

GOOD AND EVIL IN THE AMERICAN FOUNDING

THE 2023 VAUGHAN LECTURE ON AMERICA'S FOUNDING PRINCIPLES

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The past few decades have seen a broad moral reevaluation of the American Founding. Both on the left and on the right, many now regard the Founders' ideals as less valuable and their failings as more salient. These reckonings are necessary, but they also risk missing something important: a richer and more human understanding of the past, together with a recognition of the great good that the American Founding achieved, here and elsewhere. This Essay discusses how we ought to understand the Founders' historical legacy—and why we might respect and indeed honor their contributions with open eyes.

I'm honored this afternoon to deliver the Vaughan Lecture on America's Founding Principles. I'd like to begin with a short illustration of those principles, as expressed in the famous letter from George Washington to the Hebrew Congregation in Newport, Rhode Island.

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In 1790, Rhode Island finally agreed to the Constitution.¹ And in August of that year, President Washington paid Newport an official visit.² Among the clergy who welcomed him to the city was Moses Seixas, the warden of Congregation Yeshuat Israel, a small community of Sephardic Jews.³ In response to the congregation's letter of congratulations, Washington wrote the following, which I hope you'll indulge my reading:

Gentlemen.

While I receive, with much satisfaction, your Address replete with expressions of affection and esteem; I rejoice in the opportunity of assuring you, that I shall always retain a grateful remembrance of the cordial welcome I experienced in my visit to Newport, from all classes of Citizens.

The reflection on the days of difficulty and danger which are past is rendered the more sweet, from a consciousness that they are succeeded by days of uncommon prosperity and security. If we have wisdom to make the best use of the advantages with which we are now favored, we cannot fail, under the just administration of a good Government, to become a great and a happy people.

The Citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy: a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship[.] It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who

1. R.I. DEP'T OF STATE, *U.S. Constitution*, <https://www.sos.ri.gov/divisions/civics-and-education/for-educators/themed-collections/ri-and-us-constitution> [<https://perma.cc/7L5R-P8RE>].

2. Jonathan D. Sarna, *George Washington's Correspondence with the Jews of Newport*, in *WASHINGTON'S REBUKE TO BIGOTRY* 73, 74 (Adam Strom, Dan Eshet & Michael Feldberg eds., 2015).

3. See *id.*; David N. Myers, *From Toleration to Equality: George Washington's Letter in Comparative Context*, in *WASHINGTON'S REBUKE TO BIGOTRY*, *supra* note 2, at 141, 142.

live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.

It would be inconsistent with the frankness of my character not to avow that I am pleased with your favorable opinion of my Administration, and fervent wishes for my felicity. May the Children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other Inhabitants; while every one shall sit in safety under his own vine and figtree, and there shall be none to make him afraid. May the father of all mercies scatter light and not darkness in our paths, and make us all in our several vocations useful here, and in his own due time and way everlastingly happy.⁴

I don't remember when I first read Washington's letter, likely in high school. To a Jewish kid who grew up in St. Louis, Missouri, this letter of welcome from the Father of His Country has always been extraordinarily moving—as well as deeply emblematic of America's promise, both to my family and to millions of others.

Moses Seixas was the child of *conversos*, Jews who had been forcibly converted and who had preserved their faith in secret across the centuries.⁵ His father Isaac left Portugal and came to America,⁶ where Moses would cofound the Newport Bank and lead the local congregation. His brother Abraham fought in the American Revolution; his brother Benjamin co-founded the New York Stock Exchange; his brother Gershom was a cantor in New York and Philadelphia, a colleague of Alexander Hamilton, a participant in

4. Letter from President George Washington to the Hebrew Congregation in Newport, R.I. (Aug. 1790), in 6 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 284, 284–85 (Mark A. Mastromarino ed., 1996) [hereinafter Washington Letter]. See generally WASHINGTON'S REBUKE TO BIGOTRY, *supra* note 2 (collecting essays on the letter and its influence).

5. Myers, *supra* note 3, at 142–43.

6. *Id.*

Washington's first inauguration, and a trustee of Columbia College—the only Jewish trustee for more than a century, until Benjamin Cardozo in 1928.⁷

It's hard to imagine a more American story than this, or one more representative of America's founding principles: that a family could flee oppression in the Old World to build a new life in the New, a place that would give "to bigotry no sanction, to persecution no assistance," and where they could sit, each "under his own vine and figtree," and there would be "none to make him afraid."⁸

But my topic today isn't just praise for America's Founding and for its founding principles. Rather, it's "Good and Evil in the American Founding"—and it isn't hard to find plenty of both.

As we all know, the past decades have seen a broad moral reevaluation of the American Founding. Both on the left and on the right, many now regard the Founders' ideals as less valuable and their failings as more salient.

On the left, the primary charge is that America has never lived up to its principles—that its principles are hypocrisies, pious frauds, designed to disguise the privileges of an elite and the oppression of others. How can it be said that America gave "to bigotry no sanction,"⁹ when it held millions of people in slavery based on the color of their skin, and denied rights to millions of its own citizens based on their sex or their poverty? How can it be said that America gave "to persecution no assistance,"¹⁰ when Washington and his wife not only owned hundreds of human beings in their own right, but even sought to recapture one of them, a woman named Ona Judge, after

7. See Leon Hühner, *Seixas*, in 11 THE JEWISH ENCYCLOPEDIA 159, 159–61 (Isidore Singer ed., 1906); ANDREW PORWANCHER, THE JEWISH WORLD OF ALEXANDER HAMILTON 85–86, 220 n.56 (2021); David G. Dalin, *Jews, Judaism, and the American Founding*, in FAITH AND THE FOUNDERS OF THE AMERICAN REPUBLIC 63, 67–68, 70 (Mark David Hall & Daniel L. Dreisbach eds., 2014); Gary Shapiro, *Columbia Trustee, Jewish Leader and Patriot of the American Revolution*, COLUM. NEWS (Feb. 17, 2017), <https://news.columbia.edu/news/columbia-trustee-jewish-leader-and-patriot-american-revolution> [<https://perma.cc/Y7E4-66RW>].

8. Washington Letter, *supra* note 4, at 285.

9. *Id.*

10. *Id.*

she fled from the presidential mansion?¹¹ How can it be said that America let “every one . . . sit in safety under his own vine and figtree,”¹² when it repeatedly engaged in the military conquest of its Native American neighbors? Indeed, how can we celebrate the freedom of the Newport congregation, when some of its members were themselves stained by the sin of slavery, a trade in which Abraham Seixas, Moses’s own brother, took shameful part?¹³

This isn’t nitpicking. These are deeply woven features of the Founding era that have afflicted us to the present day. And any moral outlook that insists on *taking these things seriously*, one that refuses to shrug them off, may understandably have difficulty hearing unqualified praise of the Founding era or indeed seeing statues and monuments raised to its leaders.

This is one side of the challenge, largely from the left: that America’s adherence to its founding principles was always limited, always only for a few. But more recently we’ve seen another side of the challenge, largely from the right: that the principles *themselves* have always been flawed. On this account, the problem isn’t that America failed to live up to Washington’s “enlarged and liberal policy.”¹⁴ The problem is *the liberalism*—the effort to cabin true morals and true religion to some private sphere in favor of a public compromise with falsehood and error. The state’s vaunted neutrality can never truly be neutral, the critic might say; it’s always deciding, always making choices, even if it conceals those choices in the language of evenhandedness. And even if the state could be neutral,

11. See Mrs. [?] Staines, in *SLAVE TESTIMONY: TWO CENTURIES OF LETTERS, SPEECHES, INTERVIEWS, AND AUTOBIOGRAPHIES* 248, 248–50 (John W. Blassingame ed., 1977); ERICA ARMSTRONG DUNBAR, *NEVER CAUGHT: THE WASHINGTONS’ RELENTLESS PURSUIT OF THEIR RUNAWAY SLAVE*, ONA JUDGE (2017).

12. Washington Letter, *supra* note 4, at 285.

13. See Bertram W. Korn, *Jews and Negro Slavery in the Old South, 1789 – 1865*, 50 *PUBL’NS AM. JEWISH HIST. SOC’Y* 151, 168–71 (1961). Such involvement shouldn’t be overstated by prejudice, as “Jews could not qualify as major players” in “any global analysis of the transatlantic slave trade,” Seymour Drescher, *The Role of Jews in the Transatlantic Slave Trade* (1993), in *FROM SLAVERY TO FREEDOM: COMPARATIVE STUDIES IN THE RISE AND FALL OF ATLANTIC SLAVERY* 339, 349 (1999), but neither can it be overlooked.

14. Washington Letter, *supra* note 4, at 285.

they might argue, so much the worse: neutrality between good and evil is no virtue, and extremism in defense of good is no vice.

These, then, are the challenges, from both left and right, to America's founding principles. How can they be answered?

I'll suggest today that both challenges stem from a form of pessimism—but that neither is quite pessimistic *enough*. Both challenges look at a society that we're accustomed to thinking good, and both see within it very severe evils. But neither quite accepts that widespread societal evil is the *ordinary* condition of societies and of the people who compose them. It's the circumstance in which, throughout history, we normally find ourselves, and we have to assess both people and political regimes accordingly.

As I'll argue today, we ought to be absolutists about right and wrong, but relativists about praise and blame. That particular *wrongs* were widely practiced in the past (or, indeed, are now widely practiced in the present) doesn't make them right. Good and evil don't depend on what the people around you will celebrate or condemn. But when we look at *human beings* in different times and places, we won't be able to understand them, let alone appreciate what's good in them or worth celebrating in them, unless we attend to the circumstances in which they lived and measure them in the same way that we routinely measure ourselves. And when we look at human governments and at the inevitable compromises they reach, we won't be able to understand them either, much less appreciate what goods they have to offer the world, if we ignore the circumstances of disagreement and division they have to face.

The principles on which America was founded—that "it's a free country," that you can go off and found your own weird commune so long as you aren't hurting anybody, and so on—have been slowly but remarkably effective, over time, at cabining the ever-present human impulse for power over others, and at fulfilling Wash-

ington's dream of offering "a safe & agreeable Asylum to the virtuous & persecuted part of mankind, to whatever nation they might belong."¹⁵

And the reliance on liberal freedoms as a second-best, a *modus vivendi* among those who disagree, has been responsible for hundreds of millions of lives lived in safety and happiness, as well as a historically extraordinary outpouring of freedom, creativity, and abundance. If politics is the art of the possible, we should recognize that America has achieved things that few at its Founding would have thought possible, and that its founding principles deserve much of the credit.

I.

But before we get too far ahead of ourselves, we ought to recognize the seriousness of these challenges.

Begin with the challenge from the left. During the contentious summer of 2020, when many longstanding monuments and statues were removed, some asked whether even statues of George Washington, our country's greatest Founder, would have to come down. In answer, *New York Times* columnist Charles Blow composed an essay, *Yes, Even George Washington*,¹⁶ which I think is instructive to discuss at length.

Blow argued, in short, that "[s]lave owners should not be honored with monuments in public spaces."¹⁷ In the essay, he described the horrors of the Middle Passage: human beings packed into ships, chained for weeks unable to move, many dying from disease before reaching the land where they, their children, and their children's children would work and suffer their entire lives for others' profit.¹⁸

15. Letter from George Washington to Francis Adrian Van Der Kemp (May 28, 1788), in 6 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES, *supra* note 4, at 300, 301, <https://founders.archives.gov/documents/Washington/04-06-02-0266> [<https://perma.cc/2SAG-RNBP>].

16. Charles M. Blow, *Yes, Even George Washington*, N.Y. TIMES, June 29, 2020, at A21, <https://www.nytimes.com/2020/06/28/opinion/george-washington-confederate-statues.html> [<https://perma.cc/84GG-77Y7>].

17. *Id.*

18. *Id.*

These people “were just as much human as I am today. They love[d], laugh[ed], cr[ie]d and hurt just like I do.”¹⁹ And so, for “the people who showed up to greet these reeking vessels of human torture, to bid on its cargo, or to in any way benefit from the trade and industry that provided the demand for such a supply,” he wrote, “I have absolute contempt.”²⁰

Slaveowners such as Washington are often described as “men and women of their age, abiding by the mores of the time” —and yet, Blow pointed out, “[t]here were also men and women of the time who found slavery morally reprehensible.”²¹ When he heard “people excuse their enslavement and torture as an artifact of the times,” Blow wrote, he “consider[ed] that if slavery were the prevailing normalcy of this time, my own enslavement would also be a shrug of the shoulders.”²² Instead, “the very idea that one group of people believed that they had the right to own another human being is abhorrent and depraved. The fact that their control was enforced by violence was barbaric.”²³ He therefore declared: “On the issue of American slavery, I am an absolutist: enslavers were amoral monsters.”²⁴

In considering Blow’s argument, I want to begin by noting areas of agreement. Blow is *right* that it’s all too easy to respond to historical evils with a “shrug of the shoulders”²⁵ —that the Founders were flawed people, that we grade them on a curve, and so on. He’s *right* that many people at the Founding knew slavery for the evil that it was. (One of the world’s first antislavery societies was formed in Pennsylvania in 1775; it was reorganized in 1787 under Benjamin Franklin, one of the most famous people in North America;²⁶ and

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. William C. diGiacomantonio, “For the Gratification of a Volunteering Society”: Anti-slavery and Pressure Group Politics in the First Federal Congress, 15 J. EARLY REPUBLIC 169, 171 & n.4 (1995).

yet Franklin and other well-known abolitionists were likely in the room at Philadelphia when the Fugitive Slave Clause was added to the draft.²⁷) And, most importantly, Blow is *right* about the horrors of slavery—and that, as Lincoln put it, “if slavery is not wrong, nothing is wrong.”²⁸

If we can understand all this, we ought to be able to understand why many people might resist honoring Washington or other figures of the American Founding. As Senator Charles Sumner said, in arguing against placing a bust of Chief Justice Taney in the Capitol (a bust that has recently been removed): “If a man has done evil during life he must not be complimented in marble.”²⁹

Indeed, the Founders might seem singularly undeserving of such compliments. How can they have *looked* at slave markets and whipping posts and not recoiled, the way we recoil? How can we honor them? How can we take them as models? How can we even understand them as people like ourselves, when their moral senses seem so stunted compared to our own?

I want to answer these questions by explaining where Blow goes wrong—not in matters of morals, but in moral psychology. Slavery was monstrous, but the people who took part in it weren’t necessarily monsters, nor were they amoral. Instead, they were more like us than we’d like to think.

A.

To illustrate this, consider other claims of thoroughgoing societal evil, claims about our own modern society—and claims at which we today might respond with a “shrug of the shoulders.”³⁰

27. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 453–54 (Max Farrand ed., 1911) (noting that Gouverneur Morris suggested an amendment immediately after the adoption of Pierce Butler’s suggested clause, codified as U.S. CONST. art. IV, § 2, cl. 3); see also *id.* at 348, 542 (noting Franklin’s attendance on nearby dates).

28. Letter from President Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), in 7 ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 281, 281 (Roy P. Basler ed., 1953).

29. CONG. GLOBE, 38th Cong., 2d Sess. 1013 (1865); see Act of Dec. 27, 2022, Pub. L. No. 117-326, § 1(b), 136 Stat. 4452, 4453 (ordering the bust’s removal).

30. See Blow, *supra* note 16.

Nothing in our own society, of course, holds the same terror for our modern moral sense as slavery. (If something did, we surely wouldn't shrug at it.) But the injustices of today don't have to be comparable to slavery for us to *respond* to them in a comparable way—for us to shrug at them in much the same way that our forebears, to their dishonor, shrugged at slavery.

And to clarify, lest I be misunderstood, it's the *ease* and *familiarity* and *ubiquity* of this shrug, and not the seriousness or the evil or the injustice of what's being shrugged at, that I want us to place in mind. What we're looking for is an issue that we can *imagine* that we ought to take much more seriously than we do, and yet one at which we ourselves respond—or those whom we love, respect, and admire respond—with a shrug of the shoulders nonetheless.

Consider, then, the following example. My wife previously worked for a nonprofit that provided legal services to the People for the Ethical Treatment of Animals (PETA). Her work brought me into contact with people whose views were rather different from my own. And regardless of your views on the topic, I want you to imagine for a moment the perspective, and to look out on modern America through the eyes, of the dedicated supporter of animal rights.

This animal-rights activist would see in the practice of eating meat (or of farming animals for their milk or their eggs, of testing cosmetics or other consumer products on animals, or of making clothes from their fur or from their skin) a practice that is:

- enormously widespread;
- generally uncriticized, except maybe by a few do-gooders or busybodies;
- associated with a vague sense of moral disquiet;
- perhaps to be abandoned, in some ideal and distant future;
- but nonetheless, for now, an absolutely ordinary part of many people's daily lives.

In other words, they'd see a practice that shares, in its widespread social acceptance, many of the features previously shown by the widespread social acceptance of slavery.³¹

Now, I hasten to recognize that some might consider this juxtaposition by the animal-rights activist inappropriate—indeed, even insulting. The evils of slavery, they might argue, are so vast as to render invalid any comparison with our modern treatment of animals. But I don't think that's quite right, because that isn't quite how comparisons work. One can *compare* a puddle to Lake Superior, without suggesting that the two are of *comparable size*, simply by pointing out that they share common features in an illuminating way. And it's the broad and unreflective *acceptance* of our treatment of animals in the modern day, the animal-rights activist might argue, which bears the crucial resemblance to the broad and unreflective acceptance, in an earlier era, of slavery—an acceptance which in both cases fails to track the wrongness of what's being done, even if both aren't equally wrong.

Others might portray the activist's invocation of animal rights in such a context as itself offensive, because it echoes or even seems to endorse the slaveowners' analogies of enslaved human beings to mere animals. But I don't think that's right either—or that it seeks to understand the activists fairly on their own terms, especially those who invoke their own experiences as the descendants of slaves.³² If the essential wrong of slavery was that it treated human beings, people just like you and me, as if they were so many cattle to be *used* for others' benefit, then the claim of the animal-rights movement is that maybe it's wrong to treat cows that way too.³³ The point of the activist's argument isn't that we're free to take human suffering less seriously, or to make light of it, but that perhaps we

31. See, e.g., Alice Walker, *Foreword* to MARJORIE SPIEGEL, *THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY* 14 (rev. ed. 1996).

32. See *id.*

33. See *id.* at 15 (“The animals of the world exist for their own reasons. They were not made for humans any more than black people were made for whites or women for men.”).

ought to take animal suffering *more seriously*, and to *stop* making light of it.

But whatever one thinks of this juxtaposition, the potential uniqueness of slavery shouldn't prevent us from seeing something that is *not* unique: the toleration by those whom we might otherwise see as good and decent people of some truly bad and indecent things. The removal of one great societal evil, in the abolition of slavery, didn't entail that every socially accepted evil, of every size, was eliminated along with it. Instead of animal suffering, if you prefer, choose misogyny, or xenophobia, or indifference to the environment, or legal abortion, or *restrictions* on abortion, or military interventions abroad, or *failures* to intervene abroad, or any other evils or alleged evils you choose. All of these have been and still are accepted by societies, even as some people speak out against them. And if you think that only monsters could tune out such voices and grow accustomed to such serious societal evils, then I question how many monsters you see walking around you, or else how few serious societal evils you're willing to admit.

For the seriousness of a societal evil, alas, needn't be matched by the degree of society's concern. Return to the example of animal rights. Not long ago a fire in Dimmitt, Texas, killed more than 18,000 cows at a dairy farm, who were trapped inside and burned or suffocated when overheated equipment ignited methane gas.³⁴ This kind of story quickly disappears from the front page, if it ever gets there. The *Texas Tribune*, in reporting on the event, pointed out that these cows "represent just a fraction" of the 13 million cows raised in the state, noting in passing that "[d]uring Winter Storm Goliath in 2015, 35,000 cattle froze to death."³⁵

These unusual events pale beside the ordinary cruelties of animal agriculture—practiced not just by factory farms, the kinds where animals live their whole lives without being able to stand up or turn

34. Jayme Lozano Carver & Erin Douglas, *More than 18,000 Cows Are Dead After Dairy Farm Explosion in Texas Panhandle*, TEX. TRIB. (Apr. 13, 2023, 3:00 PM), <https://www.texastribune.org/2023/04/13/texas-dairy-farm-explosion-cows/> [https://perma.cc/CA5E-FHL5].

35. *Id.*

around in their cages,³⁶ but by “humane” farmers who sell “humanely raised” products.³⁷ Consider this discussion of typical American egg-raising practices:

Although the wild cousins of domesticated chickens can live to be ten years old, even hens who avoid succumbing to illness will typically be killed at about two years of age, when their egg production diminishes. Accordingly, farmers must constantly replenish their supply of laying hens.

Hatcheries, meanwhile, cannot determine the sex of chicks until they hatch from their shells. . . . With no market for male layer chicks, they are killed almost immediately after hatching—regardless of whether the female layer chicks will be sent to cages in “factory” farms or to so-called free-range farms.

How do farmers kill male chicks . . . ? Common industry methods include suffocating them by sealing them in garbage bags, gassing them, and macerating them—that is, grinding chicks to death by feeding them along a conveyor belt into a gigantic high-speed meat grinder. . . . It is difficult to imagine anyone thinking that maceration would count as a humane method of euthanasia for an ailing family pet But even if one were to accept the . . . [claims of the American Veterinary Medical Association, which] classifies those last two methods as “humane,” . . . the truth is that many male chicks are killed by methods that the guidelines acknowledge cause serious distress, such as suffocation. And that is to say nothing of the deprivation of life itself suffered by these millions of healthy rooster chicks”³⁸

Now, ordinary Americans who drink milk or eat eggs don’t themselves engage in cruelty to cows and chickens, the way that “ordinary” slaveowners like George and Martha Washington were personally steeped in the evils of slavery. Yet the Washingtons also

36. *Cf.* *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 363 (2023) (describing “breeding pigs confined in stalls so small they cannot lie down, stand up, or turn around”).

37. SHERRY F. COLB & MICHAEL C. DORF, *BEATING HEARTS: ABORTION AND ANIMAL RIGHTS* 17 (2016).

38. *Id.* at 16–17.

didn't personally inflict the unspeakable horrors of the Middle Passage that Blow eloquently described.³⁹ They merely hired it done.

Indeed, the animal-rights activist who deplores our modern inattention to the sufferings of animals would find plenty to criticize in the Founding as well. The abuse of animals wasn't written into the Constitution like the Fugitive Slave Clause,⁴⁰ or like the prohibition on Congress's restricting the slave trade before 1808 (one of the only *unamendable* parts of the Constitution, put wholly beyond the reach of Article V).⁴¹ Yet it's hard to argue that the abuse of animals wasn't in its own way central to Founding-era life. Historians at Mount Vernon tell us that Washington raised sheep, cattle, pigs, chickens, turkeys, and geese for their meat, and that he "enjoyed fox hunting on the Estate and had a pack of hounds specifically for this purpose."⁴² From the perspective of the PETA supporter, the American revolutionaries were literally *fed* through cruelty to animals. The Constitution and the Declaration of Independence were literally *written* on the skins of dead animals, dried and turned into parchment—perhaps animals killed for the purpose.⁴³ And all this was so even though there were people at the Founding who argued against the misuse of animals,⁴⁴ just as there are today.

The dedicated animal-rights activist, then, might condemn the American Founding in much the same *way*, whether or not with as much justification, that others might condemn it on the grounds of human slavery. To such an activist, what others might see as a

39. See Blow, *supra* note 16.

40. U.S. CONST. art. IV, § 2, cl. 3.

41. *Id.* art. I, § 9, cl. 1; *id.* art. V ("Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article . . .").

42. See *The Animals on Washington's Farm*, GEORGE WASHINGTON'S MOUNT VERNON, <https://www.mountvernon.org/george-washington/farming/the-animals-on-george-washingtons-farm/> [<https://perma.cc/DQA2-3UNY>].

43. See *Differences between Parchment, Vellum and Paper*, NAT'L ARCHIVES (Aug. 15, 2016), <https://www.archives.gov/preservation/formats/paper-vellum.html> [<https://perma.cc/Q6MK-9G3S>].

44. See, e.g., MARCUS REDIKER, *THE FEARLESS BENJAMIN LAY: THE QUAKER DWARF WHO BECAME THE FIRST REVOLUTIONARY ABOLITIONIST* 115 (2017) (describing the life of Benjamin Lay, the eighteenth-century abolitionist campaigner and vegetarian).

heartwarming Thanksgiving dinner or neighborly Fourth-of-July barbecue might, as David Foster Wallace wrote of the Maine Lobster Festival, instead “take on aspects of something like a Roman circus or medieval torture-fest.”⁴⁵ “Is it not possible,” Wallace asked, “that future generations will regard our own present agribusiness and eating practices in much the same way we now view Nero’s entertainments or Aztec sacrifices?”⁴⁶

B.

My point here isn’t to preach to you the cause of animal rights. For one thing, I myself am only a vegetarian. Though I’ve given up on eating meat, I still haven’t given up the products of the Dillard, Texas, dairy farm or the chick-killing egg hatcheries—and I have less excuse than most, because I *know* what goes on there. (Once you read this stuff, in the phrase attributed to Wilberforce, you can never again say you did not know.)

Instead, I raise all this not to proselytize or to harangue or to gain converts for veganism, but just to *explain*: to explain how people whom I would *not* call “amoral monsters” (people like my parents, or my friends, or indeed perhaps many of you), people who try hard in much of their lives to do the right thing, might nonetheless take part in what, in the fullness of time, might be understood to be very serious evils—even when they know, in more or less detail, what is actually going on.

A better awareness of history doesn’t merely acquaint us with a parade of historical evils. It also proves to us, beyond doubt, that many people who sought to do good have been very wrong about matters of morals, and that others who were right about matters of morals nonetheless failed to act on them. The notion that “the spirit is willing, but the flesh is weak” was observed thousands of years ago,⁴⁷ and it hasn’t become less true since.

So to say that all these people are “amoral monsters” is wrong—wrong simply as a matter of moral psychology. This isn’t a claim of

45. David Foster Wallace, *Consider the Lobster*, GOURMET, Aug. 2004, at 50, 64.

46. *Id.*

47. See Matthew 26:41.

moral relativism. One can hold that the treatment of animals in modern farming is monstrous, and not justified by its widespread acceptance, without viewing the *people* who eat meat as amoral monsters themselves. In the same way, we can affirm that what the slaveowners were doing was truly monstrous, and that the circumstances of their times didn't justify it. But we simply won't *understand* them properly if we see them only as inhuman monsters, and not as the same sorts of ordinary sinful humans that we see all around us today. We simply won't understand them, or their societies, if all we can see in them is their indifference to human slavery.

One can insist on viewing a society through such a lens, but only at the cost of rendering opaque all that might otherwise render it comprehensible. By way of illustration: in 1975, Susan Sontag had an exchange in the *New York Review of Books* with Adrienne Rich, who accused Sontag of underplaying the importance of misogyny in a discussion of Nazi Germany.⁴⁸ Sontag responded that a focus on misogyny might obscure, rather than illuminate, the nature of Nazi society.⁴⁹ "Suppose, indeed," Sontag wrote, quoting Rich, "that 'Nazi Germany was patriarchy in its purest, most elemental form.'"⁵⁰ Where, she asked,

do we rate the Kaiser's Germany? Caesarist Rome? Confucian China? Fascist Italy? Victorian England? Ms. Gandhi's India? Macho Latin America? Arab sheikery from Mohammed to Qadhafi and Faisal? Most of history, alas, is "patriarchal history." So distinctions will have to be made, and it is not possible to keep the feminist thread running through the explanations all the time. Virtually everything deplorable in human history furnishes material for a restatement of the feminist plaint . . . , just as every story of a life could lead to a reflection on our common mortality and

48. Adrienne Rich & Susan Sontag, *Feminism and Fascism: An Exchange*, N.Y. REV. BOOKS, Mar. 20, 1975, at 31, <https://www.nybooks.com/articles/1975/03/20/feminism-and-fascism-an-exchange/> [<https://perma.cc/WW4C-VTW8>].

49. *Id.*

50. *Id.*

the vanity of human wishes. But if the point is to have meaning some of the time, it can't be made all the time.⁵¹

And Sontag went on to suggest “that there are other goals than the depolarization of the two sexes, other wounds than sexual wounds, other identities than sexual identity, other politics than sexual politics—and other ‘anti-human values’ than ‘misogynist’ ones.”⁵² Trying to reduce all of these societies to questions of misogyny would erase extraordinarily important differences among them. We won't understand them or their world if we simply place them somewhere along a single axis of greater or lesser sex equality, if only because there's more than one evil to worry about at a time.

The danger inherent in broadening our gaze to look beyond specific historical evils is that we might, as Blow fears, respond to things like human bondage with a shrug of the shoulders.⁵³ But the danger inherent in narrowing our gaze to scrutinize such historical evils is that we might, in the glare of their intensity, miss everything else that's illuminating and valuable in human experience. An animal-rights activist who can't see anything but the suffering of animals in a family's sitting down together to Thanksgiving dinner has allowed his awareness of some very great evils to blind him to some very great goods.

Even Frederick Douglass, who was subject to recapture and reenslavement in any state or territory where the Stars and Stripes flew, could still see something of great value in America, something he thought would overcome the evils within it. In his famous Fourth of July address, amid the “dark picture” he offered “of the state of the nation,” he insisted that he “d[id] not despair of this country. There are forces in operation,” he argued, “which must[,] inevitably, work the downfall of slavery.”⁵⁴ And he drew “encourage-

51. *Id.*

52. *Id.*

53. See Blow, *supra* note 16.

54. FREDERICK DOUGLASS, ORATION DELIVERED IN CORINTHIAN HALL, ROCHESTER 37 (Rochester, N.Y., Lee, Mann & Co. 1852).

ment,” rather than cynicism, from “‘the Declaration of Independence,’ the great principles it contains, and the genius of American Institutions.”⁵⁵ I don’t think anyone alive today can claim more reason to hate the Founders’ acceptance of slavery than Douglass could; and yet many are unwilling to view the Founders’ principles as he did.

Instead, our blindness to the potential faults of the present has led many to take a deeply mistaken attitude to the past. Today, “they had slaves” is often taken as reason enough to disregard whatever someone from the past might otherwise have to teach us, and to refuse to accord them honor on any ground. (Those who have “done evil during life,” to quote Sumner again, “must not be complimented in marble.”)⁵⁶ But this view has a great deal of trouble once we realize how deep the societal evils go. Again, we ought to be absolutists about right and wrong, but relativists about praise and blame. If “they ate meat” shouldn’t be enough, *even for the animal-rights activist*, to wipe the slate clean of all achievements worth praising, then the same is true for other evils as well. It’d be absurd, I suggest, to tear down statues of Dr. Martin Luther King, Jr., on the ground that he was a meat-eater who accepted an award from Planned Parenthood.⁵⁷ And this ought to be true, I think, *regardless* of one’s views on meat-eating or abortion—for to do so would reduce, as Sontag pointed out, all of life to a single axis.⁵⁸

In the same way, I believe, it’d be absurd to tear down statues of the American Founders, or of Gandhi, or of the philosopher David Hume (all of which have been suggested of late), even though all of these expressed truly racist sentiments toward those of African descent, and even though such racism is truly wrong.⁵⁹

55. *Id.* at 38.

56. CONG. GLOBE, *supra* note 29.

57. See Jill Howard Church, *A King Among Men*, VEGETARIAN TIMES, Oct. 1995, at 128 (describing the vegetarianism of King’s son Dexter); *Mrs. King Receives Award for Husband*, AFRO-AM., May 21, 1966, at 14 (describing King’s receipt of the Margaret Sanger Award).

58. See Rich & Sontag, *supra* note 48.

59. See Blow, *supra* note 16; Bukola Adebayo, *Gandhi Statue Pulled Down in Ghana After Controversy over ‘Racist’ Writings*, CNN (Dec. 14, 2018, 10:18 AM),

The reason is as follows. Today, when racism is thankfully subject to social sanction, it's *easy* to condemn it. In that respect, we who live today are the beneficiaries of a kind of moral luck: the forces of social convention push us toward the correct view of an important moral issue. But it's a form of vanity to claim this luck as something we earned by our own merits—to engage in the historical fiction of suggesting too easily that, “oh, of course, *I* would have hidden Jewish families,” or “oh, of course *I* would have helped slaves escape,” when we *know* that doing so required unusual, even extraordinary fortitude of character.

Abraham Lincoln knew better. In the same debate with Stephen Douglas in which he spoke of “the monstrous injustice of slavery,” he also argued that the white people of the South

are just what we would be in their situation. If slavery did not now exist amongst them, they would not introduce it. If it did now exist amongst us, we should not instantly give it up. . . . Doubtless there are individuals, on both sides, who would not hold slaves under any circumstances; and others who would gladly introduce slavery anew We know that some southern men do free their slaves, go north, and become tiptop abolitionists; while some northern ones go south, and become most cruel slave-masters.⁶⁰

Or, as it was put by the famous writer, dissident, Nobel Prize winner, and Putin supporter Aleksandr Solzhenitsyn:⁶¹

If only there were evil people somewhere insidiously committing evil deeds, and it were necessary only to separate them from the rest of us and destroy them. But the line dividing good and evil cuts

<https://www.cnn.com/2018/12/14/africa/gandhi-statue-ghana-intl/index.html> [https://perma.cc/J4U4-ZGWD]; Felix Waldmann, *David Hume Was a Brilliant Philosopher But Also a Racist Involved in Slavery*, SCOTSMAN (July 17, 2020, 7:30 AM), <https://www.scotsman.com/news/opinion/columnists/david-hume-was-a-brilliant-philosopher-but-also-a-racist-involved-in-slavery-dr-felix-waldmann-2915908> [https://perma.cc/4X38-SKY2].

60. ABRAHAM LINCOLN, *Speech at Peoria, Ill.* (Oct. 16, 1854), in 2 LINCOLN, *supra* note 28, at 247, 255.

61. See Luke Harding, *WikiLeaks Cables: Solzhenitsyn Praise for Vladimir Putin*, GUARDIAN (Dec. 2, 2010, 2:30 AM), <https://theguardian.com/world/2010/dec/02/wikileaks-cables-solzhenitsyn-vladimir-putin> [https://perma.cc/UKY2-BSM9] (“Under Putin, the nation was rediscovering what it was to be Russian, Solzhenitsyn thought.”).

through the heart of every human being. And who is willing to destroy a piece of his own heart?⁶²

C.

Every era's ideals throw into stark relief its departures from those ideals. We see deep corruption in republics dedicated to virtue, extraordinary inequalities in socialist states, decidedly unchristian behavior by Christian kingdoms, and so on. In honoring or celebrating particular people, the question for us is whom we should venerate as symbols of our ideals, not which actual and flawed human beings we should worship as idols. As Judge John Bush has put it, we should be judging the morality of the ideas, and not of the people.⁶³ Today, it's plainly true that in some areas where Gandhi or Hume failed, any of us can easily succeed. But it's also plainly false that what Gandhi or Hume achieved, any of us could as easily achieve.

For this reason we can honor those from the past for their principles and their achievements, if not always for their full characters. A bust of Archimedes in a physics department isn't a celebration of Archimedes's moral qualities (still less of Greek settler colonialism in Syracuse), but of his reported discoveries in science, an attempt to inspire us to similar discoveries. Likewise, a bust of Washington isn't a celebration of his ownership of slaves or his participation in Indian wars, but of the work he did for his country—guiding his soldiers through the Revolution, forestalling more than one potential military coup, and ultimately giving up his own power so that others might enjoy order and freedom. Even as grudging an admirer as King George III once told a friend that Washington's refusal of a third term “placed him in a light the most distinguished of any man living, and that he thought him the greatest character of the age.”⁶⁴

62. ALEKSANDR SOLZHENITSYN, *THE GULAG ARCHIPELAGO* 168 (1974).

63. Judge John Bush, *How Should We View the Founders?*, Panel Discussion Before the Harvard Federalist Society (Apr. 3, 2023).

64. 3 *THE LIFE AND CORRESPONDENCE OF RUFUS KING* 545 (Charles R. King ed., N.Y., G.P. Putnam's Sons 1896) (recounting a conversation between Rufus King and Benjamin West). See generally Julie Miller, *George Washington, “The Greatest Man in the World”?*,

Rather, the reasons why one might object to a statue of Washington have more to do with the present than the past. There are, even today, statues in Mongolia of Genghis Khan.⁶⁵ Very few people object to them, even though he's among the greatest murderers of human history, whose "cold and deliberate genocide . . . has no parallel save that of the ancient Assyrians and the modern Nazis."⁶⁶ The reason why we can have historical distance from him, and see him as a historical figure only, is that he poses to us no present threat: no one's worried that these statues will inspire new armies of Mongols to sweep across the central Asian steppe.

But people very much *are* worried—and not without cause—that the suffering of American slaves and the interests of their descendants will be met today with a "shrug of the shoulders"; and it's for *this* reason that monuments to slaveowners are said to be unacceptable.⁶⁷ Which historical evils are seen as proper grounds for *damnatio memoriae*, whether slavery or racism or misogyny or religious prejudice or meat-eating, depends on which evils are seen as particularly threatening *today*. This isn't at all to say that such objections are dishonest, or that they serve merely as political weapons (as just about anything can). But they are presentist, and they respond to present concerns.

So we have to be careful not to be misled by those concerns into disregarding what the past still has to teach us. What takes the form of heated moral condemnation of the past can actually be a form of moral quietism about the present. Having shaken off those amoral monsters who came before us, we might feel no need to consider the possibility that *we ourselves* might be such monsters—that we, too, might suffer from deep moral errors, as yet unrecognized and

LIBR. CONG. BLOGS: UNFOLDING HIST. (Dec. 15, 2022), <https://blogs.loc.gov/manuscripts/2022/12/george-washington-the-greatest-man-in-the-world/> [<https://perma.cc/7ALU-VS34>] (describing the history of the quotation).

65. See, e.g., Dan Levin, *Genghis Khan Rules Mongolia Again*, in a P.R. Campaign, N.Y. TIMES, Aug. 3, 2009, at A6, <https://www.nytimes.com/2009/08/03/world/asia/03genghis.html> (describing 131-foot monument).

66. J.J. SAUNDERS, THE HISTORY OF THE MONGOL CONQUESTS 56 (1971).

67. See Blow, *supra* note 16.

unrepented. Instead we might feel that we've finally figured everything out—that we've reached a moral “end of history,” when all true morality has been revealed, and when there's nothing left to be done but the conversion of the heathen. But to declare a moral Year Zero isn't actually progressive, because you can only really declare it once. Having done so, you've denied the possibility of *future* moral progress, of anything that might require a similar reset later on.

In this way, the contemporary attitude toward the past uncomfortably resembles the reported suggestion of the scholar Li Si, in the reign of China's First Emperor, that “[a]nyone referring to the past to criticize the present should, together with all members of his family, be put to death.”⁶⁸ Maybe few would put it in such terms. But we should see that the wholesale rejection of the disreputable past, for its failure to share the moral assumptions of the present, can be a way to protect those present assumptions from *further* moral critique. (Consider, for example, the offensiveness claims sometimes leveled against the arguments for animal rights above.)

The reason that “we need intimate knowledge of the past,” C.S. Lewis argued, is

[n]ot that the past has any magic about it, but because we cannot study the future, and yet need something to set against the present A man who has lived in many places is not likely to be deceived by the local errors of his native village; the scholar has lived in many times and is therefore in some degree immune from the great cataract of nonsense that pours from the press and the microphone of his own age.⁶⁹

When we've morally discredited the past and all that's in it, as beneath our notice if not actively tainted or dangerous, then this cataract finds rather less in its way.

In choosing which figures to honor from the past, then, it matters a good deal what we're honoring them *for*. When confronted with

68. Li Si, Memorial on the Burning of Books (213 B.C.E.), in 1 SOURCES OF CHINESE TRADITION 209, 210 (Wm. Theodore de Bary & Irene Bloom eds., 2d ed. 1999).

69. C.S. LEWIS, *Learning in War-Time*, in THE WEIGHT OF GLORY 47, 58–59 (HarperOne 2001) (1949).

statues of Stonewall Jackson or of Robert E. Lee, we should ask whether they're really being celebrated as generals or as sons-of-the-South without also celebrating the Southern cause in which they fought—the cause of preserving slavery and of betraying the country and Constitution they'd sworn oaths to support, a cause unfortunately not lacking in modern defenders. The objection to their statues isn't that the past is disreputable, but that the particular reasons advanced for honoring them, and for honoring them in particular, are precisely what was disreputable in it. By contrast, it's simply false that we today honor George Washington *for*, rather than *despite*, his attempts to recapture an enslaved woman seeking her freedom.⁷⁰ Instead, we honor him for very different reasons, reasons expressed in our admiration of his letter to the Newport congregation.⁷¹

If the achievements of the American Republic that Washington helped found—constitutional democracy, individual rights, free speech and press and religion and enterprise, the extraordinary outpouring of creativity and safety and abundance that all these things made possible—now seem to us less impressive in global context, that might be because of their success. After all, constitutional democracies today are a dime a dozen. But that was hardly the case at the American Founding, and America's example had no small amount to do with that. To downplay America's contributions to the world, now that it's succeeded in remaking the world in its image, is like accusing Shakespeare of being full of *clichés*, now that our language is defined by his turns of phrase. And to downplay America's founding principles, the principles that helped put slavery on a path to extinction,⁷² because they were often betrayed by the very Founders who helped articulate them, is to forget that

70. See DUNBAR, *supra* note 11.

71. See Washington Letter, *supra* note 4, at 284–85.

72. IMMANUEL KANT, *Idea for a Universal History with a Cosmopolitan Purpose*, in KANT: POLITICAL WRITINGS 41, 46 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991) (“Nothing straight can be constructed from such warped wood as that which man is made of.”).

hypocrisy is the tribute that vice pays to virtue, and that from the crooked timber of mankind, no straight thing was ever made.⁷³

II.

I turn now to the other critique, the critique from the right—which you’ll be glad to learn I plan to address in rather fewer words.

In part that’s because, to debate whether America’s founding principles themselves are wrong, one needs some shared criteria by which to evaluate those principles. If one truly believes that only a particular form of government can be good or just (whether that’s a caliphate, a hereditary monarchy, a dictatorship of the proletariat, or what have you), and if America’s liberal founding principles are incapable of supporting such a government, then there’s relatively little to be said. But there are some areas, both of theory and of practice, where I think liberals and their critics can usefully speak to one another—and where the criticisms, in my view, seriously misfire.

A.

Start with theory, and the claim that liberal “neutrality” is impossible. Neutrality, the critic might say, just exchanges one sort of rule for another. Few people think the free exercise of religion should allow the free exercise of human sacrifice; and if the state chooses to draw a line here, then it isn’t really being neutral. Nor can the state defend its choices as enhancing liberty, for liberty requires coercion: one can only have *laissez-faire* property rights in a powerful state that uses force to protect them. Every claim to “liberty at one place” is, as Dewey argued, at the same time “a restraint at some

73. See LINCOLN, *supra* note 60, at 266 (“[M]y ancient faith teaches me that ‘all men are created equal’”); cf. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 20 (2005) (noting that many states restricted slavery post-Independence, as “soaring rhetoric of liberty . . . pulled many Americans toward abolition”). See generally Dan McLaughlin, *American Slavery in the Global Context*, NAT’L REV. (Jan. 6, 2022, 11:43 AM), <https://www.nationalreview.com/magazine/2022/01/24/american-slavery-in-the-global-context/> [<https://perma.cc/BC6W-X5CG>] (describing the broad extent and slow abolition of global slavery).

other place,” part of a “system of control of power, of social restraints and regimentations.”⁷⁴ The question is which exercises of coercion are justified, not which promote an incoherent goal of “liberty” amid “this endless human struggle.”⁷⁵

Yet liberal neutrality was never just an unreasoned refusal to make distinctions. It’s a particular way of speaking about a particular set of *goals*, which the principled refusal to distinguish on other grounds is *for*. Professors grading an anonymous exam, for example, are neutral as to their students’ identities. That’s because those identities are irrelevant to what the professors *ought* to care about, namely the quality of the anonymous students’ work. Likewise, a university administration inevitably makes some moral choices, such as whether to have meat in the cafeteria, abortion in the health plan, or tobacco stocks in the endowment; there’s no way to remain wholly neutral on such questions. But at the same time, a good university also sets out areas in which it takes no position. It might choose not to declare on university letterhead that it finds meat-eating to be morally acceptable, much less to require its students to sign a statement to that effect—or even not to make them sign the Thirty-Nine Articles of Religion of the Church of England. And it makes these choices, and takes these “neutral” stances, in order to advance the affirmative moral goals of its particular academic mission: for example, that of serving as a “home and sponsor of critics,” or as a “community of scholars” organized for the “limited and distinctive purposes” of “teaching and research.”⁷⁶

So there’s a very big difference between neutrality and indifference—or between thinking that an effective state must make *some* choices and that it must make *every* choice, or even *most* choices. If “Governments are instituted among Men”⁷⁷ for a particular *goal*—

74. JOHN DEWEY, *Liberty and Social Control*, in THE POLITICAL WRITINGS 158, 159 (Debra Morris & Ian Shapiro eds., 1935).

75. *Id.*; accord ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 14, 192 (2022).

76. KALVEN COMMITTEE, REPORT ON THE UNIVERSITY’S ROLE IN POLITICAL AND SOCIAL ACTION (1967), https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt_0.pdf [<https://perma.cc/S8LK-HRB8>].

77. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

say, “to secure these rights” of “Life, Liberty, and pursuit of Happiness”⁷⁸—then this goal helps tell us which distinctions the state should draw and which it should disregard. And it’s only because such rights tend to cut across so many once-salient distinctions, such as those that forced Moses Seixas’s ancestors first to conceal their religion and then to flee across the Atlantic,⁷⁹ that we think of liberalism as particularly “neutral.”

For the same reasons, there’s a very big difference between recognizing that liberty requires defending (that “freedom isn’t free,” as the saying goes) and seeing liberty solely as a mask for coercion. Consider the liberty, which many societies have at times restricted, to choose your own spouse rather than having someone else choose for you. If we tried hard enough, we could reword this liberty in Dewey’s language of coercion: say, that “the state will use coercion to stop people from making others say wedding vows at gunpoint.”⁸⁰ But the awkwardness of this phrasing reveals something important. A system in which marriage is largely a matter for individual choice, and a system in which spouses are routinely assigned by maternal uncles or Party committees, aren’t just two unremarkable reconfigurations of Dewey’s “social restraints and regimentations” amid an “endless human struggle”:⁸¹ the former really does give its participants a unique and valuable experience of freedom that the latter does not. (So, too, does the Thirteenth Amendment.)⁸² And while Dewey might himself agree that our current system involves *better* forms of coercion than some of the alternatives, the most natural way to express *why* it’s better would mention the importance of the individual liberties it protects.⁸³ Liberty doesn’t have to be the only thing of importance, but it’s *something* of importance, and something often worth preserving at very real cost.

78. *Id.*

79. See Myers, *supra* note 3, at 142–43.

80. See *supra* note 74 and accompanying text.

81. See Dewey, *supra* note 74.

82. See U.S. CONST. amend. XIII.

83. See Dewey, *supra* note 74, at 158–60.

B.

Turn now to practice, and the claim that liberalism simply doesn't do what it promises. To some critics, the liberalism of the 1760s and 1770s leads ineluctably to the very different liberalism of the 1960s and 1970s, and ultimately to disenchantment with liberal society.⁸⁴ On this portrayal, it's the nature of liberalism to eat its seed corn: it tends to demoralize society, to empty the public square of values and virtue, and to draw down continually on the reservoirs of social norms that keep a good society in operation.⁸⁵ The Founding-era promise that a community could build its own "city upon a hill" has been broken; the cities were built, but now they stand empty, and everyone has moved to Vegas instead.

This critique, too, is flawed—and it's flawed, as I said above, because it isn't pessimistic *enough*. If the claim is that liberalism has been tried and found wanting, the problem is that illiberalism has been tried and found wanting too. There are few good models of illiberal governments in modern times, and plenty of cautionary tales, from Castro and Chavez on the left to Franco or Salazar on the right. Many twentieth century attempts to promote religion by government influence, whether in Quebec, Ireland, or Spain, came to rather bad ends as well: bad for the religion and not just for the state.⁸⁶ And if it's true, as Edmund Waldstein wrote in *First Things*, that all these states chose too liberal a strategy⁸⁷—that is, that the real illiberalism hasn't yet been tried—then one might ask (as Ross Douthat asked in reply) *why* the committed supporters of those

84. See, e.g., PATRICK J. DENEEN, *WHY LIBERALISM FAILED* 28–42 (2018).

85. See *id.*

86. See Ross Douthat, *A Gentler Christendom*, *FIRST THINGS*, June 2022, at 27, 31; Ross Douthat, *The Shadow of Failure*, *FIRST THINGS*, June 2022, at 38, 39; see also Dina Nayeri, *Why Is Iran's Secular Shift So Hard To Believe?*, *N.Y. MAG.* (Oct. 21, 2022), <https://nymag.com/intelligencer/article/iran-secular-shift-gamaan.html> [<https://perma.cc/4RB5-GFEL>] (making a similar point regarding the 1979 revolution in Iran).

87. See Edmund Waldstein, *All We Need Is Everything*, *FIRST THINGS*, June 2022, at 34, 36.

governments all made such choices, and why doubling down on the use of state coercion seemed to them even less palatable.⁸⁸

As they say in advertising, you can have the best marketing campaign in the world, but you still have to get the dogs to eat the dog food. Ultimately a government staffed by human beings can only enforce virtue for its citizens if there are a majority of citizens who *want* a particular sort of virtue to be enforced; or, if a minority has taken power instead, if you're lucky enough to get the *right* minority, and not one that worries less about using its power to enforce virtue and more about defending its tenuous hold on that power (or, indeed, abusing it).

This is one of the disagreements between classical political theory, which asked how leaders might be taught to use their power in virtuous ways, and modern political theory, which assumes that power corrupts, and that absolute power corrupts absolutely. We can recognize that *someone* must exercise power in a flourishing society without forgetting that the specific people in power often abuse it, and that familiar kinds of liberty often lower the cost of those abuses. There are many things, for example, that parents might do wrong; but only in unusual cases do we trust that a representative of the state could do better. Thus the restriction of child-neglect law to extreme deprivation or abuse—which, at least in liberal states, usually doesn't include instructing your children in the wrong religion.⁸⁹ If responsible parents all agreed on questions of child-raising, we wouldn't need to leave so much up to individual choice; but they don't, so we do.

As this disagreement should remind us, the practical claim against liberalism has a further fault, namely that it forgets why Americans resorted to liberalism in the first place. The colonists weren't all seeking religious *liberty*: many of them were seeking their own religious enclaves, in which they could enforce their own

88. See Douthat, *The Shadow of Failure*, *supra* note 86, at 39.

89. *But cf.* Romanus Cessario, *Non Possumus*, *FIRST THINGS*, Feb. 2018, at 55, 55 (book review) (describing how "the laws of the Papal States stipulated that a person legitimately baptized receive a Catholic upbringing," to the point of removing from his family the involuntarily baptized child of Jews).

beliefs as intolerantly as they liked.⁹⁰ But when they were forced to live cheek-by-jowl with other colonists promoting other religions—Puritans in Massachusetts, Anglicans in Virginia, Catholics in Maryland, and Quakers, Baptists, and God knows what else in Pennsylvania—and to make common cause with them in the Revolution, they found themselves forced to recognize a certain kind of liberalism, simply as a means of getting along. Madison’s efforts to prevent the choice of any “national religion”⁹¹ later became the Establishment Clause, which left Congress without power to interfere with state establishments and which prevented the national government from favoring some state religions over others.⁹² The miracle of the American Founding was that these sorts of realpolitik considerations led to a society in which millions of people could live in freedom and safety.

And attempts to undo the liberal compromise that ignore this realpolitik may find themselves frustrated at the outset. Consider, for example, the proposal of Sohrab Ahmari to restore “blue laws,” which once required many stores to stay closed on Sundays; citing the works of Rabbi Abraham Joshua Heschel, Ahmari argues that Sabbath observance is crucial to private and public virtue.⁹³ Yet we ought to remember that the midcentury legal challenges to blue laws were often brought *by Orthodox Jews*—those who suffered a “double-penalty” when they closed their businesses on Saturdays for their Sabbath observance, but then were forced to remain closed

90. See, e.g., THOMAS H. O’CONNOR, *BOSTON CATHOLICS: A HISTORY OF THE CHURCH AND ITS PEOPLE* 9 (1998) (describing mistreatment of Catholics in early New England).

91. 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834).

92. See Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Non-Establishment Principle*, 27 ARIZ. ST. L.J. 1085, 1089–91 (1995); see also Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 490, 567–68 (denying that the Clause was specifically intended to insulate state establishments, but acknowledging that it was redrafted to avoid any implication of interfering with such establishments).

93. Sohrab Ahmari, *What We’ve Lost in Rejecting the Sabbath*, WALL ST. J., May 8, 2021, at C1.

on Sundays to ease the observance of others.⁹⁴ Maybe some practical accommodation among different religions could be reached; but if so, it might well take the form of something largely resembling liberal neutrality, with some stores open, some employees working, and some people shopping on Sundays nonetheless. The modern critic of neutrality can't avoid this outcome simply by wishing away the very divisions that previously forced toleration and acceptance on our forebears.

As projects of compromise, liberal societies won't be one size fits all. Different compromises will be proper in different places or circumstances. America's historical identity as an "Asylum to the virtuous & persecuted part of mankind, to whatever nation they might belong,"⁹⁵ may make some compromises more suitable for us than for others. But these decisions remain decisions of principle, because it *matters* how much one values the interests at stake. Requiring that certain kinds of medical care be provided to the children of Christian Scientists,⁹⁶ and requiring that a cross be placed atop each U.S. government building,⁹⁷ are different places to draw the line, to be sure; that doesn't make choosing among them a mere exercise in line-drawing. As Oliver Traldi has written, "[t]he person who considers a course of action they find distasteful as a last resort does not, in common parlance, share the principles of the person who hardly finds that course of action distasteful at all."⁹⁸

94. See *American Jewish Congress Report Foresees Discord on Sunday Blue Laws*, JEWISH TELEGRAPHIC AGENCY DAILY NEWS BULL., July 6, 1961, at 6, http://pdfs.jta.org/1961/1961-07-06_128.pdf [<https://perma.cc/NX8V-RHEF>]; accord *U.S. Supreme Court Upholds 'Blue Laws' Banning Trading on Sundays*, JEWISH TELEGRAPHIC AGENCY DAILY NEWS BULL., May 31, 1961, at 5, http://pdfs.jta.org/1961/1961-05-31_103.pdf [<https://perma.cc/LFH4-2B3J>].

95. Letter from George Washington to Francis Adrian Van der Kemp, *supra* note 15.

96. See *Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988), *cert. denied*, 491 U.S. 905 (1989).

97. See Matthew Schmitz, *The Cardinal and the Cross*, CATHOLIC HERALD (May 9, 2018, 6:05 P.M.), <https://catholicherald.co.uk/matthew-schmitz-the-cardinal-and-the-cross/> [<https://perma.cc/83SE-Q6LA>].

98. Oliver Traldi, *Free Speech, on Principle*, ARC DIGITAL (Feb. 19, 2022), <https://www.arcdigital.media/p/free-speech-on-principle> [<https://perma.cc/3YF2-YYQRT>]; accord Oliver Traldi, *Let's Talk About Free Speech*, CITY J. (Apr. 15, 2021), <https://www.city-journal.org/article/lets-talk-about-free-speech> [<https://perma.cc/UF7>].

Perhaps some compromises are simply too immoral to make. One thinks immediately of America's compromises with slavery, which led Garrison to condemn our Constitution as "a covenant with death and agreement with hell."⁹⁹ And none of these arguments may convince someone who finds living together *peacefully* less important than living together *morally*. In his famous speech against the civil disabilities of the Jews, Thomas Macaulay suggested that he would rather take his shoes to "a heretical cobbler" than to one "who had subscribed all the thirty-nine articles, but had never handled an awl."¹⁰⁰ To others, by contrast, it might seem perverse, even diabolical, to care less for salvation than for well-made shoes. (It profits a man nothing to give his soul for the whole world—but for shoes?)¹⁰¹

Yet if liberalism might not be anyone's first-best regime, it also might not have to be. As Scott Alexander once put it, "[l]iberalism is a technology for preventing civil war."¹⁰² It emerged from the horrors of the sixteenth century, in which "Europe tore itself apart in some of the most brutal ways imaginable"; its sole aim is to "let people live together peacefully *without* doing the 'kill people for being Protestant' thing."¹⁰³ As he wrote, "[p]opular historical strategies for dealing with differences have included: brutally enforced conformity, brutally efficient genocide, and making sure to keep" the machinery of liberalism "tuned *really really carefully*."¹⁰⁴

I can say little to persuade those who prefer either of the first two options to the third. But anyone who sees something deeply *wrong* with the ways in which Moses Seixas's ancestors were treated in

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99. *The Union*, LIBERATOR, Nov. 17, 1843, at 182.

100. T.B. Macaulay, Civil Disabilities of the Jews (1831), in THE SPIRIT OF THE AGE: VICTORIAN ESSAYS 80, 82 (Gertrude Himmelfarb ed., 2007).

101. Cf. ROBERT BOLT, A MAN FOR ALL SEASONS 100 (1960) (Methuen Drama 1995) (asking the same question, but for Wales).

102. Scott Alexander, *Against Murderism*, SLATE STAR CODEX (June 21, 2017), <https://slatestarcodex.com/2017/06/21/against-murderism/> [https://perma.cc/7T5A-QNZN].

103. *Id.*

104. *Id.*

Portugal¹⁰⁵—and who hopes to minimize, if one possibly can, the occasions on which someone must be discouraged from worshipping and acting in the ways his conscience demands—will understand the attractions that America’s founding principles have to offer.

Living together is never easy, and there’s no guarantee that we, any more than the Founders, will arrive at the right answers. In this regard, I see no other course but to express the same hope that Washington did, and to conclude here as he concluded his letter to the Newport congregation:

May the father of all mercies scatter light and not darkness in our paths, and make us all in our several vocations useful here, and in his own due time and way everlastingly happy.¹⁰⁶

105. See Myers, *supra* note 3, at 142–43.

106. Washington Letter, *supra* note 4, at 285.