John Quincy Adams Revisited

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Let us follow the Prophet’s counsel: *I said, I have resolved to keep watch over my ways that I may never sin with my tongue. I have put a guard on my mouth. I was silent and was humbled, and I refrained even from good words.* (Psalms 38: 2-3) Here the Prophet indicates that there are times when good words are to be left unsaid out of esteem for silence. For all the more reason, then, should evil speech be avoided. Indeed, so important is silence that permission to speak should seldom be granted even to mature disciples, no matter how good or holy or constructive their talk, because it is written: *In a flood of words you will not avoid sin* (Proverbs 10: 19), and elsewhere, *The tongue holds the key to life and death* (Proverbs 18: 21). Speaking and teaching are the master’s talk; the disciple is to be silent and listen.

—*The Rule of St. Benedict*, chap. 6

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† In accordance with the Author’s preference, the citations in this Collection and appendices vary from *The Bluebook: A Uniform System of Citation* (16th ed. 1996).
PROLOGUE

I had occasion, some decades ago, to examine the limits of freedom of speech in the United States by recalling the explosive career of John Quincy Adams in the House of Representatives between 1831 and 1848. That career, particularly his handling there of the slavery controversy, was examined by me in a 1971 book, *The Constitutionalist: Notes on the First Amendment*, which is excerpted in Appendix B of this Collection.

Adams, especially in his responses to slavery-related issues, is revisited in the essay immediately following this Prologue, "John Quincy Adams and the Irrationality of Slavery." The exuberance with which Adams conducted himself in the House of Representatives and also in Supreme Court litigation in the 1840s can be usefully compared to the restraint, especially with respect to slavery-related issues, exhibited by him decades before as Secretary of State and as an aspirant to the Presidency.

A review of Adams's overall career can help us appreciate the effects of slavery on American politics during the first half of the Nineteenth Century. That review may also help us see properly race-relations issues of our own time.

The systematic treatment by Aristotle of the Four Causes is adapted, somewhat loosely but still usefully, to the selection of Appendices for this Collection. These Appendices exhibit facets of American constitutionalism. The principal discussion by Aristotle of the Four Causes can be found in his *Physics* and in his *Metaphysics*, with his understanding of causation illuminating most of his other works as well, including his ethical and political studies. (See also Note ix of Appendix D of this Collection.)

The Final Cause is drawn upon in Appendix A of this Collection, with its introduction to the Preamble to the Constitution. That Preamble, anticipated in this respect by the Declaration of Independence, records the ends to which a proper constitutional system may be directed.

The so-called Efficient Cause is drawn upon in Appendix B, with its somewhat detailed review of how slavery came to be handled in the House of Representatives in the 1840s. The workings of a constitutional system, and especially its dependence upon an effective freedom of speech, are thereby exposed to view, with suggestions made about the manner in which political power may properly be exercised.

The Material Cause may be glimpsed in Appendix C, with its reminders of the human material which any political order must take into account. An understanding of what it means to be human is debated, in effect, in
controversies that have shaken Americans, such as the slavery controversy in the Nineteenth Century and the abortion controversy in the Twentieth Century.

The Formal Cause is drawn upon in Appendix D, with its celebration of the authoritative guidance, including the forms, upon which constitutionalism and good government depend. There can be seen in that account an instance of that overlapping of the Final and Formal Causes with which we are familiar, especially in the political domain. (An overlapping of the Efficient and Material Causes may also be familiar.)

When the ends of government are neglected, if not even dismissed as politically naive and as legally irrelevant (as is routinely done these days with the Declaration of Independence and the Preamble to the Constitution), the tendency of "realists" becomes that of making much more than is healthy of process, of power, of personal ambition, of chance desires, and even of "economics." Constitutionalism must then try to manage without its heart.

JOHN QUINCY ADAMS AND THE IRRATIONALITY OF SLAVERY

It is impossible for us to assume these people [African slaves] are men because if we assumed they were men one would begin to believe we ourselves were not Christians.

— Montesquieu

I.

Michael Daly Hawkins's study of John Quincy Adams and the pre-Civil War maritime slave trade is quite instructive, not least in describing how Adams's social circumstances and personal ambitions affected how he would speak publicly about and act upon his political and constitutional principles. The two most dramatic controversies with respect to that slave

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trade during his career were provoked by litigation about the disposition of two slave-trade ships seized by the United States Navy in North American waters—The Antelope in 1820 and The Amistad in 1839.\(^3\) During the Antelope controversy, Adams was the Secretary of State in James Monroe’s administration, counseling the return of the ship and its cargo (including Africans held as slaves) to its Spanish and Portuguese owners. During the Amistad controversy, Adams, then a member of the House of Representatives, served as one of the lawyers arguing in the United States Supreme Court for the freedom of the slaves who had taken over their ship and emancipated themselves.\(^4\)

Judge Hawkins’s instructive account is particularly useful for the student of the career of Abraham Lincoln, for one can see, in Lincoln’s handling of the doctrines and deeds of abolitionists in the 1840s and 1850s, considerations anticipated by those taken into account by Secretary of State Adams in the handling of the Antelope matter in the 1820s. The following passage, the concluding paragraph in the Hawkins account of the Adams response to the maritime slave-trade challenge, applies substantially to the later Lincoln response to the abolitionist challenge:

The cases involving the antebellum maritime slave trade serve as extraordinary studies of the pressures that high profile and politically sensitive issues can bring to bear on even the most independent of our institutions and officials. It was the “third rail” of the politics of its day: touching it meant instant political death to one’s national political ambitions. Avoiding it was the only politically healthy alternative. In that sense, slavery produced a political force that enslaved the seekers of national elective office. As extraordinary an individual as he was, John Quincy Adams was himself a slave to political forces as long as he harbored ambitions for higher office. Slavery, and the slave trade that helped support it, was more than an institution; it represented a combination of the

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4. See John Forsyth, John Quincy Adams (1767-1848), in 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 20 (1986); Worthington Chauncey Ford, John Quincy Adams, in 1 DICTIONARY OF AMERICAN BIOGRAPHY 84 (1928).
most powerful political, social and economic interests of the day. Adams described the result of that combination: "[T]he cement of that common interest produced by slavery is stronger and more solid than unmingled freedom." Free of the political force of those "common interests" and answerable only to his neighbors and admirers back in Quincy, Massachusetts, Adams could [as a Member of the House of Representatives between 1831 and 1848] take a more forceful role in the efforts to end slavery. In the end, his earlier predictions proved correct; it would take a terrible war to begin to resolve the divisions produced by the contradiction between America’s ideals and its practices.5

Adams, like Lincoln after him, recognized that it could be simply irresponsible to say publicly, in all situations, whatever one happened to believe.6

For Adams, as for Lincoln in the next political generation, the Declaration of Independence was vital. After all, Adams’s father had been critical to both the drafting and the adopting of the Declaration. And in turn, Adams’s son, Charles Francis Adams, argued (like his father in his old age) that Americans had to choose between slavery and the Declaration of Independence.7 One can see, from the careers of men such as John Quincy Adams and Abraham Lincoln, the distorting effects that slavery, and later race relations, have always had in the United States. The immensity of the "race problem" in the Western Hemisphere is suggested by this report: "In the first three and a quarter centuries of European activity in the Americas, between 1492 and 1820, five times as many Africans went to the New World as did white Europeans; and even in the next fifty years, until 1870,

5. Hawkins, supra note 2, Section 20 ("The Role of John Quincy Adams"). On Adams’s "more forceful role" in the House of Representatives, see Appendix B of this Collection.

6. The paths of Adams and Lincoln crossed in the House of Representatives, with Adams dying during the single term that Lincoln served there. Lincoln was a junior member of the Congressional Committee in charge of Adams’s funeral. See I ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 450n (Roy P. Basler ed., Rutgers University Press 1953).

probably as many blacks were taken to Brazil and Cuba as there were white men arriving in the continent."

One is reminded again and again, upon reviewing accounts of modern slavery and especially of the slave trade, of the chronic irrationality in public (as well as in private) life that the accommodations to slavery (however "understandable") required and led to. This was particularly evident, as we shall see further on, in the arguments that could be made by the Government of the United States in its attempts to restore to slavery the Africans on The Amistad who had presumed to emancipate themselves. Similarly, questionable accommodations could be seen, a generation earlier, in the way that John Quincy Adams, as Secretary of State and as prospective President, considered himself obliged to act in the affair of The Antelope.

II.

John Quincy Adams had been circumspect, especially with respect to slavery-related issues, during his service as Secretary of State and then as President of the United States. His presidential term (1825-1829) is regarded as unsuccessful, in large part because of the passions aroused among Andrew Jackson’s supporters by the way Adams secured the office after the presidential contest had to be resolved in the House of Representatives. On the other hand, Adams is widely regarded as perhaps our greatest Secretary of State.

He figured, while still Secretary of State, that he would need the support of Southern voters if he was to be elected President in 1824—and that, it was obvious, required that he not arouse the hostility of the South by openly questioning what Southerners considered their slavery-related prerogatives under the Constitution of 1787. His caution with respect to these matters is reflected in how he dealt, in the State Department, with the


issues posed by the *Antelope* matter, urging the course advocated by the foreign governments concerned: the return of the ship and all of its cargo to its presumed owners, even though it was suspected that those owners had planned to violate the law, in effect since 1808, against the importation of slaves into the United States.\(^{11}\)

There are ample indications, here and there in Adams's diaries and other private papers, that he (like his father before him) had a lifelong antipathy to slavery. But John Quincy Adams's antipathy did not become generally known until he left the Presidency in 1829. At the root of his long-time position here were political and constitutional principles described in this way by an encyclopedist:

> Defeated for reelection in 1828, Adams seemed at the end of his career. In 1829 he wrote the least prudent, if most interesting, of his many essays and pamphlets, an account of the events leading up to the convening of the Hartford Convention, implicating many of New England's most famous men in treason. In writing this long essay (published posthumously in *Documents Relating to New England Federalism, 1801-1815*) he developed a theory of the Union that constituted the burden of his speeches and public writings until his death in 1848, and that became the political gospel of the new Republican Party and its greatest leader, Abraham Lincoln.\(^{12}\)

The encyclopedia account provides further indications of how Adams anticipated the doctrines of Lincoln and the Republican Party.

According to Adams, the Constitution was not a compact between sovereign states but was the organic law of the American nation, given by the American people to themselves in the exercise of their inalienable right to consent to the form of government over them. The state governments derived their existence from the same act of consent that created the federal government. They did not exist before the federal government, therefore, and could not have created it themselves by compact. What is more, the state


\(^{12}\) Forsyth, *supra* note 4, at 21.
governments, like the federal government, depended decisively on the truth of those first principles of politics enunciated in the Declaration of Independence for their own legitimacy.

The Whig theory of the Constitution was politically provocative. By it slavery was a clear moral evil. Adams, like Lincoln after him, justified the compromise with slavery as necessary in the circumstances to the existence of a constitutional union in America, but Adams vehemently maintained the duty to prevent the spread of what was at best a necessary evil. While he advocated a scrupulous care for the legal rights of slavery where it was established, he insisted that the government of the United States must always speak as a free state in world affairs. He believed it to be a duty of the whole nation to set slavery, as Lincoln would later say, on the course of ultimate extinction.  

It was in the Congress, for a decade and a half, that the elderly John Quincy Adams pursued his unrelenting campaign against the slavery interests, as may be seen in this continuation of the account which has just been quoted:

This theory guided his words and deeds in the House of Representatives from 1831 until his death. For fourteen years he waged an almost single-handed war against the dominant Jacksonian Democratic majority in the House, a struggle focused on the gag rule. The gag rule was actually a series of standing rules adopted at every session of Congress from 1836 on. In its final form it read: "No petition, memorial, resolution, or other paper praying the abolition of slavery in the District of Columbia or any State or Territory, or the slave trade between the States or Territories in which it now exists, shall be received by this House, or entertained in any way whatever."  

The gag rule was part of a policy followed by the Democratic party in this period, on the advice of John C. Calhoun, among others.

13. Id.
never in the least thing to admit the authority of Congress over slavery. Adams argued that the gag was a patent abrogation of the First Amendment’s guarantee of freedom of petition. His speeches against the gag rule became a rallying point for the growing free-soil and abolition movements in the North, though Adams himself was cautious about endorsing the programs of the radicals.15

However cautious Adams may have always been about endorsing the programs of the radical abolitionists, he was anything but that in the way that he conducted himself during the decade-long controversy about the gag rule. Indeed, it has been said that Adams was largely responsible for converting much of the North to an aggressively anti-slavery position. Lincoln, in distinguishing himself from the abolitionists, even as he made astute use of them, was far more restrained in his political discourses throughout his career than Adams was after 1828.16

The encyclopedia article about John Quincy Adams upon which we have drawn concludes with these observations.

Through a long and varied career, Adams’s statesmanship was guided by the twin principles of liberty and union. As a diplomat and architect of American foreign policy, Adams played a large part in the creation of a continental Republic. He believed that the westward expansion of the country was necessary if the United States was to minimize foreign interference in its domestic politics. Yet expansion brought the most powerful internal forces of disruption of the Union into play and prepared the way for the Civil War.17

Such a war was evidently anticipated by him, as well as the possibility that use of the so-called “war power” might enable the Government of the United States to take measures against slavery that it might not otherwise be authorized to consider.18

15. Forsyth, supra note 4, at 21-22.
16. See Appendix B of this Collection. Also, Lincoln was sensitive to the usefulness of silence, even though he would not go as far as The Rule of St. Benedict. See the epigraph at the head of this Collection. See also infra note 33, and the text accompanying infra notes 106 and 107 in Appendix B of this Collection.
17. Forsyth, supra note 4, at 22.
However this may be, it was at roughly the midpoint of his already notorious campaign against the gag rule in the House of Representatives that John Quincy Adams became involved in the affair of the Amistad.

III.

Useful background for appreciating the discussion by Judge Hawkins of the Amistad case is provided by this report:

The African slave trade depended on black Africans capturing other black Africans and selling them to dealers on the coast for shipment to plantations in the Caribbean and elsewhere in the Americas. This is what happened to a group of Mende tribesmen in West Africa in the spring of 1839. They were transported in a Portuguese slaving vessel to Cuba, where fifty-three of them were sold to two Spaniards who planned to carry them by sea in the chartered ship Amistad for resale at Puerto Principe on the island’s northwest coast. But on the fourth night out one of the captives, Joseph Cinqué, managed to get free of his manacles and unchain the others.¹⁹

The Hawkins account of the dramatic Amistad affair, about which even an opera has been made in our time, begins thus:

Fifteen years after the decision in the Antelope and two years into the Van Buren Administration, another slave ship, L’Amistad (ironically meaning “friendship”), was discovered by an American revenue cutter off the American coast. A two-masted schooner, sailing under the flag of Spain, Amistad had set out of Havana, Cuba with approximately fifty-nine Africans in chains. But there was a fundamental difference between Amistad and all the slave ships that had preceded it: while at sea, the Africans aboard had managed to free themselves. Months of captivity, starvation and the slaughter of the weakest among them had set them in a blinding rage. Free of their chains, they proceeded to murder nearly all the ship’s crew.²⁰

¹⁹. McKittrick, supra note 10, at 53. See infra the text accompanying note 42.
²⁰. Hawkins, supra note 2, Section 14 (“The Amistad”).
It can be questioned whether these killings were indeed "murder." What duty did these self-emancipated slaves owe to the *Amistad* crew which had treated them in the brutal manner that they had, and upon whom they could not rely to acquiesce in their own temporary restraint by their former captives? Indeed, it eventually became evident that the survivors among the whites on board the ship conspired to return "their" Africans to slavery:

Two crew members, Jose Ruiz and Pedro Montes, were spared to sail the vessel and the Africans home. Under the watchful but untrained eyes of the Africans, Ruiz and Montes sailed to the East in daylight, but in the opposite direction during the night. Ruiz and Montes had prayed this zig-zag course would lead them to the southern coast of the United States, but the *Amistad* wound up off of Montauk Point, Long Island. On August 24, 1839, it was boarded by men [from] the U.S.S. *Washington*. A shore party of the Africans had also encountered a group of seamen from nearby Sag Harbour... When [the American sailors] heard what Ruiz and Montes had to say about the events at sea, the Africans were taken into custody and transported to New Haven, Connecticut.22

Critical to the fate of these Africans was the claim made on their behalf in Courts of the United States, and fairly easily established, that they had been transported from the African coast quite recently—that is, decades after both international law and the relevant treaty obligations forbade such traffic in human beings by the parties involved.

Justice Joseph Story, who wrote the Opinion for the United States Supreme Court in this case, identified the treaty obligations and related issues to be considered here.

The main controversy is, whether these negroes are the property of Ruiz and Montes, and ought to be delivered up... It has been argued on behalf of the United States, that the Court are bound to deliver them up, according to the treaty of 1795, with Spain, which has in this particular been continued in full force, by the treaty of 1819, ratified in 1821... The ninth article provides, "that all ships and merchandise, of what nature soever, which shall be rescued out

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21. On "person" and "murder," see Appendix C of this Collection.
22. Hawkins, *supra* note 2, Section 14 ("The Amistad").
of the hands of any pirates or robbers, on the high seas, shall be brought into some port of either state, and shall be delivered to the custody of the officers of that port, in order to be taken care of and restored entire to the true proprietor, as soon as due and sufficient proof shall be made concerning the property thereof." This is the article on which the main reliance is placed on behalf of the United States for the restitution of these negroes [to the true proprietors].

It is one reminder of the gulf of experience and doctrine which separates us from conscientious jurists of the mid-Nineteenth Century that they assume there can be "true proprietors" of property in human beings, or slaves.

To bring the Amistad case within the article of the treaty identified by Justice Story, it is (he says) essential to establish:

First, That these negroes, under all the circumstances, fall within the description of merchandise, in the sense of the treaty. Secondly, That there has been a rescue of them on the high seas, out of the hands of pirates and robbers; which, in the present case, can only be, by showing that they themselves [these negroes] are pirates and robbers; and, Thirdly, That Ruiz and Montez, the asserted proprietors, are the true proprietors, and have established their title by competent proof.

The proof advanced here included documents prepared in Cuba which purported to show that the Africans shipped in Cuba (and perhaps elsewhere in the Western Hemisphere) from one slave market to another were persons who had not been forced into slavery since the ban had been placed decades earlier upon the importation of new slaves from Africa. It was known, however, that false documents to this effect were routinely available in Cuba—and John Quincy Adams and his associates were indignant that the Government of the United States should have relied upon such documents on this occasion, well knowing the practices of both the authorities and of slave traders in Cuba and elsewhere.

Justice Story assesses in this fashion that "competent proof" offered on behalf of the claimant Ruiz and Montes:

If these negroes were, at the time, lawfully held as slaves under the laws of Spain, and recognized by those laws as properly capable of

24. Id. at 592-93.
being lawfully bought and sold; we see no reason why they may not justly be deemed within the intent of the treaty, to be included under the denomination of merchandise, and, as such, ought to be restored to the claimants: for, upon that point, the laws of Spain would seem to furnish the proper rule of interpretation. But, admitting this, it is clear, in our opinion, that neither of the other essential facts and requisites has been established in proof; and the onus probandi of both lies upon the claimants to give rise to the causes foederis. It is plain beyond controversy, if we examine the evidence, that these negroes never were the lawful slaves of Ruiz or Montez or of any other Spanish subject.25

Instead, we are then told:

They are natives of Africa, and were kidnapped there, and were unlawfully transported to Cuba, in violation of the laws and treaties of Spain, and the most solemn edicts and declarations of that government. By those laws, and treaties, and edicts, the African slave trade is utterly abolished; the dealing in that trade is deemed a heinous crime; and the negroes thereby introduced into the dominions of Spain [which include Cuba], are declared to be free. Ruiz and Montez are proved to have made the pretended purchase of these negroes, with a full knowledge of all the circumstances. And so cogent and irresistible is the evidence in this respect, that the [United States] District Attorney has admitted in open court, upon the record, that these negroes were native Africans, and recently imported into Cuba, as alleged in their answers to the libels in the case. The supposed proprietary interest of Ruiz and Montez, is completely displaced, if we are at liberty to look at the evidence of the admissions of the District Attorney.26

It can be suspected that if these Africans had been regarded as truly, or fully, human by the Government of the United States, Ruiz and Montez (instead of being supported in their claims) should have been threatened by criminal actions for the perjury and fraud they engaged in and by civil actions for the damage done by them to the Africans they claimed.

25. Id. at 593.
26. Id.
The Opinion of the Court rounds off this part of its assessment with these further observations:

If, then, these negroes are not slaves, but are kidnapped Africans, who, by the laws of Spain itself, are entitled to their freedom, and were kidnapped and illegally carried to Cuba, and illegally detained and restrained on board of the Amistad, there is no pretense to say, that they are pirates or robbers. We may lament the dreadful acts, by which they asserted their liberty, and took possession of the Amistad, and endeavoured to regain their native country; but they cannot be deemed pirates or robbers in the sense of the law of nations, or the treaty with Spain, or the laws of Spain itself; at least so far as these laws have been brought to our knowledge.27

Even so, to call the acts of the Africans “dreadful” is not to regard them as “murder.” Dreadful acts may be sometimes required, or at least plausibly justified, in efforts to revive liberty which has been improperly suppressed. Is most, if not all, of modern slavery grounded in kidnapping or other crimes? And if so, what “dreadful deeds” may not be justified in endeavours to regain one’s liberty?28

Should not such questions remind us that Southerners, in the 1840s and 1850s, depended upon a species of property to which they were not ultimately entitled and the presence of which left them highly vulnerable? What, for example, might not a boatload of slaves shipped from, say, Charleston to New Orleans, properly attempt to do to their “owners” on the high seas? Should it matter to them whether their enslavement was recent or generations-old in its origin? The ultimate absurdity, or irrationality, of the property claimed in Africans as slaves is suggested by these and like questions—as well as by the indignation aroused among those who believed that Africans, however kidnapped and brutalized as slaves, were not entitled to use the force and tactics that could properly be used by innocent whites to recover their own liberty in comparable circumstances.29

27. Id. at 593-94.

28. It is here that a defense of John Brown’s 1859 Harper’s Ferry Raid could begin. See ANASTAPLO, supra note 14, at 362. See also the Epilogue to this Collection (drawing on Frederick Douglass).

29. Compare the passage bitterly condemning the slave trade which was rejected by the Continental Congress upon adopting the Declaration of Independence. See ANASTAPLO, supra note 14, at 272-73 n. 44. See also supra note 11, and the text accompanying infra note 58 and the text accompanying infra note 113 in Appendix B of this Collection.
IV.

Adams's principal involvement in the Amistad case was evidently his share in the oral argument on behalf of the Africans before the United States Supreme Court. Nothing is said in the Opinion of the Supreme Court about the matters that are distinctive to Adams's argument, as compared to the argument made by his co-counsel. We do have the extended argument that Adams published shortly after the case was disposed of by the Court, but we cannot be sure that he had used any of that in his actual argument. The Reporter of the decision does note that he did not have Adams's argument in preparing his summary of arguments, adding that the Court's decision had not depended on the Adams arguments. It seems, in any event, that Adams prepared that extended argument for publication in an effort to influence public opinion about the issues he discussed.

Much of what he does is to castigate the Government of the United States, and especially the Secretary of State, for having taken the position it did in support of the Spanish claimants. (I will say more about this soon.) Related to this is Adams's analysis of the relevant treaty and statutory provisions. These are, however, of secondary interest for us. Far more important are the suggestions Adams makes about slavery and the constitutional principles of the American regime.

At the heart of Adams's case against slavery, which case is made much of in his constitutional and legal interpretations, are the pronouncements in favor of liberty and equality in the Declaration of Independence. The Declaration is drawn upon at least a half-dozen times in the course of Adams's remarks, with several references made by him to the two copies of the Declaration of Independence displayed in the Supreme Court's chamber. It is the dependence upon the Declaration that helps Adams to condemn slavery as he does, however much he considers himself obliged to recognize the constitutional authority of the Slave States to retain and protect their "peculiar institution."30

Adams recognized as well that the Government of the United States lacks the authority, at least in ordinary circumstances, to interfere with slavery in the States in which it had been legally established. But he could still insist upon the right, if not also the duty, of the Government of the

30. Justice Story, in his Opinion for the Supreme Court in Amistad, does not refer to the Declaration of Independence. Was it considered too "political," and hence potentially dangerous, to do so?
United States to curtail the expansion of slavery and to prohibit (since 1808) the importation into the United States of any more slaves. It is that prohibition, and related treaties and developments in international law with respect to the international slave trade, which Adams considered the Spanish diplomats and the Van Buren Administration to have attempted to subvert.

The "created equal" language of the Declaration of Independence obviously posed problems for anyone who attempted to justify an indefinite continuation, to say nothing of a deliberate extension, of slavery. Adams assumes throughout his *Amistad* argument that the Declaration is a constitutional document. But it is elsewhere that we find what may have been his most extended discourse on behalf of the constitutional stature of the Declaration of Independence: this was in the address he gave on the Jubilee of the Constitution, delivered in New York City on April 30, 1839, the fiftieth anniversary of the Inauguration there of George Washington as President of the United States.

Not only does Adams insist in his 1839 address that the Declaration lies at the foundations of the American regime, but he also considers the Constitution of 1787 the natural implementation of the principles of the Declaration. Thus, he explains, the dozen years of the American States under the Articles of Confederation should be seen as an unfortunate digression from the path laid down in the Declaration toward a proper constitutional government for all of the people of the United States. It was that united people, not the individual States or the peoples of the various States, who had been responsible for the development and implementation of the Constitution of 1787. Much the same is suggested by Abraham Lincoln about the relation between the Declaration of Independence and the Constitution of 1787.

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32. This address, *The Jubilee of the Constitution* may be found, at among other places, on the Internet (e.g., exLaw.com). Substantial excerpts from it may also be found in 6 *The Annals of America* 471 (1976). A summary of *The Jubilee* is added to Appendix A of this Collection.

33. On the significance of the Preamble to the Constitution, see Appendix A of this Collection. See also Appendix D of this Collection. On Lincoln's Declaration of Independence, see *Anastaplo*, *supra* note 14, at 11, 31, 363. These statements are central to the American regime, especially in the hands of those who know when to remain silent. *See supra* note 16. *Compare* Appendix B of this Collection.
V.

Considerable passion is expressed by Adams in his *Amistad* argument against what he regards as the gross improprieties of the Martin Van Buren Administration in supporting the claims of the Spaniards seeking to recover "their" Africans. Adams insists, here, upon the sovereignty of nations (and even, it can seem, the prerogatives of individual States in the United States, in opposition to the demands of the Spanish Government).

Adams is particularly scornful of the deference exhibited by the Van Buren Secretary of State, John Forsyth, in complying with the improper demands of the Spanish Government for the return to Cuba of the self-emancipated slaves. Indeed, the attacks by him upon the Secretary of State can seem at times uncomfortably "personal," so much so that one can wonder what accounted for the passion displayed in this form.

These attacks may reflect Adams's longstanding interest in how the State Department conducted the business of the United States. After all, he had not only served several years as Secretary of State, but he had been before that in the diplomatic service of his country and after that Chairman at times of the Foreign Affairs Committee in the House of Representatives.

But the passion exhibited here by Adams may be even more personal, in that he may be implicitly commenting upon, and hence disavowing (unconsciously, if not consciously), his own management of the *Antelope* affair when he was himself Secretary of State. Certainly, he works hard in his *Amistad* argument to distinguish *Antelope*—but must he not have sensed that he, in the *Antelope* crisis, like the Van Buren Administration in the *Amistad* crisis, had been unduly concerned not to risk the political consequences of disturbing Southerners sensitive to their slavery interests? We can be reminded here of the reformed drunkard who is transformed into a much-publicized star of the temperance movement.

We have noticed affinities between John Quincy Adams and Abraham Lincoln, especially in their "theory" of the Constitution and in the significance of the Declaration of Independence for that constitution. But Lincoln, in his steady opposition to the extension and perpetuation of

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34. Elsewhere Adams referred to Van Buren himself as a Northern man with Southern principles. On Van Buren, see *supra* note 7.

slavery in the Territories of the United States, never exhibits the sustained passion that Adams does (in the closing decades of his life) against slaveholders. In fact, Lincoln often observed that anti-slavery Northerners would likely, in the circumstances of their Southern brothers, act as they did. Adams himself does not face up to this kind of fact, however uncomfortable he may have been with the (suppressed?) awareness that he, as Secretary of State, had provided troublesome precedents for John Forsyth and his associates. Thus, the way that Congressman Adams conducted his campaign in the House of Representatives should be contrasted with the far greater personal restraint exhibited by President Lincoln in conducting his campaign for the Union. Adams did become known as "Old Man Eloquent" for his vehement attacks upon slavery and slaveholders, but despite the volumes of diaries he penned from his youth, I do not believe he was ever capable of the kind of introspective compassion evident in Lincoln's Second Inaugural Address. Was Adams too "Roman" in this respect?  

VI.

The irrationality upon which the system of modern slavery depended, and which it promoted, can be noticed wherever one probes into its presuppositions and operations. This may be seen in the brazenness of governments in their willingness, well into the Nineteenth Century, to use contrived documents to paper over the continuing kidnapping of Africans from their native lands. It may also be seen in such measures as that promoted by the trial court in the Antelope case, whereby it was initially decreed that the sixteen Africans "entitled" to their immediate freedom (out of the cargo of more than two hundred and fifty Africans) would be found by lot. (The Almighty, it seems, was relied upon to guide the lottery.)

The United States Supreme Court quietly set aside this device. But it is worth considering what understanding of things could have led to such a recourse to lots ever having been taken seriously (even by a member of the United States Supreme Court sitting as Circuit Judge at the trial level in the Antelope matter). Consider, for example, what would be said (then as well as well

36. On Lincoln's Second Inaugural Address, see ANASTAPLO, supra note 14, at 243.
as now) about any suggestion that a lottery be used in a murder trial to identify the innocent in a consignment of prisoners among whom there are known to be some guilty men who cannot be sorted out by relying only upon the available evidence.

Such use of a lottery might sometimes be acceptable when properties have to be allocated. But should the fate of human beings be decided thus? Certainly, capital punishment could not be properly allocated thus in a murder trial; but was not the allocation of someone to enslavement in the 1820s equivalent to capital punishment of the spirit? What we can see here, as elsewhere in the system of slavery in North America, is the instinctive refusal on the part of "the system" to regard people of African descent as truly or fully human.39

The absurdities of the system go back to what routinely happened on the coast of Africa: who was captured, by whom, and on what justification? Judge Hawkins observes that even after the international slave trade had begun to be condemned by treaties and international law, "as many as 50,000 Africans, each with as much legal claim to freedom as a resident of London or Paris, were being kidnapped each year and brought to the Americas."40 He also observes that "one of the most transparent aspects of the antebellum maritime slave trade [was] the use of the flags of other nations to cloak American involvement in an illegal and nasty enterprise."41

One reservation should be noticed, however, in response to any suggestion that the men and women routinely being kidnapped on the West Coast of Africa, decade after decade, had claims (legal or otherwise) to freedom comparable to those of "a resident of London or Paris." That is, genuine freedom depends upon conditions that evidently were not available in much of Africa during the Nineteenth Century and before. Otherwise, rapacious European and American slave traders could not have "depended on black Africans capturing other black Africans and selling them to dealers on the coast" for shipment as slaves to the Western Hemisphere.42

Of course, Africans were divided into distinctive tribes or peoples, so that the selling that was done may not usually have been of one's "own." But it should not have taken long for Africans to recognize that Africans, of whatever tribe, were all quite different from the Europeans and

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39. On Africans as "persons", see Appendix C of this Collection. See also infra note 43.
40. Hawkins, supra note 2, Section 4 ("Slavery After the Revolution").
41. Id. Section 7 ("La Jeune Eugenie").
42. See supra the text accompanying note 19. On freedom, see the materials collected in the source book cited in supra note 1.
Americans to whom the sales into slavery were being made. The civic-mindedness, or distressing lack of it, displayed among Africans with power, in cooperating with the slave trade (prior to and independent of colonization in many instances), may be seen in contemporary ruthless exploitations of one African people after another by “their” rulers.43

Thus, the irrationality of the general system of African slavery in the Eighteenth and Nineteenth Centuries depended to a considerable extent upon absurdities in the ways that some African leaders conducted themselves.44 But however lamentable the greedy misconduct of African suppliers of slaves, those suppliers could not have been as well informed as their North American customers were about the dreadful consequences of the enslavement to which they were contributing, beginning with the high mortality rate of the Middle Passage. Nor did those suppliers purport, unlike many of their ultimate American customers, to believe that “all Men are created equal.” The deepest irrationality, then, is to be seen in those who make a mockery of what they purport to believe and upon which they depend for their very existence as a community and as moral agents.

VII.

The Constitution was, for John Quincy Adams, not merely a compact between sovereign States, but rather (as we have seen) part of the organic law of the country ordained by the people of the United States. In this (we have also seen) he anticipated Abraham Lincoln, as he did as well in making as much as he did of the Declaration of Independence as a vital part of the organic law of the United States.

Justice Story, in the Amistad case, had recourse to “the eternal principles of justice and international law.”45 This echoes what Adams had argued, with priority by both of them assigned to “human life and human


44. See also ISAIAH TRUNK, JUDENRAT: THE JEWISH COUNCILS IN EASTERN EUROPE UNDER NAZI OCCUPATION (1972); DAN COHN-SHERBOK, UNDERSTANDING THE HOLOCAUST 162 (1999).

The Amistad decision, by a virtually unanimous Court, repudiated in effect what a sorely divided Court had done in the Antelope a generation earlier (with Secretary Adams's support). The Africans in question were ordered, in 1841, to be allowed to "go without day." This is to be contrasted as well with what the "same" Court, again sorely divided, did sixteen years later in the Dred Scott Case.47

A persistent question throughout this period was what the principles of the American system were and who could properly invoke them. However much Adams had once considered himself obliged to accommodate himself politically to Southern opinion, it seems that he knew better than he could admit to the public at large. Thus, at the time of a Cabinet discussion (on March 3, 1820) of the pending Missouri Bill in Congress, Adams records in his Diary that he had insisted

The Declaration of Independence not only asserts the natural equality of all men, and their inalienable right to liberty, but that the only just powers of government are derived from the consent of the governed. A power for one part of the people to make slaves of the other can never be derived from consent, and is, therefore, not a just power.48

The Cabinet exchanges on this occasion included pro-slavery comments by other cabinet members, including disparagements by them of the Northwest Ordinance of 1787, disparagements that Adams did not consider it useful to contradict:

46. Justice Story dismissed the absurdity, perhaps required by the Spanish claimants' position, of assuming that these Africans intended to import themselves as slaves. See id. at 596-97.

47. Another way of putting this difference is to suggest that the Amistad case was decided in the spirit of Somerset, while the Dred Scott case was decided in the spirit of Antelope. On Somerset v. Stewart, 98 Eng. Rep. 499 (K.B. 1772), see Anastaplo, supra note 14, at 2, 369; I Liberty, Equality & Modern Constitutionalism, supra note 1, at 249. On Dred Scott, see Anastaplo, supra note 14, at 363.

I did not reply to the assertion that a solemn compact, announced before heaven and earth in the Ordinance of 1787, a compact laying the foundation of security to the most sacred rights of human nature against the most odious of oppressions [by forbidding slavery in the Northwest Territory], a compact solemnly renewed by the Acts of Congress enabling the States of Ohio, Indiana, and Illinois to form State Governments, and again by the acts for admitting those States into the Union, was a nullity, which the Legislatures of any of these States may at any time disregard and trample under foot.49

It is evident from Adams's comments that he considered the Northwest Ordinance to have been an official expression of the general antipathy among the Founding Fathers against the extension of slavery into parts of the United States in which it did not happen to be already deeply entrenched.50

Adams continues, in his March 3, 1820 entry, that it "was sickening to [his] soul to hear the assertion [disparaging the Northwest Ordinance]; but to have discussed it there would have been useless, and [would] only have kindled in the bosom of the Executive [that is, in the Cabinet] the same flame which had been raging in Congress and in the country."51 "Its discussion," he added, "was unnecessary to the decision of the question [about the Missouri Bill] proposed [to the Cabinet] by the President."52 Even so, Adams believed it necessary to justify in Cabinet the continuing relevance of the Northwest Ordinance in this fashion:

I therefore only said that the Ordinance of 1787 had been passed by the old Congress of the Confederation without authority from the States, but had been tacitly confirmed by the adoption of the present Constitution, and the authority given in it to make needful rules and regulations for the Territory. I added that in one of the numbers of *The Federalist* there was an admission that the old Congress had passed the ordinance without authority under an

52. Id.
impulse of necessity; and that it was used as an argument in favor of the enlarged powers granted to Congress in the Constitution.\footnote{Id.}

This extended account of the March 3 Cabinet meeting concludes with Adams's observation that one of his colleagues "is already aware how his canvass for the Presidency may be crossed by this slavery contest. The violence of its operations upon his temper is such that he could not suppress it."\footnote{Id. at 10. This colleague, William Harris Crawford, was among those running for the Presidency when Adams was elected in 1824. See COLE, supra note 7, at 116-41.} Later that year, of course, Adams himself had to consider, in what he said publicly about the Antelope matter, how his canvass for the Presidency might be crossed by this slavery contest.

All this did not mean that Adams could not speak somewhat frankly in private with his Southern friends, who seem to have included at this time, John C. Calhoun, a fellow member of the Monroe Cabinet.\footnote{On Calhoun, see ANASTAPLO, supra note 14, at 113, 362.} Consider, for example, what happened immediately after the Cabinet meeting we have just visited:

After this meeting, I walked home with Calhoun, who said that the principles which I had avowed were just and noble; but that in the Southern country, whenever they were mentioned, they were always understood as applying only to white men. Domestic labor was confined to the blacks, and such was the prejudice, that if he [Calhoun], who was the most popular man in his district, were to keep a white servant in his house, his character and reputation would be irretrievably ruined.

I said [to Calhoun] that this confounding of the ideas of servitude and labor was one of the bad effects of slavery; but he thought it attended with many excellent consequences. It did not apply to all kinds of labor—not, for example, to farming. He himself had often held the plough; so had his father.\footnote{The venerable precedent of Cincinnatus must have reassured Southern patricians here.} Manufacturing and mechanical labor was not degrading. It was only manual labor—the proper work of slaves. No white person would descend to that. And it was the best guarantee to equality among the whites. It produced an unvarying level among them. It

\footnotesize\begin{enumerate}
\item Id.
\item Id. at 10. This colleague, William Harris Crawford, was among those running for the Presidency when Adams was elected in 1824. See COLE, supra note 7, at 116-41.
\item On Calhoun, see ANASTAPLO, supra note 14, at 113, 362.
\item The venerable precedent of Cincinnatus must have reassured Southern patricians here.
\end{enumerate}
not only did not excite, but did not even admit of inequalities, by which one white man could domineer over another.\(^5\) 

Although Adams then says, "I told Calhoun I could not see things in the same light," he is able to present the Calhoun doctrine in such a way as to suggest how Southerners (including the large majority who did not own slaves) could be shaped and challenged by the system of slavery, a system which somehow promoted heightened (if not even excessive) sentiments of honor in the white community.

Adams continues his account, evidently recording now a series of thoughts that he did not share with Calhoun but which reflected both the Adams family heritage and his New England upbringing.

It [what Calhoun had been saying] is, in truth, all perverted sentiment—mistaking labor for slavery, and dominion [over others] for freedom. The discussion of this Missouri question has betrayed the secret of their souls. In the abstract they admit that slavery is an evil, they disclaim all participation in the introduction of it, and cast it all upon the shoulders of our old Grandam Britain. But when probed to the quick upon it, they show at the bottom of their souls pride and vainglory in their condition of masterdom. They fancy themselves more generous and noble-hearted, than the plain freemen who labor for subsistence. They look down upon the simplicity of a Yankee's manners, because he has no habit of overbearing like theirs and cannot treat negroes like dogs.\(^5\)

It is understandable that the usefully cordial relations between Adams and Calhoun could not have continued if Adams had said to his South Carolinian colleague all that he thought on this occasion. This applies as well to Adams's further silent probing of the Southern soul, pointing up

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58. V ADAMS MEMOIRS, supra note 48, at 10-11. See also supra note 29. Samuel Johnson asked, "How is it that we hear the loudest yelps for liberty from among the drivers of negroes?" SAMUEL JOHNSON, TAXATION NO TYRANNY, AN ANSWER TO THE RESOLUTIONS OF THE AMERICAN CONGRESS 89 (London 1774) (quoted in Hawkins, supra note 2, Section 3 ("Slavery & American Independence"). Still, one may appreciate how sweet liberty can be when one sees close at hand what slavery looks like. On Patrick Henry, liberty, and slavery, see ANASTAPLO, supra note 14, at 358-59.
thereby both the fundamental irrationality of slavery and the problems confronted by those who acquiesced in it:

It is among the evils of slavery that it taints the very sources of moral principle. It establishes false estimates of virtue and vice; for what can be more false and heartless than this doctrine which makes the first and holiest rights of humanity to depend upon the color of the skin? It perverts human reason, and reduces man endowed with logical powers to maintain that slavery is sanctioned by the Christian religion, that slaves are happy and contented in their condition, that between master and slave there are ties of mutual attachment and affection, that the virtues of the master are refined and exalted by the degradation of the slave; while at the same time they vent execrations upon the slave-trade, curse Britain for having given them slaves, burn at the stake negroes convicted of crimes for the terror of the example, and writhe in agonies of fear at the very mention of human rights as applicable to men of color. [59]

Adams is then moved, perhaps not unnaturally, to wonder (again, silently) whether the 1787 constitutional “bargain” with respect to slavery should have been made:

The impression produced upon my mind by the progress of this discussion [with Calhoun? or in the Cabinet also?] is, that the bargain between freedom and slavery contained in the Constitution of the United States is morally and politically vicious, inconsistent with the principles upon which alone our Revolution can be justified; cruel and oppressive, by riveting the chains of slavery, by pledging the faith of freedom to maintain and perpetuate the tyranny of the master; and grossly unequal and impolitic, by admitting that slaves are at once enemies to be kept in subjection, property to be secured or restored to their owners, and persons not to be represented themselves, but for whom their masters are privileged with nearly a double share of representation. . . . It would be no difficult matter to prove, by reviewing the history of the Union under this Constitution, that almost everything which has contributed to the honor and welfare of the nation has been

59. V ADAMS MEMOIRS, supra note 48, at 11.
accomplished in despite of them or forced upon them [the masters of slaves], and that everything unpropitious and dishonorable, including the blunders and follies of their adversaries, may be traced to them.\textsuperscript{60}

This Diary entry of March 3, 1820 concludes with doubts about whether the 1787 and subsequent accommodations to slavery should ever have been made, New Englandish doubts which are expressed in a more elegant form by Henry Thoreau in his 1849 essay on civil disobedience.\textsuperscript{61} For Adams goes on to say:

I have favored this Missouri compromise [which had been discussed that day in the Cabinet meeting], believing it to be all that could be effected under the present Constitution, and from extreme unwillingness to put the Union at hazard. But perhaps it would have been a wiser as well as a bolder course to have persisted in the restriction [with respect to slavery] upon Missouri, till it should have terminated in a convention of the States to revise and amend the Constitution. This would have produced a new Union of thirteen or fourteen States unpolluted with slavery, with a great and glorious object to effect, namely, that of rallying to their standard the other States by the universal emancipation of their slaves. If the Union must be dissolved, slavery is precisely the question upon which it ought to break. For the present, however, this contest is but asleep.\textsuperscript{62}

\textsuperscript{60} Id. at 11-12.

\textsuperscript{61} For reservations about Thoreau’s celebrated Essay, see George Anastaplo, Human Being and Citizen: Essays on Virtue, Freedom and the Common Good 203 (1975).

\textsuperscript{62} V Adams Memoirs, supra note 48, at 12. Charles Francis Adams, the editor of his father’s Diary, adds in a note at this point:

This sleep last about twenty-eight years. The writer [John Quincy Adams] was sagacious enough to foresee that a compact resting upon no solid principles either in morals or politics could not be permanent... [T]he fearful problem presented by [John Quincy] Adams has been solved, at a prodigious cost of blood and treasure, without paying the penalty of the disruption of the Union, which he held as inseparable from success.

\textit{Id.} at 12 n.1.
However significant the resemblances between John Quincy Adams and Abraham Lincoln, it is here that a vital difference between them can again be seen. For Lincoln came to insist—perhaps Adams would have done so also in like circumstances?—that “slavery is precisely the question” upon which the Union should not be allowed to be dissolved, especially after a free and fair election had been held, pursuant to constitutional processes, in which an explicit policy of no-expansion-of-slavery had been debated and had prevailed at the polls.

Indeed, it can be suspected, the irrationality of slavery was such that not only were its proponents almost certain to be deceived by the system (as may be seen in the careers of Southerners as gifted as John C. Calhoun and Alexander H. Stephens64) but also that its opponents could be driven to desperate and self-defeating measures in the effort to suppress a maddening evil (as may be seen in the careers of Northerners as dedicated as Charles Sumner and John Brown).65

63. In these matters, it can seem, Adams is closer to Henry Thoreau while Lincoln is closer to Daniel Webster. On Thoreau, see supra note 61. On Webster, see George Anastaplo, American Constitutionalism and the Virtue of Prudence, in ABRAHAM LINCOLN, THE GETTYSBURG ADDRESS AND AMERICAN CONSTITUTIONALISM 106 (Leo Paul S. de Alvarez ed., 1976); see also, ANASTAPLO, supra note 14, at 370.

64. On Alexander H. Stephens, see ANASTAPLO, supra note 14, at 121, 185, 309, 310.

65. On John Brown, see id. at 362; see also the Epilogue to this Collection. We can see in Charles Sumner another Member of Congress who could attack slavery with the vigor of the elderly John Quincy Adams (who died in 1848):

In 1841 Sumner won the Senate seat once held by Daniel Webster. In his first speech, “Freedom National, Slavery Sectional,” Sumner attacked the fugitive slave law and congressional support of slavery for nearly four hours. In an 1856 speech, “The Crime Against Kansas,” Sumner vilified senators who had supported the Kansas-Nebraska Act. He described Stephen A. Douglas as “the squire of slavery, its very Sancho Panza, ready to do all its humiliating offices.” South Carolina’s Andrew Butler was, in Sumner’s view, the Don Quixote of slavery who had “chosen a mistress to whom he has made his vows, and who, though ugly to others . . . is chaste in his sight; I mean the harlot slavery.” Two days later Congressman Preston Brooks, a relative of Butler, repaid Sumner for these remarks by beating him insensible with a cane. Many Northerners viewed this incident as a symbol of a violent slavocracy which threatened the Constitution and the nation. After a three-and-a-half year convalescence Sumner returned to the Senate in 1860, renewing his crusade against bondage with a four-hour oration, “The Barbarism of Slavery.” This speech became a Republican campaign document in 1860.

From the beginning of the Civil War Sumner urged the abolition of slavery. He
These reminders of how even the best on all sides could miscalculate and miscarry points up the remarkable talent, as well as the justified good fortune, of a statesman such as Abraham Lincoln.

EPILOGUE

I have, over the years, indicated reservations about the uncompromising positions against slavery in the United States taken by Henry Thoreau and by John Quincy Adams in his old age. I prefer the prudential approach to these matters of Abraham Lincoln and those of like mind, which deeply political approach is to be preferred also to the States’ Rightist positions protecting slavery taken by John C. Calhoun and Stephen A. Douglas.

A critique of my longstanding approach—a vigorous critique from the somewhat a-political Thoreau-Adams perspective—is suggested by a generous reviewer of my 1999 book, Abraham Lincoln: A Constitutional Biography. That challenging review (by Bruce Fein, in The Washington Times, January 30, 2000, page B7) is set forth here in its entirety. I provide thereafter a brief response, drawing upon what is said by me in Appendix B and Appendix C of this Collection and elsewhere.


Suppose you are a slave in the Deep South in mid-19th-century America. The Wilmot Proviso that would prohibit slavery in territory conquered during the Mexican-American War has been defeated by Congress. The 1850 Compromise has added canine teeth to the Fugitive Slave Act. The 1854 Kansas-Nebraska Act has superceded the Missouri Compromise of 1820 that carved out territory sealed off from slavery.

The Democrat Party is ascendant, and Presidents Franklin Pierce and James Buchanan have winked at the Democratic and argued that secession was State Suicide, that the Confederate States had reverted to territorial status, and that, despite the decision in Dred Scott v. Sandford, Congress had the power to end slavery in these Territories.

Paul Finkleman, Charles Sumner (1811-1874), in IV Encyclopedia of the American Constitution, supra note 4, at 1809. We can hear, in this ingenious argument about the seceding States’ reversion to territorial status, the sort of argument that could also be made on occasion by Sumner’s fellow-Massachusetts-man, John Quincy Adams.
violent outrages of pro-slavery forces in Bleeding Kansas. Congress refused to end slavery in the District of Columbia, or to ban the slave trade from the channels of interstate commerce. The United States Supreme Court has declared that no black person, enslaved or free, enjoys rights that a white man is required to respect, and, that Congress lacks power to forbid slavery in territories of the United States.

Do you possess a natural right to revolt against duly constituted authorities under Abraham Lincoln’s constitutional philosophy? That is the type of gripping questions that recurs in the deftly crafted collection of provocative essays by law professor George Anastaplo in “Abraham Lincoln: A Constitutional Biography.” The book, nevertheless, also examines several cornerstones of our constitutional dispensation and heritage, including the Declaration of Independence, the constitutional convention, Alexis de Tocqueville’s “Democracy in America,” and John Calhoun’s ferocious yet intellectually feeble defense of slavery, that are peripheral to the author’s analysis of Lincoln’s thoughts and actions.

The essays themselves enlighten regarding our constitutional evolution and cultural underpinnings, for example, the shifting balance between liberty and equality and the consequences for the nation, its aspirations and achievements. Lincoln connoisseurs need warning that their icon does not star in every chapter.

Generally speaking, Mr. Anastaplo, who is on the law faculty at Loyola University of Chicago, acclaims the Founding Fathers and Lincoln for their reason, prudence, and renunciation of visionary politics that blighted the French Revolution. He dispels any insinuation that they were sympathetic to slavery despite their refusals to risk national martyrdom under an abolitionist banner a la William Lloyd Garrison or John Brown. Slavery is either expressly or tacitly condemned by the principles of the Declaration of Independence, the Northwest Ordinance of 1787 and the Constitution itself in its verbal characterization of slaves as “persons,” not chattels.
Let us return to the right of revolution postulated in the Declaration of Independence, and to slaves. Mr. Anastaplo asks: "Suppose one went as far as Lincoln did, including as he did Africans among 'all Men.' Does it now follow, then, that the slaves themselves were entitled, in the words of the Declaration of Independence, 'to alter or abolish' — that is, to resist and replace — any form of government that denied them their 'unalienable Rights' to 'Life, Liberty, and the Pursuit of Happiness?'"

John Brown of Harper's Ferry fame bellowed "yes," but Lincoln hedged. Mr. Anastaplo defends the Great Emancipator's caution guided by countervailing concerns for domestic tranquility, property rights, the Constitution, and Americans yet to be born including the children and grandchildren of slaves. Rebellious slaves and their sympathizers, according to Mr. Anastaplo, should have been placated by Northern politicians rhetorically asking them:

"Did not the best hope for the African slaves, once they found themselves permanently in the United States, lie in a gradual political resolution of the slavery issue, one that permitted both the slaves and their masters to prepare for general emancipation and eventual citizenship?"

The question, however, elides the slave viewpoint. Nowhere in natural law or the Declaration is it suggested that the subjugated should accept their subjugation, even for a lifetime, to enhance the likelihood that future generations will enjoy a smooth transition to liberty. Slaves were not saddled with a burden of political altruism. Didn't Nat Turner have the right of revolution on his side in his 1831 slave revolt? Any idea of an impending emancipation would have been a delusion.

The same bleak prospect persisted into the 1850s. The legal and political signals, as noted previously, were overwhelmingly negative.
It would have been reasonable for slaves to assume that absent revolt they would die in slavery. Why not fight for immediate freedom, as the African National Congress did in South Africa to end apartheid, a struggle crowned with success in 1994 with free and fair elections — especially because the end of slavery at some future time was no Euclidean certitude?

Mr. Anastaplo falsely likens gradual emancipation proponents to American Statesmen who did business with the tyrannical Soviet Union to avoid nuclear war. But the latter shared neither complicity nor responsibility for Soviet oppression, while the former were direct legal and moral participants in American slavery.

Maybe Lincoln’s political prudence yielded a net gain in morality and human happiness when the equation extends through the long years of history, although adding and subtracting the lives and joys of individuals seems beyond both science and intuition.

In sum, for all its occasional shortcomings, Mr. Anastaplo’s essay collection deserves the close attention of deep thinkers who understand that political life comes much more in chiaroscuro than in prime colors.

This *Washington Times* reviewer has put to me a question which can help us think about how to apply universal principles to ever-changing circumstances. The questions has been posed of what the invaluable right of revolution should have meant to the men and women of African descent held in slavery in the United States in the 1850s.

We can readily sympathize today with any slave who attempted to run away to freedom, whatever the cruel necessities of the Fugitive Slave Law and its enforcement may have been. But it seems to have been obvious to most slaves in the 1850s, as well as to most of their champions, that mounting an armed revolution at that time would have been a hopeless and indeed suicidal undertaking.

Any politician who sympathized openly with efforts to promote slave uprisings, such efforts as John Brown’s spectacular 1859 Harper’s Ferry Raid, not only put in serious jeopardy those spirited slaves who might be encouraged to join any uprising, but also crippled himself politically in the ongoing campaign to contain and eventually to eliminate slavery in the
United States. It is revealing that Frederick Douglass, a former slave himself and perhaps the most eloquent abolitionist of his day, could (in 1859) both praise his friend John Brown as "noble and heroic" and yet insist that "the taking of Harper's Ferry was a measure never encouraged by my word or my vote, at any time or place."

Critical to how to regard any invocation of the right of revolution in desperate circumstances is Douglass's 1859 pronouncement, "I am ever ready to write, speak, publish, organize, combine, and even to conspire against Slavery, when there is a reasonable hope of success." It is this deeply prudential approach in combating the dreadful evils of Slavery that probably contributed to the considerable respect for one another evidently developed by Frederick Douglass and Abraham Lincoln during the Civil War.

APPENDIX A. THE PREAMBLE TO THE CONSTITUTION OF THE UNITED STATES*

It has long been fashionable for judges and scholars to assume that the Preamble to the Constitution of 1787 has no legal effect. It is even dismissed by some as merely a flourish, adding little if anything to our constitutional undertaking. But such a depreciation of the Preamble is not supported by how it has been regarded by distinguished citizens at various times in the history of the United States. In 1819, for example, the United States Supreme Court (speaking in *McCulloch v. Maryland* through Chief Justice John Marshall) looked to the Preamble for support of its holding that the National Government should be paramount to State governments with respect to matters about which the Constitution empowered the Congress to legislate.

The most dramatic testimony to the importance and scope of the Preamble may be seen in what Southerners considered it necessary to do in 1861 when they drafted a constitution for the Confederate States of America. This was done at the outset of Southern effort to secede from the Union after the 1860 election of Abraham Lincoln to the Presidency. The 1787 document provided the first draft for the constitution that the Confederates prepared for themselves. This is the Preamble that they settled upon, with my brackets indicating words deleted from the 1787 Preamble.

* An encyclopedia entry prepared by George Anastaplo in 1997. It was published at that time, but in a considerably edited form.
in 1861 and my italics indicating words added to it at that time (we can disregard here changes in capitalization and punctuation):

We the People of the [United] Confederate States, each State acting in its sovereign and independent character, in order to form a [more perfect Union] permanent federal government, 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 — invoking the favor and guidance of Almighty God — do ordain and establish this Constitution for the [United] Confederate States of America.

Thus, the Southerners added to their 1861 Preamble an invocation of "the favor and guidance of Almighty God," perhaps sensing the divine favor that they would need in order to carry off the radical dismemberment of the Union that they were undertaking. The phrase "a more perfect Union" is replaced by "a permanent federal government," emphasizing thereby the States' Rights approach of the seceding States.

Also significant here are (1) their dilution of "We the People" by insisting that each State acted "in its sovereign and independent character," and (2) their removal of the promotion of "the general Welfare" from the ends of the government under the Constitution. (Provision for "the common defence" is also removed from the Preamble, but it is retained in Article I, Section 8 of the Confederate Constitution, while provision for the general welfare is not. Perhaps "the common defence" was removed from the Preamble because the use of "common" seemed to look more at the outset to a Union than to a Confederation.) These 1861 changes in the 1787 Preamble anticipate that the powers of the government under the new Confederate Constitution would be much more dependent upon the States, with their overriding concern about and control of slavery, than the powers of the government under the original United States Constitution had been, where the People recognized by the Declaration of Independence had taken charge of their affairs nationwide.

The changes recorded in the Confederate Constitution of 1861 remind us of how troublesome and even dangerous the 1787 Preamble and its Constitution had come to seem to the slavery-minded Southern States. The complete defeat of the Confederacy in the Civil War left the Constitution of 1787 reaffirmed, if not even strengthened, with the always divisive institution of slavery abolished nationwide.
Six ends of government are listed in the 1787 Preamble. The first and last of these ends—“to form a more perfect Union . . . and [to] secure the Blessing of Liberty to ourselves and our Posterity”—can be understood to be special to the new political order inaugurated by the Declaration of Independence in 1776. The other four ends—to “establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare”—had long been understood to be expected from any national government which was to be taken seriously. It also seems to have been understood in the Eighteenth Century that any ambiguity or uncertainty in the body of a document such as the Constitution might be resolved by looking to the objectives listed authoritatively in its preamble.

One consequence of elevating “We the People” to the head of the Constitution of 1787 has been to make the People of the United States more likely to regard themselves as one People entitled both to keep their Country together and to sustain a National Government powerful enough to serve the ends which are recognized, and are thereby legitimated, by the Preamble of the Constitution of the United States.”

** See, for further study of the Preamble: 1) WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION 370f (1953); 2) GEORGE ANASTAPLO, THE CONSTITUTION OF 1787, at 13f (1989); 3) GEORGE ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION 97f, 125f (1995). The authority of the People of the United States, as evident in both the Declaration of Independence and the Constitution of 1787, is emphasized by John Quincy Adams in his summary of The Jubilee of the Constitution, his April 30, 1839 discourse on the constitutional history of the United States since 1776. His summary reads:

It has been my purpose, Fellow-Citizens, in this discourse to show:

1. That this Union was formed by a spontaneous movement of the people of thirteen English Colonies, all subjects of the King of Great Britain—bound to him in allegiance, and to the British empire as their country. That the first object of this Union, was united resistance against oppression, and to obtain from the government of their country redress of their wrongs.

2. That failing in this object, their petitions having been spurned, and the oppressions of which they complained, aggravated beyond endurance, their Delegates in Congress, in their name and by their authority, issued the Declaration of Independence—proclaiming them to the world as one people, absolving them from their ties and oaths of allegiance to their king and country—renouncing that country; declared the UNITED Colonies, Independent States, and announcing that this ONE
PEOPLE of thirteen united independent states, by that act, assumed among the powers of the earth, that separate and equal station to which the laws of nature and of nature’s God entitled them.

3. That in justification of themselves for this act of transcendent power, they proclaimed the principles upon which they held all lawful government upon earth to be founded—which principles were, the natural, unalienable, imprescriptible rights of man, specifying among them, life, liberty and the pursuit of happiness—that the institution of government is to secure to men in society the possession of those rights: that the institution, dissolution, and reinstigation of government, belong exclusively to THE PEOPLE under a moral responsibility to the Supreme Ruler of the universe; and that all the just powers of government are derived from the consent of the governed.

4. That under this proclamation of principles, the dissolution of allegiance to the British king, and the compatriot connection with the people of the British empire, were accomplished; and the one people of the United States of America, became one separate sovereign independent power, assuming an equal station among the nations of the earth.

5. That this one people did not immediately institute a government for themselves. But instead of it, their delegates in Congress, by authority from their separate state legislatures, without voice or consultation of the people, instituted a mere confederacy [with the Articles of Confederation].

6. That this confederacy totally departed from the principles of the Declaration of Independence, and substituted instead of the constituent power of the people, an assumed sovereignty of each separate state, as the source of all its authority.

7. That as a primitive source of power, this separate state sovereignty, was not only a departure from the principles of the Declaration of Independence, but directly contrary to, and utterly incompatible with them.

8. That the tree was made known by its fruits. That after five years wasted in its preparation, the confederation dragged out a miserable existence of eight years more, and expired like a candle in the socket, having brought the union itself to the verge of dissolution.

9. That the Constitution of the United States was a return of the principles of the Declaration of Independence, and the exclusive constituent power of the people. That it was the work of the ONE PEOPLE of the United States; and that those United States, though doubled in numbers, still constitute as a nation, but ONE PEOPLE.

10. That this Constitution, making due allowance for the imperfections and errors incident to all human affairs, has under all the vicissitudes and changes of war and
APPENDIX B. JOHN QUINCY ADAMS IN THE HOUSE OF REPRESENTATIVES*

The abuses by free-speaking citizens most likely to be seen in the United States are in the exercise of rights that are clearly recognized as protected. This emphasizes the duty of respectable citizens to choose with care the occasions when acknowledged rights are to be exercised.

An appropriate caution is reflected in a comment by James Madison in the First Congress. It had been suggested by a Member of the House of Representatives that the Rhode Island legislature be requested to call a State convention to consider ratifying the Constitution. The Member asked that the House resolve itself into a Committee of the Whole to discuss this, a request that aroused the opposition of Members who preferred not to intrude themselves into this delicate matter even to that extent but preferred rather to leave Rhode Island completely alone. Thus, Madison was obliged to say,

I believe, Mr. Speaker, there are cases in which it is prudent to avoid coming to a decision at all, and cases where it is desirable to evade debate; if there were not cases of this kind, it would be unnecessary to guard our discussions [by interposing] the previous question. My idea on the subject now before the House is, that it

peace, been administered upon those same principles, during a career of fifty years.

11. That its fruits have been, still making allowance for human imperfection, a more perfect union, established justice, domestic tranquility, provision for the common defence, promotion of the general welfare, and the enjoyment of the blessings of liberty by the constituent people, and their posterity to the present day.

* This Appendix is reprinted from GEORGE ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT ch. VIII, § xii, 239-53, 725-30 (1971) (with Notes 106-121). The notes for this text are provided here as footnotes, using the original numbering of the notes. In the notes from The Constitutionalist which follow (Notes 106-121), all references to chapters and notes are, unless otherwise indicated, to notes elsewhere in The Constitutionalist.

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would be improper in this body to expose themselves to have such a proposition rejected by the Legislature of the State of Rhode Island. It would likewise be improper to express a desire on an occasion where a free agency ought to be employed, which would carry with it all the force of a command. How far this is contemplated on the present occasion, I cannot tell; but I heartily wish that as little may be said about it as possible. I conceive this to be one of the cases to which the previous question is applicable; and, if the gentleman means to call the House on a direct decision on this motion, I shall step between, and interpose the previous question. \[Annals of Congress, vol.1, p. 423\]  

Alexander White, expressing a different attitude about such matters, replied (on another occasion) to an objection that a proposed discussion was on “a subject of considerable delicacy” with the declaration, “As to delicacy, I know of none, sir, that ought to be used while we are in pursuit of the public good. I speak, therefore, with candor what are my sentiments on this subject.” \Annals of Congress, vol. I, p. 633\ (The subject on this later occasion related to the salaries appropriate for the President and the Vice-President of the United States.).

Madison’s position was stated, in a much more serious context, in the words of President Abraham Lincoln in 1862: “If there ever could be a proper time for mere catch arguments, that time surely is not now. In times like the present, men should utter nothing for which they would not willingly be responsible through time and in eternity.”  

These are not judgments that can be determined by rules of law. Rather, the traditions and good sense of a people and of their leaders must be relied upon. Critical to such good sense is the ability to recognize when one’s rights should be foregone for the sake of a greater good than that which is implied in the

106. In this instance, the previous question was, “Shall the main question be now put?” This was negated, thus shutting off further discussion of the Rhode Island proposal. See Arthur E. Sutherland, \Constitutionalism in America: Origin and Evolution of the Fundamental Ideas\ (New York: Blaisdell Publishing Co., 1965), p. 444.

107. Abraham Lincoln, \Complete Works,\ ed. John G. Nicolay and John Hay (New York: Century Co., 1902), 2:274. Lincoln’s care in the use of language is exhibited by the shift in prepositions in his phrase, “through time and in eternity.” \Compare\ at p. 200, above, the younger Lincoln. (Does not Hamlet, on the other hand, consider time to continue “through” eternity? \See\ pp. 30-31, above. Would the lack of change “in” eternity make the notion of “eternal punishment” [say, of Claudius] unrealistic?) \See\ chap. 9, n. 30, below. \See, also,\ Thomas Paine, \Writings\ (New York : G.P. Putnam’s sons, 1894), 2:277-79, 4:211.
immediate preservation or exercise of particular constitutional rights. That is, one is driven to consider and to respect the ends or purposes of freedom.

Perhaps the most important occasion on which this problem has been raised for Americans was that of the abolitionist agitation in the second quarter of the Nineteenth Century. An example in this connection is the conduct in the House of Representatives of the elderly John Quincy Adams (then a former President of the United States), when he (as a member of the House from Massachusetts) attempted to lay before that body the antislavery petitions supplied him for that purpose. It has been observed that Adams said more on freedom of speech in the course of this struggle than all of the United States Supreme Court cases for the first one hundred years of this Republic.108

108. John Paul Frank, Marble Palace; The Supreme Court in American Life (New York: Knopf, 1958), p. 183. It would not be thought today that the refusal of the House to refer certain petitions to committees would be inconsistent with the constitutional injunction against abridging "the right of the people . . . to petition the Government for a redress of grievances." Congress is prohibited, however, from imposing limitations on the right of petition (such as prescribing criminal liability for petitioners), whatever either House may do in disposing of the petitions submitted to it.

Precisely what is included in the traditional "right of the people to assemble and to petition the government for a redress of grievances," which is not included in "freedom of speech, or of the press," is hard to say. But to have left this traditional formulation out of the constitutional enumeration might have suggested that there is guaranteed something less than there could have been. (Compare Chap. 3, n. 11, above.)

The right of petition had been vital to the Colonists in their dealings with Great Britain. ("In every stage of these Oppressions We have Petitioned for Redress in the most humble terms. Our repeated Petitions have been answered only by repeated injury." U.S., Declaration of Independence.) Petitions had had, in English law, a privileged character, at least compared with ordinary publications. (Compare chap. 5, n. 145, above.) They have become less important in a regime which is as dependent as ours is on freedom of speech and of the press. (Compare chap. 4, n. 105, above.) Are petitions more apt to be employed today by citizens acting in their capacity as subjects rather than in their capacity as rulers? (See chap. 5, nn. 92, 133, above. "The extraordinary tact and sure instinct of the Negro protest has made it primarily a massive petition for the redress of grievances, a form of political action, in the courts and in the streets." Harry Kalven, Jr., The Negro and the First Amendment [Chicago: University of Chicago Press, 1966], p. viii. This was said in September, 1964.)

Congress, in any event, cannot interfere with the access the people have to the Executive and to the Judiciary. (See, e.g., chap. 4, n. 83, above. See, also, chap. 4, nn. 87, 96, above.) No redress is guaranteed, but one has at least the satisfaction of having had one's say, of having been heard:
It has also been observed that Adams had "the instinct for the jugular."\textsuperscript{109} That is, he had the capacity to discern and the will to attack the

Katherina: Why, sir, I trust I may have leave to speak:
And speak I will; I am no child, no babe:
Your betters have endured me say my mind,
And if you cannot, best you stop your ears.
My tongue will tell the anger of my heart,
Or else my heart concealing it will break;
And rather than it shall, I will be free
Even to the uttermost, as I please, in words

William Shakespeare, \textit{The Taming of the Shrew}, act 4, sc. 3. (See chap. 8, n. 127, below.)

See Joseph Story, \textit{Commentaries on the Constitution}, 2: secs. 1893-96. See, also, Carl J. Friedrich, \textit{Constitutional Government and Democracy: Theory and Practice in Europe and America} (Waltham, Mass.: Blaisdell Publishing Co., 1950), p. 159, on "assembly" having been broadened to include "association." (The right of petition and freedom of the press seem to have been blended in a recent development noted in \textit{Parade}, June 1, 1969, p. 5:

Petitions are a traditional democratic means of voicing dissent. But buying newspaper space at \$5,000 and \$10,000 a throw in \textit{The New York Times} for that purpose is not. In a recent issue of \textit{Science} magazine Everett Carl Ladd Jr., director of the political data center at the University of Connecticut, gives some facts about this new procedure. In 1953, a year with its fair share of political controversy, not one issue of the Sunday \textit{New York Times} contained a petition. Last year the Sunday editions were jammed with paid petitions. Ladd reveals that for the last four years the war in Viet Nam has been the major subject of advertised protest, and that virtually all the mass-signature petitions have opposed government policy. . . .

Are not such advertisements a means of expressing dissent rather than voicing grievances? See chap. 3, n. 22, chap. 5, n. 24, above.)

109. This was said of Adams and of Rufus Choate by Justice Oliver Wendell Holmes. Mark DeW. Howe, ed., \textit{Holmes-Pollock Letters} (Cambridge : Harvard University Press, 1946), p. 95. Choate himself had said, "John Quincy Adams had an instinct for the jugular and the carotid artery, as unerring as that of any carnivorous animal." Gilbert J. Clark. ed., \textit{Great Sayings by Great Lawyers} (Kansas City, Mo.: Vernon Law Book Co., 1926), p. 12. One problem with "going for the jugular" is that men become desperate and even irresponsible in defending the jugular. (See chap. 8, n. 118, below.)

One should not go for the jugular unless one is fairly sure it can be reached. (See chap.
most vulnerable spot in the constitution of his opponents. The vulnerability of the South with respect to the institution of slavery was exposed in 1835 by Tocqueville:

I am obliged to confess that I do not regard the abolition of slavery as a means of warding off the struggle of the two races in the Southern states. The Negroes may long remain slaves without complaining; but if they are once raised to the level of freemen, they will soon revolt at being deprived of almost all their civil rights; and as they cannot become the equals of whites, they will speedily show themselves as enemies. In the North everything facilitated the emancipation of the slaves, and slavery was abolished without rendering the free Negroes formidable, since their number was too small for them ever to claim their rights. But such is not the case in the South. The question of slavery was a commercial and manufacturing question for the slave-owners in the North; for those of the South it is a question of life and death. God forbid that I should seek to justify the principle of Negro slavery, as has been done by some American writers! I say only that all the countries which formerly adopted that execrable principle are not equally able to abandon it at the present time.

When I contemplate the condition of the South, I can discover only two models of action for the white inhabitants of those States:

8, n. 80, above.)

[D]issenters frequently force the majority to take positions more extreme than was originally intended. The classic example is the Dred Scott Case [19 How. (U.S.) 393 (1856)], in which Chief Justice [Roger B.] Taney's extreme statements were absent in his original draft and were inserted only after Mr. Justice [John] McLean, then a more than passive candidate for the presidency, raised the issue in dissent. [Robert H. Jackson, The Supreme Court in the American System (New York: Harper & Row, 1963), p. 19]

See chap. 2, n. 28, above.

Ralph Waldo Emerson spoke of John Quincy Adams as "a man of an audacious independence that always kept the public curiosity alive in regard to what he might do. None could predict his word, and a whole congress could not gainsay it when it was spoken." The Complete Works of Ralph Waldo Emerson, ed. E.W. Emerson (Boston: Houghton Mifflin Co., 1911), 11:521.
John Quincy Adams Revisited

namely, either to emancipate the Negroes and to intermingle with them, or, remaining isolated from them, to keep them in slavery as long as possible. All intermediate measures seem to me likely to terminate, and that shortly, in the most horrible of civil wars and perhaps in the extirpation of one or the other of the two races. Such is the view that the Americans of the South take of the question, and they act consistently with it. As they are determined not to mingle with the Negroes, they refuse to emancipate them.

Not that the inhabitants of the South regard slavery as necessary to the wealth of the planter; on this point many of them agree with their Northern countrymen, in freely admitting that slavery is prejudicial to their interests; but they are convinced that the removal of this evil would imperil their own existence.\textsuperscript{110}

Such were the considerations that moved Lincoln to a charitable view of where responsibility lay for the curse of slavery. Adams, on the other hand—insofar as there is any indication in his \textit{Diary} from which we can reconstruct his approach to such problems—was armed with a terrible righteousness.


The thesis that slavery would not have gone into the territories, whether it was prohibited by law or not, is the fundamental thesis of revisionism in dealing with the political causes of the Civil War. But this thesis is itself a subordinate manifestation of an apology for the South which has received a classic formulation in the work of [Charles W.] Ramsdell [in "The Natural Limits of Slavery Expansion," published in the \textit{Mississippi Valley Historical Review}, Oct. 1929]. The main thesis of this apology . . . is that slavery as an economic institution had reached its peak in 1860 and was about to decline. Gradual emancipation was "just around the corner," if only the Republicans had not placed the South on the defensive. This contention has recently received its most detailed and circumstantial refutation in a monograph written under the auspices of the National Bureau of Economic Research by two Harvard economists, Professors Alfred H. Conrad and John Meyer. "The Economics of Slavery in the Ante-Bellum South," published in \textit{The Journal of Political Economy}, April 1958, is the most enlightening piece of original research we have encountered on the slavery question.
The first Diary reference to petitions goes back to 1805, before Adams became President, while he was in the Senate:

Jan. 21—In Senate Dr. Logan presented the petition of certain Quakers, requesting the interference of Congress as far as they have power to check the slave trade. A question was made, whether the petition should be received, and very warmly debated about three hours; when it was taken by yeas and nays—yeas nineteen, nays nine. [Diary, pp. 29-30]

His entries during that year included a comment by Adams upon the House of Representatives that came to be significant in the light of his own experience in that House thirty years later:

March 3 . . . Thus has terminated the second session of the Eighth Congress; the most remarkable transaction of which has been the trial of the impeachment against Samuel Chase [a Justice of the Supreme Court of the United States]. This is a subject fruitful of reflections, but their place is not here. I shall only remark that this was a party prosecution, and has issued in the unexpected and total disappointment of those by whom it was brought forward. It has exhibited the Senate of the United States fulfilling the most important purpose of its institution, by putting a check upon the impetuous violence of the House of Representatives. It has proved that a sense of justice is yet strong enough to overpower the furies of faction; but it has, at the same time, shown the wisdom and necessity of that provision in the Constitution which requires the concurrence of two-thirds for conviction upon impeachment. [Diary, p. 35]

He added that "the essential characters which ought to belong to the Senate are coolness and firmness."

111. The references to Diary in this section are to The Diary of John Quincy Adams, 1794-1845, ed. Allan Nevins (New York: Charles Scribner's Sons, 1951).

112. Adams was President of the United States for one term, 1825-1829.

112. The House of Representatives brings the "indictment" (impeachment) before the Senate, where the "trial" is held. See Federalist (New York: Random House, Modern Library, n.d.), p. 424: "a method of national inquest into the conduct of men." See also, chap. 7, n. 3, chap. 8, n. 43, above.
Fifteen years later (1820) Adams was to record as his "own deliberate opinion, that the more of pure moral principle is carried into the policy and conduct of a Government the wiser and more profound will that policy be." (Diary, p. 237) What "pure moral principle" consisted of will be seen in the controversy about the abolitionist petitions. His uncompromising attitude during that controversy is anticipated in his comments in an 1831 entry about Thomas Jefferson:

In the evening I read a few pages of Jefferson's correspondence. . .

Mr. Jefferson's love of liberty was sincere and ardent—not confined to himself, like that of most of his fellow slave-holders. He was above that execrable sophistry of the South Carolina nullifiers, which would make of slavery the corner-stone to the temple of liberty. He saw the gross inconsistency between the principles of the Declaration of Independence and the fact of Negro slavery, and he could not, or would not, prostitute the faculties of his mind to the vindication of that slavery which from his soul he abhorred. Mr. Jefferson had not the spirit of martyrdom. He would have introduced a flaming denunciation of slavery into the Declaration of Independence, but the discretion of his colleagues struck it out. He did insert a most eloquent and impassioned argument against it in his Notes upon Virginia; but on that very account the book was published almost against his will. [Diary, p. 412]

113. The more politically-minded Lincoln, on the other hand, spoke of Jefferson in this manner (in 1854):

Mr. Jefferson, the author of the Declaration of Independence, and otherwise a chief actor in the Revolution; then a delegate in Congress; afterward, twice President; who was, is, and perhaps will continue to be, the most distinguished politician of our history; a Virginian by birth and continued residence, and withal a slaveholder—conceived the idea of taking that occasion to prevent slavery from going into the Northwestern Territory. He prevailed on the Virginia legislature to adopt his views, and to cede the Territory, making the prohibition of slavery therein a condition of the deed. Congress accepted the cession with the condition; and the first ordinance (which the acts of Congress were then called) for the government of the Territory provided that slavery should never be permitted therein. This is the famed "Ordinance of '87," so often spoken of. Thenceforward for sixty-one years, and until, in 1848, the last scrap of this Territory came into the Union as the State of Wisconsin, all parties acted in quiet obedience to this ordinance. It is now what Jefferson foresaw and
Unlike Jefferson, Adams did have "the spirit of martyrdom"—and this suggests both the attractiveness of the Massachusetts-man and the limitations of his political thought.

Adams, in his first term in the House of Representatives (he was then, in 1832, sixty-four years old), recorded the procedure for handling petitions:

Being Monday, the States were successively called for presentation of petitions; a most tedious operation in the practice, though to a reflecting mind a very striking exemplification of the magnificent grandeur of this nation and of the sublime principles upon which our Government is founded. The forms and proceedings of the House, this calling over of States for petitions, the colossal emblem of the union over the Speaker's chair, the historic Muse at the clock, the echoing pillars of the hall, the tripping Mercuries who bear the resolutions and amendments between the members and the chair, the calls of ayes and noes, with the different intonations of the answers from the different voices, the gobbling manner of the clerk in the reading over the names, the tone of the Speaker in announcing the vote, and the varied shades of pleasure and pain in the countenances of the members on hearing it, would form a fine subject for a descriptive poem. [Diary, p. 430]

He recorded as well his first presentation of abolitionist petitions:

Dec. 12 [1831] Attended the House of Representatives. . . . The petitions were called for by States, commencing with Maine and proceeding southward. 114 I presented fifteen petitions, signed numerously by citizens of Pennsylvania, praying for the abolition of slavery and the slave-trade in the District of Columbia. I moved intended—the happy home of teeming millions of free, white, prosperous people, and no slave among them. [Complete Works, 1:181-82]

Lincoln later corrected the statement that the prohibition was "a condition of the deed" but his general appraisal of Jefferson's attitude and effort with respect to slavery remains and invites comparison with Adams's. See Lincoln, Complete Works, 1:570-72.

114. This geographical sequence for "calling" the States is evident in the Declaration of Independence and in the Constitution, and was used for many years thereafter until the admission of many new States to the Union led (as it did in many other respects) to an abandonment (after the Civil War) of the old way of doing things.
that they should be referred to the Committee on the District of Columbia.

The practice is for the member presenting the petition to move that the reading of it be dispensed with, and that it be referred to the appropriate, or to a select, committee; but I moved that one of the petitions presented by me should be read, they being all of the same tenor and very short. It was accordingly read. I made a very few remarks, chiefly to declare that I should not support that part of the petition, which prayed for the abolition of slavery in the District of Columbia. . . . I was not more than five minutes upon my feet; but I was listened to with great attention. . . . [Diary, pp. 426-27]

His self-restraint at this stage is reflected in an entry of the month following:

Mr. Lewis is a member of the Society of Friends [the Quakers], and has taken much part for the last twenty years in the measures leading to the abolition of slavery. He came to have some conversation with me upon the subject of slavery in the District of Columbia. I asked him if he had seen the remarks that I made on presenting the petitions from Pennsylvania. He said he had—but wished to know my sentiments upon slavery. I told him I thought they did not materially differ from his own; I abhorred slavery, did not suffer it in my family, and felt proud of belonging to the only State in the Union which at the very first census of population in 1790 had returned in the column of slaves—none;¹¹⁵ that in presenting the petition I had expressed the wish that the subject might not be discussed in the House, because I believed discussion would lead to ill will, to heart-burnings, to mutual hatred, where the first of wants was harmony; and without accomplishing anything else. [Diary, pp. 429-30]

This was in 1832.

Disharmony did develop in the years that followed, however. Adams wrote in 1835:

¹¹⁵. "They were anti-slavery by birth, as their name was Adams and their home was Quincy." Henry Adams, The Education of Henry Adams (Boston: Houghton Mifflin Co., 1918), p. 25.
Aug. 11. There is a great fermentation upon this subject of slavery at this time in all parts of the Union. The emancipation of the slaves in the British West India Colonies; the Colonization Society here; the current of public opinion running everywhere stronger and stronger into democracy and popular supremacy contribute all to shake the fetters of servitude. The theory of the rights of man has taken deep root in the soil of civil society. It has allied itself with the feelings of humanity and the precepts of Christian benevolence. It has armed itself with the strength of organized associations. It has linked itself with religious doctrines and religious fervor. Antislavery associations are formed in this country and in England, and they are already cooperating in concerted agency together. They have raised funds to support and circulate inflammatory newspapers and pamphlets gratuitously, and they send multitudes of them to the Southern country, into the midst of the swarms of slaves. There is an Englishman by the name of Thompson, lately come over from England, who is traveling about the country, holding meetings and making eloquent inflammatory harangues, preaching the immediate abolition of slavery. The general disposition of the people here is averse to these movements, and Thompson has several times been routed by popular tumults. But in some place he meets favorable reception and makes converts. There has been recently an alarm of slave insurrection in the State of Mississippi, and several white persons have been hung by a summary process of what they call Lynch’s law; that is, mob-law. . . . There are now calls [in the newspapers] at Boston for a town-meeting to put down the abolitionists; but the disease is deeper than can be healed by town-meeting resolutions.

Aug. 14. The accounts of the riots in Baltimore continue. In the State of Mississippi mobs are hanging up blacks suspected of insurgency, and whites suspected of abetting them. At Charleston, South Carolina, mobs of slave-holding gentlemen intercept the mails and take out from them all the inflammatory pamphlets circulated by the abolitionists, who, in their turn, are making every possible exertion to kindle the flame of insurrection among the slaves. We are in a state of profound peace and over-pampered with prosperity; yet the elements of exterminating war seem to be
in vehement fermentation, and one can scarcely foresee to what it will lead. [Diary, pp. 462-63]

This account, from a friend of freedom and a vigorous opponent of slavery, suggests to me the conclusion that something ought to have been done to suppress the agitation and calm the people, North and South. It seems to have been assumed that the duty for moderating the conflict lay with State governments and with private citizens; Congress had no power with respect to such matters, at least short of the obligation to put down insurrections and preserve republican government in the States.

The most that the House of Representatives could do, it tried to do, by tabling the abolitionist petitions which it received. Such control Adams interpreted as an abridgement of his and his constituents' constitutional rights: when confronted by such a restraint, the high-spirited citizen is tempted to press for his rights at all costs. Thus began for Adams a struggle that was to last almost a decade, during which he was to record no more sentiments suggesting the need for moderating "the elements of exterminating war [which seem] to be in vehement fermentation." (Perhaps no solution short of the abolition of slavery could have permanently eliminated the conflict; but the foregoing of some rights by Northerners and, one suspects, more respect by Southerners for the rights as well as the sensibilities of others might well have kept men's minds clear.)

This struggle began with the New Year (1836) upon Adams's presentation of a petition by 154 Massachusetts inhabitants "praying for the abolition of slavery and the slave-trade in the District of Columbia." (Diary, p. 464) Two weeks later, additional abolitionist petitions were presented by him. (Diary, p.465) All such petitions were referred to a select committee of the House, which submitted its report to the House on May 18, 1836. This report declared, first, that Congress had no power to interfere with slavery in any State; second, that Congress ought not to interfere with slavery in the District of Columbia; and third, that since the agitation of the topic was disquieting, all petitions or papers relating to slavery "shall, without being either printed or referred, be laid upon the table, and that no further action whatever shall be had thereon." All three resolutions were passed over Adams's protest, the third by a vote of 117 to 68. And, the
editor of the Adams diary adds, "Such was the origin of the famous gag-rule." *(Diary, pp. 465-66)*\(^{116}\)

Adams records that this committee report was immediately attacked in the House "with extreme violence, and a fiery debate arose, which continued until one o'clock, and then, by a suspension of the rules, for another half-hour." *(Diary, p. 465)* In the year that followed, Adams attempted to present other abolitionist petitions, including some purporting to come from slaves. This in turn led to an attempt on January 23, 1837, to censure him in the House of Representatives. *(Diary, p. 476)* He had occasion thereafter to record:

April 19. . . . Upon this subject of anti-slavery my principles and my position make it necessary for me to be more circumspect in my conduct than belongs to my nature. I have, therefore, already committed indiscretions, of which all the political parties avail themselves to proscribe me in the public opinion. The most insignificant error of conduct in me at this time would be my irredeemable ruin in this world, and both the ruling political parties

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116. The effect of tabling such petitions was to shut off all debate respecting them. See chap. 8, n. 106, above. See, for a Southerner's assessment of the seventy-year conflict of which this gag-rule controversy was an episode, chap. 7, n. 95, above.

Robert Wain (of Pennsylvania) presented in the House of Representatives on Jan. 2, 1800

a petition of Absalom Jones and others, free men of color, of the city and county of Philadelphia, praying for a revision of the laws of the United States relative to fugitives from justice; and for the adoption of such measures as shall in due course emancipate the whole of their brethren from their present situation; which he moved to have referred to the committee appointed to inquire whether any and what alterations ought to be made in the existing law prohibiting the slave trade from the United States to any foreign place or country. *[Annals, VI, p. 229]*

The House voted, 85-1 (the one being George Thatcher of Massachusetts), that

the parts of the said petition which invite Congress to legislate upon subjects from which the General Government in precluded by the Constitution, have a tendency to create disquiet and jealousy, and ought therefore to receive no encouragement or countenance from this House. *[Annals, VI, p. 244]*

are watching with intense anxiety for some overt act by me to set the whole pack of their hireling presses upon me.

It is also to be considered that at this time the most dangerous of all the subjects for public contention is the slavery question. . . . The exposure through which I passed at the late session of Congress was greater than I could have imagined possible; and, having escaped from that fiery furnace, it behooves me well to consider my ways before I put myself in the way of being cast into it again. [Diary, p. 479]

Nothing was said by Adams on this occasion about the desirability (acknowledged thirty years earlier) of “putting a check upon the impetuous violence of the House of Representatives.” (Diary, p. 35) Rather, at the next session, he returned to the battle. Ordinary petitions were received by the House, but not those calling “for the abolition of slavery in the Territories; for refusing the admission of any new slave-holding State into the Union; and for the prohibition of the inter-State slave-trade.” (Diary, p. 484) During September, 1837, Adams presented several dozen more such petitions, “reserv[ing] a considerable number for the winter session.” (Diary, p. 484) He presented even more slavery petitions in December, all of which were tabled. One entry reflects the feeling of the time:

Dec. 20. Slade’s motion of Monday, to refer a petition for the abolition of slavery and the slave-trade in the District of Columbia to a select committee, came up.

Polk, the Speaker, by some blunder had allowed Slade’s motion for leave to address the House in support of the petition without putting the question of laying on the table. So Slade today got the floor, and in a speech of two hours on slavery, shook the very hall into convulsions. Wise, Legare, Rhett, Dawson, Robertson, and the whole [pro-slavery] herd were in combustion. Polk stopped him half a dozen times, and was forced to let him go on. The slavers were at their wits’ ends. At last one of them objected to his proceeding, on the pretence that he was discussing slavery in Virginia, and on this pretense, which was not true, Polk ordered him to take his seat. [Diary, pp. 490-91]

The following day a resolution was moved (and carried 136 to 65), like that of an earlier session, “that no petitions relating to slavery or the trade in
slaves in any State, district, or Territory of the United States shall be read,
printed, committed, or in any manner acted upon by the House." (Diary, p. 491) Adams, when his name was called, responded, "I hold the resolution
to be a violation of the Constitution, of the right of petition of my constituents, and of the people of the United States, and of my right to freedom of speech as a member of this House." (Diary, p. 491) He also recorded his exchange with a Southerner on the floor of the House the following day:

. . . . I bantered him upon his resolution, till he said that if the question ever came to the issue of war, the Southern people would march into New England and conquer it. I said I had no doubt they would if they could, and that it was what they were now struggling for with all their might. [Diary, p. 492]

Adams's entries continued to record the conflict: "Jan. 15 [1838]. . . . There were a great multitude of abolition and anti-Texas petitions from all the free States; all laid on the table. I presented nearly fifty myself." (Diary, p. 493) The gag rule provoked further petitions, which poured in on Adams and his supporters:

Jan. 28. I received this day thirty-one petitions, and consumed the whole evening in assorting, filing, endorsing, and entering them on my list, without completing the work. With these petitions I receive many letters, which I have not time to answer. Most of them are so flattering, and expressed in terms of such deep sensibility, that I am in imminent danger of being led by them into presumption and puffed up with vanity. The abolition newspapers . . . contribute to generate and nourish this delusion, which the treacherous, furious, filthy, and threatening letters from the South on the same subject cannot sufficiently counteract. My duty to defend the free principles and institutions is clear; but the measures by which they are to be defended are involved in thick darkness. The path of right is narrow, and I have need of a perpetual control over passion. [Diary, p. 493]

The "control over passion" evidently did not require, in his view, that he not arouse the passion of others:

Feb. 14. . . . The call commenced with me, and I presented three hundred and fifty petitions. . . . There was one, praying that
Congress would take measures to protect citizens of the North going to the South from danger to their lives. When the motion to lay that on the table was made, I said that "in another part of the Capitol it had been threatened that if a Northern abolitionist should go to North Carolina and utter a principle of the Declaration of Independence—“ Here a loud cry of “Order! Order!” burst forth, in which the Speaker yelled among the loudest. I waited till it subsided, and then resumed, “that if they could catch him they would hang him.” I said this so as to be distinctly heard throughout the hall; the renewed deafening shout of “Order! Order!” notwithstanding. The Speaker then said, “The gentleman from Massachusetts will take his seat”; which I did, and immediately rose again, and presented another petition. He did not dare to tell me that I could not proceed without permission of the House; and I proceeded. The threat to hang Northern abolitionists was uttered by Preston, of the Senate, within the last fortnight. [Diary, pp. 493-94]

The controversy raged through the year. On June 23, 1838, Adams was “peremptorily stopped by the Speaker” for his “disorderly words” on petitions. (Diary, p. 495) On December 14, he recorded his attempt to protest the treatment of additional petitions:

..... When my name was called by the clerk, I rose and said, “Mr. Speaker, considering all the resolutions introduced by the gentleman from New Hampshire as—” The Speaker roared out, “The gentleman from Massachusetts must answer aye or no, and nothing else. Order!”

With a reinforced voice—“I refuse to answer because I consider all the proceedings of the House as unconstitutional.” While in a firm and swelling voice I pronounced distinctly these words, the Speaker and about two-thirds of the House cried, “Order! Order!” till it became a perfect yell. I paused for a moment for it to cease, and then said, “A direct violation of the Constitution of the United States.” While speaking these words with loud, distinct, and slow articulation, the bawl of “Order! Order!” resounded again from two-thirds of the House. The Speaker, with agonizing lungs, screamed, “I call upon the House to support me in the execution of my duty!” I then coolly resumed my seat. [Diary, p. 496]
Three years later—the tabling of abolitionist petitions had continued—Adams described himself in this manner:

March 29 [1841] . . . . The world, the flesh, and all the devils in hell are arrayed against any man who now in this North American Union shall dare to join the standard of Almighty God to put down the African slave-trade; and what can I, upon the verge of my seventy-fourth birthday, with a shaking hand, a darkening eye, a drowsy brain, and with all my faculties dropping from me one by one, as the teeth are dropping from my head—what can I do for the cause of God and man, for the program of human emancipation, for the suppression of the African slave-trade? Yet my conscience presses me on; let me but die upon the breach. [Diary, p. 519]

Adams’s censure by the House was attempted again in early 1842 upon his presenting “a petition praying for the dissolution of the Union,” a petition which he himself did not endorse. (Diary, p. 533) A bitter struggle followed, which Adams recorded thus:

Jan. 31. My occupations during the month have been confined entirely to the business of the House, and for the last ten days to the defense of myself against an extensive combination and conspiracy, in and out of Congress, to crush the liberties of the free people of this Union by disgracing me with a brand of censure and displacing me from the chair of the Committee on Foreign Affairs for my perseverance in presenting abolition petitions. I am in the midst of that fiery ordeal, and day and night are absorbed in the struggle to avert my ruin. God send me a good deliverance! [Diary, pp. 535-36]

Deliverance came on February 7, on a vote of 106 to 93 to table the anti-Adams censure motion. The end of the following year, however, found Adams in even greater agony:

Dec. 21 [1843]. In the House, the life-and-death struggle for the right of petition was resumed. The question of reception of the petition from Illinois was laid on the table—98 to 80—after a long and memorable debate. I then presented the resolves of the Massachusetts Legislature of the 23rd of March, 1843, proposing an amendment to the Constitution of the United States, making the
representation of the people in the House proportioned to the numbers of free persons, and moved it should be read, printed, and referred to a select committee of nine. And now sprung up the most memorable debate ever entertained in the House. . . . [Diary, p. 561]

A Northern legislature was challenging, in the resolves presented by Adams, the constitutional arrangement which permitted the Southern States to count, for purposes of representation, three-fifths of their slaves. One can imagine the agitation of the Southern members by observing Adams’s: “The crisis now requires of me coolness, firmness, prudence, moderation, and fortitude beyond all former example. I came home in such a state of agitation that I could do nothing but pace my chamber.” (Diary, p. 562) This petition was presented to a Select Committee, rather than tabled, but not before one of the Southerners called upon the reporters to take note of what he was about to say, asked the particular attention of the House, and declared once for all, and forever, that he renounced this WAR against Southern rights which had been for several years waged in the hall. He would vote for my motion to refer these resolves to a Select Committee, and hoped I should be chairman of it, that the whole committee should be of the same complexion, and that the whole mass of abolition petitions should be referred to the same committee, that we might make a report in our own way, and the House and the country might see what we were after. . . . [Diary, pp. 562-63]

The struggle continued, but with the majorities upholding the gag rule steadily declining. In 1842 the supporters of the rule had a margin of only four votes; in 1843, the margin was down to three. (Diary, p. 573) But then occurred what Adams considered a disaster:

Quincy, Nov. 8 [1844]. . . . James K. Polk of Tennessee [who had been Speaker of the House of Representatives] is to be President of the United States for four years from the 4th of March, 1845. What the further events of this issue may be is not clear, but it will be the signal for my retirement from public life. It is the victory of the slavery element in the constitution of the United States.
Providence, I trust, intends it for wise purposes and will direct it to good ends. [Diary, p. 572]

Within a month Adams was back in Washington in the House of Representatives, where the "good ends" he had prayed for were realized, apparently because "the slavery element" could (upon having elected a President) relax its vigilance:

Dec. 3 [1844]. . . . In pursuance of the notice I had given yesterday, I moved the following resolution: "Resolved, that the twenty-fifth standing rule for conducting business in this House; in the following words, 'No petition, memorial, resolution, or other paper praying the abolition of slavery in the District of Columbia or any State or Territory, or the slave trade between the States or Territories in which it now exists, shall be received by this House, or entertained in any way whatever,' be, and the same is, hereby rescinded." I called for the yeas and nays. Jacob Thompson of Mississippi moved to lay the resolution on the table. I called for the yeas and nays on that motion. . . . The clerk called the roll, and the motion to lay on the table was rejected—81 to 104. The question was then put on the resolution; and it was carried—108 to 80. Blessed, forever blessed, be the name of God! [Diary, p. 573]

Adams's last significant diary entry related to the celebration of this victory:

March 13 [1845]. At the Patent Office, I applied to the Commissioner . . . . for the ivory cane made from a single tooth, presented to me by Julius Pratt & Co. of Meriden, Conn., and which on the 23rd of April last I deposited in the Patent Office. There is in the top of the cane a golden eagle inlaid, bearing a scroll with the motto "Right of Petition Triumphant" engraved upon it. The donors requested of me that when the gag-rule should be rescinded I would cause the date to be added to this motto; which I promised to do, if the event should happen in my lifetime. . . . There is a gold ring immediately below the pommel of the cane, thus engraved:
I crave pardon for the vanity of this memorial. [Diary, pp. 574-75] 117

One must wonder, however, whether the true memorial, not only to Adams but to all who contended with him (supporters and opponents alike) on constitutional principles regardless of costs, was the Civil War of the next generation. 118 The reader sensitive to moral and political realities is

117. The editor notes that from this date on the diary entries become increasingly scattered and feeble. Adams continued to serve in the House until February 21, 1848, when he was fatally stricken there. He died in the Capitol building on February 23 at the age of eighty.

118. A comparable struggle in the Senate is reported in H. von Holst's John C. Calhoun, American Statesmen Series (Boston: Houghton Mifflin Co., 1892), pp. 122-34. "[Calhoun] shares with the abolitionists the merit of having always probed the wound to the bottom, without heeding in the least the protesting shrieks of the patient." Id., p. 309. See chap. 8, n.109, above; see, also, chap. 7, n.95, above.

The two [hospitalized Civil War soldiers] were chatting of one thing and another. The fever soldier spoke of John C. Calhoun’s monument, which he had seen, and was describing it. The veteran said: “I have seen Calhoun’s monument. That which you saw is not the real monument. But I have seen it. It is the desolated, ruined south; nearly the whole generation of young men between seventeen and thirty destroyed or maim’d; all the old families used up . . . all that is Calhoun’s real monument.” [The Portable Walt Whitman (New York: Viking Press, 1945), p. 580]

See chap. 4, n.10, above. Compare Paine, Writings, 1:177.

. . . As early as the 1820’s the South Carolinian [Calhoun] had been increasingly conscious of a change taking place in the equilibrium of the power structure of the republic, a change harmful to the South. He sensed that some ingenuity was called for to maintain the balance. He was a man of ingenious mind, and he built upon the work of the Virginia dynasty. In the spirit of the Virginia and Kentucky resolutions of 1798 he could advocate nullification . . . . [Roy F. Nichols, Blueprint for Leviathan: American Style (New York: Atheneum, 1963), p. 133].

Daniel Webster, in his second reply to Senator Robert Young Hayne of South Carolina, January 26, 1830, interpreted in this way the resolutions written by Madison for the Virginia legislature:
prompted to wonder thus when he reflects on the problems that are ignored in Allan Nevins's editorial eulogy of this immoderately gallant former President of the United States:

\[
\ldots \text{the most dramatic record of all is that of how, as an old man, he met the forces of \ldots}}
\]

\[
\text{he met the forces of slavery in the gate, fought the Southern \ldots}}
\]

\[
\text{advocates of the gag-rule from session to session, and, often beaten but never despairing, after a decade of unremitting conflict won an ever-memorable victory for the great Anglo-Saxon rights of free petition and of free speech.}
\]

It was the happiest feature of Adams's public life that he lived to taste the full sweets of this victory over those whom in his acrid way he calls the slave-mongers, and to hear abolition petitions again referred to committees in the House. It was a happy fact also that he lived to make a tour of the West, in which he was able to see how warm a place his brave fight for freedom had won him in the hearts of the people of New York and Ohio.\textsuperscript{119}

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I cannot undertake to say how these resolutions were understood by those who passed them. Their language is not a little indefinite. In the case of the exercise by Congress of a dangerous power not granted to them, the resolutions assert the right, on the part of the State, to interfere and arrest the progress of the evil. This is susceptible of more than one interpretation. It may mean no more than that the States may interfere by complaint and remonstrance, or by proposing to the people an alteration of the Federal Constitution. This would all be quite unobjectionable. Or it may be that no more is meant than to assert the general right of revolution, as against all governments, in cases of intolerable oppression. This no one doubts, and this, in my opinion, is all that he who framed the resolutions could have meant by it; for I shall not readily believe that he was ever of opinion that a State, under the Constitution and in conformity with it, could upon the ground of her own opinion of its unconstitutionality, however clear and palpable she might think the case, annul a law of Congress, so far as it should operate on herself, by her own legislative power. \textit{[Works, 3:332]}

(See, for the opinion of John Taylor of Caroline, chap. 8, n.68, above. \textit{See, also}, chap. 7, n.2, above).

\textsuperscript{119} John Quincy Adams, \textit{Diary}, pp. xv-xvi. Nevins's evaluation of Adams's career seems to be that of most contemporary students. A reviewer of Samuel F. Bemis, \textit{John Quincy Adams and the Union} (New York: Knopf, 1916), wrote:

\[
\text{John Quincy Adams was an anomaly in American public life. A scholarly,}
\]
truculent, suspicious, little man, he despised the ways of politics yet let the politicians make him President. At a time when sectionalism was dominant, he thought in terms of a national interest that transcended internal differences. In an age of compromise, he remained inflexible. He came to the Presidency better equipped by training and experience than any man before or since his time but allowed his idealistic program to collapse because he would not deal with political realities. Then, at the age of sixty-three, Adams entered the House of Representatives, where he achieved the true greatness that was in him . . .

Bemis is at his best in the chapters dealing with the anti-slavery crusade, with the long battle for the right of petition . . . but it was here that Adams himself was at his best. . . . In the House of Representatives, he acknowledged responsibility to no party or clique but only to his conscience. There his deep moral fervor, his “compulsive genius for political contention,” his vast learning, the constantly whetted keenness of his mind, and the undiluted vitriol of his tongue made him one of the most feared debaters in congressional history— a fierce, unyielding champion of human freedom who could not be frightened, or coerced, or silenced. . . . [Charles M. Wiltse, American Historical Review 61 (1955-56): 981-82]

Ralph Waldo Emerson said, in a talk at Concord in 1844 (Complete Works [Boston: Houghton Mifflin Co., 1911], 11:133-34):

Gentlemen, I am loath to say harsh things, and perhaps I know too little of politics for the smallest weight to attach to any censure of mine,— but I am at a loss how to characterize the tameness and silence of the two senators and the ten representatives of the State [of Massachusetts] at Washington. To what purpose have we clothed each of those representatives with the power of seventy thousand persons, and each senator with near half a million, if they are to sit dumb at their desks and see their constituents captured and sold;— perhaps to gentlemen sitting by them in the hall? . . . I may at well say, what all men feel, that whilst our very amiable and very innocent representatives and senators at Washington are accomplished lawyers and merchants, and very eloquent at dinners and at caucuses, there is a disastrous want of men from New England. I would gladly make exceptions, and you will not suffer me to forget one eloquent old man, in whose veins the blood of Massachusetts rolls, and who singly has defended the freedom of speech, and the rights of the free, against the usurpation of the slave-holder. [Editorial note: John Quincy Adams, who, though disapproving, as untimely, the legislation urged on Congress by the abolitionists, yet fought strongly and persistently against the rules framed to check their importunity, as inconsistent with the right of petition itself.] But the reader of Congressional debates, in New England, is perplexed to see with what admirable sweetness and patience the majority of the free States are schooled and ridden by the minority of slave-holders.
Many more such victories, the prudent man may observe, and constitutional government is undone.

This story suggests to me that the most serious abuses of freedom of speech and of the press among us are likely to occur in circumstances where there is no safeguard but the good sense and self-restraint of the best citizens, of men who know when and how to use delicacy while "in pursuit of the public good." It is not enough to be right, in the strict constitutional sense. Rather, the good man should be concerned lest he deserve the rebuke that Cicero leveled against Cato—the rebuke with which Francis Bacon concluded his interpretation of the story of Cassandra:

They say that Cassandra was beloved by Apollo; that she contrived by various artifices to elude his desires, and yet to keep his hopes alive until she had drawn from him the gift of divination; that she had no sooner obtained this, which had all along been her object, than she openly rejected his suit; whereupon he, not being permitted to recall the boon once rashly promised, yet burning with revenge, and not choosing to be the scorn of an artful woman, annexed to it this penalty,—that though she should always foretell true, yet nobody should believe her. Her prophecies therefore had truth, but not credit: and so she found it ever after, even in regard to the destruction of her country; of which she had given many warnings, but could get nobody to listen to her or believe her.

This fable seems to have been devised in reproof of unreasonable and unprofitable liberty in giving advice and admonition. For they that are of a froward and rough disposition, and will not submit to learn of Apollo, the god of harmony, how to observe time and measure in affairs, flats and sharps (so to speak) in discourse, the differences between the learned and the vulgar ear, and the times when to speak and when to be silent; such persons, though they be


See Plato, Republic 536C.
wise and free, and their counsels sound and wholesome, yet with all their efforts to persuade they scarcely can do any good; on the contrary, they rather hasten the destruction of those upon whom they press their advice; and it is not till the evils they predicted have come to pass that they are celebrated as prophets and men of a far foresight. Of this we have an eminent example in Marcus Cato of Utica, by whom the ruin of his country [Rome] and the usurpation that followed, by means first of the conjunction and then of the contention between Pompey and Caesar, was long before foreseen as from a watchtower, and foretold as by an oracle; yet all the while he did no good, but did harm rather, and brought the calamities of his country faster on; as was wisely observed and elegantly described by Marcus Cicero, when he said in a letter to a friend, Cato means well: but he does hurt sometimes to the State; for he talks as if he were in the republic of Plato and not in the dregs of Romulus.121


His manners were little agreeable or acceptable to the people, and he received very slender marks of their favour; witness his repulse when he sued for the consulship, which he lost, as Cicero says, for acting rather like a citizen in Plato's commonwealth, than among the dregs of Romulus's posterity, the same thing happening to him, in my opinion, as we observe in fruits ripe before their season, which we rather take pleasure in looking at and admiring than actually use; so much was his old-fashioned virtue out of the present mode, among the depraved customs which time and luxury had introduced, that it appeared, indeed, remarkable and wonderful, but was too great and too good to suit the present exigencies, being so out of all proportion to the times.

See Edmund Burke, Works, World Classics (London: Oxford University Press, 1930), 4:189. Bacon's fable is found in his Wisdom of the Ancients, with the full title, "Cassandra; or Plainness of Speech." (In the Latin original, the title is Cassandra, sive Parrhesia. See, on parresia, chap. 9, n.9, below.) It is impossible to imagine the scenes described by John Quincy Adams as taking place either in the Constitutional Convention of 1787 or in the First Congress. Compare, in Gouverneur Morris (A Diary of the French Revolution, ed Beatrix C. Davenport [Boston; Houghton Mifflin Co., 1939] 1:232, 382), his disapproving description of the proceedings in the French Assembly during the Revolution. See, for a selection of extended comments by Morris, pt. 2 of the lecture on the Constitution appended to my doctoral dissertation. See,
APPENDIX C. THE PERSON IN ABORTION CASES AND IN A SLAVERY SYSTEM*

INTRODUCTION

Pro-lifers today proudly identify themselves with the abolitionists of a century and a half ago. Thus, they have seen in the toleration of abortion in the late Twentieth Century much that resembles the disturbing toleration of slavery in the early Nineteenth Century. There is something to this identification, which testifies to the strengths as well as to the weaknesses of both the abolitionist and the pro-life movements. A preliminary comment upon this identification is implicit in the following observations about the significance across centuries of the person in Anglo-American law.

I.

I have recently been asked, by a community leader here in Chicago, to comment upon this proposition, “The United States Supreme Court ruled, in Roe v. Wade, that a human fetus prior to birth is not a person in the constitutional sense.” This proposition invites both correction and commentary.

First, the Supreme Court made no such ruling in Roe v. Wade, 410 U.S. 113 (1973). Nor was the personhood of the human fetus, prior to birth, addressed either by the concurring opinions, or by the dissenting opinions, on that occasion. Rather, all nine Justices seemed to recognize that the human fetus has long, if not always, been regarded in the Anglo-American legal tradition as something other than a person. If the human fetus should indeed be regarded as a person, it would be very difficult to justify one or more of the exceptions permitted by most (but not by all) of those who advocate the pre-1973 restraints in this country upon performing abortions. Thus, even one of the dissenting Justices in Roe v. Wade assumed that no State should be allowed to enforce an anti-abortion law which did not permit an abortion (at any stage of the pregnancy?) when the life of the...

* A talk given by George Anastaplo to an alumni seminar of the Basic Program of Liberal Education for Adults, The University of Chicago, Chicago, Illinois, June 5, 2000.
woman carrying the fetus is endangered by her pregnancy. But if the human fetus is truly, or fully, a person, could it ever be justly killed in order to save the pregnant woman? Certainly, it is generally understood that the life of one innocent person cannot be taken in order to save the life of another.

If the human fetus is not a person, then it is not accurate to speak, as some do, of a fetus being “murdered” by the abortionist. If, however, the fetus is a person, then the community probably has the duty to prevent most, if not all, of the deliberate abortions we are now accustomed to. If, again, the fetus is not a person, then how the community deals with the treatment of fetuses by doctors and others is likely to become more complicated. The fact that the fetus is not regarded as a person does not mean that the State should have no authority to deal with what is done to or with fetuses. The fetus is obviously a living thing—and there are many living things, aside from human beings, which communities are expected and empowered to regulate and protect. Various species of animals, of fish, of birds, and of plants may be rigorously looked after by the community, as may be of course many inanimate things, including rock formations, rivers, and buildings.

II.

At the other constitutional extreme, so to speak, from the insistence that the human fetus is a person is the insistence that such a fetus is left so much in the control of the pregnant woman that the community should have no legitimate say about how she deals with it. But it is not difficult to imagine social and hence legal limitations that might properly be placed upon the pregnant woman. The community, for example, might have a duty, as well as the power, to interfere with practices by pregnant women, or by others around them, which routinely damage (without aborting) fetuses, so much so as to burden the community thereafter with permanently crippled children. The community might even have the duty to interfere at a prior stage, prescribing when or how or where a woman might be impregnated and by whom. (We can be reminded here of, for example, laws forbidding incest, the seduction of minors, and rape.) Thus, just as the human fetus is not a person, always entitled to the protections that a human being is routinely entitled to, so a woman is not a super-person, a virtually sovereign individual who is beyond the reach of the community with respect to anything she might choose to do (prior to a live birth) with her body and hence with the fetus she happens to be carrying.
I return to *Roe v. Wade*. The Supreme Court there, in the way it regarded the human fetus, was very much in the Anglo-American legal tradition. It is that tradition upon which I draw in this talk, leaving for another occasion a discussion of the principles, authorities, facts and arguments of those who sincerely believe that the human fetus is an ensouled person from the moment of its conception. Although the Anglo-American tradition does not work from this premise, it does not deny that someone might be punished, or obliged to pay damages, for the harm caused to a couple’s fetus. This kind of liability, it should at once be added, does not depend upon the fetus ever being considered a person, however harsh the judicial treatment might be of anyone who causes such harm. (The refusal of Anglo-American law to designate the human fetus a person has long been considered consistent, by the way, with legal arrangements which can have fetuses designated as beneficiaries of designated property interests, but such arrangements are usually contingent, for their realization, upon live births.)

That the human fetus has not, in American constitutional history, been regarded as a person is reflected in such facts as that fetuses are never counted in the census required every ten years by the Constitution. Neither potential human beings (that is, the fetus, no matter how near to delivery) nor former human beings (that is the dead, no matter how recently alive) are counted in compliance with the mandate (in Article I of the Constitution) to determine the number of persons to which representation and taxation are to be keyed.

III.

I have suggested that although the human fetus is not regarded as a person in our constitutional tradition, the community may still do much to regulate what is done among us to or with fetuses. On the other hand, our experience with the decennial census should caution us against relying too much or in a mechanical fashion upon the issue of personhood to settle serious controversies among us. For the census provision in the Constitution, already referred to, can help us notice that although human fetuses are not regarded by the Constitution as persons, slaves certainly were thus regarded so long as there were slaves in the United States. Three-fifths of the slaves in this country were included by the Framers among the persons to be counted toward the allocation of seats in the House of Representatives. Nor should this Article I provision be taken to mean, as it often is, that the slave was not regarded as fully or truly a person, but only
as three-fifths of a person. Southern slaveholders were quite willing to have their slaves, along with (as in the North) their non-voting women, children and resident aliens, counted as full persons for representation purposes. That slaves were regarded as persons may be seen elsewhere in the Constitution as well. For example, the fugitive slave is referred to, in Article IV of the document, as a person, one who is to be returned to the labor sanctioned by the laws of the State from which he has fled.

These and like provisions meant, among other things, that although the slave was a person, he could, depending upon how State laws were framed, be routinely denied fundamental liberties. This seems to have been consistent with the intentions and expectations of the Framers of the Constitution, accommodating themselves thereby to an arrangement which would encourage, perhaps even require, the eventual elimination of slavery in the United States. That elimination was contributed to by the recognition, in the Constitution as elsewhere, that the slave was truly a person. Thus, since the slave was a person, and obviously so—that is, since he was no doubt a human being—, challenges could properly be made to the laws, and even more important to those underlying constitutional provisions, that permitted the slave to be denied privileges and immunities, or the rights and liberties, to which all human beings are believed to be naturally entitled in ordinary circumstances. There has been, at least since Magna Carta, a presumption in favor of liberty among the English-speaking peoples. Indeed, the Southern States which attempted to secede from the Union, in 1860-1865, proclaimed themselves the champions of liberty even as they insisted upon retaining slavery.

Be all this as it may, when a community is properly ordered, there are apt to be few if any hereditary slaves. Perhaps, also, when human relations are properly ordered, there are apt to be few if any abortions. Vital to such proper ordering in both situations is an informed awareness in the community of three questions: Who is truly a person? What are persons obliged to do and not to do? How are persons generally entitled to be treated? Perhaps the most difficult of these three questions to grasp today is what it is that persons are obliged to do and not to do. It is here that our most troublesome controversies—such as the civil rights controversy (a legacy of our experience with slavery) and the abortion controversy (a reflection of modern individualism)—may be usefully engaged.
CONCLUSION

It should be evident from these observations that the critical questions with respect to issues such as slavery and abortion are political and moral questions, not primarily constitutional questions of the kind that courts can reasonably be expected to settle. That is one of the lessons of the disastrous ruling by the United States Supreme Court in *Dred Scott v. Sandford*, 60 U.S. (19 Howard) 393 (1837). Abraham Lincoln, however much he respected and even drew upon the anti-slavery principles of the antebellum abolitionists, believed that their passion had to be disciplined by political requirements if slavery was indeed to be contained in the Territories of the United States and eventually eliminated in the South. Pro-choice citizens are eminently useful today, not least in that they remind the community at large that there are standards by which the laws, as well as the opinions, of the day may be judged and corrected. Certainly, such citizens are entitled, if not even obliged, to help us all examine the constitutional doctrines which courts presume to pronounce, whether the courts are like the *Dred Scott* Court in 1857 or are like the *Roe v. Wade* Court in 1973.

APPENDIX D. CONVENTIONS, REASON AND AUTHORITY*

It is easy to feel pride and satisfaction in one’s own things, so hard to make sure that one is right in feeling it! —Matthew Arnold

It is perhaps providential that this Caxton Club dinner meeting, dedicated this month to the memory of your esteemed member, Elmer Gertz, should happen to fall at Midsummer’s Night’s Eve. This is a holiday that is most familiar to us because of Shakespeare’s play, a play in which Puck, also known as Robin Goodfellow, is put to work by his sovereign in the Wood.

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* A talk given by George Anastaplo to the Caxton Club, Chicago, Illinois, June 21, 2000. The other speakers on this program were Harry Mark Petrakis, a Greek-American story-teller, and Paul Simon, former United States Senator from Illinois.

i. MATTHEW ARNOLD, ESSAYS IN CRITICISM, SECOND SERIES 127 (1924).

I say “providential” because Elmer Gertz was Puckish in more ways than one, including in his effervescence, if not also in his physical appearance. Had he taken to the stage, Puck surely would have been one of his favorite parts. And in the Wood of Life, especially in the law courts, he was an ever-active servant of his sovereign, which could be not only his clients but even more the law and the community which the law serves.

But, we recall from Shakespeare’s play, that things can go wrong when Puck is put to work, especially when his sovereign, Oberon, either is unduly moved by passions or is imprecise in the directives he lays down. Sovereigns, it is salutary to be reminded, sometimes do not know what they are doing or even what they are asking for.

The opinions of a sovereign—of the community at large—often appear in the form of the conventions of the day. Those conventions do have to be challenged from time to time, including (in Elmer’s Gertz’s experience) conventions about acceptable literary publications, about prison practices and expectations, about capital punishment, and about constitutional arrangements. We all know, of course, of the services he rendered to the likes of Henry Miller, Nathan Leopold, Jack Ruby, and Illinois constitutionalists.iii In the course of these campaigns, he also struck a blow for personal privacy which netted him a handsome libel-suit award and, through it, a much-enjoyed deluxe cruise around the world with his lively wife.iv

It is prudent to notice, upon surveying the accomplishments of the campaigning Gertz, that he was not simply a professional iconoclast. That is, there were standards in the light of which he selected his causes, standards which reflected his ultimate grounding in a lifelong respect for proper authority, beginning of course with his deeprooted allegiance to Judaism.v Otherwise, he would have been like various prominent lawyers we know whose guiding principle sometimes seems to be notoriety, preferably a profitable notoriety, without much effective concern for guilt, innocence, or the common good.

Particularly instructive here is what Elmer Gertz said about the Jack Ruby case, that 1966 case which led him to study with some care the assassination of President Kennedy as well as the shooting of Lee Harvey Oswald. Our Chicago lawyer, as many of you know, did not become professionally involved in these matters until Ruby had been sentenced to death in a Texas court. This acknowledged killer of Oswald himself died in January 1967, evidently of natural causes, not long after his conviction had been vacated and while awaiting a new trial. The principal issue that the Gertz team planned to develop was whether the defendant had been of sound enough mind to warrant a death sentence for what he had obviously done, in full view of a nationwide television audience. The Gertz approach to this matter is reflected in the title he gave to the book he wrote about all this, *Moment of Madness*.

The most valuable part of this big book is its championing of common sense in helping the public think about the Kennedy-Oswald-Ruby entanglement, perhaps the Bermuda Triangle of American public life, at least in our time. It has now been more than thirty years since *Moment of Madness* was published—and nothing substantial has emerged since then to require the intelligent reader to accept an account of those terrible 1963 Dallas killings that is significantly different from the more or less orthodox account we have had for decades, the account presented in the Gertz book: to wit, the President was killed by a lone assassin, acting on his own, who was killed in turn by a lone gunman, again acting on his own, a gunman who often carried a pistol, who was known to be quite impulsive, and who readily moved in and out of Dallas police circles.

It is possible, of course, that evidence may yet be unearthed which exposes an elaborate assassination plot as well as extensive coverup measures (which included the gunning down of an innocent suspect by a hitman who was in turn ruthlessly done away with while he was held in jail). What would such evidence of a plot, if truly persuasive, really prove? Only that one of the literally hundreds, if not thousands, of quite fanciful conspiracy theories and other wild speculations by which we are routinely threatened and hence entertained—only that one of these speculations had actually won the Fantasy Lottery. Thus, it is possible that one can, on rare occasions, be "proven" correct about something that one had never been

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justified in believing—that one had been no more justified in believing than are those hundreds (if not thousands) of people justified in believing, for example, that they have been personally abducted into spaceships or wherever and then returned to their everyday lives by aliens from outer space.\textsuperscript{vii}

It should have long been obvious that immense fortunes are to be made by anyone who has access to experience with massive coverups—and there would have to be many with such experience if the speculations by which we are barraged have any merit. Men and women run great risks to make far less money than would be available to anyone who comes forward with credible evidence about the more spectacular coverups which have been alleged over the decades, beginning with, say, the “Roswell” phenomena. And yet such evidence has not been forthcoming—which may be evidence for some truly cosmic conspiracy which is virtually impossible to fathom. Unfortunately, comfortable (if not immense) fortunes can also be made developing and retailing exciting allegations, however flimsy the evidence available to support them has to be. The mass media, as we all know, are always desperate for something “new,” even if it is really more of “the same old thing” and thus destined to engage us for only a brief span on each occasion. The irresponsibility of the purveyors here, who can include respectable mass media executives, should be obvious, not least when they themselves are gullible.

Fundamental to our situation these days is the problem of the status of authority itself, a problem which has been worsened by such disturbances as our decade-long involvement in Indochina, our addiction to Cold War fantasies, and our dependence upon political leaders who turned out to be

\textsuperscript{vii.} Indeed, it might even be argued, in support of such claims by returned abductees, that the temperament and the mode of argument of those who report these experiences testify to the judgment of those “aliens” who have done the abducting: that is, it is the sensible abductees that they have evidently kept. See “Scientific Integrity, UFOs, and the Spirit of the Law,” in George Anastaplo, \textit{Lessons for the Student of Law: The Oklahoma Lectures}, 20 Okla. City U. L. Rev. 19, app. at 187 (1995). See also Alessandra Stanley, \textit{3rd Secret of Fatima is Revealed by Vatican}, Chi. Trib., May 14, 2000, § 1, at 3 (distributed by the New York Times News Service); Henry Chu, \textit{Fascination with Paranormal Sweeps All Walks of Life in China}, Chi. Trib., Apr. 24, 2000, at A-18; Antony Barnett, Britain’s UFO Secrets Revealed, London Observer, June 4, 2000, at 18; Patricia Cohen, \textit{From U.F.O. Dreams to Federal Schemes, He Debunks Them All}, N.Y. Times, Apr. 29, 2000, at A15. George Bernard Shaw observed, a century ago, that “modern populations are so vast that even the most uncommon things are recorded once a week or oftener.” GEORGE BERNARD SHAW, III COMPLETE PLAYS WITH PREFACES lii (1963).
not as trustworthy as we had allowed ourselves to believe. Elmer Gertz, whatever the conventions that he was obliged, if not even eager, to challenge from time to time, retained a deep-seated respect for authority—for the principles and institutions upon which this country must depend. He did not permit himself to become as apprehensive of government or as suspicious of official pronouncements as it has long been fashionable to be.

The contemporary suspicion of authority includes determined resistance among us to any communal efforts to shape and thereafter to preserve the character of the people of this country. This has gone so far that even lawyers, our anointed ministers of public rationality, can no longer be counted on to respect either the authority of reason or the protocols of institutions that have been rationally developed in the interest of justice. The habitual responses of not a few lawyers these days take two forms, either a thoughtless resistance to all constituted authority or, in an effort to establish their own authority, a recourse themselves to power instead of to reason. In the process, lawyers become thoroughgoing, and consequently irresponsible if not even cynical, skeptics. But it is aptly noticed, in the Moment of Madness book, that "it is as much a form of gullibility to believe nothing as it is to believe everything."viii

viii. GERTZ, supra note vi, at 540 (quoting Hugh Kingsmill). On the lawyer's duty in this kind of case, see id. at 127-28. On the Kennedy Assassination generally, see George Anastaplo, Human Nature and the First Amendment, 40 U. Pitt. L. REV. 661, 702-05 (1979). Consider, also, the following set of observations I made in 1974:

I should notice that many Europeans are even more skeptical than some Americans are about the official accounts of the Kennedy assassination. I recall being met at a Paris airport the summer after the assassination by an experienced Chicago criminal lawyer, of liberal (if not even radical) inclinations—a lawyer who had been in Paris for a year. The first thing I asked him was, "Who killed President Kennedy?" "Oswald, of course," he replied. And he let me know, in response to my questions, he did not see any connection between Mr. Ruby and Mr. Oswald. I then asked, "Is this what you have learned from the Paris newspapers?" "No," he replied, "but they have never been in an American police station. I have and I know what can go on there!"

Thus, Mr. Ruby's moment of madness need not be seen as part of a conspiracy in order to be understood. Indeed, is it not a distortion of reality to have recourse to conspiracy theories to understand such things?

Id. at 704-05. See Mike Dorning, U.S. Report Debunks [Martin Luther] King Conspiracies,
The middle course between these two extremes—the extreme of mindless negativity and the extreme of ruthless power-plays—the middle course is that steered by Elmer Gertz, almost instinctively, it could sometimes seem. We can be reminded, by his long career of enlightened public service, of an observation made by Matthew Arnold a century and a half ago,

The world is forwarded by having its attention fixed on the best things . . . . A nation . . . is furthered by recognition of its real gifts and successes; it is [thus] encouraged to develop them further.\textsuperscript{ix}

\textsuperscript{ix} ARNOLD, supra note i, at 127. The term “recognition” in this quotation from Matthew Arnold depends upon proper observation and sensible interpretation of that which is observed. This dependence is drawn upon in the following Letter to the Editor that I sent to the New York Times on April 1, 2000 (a letter which was not published):

Your correspondent (April 3, 2000) is right to remind us “that people who choose to use tobacco products are doing so with full knowledge of the consequences.” He insists that smokers should not “be absolved of taking responsibility for their own actions.” What should be said, then, about the “responsibility” for the “actions” of those who produce and market obviously harmful products, year after year, “with full knowledge of the consequences”? That is, should only those addicted to nicotine, and not those addicted to substantial profits, be expected to pay for the considerable damage done because of tobacco?

Such suggestions as these can be offered as contributions to enlightened public service. The ultimate authority invoked here may be that of the common good or, in the words of the United States Constitution, the general welfare. The potency of this authority is acknowledged by the determination of the framers in 1861 of the Confederate Constitution to remove “the general Welfare” both from the Preamble and from Article I, Section 8 of the Constitution. See GEORGE ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION 195 (1995). See also Appendix A of this Collection.

We return here to the Four Causes of this Collection’s Prologue by illustrating “the different ways in which something can be said to be responsible for something else”:

\ldots Aristotle does not deviate [here] from the Socratic-Platonic path. There are different meanings attached to the question “Why?” and, correspondingly, there are different ways of answering the question, “Why is this lectern such as it is?” We might answer: “because of the wood, the particular material out of which it is made.” We might also say: “because the particular carpenter, the maker, made it this way.” We might also say: “because of the \textit{shape} or \textit{look} the maker
It is fitting and proper, therefore, that your Club, with its determined respect for fine books, should celebrate Elmer Gertz's patriotic career as you do this auspicious evening.

The volumes you cherish tend to be those old books whose intrinsic quality is such that considerable resources could be devoted over the centuries to their creation, publication and preservation. No doubt, chance can affect what happens to be printed and preserved—but there is still the dominant sense among you that there are in the world fine publications which can be identified as such (if only for the craftsmanship in their production), things which are worthy of enduring respect. Even worthier of respect, of course, are lives well-lived by those who truly know what they are doing, especially as they stoutly challenge conventions when it is indeed their duty to do so, but without mindlessly repudiating in the process all legitimate authority.

had in mind." We might finally say: "because of the purpose this thing is supposed to serve." However important and even indispensable the first three answers might be, it is not difficult to agree that the choice of the material, the shape or looks of the thing, and the performance of the maker who initiated the transformation of the material into the lectern all depend on the purpose, the end for the sake of which the lectern has been made. It is that purpose which is decisively responsible for the lectern being as it is. Its purpose, its end, is its true "beginning." . . .

Jacob Klein, LECTURES AND ESSAYS 192 (1985) (the Greek terms have been omitted). On the Four Causes, see also Joe Sachs, ARISTOTLE'S "PHYSICS": A GUIDED STUDY 257 (1995); Book Review, 26 INTERPRETATION 275 (1999).