

# CREATION AND COMMITMENT: LINCOLN, THOMAS, AND THE DECLARATION OF INDEPENDENCE

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The trail that took Clarence Thomas to the Supreme Court is blazed with the mark of his controversial ideas about natural law. Some of Thomas's supporters, drawing lessons from the differing fates of the Bork and Souter nominations, may have wished that the nominee had said much less (at least in public) about these ideas. But it is to Thomas's credit that he left the mark of his thought along the path he took to the Court. His efforts to account for his ideas under questioning from the Judiciary Committee were rather feeble when compared with the vigor of his prior presentations in speeches and in published articles. Yet if Thomas's inability or unwillingness to use the confirmation process to lead us along his course of thought raises questions about his qualifications or character, it does not establish that this course of thought is not worth pursuing.

Thomas's belief in natural law expresses and is expressed by his faith in the principles of equality, rights, and representative government proclaimed by the Declaration of Independence. In forming such a high regard for the Declaration of Independence and in seeking to renew its bearing on the great issues of his day, Thomas has followed in the footsteps of Abraham Lincoln. By coming to terms with Clarence Thomas's view of the Declaration, especially through comparisons between Thomas's and Lincoln's understandings of that document, we will be able to glimpse both what is high-minded and attractive about Thomas's belief in natural law, and also what is most worrisome.

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## I.

Thomas contends that the Declaration is the cornerstone of our Constitution and laws, providing us with fundamental moral principles and with a model for the defense and application of those principles.<sup>1</sup> What are these "natural law" principles and methods,<sup>2</sup> and how might a judge make use of them today?

The first sentence of the Declaration appeals to "the Laws of Nature and of Nature's God" to justify the colonies' disengagement from Britain and assumption of the status of a sovereign nation.<sup>3</sup> In today's global context of resurgent bids for national independence, this sentence looms large. It leads us to wonder just which features of nature or law shall

1. Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 How. L.J. 983 (1987) [hereinafter Thomas, *Plain Reading*]; Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. PUB. POL'Y 63 (1989), esp. *id.* at 64-68 [hereinafter Thomas, *Higher Law*]; see also Clarence Thomas, Remarks to the Federalist Society for Law and Public Policy Studies, University of Virginia School of Law 5 (Mar. 5, 1988) (transcript on file with the author) ("Never lose sight of the fact that the last words of the Constitution of 1787 refer to the Declaration of Independence. The Constitution must always be understood in light of the ends set forth in the Declaration.").

2. Thomas has discussed natural law in many of his writings and speeches. In addition to the sources cited *supra* note 1, see Clarence Thomas, *Conservatism and Dissent: Personal Character in Public Life* 4-6 (Mar. 30, 1988) (transcript on file with the author) (summarizing the main themes of natural law and natural right that thinkers from Jefferson to Martin Luther King made central to our public life); Clarence Thomas, *Why Black Americans Should Look to Conservative Policies* 8-9 (June 18, 1987) (transcript on file with the author) (natural law is a form of principled ethical thought, grounded in human nature, that is both ancient and applicable to contemporary social and constitutional problems) [hereinafter Thomas, *Conservative Policies*]. For a summary and critique of Thomas's natural law views, see Erwin Chemerinsky, *Clarence Thomas's Natural Law Philosophy* (n.d.) (unpublished manuscript, on file with the author).

3. When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with one another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle them, a decent Respect to the Opinions of Mankind requires that thy should declare the causes which impel them to the Separation.

The Declaration of Independence para. 1 (U.S. 1776). Notice the phrase "separate and equal," whose later echo in the segregationist maxim of *Plessy v. Ferguson*, 163 U.S. 537 (1896), intimates the Declaration's ironic career. See *infra* note 21.

There are three extant texts of the Declaration, differing from one another in punctuation, capitalization, and other respects. The earliest of these is the Dunlap Broadside, printed in Philadelphia on the night of July 4 by order of the Continental Congress. The second text is the fair copy written into the Journal of the Congress by Charles Thomson, its secretary. The third text is the parchment version, engrossed by resolution of Congress (July 17, 1776) and signed by its delegates on August 2 and thereafter. All quotations in this essay are from the Dunlap Broadside. For the text of the Dunlap Broadside, see EDWARD DUMBAULD, *THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY* 157 (1951).

serve to identify the human communities that deserve to be self-governing. Do “the Laws of Nature and of Nature’s God” require that Lithuania be independent? Slovenia? Quebec? Are there, in fact, any useful generalizations to be made about which populations should be sovereign? The present administration has offered none, and has preferred to take a more political approach to the proliferating movements toward secession or independence in Europe and beyond. If there is wisdom in this posture, it consists in a mixture of skepticism about natural law and fear of the violent consequences that may result from using the language of principle to legitimate and give further power to nationalism, xenophobia, and the force of hatred.

Whether Justice Thomas will be called upon to interpret and apply the natural law language of the Declaration in the context of its greatest and most obvious relevance—the independence and sovereignty of communities of people—we can have no way of predicting. Surely we should have asked him how he understands the Declaration’s teaching on the matter of independence; and if he failed to use the Declaration’s natural law assertions to advantage in that context, on their home court so to speak, perhaps we should doubt his ability to use them fruitfully in other connections.

Apart from the reference to natural law in the first sentence of the Declaration, Thomas’s interest is chiefly in the Declaration’s famous second sentence.<sup>4</sup> The natural law content of the second sentence consists in three assertions. First, there are certain self-evident truths (or, at least, “we hold” them to be self-evident) which are foundational principles of law and government. Second, the content of these principles includes equal rights to life, liberty, and the pursuit of happiness. (Ensuing clauses present two further principles, government by consent and the people’s right to overthrow tyranny.) Finally, these principles have their foundation in or are appropriate to the human condition. It is in virtue of our status as created beings that we are equal (“all Men are

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4. We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—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 to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

The Declaration of Independence para. 2 (U.S. 1776). See Dan Himmelfarb, *The Constitutional Relevance of the Second Sentence of the Declaration of Independence*, 100 YALE L.J. 169 (1990) (contending that the Framers of the Constitution meant its provisions to embody the political ideas of the Declaration).

created equal") and holders of the specified rights ("endowed by their Creator with certain unalienable Rights"). This last assertion is crucial. For it is not only their self-evidence but also their basis in "nature," in our "endowment" as creatures, that makes these principles a "natural law."

The phrase "natural law" should, it seems, have something to do with nature, and something to do with law.<sup>5</sup> If the references to self-evidence and Creation in the Declaration's second sentence help make sense out of the "nature" part of the idea, where does the "law" come in? There are two possibilities. One is that the announced principles (of equal rights, et cetera) are "law" just because they are self-evident and built into our "nature." The other possibility is that these principles become law when they are declared in a communal act of commitment. The Declaration of Independence, is, after all, just that—a Declaration, a speaking-out in words. The Declaration uses words to speak nature to us. And it concludes these words with a vow that makes a commitment: "for the support of this Declaration. . . we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor."<sup>6</sup>

An apologist for the Declaration's authority and significance might well hold that while the principles proclaimed in that document would be valid even if the Declaration had never declared them—they are, after all, self-evident and built into our nature—these principles acquire a more positive legal effect through the fact of their having been laid down in a founding text that expresses our national commitments. Indeed, the genius of Clarence Thomas's recourse to the Declaration is that it enables him to assume both the mantle of natural law and the cloak of faithful adherent to the positive (enacted) law. For the Declaration is precisely the enactment of natural law into positive law. It is the official text that bids us look to the moral principles on which our system of laws rests.

Through this reasoning, Clarence Thomas arrives at the same conclusion as did Abraham Lincoln, whose views of the Declaration Thomas cites approvingly.<sup>7</sup> The conclusion is that our Constitution and laws are to be interpreted in such a way as to give effect to their animating moral principles, the principles to which the Declaration commits us.<sup>8</sup> Abraham Lincoln made use of this interpretive method to support his view

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5. See Ronald R. Garet, *Natural Law and Creation Stories*, in 218 RELIGION, MORALITY, AND THE LAW: NOMOS XXX (J.R. Pennock & John Chapman, eds., 1988).

6. The Declaration of Independence para. 32 (U.S. 1776).

7. Thomas, *Plain Reading*, *supra* note 1, at 984; Thomas, *Higher Law*, *supra* note 1, at 65.

8. [The authors of the Declaration] defined with tolerable distinctness, in what respects they did consider all men created equal—equal in 'certain inalienable rights, among which

that slaves, or at least free blacks, were citizens of a state within the meaning of the diversity jurisdiction clause of Article III of the Constitution. Lincoln denounced the contrary result that the Court reached in *Dred Scott*.<sup>9</sup> Even more passionately, he denounced Chief Justice Taney's reasoning in support of that result. Taney harmonized the assumption that the authors and signers of the Declaration truly meant that "all Men are created equal," and the historical fact that these men did not abolish slavery or take steps towards its abolition, by concluding that the principle of equal rights laid down in the Declaration does not cover blacks and was never meant to cover them. They are not "Men" in the meaning of the Declaration, and therefore they are not "citizens" within the meaning of the Constitution.

Lincoln's answer to Taney, the answer much admired by Clarence Thomas,<sup>10</sup> was that in announcing the universally valid principle of equal human rights, Jefferson and the other authors and signers did not pretend that they could give full effect to that principle within the political limits of their own time. Instead, they transmitted the valid principle of equal rights to each subsequent generation, to be progressively actualized. But Lincoln's answer, and also Thomas's own stance, begs the decisive question. Is each successive generation to implement the principle of equal rights as that principle was understood in 1776? Or are courts and civic leaders to give the principle of equal rights its best possible formulation, one that might differ significantly from Jefferson's own understanding of it?

This question carries grave implications along two fronts. First, who counts as "men" within the meaning of the principle that "all Men are created equal"? Are women men? Are slaves, or free blacks? Are fetuses men? What about those who linger, like Nancy Cruzan,<sup>11</sup> in an

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are life, liberty, and the pursuit of happiness.' This they said, and this they meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.

Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 405 (Roy Basler ed., 1953) [hereinafter COLLECTED WORKS]. Thomas quotes a portion of this passage in Thomas, *Plain Reading*, *supra* note 1, at 984.

9. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

10. Thomas, *Plain Reading*, *supra* note 1, at 984-87.

11. *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841 (1990).

irreversible "persistent vegetative state": a condition about which Jefferson could have had no intentions, since the defining features of the condition were unknown in Jefferson's time? Second, supposing that an entity counts as an instance of "Men," or comes within the meaning of the equal rights principle: just what rights does that entity have? Do "Life, Liberty, and the Pursuit of Happiness" include a right to privacy? Does a right to privacy include a woman's interest in making her own decisions about whether to continue or terminate a pregnancy? If a woman has a right to make that decision, and a fetus is also a human person enjoying equal rights, how is the conflict of claims to be resolved? Does natural law address these issues; or does it leave them, like the problem of which communities should be allowed or helped to become independently self-governing, to a political fate?

The dissenting opinion that Justice Stevens wrote in the recent *Cruzan* case<sup>12</sup> suggests some possible answers. In that case, the Supreme Court held that the Due Process clause of the Fourteenth Amendment was not violated when the state of Missouri barred Nancy Cruzan's doctors from honoring her parents' wish that her feeding tube be removed, so that her years of degeneration in an irreversible persistent vegetative state would be brought to an end. Justice Stevens argued in dissent that such a state-imposed barrier deprived Nancy of liberty without due process of law. In reaching this conclusion, he relied upon the language of the Declaration of Independence.<sup>13</sup> He understood the rather open-ended language of the Due Process clause in terms of what he took to be the Declaration's philosophy of life. The Declaration places its value, said Stevens, not on mere organic life, but on life lived purposively, oriented to happiness and meaning, and aware of the horizon of death.<sup>14</sup> Such meaningful liberty, concluded Stevens, is needlessly obstructed when the state interposes its own view of the value of life and keeps loving parents from bringing to a close a beloved daughter's tragically prolonged dying.

It should be obvious that neither the principles nor the methods of the Declaration of Independence suffice to bring Justice Stevens to his

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12. 110 S. Ct. at 2878-92 (Stevens, J., dissenting).

13. Stevens begins his opinion by quoting the Declaration's second sentence in full. 110 S. Ct. at 2878 n.1.

14. In expounding the Declaration's implicit philosophy of life and death, Stevens looks to Lincoln's Gettysburg Address, which honors the sacrifice of the dead and links their devotion to the moral needs of the living. 110 S. Ct. at 2885 n.17. For discussion of the relationship between the Gettysburg Address and the Declaration, see *infra* notes 28-31.

humane, though controversial, conclusions. Does the right to life support the right to liberty here, or conflict with it? If Nancy, seven years clenched in a persistent vegetative state, is not truly alive in the full sense, why does she continue to have rights at all; why is she among the "all Men" who are endowed with equal rights; why is she a "person" within the meaning of the Due Process clause? No text, not even one as wise and venerable as the Declaration of Independence, holds answers to such questions. No text, no principle, no method, offers any substitute for a judge's requisite humanity, understanding, and judgment. Soon we will know how far these qualities reside in Clarence Thomas.

## II.

Clarence Thomas's effort to show how the Declaration lies at the heart of our laws is inspiring and praiseworthy. It is also politically sensible. By appealing to the Declaration as a bridge between law and morality, the conservative nominee was able to take positions not far from those of Judge Bork, without seeming to. Like Bork, Thomas relies on the "original understanding" or original intent of the laws; but Thomas reaches farther back than Bork, to give Jefferson pride of place among the Founders. Thomas's originalism of moral principles was more politically palatable, and deservedly so, than Bork's crabbed originalism of specific intentions.

What sank Judge Bork, however, was not so much his adherence to the intent of the Framers as his professed disbelief in natural rights. The final, fatal image of Judge Bork was of a man who, turning conservatism upside down, believed that we enjoy only those rights against government that the official legal texts expressly give us. By contrast, Clarence Thomas's celebration of the Declaration of Independence seems less legalistic in the bad sense, more supportive of natural rights that we enjoy just because we are human persons.

The appearances, however, may be deceiving. Consider the law of sex discrimination. Not only in 1868, when the Fourteenth Amendment and its civil rights provisions were ratified, but as recently as 1964, when the anti-discrimination provisions of the Civil Rights Act were enacted, the majority of those who authored and voted for these laws had only the narrowest and dimmest understanding of the evils of sex discrimination. When called upon to apply these laws, will Justice Thomas construe them in a truly "natural law" fashion, and breathe into them the animating moral principle of equal rights? Or will he stick closer to the limited intentions and goals of the laws' authors? And if Justice Thomas takes

the former approach, and relies on the Declaration of Independence to give weight and substance to the principle of equal rights, will he see it as his job to give that principle its fullest and best formulation? Or will he content himself with an understanding of equal rights that was hammered out two centuries ago, in contexts far removed from our contemporary encounter with the complexities and paradoxes that afflict the struggle for equality between men and women?

Thomas wisely relies, as we have seen, on Abraham Lincoln's famous saying that the reach of the Declaration's principle that "all Men are created equal and endowed by their Creator with certain unalienable Rights" is not limited by what the Founding generation was able to accomplish.<sup>15</sup> Thomas agrees with Lincoln's idea that the authors of the Declaration handed down a general moral principle that each generation must progressively implement to the best of its ability.

But Lincoln wrapped his statements about the Declaration in a political cloak of ambiguity. Did he mean that our system of laws is committed to implement, as fully as present circumstances allow, the principle of equal rights as it was understood in 1776? Or did he mean that our system of laws is committed to implement, so far as possible, the principle of equal rights as it can best be grasped in the light of human intelligence and experience? Under the pressure of his time's greatest controversy, the debate over slavery, Lincoln made the choice to give our founding principles, not their "original" understanding, but the best understanding of which he was capable. He insisted, as the Founding generation did not, that blacks and whites have an equal right to the product of their labor.<sup>16</sup>

Elevated to a high office in which he must make comparable choices, will Thomas, like Lincoln, search for a more adequate interpretation of the principle of equal rights than that which he inherited? Or will he assume that the "original understanding" of that principle is all that is required to do the work of the law? The nominee's response to questions during the confirmation hearings suggests that, for now at least, the latter is more probable. Yet if Thomas is truly as independent in his thought as he has declared himself to be, perhaps he will have the courage to demand of himself that his every judicial application of the principles of human equality and liberty be based on his deepest understanding of those principles, and not just on their most canonical, hallowed, and musical formulation.

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15. See *supra* note 8.

16. Lincoln, *supra* note 8, at 405.



## III.

High principles such as those proclaimed by the Declaration do and should leave their mark upon our understanding of our Constitution and laws. Yet our application of these principles to the dilemmas of our time should be guided by a sense of irony.<sup>17</sup> The highest principles, given their loftiest formulation by the most high-minded of civic leaders, have contributed throughout our history not only to great political achievements but also to incivility, suffering, and wrongdoing. A judge who does not see the irony in high principles does them, and us, a disservice.

As we have seen, Clarence Thomas has modeled his approach to the Declaration of Independence on Abraham Lincoln's. Lincoln, in his great debates with Stephen Douglas during their 1858 Illinois senatorial contest, called his state and country to revive the principles of the Declaration and apply them to the most divisive issue of the time: the extension of slavery into the territories. Stephen Douglas said that the territories should decide for themselves whether they should be slave or free. He saw nothing in the Declaration to oppose this policy; for, as Douglas saw it, when the authors and signers of the Declaration said that "all Men are created equal" and endowed with equal rights, they did not mean to include blacks. Lincoln charged Douglas not only with advocating a bad policy but also with the greater crime of besmirching the Declaration and trivializing our national moral commitment to the great principles of equality and liberty.

Lincoln never satisfactorily explained how the Declaration's equal rights principle could be satisfied by any measure that fell short of slavery's outright abolition. But his greater sin against the Declaration was his willingness to drag it through the popular muck of racism. With the same breath that he used to condemn Douglas for his low and mean interpretation of the Declaration, Lincoln said things that merit an equally harsh judgment. Reports of one of Lincoln's speeches show Lincoln using the language of the Declaration to play to the prejudices of his audience.

'The Judge [Douglas] regales us with the terrible enormities that take place by the mixture of races; that the inferior race bears the superior down. Why, Judge, if we do not let them get together in the territories they won't mix there.' A voice—"Three cheers for Lincoln." The

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17. See REINHOLD NIEBUHR, *THE IRONY OF AMERICAN HISTORY* 151-74 (1952).

cheers were given with a hearty good will. Mr. Lincoln—"I should say at least that that is a self-evident truth."<sup>18</sup>

How could Lincoln both celebrate the principle of equal rights as a self-evident truth, and cheapen the very idea of moral first principles by including among them a base appeal to fears of racial mixture? Should not anyone, Clarence Thomas included, who looks to the Declaration for illumination of the great civil rights issues of our own day, and who looks to Lincoln for insight into the place of moral principle in politics and law, be alive to the ironies?

Surely the fact that Lincoln was led, either by political motives or by limitations in his own vision of emancipation, to misconceive the nature and demands of equality, does not mean that Clarence Thomas or any other advocate of the Declaration's philosophy must do the same. To say that a full appreciation of the Declaration is an ironic appreciation is only to ask that those who call us to be faithful to the great ideas of the Founding be attentive to the fact that wherever exalted sentiments leave room for interpretation and judgment there is also room for selfish politics, narrowness, and self-deception.

Justice Thomas is now a part of the ironic career of the Declaration of Independence in the Supreme Court. He would do well to study not only Lincoln's political ideas, but the work of Lincoln's appointees to the Court.<sup>19</sup> Of special interest is the long tenure on the Court of Justice Steven Field. Justice Field, appointed to the Court in the same year that Lincoln gave his Gettysburg Address, with its invocation of the Founding commitments to the principle that "all Men are created equal," did more than any other single Justice to implement Lincoln's vision of the Constitution as the legally-applied Declaration. But Field invoked the Declaration, not to combat peonage or segregation, but to constitutionalize the idea of freedom of contract<sup>20</sup> and to restrict the power of the

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18. Abraham Lincoln, Speech at Chicago (July 10, 1858), in 2 COLLECTED WORKS, *supra* note 8, at 498.

19. Lincoln made five appointments to the Supreme Court: Chief Justice Salmon P. Chase, and Associate Justices Samuel Miller, Noah Swayne, Steven Field, and David Davis. Several of these enjoyed long tenure on the Court, and shaped the development of what would ultimately become the jurisprudence of the *Lochner* era.

20. Justice Field first articulated his interpretation of the Constitution as application of the principles of the Declaration in his dissent in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 83 (1873), contending that the Fourteenth Amendment should be seen as implementing the libertarian ideals of the Declaration of Independence. "That amendment was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes." *Id.* at 105. Field went on to say that an "equality of right, with exemption for all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States." *Id.* at 109-110.

states to enact and enforce a wide range of economic regulations. The career of Justice Field is the ironic bridge between Lincoln's vision and both *Plessy v. Ferguson*<sup>21</sup> and *Allgeyer v. Louisiana*.<sup>22</sup>

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The openness of callings to all "is the fundamental idea upon which our institutions rest." *Id.* at 110. Of the other Lincoln appointees, Justice Swayne and Chief Justice Chase joined the Field dissent, while Justice Miller, joined by Justice Davis, wrote for the majority, holding that the provisions of the Reconstruction Amendments did not bar a state statute incorporating a New Orleans slaughterhouse and livestock landing, and concentrating the butchering of livestock there.

A decade later, the Court upheld, against a Contract Clause challenge, a subsequent state statute rescinding the New Orleans company's monopoly. *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746 (1884). Of the two Lincoln appointees who remained on the Court at that time, Justice Miller wrote the majority opinion, while Justice Field, in his concurrence, expounded the second sentence of the Declaration at some length, and repeated his earlier assertion that the original monopoly grant was invalid as a violation of

the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give them their highest enjoyment.

*Id.* at 757 (Field, J., concurring). Field's interpretation of the Declaration of Independence was accepted in the concurring opinion of Justice Bradley (joined by Justices Harlan and Woods), *id.* at 756-58, 763, who had also joined Field's *Slaughter-House Cases* dissent.

21. *Plessy v. Ferguson*, 163 U.S. 537 (1896). *Plessy* was decided in 1896, the penultimate year of Field's tenure on the Court. It is chilling enough to realize that a Justice appointed in the year of the Gettysburg Address could regard segregated railway carriages, and the statutory rule of "equal but separate," *id.* at 540, as consistent with a nation "dedicated to the proposition that all men are created equal." But the deeper concern is that while Justice Field was a libertarian visionary when it came time to interpret the Fourteenth Amendment's Privileges or Immunities clause, *see supra* note 20, regarding that provision as an embodiment of the Declaration's sweeping commitment to liberty and equality, he was somehow able to turn this jurisprudence on or off at will, replacing it when necessary or desirable with a much narrower jurisprudence of original intentions. Dissenting in *Strauder v. West Virginia*, 100 U.S. 303 (1880), Field argued that the intent of the Fourteenth Amendment was to create a constitutional foundation for the Civil Rights Act of 1866, which in turn was intended only to insure equality of "civil rights," not of "political" or "social" rights. *Id.* at 312 (Field, J., dissenting).

This is not to say that Justice Field seized every opportunity to perpetuate racial inequality. If that were the case, there would be no incongruity in his thinking that deserves to be brought out into the light of irony. In fact, it was Justice Field who, in his capacity as circuit court judge, decided the path-breaking anti-discrimination case *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6546), invalidating the San Francisco "queue ordinance," which required the hair of all county jail inmates to be cut short, but which was meant to apply only to the long, braided hair of the Chinese. And it was also Justice Field who insisted on an expansive interpretation of the Equal Protection clause outside the area of racial civil rights altogether. *See infra* note 22.

22. In 1897, Justice Field's final year upon the Court, the views he had first advanced in his *Slaughter-House Cases* dissent shaped majority opinions in two cases pregnant with significance for the economic substantive due process jurisprudence of the *Lochner* era. In *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), the Court, through Justice Peckham, held that:

The liberty mentioned in [the Fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

Today, we once again confront divisive issues of economic policy and civil rights. The Supreme Court will decide these issues. For all of the controversy that has surrounded him, Clarence Thomas has accomplished something of real value by insisting that these issues be framed by the high principles of the Declaration of Independence.<sup>23</sup> Let us recall, however, that high principles lend themselves to low politics, and that shining ideas, when brought to a career on the Supreme Court, sometimes lose their luster there. Let us hope that Clarence Thomas, whose own nomination was beset by the ironies of affirmative action, and who evinced little appreciation of those ironies, can bring a sense of irony to his stand on behalf of law's foundational principles.

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165 U.S. at 589. This affirmation of an expansive concept of liberty of contract is immediately followed by an extensive application of the views of the Declaration advanced earlier in Justice Bradley's *Butcher's Union* concurrence, 111 U.S. at 760, views parallel to those Field put forward in both the earlier and the later Louisiana slaughterhouse cases. *Slaughter-House Cases*, 83 U.S. at 83; *Butcher's Union*, 111 U.S. at 754.

The second of the 1897 cases, *Gulf Colo. & Santa Fe Ry. v. Ellis*, 165 U.S. 150 (1897), invoked the Declaration of Independence in support of an interpretation of the Equal Protection clause, again in a context far removed from the issues of slavery and racial justice that the *Slaughter-House Cases* Court had regarded as the Reconstruction Amendments' exclusive concern. Justice Brewer's majority opinion insists that while the Declaration cannot, without implementation by specific Constitutional provisions, invalidate egregious laws,

yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence.

165 U.S. at 160.

Justice Brewer's theory of the letter and the spirit accepts belatedly, and in a far different normative and legal context, Lincoln's own view of the relationship between Constitution and Declaration. Writing in 1861 about the Declaration's principle of "liberty to all," Lincoln had said:

The assertion of that principle, at that time, was the word 'fitly spoken' which has proved an 'apple of gold' to us. The Union, and the Constitution, are the picture of silver, subsequently framed around it. The picture was made, not to conceal, or destroy the apple; but to adorn, and preserve it. The picture was made for the apple—not the apple for the picture.

Abraham Lincoln, *Fragment on the Constitution and the Union*, in 4 COLLECTED WORKS, *supra* note 8, at 169. (The source of Lincoln's metaphor is Proverbs 25:11, "A word fitly spoken is like apples of gold in a setting of silver.")

23. Thomas's speeches and writings suggest that he shares with Justice Field a conviction that the liberty proclaimed by the Declaration and protected by the Constitution includes, even pre-eminently, economic liberties. Clarence Thomas, Address for Pacific Research Institute 5 (Aug. 10, 1987) (transcript on file with author) (Jefferson's statements indicate that "natural law, when applied to America, means not medieval stultification but the liberation of commerce"); Clarence Thomas, American Bar Association Address, Luncheon Meeting of Business Law Section 1-5 (Aug. 11, 1987) (transcript on file with the author) (stressing the importance of economic rights and economic liberties). Yet the idea of economic rights or liberties is broad enough to accommodate quite different interpretations, and Thomas's might not coincide with Field's. See Clarence Thomas, Address for Pacific Research Institute, *supra*, at 3-5, in which Thomas gives content to the idea of economic liberty by describing his grandfather's opportunities for productivity and self-reliance, as well as the barriers to participation that made it especially difficult for him to acquire property and security.

## IV.

The outcry that was raised in the early stages of the confirmation process against Clarence Thomas's endorsement of natural law was animated by several interlocking worries. "Natural law" signalled to some a return to economic substantive due process, to vigilant judicial protection of market liberties; to others it suggested a kind of "voodoo jurisprudence," in which magical and mysterious concepts are invoked to justify the interpretation and application of the law. Many, no doubt, were concerned about the prospect of a judge making overly free use of his own moral beliefs in the course of decision, undisciplined by law's objectivity and by the professional norms of judging. But, especially given Thomas's Roman Catholic education, his celebration of that education in the public accounts of his life story, and his putative views about abortion, there was another and in some respects more complex source of protest against Thomas's warm views of natural law. "Natural law," perhaps, was understood by some to be a kind of code-phrase for Catholicism.

Indeed, one of the things that makes it difficult to have a productive exchange of views about natural law is that the phrase means so many things in so many different contexts. In ethics, natural law suggests the existence of a moral reality that is by and large accessible to us, to which we can come to a better understanding through sincere dialogue and careful exercise of the power of reason. Some would say that such a moral reality does not exist, or that even if it does, we cannot learn much about it. Others might believe that moral understanding and even improved dialogue and agreement about moral matters are possible for us, yet insist that the object of this understanding and agreement is not truly a moral reality but instead the workable practices and conventions of various societies or communities, situated as they are in specific historical or cultural contexts. I suspect that on this score, Clarence Thomas is inclined to believe that there really is a right and wrong that we can grasp through the exercise of reason. In that sense, he can be said to hold a natural law view of ethics. But, outside the academy, I hardly think that this is terribly controversial. I do not think that if Clarence Thomas simply stood for the proposition that there is such a thing as right and wrong, and that human beings can tell what is right and wrong, he would have been pilloried for those beliefs during the confirmation process. To the contrary: if any Supreme Court nominee were so foolish as to state publicly his or her belief that there is no such thing as right

and wrong, such a nominee would never defend those views at the hearings. The fact that Thomas did not defend his own natural law statements does not mean that they were indefensible. As beliefs about ethics, they were and are broadly acceptable.

Natural law also names some positions about law in general and about judging in particular. These positions are quite complex, as recent academic debates about natural law attest. Despite this complexity, however, one might say that a natural law view of law is one that holds that the question of what the law is—for example, what the rule is (where there are competing formulations available), or what the implications of a rule are for a given set of facts—is a question that depends for its answer on moral determinations. I will not try to spell out such a natural law viewpoint here, or explain how it differs from positivism, say, as a theory of what it is in virtue of which something is law, or from formalism, as a theory about the derivation of decision rules from legal rule-premises. The reason I am spared such labors is that there is little evidence that Clarence Thomas holds or ever did hold a natural law view of law in this sense. If he had held it, it might have gotten him into difficulty during confirmation, if only because the idea is a complex one that is difficult to get across. It is easily mistaken for an endorsement of a kind of judicial activism, in which the judge feels licensed to apply his or her own moral beliefs whenever the occasion arises. But I do not believe that Clarence Thomas holds a natural law view of law or of judging. Certainly the confirmation process yielded no enlightenment on this score.

But natural law is a name, not only for a position in ethics and a position in law, but also for a position in theology. As such, natural law is chiefly a Catholic stance, although major Reformation thinkers accepted more natural law ideas than is sometimes thought to be the case. We should ask how far the firestorm over Thomas's affirmations of natural law was fueled by unease about the role of theological commitments in a Supreme Court Justice's thought or in the working out of constitutional law, as opposed to controversy about moral reality (natural law as an ethical idea) or about the merits of natural law as a rival to positivism or formalism.

The topic is vast in scope, and I cannot begin to cover the whole ground of it here. Let us consider, then, just one detail: the fact that our Declaration of Independence appeals twice to a notion of Creation, together with the fact that Clarence Thomas asked us to be guided by the Declaration. Are the Declaration's appeals to Creation an intellectual

embarrassment? Do they do any work; if so, what? If Clarence Thomas had chosen to fight for natural law before the Judiciary Committee, and had insisted that the Declaration's appeals to a Creator God are filled with significance for today's constitutional problems, what might he have said? And with what reception should such a defense have met?

Lincoln took it upon himself to offer a public political explanation of the meaning of the Declaration's appeal to Creation. Reports of the speeches that Lincoln gave in the campaign against Douglas, and of the crowd's response, show that this explanation was well-received.

These communities, by their representatives in old Independence Hall, said to the whole world of men: 'We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness.' This was their majestic interpretation of the economy of the Universe. This was their lofty, and wise, and noble understanding of the justice of the Creator to His creatures. [Applause.] Yes, gentlemen, to *all* His creatures, to the whole great family of man. In their enlightened belief, nothing stamped with the Divine image and likeness was sent into the world to be trodden on, and degraded, and imbruted by his fellows.<sup>24</sup>

Lincoln here supplies to the Declaration an implicit reference to Genesis 1:26-27: "Then God said, 'Let us make man in our image, after our likeness. . . .' So God created man in his own image, in the image of God he created him, male and female he created them." The essence of the Declaration's conception of human equality, as well as of its argument for rights, can then be captured in the form of the *imago dei* syllogism: God is worthy; God made humankind in the divine image and likeness; therefore humankind too is worthy.

Such a way of working out the meaning and normative significance of the Declaration's appeal to Creation seems far removed from the kind of "natural law" creationism that critics of Clarence Thomas might have associated with him, and which has from time to time contributed to the shaping of our constitutional law. The latter kind of creationism is illustrated by this well-known statement by Justice Bradley (a Grant appointee), concurring in *Bradwell v. Illinois*<sup>25</sup>:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and

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24. Abraham Lincoln, Speech at Lewistown (Aug. 21, 1858), in 2 COLLECTED WORKS, *supra* note 8, at 546.

25. 83 U.S. (16 Wall.) 130 (1873) (rejecting a constitutional challenge to a state law barring women from the practice of law).

woman. . . . The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.<sup>26</sup>

This elaboration of the "divine ordinance" seems to sit uneasily with Lincoln's *imago dei* interpretation of the Declaration, especially when we recall that the relevant passages from Genesis, quoted above, go out of their way to draw attention to the fact that God's worth is reflected equally by males and by females. Indeed, since humankind is made in the image and likeness of God, and humankind is male and female, it follows that God is male and female: an inference that Justice Bradley seems not to have drawn.

For whatever reason, including perhaps that he does not share them, Clarence Thomas did not champion these *imago dei* views of dignity, rights, and equality in his public presentations during the confirmation proceedings. Had he done so, it might have proved necessary to inquire whether it is true, in this world that has felt the slave-holder's lash and the exterminating monstrosity of the death camps, that we carry yet God's image. This question is not only the skeptic's rejoinder to the theologian; it is also the Biblical response to any oversimplification of the human situation that makes our moral condition a straightforward deduction from God's holiness. Corruption, sinfulness, and evil, as well as a groaning under suffering and death, round out the Biblical view of the human condition. From a Biblical viewpoint, any conception of our rights that is based entirely on our created worth must founder on these sad truths about existence. Correspondingly, any conception of God that defines God solely as Creator leaves out the chief ways that God addresses our human condition, as Sustainer through our sufferings and as Emancipator from bondage.

From a Biblical perspective, then, the Declaration's way of grounding and communicating our equality and rights is imperfect, since it is based upon an imperfect grasp of our existence and of the several ways in which existence is addressed by God. These imperfections heighten the need for irony in appreciating the Declaration's principles and the history of their use and abuse. Anyone who understands that our created status is not the final word about our moral situation will appreciate the

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26. *Id.* at 141 (Bradley, J., concurring in the judgment). For a more thorough discussion of the place of such natural law creationism in theories of natural law and Creation, see Garet, *supra* note 5, at 236.



irony in Lincoln's anti-miscegenationism or in Bradley's creationist sexism, and will fully expect these to recur again and again in the name of "all Men are created equal."

## V.

The Declaration of Independence asserts that the truths of human equality and rights, and of Creation as their ground, are "self-evident," or at least that we hold them to be. I think it important that the second sentence of the Declaration does not read, "These truths are self-evident," but instead begins: "*We hold* these truths to be self-evident." The affirmation of equality and rights commences as an act of collective public holding. This statement of the faith, as it were, presages the last sentence of the document, which performs a stirring act of communal dedication. The Declaration's chief moral idea is neither Nature in general nor Creation as a specific interpretation of it, but Commitment. Lincoln saw this clearly; Thomas, I think, not so clearly.

Clarence Thomas commended himself to America as a man who stands for values. This is the picture of himself that he painted in the short speech he made at the opening of his confirmation hearings. Yet on the same day that he made the speech, Judge Thomas renounced natural law—not once but three times, somewhat like Peter the disciple—and failed to explain how he expects values to serve him as a judge.

Under the pressure of questioning, and perhaps recognizing the survival-value of intellectual blandness, Thomas explained that his statements in support of natural law did not mean anything at all. These statements, Thomas said, were just the ruminations of an amateur philosopher: appropriate perhaps for an agency head, but irrelevant to constitutional adjudication. As for the article on fetal personhood, which the nominee once had praised as a "splendid example of applying natural law,"<sup>27</sup> Thomas pleaded that he had never read it, and, in the alternative, that it was not a splendid example of applying natural law. I recall a story that Owen Fiss told in the first week of Procedure class: that the complete pleading in the Case of the Broken Pot is: (1) I never borrowed the pot; (2) the pot isn't broken; (3) the pot was already broken when I borrowed it. Perhaps Clarence Thomas heard that story in his first week of law school too, but drew from it a somewhat different moral than I did.

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27. Thomas, *Conservative Policies*, *supra* note 2, at 8 (referring to Lewis Lehrman, *The Declaration of Independence and the Right to Life*, AM. SPECTATOR, Apr. 1987, at 21).

If there is one thing that one who believes in natural law *cannot* believe, it is that natural law is “just philosophy,” just ruminations with no bearing upon legal decision. Had Thomas contended that natural law is an appropriate philosophy to guide legal decisionmaking in the executive branch of government, but inappropriate for adjudication by judges, I might have respected that notion; I surely would have been curious to see how Thomas went about defending such a double standard. But Thomas said nothing of the kind. He simply stepped away from his previous affirmations.

Had Thomas argued that the Declaration of Independence is relevant to the questions of legal interpretation, enforcement, and leadership that arise in the executive branch of government, but not relevant to the adjudication of cases in the courts, he might have salvaged his position. Lincoln was (after all) the President, not a judge, when he delivered the Gettysburg Address, with its opening appeal to the issuance of the Declaration as our nation’s founding act of commitment. But Thomas showed no inclination to pursue this route toward maintaining the integrity of his views. Instead, he jettisoned his previous affirmations as if they were so much ballast, to be cast off to keep his balloon airborne.

But if there is one thing that an admirer of the Declaration of Independence and of the Gettysburg Address *cannot* do, it is to treat those affirmations as non-binding and of “merely philosophical interest.” For the Declaration concludes with these words of commitment: “for the support of this Declaration. . . we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.” Beginning by observing that “the Laws of Nature and of Nature’s God” exist, and by holding certain truths to be self-evident, the Declaration ends with an exchange of vows. The principles of sovereign self-government, government by consent of the governed, the equality of human persons as God’s creatures, and the natural rights to life, liberty, and the pursuit of happiness, are presented first as affirmations and last as commitments.

It is in this spirit that Lincoln retrieves those principles in the Gettysburg Address. He says that in 1776 (four score and seven years before 1863), our ancestors created a nation “conceived in Liberty, and dedicated to the proposition that all men are created equal.”<sup>28</sup> The central idea is that the generation of our legal institutions was at the same time a

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28. Abraham Lincoln, Gettysburg Address (Nov. 16, 1863), in 7 COLLECTED WORKS, *supra* note 8, at 23.

dedication to a principle. The Creation effected a Commitment.<sup>29</sup> Civil war has tested that commitment; and the challenge has been met by the greatest form of dedication, the sacrifice of life.<sup>30</sup> In closing the Address, Lincoln challenged the war-torn nation to honor and commemorate this sacrifice by rededicating itself to the Republic's foundational principles.<sup>31</sup>

Lincoln regarded our system of laws as bound, pledged, called to the honoring of certain moral principles. With Jefferson, the Declaration's main author, Lincoln accepted the traditional view that reason and argument can bring those principles to light. Yet in giving primacy to notions of dedication or commitment, Lincoln and Jefferson brought traditional natural law claims, about the power of reason to discern and advance the common good, into uneasy allegiance with a new insistence on devotion, or the making of a public leap of faith. On the one hand, the truths about equality, natural rights, and so on, are self-evident; on the other, through a political act, *we hold* them to be so. On the one hand, nature creates moral relationships (rights, sovereignty, powers of self-government) that law is bound to respect; but on the other hand, to respect these principles requires that "we mutually pledge." On the one hand, our nation is dedicated to principles; on the other hand, "it is for us, the

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29. The opening of the Gettysburg Address nests two creation stories within one another. The outer story is that of the creation of the Republic, traced to the issuance of the Declaration. This creative act is presented at once as a conception ("conceived in Liberty"), as the resultant birth of a nation sired on the land by "our fathers," and as a commitment to principle ("dedicated to the proposition that all men are created equal"). The inner story is the creation story told in the second sentence of the Declaration, the Genesis account of human persons invested with worth by their Creator. The effect of these nesting stories is to enhance the grandeur of the origin, and to reflect its prestige upon Lincoln's closing call for a national rebirth.

30. Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battle-field of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this.

But, in a larger sense, we can not dedicate—we can not consecrate—we can not hallow—this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here.

Gettysburg Address, *supra* note 28.

31. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.

*Id.* It is remarkable how, in a short speech ostensibly made to dedicate a cemetery, Lincoln transforms and exalts the theme of dedication, rendering it his chief moral and patriotic idea. The word "dedicate" or "dedicated" occurs six times; "devotion" is used twice in a comparable sense, and "resolve" once.

living” to rededicate ourselves to those same principles. The genius of the American theory of natural law developed by Jefferson and Lincoln lies in its insistence that while basic moral facts and relationships are real, in the sense of being built into nature and human nature, and available to the inquiring mind, their standing and their bearing on the issues we face depend on devotion, on commitment, on the exchange of vows.

It is commonly said that the principles of natural law, supposing them to include ideas such as those contained in the Declaration of Independence, are couched at such a high level of abstraction that they do not yield definite answers to contested issues of the day. For some—Clarence Thomas perhaps included—“all Men are created equal” means that fetuses are persons, and that government must be colorblind. For others, the same principle supports abortion rights and affirmative action. Yet whatever views a judge may hold, he or she must accept responsibility for the hard intellectual effort, the imagination and creativity, needed to walk the long road that leads from a general principle about equality, liberty, or consent, to the resolution of the great issues of the day. This responsibility makes a small but important contribution to the building of old promises into new moral efforts.

Recall the words “we mutually pledge.” This is the language, not only of the Declaration, but of the exchange of wedding vows. Those who marry make basic pledges to one another: to love one another, to give respect and supportive care. How amazing and how poignantly human, that we can take such vows together and allow ourselves to be bound by them, even though, in our often-youthful inexperience, we know so little about what is meant and what life will bring. Surely it is to be expected that in the course of a marriage, reasonable differences of opinion—if anything about marriage can be said to be reasonable—will arise over what those vows meant and just how they bear on a pressing issue of marital rights or duties. Still, what would we think of a married man who said: “Those vows don’t bind me as a husband. They don’t have a bearing on my choices as a husband. I’m interested in those vows, but just as an amateur philosopher.”

Vows that perform and celebrate the union of human persons, in marriages, communities, or states, are not the sort of thing in which it is honorable to take an amateur philosophical interest. One either makes these pledges and means them and tries in loving partnership to give them substance and to live up to them: or one has no business speaking their language.