

# Principalities & Powers

by Samuel Francis

No matter how many curses should be heaped on the head of Thurgood Marshall, recently retired from some 24 years of slicing and twisting the raw meat of the Constitution into whatever ideological pastry suited his appetite of the moment, even his shrillest foes have to acknowledge Mr. Marshall's eminence in the legal and judicial world in which he lived. When Lyndon Johnson hailed him to the Supreme Court in 1967 as the first black justice in American history, Mr. Marshall was by far the most distinguished civil rights tub-thumper in the country. For years he had manfully wrestled and wriggled with Jim Crow and the sour apostles of the thesis that the children of Ham shall never mix with the progeny of Shem and Japheth, and his crowning moment came in 1954, when he mouthed before the Court the clever sophisms that won the field in *Brown v. Board of Education*. It was hardly his fault that by the time of his retirement last June, Mr. Marshall's mind had long since rotted on the shelf, and he spent his final days in office muttering to reporters the same inanities he had entrenched in the nation's fundamental law.

Unfortunately, Clarence Thomas, his would-be successor, cannot match Mr. Marshall for distinction. Though there is no evidence of senility in the man President Bush named to the Court a few days after Mr. Marshall bid farewell to it, neither is there much indication of intellectual luster. Mr. Thomas appears to be as much of a man of integrity as any career public servant can be, and he is by no means given to the kind of jurisprudential extravagance that made Mr. Marshall and his colleagues on the Warren Court a greater menace to society than Baby Face Nelson. Nevertheless, he does espouse a judicial philosophy, though his is a creed only marginally different from the egalitarian sonorities that steamed through the pipes of his predecessor's cerebral organ.

Mr. Thomas, the author of a number of articles in legal journals and the popular press, is a disciple of philosopher and historian Harry V. Jaffa, and

his bibliography bristles with allusions to and quotations from the works of the Master. Mr. Jaffa, now retired from a long career at Claremont College, is perhaps best known for his own untiring adulation of the political emissions of Abraham Lincoln and for nearly twenty years of literary guerrilla warfare with Lincoln's chief contemporary nemesis, Professor M.E. Bradford of the University of Dallas.

Some years ago, after the repeated thrashings Professor Bradford had inflicted on Mr. Jaffa's roseate views of Father Abraham and their supposed connection with the "Founding" of the Republic, his friends and supporters (of whom I am one) deluded themselves that Lincoln's ghost would rise no more and that we were free at last of the sage of Claremont. But it was not to be. Indeed, the Jaffa school, a faction of the larger conclave that trundles after Mr. Jaffa's own mentor, Leo Strauss, seems to have permeated much of what passes for philosophical conservatism in the country today. Both Jack Kemp and Lew Lehman, among other illuminati, have lent their lips to his praise, and in one guise or another his disciples throng the think-tanks, law firms, and periodicals that have sprouted in the beehives of the right for the last decade or so. Now Mr. Thomas threatens to inject Mr. Jaffa's pronouncements into the Constitution itself, whence they shall come to rule the land for generations. Those who understand the errors of the Jaffa persuasion cannot welcome this prospect, nor can those Americans who would prefer to be governed, not by the concoctions of an academic stylite, but by the simple rules and principles their forebears established.

The central contention of Mr. Jaffa's teaching is the claim that the Declaration of Independence—specifically, its assertion that "all men are created equal"—governs the Constitution. As Mr. Thomas expresses it in an article in the *Harvard Journal of Law and Public Policy*, "If the Constitution is not a logical extension of the principles of the Declaration of Independence, important parts of the Constitution are inexplicable." The purport of this claim is that in the absence of the egalitarian effusion at the begin-

ning of the Declaration, there is little justification for much of what eventually triumphed in American history—the prosecution of war against the South, Lincoln's own egalitarian rhetoric, the abolition of slavery, the passage of the Reconstruction amendments, and the victory of the civil rights movement over states' rights and segregation. Mr. Jaffa, Mr. Thomas, and their school are at one in demanding concurrence in the view that the doctrine of equality is the guiding principle of the American political tradition.

Yet the argument for the connection between Declaration and Constitution is particularly weak. Not only were the two documents the work of almost entirely different groups of men assembled in two entirely different institutions and under entirely different circumstances, but also the documents themselves are entirely different in their purposes and content. The Declaration of Independence is precisely that—a declaration (by the representatives of the 13 colonies) that the colonies were no longer subordinate to Great Britain but independent states. The first part of the Declaration rehearses the natural rights ideology that enjoyed a vogue among many educated Americans and Europeans (especially at the French court, whose sympathy the Americans were trying to win), but the grounds for and the meaning of these bromides are never made clear, and they are soon forgotten in the bulk of the document. As Professor Bradford has shown, most of the Declaration is an exposition of the atrocities allegedly visited upon the colonists by George III, and they are atrocities not because they violate "natural rights" or the doctrine of equality but because they transgress the historic liberties of Englishmen and thereby deliver the innocent subjects of the king to the misrule of an illegal and arbitrary regime.

Yet, even if the Declaration is read as a predominantly egalitarian manifesto, its relevance to the Constitution remains minimal. The Constitution presupposes the Declaration only in the sense that national independence was necessary for any national constitution to have legal and political stand-

ing. But nowhere in the Constitution are the Declaration or its supposed doctrines invoked or implied, and in the Preamble, where the purposes of the charter are explicitly stated, the Declaration and any mention of equality are conspicuous by their absence. All of which is understandable. The Framers of the Constitution had enough trouble drafting, adopting, getting ratified, and enforcing their charter without importing into it the quixotic ramblings of Enlightenment table-talk.

As dubious as the Jaffa-Thomas connection between Declaration and Constitution is, it is the foundation for a good deal of mischievous misunderstanding of what the Framers intended and of how the idea of equality should be imposed upon us. Mr. Thomas, again following Mr. Jaffa and his school, has to explain why it is, if the Framers were egalitarians, they refrained from abolishing slavery and even went so far as to acknowledge and protect slavery in the text of the Constitution: the "three-fifths clause," whereby slaves were to count as three-fifths of a free person in apportioning congressional representation; the fugitive slave clause; and the prohibition of restrictions on the slave trade until 1808.

It is the conceit of the Jaffa-Thomas school that, in Mr. Thomas' words, "With the Declaration as a backdrop, we can understand the Constitution as the Founders understood it—to point toward the eventual abolition of slavery." The protection of slavery in the Constitution the Jaffa-ites see as a mere "compromise," necessary to drag along the Southerners, who would not have ratified the Constitution had they believed the document contemplated abolition.

It is curious that the Jaffa-Thomas argument, ostensibly designed to praise the Constitution and its architects, in fact turns the Framers into liars and hypocrites. When Virginia debated ratification, for example, Patrick Henry, who opposed ratification, argued that the Constitution and its strong central government would indeed lead to the abolition of slavery. But both James Madison and Edmund Randolph, leading veterans of the Constitutional Convention, denied his charges vigorously. "There is no power to warrant it

[abolition]," Madison declared. "I believe such an idea never entered any American breast." Randolph also argued that "The Southern states, even South Carolina herself, conceived [slaves] to be secure by these words [the slave-trade clause]. . . . There was not a member of the Virginia delegation who had the smallest suspicion of the abolition of slavery."

If the Jaffa-Thomas interpretation is correct, then Madison and Randolph either were lying or else didn't understand the document they had just helped write. Moreover, if the Framers had really regarded slavery as a grotesque violation of natural rights that should have been abolished, how can their temporary compromises with it be judged as anything but the most cynical pragmatism?

Indeed, Madison's own notes of the Convention show that there was no intention on the part of the Framers to abolish slavery through the Constitution, though different members expressed different opinions about slavery as an institution. In any case, the Jaffa-Thomas efforts to paint slavery out of the Constitution (and thereby exclude acceptance of inequality in the American political tradition) don't wash. As historian William E. Wiecek has written, "So permeated was the Constitution with slavery that no less than nine of its clauses directly protected or referred to it."

Were Mr. Jaffa's misconceptions confined to the esoterica of the Founding, they might be irrelevant for constitutional law today. But Mr. Thomas insists on making them stand up and march. If the purpose of the Constitution is to implement the equality clause of the Declaration, then it is the business of the Supreme Court to get on with the project. Mr. Thomas himself has roundly endorsed this mission, praising Martin Luther King's characterization of the Declaration as a "promissory note" (a conception strikingly similar to that of Mr. Jaffa), and gladly hailing also King's remarks showing that "Dr. King captured well the utopianism of America." He finds especially inspiring "the powerful element of the American political tradition President Reagan appeals to in his frequent quotation of the political theorist and pamphleteer Tom Paine: 'We have it within our power to begin the

world over again.' Paine captured well the revolutionary meaning of basing a particular nation on a universal truth, the truth of human equality."

It was, of course, the "truth of human equality" that produced the Reign of Terror in the country where natural rights egalitarianism was so chic a few years before. Mr. Jaffa and Mr. Thomas presumably would disavow the bloodshed of the French Revolution (ideologues never take responsibility for their misshapen offspring; they merely engender more), but the passion they share with Paine and Robespierre for using the state to impose equality by force ought to make us skeptical.

Mr. Thomas, of course, is best known for his criticism of affirmative action and other "group rights" that egalitarians of the stripe of Thurgood Marshall have spawned. There is no reason to doubt his sincerity, but the point is that the Jaffa-Thomas brand of equality is no less generative of tyranny than that of Mr. Marshall.

It is in his account of civil rights law that Mr. Thomas makes clear his fundamental kinship with Jacobinism. Unlike the Warren Court, which invoked social science as a justification for striking down school segregation, Mr. Thomas relies on the dissent of Justice John Marshall Harlan in the decision *Brown* overturned. In *Plessy v. Ferguson* (1896), the Court upheld a law segregating New Orleans streetcars on the grounds that such social segregation was not inherently a "badge of inferiority" but was only construed as such by the "colored race." The Court had already held in the *Civil Rights Cases* of 1883 that "badges of slavery" were forbidden by the Thirteenth Amendment's outlawing of slavery itself. In *Plessy*, it simply refused to label segregation such a badge.

Harlan dissented, arguing, as he had in his dissent in the 1883 decision, that the Thirteenth Amendment forbade all forms of racial segregation on the grounds that "the arbitrary separation of citizens, on the basis of race . . . is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution." Harlan's view, based on the same understanding of the Declaration as egalitarian charter that the Jaffa school promulgates, is thus broader

than that proclaimed by the Warren Court in *Brown* nearly sixty years later. In *Brown*, only state-enforced school segregation was struck down. Harlan's reasoning would forbid private racial discrimination as well, and it is Harlan's view that Mr. Thomas and other Jaffa disciples champion.

Jaffa-ite Kenneth M. Holland has written that "The Court [in 1883 and 1896] erroneously held that the Thirteenth Amendment did not reach pri-

vate acts of racial discrimination" and that "By itself, the Thirteenth Amendment prohibited all forms of racial discrimination practiced by governments or by individuals and corporations providing public services." The Court's error, in Mr. Holland's view, was illuminated only by the dissent of Justice Harlan, and Mr. Thomas substantially concurs. "Justice Harlan understood, as did Lincoln," Mr. Thomas writes in the *Howard Law Journal*,

"that his task was to bring out the best of the Founders' arguments regarding the universal principles of equality and liberty."

And logically so. If equality as the Jaffa school understands it is the premise of American government, then it must be universal and uncompromising in its application. Mr. Jaffa's faction has manufactured a rationale by which any social or individual act, if it can be shown to involve "discrimination" and therefore to perpetuate some supposititious "badge of slavery," can be extirpated by the state on the grounds that it violates the imperative of equality that Mr. Jaffa and his academy of astrologers spy in their metaphysical zodiac. Not just the segregation of public facilities but also any private choice that reflects a desire for racial homogeneity: choosing to live in a white neighborhood, to send one's children to a white school, or merely to associate with other white people. These, in the absolutist *Weltanschauung* of the Jaffa-ites, are not matters of individual preference but transgressions of the egalitarian message the school sees carved in the face of the heavens.

How far the Jaffa school in general and Mr. Thomas in particular are willing to carry the ideological mission they have shouldered is not clear, but two warning signs should be posted. First, regardless of how far they wish to carry it themselves, the country today is full of crackpots and demagogues who are eager to push the implications of equality to the limit and beyond. Second, the Jaffa doctrines do nothing to resist or to challenge these implications or their champions. Indeed, it is the proudest boast of Mr. Jaffa's adherents that the tree of equality will bear much larger fruit if it is planted in the soil of "natural rights" rather than in the sociological compost heap of the egalitarian left.

But the tree is the same species nonetheless and is scarcely to be distinguished from the egalitarianism of the left. It is no less and perhaps even more revolutionary and totalitarian in its implications, and serious conservatives ought to understand and repudiate it as strongly as they do the more common variety that Thurgood Marshall and his own school leave behind them.

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Anna Mycek-Wodecki

## America, From Republic to Ant Farm

by Thomas Fleming

In July I took my four children back to the South Carolina village in which they had spent their earliest years. The most frequent topics of conversation were still, in order, Hurricane Hugo and its aftermath, a public school controversy that appeared to pit blacks against whites but really concerned the ambitions of a New York "intellectual" who wanted to change the character of a community that had accepted him into its midst, and, finally, the inevitable growth of the village as Charleston, swollen with refugees from Ohio, spreads up along the coast.

I spoke with an artist who had been given the task of drawing up a plan for controlled development, and he expressed the hope that the village could retain its character as a community that mixed black and white, rich and poor, shrimpers and lawyers. What the artist really wanted to talk about was a series of paintings depicting the activities of shrimpers, crabbers, and oystermen whose way of life was rapidly disappearing. "The problem is," he explained, waving his hand across a vista of palmettos and oaks, flowers and marsh grass as if it were a painting, "the problem is, we are in the midst of all this beauty. Everybody wants to live here, but there is a finite supply of prime coastal property."

It was the Rev. Thomas Malthus who first recognized that population growth exacerbated the competition for scarce resources. His theory was expressed in a pair of simple

sentences: "Population, when unchecked, increases in a geometrical ratio. Subsistence only increases in an arithmetical ratio." Although Malthus's formula failed to consider the consequences of technological change and economic growth, his insight gave Charles Darwin the key to understanding the process of natural selection. In the competition for scarce resources, it is the winners who survive, propagate, and pass on their characteristics.

Today, the population debate is dominated by two opposing views, neither of which fully appreciates the significance of Malthus and Darwin. On one side are the Pollyannas, led by Julian Simon, who think that modern man can continue to stay one step ahead of the Malthusian sheriff, so long as he continues to develop new technologies and devote himself to economic growth. On the other side are the Chicken Littles, whose champion is Paul Ehrlich, who have set themselves against all human increase to the point that they are against life itself. For Simon, it doesn't matter whether America grows by having babies or importing aliens, while Ehrlich points the finger of blame at the Vatican (particularly the profound encyclical *humanae vitae*) and refuses to distinguish between the American middle class and the beggars of Calcutta.

Neither Simon nor Ehrlich is asking the right question, which is not, What is good for the world or for the global