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**THE DECLARATION AS *UR*-CONSTITUTION:
THE BIZARRE JURISPRUDENTIAL PHILOSOPHY
OF PROFESSOR HARRY V. JAFFA**

by

PATRICK M. O'NEIL*

In his most recent work, *Original Intent and the Framers of the Constitution: A Disputed Question*,¹ Professor Harry V. Jaffa finally has put together in one place the core of his constitutional hermeneutic with all the attendant elements of his jurisprudential philosophy.

Stated in oversimplified terms, perhaps, Dr. Jaffa sees the Declaration of Independence as the source of the principles embodied in the Constitution of the United States and finds the Declaration, furthermore, to be an indispensable aid to the correct interpretation of that later document.²

In order to comprehend the error of Jaffa's claims, one must first consider several key questions.

THE DECLARATION AS LAW

Central to Harry Jaffa's constitutional hermeneutic is the notion that the Declaration is law, and more specifically, that the Declaration is part of the Organic law of the United States. Lewis E. Lehrman in his introduction to the Jaffa volume, "On Jaffa, Lincoln, Marshall, and Original Intent," is quick to present the standard Jaffa argument concerning the status of the Declaration: "... the Declaration is placed at the head of the statutes-at-large

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1. HARRY V. JAFFA, *ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION* (1994).

2. This point is a recurrent one with Jaffa. See HARRY V. JAFFA, *HOW TO THINK ABOUT THE AMERICAN REVOLUTION, passim* (1978); Harry V. Jaffa, *The Emancipation Proclamation, in 100 YEARS OF EMANCIPATION*, 1, 1-24 (Robert A. Goldwin ed., 1964); HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES* 308-29 (1959); HARRY V. JAFFA, *What is Equality? The Declaration of Independence Revisited, in THE CONDITIONS OF FREEDOM: ESSAYS IN POLITICAL PHILOSOPHY* 149, 149-60 (1975); HARRY V. JAFFA, *Another Look at the Declaration, in AMERICAN CONSERVATISM AND THE AMERICAN FOUNDING* 18, 18-25 (1984).

of the United States Code, and is described as one of the ‘organic’ laws of the United States.”³

Why argue from the judgments of the editors of the *U.S. Code*, however? The Declaration is part of our Organic Law because of what it does, not because of where it has been placed by a bureaucrat/editor. It declared the United States to be independent of Great Britain and able to do all which independent states may do.⁴ Unlike colonies whose separations from the Empire were done in a more regular and less violent manner, we do not trace our independence to the British recognition of the same in the Treaty of Paris (1783).

Must we not ask ourselves, however, what part of the Declaration is truly law? As the legal scholar Dennis J. Mahoney noted, “The Declaration of Independence may carry little weight in the courts; it may, for all its being placed at the head of the *Statutes at Large* and described in the United States Code as part of the ‘Organic Law,’ have no legally binding force.”⁵

Let us look at the Constitution of the United States first. Consider the Preamble⁶ to that document:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

How sweeping its phrases, how noble its rhetoric, how inspiring its cadences are. As law, however, the Preamble is without effect. True law commands, or it defines pertinent to commands. Could the Supreme Court set aside a law of Congress because it did not, in the Court’s judgment, “promote the general Welfare” or “insure domestic Tranquility”?

Let us look back at the Declaration of Independence. It was intended, apart from its simple, single legal purpose, to inspire support for the Revolution at home and to attract practical aid for it from abroad—especially from amongst the Princes of Europe.

The fine Jeffersonian rhetoric with its careful enunciation of Lockean

3. LEWIS E. LEHRMAN, *On Jaffa, Lincoln, Marshall, and Original Intent, in ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION* 3, 4-5 (1994).

4. For different views of the role of the Declaration, see WALTER BERNS, *TAKING THE CONSTITUTION SERIOUSLY* (1987); and WILLMOORE KENDALL & GEORGE W. CAREY, *THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION* (1970).

5. Dennis J. Mahoney, *Declaration of Independence, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION*, 545, 545-46 (Leonard W. Levy et al. eds., 1986).

6. U.S. CONST. pmb1.

natural law principles to justify the break with Great Britain served the practical end of rallying support, but would also serve the high moral purpose of avoiding the giving of scandal, in the phrase of the ethicists.⁷ When Jefferson states that “a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation,” he was making the moral point that were America to have revolted without demonstrating the moral justification of its cause that would have been to have encouraged other revolts which might not have had justification under the moral law.

Laws often have prefatory statements prefixed to them, but no *necessary* logical relationship exists between the facts and values asserted in any preamble and the contents of the law it introduces. Let us consider direct mendacity first. Imagine a farm price support bill which every person with minimal economic literacy would recognize at once as having the effect of raising commodity prices (say, on milk). Now suppose that the congressmen drafting this legislation preface it with a statement that to insure lower milk prices Congress now institutes the price support system mandated herein.

The blatant contradiction between the expressed purpose of the law as proclaimed by its introductory section and the clear effect which its implementation may be expected to have in the real world in no way affects the law as law. It has not compromised or contradicted its principles. Its principles are to be found in its mandates, not in the pious verbiage affixed thereunto.

The Declaration of Independence is at once a legal document, an historical document, and a political document. In the Declaration as a political and as an historical document, the congruency of the reasons presented by Jefferson for the revolt and the real causes of the revolt matter, but as a legal document — even an organic legal document — nothing of any import flows from the accuracy of the prefatory statements. Consider the charge against King George III, “[f]or protecting the [British troops] by a mock trial, from punishment, for any murders which they should commit on the inhabitants of these States.” Many would find the trial of the redcoats in the so-called Boston Massacre case to have been quite fair and the outcome to have been perfectly reasonable, for example, John Adams and Josiah Quincy, Jr., who defended the soldiers in their court trials.⁸

Suppose, then, that this charge and many others (or, indeed, all others) against the Hanoverian monarch had proven untrue, that in no way would have affected the truly legal portion of the Declaration which, though stated in the

7. For the traditional view of scandal in moral philosophy and moral theology, see THOMAS J. HIGGINS, *MAN AS MAN: THE SCIENCE AND ART OF ETHICS* 338-340 (1992).

8. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 116-

indicative mood, is, in fact, a command: From this point forward, the United States shall be considered independent, etc. To cite an example of its effect, in law cases where the common law is at issue, decisions of English courts prior to July 4, 1776, are taken as binding legal precedent, while those from that date onward are held to be only learned commentary.⁹

Given that the legal portion of the Declaration is a disguised imperative, it could have no logical relation to the factual assertions which precede it.¹⁰ Imperatives are not and cannot ever be true or false.¹¹ They command, and that is all.

If the truth of the bill of particulars against George III is irrelevant to the logical effect of the Declaration, how much more so the Lockean philosophical propositions? If, *per arguendo*, all men are not created equal and are not endowed by their Creator with certain inalienable rights, would the United States revert to colonial status in the now barely extant British Empire?

THE AUTHORITY OF THE DECLARATION

In the process of the adoption of the Constitution of the United States the most elaborate care was exercised to insure legitimacy to the new governmental order. Under Article VII of the Constitution, the Constitution would take effect in the ratifying states when nine states had ratified, and ratification was to be by ratifying conventions in each state.

By the device of popularly elected ratifying conventions, the Framers sought to insure that ratification would be an act by the people, not merely an intergovernmental agreement with ratification accomplished by state legislatures, as had been the case with the Articles of Confederation.¹²

In fact, however, the action of state legislatures was also required for the permissive legislation enabling the elections for the conventions and the conventions themselves to take place. This, in effect, made the Constitution's ratification a joint act by both the legislatures and by the ratifying conventions together. In addition, although Article VII ignored the Congress of the Articles of Confederation out of strategic considerations, the Congress did in fact "report out" the Constitution with the recommendation that state legislatures act to set up elections for convention delegates in order to decide the question of adoption.

17 n.24 (1967).

9. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 111-15 (2d ed. 1985).

10. For the imperative theory of law, see C.L. HAMBLIN, IMPERATIVES 18-20 (1987).

11. W. WARD FEARNside, ABOUT THINKING 72-74 (1980).

12. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 92-93 (Max Farrand ed., 1966).

It is quite true, of course, that the adoption of the Constitution was illegal under the Articles of Confederation, because the Articles required, amongst other things, the unanimous consent of the states to any amendment of the Articles, and the Constitution could be seen to constitute an amendment *in toto* of the Articles. As things ultimately turned out, of course, the Constitution did receive ratification by all thirteen states, but potentially, the method of ratification prescribed in Article VII implied the secession of the nine from the thirteen. At the Constitutional Convention in Philadelphia, James Madison dealt with the question of the violation of the rules for amendment of the Articles. His answer was simple and direct: The Articles had not been true Organic Law because under them sovereignty had continued to reside in the states individually. The Articles, therefore, were a kind of elaborate treaty of alliance between nations.¹³ If the Articles were a treaty, were they not binding; and since they spoke of a “perpetual union”, were they not binding in perpetuity?

Madison proposed a double defense for the abrogation of the “treaty” of the Articles. First, of course, there is no perpetuity in the international law of treaties.¹⁴ Under the principle of *rebus sic statibus*, a treaty may be set aside when it no longer serves the purposes for which it was created due to changed circumstances.¹⁵ Also, if one party to a treaty has seriously violated it, any other party (or parties) to the pact may declare it a nullity if they so wish.¹⁶ The Articles of Confederation had been violated by all parties — and violated repeatedly.¹⁷

The Articles of Confederation, as has been mentioned above, were ratified by the thirteen state legislatures. What, however, was the mode of adoption of the Declaration of Independence? It was approved by the Continental Congress — a thoroughly *ad-hoc* body — operating on behalf of the thirteen states which had or which would give up their colonial allegiance to the Crown. Prior and posterior acts of state legislatures affirmed the legal claim of independence dating to the Declaration of July 4, 1776, and ultimately, the governments of the Articles and of the Constitution looked back and, in effect, reaffirmed the Declaration’s claims of independence. From what authority, however, did the Declaration derive its alleged right to

13. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 314-15 (Max Farrand ed., 1966).

14. GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 505 (4th ed. 1981).

15. *Id.* at 507-509.

16. *Id.* at 507.

17. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 12, at 315-16; THE FEDERALIST No. 43, at 279-80 (James Madison) (Clinton Rossiter ed., 1961).

act as *ur*-Constitution — as legally defining the character of all subsequent American governments?

Locke would say that when government legally dissolves — as it did in the Glorious Revolution — then the legislative power devolves upon the people (for it can never be destroyed unless civil society itself ceases).¹⁸ In what way, however, may the rhetorical flourishes of Jefferson be seen as an act of the people corporately? Independence was undoubtedly an act of the people, but the high-blown rhetoric in the document of its proclamation — the Declaration of Independence — cannot, seemingly, claim that status.

The members of the Continental Congress assembled at Independence Hall in Philadelphia on July 4, 1776, were delegates from state legislatures, unelected by the people and having no commission to ratify an Organic Instrument, and no subsequent act of the Continental Congress nor of the legislatures would seem to qualify for such an extraordinary act.

Who authorized the Continental congressmen so to act, and in the absence of such an authorization, how may the Declaration be said to do other than it claims on its surface to do — declare independence?

Ironically, it is the very frailty of the Declaration's position which allows it best to serve Professor Jaffa's philosophical legerdemain. The seeming unamendability of the Declaration comes from the fact that the Continental Congress was a disembodied *ad-hoc* legislature which went out of existence with the adoption of the Articles of Confederation, and was placed further at a distance historically by the adoption of the U.S. Constitution as our Organic Law.

To the extent that Jaffa sees particular provisions of the Constitution, such as the three-fifths clause,¹⁹ the fugitive slave clause,²⁰ and the reservations on the prohibition of the slave trade²¹ as contrary to the principles of the Declaration, it is unclear why their adoption should not be regarded as a repeal of the appropriate section of the Declaration. [Most scholars would not think this way, of course, but that is because most scholars would see the Declaration as law only in regard to its declaring of independence.]

The American people are a fully self-governing people, and as such, they possess the power to alter any of their Organic Law²², including the Declara-

18. JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT 118 (Buffalo, Prometheus 1986).

19. U.S. CONST. art. I, § 2, cl. 3.

20. U.S. CONST. art. IV, § 2, cl. 3.

21. U.S. CONST. art. I, § 9, cl. 1; U.S. Const. art. V.

22. The restrictions upon the power of amendment contained in the Fifth Article of the Constitution are merely procedural variants. If an individual state were to be deprived of its

tion. Should they decide to do so, Americans can fully revise the Declaration, undoing even their political independence. Unlikely though it might be in the event, America could resume its colonial status in the British Empire by a three-fold legal strategy — a treaty with the United Kingdom, appropriate enabling legislation, and an appropriate constitutional amendment.

If the proposition that “All men are created equal” were part of the legal contents of the Declaration (which I find difficult to imagine or understand), then why does the adoption of the three-fifths clause, the fugitive slave clause, and the temporary protection of the international slave trade in the Constitution not repeal that portion of the Declaration which they contradicted. That is the normal effect of contradictory legislation, whether statutory, treaty, or Organic — the last act of the sovereign will is decisive.

Another clear problem in this regard for Dr. Jaffa’s theory of the Declaration is his own citation of the Northwest Ordinance as part of the Organic Law of the United States. In lectures delivered in the early 1980s,²³ Dr. Jaffa emphasized that the Organic Law section of the *U.S. Code* contains the Declaration of Independence, the Northwest Ordinance, and the Constitution of the United States. The inclusion of the Northwest Ordinance in the Organic Law emphasizes the differences to be found in the various parts of the Organic Law.

The Articles of Confederation, which was part of our Organic Law, and the Constitution, which is the core of that law, have elaborate procedural requirements for their own amendment. It was not so with the Northwest Ordinance. Although part of our Organic Law by virtue of the nature and importance of its subject matter, the Ordinance was a legislative enactment of the Congress of the Articles. As such, it was effectively repealed by the adoption of the U.S. Constitution. Note the precise Phraseology of the Constitution in Article VI, clause 2: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”

Pre-existing treaties of the United States were left in force by the Con-

equal suffrage in the Senate, that state would have to be one of the ratifiers of the amendment, and abolition of the Senate would require unanimous ratification by the states. See JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* 156-82 (1992) (detailing the historical arguments about implicit limitations on the power of the amending process); and JOHN R. VILE, *CONTEMPORARY QUESTIONS SURROUNDING THE CONSTITUTIONAL AMENDING PROCESS* 127-54 (1993) (exploring and critiquing claims by contemporary scholars to have discovered substantive limitations on the amending power in Article V).

23. Harry V. Jaffa, Lectures delivered at the Intercollegiate Studies Institute Western Summer School at Claremont McKenna College (1980 & 1981).

stitution, as was the public debt,²⁴ but the confederal laws passed under the Confederation ceased to have the force of law. The new Congress, convened under the authority of the Constitution of the United States, moved almost at once to re-enact the Northwest Ordinance, which has remained law ever since.

The Northwest Ordinance is a solemn compact between the United States and the inhabitants of its territories promising statehood upon the achievement of sufficient population and political stability. Nobody familiar with the standards of legal interpretation, however, could mistake that pledge as legally binding — it is a moral promise — but no future Congress can actually be bound in law to grant statehood to any particular territory, no matter what conditions prevail within it.

In addition, tomorrow Congress could pass an act invalidating the Northwest Ordinance, and upon the new act's taking effect, the Northwest Ordinance would be repealed. Its status as Organic Law does not prevent this. The Articles of Confederation required and the Constitution requires special procedures for amendment or repeal (i.e., amendment *in toto*) on account of their methods of adoption and on account of their own internal rules for amendment. If the Declaration of Independence could be passed by a simple act of the Continental Congress, why could an act of the U.S. Congress — a more regular and representative a legislative body than its predecessors — not repeal the Declaration (if that were what the act purported to do)? By the same token, an enactment of Congress which violated some part of the Declaration would seem by that very contradiction to invalidate that portion of the Declaration which its content contradicted.

Perhaps, however, we may conclude that Dr. Jaffa has another reason for the unamendability of the Declaration, another reason for its special status as *ur-constitution*.²⁵

THE DECLARATION AS NATURAL LAW

To the extent that the Declaration truly expresses the natural law, and it is at most a replication of the Lockean version of the same, it might be held to be immune to alteration by majorities, or even super-majorities. Such a stand, however, confuses natural law doctrine and conflates the positive law with the natural law.²⁶

24. U.S. CONST. art. VI, cl. 1.

25. By the term "*ur-constitution*", this article means to convey a legal document which is at once the most basic and perduring enactment of the Organic Law of the nation, which also (somehow) takes on as well the aspects of the political philosophers' social contract and the instantiation of the natural law as it relates to the political order.

26. See Patrick M. O'Neil, *Etharchism – The Birth of a Political Heresy in Hedley Arke's*

Of course, it goes without saying that the natural law cannot be altered or amended by any political process whatsoever. However, this is simply not true of the natural law *as it may be embodied in the positive law*. If the Declaration proclaims the true principles of the natural law, that does not prevent alteration of the Declaration to exclude or even to contradict those true principles. Let us assume, contrary to historical fact, that a year after the adoption of the Declaration, the Continental Congress voted to delete the phrase “All men are created equal . . .” from the Declaration. Let us assume further that they indulge a racist bent and substitute the phrase, “all white men are created equal,” or even more offensively, “No Negro is equal to a white man in law or in natural right.”

Dr. Jaffa and this author would both be opposed to such an amendment on the grounds that it violated natural law and instituted (in essence) a false statement. Where Jaffa would, I believe, disagree with this author would be in the fact that he would see the Declaration as somehow unamendable. If the Declaration proclaims the true principles of natural law, Jaffa would maintain nobody has the right to alter it. That is true on the moral level, of course, but this cannot be translated into a ban on such alteration in positive law.

If the American people *may* not repudiate the principle of equality or the principle that “just authority comes from the consent of the governed” that is because these principles are part of the natural law, not because they are enshrined in the Declaration. Equality—to the extent that equality is part of the natural law—remains part of the natural law whether later installments of the Organic Law contradict it or not. The inclusion of provisions in the Constitution contradictory to equality must be seen as repealing the commitment to equality which the Declaration enacted into law (if such it did). Adopting provisions in the Constitution which contradict the Declaration’s principles does not compromise those principles, it repeals them *as matters of law*.

The way that the Declaration can continue to be seen as articulating principles for the Republic is for these principles to be seen as traditional principles, as well as moral one (but not legal ones) — which is probably what was meant by Madison, Lincoln, and others when they evoked the Declaration.

Beyond the Constitution, 85 SOC. JUST. REV. 182-85 (Nov./Dec. 1994). Arising from an examination of HEDLEY ARKES, *BEYOND THE CONSTITUTION* (1990) (this article critiques “etharchism” (coined term) which conflates the spheres of the positive law and the moral law in a way quite alien to orthodox natural law thinking, wherein the interrelationship of law and morality does not obliterate the independence and integrity of the domain of the positive law).

Traditional principles, unlike legal ones, are not revoked by the enacting of contrary pieces of legislation. In many cases, their status as traditional principles are actually strengthened by their contradiction by the positive law, for traditional principles are often confirmed in opposition to official deviations as much as in the compliance of rules and laws to these principles. Why does Professor Jaffa seem to need *legal* status for the principles of natural law embodied in the Declaration? Why does he not find the more common status of traditional values to be sufficient for his purposes?

NATURAL LAW AS POSITIVE LAW—A STRAUSSIAN GAMBIT

By making the natural law a part of the positive law, Jaffa seems to hope to strengthen the relationship between these two types of law, but that simply cannot be done. The positive law may be shaped and informed by the natural law, but it always remains a separate sphere of law.

Much of the sphere of positive law involves extrinsic rules which are not directly mandated by the natural law. According to the natural law view, extrinsic law may not contradict the intrinsic principles of natural law; the rules it establishes must serve purposes which ultimately would be embraced by intrinsic morality, and the principle of obedience to just authority, which is the basis of the extrinsic, is itself a principle of intrinsic morality.

Much of Organic Law turns out to be extrinsic in nature, of course. Right to trial by jury, right to legal counsel, freedom from double jeopardy, right to a speedy trial, requirement of indictment by a grand jury, immunity from compulsory self-incrimination, etc. can none of them be absolutely required by natural law, but are part of a legal artifice designed to insure a fair trial. A different set of safeguards might theoretically suffice just as well.

When challenged with the extrinsic nature of most of our constitutional safeguards, Dr. Jaffa has often retreated to a citation of the bans on *ex post facto* legislation²⁷ as an example of the intrinsic nature of at least some of our constitutional protections.²⁸ In fact, however, all retrospective legislation cannot be regarded as inherently unjust, as was demonstrated by this author in a recent publication.²⁹ *Ex post facto* law which punishes morally neutral action which has subsequently been criminalized by legislation based on extrinsic morality is, of course, inherently unjust, for at the time of the

27. See U.S. CONST. art. I, § 9, cl. 3; and U.S. CONST. art. I, § 10, cl. 1.

28. Harry V. Jaffa, Lectures delivered at the Intercollegiate Studies Institute Western Summer School at Claremont McKenna College (1980 & 1981).

29. Patrick M. O'Neil, *Retroactivity and Justice in Law: Some Reflections on Ex Post Facto Legislation*, 7 Free Life: J. Libertarian Alliance 20, 20-23 (No. 1, 1992) (Published in the U.K.).

commission of the “crime” there has been no promulgation of the law with the result that the “perpetrator” could not know that his action was to be forbidden. In the case of a violation of intrinsic morality with serious antisocial implications, however, the punishment of such action by retrospective legislation would not necessarily be unjust.

If one imagines a regime which legalizes mass murder of its opponents before committing genocide, one would not see a subsequent regimes punishment of such atrocities as unjustified. The U.S. Constitution contains a total ban on such legislation on account of the prudential judgment that the dangers of the misuse of the power to create such legislation exceeds the dangers of the potential exoneration of serious antisocial malefactors.

Even when the positive law seems to recapitulates the natural law, they still remain separate spheres. When human law forbids murder, for example, it is still imposing the degrees and punishments of murder by the will of the legislator. Natural law may set the upper limits of punishments, but in general, the range of punishments is open to choice.

Furthermore, to discover that a thing is contrary to the natural law is not to discover whether it is to be outlawed or not, for as St. Thomas observed,³⁰ not every vice is to be proscribed by law, but only those which are contrary to the nature of society — e.g., murder, theft, fraud. The lawgiver must draw that delicate line between public and private vice, which line may legitimately vary between cultures and societies.

In Jaffa’s view of the history of American law, the enactment of the Declaration bound U.S. law to the natural law in a very unique way. The Declaration specifically endorses the natural law, in the Jaffa view, and on that account natural law is binding in constitutional and statutory interpretations by the courts.

On the one side, this is extraordinarily convenient for Jaffa, since he fears (as a good Straussian) the entanglement of revealed religion in natural law jurisprudence. Invocation of St. Thomas, or even Maimonides, always carried the danger of doctrinal pollution of the pure springs of natural law, which is why Jaffa always advocated the use of Aristotle in preference to the use of his medieval followers.³¹ By having the natural law enacted as a part of the organic positive law, Jaffa seeks to relieve himself of the problem of the metaphysical basis of the natural law, with its religious underpinnings.

30. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II, Q. 96, art. 2, *reprinted in* THE POLITICAL IDEAS OF ST. THOMAS AQUINAS (D. Bigonglari ed., 1953).

31. For Jaffa’s preference for Aristotle over St. Thomas Aquinas, *see* HARRY V. JAFFA, *THOMISM AND ARISTOTELIANISM: A STUDY OF THE COMMENTARY BY THOMAS AQUINAS ON THE NICHOMACHEAN ETHICS* (1952).

The enunciation of general principles of natural law in the positive law cannot make them more obligatory in conscience for the citizen than they are already. To the extent that these principles are truly natural law principles, they are automatically binding in conscience. To the extent that they contradict the natural law, the positive law cannot make them binding.

What if the natural law principles of the Declaration act as interpretative guides to the Constitution — which is at least part of Jaffa's claim? If the positive law of the Constitution would contradict the principles of the Declaration by authorizing and protecting slavery, it is unclear how such principles could be invoked to prevent any other institution which the Constitution could be interpreted to allow. Let us examine this last possibility in the context of *Dred Scott*³² and the issue of slavery in the territories.

DRED SCOTT AND THE GOVERNANCE OF THE TERRITORIES

A central issue upon which Jaffa tests his constitutional hermeneutic based on the Declaration as the true repository of the original intent of the Framers of the Constitution is that raised by the *Dred Scott* case, and specifically by Chief Justice Taney's opinion. This opinion figures large in Jaffa's thought, and he uses it as a battering ram against what he regards as the insufficient originalism of former Attorney General Edward Meese: "Unfortunately for Mr. Meese's argument, no one, on or off the Court, has ever expounded the theory of original intent with greater eloquence or conviction than Chief Justice Taney in the case of *Dred Scott*."³³

Of all of the Jaffa arguments, this is doubtlessly the strangest. Taney's search for "original intent" involved the presentation of numerous historical falsehoods (whether presented deliberately or through carelessness) as well as abstruse and distorted theory which on its surface must appear preposterous.

In Jaffa's misunderstanding of the Taney opinion in the *Dred Scott* decision,³⁴ he is scarcely unique, for that decision is possibly the most misunderstood in all American judicial history. To Jaffa, as to most commentators, the heart of the decision rests in the denial of effective legal personhood to Blacks. Jaffa expresses it thus: "Taney decided that Dred Scott, as a member of an inferior and dependent race (inferior and dependent, that is, by the

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

33. HARRY V. JAFFA, *What Were the "Original Intentions" of the Framers of the Constitution of the U.S.?*, in ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION 13 (1994).

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

law of the Constitution) was not and could not become a citizen of the United States.”³⁵

This reason was one of the two *rationes decidendi* of the *Dred Scott* decision.³⁶ Normally, an opinion is held to have only one *ratio decidendi*—the one key point upon which the logic of the decision turns. *Dred Scott* had two *rationes decidendi*, however, because the case had two independent conclusions.³⁷ On the one hand, Dred Scott did not have the right to have brought the suit (in Taney’s opinion), and thus he is labeled as “plaintiff in error”—the case being heard as a plea in abatement. Some scholars have raised the issue of the appropriateness of Taney’s examination of other issues in the case given the status of the plea in abatement.³⁸

This article will maintain that the examination of other issues was procedurally appropriate since the dismissal of the case due to the denial of citizenship status to Dred Scott would not have hindered the refileing of the identical case by the federal attorney for the district in which Dred Scott was held in Missouri or by the Attorney General. The United States would be the plaintiff, and its standing as plaintiff would arise from its interest in freeing the slave in vindication of its ban on slavery in some of the territories; all other aspects of the case would be similar.

The right of the federal government to sue for emancipation of slaves brought into areas where they were prohibited was well established in the *Antelope* case,³⁹ which involved a pirate/slaver caught in U.S. territorial waters. Certain complications arose in the *Antelope* case, but the right of the federal government to seek the emancipation of slaves brought into the country through the illegal slave trade was never in doubt.

The second *ratio decidendi*, therefore, had to deal with the substantive issue of the case apart from the question of the ability of Dred Scott to have brought the action in federal court.⁴⁰ The second and substantive question of the case involved the existence of a municipal authority over the territories possessed by the federal government. Jaffa tends to see this simply as the power of the federal government to ban slavery from the territories, but it is important in posing the existence of this power to understand how and in what

35. JAFFA, *supra* note 26, at 14.

36. *See generally Dred Scott*, 60 U.S. (19 How.) 393.

37. *Id.*

38. *See, e.g.,* DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978).

39. *The Antelope*, 25 U.S. (12 Wheat) 546 (1827); *see also* JOHN T. NOONAN, JR., *THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS* 323-326 (1990).

40. *See Dred Scott*, 60 U.S. (19 How.) 393.

way it is claimed.

The U.S. Constitution states in part: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." ⁴¹ Taney denied the clear meaning of the text as well as all legislative practice, and to achieve this deception, he had to distort prior legal precedent.

Banning a form of property in one geographical area does not deprive owners of that form of property of their rights provided only that their property is located outside of the proscribed area or that they are permitted to remove the property from the forbidden area or that they are compensated for emancipations which occur in pursuance of that law.

Perhaps one could maintain that the absolute value of one's property is diminished if one cannot take that property with one into a particular territory, but that is not the same thing as an absolute depredation of one's property right, and all regulation whatsoever involves such diminishment of the property right.

The right of the federal government to forbid slavery in the territories rested upon the federal government's possessing municipal authority for the territories. Taney had first to deal with the above quoted section of the Constitution. This he did by claiming that the constitutionally granted power of the territories was only to sell or grant land to settlers etc. Congress had no right, in Taney's view, to make any law whatsoever for the territories.⁴²

The first difficulty Taney then had to face was the Northwest Ordinance which was passed just before the Constitutional Convention by the Congress of the Articles and then re-enacted by the First Congress convened under the Constitution. The Northwest Ordinance forbade slavery, clearly indicating that many of the members of the Congress of the Articles and of the First Congress under the Constitution (many of whom were at the Constitutional Convention) thought Congress had that power. Taney attempted to escape this gambit by claiming that Congress's right to forbid slavery in the North-

41. U.S. CONST. art. IV, § 3, cl. 2.

42. However the Supreme Court rejected Taney's view of an absence of federal municipal authority over the territories in a wide variety of cases. *See, e.g.,* Reynolds v. United States 98 U.S. 145 (1878) and Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1 (1890). In what have become known as the *Insular Cases*, i.e., DeLima v. Bidwell, 182 U.S. 1 (1901), Dooley v. United States, 183 U.S. 151 (1901), and Downes v. Bidwell, 182 U.S. 244 (1901), the Supreme Court began to establish an elaborate theory of territorial governance including doctrines of incorporated and unincorporated territories and of organized and unorganized territories. In *Bd. of Pub. Util. Comm'rs v. Ynchausti & Co.*, 251 U.S. 401 (1920), the unanimous court accepted the doctrine of the incorporation of territories, and by 1922, a unanimous court would apply it as settled law in *Balzac v. Porto Rico*, 258 U.S. 298 (1922). *See also* THE AMERICAN TERRITORIAL SYSTEM (John Porter Bloom ed., 1973); and

west Territory came from the grant of the State of Virginia which ceded her claim to this area under the condition that slavery not be allowed to exist therein. In carrying out the prohibition of slavery, the federal government was only carrying out the conditions of the cession, which were within the municipal authority of the state, according to Taney.

The ownership of the Northwest Territory by Virginia (and particularly the ownership of all of that territory) was challenged by other states, many of which made their own cessions. This does introduce the problem of how the Virginia cession could be determinative unless it were to be determined that Virginia had, in fact, been the true owner.

The next problem for Taney was an existing Supreme Court decision which Taney cited, *American Insurance Company v. Canter*.⁴³ Canter had been awarded ownership of the recovered cotton in a Florida Territorial Salvage Court at Key West. The insurers of the cargo involved, the American Insurance Company and the Oceanic Insurance Company appealed the salvage court ruling, ultimately to the Supreme Court under Chief Justice Marshall.⁴⁴

The claim of the appellant to reverse the original judgment for Canter rested in the alleged unconstitutionality of the Florida Territorial Salvage Court. All federal judges, according to the Third Article of the United States Constitution, are to be nominated by the President, to be approved by the Senate, and are to enjoy a life tenure. Judges of the Florida Territorial Salvage Court were nominated by the territorial governor, were approved by the territorial legislature, and were to enjoy fifteen-year terms. Chief Justice Marshall upheld the original decision, dismissing the claim of unconstitutionality in the composition of the salvage court, and his justification lay in the fact that this court was created under the municipal authority of the federal government in the territory, not by the federal government *qua* federal government. In itself, therefore, *Canter* affirmed the municipal authority of the federal government in the territories. Taney deliberately misinterpreted *Canter*, claiming that it dealt with Article III and had no relevance to the issue contested in *Dred Scott*.

Canter was, of course, central to *Dred Scott* because its bold assertion of a municipal authority in the territories exercised by the federal government settled the right of Congress to forbid, or to allow slavery in whatsoever territories it saw fit. For Taney, then, one final, enormous problem remained.

Arnold H. Liebowitz, *United States Federalism: The States and The Territories*, 28 AM. U. L. REV. 449 (1979).

43. 60 U.S. (19 How.) at 393; citing *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828).

44. See generally 26 U.S. (1 Pet.) 511.

Having denied a federal municipal authority for the territories, there was no source of lawgiving for the territories. This Taney attempted to solve by an extraterritoriality by which each person entering the territories was under the laws of the state from which he had come.

Apart from the legal chaos that such a system would produce in practice, there seems no source for this extraordinary notion, except, perhaps, in a distorted reading of the Northwest Ordinance. When the federal governance of the Northwest Territory was first envisioned, a problem arose in that the governor had, for practical reasons, to be given the right to make laws by decree. In order to avoid tyranny, however, a proviso was placed upon the power of rule by decree. The governor was restricted to enacting laws which already existed on the statute books of some state. Needless to say, this is not truly the extraterritoriality envisioned by Taney, but merely a restraint upon the right to legislate by decree.

To call Taney's decision in *Dred Scott* an exercise in interpretation by a hermeneutic of original intent, as Jaffa does, is simply perverse. Taney may claim to be guided by original intent, but, in fact, he was attempting to solve the political issue of slavery in the territory by judicial *fiat* disguised as constitutional scholarship or adjudication.

The doctrine of the Declaration as *ur*-constitution, which Professor Jaffa has promulgated for years does not provide one with a consistent constitutional hermeneutic, but actually creates more philosophical difficulties than it solves. From the point of view of legal scholarship, the Declaration as the meaning of the Constitution is almost incomprehensible.

The greatest pity in this regard is that Jaffa is not completely wrong. Many of the Framers hoped that the people would use the mechanisms of the Constitution to preserve the ideals of the Declaration both in their roles as public officials and in their roles as members of an enlightened electorate. They did not, however, envision the Declaration as an *ur*-constitution in the keeping of a priestcraft of judicial activists.