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THE LEGAL UNIVERSE

Observations on the Foundations of American Law

Vine Deloria Jr. and David E. Wilkins



INTRODUCTION

WHENEVER RACIAL, ETHNIC, AND OTHER MINORITIES in the United States have raised voices of protest against the conditions under which they have been forced to live, they have been admonished to work within the system rather than seek its abolition. Purveyors of this good counsel point to the many institutional checks and balances that have been devised to protect the rights of the minority: the division of sovereignty between the national government and the states, the tripartite arrangement of the federal government itself, which inhibits any one of the three branches from dominating the affairs of government, and the provisions for frequent popular elections and limited terms of office—all of which are further modified by the American propensity to seek a social consensus by offering disputing parties a reasonable compromise on any major issue. These provisions, minorities have been told, are sufficient to prevent the miscarriage of justice in almost every instance. These institutional and procedural devices, however, are designed as much to protect a lethargic majority against activist minorities as they are to afford minorities a shield against the oppression of the majority. Moreover, the minority that *is* protected is a political minority—a fictional entity consisting of people who temporarily share a political opinion on a specific issue. No individual is a permanent member of a political minority except by his own choosing; and even this minority is not always protected in instances of national hysteria.

We should not confuse a political minority with other nonpolitical minorities in society. Nonpolitical minorities are permanent minorities that have always been outside the social contract and the protection of the Constitution: racial and ethnic groups, the isolated cultural enclaves that diverge radically from the majority culture, small religious communities (Amish and Rastafarians, for example), obese individuals, children, the elderly, gays and lesbians, criminals, the natural world, and the largest group of all, women. For the members of many of these groups, individuals have no choice concerning membership—especially those in racial, ethnic, age, or gender groups. Their physical characteristics alone permanently classify them as part of the group.

Individuals in religious and cultural groups, on the other hand, derive most of their values and certainly their personal identities from distinctive beliefs and practices. Surrendering this unique understanding of life is

akin to spiritual and psychological obliteration, because no power on earth, particularly a secular government, is considered equal in importance to the central core of beliefs that distinguishes these people from the rest of society.

Gays and lesbians, obese persons, the natural world, and criminals also encounter special problems and experience discriminatory treatment, and each of these groups is also plagued by particular perceptual difficulties that make their situation problematic. Homosexuals, for example, are frequently told that they have a choice in their sexual preferences or that their behavior is either immoral or unnatural. Obese individuals are also often told that they, too, have a choice in being grossly overweight and therefore do not deserve equal opportunity. And criminals, even after being released from incarceration, continue to be treated in a manner that makes it difficult, if not impossible, to get reacclimated to society.

Nonpolitical minorities have no significant constitutional protection, nor have they ever. Insofar as they enjoy constitutional rights and protections, their status is the result of an intense and continuing struggle for respect and equal treatment in the courts and legislatures of the land. Their task has been to force open the definitions that describe the American social contract and extend its applicability beyond the narrow scope originally envisioned by the constitutional fathers. Thus, Chief Justice Roger Taney might well have been describing all of the nonpolitical minorities when, in discussing the status of African Americans in *Dred Scott v. Sandford* (1857),¹ he noted:

[T]hey are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.²

In the postwar decades, speakers for nonpolitical minorities have typically cited racism, sexism, ageism, speciesism, and ethnocentrism as the primary barriers preventing them from enjoying full rights as citizens

in American society. These accusations have much to recommend them, and these are serious social problems; they do not, however, fully explain the continuing failure of the nonpolitical minorities—withstanding the 2008 election of the first African American to the presidency, Barack Obama, or his appointments of Sonia Sotomayor in 2009, the first Latina Supreme Court justice, or Elena Kagan in 2010, a female Jewish Supreme Court nominee—to achieve a greater measure of legal equality within the American political system.

We suggest that a hidden conceptual barrier exists that inhibits not only the permanent minorities but members of the majority as well. That barrier is the inadequate development of the philosophical framework that provided the foundation for the American social contract. In the form in which the men who framed the Constitution received it, the philosophy of social contract was oriented wholly toward a certain restricted class of individuals and could neither include any divergent groups nor provide any significant guidance or protection for the mass of people. Its primary virtue was to encourage a clever, established elite to benefit at the expense of others and perpetuate itself.

Identifying the flaw in US philosophical roots requires that we move beyond the intellectual and emotional climate in which the Constitution was conceived and adopted. The meanings of concepts and words change with use, and even the Supreme Court has admitted that the original perspective of the American social contract has been altered by the passage of time. In *Dred Scott*, Chief Justice Taney recited the familiar refrain of the Declaration of Independence: “We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights,”³ and so forth, and then suggested that the words “would seem to embrace the whole human family, and if they were used in a similar instrument *at this day* would be so understood.”⁴ But he also remarked that if these words had originally possessed this meaning at the time of the American Revolution, then the conduct of the men who framed the Declaration of Independence “would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.”⁵

With its narrowly restricted view of the human family, the intellectual world of the American Revolution would not have countenanced the

acceptance of African Americans (or women, indigenous peoples, and other racially distinct groups) as equal and participating members of a social contract society. Self-evident truths are generally limited to the era in history in which they are accepted with minimal critical examination. So the fact that nonpolitical minorities are not included in the concept of *man* as defined by the nation's organic documents is not really debatable. But we are not concerned with the changing opinions of the sociopolitical world as any generations experience it, rather with the internal logical consistency of the philosophical system that is thought to justify the social contract form of government, the manner in which the words relate to each other.