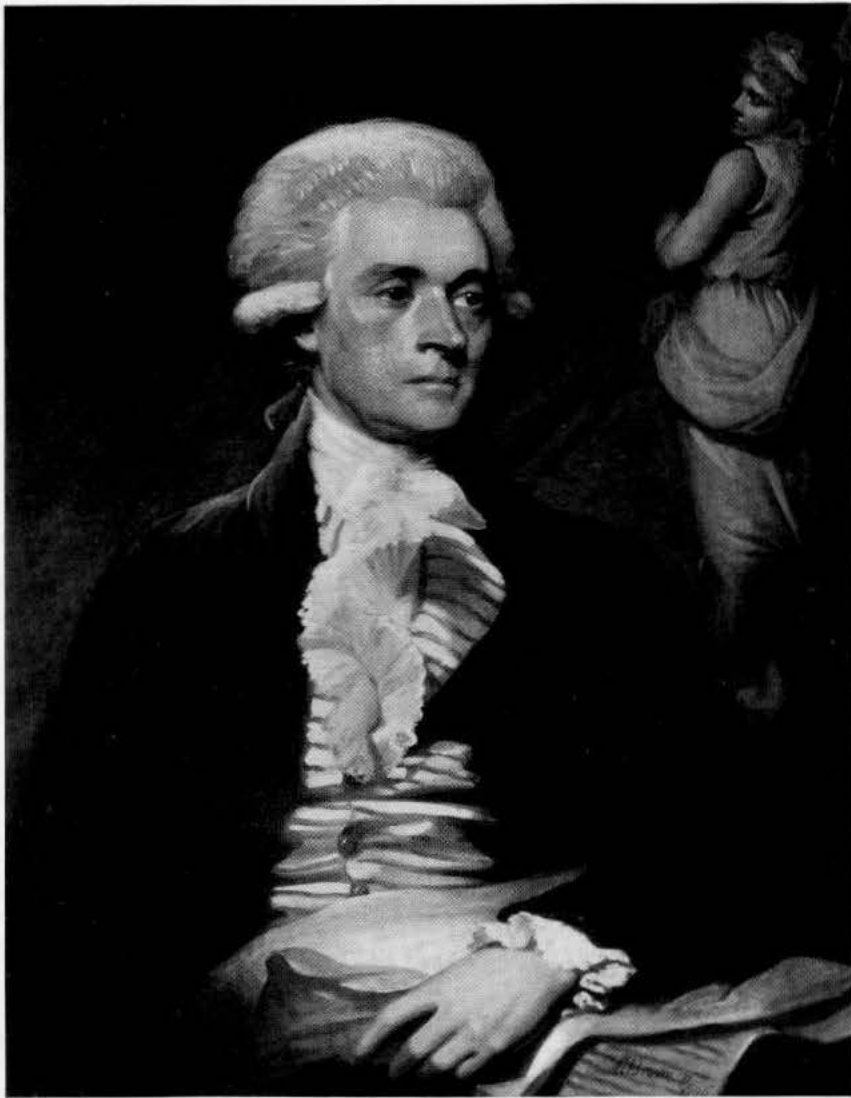


THE COLLEGE

FILE

St. John's College
Annapolis, Maryland
Santa Fe, New Mexico



BICENTENNIAL ISSUE

July 1976

ON THE COVER:

This painting was done by Mather Brown in 1786. It is the earliest identified portrait of Jefferson, painted in his forty-third year, just a decade after the writing of the Declaration of Independence. The figure in the background represents Liberty. We chose the picture for its enchanting melancholy, but feel obliged to report that two of Jefferson's friends did not consider it a true likeness.

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Editors' Notes

The three bicentennial contributions in this issue were given as lectures connected with the celebration of the Bicentenary of American independence. A fourth contribution, written by Edward Macierowski of the class of 1970, will appear in a later issue. As it is, this issue is the largest in the history of this journal: but we thought we would keep the lectures together. We trust that interest in the questions raised in them will persist beyond July 1976. As always we welcome letters concerning these contributions.

B.R.v.O.

Apologies for not acknowledging the courtesy of the Pierpont Morgan Library in lending us photographs of the Thaw Collection, and for hiding the credit line for Anne Buchanan Crosby (Desert Fathers drawings) behind the return post card, both in the April issue.

T.P. Jr.

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Erratum:

In the cover note in the April issue, Eugene Thaw's class was incorrectly shown as 1967; Mr. Thaw's class was 1947.

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Concerning the *Declaration of Independence*

by Eva Brann



I A.

When American schoolchildren first discover that they have a place in the world they sometimes give their addresses a wonderful form. Transformed for our case, it would be: "Proper Name, St. John's College, Annapolis, Maryland, the United States of America, the North American continent, the Earth, the Solar System." That is the containing sequence of places in which we live and have our being. The effects of the document with which we are to concern ourselves tonight have pervaded or invaded each of them: "space," our planet, this land, this nation, this state, this city, this school. I might say right now that this diffusion of its power would not have astonished its author very much.

I shall not try to trace its influence on the largest realms, which began with its acknowledged role in the early, as yet innocent, days of the French Revolution. That attempt, I am convinced, would be tantamount to that of giving an account of modern politics. But I do want to point to its relation to the smallest realm, this college, whose immediately post-revolutionary foundation was assisted by the four Maryland signers: by Paca, Carroll and Stone with subscriptions of money, and by Chase and Stone as members of the first Board of Visitors and Governors. We may therefore imagine that the college was conceived in a spirit much like that which later informed Jefferson's University of Virginia. And indeed it was originally to be the Western branch of the University of Maryland, committed by its charter to admitting students "according to their merit without requiring or enforcing any religious or civil test" and to preparing them "upon a most

This is a fuller text of the Friday Night Lecture for April 30, 1976, given to celebrate the 200th anniversary of the Declaration's conception by Jefferson in mid-June, its adoption by Congress on July 4, its proclamation in "each of the united states" in the days following, and its signing on August 2, 1776.

liberal plan" for discharging "the various offices of life, both civil and religious." But even if these original conditions and aims were to have to be termed "post-Revolutionary" rather than specifically Jeffersonian, it would still be demonstrable—though not here and now—that our present program, a very pure realization of the founding intention, has more Jeffersonian elements than any other well-known college plan.

Now at Jefferson's university, the Declaration of Independence was to be the first of the "textbooks" prescribed by him as the "teaching norm" for the political education of young Americans. In this one instance Jefferson was the unashamed advocate of indoctrination—he intended the Declaration as a teaching tool for combatting certain anti-Republican "heresies." It is probably not necessary to be more liberal than Jefferson. Nonetheless let us say that the Declaration should not so much be taught as talked of at every American college, and above all, at this one.

It is consequently my ambition and my project for tonight to persuade those of you not already so convinced that this text must be to you, as students and as human beings in the world, a near and dear, a most personal concern.

B.

You may well be wondering—I would in your place—why a person audibly not native born should presume to have such an ambition. But consider: a naturalized citizen, like myself, is a citizen by a second, acquired nature, by deliberation and choice. Therefore, just as it is a natural stance for young natives to foster alienation in themselves so it may well be the proper business of those whose youth was alien to feel at home—and to reflect on that feeling.

Forgive me then if I began with a personal apology and continue with a personal prologue—it is after all my argument that the founding tradition should be a personal concern.

Article II, Section 1, of the Constitution requires the President to be native born, except in the founding generation. You

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MARYLAND

Charles Carroll of Carrollton

Charles Carroll of Carrollton

Samuel Chase

Samuel Chase

Wm. Paca

Wm. Paca

Thos. Stone

Thos. Stone

know, of course, that it is the way of human nature to be scandalized by any inhibition, even if it has not the remotest bearing on one's practical intentions. Accordingly I have sometimes wondered in passing if that article, which keeps me from an office I could never obtain and do not remotely want, is acceptable to me in principle. In consulting Madison's notes of the Constitutional Convention, I find that the restriction is the remnant of a debate concerning qualifications. During it Franklin, Madison and James Wilson, himself one of the several foreign born Founding Fathers, argued against the "illiberality" of such restrictions, while others claimed that the love of an acquired country can never be undivided enough to make it safe for an alien to hold high office.

When I ask myself whether there is something in the latter claim, I must admit that there is, and that the "illiberal" clause has its wisdom. For naturalization has two aspects, in one of which it can be explicit, expeditious and complete, while in the other it is dilatory and delicate.

That latter aspect has to do with what I think of as "the conversion of the imagination." It is concerned with the change of venue our dreams—I mean sleeping dreams—must eventually undergo, and with the slow migration of meaning to new landscapes. The tardiness of that conversion is related to a certain repellent aspect of the American scene to which Crèvecoeur, the colonial immigrant farmer, alludes in his comparison of the American land with Europe, where, he says,

... all the objects of contemplation, all the reveries of the traveller, must have reference to ancient generations and to very distant periods, clouded with the mist of ages. Here, on the contrary, everything is modern, peaceful and benign.

He himself had fallen in love with Pennsylvania and found the aspect of a prosperous present more gratifying than the romantic reverberations of the past. And yet it is just these which attach the imagination, as their absence most rebuffs feeling. Add to this circumstance the fact that the benign beauty of America is now much overlaid with the ugly apparatus of convenience. To be sure, this newer modernity has an exhilaration of its own, but that is an acquired taste. (Another immigrant has, in fact, written a book about this matter: Nabokov's *Lolita* dwells much on the relation this "lovely, trustful, dreamy enormous country" has to its overlay, of which the author, rightly, I think, says that "nothing is more

exhilarating than [its] philistine vulgarity.") In view of these impediments, love—as distinguished from appreciation—of America will be no romantic adventure but, to put it intimately, like a marriage of convenience in which a woman finds herself, to her secret and surprised delight, one day solidly in love.

I dwell on these matters of the heart only to set off clearly a straighter and more accessible road to citizenship. It is the one proposed by Lincoln.

Let me insert here the reasons why I shall so often appeal to Lincoln in this lecture. First of all it is because he is that interpreter of the Declaration who has both most stature and most passion, who could say of himself that

I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence.

But there is also something else. Lincoln and his war, that haunting tragedy in which the sins of omission of the Revolution were expiated, form the backdrop against which Jefferson's secular comedy gains its brightness. You may think that it is frivolous to view the American past as an artful chiaroscuro, but I think that to participate in the past as viewer of a play is not the worst way to absorb history, especially when, like the American past, it abounds in providential-seeming contrasts and coincidences. All I mean to say, however, is that I came to the Declaration through the Civil War and particularly through its distillation, the Gettysburg Address.

To return to the point, Lincoln says of those immigrants who cannot trace their lineage back to the Revolution:

... they cannot... make themselves feel that they are part of us, but when they look through that old Declaration of Independence, they find that those old men say that "We hold these truths to be self-evident, that all men are created equal," and then they feel that that moral sentiment taught in that day evidences their relation to those men, that it is the father of all moral principle in them, and that they have a right to claim it as though they were blood of the blood, and flesh of the flesh, of the men who wrote the Declaration, and so they are.

This way, then, would be the highway to naturalization. Therefore one important question I, as an immigrant, must certainly ask myself is: do the sentiments of the Declaration engender moral opinions in me, particularly about equality?

II

To begin. And first I have to subject you to a rather pedestrian recital of two groups of facts, partly just to recall and put them on record for you, partly for later reference.

A.

The document known as the "Declaration of Independence," which was drafted by Jefferson for a committee whose other working members were Franklin and Adams, debated by the Continental Congress as a Committee of the Whole,

"agreed to" on July 4, 1776, and ordered immediately "to be proclaimed in each of the united states"—this committee report is not the political act for which it is commonly taken. For on July 2, the Congress had already passed a resolution by Richard Henry Lee of Virginia to the effect:

That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved.

You will recognize these words as incorporated in the last paragraph of the Declaration; they constitute the epochal political act which formally initiated the United States. That fact is of great significance, since it means that the Declaration is primarily a work of justification and explanation, an accounting, not an act, *logos not ergon*, as the Greeks would say. In Madison's words, it was intended to provide the rational "basis of the Revolutionary act." The Resolution of Independence had already satisfied the urgent political demand made in Tom Paine's pamphlet *Common Sense* half a year earlier: to extract the American colonies from the paradox of "resistance and subjection," by converting them from the state of rebellion, in which King George had formally declared them to be, into "legitimate" revolutionists and so to make them eligible for support in the eyes of the world. Paine had indeed also urged that a manifesto be dispatched to foreign courts "to set forth the miseries we have endured and the peaceable methods we have ineffectually used for redress." Jefferson took that advice very exactly, giving his document the precise legal form of a declaration of plaintiff's cause for action. But the document is no mere apology before the nations,

since no one nation has the right to sit in judgment over another, but the tribunal of our consciences remains, and that also of the opinions of the world.

It is rather an ingenuous disclosure by the American "mind" and "soul"—these are Jefferson's terms—of its principles of action. In Lincoln's words:

All honor to Jefferson—to the man who, in the concrete pressure of a struggle for national independence by a single people, had the coolness, forecast and capacity to introduce into a merely revolutionary document, an abstract truth, applicable to all men and all times . . .

Accordingly the chief paragraphs, those which caused Madison to call the Declaration a "lucid communication of human rights," is written in that tone of responsible reasonableness which evinces "a decent respect for the opinions of mankind." Nothing throws this quality into relief better than the contemptuous sectarian language with which the comparably influential document of the next century begins:

A spectre is haunting Europe—the spectre of Communism. . . . It is high time that Communists should openly, in the face of the whole world, publish their views, their aims, their tendencies, and meet this

nursery tale of the spectre of Communism with a Manifesto of the party itself.

The Declaration means not to threaten but to enlighten.

B.

The second group of facts concerns the "merely revolutionary" part of the document. This is its middle section with its ringing "he has's," its twenty-seven accusations against the "King of Great Britain." The sum of these is that he has had

in direct object the Establishment of an absolute Tyranny over these States. To prove this let Facts be submitted to a candid [i. e., benignly receptive] World.

The remarkable aspect of this section is that the final version contains, aside from two oblique references, no mention at all of Parliament and the injuries it had inflicted on the colonies. Since it is by means of this omission that the Declaration expresses its revolutionary character, let me, very schematically, recount what is behind it.

1. In the first phase of the quarrel between the mother country and her colonies, their emphasis had been on the colonials' ancient *rights as Englishmen*, particularly in their economic application of "no taxation without representation," since the colonies were not represented in Parliament. The argument had sometimes been modified by distinctions between permissible and impermissible taxes such as external vs. internal, regulatory vs. revenue-raising taxes.

2. In the second phase the colonial argument, formulated by Franklin among the first, became *constitutional and political*. Representation was now no longer even sought: instead, the argument, an oddly counter-revolutionary one, was that the colonials were exclusively the King's subjects; Parliament was considered to have usurped its powers of legislation over the colonies in the Glorious Revolution of 1688, the very event Locke wrote to justify.

3. In the final, revolutionary, phase the Constitutional question was regarded as decided by its chief proponents, like Adams and Jefferson, whose draft version of the Declaration was to state flatly that "submission to their parliament was no part of our constitution." Henceforth the argument was from the *universal natural rights of man*, through the "Facts" proving the object of establishing a tyranny, to the revolutionary breaking of the last remaining bond, that with the King.

The main logical line of this political argument as contained in the Declaration can be unravelled as follows:

1. Men are individually endowed with rights.
2. Governments are instituted to secure them.
3. When they are destructive of these rights governments may be altered.
4. Facts prove that the King's government intends to destroy these rights.
5. The proper agent for an alteration in the government is a people.
6. The inhabitants of the United Colonies are a people.
7. Therefore they can and should authorize the act of alteration.

Now what kind of alteration did the facts support? The answer

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is set out in the opening paragraph. It is a "course of human Events" which makes it

necessary for one people to dissolve the political Bonds which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the laws of Nature and Nature's God entitle them . . .

The passage asserts a natural right to revolution interpreted as *separation*, as independence—self-determination in contemporary language. The right to "alter or to abolish" a government and to institute a new one which will secure individual rights is to be exercised by a *people* and by *seceding*, that is, not by absolutely abolishing the old government, but by withdrawing from it. Certainly the Declaration uses the language of revolution: it speaks of "altering former Systems of Government," but it intends a territorial withdrawal together with a revolutionary re-institution of the true features of the old system. Jefferson, following Locke, had already argued in his *Summary View of the Rights of British America* of 1774 that the very settling of this country was an expression of such a natural right of removal, the right of

Going in quest of new habitation . . . and establishing new societies under such laws and regulations as shall seem most likely to promote public happiness.

He alludes to this right again in the Declaration in his reference to "the circumstances of Emigration and Settlement here." This individual "natural right of man to expatriate himself, at will" was very important to him—it is the personal counterpart of a people's right of separation.

The relation between these two kinds of political alteration, secession and revolution, became the unhappy dilemma of the Civil War, the Confederates claiming to have good warrant for secession in the founding documents, and the Unionists arguing that in this unique Union secession would amount to a counter-revolutionary, that is, rebellious, destruction of that system of government which truly embodies the will of the people: such rebellion is not supported by the Declaration, quite apart from the question whether the states have a Constitutional right to secede from the federation. This issue, like a number of others, was, as we shall see, settled in effect perhaps rather than in principle by the Civil War.

The American Revolution, then, derives much of its benign character from the fact that it includes no necessary element of destruction of established governments. It seems to me that this happy aspect of the original act is reflected everywhere in American life in its reliance on alternatives, particularly those permitted by spaciousness as a curative for friction. The physical possibilities for exercising the right of removal may now be much narrowed—but happily space is not the only dimension in which it can be exercised.

Here we shall leave that "merely revolutionary" aspect of the Declaration—surely the use of that adverb "merely" does as much honor to Lincoln as ever he intended for Jefferson—to concern ourselves with the perennially important paragraphs, those that dwell not on what is to be changed but on what is to be secured.

III

A.

In reading the Declaration it is particularly necessary to consider first of all *what kind* of a text we have before us. It is, to begin with, a committee report, accepted and published as an official document of a representative body. But what I want to take special pains to bring out is the peculiar relation it bears to its author.

Let me begin by comparing its authorship to that of the *Constitution* and the *Federalist*. The articles comprising the *Federalist* were published under a single, suggestive pen name, Publius. But almost every paper is fairly surely attributable to one of three authors whose thoughts and sentiments it expresses. The *Constitution*, on the contrary, may have a "father" in spirit, Madison, and a formulator in committee, Gouverneur Morris, but its provisions, negotiated in long debate and continuous compromise are hardly attributable to any author. It is a truly *composite* work, because in it are absorbed the varying opinions of fifty-five men (incidentally excluding precisely Jefferson and Adams), but it is not a *collective* work, because the framers were not possessed by one spirit, unless it were the spirit of compromise.

Now consider the Declaration. We all know it has one author. John Adams himself reports his own role in the choice of Jefferson, partly because Jefferson was a Virginian, partly because Adams had

a great Opinion of the Elegance of his pen and none at all of my own.

Jefferson was proud enough of his authorship to want it to appear in his epitaph first among his works and to the emphatic exclusion of all his offices. What is more, the drafting committee made only minor changes in the rough draft. The changes made by Congress seemed, to be sure, devastating to Jefferson and came near to spoiling the occasion for him. But they were all negative—Congress cut the text by a quarter.

Yet Adams kept repeating that the document contained nothing original, that

there is not an idea in it but had been hackneyed in Congress for two years before.

Here is Jefferson's response as expressed to Madison:

. . . whether I gathered my ideas from reading or reflection I do not know. I know only that I turned to neither book or pamphlet while writing it. . . I thought it a duty to be, on that occasion, a passive auditor of the opinions of others . . .

And again, he wrote that the Declaration was intended to make the proper appeal to the tribunal of the world, but

Not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before, but to place before mankind the common sense of the subject; in terms so plain and firm as to command their assent. . . Neither aiming at originality of principle or sentiment, nor yet

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who have full power to do what independent states may of right do.

From a reading of the mere text it is impossible to tell whether "the United States of America" and the "Free and Independent States" are an entity or a collection. (The issue seems to have been as doubtfully phrased in the states; for instance, the provincial convention of Maryland resolved on June 28, 1776, to "concur with the other united colonies . . . in declaring the united colonies free and independent states.")

Both the Resolution and the Declaration were approved by the twelve delegations so authorized, in state conventions and voting by states. On the other hand their authority is said to come from the people as a whole. Did the colonies then undergo their conversion into states in union or separately? Does the Union precede the states in such a way as to have superior sovereignty? The intent of the signers was almost certainly that "united states" should mean "states united," which implies the priority of the states. A literal construction, however, permits the other reading.

Lincoln was the strong proponent of this alternative understanding that the Union anticipated statehood and the event of the Civil War confirmed this interpretation: the states are not ultimately sovereign.

C.

The most fruitful question, finally, settled in fact but not necessarily forever or in principle, is whether the Declaration entails a particular kind of government or not. This is what the text says:

... That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its Foundations on such Principles, and organizing its Powers in such Form as to them shall seem most likely to effect their Safety and Happiness.

It seems pretty clear that the right of revolution is here regarded as reaching *any* government whatsoever. No government is so complete or so permanent an incarnation of the true principles of government as to be untouchable. Indeed, Jefferson contended that

no society can make a perpetual constitution.

It is equally clear that any new government must have, as a necessary feature, the consent of the governed. Here Jefferson follows Locke exactly enough.

But a whole congeries of great questions is not answered by the text: Can consent be passed down through the generations, a proposition Jefferson elsewhere strenuously denied? Does government by consent necessarily imply, as it did for Locke, majoritarian government? And ought majoritarian government to be constitutional government? And does constitutional government mean republican government? And that in turn a representative democracy? What Jefferson himself thought is

clear from his other writings: he was a majoritarian, a constitutionalist, an enemy of "artificial aristocracy," or monarchy, a supporter of the representative principle, and America's "greatest democrat" according to Tocqueville. No doubt his preferences are somehow behind the Declaration. But the text itself does not say any of this—it confines itself to a mention of "likely" governmental principles. For:

... the same original principles, modified in practice according to the different habits of different nations, present governments of very different aspects,

while the Declaration is intent on such "original principles" only.

Therefore, although we have in accomplished fact a constitutional, representative republic, consent to which is plausibly inferred from the mere fact of continued habitation, the ultimate theoretical question remains open: what is meant by "consent" and what governments can claim it? And in its urgent, contemporary application: could any popular government claiming consent on purely theoretical grounds, for instance a "people's dictatorship," secure those rights whose preservation is, in the Declaration, the purpose of government? I think the answer is no and that the nature of the rights enumerated precludes certain kinds of government from claiming consent, but this most pressing topic is beyond my scope for tonight.

I conclude only that our tradition becomes more *universal* by being regarded as having two sources, one of which, the Declaration, is on a much higher level of abstraction than the second. On the other hand, the tradition is made more *coherent* when it is shown that that second source, the Constitution, is not only compatible but even supremely consonant with the first. The most interesting work in American political theory seems to me to deal with these matters.

V

Now to the paragraph containing the "abstract truths." In wrestling with its meaning I shall take into account its nature as a text of "harmonizing sentiments"—and therefore expect *neither* deep coherence *nor* diffuse generalities, but bounded possibilities of meaning. And I shall regard its ambiguities not as accidental flaws but as revealing consequences of its mode of authorship.

A.

*We hold these Truths to be self-evident,
that all Men are created equal . . .*

"all Men"

As has been shown, the best reading of "all men" is that it means *all men*: "This they said, and this they meant" is Lincoln's brusque comment. Furthermore, Lincoln expands: these truths are "applicable to all men and all times." He is claiming that this paragraph contains *the* universal political philosophy. It is, I believe, a correct rendering of Jefferson's conviction that the United States is founded upon eternal truth.

Notice, however, that the text speaks not of the class, man,

but of men, that is, of human beings taken individually. In logical terms: "all men" is a "universal" subject; "man" would have been "indefinite" in quantity. By not giving a mark or definition of the class but allowing it to be given simply through all its members, the text becomes more concrete, less in danger of being trapped into the requirement of a preliminary definition of "man"—an unnecessary exercise since human beings, when not self-deluded, are always able to recognize each other's humanity.

What is more, the phrase discourages all class-bound equality. The discriminable sub-classes of mankind, the religions, the races, the sexes, may present themselves for inclusion as the issue arises, but they are absorbed not as members of their sub-class but as "men," that is, as human beings; neither equality (nor, it follows, rights) can belong to "minorities," or for that matter "majorities," but only to human beings, one by one, as members of the human class taken, in logical terms, "extensively," through all its members.

"are created equal"

1. It is usual to minimize the theological weight of the word "created," not without good cause, as I will further show under the word "Creator." Jefferson did believe in a sudden and single creation of the world and its species. God made the kinds which then propagate according to their species nature. Hence, though the species are created, each human being is not a creature in the direct sense: its creatureliness, that is, its dependent relation on its creator, is not its essential characteristic. Hence the source of Christian equality, which is the fact that we are all *souls* shaped in the image of our creator, cannot be Jefferson's. We may therefore say that in this text equality is not grounded in theological considerations.

2. Whence, then, does our equality derive?

A second possible source is an original state of nature, such as Locke set out. Let me quote his whole famous passage because it echoes through the Declaration:

The state of nature has a law of nature to govern it which obliges everyone; and reason, which is that law, teaches all mankind who will but consult it that being all equal and independent [Jefferson's rough draft read: "all men are created equal and independent"], no one ought to harm another in his life, health, liberty, or possessions. . . .

In this state of nature men are in

A state of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of nature and the use of the same faculties, should also be equal one amongst another without subordination or subjection. . . .

Now Jefferson does on occasion make reference to a state of nature as having existed before the organization of political society, but I have found no evidence that he considered such an original state of nature to be the source and warrant for human equality.

Nor is help to be found in the first paragraph of the Declaration, and its reference to "the Laws of Nature and of Nature's God," since the relation of this nature and its laws, and Locke's law of nature are obscure. Indeed, the phrase itself, which Jefferson had already used in his *Summary View*, is difficult: How many sets of laws are intended? Those of God and in addition those of nature? Or are these—this is more likely—one and the same, as in the tradition found in Aquinas' "Treatise on Law", where natural law is but divine law made accessible to reason? Again, why are there "Laws" in the plural? Are they the several dictates of reason which are comprised in Locke's law? Or moral laws that "nature has written," in Jefferson's phrase? Or are they rather the "laws of nature" as normally understood and, on an occasion, referred to by Jefferson himself—Newton's laws of physical motion? Newton was, along with Bacon and Locke, one of Jefferson's admired "trinity," and it is possible that he had in mind a Hobbesian analogy between the body politic and a Newtonian system of equivalent moving atoms organized by mutually exerted forces of repulsion and attraction. Or are they, as Paine implies in the *Rights of Man*, sociological laws? It is a hard exercise for another day to answer these questions, not least of all because of the peculiar way, having in it a certain heedlessness born of independence, in which Jefferson's sources were filtered through his memory, the words being preserved but the context shifting.

3. So the remaining interpretation is that equality in the Declaration must be taken to arise in a third way, that is, not by the divine creation of souls, nor through an original natural state, but by an ever-present characteristic: our birth, our nature. That nature is ours only remotely by reason of our divine origin. More immediately we participate in it by reason of being humankind, thinking bodies, rational *animals*, natures born within Nature. Our equality springs from our membership in one God-created species and is re-iterated at every birth. Tom Paine speaks of "*the unity of man*" by which he means

That all men are born equal, and with equal natural right, in the same manner as if posterity had been continued by *creation* instead of generation. . . .

We may speculate that Jefferson jibbed at the unqualified statement that "all men are by nature equal." Indeed, when speaking of nature directly, he claims, not quite consistently, that classes, orders, genera and species are the arbitrary work of men and that "her creation is of individuals," indefinitely varied, and hence, I suppose, incommensurable.

"equal"

Nothing should concern us more in the Declaration than the delineation of the meaning of equality.

Now just as there is evidently no reference to equality of primeval condition, so there appears to be no warrant for supposing that there is in the Declaration a definite demand for an equality of actual condition. The strict intention of the text is revealed by Jefferson's original phrasing, which became a casualty of the condensing he himself thought it necessary to do.

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It read:

We hold these truths to be sacred and undeniable, that all men are created equal and independent; that *from that equal creation* they derive rights inherent and inalienable. . . .

And in a next stage he wrote:

. . . they are endowed by their Creator with *equal rights*. . . . (My italics.)

These wordings are clearer than that of the final text. They show what is there left doubtful, namely the relation of men's being equal to their being endowed by their creator with certain rights. In the original version equality is explicated as a ground or source of rights. Equality means *equality of rights*.

This interpretation was accepted and carried to its conclusion by Lincoln, who says:

I think that the authors of that notable instrument intended to include *all* men, but they did not intend to declare all men equal *in all respects*. They did not mean to say that all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal—equal in "certain inalienable rights. . . ."

In this understanding, equality is an original *sameness* of humanity with respect to one kind of capacity, the kind called a right, or rather a definite complex of rights—not needs, not possessions, not virtues, not claims to love, but *rights*. From this point of view equality, which would seem, after all, to be first of all a quantitative notion, is converted into sameness, a quality. Or even more precisely, equality is a capacity rather than a property; it plays the role of a substrate which may be endowed with properties, that is, rights. (Hence the full explication of equality is thrown forward onto the rights enumerated in the next clause.) This substrate may, in fact, be understood as the matter of humankind itself, as "the species," in Jefferson's term.

One addition: men having such original sameness of capacity as I have articulated do not on that account lend themselves to homogenization—to the *making alike* of all to all. For this modern miasma there is no, repeat *no*, warrant in our founding word: Jefferson delighted in the ineradicable variety of men.

And yet there is a substantive meaning, bearing something of its ordinary quantitative levelling, egalitarian sense, attached to the term equality as it has entered American life from the Declaration. It too ought to be given its place, particularly since Jefferson himself had tendencies that way, that is, toward regarding equality in itself as a positively desirable condition. Jefferson was, to be sure, a proponent of "natural aristocracy" and quite capable of speaking of a school selection process as raking genius from the "rubbish." But he also counted among his greatest accomplishments his authorship of the Virginia law against primogeniture which resulted in more equal distribution of landed property, and he once spoke of "lovely equality." So there can be no question that he, and certainly Lincoln,



viewed a certain equality of condition, achieved slowly and lawfully, as a desirable goal for the future.

I think that from these two root notions of equality—equality as a capability and as a condition—taken together arises the familiar and well-founded understanding of equality as equal condition of opportunity. This understanding underlies all legitimate efforts to equalize, for instance, education, which is the pure materialization of opportunity. The mark of legitimacy of such efforts is always that resentment plays no role in them and that equalization is not only in intention but also in effect upward rather than downward. Then it becomes a matter of mere logic that given equal opportunity, and assuming that abilities were really roughly equal, approximate equality of condition—an equality spiced with diversity—will result. The outcome could be entrusted to time and the long run; a sensitive question left open in the Declaration, namely what the notion of equality might contain beyond equality of rights, need not be settled in principle beforehand at all. It seems to me a reasonable extension of the Declaration—this egalitarianism not of intention but of effect.

But here as nowhere else the Declaration is supple enough not merely to support, but to ask for, a personal concern with it—to demand a private interpretation. Here is the place to ask myself: is the principle of equality really in Lincoln's sense a moral source to me? I find—and I am sure I am not alone in this—that I can grow quite heated when I hear it flatly denied in public, but that within myself I adhere to it without any fervor, although perhaps with a kind of compensating firmness. I think I ought to say from what motives. I adhere to it:

1. From ignorance: I have a suspicion that in themselves human beings are radically unequal in crucial respects—that if their souls were visible, some would be little and mean and others large and lovable. But I do not know, ever, what soul a given body envelops. Recall the "noble lie" of Plato's *Republic*; the lie of it is not the claim that human souls are of different metal, but that the metal of the soul can be unerringly assayed. In truth, we cannot even say on what occasion a human being does reveal himself truly, whether at a moment of crucial decision or under the steady burden of ordinary life. One thing is certain: that those who *claim* to be the best and the brightest have often mistaken sophistication for excellence.

2. From the experience of suffering: pain is a wonderful equalizer, and while it seems entirely thinkable that the quality of bliss varies widely, it is impossible to feel that misery does.

3. From a sense of scale: under the aspect of eternity or the

measure of infinity human beings all appear pretty nearly equally tiny.

4. From incommensurability: in their particularity human beings are so incomparable that one might as well call them equal—equally peculiar.

5. From a feeling of fellowship: because in the long run the common concerns turn out to be the most serious concerns and ordinary ways the wisest ways. Add to this the direct friendliness that the American principle of equality induces in human intercourse. Aristotle asserts that friendship “holds together” the city state; the casual fellowship of American public life seems to me to serve as the appropriate counterpart of that cement for a great national state.

I might therefore say that I feel no passion, but a steady inclination toward this principle of equality which cannot fail to influence my conduct, and so it is a source of morality for me. But my reasons for adhering to it are very different from those implied in the Declaration—they have next to nothing to do with any inherent nature of man, and everything with the limitations of the human condition. And yet I shall maintain that it is permissible, and even appropriate, to uphold the great text in this subversive way (which may not even be so far from that of Lincoln). For to show that a truth may have several roots serves to confirm its acceptability. Nor is its self-evidence impugned by this re-rooting, for my motives all come from a kind of immediate, if subdued, sentiment and are therefore somehow axiomatic.

A note: in his rough draft Jefferson had written “equal and independent.” We may speculate that Jefferson reconsidered the phrase because it seemed inappropriate to affirm the independence of *individuals* in a document declaring the founding of an independent *nation*.

B.

The paragraph continues:

that they are endowed by their Creator with certain unalienable Rights, . . .

“endowed”

As in this text, so in Jefferson’s *Summary View of the Rights of British America* of 1774, rights are God’s gift:

The God who gave us life, gave us liberty . . .

But sometimes it is nature from whom rights come immediately:

. . . man was a rational animal, endowed by nature with rights.

And sometimes, in a more precise vein, the people claim

their rights as derived from the laws of nature.

The chain of derivation is, therefore, not clearly fixed in Jefferson’s writings. I speculate again that he omitted nature, the intermediary between God and man, in the text before us because he could not quite support the juxtaposition of equal endowments with nature.

“by their Creator”

In the rough draft Jefferson spoke only of “created” and “creation.” Then he decided to name the agent. But the theological definition of the endowing Creator is slender.

God is indeed introduced in a neat complex of political roles in the Declaration (as he had been in the Declaration of ’75). He is the founder of the Universe (“Nature’s God”), universal legislator (“Laws of Nature”), chief judge (“the Supreme Judge of the World”) and chief executive (“the Protection of Divine Providence”). But the very completeness of the political metaphor may give warning of this divinity’s weak theological character—deep critics of the enlightenment have pointed out that its god, the “Supreme Being,” cannot help but be a transcendental vacuum. I do not for a minute mean to imply that the Signers did not feel great reverence for the “Supreme Being,” but rather that it was rational reverence more than the saving faith of traditional Christianity.

In fact, as many terms as Jefferson has for the Ruler of man, so many has he for the Maker of nature, for instance, “Fabricator” and “Superintending power.” But these terms are no more intended as transcendental determinations than the others. Jefferson *hated* theological speculations (it is probably the only thing he hated.) They are meant rather as tributes to the product of the divine operation, the well-designed, self-regulating world. In sum:

Of the nature of this Being we know nothing

Indeed, God’s definition is more than slender, it is self-attenuating. For Jefferson’s strongest characterization of God happens to come in the Virginia Statute of Religious Freedom (the second document he wished mentioned on his epitaph). Now this law begins:

Well aware that Almighty God hath created the mind free

and soon concludes that

our civil rights have no dependence on our religious opinions.

Here as elsewhere Jefferson values freedom of conscience more than substantial truth:

Difference of opinion is advantageous in religion.

Hence he will always consider the maintenance of God-given freedom more interesting than the defense of particular religious truths, blithely disregarding the fact that his warrant for doing so is itself a religious dogma. In this way “the Holy Author of our religion” is himself made to underwrite the absence of religious substance from political life. Jefferson’s Creator is eventually the guarantor of his creatures’ insouciant relation to him.

“certain”

In the rough draft, Jefferson wrote: “Equal rights, *some of which* are inherent and inalienable.” (My italics.) Among the rights not inalienable is the right of property, that is, property not acquired by one’s own labor. Evidently he decided to make no mention of such rights at all.

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The three primary rights he enumerates are, again, not the only ones with which human beings are *inalienably* endowed. At the same time the word "certain" suggests that their number is not to be indefinitely multiplied. Nonetheless it is pregnant with the contemporary inclination to enlarge substantially the list of rights. A reflection on the word "unalienable" and on the enumerated rights themselves can give the clue to which additional rights are legitimate. They would, in general, be the rights which are the conditions of possibility of gaining goods rather than those which give access to goods directly. Jefferson himself listed quite a few such subsidiary rights, for example, the natural right of free trade, in his *Summary View*.

"unalienable"

Jefferson had first written "inherent and unalienable." The "Declaration of the Rights of Man and Citizen" of 1789, the fundamental document of the French revolution for which the American Declaration served, selectively, as a source, speaks of "natural, imprescriptible and unalienable" as well as "sacred" rights, and Thomas Paine adds the adjectives "indefeasible" and "hereditary," and Adams adds "essential." The very profusion of terms shows the indeterminateness of the notion. It is, in brief, that the rights so described can be neither taken away from nor given up by any human being. Speaking philosophically, they are *primary properties* of human nature; in fact, the terms "inherent" and "natural" are practically convertible.

What is here most worthy of note is a wonderful inconsistency which arises within the text in connection with the notion of inalienable rights. For "in support of this Declaration," the Signers proclaim with stately enthusiasm, "we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor."

How can they make this pledge? The inalienable right to life precludes it. It seems to me the merest sophism to argue that we are precluded from alienating our right to life, but we may alienate our lives. On that argument any tyrant may claim to be taking merely the life while leaving the right secure. The inalienability of life must surely mean something crudely straightforward: that life can be neither taken nor given freely, but only under compulsion of necessity. Yet the Signers offer their lives freely.

Indeed, something similar can be said of the other two pledges. Jefferson had deliberately substituted a new right in the Lockean list of rights which included life, liberty and property. As I have mentioned, he regarded it as a "moot question" whether property, at least inherited property, is an original natural right, and hence it is not among the rights to be secured by government. At the same time many of the Signers, Jefferson included, were men of fortune. (The Annapolitan Charles Carroll, heir to the first or second greatest fortune on the continent, defiantly added "of Carrollton," the name of his residence down on Spa Creek, so as to be the more readily identifiable as the rich Carroll.) It was, in fact, their fortunes which gave them the leisure and the means to make a revolution. And finally, they were men of honor, such men as in their own lives consider their duties rather than their rights, including, of course, the Declaration's own *sole* Duty, that of "throwing off" despotic government.

In sum, the Declaration incorporates what I will term the "Founders' Paradox": that the world out of which they acted was in some ways richer and finer—more daring and less self-centered—than the one which they fought to found. For that new world was based, at least in its founding theory, on security and self-interest. This peculiar deprivation of the beneficiaries of a revolution is the theme of Lincoln's speech on "the Perpetuation of our Political Institutions;" it seems to me that it is very much the crux of our present much-debated decline in morale.

"Rights"

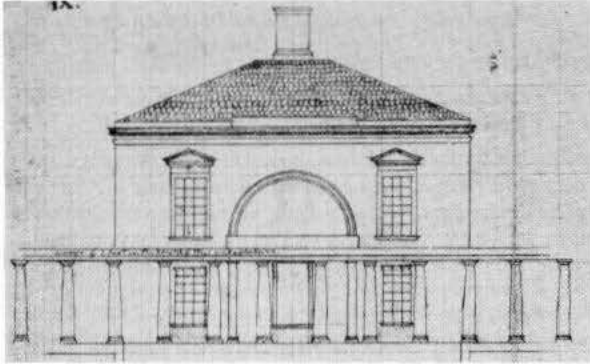
This is the most potent and the least lucid word in the text. How are we to understand these primary properties of our nature? The classical term "natural right" signifies what is right by the *nature* of things: natural justice or right as against what is right by human *convention*. Such natural right is disclosed in a metaphysical inquiry. In contrast the use of the word in the plural, "rights," implies some sort of patent claim justifiable in law. Locke's theory, which Jefferson himself considers a source, is quite consistent with this common use in positing first a "natural law" from which natural rights then immediately arise.

Now it is undeniable that Locke occasionally refers to the "properties" of human nature such as life, health and liberty as natural "rights" (Incidentally, for Locke the pre-eminently primary property of human nature is to have property, life being but our chief possession and all the others, liberty first among them, but supports to life). At crucial places, however, he defines rights as quite distinct from original properties or innate desires, like the desire for happiness. The rights rigorously derived from the law of nature, "which is reason," are not, as is sometimes thought, vacuous prerogatives to be what we are anyway, but entitlements to the defense and recovery of whatever state we happen to have placed ourselves in; they are the rights to repel invasions of our peace. So therefore the idea of natural rights follows lucidly enough from the idea of the law of nature, if one can come to terms with the mode and content of such a universal command.

But the notion of rights which filtered through Jefferson into the Declaration was a much blunter, not to say, cruder one. Its one and only American theorist was Thomas Paine, the first part of whose *Rights of Man* Jefferson endorsed when it appeared in 1791. I think Paine's view was a stark version of the common opinion and can be used to explicate what was in Jefferson's mind. Paine defines:

Natural rights are those which pertain to man in right of his existence.

Is this intelligible? I may argue that something is right (or wrong) by reason of nature, that is, the complex constitution of *being*, but can I assert justifiable claims by mere reason of *existence*? Existence is a *fact*, and, it seems to me, from a fact no claim can follow, but only from a reflection on implications and relations. The truth is, I think, that the so-called "natural rights philosophy" is opaque because it is a covert, an elliptical *moral* theory, a theory about what ought to be rather than what is. But for a specific rhetorical purpose, namely that of representing



nature herself as supporting its claims, the moral aspect is obscured.

Nor can this missing moral basis be straightforwardly supplied, because it does not consist of substantial articulable moral principles. It is rather a purely formal imperative, namely the general injunction to take public life morally, *to moralize*: it does not concern what we ought to *think* and do, but what we are encouraged to *feel*, and that is—*indignation*. The claim that there are rights by nature is at bottom an *invitation* to resist indignantly the perversions of man. And it furthermore enlists the faculty for indignation on the side of the desires, conveniently interpreted as *needs*. For these are thought to be more irrepressibly natural and always know their purpose, whereas reason is instrumental and adaptable. You will remember that in Plato's *Republic*, the first text of classical political philosophy, the reverse is the case: the faculty of indignation, the middle part of the soul, sides with the reasoning faculty.

But the first text of *our* republic, I claim, entitles us to feel indignation when our needs or desires are disappointed of fulfillment. Consequently that feeling does indeed pervade American modes of argument. It seems to me, I should add, a great blessing, precisely because human nature is not what the natural rights theory presents it to be: self-assertion is not a universal fact. Human beings are capable of living with almost indefinitely diminished requirements and even of resigning their right to life by foregoing self-defense. The theory is, therefore, false in simple fact, but it is salutary in *causing* people to act *as if* it were true. It drives them out of the dreary limbo of resignation, which is the chief blight of bad politics. Furthermore, Jefferson himself gave the moral aspect of the theory so noble a cast as almost to return it to its ancient origin in natural justice.

One more observation: the Declaration does not explicitly associate the term "natural" with "rights." So also in current public life when we talk, as we incessantly do, of our rights we make no reference to nature. Probably rightly, since the theory is almost impossible to pursue to its roots; "nature" turns out—certainly for Jefferson—to be chiefly a resting place for reason. He almost routinely appealed to nature as the last resort: nature is responsible for everything from our moral sense to our propensity to being either Whig or Tory.

And yet there is something salutary in reminding ourselves

that our rights were first thought of as coming from nature, for even in its forshortened use that word directs our thoughts to a scheme of things within which to locate our own requirements and forestalls the chief danger in the life of indignation—infinite demands. Furthermore, unperspicuous as it is in its philosophical foundation, its ingenuousness gains stature, I think, when compared to the alternative derivations which superseded it in the next century, for instance that rights inhere originally in nations rather than men, or are rooted in history or arise dialectically in economic classes.

C.

that among these are Life, Liberty, and the Pursuit of Happiness—

These enumerated rights together delimit the matter in the formal notion of rights. For that very reason I shall make short shrift of them here, since tonight I am pursuing the formal aspects, the "how" of the Declaration rather than its "what," its substance.

"Life"

By the fifth article of the Bill of Rights, among whose chief supporters was Jefferson, persons are protected against deprivation of "life, liberty, or property without due process of law" at the hands of the government. But the natural right to life of the Declaration is precisely to be secured by the government; from that point of view the Fifth Amendment is a safeguard of a safeguard, the precautionary complement of the Declaration. However, it seems to be the case with us that these secondary safeguards of our civil rights play a more respectable and honored role in public debate—they are, after all, part of the Constitution—than our private safety: We are a nation without political executions and with an appalling number of private murders. Yet the text of the Declaration could be cited in behalf of the "law and order" side of the debate. It seems to me to support the contention that the right to life requires the government to protect citizens against each other just as much as it requires that the citizen be protected against the government. After all, the more fundamental of the two texts says that the powers of government are to be organized in such a form as is most likely to effect our safety, and the twenty-seventh and final accusation against the king deals just with his failure to protect his subjects against each other. The problem of energetic versus intrusive government already lies within the Declaration.

"Liberty"

The most complex and most precarious right is liberty. It was, I believe, the one dearest to Jefferson, especially as it relates to the free "diffusion of knowledge." In writing of the younger generation he said:

We have spent the prime of our lives in procuring them the precious blessing of liberty. Let them spend theirs in showing that it is the greatest parent of *science* and *virtue* . . .

And he was perfectly deaf to the chief problem of liberty, which

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is that of its compatibility with equality as set out by Tocqueville. The place is the chapter "Why Democratic Nations Show a More Ardent and Enduring Love of Equality than Liberty" in Part II of *Democracy in America*, which is indeed the text to go to whenever in perplexity about America's deepest difficulties. (I recommend also the chapter on "Liberty and Equality" in Calhoun's *Disquisition on Government*.) In omitting to discuss liberty, I am in effect leaving out the substance of the Declaration. One observation is necessary with reference to the next right: Jefferson still distinguishes liberty, as implying an arduous public preoccupation, from the private pursuit of happiness.

"the Pursuit of Happiness"

By the deliberate substitution of "the Pursuit of Happiness" for "prosperity" in the Lockean list, Jefferson conveys that this pursuit is the specifically *American* right. And furthermore he thereby succeeds in removing from the "abstract" portion of the founding text for the world's most prosperous country any reference whatsoever to any economic system or even to prosperity. Indeed Jefferson's vision of republican prosperity was pastoral, not industrially productive.

The question is: what does the phrase intend? The word pursuit in those days was used more commonly than now to mean "practice," as when we speak of pursuing a profession. The Virginia Declaration of Rights of June '76 included the right of "pursuing and obtaining happiness and safety." It is possible that Jefferson omitted the reference to "obtaining" as redundant. The Declaration itself speaks of the form of government most likely to effect the people's "Safety and Happiness." The phrase was therefore very probably intended to mean "living in the practice of happiness, plying it."

We may ask what is meant by the "practice of happiness." To judge from Jefferson's own, if not quite representative, then certainly exemplary, way of life, the meaning is not far from Aristotle's definition of happiness as a practice, that is, an "activity of the soul in accordance with excellence." The pursuits Jefferson thought of as giving happiness were the perfecting of his estate, Monticello, and study, for instance, mathematics. Thus he evidently longed for time to indulge in the "delicious luxury," as he termed it, of studying higher degree curves, or in the "sublime luxury" of reading Greek and Latin authors in the original. Public affairs, on the other hand, he regarded as an almost unmitigatedly unpleasant duty which removed him from virtuous pleasures, and would have wrecked his happiness, were not happiness dependent on doing one's duty. We see that the Declaration embodies a view of happiness which is *private* but not mean or merely material.

Yet the common and accepted reading of this right is quite different, and, I think, not without its fitness. The pursuit of happiness is usually taken as the "hunting after happiness," as in the pursuit of a fugitive. In this meaning the right is thought of as an invitation to an endless quest for an end that is by the very terms of the right forever elusive, that is to say, an indefinite chase incited by ever-raised expectations. Tocqueville, in the chapter "Why Americans are so Restless in the Midst of Prosperity" speaks of the

strange melancholy which haunts the inhabitants of democratic countries in the midst of their abundance.

Death overtakes them before they are weary of

the bootless chase of that complete felicity which forever escapes [them].

It is implied in this melancholy pursuit of an elusive goal that, as Tocqueville observes, true brute materialism is rare in America.

The Declaration then furnishes a text for two American ways: *either* the serene practice of *or* the melancholy pursuit of a *private* happiness. But again it embodies something beyond what it projects, since the composer and the signers of the Declaration were surely sometime in the course of their activity translated from the mode of a modern state to that of an antique *polis*, that is to say, raised to a "sublime pleasure," an unsurpassable peak, of *public* elation. And if not in its course, then, at least, in its remembrance: why else would both Jefferson and Adams have died on the afternoon of the Declaration's semi-centennial?

VI

You may have noticed that I have so far omitted the beautiful opening iambic pentameter line:

We hold these Truths to be self-evident . . .

The reason was that my main concerns tonight were the *modes of truth-telling* of this text, and its reference to self-evident truths is obviously crucial in this respect.

"We"

Who is "we"? As I have mentioned, this document is neither strictly a political act nor a fundamental law, but a declaration of reasons. There was punishment for resisting the Resolution of Independence, for instance "death without benefit of clergy and forfeit [of] all estate" in the state of Maryland. There are penalties for contravening the Constitution. But since it is neither revolutionary act nor social contract (for as such Jefferson regarded only the Constitution), there are no enforceable sanctions on denying the "truths" of the Declaration of Independence. Many people do.

For example, the People's Bicentennial Commission reports that it asked 2300 federal employees to endorse the central paragraph. Over two-thirds refused with remarks like these:

Looks like trash. Commie stuff. So that's what our Founding Fathers were up to. What is this? An anti-CIA thing?

Let me say right away that polling is evidently so distorting a way of extracting people's opinion that, I firmly believe, half an hour's rational conversation would in many cases have brought out a much more orthodox faith. Still, "we" is an elusive collection. It may be supposed that the Signers subscribed to the text in a more than perfunctory way, as did also the "People" whom they represented and who acclaimed it in the days after its approval. Indeed, Jefferson went so far as to call it "the genuine effusion of the soul of our country at that time." But that the

"we" should include later generations and us among them, is, apart from all oratory, solely a function of individual reconsideration and re-affirmation. The recent publication in the local newspaper of texts of the Declaration signed by schoolchildren and citizens is a recognition, although perhaps not very thoughtful, of this circumstance.

"hold these truths to be self-evident"

This part of the opening clause clearly contains two thoughts: we affirm that the propositions following are true, and, moreover, they are self-evidently true.

"self-evident"

How then are truths held which are held self-evidently? I think in two ways.

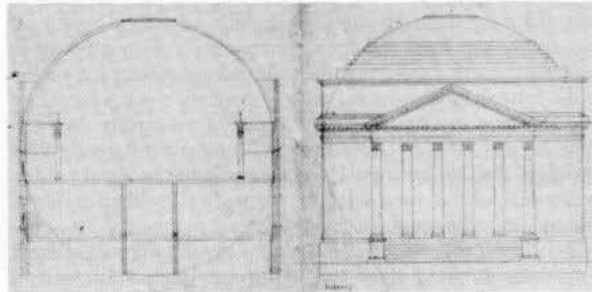
1. If the "we" was truly universal, if every one always held, and held with certainty, that the truths to follow were, as Jefferson said in the first draft, "sacred and undeniable"—then the question concerning self-evidence would never arise. What no one denies is *in fact* as good as self-evident. As I mentioned, Jefferson even made an effort to maintain such a consensus. His method was to make the Declaration, as a document containing the political principles "generally approved by our fellow citizens" one of the required textbooks of political theory at the University of Virginia, and he caused its Board of Visitors so to resolve.

In fact, of course, there are, besides the thoughtless detractors, very serious dissenters to the Declaration's self-evident truths. Among these John Calhoun is one with real stature, and he on a public occasion denied the central proposition, going on to prove its falsity word by word. But one thoughtful dissenter can undermine *de facto* self-evidence.

2. The second, proper, meaning of "self-evident" is "axiomatic," not in the modern mathematical sense of starting points arbitrarily assumed, but in the classical sense of being a primary truth so immediately present to the attentive reason as to be deemed worthy of unreserved acceptance and universal application. An axiom is its own and only evidence for itself; it is manifest; it shines out; to reject it is the mark of unreason. As Jefferson says in another context, namely his favorite contention that "we may consider each generation as a distinct nation," independent from the preceding one:

These axioms are so self-evident that no explanation can make them plainer; for he is not to be reasoned with who says that non-existence can control existence or that nothing can move something.

But the prime examples of such starting points of reason are the axioms of Euclidean geometry, the "common notions" as they are called in the *Elements*. For instance, the fifth axiom says that "the whole is greater than the part." Such truths can be *evident* only within a clearly envisioned mathematical universe. When that is breached, when, for instance, infinity is admitted, the axioms may appear no longer to hold, as in this case where the very definition of infinity is that its whole *can* be equal to its parts. At that moment their self-evidence can be saved only by being asserted for a better defined and more restricted realm.



Without doubt the Founding Fathers' modes of conviction were based on the model of that classical, immediate, natural mathematics. At William and Mary College Jefferson himself learned a logic based on a mathematical model especially stressing self-evidence; the source was his teacher, William Small, of whom he said that he "probably fixed the destinies of my life." Hamilton begins the *Thirty-first Federalist* with a disquisition on geometrical self-evidence as found in politics. And Lincoln wrote most plainly:

One would state with great confidence that he could convince any sane child that the simpler propositions of Euclid are true; but, nevertheless, he would fail, utterly, with one who should deny the definitions and axioms. The principles of Jefferson are the definitions and axioms of free society.

In their immediacy such political axioms are, for all their lucid, succinct propositional form, *universal passions* of the soul, the *reliable responses* of a "moral sense," to use a favorite Jeffersonian term. That is why the Founders cherished the axiomatic mode—because it holds out hope of an effective consensus, with its basis in individual sentiment and its public manifestation in the realm of rational discourse: Jefferson sums up:

For the reality of these principles I appeal to the true fountains of evidence, the head *and* the heart of every rational and honest man. (My italics.)

And:

The evidence . . . of the right to life, liberty, the use of our faculties, the pursuit of happiness, is not left to the feeble and sophistical *investigations* of reason, but is impressed on the *sense* of every man. (My italics.)

The Declaration, then, contains a public roster of these fervent axioms from which our society is deduced. This fact gives our institutions a logical cast. They are to be regarded as *derived* consequences, as *founded*. It also means that the founding propositions themselves, insofar as they are axioms, are, on the one hand *in no need* of proof, since they are presumed to carry immediate conviction, while on the other, again as axioms, they are *incapable* of proof and therefore ever vulnerable: the foundations are themselves unfounded, except in immediate conviction. We live on the knife's edge of a kind of faith of reason. To understand this mode a short philosophical reflection is necessary.

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But before I begin on this last consideration, I want to observe that the axiomatic character especially of the principle of equality has at least one firm consequence: every attempt to construct proofs concerning the political equality or inequality of the human kinds—races, sexes, or any other—is a breach of the Declaration. An attempted proof of inequality, were it convincing, would contradict its *substance*, namely, its “truths.” But an attempted proof of equality is almost more pernicious, for it would tacitly contradict its binding *form*, namely its self-evidence. Self-evidence so assisted must be self-evidence annulled. In any case, either sort of proof rests on a misunderstanding of the text: within the Declaration human beings are equally gifted with *rights*; all other gifts are irrelevant to their standing. I think that axiomatic equality is a better equality than the kinds which can be made or proved.

VII

A.

What is the formal significance of the mathematical mode in which the Declaration is cast?

Mathematical reasoning goes downward, it *deduces* propositions from axioms, but it is not in its competence to go upward to find their sources. This middle mode, this betwixt-and-between of thought, is treated with special interest by Plato, since it is where most of our reasonable activity takes place. You will remember that it is aligned with the upper middle part of his “Divided Line” in the sixth book of the *Republic*. This is the realm of ungrounded but reasonable hypotheses, of convincing assumptions yet awaiting the philosopher’s deep-laid justification. It is the realm of the Declaration.

To put it in a stark way: our Declaration of Independence is a shallow text, *deeply* shallow. In that lies its virtue. And now I owe you an explanation, first of the shallowness, and then of the depth. Not without design—in order to have a counterweight, as it were—I have been reading Hegel this year. That German philosopher’s depth, at least, is unimpeachable. What he says about depth he says in the context of his system, but it seems to me to hold on its own. He says that the deepest depth is the comprehension of contradiction, and of the particularity of human evil. It is a mark of a deep account of the world that it contains a precariously resolved opposition and that it regards the embodied soul as a deep dilemma. (An apology: I am not citing Hegel indiscriminately. His *Phenomenology* contains in the section on “Absolute Freedom and the Terror” the deepest critique of a mode represented by Jefferson in its best and most benevolent American variation—the Enlightenment.)

Now Jefferson—that arch-American—was a model of a man: delicately scrupulous in private life, and bold even to cunning in public affairs; of strictest reserve in deep-felt personal matters and capable of the highest eloquence, as evidenced in the document before us; a man to take ever-fresh pleasure in study, in music, in poetry (a predilection of greatest moment to the Declaration), in designs, in inventions; and with at least one trait of a true philosopher king, a genuine aversion to public office—“I have no ambition to govern men,” he wrote—and a determination nevertheless to do his duty. To me the unopulent

antique-American grace of his dining room in Monticello, which is an expression of his nature, represents that form of the good life I can best savor.

Yet the author of the Declaration was the reverse of deep in Hegel’s sense. His views were in their main lines formed early in life and soon attained the crystalline state of intellectual possessions. The evidence is in the commonplace books of his youth. His opinions were unrent by contradictions admitted and maintained and gave none but passing place to human evil, which he regarded as a curable disease. I have already referred to his unreflective view of the relation of creature and Creator. Of man himself he writes in a typical passage:

I am among those who think well of the human character generally. I consider man as formed for society, and endowed by nature with those dispositions which fit him for society. I believe also, with Condorcet, . . . that his mind is perfectible to a degree of which we cannot as yet form any conception.

He considered that self-love, the sole antagonist of virtue, could be subdued by education, that human knowledge could be increased “indefinitely” and that it was the American character rightly “to consider nothing as desperate; to surmount every difficulty by resolution and contrivance.”

In philosophy he declared himself, in passing, an Epicurean, that is, an “empiric” in inquiry and a tranquil materialist in theory, while omitting to note the dark and doubtful side of this doctrine; he rejected all “speculations hyperphysical and antiphysical;” he had faith only in “Facts” that could be submitted to the world. He viewed with aversion all texts which “disquiet the mind” by grappling with deep discords: here is what the author of our founding text has to say to John Adams about the founding text of political philosophy:

. . . I amused myself with reading seriously Plato’s *Republic*. . . . While wading through the whimsies, the puerilities, and unintelligible jargon of this work, I laid it down often to ask myself how it could have been, that the world should have so long consented to give reputation to such nonsense.

And again, although Jefferson mentions Aristotle as a source for the Declaration, it is hard to point to Jefferson’s own use of an Aristotelian text; of the *Politics* he merely observed that it was unprofitable because it lacked the idea of representation. Moreover, as I have pointed out, he had a curiously disjointed relation to the philosophers on whom he did, in passing, rely, like Locke. The cause of this was in part, I am persuaded, his very excellent memory for phrases, developed in assiduous study, since a very literal partial recall of a text can stand in the way of reflection upon it. And that mode of study was, in turn, the consequence of the characteristic instrumental use he made of his philosophical reading—a fascinating separate topic.

I am noting this evidence concerning Jefferson’s un- or anti-philosophical, or better, counter-metaphysical, propensities for no derogatory purpose. On the contrary, I intend it to explain not only how he came to be so unflawed and authoritative a harmonizer of sentiments but how, by the same

token by which he did not descend into the depths of being, he refrained from hacking at the roots of life.

The most enlightening chapters on our times of which I know are those in Tocqueville's book on the French Revolution in which he describes the "*littérateurs*," the political theorists who are, it is implied, finally responsible for its ultimate form, the Terror. Tocqueville says:

... their starting point was the same in all cases; and this was the belief that what was wanted was to replace the complex of traditional customs governing the social order of the day by simple, elementary rules deriving from the exercise of the human reason and natural law.

These "elementary rules," it must be understood, are quite distinct from Lincoln's "axioms of a free society." For the latter are working hypotheses, while the former are the principles of a complete system which leaves nothing undetermined, if not in result then in method. Jefferson's lawyer's training and his early involvement in affairs both kept him from being such a totalitarian of the reason; so did the fact that his early reading was in English rather than French writers; add to this his endless curiosity and appetite for inquiry. But most of all it was the very nature of his intellect which prevented him from constructing or even appreciating a coherent radical theory of politics and its grounds and inflicting it on this country. (For example: he ignored Rousseau.) It was an intellect which had a peculiar power of levitation, a power of making energetic and convincing formulations without deep delving: a *mathematical* intellect in Plato's sense. But this very curtailment of reasoning saves our text, first from the harsh extremes of reason, and then from the petrification which overtakes expressions of general opinion when the world in which they were all too securely rooted passes. Thus Jefferson's vigorous, independently reasonable axioms are capable of surviving their time and finding a new context. I have tried to give one modest example of such a re-appropriation of the axiom of equality.

B.

The document whose propositions passed through Jefferson's intellect does not, then, contain coherent deep-rooted truths. It is rather, as I have just suggested, a writing of practical wisdom, a benign text. I have been concentrating on working out its diversity of possible interpretations and their suggestive difficulties which are the consequence of its curtailed mode. At this moment I would like to recapitulate the substance of the Declaration from the point of view of its beneficence:

1. By its specifically declaratory character, this "Declaration" places the United States from its very beginning in a universe of reasonable communication; by their very foundation her citizens are obligated to explain their actions to the world. And by the dignity of its diction and the poetry of its rhythm this country's first communication sets the highest standards for public speech.

2. By naming as its authorizing power "one People" the document posits a unified social fabric which is prior to any particular government.

3. By the inclusion of the term "Nature" this political document bears within it a permanent philosophical reference to the question concerning the being of things; and in the phrase "the Laws of Nature" it commits the country to an original sympathy with a world accessible to science.

4. By placing "God" on a political throne, attention to a divinity is acknowledged as a fundamental aspect of public life, while all doctrinal definition and hence every imposition of sectarianism is eschewed.

5. By declaring "truths" the text implies that for this nation a determination of truth originally lies behind action; and by pronouncing them "self-evident" the mode of the founding proposition is made to be a kind of faith of reason which combines conviction with rationality.

6. By the use of the logical universal "all men" the argument made for a specifically American occasion assumes the dignity of universality.

7. By the assertion that men are "created equal" the Declaration induces a specific democratic way of life, characterized by public fellowship and private reserve.

8. By interpreting equality essentially as equality in respect to "unalienable Rights," the Declaration confirms citizens in their sense of dignity and in a readiness to moral indignation, which is the spring of political activity.

9. By enumerating "Life, Liberty, and the Pursuit of Happiness" as the characteristic central rights, the document indicates that the widest spread of actual "Safety and Happiness" will be obtained by insuring the condition of their possibility, and not by delineating and attempting to decree directly any particular form of the good life.

10. By defining the purpose of government as being "to secure these Rights" the document lays down limits to the government's efforts to promote the general welfare, limits which are ever ready for reassertion.

11. By the explicit inclusion of the people's right to "alter or abolish" its government, that is, the right to revolution, the nation acquired an incalculable stabilizing force, since the possibility of radical amendment is a part of its very foundation. And by recommending patience and "Prudence" as well as by pointing to the precise justification for revolution as "Tyranny," the Declaration wisely moderates this right of revolution.

12. By subscribing, at the end of the document, to considerations of duty, sacrifice and honor, the Signers nobly enlarge the sphere of self-interest defined by the central truths.

At the end of his life Jefferson asked himself: "Is my Country the Better for my Having Lived at All?" His answer included the mere listing: "the Declaration of Independence"—justly, I think.

C.

I cannot pretend to have given sufficient evidence for the rightness of the substance of the Declaration—I am, in effect, assuming it. I am here rather intent on discovering whether it would be possible to point to a peculiar *formal* cause for the salubriousness of this text. I think it would be. Let me first say wherein it seems to me to consist. A criterion ought to be applied to founding texts which I think of as the criterion of

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"least pervertibility." A text is benign if its peculiar doctrines do not readily lend themselves to bad uses. The Declaration displays this incorruptibility—always conditioned, of course, on the text's being actually attended to. The cause of this virtue seems to me to be the very circumstance that its right-minded substance is presented in an "unfounded" but pregnantly rational form.

The classical philosophers had a useful term for this peculiar curtailed or shallow mode of the Declaration. They called it *opinion*, the sum of propositions held as true but without a full account of their roots in the nature of things. And if they were *in fact* truths, they called it "right opinion," *orthē doxa*, orthodoxy. Right opinions are unthought-out thought. Clearly axioms are right opinions of a peculiarly pure, lucid, rational sort. The Declaration is the very exemplification of *right opinion*.

No philosophical issue seems to me of more political interest and yet more perplexing than our ability use the intellect in this localized way and yet to use it very soundly. It is a kind of mystery: the mystery of the instrumental use of reason.

But this much at least is evident: that for different peoples such "right opinion" is differently related to the depth of being as known to their own sages. In each the practical intelligence laboring *within* the world is differently connected with the reflective intellect concerned *about* the world. Some peoples walk in direct obedience to the law of their God; some exist in a state organized by the kind of radical theory called ideology; some live enmeshed in the tough but delicate web of tradition; this nation is what it is through being conceived in liberty and dedicated to a *proposition*.

To give an example: the way of tradition, the English way which Jefferson's friendly antagonist Adams thought next best to our own, is thus described by Edmund Burke in his *Reflections on the French Revolution*:

We know that we have made no discoveries; and we think that no discoveries are to be made, in morality; nor many in the great principles of government, nor in the ideas of liberty, which were understood long before we were born, as well as they will be after . . . the silent tomb shall have imposed its law on our pert loquacity.

And again, in praise of prejudices:

. . . we cherish them because they are prejudices; and the longer they have lasted, and the more generally they have prevailed, the more we cherish them. We are afraid to put men to live and trade each on his own private stock of reason; because we suspect this stock in each man is small . . .

It is clear that we are the opposite. We publicly abhor prejudices and declare ourselves dedicated to propositions. That is, we intend to hold our opinions as if they were not "opinion" but deep-founded truths which each has thought out as thought can alone be thought, for himself. Our public discourse and our peculiarly American private talk, too, is irretrievably informed by an incessant, all-pervasive rationality, in which propositions and their consequences are continually posited and questioned

and re-affirmed. Our ratiocinations easily reach the founding axioms themselves. But, I want to argue, this permanent debate is securely held within a world shaped by the truths and modes of our text: we safely consider ourselves equal participants in a rational enterprise requiring true principles—even when we tell lies and talk jargon.

In politics the Declaration sets out fairly definitely the public conditions of possibility of private comfort, without delimiting its character or promising its achievement. So *in the realm of thought*, the Declaration focuses the reason without determining it. Much in the manner of a work of poetry—which indeed it literally is, since the great paragraph of "abstract truths" can be read in near-perfect lines of iambic pentameter—it offers the greatest definition of view with the least restriction of thought. Therein consists its *depth*.

In our best tradition, things are thought of as having a true nature, their being, which is reachable through a directed questing activity. The Declaration promotes the pre-figuring of that activity in ordinary life. Through the memorable reasonableness of its tone, from the clear immediacy of its peculiar vision and by the many-rootedness of its truths, it establishes access from our realm of opinion, however corrupted, to the realm of being and its truth. This wordly text has a peculiarly felicitous relation to the depths from which its opinions spring—therein lies the warrant for its claim to universality.

I have wished to argue that the Declaration, intended as an expression of the common opinion, is truly a text of "right opinion" in the ancient sense, a benign practical text which also has a peculiarly sound relation to the realm of thought. But now I must grasp at a metaphor: this "lucid communication" is really *translucent*; it is enlightened and enlightening without positively revealing the source of its illumination. It is like a window of alabaster in the cave of our world, a window which does not frame the truth but which permits its pursuit.

To draw the conclusion: In 1854, in a different context, Lincoln gave this advice. He said:

Let us re-adopt the Declaration of Independence and with it, the practices and policy which harmonize with it.

It seems to me sound advice. It may seem to you superfluous advice, if my argument, that we already live in the world of the Declaration, is right. But it is one thing to live in a derivative world and another to possess its source. And it is the re-appropriation of that old source which I am proposing.

On hearing such suggestions people observe sagely: "You cannot look to the past." To what then are we to look? The present, that moving band of vanishing "nows," always produces the wisdom which fits it, evanescent wisdom. The future, which we have yet to make and have some reason to fear, is in its essence non-being, and when appealed to for advice can only reflect our present ignorance. But our past, which is really our perpetual present, is what we have. So why not re-possess what is ours, the more so since it seems to be good?

* * * * *

Many of the facts and some of the ideas in this lecture come from the following works:

Carl L. Becker, *The Declaration of Independence, A Study in the History of Political Ideas*, Vintage Books (1967, first published in 1922).

Daniel J. Boorstin, *The Lost World of Thomas Jefferson*, Beacon Press (1948).

Adrienne Koch, *The Philosophy of Thomas Jefferson*, Gloucester, Mass. (1957, first published in 1943).

A Casebook on The Declaration of Independence, Analysis of the structure, meaning and literary worth of the text, ed. Robert Ginsberg, Thomas Y. Crowell Company (1967), particularly the articles by S. G. Fisher, W. S. Howell and A. M. Schlesinger.

American Civil Religion, ed. Russell E. Richey and Donald G. Jones, Harper and Row (1974), particularly the article by D. Little.

George Anastaplo, "The Declaration of Independence," *Saint Louis University Law Journal*, IX (1965), 390-415.

Martin Diamond, "The Revolution of Sober Expectations," Distinguished Lecture Series on the Bicentennial, American Enterprise Institute for Public Policy Research (1974).

Harry V. Jaffa, "How to Think About the American Revolution—A Bicentennial Cerebration," prepared for delivery at the 1975 annual meeting of the American Political Science Association, San Francisco (Copyright 1975).

Elliott Zuckerman pointed out to me the pentameter prosody of the whole great paragraph of the Declaration, and that the rest of the text is shot through with "fossils" of iambic pentameter, like:

the Laws of Nature and of Nature's God,

and:

our Lives, our Fortunes, and our sacred Honor.

The Founders and Slavery

by Herbert J. Storing



"It is refreshing," said one of the dissenters in the case of *Dred Scott v Sandford* "to turn to the early incidents of our history and learn wisdom from the acts of the great men who have gone to their account."¹ It is a common opinion today, however, that, admirable as the American Founders may be in other respects, in their response to the institution of Negro slavery their example is one to be lived down rather than lived up to. A good expression of this opinion has recently come from the distinguished American historian, John Hope Franklin.² We need to face the fact, Franklin contends, that the Founders "betray[ed] the ideals to which they gave lip service." They failed to take an unequivocal stand against slavery. They regarded "human bondage and human dignity" as less important than "their own political and economic independence." They "spok[e] eloquently at one moment for the brotherhood of man and in the next moment den[ie]d it to their black brothers." They "degrad[ed] the human spirit by equating five black men with three white men." The moral legacy of the Founders is shameful and harmful. "Having created a tragically flawed revolutionary doctrine and a Constitution that did not bestow the blessings of liberty on its posterity, the Founding Fathers set the stage for every succeeding generation of Americans to apologize, compromise, and temporize on those

principles of liberty that were supposed to be the very foundation of our system of government and way of life."

This view of the American Founding—that the Founders excluded the Negroes from the "rights of man" expressed in the Declaration of Independence and sanctioned slavery and Negro inferiority in the Constitution—is a view that the radical abolitionists, from whom John Hope Franklin descends, share with their pro-slavery antagonists. Indeed, one of the best, and surely most authoritative, expressions of this view came in the opinion of Chief Justice Taney in the famous Supreme Court case of *Dred Scott v Sandford* in 1857, in which the Supreme Court, for the second time in its history, held an act of Congress unconstitutional, and in which Taney tried to secure once and for all the place of slavery under the Constitution. I want to examine Taney's carefully worked-out reasoning, for there one can confront most clearly what is today the dominant opinion about the Founders and slavery.

Dred Scott was a slave owned by a Doctor Emerson, a surgeon in the United States Army. In 1834 Scott was taken by his master from Missouri to Rock Island, Illinois, where they lived for about two years, and from there to Fort Snelling in the federal "Louisiana territory," where they lived for another couple of years before returning to Missouri. On Emerson's death, Scott tried to purchase his freedom from Mrs. Emerson. Failing in that, he sued in the Missouri courts for his freedom, on the ground that he had become free by virtue of his residence in a free state and a free territory. He won in the lower court, but

¹This is the text of a lecture given at St. John's College, Annapolis, on March 5, 1976. Herbert Storing is Professor of Political Science at the University of Chicago.

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the decision was reversed on appeal. The Supreme Court of Missouri, abandoning eight Missouri precedents and departing from the then almost universal adherence of Southern courts to the principle "once free, always free," held that, whatever his condition in Illinois and in federal territory, Scott was a slave upon his return to Missouri.

On Mrs. Emerson's remarriage, Scott became the property of her brother, John Sandford, a citizen of New York; and this enabled Scott to sue for his freedom in federal court under the provision of the Constitution that gives federal courts jurisdiction in cases between citizens of different states. He lost in the lower court and appealed to the Supreme Court, which in 1857 finally handed down its opinion—or rather its opinions, for all nine justices expressed their opinions, most at considerable length. I will be concerned here only with the opinion "of the court" given by Chief Justice Taney.

Taney held, in the first place, that because he was a Negro, Scott was not and could not be a citizen of the U.S. (regardless of whether he was free or not) and could therefore not sue in the federal courts on the grounds he had chosen. (I pass over Taney's dubious assumption that for a citizen of a state to be entitled to sue under the diversity clause he must establish citizenship of the United States.) Taney held, in the second place, that the federal act under which Scott claimed freedom, the Missouri Compromise Act of 1820 outlawing slavery in the northern part of the Louisiana Purchase, was unconstitutional: for Congress to prohibit slavery in federal territory was to deprive slave-owning citizens who might move into that territory of their property without due process of law.

These two holdings are the conclusions of two lines of argument, one concerning the status of Negroes and the other concerning the status of slavery, that provide my two themes. Taney emphasized throughout his opinion that he was merely giving effect to the Constitution. It was not his business to read into the Constitution the more favorable views toward the Negro that had emerged since the time of the Founding. Actually, as Lincoln correctly argued, opinion about Negroes had hardened rather than softened in the seventy years since the adoption of the Constitution.³ But more important is the fact that Taney's reading of the Constitution and the views of the Founders was wrong, except perhaps in one very important respect.

Taney takes up first the question of Negro citizenship, then the question of Negro slavery; but it will be clearer if I reverse the order and look first at slavery. According to Taney, the Founders assumed the legitimacy of slavery; and back of that was a universal opinion of the inferiority of the Negro race.⁴ Negroes "had for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit." "No one thought," Taney said, "of disputing" such opinions. Negroes "were never thought of or spoken of except as property."

Only on such a basis, it seemed to Taney, could the framers of the Declaration of Independence be absolved from utter

hypocrisy. They *said* that "all men are created equal and are endowed by their Creator with certain unalienable rights." Yet they were, many of them, slaveholders; and they certainly did not destroy slavery. But there was no hypocrisy, because the writers of the Declaration "perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew it would not, in any part of the civilized world, be supposed to embrace the negro race, which, by common consent, had been excluded from civilized governments and the family of nations, and doomed to slavery." The men of that age (that is, the white men) simply did not regard Negroes as included among the "all men" who are, according to the Declaration of Independence, "created equal"; and, Taney concluded, "no one misunderstood them."

This whole argument—and I repeat, it is identical to the common view today—is a gross calumny on the Founders. The truth is almost the exact opposite of Taney's account. The Founders understood quite clearly that Negroes, like men everywhere, were created equal and were endowed with unalienable rights. They did not say that all men were actually secured in the *exercise* of their rights, or that they had the power to provide such security; but there was no doubt about the *rights*. Far from it being true that "negroes were never thought of except as property," not only Negroes but slaves were very frequently spoken of and treated as persons. All of the Constitutional provisions relating to slaves, for example, refer to them as persons. And while slaves were typically deprived of *civil* rights, they were regarded as persons under criminal law. As rational and, to some degree, morally responsible human beings, they were held capable of committing crimes and they were protected by the law—in principle and surprisingly often in practice—against crimes committed against them. In the first three or four decades of our history, the injustice of slavery was very generally acknowledged, not merely in the North but in the South and particularly in Southern courts.

Since I think this is likely to be unfamiliar territory to most of you, let me give a couple of examples.

In 1820 the Superior Court in Mississippi was confronted with the question, there being no positive legislation covering the matter, whether the killing of a slave was murder under the common law.⁵ The Court held that it was; and this was the usual view of Southern courts that considered this question. The Mississippi judge began by emphasizing that "because individuals may have been deprived of many of their rights by society, it does not follow that they have been deprived of all their rights." The slave "is still a human being, and possesses all those rights, of which he is not deprived by the positive provisions of the law . . ." Since the common law definition of murder is the taking away the life of a reasonable creature with malice aforethought and since a slave is a reasonable being, such a killing of a slave is murder.

Slavery is the creature, Southern as well as Northern judges said again and again, of positive law only; it has no support in natural law or in transcendent principles of justice. Yet slavery existed; it was lawful in the Southern states. Even when the judges were giving effect to the positive law of slavery (which they had a clear duty to do) they typically acknowledged the injustice of the institution.

In a Supreme Court case fifteen years before *Dred Scott*, *Prigg v Penna* (1842), the Supreme Court upheld the constitutionality of the Fugitive Slave Act of 1793, which implemented the fugitive slave clause of the Constitution; the Court held that this federal power was exclusive, thereby invalidating state "personal liberty laws," which had been passed in a number of northern states to try to give greater protection to Negroes claimed as fugitive slaves than the federal law provided.⁶ The opinion was written by a strong anti-slavery man, Joseph Story, and many of Story's friends wondered how he could make such a decision. Story replied that his first obligation was to the law but that, in any case, he thought his opinion a great "triumph of freedom."⁷ It was a triumph of freedom mainly because while upholding the Fugitive Slave Law, Story took the opportunity to stress that slavery is a mere creature of positive law and has no support in natural law. "The state of slavery is deemed to be," in Story's words, "a mere municipal regulation, founded upon and limited to the range of the territorial laws." That means that the presumption is always against slavery, even while provisions of the positive law protecting slavery are being enforced.

The same view was common in the South. Indeed, contrary to Taney's claim that no one questioned the legitimacy of slavery, nothing was more common than Southern judges giving public utterance to the excruciating agony of trying to reconcile the law that protected slavery with the principle of justice that condemns it. One of the most interesting of these cases is an 1820 North Carolina case, *State v Mann*, where the Court held that a master cannot commit a legal battery upon his slave.⁸ The Court had held earlier, that a white person could be punished for assault and battery against someone else's slave.⁹ But the law cannot protect the slave, Judge Ruffin held, against his master, even in case of a wanton, cruel, senseless beating. Ruffin was offered by counsel the analogy of parent and child or master and apprentice, where the authority of the superior is limited and supervised by the law. He reluctantly, but surely correctly, rejected the analogy on the ground that the end of these relations is the good and happiness of the child or the apprentice, whereas in slavery the end is nothing but the profit of the master. It is the wrongness of slavery that makes it impossible to limit it. "We cannot allow the right of the master to be brought into discussion in the courts of justice." To question that right is to deny it, and that cannot be the business of a judge in a slave state. "The slave, to remain a slave, must be made sensible that there is no appeal from his master. . . ." "I most freely confess sense of the harshness of this proposition; I feel it as deeply as any man can; and as a principle of moral right every person in his retirement must repudiate it. But in the actual condition of things it must be so. There is no remedy. . . . It constitutes the curse of slavery to both the bond and free portion of our population. But it is inherent in the relation of master and slave."

I should add that 20 years later, nevertheless, Ruffin upheld a conviction of murder in the case of an especially brutal, but probably not premeditated, killing by a master of his own slave.¹⁰

Another kind of case that was common in the Southern courts was like *Dred Scott*; it arose where a person who had been a slave but who had been taken to reside in a free state and then



returned to a slave state sued in the courts of the latter for his freedom. As I have said, in such a case the Southern courts held (at least until the 1840's or 1850's) that such a person was free. Once the chains of slavery enforced by positive law are broken, they can never be restored.

A slave, Lydia, was taken in 1807 by her master from Missouri to free Indiana where he registered her as his servant under Indiana's gradual emancipation law. He sold his right to her but when her new master brought her back to Missouri, the court there upheld her claim to freedom.¹¹ The rights of her master had been destroyed in Indiana, "and we are not aware of any law of this state which can or does bring into operation the right of slavery when once destroyed." Can it be thought, the judge asked, that "the noxious atmosphere of this state, without any express law for the purpose, clamped upon her newly forged chains of slavery, after the old ones were destroyed? For the honor of our country, we cannot for a moment admit, that the bare treading of its soil, is thus dangerous, even to the degraded African."

The American Founders and their immediate descendants, North and South, not only believed in but emphasized the wrongness of slavery, at the same time that they wrestled with the fact of slavery and the enormous difficulty of getting rid of it. It was a fact; it seemed for the time being a necessity; but it was a curse—the curse of an unavoidable injustice.

It is true, as Taney said, that Negroes were thought to be inferior to whites; but it is not true that this was thought to justify slavery. In a famous section of his *Notes on Virginia*, published in 1784, Thomas Jefferson reflected on Negroes and Negro slavery in terms that are today generally found offensive and that are in consequence usually distorted and misunderstood.¹² Proceeding in the spirit of the 18th Century student of natural history, and emphasizing the shameful lack of systematic study of this subject, Jefferson examined the differences between the races. He thought that the blacks "participate more of sensation than reflection." He judged them inferior to whites in physical beauty, in reason, and in imagination, though in many physical attributes and in what he called "endowments of the heart," or the "moral sense," they are equal. Jefferson did conclude that