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THE INFLUENCE OF ABRAHAM LINCOLN ON THE SUPREME COURT'S
INTERPRETATION OF THE CONSTITUTIONAL PRINCIPLES OF LIBERTY AND
EQUALITY

Wilson R. Huhn*

*The spirit of Lincoln still lives.*¹

In recent years leading historians and legal scholars including Gary Wills, Charles Black, Daniel Farber, Herman Belz, and George Fletcher have written about the profound effect that Abraham Lincoln had both on this Nation's conception of itself and the Constitution.² I

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¹ Atlanta high school student, 1944. See note ___ *infra* and accompanying text.

² See GARY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* (1992) (analyzing the Gettysburg Address and other Lincoln writings from a literary, political, and philosophical perspective); CHARLES BLACK, *A NEW BIRTH OF FREEDOM* (1997); *id.* at 1 (stating, "This work is being undertaken to set upon a firmer and wider ground the legitimacy of the human-rights law of the United States"); *id.* at 5 (arguing that this nation's commitment to human rights is derived from the opening paragraphs of the Declaration of Independence, the Ninth Amendment, and the Citizenship and Privileges and Immunities Clauses of the Fourteenth Amendment); HERMAN BELZ, *ABRAHAM LINCOLN, CONSTITUTIONALISM, AND EQUAL RIGHTS IN THE CIVIL WAR ERA* (1998) (describing the changes to our Constitution arising out of the Civil War era); GEORGE P. FLETCHER, *OUR SECRET CONSTITUTION* (2001); *id.* at 2 (stating, "The Civil War called forth a new constitutional order."); *id.* at 2-3 (identifying three ways in which the meaning of the Constitution changed after the Civil War – moving from an emphasis on choice to self-realization, from freedom towards equality, and from elitism towards popular democracy); DANIEL FARBER, *LINCOLN'S CONSTITUTION* (2003) (examining the constitutionality of Lincoln's official actions during the Civil War, and their effect on individual rights). See also Michael Stokes Paulson, *The Civil War as Constitutional Interpretation*, 71 U. Chi. L. Rev. 691, 693 (2004) (reviewing Farber's book and stating, "Given the centrality of Lincoln and the Civil War to the constitutional order we have today, it is little short of incredible how little attention modern scholarship pays to the Civil War as an event of constitutional interpretation or to Lincoln as a constitutional interpreter."). But see Jason A. Adkins, *Lincoln's Constitution Revisited*, 36 N. KY. L. REV. 211 (2009) (criticizing Farber for reading his own view of the Constitution into Lincoln's life and work).

The American government's conduct in fighting terrorism over the past decade has also revived interest in Lincoln's actions to suppress rebellion during the Civil War. See Michael Stokes Paulson, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257 (2004) (seeking to justify the Bush administration's actions in the War on Terror by reference to Lincoln's actions in the Civil War); Michael Kent Curtis, *Lincoln, The Constitution of Necessity, and the Necessity of Constitutions*, 59 Me. L. Rev. 1 (2007), (responding to Professor Paulson); *id.* at 3 (stating, "This essay is an effort to explain why we should reject the clever and alluring argument that Lincoln's example justifies largely unchecked executive power in times of crisis."). See also Michael Les Benedict, "The Perpetuation of Our Political Institutions": *Lincoln, The Powers of the Commander-in-Chief, and the Constitution*, 29 CARDOZO L. REV. 927 (2008); *id.* at 928-929 (citing authorities characterizing Lincoln as a "dictator"). Benedict states:

But those who stress Lincoln's willingness to disregard constitutional limitations in the Civil War crisis have it wrong. Lincoln did exercise the war powers of the presidency aggressively, but he never claimed the right to transcend constitutional limitations or to escape democratic control. Indeed, he was constrained by the very popular commitment to the rule of law that he had identified as the only security against presidential despotism.

wholeheartedly concur with those authors as to the importance of Lincoln's influence, and in this article I seek to demonstrate how Lincoln's ideas are reflected in the decisions of the United States Supreme Court interpreting the principles of liberty and equality during the modern era.³

I have argued that Abraham Lincoln should be regarded as a framer of the Constitution because of his central role in defining and resolving the transcendent constitutional issues of his day.⁴ His importance extends far beyond his eloquence on the subject of human rights.⁵ He commanded the armed forces of the United States in the war to preserve the Union,⁶ he issued the Emancipation Proclamation freeing the slaves in the states in rebellion, and he was the person principally responsible for the adoption of the Thirteenth Amendment.⁷ After his death the Republican Party which he had led into power⁸ on a platform of human rights⁹ speedily adopted

Id. at 930. See also Mark E. Neely, Jr., *The Constitution and Civil Liberties Under Lincoln*, in OUR LINCOLN: NEW PERSPECTIVES ON LINCOLN AND HIS WORLD 37-61 (Eric Foner, ed. 2008) (contending that Lincoln returned areas of the United States to civil rule as quickly as possible). See also BELZ, *supra*, at 17-43 (refuting the notion that Lincoln was a dictator); *id.* at 43 (stating, "Lincoln was neither a revolutionary nor a dictator, but a constitutionalist who used the executive power to preserve and extend the liberty of the American founding.").

³ By "modern era," I mean since 1937, when the Supreme Court began protecting *human* rights instead of *property* rights. See generally Wilson Huhn, *In Defense of the Roosevelt Court*, 2 FLORIDA A. & M. UNIVERSITY LAW REVIEW 1-90 (2007) (describing how the Supreme Court changed constitutional doctrine in a number of areas, and defending the decisions of the Roosevelt Court against the attacks of Justice Antonin Scalia and Justice Clarence Thomas).

⁴ See Wilson R. Huhn, *Lincoln Was a Framers of the Constitution*, 87 WASH. U. L. REV. (2009 *Comments*) (describing how Lincoln articulated and shaped the fundamental constitutional issues of pre-Civil War and Civil War period), available at <http://lawreview.wustl.edu/comments/abraham-lincoln-was-a-framer-of-the-constitution/>.

⁵ I do not mean to minimize Lincoln's importance in that regard. See GABOR BORITT, *THE GETTYSBURG GOSPEL: THE LINCOLN SPEECH THAT NOBODY KNOWS* 202 (2006) (describing how Lincoln was revered by Tolstoy, Gandhi, Nehru, and Sun Yat-Sen).

⁶ See James M. McPherson, *A. Lincoln: Commander in Chief*, in OUR LINCOLN, note 2 *supra*, at 19-36 (describing Lincoln's generalship in the Civil War); *id.* at 36 (stating, "He enunciated a clear national policy, and through trial and error evolved national and military strategies to achieve it.).

⁷ Even William Lloyd Garrison, who had frequently criticized Lincoln for not supporting the abolition of slavery more fervently, credited Lincoln for the adoption of the 13th Amendment. See DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 690 (2005) (quoting Garrison):

And to whom is the country more immediately indebted for this vital and saving amendment of the Constitution than, perhaps, to any other man? ... I believe I may confidently answer – to the humble railsplitter of Illinois – to the Presidential chainbreaker for millions of the oppressed – to Abraham Lincoln!

⁸ See generally DAVID HERBERT DONALD, *LINCOLN* 162-256 (1995) (describing Lincoln's political life between 1854 and his election to the Presidency in 1860); JULIE M. FENSTER, *THE CASE OF ABRAHAM LINCOLN: A STORY OF ADULTERY, MURDER, AND THE MAKING OF A GREAT PRESIDENT* (2007) (describing Lincoln's speeches and political efforts on behalf of the Republican Party in 1856); *id.* at 118-121 (describing the "Lost Speech" at Bloomington, Illinois, on May 29, 1856, organizing the Republican Party in Illinois).

⁹ See John Woolley and Gerhard Peters, *The American Presidency Project* <http://www.presidency.ucsb.edu/ws/index.php?pid=29619> (1856 Republican Party platform, referring to the "principles promulgated in the Declaration of Independence, and embodied in the Federal Constitution"); *id.* at <http://www.presidency.ucsb.edu/ws/index.php?pid=29620> (1860 Republican Party platform, same, and quoting the second sentence of the Declaration); *id.* at <http://www.presidency.ucsb.edu/ws/index.php?pid=29621> (1864 Republican Party platform, favoring the adoption of a constitutional amendment "as shall terminate and forever prohibit the existence of Slavery within the limits of the jurisdiction of the United States.").

the Fourteenth Amendment which introduced the principles of the Declaration of Independence into the Constitution.¹⁰ He was indisputably the principal figure behind the “Second American Revolution”¹¹ that made the concept “all men are created equal” part of our fundamental law.¹²

Lincoln’s influence on constitutional analysis may be traced and followed in Supreme Court history, but the sad fact is that for nearly a century the Supreme Court denied Lincoln’s legacy and betrayed the intent of the framers of the post-civil war amendments. Immediately following the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments the Supreme Court eviscerated key provisions of those amendments and throughout the nineteenth century the Court emasculated the power of Congress to enact civil rights laws meant to enforce the Amendments.¹³ Lincoln planted the seed and tilled the field for “a new birth of freedom” in the

¹⁰ See U.S. CONST., amend. 14. This purpose was implicit in Lincoln’s statement in the Peoria Address: Our republican robe is soiled, and trailed in the dust. Let us repurify it. Let us turn and wash it white, in the spirit, if not the blood, of the Revolution. Let us turn slavery from its claims of “moral right,” back upon its existing legal rights, and its arguments of “necessity.” Let us return it to the position our fathers gave it; and there let it rest in peace. Let us re-adopt the Declaration of Independence, and with it, the practices, and policy, which harmonize with it. Let north and south—let all Americans—let all lovers of liberty everywhere—join in the great and good work. If we do this, we shall not only have saved the Union; but we shall have so saved it, as to make, and to keep it, forever worthy of the saving. We shall have so saved it, that the succeeding millions of free happy people, the world over, shall rise up, and call us blessed, to the latest generations.

2 COLLECTED WORKS OF ABRAHAM LINCOLN 276 (Roy P. Basler, ed. 1953) (hereinafter COLLECTED WORKS), available online from a website maintained by the Abraham Lincoln Association, at <http://quod.lib.umich.edu/l/lincoln/>. See also Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, A Brief Historical Overview*, 11 U. Pa. J. Const. L. 1381 (2009); *id.* at 1383 (stating, “the Thirteenth, Fourteenth, and Fifteenth Amendments were a second founding. In the second founding, a second group of framers sought to give the nation a new birth of freedom and to bring it closer to the ideals of the Declaration of Independence and the Constitution’s preamble.”); Robert Kaczorowski, *Congress’ Power to Enforce Fourteenth Amendment Rights: Lessons from the Federal Remedies the Framers Enacted*, 42 HARV. J. LEG. 187, 199, 203 (2005) (contending that framers of the 14th Amendment such as Speaker of the House Schuyler Colfax and Senator Lyman Trumbull expressly intended to incorporate the principles of the Declaration into the Constitution).

¹¹ JAMES M. MCPHERSON, *ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION* (1991); see also Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper’s Book*, 68 CHI-KENT L. REV. 1113, 1172 (1993) (stating, “If the Civil War was the second American Revolution, the Thirteenth and Fourteenth Amendments gave birth to a transformed Constitution and Bill of Rights.”); FLETCHER, note __ supra, at 2 (referring to the Civil War Amendments as having created a “second American Constitution”).

¹² But see MICHAEL LIND, *WHAT LINCOLN BELIEVED: THE VALUES AND CONVICTIONS OF AMERICA’S GREATEST PRESIDENT 16* (2004) (stating, “The images of Lincoln as the Savior of the Union, the Great Commoner, and the Great Emancipator are not lies; they are myths.”).

¹³ See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW 70-71* (1966) (stating, “the cumulative weakening of resistance to racism was expressed also in a succession of decisions by the United States Supreme Court between 1873 and 1898 ...”); ERIC FONER, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION 194* (2006) (“as support for reconstruction waned in the North, the [Supreme] court began to emasculate the legislative and constitutional amendments of the 1860s”); Wilson R. Huhn, *The Legacy of Slaughterhouse, Bradwell, and Cruikshank in Constitutional Interpretation*, 42 AKRON L. REV. 1051 (2009) (critiquing the decisions of the Supreme Court in the post-civil war period narrowly construing the 14th Amendment and striking down or rendering ineffective the Civil Rights Acts adopted during Reconstruction); cases cited at note __ infra.

United States, but only in the last few decades is Lincoln’s political philosophy blossoming and bearing fruit in the jurisprudence of the Supreme Court.

Since 1937, when Franklin Roosevelt nominated the first of eight justices he would eventually appoint,¹⁴ the Supreme Court has come to interpret the Constitution in light of Lincoln’s political philosophy. In particular, the Supreme Court has adopted a transcendent understanding of the principles of liberty and equality. Part I of this article describes how Lincoln articulates each of these principles, and Part II demonstrates how each principle has been applied by the Supreme Court in modern times.

I. LINCOLN’S TRANSCENDENT UNDERSTANDING OF THE PRINCIPLES OF LIBERTY AND EQUALITY

Lincoln was the leading man of his age, and he both reflected and enhanced the dominant philosophical movement of his time – transcendentalism. Gary Wills devotes an entire chapter in his masterful book *Lincoln at Gettysburg* to the impact of the transcendental movement on American society in general and on Lincoln in particular.¹⁵ Transcendentalism mixed Kantian moral philosophy with Universalist religious belief, and the result was a kind of “natural law” understanding of moral and religious imperatives.¹⁶ The many strands of Transcendentalism reflect myriad concerns and viewpoints,¹⁷ but at its core all transcendentalists centered their faith on the following principles:

1. Fundamental moral truths are accessible to the individual conscience through reflection and intuition;¹⁸

¹⁴ See Huhn, *In Defense of the Roosevelt Court*, note __ *supra* (describing the members, rulings, and significance of the Roosevelt Court).

¹⁵ See WILLS, note __ *supra*, at 90-120 (chapter entitled “The Transcendental Declaration,” linking Lincoln’s understanding of the Declaration to Transcendentalism).

¹⁶ See PHILIP F. GURA, *AMERICAN TRANSCENDENTALISM* (2007) (describing the history of Transcendentalism in America); *id.* at 46-68 (chapter entitled “Reinvigorating a Faith” describing the influence of Kantian thought on certain members of the Unitarian Church); PERRY MILLER, *THE TRANSCENDENTALISTS* 3-15 (describing the Transcendental movement); *id.* at 8 (stating, “the Transcendental movement is most accurately to be defined as a religious demonstration. The real drive in the souls of the participants was a hunger of the spirit for values which Unitarianism had concluded were no longer estimable.”); *id.* at 12 (calling Transcendentalism a “rift between generations” of the Unitarian Church).

¹⁷ See GURA, note __ *supra*, at 5 (referring to the disparity of views within the Transcendental Club); *id.* at 71 (describing how leading Transcendentalists met nearly 30 times between 1836 and 1840, when their meetings came to an end because “the proliferation of so many different views of what constituted reform” prevented their meeting on “common ground,” *quoting* historian Peter Carafiol).

¹⁸ See *id.* at 8 (describing Transcendentalism as “a way of perceiving the world, centered on individual consciousness rather than external fact.”); *id.* at 11 (stating that “Innately present in each individual . . . is a spiritual principle . . . that allows one to distinguish between right and wrong, good and bad, God and Satan, and it supersedes any outward laws or injunctions.”); *id.* at 54 (discussing J.D. Morrell’s belief that “‘there is an inward sense – a rational intuition – a spiritual faculty – by which we have a direct and immediate revelation of supersensual things’ such as God, providence, freedom, and immortality.”); *id.* at 61 (discussing Sampson Reed’s influential pamphlet *Observations on the Growth of the Mind*, in which Reed describes the mind as a “‘delicate germ, whose husk is the

2. These truths are eternal and unchanging;¹⁹
3. These truths are universal to all mankind;²⁰ and,
4. Every person has a moral obligation to recognize and act consistently with these principles.²¹

In the 1850s the Transcendentalist Movement was swallowed up by the antislavery movement – leading transcendentalists such as Theodore Parker, Ralph Waldo Emerson, and Henry David Thorough became consumed with the task of applying the timeless and universal moral imperatives they believed in to the specific task of abolishing American slavery.²² Similarly, as a result of his opposition to slavery Abraham Lincoln sought to bring our society and our law more in line with fundamental moral truths. He found both inspiration and a ready tool in the Declaration of Independence.

The Declaration of Independence as a Higher Law

The second sentence of the Declaration of Independence states:

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 governed²³

In 1861 at Independence Hall in Philadelphia Lincoln said, “I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence.” He added:

body,’ put into the world so that ‘the light and heat of heaven may fall upon it with a gentle radiance, and call forth its energies.’”).

¹⁹ See *id.* at 14 (quoting O.B. Frothingham describing Transcendentalism as “a belief in ‘the living God in the Soul, faith in immediate inspiration, in boundless possibility, and in an unimaginable good.’”). See, e.g., Theodore Parker, *A Discourse of the Transient and Permanent in Christianity* (1841) in MILLER, note __ *supra*, at 259-283. This famous sermon by one of the leading Transcendentalists considered Jesus’ teachings to be permanent, but religious institutions and forms of worship to be merely transient. Parker stated:

Looking at the Word of Jesus, at real Christianity, the pure religion he taught, nothing appears more fixed and certain. Its influence widens as light extends; it deepens as the nations grow more wise. But, looking at the history of what men call Christianity, nothing seems more uncertain and perishable.

Id. at 262.

²⁰ See GURA, note __ *supra*, at 68 (describing the movement’s “profound sense of universal brotherhood”).

²¹ See *id.* at 225 (describing Henry David Thorough’s belief that “Man’s conscience constituted the higher law, and only the state that recognized this was worthy of man’s allegiance.”).

²² See *id.* at 240-266 (Chapter 9, entitled “The Inward Turn,” describing how the transcendental movement merged into the antislavery movement); *id.* at 241 (stating, “Transcendentalists ... became preoccupied with issues they believed were unique to the United States, chief among them the curse of slavery.”); MILLER, note __ *supra*, at 13 (referring to the “channelizing of reforming energies into the antislavery crusade”).

²³ DECLARATION OF INDEPENDENCE.

I have often inquired of myself, what great principle or idea it was that kept this Confederacy so long together. It was not the mere matter of the separation of the colonies from the mother land; but something in that Declaration giving liberty, not alone to the people of this country, but hope to the world for all future time. It was that which gave promise that in due time the weights should be lifted from the shoulders of all men, and that *all* should have an equal chance. This is the sentiment embodied in that Declaration of Independence.²⁴

The Declaration comprised Lincoln's core political philosophy, and the principal significance of his life and work was that he persuaded his countrymen that the purpose of America was to cultivate and preserve these principles for the benefit of all mankind.²⁵ Like Daniel Webster,²⁶ Lincoln believed that patriotism and loyalty to the Union had a purpose

²⁴ 4 COLLECTED WORKS 240.

²⁵ See, e.g., Adkins, note __ *supra*, at 213 ("The unifying theme of his political career was the rededication of America to its sacred charge."); *but see* LIND, note __ *supra*, at 13-18, (arguing that Gary Wills and other scholars have misunderstood Lincoln as an egalitarian).

²⁶ The speeches of Daniel Webster are available at Daniel Webster, Dartmouth's Favorite Son, at <http://www.dartmouth.edu/~dwebster/>. See, e.g., Webster's speech at the Bunker Hill Monument, June 17, 1825, where he said:

The last hopes of mankind, therefore, rest with us; and if it should be proclaimed, that our example had become an argument against the experiment, the knell of popular liberty would be sounded throughout the earth.

<http://www.dartmouth.edu/~dwebster/speeches/bunker-hill.html>.

See also Daniel Webster, Funeral Oration for Adams and Jefferson, August 2, 1826:

We can never, indeed, pay the debt which is upon us; but by virtue, by morality, by religion, by the cultivation of every good principle and every good habit, we may hope to enjoy the blessing, through our day, and to leave it unimpaired to our children. Let us feel deeply how much of what we are and of what we possess we owe to this liberty, and to these institutions of government. Nature has, indeed, given us a soil which yields bounteously to the hand of industry, the mighty and fruitful ocean is before us, and the skies over our heads shed health and vigor. But what are lands, and seas, and skies, to civilized man, without society, without knowledge, without morals, without religious culture; and how can these be enjoyed, in all their extent and all their excellence, but under the protection of wise institutions and a free government?

<http://www.dartmouth.edu/~dwebster/speeches/adams-jefferson.html>.

Our newest President has also recalled the sacrifices of the framers, and exhorted us to emulate their commitment to freedom:

So let us mark this day with remembrance, of who we are and how far we have traveled. In the year of America's birth, in the coldest of months, a small band of patriots huddled by dying campfires on the shores of an icy river. The capital was abandoned. The enemy was advancing. The snow was stained with blood. At a moment when the outcome of our revolution was most in doubt, the father of our nation ordered these words be read to the people:

"Let it be told to the future world ... that in the depth of winter, when nothing but hope and virtue could survive ... that the city and the country, alarmed at one common danger, came forth to meet ... it."

America! In the face of our common dangers, in this winter of our hardship, let us remember these timeless words. With hope and virtue, let us brave once more the icy currents, and endure what storms may come. Let it be said by our children's children that when we were tested we refused to let this journey end, that we did not turn back nor did we falter; and with eyes fixed on the horizon and God's grace upon us, we carried forth that great gift of freedom and delivered it safely to future generations.

beyond simple group identity.²⁷ America is not a race or a culture or even a land – it is instead a set of fundamental truths about human nature, something worth fighting for and dying for.

Lincoln frequently expressed his conception of the Declaration as a form of higher law. He considered the principles of the Declaration to be transcendental – transcending race, nationality, time, and tradition – universal in their scope and applicable to the entire human race.²⁸ He conveyed this most often, and in light of the period and his audience, most effectively, through the use of religious imagery.²⁹ Examples of this are legion. In the Peoria Address of 1854, his first great speech, twice he refers to the Declaration as an “ancient faith” – first as “my ancient faith,” and then as “our ancient faith.”³⁰ Also at Peoria, paraphrasing from the Sermon on the Mount in the Book of Luke, Lincoln states:

It still will be the abundance of man's heart, that slavery extension is wrong; and out of the abundance of his heart, his mouth will continue to speak.³¹

In a letter that he drafted but never sent, Lincoln used religious imagery to illustrate what he considered to be the proper relation of the Declaration and the Constitution. The Book of Proverbs states that “The word fitly spoken is like apples of gold in pictures of silver.”³² In this unfinished letter Lincoln wrote that the principle of “liberty for all” made manifest in the Declaration was “the word fitly spoken,” the “apple of gold” – and the Constitution merely the “picture of silver” framed around it.³³ By characterizing the Declaration as “the word,” Lincoln

See also President Barack Hussein Obama, Inaugural Address, January 20, 2009, at http://www.whitehouse.gov/the_press_office/President_Barack_Obamas_Inaugural_Address:

²⁷ *See* MCPHERSON, at 115-116. McPherson states:

Lincoln’s nationalism was profound. It was not merely chauvinism, not the spread-eagle jingoism typical of American oratory in the nineteenth century. It was rooted in the Declaration of Independence and the ideals of liberty and equal opportunity that the Declaration had implanted as a revolutionary new idea on which the United States was founded.

²⁸ *See* WILLS, note __ *supra*, at 103 (stating, “The ideal is so general and time-free that it does not merely affect Americans – rather, its influence radiates out to *all* people *everywhere*.”); Andrew Delbanco, *Lincoln’s Sacramental Language*, in OUR LINCOLN, note __ *supra*, at 218 (stating, “His faith was in the transcendent principle of human equality.”).

²⁹ *See* JOHN CHANNING BRIGGS, LINCOLN’S SPEECHES RECONSIDERED (2005) (analyzing several of Lincoln’s speeches from a literary standpoint, including Lincoln’s use of the King James Bible); Andrew Delbanco, note __ *supra*, 199-222 (describing Lincoln’s use of religious imagery).

³⁰ 2 COLLECTED WORKS 266.

³¹ 2 COLLECTED WORKS 271. Lincoln’s audience would have immediately recognized the significance of Lincoln’s biblical reference from Chapter 6 of the Book of Luke, in which Jesus chose his disciples and instructed them that just as a tree is known by its fruit, the good or evil in men’s hearts is also revealed. *See* Luke 6:45 (King James Version) (“A good man out of the good treasure of his heart bringeth forth that which is good; and an evil man out of the evil treasure of his heart bringeth forth that which is evil: for of the abundance of the heart his mouth speaketh.”).

³² Proverbs 25:11 (King James Version).

³³ *See* COLLECTED WORKS OF ABRAHAM LINCOLN 168-169. Lincoln wrote:

The *expression* of that principle [“Liberty to all”], in our Declaration of Independence, was most happy, and fortunate. *Without* this, as well as *with* it, we could have declared our independence of Great Britain; but *without* it, we could not, I think, have secured our free government, and

was suggesting a divine origin to the concepts of liberty and equality.³⁴ To extend Lincoln's metaphor, the Declaration is the Bible, and the Constitution the church.³⁵ The Declaration expresses ideals that are eternal and that apply to all of humanity, while the Constitution is merely our present understanding of those concepts, the earthly vessel meant to preserve those ideals at a particular time and place.³⁶ The Constitution serves and is subservient to the Declaration.

At Gettysburg, Lincoln's religious imagery becomes even more subtle and powerful.

"Fourscore 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."³⁷

In this first sentence alone, in the use of the words "four score," Lincoln identifies the Founders of our country with Abraham and Moses,³⁸ and by use of the words "brought forth" he compares them to God who "brought forth" the people of Israel from Egypt, and to Mary, the mother of Jesus.³⁹ Lincoln implicitly yet indelibly links the American people to the ancient nation of Israel; the Declaration of Independence to the Ten Commandments; and the announcement of the principles of liberty and equality to the birth of the Son of God.⁴⁰

The Declaration Calls Us to Duty

consequent prosperity. No oppressed, people will *fight*, and *endure*, as our fathers did, without the promise of something better, than a mere change of masters.

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

Id.

³⁴ See John 1:1 (King James Version) ("In the beginning was the word . . .").

³⁵ See SANFORD LEVINSON, CONSTITUTIONAL FAITH 44 (1988) (distinguishing between a "protestant" and "catholic" approach to constitutional interpretation.); Elizabeth Reilly, *Priest, Minister, or "Knowing Instrument": The Lawyer's Role in Constructing Constitutional Meaning*, 38 TULSA L. REV. 669 (2003) (discussing and expanding upon Levinson's theory regarding the difference between a "protestant" and "catholic" approach to constitutional interpretation).

³⁶ See WILLS, note __ *supra*, at 101 ("Lincoln distinguished between the Declaration as the statement of a permanent ideal and the Constitution as an early and provisional embodiment of that ideal, to be tested against it, kept in motion toward it.")

³⁷ 7 COLLECTED WORKS 23.

³⁸ See Genesis 16:16 (King James Version) ("And Abram was fourscore and six years old, when Hagar bare Ishmael to Abram."); Exodus 7:7 ("And Moses was fourscore years old, and Aaron fourscore and three years old, when they spake unto Pharaoh.").

³⁹ See *id.*, 2 Chronicles 6:5 (King James Version) ("I brought forth my people out of the land of Egypt . . ."); Matthew 1:24-25 ("Then Joseph being raised from sleep did as the angel of the Lord had bidden him, and took unto him his wife: And knew her not till she had brought forth her firstborn son: and he called his name JESUS.").

⁴⁰ See GABOR BORITT, THE GETTYSBURG GOSPEL: THE LINCOLN SPEECH THAT NOBODY KNOWS 120 (2006) (stating, "Birth, sacrificial death, rebirth. A born-again nation. At a less than conscious level, Lincoln weaved together the biblical story and the American story....")

Yet another characteristic of Lincoln's philosophy is that the Declaration imposes a duty upon each and every one of us – it calls us to service. At Lewiston he admonishes us that it is we who must “drop every paltry and insignificant thought for any man's success.”⁴¹

I charge you to drop every paltry and insignificant thought for any man's success. It is nothing; I am nothing; Judge Douglas is nothing. *But do not destroy that immortal emblem of Humanity---the Declaration of American Independence.*⁴²

At Independence Hall, Lincoln recalls the sacrifices of the founders:

I have often pondered over the dangers which were incurred by the men who assembled here and adopted that Declaration of Independence – I have pondered over the toils that were endured by the officers and soldiers of the army, who achieved that Independence.⁴³

Like Webster,⁴⁴ Lincoln thought that the founders' sacrifices obligate us to preserve and uphold the principles of the Declaration.⁴⁵ At Gettysburg, Lincoln turns our attention to the sacrifices of the present generation – whose losses far exceed the amount of blood spilled and fortune spent in the War of Independence.⁴⁶ It was not enough for “we here,” to “dedicate” a cemetery:

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

⁴¹ See 2 COLLECTED WORKS 547.

⁴² *Id.* (emphasis in original).

⁴³ 4 COLLECTED WORKS 240.

⁴⁴ See note __ *supra*.

⁴⁵ See 1 COLLECTED WORKS 115. In closing his speech to the Young Men's Lyceum, Lincoln appeals to the memory of the Founders in support of the “The Perpetuation of Our Political Institutions:”

They *were* the pillars of the temple of liberty; and now, that they have crumbled away, that temple must fall, unless we, their descendants, supply their places with other pillars, hewn from the solid quarry of sober reason. Passion has helped us; but can do so no more. It will in future be our enemy. Reason, cold, calculating, unimpassioned reason, must furnish all the materials for our future support and defence. Let those [materials] be moulded into *general intelligence*, [sound] *morality* and, in particular, *a reverence for the constitution and laws*; and, that we improved to the last; that we remained free to the last; that we revered his name to the last; [tha]t, during his long sleep, we permitted no hostile foot to pass over or desecrate [his] resting place; shall be that which to le[arn the last] trump shall awaken our WASH[INGTON].

See note __ *supra* and accompanying text (setting forth similar appeals by Daniel Webster and Barack Obama).

⁴⁶ See

that government of the people, by the people, for the people shall not perish from the earth.⁴⁷

The Battle of Gettysburg is not solely something that happened in the distant past – it continues to have significance for “we here” – that we here must complete the “unfinished work,” the “great task remaining before us” – the preservation of liberty and equality.

Liberty and Equality Defined

At this point let us admit that we are limited in our ability to know exactly what Abraham Lincoln means by “liberty” and “equality.” Lincoln does not articulate a single, precise legal definition of either of those terms. In his letters and speeches he is not addressing a court in a specific case. Instead, he is addressing his own generation as well as succeeding generations – he is speaking to all Americans, present and future. As a result, he necessarily speaks in general terms. Furthermore, the subject that dominated all others in his time, the great issue of the day, was slavery. We cannot expect to learn Lincoln’s specific beliefs on topics germane to our own time, such as a woman’s right to terminate a pregnancy or the right of gay and lesbian couples to marry. However, Lincoln’s definitions of liberty and equality, and, even more important, the general approach that he takes to their interpretation, provide us with rich guidance.

Lincoln’s Definition of Liberty Is Close to That of John Stuart Mill

According to his friend Noah Brooks, Lincoln “particularly liked” John Stuart Mill’s *On Liberty*.⁴⁸ In that notable work Mill articulated the “harm principle,” the idea that the law may restrict people only when they cause harm to others. Mill stated: “Over himself, over his own body and mind, the individual is sovereign.”⁴⁹ Mill indicated that “The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute.”⁵⁰ Finally, Mill noted that it is only conduct affecting other people’s *legal rights* that may be subject to lawful restraint: “The acts of an individual may be hurtful to others or wanting in due consideration for their welfare, without going to the length of violating any of their constituted rights. The offender may then be justly punished by opinion, though not by law.”⁵¹ Many legal scholars believe that Mill has had a profound influence on the development of constitutional law.⁵²

⁴⁷ 7 COLLECTED WORKS 22-23.

⁴⁸ See Noah Brooks, *Personal Recollections of Abraham Lincoln*, in THE LINCOLN ANTHOLOGY: GREAT WRITERS ON HIS LIFE AND LEGACY FROM 1860 TO NOW 164, 179 (Harold Holzer, ed. 2009) (hereinafter HOLZER) (stating that Lincoln “particularly liked Butler’s Analogy of Religion, Stuart Mill On Liberty, and he always hoped to get at President Edwards on the Will.”).

⁴⁹ JOHN STUART MILL, ON LIBERTY 22 (1859).

⁵⁰ *Id.* at 9.

⁵¹ *Id.* at 73.

⁵² See Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2002-03 CATO SUP. CT. REV. 21 (stating, “Contrary to how their decision was widely reported, the *Lawrence* majority did not protect a ‘right of privacy.’” Instead, quite simply, they protected ‘liberty.’”); J. M. Hill, *The Five Faces of Freedom in*

In 1864, at the Sanitary Fair in Baltimore, Lincoln applied Mill's concept of liberty to the problem of slavery. First, Lincoln acknowledged that Americans have different notions of what "liberty" is:

We all declare for liberty; but in using the same *word* we do not all mean the same *thing*. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor.⁵³

Lincoln then contrasted these competing definitions by means of a simple yet unforgettable metaphor:

The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as a *liberator*, while the wolf denounces him for the same act as the destroyer of liberty, especially as the sheep was a black one. Plainly the sheep and the wolf are not agreed upon a definition of the word liberty; and precisely the same difference prevails to-day among us human creatures⁵⁴

Lincoln evidently meant for us to embrace the sheep's definition of liberty: "for each man to do as he pleases with himself, and the product of his labor."

In 1858 Lincoln offered another, similar phrasing of the liberty principle consistent with Mill's admonition that people are free to engage in actions that do not interfere with other people's "constituted rights."⁵⁵ Lincoln said: "I believe each individual is naturally entitled to do as he pleases with himself and the fruit of his labor, so far as it in no wise interferes with any other man's rights"⁵⁶ Lincoln's formulation anticipates and bears great similarity to John Rawls'

American Political and Constitutional Thought, 45 B. C. L. REV. 499, 575 (2004) (stating, "Justice Anthony Kennedy's majority opinion [in *Lawrence*] articulates a notion of freedom that is reminiscent of John Stuart Mill."); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 744-745 (2007) (discussing the influence of John Stuart Mill on the development of the concept of freedom of speech); Wilson R. Huhn, *Mill's Theory of Liberty in Constitutional Interpretation*, 22 AKRON L. REV. 133 (1988) (describing the influence of Mill's libertarian philosophy on constitutional analysis). *But see* Mark Strasser, *Lawrence, Mill, and Same-Sex Relationships*, 15 S. CAL. INTERDISC. L.J. 285 (2006) (contending that while the decision in *Lawrence* is consistent with Mill's libertarian philosophy, Kennedy's opinion in *Lawrence* and Mill's philosophy are both more extensive in the sense that each contains elements that the other does not).

⁵³ 7 COLLECTED WORKS 301-302.

⁵⁴ *Id.* at 302.

⁵⁵ *See* note __ *supra* and accompanying text.

⁵⁶ 2 COLLECTED WORKS 493 (Speech at Chicago, July 10, 1858).

“liberty principle,” which states that “Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.”⁵⁷

As we shall see below, the Supreme Court has moved towards this libertarian viewpoint in its interpretation of the Constitution.⁵⁸

Universal Equality

A fundamental point is that Lincoln believed in the equality of *all* men, everywhere. In reference to the phrase “all men are created equal” in the Declaration, Lincoln said, “I think the authors of that notable instrument intended to include *all* men.”⁵⁹ He predicted that this ideal would, in the future, augment “the happiness and value of life to all people of all colors everywhere.”⁶⁰

On July 10, 1858, in the city of Chicago, Lincoln again made it clear that he did not consider the notion of equality expressed in the Declaration to be a mere “social contract” applicable to one race of men, but rather a universal principle. At a time when the No-Nothing Party, a party whose support Lincoln needed for the Republican Party, was fiercely anti-immigrant,⁶¹ Lincoln reached out to immigrants, extending to them an equal share in the American dream, stating that the principle of equality extends to all people “throughout the world:”

We have besides these men – descended by blood from our ancestors – among us perhaps half our people who are not descendants at all of these men, they are men who have come from Europe – German, Irish, French and Scandinavian – men that have come from Europe themselves, or whose ancestors have come hither and settled here, finding themselves our equals in all things. If they look back through this history to trace their connection with those days by blood, they find they have none, they cannot carry themselves back into that glorious epoch and make themselves feel that they are part of us, but when they look through that old Declaration of Independence they find that those old men say that “We hold these truths to be self-evident, that all men are created equal,” and then they feel that that moral sentiment taught in that day evidences their

⁵⁷ JOHN RAWLS, A THEORY OF JUSTICE 302 (1963). See, e.g., Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 69 (2009) (stating, “there is a fair case to be made that Rawls is very useful in understanding the Equal Protection Clause,” and citing Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law*, in THE CAMBRIDGE COMPANION TO RAWLS 394 (Samual Freedman ed., 2003); see also Frank A. Michelman, *The Supreme Court 1968 Term: Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 14-16 (1969) (contending that the Equal Protection Clause should be construed to be consistent with Rawls’ theory of justice).

⁵⁸ See notes ___-___ *infra* and accompanying text.

⁵⁹ 2 COLLECTED WORKS 405 (emphasis in original). See notes ___-___ *infra* and accompanying text.

⁶⁰ *Id.* at 406.

⁶¹ See GOODWIN, note ___ *supra*, at ___.

relation to those men, that it is the father of all moral principle in them, and that they have a right to claim it as though they were blood of the blood, and flesh of the flesh of the men who wrote that Declaration, and so they are. That is the electric cord in that Declaration that links the hearts of patriotic and liberty-loving men together, that will link those patriotic hearts as long as the love of freedom exists in the minds of men throughout the world.⁶²

Consistent with Lincoln's thoughts, it has become a basic tenet of constitutional law that the Equal Protection Clause protects all *persons*, not just *citizens*.⁶³

Equal with Respect to Fundamental Rights

For Lincoln, equality is not simply a matter of philosophical or a political principle – it is a *legal* principle; as proof, Lincoln quoted the founders' words from the Declaration:

They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal – equal in “certain inalienable rights, among which are life, liberty, and the pursuit of happiness.” This they said, and this meant.⁶⁴

Charles L. Black has argued that that the Declaration of Independence is *law*.⁶⁵ Whether or not it is law in and of itself, it becomes law when the Supreme Court incorporates its provisions into the Constitution, thus ensuring that “Our constitutional ideal of equal justice under law is thus made a living truth.”⁶⁶

Equality as Equal Opportunity

Above all, Lincoln conceived of equality as “equal opportunity.” This self-made man believed that every person has the right to achieve as much and to rise as far as his talent and effort will take him. Lincoln expressed this idea in his address to the special session of Congress on July 4, 1861, explaining to Congress and the American people why it was necessary to fight for the principle of equality:

⁶² 2 COLLECTED WORKS 499-500.

⁶³ See *Graham v. Richardson*, 403 U.S. 365, 371 (1971) (stating, “It has long been settled, and it is not disputed here, that the term “person” in this context encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside.”); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (extending Equal Protection to “even aliens whose presence in this country is unlawful.”).

⁶⁴ 2 COLLECTED WORKS 405.

⁶⁵ See BLACK, note __ supra, at 8 (stating, “The Declaration as a whole was an act of ‘constitution,’ a *juristic* act, an act of *law*, after the manner of law in all its fields, quite as surely as is a statute setting up a state police force.”).

⁶⁶ *Cooper v. Aaron*, 358 U.S. 1, 20 (1958).

This is essentially a People's contest. On the side of the Union, it is a struggle for maintaining in the world, that form, and substance of government, whose leading object is, to elevate the condition of men – to lift artificial weights from all shoulders – to clear the paths of laudable pursuit for all – to afford all, an unfettered start, and a fair chance, in the race of life.⁶⁷

Three years later he used the same expression – “the race of life” – in his remarks to soldiers of the Ohio 166th Regiment on August 22, 1864, as he stood on the steps of the White House:

I happen temporarily to occupy this big White House. I am a living witness that any one of your children may look to come here as my father's child has. It is in order that each of you may have through this free government which we have enjoyed, an open field and a fair chance for your industry, enterprise and intelligence; that you may all have equal privileges in the race of life, with all its desirable human aspirations. It is for this the struggle should be maintained, that we may not lose our birthright---not only for one, but for two or three years. The nation is worth fighting for, to secure such an inestimable jewel.⁶⁸

For Lincoln, liberty and equality are not competing, but rather complementary values. Only in “the wolf’s dictionary” does liberty negate equality.⁶⁹ According to Lincoln, all persons have an equal right to govern themselves and must be afforded equal opportunity to reach their highest potential.

Equality Linked to the Principle of Self-Government

Lincoln’s faith in the principle that “all men are created equal” led him also to a profound understanding of the principle of “self-government,” which he expressed in the Peoria address, his first great response to Stephen Douglas. Douglas had developed a political solution to the problem of the extension of slavery that he called “popular sovereignty.”⁷⁰ It was the idea that the people of each new state had the right to choose whether to enter the Union as a slave state or a free state – that the people of each state could, by free elections, determine whether slavery would be permitted or excluded from their territory.⁷¹ At Peoria Lincoln accepts the premise that the principle of self government is right – “absolutely and eternally right”⁷² – a principle he calls

⁶⁷ 4 COLLECTED WORKS 439.

⁶⁸ 7 COLLECTED WORKS, at 512.

⁶⁹ See notes ___-__ *supra* and accompanying text.

⁷⁰ See DONALD, note ___ *supra* at 218 (setting forth Douglas’ position on popular sovereignty, and describing how Lincoln forced Douglas to explicitly state his position).

⁷¹ See *id.*

⁷² 2 COLLECTED WORKS 265.

the “the sheet anchor of American republicanism”⁷³ – but he challenges Douglas’ understanding of the principle:

The doctrine of self government is right – absolutely and eternally right – but it has no just application, as here attempted. Or perhaps I should rather say that whether it has such just application depends upon whether a negro is *not* or *is* a man. If he is *not* a man, why in that case, he who *is* a man may, as a matter of self-government, do just as he pleases with him. But if the negro *is* a man, is it not to that extent, a total destruction of self-government, to say that he too shall not govern *himself*? When the white man governs himself that is self-government; but when he governs himself, and also governs *another* man, that is *more* than self-government---that is despotism. If the negro is a *man*, why then my ancient faith teaches me that “all men are created equal;” and that there can be no moral right in connection with one man's making a slave of another.⁷⁴

Lincoln contends that the principle of self-government requires that all persons must have an “equal voice in the government:”

Allow ALL the governed an equal voice in the government, and that, and that only is self government.⁷⁵

As we shall see, like Lincoln, the Supreme Court now believes that democracy is rooted in principles of equality – that all citizens have an equal right to participate in the political process.⁷⁶ But it is in Lincoln’s general approach to interpreting the principles of the Declaration that we find the greatest inspiration for constitutional law, and it is to that idea that we now turn.

Lincoln’s General Approach to Constitutional Interpretation

In our time Judge Robert Bork has written persuasively that, to the extent possible, the Constitution must be interpreted according to “neutral principles” – that in interpreting the Constitution judges should not make value choices, but instead should adhere to value choices already made.⁷⁷ The neutral principle that Bork identifies and would rely upon in interpreting

⁷³ *Id.* at 266.

⁷⁴ 2 COLLECTED WORKS 265-266 (emphasis in original).

⁷⁵ *Id.* at 266 (emphasis in original).

⁷⁶ See notes ___-___ *infra* and accompanying text.

⁷⁷ See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) (hereinafter *Neutral Principles*) (stating, “Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights.”). See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1997); ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* (2003); ROBERT H. BORK, *A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS* (2008). But see Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 71 (1983) (criticizing the theory of neutral principles and the interpretive method of specific intent).

the Constitution is “original intent;” he insists that the Constitution should be interpreted the same as the Framers would have interpreted it.⁷⁸ Supporting Bork’s argument is the fact that nearly all lawyers, judges, and legal scholars agree that the touchstone for statutory interpretation is legislative intent;⁷⁹ that the true meaning of a statute is the meaning that was intended by the persons who wrote the statute.⁸⁰ Because the Constitution is a law one could argue that it should be interpreted the same way we interpret statutes, in a manner that is consistent with the meaning that its drafters and adopters intended. Furthermore, one could argue, our fundamental political principles require this approach. The people have the “original right” to establish a government;⁸¹ because all just powers of government are derived from the “consent of the governed,”⁸² the Constitution must be interpreted in accordance with the original intent of the framers.

In a similar vein, Justice Antonin Scalia interprets the Constitution mainly by reference to tradition. He has stated that “a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.”⁸³ Dissenting in *Romer v. Evans*,⁸⁴ he defended a state constitutional amendment that made it impossible to gays to gain the protection of antidiscrimination laws on the ground that the people of the state were simply trying “to preserve traditional sexual mores,”⁸⁵ and he chastised the majority of the Court for “verbally disparaging as bigotry adherence to traditional attitudes.”⁸⁶ In *Lawrence v. Texas*,⁸⁷ another gay rights case where Justice Scalia dissented, he stated that laws making same-sex sexual intercourse a crime

⁷⁸ See Bork, *Neutral Principles*, note ___ *supra*, at 13 (stating, “If the legislative history [of the Constitution] revealed a consensus . . ., I do not see how the Court could escape the choices revealed and substitute its own, even though the words are general and conditions have changed.”).

⁷⁹ See, e.g., ABNER J. MIKVA & AND ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 36 (1997) (setting forth a rough hierarchy of categories of legislative history for use in statutory interpretation); *but see* Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L. J. 511, 517 (1989) (stating, “[t]o tell the truth, the quest for the ‘genuine’ legislative intent is probably a wild-goose chase anyway.”).

⁸⁰ See Bork, *Neutral Principles* at 11 (stating, “Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution.”).

⁸¹ *Marbury v. Madison*, 5 U.S. 137, 176 (1803) (stating, “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.”).

⁸² DECLARATION OF INDEPENDENCE.

⁸³ *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n. 6 (1989) (Scalia, J.). *But see id.* at 132 (O’Connor, J., concurring). In her concurring opinion in the same case, Justice Sandra Day O’Connor stated:

I concur in all but footnote 6 of Justice Scalia’s opinion. This footnote sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area. On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be “the most specific level” available. I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.

Id. at 132.

⁸⁴ 517 U.S. 620 (1996) (striking down a state constitutional amendment that prohibited the adopting of laws prohibiting discrimination on the basis of sexual orientation).

⁸⁵ *Id.* at 651 (1996) (Scalia, J., dissenting).

⁸⁶ *Id.* at 652 (Scalia, J., dissenting).

⁸⁷ 593 U.S. 558 (2003) (striking down state law making same-sex sexual intercourse a crime).

are supported by “*society’s* belief that certain forms of sexual behavior are “immoral and unacceptable,”⁸⁸ and that the law in question was justified in light of the fact that the goal of the statute was “preserving the traditional sexual mores of our society.”⁸⁹ Finally, in his dissent in *United States v. Virginia*⁹⁰ – the case ordering the State of Virginia to admit women to the Virginia Military Institute on an equal basis with men – Justice Scalia again makes “tradition” the cornerstone of his opinion:

Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. ... [I]t counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government.⁹¹

Justice Scalia contends that V.M.I. became a target in that litigation because of its “attachment to such old-fashioned concepts as manly ‘honor’”⁹² Pursuant to Justice Scalia’s approach to interpreting the Constitution, there are no fundamental rights to liberty and equality except those that have been traditionally recognized by American society.⁹³

The advantage of the interpretive methods employed by Judge Bork and Justice Scalia is that the precise meaning of the Constitution can be determined by looking solely to the past – to how the Constitution was understood by specific persons at specific points in time over the last two centuries. The disadvantage of their interpretive approaches is, of course, the same.

Lincoln rejects sole reliance on “specific intent” or “specific tradition” as the proper method to interpret the fundamental principles of liberty and equality. He does not believe that the founders of this country or the drafters of the Constitution had realized the ultimate meaning of either of these concepts. Nor does he believe that the people of his own time, who became the drafters of the Fourteenth Amendment, had achieved perfection in this regard.

⁸⁸ *Id.* at 600 (Scalia, J., dissenting) (*quoting* *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)).

⁸⁹ *Id.* at 601 (Scalia, J., dissenting)

⁹⁰ 518 U.S. 515 (1996) (ordering state to admit women to public military college).

⁹¹ *Id.* at 566 (Scalia, J., dissenting).

⁹² *Id.* at 601 (Scalia, J., dissenting).

⁹³ *See id.* at 593 n. 3 (Scalia, J., dissenting) (concluding that laws regulating activities that are not “deeply rooted” in tradition are not subjected to any standard of review greater than rational basis). Justice Scalia stated:

The Court is quite right that “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” An asserted “fundamental liberty interest” must not only be “‘deeply rooted in this Nation's history and tradition,’ ” but it must *also* be “‘implicit in the concept of ordered liberty,’ ” so that “‘neither liberty nor justice would exist if [it] were sacrificed.’ ” Moreover, liberty interests unsupported by history and tradition, though not deserving of “heightened scrutiny,” are *still* protected from state laws that are not rationally related to any legitimate state interest.

Id. (citations omitted) (emphasis in original).

In his time, eminent legal authorities asserted the specific intent of the framers in support of slavery. Chief Justice Roger Taney had made this point in *Dred Scott*,⁹⁴ and Senator Stephen Douglas had made the same argument in support of the extension of slavery.⁹⁵ Neither Taney nor Douglas believed that blacks were intended to be included in the phrase “all men are created equal.”

On June 26, 1857, at Springfield, Lincoln repudiates their argument:

I think the authors of that notable instrument intended to include *all* men, but they did not intend to declare all men equal *in all respects*. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal -- equal in "certain inalienable rights, among which are life, liberty, and the pursuit of happiness." This they said, and this meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.⁹⁶

Lincoln does not embrace a static interpretation of the principles of liberty and equality. He does not define these principles by reference to specific social and legal relations as they existed at some point in our distant past. These principles are, instead, transcendent ideals that

⁹⁴ See 60 U.S., at 407. Chief Justice Taney stated:

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

Id.

⁹⁵ See 2 COLLECTED WORKS 406 (Lincoln quoting Douglas arguing that the framers did not mean to include blacks in the phrase “all men are created equal.”). Douglas had stated:

‘No man can vindicate the character, motives and conduct of the signers of the Declaration of Independence except upon the hypothesis that they referred to the white race alone, and not to the African, when they declared all men to have been created equal--that they were speaking of British subjects on this continent being equal to British subjects born and residing in Great Britain--that they were entitled to the same inalienable rights, and among them were enumerated life, liberty and the pursuit of happiness. The Declaration was adopted for the purpose of justifying the colonists in the eyes of the civilized world in withdrawing their allegiance from the British crown, and dissolving their connection with the mother country.’

Id.

⁹⁶ 2 COLLECTED WORKS 405-406.

obligate us to the “unfinished work,” the “great task remaining” of making our society more free and more equal, so that all persons might have “an unfettered start, and a fair chance, in the race of life.” Lincoln points us to the following goal: “in relation to the principle that all men are created equal, let it be as nearly reached as we can.”⁹⁷

Lincoln was not afraid of change. His single greatest achievement was to issue the Emancipation Proclamation freeing the slaves in the South, but the single greatest political risk that he took was to arm the black race – to make them soldiers.⁹⁸ When a Confederate general proposed taking the same step, another southern leader replied, “If slaves will make good soldiers, then our whole theory of slavery is wrong.”⁹⁹ In his message to Congress on December 1, 1862, preparing Congress and the country for emancipation and the arming of blacks, Lincoln said:

“The dogmas of the quiet past, are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise -- with the occasion. As our case is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country.”¹⁰⁰

We now turn to an examination of how the Supreme Court has interpreted the constitutional principles of liberty and equality in recent decades.

II. THE SUPREME COURT’S ADOPTION OF LINCOLN’S UNDERSTANDING OF LIBERTY AND EQUALITY

Since 1937 the Supreme Court has moved steadily closer to Lincoln’s understanding of our basic rights to liberty and equality.

In 1938, in the case of *United States v. Carolene Products*,¹⁰¹ the Supreme Court signaled that it was changing its emphasis from the protection of property rights to the protection of human rights, and that henceforth laws affecting fundamental rights or the rights of minorities would be subjected to “more exacting judicial scrutiny.”¹⁰² Over the intervening decades the

⁹⁷ 2 COLLECTED WORKS 501 (Speech at Chicago, July 19, 1858).

⁹⁸ See 6 COLLECTED WORKS 28-30 (Emancipation Proclamation, January 1, 1863); *id.* at 30 (stating, “And I further declare and make known, that such persons of suitable condition, will be received into the armed service of the United States to garrison forts, positions, stations, and other places, and to man vessels of all sorts in said service.”).

⁹⁹ SHELBY FOOTE, *THE CIVIL WAR A NARRATIVE: FREDERICKSBURG TO MERIDIAN* 955 (1963) (quoting Confederate congressman and slaveholder Howell Cobb).

¹⁰⁰ 5 COLLECTED WORKS 537. See also 6 COLLECTED WORKS 409 (Letter to James Conkling, August 2, 1863) (stating, “You say you will not fight to free negroes. Some of them seem willing to fight for you; but, no matter. Fight you, then, exclusively to save the Union.”); *id.* 410 (stating that after the government achieved victory, “there will be some black men who can remember that, with silent tongue, and clenched teeth, and steady eye, and well-poised bayonet, they have helped mankind on to this great consummation; while, I fear, there will be some white ones, unable to forget that, with malignant heart, and deceitful speech, they have strove to hinder it.”).

¹⁰¹ 304 U.S. 144 (1938) (applying rational basis test in upholding regulation of food product).

¹⁰² *Id.* at 153 n. 4. The Court stated:

Roosevelt Court, the Warren Court, and subsequent courts continued to expand the understanding of our fundamental rights to liberty and equality.

1. *Liberty and the Right to Privacy in the Supreme Court*

The word “liberty” has many applications: freedom from unlawful imprisonment,¹⁰³ the right of association,¹⁰⁴ freedom of speech,¹⁰⁵ and freedom of religion¹⁰⁶ Justice Kennedy has even drawn the connection between liberty and the doctrine of Separation of Powers.¹⁰⁷ In this portion of this article I focus upon a single application of the concept of liberty – the Right to Privacy.

Like Lincoln’s political philosophy, the principle of the Right to Privacy is grounded in the Declaration of Independence – in particular, the idea that all persons are endowed with the inalienable right to “the pursuit of happiness.” And like Lincoln, the Supreme Court has come to embrace a transcendent understanding of what that means.

The relation between the Declaration and the Right to Privacy was implicitly acknowledged by the Supreme Court in *Meyer v. Nebraska*,¹⁰⁸ the first Right to Privacy case. In that case the Court struck down a state law which prohibited foreign language instruction in the lower grades because the Court found that the right of parents to direct the education of their children was “essential to the orderly pursuit of happiness by free men,”¹⁰⁹ and therefore implicit

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Id. (citation omitted).

¹⁰³ See *Boumediene v. Bush*, ___ U.S. ___, ___ (2008) (finding that prisoners held at Guantanamo Bay were entitled to *habeas corpus* hearings, and stating, “The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of *habeas corpus* as a vital instrument to secure that freedom.”).

¹⁰⁴ See *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) (striking down order of state court ordering civil rights organization to turn over membership list to court, stating, “In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.”).

¹⁰⁵ See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (stating, “For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

¹⁰⁶ See *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (finding a state statute, as applied, violated the defendants’ right to the Free Exercise of Religion, and stating, “The fundamental concept of liberty embodied in [the 14th] Amendment embraces the liberties guaranteed by the First Amendment.”).

¹⁰⁷ See *Clinton v. New York*, 524 U.S. 417 (1998) (striking down Line Item Veto Act); *id.* at 450 (Kennedy, J.) (stating, “Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.”).

¹⁰⁸ 262 U.S. 390 (1923) (striking down state law forbidding the schools from teaching children a foreign language before high school).

¹⁰⁹ *Id.* at 399. The Court stated:

in the Constitution.¹¹⁰ Over the intervening decades the Court has expanded and refined the concept of the Right to Privacy, ruling that prisoners have the right not to be sterilized,¹¹¹ that sexual partners have the right to use contraception,¹¹² that interracial couples have the right to marry,¹¹³ that women have the right to terminate their pregnancies prior to viability,¹¹⁴ that people have the right to live with their extended families,¹¹⁵ and that patients have the right to refuse medical treatment, even when the treatment is necessary to save the patient's life.¹¹⁶ In its most recent Right to Privacy case, *Lawrence v. Texas*,¹¹⁷ decided in 2003, the Supreme Court ruled that individuals have a constitutional right to have sex with someone of the same gender.

Justice Kennedy's opinion in *Lawrence* is significant because he defines the Right to Privacy in transcendent terms, just as Abraham Lincoln viewed the principles of the Declaration. Justice Kennedy commences his majority opinion in *Lawrence* with a discussion about the nature of the Right to Privacy – whether the right primarily prohibits the government from interfering with specific and concrete aspects of human behavior such as “sexual conduct in the home” or whether it protects transcendent aspects of human nature such as “loving relationships.” Kennedy opts for a broad reading of the Right to Privacy:

Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.¹¹⁸

According to Justice Kennedy, the problem with the Texas statute was that it seeks “to control a personal relationship that, whether or not entitled to formal recognition in the law, is

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

¹¹⁰ *See id.*

¹¹¹ *See Skinner v. State of Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (striking down state law authorizing sterilization of persons convicted of certain felonies).

¹¹² *See Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down state law prohibiting the use of contraceptives, as applied to married couples); *Eisenstadt v. Baird*, 406 U.S. 438 (1972) (extending right to use contraception to unmarried persons).

¹¹³ *See Loving v. Virginia*, 388 U.S. 1 (1967) (striking down state law prohibiting interracial marriage).

¹¹⁴ *See Roe v. Wade*, 410 U.S. 113 (1973) (striking down state law prohibiting abortion except to save the life of the woman).

¹¹⁵ *See Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (striking down municipal ordinance limiting the power of extended family to share a “single-family” residence).

¹¹⁶ *See Cruzan v. Director*, 497 U.S. 261 (1990) (upholding state law requiring that there must be clear and convincing evidence of a patient's wish to discontinue lifesaving medical treatment).

¹¹⁷ 539 U.S. 538 (2003) (striking down state law making homosexual intercourse a crime).

¹¹⁸ *Id.* at 562.

within the liberty of persons to choose without being punished as criminals.”¹¹⁹ Kennedy, adds:

When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.¹²⁰

In the key passage from his opinion, Justice Kennedy describes the scope and nature of the Right to Privacy. In referring to prior cases affording constitutional protection to “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,”¹²¹ Justice Kennedy explains the meaning of these cases in universal terms:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”¹²²

In closing his opinion for the majority of the Court, Justice Kennedy made clear that the framers intended for every generation of Americans to reassess “the components of liberty in its manifold possibilities:”

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.¹²³

Justice Kennedy’s opinion in *Lawrence* is representative of Lincoln’s political philosophy that calls us to a more enduring and transcendent understanding of freedom under the Constitution.

2. *The Supreme Court and the General Principle of Equality*

¹¹⁹ *Id.* at 567.

¹²⁰ *Id.*

¹²¹ *Id.* at 574

¹²² *Id.*

¹²³ *Id.* at 578-579.

A few years after the Fourteenth Amendment was adopted, the Supreme Court issued a number of rulings stating that the Equal Protection Clause had been adopted for the sole purpose of protecting the newly freed slaves, and it expressed doubt that the clause would have application to any other group.¹²⁴ Invoking that reasoning, in 1873 the court denied relief to a woman who had been barred by the State from entering the legal profession.¹²⁵ Furthermore, for many decades the Supreme Court neglected even to adequately protect the equal rights of blacks and other racial minorities.¹²⁶ By 1927 the Court could accurately characterize an Equal Protection claim as “the usual last resort of constitutional arguments.”¹²⁷

Over the last 70 years the Court’s interpretation and application of the Equal Protection Clause has completely changed. Today, the Supreme Court has extended constitutional protection to any and all groups of people.¹²⁸ To achieve this goal the Court has adopted a universal standard, applicable to all persons, for use in Equal Protection cases. As the Court said in 1985 in *Cleburne v. Cleburne Living Centers, Inc.*:¹²⁹

¹²⁴ See, e.g., *Slaughter-House Cases*, 83 U.S. 36, 81 (1873), where the Court stated:

We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.

¹²⁵ See *Bradwell v. Illinois*, 83 U.S. 130 (1873) (upholding decision of state supreme court barring women from admission to the bar); *id.* at 7 (stating, “It is unnecessary to repeat the argument on which the judgment in [*Slaughter-House Cases*] is founded. It is sufficient to say they are conclusive of the present case.

¹²⁶ See, e.g., *Blyew v. United States*, 80 U.S. 581 (1871) (reversing the murder conviction of two whites who had killed members of a black family on the ground that removal of this case to federal court was improper because, the Court reasoned, the rights of the victim and the witness were not “affected” by the fact that blacks were not allowed to testify in State courts); *United States v. Reese*, 92 U.S. 214 (1875) (striking down civil rights law protecting blacks right to vote); *Cruikshank v. United States*, 92 U.S. 542 (1875) (reversing the convictions of the perpetrators of the Colfax Massacre, on the ground that the indictment had simply stated that the victims were black, instead of stating that the murders were committed because the victims were black); *The Civil Rights Cases*, 106 U.S. 3 (1883) (striking down the Civil Rights Act of 1875, a law prohibiting segregation in certain places of public accommodation); *Pace v. Alabama*, 106 U.S. 583 (1883) (upholding Alabama statute forbidding blacks and whites from marrying or from having sex with each other); *Harris v. United States*, 106 U.S. 629 (1883) (declaring a civil rights law, the Enforcement Act of 1871, to be unconstitutional, thus reversing the convictions of a lynch mob); *Baldwin v. Franks*, 120 U.S. 678 (1887) (following *Harris* in finding the Ku Klux Klan Act to be unconstitutional insofar as it applies to private action); *Plessy v. Ferguson*, 63 U.S. 537 (1896) (upholding Louisiana law requiring segregated passenger cars on trains); *Williams v. Mississippi*, 170 U.S. 213 (1898) (upholding Mississippi election laws designed to disenfranchise blacks); *Cumming v. Richmond Bd. Of Educ.*, 175 U.S. 528 (1899) (refusing to intervene when the City of Richmond closed the high school for blacks but kept the school for whites open); *Hodges v. United States*, 203 U.S. 1, 14 (1906) (overturning convictions of a group of individuals for interfering with the civil rights of other individuals in violation of Civil Rights Act of 1866, in part because the statute could not be grounded upon the Fourteenth Amendment, stating, “that the 14th and 15th Amendments do not justify the legislation is also beyond dispute, for they, as repeatedly held, are restrictions upon state action, and no action on the part of the state is complained of.”); *Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding racial segregation in the public schools).

¹²⁷ *Buck v. Bell*, 274 U.S. 200, 208 (1927) (upholding the sterilization of institutionalized persons with mental retardation).

¹²⁸ See notes ___-___ *infra* and accompanying text.

¹²⁹ 473 U.S. 432 (1985).

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws,” which is essentially a direction that all persons similarly situated should be treated alike.¹³⁰

The Court has used the same or similar wording in many cases.¹³¹ In *Cleburne* itself, the Court ruled in favor of persons with mental disabilities who had been denied a zoning permit for a group home;¹³² in *Lawrence v. Texas*, the Court invoked that universal standard in striking down a state law making homosexual sex a crime;¹³³ and in *Tennessee v. Lane* the Court used the same test in upholding the constitutionality of the application of the Americans with Disabilities Act against a state that had failed to provide wheelchair access to a courthouse.¹³⁴

In extending the scope of the Equal Protection Clause to include all groups, the Court has *not* been mindful of tradition, as the following section of this article demonstrates.

3. Tradition is No Excuse for Inequality

In the notorious case of *Plessy v. Ferguson*,¹³⁵ the Supreme Court invoked custom and tradition to justify a policy of official segregation,¹³⁶ just as the Court in *Dred Scott*¹³⁷ had invoked the intent of the framers in denying citizenship to all African-Americans.¹³⁸ Today, in contrast, in Equal Protection cases the Supreme Court considers “tradition” to be a particularly weak interpretive modality.

In *Harper v. Virginia State Board of Elections*,¹³⁹ Justice William O. Douglas stated:

¹³⁰ *Id.* at 439.

¹³¹ See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 522 (2004) (quoting same language from *Cleburne*); *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (same); *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (stating that “all persons similarly circumstanced shall be treated alike,” quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (recognizing an equal protection claim where the plaintiff alleged she had been “intentionally treated differently from others similarly situated”). This standard apparently originates in the case of *Barbier v. Connally*, 113 U.S. 27 (1884) (legislation is constitutional if “it affects alike all persons similarly situated”).

¹³² See *Cleburne*, 473 U.S., at 450 (stating, “The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded”).

¹³³ See note __ *supra* and accompanying text.

¹³⁴ See *Lane*, 541 U.S., at 533-534 (stating, “we conclude that Title II [of the ADA], as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment.”).

¹³⁵ 163 U.S. 537 (1896) (upholding state law requiring railroad passenger cars to be racially segregated).

¹³⁶ See *id.* at 550 (stating, “the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people”).

¹³⁷ 60 U.S. 393 (1857) (striking down Missouri Compromise as violating the property rights of slaveholders and holding that under the Constitution African-Americans could not become citizens).

¹³⁸ See note __ *supra* and accompanying text.

¹³⁹ 383 U.S. 683 (1964) (striking down state poll tax on Equal Protection grounds).

In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. ... Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.¹⁴⁰

In upholding the equal the rights of gay and lesbians persons in cases such as *Romer v. Evans*¹⁴¹ and *Lawrence v. Texas*,¹⁴² both of which were written by Justice Anthony Kennedy, the Court has quite obviously had to reject what Justice Scalia describes as “the traditional sexual mores of our society.”¹⁴³ In *Romer* Justice Kennedy instead invokes the “emerging tradition” of statutory protection for disfavored groups,¹⁴⁴ and in *Lawrence* Kennedy places principal reliance upon the “emerging awareness” of protection accorded adult persons in matters pertaining to sex.¹⁴⁵ In his opinion for the Court in *Lawrence*, Justice Kennedy specifically states that “[H]istory and tradition are the starting point but not in all cases the ending point”¹⁴⁶ of constitutional analysis, and that “we think that our laws and traditions in the past half century are of most relevance here.”¹⁴⁷

In her concurring opinion in *Lawrence* Justice O’Connor goes even further, concluding that traditional notions of morality, by themselves, are “illegitimate” considerations. She states,

This case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be "drawn for the purpose of disadvantaging the group burdened by the law."¹⁴⁸

She also states, “the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted

¹⁴⁰ *Id.* at 669 (citation omitted).

¹⁴¹ 517 U.S. 620 (1996) (striking down state constitutional amendment prohibiting the state legislature or political subdivisions from adopting laws prohibiting discrimination on the basis of sexual orientation).

¹⁴² 539 U.S. 558 (2003) (striking down state law making homosexual intercourse a crime).

¹⁴³ See notes __ *supra* and accompanying text.

¹⁴⁴ See *Romer*, 517 U.S., at 628.

¹⁴⁵ See *Lawrence*, 539 U.S., at 572.

¹⁴⁶ *Id.*, quoting *County of Sacramento v. Lewis*, 523 U.S. 823, 857 (Kennedy, J., concurring).

¹⁴⁷ *Id.* at 571-572.

¹⁴⁸ *Id.* at 582 (O’Connor, J., concurring).

state interest for the law,”¹⁴⁹ and “A law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.”¹⁵⁰

The illegitimacy of traditional notions of inequality is in fact a cornerstone of the modern Supreme Court’s equal protection analysis. The Court has held that a key factor in determining whether or not a group is a “suspect class” is whether or not the group has suffered a history of discrimination.¹⁵¹ Another reason for the courts to be skeptical of a legal distinction is if it is based upon “archaic and overbroad generalizations”¹⁵² or reflects “outmoded notions of the relative capabilities” about different groups.¹⁵³ History and tradition are, indeed, the starting point for Equal Protection analysis. But under the Supreme Court’s interpretation of the Equal Protection Clause, traditional notions of inequality – including historical patterns of discrimination, archaic stereotypes, and outmoded notions regarding human potential – are presumed *unconstitutional*.

The rulings of the Supreme Court rejecting traditional beliefs and customary patterns of discrimination are in accordance with Lincoln’s view that “we must disenthral ourselves” and “think anew” and “act anew” to save our country¹⁵⁴ – that equality is a principle that must be “constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated”¹⁵⁵ – and that we must dedicate ourselves to the principle of equality so that our country may have a “new birth of freedom.”¹⁵⁶

4. *Equality of Opportunity*

After decades of upholding the constitutionality of segregated and unequal education for blacks and other races,¹⁵⁷ beginning in 1938 with the case of *Missouri ex rel. Gaines v.*

¹⁴⁹ *Id.* at 584.

¹⁵⁰ *Id.* at 585.

¹⁵¹ See *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 730 (2003) (stating, “The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny *United States v. Virginia*, 518 U.S. 515, 531 (1996) (stating, “our Nation has had a long and unfortunate history of sex discrimination,” quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

¹⁵² See *J.E.B. v. Alabama*, 511 U.S. 127, 135 (stating, “this Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of ‘archaic and overbroad’ generalizations about gender.” (citation omitted)).

¹⁵³ See *Cleburne*, 473 U.S., at 441.

¹⁵⁴ See note _ *supra* and accompanying text.

¹⁵⁵ See note _ *supra* and accompanying text.

¹⁵⁶ See note _ *supra* and accompanying text.

¹⁵⁷ See *Cumming v. Richmond Bd. Of Educ.*, 175 U.S. 528 (1899) (refusing to intervene when the City of Richmond closed the high school for blacks but kept the school for whites open); *Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding racial segregation in the public schools).

Canada,¹⁵⁸ the Supreme Court began to tear down the walls of educational apartheid in America.¹⁵⁹ In its landmark decision in *Brown v. Board of Education*,¹⁶⁰ the Court emphasized the value of public education:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹⁶¹

As in other areas, the Supreme Court has expanded the concept of equal opportunity in education to other groups. In *Plyler v. Doe*¹⁶² the Supreme Court extended the right to a free public education to the children of undocumented aliens on the ground that law denying them this right “poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”¹⁶³

Similarly, in *United States v. Virginia*, the Supreme Court ruled that traditional notions of gender roles do not justify the exclusion of women from a unique and prestigious state university.¹⁶⁴ Writing for the majority, Justice Ginsburg stated that as full citizens, women must

¹⁵⁸ 305 U.S. 337 (1938) (ordering the State of Missouri to admit an African-American student to its state law school).

¹⁵⁹ See Huhn, *In Defense of the Roosevelt Court*, note ___ supra, at 54-56 (describing the role of the Roosevelt Court in ending public school segregation); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 277 (stating, “Foremost in the Warren Court’s catalogue of individual rights was that to racial equality.”).

¹⁶⁰ 347 U.S. 483 (1954) (outlawing official racial segregation in the public schools). See also SCHWARTZ, note ___ supra, at 277 (stating, “*Brown* not only outlawed school segregation but also served as the foundation for a series of decisions outlawing racial segregation in all public institutions.”).

¹⁶¹ *Brown*, 347 U.S., at 493.

¹⁶² 457 U.S. 202 (1982).

¹⁶³ *Id.* at 221-222. The Court stated:

The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.

Id. at 222 (footnote omitted).

¹⁶⁴ 518 U.S. 515 (1996) (ordering state to admit women on the same basis as men to a public military college); see *id.* at 557-558. The Court stated:

A prime part of the history of our Constitution, historian Richard Morris recounted, is the story of the extension of constitutional rights and protections to people once ignored or excluded. VMI’s story continued as our comprehension of “We the People” expanded. There is no reason to

have “equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”¹⁶⁵

The Supreme Court has ruled that any deviations from a color-blind governmental policy must be justified by a compelling governmental interest.¹⁶⁶ In 2003 in the case of *Grutter v. Bollinger*,¹⁶⁷ upholding the affirmative action admissions policy of the University of Michigan Law School, Justice Sandra Day O’Connor stated:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. ... Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.¹⁶⁸

Opening the path of leadership to persons of every race and ethnicity is, according to *Grutter*, a compelling governmental interest sufficient to justify a deviation from color-blind governmental action.

5. *Equal Right to Participation in the Political Process*

Since 1937 the Supreme Court has knocked down a number of laws and policies that were intended to deprive African-Americans of an equal right to participate in the political process.¹⁶⁹ But, as in other areas of equal protection, the Court has extended this concept of political equality to all groups.

In *Harper v. Board of Elections*¹⁷⁰ the Court struck down the poll tax as applied in state elections, thus opening up the political process to the poor. The Court ruled that with respect to

believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the “more perfect Union.”

Id. (footnote and citation omitted).

¹⁶⁵ *Id.* at 532. The Court stated:

Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.

¹⁶⁶ See *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995) (plurality opinion) (stating, “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”).

¹⁶⁷ 539 U.S. 306 (2003) (upholding affirmative action admissions program at public law school).

¹⁶⁸ *Id.* at 332-333 (citation omitted).

¹⁶⁹ See, e.g., *Rogers v. Lodge*, 458 U.S. 613 (1982) (striking down at-large voting system designed to prevent the election of African-American candidates).

¹⁷⁰ 383 U.S. 663 (1964) (striking down state poll tax).

the right to vote, it makes no difference “whether the citizen, otherwise qualified to vote, has \$1.50 in his pocket or nothing at all.”¹⁷¹

In *Reynolds v. Sims*,¹⁷² the Court declared malapportionment to be unconstitutional. In the opinion for the Court, Chief Justice Earl Warren stated that the Equal Protection Clause requires “the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged”¹⁷³ because “all voters, as citizens of a State, stand in the same relation regardless of where they live.”¹⁷⁴ Warren concluded:

[T]he Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, or economic status. Our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures. And the democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future.¹⁷⁵

In *Romer v. Evans*¹⁷⁶ the Supreme Court struck down yet another device that the States have utilized, again and again, to deprive unpopular groups of equal political rights. In *Romer* the Court considered the constitutionality of a Colorado state constitutional amendment that prohibited the legislature, political subdivisions, or any state agency from adopting laws or policies protecting against discrimination on the basis of sexual orientation.¹⁷⁷ The effect of this law was to make it impossible for gays and lesbians, acting through the normal political process, to gain the protection of the government on the same basis as other people could be protected against discrimination based upon race, gender, age, disability, or a host of other characteristics.¹⁷⁸

The Supreme Court had previously addressed this issue with regard to race. In a series of cases the Court struck down state constitutional amendments and a city charter amendment that purported to withdraw from normal political bodies the power to adopt civil rights measures

¹⁷¹ *Id.* at 668.

¹⁷² 377 U.S. 533 (1964) (striking down plans for apportionment of representatives in state legislature that were not based on population).

¹⁷³ *Id.* at 565.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 566

¹⁷⁶ 517 U.S. 620 (1996) (striking down state constitutional amendment prohibiting the state legislature and political subdivisions of the state from adopting laws prohibiting discrimination on the basis of sexual orientation).

¹⁷⁷ *See id.* at 623-624 (setting forth facts of case).

¹⁷⁸ *See id.* at 631 (stating, “They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State’s view, by trying to pass helpful laws of general applicability.”).

such as fair housing laws or voluntary school integration programs.¹⁷⁹ Lincoln had condemned a similar practice with regard to slavery in his speech of June 26, 1857, where he noted that although the framers had generally favored the abolition of slavery, more recently the states had adopted constitutional amendments that prohibited their legislatures from even considering emancipation or manumission: “In those days, Legislatures held the unquestioned power to abolish slavery in their respective States; but now it is becoming quite fashionable for State Constitutions to withhold that power from the Legislatures.”¹⁸⁰ Lincoln compared these state constitutional amendments to a “prison house:”

They have him in his prison house; they have searched his person, and left no prying instrument with him. One after another they have closed the heavy iron doors upon him, and now they have him, as it were, bolted in with a lock of a hundred keys, which can never be unlocked without the concurrence of every key; the keys in the hands of a hundred different men, and they scattered to a hundred different and distant places; and they stand musing as to what invention, in all the dominions of mind and matter, can be produced to make the impossibility of his escape more complete than it is.¹⁸¹

In *Romer*, Justice Kennedy explained why state constitutional amendments like these violate Equal Protection, no matter *what* group of citizens are affected:

A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.¹⁸²

Taken together, these cases stand for the proposition that the Equal Protection Clause requires that *all* citizens must have an equal opportunity to participate in the political process. This principle was articulated most eloquently in Chief Justice Earl Warren’s opinion in *Reynolds*, where he explains how the Court should apply a transcendent principle such as equality to changing conditions. In support of this approach to constitutional interpretation, Warren expressly invokes Lincoln’s vision of democracy:

¹⁷⁹ See *Reitman v. Mulkey*, 387 U.S. 369 (1967) (striking down state constitutional amendment preventing state legislature from adopting fair housing law); *Hunter v. Ericson*, 393 U.S. 395 (1969) (striking down city charter amendment prohibiting city council from adopting fair housing law unless approved by voters at referendum and stating, “the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.”); *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) (striking down state constitutional amendment denying local school districts the power to assign children to schools for purposes of integration, stating, “[T]he practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in *Hunter*. The initiative removes the authority to deal with a racial problem – and only a racial problem – from the existing decision-making body, in such a way as to burden minority interests.”).

¹⁸⁰ 2 COLLECTED WORKS 404.

¹⁸¹ *Id.*

¹⁸² 517 U.S., at 633.

To the extent that a citizen's right to vote is debased, he is that much less a citizen. ... A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged – the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of 'government of the people, by the people, (and) for the people.' The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.¹⁸³

Lincoln's speeches and letters have inspired the Supreme Court, as they have inspired all Americans, to a deeper understanding of the principles of liberty and equality.

CONCLUSION

The concept of "equality" is no longer measured by traditional attitudes and social customs, but rather by reference to people's actual abilities. People must be given an equal opportunity to succeed and participate in the political life of the country. Traditional notions of capability, morality, or social role are illegitimate reasons for the government to treat any group of persons differently. Because "all men are created equal," our courts now require that "all persons similarly situated should be treated alike."¹⁸⁴

Similarly, "liberty" is no longer determined simply by reference to tradition, but rather by taking into account the transcendental importance of an activity in the life of the individual as well as the capacity for the activity to cause harm. In this sense, the courts now recognize that individuals have a constitutional right to make "personal and intimate choices"¹⁸⁵ in their private lives and living arrangements.

These ideas have become central to American life and law because of a man who came from "poverty and obscurity,"¹⁸⁶ but who, like millions of other Americans before and since,

¹⁸³ 377 U.S., at 567-568 (footnotes omitted).

¹⁸⁴ See notes ___-___ and accompanying text.

¹⁸⁵ See notes ___-___ and accompanying text.

¹⁸⁶ HOLZER, note ___ *supra*, at xxiv (stating that Lincoln "triumphed over poverty and obscurity through hard work, relentless study, intense determination, and unyielding honesty.").

wanted desperately to rise,¹⁸⁷ and who fought to give all persons “an unfettered start and a fair chance in the race for life.”¹⁸⁸

Lincoln did not address his speeches, letters, and remarks to the Supreme Court. He addressed *us* in order to convince us to adopt a broader and more universal understanding of the Declaration and the Constitution. Nor is he the only American leader to call upon the better angels of our nature.

In 1944 an Atlanta high school junior entered an oratorical contest on the subject “The Negro and the Constitution.” The youth closed his speech with the following words:

The spirit of Lincoln still lives. ... America experiences a new birth of freedom in her sons and daughters; she incarnates the spirit of her martyred chief. Their loyalty is repledged; their devotion renewed to the work He left unfinished. My heart throbs anew in the hope that inspired by the example of Lincoln, imbued with the spirit of Christ, they will cast down the last barrier to perfect freedom.¹⁸⁹

Martin Luther King, Jr., won that contest¹⁹⁰ and he later led this Nation in the unfinished work for which both he and Lincoln gave the last full measure of devotion.

Time and again, Lincoln’s acts and words have reawakened America’s commitment to human rights. His call for us to dedicate ourselves to the transcendent principles of liberty and equality resonates down to the present day.

¹⁸⁷ See GOODWIN, note __ *supra*, at __.

¹⁸⁸ See note __ *supra* and accompanying text.

¹⁸⁹ Martin Luther King Jr., *The Negro and the Constitution*, available at

http://www.stanford.edu/group/King/publications/papers/vol1/440500-The_Negro_and_the_Constitution.htm

¹⁹⁰ See *id.*; FONER, note __ *supra*, at 227.