Constitutional Democracy, Human Dignity, and Entrenched Evil

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PREFACE

Political scientists and law professors of my generation are able to see what we see about constitutionalism because we are sitting comfortably on Professor Sandy Levinson's shoulders.[1] While on that comfortable perch, we see better the Constitution outside the courts,[2] the relationships between law and literature,[3] the way in which monuments reflect and shape political regimes,[4] the complexities of torture in a democratic regime,[5] the rise of the surveillance state and new presidentialism,[6] the virtues and challenges of diversity,[7] the nature of constitutional crises,[8] basic flaws in the Constitution

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1. *See Symposium: A Tribute to Sandy Levinson*, 20 L. & CTS. (Law & Courts Section of Am. Political Sci. Ass'n, New York, N.Y.), no. 3, Summer 2010, at 4–20 http://www1.law.nyu.edu/lawcourts/pubs/newsletter/Newsletter%20Summer%2010.pdf.

2. *See, e.g.*, SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

3. *See, e.g.*, Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982).

4. *See, e.g.*, SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (1998).

5. *See, e.g.*, SANFORD LEVINSON, TORTURE: A COLLECTION (2004).

6. *See, e.g.*, Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and its Design*, 94 MINN. L. REV. 1789 (2010); Sanford Levinson & Jack M. Balkin, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006).

7. *See, e.g.*, SANFORD LEVINSON, WRESTLING WITH DIVERSITY (2003).

of the United States,[9] and the state constitutional alternative.[10] The publication of *Compromise and Constitutionalism*[11] will facilitate scholarly engagement with the high price of sharing constitutional space with those whose values are fundamentally different than ours.

Professor Levinson has been able to see so acutely in part because he had the opportunity to sit on the shoulders of many scholarly giants. The first was his dissertation advisor, Robert G. McCloskey, the longtime Professor of Government at Harvard University.[12] McCloskey is best known to contemporary scholars as the author of *The American Supreme Court*,[13] a work which Professor Levinson has lovingly updated.[14] Walter F. Murphy, the longtime McCormick Professor of Jurisprudence in the Politics Department at Princeton University, was another mentor.[15] Murphy was a remarkable man.[16] He was a war hero,[17] an outstanding novelist,[18] and a scholar whose interests ranged from empirical studies of judicial decision making in the United States[19] to the practical and normative problems with designing and maintaining constitutions that might shape and preserve just political orders.[20]

McCloskey and Murphy were both concerned with constitutional compromises. The central theme of *The American Supreme Court* is that courts function best at the constitutional margins. McCloskey opposed judicial decisions that sought to settle such major questions of constitutional law as the precise degree of government power to regulate the national

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8. *See, e.g.*, Sanford Levinson & Jack M. Balkin, *Constitutional Crisis*, 157 U. PA. L. REV. 707 (2009).

9. *See, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

10. *See, e.g.*, Sanford Levinson, *America's "Other Constitutions": The Importance of State Constitutions for Our Law and Politics*, 46 TULSA L. REV. (forthcoming 2011).

11. Sanford Levinson, *Compromise and Constitutionalism*, 38 PEPP. L. REV. 821 (2011).

12. *See* Sanford Levinson, *Remarks Prepared for Lifetime Achievement Award Panel*, *in* 20 L. & CTS., *supra* note 1, at 18, 19.

13. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (1960).

14. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (Sanford Levinson, rev., 5th ed. 2010).

15. *See* Levinson, *supra* note 12, at 20.

16. *See* Kim Lane Scheppele, *The Passing of a Generation*, 20 L. & CTS. (Law & Courts Section of Am. Political Sci. Ass'n, New York, N.Y.), no. 2, Spring 2010, at 5, http://www1.law.nyu.edu/lawcourts/pubs/newsletter/LC_Newsletter_Spring_20-2.pdf; Sotirios Barber, *Walter Murphy and the Public Spirit*, *in* 20 L. & CTS., *supra*, at 16; David J. Danelski, *Walter F. Murphy: Hero, Scholar, and Friend*, *in* 20 L. & CTS., *supra*, at 17; James E. Fleming, *An Appreciation of Walter F. Murphy*, *in* 20 L. & CTS., *supra*, at 18; Sanford Levinson, *Walter Murphy:* Semper Fi!, *in* 20 L. & CTS., *supra*, at 20.

17. *See* Danelski, *supra* note 16, at 17.

18. *See, e.g.*, WALTER F. MURPHY, THE VICAR OF CHRIST (1979).

19. *See, e.g.*, WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964).

20. *See, e.g.*, WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER (2007).

economy or the free speech rights of communists. Instead, he preferred that courts decide cases in ways that maintained a dialogue between all branches of the national government over the best application of constitutional principles in particular circumstances. "The Court's greatest successes," McCloskey wrote, "have been achieved when it has operated near the margins rather than in the center of political controversy, when it has nudged and gently tugged the nation, instead of trying to rule it."[21] Murphy was more self-conscious about the role of compromise in a constitutional order. His *Constitutional Democracy: Creating and Maintaining a Just Political Order* detailed at length the special challenges the need to compromise presents to constitutional regimes committed to protecting fundamental human rights.

The following essay pays tribute to Sandy Levinson's thoughts on constitutional compromises by paying tribute to the thoughts on constitutional compromises of our common mentor, Walter Murphy. Rather than directly engage in a dialogue with *Compromise and Constitutionalism*, the analysis below joins the preexisting dialogue between Professors Levinson and Murphy on how to construct a decent polity among people who have deep disputes over what constitutes political decency. Walter Murphy is unfortunately largely known to legal audiences only through the work of such outstanding mentees as Sandy Levinson, Jim Fleming, Christopher Eisgruber, Andrew Koppelman, Jennifer Nedelsky, and Robert George. Walter Murphy's *Constitutional Democracy* and other magnificent opuses merit close reading. Law professors should not rest content with learning about one of the most important constitutional thinkers of our time only through the work of his students.

I. INTRODUCTION

Why is Walter Murphy's seminal work on constitutionalism, *Constitutional Democracy*, different from (almost) all other seminal works on constitutionalism? Most classics of late twentieth century constitutional theory in the United States are devoted to theories of constitutional adjudication and interpretation. John Hart Ely insists that justices should promote the democratic vision of the Constitution;[22] Robert Bork argues that justices should promote the original vision of the constitution;[23] Ronald

21. MCCLOSKEY, *supra* note 13, at 229.

22. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

23. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

Dworkin asserts that justices should promote the aspirational vision of the constitution;[24] Sandy Levinson maintains that elected officials and ordinary citizens should have some authority as constitutional interpreters;[25] Mark Tushnet wants to take the power to declare laws unconstitutional away from justices,[26] at least as that power is exercised in the United States.[27] *Constitutional Democracy* expands the scope of constitutional inquiry. Murphy explores the normative commitments entailed by constitutional democracy, the institutions most likely to realize those normative commitments, and the characteristics of the good citizen necessary for maintaining a constitutional democracy.

Theories of constitutional interpretation and adjudication, Murphy demonstrates, are only a small facet of the constitutionalist enterprise. Who should interpret, whose interpretations should be authoritative, and how interpretation should be done must be derived from more basic understandings of constitutional purposes and institutions. Determining whether to have a presidential or a parliamentary system is more crucial to the constitutional order than determining whether courts ought to have the power to declare that certain holiday displays violate the Establishment Clause. Constitutional democracy is more likely to survive when citizens are committed to constitutional norms than when justices consistently apply the "right" theory of constitutional adjudication. Perhaps academic lawyers, given the particular institutional missions of law schools, ought to continue equating constitutional theory with the theory of constitutional adjudication when teaching and writing. Their students and the broader public should nevertheless remember, as *Constitutional Democracy* so vitally emphasizes, that the fundamental questions of constitutionalism are for elected officials, political movements, and citizens to answer, even such questions as should courts have the authority to fix constitutional meanings.[28]

Professor Murphy's claim that "[c]onstitutionalism demand[s] adherence . . . to principles that center on respect for human dignity and the obligations that flow from those principles,"[29] however, risks unduly narrowing the constitutional enterprise. The problem is not simply, perhaps not even, that identifying constitutionalism with a commitment to basic human rights removes many regimes from constitutional study. *Constitutional Democracy* insists that authoritarian political orders may be

24. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

25. *See* LEVINSON, *supra* note 2.

26. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

27. *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE PERSPECTIVE (2008).

28. Professor Stephen Elkin has also been emphasizing these points for years. *See* STEPHEN L. ELKIN, RECONSTRUCTING THE COMMERCIAL REPUBLIC: CONSTITUTIONAL DESIGN AFTER MADISON (2006).

29. MURPHY, *supra* note 20, at 16.

"constitutionist" if the political leaders respect the norms laid out in the constitutional text of that regime.[30] This may simply be more awkward terminology for what Ran Hirschl labels "constitutional theocracies."[31] Still, debunking the conventional notion that Americans in 1787 were committed to constitutional government has the virtue of highlighting how governing institutions at the founding were designed to protect slavery as well as fundamental human rights. The more troubling problem is that the distinction between constitutionalism and constitutionism obscures how disputes over what constitutes human dignity and fundamental human rights may structure numerous elements of the constitutional regime. The characters in Professor Murphy's fictional constitutional convention bargain with persons whom they believe deny fundamental human rights, and their reasons for doing so suggest that such debates are endemic to constitutional democracy. Rather than treat abortion as a "special case,"[32] the American experience with slavery suggests that "covenants with death"[33] are at the heart of the constitutionalist enterprise.[34]

This brief note explores Professor Murphy's analysis of proposed constitutional protections for legal abortion and the unborn as a means for elaborating on "the problem of constitutional evil."[35] Problems of constitutional evil arise when people have good reasons for sharing civic space with persons they believe are committed to abhorrent practices. Persons who find themselves in such a regime may have to provide far more accommodations for injustice than the distinction between constitutionalism and constitutionism may indicate are necessary. The same justifications for the compromises over abortion made in the fictional polity of Nusquam justify compromises over slavery made in the antebellum United States. These constitutional compromises present particularly difficult interpretive problems that cannot be resolved by shared understandings of human dignity or fundamental rights. The greater the political significance of controversies over what constitutes human dignity, the more likely that basic constitutional institutions were structured with these controversies in mind, and the more crucial that constitutional institutions, including practices for

30. *See id.* at 15.

31. Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1820 (2004).

32. *See* MURPHY, *supra* note 20, at 315–22.

33. HENRY MAYER, ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY 313 (1998).

34. *See* Levinson, *supra* note 11, at 828–32.

35. This is, of course, a shameless plug for MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006).

interpreting the constitution, generate solutions that continue accommodating persons who lack a common ideal of the good polity.

The bargains that make constitutions possible caution against too sharp a distinction between acting on principle and compromising. Much legal theory is premised on a distinction between law and politics often rooted in this distinction between principles and compromise. Murphy tells us that "[c]onstitutionalism demand[s] adherence . . . to principles that center on respect for human dignity and the obligations that flow from those principles."[36] Levinson tells us that "[p]olitics is indeed the art of accepting all sorts of lesser evils."[37] "Perhaps one can say that compromises do not fully 'abandon principle,'" he writes, "but they often leave ostensible principles hanging by the weakest of threads."[38] On a different view, the view advanced in this essay, compromise is rooted in the same kinds of principles as equality, justice, liberty, human dignity, and other constitutional goods. The person who never compromises can no more claim faithfulness to the Constitution of the United States or any constitution than the person who denies that all persons are entitled to "the equal protection of the law."

II. COMPROMISING WITH EVIL

Constitutional democrats make compromises on matters they believe concern human dignity and fundamental rights. Some participants in Professor Murphy's fictional constitutional convention insist that legal abortion violates fundamental human rights. "If . . . we agree that human dignity is our central value and human life is sacred," one delegate to the fictional constitutional convention in Nusquam contends, "[o]nly when another human life is at risk could we remain true to that central value and say that a mother has a constitutional right to kill the human fetus she's carrying."[39] Another delegate immediately responds, "And what about the dignity of the woman."[40] "Doesn't her human dignity," she continues, "require that she control her own body and life?"[41] Subsequent debate reveals substantial differences over whether and what abortion policies are consistent with the constitutional commitment to human dignity. Nevertheless, aware that no faction is likely to "convince our opponents that we were right,"[42] a constitutional compromise is agreed on. In a close vote, the convention agrees to "a clear statement in a constitutional charter that

36. MURPHY, *supra* note 20, at 16.
37. Levinson, *supra* note 11, at 828.
38. *Id.* at 18.
39. MURPHY, *supra* note 20, at 315.
40. *Id.*
41. *Id.*
42. *Id.* at 320.

human life is sacred and, with the Constitutional Court part of the decision-making process, [to] allow the political processes to make the initial choice."[43]

Nusquam apparently remains a constitutional democracy after reaching a compromise on abortion, although why is not clearly stated in *Constitutional Democracy*. That the constitution neither explicitly permits nor clearly bans abortion hardly demonstrates the proper respect for basic human rights. The constitution of a constitutional democracy could hardly declare that persons have inalienable rights to life, liberty, and the pursuit of happiness, but grant the elected officials the power to enslave persons of color or deprive them of fundamental rights. That all sides to the debate over abortion derive their positions from a commitment to human dignity does not adequately distinguish compromises over abortion from the compromises antebellum Americans reached over slavery. Slaveholders engaged in rights talk as well as abolitionists. They invoked the right not to be deprived of property without due process,[44] insisted that anti-slavery laws passed without their consent were forms of enslavement,[45] and claimed that abolitionist rhetoric insulted their dignity as moral beings.[46] Self-interest does not explain why so many southern soldiers, slaveholders and non-slaveholders, willingly engaged in near suicidal battle charges during the Civil War.

The ostensible justification for the compromise over abortion in Nusquam is the same pragmatic justification given for compromises over slavery in the antebellum United States. Constitutional accommodations for perceived evils in both regimes were the price for constitutional union. Professor Murphy's apparent alter ego, Professor Retlaw Deukalion, urged concessions on abortion that would allow "both sides . . . to live together in peace."[47] Representatives from the free states during the drafting and ratification conventions sounded this chord when urging forbearance on slavery. "If we do not agree on this middle & moderate ground," Oliver Ellsworth warned fellow delegates at the framing convention, "we should lose two States, with such others as may be disposed to stand aloof, should fly into a variety of shapes & directions, and most probably into several confederations and not without bloodshed."[48] Other northern framers spoke

43. *Id.* at 321.

44. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857).

45. *See* MARK E. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE 154 (1998).

46. *See* CONG. GLOBE, 25TH CONG., 2D SESS. APP. 558 (1838).

47. MURPHY, *supra* note 20, at 320.

48. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 375 (Max Farrand ed. 1937).

of "the necessity of compromise" when justifying constitutional protections for slavery.[49]

The American compromises on slavery in 1787 may be more consistent with constitutional democracy than Nusquamite or American compromises on abortion in 2008. Many northern framers had some grounds for thinking that slavery was dying a natural death. David Brion Davis notes the growing "general consensus" in the United States and Europe that government need not act to weaken human bondage. "[B]lack slavery," conventional wisdom in the late eighteenth century maintained, "was a historical anomaly that could survive for a time only in the plantation societies where it had become the dominant mode of production."[50] Roger Sherman urged northern delegates at the framing convention not to be concerned about constitutional protections for human bondage because "the abolition of slavery seemed to be going on in the U.S. & that the good sense of the several States would probably by degrees compleat it."[51] No member of the Nusquam convention claimed that time alone might resolve debates over reproductive choice.[52] Good reason exists for thinking that some accommodation for slavery was necessary in 1787 for any constitutional arrangement to be reached. James Madison informed Thomas Jefferson that "S. Carolina & Georgia were inflexible on the point of the slaves."[53] No such necessity seems apparent with respect to abortion, either in Nusquam or the United States. No state is likely to secede from the Union should abortion policy dramatically tilt in either a pro-life or pro-choice direction.

The problem of constitutional evil cannot be finessed in the Nusquamite case by acknowledging that persons with wrong opinions on abortion are better described as having made a moral mistake or suffering from a moral blindspot than as abandoning the constitutional commitment to human dignity. Claims that constitutional democracy exists when all parties make good faith appeals to human dignity do not distinguish contemporary debates over abortion from antebellum debates over slavery. Many participants in contemporary abortion debates do not make this concession. Advocates who claim that pro-life advocates are misogynists or who equate abortion clinics with concentration camps do not treat rival positions as grounded in a reasonable, if mistaken, conception of human flourishing. While many abolitionists hurled related epithets at slaveholders, Lincoln did not. The Illinois Republican insisted that all parties to debates over human

49. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 48, at 587.

50. DAVID BRION DAVIS, SLAVERY AND HUMAN PROGRESS 81 (1984).

51. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 48, at 369–70.

52. The increased use of morning-after pills may complicate the assertion in the text. *See* Rob Stein, *As Abortion Rate Drops, Use of RU-486 Is on Rise*, WASH. POST, Jan. 22, 2008, at A1.

53. Letters from James Madison to Thomas Jefferson (Oct. 24 & Nov. 1, 1787), *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION BY THE STATES: VIRGINIA 105 (John P. Kaminski & Gaspare J. Saladino eds., 1988).

bondage shared the same moral capacities. "[T]he Southern slaveholders were neither better, nor worse than we of the North, and . . . we of the North were no better than they," he declared. In his view, "[i]f we were situated as they are, we should act and feel as they do; and if they were situated as we are, they should act and feel as we do; and we never ought to lose sight of this fact in discussing the subject."[54] Hard data is lacking, but one suspects the percentage of advocates in the abortion debate who believe their rivals are as committed as they to fundamental human rights is probably not much different than the percentage of advocates in slavery debates believed their rivals made good faith appeals to human dignity.

The fictional experience of Nusquam and actual experience in the United States suggests that commitments to democracy provide more practical protections for basic human rights than commitments to constitutionalism. Democratic practice imposes several barriers to injustice. Aspirants for power in a democracy must make arguments and advocate policies that are consistent with the democratic commitment to popular rule and popular notions of human dignity. This practical constraint rules out political calls for re-enslavement at present and constitutional protections for abortion before the Civil War. Authoritarian rulers who typically appeal to a narrower constituency have greater rhetorical latitude when defending their preferred policies. The distinctive constitutional commitment to human dignity is unlikely to do more than democracy can deliver. Abortion in contemporary politics and slavery in the nineteenth century highlight how debate in democracies tends to be between factions with very different understandings of human dignity, not between the party of human dignity and the party of self-interest. When persons have sincere beliefs that the genders have different destinies, that different races cannot share the same political space, that the unborn have fewer rights than the born, or that a four-cell blob with human DNA has the same rights as a human adult, appeals to the constitutional commitment to human dignity or the constitutional ban on naked preferences[55] are likely to do no political, intellectual, or academic work.

III. INTERPRETING CONSTITUTIONAL COMPROMISES

Interpreting constitutional compromises is challenging theoretically and politically. Potential linguistic ambiguities often do not present practical

54. Abraham Lincoln, Speech at Bloomington, Illinois (May 29, 1856), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 230 (Roy P. Basler ed., 1953).

55. *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

interpretive problems when a consensus exists on underlying purposes or principles. Gilbert and Sullivan's Frederick may have suffered a longer indenture than anticipated to the Pirates of Penzance for being born on February 29 because his contract specified that he would be released only on his twenty-first birthday. No one thinks being born in leap year influences eligibility to be president of the United States. Agreement exists either that "the Age of thirty five Years" in Article II does not refer to birthdays or that, if the provision is linguistically ambiguous, the underlying purposes are best achieved by measuring age by years rather than by birthdays.[56] This recourse to generally agreed on principles or purposes is impossible when potential linguistic ambiguities in constitutional compromises become politically salient. When constitutional language is a consequence of disagreement over basic human rights or over what policies promote human dignity, noting that "the ultimate objective of purposive constitutional interpretation is to maintain both the nation and the values of constitutional democracy"[57] is unlikely to provide guidelines for resolving controversies over what the contested provisions mean.

Consider the interpretive problems that would arise in Nusquam after a legislator proposes that all doctors be required to perform abortions at the request of a pregnant woman. The Constitution of Nusquam declares that "human life is sacred," but also that governing officials shall have the power to determine when a woman shall have the legal right to terminate a pregnancy.[58] The latter provision does not make explicit whether the power to determine the right of a woman to have an abortion encompasses the power to require that particular doctors perform abortions. Originalism in any form is inadequate to the interpretive task. The persons responsible for the Constitution of Nusquam did not consider whether doctors could be compelled to perform abortions, no general understanding existed at the time of ratification on the public meaning of the relevant language, and the principles underlying the constitutional provisions were disputed. Instead, the American constitutional experience with slavery suggests four very different interpretive strategies for interpreting this and other constitutional compromises.

The legislative power to determine the legality of abortion might be interpreted as elaborating the constitutional principle that "all human life is sacred." What "all life is sacred" means must be determined in light of the constitutional willingness to tolerate abortion. That the constitution permits governing officials to prefer the rights of the born to the rights of the unborn suggests that, although all human life is sacred, either the unborn are not constitutional humans or they lack the rights of born humans. This analysis

56. *See* U.S. CONST. art. II, § 1, cl. 4.

57. MURPHY, *supra* note 20, at 489.

58. *Id.* at 321

suggests legislative power over abortion should be broadly construed. If governing officials may determine that a woman's right to terminate a pregnancy trumps the value of unborn life, then they may determine that right also trumps a doctor's freedom not to perform the abortion. The Justices in *Dred Scott* demonstrated how a constitutional compromise may be used to elaborate a more general constitutional principle when they insisted that constitutional protections for property in the territories clearly encompassed constitutional protections for human property. In their view, the clear constitutional guarantees for slavery supported a constitutional understanding that slaveholders had all the rights of other property holders. "[T]he Constitution," Taney wrote, "recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen . . . ."[59] Hence, he continued, "no tribunal, acting under the authority of the United States . . . has a right to draw such a distinction, or deny to [slavery] the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government."[60]

The legislative power to determine the legality of abortion might also be interpreted as an exception to the constitutional principle that "all life is sacred." Explicit constitutional authorization for legal abortion was necessary because legislation legalizing abortion would otherwise violate the constitutional commitment to the sanctity of life. Understood as an exception to general constitutional principles, the constitutional power of governing officials should be interpreted as narrowly as possible. If the constitution does not plainly indicate that the legislature may compel doctors to perform abortions, then such a law is unconstitutional. The dissenters in *Dred Scott* treated the compromises over slavery as an exception to more fundamental constitutional principles when they claimed, "[s]lavery, being contrary to natural right, is created only by municipal law."[61] In the absence of any constitutional provision plainly authorizing persons to bring slaves into the territories, no such right existed or could be inferred from other constitutional provisions.

Constitutional compromises may create interpretive no-fly zones. The constitutional rules on abortion, being compromises, may neither be considered as elaborations on, or exceptions to, the general constitutional commitment to human dignity or the sanctity of life. When potential ambiguities arise, they must be resolved by recourse to principles underlying

59. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 451 (1856).

60. *Id.*

61. *Id.* at 524 (Curtis, J., dissenting); *see also id.* at 547–49 (McLean, J., dissenting).

other constitutional provisions. Whether doctors may be constitutionally required to perform abortions may be determined by reference to the constitutional principles underlying religious freedom or legislative authority to regulate the medical profession, but no legitimate reference may be made to the principle of human dignity underlying the constitutional authority to regulate abortion because no constitutional principle explains or justifies that provision. Madison suggested such an interpretive approach when he gave up trying to find any coherent justification for treating slaves as three-fifths of a person. He simply pronounced the relevant constitutional provision to be one of many "compromising expedient[s] of the Constitution."[62] This refusal to ground the Three-Fifths Clause in any more general principle meant that disputes over fractional persons could be resolved only by interpreting the principles underlying constitutional provisions unrelated to slavery.

Constitutional compromises in constitutional texts might support the interpretive principle that constitutional disputes ought to be compromised. If compromises on basic questions of human dignity are necessary when creating constitutions, then the same spirit of compromise ought to be practiced when interpreting constitutional ambiguities. In the spirit of the Nusquamite framers, who accommodated both proponents and opponents of legal abortion, subsequent constitutional authorities might determine that governing officials may constitutionally require doctors to perform abortions only when no other doctor is willing and available to perform the procedure. Some antebellum justices interpreted constitutional provisions on abortion in the same compromising spirit. After noting that the constitutional framers compromised on slavery, federal justices agreed to interpret broadly both the federal power to return fugitive slaves[63] and the federal power to prohibit the importation of foreign slaves.[64]

Elaboration, exception, no-fly, and compromise may all be legitimate strategies for interpreting constitutional provisions that accommodate different beliefs about human dignity. Liberal constitutionalists, Howard Schweber convincingly asserts, commit themselves to speaking a certain language when debating fundamental regime matters.[65] Americans, when debating the constitutional status of capital punishment, must talk in terms of "cruel and unusual punishments" rather than "efficient punishments." Deterrence matters only because the failure to deter may be a mark of a cruel and unusual punishment. When debating abortion, Nusquamites are constitutionally committed to recognizing that all life is sacred and that

62. THE FEDERALIST NO. 54, at 339 (James Madison) (Clinton Rossiter ed., 1961).

63. *See, e.g.*, Jones v. Van Zandt, 46 U.S. (5 How.) 215 (1847); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

64. *See, e.g.*, United States v. Haun, 26 F. Cas. 227 (C.C.S.D. Ala. 1860) (No. 15,329) (Campbell, J.); Charge to Grand Jury, 30 F. Cas. 1026 (C.C.D. Ga. 1859) (No. 18,269a) (Wayne, J.).

65. *See* HOWARD SCHWEBER, THE LANGUAGE OF LIBERAL CONSTITUTIONALISM (2007).

governing officials have the power to determine the scope of the right to terminate a pregnancy. Their rhetoric must also provide an account of other constitutional provisions, most notably constitutional provisions on gender equality,[66] that are relevant to determining the constitutional status of reproductive choice. Which arguments, policies, and constitutional understandings that respect these commitments become the official law of the land is for the constitutional politics initially established during the drafting and ratification process to decide.

Antebellum American framers were more interested than their fictional Nusquamite counterparts in the structure of the constitutional politics that would temporarily and perhaps permanently settle intense disputes over what human rights were fundamental. The framers in 1789 foreswore making many particular rules, seeking instead to have future debates over human bondage settled by particular constitutional politics.[67] The compromises responsible for the final structure of the national legislature, national executive, and national judiciary were all made with an eye toward future compromises over slavery. Constitutional institutions, functioning as originally expected, would guarantee that all policies that touched on human bondage would have substantial support in both the free and slave states. Abortion in Nusquam, by comparison, was largely relegated to a "special case." Debates over the right to terminate a pregnancy occasionally arose when Nusquamites were considering the structure of governing institutions, but most basic decisions on the structure of government were not made with an eye toward future abortion policy.

Constitutional regimes are unlikely in practice to experience this sharp a separation between questions about the structure of government and questions about how to resolve disputes over what human rights are fundamental. Governing institutions are rarely debated politically primarily in terms of their intrinsic merits. Persons tend to support those institutional arrangements they believe will most likely privilege their best understanding of human dignity and secure what they believe are fundamental interests. Changes in partisan support for judicial supremacy in the United States, for example, have historically taken place after changes in the course of judicial policy making. Whether constitutions survive may depend on how well they mediate intense disputes over what practices best respect human dignity. Nusquam will become a stable constitutional polity only if constitutional

66. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985).

67. For an elaboration on the arguments in this paragraph, see GRABER, *supra* note 35, at 102–03.

institutions consistently yield policies that most citizens find tolerable, even if those policies are inconsistent in many respects with what any particular person believes is entailed by a constitutional commitment to human dignity.

Disputes over human dignity saturate constitutions. They influence the structure of governing institutions, the specific limits on government power, and the principles used to interpret constitutional ambiguities.[68] When new constitutional regimes are wracked by cultural wars, constitutional democracy must be as committed to mediating those disputes as to promoting human dignity or securing increased public support for fundamental human rights. Whether the end result is best labeled "constitutionalism" or "constitutionism," if not largely a semantic question, will largely be in the eyes of the beholder. Some protection for constitutional evils is the fate of ongoing constitutional projects in diverse society. Professor Murphy frequently highlights the importance of compromise during the process of creating and interpreting constitutions.[69] The theory of constitutional democracy, the American experience suggests, should regard these compromises as central to the constitutional enterprise rather than as special cases that can be resolved independently from more basic constitutional decisions.

EPILOGUE

John Paul Sartre articulated a basic truth of political theory in *No Exit* when one of the main characters declares, "Hell is—other people!"[70] Edmund Burke offered the polite version of this political catechism when he insisted, "All government—indeed every human benefit and enjoyment, every virtue and every prudent act—is founded on compromise and barter." For better and undoubtedly worse, human beings constantly find themselves in environments where they must cooperate with persons whom they find, if not morally reprehensible on most subjects, morally reprehensible on some subjects. If principle is understood as the set of values that enable human beings to live a decent life, then the obligation to agree to constitutional compromises when creating and maintaining constitutional orders is as fundamental a principle as any other.

68. *See id.* at 1–2.

69. *See* MURPHY, *supra* note 20, at 473, 494.

70. JOHN-PAUL SARTRE, NO EXIT AND THREE OTHER PLAYS 47 (L. Abel trans., Vintage Books Ed. 1955) (1944).