Martin Luther King's Civil Disobedience and the American Covenant Tradition

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Daniel J. Elazar introduced the covenant idea to political science in his four-volume work, The Covenant Tradition in Politics. *As he showed, American government and society are indebted to the covenant ways of New England Puritans and their doctrine, "federal theology." Puritan covenants fostered polities whose frames of government and patterns of civil order established a federal matrix antecedent to modern American federalism. The moral orientation of covenant has also influenced modern American political thought, as evidenced by the public philosophy articulated by the Rev. Dr. Martin Luther King, Jr. during the Civil Rights Movement (1954-1968). In such works as "The Letter from the Birmingham City Jail," King challenged his contemporaries' ideas about law and justice, providing Americans with an opportunity to examine modern covenant practice.*

On Good Friday, 12 April 1963, the Reverend Dr. Martin Luther King, Jr. was arrested and placed in solitary confinement, charged with defying an Alabama court injunction prohibiting protests and marches for racial equality in Birmingham. During his confinement, King wrote the "Letter from the Birmingham City Jail," responding not only to the circumstances of his arrest but also to the public statement written by eight members of the clergy to local citizens published in the local newspaper.[1] The Alabama rabbi and ministers criticized the civil rights protests as untimely, unwise measures, led by outsiders whose actions precipitated violence. Synthesizing nearly a decade of his civil rights activism, King answered these charges, offering a careful analysis of civil disobedience. Citing a wide array of doctrines, philosophies, and thinkers (including Thomas Jefferson and Jesus, Martin Buber and Reinhold Niebuhr, Paul the Apostle and Paul Tillich, Saints Aquinas and Augustine, and John Locke and James Madison), King

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[1]See Keith D. Miller, *Voice of Deliverance: The Language of Martin Luther King, Jr. and Its Sources* (New York: Free Press, 1992). Miller shows that the impetus for an epistolary essay came from *Christian Century*, which in 1959 commissioned King, as one of its editors-at-large, to write letters for a Christmas issue that would place contemporary social problems in the context of liberal Christianity. King, Miller points out, did not write a public letter for the journal at that time, but used the occasion of his arrest as well as a public statement written by the eight members of the clergy for a local newspaper as the context for his letter. The lore that places the clergies' letter for the real context may have started with the republication of their statement by activist and editor Bayard Rustin under the headline "Go Slow Dr. King" as a sidebar to King's letter in *Liberation* 8 (June 1963): 10.

joined a vision of community drawn explicitly from his Christian ministry with the secular ideals of liberty and justice articulated in the Declaration of Independence, *The Federalist,* and the United States Constitution.[2]

In several ways, the values and philosophy King mined in his response to the Alabama clergy are profoundly federal in spirit and form. King's vision for the individual who consents to join and is welcomed into an American community draws explicitly on federal political ideals and the federal (covenant) theology of Reformed Protestantism. King's early emphasis on local, face-to-face negotiations and on the empowerment of local African-American communities, coupled with his *simultaneous* insistence that sectional differences in fundamental civil rights give way to a common moral and constitutional standard, also evince a federal orientation. In the view of Daniel J. Elazar, the Civil Rights Movement stands as one of the most "comprehensive expressions of the covenant tradition." In Elazar's view, King implicitly invoked the principles of covenant to demonstrate the unconstitutionality and injustice of segregation laws.

More than a test of law was at stake in King's civil protests, however; King asked Americans to judge themselves and their institutions according to values and commitments that transcended and informed constitutional choice. From the perspective of African-Americans, the injustices of ordinary law and the imperfections of the federal Constitution impelled not only constitutional tests, but also a movement to rededicate American constitutionalism to natural right, equality, and justice. Only by returning to the precepts articulated in the Declaration of Independence could Americans elevate their founding principles above constitutional compromises. For King, the political principles of equality and liberty articulated in the Declaration referred to religious insights concerning the inherent worth of God's creation.[3] As Elazar shows, the Declaration of Independence reflects nothing other than the covenantal foundations of American constitutionalism.[4] By embracing King's thesis, Americans indicated their willingness to return to more fundamental principles of justice than those articulated in the text of their most fundamental law. The nation's political and moral response to the Civil Rights Movement demonstrate the resiliency of American federalism and the power of the covenant idea as a "firm but flexible framework for political change."[5]

[2]See King's discussion of the letter in Martin Luther King, Jr., *Why We Can't Wait* (New York: New American Library, 1964). p. 76. Citations here are to the version printed in *Liberation* 8 (June 1963): 10-16, 23 also anthologized in *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* ed., James M. Washington (New York: Harper & Row, 1986), pp. 289-302.

[3]King, "Letter," 10.

[4]For Elazar's complete appraisal of the covenant tradition see Daniel J. Elazar, *The Covenant Tradition in Politics,* 4 vols. (New Brunswick, NJ: Transaction Publishers, 1995-98), 3:123. See also, Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988). pp. 111-125.

[5]Elazar, *The Covenant Tradition in Politics,* 3:167, 168.

The essence of these claims is supported by King's sermons, speeches, and activism. King's thought may be associated with the American covenant tradition through his training in theology at Crozer seminary and Boston University as well as through his experience in the black church. The covenant idea also provides the latent framework for King's explication of civil disobedience and nonviolent direct action. Indeed, interpreting King's works as examples of covenantal thinking reveals the radical character of his moral charge to the nation. By insisting that positive law be brought into alignment with its moral basis, King challenged contemporary constitutionalism to an extent that scholars often fail to appreciate.[6] In popular sentiment (and perhaps jurisprudence) Americans increasingly venerate the federal Constitution as an article of faith; King demanded that the nation assess its highest law more critically.[7] This shift toward a more "covenantal" constitutionalism draws our attention to a paradox that Elazar observed in modern covenant-based polities. As Elazar's analysis of the covenant tradition shows, a commitment to constitutionalism ("the idea of limited government and limitations on governors") emerges as a defining political element of modern covenant-based polities. Despite this apparent affinity, Elazar also finds that "as constitutionalism has spread, covenantalism seems to have retreated."[8] Our preference for the letter rather than the spirit of the laws seems to follow logically from our desire for constitutionally limited government. King's political thought and action draw this logic into question, however, challenging Americans to assume a covenantal orientation in reassessing their constitutional faith.

DANIEL ELAZAR ON COVENANT PRINCIPLES AND CONSTITUTIONALISM

Elazar describes the covenant tradition as one of three basic approaches to authority. Covenant foundings emphasize consent and encourage authoritative institutions to develop as a matrix of shared, concurrent, and limited powers. In contrast, Elazar associates rule justified by an act of conquest with hierarchy, command, and control; organic authority, which, for example, emerges from kinship, villeinage, and patronage, produces governing institutions of the center-periphery type.[9] Elazar furthermore associates

[6] See, for example, John Rawls who has used the argument in King's letter as an example of a political action that required no necessary appeal to religious doctrines to fulfill its goal of correcting serious injustice in a constitutional order. John Rawls, *Theory of Justice* (Cambridge: Harvard University Press, 1971), p. 365.

[7] See Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1988). Levinson examines evidence of Americans' treatment of the federal Constitution as a document imbued with nearly religious significance, distinguishing principles worthy of this response from law that is legitimated merely by force.

[8] Elazar, *The Covenant Tradition in Politics*, 4:265.

[9] Elazar, *The Covenant Tradition in Politics*, 1:35-42 and 3:2-3.

these three forms of polity with different processes of constitutional design. In the hierarchical command structure of conquest-based foundings, the fidelity of the vanquished is secured by fealty when a subjugated people acknowledge the legitimacy of charters imposed by their rulers. In organic unions, constitutional design occurs as an act of ordinary law-making through existing institutions with informal processes for signaling agreement. Covenanted polities use a convention of partners and a process of formal consenting to write and ratify comprehensive constitutions.[10] While actual foundings may combine these elements, Elazar maintains that one rationale for political authority will predominate in a community's story of its origins. The Biblical archetype of a covenant between God and humanity set the frame for human partnerships in the covenanted polities of colonial North America.

The covenants between God and Adam, Noah, Abraham, Moses, and David (and for Reformed Protestants, the New Covenant of Christ) offer a model in which entities of vastly different powers and origins joined for a common purpose, gaining a new identity as a member of a partnership, while maintaining the integrity of their essential being. Creature and Creator are neither fused nor equated, but rather unite in a partnership to continue the work of creation.[11] This partnership required responsibilities of human beings who "are bound by a moral order, yet are free to act within it."[12] Freedom-in-covenant entailed what Puritans (who called their doctrines "federal theology," using the Latin term for covenant, *foedus*) defined as "federal" or "civil" liberty: the liberty only to do only what is right, good, and honest. In the federal republican tradition, "civil liberty" depended on citizens knowing when to set a matter of personal interest before the public, when to withdraw from public what was truly private, and when to set aside narrow interest for the good of the whole. They developed their common sense of the appropriate distinction and interdependence of public and private interest in light of experiences with self-government in covenanted polities.

In American public philosophy, enlightenment influences filtered through covenant theology and federal practice, producing a type of "civic republicanism" that uniquely blended older ideas of civil liberty with modern notions of individual right, autonomy, and self-sufficiency. This federal version of civic virtue was expressed in nineteenth-century America as "self-

[10]Elazar, *The Covenant Tradition in Politics*, 4:227.

[11]See, Louis E. Newman, "Covenant and Contract: A Framework for the Analysis of Jewish Ethics," *The Journal of Law and Religion* 9 (1991): 89-112; Elazar, *The Covenant Tradition in Politics*, 1:79-81; David Hartman, *A Living Covenant: The Innovative Spirit in Traditional Judaism* (New York: Free Press, 1985); Lyle D. Bierman, "Federal Theology in the Sixteenth Century: Two Traditions?" *The Westminster Theological Journal* 45 (1983): 304-321.

[12]Elazar, *The Covenant Tradition in Politics*, 1:22-23; 3:7; and 4:8.

interest well understood" (to cite Alexis de Tocqueville). Abraham Lincoln articulated the ideal of federal liberty in his debate with Stephen A. Douglas when he declared "there is no right to do wrong;" in Elazar's view, federal liberty is also implicit in the theo-political foundations of King's civil rights activism.[13] Indeed, King's confessed motive for resisting segregation laws was nothing less than the redemption of the American soul, an objective that required protestors to transcend self-interest. The individual's expressed will legitimizes covenantal foundings; yet, as each of these visions of civil liberty shows, the relational aspect of right and obligation also imparts an appreciation for life in association to the polity's legal framework. According to Elazar, "Federal liberty bridges between the premodern and modern conceptions of rights and recognizes the relationship between obligation and right."[14] The implications of this observation become clearer when we compare covenants with other consent-based arrangements, including compact and contract.

Equals enter freely into any of these three types of agreement, but covenants, compacts, and contracts guarantee their promises by different proportions of moral, ethical, and legal constraint. According to Elazar, covenants and compacts emphasize the moral dimension of an agreement (and the relationship such an agreement creates) to a degree not found in a contractual orientation. In the case of covenants, the agreement's moral dimension is primary. Compacts also reflect moral concerns, but a compact's legal compulsions are often on par with its moral claims.[15] In contracts, the legal dimension of the agreement is predominant. Covenants and compacts can also be distinguished from contracts in terms of the duration, scope, and means of enforcement. Contracts are generally of limited duration, for limited purposes, with limited liabilities, enforced by a third party with a mutually acknowledged authority to regulate negotiations, adjudicate disputes, and enforce sanctions. Unlike contracts, covenants create perpetual agreements enforced by the "watchfulness" of the covenanted parties.

As tidy as these categorizations seem to be, they become blurred in the actual use of most covenants, compacts, and contracts. In Britain's North American colonies, "covenant" and "compact" were often used interchangeably and took effect along with numerous other types of agreement. Covenants and compacts were formal agreements witnessed by the highest

[13]Alexis de Tocqueville, *Democracy in America*, trans. and eds. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000).; Abraham Lincoln, "15 October 1858, Reply to Douglas at Alton," *Created Equal? The Complete Lincoln-Douglas Debates of 1858*, ed. Paul M. Angle (Chicago: University of Chicago Press, 1958), pp. 390-396; Lincoln, "27 February 1860, Address at Cooper Institute, New York City," *Abraham Lincoln Speeches and Writings 1859-60*, ed. Don E. Fehrenbacher (New York: Library of America, 1989), pp. 120, 128-129; Elazar, *The Covenant Tradition in Politics* 3:167.

[14]Elazar, *Covenant Tradition in Politics*, 4:248.

[15]Elazar, *Covenant Tradition in Politics*, 1:22-23.

relevant authority, religious or civil, but it was not always easy to distinguish these agreements according to their "secular" or "sacred" character. While church covenants were obviously religious, many civil covenants also developed from religious foundations. Some civil agreements known as covenants were purposely separated from the polity's religious authority and were, in this sense, akin to the generally secular compact form. Secular and sacred agreements coexisted under the same covenantal rubric, indicating not so much a fusion of church and state as an acknowledgment of the simultaneity of distinct but interrelated arenas of life. Covenants and compacts did not always enjoy the status of law; nevertheless, they often acted as founding documents influencing a community's public activity, including the establishment of a "due form of government." In New England, contracts generally were the most limited in scope, exacting specific obligations and limiting liabilities to the terms and conditions of the agreement. Still, it would be difficult to find a New England contract or enforcement procedures that disregarded moral reasoning. The verbs "to compact," "to covenant," and "to agree" were used interchangeably; compacts and covenants constituted relationships in New England that were further institutionalized as constitutions by adding an explicit statement of the frame of government.[16] Constitutionalism appears as an ever-present element of the covenant orientation; the constitutions developed from covenant relations evinced a specific orientation to law and favored a particular frame of government.

In a covenantal orientation, agreement establishes enduring relationships that cannot be exited unilaterally. Parties cannot simply discard their relationship; those who desert their commitments are absent, but still obligated, and those who have been abandoned are, nevertheless, obligated to receive the returning prodigal–at least until the covenant can be dissolved mutually. As a result, covenantal relationships require parties to reach subsidiary agreements about terminating their relationship. Thus, the perpetual nature of covenants imputes a foundational quality to their purposes, but because this perpetual union can be dissolved by mutual agreement, covenantal thinking also balances a desire for permanence against human frailty. Parties to a covenant define their agreement's aims, but their scope is not unlimited; their purpose and even their authority can be the subject of continuous negotiation and amendment. In New England, for example, the aims of a covenant were often comprehensive, but covenants were also used for more limited ends in mundane transactions. What seemed most important to the people who covenanted was the orientation inspired by such agreements. Covenants embodied the transcendent principles and

[16]Lutz, *Origins of American Constitutionalism*, pp. 16-34.

relationships to which other agreements (or measures for enforcing subsidiary agreements) referred. Covenants set the course for the parties involved; the direction could always be questioned, but inquiry assumed that relations would persist even as the foundations of an association were renovated. The significance of federal liberty in actual covenants is obvious.

In practice, a covenant's viability depended on perceptions of self-interest and the good of others which often only surfaced during disputes. In the typical scenario for handling disagreements, covenantal thinking was meant to encourage the parties to elevate the value of the relationship above their individual circumstance or narrow interest. Individual interest was a legitimate concern in covenantal negotiations, but more than interest brought parties in dispute together; bargaining in "mutual good faith" envisioned a relationship in which a person represented much more than an articulated interest. Far from a license to gain a relative advantage over a partner in covenant, such reflections on self-concern prompted all parties to acknowledge their mutual obligations; covenanted bonds not only asked the individual to hearken to others, but also gave the individual the same grounds on which to appeal to others. Whatever duties others might reasonably expect from a partner in covenant, that individual could, with equal merit, claim from other covenanting parties. As a result, covenantal claims were pursued and enforced by the parties themselves. When such claims did have standing in civil law, the principles of equity and mediation generally prevailed in court proceedings. In this way, covenants provided a way for individuals to place themselves willingly under the judgment of a power that incorporated but transcended their will. Those who covenanted accepted the responsibility to act as judges, monitoring their relationships, showing self-restraint, demanding just treatment from their partners, and holding a similar place in the eyes of other parties. The principle of consent and, more basically, the moral equality of God's self-conscious human creation necessitates institutional means by which the partiality of individual, self-interested views are reconciled with the impartial, disinterested claims of justice.

Individual, church, and civil covenanting required conscientious participation and continuous self-and communal assessment. Such intense scrutiny (and the calls for renewal and reform that often followed) encouraged arenas of private reflection and collective deliberation, and choice to develop along with rituals and rules of discourse, assent, and dissent. Major exponents of federal theology, such as Johannes Althusius, described the federal polity as a matrix of associations based on a combination of necessity and choice.[17] Some relational ties (including kinship) might

[17]Johannes Althusius, *Politica*, trans. and ed. Frederick S. Carney (Indianapolis: Liberty Fund Publishers, 1995).

emerge organically within a polity, but, ultimately, even familial obligations must be assumed consciously. The associational ideal not only rejected notions of biological determinism that often justify an organically derived status hierarchy, but also the conceptual framework of command and control that justifies Leviathan after an initial moment of consent. As the most universal form of association in a federal polity, the commonwealth represented a larger arena of collective endeavor, employing powers and authority concurrently with other arenas of public and private association. Individuals in a federal polity exercise authority and are thus buffered from the excesses of a totalizing state by their participation in associations of their own design. In Elazar's words, the individual in a federal polity "was a reality because every individual was created in God's image with his or her own soul;" nevertheless, "individuals did not stand naked in the face of powerful public institutions."[18] Relationships are not more important than the people who forge them; rights inhere in the individual as a created being with capacities for self-consciousness and self-control. Still, associations sustain the individual by compelling an understanding of liberty that is ordered by the necessity of relationship, albeit relationships to which we consent.

As Elazar points out, early state bills or declarations of rights recognized or assumed that individuals lived as a part of a community and were obligated to use their individual rights to maintain the shared institutions of their common existence. Communities were reciprocally obligated to secure for individuals the rights of life, liberty, and property. By the early nineteenth century, the shared assumptions about natural rights and community had given way to an increasingly text-based construction of constitutional rights. The fundamental law of the people (established by their mutual consent) may ultimately have referred to the law of nature or nature's God, but citizens and jurists found increasingly less need to look beyond the will of the people as it appeared in the text of their constitution. As a result, constitutional law might be more easily detached from any sense of its antecedent or transcendent foundations.[19] More than a shift from abstract principles to concrete rules is at work in the ascent of text in constitutional practice. The longitudinal development of a seemingly inverse relationship between covenant and constitutionalism signals a "transformation of the worldview that informs humanity, or at least its dominant expressions."[20] Consti-

[18]Elazar, *Covenant Tradition in Politics*, 2:316.

[19]Elazar, *Covenant Tradition in Politics*, 4:247-248; 3:94; Harold Berman, *Faith and Order: The Reconciliation of Law and Religion* (Atlanta: Emory University Scholars Press, 1993); Marvin Meyers, *The Jacksonian Persuasion* (Stanford: Stanford University Press, 1957); Perry Miller, *Life of the Mind in America from the Revolution to the Civil War* (New York: Harcourt Brace Jovanovich, 1965).

[20]Elazar, *Covenant Tradition in Politics*, 4:265.

tutional scholars point to the period of John Marshall's post-*Marbury* tenure (1803-1835) as the decisive stage of this transition.[21]

In this view, the Marshall Court established the modern era of judicial review by rejecting the idea that the federal Constitution acts as the written testament of an antecedent social compact, chartering a government that is limited by antecedent natural rights, universally understood and accepted by a covenanted people. In place of the covenant treatment of the federal Constitution, the Marshall Court established the Constitution as "the first and supreme piece of legislation emanating from the people, who are the first and supreme legislature."[22] These scholars construe the former view of the constitution as a "compact theory" that contrasts with the "contract theory" articulated by the Marshall Court. At stake in this discussion are two distinct justifications of judicial review and, as a consequence, conflicting views of the appropriate bounds of judicial power. When the Constitution is taken as an embodiment of a social compact that is prior to legislative power in time and authority, judges must inquire into the nature of the compact in order to interpret the Constitution and review legislative acts. In the American case, such a social compact had presumably been founded on the rights of nature and nature's God, as articulated in the Declaration of Independence and the bodies of liberties preceding the frames of government found in colonial New England. This pedigree might offer some guidance for jurists probing the specific nature of a fundamental right; nevertheless, the compact theory reserved to judges the power to interpret constitutional law in light of the more fundamental principles embodied in an antecedent (and possibly receding) social compact. In contrast, the Marshall Court approached the Constitution as a text of "expoundable law," less dependent on jurists' perceptions of natural justice and more securely tethered to laws adopted in formal acts of consent.[23]

Agreement about this history has not been matched by agreement about its implications. One interpretation holds that the transformation from a pre-constitutional compact of "implied unwritten laws" to the more contractual characterization of jurisprudence successfully restrained judicial power. In this view, text-focused judicial review imparted to jurists a sense of the judiciary's own subordination to the Constitution. This attitude of self-constraint developed without reducing the judiciary's capacity to limit executive and legislative powers. In this view, a judiciary that could look to pre-legal, unwritten principles gave too much latitude to jurists to determine the content of natural justice and the nature of the universal founda-

[21] *Marbury v. Madison*, 5 U.S. 137 (1803); See Leslie F. Goldstein, "Social Compact in Nineteenth Century Constitutional Law," *Covenant in the 19th Century: The Decline of an American Political Tradition*, ed. Daniel J. Elazar (New York: Rowman & Littlefield, 1994); Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven: Yale University Press, 1990).

[22] Goldstein, "Social Compact," 50.

[23] Ibid., 62.

tion of society's compact.[24] The contrasting interpretation views Marshall's ideal as leading to a more powerful judiciary. When jurists are seen primarily as expositors of text, they may declare as unconstitutional acts that reflect an equally legitimate alternative reading given by Congress. From this perspective, when judicial review is limited to assessing laws that fit the spirit of the Constitution (as per the principles established and acknowledged in the antecedent social compact), the Court would be less likely to annul acts of Congress simply because jurists read the Constitution differently.[25]

The debate hinges on different interpretations of constitutional development in America's covenant tradition, but both views describe the antecedent "social compact" as the pre-legal, unwritten spirit of the law. In many cases, colonial moments of constitutional choice did not follow this linear trajectory from spirit to letter, however. Written covenants and compacts often assumed a foundation of shared principles and intended these documents as an explicit declaration of implicit values. In the process of self-government, doubts often arose about the content and universality of shared beliefs. In response, covenants and compacts became more explicit, but these amendments followed collective reflection in which shared values were articulated, developed, and practiced. Living by the letter of the law required self-governing people to consider the spirit of the law in myriad mundane decisions. Numerous examples from the New England experience in covenanting suggest that, on their own, more explicit statements of covenantal principles might do little to address institutional inadequacies. More explicit texts generally had to be accompanied by a more widely shared understanding of the polity's transcendent aims or covenant principles. The act of reworking a covenant often accomplished a broad recommitment to shared values, as ideas were tested in public forums against the lived experience of covenanting. Where public discourse was not a part of the process used to produce new working arrangements, more explicit language and textual interpretation often exacerbated institutional failures. Covenantors seemed to recognize that constitutional choice and interpretation could not be limited to jurists, and that basic agreements (and contestation) about values as well as the basic frame of government were important aspects of their constitutionalism.

It would seem that in cases where transcendent principles of natural right are articulated in antecedent public documents (as in a variety of state constitutions and their covenant or compact predecessors) as fundamental law, jurists might find a middle ground between the text and the spirit of constitutional principles. The distinction between compact and contract constitutionalism also depends on the assumption (or denial) that

[24]Ibid., 51-55.
[25]Snowiss, *Judicial Review and the Law of the Constitution*, p. 173.

a universal sense of justice, or at least a shared sense of the spirit of the law, can become known or developed by a people. From the perspective of covenant theory, people have such capacities; what individuals and communities also require are adequate institutions for gaining a practical understanding of their shared (or universal) standards of value. Perhaps there is a middle ground on which covenantal thinking and constitutional development might meet. By appealing to our shared sense of justice, King at least indicated such a hope. The history of constitutional approaches to race and civil rights in America might have given King pause as he set out to "awaken the consciousness of America." As he knew well, the basic institutions required for political integration (including arenas of common discourse and collective action) had been absent, and constitutional interpretation seemed largely antithetical to their development until well into the twentieth century.

COVENANT PRINCIPLES AND CONSTITUTIONAL COMPROMISES

King looked to three sources of African-American inclusion in the American covenant: the new constitutional founding of Reconstruction, the Declaration of Independence, and African-American religious tradition. Paradoxically, constitutional refounding appears as the weakest of these sources; most of King's references to Reconstruction express the theme of "broken promises." Constitutional amendments and civil rights laws notwithstanding, it seemed to King that the nation lacked the will to rectify injustices and include freedmen in a more perfect union. Divorced from its covenant foundations, constitutional faith had limited resonance for the African-American community. Indeed, the federal Constitution (1789) gave quarter to slavery, apportioning representatives and levying taxes according to population figures that counted enslaved inhabitants of a state as equal to three-fifths of other persons; prohibiting Congress from considering a ban on the slave trade until 1808; and establishing as a matter of fundamental law a public obligation to return fugitive slaves to their masters.[26] These provisions produced several anomalies in the early life of the republic.

The most intransigent constitutional problems arose from the incompatibility of two schemes of authority; the federal union joined a theory of consent-based government with notions of naturally emergent rule. In this case, the organic ideal was also premised on theories of biological determinism and racial superiority that directly opposed the principles of covenant. As a result, two constitutional theories vied for supremacy. In one,

[26]U.S. Constitution. art. 1, sec. 2; art. 2, sec. 9; art. 4, sec. 2.

the federal union existed as a compact among the states, and the source of authority within a state was of no interest to the whole. In the competing view, the federal union joined states, to be sure, but the right of the states to control their domestic institutions depended expressly on the rights of individuals within the states. In the latter, covenantal view, the source of authority within a state must also be based on individual consent, and the rights of states in the federal arena must be derived explicitly from the consent of the people in their collective capacity.

John C. Calhoun articulated one of the most substantial versions of organically emergent political authority and the compact theory of political union. Calhoun denied the doctrine of equal natural right announced in the Declaration of Independence. The phrase "all men are created equal," he contended, was an unnecessary addition to the document that encouraged pernicious doctrines, elevating individual liberty above "the liberty of the community and safety of society." The mistake, Calhoun explained, started with an erroneous interpretation of Scripture. God had created only two persons, and one was subordinate to the other. All other human beings were born, not created, and no one was born in a state of liberty. Instead, human beings were born subjects in a political state; liberty was, thus, not a right of individual persons. Only a "people" (in this case, an organically formed community) could claim this greatest of all blessings.[27] Only peoples of virtue and intelligence who were favored by fate were entitled to liberty, and only a government that developed organically from the activities of a virtuous community could claim its allegiance.[28] Accordingly, only the emergent authority of the state governments could claim legitimacy; the compact among states was a mere construction to facilitate the joint efforts of these distinct communities.[29]

Preserving the organic community's distinct way of life remained the paramount concern of Calhoun's legislative agenda. As a result, he recommended a veto for the states over congressional legislation (interposition and nullification) and voting rules designed to enable a majority position to be derived from a combination of majority positions taken by distinct communities with concurrent governing authority (a concurrent majority). Each of these institutions could be justified within a federal system, especially one in which a distinct minority could expect domination from an opposing majority. In this case, faulty philosophical foundations, namely, biological determinism and racial supremacy, rather than any inherent

[27]John C. Calhoun, "Speech on the Oregon Bill," *Union and Liberty: The Political Philosophy of John C. Calhoun*, ed. Ross M. Lence (Indianapolis: Liberty Fund, 1992), pp. 539-570, quoted portion, p. 568. See also Calhoun's "A Disquisition on Government," *Union and Liberty*, 42-48.

[28]Calhoun, "Discourse on the Constitution and Government of the United States," *Union and Liberty*, 81-286, quoted portion, 569.

[29]Ibid.

design flaw rendered these institutions incompatible with covenant-based republican values.

The constitutional status of slavery and deep philosophical divisions encouraged a host of competing constitutional positions on abolition, "non-extension," and reconstruction. In the early republic, Congress conceded that it lacked the authority to abolish slavery, although it asserted a power to prohibit slavery in territories and new states. Arguing from a natural rights perspective, the Free Soil party advocated the "freedom national" doctrine, maintaining that if the federal government could not abolish slavery, it could similarly not establish it. Freedom, they held, was the natural, even universal human condition; slavery an anomaly produced by local positive law. The federal government could appeal to universal precepts that transcend local errors in support of a policy of "non-extension," refusing to permit slavery in the territories or to admit new slave states to the union.

Again, the rival thesis came from Calhoun. He described the states as the principals or the beneficiaries of their agent or trustee, Congress, concluding that Congress could not exclude slavery from the territories. Because the states held the territories in common, Congress could not acknowledge some property rights and ignore others, without discriminating against the way of life preferred in one group of states. Stephen A. Douglas offered a modification to the agency theory. He agreed with Calhoun that Congress could not interfere with the territories, but, he reasoned, neither could the states; his doctrine of "territorial sovereignty" held that territorial settlers must decide. For many, Douglas suggested the most "democratic" approach (in fact, the doctrine was dubbed "popular sovereignty"), but practicalities, including the decision rule for determining a territorial preference, suggested otherwise. The tragic competition between slave and non-slave states to gain a plurality in territories whose status was unclear, with results such as "bloody Kansas," suggest that majority rule predominated in the public mind as a fair surrogate of right. Yet, the principles of property and private right were also foundational to the doctrine of territorial sovereignty. The frame of private property implied that each individual could sustain a right to bond labor, without referring to the preferences of others. If the majority did not wish to own slaves, no one could force such property upon them, but they, likewise, could not force a slaveholder to divest. On this reading, a territory could become a slave state owing to the choices of a minority, even a minority of one. Ironically, Douglas, who accused Lincoln of favoring policies that would encourage undesirable uniformity among the nation's diverse political cultures, backed a policy that portrayed slavery as a private choice, exposing every community to a minority preference for slaveholding, arguably a swifter path to homogeneity. Advocates for all of these positions confirmed their beliefs with the text of the federal Constitution.

The Supreme Court ended this discussion in 1856. In *Dred Scott v. Sandford,* Chief Justice Roger Taney denied citizenship to freed blacks, asserting that Negroes had been considered an inferior race at the time of constitutional framing and remained "subjugated by the dominant race," whether they were emancipated or not.[30] In a construction of federalism that offered few grounds for negotiation or compromise, Taney concluded that Congress held no authority to prohibit slavery in the territories; for that matter, a territorial populous also lacked authority to act through a territorial legislature to make such a decision for itself. The Court's ruling undermined congressional authority, diminished its effectiveness as a deliberative body, and destroyed hopes for institutional remedies to the impending crisis.

The options theorized for free states and citizens who hoped to challenge the morality of human bondage also reflect a range of constitutional readings. In 1848, the Free Soil party advocated a doctrine of "divorce," in which the federal government separated itself absolutely from the institution of slavery.[31] Separation proposals included repealing the constitutional clause for tabulating slaves among the represented population of a state, repealing the Fugitive Slave Act (1793), abolishing the interstate slave trade, and excluding slaveholders from federal appointments. Abolitionists in the camp of William Lloyd Garrison rejected the federal Constitution as the "covenant with death and agreement of hell" in an allusion to Isaiah's condemnation of Israel's civil leaders who had forsaken their promises to do justice and righteousness.[32] For Garrisonians, nullifying the proslavery clauses of the federal Constitution represented a small initial step in a long process of cleansing the Constitution of slavery's stain. Separation inched toward secession on both sides of the controversy. Secessionists in the South contended that membership in a compact of states was contingent on their continued support and consent of the agreement. Ratifying the Constitution as the will of the people (speaking in their collective capacity in an ordered assembly or, for some, taken as an organic whole) had made them part of the Union. A duly formed body representing the people could use the same process to withdraw from the pact. It remained for Abraham Lincoln to negate this thesis by returning to a more covenantal view of the Constitution.

Neither the "divorce" nor the secessionist formulations treated the Con-

[30]*Dred Scott v. Sandford,* 60 U.S. 393 (1856); HOW 393.

[31]See Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* (London: Oxford University Press, 1970).

[32]Isaiah 28:14-18. Israel had shown faithlessness and ingratitude by ignoring the plight of the poor and infirm as well as widows and orphans, being inhospitable to strangers, and exalting the rule of men above God's covenant. For Garrison's use of the prophet's words, see Timothy L. Smith, *Revivalism & Social Reform: American Protestantism on the Eve of the Civil War* (Baltimore: The Johns Hopkins University Press, 1980).

stitution accurately; the Union was based on a binding agreement that prohibited unilateral separation. For evidence, Lincoln looked first to history, arguing that the states united to mount their revolution, declaring their independence collectively. He then turned to the ideas evidenced by this history and its primary documents. In his view, the Declaration of Independence stated the principles on which the states mounted their collective campaign and formed a civil union. In opposition to Calhoun's premise, the states were not legitimate authorities by virtue of their organic development; instead, the rights of states derived from their position in the Union, and that status was, in turn, premised on the will of the people acting through the states' republican governments.[33] Consent conferred legitimacy in this construction of interdependent governments; not since the Revolution had the states acted independently of the Union in the way imagined by secessionists. The federal Union had articulated its laws not only to the people in their corporate capacity but also as individual citizens since 1789. That said, Lincoln was no enemy of states' rights. In fact, his platform recognized "the right of each State to order and control its own domestic institutions according to its judgment exclusively." However, that right must express the rights of the people, which, in turn, must reflect the unalienable rights with which the Creator had endowed all human beings. The federal Constitution had been designed to secure the principles of the Declaration of Independence through a due form of government directed at perfecting the Union over the association produced by the Articles of Confederation.[34] Concessions to slavery had compromised both frames of government, but the principles of the Declaration provided the historical and moral grounds for remedying these faults. In Lincoln's view, neither the will of the people nor that of the states could be exercised lawfully or morally for a purpose inconsistent with securing those unalienable, original rights.[35] The doctrine of racial supremacy espoused in support of slavery opposed the doctrine of natural right (just as Calhoun had said); biological inheritance, rather than choice, justified authority. As Lincoln reasoned, such a proposition denied that there are any "laws of nature and of nature's God." Where choice was absent, force, not right, lay the foundation for authority, reducing the rule of law to interest, power, and dominance.

As Lincoln made clear in debates with Douglas and during his presidency, this position was unacceptable. Lincoln faced Confederate intransigence with a proclamation that made it lawful for the Union military to

[33]Lincoln, "4 July 1861, Message to Congress in Special Session," *Abraham Lincoln Speeches*, 256.
[34]Lincoln, "4 March 1861, First Inaugural Address," *Abraham Lincoln Speeches*, 215-224.
[35]Lincoln, "16 June 1858, Lincoln at Springfield," *Created Equal*, 2-3; "10 July 1858, Lincoln at Chicago," *Created Equal*, 34-35; "21 August 1958, Reply to Douglas at Ottawa," *Created Equal*, 117-119; "7 October 1858, Reply to Douglas at Galesburg" *Created Equal*, 298-299.

assist runaways, even though he was bound by the Constitution and federal laws concerning fugitive slaves. On the theory that the presidential oath to "preserve, protect, and defend the Constitution" by executing the laws faithfully imparted a duty that might exceed the letter of the law, he asserted that an otherwise unlawful action of the president might become lawful by becoming indispensable. Secession and armed conflict marked the threshold of necessity in 1862, rendering the Emancipation Proclamation the indispensable law he created.[36]

Lincoln carried his thesis that secession was null and void into his Proclamation of Amnesty and Reconstruction in December 1863. In this view, the states as political entities were still part of the Union, although their disloyal governments had put them in an irregular relationship to the other states and the federal governments. According to Article IV, section four of the Constitution, the federal government guarantees a republican form of government to every state of the Union. The federal government was obliged to suppress the military rebellion and engage in reconstructing republican governments for the Confederate states. According to Lincoln's proclamation, loyal white southerners could reorganize the state governments with minimal federal supervision.[37] Congress endorsed the plan and took legislative action aimed at securing the civil liberties of freedmen within the new state constitutions. Assassination left the work of Reconstruction to later administrations and congressional legislation, but by rejecting secession and framing Reconstruction as a project of reorganizing republican governments, Lincoln helped broaden the jurisdiction of the federal government in the reconstruction process. Lincoln's justification for this expanded federal role was not based on a desire to centralize political authority in a national government, however. As he explained in his debates with Douglas, it was not uniformity he sought; rather, what he hoped to elicit from Americans was a shared conception of justice.[38] Without a shared moral framework, the Union was a house divided, and so fundamental a division could not stand.[39]

Reconstruction marked a radical shift in race politics and a moment of

[36]Lincoln, "26 August 1863, To James C. Conkling," *Abraham Lincoln Speeches*, 496-497. Emancipation Proclamation. U.S. Statutes at Large 12 (1864): 1268-1269.

[37]Proclamation of Amnesty and Reconstruction. U.S. Statutes at Large 13 (1866): 737-739; Lincoln, "11 September 1863, To Andrew Johnson," *Abraham Lincoln Speeches*, 503-504; "8 December 1863, Proclamation of Amnesty and Reconstruction," *Abraham Lincoln Speeches*, 555-558; "11 April, 1865, Speech on Reconstruction, Washington, D.C.," *Abraham Lincoln Speeches*, 697-701.

[38]Lincoln, "4 July, 1861, Message to Congress in Special Session," *Abraham Lincoln Speeches*, 256-257.

[39]Lincoln, "27 February 1860, Address at Cooper Institute, New York City," *Abraham Lincoln Speeches*, 112-113;

constitutional "refounding;" for many, constitutional amendments and congressional legislation revealed a new covenant for the nation.[40] Yet, the history of Reconstruction shows that these initiatives succeeded only partially in putting the nation on a new covenantal foundation. The Civil War Amendments and the Civil Rights Act of 1866 addressed several of the legal conclusions drawn by the Taney Court from its premise of race supremacy, but judicial interpretation and congressional lawmaking retreated from fully embracing African-Americans as kin in the American covenant.[41] The Thirteenth Amendment (1865) abolished slavery and involuntary servitude and empowered Congress to enforce abolition, but the result was far from racial parity. Emancipation and abolition had not established the legal rights that would make freedom a reality for African-Americans. Statutes specifying the former slaves' civil status and capacity (including the right to buy, sell, own, and bequeath property; the right to make contracts; the right to contract a valid marriage and to enjoy a legally recognized parent-child relationship; various personal liberties; the right to sue and be sued) defined freedom for African-Americans in the former slave states, yet that definition also fell short of equality. The "Black Codes," as these statutes were known, conferred a racial status along with civil rights to the members of the reconstructed polity. Ironically, these bills often carried such titles as "An Act to confer Civil Rights on Freedmen;" the codes controlled the movement of African-Americans, prohibited their free assembly, restricted their residency to certain areas, prohibited African-Americans from pursuing some occupations, outlawed interracial marriage, and provided other special criminal codes and mandated harsher punishments for African-Americans than for whites found guilty of the same offense.[42]

Congress enacted the Civil Rights Act of 1866 to remedy the *Dred Scott* exclusion of blacks from citizenship and to address the legacy of racial caste preserved by the Black Codes. The law granted national citizenship to African-Americans and guaranteed equal protection of the laws to all citizens without regard to race or previous status as a slave. It permitted persons denied civil rights to remove their cases from state to federal courts and allowed all federal officials to initiate legal proceedings. Federal judges were given broad enforcement powers, including employing the army or state militias, under the president's command, as a posse. Although Congress ultimately passed the bill over President Andrew Johnson's veto, Johnson's charge that the measure would produce a centralized military

[40]See Robert J. Kaczorowsk, "To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War," *American Historical Review* 92 (1987): 45-68; Bruce Ackerman, *We The People: Transformations* (Cambridge: The Belknap Press of Harvard University Press, 1998). p. 198; Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution Its Origins and Development*, vol. 2, 7th ed. (New York: WW Norton & Co., 1991), pp. 319-361.

[41]*Civil Rights Act* 14 Stat. 27 (1866).

[42]Theodore B. Wilson, *The Black Codes of the South* (Birmingham: The University of Alabama Press, 1965), pp. 61-80; 96-115; the title of the bill is from a Mississippi Statue discussed on p. 66.

despotism and destroy the states' constitutional power to protect civil rights is revealing. To the extent that Johnson's constitutional challenge portrayed the bill's effects accurately, congressional legislation underscored the limited reconciliation that had been achieved since 1860. If it were true that no statutory remedies were available to injured citizens when states failed to treat their citizens equally, the small advances in equality since war commenced, unfortunately, had come as a result of force, rather than reflection and choice. In 1866, it remained a question whether force or reason would secure civil rights.

The Fourteenth Amendment addressed problems left unresolved by the earlier amendment by establishing federal protections for civil rights as a matter of constitutional law. Congress would assure that no state made or enforced a law that abridged the privileges or immunities of citizens of the United States, failed to provide due process of law, or denied any person equal protection of the laws. This amendment also encouraged states to enfranchise African-Americans by preventing states that denied blacks the right to vote from including any African-Americans in the population tally that determines representation in the U.S. House. The Fifteenth Amendment enfranchised adult African-American males–a final step, it would seem, in the long march toward legal equality. Here, too, were compromises, however. Clauses that would have outlawed property qualifications and literacy tests and provisions that would have banned racial discrimination in qualifications for office-holding were dropped to achieve the bill's primary objective: to enfranchise blacks in the northern and border states and maintain the Rupublican party's power. Although practical necessity was not inevitably at odds with moral concerns (little would have been done for federal civil rights without a Republican majority), the compromises and ensuing retrenchment in legislative efforts on behalf of equality lay the foundation for an era of systematic segregation. The intertwined goals of protecting civil rights, while preserving federalism in the United States demanded cooperation from all parties to the new founding. When the former slave states resisted, federal institutions often lacked the capacity to enforce federal law. Authority alone could not perfect the Union; ultimately, the congressional reformers retreated from the enforcement of civil rights and turned to other matters. The judiciary also retreated from broadening the federal role in state civil-rights enforcement.

Writing the Court's opinion for the *Slaughterhouse Cases* (1872), Justice Samuel F. Miller held that the Reconstruction Amendments were created "to forbid all shades and conditions of African slavery;" the "one pervading purpose" of the amendments was the "security and firm establishment" of

[43] *The Slaughterhouse Cases*, 83 U.S. 36; 16 Wall. 36. (1873).

the former slaves' freedom and "the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[43] These promising pronouncements nevertheless heralded a decision that narrowed the scope of the Reconstruction Amendments. According to Miller, these laws had not been established to enable federal authorities to contravene state actions for the purpose of creating new state privileges and rights. National and state citizenship provided for distinct rights, and the Fourteenth Amendment only spoke to the limited number of rights inherent in national citizenship. Nothing in the amendment could be construed as destroying "the main features of the general system" of federalism, including the traditional jurisdictional balance that gave states primary responsibility for securing the civil rights of citizens. The states remained the source of most substantive privileges and immunities; thus, the equal protection clause was restricted to cases of "discrimination against negroes as a class," and congressional authority was limited to provisions "for that race and that emergency" only. Given the reticence of some state governments to secure civil rights for African-Americans, their white supporters, or federal officers who tried to enforce the law, the Court's ruling left of discrimination, intimidation, and terrorism in place.

In 1875, Congress passed the last Reconstruction measure, affirming the equality of all persons in the enjoyment of public transportation facilities, in hotels and inns, and in theaters and places of public amusement. Businesses, although privately owned, were understood as exercising public functions and were subject to public regulation; individuals were civilly liable for violations of the statute. No wonder King felt the sting of a fallow constitutional vision in 1955; in 1870, long-time advocate of equality in congressional Reconstruction and the bill's author, Republican Charles Sumner, contended that racial segregation was discriminatory, that separate but equal facilities were inherently unequal, and that compulsory desegregation would combat prejudice, while compulsory segregation fostered it. He begged Congress to pass the second Civil Rights Act, which it did in 1875.[44] The legacy of the bill was primarily rhetorical, however, as an 1883 Supreme Court opinion, from which only Justice John Marshall Harlan dissented, declared that Congress had no constitutional authority under either the Thirteenth or Fourteenth Amendment to pass such legislation. In each of the five suits comprising the *Civil Rights Cases* (1883), a black citizen had been denied the same accommodations, guaranteed by the statute, as white citizens enjoyed.[45] The act of 1875 had been enforced against innkeepers, theater owners, and a railroad company. In these actions, the Court saw an

[44] *Civil Rights Act* 43 Stat. 235 (1875).
[45] *The Civil Rights Cases*, 109 U.S. 3 (1883).

invasion of local law by the federal government, an unconstitutional usurpation of powers reserved to the states. Justice Joseph P. Bradley, speaking for the Court, argued that the Fourteenth Amendment only restrained state action; "individual invasion of individual rights is not the subject-matter of the amendment." In arguments that would be revisited almost 100 years later, the Court found that under the Thirteenth Amendment, Congress could enact legislation to end slavery and "badges and incidents of slavery," but distinctions of race, class, or color–mere discrimination–by private parties represented no such harm. The Fourteenth Amendment gave Congress means to eliminate discrimination by a state, but again, provided no power to regulate private conduct. In short, Congress had not outlawed racial discrimination imposed by private action; it only outlawed racial discrimination in public places chartered or licensed by a state.

Federal theory does not tell us immediately what is amiss in these rulings, nor will recurring to constitutional text alone enlighten us. To understand what might be objectionable in the Court's decisions, we need to look beyond constitutional text to the covenantal spirit of the amendments and the federal frame of government. A sympathetic reading of the Court's position in the *Civil Rights Cases* and the *Slaughterhouse Cases* might point out that the states had been the primary repositories of civil rights, not because they represented the organic unity that Calhoun imagined, but because the earliest state constitutions assumed that states were comprised of a citizenry suffused with sufficient republican virtue to sustain an engaged civil society. From this perspective, state police powers are a vital part of the institutional framework that would protect the moral foundations of self-government; to have a reasonable expectation that citizens could meet their civic obligations, the states must be the first defenders of individual rights. In the view of several scholars, the distinct philosophical grounding of the state constitutions completes a federal tableau in which the federal Constitution embodied the somewhat contrasting principles of interest, utility, and commerce.[46] Constitutional scholars have shown that the federal Constitution requires the existence of the state constitutions to be complete; the Union makes no sense without the parts united.[47] Given this history, these Court decisions make a reasonable effort to maintain federal principles and practices while moving the state governments (and citizenry) toward a shared understanding of basic civil rights.

In what way is this analysis lacking? The covenantal resolution to a conflict in the situation so outlined would be likely to unfold gradually, with success depending on how adequate the arenas of deliberation and choice

[46]Elazar, *Covenant Tradition in Politics*, 3:92.
[47]Lutz, *Origins of American Constitutionalism*, p. 96.

were for enabling parties in conflict to move toward greater agreement. Even a covenantal approach can remain vulnerable to persistent prejudice, biases that must be broken down in the quotidian interactions of citizens with their governments. However, these important arenas of everyday interaction were the very areas of private interactions from which the court stood clear. The civil culture of late-nineteenth-century America hardly stood aloof from the racial prejudice of previous generations. In these constitutional decisions, federal solutions and covenantal practices of equity and justice were abridged by doctrines of racial supremacy. As King would argue 100 years later, legal remedies for public injustice could have only a limited effect on race relations under such conditions.

By 1890, private discrimination had developed into a system of cast ("Jim Crow," as segregation was known in the South). In addition to the infamous separate water fountains, waiting rooms, lunch counters, and bus seating ubiquitous throughout the South, twentieth-century blacks and whites were to use separate telephone booths in Oklahoma, rode separate elevators in Atlanta, used separate Bibles for swearing as witnesses in Georgia courts, and had their school books stored in separate spaces in North Carolina and Florida.[48] The constitutional source of Jim Crow was *Plessy v. Ferguson* (1896) and its separate but equal doctrine.[49] According to *Plessy*, an African-American's Fourteenth Amendment guarantees to equal protection of the laws were safeguarded when they were provided with facilities substantially equal to those available to whites. Not until *Brown v. Board of Education* (1954) would the claim made by Justice John Marshall Harlan (the lone dissenter in *Plessy*) that compulsory racial segregation imposed a badge of servitude (in violation of the Thirteenth Amendment) be revisited.[50]

In *Brown*, Chief Justice Earl Warren used social science data to verify that school segregation stamped African-Americans with a badge of inferiority, making segregated education inherently unequal. The decision in *Brown* did not immediately overturn *Plessy* or eliminate segregated facilities, however. The Court limited the scope of the decision, issuing no orders to defendant school boards, instead scheduling the cases for another argument on the question of remedy. A year later, when the Court considered whether segregation should be ended immediately or gradually, it set no deadlines for compliance with its findings, but asked segregated schools to act with "all deliberate speed," a phrase that King reviled as "the tranquiliz-

[48]See Vann C. Woodward, *The Strange Career of Jim Crow* (New York: Oxford University Press, 1974), pp. 98-102.

[49]*Plessy v. Ferguson*, 163 U.S. 537 (1896).

[50]*Brown v. Board of Education of Topeka*, 348 U.S. 886 (1954); *Brown v. Board of Education*, 347 U.S. 483 (1954).

[51]*Brown v. Board of Education*, 349 U.S. 294 (1955).

ing drug of gradualism."[51] *Plessy* was implicitly overruled in a series of *per curiam* orders that invalidated state-supported segregation in all forms. Perhaps the Warren Court hoped to quell conflict by quietly ending segregation, but resistance to desegregation suggests that citizens and officials in Jim Crow states understood exactly what the decision meant.

King berated hesitant federal authorities, including the Warren Court, arguing that inaction allowed a superficial analysis of racial inequality to stand unchallenged. In the "Letter from the Birmingham City Jail" and other speeches and writings, he spoke of the "myth of time," the idea that history was inevitably progressive. This mistaken view of social progress derived from a faulty sociological and political analysis that evinced a naïve view of America's destiny and God's role in human history. Human beings, King maintained, could not wait for "time" or God or even government to end human misery. Progress came only through the persistent efforts of people "willing to be co-workers with God."[52] Like Lincoln, King looked to institutions that encouraged such efforts. King found that a retreat from the covenantal promise of Reconstruction had created obstacles to the development of new standards of value consistent with the moral basis of law. Like Lincoln, King also looked beyond institutions to sentiments; legal victories certainly mattered, "but the racial problem, North and South, cannot be solved on a purely political level, " King contended; it must also "be approached morally and spiritually."[53] King found federal institutions to be instruments whose moral import was only revealed in practice, however, as illustrated by antebellum federal responses to slavery and, 100 years later, to desegregation.

As an institutional arrangement, federal police powers, like time, were morally neutral. The federal Constitution gave federal authorities the sole responsibility for enforcing fugitive-slave laws, and an anti-slavery judicial interpretation of the Fugitive Slave Act (1793) rendered a theory of federalism in which obstinate states could hinder federal efforts simply by refusing to assist federal authorities.[54] When slaveholders who felt the limitations of federal enforcement without local cooperation agitated for stronger laws, the resulting Fugitive Slave Act (1850) provided for federal interference in state law-enforcement.[55] The law forced federal marshals to obey and execute all warrants for recovering fugitives in non-slave states and territories, fined them for slaves who escaped from their custody, and empowered them to summon bystanders to assist them as a *posse comitatus*.[56] A century later, the federal government and marshals on whom King relied to en-

[52]King, "Letter," 13.
[53]King, "We Are Still Walking," *Liberation* 1 (December 1956): 6-9; quoted portion p. 9.
[54]*Fugitive Slave Act* 1 Stat. 302 (1793).
[55]*Fugitive Slave Act* 9 Stat. 462 (1850).
[56]*Fugitive Slave Act* 9 Stat. 462, sec. 5 (1850).

force desegregation orders–the federal instruments that segregationists of the twentieth century resisted–also sought a uniform standard of justice, but this standard was confirmed by the opposite moral content. Similarly, the moral status of "states' rights" depends on more basic claims about the origin and meaning of a state. Like Lincoln, King's aim was not an inappropriate uniformity of the nation's diverse regions; integration allowed for differences, as long as basic rights were drawn from shared perceptions of the basic equality of persons. King faced charges that his works destroyed the cultural integrity of his native region, and, like Lincoln, he returned to the Declaration as the articulation of the country's unifying moral principles.

CONTENDING PUBLIC PHILOSOPHIES OF JUSTICE AND LAW

When the Montgomery Bus Boycott began in 1954, King faced constitutional rulings and federal law that lagged behind social problems. Of even greater concern, in his view, were the attitudes about law and its moral foundation that also fell short of what justice required. In particular, King faced a reductionist view of the Constitution in which fundamental law could neither be judged according to any standard nor viewed as anything more than a body of interpreted text. King intended to examine the Constitution in light of religious precepts encompassed by the Declaration. If the Constitution could not be scrutinized, how could a people put itself under judgement, see its errors, or correct them? These questions surface several times as King responded to his critics. James Kilpatrick most clearly articulated the understanding of constitutionalism to which King objected on Saturday, 26 November 1960, when he faced King in a debate broadcast on a special edition of NBC television's "The Nation's Future." Kilpatrick, who had been the editor of the *Richmond New Leader* in Richmond, Virginia, since 1951 and a member of the Virginia Commission on Constitutional Government, focused much of his critique of the Civil Rights Movement on King's justification for nonviolent civil disobedience. Kilpatrick gave a contractarian response to King's philosophy of nonviolence and civil disobedience. Kilpatrick attributed the violence against civil rights protestors to the thesis of nonviolent direct action; the demonstrations, however peaceful their intent, precipitated riots. The right to eat at a privately owned lunch counter or to shop in a department store or to receive service from any "private" business enterprise enjoyed no constitutional guarantee, according to Kilpatrick. He challenged King to find a basis for his protests in law. Kilpatrick had the *Civil Rights Cases* and the *Slaughterhouse Cases* in his corner. The theory of civil disobedience was also fundamentally flawed, according to Kilpatrick. Law-abiding behavior was moral, and he could see no legitimate argument to support King's assertion that a person of conscience can evaluate and chose to disobey a legal statute. In Kilpatrick's

view, King was choosing to obey or disobey laws as a matter of personal preference, with riots and civil disorder as a direct result.

In response, King spoke of the discipline of the protestors and the context of violence that surrounded them, blaming the disorder on the precipitous actions of the white community. Addressing Kilpatrick's charge that his civil disobedience was unprincipled lawlessness, King contended that the protestors were affirming the justice of the United States Constitution. He cited Augustine–"an unjust law is no law at all"–to support his claim that a person discovering an unjust law has the moral obligation to stand against it in civil disobedience. He explained that in many instances, the protestors were breaking no laws, but simply defying local customs. In closing, King attempted to address segregationist resistance to the 17 May 1954 Supreme Court holding in *Brown*.[57] The protestors were illuminating such unconstitutional behavior, meeting the opposition's defiance with moral force.

Kilpatrick struck the debate's final blow, quipping that segregationists were simply resisting what they believed was the unjust law made by the *Brown* decision. A hesitant King replied that Kilpatrick should distinguish the immoral, violent resistance of white segregationists from the peaceful, loving, civil disobedience of the civil rights protestors, but Kilpatrick refused to make the distinction. Painting King as a moral relativist, Kilpatrick quashed King's defenses, vindicating property rights and freedom of association as well as the segregationists' rights of conscience. Why was the right to boycott a business not balanced by a business owner's right not to sell? Who could distinguish justice from injustice, if not the Supreme Court? Were such judgments the province of individual conscience? King had enjoined Jefferson as the exemplar of moral resistance in the Declaration of Independence, but was King not aware that Jefferson and Madison also conceived the Kentucky and Virginia Resolutions–the states' rights doctrine of nullification and interposition, which King loathed?[58]

Kilpatrick cornered King with distinctions between constitutional and ordinary law and the potential for anarchy if each individual claimed a right to pass judgment on the justness of law. Citing numerous court rulings in support of individual rights and the rights of a community to maintain its way of life, Kilpatrick trivialized King's foundational principle, *agape*.

[57] *Brown v. Board of Education*, 347 U.S. 483 (1954); see also *Brown v. Board of Education*, 349 U.S. 294 (1955), announced May 31, 1955.

[58] James Madison and Thomas Jefferson had developed the concepts of interposition and nullification in the Virginia and Kentucky Resolutions against the *Alien and Sedition Acts of 1798*, 5th Cong., 2nd sess., 1571, 1580, 1778; 2093-2116, 2133-2171. The texts of the Resolutions and the replies of other states may be found in Jonathan Elliot, ed., *Debates . . . on the Adoption of the Federal Constitution . . . Together with . . . Virginia and Kentucky Resolutions of '98-99* . . . IV, (Philadelphia: 1836), pp. 528-545.

King could not counter Kilpatrick's legalism with a thesis of peaceful, loving protest as a moral response to injustice; he cited the insights of saints and prophets, but to no avail. Moderator John K. M. McCaffery abruptly ended the match with a word on the significance of legal doctrines. No one engaged King's perceptions about our moral intuition or shared sense of justice.[59] That evening, not only the principles of civil disobedience but also the moral foundations of law stumbled against the ropes of Kilpatrick's constitutionalism. Unable to articulate the principles by which law itself could be judged, King faltered in his attempt to place human creation, including positive law, in a transcendent frame of knowing and judging.

The African-American press reckoned the debate a failure; editor Lucile Bluford, of the Kansas City, Missouri African-American newspaper, *The Call*, analyzed the debate positions in detail, conceding the unprincipled nature of civil disobedience. Her editorial garnered several responses, among them a letter from a political science student at the University of Minnesota, John H. Herriford, who explained the rule of law, equality under the law, constitutional safeguards against majority tyranny, and civil disobedience. Herriford forwarded a copy of his letter to King on 19 December 1960, offering his ideas for King's use in improving his argument. Notes in King's hand on the back of Herriford's letter suggests that he immediately began integrating Herriford's ideas with his own construction of the purposes of nonviolent direct action: making voluntary sacrifices to arouse a community's conscience, emphasizing the protestor's humanity and dignity, disarming one's opponent by moral force, and dramatizing injustice. These notes also express familiar themes of creative protest, the importance of the protestors' inner attitude, the tired spirit of the oppressed, the immediacy of the struggle, and his closing charge to his audiences not to "slow up"–set pieces in the King lexicon.

Herriford gave King a language for distinguishing "tyrannous" from "non-tyrannous" laws that resonated with *The Federalist*. He described tyrannical laws as those that held the minority to a standard different from the majority, compelling a minority to follow rules to which the majority was not bound or denying to a minority privileges or rights enjoyed by the majority. Such laws were, in Herriford's terms, "differences made legal" and, by that definition, tyrannous. Holding a minority view, but accepting the majority's power to bind those who disagree as well as those who favor a rule was a different matter, Herriford argued. Equality under the law, or "sameness made legal," in which all were similarly bound, represented a legitimate democratic design, as long as voting rules gave a fair chance to minority as well as majority voices. King's instincts in the debate had been correct,

[59] *The Nation's Future*, with Martin Luther King, Jr. and James Kilpatrick; John K. M. McCaffery moderator, National Broadcasting Company, 26 November 1960.

Herriford counseled; not only had a majority apportioned privileges to itself that it refused the minority, but even in cases of equal treatment, the laws enacted had not resulted from fair democratic processes. The minority had not been consulted, nor had they voted for the segregation laws that regulated their lives. Herriford maintained that King had been encumbered by his attempt to frame segregation laws in terms of divine or natural law. Kilpatrick had easily dismissed these vagaries, demanding that King defend the protests in statutory terms. In this sympathetic critic's eyes, King must legitimate civil disobedience by mundane, not transcendent, appeals to justice. [60]

King responded with gratitude to Herriford's letter, saying that no one had so clarified his thinking on tyrannical laws. King explained that he would soon be writing a magazine article on these ideas and asked for further suggestions, citations concerning Herriford's distinctions between tyrannous and non-tyrannous laws, and permission to use these ideas.[61] Herriford replied that King could use the material on laws and majority tyranny freely. Herriford reported that the University of Minnesota professor from whom he had garnered the basic ideas, described the material as "public property," assuring Herriford that King was at no risk for accusations of plagiarism by asserting such well-known doctrines.[62] For the rest of his life, King faced significant resistance from America's moral and civic leaders when he defended nonviolent direct action and civil disobedience as appropriate responses to injustice.[63] King never abandoned the language of transcendent justice in favor of the Madisonian formulation of majority tyranny, however.[64] Instead, he incorporated Herriford's ideas into the larger tradition of America's Reformed Protestant heritage, particularly the gospel of social reform. The result was a synthesis of covenant religious doctrines and the secular precepts of the Declaration that could bring state and federal constitutions under moral scrutiny.

[60]John H. Herriford, to Martin Luther King, Jr., 19 December 1960, Papers of Martin Luther King, Mugar Library Special Collections, Boston University. Box 53 A, VIII-13, 2 of 3, Correspondence H.

[61]King to Herriford, 31 March 1961, King Papers.

[62]Herriford to King, 11 April 1961, King Papers.

[63]See, for example, the statement concerning nonviolence made by the National Commission on the Causes and Prevention of Violence, 8 December 1969, in which the whole commission condemned violence, but disagreed about the use of civil disobedience in constitutional tests. A majority held that "any and all acts led to disrespect for law and to violence." A minority reasoned that "dissent was a catalyst of progress within a democratic society" but that "disobedience to valid law as a tactic of protest by discontented groups is *not* contributing to the emergence of a more liberal and human society . . ." *Congressional Quarterly Weekly Report*, 50 (12 December 1969): 2550.

[64]See, for example, the exposition of these ideas in Martin Luther King, Jr., "Love, Law, and Civil Disobedience," *The New South* (12 December 1961): 3-11.

COVENANT AND KING'S PILGRIMAGE TO NONVIOLENCE

Federal religious doctrines and political principles percolated through the republican ideology of the American Revolution and Reconstruction, ultimately reaching King through the nineteenth-century and early twentieth-century social reformers who made up the "social gospel" movement.[65] King encountered theologian Walter Rauchenbusch's call for Christian social activism in courses with George Davis at Crozer Seminary. For Rauschenbush, the Christian ideal of the Kingdom of God reflected not only a religious doctrine but also a social imperative. The Kingdom of God was "always pressing in on the present . . . always inviting immediate action" to promote the "progressive unity of mankind."[66] The "continuous revelation of the power, the righteousness, and the love of God" compelled Christians to transform human society into the Kingdom of God by regenerating and reconstituting human relations according to the framing covenant between humanity and God.[67] Through covenant, God and human partners co-created history in the cause of social justice.[68] These insights appear as foundational principles for King's activism, figuring prominently in his call for a political and spiritual transformation to produce a "Beloved Community" of integration and harmony. Yet, King's studies at Crozer also exposed him to a far less optimistic view of humanity's potential.

The work of Reinhold Niebuhr offered a sobering contrast to the evangelical liberalism of the social gospel. Niebuhr distinguished human law from the Christian ideal of God's perfect righteousness and justice. His work gave King a convincing explanation of the gulf between individual moral behavior and the immoral actions of groups. Fallible, partial human perspectives were in no measure similar to God's perfection; thus, apparently moral, but nevertheless, imperfect individual choices may unintentionally reap collective harm. For King, Niebuhr demonstrated conclusively that human imperfection made it impossible to govern the world by good intentions and the Christian ideal of love. The material world required coercive political force. Christians, Niebuhr argued, were not only naïve if they merely turned the other cheek, they were dangerous. By adopting pacifist strategies, the "children of light" abdicated power to the "children of darkness." Compassion could motivate the just use of force, but force could never be eliminated from the human community.[69]

If Niebuhr's counsel turned King resolutely from naïve optimism, it also deflected him from pacifism. At Crozer, King attended a lecture by Fellow-

[65]Martin Luther King, Jr., "How My Mind Has Changed," *Christian Century* 77 (27 April 1960): 439-41.
[66]Walter Rauschenbusch, *A Theology for the Social Gospel* (New York: Macmillan, 1917), pp. 131-145.
[67]Ibid., 142, 155.
[68]Walter Rauschenbusch, *Christianity and the Social Crisis* (New York: Macmillan, 1907).
[69]See Reinhold Niebuhr, *Moral Man and Immoral Society* (New York: Charles Scribner's Sons, 1932), p. 3; *The Nature and Destiny of Man* (New York: Charles Scribner's Sons, 1943), pp. 2:252; *The Children of Light and the Children of Darkness* (New York: Charles Scribner's Sons, 1944), p. 57.

ship of Reconciliation executive secretary A. J. Muste on that topic and also heard Howard University President Mordecai Johnson describe Mohandas K. Gandhi's Indian movement. These encounters briefly rekindled an interest in the Gandhian writings King had studied in earlier coursework. But his student papers suggest that King had grave misgivings about "a strategy of non-participation" that he considered as nothing less than cooperation with evil. "A position of absolute pacifism allows no grounds for maintaining even a police force," with anarchy and even greater violence as the result, King wrote in a student essay. Christians had an obligation to defend the oppressed, although they were also obligated to treat oppressors "in such a way as to reclaim them to . . . the community." Whatever reformers suffer, "we must not seek revenge."[70] As a student, King continued to wrestle with his desire to do justice for the oppressed and redeem the oppressor. He found intellectual respite in the theology and philosophy of "personalism" taught by Edgar S. Brightman and L. Harold DeWolf at Boston University.[71]

The core idea of this philosophy was "personality," self-direction and self-consciousness, in short, the power to know. The primary religious and social implication of personalism was that freedom is a necessary precondition for self-consciousness. In this view, human awareness, while it is not self-sufficient, independent, or perfectible, is created in the image of perfection, of the Infinite, the absolute consciousness. As King put it, the theological phrase "image of God" meant that "every human being has etched in his personality the indelible stamp of the Creator." This precept logically called for freedom in a form akin to federal liberty. Personalism taught that as a self-directed creature made in God's image, the human being strives to attain a greater understanding of God and human purpose by reflecting on experience. Thus, it followed that "the very character of the life of man demands freedom," the "capacity to deliberate and weigh alternatives," as well as the capacity to choose. In King's view, "freedom" is circumscribed by natural limitations; "a man is free to go north from Atlanta to Washington . . . but he is not free to go south to Washington . . . and he is not free to go to both cities at one and the same time." Freedom is also restricted to

[70]Martin Luther King, Jr., "20 February-4 May 1951, War and Pacifism," *The Papers of Martin Luther King, Jr.*, ed. Clayborne Carson (Berkeley: University of California Press, 1992), 1:433-445. As the editor notes, the authorship of this paper written for Kenneth L. Smith's course Christianity and Society is unclear. The ideas expressed are consistent with the King's description of his effort to come to terms with a thesis nonviolence, as recorded in *Stride Toward Freedom* and with King's class notes on Smith's lectures and Smith's recollection of King's views. Martin Luther King, Jr., *Stride Toward Freedom: The Montgomery Story* (New York: Harper & Row, 1958).

[71]During the last quarter of the nineteenth century a group of influential thinkers including Josiah Royce, William James, and Borden Parker Browne, developed the philosophical perspective known as personalism. Browne, a professor of philosophy at Boston University until his death in 1910, synthesized the thought of Berkeley, Kant, and Lotze and passed these ideas along to generations of Boston University students including Edgar S. Brightman and L. Harold DeWolf, King's major professors.

the right to the good, just, and honest course; in religious and practical terms, "we are both free and destined," he would later tell his audiences.[72] Other implications followed from the personalists' conception of a reasonable Creator of self-conscious beings. Brightman expressed the ideal of an objectively ordered moral universe as a corollary theme in his work on the nature of God's self-possession. As King understood Brightman's ideas, moral experience reveals the reality of an objective moral order, just as sensory experience reveals an objective physical order, and this universe of order can be understood as the activity of a generative supreme mind.[73] If God placed the desire for understanding in human creation, this striving cannot be in vain. In King's words, "the arc of the moral universe is long, it bends toward justice."[74] Human beings have a moral duty to cooperate with God in creating the condition of freedom and justice that aligns human creation with God's moral order.[75] This order demands the reconciliation of oppressor and oppressed, a charge that King eventually translated into a program of nonviolent resistance in which protestors were trained not to retaliate, harm, or humiliate those who opposed them.

Personalism offered a way to synthesize the antithetical views of Niebuhr and Rauschenbush.[76] A newly synthesized "Niebuhr" held that sin, evil, and injustice resulted from the finiteness of human personality (our limited consciousness) and not, as Rauschenbush would have it, primarily from the failure of social institutions (our collective incapacity). The "Rauschenbush" redux presents the human being as potentially able to confront these inadequacies through a healing grace; working through one person at a time, God's grace might cast evil from the world. This synthesis also made it possible for King to reexamine his perspective on pacifism when the Universe turned to him as an agent in history. While neither

[72]Martin Luther King, Jr., "The Ethical Demands for Integration," *The Nashville Consultation, Atlanta Georgia*, 27 December 1962, King Library and Archives, 6-7 (reprinted in Washington, *Testament of Hope*, pp. 117-125).

[73]Martin Luther King, Jr., "4 December 1951, The Personalism of J. M. E. McTaggart Under Criticism" and "6 December 1951, A Comparison and Evaluation of the Philosophical Views Set Forth in J. M. E. McTaggart's *Some Dogmas of Religion*, and William E. Hocking's *The Meaning of God in Human Experience* with Those Set Forth in Edgar S. Brightman's Course on 'Philosophy and Religion,'" *The Papers of Martin Luther King, Jr.* ed. Clayborne Carson (Berkeley: University of California Press, 1994) 2:61-75 and 76-92; quoted portion p. 92. See Edgar S. Brightman, *Moral Laws* (New York: Abingdon Press, 1933), p. 264. For discussions of the role of personalism in King's later writing see Leo Sandon, Jr., "Boston University Personalism and Southern Baptist Theology," *Foundations* 20 (April 1977): 101-108; Stephen B. Oats, "The Intellectual Odyssey of Martin Luther King," *Massachusetts Review* 22 (1981): 301-320; Warren E. Steinkraus, "Martin Luther King's Personalism and Non-Violence," *Journal of the History of Ideas* 34 (1973): 97-111.

[74]Martin Luther King, Jr., "Love, Law, and Civil Disobedience," *The New South*, 16 November 1961, p. 10.

[75]Martin Luther King, Jr., "The Power of Nonviolence" *The Intercollegian* (4 June 1957): 8 (reprinted in Washington, *Testament of Hope*, pp. 12-15).

[76]Martin Luther King, Jr., "1 December 1953 To George W. Davis," *Papers of Martin Luther King, Jr.*, pp. 2:223-4. In 1953, King announced to his mentor George W. Davis that he still found himself "holding to the liberal position," able to see a connection between the ideas of his mentor and his major professor at Boston, the personalist, Harold DeWolf.

passive nor pacifist, nonviolence direct action surfaced as the only way to deal with human beings once one accepted the "sacredness of human personality." King interpreted the Civil Rights Movement as evidence of the moral law of the universe playing out in human history; nonviolence represented an act of cooperation with grace.

In this interpretation, segregation was a paradigm case of sin and oppression because it treated the person, the ultimate intrinsic value, as an object, "a thing." This odious practice negated the freedom inhering in creation, stunting the development of consciousness. Segregation, in King's view, was a moral as well as political problem, one of many manifestations of humanity's estrangement from God. Just as slavery was a tragic example of objectifying other human beings and failing to see our essential connectedness, segregation also opposed a cosmology of wholeness and was, in its essential nature, sinful.[77] Segregation denied humanity's essential unity and the equal worth inhering in God's creation. Consequently, segregation denied God's wholeness and perfection. In ridding the polity of segregation, the moral choice was clear. The moral and ethical impetus for change was also part of America's political legacy. "Deeply rooted in our political and religious heritage is the conviction that every man is an heir to a legacy of dignity and worth," King maintained. The Declaration made it clear that "there is no graded scale of essential worth; there is no divine right of one race which differs from the divine right of another."[78] The pursuit of justice was not only the "eternal will of God," but also the "sacred heritage of our nation." The Declaration announced this aim; American political institutions could be judged by their ability to allow citizens to recognize and address these moral imperatives.[79]

Understanding segregation in this religious context influenced protest motives and goals. The protesters not only struggled for political rights in the legal arena, their work also included the moral charge not to separate themselves from the segregationist. Integration, for King, meant a fundamental reconnection and moral transformation. The Civil Rights Movement presented an opportunity to redeem the nation, realigning political institutions with the fundamental principle of justice to create a "Beloved Community."[80] Even the movement's material goals required a change of heart as much as a change in policy; "self-purification" was the first step in King's nonviolent direct action.

[77]King, "Letter," 10-12.

[78]King, "Ethical Demands of Integration," 4.

[79]King, "Letter," 10.

[80]Martin Luther King, Jr., "The Current Crisis in Race Relations," *New South* (March 1958): 10 (reprinted in Washington, *Testament of Hope*, pp. 85-90). See also King, "Love, Law, and Civil Disobedience," *The New South* (16 December 1961): 3-11 (reprinted in Washington, *Testament of Hope*, pp. 43-53); "Social Organization of Nonviolence," *Liberation* (October 1959): 5-6 (reprinted in Washington, *Testament of Hope*, pp. 31-34); "The Power of Nonviolence," 8-9.

The constant self-assessment represented by the concept self-purification emphasized personal responsibility for correcting injustices by reconciling political justice with transcendent moral claims. In the process of self-purification, the potential protesters prepared to present their "very bodies as a means of laying [their] case before the conscience of the . . . community."[81] This preparation required workshops in nonviolence in which participants practiced accepting blows without retaliation and made the conscious choice to endure the ordeals of jail. More than physical capacities were involved in this training. To refuse cooperation with evil not only required protestors to defy segregation laws but also compelled them to acknowledge the inherent good of the segregationist. In addition to nonviolent behavior, the workshops taught the protesters to respond to violence with love, "redemptive creative good will."[82] The aim of their struggle was a new relationship with their would-be opponents; the object of their concern was the whole community. If these ends were to remain linked to the means of protest, nonviolent activists could not inflict injury in any form.[83] Not only must they avoid physical retaliation, each person must also avoid the internal violence of hateful thoughts; the protests were meant to encourage the necessary change of heart through a sense of moral shame instead of seeking retribution through condemnation and humiliation. In many speeches, interviews, and sermons, King stressed that his understanding of loving one's enemies implied a level of disinterested concern that was far from a sentimental attachment.[84] To return love for violence and hatred required each protester to engage in the on-going intellectual and spiritual process of discerning the deepest causes of human suffering and the deepest cravings for peace.

King believed that this moral effort allowed God to work through the heart of the oppressed person to change fundamentally the oppressive situation.[85] By offering the empathetic response, the protester broke the chain of suffering or, in King's words, used suffering to redeem and transform the relationship between protester and segregationist.[86] The goal of nonviolence was to correct injustice by evoking universal moral principles and, by witnessing to the truth of human integration, "reestablishing the broken community."[87] Confrontation and negotiation concerned more than bargaining over the material situation at hand; the process required nothing less than a colloquy among different perspectives, including the perspec-

[81]King, "Letter," 11.
[82]King, "Love, Law, and Civil Disobedience," 6.
[83]Ibid., 5; See, also, King, "The Power of Nonviolence," 8.
[84]King, "The Power of Nonviolence," 8
[85]King, "Letter," 13.
[86]King, "Love, Law, and Civil Disobedience," 6-7.
[87]Martin Luther King, Jr., "The Case Against Tokenism," *New York Times Magazine*, 5 August 1962, pp. 5; (reprinted in Washington, *Testament of Hope*, pp. 106-111).

tives of racists. In the process described by King, all parties confront and communicate the truth of their situations. The alternatives to this transforming process are either the passive acceptance of injustice, or violent retaliation and the perpetuation of injustice by the protesters themselves. Each of these approaches lead not only to frustration and violence, but also diminish oppressor and oppressed alike.

The trajectory of this new vision emerged in King's dissertation on the theologies of Paul Tillich and Henry Nelson Wieman, written in 1953, as he began his ministry in Montgomery, Alabama, at the Dexter Avenue Baptist church.[88] In his analysis, King took issue with these theologians' approaches, but Tillich's ideas remained important to King's understanding of law and justice. Tillich, like Niebuhr, gave King the opportunity to examine the conjunction of love, compassion, and justice as a theological concern. Events in Montgomery provided an occasion to link love and justice in practical politics. At the first mass rally of the Montgomery bus boycott, King admonished the crowd to "keep God in the forefront" and also to realize that love, forgiveness, and mercy were only part of the Gospel's message. Love represents "one of the pivotal points of . . . faith," but love must be accompanied by its obverse, justice. Recalling Tillich, King told his audience: "Justice is really love in calculation. Justice is love correcting that which revolts against love."[89] In words that King would incorporate with his philosophy of personalism, Tillich held: "We speak for a love which respects the claim of the other one to be acknowledged as what he is, and the claim of ourselves to be acknowledged as what we are, above all as person."[90] Yet, King's emphasis on justice as a corrective to love led again to Niebuhr; justice as a pivotal point in biblical history also entailed the willingness to judge and be judged. Moreover, justice required the legitimate power to coerce behavior in conformity with its precepts. At the Montgomery rally, King reminded the crowd that their loving God was not passive; the God that says "through Hosea, I love you Israel," also "stands up before the nations" to say "I will break the backbone of your power." In the boycott, Montgomery was seeing the "tools of justice" in use, and that meant "not only are we using the tools of persuasion, but we've come to see that we've got to use the tools of coercion."[91] The formula of justice and righteous-

[88]Martin Luther King, Jr., "15 April 1955, A Comparison of the Conceptions of God in the Thinking of Paul Tillich and Henry Nelson Wieman," *Papers of Martin Luther King, Jr.* 2:339-544. King's appropriation of much of his dissertation from other sources and generally faulty citation practices are well documented. See *The Journal of American History* 78 (June 1991), in which the entire issue is devoted to the historical meaning of these facts.

[89]Martin Luther King, Jr., "5 December 1955, MIA Mass Meeting at Holt Street Baptist Church, Montgomery Alabama," *Papers of Martin Luther King, Jr.* 70-79, quoted portion, p. 73.

[90]Paul Tillich, *The New Being* (New York: Charles Scribner's Sons, 1955), pp. 32-33; *Systematic Theology* (Chicago: University of Chicago Press, 1951) 1:279-80; *Love, Power, and Justice* (New York: Oxford University Press, 1954), p. 25.

[91]King, "MIA Mass Meeting," p. 73. See also James H. Cone "The Theology of Martin Luther King, Jr.," *Union Seminary Quarterly Review* 40 (1986): 21-39.

ness in Isaiah, with its echoes of biblical covenant joined the American tradition of equality articulated in the Declaration as the cornerstone of King's nonviolent direct action.

King's theological study gave him a way to join religion and politics in a public gospel for civil rights. But the faith experience of the African-American church provided the context in which King's intellectual journey took place.[92] Themes of exodus, justice, love, and hope are the focus of King's ministry, as they had been for generations of ministers in this tradition. Not only the words of spirituals and the testimonial legacy of the black church pervade King's work, many ministers who were his contemporaries sent sermons for his use. The writings of African-American preacher Howard Thurman gave King a language of reconciliation. King's voice also melded with radio evangelists and mainstream ministers such as Emerson Fosdick, George Buttrick, and J. Wallace Hamilton.[93] The heritage of Montgomery's Dexter Avenue Baptist Church (King's first ministerial post and the locus of initial activities sparking the Civil Rights Movement) also contributed to Kings journey toward nonviolent activism.

In several respects, the history of the Dexter Avenue Baptist Church and its ministers is a microcosm of a complex southern society that was transformed by Reconstruction and stabilized by its religious foundations. The forerunners of the Montgomery Baptists of King's flock, like Baptists and Methodists throughout the lower Middle West and South, had been evangelized by circuit-riding preachers who continued to push the intellectual and spiritual frontiers of Protestant dissent. The mass religious movements that hit America in waves beginning in the mid-eighteenth century diverged in doctrine and method, but shared a hostility to religious orthodoxy and hierarchical authority. Baptists such as Isaac Backus challenged the New England Congregationalist idea of a Bible polity uniting church and civil order through interlocking covenants.[94] Baptist minister John Leland, who by many accounts helped to shape the thinking of Jefferson and Madison on religious freedom, likewise set out for American borderlands to form

[92]See also Cone, op. cit. and "Martin Luther King, Jr., Black Theology–Black Church," *Theology Today* 40 (January 1984): 409-420.

[93]For the most complete analysis of King's use of various sources for his own speeches, sermons, and published work see, Miller, *Voice of Deliverance.* For an examination of King's use of Ghostwriters see David Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* (New York: Morrow, 1986). Howard Thurman, *Deep River and the Negro Spiritual Speaks of Life and Death* (Richmond, IN: Friends United Press, 1975); J. Wallace Hamilton, *Ride the Wild Horses!* (Westwood, NJ: Revell, 1952); Hamilton, *Horns and Halos in Human Nature* (Westwood, NJ: Revell, 1954); George Buttrick, *Parables of Jesus* (New York: Harper, 1928); Buttrick, *The Christian Fact and Modern Doubt* (New York: Scribner's Sons, 1934); Buttrick, *So We Believe, So We Pray* (New York: Abingdon-Cokesbury, 1951).

[94]See, for example, Isaac Backus, "Truth is Great and Will Prevail," *Isaac Backus on Church, State, and Calvinism: Pamphlets, 1754-1789,* ed. William G. McGloughlin (Cambridge: Harvard University Press, 1968).

independent congregations.[95] These religious reformers hoped to create churches in which individuals led dignified lives conditioned by self-discipline and conscious consent. The churches they organized were lay-centered, emphasizing self-government in matters of church discipline. Their national societies functioned mainly through the contributions of highly committed individuals, rather than as a federation of church bodies; in regional and state bodies, unions of individuals and associations produced denominational coherence of a federated sort.[96] In every dimension of church organization, Baptists accorded authority to personal interpretation of scriptural truths in theologies that emphasized the practical, empirical foundation of Christian experience. As a result, these congregations were at once more inclusive and more often plagued by schism.[97]

The practical piety and inclusiveness of antebellum evangelicalism facilitated the rapid growth of churches that encouraged women and African-Americans to assume positions of spiritual leadership. Along with the Methodist churches whose ministers also carried the Word on horseback, Baptists were the fastest growing sects in antebellum America.[98] Although slavery would eventually divide both church polities, turn-of-the-century Baptists and Methodists condemned slavery and welcomed African-Americans to their communion.[99] Biracial and multiracial religious congregations translated doctrines of moral equality into concrete expressions of equality in the exercise of church authority. In such congregations, whites and blacks were held to the same standards of church discipline in pursuing lives of faith and dignity.[100] All individuals, regardless of race, were expected to submit themselves to common standards of belief and behavior; all communicants were empowered to evaluate their co-religionists according to standards that they interpreted and applied.[101] The syncretism uniting traditional African spirituality with the immediacy of evangelical Protestantism encouraged a communal revival style that mitigated the more individualistic and sectarian tendencies of the dissenting

[95]John Leland, "The Rights of Conscience Inalienable . . . from The Connecticut Dissenters' Strong Box: No. 1, New London Connecticut," *American Political Writings of the Founding Era*, eds. Charles S. Hyneman and Donald S. Lutz (Indianapolis: Liberty Press, 1983), 2:1189-1205. For a discussion of Leland's relationship to religious populism in the early nineteenth century as well as his influence on Thomas Jefferson and James Madison see Nathan O. Hatch, *Democratization of American Christianity* (New Haven: Yale University Press, 1989), pp. 95-101.

[96]C. C. Goen, *Broken Churches, Broken Nation: Denominational Schisms and the Coming of the American Civil War* (Macon, GA: Mercer University Press, 1985).

[97]Donald G. Matthews, *Slavery and Methodism: A Chapter in American Morality 1780-1845* (Princeton: Princeton University Press, 1965).

[98]Smith, *Revivalism & Social Reform*, pp. 20-23.

[99]Hatch, *Democratization of American Christianity*, p. 102.

[100]Donald G. Matthews, "Religion and Slavery: The Case of the American South," *Anti-Slavery, Religion, and Reform* eds. Christine Bolt and Seymour Drescher (Kent, England: William Dawson & Sons Ltd., 1980), pp. 216-217.

[101]Betty Wood, "'For Their Satisfaction or Redress:' African Americans and Church Discipline in the Early South," *The Devil's Lane: Sex and Race in the Early South* eds. Catherine Clinton and Michele Gillespie (Oxford: Oxford University Press, 1997), pp. 109-123.

tradition.[102] Evangelical passion also produced a wholly American phenomenon, The Preacher, "the most unique personality developed by the Negro on American soil," according to W. E. B. DuBois. He was "a leader, a politician, an orator, a 'boss,' an intriguer, an idealist–all these he is, and ever too, the center of a group of men, now twenty, now a thousand in number."[103] As America moved toward civil war, African-American leadership was forced to the margins of the integrated churches; integrated worship survived in many congregations well into Reconstruction, but African-American preachers and laity increasingly established the independent churches that collectively represented the first public institution under African-American control.

The African-American community of Montgomery was accustomed to talented, well-educated church leadership. In 1867, African-Americans of the biracial First Baptist Church of Montgomery left to form the First Baptist Church (Colored). Ten years later, class and doctrinal divisions motivated the exodus of a relatively more prosperous faction to establish a church at Dexter Avenue. The Dexter Avenue Baptist Church operated under the authority of a powerful board of deacons, while the First Baptist Church (Colored) remained subject to ministerial governance. The ministers who preached the social gospel in Montgomery found themselves in the center of a progressive church polity, exercising shared authority with other powerful elites.

Largely invisible to the white America, the black church developed ministers of world renown, such as Howard Thurman and Mordecai Johnson. By 1945, the National Baptist Convention, with its five million African-American members, made up the largest association of Negroes in the world.[104] In his first ministerial post, Martin Luther King, Jr. succeeded one of the most celebrated of scholar-preachers, Vernon Johns.[105] Johns was a controversial minister whose political activism split Montgomery's African-American community into accommodationist and activist factions. When John's left his post in 1952, his public stands against the Ku Klux Klan and police brutality had, nevertheless, kindled the flame that would ignite the Montgomery Bus Boycott. Church leaders waited a year before hiring their next minister, hoping that King, who was only 27 years old at the time, represented a talented, but pliable replacement. While he was less contentious than his predecessor, King decried the "false peace" of accommodationists

[102]On syncretism and the possible overestimation of slave conversions to mainstream Christianity, see Jon Butler, *Awash in A Sea of Faith: Christianizing the American People* (Cambridge: Harvard University Press, 1990), pp. 247-251. On the communal style of revivals, see Wood, "For Their Satisfaction or Redress," pp. 109-123.

[103]W. E. B. DuBois, *The Souls of Black Folks* (Chicago: University of Chicago Press, 1937), p. 190.

[104]Taylor Branch, *Parting the Waters: America in the King Years 1954-63* (New York: Simon & Schuster, 1988), p. 1-3, 5.

[105]For a compelling discussion of Johns and the history of the Dexter Avenue Baptist Church see Branch, *Parting the Waters*, pp. 1-26.

from the start. It nevertheless remained for the political veterans of Montgomery to initiate the protests that would grow into the Civil Rights Movement.

In 1955, Montgomery's chapter of the National Association for the Advancement of Colored People (NAACP) finally found in the defiance of a municipal segregation ordinance and arrest of member Rosa Parks a viable legal case for challenging segregation in public transportation. The Montgomery Bus Boycott (1955-1956), sparked by Parks's arrest and begun by Jo Ann Robinson and the Women's Political Council of Alabama State University, catapulted King into the national spotlight. Serendipity placed King in this role, and a chance national radio broadcast of his 5 December speech gave him a rare public forum, but King's abilities made him the powerful leader that he became.[106] It was the nonviolent character of the Montgomery uprising and King's ability to popularize a Christian thesis of nonviolent direct action that first captivated social activists beyond Montgomery.

Soon after the Montgomery bus boycott, King began to speak about the moral reasoning involved in nonviolent protest, describing nonviolent direct action in ways that evince covenantal connections.[107] Eventually, King adopted Ganhdian terminology as a way of describing his use of "soul force" (*satyagraha*; *satya* or truth which equals love, and *graha*, force, meaning truth-force or love force), but he insisted that his understanding of nonviolence evolved from teachings of the Christian Gospel.[108] King argued that the proper functioning of democratic institutions requires the greater concern for the well-being of others embodied in the ideal of *agape*. While government might function productively on the basis of enlightened self-interest to achieve some goals, King believed that enlightened self-interest without this transcendent basis for concern results in an "anemic democracy." Justice requires the constant correction of humanity's inevitable failures. Niebuhr correctly identified the necessary role of force in society, but Tillich was also right. To exercise force legitimately, societies need individuals with a profound understanding of the foundations of justice. Despite the legacy of slavery and segregation, King believed these foundations are universal and eternal. God's law informs natural law and each can be found at the heart of American constitutionalism. King expressed this philosophy in its fullest form in the 1963 "Letter from the Birmingham City Jail."

[106]For a history of events in Montgomery see Garrow, *Bearing the Cross*, pp. 11-82.

[107]See, for example, King, "The Power of Nonviolence" and "Love, Law, and Civil Disobedience."

[108]Cf. King, *Stride Toward Freedom*, pp. 96-97. See Martin Luther King, Jr., "Sermon on Gandhi" unpublished mss. (22 March 1959) Martin Luther King, Jr., Center for Nonviolent Social Change, Atlanta, GA. See Garrow, *Bearing the Cross*, pp. 75, 200.

LAW AND JUSTICE IN KING'S CIVIL DISOBEDIENCE

King and other activists in the Civil Rights Movement used nonviolent civil disobedience and other forms of direct action to address serious breeches of fundamental civil rights. Many of these demands were accommodated by legislative change. Yet King used direct action to engage ordinary citizens in the task of evaluating ordinary law against constitutional law and both of these against universal moral claims. "Law and order exist for the purpose of establishing justice;" when laws fail to be just, they are dangerous impediments to peace.[109] It is the citizen's responsibility to take direct action to bring injustice to light, rather than wait for government agencies to act.[110] In his widely cited definition of civil disobedience, King described the moral and political obligations of citizenship.

> In no sense do I advocate evading or defying the law as rabid segregationists would do. This would lead to anarchy. One who breaks an unjust law must do it openly, lovingly . . . and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice is in reality expressing the very highest respect for law.[111]

In this passage, King incorporated the ideas of fellow activist Harris Wofford. Wofford's perception that "the law needs help" in doing justice accorded with King's appeal to the moral basis of positive law.[112] Following this definition of civil disobedience, King explained the difference between just and unjust law, summoning points from his correspondence with Herriford following the Kilpatrick debate. King described three types of injustice; two could be evaluated from the perspective of positive law. First, he discussed laws by which a majority binds a minority, but not itself, contrasting "difference made legal," with "sameness made legal" or, equality under the law. Injustice also occurs, he explained, when laws are made without minority participation.[113] These two instances of injustice might be handled through constitutional tests, in which civil disobedience creates an opportunity to seek constitutional correction of unjust (e.g., unconstitutional) ordinary law. In King's case, however, a just law had been used to conceal injustice. King had been jailed for marching without a parade permit. The just law requiring a permit had been used to thwart

[109]King, "Letter," 12

[110]Martin Luther King, "The Case Against Tokenism," *New York Times Magazine* (5 August 1962), p. 5. (Reprinted in Washington, *Testament of Hope*, pp. 106-11.)

[111]King, "Letter," 12-13.

[112]See Miller, *Voice of Deliverance*, pp. 165-167. Harris Wofford, "Non-violence and the Law: The Law Needs Help," *Journal of Religious Thought* 15 (Autumn-Winter 1957-1958): 25-36.

[113]King, "Letter," 12.

protests that would bring segregation's injustice to light. In this situation, positive law could not be used as the sole criterion for evaluating King's action. King's critics agreed that defiance in Birmingham asked more of the law, but drew the very different conclusion that his protest bordered on anarchy. To prevail against such criticism, King had to legitimate his indirect attack on segregation by appealing to shared moral precepts that he believed transcended and informed positive law. The following syllogism describes this third type of appeal.

> I would agree with Saint Augustine that 'An unjust law is no law at all' . . . How does one determine when a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saint Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality.[114]

In the terms of the Thomistic theology on which King relied, segregation laws reflected a misuse of power for the sake of domination. Segregation represented arrogant rule, rule not for the sake of those ruled but for the purpose of their subjection. Segregation was out of harmony with God's authority, made known to humanity in the laws of nature.[115] Despite King's appropriation of Aquinas's proposition (and the wisdom of Augustine), Aquinas, in fact, counseled against disobeying an unjust command. He cautioned that political disorder could unleash greater evils than the rule of tyrants, he endorsed disobedience only when positive law directly contravened God's commandments.[116] Even so, Christians were to disobey laws that were "contrary to Divine goodness" to secure salvation, not to redeem society; their resulting martyrdom was not aimed at changing the law.[117] What King could borrow from Thomistic thinking beyond a well-turned phrase was the saint's perception that a statute's "quality as a law depended on the extent to which it was just."[118] By arguing that human law had the quality of a law only insofar as it was in accordance with right reason and was, therefore, evidently derived from eternal law, Aquinas could define an unjust law as "an act of violence." For Aquinas, however, no institutional

[114]Ibid.

[115]St. Thomas Aquinas, *De Regimine Principum* (On the Governance of Rulers), trans. Gerald B. Phelan (London: Sheed & Ward, 1938). See also Miller (*Voice of Deliverance*, p. 166), who shows that Wofford is the source for King's citations of Socrates, Augustine, and Aquinas as advocates to civil disobedience.

[116]Aquinas, *On the Governance of Rulers*, pp. 48, 23.

[117]Ibid., 55.

[118]Ibid., 53.

arrangements permitted the sort of participation in which King engaged. Although institutions were available to King, their use necessitated a new way of thinking about a moral response to tyranny that was consistent with eternal law.[119]

In King's democratic revision of the Thomistic argument, it is morally necessary to break unjust laws, including legitimate laws that shield injustice and, perhaps, even constitutional laws. The will necessary to persist in this essential act of self-government must spring from a deeper moral impetus than reciprocal interests, however. The objective of civil disobedience cannot be self-serving, even in the enlarged sense of serving the interests of a particular group or community; rather, the whole must be bettered, and no one may be degraded by the protest, if it is to comport with King's standards. In keeping with a Christian perception that King shared with Aquinas (albeit in a modern democratic variant), the individual is but a fraction of the whole. For Aquinas, this fraction imperfectly represented the whole; King emphasized the individual personality, but both understood "the whole human family" as the object of concern in doing justice. In King's words, "At the heart of all that civilization has meant . . . is 'community'–the mutually cooperative and voluntary venture of man to assume . . . responsibility for his brother." Still, the community was only a reflection of a greater end; cooperation and resulting relationships represented only "Christianity's minimal declaration of human unity." The individual's worth did not lie primarily in relationship to community or stem from good deeds done, however important these may be; "human worth lies in relatedness to God."[120] Justice could not be done for the whole except by "uplifting the human personality." The injustice represented by segregation laws distorted the personality by relegating people to the status of objects. Returning human beings to their status as moral equals through a highly disciplined nonviolent effort benefited the whole.

By presenting three criteria for evaluating the quality of law, King asked his readers to accept two approaches to conscientious resistance of injustice. In the more familiar logic, protest exposed injustice, awaiting a constitutional response. In reasoning less often cited by political scientists, protest appealed to conscience, seeking a more fundamental "declaration of human unity." In practice, these distinctions were often more ambiguous because both constructions appealed to shared public values. Nevertheless, the difference remains important. King's repeated emphasis on conscience revealed the considerable responsibilities of citizenship in a federal democracy. The U.S. Supreme Court is not the final arbiter of justice in King's view; that is, no institution could claim finality on that score with-

[119]Ibid., 24-25.

out also claiming infallibility. Although King stressed individual conscience, this observation is no less true of jurists who attend primarily to the conventions of the "first and supreme legislature," the people. The point was, it matters how conventions are created and what values they reflect; it matters how conscience is evoked in political practice.

For King to argue successfully that civil disobedience could appropriately test law so fundamental as the federal Constitution, he had not only to assume the existence of transcendent principles of justice but also to believe that these principles were known and shared by a community that predated the legal conventions that frame a polity's government. For a time at least, King's message was developed within such a community. King's presentations created an international forum for debating the public philosophy of nonviolence. The Civil Rights Movement's nonviolent philosophy provided not only a clear intellectual foundation for practical action but also opened public forums to reflections on "the measure of man."[121] That discussion must, of course, remain incomplete, but what mattered to King were the individual motives and broad patterns of social interaction that stimulated or suppressed discourse and response. The constitutionalism represented by King's thinking made room for a stereoscopic projection of the fraction and the whole. His rationale for limiting the prerogatives of majorities or minorities was premised on a perception of the individual as in "an inescapable network of mutuality;" we are free and responsible, capable of realizing the fundamental encumbrances that must follow if every human being is an equally precious creation, but "free" to turn a blind eye. This modern vision of federal liberty found ready adherents as long as the movement made few demands for material investments in civil rights.

From his first speeches and sermons on civil rights, King described economic justice as a precondition for racial equality. In his view, "equality under the law" presupposed a sense that citizens are moral equals, and that basic proposition, in turn, laid the foundation for general claims of equal opportunity and remedial action to remove barriers raised on account of mistaken notions of moral (e.g., racial) supremacy. Throughout the Kennedy years, King denounced federal housing and employment policies and cited the uninterrupted federal aid given to schools that continued to defy court-ordered desegregation as evidence of a callous administration. The self-imposed limits of federal policy were, he said, as much to blame for the "intolerably slow pace of civil rights" as "segregationist opposition." King implored Kennedy to move beyond "tokenism" (as he called federal efforts to integrate southern municipal bus-lines) and to issue an executive order to end discrimination in federal housing, health care, education,

[120]King, "Ethical Demands for Integration," 12.

[121]Martin Luther King, Jr., ("What is Man?") *Strength to Love* (New York: Harper & Row, 1963), pp. 87-92.

urban development, and employment programs.[122] Still, King focused on bringing the moral force of the executive branch to bear on a Congress and Supreme Court that appeared unable to move forward in the face of southern opposition.

In 1965, the Southern Christian Leadership Conference (SCLC) took the Movement north to Chicago. Here, King faced the full weight of *de facto* segregation and an African-American community divided by social class into a minority of African-Americans who had managed token representation in machine politics and the majority who languished on "an island of poverty in the midst of an ocean of plenty." In a 1966 essay written for *Ebony*, King spoke of the importance of constitutional law and a federal government that supported the rights of assembly and speech that facilitated an effective strategy of nonviolent direct action. Yet, he argued more than ever that the next phase of the Civil Rights Movement would move beyond the "realm of constitutional rights" into "the area of human rights." Political programs and laws certainly helped, but were such measures clear evidence of a nation's will to address its deep spiritual chasm? African-Americans had secured a constitutional right to vote, but were there any rights to adequate housing or work? He suggested a voting strategy that took advantage of the predominance of African-Americans in many cities; if they could form a voting bloc, African-Americans would become a force to be considered by either major political party. As such, "ten percent of the nation's population . . .[could] lead a political and moral coalition which can direct the course of the nation."[123] Despite this promising statistic, King concluded that the role of African-Americans in social change could not be reduced to political power. Achieving the movement's fundamental aims depended on the activists' continued commitment to marshal the moral power evidenced in Montgomery and Birmingham. The pace of moral transformation continued to raise doubts in the African-American community about the efficacy of King's methods, however. King and the Southern Christian Leadership Conference (SCLC) increasingly turned to government programs of national scope to provide more uniform economic and social conditions for all Americans.

King hammered on the issues of poverty, housing, and jobs in a series of articles carried by the African-American press in Chicago and New York.[124]

[122]Martin Luther King, Jr., "Equality Now: the President Has the Power," *Testament of Hope*, ed. James Washington (New York: Harper & Row, 1986). p. 152. See also Martin Luther King, Jr., "At the Threshold of Integration." *Economic Justice: The Bulletin of the Religion and Labor Foundation.* 25 (June-July 1957): 1, 7-8; Martin Luther King, Jr., "Fumbling on the New Frontier," *The Nation* 194 (March 3 1962): 190-193.

[123]Martin Luther King, Jr., "Nonviolence: The Only Road to Freedom," *Ebony* 21 (October 1966): 27-30.

[124]See Martin Luther King, Jr., "My Dream: The Violence of Poverty," *Chicago Defender*, 8 January 1966; "Going to Chicago," *New York New Amsterdam Times*, 15 January 1966; "Message for My People," *Chicago Defender*, 21 January 1966; "Is Non-Violence Doomed to Failure?" *Chicago Defender*, 22 January 1966; "The Dilemma of the Negro," *New York New Amsterdam News*, 29 January 1966.

On 15 December 1966, he spoke before a subcommittee of the U.S. Senate Committee on Government Operations on the federal role in urban affairs. King recommended a significant role for federal institutions in education, housing, and employment. The vision of a Great Society remained an abstraction, he told the committee; where legislation had taken hold, it produced bureaucracy without simultaneously "protecting the citizen against the power of the state."[125] Analysts of federal designs might find much to fault in King's policy proposals, but beyond his call for institutional change lay goals in harmony with the moral claims of King's earlier desegregation efforts. Following a now familiar logic, he told the committee that poverty creates a system of caste in northern cities, destroying the dignity of individuals in the lower strata and instilling false pride in those above. The poor capitulated to a sense of powerlessness that "extends beyond the right to grievance and redress;" members of the middle class barricaded themselves in suburban enclaves. The problem is moral as well as political; government must be involved, but policy and law must work also from the bottom up; the poor must participate in the renewal of community. Above all, the struggle for racial equality cannot be ignored. "Being a Negro in America . . . means smothering in an airtight cage of poverty . . . being lynched at will, and brutalized at whim . . . trying to smile when you want to cry . . . trying to hold on to physical life amid constant psychological death"; society along with individuals are casualties of such an intolerable existence.[126] The crisis called for answers still, none of these insights or demands seems inevitably at odds with federalism.

Throughout the South, African-Americans had organized alternative public transportation during bus boycotts as well as nonviolence workshops, and a massive fund-raising effort in one of the most sweeping examples of collective action and self-government of the twentieth century. King, moreover, looked to the majority of white moderates in southern states as much as to federal authorities to end segregation. Despite disappointing responses from local moderates and federal agents, King continued to demand that all partners in the enterprise of self-government–citizens, local, state, and federal authorities, civil associations and businesses–address the attitudes and policies that perpetuated segregation in employment and housing and inhibited the political participation of African-Americans. Nevertheless, the policy demands made by civil rights activists in the later years of King's leadership increasingly promoted government centralization and, in that respect, were less amenable to federalism. As the Civil Rights Movement

[125]Martin Luther King, Jr., "Statement of the Reverend Martin Luther King, Jr., President, Southern Leadership Conference . . ." *Federal Role in Urban Affairs* (Washington, DC: U.S. Senate Committee Hearings, 1966), 1423:2967-3034, quoted portion, p. 2975.

[126]Ibid. 2979-2980.

found new fronts on which to wage the battle against racial injustice, President Lyndon B. Johnson's War on Poverty similarly gave voice to the belief that an affirmative approach to social and racial injustice required greater government centralization.

As a result, the conventional wisdom today holds that local initiatives for racial justice are of dubious worth and that any real advance will come only as a result of national mandates. As I have shown, King's philosophical orientation is not antagonistic to federalism; indeed, to the extent that his ideas and actions are in accord with principles of covenant, they would seem to demand federal institutional arrangements. Here, we return to Elazar's paradox in the form encountered by King. The Civil Rights Movement produced a paradoxical legacy. A moral protest that enlisted the common bonds of covenant ultimately found itself recast in support of an individualistic notion of right; a movement that demanded a transformation in attitudes and beliefs as well as in behavior fell victim to platitudes, tokenism, and expedience, and, as a result, often found its objectives reduced to limited material stakes. It remains an open question whether the Civil Rights Movement transformed the federal matrix in ways that encouraged a more inclusive form of the American covenant, diminished American federalism by increasing the powers of a more centralized national government, or strengthened covenant and federalism alike by reaffirming and reforming common standards of justice and reinvigorating or creating more robust bonds among the arenas of the federal matrix. We might recall that King did not view covenantalism and constitutionalism as antagonists, nor did he see individual welfare and social good as incommensurable. Here, we turn to Elazar for the last word. King's vision of mutuality evinces the inevitable tensions in covenant theory and practice. As Elazar observed, it remains for each generation to strike the balance captured in the concept of federal liberty and to renew the moral colloquy of founders and framers, of ordinary citizens, of a Lincoln, of a King.