THE HUMAN NATURE OF
FREEDOM AND IDENTITY—
WE HOLD MORE THAN RANDOM THOUGHTS

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In contemplating the relation of freedom and identity, the Latin maxim \textit{libertas non datur sine veritate} aptly reminds us that there can be no freedom without truth. While certain aspects of who we are, such as nationality or ethnic ancestry, may be culturally or serendipitously determined, there is a truth to human nature which, if not observed, corrupts or destroys life and any exercise of freedom dependent upon it. Human nature and the natural law it reflects are inescapable, and, insofar as the Constitution of the United States was consciously fashioned with an outline of human nature in mind, natural law is an indispensable aid to proper constitutional interpretation.

This essay explores the founding conception of liberty and its interrelationship with human nature. It then addresses how the Constitution reflects these aspects of human nature. Finally, it contains some concluding perspectives on aspects of human nature understated in the constitutional design and what ought to be done when there are disputing conceptions of human nature.

I. LIBERTY

The founding view of liberty was taken up directly by Hamilton. In \textit{Federalist 15}, Hamilton asks “why,” if man\(^1\) is naturally

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\(^1\) The use of the masculine in this essay is intended to include the feminine; the masculine usage is continued in the essay so as not to raise in the mind of the reader any inference that the thoughts expressed are somehow at odds with the quoted material from the founding period, which reflected a different custom in
free; 2 “has government been instituted at all?” 3 Hamilton’s answer is blunt and rests squarely on a claim about human nature. Government is instituted, Hamilton asserts, “[b]ecause the passions of men will not conform to the dictates of reason and justice without constraint.” 4 Liberty without restraint will not lead to private or public good.

How does Hamilton know this? Well, he says, just look around; and further, if the evidence of our own eyes does not convince us and we seek something beyond this empirical claim, he urges us to draw yet another inference about human nature: It is to be expected that men in a collective or group will act badly because the “[r]egard to reputation has a less active influence.” 5 Think about it, Hamilton admonishes: Liberty will be badly used if joining together obscures accountability. Moreover, “a spirit of faction” will aggravate these intrinsic human aspects, thereby magnifying the resulting harms. 6 In a group, we will ally with others of like mind in a shameless way to disadvantage or harm others. We will be inclined to use our liberty to pursue “improprieties and excesses, for which [we] would blush in a private capacity.” 7

The desire for liberty to be well used, once “we the people” were united in political society, greatly motivated the Founders. It will be argued below that this founding conception of liberty informed by human nature accounts for much of the constitutional structure and the express limitations upon government power within and appended to it. The justification for the new Constitution is forthrightly anchored in the maintenance of human nature as the “great principle of self-preservation.” 8 As such, the precondition for liberty to be used well is honoring the core principle of preserving the truth of oneself—a proposition traceable, as Federalist 43 expressly af-

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4. Id.
5. Id. at 111.
6. Id.
7. Id.
8. The Federalist No. 43 (James Madison), supra note 3, at 279.
firms, to “the transcendent law of Nature and of Nature’s God” upon which the nation is founded and all human action depends. The question whether identity is a limitation or starting point for freedom may be a puzzler for twenty-first century man, but it is an easier question when tossed the way of Publius. The authors of The Federalist Papers knew human nature or identity to be the starting point for human freedom or liberty.

II. HUMAN NATURE

What is the law of nature? An early twentieth century lecturer put matters nicely:

Every living creature is the embodiment of some form of natural law. Its duration of life depends upon its obedience to the law of its nature, as embodied in its organism. It lives by being itself, by persisting in being itself, and when it violates the law of the kind of being it is, it renounces life and perishes. All animated beings are subject to the laws of cause and effect, as Nature has prescribed them for each species. In any complex organization, like human society, something must be freely granted to the individual. This is what we mean politically by “liberty.” On the other hand, something must be insisted upon for the benefit of the group. This is what we mean by “law,” in its social sense. Without liberty, there is no initiative, and hence no progress. Without law, there is no survival of the group.

It is within the will of man to have positive law either advance human nature or undermine it. It would be a mistake, however, to suppose that the constructed, positive law of society can disregard the law of nature without consequence. We can construct governments and other social structures beyond our individual natures, but these perform well only if nature’s truths are observed. “What we must never forget is that Nature never ceases to govern; and that, if men wish to govern, they must govern under Nature’s Laws, or they will be doomed to failure.”

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9. Id.
11. Id. at 29.
A. Human Liberty or “Right” Derived from Assumed Duty

The founding generation was studied in the dismal history of societies that sought the false freedom of governing against human nature. If one begins the history of human government with the patriarchal clan, one sees force, but little acknowledgment of human liberty or freedom. As the clan gave way to various forms of warrior chiefs and kingships, there was a natural mindfulness of the well-being of one’s group. Several thousand years before Christ, Hammurabi’s famous legal code would describe the clan leader as a shepherd chosen “to care for the people [and cause them] to dwell in peace and security, that the great should not oppress the weak.”13 The Greeks would give a name to these assumed natural duties of care, and these in turn would later become encapsulated into the notion of rights or liberties. Rights, therefore, arose as correlatives from the reasoned objection of man’s intellect when leaders defaulted on their expected duty of care and irrationally deprived man of the necessary goods or sustenance to survive. Stoic philosophers like Cicero would bring this conception of human right or liberty derived from duty to Rome, but, with Rome’s fall, barbarian kings once again obscured the concept of natural rights. It would not re-emerge until the American Founders decided to build a government upon human nature and its associated rights.

B. Affirmation of Creation as Source of Natural Right or Liberty

“When...the Laws of Nature and of Nature’s God entitle them, [and] a decent respect to the opinions of mankind requires...”.14 With these words, the Founders gave explanation not only for the formation of a new sovereignty, but also the human liberty the newly established United States sought to advance. It was an explanation premised upon the proclaimed truth that man is not self-creation, but created. That the handiwork of the Creator came with a conscious endowment of unalienable rights—life, liberty, and the pursuit of happiness—led to the conclusion that any governmental form

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12. This is not to say that force within the clan was always contrary to human nature.
13. Hill, supra note 10, at 37 (quoting Hammurabi’s legal code from approximately 2250 B.C.).
that followed would need to have one overriding end: to secure human nature and the rights associated with it.

There is much speculation as to why America in the late Eighteenth Century was the locus of natural law rediscovery. Possibly, it was the wide sweep of land, and nature, itself, that the colonists daily inhabited and sought to harness. Perhaps it was the extraordinary discoveries of the era in natural science. Or it may simply have been that no people so distant from their country of origin could rationally continue to think of themselves as “subjects.” American colonists were persons enjoying natural liberty. However it was, “[t]he American colonists came upon this idea in their own way . . . . It was the result of their own experience in self-government, coupled with their faith that their human nature had a Divine origin and involved a moral responsibility of which freedom was a necessary correlate.” 15

If freedom, and the new government that aspired to it, were to be guided by human nature, then that nature would need to be understood. At a very basic level, giving proper attribution to a Creator put human nature off-limits to human redefinition 16 and secured unalienable rights against the government, 17 but a workable government would require some greater identi-
fication of the particulars of human nature. A few of these particulars are explored below.

III. MAN IS FREE, BUT NOT APART FROM OR ABOVE, SOCIETY

In the Seventeenth and Eighteenth Centuries, it was understood that man was not intended to live alone, but in society. Of course, part of this sociability was a product of pure necessity. “From his beginning [man] was born into [society], and without it he could never have been. Helpless in his isolation, he could be exterminated even by swarms of insects.”18 But the yearning for community was more than a utilitarian means of defense against predatory animals or other threats to physical existence. The Founders read Aristotle and accepted his proposition that “man is by nature a political animal . . . . There is . . . a natural impulse in all men towards an association [with others].”19 This natural desire, according to Aristotle, arose from two sources: reasoned reflection on right and wrong (which is only a comprehensible exercise in relation to others) and our love of others.20

A. Jefferson: Man Has a Moral Sense Developed Out of Service to Others

Thomas Jefferson most notably made reference to man’s social side, observing in correspondence to John Adams that man is “an animal destined to live in society.”21 For this reason, Jefferson would deliberately criticize the anti-social, atomistic conceptions of Hobbes as a “humiliation to human nature.”22 Thomas Pangle records that Jefferson had derived from the Enlightenment philosopher Helvetius that we experience pleasure “when we aid or even when we seem to sacrifice for others.”23 Jefferson was not fully satisfied that Helvetius had explained the origin of the pleasure derived from the service to

others and was unprepared to ascribe the origin of man’s moral sense solely to God since that would leave unaccounted for the moral sense or like sensation in a disbeliever. Therefore, on a philosophical level, Jefferson would conclude that, like other aspects of the moral sense in man, nature simply reveals the pleasure of service. As he grew older, Jefferson would come to value tranquility over continued public service, but he would continue to lean upon the theorem that the pursuit of happiness was dependent upon the virtue of knowing oneself and being useful to others. The “moral instinct” that inclines us to do good out of a love of others is, Jefferson would conclude, “the brightest gem with which the human character is studded, and the want of it as more degrading than the most hideous of bodily deformities.”

B. Wilson: Man Has Moral Sense Because He Has an Innate Conscience

James Wilson would question Jefferson’s reliance upon the pleasure or utility of serving others as a sufficiently reliable basis for the development of a moral sense. Unlike Jefferson, Wilson would insist that human nature intrinsically includes not only a desire to be social and socially useful, but also a conscience. Relying upon Thomas Aquinas by way of Richard Hooker, Wilson would insist that it is conscience that guides reason. The first principles of virtue are self-evident to man, and, were it otherwise, most men would find the pursuit of virtue to be impossible and beyond their capacity.

Wilson’s attachment to innate conscience contrasts with John Locke, who, in his Essay Concerning Human Understanding, opines that not even the Golden Rule is innately known. Locke is often quoted in a way that makes his writing seem highly relativistic, and certainly the statement, “[c]onscience . . . is nothing else, but our own Opinion,” seems to be just that. Locke was obviously a stronger influence on Jefferson than on Wil-
son, as Locke’s denial of conscience as innate fits nicely with Jefferson’s proposition that men always inquire further to seek an underlying reason for a moral rule.\textsuperscript{30} For Jefferson again, it was the utility of service that brought happiness, not following an inner voice guided by an objective, knowable virtue. Locke would similarly write that “[p]ower and riches, nay Vertue [sic] itself, are valued only as Conducing to our Happiness.”\textsuperscript{31}

C. Man’s Created Nature Bridges Jefferson and Wilson

But Jefferson (and Locke) may not be as far from Wilson as it first would seem. What unifies them is reference to the transcendent. All three concede that acknowledgment of a Creator influences man’s moral sense. Locke makes repeated reference to man’s creation, and Jefferson’s “endowed by their Creator” reference in the Declaration is well known. Nevertheless, Jefferson is sometimes described as a “materialist,” a term he borrowed from Locke, or often as a “deist.” These terms obscure more than they clarify because it was Jefferson’s concession of a Creator God that had real consequence for filling out his conception of human nature. As Father John Hardon, S.J., wrote in apprising the so-called Jefferson Bible, the Life and Morals of Jesus of Nazareth:

That Jefferson believed in God is evident first from his ready acceptance of the teachings of Christ on the subject, the Lord’s Prayer, the Eight Beatitudes, the Parables of the Unjust Steward and the Ten Talents, the Sermon on the Mount—all of which presuppose a belief in the existence of God, the Creator of heaven and earth. Correlative with this goes the belief in prayer and some kind of Providence, and to that extent, at least, an acceptance of some kind of grace, requested for example in the petition, “Deliver us from evil,” in the Pater Noster.

Also the Morals of Jesus allows us to conclude that Jefferson believed in some sort of future life, where the good are rewarded and the wicked punished. Besides the Parables of Lazarus and Dives, of the Pharisee and Publican, and the Wedding Feast, Jefferson accepted and extracted the whole discourse of Christ about the Day of Judgment, in the twenty-fifth chapter of Matthew, not excluding the classic

\footnotesize{\textsuperscript{30} See id. at 65.}

\footnotesize{\textsuperscript{31} John Locke, Some Thoughts Concerning Education, in The Educational Writings of John Locke 109, 249 (James Axtell ed., 1968).}
verse 46, in which Christ foretells: “These will go into ever-lasting punishment, but the just into everlasting life.”

What, then, of Jefferson’s self-description as a materialist in the Lockean sense? Hardon writes that it was not a denial of the spirituality of the human soul, but merely the humble confession that there is no human proof anchored solely in reason of the soul’s spiritual nature. Hardon’s explanation is persuasive. Even though Locke (and by extension Jefferson) was unable to prove the imprint of a moral sense in man and questioned whether reason is naturally inclined toward seeking the good, as Aquinas taught, Locke nevertheless insisted on the existence of natural law, knowable only by means of the Divine creator and legislator. By this, Locke meant that human beings are the creation or “workmanship” of God; therefore, they belong to God and are His property.

From this declared status as created beings, a set of prescriptions under the natural law can be deduced. For example, the presupposition of creation allows man to deduce moral precepts in support of “unalienable rights” derived out of his relationship with a Creator-Owner and other created human beings. These moral precepts themselves then encourage habits of virtue, especially including Jefferson’s insight of service to others. Habits of virtue yield happiness. Disregard the presupposition of man as a created being, however, and think of man as his own self-creation living outside or above society, and the process would work in reverse: unhappiness resulting from practices of vice and self-interest unchecked by any moral sense derived from human nature. Without the public acknowledgment of man’s created nature, the derivation of moral sense would be impossible, because there would then be no

33. See id. John Locke writes, “we do not owe our origin to ourselves ....” JOHN LOCKE, QUESTIONS CONCERNING THE LAW OF NATURE 161 (Robert Horowitz et al. trans., Cornell Univ. Press 1990) (1664). Locke was sure that this is not a religious doctrine, even as such doctrines may confirm “the truth of our argument that man can, by making use of sense and reason together, arrive at knowledge of some supreme power ....” Id. at 165. Locke admitted that reason may prompt some to doubt God’s existence, but he said “there exists nowhere a race so barbarous, so far removed from all humanity” that is not suited to “infer from sensible things that there exists some powerful and wise being who has jurisdiction and power over men themselves.” Id. at 165, 167.
stable conception of human nature. Human nature would, of
course, be factually constant, but insofar as it would be subject
to legal redefinition by those in the possession of force, it
would not yield moral clarity for public or private decision.

Of course, man is not assured of happiness merely by public
acknowledgment of his created nature. When man enacts laws
or undertakes personal action in defiance of that created na-
ture, he is acting in a way that is contrary to a state of hap-
piness. For this reason, if a government of law is to be successful,
it must be formed to meet the reality of man’s nature: a reality
which recognizes both man’s created nobility and rebelling
imperfection. Hence, Wilson insightfully comments:

[G]overnment is the scaffolding of society: and if society
could be built and kept entire without government, the scaf-
olding might be thrown down, without the least inconven-
ience or cause of regret.

Government is, indeed, highly necessary . . . to a fallen
state. Had man continued innocent, society, without the aids
of government, would have shed its benign influence even
over the bowers of Paradise.35

The Founders believed man had not “continued innocent”
and so shaped American government to meet his shortcom-
ings.

IV. MAN’S IMPERFECT NOBILITY

The seventeenth-to-eighteenth-century period out of which
the Constitution emerged was, as Arthur O. Lovejoy records, a
period of transition between the denigration of man and the
celebration of his potential.36 Theologians and religious writers
reminded the Founders of man’s creation in the image and like-
ness of God and man’s supernatural destiny, but one satire
writer after another demonstrated that man, in action, failed
regularly to live up to this nobility. These satires of the Seven-
teenth Century were but the flowering of earlier writing. Father
James Gillis writes:

Shakespeare—the myriad-minded Shakespeare—probably
knew man better than any other poet or dramatist or phi-
losopher. Certainly he made a life study of man; he tracked

35. JAMES WILSON, Of the Study of Law in the United States, in SELECTED
POLITICAL ESSAYS OF JAMES WILSON, supra note 28, at 210.
every emotion and mood and thought and passion of man to its secret lair in the human heart, dragged it out, incarnated it in man or woman, king, peasant, soldier, student, lover, clown, clothed it in ermine or fustian or in mourner’s weeds, and made it “strut and fret its hour upon the stage.” If ever a man revealed ourselves to ourselves, it was that all-but-omniscient Shakespeare. But even he was compelled in the end to confess that he couldn’t solve the riddle of man. Witness the famous monologue, “[w]hat a piece of work is man!” continuing “how like an angel!” but concluding, “this quintessence of dust!”37

A. Man Rationalizes Himself as an Exception: The Self-Interest Problem

Thirty years before the Declaration, the French writer Marquis de Vauvenargues noted how much we enjoy pointing out human defect, thinking we can somehow exempt ourselves from the same criticism. Vauvenargues lamented, “We are so presumptuous that we imagine we can separate our personal interest from that of humanity in general, and malign the human race without implicating ourselves.”38

In response to this criticism, man would assert as a defense his commitment to reason. However, one would have to cautiously wonder if “reason” was itself rationalization and self-deception. Man reaches a conclusion favoring passion over reason, then finds reasons to justify the passion and deceives himself into thinking the reasons discovered were the cause for the initial decision. Again, satirists of the Seventeenth Century regularly pointed out that “[t]he passions always seek to justify themselves and persuade us insensibly that we have reason for following them. The gratification and pleasure to which they give rise in the mind which should be judging them, corrupt its judgment in their favor.”39

These insights were best represented in the founding generation by John Adams. He observed that men tend to act first and think after. Men have a tendency to flatter themselves, and Adams thought this self-deception was responsible for many ca-

37. JAMES M. GILLIS, THIS MYSTERIOUS HUMAN NATURE 5 (1956) (quoting WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2).
38. LOVEJOY, supra note 36, at 20 (citation omitted).
39. Id. at 26.
Caught up in the various political controversies of his day, Adams wondered why those against him sought to "blacken and discredit" his motives, rather than address underlying issues. This trait of human nature has not changed.

B. A Government to Bring Perfection from Imperfect Human Nature

Richard Hooker had faithfully recorded the noble, but imperfect, aspects of human nature:

Laws politic, ordained for external order . . . are never framed as they should be, unless presuming the will of man to be inwardly obstinate, rebellious, and averse from all obedience unto the sacred laws of nature; in a word, unless presuming man to be in regard of his depraved mind little better than a wild beast, they do accordingly provide notwithstanding so to frame his outward actions, that they be no hindrance unto the common good for which societies are instituted: unless they do this, they are not perfect.

Yet all was not lost. God had created a universe by counterbalancing the forces of physical science, as Newton explained, and man could likewise construct a successful polity by following His model. So the Constitution came to be, following this instruction of counterpoise or balance, reflected in the planets as well as literature. The Founders, already having declared their fidelity to "the Laws of Nature and Nature’s God," pro-

41. Id. at 436.
42. Why, for instance, did environmental groups seek to demonize then-Judge John Roberts as anti-environment because of his dissent in Rancho Viejo v. Norton, 334 F.3d 1158 (D.C. Cir. 2003), rather than take up the jurisprudential difficulty that animated the Supreme Court decisions upon which precedent Judge Roberts based his dissent—the proper division of state and federal power under the Commerce Clause? See, e.g., Katharine Mieszkowski, The John Roberts Dossier: Everything You Need to Know about Bush’s Nominee, Before the Battle Begins, Salon.com, July 20, 2005, http://www.salon.com/news/feature/2005/07/20/roberts_dossier/index_np.html (“Roberts doesn’t seem to be a big fan of the Endangered Species Act, at least considering his attitude toward the arroyo toad . . . . In 2003, Roberts wanted the court to reconsider a panel’s decision that upheld a Fish and Wildlife Service regulation protecting the toads under the act. The court declined to hear the case, but in his dissent Roberts maintained there could be no interstate commerce rationale for protecting the toad.”).
ceed to the practical task of constructing a government, not on the basis of what man ought to do, but what man would, in fact, likely do.

Enter, for example, James Madison and the Federalist solution for faction. Factions—special interests today—pursue their own agendas, while giving little care to the aggregate or common interests of the whole. This could be corrected either by removing the ability of a special interest to act in this way or by mitigating the effect of this natural action. Had Madison and the Framers chosen the former, it is fair to say that in view of an accurate understanding of human nature as imperfect and rebellious, it would have meant greatly constrained freedom. This, of course, had largely been the history of the world to that time. The wills and passions of men running counter to the choices of those in control of armies and great wealth were simply crushed. Even a benign despot nourishing the idea that men could be reformed to see the wisdom of opposing interests would fail. Such indoctrination would not be costless to freedom, and, in any event, it would assume that human nature was malleable in ways that it is not. Since ignoring the truth of human identity would sacrifice freedom, Madison—taking his cue from the Creator of the universe—decided, instead, to mitigate the effects of man freely choosing to follow his own passions. Ambition would check ambition.

A primary means for Madison to reach counterpoise was his belief in an extended republic. National power over truly national subjects would help submerge factional interests in ways that more localized governance could not. Consider a topical Exhibit A: the Supreme Court’s decision in *Kelo v. City of New London*. It was far easier for Pfizer and the proponents of commercial redevelopment to capture locally exercised eminent domain power than it was to convince the Supreme Court of the United States to disregard the original meaning of the Public Use Clause to affirm the exercise of that power. Of course, in this instance, a narrow 5-4 majority did ignore the words of the Fifth Amendment and approve a regrettable result in favor of faction. Still, the unfortunate *Kelo* result prompted several Justices to point out explicitly how the decision would lead to advantages primarily for those who had legislative friends, to the great disadvantage of racial minorities.

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44. 125 S. Ct. 2655 (2005).
and those of modest means. Justice Stevens, for the majority, put his faith in comprehensive planning and town meetings. This is a faith in the intrinsic rationality of man, something the Founders might say indulges a delusional conception of human nature. The town meetings merely facilitated a faction’s ability to take what was not theirs and reallocate it.

It is a fair objection to contend that if the city of New London could not undertake planning in 2005 without succumbing to faction, was not the same true of the participants in the 1787 Constitutional Convention? Large states versus small ones, farmers pitted against merchants, the convention was rife with faction. Why should not the resulting constitutional product be seen to be as suspect as New London’s condemnation plan? Because, unlike Justice Stevens, Madison and his fellow delegates consciously understood that they could not draft a document that exempted man from his natural impulses. They could only fashion one that would place his passions in counterpoise. The Founders were not like the satirists who made fun of man’s limitations, thinking themselves above them. Rather, the Founders fully expected man to obey his natural inclinations, which is why they deliberately framed the document to set one interest against another to yield a more perfect or satisfactory result.

V. SOME OVERLOOKED OR UNDERSTATED ASPECTS OF HUMAN NATURE

Two aspects of human nature are less well reflected in the Constitution’s design. The first is the desire to be held in the esteem of our fellows. Locke noted in The Rambler that:

Every man, however hopeless his pretensions may appear, to all but himself, has some project by which he hopes to rise to reputation; some art by which he imagines that the notice of the world will be attracted; some quality, good or bad, which discriminates him from the common herd of mortals,

45. See, e.g., id. at 2686–87 (Thomas, J., dissenting) (noting that “[s]o-called urban renewal programs” will disproportionately harm poor and politically weak communities).

46. See id. at 2668–69 (majority opinion) (noting that the necessity and wisdom of using eminent domain are matters for public debate).
and by which others may be persuaded to love, or compelled to fear him.\textsuperscript{47}

Jesuit thinking, it is supposed, traced this desire for approval to the Creator, who, it was thought, ingeniously implanted it within our natures as a substitute for reason or virtue.\textsuperscript{48} Adam Smith in his \textit{Theory of Moral Sentiments} likewise observed that “the love of virtue [is] the noblest and the best passion in human nature” and that the love of true glory is “a passion inferior no doubt to the former, but which in dignity appears to come immediately after it.”\textsuperscript{49}

This desire for esteem did not totally elude the Framers, for it lends explanation to how Jefferson could so forthrightly identify the pursuit of happiness with the service of others. Nonetheless, it did not receive sufficient attention. A desire for praise stirs human action, causing men to take up arms in common defense when they otherwise might not and to forego leisure for study (and even write essays on human nature) in hopes of some immortality. But where, it might be asked, is this powerful motivation honored as a source of human action in the Constitution? It might be supposed that the various offices of profit and trust provided or enabled there, including the Executive itself, satisfy this craving. However, John Adams thought them wholly inadequate to this task. Adams commented that

\begin{quote}
[The desire of the esteem of others is as real a want of nature as hunger; and the neglect and contempt of the world as severe a pain as the gout or stone. . . . Every personal quality, and every blessing of fortune, is cherished in proportion to its capacity of gratifying this universal affection for the esteem, the sympathy, admiration and congratulations of the public.\textsuperscript{50}
\end{quote}

The founding focus was to create checks and balances that counteracted the passions of man, including the excessive de-

\begin{footnotes}
\textsuperscript{47} John Locke, \textit{No. 164, Rambler}, Oct. 12, 1751, at 282.

\textsuperscript{48} See, \textit{e.g.}, \textsc{Juan de Mariana}, \textit{De Regis Institutione Libri III} 235–45 (Scientia Verlag Aalen 1969) (1599) (“Who does not see that it is the desire for praise [implanted by Nature] that men are powerfully stirred to undertake great deeds.”).

\textsuperscript{49} \textsc{Adam Smith}, \textit{The Theory of Moral Sentiments} 309 (Liberty Classics 1981) (1759).

\textsuperscript{50} \textit{6 John Adams}, \textit{On Government}, in \textsc{The Works of John Adams, Second President of the United States}, \textit{supra} note 40, at 181, 234.
\end{footnotes}
sire for power or fame, but in regards to this feature of human nature there seem to be insufficiently few fonts of public honor to motivate or to supply emulation, which Adams described as “imitation and something more—a desire not only to equal or resemble, but to excel.”51 It may well be that a government “of the people” risks too much inequality if it promotes such honorific distinctions. But if that is the case, we might spend some time contemplating whether the space for unregulated activity in the Constitution sufficiently allows for human achievement to be noted in the spheres of economics and the observance of property rights.52

A second overlooked aspect of human nature relates to the failure to work out more completely in the Constitution itself the significance of the corporate acknowledgment in the Declaration of Independence of man’s being made, and arguably therefore “owned,” by a creator. Where, for example, in constitutional jurisprudence is Locke’s sentiment that “[m]an not having the power of his own life, man does not own himself, cannot by compact, or his own consent, enslave himself to any one . . . . Nobody can give more power than he has himself.”53 That is an intriguing philosophical insight, and one that is in a good deal of tension with modern expansive, and expanding, claims of autonomy.

It was observed earlier that the Founders deduced a set of moral precepts from our created human nature. These prescriptions mainly took the form of limitations on what human beings may do: They may not use force against or to directly harm each other, for they belong to God and not to each other; they may not harm themselves, such as through suicide, for the same reason; and they may not indirectly harm each other through taking more than their fair share of the goods from the external world, which is of Divine making.

Does the modern mind resist deducing additional guidance from the public acknowledgment of man’s created nature? The Declaration, the founding positive law incorporating the United States as a sovereign nation, puts Creator-skepticism

51. Id. at 267.
52. See THORSTEIN B. VEBLEN, THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY OF INSTITUTIONS 25 (1905) (observing that “[t]he motive that lies at the root of ownership is emulation”).
off-limits as a matter of sovereign, corporate statement. The Constitution, in relation to individual inquiry, does just the opposite, as the Religion Clauses properly ensure that such skepticism is not impeded. But perhaps the Establishment and Free Exercise Clauses can still be fully honored with a fuller understanding of other structural or substantive aspects of the Constitution in light of the corporate acceptance of our created natures. As Walter Berns has observed, the Founders “were fully convinced that the Constitution of the United States derived from a ‘self-evident’ truth respecting man’s nature and the government appropriate to it.”54 As I have argued in an earlier volume of this Journal:

For similar reasons, the Declaration of Independence cannot be relegated to a constitutionally insignificant aspiration. Jefferson himself understood the Declaration as the embodiment of “the American Mind” and the “harmonizing sentiments of the day.” Few originalist traditions will come so well-described in the search for original meaning. As one author described it, “the clarity of [the natural-rights] doctrine in the minds of the Americans is indicated by the first phrase. The statement that ‘we hold these truths to be self-evident’ . . . indicates that to the colonists the principled argument is well-known and widely accepted.” When Jefferson undertook to prescribe a curriculum for the University of Virginia, he instructed the Board of Visitors that it was their “duty . . . to provide that no [principle of government] be inculcated which [is] incompatible with those on which the Constitution of this State, and of the United States were genuinely based.” The first text on Jefferson’s prescribed list was the Declaration of Independence. The enduring significance of the Declaration can also be seen in the recourse made to it by Abraham Lincoln in the midst of the gravest threat to the Union. . . . [O]ne finds in the Book of Proverbs the meditation that “[a] word fitly spoken is like an apple of gold in a frame of silver.” Lincoln likened the Constitution to the frame, and the Declaration to the apple, noting, “the frame is made for the apple, not the apple for the frame.”55

The apple of gold—human identity—is not clarified but obscured when the Supreme Court understates our created origin

in constitutional jurisprudence. No one should be coerced under law to believe any religious teaching, but would not taking account of man as a created being also mean a lesser readiness to exclude religious reference in the public square?\textsuperscript{56} We are free to be atheists, but, given the created identity identified in our founding document of incorporation, the Supreme Court arguably is not.

Our human identity as created beings may be given insufficient attention in other contexts as well. For instance, the implications of created human identity might also enhance an appreciation for federalism. Recently, the federal government sought to enforce federal drug laws in a way that obliterated the distinction between what is national and what is local.\textsuperscript{57} In so doing, did it also short-change the understanding of law as designed to advance the well being of created human persons? To many, recreational drug use is self-destructive. It is not irrational to understand drug crime as facilitating everything from gang violence to terrorism. Nevertheless, a woman with a brain tumor using marijuana under a doctor’s supervision is not engaged in interstate commercial activity.\textsuperscript{58} The failure of the United States in its briefing and arguments to appreciate the difference between locally provided and authorized medical care and an illegal drug market was distressing and deeply threatening to Mrs. Raich’s created identity, if not her very existence. Human identity is also obscured when race is made the basis of public decision. The overly casual applications of \textit{Grutter v. Bollinger}\textsuperscript{59} may be the proof of this. The Court in \textit{Grutter} proclaimed that it was not relying upon race as a person’s sole defining characteristic.\textsuperscript{60} Yet a lower court decision has relied upon race as such a characteristic, in approving another public-school diversity plan.\textsuperscript{61} An acknowledgment of being created equal would seem to stand in refutation.

\textsuperscript{56} Cf. McCreary County v. ACLU, 125 S. Ct. 2722 (2005) (affirming the Sixth Circuit’s holding that the county’s purpose in erecting the Ten Commandments was not integrated with other material so as to carry a secular message and hence was unconstitutional).

\textsuperscript{57} See Gonzales v. Raich, 125 S. Ct. 2195 (2005).

\textsuperscript{58} \textit{Contra} \textit{id.} at 2207.

\textsuperscript{59} 539 U.S. 306 (2003).

\textsuperscript{60} See \textit{id.} at 337–38; \textit{see also} Gratz v. Bollinger, 539 U.S. 244, 271–72 (2003).

\textsuperscript{61} See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 426 F.3d 1162, 1191 (9th Cir. 2005) (en banc) (using race as a tie-breaker to racially balance public schools).
VI. CONCLUSION

Although other examples of case law seemingly disregarding our created natures might be given, this essay will conclude by returning to the assigned question: Is human identity the starting point or the ending point for liberty? If human identity is separated from human nature, it is an ending point. Chief Justice Taney’s infamous identification of Dred Scott as a part of a group that he considered a subordinate and inferior class of beings is probably the most glaring example. But at least for some, Justice Blackmun’s identification of the unborn as constitutional nonpersons is not far behind.

In 2005, it is self-evident that slavery is not consistent with the created human identity specified in the Declaration of Independence, Chief Justice Taney notwithstanding. There is no similar consensus with regard to abortion. So then, how are such competing claims of identity and freedom to be resolved? One answer is to say that when a claim of freedom is in disregard of created human nature or identity, it is specious and should be judicially disavowed. That is obviously a difficult answer for those properly mindful of a restrained judiciary. The answer cannot, however, be dismissed out of hand without sacrificing all fidelity to the founding aspect of the self-evident truth of our creation. After all, how many of us can comfortably read in the Dred Scott decision that it is not the province of a court to decide upon the justice or injustice of slavery, without sensing this to be a profound judicial default? But of course, a very large part of the human identity is, as mentioned before, imperfection—not fully grasping the truth of even our own natures—and, in part, that is why such sensitive issues as abortion and marriage are contested today. There is a truth of identity in each case and the Court is frightfully wrong when it says that human beings define their own place and their own existence in the universe. The Founders did not declare, “We

64. Cf. Town of Castle Rock v. Gonzales, 125 S. Ct. 2796 (2005) (refusing to find a positive substantive or procedural obligation to implement a court order against an abusive husband, who kidnapped and then murdered his three children in open defiance of the order, even as the mother of the children begged multiple times for the police to help or intervene).
hold these random thoughts that, however we got here, we have the right to be left alone.”

If the truth of human nature is contested, however, democracy suggests that any provisional answer must be given by the people in legislative assembly. “We the people” may very well get it wrong, but at least then the conversation will not be stopped dead in its constitutional tracks by a judicial imposition of a mistaken view of human identity that puts us at war with ourselves.