Western New England Law Review

Volume 1 *1 (1978-1979)*
Issue 2

Article 1

1-1-1978

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Volume 1
Issue 2
Fall
1978

WESTERN NEW ENGLAND
LAW REVIEW

THE CONSTITUTION AND THE RULE OF LAW

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In his article, *The Specious Morality of the Law*,[1] Professor Sanford Levinson[2] brands various calls for maintenance of the rule of law under the Constitution a "ritualistic incantation" and deplores the divorce of law from moral norms.[3] He maintains that a law that is merely identified with majority "will" is not, in terms of moral integrity, worthy of respect, because the majority "notion of justice" may be "perceived as manifest tyranny by someone else." Why should "those who feel tyrannized by the existing legal order . . . recognize it as legitimate?"[4] Add his emphasis that "[l]iberty has come to focus on freedom from the community or the State,"[5] and Levinson verges on an invitation to disregard for law, at a time, as even he acknowledges, when except "reverence for law . . . there is no other basis for uniting a nation of so many disparate groups."[6] His counsel to resist "the call for new faith in an old gospel"[7] requires more solid footing than he has furnished.

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1. S. Levinson, *The Specious Morality of the Law*, HARPER'S, May, 1977, at 35.
2. Professor Levinson is a lawyer and teaches in the department of politics at Princeton University.
3. S. Levinson, *supra* note 1, at 36.
4. *Id.* at 38, 40.
5. *Id.* at 36.
6. *Id.* at 41.
7. *Id.* at 35.

I

Levinson begins by dismissing Barbara Jordan's "total" commitment to the Constitution in the course of the House Judiciary Hearings on the impeachment of President Nixon as incomprehensible because "presumably" she would not have thought the original Constitution which "protected slavery . . . worthy of veneration."[8] One may as well reject the great cultural achievements of the Greeks because the Athenians were slaveholders, and a slave was heartlessly defined by Aristotle as "a tool with life in it."[9] Each society must be judged by standards of its own time and historical context. To transport Barbara Jordan back 200 years in time—when a nation aborning compromised with slaveholding states the better to face a hostile world—is not nearly so fruitful as to view the world in which she lives, where in the Africa where she has her roots Idi Amin slaughters thousands of fellow blacks in Uganda and is regarded admiringly by many Africans. Well might she prefer to live under a constitution that secures her against such horrors, even though it falls short of perfection.

Philosophers, William James said, devote themselves to study of those residual questions on which people are unable to agree, among them the nature of "law."[10] The thin air of philosophy is not for an earthbound lawyer, so I shall attempt in more mundane fashion first to examine what the Constitution and the rule of law meant to the Founders, and why that meaning remains vitally important for us today.

After a long and bitter struggle, the Founders had succeeded in throwing off the shackles of an "omnipotent parliament" and hereditary monarch.[11] Now they proclaimed that the *people* were sovereign and that all power was delegated by them to their "servants and agents." Schooled in the insatiable greed for power of those given to rule, the Founders grudgingly enumerated the granted powers and repeatedly stressed that those grants were "limited."[12] Their fear of arbitrary power led them to insist on standing laws, not, as the 1780 Massachusetts Constitution emphasized, laws passed after the fact which retroactively made a

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8. *Id.* at 35, 36.

9. 1 C. BRINTON, J. CHRISTOPHER, & R. WOLFF, A HISTORY OF CIVILIZATION 67 (1960).

10. Singer, *A Discipline Examining Nature's Ultimate Reality*, N.Y. Times, May 8, 1977, § 4 (Week in Review), at 20, col. 1.

11. *See* R. BERGER, CONGRESS V. THE SUPREME COURT 34-35 (1969).

12. *Id.* at 13-16.

nonproscribed act criminal.[13] They wanted no personal justice administered after the fashion of Caliph Haroun-al-Rashid, but rather the administration of known laws with an absolute minimum of discretion. As Jefferson graphically put it, the Founders sought to bind man down with "the chains of the Constitution" because they had no confidence in rulers.[14] They regarded the Constitution with "sacred reverence," in Hamilton's words, because they considered that it constituted the "bulwark" of their liberties.[15]

This is what John Adams meant by "a government of laws and not of men," not, as Levinson would have it, a linkage with "moral norms."[16] Adams' biographer, Page Smith, confirms that Adams meant by that phrase that "men are secured in their rights to life, liberty and property by clear and fair laws, falling equally on all . . . justly administered," differentiating a society where a king bestows rights at "whim" as "a society of men, not of laws."[17] When one affirms the continuing indispensability of this structure, he does not, as Levinson charges, "embrace the rule of law as an answer to the problems of modern governance."[18] No structure of government can supply the "answer," it can only furnish a framework within which each generation can strive for a peaceable solution of clashing aims. Surely this generation need not be reminded that uncurbed power, abandonment of the rule of law, returns us to the law of the jungle or, worse, the crematoria of Auschwitz and Belsen. It is easy enough for one sheltered by the rule of law blithely to dismiss it, but the Indians who lived for a time without its protection under Indira Ghandi have recently greeted its return with jubilation.[19]

II

Levinson maintains that most pre-nineteenth century adherents of the rule of law viewed law as being linked with moral norms.[20] For this postulate, Levinson relies on Adams and traces

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13. Bill of Rights, Article 24, *reprinted in* H.S. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 109 (7th ed. 1962).

14. R. BERGER, *supra* note 11, at 13 (quoting C. WARREN, CONGRESS 153 (1935)).

15. THE FEDERALIST No. 25, at 158 (Mod. Lib. ed. 1937).

16. S. Levinson, *supra* note 1, at 36.

17. 1 P. SMITH, JOHN ADAMS 246 (1962).

18. S. Levinson, *supra* note 1, at 36.

19. Borders, *India's Courts Welcome Back 'Rule of Law,'* N.Y. Times, June 14, 1977, § L, at 2, col. 2.

20. *See* text accompanying note 16 *supra*.

the lineage back to the medieval jurist, Bracton, who linked law to God. Law was defined by the medievalist as the "natural reason [natural law] given by God," or "as the commands of political leaders ordained by God and therefore given the right to rule."[21] Adams, however, flatly repudiated monarchical rule by divine right.[22] His 1780 Massachusetts Constitution described the body politic as "a social compact" whereby the whole people covenant with each citizen that "all shall be governed by certain [known] laws for the common good," in order that "every man may . . . find his security in them."[23] So too, natural law, like the "mandate from heaven" of Chinese emperors, which was known only to them, collides with Adams' commitment to "clear laws," known to all.[24] This commitment is underscored by his lengthy Bill of Rights in the 1780 Constitution, which particularizes *rights* to be *protected against* the government or community. The ban on the quartering of soldiers in private homes,[25] for example, reflects a practical rather than a moral concern.

It is true that Adams referred to the duty of the state to inculcate a common morality. Nevertheless, he wrote, "It is certain . . . that the only moral foundation of government is the consent of the people."[26] While he was attached to the "moral basis of life, the need for religion,"[27] Adams maintained that "[g]ood laws and orderly government alone would protect 'lives, liberties, religion, property, and characters.' "[28] He had long been convinced that "neither philosophy, nor religion, nor morality . . . will ever govern nations. . . . Nothing but force in the form of soundly drawn consitutions and firm laws could restrain men."[29] His were not counsels of a heavenly city of moral perfectibility, but a hard-headed response to man's inherent selfishness.

Not that Adams' views are for present purposes crucial, for Levinson himself notes that Jefferson believed that it "was the will of the nation which makes the law obligatory."[30] In this belief Jef-

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21. S. Levinson, *supra* note 1, at 36.
22. *See* 2 P. SMITH, *supra* note 17, at 692-93.
23. H.S. COMMAGER, *supra* note 13, at 107.
24. *See* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 251-52 (1977).
25. Bill of Rights, Article 27, *reprinted in* H.S. COMMAGER, *supra* note 13, at 109.
26. 1 P. SMITH, *supra* note 17, at 258.
27. *Id.* at 274.
28. 2 P. SMITH, *supra* note 17, at 690.
29. *Id.* at 274.
30. S. Levinson, *supra* note 1, at 37.

ferson was joined by James Wilson, second only to Madison as an architect of the Constitution. "[P]opular sovereignty, rooted in will rather than in a common moral order," Levinson recognizes, "was to become the motif of the new American polity."[31] This view, that *positive* law, expressed in constitutions and laws, represented the will of the people, was shared by Adams, Hamilton, Madison, and Wilson.[32] It was later reformulated by Justice Holmes and remains, as Levinson notes, "the dominant view" of American constitutional law.[33] It *was* a radical shift from Bracton's notions of law, but those medieval notions had little or no place in the thinking of the Founders, including Adams.

Those of us who are firmly convinced that Richard Nixon was properly forced out of office because of impeachable offenses cannot concur with Levinson that the "rule of law . . . provided an *ostensibly* apolitical rationale for driving from office a scoundrel who richly deserved his fate."[34] Such a result-oriented judgment would be a reproach to American justice. As one who searched the history of the constitutional impeachment provisions before the Nixon impeachment rose on the horizon,[35] I am convinced that by established standards Nixon committed impeachable offenses.

Levinson intimates that the impeachment leaders were not viewed as "subordinate to general conceptions of public morality," and cites the contention of the 10 Republican dissenters on the House Judiciary Committee that there "was no specific law prohibiting 'abuse of power,' " the offense with which Nixon was charged.[36] But "abuse of power" was a classic rubric of "high crimes and misdemeanors," and since it therefore had constitutional warrant it needed no statutory sanction. When the Republican dissenters argued that an "abuse of power" could not merely be what seems improper "in the *subjective* view of a *temporary majority* of legislators," a view apparently shared by Levinson,[37] they equally impugned the time-worn judicial and jury function of determining what conduct was "unreasonable" under the circumstances. No legal formula, be it "restraint of trade," "negligent conduct," or "abuse of power," can do more than pose the particu-

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31. *Id.*
32. R. BERGER, *supra* note 24, at 252.
33. S. Levinson, *supra* note 1, at 37-38.
34. *Id.* at 36 (emphasis added).
35. *See* Berger, *Impeachment for "High Crimes and Misdemeanors,"* 44 S.C.L. REV. 395 (1971).
36. S. Levinson, *supra* note 1, at 38 n.
37. *Id.* (emphasis in original).

lar case for judgment. Each Congress, like each judge or jury, must independently decide whether the facts at bar make out the charge. Agreed that the Senate, sitting in judgment, should consult the precedents of the past—of which the English, from where the terms "high crimes and misdemeanors" were drawn, are more important than the post-Constitution Senate precedents—and that it should not arbitrarily label a trivial act as an "abuse." But the recalcitrant Republicans fought tooth and nail to prevent the issue from going to the Senate. To cast them in the role of paladins of "public morality" is little short of grotesque.

At bottom Levinson objects to majority rule. "[A]bsolute acquiescence in the decisions of the majority," said Jefferson, is a "vital principle of republics."[38] Where would we be after a bitterly fought election if the defeated minority took to the streets to reject the will of the majority? For the protection of minorities, certain rights were placed in the Constitution beyond majority reach. Like all human endeavors, this is not a perfect shield. The reconciliation of minority and majority interests, as Arthur Schlesinger, Jr. wrote, presents an insoluble problem.[39] Certainly it is not likely to be solved by invoking "moral norms." One can say of "moral norms" what David Hume said of "natural law": "The word natural is commonly taken in so many senses, and is of so loose a signification, that it seems vain to dispute whether justice be natural or not."[40] Conceptions of what is "moral" have differed from time to time, from country to country. For the Inquisition, morality demanded that heretics be burned at the stake; southern ministers preached that slavery was divinely ordained. "[S]o much that was thought [to be] wisdom," said Bertrand Russell, "turned out to be folly."[41] Levinson acknowledges that insistence on a "linkage between law and moral norms . . . assume[s] a moral consensus which no longer exists. . . ."[42] Where, then, are we to derive moral norms? Few will be prepared to look for them in some Platonic absolute about which philosophers will forever dispute. Justice Holmes, that most philosophical of jurists, wrote, "[N]othing but confusion of thought can result from assuming that the

38. A. SCHLESINGER, JR., THE AGE OF JACKSON 401 (1947).

39. *Id.* at 421.

40. *Quoted in* R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 23 (1975).

41. B. RUSSELL, PORTRAITS FROM MEMORY 197 (1956).

42. S. Levinson, *supra* note 1, at 99.

rights of man in a moral sense are equally rights in the sense of the constitution and the laws."[43]

III

As an offshoot of his "moral norms," Levinson differentiates between current "moral pluralism" and the halcyon community sharing "a common religious or moral order."[44] In truth that community was more divided than we are today. Roger Williams did not flee Massachusetts because he shared a "common religious order." Whether Quakers and Mennonites of Pennsylvania shared that "order" with Catholics of Maryland, or the Scotch-Irish nonconformists with the Tidewater Episcopal establishment of Virginia, may be doubted.

A "community sharing a common moral vision"[45] in terms of the federal Constitution, to which Levinson's discussion is directed, romanticizes the facts. In 1787 the people viewed a remote, centralized federal government with suspicion rather than as an expression of a "common vision." Such distrust was bred in the bone of those who had fled from European tyranny and oppression. Sent to Congress in Philadelphia from Georgia in 1785, William Houston "thought of himself as leaving his 'country' to go to a strange land among Strangers."[46] Madison said, "[O]f the affairs of Georgia I know as little as those of Kamskatska."[47] The Southern States feared that they would be oppressed by the North; small states were fearful of the large; the interests of importing and nonimporting states diverged; there were quarrels over fisheries; a state imposed imposts on vessels that came from or went to another as if it were a foreign nation.[48] Above all there was a vital lack of power to deal with commerce and defense on a national scale. It was such worldly considerations, not a "common moral vision," which led to the creation of the national "community." Early America, in sum, was not "tied together" by shared "moral norms" but rather, as Tocqueville perceived, "by the common pursuit of individual interests."[49]

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43. O. HOLMES, JR., COLLECTED LEGAL PAPERS 171-72 (1920).
44. S. Levinson, *supra* note 1, at 36.
45. *Id.*
46. R. BERGER, *supra* note 11, at 33.
47. *Id.*
48. *See* S.E. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 304 (1965).
49. S. RATNER, AMERICAN TAXATION 47 (1942).

In primeval America, Adams, according to Levinson, believed individuals were "willing to subordinate their selfish personal interest in behalf of a 'common good,' " ready "to recognize primary obligation to the community," whereas today "most of us certainly believe that our primary duties are to ourselves and our families. Liberty has come to focus on freedom *from* the community or the state rather than the realization of a common vision *through* the community. . . ."[50] Preoccupation with the self is nothing new. Adams considered that only "force in the form of . . . constitutions" would restrain the beast.[51] A wise government, said Jefferson, would "restrain men from injuring one another" and "leave them otherwise free to regulate their own pursuits."[52] Government was instituted, said Hamilton in THE FEDERALIST No. 15, "because the passions of men will not conform to the dictates of reason and justice, without restraint."[53] "What is government itself," asked THE FEDERALIST No. 51, "but the greatest of all reflections on human nature? If men were angels no government would be necessary."[54] In short, that "old devil," selfish personal interest, was no less present in 1787 than it is today.

With the passage of 200 years, men have turned to the "community" in a manner originally undreamed of, for welfare, subsidies, and other contributions. How is this reconcilable with "freedom from the community"? At no time has the majority been as ready to help minorities as today; it taxes itself heavily to aid the helpless. And what but a "moral vision of the community" can account for the billions of dollars in food and aid America has sent to foreign nations. To make the test of "moral vision" turn on the treatment of minorities is to ignore that racial discrimination is a stubborn, worldwide phenomenon with which "law" may be inadequate to deal. It is no reproach to the Constitution that it has not remade man. It could only impose such restraints as he would accept and provide a framework in which he could work out his own destiny.

IV

Levinson denies the existence of "an enduring, timeless Constitution" because its meaning has changed over time, and con-

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50. S. Levinson, *supra* note 1, at 36 (emphasis original).

51. *See* note 29 *supra* and accompanying text.

52. H.C. HOCKETT, POLITICAL AND SOCIAL HISTORY OF THE UNITED STATES, 1492-1828, at 272 (1931).

53. THE FEDERALIST No. 15, at 92 (Mod. Lib. ed. 1937).

54. *Id.* at 337.

cludes that "A faith whose premises change radically over time is scarcely the rock upon which to rely for support. . . ."[55] It would be more accurate to say that over the years the Supreme Court has undertaken to *revise* the Constitution, to read into it preferences of a given majority of the Court, even in flat contradiction of the meaning attached to the terms by the Framers. In Levinson's words, the Court has "suppl[ied] new meanings."[56]

A quick example of these "new meanings" is furnished by the words "due process of law." At the adoption of the Constitution, Alexander Hamilton, reflecting historical usage, declared that these words "are only applicable to the process and proceedings of the *courts* of justice; they can *never* be referred to an act of *the legislature*."[57] The records of the several Conventions and of the First Congress which drafted the fifth amendment contain no evidence to the contrary, and Hamilton's view was also that of the framers of the fourteenth amendment.[58] Notwithstanding, in the 1890s the Court transformed due process into an instrument for the overthrow of socio-economic *legislation*, thereby substituting its own will for that of the people, and giving rise to an "unwritten constitution." No admirer of such judicial "change" has ever pointed to the constitutional warrant for this revisory function; instead there is solid ground for the conclusion that such authority was withheld from the Court. Hamilton branded such judicial action an impeachable "usurpation."[59] Here Levinson, however, echoes conventional approval of judicial "change." But Justices as diverse as Chief Justice Burger, Justice Douglas, and Justice Frankfurter are agreed that the touchstone of constitutionality is the Constitution itself, not what the Court has said about it.[60]

"Can we accept a definition of 'the law,' " asks Levinson, "as anything other than that which is declared by the Supreme Court . . .?"[61] The Constitution is not an inscrutable mystery which yields its secrets only to a black-robed priesthood. Time and again the Court has rejected its own earlier constitutional decisions. For decades commentators, and eminent jurists, Holmes, Brandeis, Stone, Learned Hand, refused to accept the Court's identification

55. S. Levinson, *supra* note 1, at 36, 42.
56. *Id. See generally* R. BERGER, *supra* note 24, at 370-72.
57. R. BERGER, *supra* note 24, at 194 (emphasis added).
58. *Id.* at 201-06.
59. THE FEDERALIST No. 81, at 526-27 (Mod. Lib. ed. 1937).
60. R. BERGER, *supra* note 24, at 297 n.57.
61. S. Levinson, *supra* note 1, at 36.

of its *laissez-faire* prepossessions with constitutional dogma whereby it blocked social and economic reform. Ultimately that educational process led the Court to acknowledge error.[62] Unfortunately, similar scholarly criticism of the Court's subsequent identification of its libertarian predilections with constitutional mandates,[63] for the most part, has been lacking because the judicial course now corresponded with the aspirations of academe and led it to mute its criticism. "Scholarly exposure of the Court's abuse of its powers," said Justice Frankfurter, would "bring about a shift in the Court's viewpoint."[64] Heightened public awareness rather than "self-help"—" 'taking the law into our own hands' upon recognizing that established officials [Nixon or the Court] are unwilling to follow 'the law' "[65]—appears to me a better alternative. After the "Saturday Night Massacre," an aroused public repudiated Nixon's excesses and drove him from the White House. The Court, Professor Charles Black wrote, would not have "the strength to prevail in the face of resolute public repudiation of its legitimacy," or of the legitimacy of its decisions.[66]

V

Levinson glides over the problems presented by judicial "change," among them government by judiciary, and draws instead on a number of presidential acts to show that the "imperatives of the Constitutional system" have not "remained constant since the establishment of the Constitutional system in 1789."[67] These, he avers, "present problems for anyone seeking an unequivocal American tradition against which to measure political leadership and define the rule of law."[68]

Levinson begins with "Jefferson's questionable expansion of

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62. R. BERGER, *supra* note 24, at 258 n.39.

63. In 1945, Chief Justice Stone wrote, "My more conservative brethren in the old days [read their preferences] into the Constitution . . . [H]istory is repeating itself. The Court is now in as much danger of becoming a legislative and Constitution-making body, enacting into law its own predilections, as it was then." A.T. MASON, SECURITY THROUGH FREEDOM: AMERICAN POLITICAL THOUGHT AND PRACTICE 145-46 (1955). In 1976, Archibald Cox stated that "the Warren Court behaved even more like a Council of Wise Men and less like a court than the *laissez-faire* Justices." A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 50 (1976).

64. R. BERGER, *supra* note 24, at 415 n.28.

65. S. Levinson, *supra* note 1, at 36.

66. C. BLACK, THE PEOPLE AND THE COURT 209 (1960).

67. S. Levinson, *supra* note 1, at 41.

68. *Id.*

Presidential power in the decision to purchase Louisiana from France in 1803."[69] Jefferson laid no claim to "expanded" power. As Schlesinger described it, "Congress set up a clamor for Louisiana, confirmed the envoys who negotiated the purchase, appropriated the funds for the purchase, ratified the treaty consummating the purchase and passed statutes authorizing the President to receive the purchase . . . ."[70] Even so, Jefferson entertained grave doubts concerning the constitutional authority of *both* Congress and the President to annex new territory, but was dissuaded from seeking an amendment.[71] Napoleon was an unpredictable expansionist neighbor who could block the Mississippi, and Congress and Jefferson acted before the mercurial Bonaparte could change his mind. With good reason did Jefferson say, "The legislature . . . must . . . throw themselves on their country for doing for them unauthorized, what we know [the people] would have done for themselves had they been in a situation to do it."[72] Jefferson did not regard this as a "precedent" for unconstitutional executive acts. Months after the purchase he wrote, "I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless."[73] This was for him the "constant."

Next, Levinson refers to Lincoln's "putative disobedience of constitutional provisions relating to habeas corpus."[74] Immediately after the firing on Fort Sumter, while the Union was crumbling, Lincoln suspended the writ of habeas corpus to prevent armed secessionists from operating in Maryland. Maryland was swarming with them and secessionist control might have isolated Washington.[75] Article I of the Constitution provides that the writ may be suspended "when in cases of rebellion or invasion the public safety may require it."[76] It does not say who may suspend, though inferably Congress was to do so because the power appears in the

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69. *Id.*

70. A. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 23 (1973).

71. *Id.* at 24; S.E. MORISON, *supra* note 48, at 366. *See also* 4 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 450 n. (2d ed. 1836).

72. A. SCHLESINGER, *supra* note 70, at 24.

73. Letter from Thomas Jefferson to W.D. Nicholas (Sept. 7, 1803), *reprinted in* 8 THE WRITINGS OF THOMAS JEFFERSON 247 (P.L. Ford ed. 1897).

74. S. Levinson, *supra* note 1, at 42.

75. H.C. HOCKETT, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES, 1826-1876, at 280-81 (1939); S.E. MORISON, *supra* note 48, at 612.

76. U.S. CONST. art. I, § 9.

"legislative" article. Lincoln might have invoked the analogy of the impeachment of Justices notwithstanding that the provision for impeachment of "officers" is contained in the "executive" article. Should Lincoln have waited to convene Congress, then not in session? Even today one cannot dismiss Lincoln's evaluation of the imminent danger. When Congress assembled in July it accepted Lincoln's measures willy-nilly. It was in these circumstances that Lincoln asked, "Are all the laws, *but one*, to go unexecuted, and the government itself to go to pieces, lest that one be violated?"[77] Lincoln's "suspension" furnishes the only genuine illustration in our history for Jefferson's 1810 statement, after he left the presidency, that the laws "of self-preservation, of saving our country when in danger, are of a higher obligation" than a "strict observance of the written laws."[78]

These incidents yield Levinson a queer distillation: "The role of the great political leader is *often* to assume the almost Nietzschean task of going beyond the law in an effort *to transform* the society which he purports to lead."[79] We condone Lincoln's "dubious" behavior, he continues, because "his memorable vision of what this country was truly about, which involved transcending the existing constitutional structure and its support for slavery, has prevailed. . . ."[80] But this reads subsequent events back into 1861. The suspension of habeas corpus was altogether unrelated to slavery; it was designed to protect the capital from a potential enemy. Lincoln himself wrote in August, 1862, "My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery."[81] There was no commitment to freeing the slaves in the early years of trial; that emerged as the fearful losses mounted and as the North came to believe that once and for all the cancer which had eaten away at the vitals of the nation must be eradicated.

Stranger yet is Levinson's question, "Was Nixon's offense his disobedience of the law or, rather, his failure [unlike Lincoln] to present a plausible case for his violations of law as necessary to 'national security?' "[82] Since the publication of Levinson's article, Nixon himself has explained that his "national security" measures

77. S. Levinson, *supra* note 1, at 42.
78. A. SCHLESINGER, *supra* note 70, at 24-25.
79. S. Levinson, *supra* note 1, at 42 (emphasis added).
80. *Id.*
81. S.E. MORISON, *supra* note 48, at 616.
82. S. Levinson, *supra* note 1, at 42.

were meant to stifle dissenters in order to prevent "those that we were negotiating with in Paris" from "gain[ing] the impression that they represent a majority." He too assimilated this to Lincoln's action for "the purpose of preserving the Constitution and the Nation," though he conceded that "in Lincoln's case it was the survival of the Union in war time" that was at stake. But he concluded that "This nation was torn apart in an ideological way by the war in Vietnam, as much as the Civil War tore apart the nation when Lincoln was President."[83] Vietnam, however, was 6,000 miles away, not next door as was Maryland; and habeas corpus was suspended in Maryland to insure defense of the capital, not to gag dissent in the North. No President has been subjected to more incessant, vitriolic calumny during the progress of a war than Lincoln, yet he never resorted to wide-scale illegality to counter it. Levinson compares the incommensurable. Nixon did not merely *fail* "to present a plausible case"; under the circumstances, it was impossible to do so. It would open a frightening chapter in our history were dissent stifled to facilitate peace negotiations!

The great "Nietzschean task of going beyond the law in order to transform the society"[84] has led to a Hitler. Germany did not have to wait for the verdict of posterity for "the final assessment . . . whether the bet as to the shape of the future is won or lost;"[85] in the process of realizing Hitler's apocalyptic vision Germany was razed to the ground. Nothing in the Jefferson and Lincoln incidents warrants Levinson's extravagant extrapolation; neither conceived of himself as a "superman." A democracy which depends for its salvation on the vision of a "superman" has confessed its impotence and is on the road to dictatorship.

Finally, Levinson remarks, "if law is *only* that which the courts are prepared to enforce . . . then it becomes impossible, by definition, to accuse those institutions of disobeying the law."[86] The "enforce" definition was uttered by Holmes in the role of jural philosopher, but he did not find it incompatible with his recognition of "the right of the majority to embody their opinions in law,"[87] to which he felt bound to give effect despite his disagreement. As judge, Justice Holmes stated that when a legislature "has inti-

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83. N.Y. Times, May 20, 1977, § A, at 16, col. 1.
84. *See* note 79 *supra* and accompanying text.
85. S. Levinson, *supra* note 1, at 42.
86. *Id.* at 99 (emphasis original).
87. *Id.* at 38.

mated its will . . . that will should be recognized and obeyed."[88] He condemned uncurbed judicial discretion to alter the law and identify personal predilections with constitutional mandates, and he recognized the perversion of due process that made such practices possible.[89] He accepted the "will" of the people when he could ascertain it and refused to change it to correspond to his predilections. Not every phrase of the Constitution lends itself to such analysis; some provisions are amorphous and afford judicial leeway. But "due process" and "equal protection," which today furnish the bulk of the Court's business, are, as I have elsewhere documented,[90] not among them.

VI

In a brilliant study, THE LIMITATIONS OF SCIENCE, J.W.N. Sullivan pointed out that Heisenberg's "principle of indeterminacy" had shaken the doctrine of strict causality in the atomic realm, but concluded that for practical purposes men can continue to rely on "cause and effect."[91] So too, whatever the philosophical doubts about the nature of the rule of law, I consider that society may safely continue to rely on it. With Charles McIlwain, I would urge that "[t]he two fundamental correlative elements of constitutionalism for which all lovers of liberty must yet fight are the legal limits to arbitrary power and a complete political responsibility of government to the governed."[92] Without the rule of law there is no accountability; recognition that Nixon had violated constitutional limits led to his banishment. It is not merely that respect for law binds our disparate elements together. Men cannot live without civil order. Law furnishes protection against the disruptive forces that would return us to the blood feud, against arbitrary power; it assures an accused that he will be impartially tried under existing law; and it furnishes a medium for the reconciliation of conflicting interests. In a recent monograph, the English Marxist historian, E.P. Thompson concluded:

> [T]he rule of law itself, the imposing of effective inhibitions upon power and the defense of the citizen from power's all-intrusive

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88. Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908).
89. Baldwin v. Missouri, 281 U.S. 586, 595 (1930) (dissenting opinion).
90. R. BERGER, *supra* note 24, at 166-220.
91. J. SULLIVAN, THE LIMITATIONS OF SCIENCE 69, 72 (1949).
92. C. MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 146 (rev. ed. 1947).

claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretensions of power continue to enlarge, a desperate error of intellectual abstraction.[93]

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93. E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 266 (1975).