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THE DECLINE OF THE AMERICAN REPUBLIC: THE LEGAL SYSTEM AS PROLEGOMENON

PETER J. RIGA*

I

Although the Declaration of Independence was written within a jurisprudence of natural law and natural rights, consistent with the classical and Christian tradition, the fundamental law — the Constitution — was born within a Hobbesian view of human nature and vested interests. This has resulted in difficulty when discussing law and ethics in an American context. In fact, the American constitutional tradition has not been influenced strongly by either the classical Republican tradition, where virtue was the objective of government and was to be brought about by stern laws, or by the Christian tradition, in which the essence of government was the inculcation of virtue through respect for the natural rights of the person, the Church, school, and family. American constitutionalism, however, attempted to preserve the best of both classical and Christian traditions.

This article will describe how, through the balancing of the influence of contending groups, the American constitutional tradition became a guarantor of economic freedom. The constitutional rationale was predicated on a value system which fostered economic privatism and struggle, while denigrating moral purposes and the political philosophy of human rights. The inculcation of virtue, it was hoped, would be left to the churches, schools, and families. The American tradition thus sought a middle road between the classical Christian traditions and extreme Hobbesianism. This framework proved successful in an explosively expanding economy. In our era of economic contraction, however, the tradi-

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tional interest-analysis as the basis for law—legal realism—is no longer efficacious.

These problems were inherent in the Constitution itself and were first observed by the 19th century abolitionists who discerned that the Constitution was predicated on procedural due process for property rights, rather than human rights. The concern with protecting property rights, for example, supported the institution of slavery. The Civil War was not fought over the issue of slavery, but over the issue of Union; the North remained willing to incorporate the institution of slavery into the Constitution itself.¹ This attitude is clearly demonstrated by the approach of the American judiciary toward this problem from 1810 through 1861.

Objective judicial decisionmaking was the product of the legal development in the United States which attempted to deal with the profoundly human, moral, and agonizing problem of American slavery.² It is ironic that modern American judicial decisionmaking had its origins and principal development in the defense of this inhuman American phenomenon.

From the beginning, American jurists accepted the moral teaching of Blackstone that slavery was contrary to natural law.³ The American judiciary of the 18th and 19th centuries adhered to this view, almost without exception.⁴ Its constitutional analyses, however, led it to uphold slavery

¹ As heirs of moderate constitutional antislavery, the Republicans preserved a strong attachment to the consensus of the country which was, overall, willing to accept almost any compromise with slavery as a local state rule. The original thirteenth amendment, endorsed by almost all leading Republicans and actually sent out by Congress to the states for ratification, provided

No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.

Joint Resolution of March 2, 1861, 12 Stat. 251. In his first inaugural address, Abraham Lincoln claimed that this point was already "implied constitutional law," but that it would do no harm to put the federal consensus explicitly into the Constitution. *First Inaugural Address*, in IV THE COLLECTED WORKS OF ABRAHAM LINCOLN 270 (R. Basler ed. 1953).

² See generally R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

³ Blackstone, in his Commentaries, notes:

[P]ure and proper slavery does not, [nor] cannot, subsist in England; such I mean, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. And, indeed, it is repugnant to reason, and the principles of natural law, that such a state should subsist anywhere.

⁴ W. BLACKSTONE, *COMMENTARIES* 423 (W. Jones ed. 1915).

⁵ One of America's foremost jurists, Joseph Story, often used his charges to juries to speak out against the immorality of slavery and the slave trade. He claimed that the only policy consistent with "the spirit of the Constitution, the principles of our free government, the tenor of the Declaration of Independence and the dictates of humanity and sound policy"

as an institution in every major case of the period.⁵ The dichotomy between natural and fundamental law is nowhere more evident and leads to an unavoidable question: How did an entire legal system uphold an institution as contemptible as slavery, which all major jurists of the period recognized as conflicting with the higher law, natural justice, and the basic principles of government?⁶

The fundamental tension between some form of higher law and human positive law presented a dilemma. This problem was not new to the 19th century.⁷ Moral arguments, of course, are not, and cannot, be resolved legally or politically; they remain with and are dependent on the moral sense of a people. Only by understanding this fundamental dichotomy between ethics and legality, in the context of slavery, can we begin to understand the fundamental conflict and contradiction in the American legal and political system. The moral cleavage in American society, which became evident as a result of the conflicting moral attitudes toward the institution of slavery, grew so large that it eliminated "the areas where the judge could move the law in the direction of freedom."⁸ Ultimately, the judiciary chose to enforce the Fugitive Slave Laws, not because they were moral⁹—the judges were not concerned with morality in applying the law—but because enforcement was necessary to save the Union.¹⁰ The

was for Congress to abolish slavery in the territories. See *Salem Gazette*, Dec. 10, 1819, at 3, col. 1.

⁵ See *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859); *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). It has been suggested that the Fugitive Slave Law of 1850, 9 Stat. 462, was "sufficiently different from the Act of 1793, [1 Stat. 302] which it amended." R. COVER, *supra* note 2, at 175. It is interesting to note, however, that Chief Justice Taney's majority opinion in *Booth*, upholding the constitutionality of the Act, is supported exclusively by authority relating to the earlier Act. *Id.* at 187. See generally G. STROUD, *A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA* (1968).

⁶ See R. COVER, *supra* note 2, at 175-91. Cover's argument concerns the way jurists dealt with the problem, whereas the focus of the present article is to trace the resolution of the conflict between "natural law" and "positive law."

⁷ See Riga, *Marsiglio of Padova: Father and Creator of the Modern Legal System*, 29 *HASTINGS L.J.* 1421, 1425-45 (1978).

⁸ R. COVER, *supra* note 2, at 7.

⁹ See *Norris v. Newton*, 18 F. Cas. 322 (C.C.D. Ind. 1850), wherein Justice McLean charged the jury: "These laws [Fugitive Slave Laws of 1793 and 1850] lie at the foundation of the social compact, and their observance is essential to the maintenance of civilization. In these matters, the law, and not conscience, constitutes the rule of action." *Id.* at 326.

¹⁰ Chief Justice Tilghman of the Supreme Court of Pennsylvania was at the origin of the historical-necessity thesis:

Whatever may be our private opinions on the subject of slavery, it is well known that our southern brethren would not have consented to become parties to a constitution under which the United States have enjoyed so much prosperity, unless their property in slaves had been secured.

Wright v. Deacon, 5 Serg. & Rawl. 62, 62-63 (Pa. 1819). See also II J. HURD, *THE LAW OF*

moral dichotomy was underscored by the decision in *Scott v. Sandford*,¹¹ prior to which it was possible to pretend that, although slavery was a reality in certain parts of the Union, the fundamental law was not pro-slavery. After *Dred Scott*, the pretense was no longer possible, and the heart of judicial formalism was dead.

The abolitionist view,¹² that a radical dichotomy existed between natural and positive law, that the entire Constitution was a proslavery document, and that it was *in fine* a compact with the devil, seemed more acceptable after the *Dred Scott* decision. The abolitionists recognized that in the face of a conflict between natural and positive law, the judiciary was obliged to faithfully execute the positive law. The predominant jurists of the slave period, Justices Story, Curtis, Shaw, Taney, and Marshall, acknowledged that the Constitution embodied a compromise on the issue of slavery. As a result, servitude was perpetuated for millions.¹³ The jurists hoped, however, that the slavery system would itself wither and die of its own moral weakness. It did not.

The abolitionist Wendell Phillips, like the jurists, viewed the Constitution as protecting slavery. He pointed to five parts of the Constitution as irrefutably demonstrating this proposition: the three-fifths clause,¹⁴ the prohibition on Congress to forbid the slave trade until 1808,¹⁵ the Fugitive Slave Clause,¹⁶ the clause affording Congress the power to suppress

FREEDOM AND BONDAGE IN THE UNITED STATES 439 (1968).

¹¹ 60 U.S. (19 How.) 393 (1857).

¹² See generally W. PHILLIPS, *THE CONSTITUTION: A PRO-SLAVERY COMPACT* (1844), wherein the author compiles all of the then available data on the intentions of the framers of the Constitution with respect to slavery. It is ironic to note that Chief Justice Taney used much of the material contained therein to buttress his opinion in *Dred Scott*. Phillips went further the following year. See W. PHILLIPS, *CAN ABOLITIONISTS VOTE OR TAKE OFFICE UNDER THE UNITED STATES CONSTITUTION?* (1845). In this latter work he deals with the complicity of abolitionists in a system which is basically corrupt and corrupting. Still one year later, Phillips destroyed the arguments of Spooner who tried to show that slavery was contrary to the Constitution itself. See W. PHILLIPS, *A REVIEW OF LYSTANDER SPOONER'S UNCONSTITUTIONALITY OF SLAVERY* (1847). Phillips also called for the resignation of antislavery judges. Yet, there is not one judge on record who ever did resign. In any event, *Dred Scott* showed whatever judges remained to be convinced, that Phillips was correct and that the moral question could no longer be avoided. The ameliorist judges simply had nowhere else to turn except to resignation or revolution. The legal system could no longer salvage their consciences.

¹³ It is remarkable that throughout the majority opinion of Chief Justice Taney in *Dred Scott*, he never once refers to slaves as human beings, but only as beings. Thus, Taney considered slaves "a subordinate and inferior class of beings," 60 U.S. (19 How.) at 404-05, a "subject race," *id.* at 417, "free persons of color," *id.* at 421, and "property of the master in a slave," *id.* at 451.

¹⁴ U.S. CONST. art. I, § 2, cl. 3.

¹⁵ U.S. CONST. art. I, § 9, cl. 1.

¹⁶ U.S. CONST. art. IV, § 2, cl. 3.

insurrection,¹⁷ and the provision for federal assistance in suppressing domestic violence.¹⁸ Both abolitionists and judges agreed that the Constitution, as the product of a bargain, was the price paid for the Union.¹⁹ Since the judge was not permitted to apply his own moral vision of natural right or wrong with respect to slavery, however, the post *Dred Scott* anti-slavery judge could not escape into an ameliorist position. To do otherwise would violate his "paramount obligation" as a member of the judiciary.

Slavery is an important example, since it clearly demonstrates the failure of legal realism and of objective, rational rulemaking. When confronted with a profound moral issue, due to intolerable moral pressure, judges become technicians of the law. Both natural law and the historical analysis of the common law, which had outlawed slavery, were rejected to preserve the Union. Thus, law became a system of technical norms, applied because judges "had no choice"—they could only enforce the law, not make it. The conscience of the judiciary was therefore subordinated to technical procedures, in order to prevent dissolution of the Union and rampant disorder. The concepts of order and unity were substituted for justice, and a judicial procedural efficiency developed to meet the crisis of slavery. Law now insured *order*, rather than *justice*. In our constitutional system, this result was unavoidable.

The Constitution could not deal with the moral problem of slavery, since it was not designed to do so. It was created to protect property, human or otherwise. If the moral problem of slavery was to be resolved, war or national division was inevitable. It could not have been resolved politically because the Constitution, as *Dred Scott* demonstrated, was an amoral document fashioned to protect property through due process. The Constitution is not and has never incorporated any public philosophy, unless philosophy connotes only the basic right to earn, keep, exchange, and inherit property. The slavery issue was not an aberration from the spirit of the American Constitution—it was its logical, ideological development.

II.

In addition to this constitutional moral void, the breakdown of traditional value sources—family, school, and church—has resulted in a profound crisis of meaning and purpose at the heart of America's self-understanding. The traditional moral purposelessness of American government, perhaps a strength in an expanding economy, has now run its course, since we have reached the end of an era of abundance and wealth.

¹⁷ U.S. CONST. art. I, § 8, cl. 15.

¹⁸ U.S. CONST. art. IV, § 4.

¹⁹ See W. PHILLIPS, *THE CONSTITUTION: A PRO-SLAVERY COMPACT* vi-viii (1844).

Today, we face an era of scarcity and simplicity. Questions of purpose and meaning have become ever more urgent as the traditional constitutional response becomes ever more meaningless.

At stake in any political system is the human meaning of a society within history. Traditional economic privatism and conflicting interest relationships, predicated on moral purposelessness, can offer no relief in this crisis since they are a part of the problem.

Jurisprudence now concerns itself with procedure, rather than the traditional concepts of good, evil, and justice. This procedural freedom thus emphasizes individualized, atomistic freedoms,²⁰ with little concern for social responsibility and restraint—concepts at the heart of a humane and civilized society. Where are the American people to find the meaning and significance of their society and of themselves within the American system if not from the political order, the laws, the schools, the Churches, or the family?

Self-understanding is the necessary condition of a sense of self-identity and self-confidence, whether in the case of a nation or an individual. It is imperative that the American people somehow find an affirmation that they are a people unique in history. The complete loss of one's identity is hell; in diminished forms it is insanity. It would not bode well for the American giant to go lumbering about the world, lost and mad.

Any self-understanding which presently exists in the people is a lasting asset from past ecclesial, familial, and educational efforts, and from a tradition of the common law, which itself was born of the Christian experience. As these institutions continue to fail as sources of value, what is to take their place? Perhaps a shock is in store for the researcher or political scientist as he examines the American system; nothing of moral purpose or of public philosophy may be found. The American system has no substance of political faith. While the Founding Fathers hoped the people would have faith in the system they devised for the training of unruly human nature, they relied on other social institutions to supply the values necessary for this democratic-republican system to function. Despite their stunning foresight, they simply never dreamed that those institutions—church, school, and family—would fail.

III.

Traditional republicanism viewed society as held together by a common moral fiber. This outlook was strongly reinforced by the law, which served to instill virtue in the people. In the classical tradition, materialism was inimical to the public interest. The laws, despite their draconian nature, were designed to vigorously reinforce civic virtue in the public

²⁰ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

interest.

America was originally faced with a novel situation. Its people comprised a heterogeneous group in one single nation; its breadth went far beyond the small, homogeneous city-states of ancient Greece and Rome which gave birth to the republicanism of the classical vintage. How were the Founding Fathers to bring together such a diverse people into one national entity and purpose? The constitutional solution was to provide the nation with no moral purpose at its core. Rather, a national purposelessness, controlled by the economic checks and balances of private self-interests, was supplied. The constitutionally created institutions of America were federalism, the representative system, presidential government, the adversary system, economic security, and the national defense.²¹ The central government would have all powers "necessary and proper" to bring this about, and private-economic individualism was guaranteed by the federal government.

A frenetic economic development could be carried on with a studied obliviousness to public purposes and individual virtue. In a sense, the American system presupposed such virtue, and hoped that it would continue to emanate from the social sectors discussed above. Thus, there has been no American purpose, ideology, or national philosophy. This may be viewed as both a remedy for a vastly differing ideological population, and as a positive good in channeling the natural greed of men towards a harmonious national direction. Traditional ambition and upward mobility were thereby nurtured as the American way. It is futile, therefore, to look to traditional American political and legal institutions for a national purpose. To this is added an almost total disintegration of other sources of values—the school and the family. As a result, the future of our institutions is, at best, bleak.

This situation demands a solution; the easiest solution will be one imposed in some form of authoritarianism. This will, however, necessitate the end of our free society. Although Americans have learned the risks of material ambition, and that such ambition cannot guarantee happiness, wealth and luxury are nonetheless desirable social objects. Today, this is a sort of death wish. We live amidst the bankruptcy of materialism and economic individualism—the pathologies of our modernity. This has created the need for public purposes and a public spirit never before observed on the American scene. Genuine freedom, in both the individual and national sense, simply cannot exist without values, meaning, and public purpose.

²¹ W. PHILLIPS, A REVIEW OF LYSTANDER SPOONER'S UNCONSTITUTIONALITY OF SLAVERY 15-17 (1847).

IV.

For the classical republican tradition, human association reached its perfection in the *polis*. To participate in political life was the greatest privilege accorded man. The object of the law was not simply justice, but the production of the virtuous citizen who could participate in the life of the *polis* as citizen. The *polis* itself was a partnership for the formation of character. In that partnership, the character of citizens was formed in accordance with a shared view of basic moral values—the shared views of the beautiful, the useful, and the just. The function of the law, to inculcate and reinforce the commonly shared values of the *polis*, was demanding and stern since it was clear that virtue was not readily acquired. The enemies of virtue were ease, sloth, wealth, creature comfort, and sexual license. In the virtuous *polis*, it was necessary for these vices to be severely restrained by the law.

This classical republicanism was rejected by the Founding Fathers. They, like Aristotle, saw the difficulty in training human nature in virtue, but rejected the use of the force of law to achieve virtue. Rather, they accepted the Hobbesian view that human nature was, at least to an extent, corrupt and had to be restrained not by legal force, but by the contentious interests of greedy human nature itself. They dealt realistically with this aspect of man's nature by balancing powerful human passions and interests. Government—as distinguished from the total *societas* of the classical tradition—would limit its role to mediating and procedurally safeguarding this process within certain tolerable limits. Since the classical tradition was monist in its commonly held values, there was no separation of state and government, society and government, or church and state. All were one, and the emperor retained all power.

The new American concept of government would depoliticize government; religion was now relegated to private practice and concern. Education, family mores, and economics were no longer functions of a government limited to the protection of individual life, liberty, property, and the private pursuit of happiness. All other institutions of the *societas* were free to establish their own norms and objectives, since government had nothing to do with character formation or values. Thus, government was disassociated from the process of the instillment of virtue. The business of the government was business. In a political sense, what was good for General Motors would be good for the country: "The regulation of these various and interfering interests forms the principal task of modern Legislation, and involves the spirit of party and faction in the necessary and ordinary operations of Government."²² The American way would be rooted in economic self-interest; one group would be kept in check in a

²² THE FEDERALIST, No. 10 (J. Madison) at 59 (J. Cooke ed. 1961).

balancing process by another group with different interests, through laws and government. All parties would develop a commodious symbiosis in order to avoid destructive zealotry.

It is dangerous for a free society to attempt to train citizens in the ways of virtue through draconian laws, as the ancients attempted, because this entails the destruction of a great degree of freedom. Instead, the constitutional system of conflicting interests was devised. Thus, in order to avoid the destructive ideological and religious fratricides of the past, America's policy deliberately risked magnifying and multiplying in American life the selfish, the interested, the narrow, and the crassly economic. The Hobbesian war of all against all was attenuated, at least to the extent that it was recognized. Further, the war would be conducted pursuant to procedural rules which would guarantee a certain degree of fairness and equality among the contending participants. The inherent self-interest and greed of men would be controlled by the adversarial process. The Founding Fathers checked vice with vice.

The classical tradition and the Founding Fathers shared a common view that human nature, in need of restraint in organized society, is changing. The ancients sought to fashion a unanimity of values and a religion which could be enforced by stern laws. The Founding Fathers, however, attempted a depoliticization of government, and a moderating system of procedural safeguards under law. Character formation was left to the private sector.

The balancing of interest with interest, and faction with faction, enjoyed success in the economic and social climate of the past. In this era of economic constraints, where cooperation is needed more than competition, the system of the past is no longer viable. The closest things we have to shared values, a national sense of sport and the common materialistic culture of the television medium, are hardly the moral virtues needed to make a people distinctly unique. Some have suggested that the present economic and social system can continue to function effectively by modifying the more aggressive aspects of traditional American political wisdom. The acquisitive man should cultivate the virtues of venturesomeness, industriousness, and the suppression of immediate passions.²³ This will point man toward justice.²⁴

The doctrine of self-interest properly understood does not inspire great sacrifices, but every day it prompts some small ones; by itself it cannot make a man virtuous, but its discipline shapes a lot of orderly, temperate, moderate, careful, and self-controlled citizens. If it does not lead the will directly

²³ Diamond, *Ethics and Politics: The American Way*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 64 (R. Horwitz ed. 1977).

²⁴ *Id.* at 65.

to virtue, it establishes habits which unconsciously turn it that way.²⁵

These virtues cannot be imposed by laws and decrees of governmental authority. In fact, laws work in quite the opposite fashion, and the government has authority — legitimacy — when the people obey because they are already virtuous, and understand that the laws are just. In this respect, the removal of government by the Founding Fathers from the business of directly superintending the formation of character was correct from a jurisprudential point of view.

The Founders presupposed that other institutions would continue to produce a virtuous citizen, standing ready to sacrifice for the common good and to give of himself to the *polis*. This is precisely the problem today. We suffer an utter bankruptcy of communal values and virtue. We have traditionally opted for freedom and the formation of character through avenues other than law. A problem arises when the whole society has few institutions on which to rely for this most important duty of character formation.

Today, the materialism produced by the American system is incapable of providing anything more than the empty purposelessness of the "American Way." Our system should not be condemned for what it does not and was never intended to produce—the virtuous citizen. The Founders created a constitutional system to free men from fiscal uncertainty, irregularities in currency, trade wars among states, economic discrimination by more powerful foreign governments, attacks on property, and popular insurrection. Such a system is not an aid in our present political and legal quandary. The aim of the Founders was to create a government that would act as an honest broker among a variety of propertied interests, thus affording those interests protection from common enemies through the procedural process, and preventing them from becoming too powerful.

V.

If the political system is irretrievably deteriorating, there will remain no institution to restrain human passion when the traditional imparters of virtue have ceased to exist or have been mortally weakened. Laws look to the moral health of the citizens for their force and legitimacy, not vice versa. Today, as more of our problems are resolved by courts, questions are presented which the judiciary cannot and should not decide. The Supreme Court has passed on a myriad of social and moral questions in the past twenty years that would have shocked the Founders of the Republic, as well as previous courts. The law is now a means to accomplish moral

²⁵ A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 499 (J. Mayer & M. Lerner eds. 1962).

ends which the classical tradition would have found astounding. This use of the law is, in the final analysis futile and counterproductive. When courts are used as shortcuts to moral ends, the short-term results may appear excellent, but the system is eventually overloaded and finally destroyed. Bitter fruits of court-imposed segregation cases and family abortion cases are already apparent. The court system and its self-imposed social and political value system is a short-term narcotic which temporarily alleviates some of the pain, but cannot cure the fatal disease. The disease is individual political and social purposelessness and despair, which no court can remedy or cure. Our present political institutions simply were not designed to provide a source of purpose and value; their object was to provide a framework of moral neutrality and legal proceduralism, thereby holding human passions and differing ideologies in check by means of controlled-interest balancing and competition. Is there any solution to this massive anomaly? There is no known civilization which has followed our path and returned to a renewed moral and intellectual, political vigor. Given its view of human nature and its basis of freedom, the American experiment was doomed from the outset. The moral deterioration has arrived, and the authoritarian solution which we have avoided for over two centuries must be invoked to establish some form of order.

In a sense, we have already moved into that imposed phase of civil life where many of the important questions affecting the citizen are not made by him, but by unelected and unresponsive courts of law. There seems to be no other force which Americans will communally accept or obey, precisely because they share no communal sense of purpose. Today's courts, in the guise of applying the law, are the origins of the authoritatively imposed solution to our present problem. There is no phase of our social life which has not been intimately touched and legislated upon by the courts which alone seem to have a commonly recognized authority in *every* aspect of human existence. By definition, this is authoritarianism. The courts, as part of the American tripartite form of government, have now invaded the sphere of the *societas* previously forbidden to the government under the American system. We are, therefore, retreating to the classical tradition as it regressed from republicanism to authoritarianism.

This is not, of course, the enterprise of evil men, but the result of a lack of common virtues and goals. The judiciary has become the arbiter of moral, social, and political values. It alone has had the authority to impose a solution where none has been forthcoming from any other political or social institution. This explains why the judicial system can be so despised by the American people, yet so heavily utilized by the citizenry. Since Americans cannot agree on the moral values underlying these problems, they permit the courts to resolve issues for them. What used to

be a practical solution to a difficult application of law has now become the arbiter of moral values. Legalism is now raised to the level of a moral imperative in the minds of many Americans. Ironically, we have come to expect the same solution which pre-Civil War Americans expected from the United States Supreme Court. They left the solution of their basic and divisive moral problems to the Court for a determination, and were given the *Dred Scott* decision.