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FAITH IN SECULAR RELIGION: A BRIEF REPLY

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How pleasant to meet Spring early in Virginia and to be honored to be chosen to deliver the main paper in the first Washington & Lee Law Review Conference of this kind. Not only was the hospitality remarkable, and the chance to meet Frances and Sydney Lewis an added treat, but I also learned from all the commentators, official and unofficial, following my talk. I have disagreements with all of them, to be sure, but that is probably always the fate of a skeptical law professor, and particularly so for one unable to express himself with adequate clarity. That fairly standard series of quibbles and rejoinders need not be detailed here. Because Professor Ides's comment also is something of a caricature of my thesis, however, and because our disagreement is illuminating in itself, a brief rejoinder seems appropriate.

Why is Professor Ides so upset? Why erect the strawperson, for example, that members of the Court are thought to be "craven simpletons?" (I hope it is clear that this phrase is Professor Ides's characterization, and surely not mine.) It is impossible to know fully, of course, and probably futile to try. But his anger seems rooted in discomfort with historic complexity and the dismay of a believer encountering skepticism. Two brief examples illustrate how faith and a passion for certainty may cloud understanding.

The first example concerns footnote four of *Carolene Products*. The careful reader will have noticed that though I made the point, too, Professor Ides angrily notes that footnote four was merely a footnote, and that it was in tension with the rest of the decision. But what of Professor Ides's further claim that any notion of carefully scrutinizing possible discriminatory inaction is "simply a figment of Professor Soifer's noncontextual, ahistorical and wishful reading of footnote four?"

You can look it up, as Casey Stengel often said. Though Professor Ides somewhat snidely notes that only parts of the footnote are actually quoted in my essay, the same is true of his quotation of the footnote as well, but let us rely on the text as he quotes it. The third paragraph mentions "prejudice against discrete and insular minorities" as a possible special condition. This condition, the footnote continues, "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." There may be cause for special scrutiny when prejudice "*tends seriously to curtail*" the political processes that ordinarily may be relied upon to protect minorities. When the word "curtail" is given its usual meaning as a synonym for "shorten" or "cut off," a textualist might begin to sense that the footnote suggests that perhaps something must be done by judges to remedy the effects of a curtailed political process. That political failure to protect discrete and insular minorities—political inaction, in other words—might require special judicial attention is underscored by consideration of paragraph two of the footnote. Presumably not intentionally redundant, paragraph two discusses challenges to state actions that

might interfere with "those political processes which ordinarily might be expected to bring about repeal of undesirable legislation." Therefore, if the paragraphs are not to be considered otiose, there must be some contrast between the state action that clogs political channels (paragraph two) and prejudice that curtails full and equal protection of discrete and insular minorities.

This is hardly the occasion to provide details about why, in 1938, the Court might have believed that the American political system contained vestiges of racism that could seriously curtail protection of minorities.[1] Professor Ides is so angry at the suggestion that there might be a constitutional duty to protect that he cannot credit evidence of such a duty even when it is within the very texts he quotes.

This propensity to overlook evidence that runs counter to his intuitions seems exacerbated when Professor Ides claims to attend to more ancient history. This provides our second example. Here Professor Ides provides no support or citations for his claims, but resorts to sweeping assertions about the "almost remarkable clarity" of the legislative history of the 1866 Civil Rights Act. Professor Ides cannot be bothered to tell us how he knows that the Act was "designed precisely to attack the infamous Black Codes and nothing more." Based on his own clarity about the nature of "our governmental system at that time, it would be surprising for Congress to directly regulate private conduct without any debate on the point." And "there is not a single statement in that history that directly supports the view that the Act was designed to cover those private discriminations."

To even glance through those debates, however, is to wonder how directly a dead Senator or Congressman must call out to Professor Ides to beware, to say that what he was doing in Washington in April, 1866 is sufficient to answer some anachronistic question. Many scholars find the debates, and the governmental system in the immediate wake of the Civil War, less clear than does Professor Ides. But Professor Ides does not need to bother with such details. His response to my article on the 1866 Civil Rights Act and its context is instructive. Professor Ides thinks Harlan was right. This should be the end of the matter. Harlan's precedent decides history, once and for all, and should have *res judicata* effect. It is a clear binary choice between Harlan and me. My article used many pages and too many footnotes and references to a host of distinguished historians in its

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1. It might be useful, for example, to consider even some of the material in the footnotes of my article. For example, note 33 discusses the tensions between Justice Stone's footnote four and the nearly contemporaneous decision in Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938), and note 47 hardly describes state action in the simplistic terms Ides appears to attribute to me. *Cf.* Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 202 (1944) (Stone, C.J.) ("We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates"). Attention to details seems not part of Professor Ides's historical method or even the kind of textualism he practices.

discussion of some of the particulars of the congressional debate and its context and the work of historians of the period.

To Professor Ides, however, the only thing that matters about my article is the sort of thing a computer word-search turns up. How many times did I mention Justice Harlan? If an article does not repeatedly discuss Harlan's opinion, no attention need be paid to its alternative, detailed reading of the 1866 Civil Rights Act.[2]

During the next decade of Reconstruction, there were repeated Congressional efforts to guarantee protection of fundamental rights when state protection failed, including an additional six major civil rights statutes and major expansions of federal court jurisdiction as well as the fourteenth and fifteenth amendments. But Professor Ides seems comfortable ignoring all that messy complexity and launching broad generalizations instead, at least when he does not find a buzzword he deems determinative.

An either/or approach to both history and jurisprudence is dear to many legal minds. Sometimes this view of law is reminiscent of the story Justice Holmes liked to retell. When a suit was brought by one farmer against another for breaking a churn, a Vermont justice of the peace "took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant."[3]

A point of my essay about history and complexity, a point either missed or ignored by Professor Ides, was put forcefully by a fabled storyteller, Abraham Lincoln. In 1862, Lincoln told Congress: "Fellow citizens, *we* cannot escape history. We . . . will be remembered in spite of ourselves. No personal significance or insignificance can spare one or another of us. The fiery trial through which we pass will light us down in honor or dishonor to the latest generation . . . We . . . hold the power and bear the responsibility."[4]

Perhaps it does come down to something of a binary choice after all. If anyone who questions the faith, who suggests that bad things happened

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2. The 39th Congress repeatedly and emphatically proclaimed a federal duty to protect the newly-freed slaves in their fundamental rights. For example, even the part of the Civil Rights Act that survives subsequent judicial evisceration and legislative revision as part of 42 U.S.C. § 1981, a part that Justice Kennedy ignored but that I quoted in full in footnote 50, declares the protection of full and equal laws and proceedings, and the assurance of no other pains and penalties. Moreover, despite Ides's assumption of consensus on the political reality immediately after the Civil War, it is hardly surprising to find numerous Congressmen declaring themselves not enamored of the niceties of states' rights, which they associated with the Confederate cause, or the need to protect the private discriminations of former slaveholders. Congress again and again proclaimed the necessity of federal protection for the freedmen in their fundamental rights. There are myriad sources on these post-1866 phenomena, of course, and many are collected and discussed in Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916 (1987); Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW AND HIST. REV. 249 (1987).

3. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 474-75 (1897).

4. Second Annual Message to Congress, December 1, 1862, 6 *Messages and Papers of the Presidents: 1789-1897*, 142 (J. Richardson ed. 1897) (emphasis in original); quoted in A. L. Higginbotham, Jr., *In the Matter of Color* ix (1978).

in the past and that history be heeded can be characterized and condemned as an irreverent hand-wringer, then Professor Ides has thrown the switch appropriately. However, if we recognize that we cannot entirely escape the sobering complexity of history, we may have less faith but more freedom to improve upon our current state. Instead of celebrating the powers that be, we might begin to heed how they—how we—have arrived at different places along the starting lines of today.