formed. Consent requires that those who have entered into the social contract recognize other men as their equal in terms of natural rights which is built upon the presupposition of the recognition of man as man. This meaning of equality also categorically asserts that no man by nature is a natural ruler of other men. Thomas Jefferson stated 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 legitimately, by

the grace of God.”⁹⁶ Men are equal in the sense that they hold natural rights and the faculty of reason; they are unequal in their ability to reason, talents, and intelligence.

This understanding of the principles of American government, Thomas asserts, is the American political tradition—the tradition of Washington, Jefferson, Lincoln, and Martin Luther King—which must be again articulated and appealed to by all Americans. These principles, which should be studied and taken seriously by every American, were attacked ceaselessly by members of the Senate Judiciary Committee and since then, have been unfortunately overshadowed by partisan views of Justice Thomas.

The major debate in Thomas’s confirmation hearings, before Anita Hill’s allegations came to light, concerned the role of natural law in constitutional interpretation. The Senators of the committee, who only two years before had grilled Judge Robert Bork on his rejection of natural law, now tried to paint Judge Thomas as a judicial activist who would use natural law to fundamentally change the country in a terrible direction. What did Thomas mean by natural law, what did he want to change if appointed to the Court (especially concerning *Roe v. Wade*), and moreover, what precedent would be changed if he had a seat on the Court were the main questions of the committee. Senate Judiciary Chairmen Senator Joe Biden even went so far as to publish a piece in the *Washington Post* entitled “Law and Natural Law: Questions for Judge Thomas.” In this piece he proposed to ask Judge Thomas about natural law and its application to the Constitution. Senator Biden made it clear that while he believed in natural law, he simply wanted to investigate Thomas’s own beliefs on the subject. Senator Biden, however, only wanted to make sure that Thomas’s beliefs

⁹⁵ Clarence Thomas, “Why Black Americans Should Look To Conservative Policies,” Speech at the Heritage Foundation, June 18, 1987, 9.

⁹⁶ Thomas Jefferson, “Letter to Roger C. Weightman” June 24, 1826.

were in line with his own beliefs on natural law.⁹⁷

As portrayed by the Senate Judiciary Committee during Thomas's hearings, natural law is something of an enigma—something which could be very dangerous if fallen into the wrong hands. It is a well-spring from which Supreme Court precedent could be overturned and new rights be created. If the wrong opinion on natural law was held, lunch counters could again become segregated, women would have to get back alley abortions, and even the right to vote could be taken away from minority groups. The judge who believes in natural law has to believe the right version of natural law—being Senator Biden and the committee's own views on natural law.

Senator Orrin Hatch, however, noted the massive inconsistencies in the way the committee was questioning Judge Thomas. Above all, Senator Hatch highlighted the inconsistent treatment by the committee with Judges Bork and Thomas. Judge Bork had been scolded by Senator Biden for not knowing that his rights came from God; now, however, nominee Thomas was now being scolded for believing in the very thing that Bork did not: the use of natural law in

constitutional interpretation.⁹⁸ Senator Hatch repeatedly maintained that if natural law was entirely out of the mainstream as some of the law professors and committee members made it out to be, then so was the Declaration of Independence and the views of the Founder and Lincoln who invoked natural law philosophies.⁹⁹ As Senator Hatch correctly understood, natural law is not beholden to “conservative” or “liberal” justices—if supposed ideological titles are even suited to judges in the first place. Natural law is available to all Supreme Court justices because natural law is self-evident and therefore available to all people. As Senator Hatch pointed out, the core of the problem was a complete misunderstanding of natural law—either out of political motivation or by sheer folly.

In the first five days of the hearings, Clarence Thomas consistently maintained that natural law did not have a direct role in constitutional interpretation but elsewhere he consistently maintained that “natural law provides for the background of the Constitution.”¹⁰⁰ Members of the committee responded with statements suggesting that Thomas was backing away from his previous speeches and statements regarding natural law. Thomas countered that during the time he was chairman of the EEOC, he was not adjudicating a case; he repeatedly maintained that at the time of those

⁹⁷ Joe Biden, “Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States,” September 10, 1991, <http://www.gpoaccess.gov/congress/senate/judiciary/sh102-1084pt1/1-5.pdf>. Accessed 15 February 2009.

“Judge Thomas, you come before this committee in this time of change with a philosophy different from that which we have seen in any Supreme Court nominee in the 19 years since I have been in the Senate. For as has been widely discussed and debated in the press, you are an adherent to the view that natural law philosophy should inform the Constitution. Finding out what you mean when you say that you would apply the natural law philosophy to the Constitution is, in my view, the single most important task of this committee and, in my view, your most significant obligation to this committee.”

⁹⁸ Orrin Hatch, “The Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States,” September 10, 1991, <http://www.gpoaccess.gov/congress/senate/judiciary/sh102-1084pt1/44.pdf>. Accessed 15 February 2009.

⁹⁹ *Ibid.*

¹⁰⁰ Clarence Thomas, “The Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States” September 10, 1991, <http://www.gpoaccess.gov/congress/senate/judiciary/sh102-1084pt1/44.pdf>. Accessed 16 February 2009.

speeches, he was a policy maker who was also a part time political theorist.¹⁰¹

This seems to present problems because on the surface, it seemed as though Thomas backed away from his previous natural law beliefs. In his book *First Principles: The Jurisprudence of Justice Clarence Thomas*, Scott Gerber explains that “it is difficult to take seriously Thomas’s attempts during the hearings to distance himself from his prior statements about the role of natural law in constitutional interpretation.”¹⁰² The problem for Gerber is this: because Thomas is a man, he like every other justice, has problems separating his political views from the law.¹⁰³ Implicit in this understanding is the idea that Justice Thomas is ultimately concerned with results, and he is nothing more than a legal positivist. This analysis greatly obscures Thomas’s beliefs on natural law.

Thomas did not distance himself from his previous views in any manner whatsoever. He noted consistently throughout the hearings that natural law does not have a “direct” role in constitutional interpretation. The word “direct” implies that natural law is still somehow useful to constitutional interpretation. Thomas was simply asserting that he would not interpret the Constitution through his own views of natural law. His role as a judge is not to make policy but to interpret the laws enacted by the people. Thomas was making it clear to the committee that he would limit himself to using the natural law understanding of the Founders in interpreting the Constitution, because he understands that inserting personal beliefs in place of the clear text of the Constitution would destroy the ideas of federalism inherent in the Constitution. This

¹⁰¹ *Ibid.*

¹⁰² Scott D. Gerber, *First Principles: The Jurisprudence of Justice Clarence Thomas*, (New York: New York University Press, 1999), 41.

¹⁰³ *Ibid.* at 43.

type of constitutional interpretation would be nothing more than legal positivism, which Thomas rightly rejects.

In a speech in honor of the deeds of President Lincoln, Clarence Thomas stated that most important principle for a justice of the Supreme Court is “to protect our Constitution and the principles that underlie our Constitution.”¹⁰⁴ As a Supreme Court Justice, Thomas views that it is his task to separate the principles from the compromises of the Constitution. The only way to separate the principles and compromises of the Constitution is to view the Constitution in light of the Declaration of Independence. It is important to note that once natural law principles are put into the Constitution, it ceases being natural law and becomes positive law of society. Natural law principles, however, remain, in part, in the Constitution. The harder undertaking is to find those principles and separate them from the compromises of the Constitution. For Justice Thomas, more important than any judicial philosophy is the importance of the Constitution and the natural law principles which underlie the People’s document.¹⁰⁵

Justice Thomas’s Cornerstone of Equality

The natural law principle of equality is the cornerstone on which Justice Thomas rests his judicial foundation. Thomas, who called Abraham Lincoln’s use of natural law the most powerful argument against slavery, certainly understands the strength that natural law arguments give to the overall

¹⁰⁴ Clarence Thomas, “Virtue of Practical Wisdom,” Speech to the Claremont Institute, February 9, 1999, http://www.claremont.org/publications/pubid.524/pub_detail.asp. Accessed 12 January 2009.

¹⁰⁵ Clarence Thomas, “Virtue of Practical Wisdom,” Speech at the Claremont Institute, February 9, 1999, http://www.claremont.org/publications/pubid.524/pub_detail.asp. Accessed 22 December 2009.

moral foundation of the United States.¹⁰⁶ Thomas's thoughts on the relationship between slavery and the principle of equality greatly helped solidify his devotion to the Founder's natural law principles.

Thomas began by asking how a country that was founded on equality could insert pro-slavery clauses into the Constitution. If the Founders were really committed to the natural rights arguments of the Declaration of Independence why did they let slavery subsist in the new Union? Thomas noted that even Abraham Lincoln, the Great Emancipator, "the man most known for bringing an end to slavery in this corner of the earth, was himself willing to compromise with that heinous institution."¹⁰⁷ How could Justice Thomas, himself the descendant of slaves, look at this country and call its principles good?¹⁰⁸ Or was the Founding as flawed as so many historians and past justices of the Court claimed it to be?

To answer these questions, we must look at the infamous case of *Dred Scott v. Sanford* (1857). Dred Scott, a slave, was taken by his master Dr. John Emerson into Illinois and the Wisconsin Territory where slavery was prohibited under the Northwest Ordinance of 1787.¹⁰⁹ Emerson moved his family around the United States quite frequently because of his job as a surgeon for the United States Army. Scott was later moved back to Missouri and sued for his freedom in court. Years later, the case was

finally appealed to the Supreme Court where a ruling would either conform to the ultimate principles of the Constitution or lead further down the road to civil war.

The Court ruled in a 6 – 2 decision which was anchored by the 123-page opinion of Chief Justice Roger B. Taney. Chief Justice Taney, a southern slave holder himself, began the ruling by stating that the "duty of the court is to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted."¹¹⁰ Taney explains here that he is going to employ original intent jurisprudence, which is completely traditional and unremarkable. According to Chief Justice Taney, however, the Founders' original intentions were completely pro-slavery.

The opinion of the Court found that because Scott was not a citizen, he did not have standing to sue in federal court.¹¹¹ In a sweeping obiter dictum Justice Taney stated that Congress did not have the power to keep slavery out of the territories.¹¹² For Taney, the Fifth Amendment did not consider the Negro to be a person, and since slaves were property held by their masters, Negroes were in fact to be considered not as man but as property by the Founders.¹¹³ The Founders never meant slaves to be included in the phrase "all men are created equal" because they were never meant to be considered as "part of the people."¹¹⁴ Furthermore, slaves were so far inferior that they held no rights for which any man was

¹⁰⁶ Clarence Thomas, "Speech Before the Pacific Research Institute," August 10, 1987, 12.

¹⁰⁷ Clarence Thomas, "Virtue of Practical Wisdom," Speech at the Claremont Institute, February 9, 1999, http://www.claremont.org/publications/pubid.524/pub_detail.asp. Accessed 22 December 2009.

¹⁰⁸ *Ibid.*

¹⁰⁹ Under the Northwest Ordinance of 1787, slavery was outlawed in the territories which became the present day states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota.

¹¹⁰ *Dred Scott v. Sanford*, 19 How. (60 U.S.) 393, in David M. O'Brien, *Constitutional Law and Politics Vol. Two: Civil Rights and Civil Liberties*, Fifth Edition., (New York, NY: Norton & Company, 2003), 1339.

¹¹¹ *Ibid.* at 1339.

¹¹² *Ibid.* at 1342.

¹¹³ *Ibid.* at 1340.

¹¹⁴ *Ibid.* at 1340.

bound to respect.¹¹⁵ Chief Justice Taney laid his conclusion on the claim that the right to own slaves was “expressly affirmed” in the Constitution.¹¹⁶

The logic of the chief justice points the nerve of the entire problem: how could the Founders have agreed that all men are created equal when in practice, they seemed to act contrary to those beliefs? Surely the chief justice did not want to suggest that the Founders were hypocrites, going against their own language in the Declaration, and so, from those premises, he logically concluded that the Founders never meant slaves to be counted as part of mankind. Since the Founders let the institution of slavery stand firm, they must have never been trying to rid the country of the institution in the first place. The chief justice even claimed that if “all men are created equal” had been written in 1857, slaves would have been included as part of the people because of the rise in public opinion of the Negro since the time of the Founding.¹¹⁷ The ruling of the Court, in Abraham Lincoln’s view, caused the “crisis of the house divided” and ultimately led to the Civil War.¹¹⁸

Lincoln saw that once public opinion garnered enough support, another case could make it unconstitutional for states to vote slavery down, essentially making the Supreme Court supreme over the rights of the people.¹¹⁹ Not only would slavery subsist in those states in which it was already legal, it would become impossible to ever vote slavery down in any new territory.

Furthermore, not only would territories be unable to vote out slavery but Taney’s conclusions provided that it was impossible for new states to vote slavery down; a vote to keep slavery out of a newly formed state would thereby deprive a citizen of their right to hold property in a slave under the protections of the chief justice’s interpretation of the Fifth Amendment.

The first question that should be asked after reading the *Dred Scott* decision is not whether the Supreme Court usurped power from Congress but whether slavery is ultimately right or wrong.¹²⁰ The Supreme Court had the right to give a ruling in this case because the Compromise of 1850 ultimately left it to the Court to decide cases dealing with the status of slavery in the territories.¹²¹ The Court ruled that slavery was one of the original intentions of the Founders and validated the expansion of that institution into the western territories.

In a letter to Alexander Stephens, a representative from Georgia who would soon become the vice-president of the Confederacy, Abraham Lincoln wrote “[Y]ou think slavery is *right*, and ought to be extended; while we think it is *wrong* and ought to be restricted. That I suppose is the rub. It certainly is the only substantial difference between us.”¹²² For Lincoln, and for Thomas, the question was not about the power of the Supreme Court or the legislature; the main point of contention was whether human equality of the Declaration was true or not. Since the country rests on the foundation of equality, the understanding

¹¹⁵ *Ibid.* at 1340.

¹¹⁶ *Ibid.* at 1342.

¹¹⁷ *Ibid.* at 1340.

¹¹⁸ Abraham Lincoln, *Abraham Lincoln: His Speeches and Writings*, Roy P. Basler ed., (Cleveland, Ohio: Da Capo Press, 2001), 372. “A House Divided: Speech Delivered at Springfield, Illinois,” June 16, 1858.

¹¹⁹ *Ibid.* at 356, “The Dred Scott Decision: Speech at Springfield, Illinois” June 26, 1857.

¹²⁰ Harry V. Jaffa, *Original Intent and the Framers of the Constitution*, (Washington D.C.: Regnery Publishing Inc., 1994), 77.

¹²¹ Harry V. Jaffa, *Storm Over the Constitution*, (Lanham, MD: Lexington Books, 1999), 40.

¹²² Abraham Lincoln, *Abraham Lincoln: His Speeches and Writings*, Roy P. Basler ed., (Cleveland, Ohio: Da Capo Press, 2001), 568, “Letter to A.H. Stephens,” December 22, 1860. (Italics in original).

of what equality means is of central importance. In Lincoln's mind, as well as in Thomas's understanding, equality is the cornerstone of the entire government.¹²³ A constitutional argument could be only made if *a priori* man recognized each other as man. If man was not considered to be equal, the principles of liberty could never be fully realized; if man was not equal in certain natural rights, the *novus ordo seclorum* would be nothing more than a lie.

Clarence Thomas reasoned that the *Dred Scott* decision undermined the ideas of the Founders in such a way that it put the country in complete opposition to their true original intent. Justice Thomas stated the following on the effects of the *Dred Scott* decision:

Chief Justice Taney, too, compromised with slavery. In his infamous opinion for the Court in the *Dred Scott* case, he gave effect to the fugitive slave clause. But he did much more: he gave force to the compromise of 1787 in a way that severely and permanently crippled the principles of the Declaration itself. His compromise with slavery was, thus, a capitulation on the question of principle, not an exercise of prudence and ultimate furtherance of principle.¹²⁴

Thomas found that the ruling of the Court in *Dred Scott* completely overran the Founders' compromises because slavery would be allowed to grow where it was originally intended to die away. Where slavery was originally compromised on the

basis of prudence and necessity, it would now be allowed to grow without any kind of limits. Thomas saw that because of Chief Justice Taney's assertions, the anomaly of slavery could become a permanent rejection of the Declaration of Independence. Even more so, Taney's implicit claim was that positive law of the Constitution could somehow change the being of a person. This dangerous precedent would seemingly be used again after Taney's death by the Third Reich in Germany. All of these facts led Thomas to assert that Taney's new compromise was completely against the true original intentions of the Founders precisely because the chief justice did not look for the principles underlying the Constitution.¹²⁵

As Justice Thomas has asserted, human equality is not a compromise: it is a principle of truth that cannot be voted up or down by a majority. Equality is the principle which forms the bedrock of the entire Union and without it, there can be no legitimate government built on the consent of the governed. It is this principle, the moral touchstone of the Union, which the chief justice in *Dred Scott* completely cast aside.

Contrary to the improper and dangerous jurisprudence of Chief Justice Taney, Justice Thomas found that the higher law of the Declaration of Independence needed to be a guide. For Thomas, true original intent in no way can be sympathetic to the supposed "original intent" of Justice Taney's making. Properly understood, original intent is the "fulfillment of the ideals of the Declaration of Independence, as Lincoln, Frederick Douglass, and the Founders understood it."¹²⁶ Frederick Douglass, one of Thomas's heroes, held in high importance the natural law principles

¹²³ Harry V. Jaffa, *A New Birth of Freedom*, (Oxford: Rowman & Littlefield Publishers, Inc., 2000), 81.

¹²⁴ Clarence Thomas, "Virtue of Practical Wisdom," Speech at the Claremont Institute, February 9, 1999, http://www.claremont.org/publications/pubid.524/pub_detail.asp. Accessed 26 November 2008.

¹²⁵ Clarence Thomas, "Towards a 'Plain Reading' of the Constitution—the Declaration of Independence in Constitutional Interpretation," *1987 How L.J.* 691 at 693.

¹²⁶ *Ibid.* at 693.

underlying the Constitution. In the words and deeds of Frederick Douglass do we see the belief in the fulfillment of the Founders' original intentions.

Frederick Douglass, like Lincoln and Thomas, believed that the Declaration of Independence was the original intent of the Founders. Douglass's arguments on equality of the races stemmed from his belief in the natural law arguments of the Declaration. His philosophies rose out of the Garrisonian tradition of the abolitionist movement.

Early on in his political career Douglass believed, as William Lloyd Garrison preached, that the Constitution was a pro-slavery document.¹²⁷ For Garrison and his followers, any compromise with slavery was unjust, and furthermore, men like Lincoln who would obey the Fugitive Slave Clause to preserve the rule of law were seen as collusioners with slave holders in the South. The United State government was seen as completely illegitimate and the laws passed by that government were equally as illegitimate. The Constitution was completely rejected on the basis that it was a pro-slavery document and it was thus null and void because it violated God's law, the higher law.¹²⁸ The proper way to deal with slavery in the eyes of many radical abolitionists was quick, decisive, and extreme action. Since the government was already illegitimate, revolution was the usual prescribed method of many extreme abolitionists.¹²⁹ Douglass gradually realized that the extreme views of Garrison and his radicals did much damage to the cause of the abolition of slavery.¹³⁰

Frederick Douglass's thinking matured and his views on the subject changed. Douglass believed that the proper

way for reconciliation between the races stemmed from the natural law arguments of the Founders. He believed slavery constituted a gross violation of natural justice and violated the natural rights of blacks held in unjust bondage.¹³¹ Douglass, unlike many in the abolitionist movement, concluded that the Constitution was decidedly anti-slavery even though it contained clauses which sanctioned slavery. Just as Thomas would find, Douglass found that the three-fifths clause of the Constitution actually supplied incentives to Southern states to liberate their slaves, and he also found that the slave trade clause of the Constitution—Article I, section 9—was merely a temporary protection that had long since expired.¹³² Just as Taney was wrong in his interpretation of the Constitution likewise were Garrison and his followers.

For Douglass, the Founders did share the abolitionists' principle of disapproving slavery but they did not share their principle of immediate emancipation without preconditions.¹³³ The Founders did not press for immediate abolition because it "would have been dangerously imprudent, imperiling a fragile Union to achieve an end that, they supposed, would likely be achieved in any event in the reasonable near future."¹³⁴ Without the prudence of the Founders, Douglass knew that slavery was destined to survive forever, but because of their actions, slavery was put into a recession. Though Douglass was dismayed that the Founders did not do enough to stamp out slavery as much as he wished, they still deserved much credit for what they did accomplish given the circumstances. Douglass's great concern in his time was whether the people would vindicate the principles of the Founding or reject them in favor of natural science or

¹²⁷ Peter C. Myers, *Frederick Douglass: Race and the Rebirth of American Liberalism*, (Lawrence, Kansas: University of Kansas Press, 2008), 84.

¹²⁸ *Ibid.* at 84.

¹²⁹ *Ibid.* at 84.

¹³⁰ *Ibid.* at 84.

¹³¹ *Ibid.* at 93.

¹³² *Ibid.* at 94, 97.

¹³³ *Ibid.* at 100.

¹³⁴ *Ibid.* at 100.

empirical mathematics. For Douglass, the only way to be faithful to the intent of the Constitution was to be faithful to the principles of the Declaration of Independence which set the equal recognition of one's equal natural rights as the foundation of this country.

From that logic, Justice Thomas reasoned that in 1787, slavery could not simply be halted and cast out. Slavery was so deeply embedded that it would be impossible to completely write it out of the Constitution. Lincoln and Thomas viewed that the Founders used prudence and principle so that slavery would be put into the "course of ultimate extinction."¹³⁵ Compromises, however, had to be made in order to achieve the ends of the Constitution—being derived from the Declaration of Independence—as set forth in the Preamble. The only way which the principle of equality could be fulfilled was to work towards the eventual end of slavery. The problem which Taney dealt with was that the Constitution seemed to implicitly give sanctions to slavery. This seemed to be plain hypocrisy considering what the Founders said and did. Thomas contended that the Founders knew of their contradiction between the compromises with slavery in the Constitution but that because of necessity and prudence, they took the most just action by dedicating the country upon the great truth of equality.¹³⁶ To prove his thesis, Justice Thomas examined the text of the Constitution to find the Founders' intent.

In the United States Constitution there are several clauses which indicate that slavery was recognized and sanctioned by

the Founders. Article I, Section 2 of the Constitution, which was ultimately repealed by the Fourteenth Amendment, states the following:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons.¹³⁷

The three-fifths clause, as it more commonly known, is misunderstood by most Americans to mean that the Founders concluded slaves were considered to be only three-fifths of a person; this clause is in fact based on representation, not a legal claim regarding the personhood of a man. At the Constitutional Convention, Southerners wanted slaves to be counted as a full vote so that they could have more representation in the legislature. The North, being opposed to this plan, sought to compromise with the South. A compromise was found and the slave population would only get three-fifths representation. Clarence Thomas reasoned that essentially, the three-fifths clause actually weakened the power of the slave states.¹³⁸ State representation was reduced for Southern slave states and implicitly, the South had an incentive to gain more representation with the freeing of slaves.

For evidence of the Founders' original intentions of the clause, Thomas also looked to *Federalist No. 54* where

¹³⁵ *Ibid.* at 393 "Speech in Reply to Douglas at Chicago, Illinois." July 10, 1858.

¹³⁶ Clarence Thomas, "Towards a 'Plain Reading' of the Constitution—the Declaration of Independence in Constitutional Interpretation," *1987 How L.J.* 691 at 695.

¹³⁷ U.S. Constitution, Article I, Section 2, Clause 3.

¹³⁸ Clarence Thomas, "Towards a 'Plain Reading' of the Constitution—the Declaration of Independence in Constitutional Interpretation," *1987 How L.J.* 691 at 695.

James Madison discussed the topic of slavery. Thomas pointed out on a cursory glance of that essay that Madison used the term “unnatural traffic” when describing slavery.¹³⁹ Madison, noting that slaves were protected against violence by others and could be punished for violence committed against others, stated that “the slave is no less evidently regarded by the law as a member of the society; not as part of the irrational creation; as a moral person, not as a mere article of property.”¹⁴⁰ For Madison, slaves were considered property in the sense that they were owned by their temporal master and because of that fact, the “slave may appear to be degraded from the human rank.”¹⁴¹ For Madison, regardless of the circumstances that the slaves found themselves, they were nonetheless persons of the human species. To deny that fact would be to deny any legitimacy to the guarantee of human equality as espoused in Declaration of Independence.

Article IV, Section 2, Clause 3, of the Constitution, which was revoked by the Thirteenth Amendment, is perhaps the most obvious sanction to slavery. The article states the following:

No Person held to Service or Labour in one State, under the laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the party to whom such Service or Labour may be due.¹⁴²

This article is a sanction to slaveholders that if their slave escaped into

another state, they would be delivered up to the party for which their service was still due. This seems to be an obvious proof that Taney was right and that slaves were not thought of to be included in the phrase “all men are created equal.” It should be noted, however, that the word slave is in no part of this clause or, for that matter, anywhere else in the Constitution. Slaves are referred to as people which indicates that they were recognized as human, part of the species homo sapiens.

During the drafting period of the fugitive slave clause, the words “just” and “legal” were removed from the final draft. The original clause read that slave owners who received back their escaped slaves were “justly claiming their service of labor” and that those slaves were “legally held to Service or Labor in one state.”¹⁴³ The removal of just and legal implies that slavery was only legal because it was sanctioned by positive laws of society; this assertion makes no claim concerning the higher laws of the Declaration. These facts suggest, however, that slavery was ultimately not just and no Founder, unlike John C. Calhoun and his disciples who concluded that slavery was a positive good, would have ever argued for the justness of slavery on any moral basis. James Madison himself noted this much when he stated that the clause was amended “with the wish of some who thought the term legal equivocal, and favoring the idea that slavery was legal in a moral view.”¹⁴⁴ According to Madison, those who framed the clause did not want to give slavery any more sanction than what was required by compromise. From this evidence, it can be determined that slavery was an unfortunate, yet at that time, necessary aberration from the natural law

¹³⁹ *Ibid.* at 695.

¹⁴⁰ James Madison, *The Federalist*, Jacob E. Cooke ed., (Hanover, NH: Wesleyan University Press, 1961), 367-368.

¹⁴¹ *Ibid.* at 367.

¹⁴² U.S. Constitution, Article IV, Section 2, Clause 3.

¹⁴³ Edwin Meese III, et al., *The Heritage Guide to the Constitution*, (Washington D.C.: Regnery Publishing Inc., 2005), 275.

¹⁴⁴ *Ibid.* at 275.

principles set forth in the Declaration of Independence.

For Abraham Lincoln, a nation dedicated to the proposition that all men are created equal, which remained only a proposition until the final outcome of the Civil War, was the ultimate good. Thomas contended that “only a union of all the states—even one tarnished by a compromise with slavery—offered the prospect of putting slavery on the course of ultimate extinction.”¹⁴⁵ Justice Thomas asserted that Lincoln’s obedience to the rule of law—to a constitution which even included a fugitive slave clause—was good, because the rule of law was based upon the recognition that men were endowed by their Creator with certain unalienable equal natural rights, among those being the rights to “Life, Liberty, and the pursuit of Happiness.”¹⁴⁶ Using prudence, the Founders knew the only way to lead slavery to its ultimate end by way of constitutional means was, out of necessity, to compromise with it in the present. Any extreme measures, like the methods radical abolitionists proposed, would ultimately lead to anarchy and slavery because the rule of law would be forever broken. Thomas ended his discussion by noting that “Lincoln’s lesson for us, however, is even more profound: the realization that prudence is sometimes a compromise with principle, in order, ultimately, to vindicate that principle.”¹⁴⁷ In a seemingly ultimate irony, the Founders kept intact an institution of inequality so that in the future, that same institution of inequality could be forever exterminated. The Founders compromised with slavery in

1787, all the while knowing the violations that institution made to the Declaration, so in that in the future, slavery would wither away and die on the vine.

Judge Bork and *Dred Scott*

In analyzing the *Dred Scott* case, Judge Bork has written that the error of Chief Justice Taney was to read slavery into the equal protection component of the due process clause of the Fifth Amendment.¹⁴⁸ By being consistent with his position, Judge Bork has to conclude that not only does the Constitution not mention slavery, it in fact denies any protections to slaveholders. For Bork, Taney simply invented the right to own a slave.¹⁴⁹ Judge Bork categorically denies that there is any clause in the Constitution which even sanctions slavery.¹⁵⁰ From this position, one must wonder what the words “other persons” stated in three-fifths clause were directed towards.

Bork then goes on to dismiss those with the view that the Founders’ intent was to place slavery into its ultimate extinction. Judge Bork stated that Lincoln later abandoned that view and he writes off the entire theory by stating that “[w]e may discuss the Court’s performance, however, without assessing the accuracy of that belief.”¹⁵¹ Although not believing in the natural law principles of the Founders

¹⁴⁵ Clarence Thomas, “Virtue of Practical Wisdom,” Speech at the Claremont Institute, February 9, 1999, http://www.claremont.org/publications/pubid.524/pub_detail.asp. Accessed 3 December 2009.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ Robert H. Bork, *The Tempting of America: The Political Seduction of the Law*, (New York: Touchstone, 1990), 29.

¹⁴⁹ *Ibid.* at 29.

¹⁵⁰ In a footnote to a piece Harry Jaffa wrote for the Claremont Review entitled “The False Prophets of Conservatism,” Jaffa states that he confronted Bork about three specific places where the Constitution recognized slavery. Jaffa remembers that Bork “exploded in anger” but after a while, he did admit that slavery was recognized but “only ‘in a few places.’” http://www.claremont.org/publications/pubid.670/pub_detail.asp. Accessed 14 November 2008.

¹⁵¹ See Footnote #148.

himself, even Chief Justice Taney was able to identify the three sections of the Constitution which erected safeguards for slave owners.¹⁵² Surely those articles prove that slavery was a protected right, albeit a right under positive law being contrary to natural law.

Without having to face the question of how one distinguishes principle and compromise, Judge Bork simply forgoes the entire argument by stating that there is no right to own slaves in the Constitution. If he admitted that there were sanctions to slavery, he would then have come to the same conclusion that Taney came to in his opinion: slavery was sanctioned and the Federal Government had no right to regulate slavery in the territories making it impossible to correct the contradictions of the Constitution. Since Judge Bork does not believe in the validity of the natural law of the Declaration of Independence, his argument is ultimately flawed. Interestingly enough, Judge Bork has also just done what he charges those who believe in a “living Constitution” of doing—reading their own preferences into the Constitution without regard for the plain text.

Justice William Brennan, the chief expositor of living constitutionalism, held the opinion that capital punishment was against “human dignity” and it was therefore unconstitutional.¹⁵³ The text of the Fifth Amendment delineates between capital crimes and other crimes; implicitly is the idea that punishment for capital crimes is different than all other crimes— capital

punishment is reserved for those who have been found guilty of a capital crime. The evidence for Justice Brennan’s opinion is, however, found nowhere in the text of the Constitution; it stems from his own beliefs in what and what does not encompass “human dignity.” The foundation of Justice Brennan and Judge Bork are thus found to be one in the same.

The equality of the Declaration not only finds the falseness of divine right but also of other forms of slavery which have trampled men for the ages.

Frederick Douglass stated that:

The manhood of a slave is conceded. It is admitted in the fact that Southern statute books are covered with enactments forbidding, under severe fines and penalties, the teaching of the slave to read or to write. When you can point to any such laws, in references to the beasts of the field, then I may consent to argue the man manhood of the slave.¹⁵⁴

Douglass, repeating Madison’s logic in *Federalist No. 54*, reasoned that human-kind certainly treated blacks as though they were people under the law. Slaves were subjected to same laws and punishments as everyone else. The Constitution itself certainly implies nothing other than the fact that slaves were considered to be people. As Thomas pointed out, slaves were ultimately considered to be both people and property, the great compromise of the Constitution.¹⁵⁵ Slaves were people in the sense that the

¹⁵² *Dred Scott v. Sanford*, 19 How. (60 U.S.) 393, in David M. O’Brien, *Constitutional Law and Politics Vol. Two: Civil Rights and Civil Liberties*, Fifth Edition., (New York, NY: Norton & Company, 2003), 1341.

¹⁵³ *Branch v. Texas*, 408 U.S. 238, 92 S.Ct. 2726 (1972), in David M. O’Brien, *Constitutional Law and Politics Vol. Two: Civil Rights and Civil Liberties*, Fifth Edition, (New York, NY: W&W Norton & Company, 2003), 1156.

¹⁵⁴ Frederick Douglass, “What to the Slave is the Fourth of July?” in *The Norton Anthology of African American Literature*, 2nd Edition, Henry Louis Gates, Jr. gen. ed., (New York, NY: W&W Norton and Company, 2004), 469.

¹⁵⁵ Clarence Thomas, “Towards a ‘Plain Reading’ of the Constitution—the Declaration of Independence in Constitutional Interpretation,” 1987 *How L.J.* 691 at 695.

Founder's recognized them as men, but they were unjustly regarded as the property of a temporal owner. How could Justices Holmes, Rehnquist, and Scalia give a rightness or wrongness to slavery just based on a majority vote? If this was the case then Stephen Douglas's idea of popular sovereignty, the logical end of Holmes, Rehnquist, and Scalia's thought, must have been correct.

In the famous Lincoln-Douglas debates of 1858, Stephen A. Douglas proposed the idea of popular sovereignty, the middle ground between Radical Republicans who wanted to rid the country of slavery by any means necessary and Southern Democrats who wanted to expand slavery into the western territories. Douglas's moderate position came about because of violence which had erupted in the Kansas-Nebraska territories in 1854. For Douglas, popular sovereignty meant that slavery was up to the vote of the citizens living in the territories. Underlying this position was the idea that slavery needed what Douglas called "friendly" legislation to exist in those territories where slavery would be accepted as part of the positive law, and in territories which voted against slavery, anti-slavery enforcement would follow.¹⁵⁶ Douglas's position seemed completely unoriginal and consistent with the ideas of democracy.

For Lincoln, Douglas's position simply could not be so because questions of morality cannot be deemed right or wrong simply by an up or down vote. Lincoln proposed that "no man can logically say he don't care whether a wrong is voted up or voted down."¹⁵⁷ For Lincoln, no majority

had the power to decide to do an act completely contrary to democracy itself. No majority had the right to decide to do something tyrannical because that would shatter the bonds of legitimate government which is based on the consent of the governed. The basis of the consent of the government is the equal recognition of every man's equal natural rights. Slavery, which is tyrannical, completely violates the foundational principles of equality, the central tenant of any legitimate government.

A majority cannot determine who is and who is not a person of the human species. This stems from the fact of human equality as asserted in the Declaration. If man is not God or beast, he cannot be the slave of another man unless he finds no wrong in being ruled himself. Lincoln commented that "although volume upon volume is written to prove slavery a very good thing, we never hear of the man who wishes to take the good of it, by being a slave himself."¹⁵⁸ Man cannot vote for slavery because he cannot be the master of another man—he is not a natural ruler of man because he is not God. Is slavery wrong simply because a majority voted it down or it is wrong because it is a complete violation of the principle of human equality? From that question, Clarence Thomas came to the conclusion that slavery is wrong because it is a violation of the principle of equality set by the laws of Nature and Nature's God.

The principle of equality proved to be the basis for Thomas's natural law philosophy. Justice Thomas saw the wrongness of chattel slavery, and he also saw the disastrous effects of judicial philosophies not founded upon the natural law under-

¹⁵⁶ Harry V. Jaffa, *A New Birth of Freedom*, (Oxford: Rowman & Littlefield Publishers, Inc., 2000), 323.

¹⁵⁷ Abraham Lincoln, *The Lincoln-Douglas Debates*, Robert W. Johanssen ed., (New York: Oxford University Press, 1965), 319.

¹⁵⁸ Abraham Lincoln, *Abraham Lincoln: His Speeches and Writings*, Roy P. Basler ed., (Cleveland, Ohio: Da Capo Press, 2001), 279, "Fragments: On Slavery," [July 1, 1854?].

standing of the Founders. Justice Taney's interpretations—which inherently reject natural law—have increasingly pervaded the philosophies of those who subscribe to finding the original intentions of the Founding Fathers. Taney's views, not those of Lincoln, Douglass, or the Founders, seem to be the general views held by many Americans today.

Without an underlying recognition of the Founders' natural law principles, the same base of moral relativism flows under both original intent and living constitutionalism. Without the aid of natural law both methods of jurisprudence have a core which is subjective to each justice, allowing for the injection of personal beliefs and feelings into constitutional interpretation. Judges can easily usurp their power, as can any branch, when they do not recognize the inherent principles of the Constitution. By not recognizing those principles, legal positivism and relativism rule. While there appears to be a huge gap in the results between those who believe in either the "living Constitution" or originalism, these justices are unfortunately, at their core, in agreement of the ultimate principle—the rejection of the Declaration of Independence.

Equality Realized: Justice Thomas and the Color-Blind Constitution

Since his nomination to the Supreme Court, Justice Thomas's opinions are often the subject of attack and criticism. Few, however, have dared to get past the false partisan clichés and taken the time to seriously study his opinions. Thomas's opinions show a devotion to the natural law beliefs of those who founded the country. The best examples of Justice Thomas's continued reliance on the Founder's natural law can be best viewed in cases that concern

the principle of equality, the central principle of Thomas's philosophy.

Before we examine Justice Thomas's understanding of the principle of equality, we must examine the dissent of Justice John Marshall Harlan in *Plessy v. Ferguson* (1896). In his dissent, Justice Harlan eloquently bases his understanding of the meaning of equality, as stated in the Fourteenth Amendment, on the natural law philosophies of the Declaration of Independence. Justice Harlan's reliance on those principles led him to conclude that the Constitution is color-blind—a doctrine which Justice Thomas has concluded is in the correct spirit of the Founding.¹⁵⁹

In *Plessy*, the Court concluded, behind the majority opinion of Justice Brown, that segregated railroad cars did not violate the Equal Protection Clause of the Fourteenth Amendment. The crux of the opinion was set forth on the now infamous doctrine of "separate but equal." Justice Harlan parted with the opinion of the Court and issued a dissent which recognized the Founders' understanding of equality that underlies the Fourteenth Amendment.

Justice Harlan began this dissent by clearly stating the text of the Fourteenth Amendment.¹⁶⁰ He concluded that the purpose of this amendment was to "greatly [add] to the dignity and glory of American

¹⁵⁹ Clarence Thomas, "Towards a 'Plain Reading' of the Constitution—the Declaration of Independence in Constitutional Interpretation," *1987 How L.J.* 691 at 700.

¹⁶⁰ U.S. Constitution, 14th Amendment, Section 1 reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

citizenship, and to the security of personal liberty.”¹⁶¹ Harlan stated that the Thirteenth Amendment outlawed slavery and other “disabilities that constitute badges of slavery or servitude.”¹⁶² The Thirteenth Amendment decreed universal civil freedom in this country but it did not forge a path to citizenship for those who had been enslaved.¹⁶³ These amendments in effect not only ended slavery but further entrenched the United States in a true understanding of the principle of equality.

Justice Thomas found that Harlan’s explanation of the original intent of the Civil War amendments was a splendid analysis because it was completely grounded in “the Founders’ arguments regarding the universal principles of equality and liberty.”¹⁶⁴ Before these amendments were in place, safeguards provided for slave owners were in constant tension with the overall spirit and ends of the Constitution.¹⁶⁵ This dangerous tension, which had culminated in the Civil War, was ended by the passage of the Civil War Amendments. For Thomas, the text of this section of the Constitution, read in the light of the “laws of Nature and of Nature’s God,” “points in the direction of abolition, though not through violent means” but

through a prudent fulfillment of the higher laws of the Declaration of Independence.¹⁶⁶

In his dissent Justice Harlan saw that distinctions made on race could not be considered constitutional because these divisions divide men based on factors which are natural, factors which men do not hold dominion over. For Harlan, the “sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments.”¹⁶⁷ The recognition of these underlying natural law principles is the only way that legitimate republican self-government can be guaranteed.

The recognition of equal protection under the law means, first and foremost, that every man is equally protected in his equal natural rights—the reason for establishing a government. Race in no way affects the principle that men everywhere have equal natural rights. Race based discrimination thus destroys the principle of all being equal before the rule of law which binds civil society together.

Justice Harlan concluded his dissent by stating the following:

In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.¹⁶⁸

The second, and perhaps most important principle which Justice Harlan put forth relates to his understanding of

¹⁶¹ *Plessy v. Ferguson*, 163 U.S. 537, 555.

¹⁶² *Ibid.* at 555.

¹⁶³ *Ibid.* at 555.

¹⁶⁴ Clarence Thomas, “Towards a ‘Plain Reading’ of the Constitution—the Declaration of Independence in Constitutional Interpretation,” *1987 How L.J.* 691 at 701.

¹⁶⁵ U.S. Constitution, Article IV, Section 4—known as the Guarantee Clause—reads:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

¹⁶⁶ Clarence Thomas, “Towards a ‘Plain Reading’ of the Constitution—the Declaration of Independence in Constitutional Interpretation,” *1987 How L.J.* 691 at 702.

¹⁶⁷ *Plessy v. Ferguson*, 163 U.S. 537, 560.

¹⁶⁸ *Ibid.* at 559.

citizenship. Throughout his dissent Harlan consistently spoke not only of the rights of persons but he added to the idea of personhood by using the term citizen. As Justice Thomas concluded “citizenship requires both rights and duties; and what is a more important duty than service to one’s country in time of war.”¹⁶⁹ Men could not become citizens without first fulfilling their required duties for citizenship. This principle comes from the Thomistic idea that one must fulfill certain duties or obligations in order to obtain the rights of civil society.¹⁷⁰ It is in this way that the pathway to citizenship is open to anyone of any color. Justice Harlan concluded that the political implications of the principle of equality therefore made all men equal before the law, regardless of race. Justice Harlan ended his dissent with the prophetic assertion that “the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case.”¹⁷¹ Harlan knew that because of the Court’s abandonment of natural law principles, *Plessy* would be overturned, but he hoped, however, that when overturning *Plessy* the Court would return to the higher law principles of the Constitution. Justice Thomas found that only by appealing to those great truths, which Justice Harlan eloquently expounded in *Plessy*, would there be an adequate answer to the social problems that have continually plagued the nation.

In 1995, the Supreme Court decided *Adarand Constructors v. Peña*, a case based around the interpretation of the Equal

Protection Clause of the Fourteenth Amendment. The U.S. Department of Transportation awarded the building of highways and roads in Colorado to Mountain Gravel. Mountain Gravel, in turn, offered sub-contracts to construction companies for the building of guardrails along the sides of the state highways. The highest bid was placed by Gonzales Construction, a company that was also certified by the Small Business Association as a disadvantaged business, and the lowest bid was submitted by Adarand Constructors. The contract was ultimately awarded to Gonzales Construction because the label of disadvantaged business qualified Mountain Gravel for extra monetary incentives. Representatives for Adarand Constructors filed suit in Court on the claim that the bonus incentive clause that caused Adarand to lose the contract was unconstitutional. The constitutional issue at hand involved whether the Equal Protection Clause of the Fourteenth Amendment to the Constitution permitted preferences built on race.

Justice Thomas wrote a concurring opinion in which he outlined his belief that the original intent of the Equal Protection Clause forbids all race based preferences. Thomas began his concurrence by stating that he agreed with majority decision that strict scrutiny applies to all classifications on race.¹⁷² Strict scrutiny, the Court’s highest standard of classification, is composed of three prongs: the first being that there must be a pressing public necessity, the second being a compelling state interest, and the third being the government’s use of racial classifications must be narrowly tailored.¹⁷³ Justice Thomas, however, disagreed with the notion that race classifications are a part of the overall spirit of the Equal Protection Clause. According to Justice Thomas,

¹⁶⁹ Clarence Thomas, “Towards a ‘Plain Reading’ of the Constitution—the Declaration of Independence in Constitutional Interpretation,” 1987 *How L.J.* 691 at 702.

¹⁷⁰ St. Thomas Aquinas, *On Law, Morality, and Politics*, William P. Baumgarth and Richard J. Regan, S.J. eds., (Indianapolis: Hackett Publishing Company, 1988), 69.

¹⁷¹ *Plessy v. Ferguson*, 163 U.S. 537, 559.

¹⁷² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), 240.

¹⁷³ *Grutter v. Bollinger*, 539 U.S. 306 (2003), 351.

“[g]overnment cannot make us equal; it can only recognize, respect, and protect us as equal before the law.”¹⁷⁴ Nowhere in the Constitution is there a way to subjugate the clear implications of equality with current notions of equality.¹⁷⁵ Even the best intentions are not enough of a reason to violate the principle of equality which underlies the Constitution.

For Thomas, “it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.”¹⁷⁶ Thomas linked this back to the moral intent of the Fourteenth Amendment. Justice Thomas saw that such classifications have a destructive impact on society; in this instance he is implicitly pointing towards the nation's past history of slavery. The discriminatory classifications which chattel slavery imposed on this country—classifications built on nothing more than race—are no better than the current racial classifications which are intended to advance racial minorities.

Current race classifications, while they may be in the correct spirit—unlike those imposed by chattel slavery—have unintended consequences which “can be as poisonous and pernicious as any other form of discrimination.”¹⁷⁷ Thomas noted that this form of racial paternalism has caused minorities to have increased “attitudes of superiority” while at the same time, they have given minorities the mark of inferiority and caused them to feel dependent and entitled to certain jobs.¹⁷⁸ The reciprocal of this is the fact that whites stigmatize all minorities because they think that they are

somehow not qualified for certain jobs. This current understanding of racial paternalism “is at war with the principle of inherent equality that underlies and infuses our Constitution.”¹⁷⁹ After this statement Justice Thomas directly cited the first paragraph of the Declaration of Independence, the promise of equality to which Founders subscribed.

For Justice Thomas, the principle of equality is the cornerstone of republican self-government.¹⁸⁰ Being equal under the law implies that any distinction on race, or any other human classification, is forbidden because this destroys the essential elements of equality which bind this nation together. The elements which make self-government operational would be unnaturally skewed by engineered social programs without any underlying philosophy other than some current notion of equality.

Justice Thomas again put forth his views on the principle of equality in *Grutter v. Bollinger* (2003). The case in *Grutter* revolved around the Michigan Law School's affirmative action program. Barbara Grutter, a white woman from Michigan who was ultimately rejected admittance to the school, maintained that she was rejected because of her race. The Court handed down a 5-4 decision which stated that the policies of the school were constitutional because those policies were “narrowly tailored” and that race was a “compelling interest.” The Court found that the law school's interest in obtaining a “critical mass” of minority students helped to promote better education through diversity. Interestingly, Justice O'Connor's opinion declared that ultimately, affirmative action should be dropped in favor of the color-blind view in 25 years. Justice Thomas

¹⁷⁴ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), 240.

¹⁷⁵ *Ibid.* at 240.

¹⁷⁶ *Ibid.* at 240.

¹⁷⁷ *Ibid.* at 241.

¹⁷⁸ *Ibid.* at 241.

¹⁷⁹ *Ibid.* at 240.

¹⁸⁰ Clarence Thomas, “Towards a ‘Plain Reading’ of the Constitution—the Declaration of Independence in Constitutional Interpretation,” *1987 How L.J.* 691 at 701.

disagreed with the ruling of the Court because of their abandonment of the principle of equality in the Declaration of Independence.

In his dissent, Justice Thomas relied on the principles of the Declaration of Independence. In Justice Thomas's view, the Constitution is color-blind and abhors any kind of racial classifications no matter the time in history. Justice Thomas, using this understanding of the Constitution, then questioned the many procedures which the Court used in getting to their final conclusion.

Justice Thomas's belief is that "every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."¹⁸¹ The opinion of the "Court upholds the use of racial discrimination as a tool to advance the Law School's interest in offering a marginally superior education while maintaining an elite institution."¹⁸² Just as in his dissent in *Adarand*, Justice Thomas implied that chattel slavery, unlike every other form of slavery which had previously existed, was discriminatory based exclusively on the color of one's skin. Affirmative action—although its intentions are completely opposite to that of slavery—ultimately uses race-based discrimination. Justice Thomas boldly concluded his dissent by stating that "the majority has placed its *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause."¹⁸³

The Court's reliance on social science and a myriad of other tests have steadily taken precedence over constitutional arguments. On this front Justice Thomas grappled with the obvious inconsistency in

the logic of the Court. As Thomas noted in his dissent, the Court overlooked many social science tests that suggested that engineered diversity actually impairs the learning of black students.¹⁸⁴ This fact brings out an obvious problem: could *Brown v. Board of Education* (1954), the case which ultimately overruled the Court's previous findings in *Plessy*, be overruled itself if new social science data emerged and refuted the past findings by the Court? Justice Thomas also noted that the implicit findings by the majority indicated that they alone think they are the final arbiters of judging when discrimination is good or bad.¹⁸⁵ Oddly enough, one cannot find this power anywhere in Article III of the Constitution. Justice O'Connor's declaration that affirmative action programs, like the one at the Michigan law school, would be found unconstitutional in roughly 25 years also presents problems. As Justice Thomas concluded, how could the majority know that in 25 years the gap between whites and blacks will be closed?¹⁸⁶ Even more, where does the Court have the power to even make such a statement? Is not the Court called on to interpret the Constitution, not base their rulings on theories of social science and the latest psychological findings? When natural law is abandoned, it is these kinds of arguments which take its place.

Thomas's beliefs on equality ultimately rest on the Founders' beliefs of equality as expressed in the Declaration of Independence. His beliefs on equality stem from his commitment to upholding the natural law foundations of the Constitution. From Thomas's understanding, the Thirteenth and Fourteenth amendments are the fulfillment of the Founder's original intent. It is through those amendments that the

¹⁸¹ *Grutter v. Bollinger*, 539 U.S. 306, 355.

¹⁸² *Ibid.* at 356.

¹⁸³ *Ibid.* at 378.

¹⁸⁴ *Ibid.* at 364-365.

¹⁸⁵ *Ibid.* at 371.

¹⁸⁶ *Ibid.* at 370.

Constitution finally fulfilled the principles of the Declaration of Independence.

The natural law to which the Founders' subscribed does not permit classifications based on race because race is not what determines one's natural and civil rights. The Declaration of Independence states that every man has the ability to access certain self-evident natural rights, regardless of what his race may happen to be. The political realization of this principle led the Founders to place all men equal before the law. This was set as the foundation of the country so that all men would be equal not only in their natural rights, but in their rights as citizens as well. Any classification which is built on a false caste system, such as race, violates this principle. The Founders limited even the political effects of economic classes and the social position of one's family. The fact that no titles of nobility were to be granted under the Constitution certainly indicates the extent of Founders' thoughts on this subject. The falseness of the divine right of kings was constantly and consistently demonstrated by those of the Founding generation. Thomas Jefferson himself noted that a natural aristocracy built on the principle of equality was to rule in the place of false ideas of natural rulers.¹⁸⁷

The United States was founded upon direct opposition to any violation of one's natural rights, and instead, the natural unequal faculties of man are to reign supreme. By citing "all men are created equal" in his opinions regarding the Fourteenth Amendment, Justice Thomas leaves no doubt that he correctly understands the Founder's principle of equality. For Justice Thomas, and for Justice Harlan, the Civil War Amendments can only be seen as the true fulfillment of the Founder's principles

of equality as enunciated in the Declaration of Independence.

Conclusion

It is unfortunate that natural law has become roundly rejected by both liberals and conservatives. Liberals reject Founding principles on the basis of Progressivism and History. They see false the idea of immutable principles or truths and instead, everything is viewed through the lens of diversity. Liberals tend to see the Founding as morally flawed and corrupt because of the presence of slavery among other atrocities. They condemn the Founding and the Founders because of what they could not do, not what they accomplished. Darwin, Hegel, and Dewey are the true intellectual heirs of the liberal movement today.

Conservatives in large part want to hearken back to Founding principles. They want see the Founders and Lincoln as worthy statesmen to be studied. Many, however, have implicitly rejected natural law because of their agreement with the ideas of states' rights of John C. Calhoun and Southern secessionists—the same John C. Calhoun who denounced natural law and decided to base his beliefs in the "interests" of men. Conservatives, who consistently try to invoke the principles of the Founding, unfortunately fall into traps and pit-falls by those who talk of the compatibility of secession and revolution. Abraham Lincoln, the great re-founder of this nation, has slowly become the enemy, being labeled with charges of starting an unnecessary war, centralizing the power of the Federal Government, and above all, being a racist—all charges that even with the littlest amount of serious study can be completely eviscerated. Going along with these trends, justices and judges have joined public opinion in the rejection of Founding principles.

¹⁸⁷ Letter to John Adams, October 28, 1813.

Beginning with Justice Holmes, and continuing through Justice Rehnquist, Justice Scalia, and Judge Robert Bork, natural law is found to be of no use whatsoever. They believe in everything the Founders did not: legal positivism, historicism, diversity, and relativism. The arguments of the previously discussed justices and judges derive from the dialogue between Socrates and Thrasymachus in Book One of Plato's *Republic*. Thrasymachus's argument was that justice was nothing more than the interest of the stronger. This argument goes against the very concepts of limited democratic government of consent—the very ideas on which this country is built upon. The majority, just by sheer numbers, determines what is just and unjust; reason is found nowhere in this discussion. Ultimately, virtues and principles mean nothing because true and just are found to mean whatever men may subjectively think they mean. Surely if the American people knew of such opinions, would not most be appalled at these claims?

The transcendent principles to which the Founders' appealed need to be rediscovered and appealed to again by all Americans. The opinions of Justice Thomas should be studied seriously by all Americans, because those opinions provide a pathway to the rediscovery of those principles the Founders once called self-evident and unalienable. Unfortunately, we have a long road towards this goal considering the absolute partisanship on display when one even whispers the name of Clarence Thomas. His image has been marred by what many remember from his senate committee hearings. This, not anything to do with American principles, is what is remembered by the public at large.

This country is built upon the greatest principles of any country that has ever existed in human history. Natural law

principles, which are enunciated in the Declaration of Independence, tell us that our rights come not from kings but from God and nature. The people are the source of all power of the government because the people created the government to better protect their natural rights. As Justice Thomas rightly concluded, it was only by appealing to those principles, namely of equality, that slavery was ultimately exterminated. Only by appealing to those principles did the Union triumph in the Civil War and forge "a new birth of freedom" for all men.¹⁸⁸ The principle of equality, which is central in Thomas's thought, provides why all forms of slavery are unjust, being that of a king or of a slave master.

From Justice Thomas can we all learn the truth of American democracy and it is in learning from those self-evident truths that we can strive to realize the principles of the Founding in reality. Through his opinions on the Supreme Court, Justice Thomas can guide us back to the Declaration of Independence and its principles which underlie the Constitution. Through those principles can we realize what has been forgotten by some and rejected by others. The immutable principles of the Declaration of Independence, which Abraham Lincoln called a "standard maxim for free society," must be once again appealed to and heralded by all.¹⁸⁹

¹⁸⁸ Abraham Lincoln, *Abraham Lincoln: His Speeches and Writings*, Roy P. Basler ed., (Cleveland, Ohio: Da Capo Press, 2001), 734. "Address Delivered at the Dedication of the Cemetery at Gettysburg," November 19, 1863.

¹⁸⁹ *Ibid.* at 361, "The Dred Scott Decision: Speech at Springfield, Illinois," June 26, 1857.

