WE THE PEOPLE – THE EVOLUTION OF AMERICA'S CONSCIOUSNESS – THE EMERGENCE OF COMMON GOOD

FOREWORD

Evolutionary Theory and The Common Good: The Beginnings of a Wisdom Intervention

BY CYNTHIA BOURGEAULT[1]

Civics for Wisdom Students

Which comes first, the chicken or the egg?

This perennial riddle comes to my mind as I prepare to introduce you to some of the backstory for the document you now hold before you, a draft version of a proposed course of study currently under development in the spiritual network I tend. Its working title is "Civics for Wisdom students."

Which is the primary container, the original? Here in the Wisdom lineage, where we study the fundamental virtues and transformational principles that have traditionally guided conscience and right action in the world, the chicken is definitely in the egg. Our 234-year-old American experiment in self-governance is a chicken securely nested within an overarching matrix— *the conscious evolution of humanity*—and cannot be fully comprehended apart from that matrix.

In the world of constitutional law, the world in which most of you hold standing, Wisdom would most likely be recognized as simply another "egg" in the chicken of our democratic system of governance: another of those individual freedoms protected under the aegis of "life, liberty, and the pursuit of happiness." Those attracted to the Wisdom pathway are free to pursue it, but it can claim no superior status to any other spiritual or doctrinal egg, and any attempt to arrogate such primacy to itself would

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immediately be flagged as a violation of the fundamental constitutional principles on which our nation was founded.

So—if the phrase is still politically permissible—"Who trumps whom?"

The solution to the riddle comes, of course, when one discovers that it's not dichotomy but a *polarity*. The two apparent opposites are in dynamic tension, and when things are running rightly, they flow into each and reinforce each other. A basic grounding in universal moral principles, combined with a broader perspective from which to ask the large questions, ensures a steady stream into our system of people with the maturity and character to actually handle themselves in this form of governance. And that level of personal maturity helps ensure that the system will not be imperiled by those who wish to abuse it for personal gain or pathological agendas. It's precisely when the chicken and her egg get severed into "either/or" that the whole system runs amok.

And isn't that pretty much where our nation is impaled right now? Everyone is intuitively aware that our constitutional crisis is also a moral crisis; the two are deeply intertwined. But the term "moral" has become so relegated to doctrinal systems, so removed from the direct bloodstream of humanity itself, that any attempt to touch it immediately becomes a third rail. Virtuous according to whom? Common good originalism ? The Greek philosophical principles that framed our founding fathers' notion of "the common good?" Medieval moral theology? The moral majority? Secular humanism? And where does this leave the growing majority of Americans who do not belong either culturally or racially to this narrow, white, inherently elitist and racist silo in which our nation came into being? Is the constitution held captive to this one very specific inflection point in cultural history, or does it have the capacity to grow in accordance with some greater "egg," identified in certain segments of the intellectual conversation as "the conscious evolution of humanity?" And if so, what is to safeguard that it grows by some objective and measurable standards, not merely at the sway of the latest relativisms and cultural fads?

I daresay that these are more interesting questions, these big perspective questions, and without the occasion to ask them, it follows almost inevitably that purely segmental solutions—be they in Constitutional Law, Integral Evolutionary theory, or Social History—can hardly be expected to yield comprehensive results. But how do these very different intellectual perspectives even begin to come into fruitful, cross-pollinating dialogue? How do they even make initial contact? And here we bump up hard against the structural limit that has plagued broad intellectual discourse at least since the beginning of the modern university system in the thirteenth century.

Knowledge has become progressively more specialized, and people who attempt to speak outside their immediate area of expertise quickly reveal their ignorance through their glib reductionisms, outdated or superficial scholarship, and imprecise application of specific principles. It is an endemic problem and it's right in our faces once again. Those pushing the "Common good originalism" argument, for example, are frightfully out of date in their general grasp of contemporary theological and philosophical currents, not to mention the rising new discipline of evolutionary consciousness. To even begin to address the question of the common good in ignorance of such key players as Jean Gebser, Teilhard de Chardin, Ilia Delio, and the groundbreaking work in chaos theory and the neurophysiology of consciousness is to condemn this otherwise legitimate inquiry to an exercise in nostalgia. And in the same measure, the would-be "spiritually evolved," "woke"—overwhelmingly of the liberal-progressive stamp—tend to be frightfully ignorant of the fundamental principles of constitutional law, and increasingly, of the constitution itself. Their information comes heavily filtered through the respected blue chip journalist sources (Harper's, Atlantic Monthly, The Economist, The New Yorker, etc.), plus liberal-leaning popular redactors such as Jill Lepore, Thomas Ricks, *et.al*, leading only to heightened moral outcry, minus any real tools for skillful change. It's a direct parallel with why quantum physicists grit their teeth when they hear rigorous scientific theories such as the Heisenberg principle being converted into sweet philosophical aphorisms. At that level of fuzziness, you lose the plot altogether.

It's just here that I began to sense in our own Wisdom network a window of opportunity for some real cross-pollinating work. As I looked at our core membership, I realized that we had the *vesica pisces* (the interlap zone of two circles) right there in our own mix. We have people like me, who are highly trained Wisdom theorists and practitioners, studying and even creating some of the breakthrough work in evolutionary theory. We have at our disposal considerable data (both theoretical and practical) on those timeless philosophical virtues such as "freedom," "truth," "conscience," and "the common good" —not simply as noble ideas but as practical pathways toward the formation of more conscious, civilized, astute and responsive human beings, trained to observe carefully and to understand skillful action in terms of polarity, not polarization. At the same time, we are blessed to have attracted to the Wisdom path people of the stature of my colleague and co-collaborator Buddy Parker, whose rigorous training in the field of Constitutional law and seasoned experience as a former DOJ attorney, set him in good stead to grasp immediately the technical subtleties missed by well-intentioned amateurs, and to teach our students how to work skillfully within the baselines of our nation's founding documents to help bring about

the desired results. We recognized that the possibility existed to put teeth in the work of catalyzing real-time, on-the ground conscious change.

The Wisdom tradition is not about withdrawing from the world to seek a private inner holiness. It recognizes that its real purpose has all along been to stand with the world, particularly in times of planetary crisis and on the cusp of new breakthroughs in consciousness. Wisdom's task is to stand watch in these times and consciously hold the connection with a larger realm of guidance that we believe is available to this planet and in fact tenderly concerned with it. In November 2020, when this project began, our nation was certainly in the vortex of one of these times of "local instability." With a contested political election, the capstone act of four years of political madness, and a pandemic holding the world in its deadly grip, we recognized that the time to step up to the plate was upon us. We also recognized that the response couldn't be simply handwringing and spiritual rhetoric; a new level of synthetic insight was required. That is what set-in motion a winter of intense immersion in core constitutional history and what gave birth four months later to the beginnings of the document you now hold in your hands. During the morning sessions of our five-day Wisdom school in April 2021, I taught a class exploring some of those cardinal virtues from a Wisdom perspective. In the afternoon, Buddy Parker and fellow lawyer Laurel Catto led the group through a systematic study of the pertinent constitutional documents with the dual objectives of refreshing people's memory on principles perhaps learned a half century ago as school children in a very different era; and at the same time laying before them a "warts and all" revisionist history of our country, directly addressing the San Andreas fault of systemic racism that has been intentionally obfuscated and minimalized. The curriculum for that afternoon set of sessions is the core of the material you hold in your hands now. It has been extensively expanded and developed by Buddy Parker, with the intention that it might be serviceable as a guidebook or teaching manual to some more extensive curriculum yet to be developed.

A final comment. During this initial study, our attention was drawn increasingly to the issue of the common good. The irony did not escape us that while lip service is paid to it in the preamble to the constitution, actually, the constitution is bent heavily toward the articulation of and protection of individual rights. This is not surprising, since the era in which it was originally composed and subsequently amended was also the highwater mark of what evolutionary theory sees as the "mental rational" level of consciousness with its strong emphasis on the *individual* as the functional unit of society. What those trained only in the legal and social disciplines have not yet sufficiently factored in is that in the larger world of evolutionary consciousness as well

as in contemporary systems theory, that era has long since waned, ceding ground to an entirely new understanding of collectivity as the new measure of personhood. This is not the faceless conformity of former Marxist theories of collectivity, but a collectivity based on *autopoiesis*—i.e., creating a whole that is greater than the sum of its parts possessing "emergent properties" vested only in the whole. The scholarship and evidence are fascinating and hopeful, but its strongest implication is that the notion of "the common good" is in also in rapid evolution, and Constitutional Law may well find itself the threshing floor on which this new understanding is threshed out. The big problem with "Common Good Originalism," from the perspective of contemporary evolutionary theory, is that *it fundamentally misunderstands and misplaces the notion of origin*. Origin is not the first point on a historical timeline, but the point at which that which is inherently beyond time enters the historical timeline. "Before Abraham was, I am," says Jesus in one of his more celebrated cryptic teachings. Origin arrives not from the past but from the future, so to speak, drawing consciousness along its evolutionary trajectory according to a deeper teleology which has always been known to mystics and seekers and which is today being confirmed from any number of credible academic reference points (but alas, apparently not yet informing those traditionally oriented constitutional experts shaping the case for Common Good Originalism.) It is time to name this clearly and to let the cross-pollination begin. The "common good" is still under conscious evolution. It cannot be captured in the coercive reinstatement of antiquated value systems; it must be hammered out, "from and toward the future" in dialogue with the timeless Wisdom that has always guided these transitional times toward a higher realization of the truth. This project hopes to be at least a first step in opening that dialogue.

Meanwhile, for bibliographical starters: Teilhard's *The Human Phenomenon*; Beatrice Bruteau: *The Grand Option*, *The Maundy Thursday Revolution*, *God's Ecstasy*; Adrian Bejan, *Design in Nature* ("The Constructal Law" and flow systems), Ilia Delio, *Making All Things New*; Jean Gebser, *The Ever-Present Origin*; and of course, continued meandering in Gurdjieff's *Beelzebub'sTales* and associated commentaries.

WE THE PEOPLE—THE EVOLUTION OF AMERICA'S CONSCIOUSNESS—THE EMERGENCE OF COMMON GOOD

CURATED AND EDITED BY BUDDY PARKER[2]

BACKGROUND

In the 1787 Constitutional Convention held in Philadelphia it may be said that statemen such as Alexander Hamilton, James Madison and others were oriented to the common good of the society. *Federalist* #57 states,

> **The aim of every political constitution is, or ought to be first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society: and in the next place to take the most effectual precaution for keeping, them virtuous whilst they continue to hold their public trust.**
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> **Federalist 57, *New York Packet*, published February 19, 1788.**

At the Philadelphia convention the Constitution of the United States was established for the common good of the Union. Its preamble proclaimed so, stating in part that, "We The People of the United States, in Order to form a more perfect Union…[seek to] secure the Blessings of Liberty to ourselves and our Posterity."—

Yet, "We The People" did not in 1787 encompass all the people of America's society. To be sure America's society was of multiple groupings: white male citizens of States; white women, indigenous Americans; and enslaved Africans. The Thirteen States deliberating the adoption of the 1787 constitution were acting by and on behalf of their white male citizens. But there was resistance among the States to adopting the constitution as Anti-Federalists, who wanted power to remain with the States, objected to a lack of a bill of rights that would limit a strong national government in taking actions against individuals. To secure the adoption of the Constitution and placate the Anti-Federalists, Madison drafted specific amendments—the Bill of Rights

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(Amendments I-X), approved in 1791. These amendments were designed to protect individual liberties by limiting the national government's power.

Initially, the Bill of Rights only limited the national government, not the States. Later, with the adoption of the Fourteenth Amendment the Bill of Rights was over time found to apply to limit the powers of the States. Many decisions by the Supreme Court address liberty, due process, and equal protection issues of the individual as against the national and state governments. This jurisprudence has largely ignored and abandoned as any guidance the common good concepts stated in the preamble.[3]

This paper traces in part America's history since 1776—at least its history in the evolutionary expansion of who comprise "We The People." The events identified arguably show the evolution of America's collective consciousness. It is hoped that this educational review will provide a minimum benchmark from which dialogue will flow regarding "a creative transposition of our founding ideals to a new structure of consciousness based on a radically evolving notion of personhood and the 'Common Good'." In service to that goal, this paper also doubles as the narrative summary of what is ultimately envisioned as a twelve session, college-level course suitable for either online or on-the-ground delivery. A "lesson plan" formatted version of the curriculum is available upon request.

SYNOPSIS OF CORE DOCUMENTS/HISTORY

Session 1: The Declaration of Independence

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.

Action of Second Continental Congress, July 4, 1776; Principal author Thomas Jefferson.

[3] Today, some legal scholars are advocating for a new jurisprudence of moral substance which they call "common good originalism," *See* Session 12, *infra.*

Thus began the American Experiment: "All men are created equal." But the aspirational assertion was made knowing of the then enslavement of hundreds of thousands, the attacking and killing of indigenous Americans, and denial of equality to women. Liberty and slavery—hand-in-hand. The English writer Samuel Johnson, a devout Anglican and committed Tory, suggested that the Americans had no right to govern themselves, "[h]ow is it we hear the loudest yelps for liberty among the drivers of negroes?"

Did Mr. Jefferson consciously embed in the stirring rhetoric, "all men are created equal" a ticking time bomb of unanswered questions. Women? Slaves? Native Americans? Are they not endowed by their Creator with certain unalienable rights of life, liberty and the pursuit of happiness? These unanswered questions would create the counter subject that set the course of American history for these 245 years since the Declaration.

The "American Experiment" was founded on equality before the law, natural rights, and sovereignty of the people. The British monarchy claimed its sovereignty in the "Divine Right of Kings," that ancient system dating to King David in which the people placed their faith in God, and God chose the ruler. Divine Right afforded no accountability between the government (the King) and the governed (the People). The British aristocracy had, over time, chiseled away at the King's absolute power, gaining concessions, both incremental and temporary. By the mid-17th Century, dissenters executed Charles I and established a short-lived "Commonwealth" form of government under Cromwell as "Lord Protector." A product of the Age of Enlightenment, the American system recognized "natural" rights separate and distinct from God-given rights, and American sovereignty rested with "the people" in a government empowered by the consent of the governed.

The signers of the Declaration of Independence signed their death warrants, as it was treason against Britain's King George III.

> **And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred power.**
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> **Declaration of Independence (US 1776).**

Session 2: "We the People . . ."

> **We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense,**

promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Constitution of the United States (US 1787).

On October 19, 1781, Cornwallis surrendered at Yorktown, Virginia ending British military action. On September 3, 1783, the Treaty of Paris was signed with Great Britain recognizing the colonists' independence. By May 1787 the Second Constitutional Congress convened in Philadelphia to discuss amending the Articles of Confederation previously adopted in 1781. What evolved was the Constitution. As of the Treaty of Paris, the former British colonies became independent sovereign states. The question then was could the independent sovereign states agree to form a union, a nation?

The Constitution was created during the most secular period in American history—before or since—with only 10% colonists attending church. Madison believed that religious freedom was a prerequisite to political freedom. There could be no political freedom under a sovereign who ruled both church and state. The Founders were equally concerned with freedom "from" religion and freedom "of" religion. The United States was not established as a "Christian nation," and consciously so.

Without the preamble, the Constitution functions as a mere organizational chart detailing the branches of government (legislative, executive, judicial) and their terms of operation. The preamble animated the new Republic around six "deliverables." The priority was to form a more perfect "Union." The Founders routinely sacrificed the preamble's other values—particularly Justice-- to maintain unity among the states which were deeply divided along sectional lines, primarily North and South. The second deliverable was to establish "Justice," later defined by John Rawls as the result a person would choose, not knowing which side of the bargain she would be on (the "veil of ignorance"). Next are domestic "Tranquility" and the common "Defense," which can only be achieved collectively, and nationwide. The same goes for the "General Welfare," which can only be seen from a national perspective. Following these five aims, the preamble promises that then, and only then, do we secure the "Blessings of Liberty." Even the term "Liberty"—today construed as an individual, rights-based idea—is stated in the collective: "for ourselves and our posterity." The Founders believed that these common goals could never be achieved, and that the Republic would fail, unless Americans were "virtuous" enough to place the common good above their personal interests. Absent virtue, they were certain that the Republic would be perennially whip-sawed by popular passions and individual greed, leading to its failure.

Session 3: The Constitution and Bill of Rights

In December 1791, having been proposed as an inducement to the States to ratify the Constitution, the Bill of Rights became part of it. With their adoption together with the Fourteenth Amendment (1868), the inherent tension between the "common good" of those who consented to be governed versus the individual "unalienable Rights, [of] Life, Liberty and the pursuit of Happiness" of those who are governed was crystallized. Over 200 years of U.S. Supreme Court jurisprudence has in-the-main focused in identifying and amplifying the "unalienable Rights," (written or not) within the U.S. Constitution, e.g., right to privacy.[4] Such a focus has been arguably to the detriment of the common good of those governed, i.e., the individual rights of a person are superior to the duties owed by all to a functioning, just society.

> **The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed. . . .**
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> ***Obergefell v. Hodges*, 576 U.S. 644, 664 (2015).**

One of the crux battles among the Framers was how much power to vest in the people. Founders who feared a tyrannical monarch favored vesting more power in the people. This group included Madison and Jefferson (who was absent from Philadelphia while serving as ambassador to France). Founders who feared democratic mob rule favored vesting greater power in the executive branch and limiting popular elections. This group was known as the "Federalists" and included John Adams (also absent, serving in London) and Alexander Hamilton.

The Founders settled on a three-branch system intended to create two checks on the power of each branch, with "hand brakes" intended to control populist passions. The Electoral College would elect the President rather than a popular vote. The upper chamber of the Legislative branch, the Senate, would be appointed by state legislatures, rather than elected. Legislation would require approval of both houses of Congress and

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[4] The Ninth Amendment states, "[t]he enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people." So, explicitly recognized within the Constitution is the existence of additional rights "retained by the people."

the President, a process that risked gridlock as a necessary evil in the service of Union. And voting was severely limited to white men with property. In computing Congressional representation, all citizens counted (including free people of color and disenfranchised white women), while enslaved people counted as 3/5 of one person. (This calculus formally sanctioned slavery and skewed political power in favor of the South for nearly a century.) Another compromise was to "kick down the road" until 1808 the lawfulness of the slave trade when international slave trade was to be abolished.

Ben Franklin's apocryphal quip, "Gentlemen, you seem to have a Republic, *if you can keep it.*" was prescient. As Jeffersonian populism ascended, the American system became increasingly "democratic" as the franchise grew. Over the next century, voting rights expanded--at least in theory--first to unpropertied and uneducated men, later to formerly enslaved men, and finally to women. With ratification of the 17th Amendment in 1913, U.S. Senators were elected by popular statewide vote. The system of checks and balances would also bend—with growing Executive power, with Legislative gridlock, and an increasingly active Judiciary that began to interpret the Constitution as a living document that should keep step with changing mores, scientific advances, and popular opinion.

Session 4: Virtue and Value: Washington as Linchpin

George Washington was flat out indispensable to the young Republic. Unusually tall for the times, Washington had both stature and *bearing*--in the wisdom sense of the word. He was educated largely at home, through what today would be the middle school grades. Though lacking the elite college degrees of the other prominent Founders (Harvard, Princeton, and William & Mary), Washington *embodied* virtue with a deep and selfless understanding of the national interest--in a way that none of the others were able to sustain.

The other Founders spoke and wrote eloquently about the Roman concept of Virtue; the ability to place common good above personal interest. But they soon abandoned high-minded rhetoric in favor of political self-interest and party politics. It was Washington's embodied Virtue and even-handed temperament that kept the Republic from splintering apart in its first few years. (There was precedent for this. Britain's earlier experiment with Republican government had lasted less than ten years before it restored the monarchy with the reign of Charles II.)

Washington understood all this and feared the Republic's collapse. He wanted to retire after serving one term as President but was persuaded by Hamilton and Jefferson (political rivals who never agreed on anything) that a second term was essential to the Republic's survival. If Virtue was the ideological "glue" holding the nation together, it was now in short supply, with Washington personally, holding the nation together as the grown-up in the room.

What would become of the Republic after Washington's retirement? What would replace Virtue, and Washington's own Being-presence? Washington's Farewell Address offers his answer to that question. Addressed to the American people, the address was widely read, with more printed copies distributed than the Declaration of Independence. Speaking not as President, but as "a parting friend," Washington advises that "spirituality and morality" of the people are needed to survive its partisan divisions and thrive as a nation.

Surrounding the "Enlightenment bubble" of the creation of the Constitution was the great stream of populism; already implicitly anti-intellectual and taking its spiritual and moral bearings from the Great Awakening. The founding of the country was bookended by the two awakenings (the first 1730-1755; the second 1790-1840), which infused into the mix a strongly individualistic bent ("Dispensationalism"), together with an archetypally Old Testament version of a righteous underdog, waging spiritual warfare against a prevailing power structure to claim its "manifest destiny" to a "promised land." These archetypal elements—implicitly uniting patriotism, holiness, and spiritual individualism—will resurface again and again throughout the next two and half centuries, profoundly shift the epicenter of the founding notion of both virtue and common good.

Session 5: Expansion of Slavery—The Road to Dred Scott

As of the Declaration of Independence, the Colonies were in dispute with George III as to who had the "right" to the western lands of the frontier and the promotion of immigrates to settle them.

> **The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. . . .**
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> **He has endeavored to prevent the population of these States, for that purpose obstructing the Laws for Naturalization of foreigners; refusing to pass others to**

encourage their migrations hither, and raising the conditions of New Appropriation of Lands. . . .

He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

The Declaration of Independence. (US 1776).

In 1803, then President Thomas Jefferson, negotiated a treaty with France to purchase land and rights to lands, commonly referred to as the Louisiana Purchase. France only controlled a small fraction of the land mass; the United States bought the preemptive right to obtain lands inhabited by Native Americans, either through conquest or treaty, to the exclusion of other colonial powers. The Louisiana Purchase extended the United States sovereignty across the Mississippi River, nearly doubling the nominal size of the country. At the time of the purchase, half of Louisiana's non-native population were African slaves.

On May 28, 1830, President Andrew Jackson signed into law the Indian Removal Act. The act authorized the president to negotiate with the southern Native American tribes of the Cherokee, Muscogee (Creek), Seminole, Chickasaw and Choctaw, their removal, together with their Black slaves, to federal territory from their ancestral lands. The act was opposed by the native tribes. The act provided the legal support for Jackson's expulsion, first of the Choctaw, then Seminoles, Creek, Chickasaw and lastly the Cherokee whose forced march in 1838 is known as the Trail of Tears.

While President Jackson was forcibly removing native Americans, others were attempting to limit immigrations. The Native American Party, a nativist political party founded in 1844, originally a secret society, was primarily an anti-Catholic, anti-Irish, anti-German, anti-Immigration, populist, and xenophobic party. Members of the party, Protestants, when questioned as to their membership would reply, "I know nothing." The party believed in a "Romanist" conspiracy which allegedly planned to subvert religious liberty and whose members were controlled by Catholic priests and bishops. The party dissolved in 1860.

With expansion of American territories westward following the Louisiana purchase (1803) slavery expanded right along with it. As new states entered the Union, the Missouri Compromise (1820) attempted to maintain a balance of power between slave and free state. The 36'30" line was established as the dividing line regarding slavery and the remainder of the Louisiana Territory.

The Transatlantic Slave Trade was the transportation of kidnapped Africans to North, Central and South America by European men. The captured Africans were shipped across the Atlantic in cramped ships under horrific conditions. It is estimated that over 10.7 million Black men, women, and children were transported in this manner and sold into slavery, with nearly 2 million more having perished during the brutal voyage. To obtain the adoption of the constitution it was agreed that the slavery issue would be "kicked down the road" where the international slave trade was scheduled to be made unlawful.

> **After Congress outlawed the Transatlantic Slave Trade beginning in 1808, growing demand for enslaved Black laborers had to rely on natural reproduction in the local enslaved population, or the sale of enslaved people from one state to another. Over the next half century, this "Domestic Slave Trade" became ubiquitous across the South and central to the debate over whether to abolish slavery.**
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> **An estimated one million enslaved people were forcibly transferred from the Upper South to the Lower South between 1810 and 1860. By the time Alabama became a state in 1819, the Domestic Slave Trade was booming. Over the next forty years, the enslaved population in Alabama increased from 40,000 to 435,000.**
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> **Equal Justice Initiative.** ***Slavery in America: The Montgomery Slave Trade,*** **2018. pp.** ***10, 23.***[5]

By 1860 Montgomery became the center of the Domestic Slave Trade, rivaling New Orleans and Natchez. At least 300,000 of the 435,000 enslaved people living in Alabama were in the state because of the Domestic Slave Trade, many sold in Montgomery where the probate office had granted licenses to 164 slave traders who were authorized to sell people either in private sales or public auction. Lehman Brothers, later to move to New York, was one of the banks which financed slavery in Montgomery. In 1860 Montgomery there were more slave trading spaces than churches and hotels.

In 1820, Congress adopted the Missouri Compromise admitting Missouri as a slave state. In 1833 Dr. John Emerson, a citizen of Missouri, took his slave, Dred Scott, to Illinois (a free state) then in 1836 to territory that would become Minnesota and lastly back to Missouri.

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[5] The Equal Justice Initiative is a non-profit organization founded by Bryan Stevenson and based in Montgomery, Alabama. The EJI provides legal representation to prisoners who may have been wrongly convicted of crimes, prisoners who are unable to afford effective representation, and others who may have been denied a fair trial. *See* https://eji.org/.

After Emerson's death, Scott was conveyed to Emerson's wife's brother, John Sanford, a citizen of New York. (The Supreme Court's clerk erroneously typed Sandford.) In 1853, Scott brought suit in federal court asserting that Sanford falsely imprisoned him as a slave. Scott contended that when he resided in a free state and territory, he became a free man. Sanford contested the Court's jurisdiction contending that Scott, as a "negro of African descent," was not a citizen of Missouri or the United States, but a slave and thus lawful property of a white man. The District Court agreed Scott was a slave and not a citizen; he had no legal standing to file a case in the courts. Scott appealed to the Supreme Court.

Dred Scott v. Sandford,
60 U.S. (19 How.) 393, (1856)

Mr. Chief Justice Taney delivered the opinion of the Court, a portion of which is reprinted below.

> **The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, becomes a member of the political community formed and brought into existence by the Constitution of the United States, and as such became entitled to all the rights, privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution. . . .**
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> **The words "people of the United States" and "citizens" are synonymous terms. . . . They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. . . . The question before us is, whether . . . [negros] compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution. . . . On the contrary, they were at the time considered a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power, and the Government might choose to grant them. . . .**
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> **It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be a mistake. They 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. . . . He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit**

could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics. . . .

The language of the Declaration of Independence is equally conclusive: . . . . "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 them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed."

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that 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. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection. . . .

This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language. The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It declares that it is formed by the *people* of the United States; that is to say, by those who were members of the different political communities in the several States; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the *people* of the United States, and of *citizens* of the several States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the people. It uses them as terms so well understood, that no further description or definition was necessary.

***Dred Scott v. Sandford*, 60 U.S. 393, 403-412 (1856).**

Taney's opinion as to the Founders' originalist intent and "the world's" originalist understanding that the "negro race" was not understood to be part of "We The People" constitutes but a part of the most reviled U.S. Supreme Court opinion.

> **On the key question of slavery, Jackson was not a great or even a good president. Born in South Carolina, America's most aggressively and shamelessly pro-slavery state, he eventually set up a cotton plantation, the Hermitage, in his adopted state of Tennessee. He came to own hundreds of slaves, and he did so by choice. Unlike his highborn Virginia predecessors—Washington, Jefferson, and Madison—Jackson did not inherit his slaves or marry into them. He bought Black humans unashamedly as a self-made man on the rise and never freed any significant number in life or at death. His most important public choices mirrored his private ones. President Washington gave America Chief Justice John Jay; President Adams gave America Chief Justice John Marshall; and President Jackson gave America Chief Justice Roger Taney.**
>
> **Amar, Akhil Reed.** ***The Words That Made Us: America's Constitutional Conversation, 1760-1840.*** **New York Basic Books, 2021, pp. 597-98.**

Session 6: The Voices of the Marginalized Arise

For the first 87 years of American national life following the Declaration of Independence, ("four score and seven years ago. . .") "all men are created equal" meant all WHITE , FREE, MEN. While white immigrant populations (Italian, Irish, German) were gradually assimilated (not without protests; *see* "know nothing" party), those rights were fiercely withheld from people of color—not only Blacks, but with equal virulence, Native Americas and from women. Gradually, voices of conscience and protest began to arise: the growing abolitionist movement from women, and perhaps most prophetically from within the Black community, as marginalized people began to find their voices.

As early as December 1833, Lucretia Mott, a Quaker minister began publicly advocating an anti-slavery message. She was joined by Sarah and Angelina Grimke, South Carolina sisters who moved to Philadelphia and became Quaker activists in the anti-slavery society. Later in 1848 a New Yorker names Elizabeth Cady Stanton and Mott organized a conclave for women in Seneca Falls, New York devoted to the topic of women's rights and abolition of slavery. In the 1850s Harriet Beecher wrote the anti-slavery book, *Uncle Tom's Cabin*, that would outsell every book except the Bible.

On July 5, 1852, in Rochester, New York, Frederick Douglass, born a slave and then recognized as a Black statesman and an abolitionist, gave a speech, "What to the Slave Is the Fourth of July?" A portion of which is reprinted below.

> **Fellow-citizens; above your national, tumultuous joy, I hear the mournful wail of millions! Whose chains, heavy and grievous yesterday, are, to-day, rendered more intolerable by the jubilee shouts that reach them. If I do forget, if I do not faithfully remember those bleeding children of sorrow this day, "may my right hand forget her cunning, and may my tongue cleave to the roof of my mouth!" to forget them, to pass lightly over their wrongs, and to chime in with the popular theme, would be treason most scandalous and shocking, and would make me reproach before God and the world. My subject, then fellow-citizens, is AMERICAN SLAVERY. I shall see, this day, and its popular characteristics, from the slave's point of view. Standing, there, identified with the American bondsman, making his wrongs mine, I do not hesitate to declare, with all my soul, that the character and conduct of this nation never looked blacker to me than on this 4th of July! Whether we turn to the declarations of the past, or to the professions of the present, the conduct of the nation seems equally hideous and revolting. America is false to the past, false to the present, and solemnly binds herself to be false to the future. Standing with God and the crushed and bleeding slave on this occasion, I will, in the name of humanity, which is outraged, in the name of liberty, which is fettered, in the name of the constitution and the Bible, which are disregarded and trampled upon, dare to call in question and to denounce, with all the emphasis I can command, everything that serves to perpetuate slavery—the great sin and shame of America! "I will not equivocate; I will not excuse;" I will use the severest language I can command; and yet not one word shall escape me that any man, whose judgement is not blinded by prejudice, or who is not at heart a slaveholder, shall not confess to be right and just.**
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> **Foner, Philip S.** ***Frederick Douglas: Selected Speeches and Writings, by Frederick Douglass.*** **Chicago: Lawrence Hill, 1999. pp. 188-206.**

Session 7: Civil War and Its Aftermath

The Civil War began on April 12, 1861, with gunfire at Fort Sumter, South Carolina. The war ended on May 9, 1865, when General Robert E. Lee surrendered to General Ulysses S. Grant at the Appomattox Courthouse, Appomattox County, Virginia. In total the war left between 620,000 and 750,000 soldiers dead; countless civilians died as collateral damage. The Southern States' economics were laid in waste. The war in large measure was fought over the continuance of slavery and the expansion of slavery into newly acquired lands.

The Confederate States of America (C.S.A.) which seceded from the Union were South Carolina, Florida, Alabama, Georgia, Mississippi, Texas, Louisiana, Arkansas,

Tennessee, North Carolina, and Virginia. A C.S.A. constitutional convention was held on February 9, 1861, in Montgomery, Alabama—the major center of the Domestic Slave Trade. On February 18, 1861 Jefferson Davis, a Mississippian, took the oath of office as President of the C.S.A. on the entrance to the Alabama State Capitol, the "cradle of the Confederacy".[6] The Vice-President of the C.S.A., Alexander H. Stephens of Georgia, in a speech later known as the "Cornerstone Speech" stated in reference to "We hold these truths to be self-evident, that all men are created equal;"

> **Our new government is founded upon exactly the opposite idea; its foundations are laid, its cornerstone rests, upon the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition. This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth.**
>
> **Stephens, Alexander H**. ***Public and Private Letters and Speeches.*** **1866. p. 721.**

On March 4, 1861, the 16th President of the United States, Abraham Lincoln, took his oath. President Lincoln is known for two major works: the Emancipation Proclamation and the Gettysburg Address, portions of which are reprinted.

The Gettysburg Address

November 19, 1863
Gettysburg, Pennsylvania

Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal.

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. 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

[6] Later, in January 1963, George Wallace intentionally took the oath of office as Alabama's governor on the same spot where Jefferson Davis took his oath.

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.

Abraham Lincoln.

November 19. 1863.

The Emancipation Proclamation

January 1, 1863
A Transcription
By the President of the United States of America:
A Proclamation.

Whereas, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and sixty-two, a proclamation was issued by the President of the United States, containing, among other things, the following, to wit:

That on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free; and the Executive Government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom. . . .

And by virtue of the power, and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free; and that the Executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons.

And upon this act, sincerely believed to be an act of justice, warranted by the Constitution, upon military necessity, I invoke the considerate judgment of mankind, and the gracious favor of Almighty God. . . .

The so-called Civil War amendments to the Constitution, Thirteen, Fourteen, and Fifteen, have a less than clear history regarding legal adoption. President Lincoln justified fighting the Civil War under the constitutional theory that the southern states could not leave the Union. Yet, Congress required the southern states to ratify the amendments as a condition of re-admission to the Union. Regardless, these

amendments are formally recognized as such to the Constitution. The Fourteenth Amendment curtails the powers of the States through its due process and equal protection clauses.

The Thirteenth Amendment

> ***Section 1***. *Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.*
>
> **Ratified December 6, 1865.**

The Fourteenth Amendment

> ***Section 1.*** *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*
>
> **Ratified July 9, 1868.**

The Fifteenth Amendment

> ***Section 1.*** *The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account race, color, or previous condition of servitude.*
>
> **Ratified February 3, 1870.**

Session 8: Reconstruction and the Jim Crow Era

W.E.B. Du Bois wrote in his book, *Black Reconstruction in America, 1860-1880:* "The slave went free, stood a brief moment in the sun then moved back again toward slavery."

"So determined were most white Southerners to maintain their own way of life that they resorted to fraud, intimidation and murder in order to re-establish their own

control of the State governments. . . .the new civil war within the Southern States stemmed from an adamant determination to restore white supremacy."[7]

> **In 1865, after two and a half centuries of brutal enslavement, Black Americans had great hope that emancipation would finally mean real freedom and opportunity. Most formerly enslaved people in the United States were remarkably willing to live peacefully with those who had held them in bondage despite the violence they had suffered and the degradation they had endured.**
>
> **Emancipated Black people put aside their enslavement and embraced education, hard work, faith, and citizenship with extraordinary enthusiasm and devotion. By 1868, over 80 percent of Black men who were eligible to vote had registered, schools for Black children became a priority, and courageous Black leaders overcame enormous obstacles to win elections to public office.**
>
> **The new era of Reconstruction offered great promise and could have radically changed the history of this country. However, it quickly became clear that emancipation in the United States did not mean equality for Black people. The commitment to abolish chattel slavery was not accompanied by a commitment to equal rights or equal protection for African Americans and the hope of Reconstruction quickly became a nightmare of unparalleled violence and oppression.**
>
> **Between 1865 and 1877, thousands of Black women, men, and children were killed, attacked, sexually assaulted, and terrorized by white mobs and individuals who were shielded from arrest and prosecution. White perpetrators of lawless, random violence against formerly enslaved people were almost never held accountable—instead, they frequently were celebrated. Emboldened Confederate veterans and former enslavers organized a reign of terror that effectively nullified constitutional amendments designed to provide Black people equal protection and the right to vote.**
>
> **In a series of devastating decisions, the United States Supreme Court blocked Congressional efforts to protect formerly enslaved people. In decision after decision, the Court ceded control to the same white Southerners who used terror and violence to stop Black political participation, upheld laws and practices codifying racial hierarchy, and embraced a new constitutional order defined by "states' rights."**
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> **Equal Justice Initiative.** ***Reconstruction in America: Racial Violence after the Civil War, 1865-1876.*** **Montgomery, Alabama. pp. 6-7.**

The Equal Justice Initiative (EJI) reports that during the 12-year period of Reconstruction, at least 2,000 Black women, men, and children were victims of racial terror lynching. Over the years, lynching has become synonymous with death by hanging. Lynching is much more than a noose and scaffold—it is an extrajudicial

[7] Henry Louis Gates, Jr. "The 'Lost Cause' That Built Jim Crow," quoting historian Rayford W. Logan, *New York Times*, November 8, 2019.

killing by a group--most often used to characterize informal public executions by a mob to punish an alleged transgressor, punish a convicted transgressor, or intimidate. EJI reports that it has documented over 4,400 racial terror lynching of Black people in America between 1877 and 1950.

Found on the National Memorial for Peace and Justice in Montgomery are the following words:

FOR THE HANGED AND BEATEN.
FOR THE SHOT, DROWNED, AND BURNED.
FOR THE TORTURED, TORMENTED, AND TERRORIZED.
FOR THOSE ABANDONED BY THE RULE OF LAW.

WE WILL REMEMBER.

WITH HOPE BECAUSE HOPELESSNESS IS THE ENEMY OF JUSTICE.
WITH COURAGE BECAUSE PEACE REQUIRES BRAVERY.
WITH PERSISTENCE BECAUSE JUSTICE IS A CONSTANT STRUGGLE.
WITH FAITH BECAUSE WE SHALL OVERCOME.

To that end, the states of the former Confederacy specifically initiated strategic political actions to enact Jim Crow Laws and to manipulate the criminal justice system to promote involuntary servitude. Jim Crow laws were state and local laws that enforced racial segregation; segregated theaters, segregated bathrooms, segregated restaurants, segregated schools, segregated public water fountains, and more. Broad and intentionally vague laws prohibiting vagrancy, disorderly conduct, loafing (idleness), loitering on any road, street or public place brought convictions of hard labor, imprisonment, and carried fines; subjecting Blacks to indiscriminate incarceration involving "chain gangs" and prison labor. The Thirteenth Amendment prohibiting involuntary servitude provides a glaring loophole, "except as a punishment for crime whereof the party shall have been duly convicted. . ." Many states maintained chain gangs that were forced into hard labor, no different than previously enslaved persons.

Jim Crow laws were found to be constitutional when in 1896, the United States Supreme Court found requiring railroads to provide "separate but equal"

accommodations for "white" and "colored" passengers (mandated by Louisiana) to be constitutional. The Supreme Court would issue yet another reviled opinion in *Plessy v. Ferguson*; second only to *Dred Scott*, forty years prior. A portion of the opinion follows:

Plessy v. Ferguson
163 U.S. 537 (1896).

Mr. Justice Brown delivered the opinion of the Court. . . .

By the fourteenth amendment, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are made citizens of the United States and of the state wherein they reside; and the states are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty, or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws. . .

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. . . .

The judgment of the court below is therefore affirmed.

In his dissent, Justice Harlan offered in part the following. . . .

In respect of civil rights common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and, under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by everyone within the United States.

The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment, which added greatly to the dignity and glory of American citizenship and to the security of personal liberty by declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," and that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it as declared by the Fifteenth Amendment that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely to secure "to a race recently emancipated, a race that through many generations have been held in slavery, all the civil rights that the superior race enjoy." . . .

***Plessy v. Ferguson*, 163 U.S. 537 (1896).**

As a result of the Jim Crow laws, use of the criminal justice system to perpetuate involuntary servitude, and a lack of economic opportunities, more than 5 million Blacks from 1916 to 1970 relocated from the rural South to cities of the North, Midwest, and West. Known as the Great Migration, Blacks moved to New York City, Chicago, Detroit, Los Angeles, Philadelphia, Pittsburgh, Cleveland, Baltimore and Washington, D.C. By the end of the Great Migration just over half of the Black population lived in the South where at the time of the Civil War over 90% of the Black population lived. Also, whereas before the 20th Century 80% of Blacks lived in rural areas, by 1970 more than 80% of Blacks lived in urban areas.

Session 9: Civil and Voting Rights

The National Association for the Advancement of Colored People (NAACP) fought to bring a measure of racial justice to the United States and, more specifically, to overturn *Plessy v. Ferguson.* In 1938 its operations became more effective when a young black lawyer named Thurgood Marshall became director of the NAACP's Legal Defense and Educational Fund.

Over the next dozen years, Marshall won every case he got before the U.S. Supreme Court as he pursued a strategy of gradually undermining the constitutional bases of racial segregation. In 1951, the NAACP, in the name of Black children, began litigation in Kansas, Delaware, South Carolina, Virginia, and the District of Columbia directly challenging the concept of "separate but equal. "Federal courts reaffirmed *Plessy*, and the NAACP appealed to the Supreme Court.

When the cases were first heard during the 1952 term, the justices divided 5-4 and concluded that it would invite disaster to decide such a crucial and volatile issue when the Court was so closely divided. They set the cases down for re-argument during the 1953 term. Shortly before that term began, Chief Justice Fred M. Vinson died, and President Eisenhower gave a recess appointment to Earl Warren as the new chief. Under his leadership, the Court eventually reached a unanimous decision.

Brown v. Board of Education of Topeka, I
347 U.S. 483 (1954)

Mr. Chief Justice Warren delivered the opinion of the Court**.**

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, *they have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called 'separate but equal' doctrine announced by this Court

in *Plessy v. Ferguson* [ ]. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools. . . .

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this court until 1896 in the case of Plessy v. Ferguson, supra, involving not education but transportation. American courts have since labored with the doctrine for over half a century. . . .

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws. . .

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.'

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been

brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

It is so ordered.

Women's Suffrage

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

The Nineteenth Amendment. (US 1920).

The efforts of women which began under President Jackson finally succeeded under President Wilson with the adoption of the Nineteenth Amendment creating for women a constitutional right to vote. World War I had ended less than two years earlier. During WWI, women worked on behalf of the war effort, proving their patriotism. Proponents for women's right to vote argued they were deserving of full citizenship . After the Nineteenth Amendment was adopted, more than 8 million women across the United States voted for the first time on November 2, 1920. But of that that 8 million women, almost all were white.

Due to state laws and practices in the South, federal non-enforcement of the Fifteenth and Nineteenth amendments, most Black men and women would remain disenfranchised well into the 20th century. Black voting rights did not become widespread in America until after Congress in 1965 passed the Voting Rights Act—legislation prompted by the public having watched on television film of the Bloody Sunday attack on John Lewis, Hosea Williams, and other Civil Rights activists as they marched over the Edmund Pettus bridge in Selma, enroute to Montgomery.

Session 10: Nonviolent Action and Dr. Martin Luther King, Jr.

Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.

Dr. Martin Luther King, Jr., April 1963

Armed with the *Brown* decision finding "separate but equal" schools unconstitutional, the NAACP and others proceeded to dismantle Jim Crow Laws by seeking desegregation of schools, lunch counters, restaurants, theaters, and more. One of the first efforts was in 1957 at Little Rock Central High School when nine Black students, known as the Little Rock Nine, were denied entrance to the school in defiance of the Supreme Court's *Brown* decision. An angry mob of over 1000 whites protested the integration effort. Television broadcasted the event.

The next day President Eisenhower ordered soldiers from the U.S. Army's 101st Airborne Division, Fort Campbell, Kentucky to escort the nine students into the school. While the effort to integrate the school at that time did not succeed, it was clear similar efforts would be made throughout the South.[8]

The integration efforts of Blacks into schools, restaurants , interstate transportation facilities (hotels, buses) would be aided by Federal Court Orders. In Montgomery, United States District Judge Frank M. Johnson was instrumental in upholding Blacks' constitutional rights of equal protection of the law under the Fourteenth Amendment. So too were four United States Court of Appeals for the 5th Circuit Judges, Elbert Parr Tuttle (Atlanta), John Minor Wisdom (New Orleans), John Robert Brown (Houston) and Richard Taylor Rives (Montgomery). Known as the "Fifth Circuit Four," in the late 1950s and 1960s they issued a series of decisions crucial in advancing the rights of Blacks in the states of Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas—the old Fifth Circuit.

Montgomery Bus Boycott

On December 1, 1955, a Black seamstress name Rosa Parks, commuting from her home in Montgomery refused to yield her seat in the front row of the bus to a white man in violation of a city ordinance. She was arrested and fined $10, plus $4 in court

[8] Integration efforts in schools continued well into the late 1960s. By 1967 the U.S. military located in Southern bases informed local school districts they must integrate or lose federal financial support and children of military soldiers. These military bases (Benning and Gordon in Georgia; Brag in North Carolina; Hood in Texas; Polk in Louisiana; Rucker in Alabama; A.P. Hill, Lee; and Pickett in Virginia) were all named after Confederate military leaders as inducements to Southern U.S. Senators to support America's entry into World War I. A white backlash resulted throughout the South with numerus private segregated "Christian" schools being established for white students.

fees. Thereafter, the NAACP on her behalf initiated federal litigation arguing Parks' constitutional rights were violated.

Shortly after Ms. Parks' arrest Black leaders in Montgomery organized meetings to mobilize Black residents to boycott the Montgomery public transit system. This Bus Boycott was viewed as one of the earliest mass protests in the name of civil rights in the United States. Also, the group organizing the boycott, The Montgomery Improvement Association, elected the then 26-year-old Morehouse college and Boston University graduate pastor of Montgomery's Dexter Avenue Baptist Church, Martin Luther King Jr., to lead it. The Montgomery Bus Boycott lasted until December 1956 when the U.S. Supreme Court upheld the lower federal court's ruling that Rosa Parks' rights of equal protection under the Fourteenth Amendment were violated. Shortly after the boycott's end, Dr. King and others founded the Southern Christian Leadership Conference (SCLC) to work to end segregation throughout the South. He returned to Atlanta to co-pastor the Ebenezer Baptist Church and lead SCLC in its civil rights undertakings.

On January 14, 1963, George Wallace having taken the oath and now Alabama's governor said, ["i]n the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the fact of tyranny, and I say segregation now, segregation tomorrow, segregation forever." Later, Wallace "stood in the schoolhouse door" of the University of Alabama in a vain attempt to halt the enrollment of Black students. President John F. Kennedy had ordered the U.S. Army's 2nd Infantry Division in Fort Benning, Georgia to be prepared to enforce racial integration . Earlier, in reference to Dr. King leading SCLC demonstrations Wallace stated, "The President [Kennedy] wants us to surrender this state to Martin Luther King and his group of pro-Communists who have instituted these demonstrations".[9]

In April 1963 Martin Luther King, Jr., Ralph David Abernathy, and others marched for civil rights on the streets of Birmingham. On April 12, 1963, King and Abernathy were arrested and placed in the Birmingham jail. The day of King's arrest, eight Birmingham clergy members wrote a criticism of the campaign that was published in the *Birmingham News* that called its direct-action strategy, "unwise and untimely" and appealed "to both our white and Negro citizenry to observe the principles of law and order and common sense." To this article King wrote his letter from the Birmingham Jail, portions of which are reprinted below.

[9] Alabama Governor George Wallace public statement of May 8, 1963, *New York Times* (May 9, 1963).

A Letter from a Birmingham Jail, April 16, 1963
Martin Luther King, Jr.

But more basically, I am in Birmingham because injustice is here. Just as the prophets of the eighth century B.C. left their villages and carried their "thus saith the Lord" far beyond the boundaries of their home towns, and just as the Apostle Paul left his village of Tarsus and carried the gospel of Jesus Christ to the far corners of the Greco Roman world, so am I compelled to carry the gospel of freedom beyond my own home town. Like Paul, I must constantly respond to the Macedonian call for aid.

Moreover, I am cognizant of the interrelatedness of all communities and states. I cannot sit idly by in Atlanta and not be concerned about what happens in Birmingham. Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly. Never again can we afford to live with the narrow, provincial "outside agitator" idea. Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds. . .

I have traveled the length and breadth of Alabama, Mississippi and all the other southern states. On sweltering summer days and crisp autumn mornings I have looked at the South's beautiful churches with their lofty spires pointing heavenward. I have beheld the impressive outlines of her massive religious education buildings. Over and over I have found myself asking: "What kind of people worship here? Who is their God? Where were their voices when the lips of Governor Barnett dripped with words of interposition and nullification? Where were they when Governor Wallace gave a clarion call for defiance and hatred? Where were their voices of support when bruised and weary Negro men and women decided to rise from the dark dungeons of complacency to the bright hills of creative protest?"

Yes, these questions are still in my mind. In deep disappointment I have wept over the laxity of the church. But be assured that my tears have been tears of love. There can be no deep disappointment where there is not deep love. Yes, I love the church. How could I do otherwise? I am in the rather unique position of being the son, the grandson and the great grandson of preachers. Yes, I see the church as the body of Christ. But, oh! How we have blemished and scarred that body through social neglect and through fear of being nonconformists.

I hope the church as a whole will meet the challenge of this decisive hour. But even if the church does not come to the aid of justice, I have no despair about the future. I have no fear about the outcome of our struggle in Birmingham, even if our motives are at present misunderstood. We will reach the goal of freedom in Birmingham and all over the nation, because the goal of America is freedom. Abused and scorned though we may be, our destiny is tied up with America's destiny. Before the pilgrims landed at Plymouth, we were here. Before the pen of Jefferson etched the majestic words of the Declaration of Independence across the pages of history, we were here. For more than two centuries our forebears labored in this country without wages; they made cotton king; they built the homes of their masters while suffering gross injustice and shameful humiliation -and yet out of a bottomless vitality

they continued to thrive and develop. If the inexpressible cruelties of slavery could not stop us, the opposition we now face will surely fail. We will win our freedom because the sacred heritage of our nation and the eternal will of God are embodied in our echoing demands. . . .

One day the South will know that when these disinherited children of God sat down at lunch counters, they were in reality standing up for what is best in the American dream and for the most sacred values in our Judaeo Christian heritage, thereby bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence. . . . .

Let us all hope that the dark clouds of racial prejudice will soon pass away and the deep fog of misunderstanding will be lifted from our fear drenched communities, and in some not too distant tomorrow the radiant stars of love and brotherhood will shine over our great nation with all their scintillating beauty.

Yours for the cause of Peace and Brotherhood, Martin Luther King, Jr.

On August 28, 1963, Dr. King gave his "I have a Dream" speech before the Lincoln Memorial.

It is a dream deeply rooted in the American dream.

I have a dream that one day this nation will rise up and live out the true meaning of its creed, "We hold these truths to be self-evident, that all men are created equal."

I have a dream that one day on the red hills of Georgia, sons of former slaves and the sons of former slaveowners will be able to sit down together at the table of brotherhood.

On September 15, 1963, in Birmingham white terrorists bombed the 16th Street Baptist Church, killing four young girls as they attended Sunday School. President Kennedy was killed on November 22, 1963. On March 7, 1965, Bloody Sunday, John Lewis and others were assaulted by Alabama State Troopers. All the while, the Vietnam War raged with American casualties rising. The Voting Rights Act of 1965 was struck down in part by the Supreme Court in *Shelby County, Alabama v. Holder*, (2013).

LET JUSTICE ROLL DOWN LIKE THE WATERS AND RIGHTEOUSNESS LIKE A MIGHTY STREAM.

Amos 5:24

Session 11: "The Long Arc of History"

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right. Of all persons to enjoy liberty as we learn its meaning.

***Obergefell, v. Hodges*, (2015)**.

With "Originary" words our American journey to nationhood began, and with Originary words they conclude. The Declaration of Independence and Preamble to the Constitution are "timeless" documents in that they intuit a future that the Nation—and conscious evolution—had not yet lived into. While the founders were personally a small, white, male, entitled group, their vision cannot be limited to or contained within their particularity. The next 234 years of American history would be just that, an attempt to live into and flesh out an understanding of "all men are created equal" that accommodates a larger and larger swathe of American humanity within its fold. The struggle was not without violence or backlash, nor is it by any means over. But it continues, because if the long arc of history bends toward justice, the long arc of conscious evolution bends toward unity. And we are on that arc; we cannot step off it.

It is undeniably true that the founding fathers planted a timebomb in their original and conscious decision not to confront the issue of slavery from the outset. They did so intentionally, because in the end they saw compromise here as the only terms upon which union could be secured. It was a compromise, and as such is fragile and will ultimately unravel. But it buys time, and that is what they gambled for.

The discovery that one has been lied to, that whole parts of our collective American history have been omitted or obfuscated, and that whole peoples have been left marginalized and unvoiced, fills contemporary viewers with anger, dismay, and cynicism. Is it possible to transcend this initial response and still maintain a hopeful and trusting attitude toward the integrity of what was originally intended? Is it possible to find a renewed determination to work with the hand of cards now on our plate in a way that moves toward a more permanent and inclusive resolution, one which can preserve both unity and diversity within a flexible whole? Martin Luther King, Jr. urged us toward this goal in faith. But there are tools and roadmaps available to us in the Wisdom tradition and evolutionary theory that will allow us to walk toward the future with even greater strength and skillful means.

Session 12: "Common Good Originalism"
An Argument for Moral Judging

Alexis de Tocqueville in describing his observations of democracy in America noticed that while America had rejected monarchy, it did have an aristocracy. "If you asked me where I place the American aristocracy, I would answer without hesitating[;] . . .[t]he American aristocracy is at the lawyers' bar and on the judge's bench."[10] Tocqueville observed that American judges viewed themselves as a "privileged class among intelligent people" by virtue of "[t]he special knowledge that jurists acquire while studying the law."[11] Many argue that Tocqueville's 1830's observations about lawyers and judges accurately describes lawyers and judges of today.

The question of the authority of the United States Supreme Court to interpret the Constitution was affirmatively determined by the Court is the case *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Mr. Chief Justice Marshall, writing for the Court stated, in part,

> **The constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and, consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States. …**
>
> **That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.**
>
> **This original and supreme will organizes the government and, assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. . . .**
>
> **Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with**

[10] Alexis de Tocqueville, Democracy in America 439 (Eduardo Nolla ed., James T. Schleifer trans. 2012) (1835).

[11] *Id*. at 432.

ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, the written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. . . .

It is emphatically the province and duty of the judicial department to say what the law is. . . .

The judicial power of the United States is extended to all cases arising under the constitution. . . .

Id.

Marbury v. Madison, having established the Court's authority to "determine"—read "interpret"-- what is the law, how is such undertaken? What intellectual method is the foundation to one's analysis in interpreting the law?

It has been said that the beginning of the interpretation of the Constitution is its words; the text, the act of interpreting text, known as textualism. The *meaning* of the document, involving philosophical and moral issues, may also be argued to involve the Constitution's purposes. One of the prominent methods developed for interpreting the Constitution is called "originalism." Originalism comes in a variety of flavors, but the common core, according to Harvard Professor of Constitutional Law Adrian Vermeule, is "the view that constitutional meaning was fixed at the time of the constitution's enactment." Of the two major schools of originalist interpretation, one involves the *subjective intentions* of the Framers—so-called original intentions. The other, best expressed by the late Justice Antonin Scalia, focuses not on the original subjective intentions of the Founders, but on the *public meanings* of the constitutional provisions understood at the time of ratification.

Originalism became a popular conservative initiative in recent decades as a brake on liberal social agenda—to such an extent that it is now "the common faith" of the prestigious Federalist Society, exerting enormous judicial weight against runaway social progressive agendas. Its roots, however, go back at least a century earlier. We have seen how it already factored prominently Justice Taney's notorious Dred Scott decision, and we have noted its inherent tendency to wind up in bed with systemic racism and white supremacy agendas.

The other danger in the originalist approach, can be a kind of wooden, mechanical "textualism" that sidesteps on a technicality all responsibility for moral

discernment. As the latest arena for the culture wars now shifts to the Supreme Court, the question is increasingly being called on this evasion tactic.

In his March 2020 essay, *Beyond Originalism*, Adrian Vermeule, the Ralph S. Tyler, Jr. Professor of Constitutional Law at Harvard Law School, stated in part,

> **In recent years, allegiance to the constitutional theory known as originalism has become all but mandatory for American legal conservatives. Every justice and almost every judge nominated by recent Republican administrations has pledged adherence to the faith. At the Federalist Society, the influential association of legal conservatives, speakers talk and think of little else. Even some luminaries of the left- liberal legal academy have moved away from speaking about "living constitutionalism," "fundamental fairness," and "evolving standards of decency," and have instead justified their views in originalist terms. One often hears the catchphrase "We are all originalists now."**
>
> **Originalism comes in several varieties (baroque debates about key theoretical ideas rage among its proponents), but their common core is the view that constitutional meaning was fixed at the time of the Constitution's enactment. This approach served legal conservatives well in the hostile environment in which originalism was first developed, and for some time afterward.**
>
> **But originalism has now outlived its utility, and has become an obstacle to the development of a robust, substantively conservative approach to constitutional law and interpretation. Such an approach—one might call it "common-good constitutionalism"—should be based on the principles that government helps direct persons, associations, and society generally toward the common good, and that strong rule in the interest of attaining the common good is entirely legitimate. In this time of global pandemic, the need for such an approach is all the greater, as it has become clear that a just governing order must have ample power to cope with large-scale crises of public health and well-being—reading "health" in many senses, not only literal and physical but also metaphorical and social.**
>
> **"*Beyond Originalism*. The dominant conservative philosophy for interpretating the Constitution has served its purpose and scholars ought to develop a more moral framework." Adrian Vermeule, *The Atlantic*, March 31, 2020.**

Careful analysis of Vermeule's proposed "common-good constitutionalism" reveal both strengths and weaknesses in his presentation.

Strengths: a groundbreaking attempt to envision a common good in the circumstances of our own times, which are arguably radically different from those of our founders, envisioning a new basis which would confer upon the government unprecedented powers to govern strongly on behalf of the common good in issues such as public health, planetary sustainability, and economic regulation on behalf of the whole.

Weaknesses: the continuing inability to articulate/codify the moral principles on which such visionary governance would be based, and to distinguish them from religious authoritarianism and sectarianism.

CRYING FOUL AND A FOOT IN THE DOOR

As might be expected, Vermeule's essay set off alarm bells on the left, while on the right, populist conservative were working overtime to get a foot in the door he had cracked open.

In a July 2021 *Wall Street Journal* article by David Rivkiv, Jr. and Andrew Grossman, the authors make several cautionary observations and pronouncements relative to judging morality and the common good.[12] Leaping perhaps too quickly to the conclusion that Vermeule's skepticism "of law, restraints on government and the Enlightenment in general" betray an underlying Catholic theocratic agenda (they gratuitously provide a weblink to Thomas Aquinas' *Summa Theologica* to flesh out what they suppose he has in mind), they argue passionately for an essentially Midrashic approach to constitutional interpretation, in which truth arises out of spirited contention conducted under the banner of freedom:

> **The Constitution doesn't codify the common good, let alone appoint judges as its inquisitors. The Framers as students of history, understood that mankind is fallible and that a government powerful enough to prescribe moral truth could achieve only tyranny. Rather than put their faith in the beneficence of statesmen they established a structure that pits faction against faction to "secure the blessing of liberty," as the preamble puts it. James Madison through self-government "presupposes" public virtue which can't be dictated, only sown in the soil of freedom.**

Meanwhile, on the religious right, Rivkiv's and Grossman's worst fears were already being confirmed as a handful of populist conservatives took up the 'common good' banner but reshaped it to their essentially Christian evangelical agenda. In a March 2021 article Hadley Arkes, Josh Hammer, Matthew Peterson, and Garrett Snedeker set forth what they claimed to be "a better originalism." Parting with Vermeule, the four "favor[ed] . . vague references to 'moral truth' and branding their enterprises as a variant of originalism, one centered on the Constitution's preamble and

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[12] "*The Temptation of Judging for 'Common Good*,'" David B. Rivkin, Jr. and Andrew M. Grossman, *Wall Street Journal,* July 23, 2021.

its reference to 'general welfare.'" In their unabashedly moralistic and ethnocentric remake of Vermeule's original, a judge's duty is "to test the underlying moral justification for why a law exists and render judgment on whether the statutes or the executive orders in question can finally be judged as justified or unjustified, defensible, or wrongful."

> **The notion that the American Republic was created to maximize unbounded individual liberty or autonomy is an egregious, ahistorical anachronism. As the Virginia Declaration of Rights and countless other writings make clear, "no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles."**
>
> **We believe in the "Originalism," then, of Founding-era luminaries such as Alexander Hamilton, Chief Justice John Marshall, and Justice James Wilson: a jurisprudence with an anchoring moral ground, directed to naturally ordered, common good: this "Originalism" is our true Anglo-American inheritance. We believe these substantive ends ought to imbue constitutional interpretation, as we try to apply the clauses and to understand the telos, or purpose, for which those clauses have been formed. And And this may be done, as well, within the confines of what some modern constitutional scholars call the "construction zone."**
>
> **"*A Better Originalism*," Hadley Arkes, Josh Hammer, Matthew Peterson, and Garrett Snedeker, *The American Mind*, March 18, 2021.**

It may be, sadly, that any direct evocation of moral responsibility is still a third rail in any intelligent civic discourse. Still, one must be cautious not to throw out the baby with the bathwater. Vermeule's prophetic charge does reverberate with a more than a trace of that old Washingtonian "virtue" and "common good," calling the question on our constitutional technical end-runs around assuming moral responsibility. It thus resonates with voices ranging from Washington and Lincoln in earlier times to Martin Luther King, Jr., Robert Franklin, and Sinead Younge in our own invoking a reawakening of strong moral leadership. It also opens this vision toward the future, creating a bridge between two and a half centuries of constitutional precedent and the unprecedented conditions facing our own point in history.

It's not an "either/or." There are resources available both in the timeless guidance of the world's universal Wisdom traditions and on the leading edge of contemporary disciplines which have not yet factored prominently in the new dialogue, particularly Integral Evolutionary Theory. When invited into the dialogue, they

instantly open new and broader perspectives while offering valuable tools with which to bridge the gap. *See* Bourgeault's "The Common Good: A Wisdom Inquiry."

WE THE PEOPLE—THE EVOLUTION OF AMERICA'S CONSCIOUSNESS

Common good has emerged to the forefront of America's collective consciousness. Conservative legal scholars are articulating "common good originalism," a new jurisprudence of "morality as discerned from our founding documents which appealed to "the Laws of Nature and Reason," and to the author of those laws, "Nature's God." "The Constitution's Preamble enumerates substantive ends. . . that pertain to the commonweal of the nation, of communities, families and individuals."[13]

Others call for moral leadership.

> **The U.S. needs more moral leaders. Moral leadership includes virtue, courage, integrity, empathy, imagination, wisdom, and individuals who serve the common good while inviting others to join the movement. Moral leadership is inclusive and draws people in, rather than actively working to suppress their constitutional rights.**
>
> ***Excerpted from "New moral leadership is needed in U.S." By Robert Franklin and Sinead Younge, Atlanta Journal-Constitution, June 16, 2021.***

Dr. King stated in A Letter From the Birmingham Jail,

> **Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly. Never again can we afford to live with the narrow, provincial "outside agitator" idea. Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds. . .**
>
> ***Supra* at 32.**

Cynthia Bourgeault states,

> **We hang on the cusp between two evolutionary ages—and try to decide which way to go?" "Are our founding documents, the Declaration of Independence and the Constitution tied to a weaning structure of consciousness which even now is rapidly**

[13] "*A Better Originalism*," Hadley Arkes, Josh Hammer, Matthew Peterson, and Garrett Snedeker, *The American Mind*, March 18, 2021.

falling astern, or is it possible to imagine a creative transposition of our founding ideals to a new structure of consciousness based on a radically evolving notion of personhood and "common good? . . .

The collective consciousness of America has evolved since its founding in 1776. The inexorable expansion of the franchise over these so many years has produced a tectonic shift in power within the American society. "We the People" has expanded far beyond what America's founders in the eighteenth century could have foreseen. The oppressed peoples; the enslaved, the indigenous, women, immigrants have expanded America's collective consciousness.

If, as President Biden said in a 2021 Memorial Day speech at Arlington National Cemetery, **"[e]mpathy is the fuel of democracy**," then enmity is the fuel of fascism, e.g., January 6, 2021. Apathy is the fuel of anarchy. Will we continue to expand American collective consciousness? Will we stand against oppression and injustice? Will we hold these truths to be self-evident that we are all created equal; that we all have been endowed by our Creator with certain unalienable rights; Life, Liberty and the pursuit of Happiness? Will we?