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THE CENTRALITY OF THE PECULIAR INSTITUTION IN AMERICAN LEGAL DEVELOPMENT

PAUL FINKELMAN*

At first glance slavery in the United States seems anomalous, a relic of an earlier age that somehow survived the Revolution, with its emphasis on natural rights and its assertion that all people "are created equal."¹ The title of the most influential and important history of American slavery, Kenneth Stampp's *The Peculiar Institution*,² suggests the way most Americans have traditionally looked at slavery. That a neo-abolitionist historian, publishing two years after *Brown*,³ thought slavery was "peculiar" should not surprise us. But even antebellum Southerners often referred to slavery as their "peculiar institution."⁴ On the eve of the Civil War, white Southerners, while they extolled the value of slavery, knew their system of organizing labor and controlling race relations was unacceptable to much of the world. It was truly peculiar.

In contrast to Stampp, in 1981 Orlando Patterson, a sociologist, argued that the "peculiar institution" was a misnomer for slavery. He claimed that "[t]here is nothing notably peculiar about the institution of slavery. It has existed from before the dawn of human history right down to the twentieth century, in the most primitive of human societies and in the most civilized."⁵ Patterson found slavery in every "region on earth" and concluded that "probably there is no group of people whose ancestors were not at one time slaves or slaveholders."⁶

I. THE PECULIARITY AND THE CENTRALITY OF AMERICAN SLAVERY

In a number of ways Stampp and Patterson are both right. In the

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

2. KENNETH STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM UNITED STATES* (1956).

3. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

4. STAMPP, *supra* note 2, at 3.

5. ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* vii (1982).

6. *Id.*

United States slavery was simultaneously peculiar and prosaic. Patterson shows, and the articles by Alan Watson and Jacob Corré in this Symposium reaffirm,⁷ that slavery has existed in most societies. Specialized monographs on slavery in numerous cultures reaffirm this analysis.⁸ Only in the last third of the twentieth century has the world been without widespread, legalized human bondage. Surely, slavery *per se* has never been a peculiar institution. However, as the great classical scholar M.I. Finley notes, the United States South was one of only five places in the world to have developed not merely slavery, but a slave society.⁹ Moreover, by 1861 the racially based slavery of the American South was different—peculiar—both when compared to human bondage in other times and places, and as it fit into the political structure of the United States.

Slavery was an oddity that ran counter to the professed ideals of the Nation, and yet it was deeply imbedded in the social, political, and legal structure of the Nation. It undermined the “more perfect Union”¹⁰ created by the Constitution, but at the same time was both protected by that Constitution and woven into the Nation’s constitutional fabric.¹¹ Slavery seemed contrary to the Nation’s common law tradition, and yet it helped shape and develop much of American common law. After 1804 slavery was peculiar to the South, but much of the North shared the racial views of the South.¹² Before the Civil War the Supreme Court endorsed these

7. Alan Watson, *Thinking Property at Rome*, 68 CHI.-KENT L. REV. 1355 (1993) [hereinafter Watson, *Thinking Property*]; Alan Watson, *Seventeenth-Century Jurists, Roman Law, and the Law of Slavery*, 68 CHI.-KENT L. REV. 1343 (1993) [hereinafter Watson, *Seventeenth Century Jurists*]; Jacob I. Corré, *Thinking Property at Memphis: An Application of Watson*, 68 CHI.-KENT L. REV. 1373 (1993).

8. The range of work on slavery is dramatic. *E.g.*, M.I. FINLEY, ANCIENT SLAVERY AND MODERN IDEOLOGY (1980) [hereinafter FINLEY, ANCIENT SLAVERY]; CLASSICAL SLAVERY (M.I. Finley ed., 1987); RUTH MAZO KARRAS, SLAVERY AND SOCIETY IN MEDIEVAL SCANDINAVIA (1988); CARL O. WILLIAMS, THRALDOM IN ANCIENT ICELAND (1937); WILLIAM D. PHILLIPS, JR., SLAVERY FROM ROMAN TIMES TO THE EARLY TRANSATLANTIC TRADE (1985); EHUD R. TOLEDANO, THE OTTOMAN SLAVE TRADE AND ITS SUPPRESSION: 1840-1890 (1982); SLAVERY AND OTHER FORMS OF UNFREE LABOUR (Léonie J. Archer ed., 1988); RICHARD HELLIE, SLAVERY IN RUSSIA, 1450-1725 (1982); SLAVERY IN AFRICA: HISTORICAL AND ANTHROPOLOGICAL PERSPECTIVES (Suzanne Miers & Igor Kopytoff eds., 1977).

9. FINLEY, ANCIENT SLAVERY, *supra* note 8, at 9. The others were classical Greece, ancient Rome, Brazil, and the Caribbean.

10. U.S. CONST. pmbl.

11. Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant With Death*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 188 (Richard R. Beeman et al. eds., 1987); William M. Wiecek, *Slavery and Abolition before the United States Supreme Court, 1820-1860*, 65 J. AM. HIST. 34 (1979). *See generally* WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977).

12. *See generally* LEON F. LITWACK, NORTH OF SLAVERY (1961). For a more nuanced analysis of the rights of blacks in the North, see Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415 (1986).

views as the law of the land.¹³ Despite its geographical isolation, the influence of slavery was felt nationally and internationally. It was recognized and protected by national laws as well as the Constitution, and not considered illegal under nineteenth-century notions of international law.¹⁴

Although apparently antithetical to American traditions of equality and democracy, antebellum Southerners, and a good many Northerners as well, had little trouble distinguishing between the rights of free white Americans and the disabilities of enslaved black Americans.¹⁵ Indeed, by the eve of the Civil War some Southerners argued that democracy in America was only possible because of slavery. The racial inferiority of blacks, these Southerners argued, relegated them to permanently diminished status. Because they were slaves, so the argument went, they could never participate in politics. Instead, they provided what Senator James Henry Hammond called a "mudsill" on top of which a democracy of white men could be built.¹⁶ Thus, the rights of life, liberty, and the pursuit of happiness proclaimed in the Declaration of Independence could be universally applied to white Americans precisely because they were not applied to blacks. This sort of defense was necessary because slavery was *peculiar* within the context of the natural rights, liberal republicanism of nineteenth-century America. Roman masters, for example, did not claim to believe in natural rights or equality and thus felt no need to defend their institution. In Rome, "[i]deological openness was facilitated by the nakedness of the oppression and exploitation: no 'false consciousness' was necessary or possible."¹⁷ In Rome there was nothing peculiar about slavery, and therefore no need to defend it. In America slavery was very peculiar, and thus the master class felt the necessity of defending it at every turn.

II. RACE AND SLAVERY IN THE UNITED STATES

The defense of slavery that allowed it to coexist with American de-

13. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

14. See, for example, Chief Justice Marshall's opinion in *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825), upholding the legality of the African slave trade under international law. For a discussion of this case, see ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 102-04 (1977). See also WIECEK, *supra* note 11.

15. For an extended discussion of the disabilities of American slaves, see ANDREW FEDE, *PEOPLE WITHOUT RIGHTS* (1992), reviewed in this Symposium in Ruth Wedgwood, *The South Condemning Itself: Humanity and Property in American Slavery*, 68 CHI.-KENT L. REV. 1391 (1993).

16. James Henry Hammond, *Speech on the Admission of Kansas*, U.S. Senate, Mar. 4, 1858, CONG. GLOBE, 35 Cong. No. Sess. 961-62, partially reprinted in *SLAVERY DEFENDED: THE VIEWS OF THE OLD SOUTH* 121-25 (Erik McKittrick ed., 1963).

17. FINLEY, *ANCIENT SLAVERY*, *supra* note 8, at 117.

mocracy was based on race. For Americans "race has always been the central reality of slavery."¹⁸ For most of the history of the world race was generally irrelevant to enslavement. Other New World cultures, such as Brazil and Cuba, had racially based slavery. But none of them maintained such rigid distinctions between the races.¹⁹ Even St. Domingue (present day Haiti), arguably the most brutal slave culture in the New World, had a large class of free people of color whose part-African ancestry did not prevent them from achieving some wealth and elevated status in that society.²⁰ Thus, racially based slavery in the United States was both peculiar and damaging, not only to the slaves and masters of the time, but to the entire society then and now. Because slavery in the United States "was black slavery," M.I. Finley argues that "even a 'purely historical' study of an institution now dead for more than a century cannot escape being caught up in the urgency of contemporary black-white tensions."²¹

In other times and places enslavement was never confined to a single race or ethnic group. Orlando Patterson's own work shows that in most premodern societies enslavement might be the fate of anyone, at any time. Historian Carl Degler notes that "[t]here was a time in antiquity when anyone, regardless of nation, religion, or race, might be a slave."²² Alan Watson's essays in this Symposium underscore this phenomenon. Watson reminds us that most legal records of Roman slavery bear on the enslavement of elite slaves who were often from the same class and race as their masters.²³ Indeed, the most striking aspect of Roman slavery, for an Americanist, was the extent to which enslavement had nothing to do with race.²⁴ Enslavement could happen to anyone regardless of race

18. David Brion Davis, *Slavery and the American Mind*, in PERSPECTIVES AND IRONY IN AMERICAN SLAVERY 59 (Harry P. Owens ed., 1976).

19. CARL N. DEGLER, NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES (1971) (comparing slavery and race relations in Brazil and the United States).

20. C.L.R. JAMES, THE BLACK JACOBINS: TOUSSAINT L'OUVERTURE AND THE SAN DOMINGO REVOLUTION (Allison & Busby rev. ed. 1980) (1938).

21. FINLEY, ANCIENT SLAVERY, *supra* note 8, at 11.

22. Carl N. Degler, *The Irony of American Slavery*, in PERSPECTIVES AND IRONY IN AMERICAN SLAVERY 19 (Harry P. Owens ed., 1976).

23. Watson, *Seventeenth-Century Jurists*, *supra* note 7, at 1347-48.

24. M.I. Finley argues that "racism" was a factor in ancient slavery, "despite the absence of the skin-colour stigma; despite the variety of peoples who made up the ancient slave populations; despite the frequency of manumission and its peculiar consequences." FINLEY, ANCIENT SLAVERY, *supra* note 8, at 118. Thus, it was "commonplace in Roman Republican speeches that Jews, Syrians, Lydians, Medes, indeed all Asiatics are 'born to slavery.'" *Id.* at 119. "Racism" in this context is really ethnocentrism and about the attitude of masters to the "barbarian" outsiders who made up the bulk of the slave population in the ancient world. However, despite his use of the term "racism" Finley notes the importance of color and "race" in the New World, and that it created a slave system quite different from that of the ancient world.

or ancestry. As M.I. Finley observes, although most classical slaves were “barbarians” from other cultures, there were also “Greek slaves in Greece [and] Italian slaves in Rome”²⁵ Similarly, there were Chinese slaves in China, Africans enslaved by Africans, and Russians enslaved by other Russians. Europeans enslaved each other throughout the ancient world and well into the modern period.²⁶

If anyone might be a slave, freedom was a realistic possibility for slaves in many cultures. Once emancipated, a Roman slave ceased to carry the burden of his former status. “At a stroke [of the pen],” Finley writes, a slave “ceased to be a property. In juristic terms, he was ‘transformed from an object to a subject of rights, the most complete metamorphosis one can imagine.’ He was now a human being unequivocally, in Rome even a citizen.”²⁷ Under Roman law “when a Roman citizen freed one of his slaves, barring certain circumstances the latter automatically acquired Roman citizenship himself.”²⁸ As Alan Watson has noted, this rule was “unique in the ancient world for its liberality.”²⁹

What was not unique for the ancient world, however, is the lack of racial stigma attached to enslavement. Former slaves in Rome, and in many other cultures, could rise to the highest levels of society. The Biblical story of Joseph shows that in the ancient Near East it was not implausible to believe someone could rise from enslavement to the highest level of political power.³⁰ Unlike “[f]reedmen in the New World” who “carried an external sign of their slave origin in their skin colour, even after many generations,” slaves in the ancient world who became free “simply melted into the total population within one or at the most two generations.”³¹ In Rome “tens of thousands of freedmen’s sons” rose “into a world remote from that of the masses”³²

This was impossible—unfathomable—in the United States, where

25. FINLEY, ANCIENT SLAVERY, *supra* note 8, at 118.

26. In the 1940s Germans enslaved their fellow countrymen (as well as Russians, Poles, and other Europeans). Those sent to German industries as slaves or sent to German slave labor camps (as opposed to death camps like Auschwitz) were often physically indistinguishable from those who commanded their labor. However, under German theories of race, those enslaved were designated as members of different races or as politically corrupted.

27. FINLEY, ANCIENT SLAVERY, *supra* note 8, at 97 (footnotes omitted).

28. *Id.*

29. ALAN WATSON, ROMAN LAW AND COMPARATIVE LAW 11 (1991).

30. *Genesis* 39-41. Whether the story of Joseph is accurate or not (or even happened at all) is irrelevant. My point here is that no one doubted it could have happened, despite the fact that Joseph was a Hebrew living in Egypt. It is of course impossible to imagine an African American slave gaining his freedom and becoming an advisor to a political leader at anytime before the Civil War.

31. FINLEY, ANCIENT SLAVERY, *supra* note 8, at 97.

32. *Id.* at 98. This was also a result in Africa, where “slaves could often anticipate the gradual assimilation of their descendants into the social mainstream.” JAMES OAKES, SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH 32 (1990).

slavery was defined by race. White people³³ in the South were always free, or, if held as indentured servants or apprentices, were in a position to become free in the future.³⁴ Only people with some African ancestry could be slaves; no one else, no matter how great their misfortune, could end up enslaved. While courts struggled at the margins to determine who might be black and therefore subject to enslavement,³⁵ Southerners never doubted for a moment that, as South Carolina's highest court put it, "By law, every negro is presumed to be a slave"³⁶

While some blacks in the South ceased to be slaves, freedom only relieved them of the burdens of servitude; it could never lead to full equality. Free blacks in the South were better off than enslaved blacks, but they remained second class members of society.³⁷ Even those few free blacks who owned substantial amounts of property—including slaves—faced a precarious existence that might be shattered by a change in public policy or popular sentiments.³⁸ The South limited the rights of free blacks much as it did slaves. Thus, Southern states denied free blacks the right to testify against whites in court,³⁹ banned them from

33. It is impossible to find clear and consistent definitions of race in the colonial or antebellum South. Throughout the slaveholding South people who were of predominately European or Native American ancestry were held as slaves and considered "black" even though their outward appearance suggested otherwise. I have taken a stab at discussing this problem in Paul Finkelman, *The Color of Law*, 87 Nw. U. L. REV. 937, 950-57 (1993); Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063 (1993) [hereinafter Finkelman, *The Crime of Color*].

34. North Carolina's Chief Justice Thomas Ruffin discussed at length the distinction between slaves and emancipated white children or apprentices in the famous case of *State v. Mann*, 13 N.C. (2 Dev.) 229 (1829). The U.S. Constitution also recognized this distinction. In determining representation in the House of Representatives, the Constitution counted "Persons . . . bound to Service for a Term of Years" with other free persons, and then added to that number "three fifths of all Persons." U.S. CONST. art. I, § 2, para. 3.

35. *E.g.*, *Gobu v. Gobu*, 1 N.C. 188 (1802); *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134 (1806); *Adelle v. Beauregard*, 1 Mart. 183 (La. 1810).

36. *State v. Harden*, 29 S.C.L. (2 Speers) 151n, 155n (1832). By the late seventeenth century every American jurisdiction followed the rule of *partus sequitur ventrem*. Under this rule the children of female slaves were themselves slaves, even if their fathers were free and white. By the nineteenth century this meant that some people who were held as "Negro" slaves were only of one-eighth or one-sixteenth African ancestry. These people appeared to be white, and according to some statutory definitions of race were in fact considered white. But they were also slaves in a society where only "Negroes" could be enslaved. On the adoption of the laws creating slavery through matrilineal descent, see A. LEON HIGGINBOTHAM, *IN THE MATTER OF COLOR, RACE, AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 43-44, 159, 194 (1978).

37. IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* (1974) (historical study of free blacks in the South); JOHN HOPE FRANKLIN, *THE FREE NEGRO IN NORTH CAROLINA, 1790-1860* (1969) (classic study of free blacks in antebellum North Carolina).

38. MICHAEL P. JOHNSON & JAMES L. ROARK, *BLACK MASTERS: A FREE FAMILY OF COLOR IN THE OLD SOUTH* (1984) (describing the limitations on free blacks in antebellum South Carolina who were relatively wealthy but still living on a precarious edge between slavery and freedom).

39. Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, 68 CHI.-KENT L. REV. 1209 (1993).

schools and certain professions,⁴⁰ forbid them from owning firearms,⁴¹ and limited or prohibited their physical movements.⁴² On the eve of the Civil War Arkansas moved to expel free blacks from the state.⁴³

Blacks who lived in the antebellum North were far better off than their Southern counterparts,⁴⁴ although they never had full equality.⁴⁵ Racial prejudice growing out of slavery became rooted in the colonial period,⁴⁶ and remained strong in some parts of the North well after slavery expired in that region. Moreover, even where Northern states rejected much of the racism associated with slavery, blacks in the North, as James and Lois Horton describe in this Symposium, were unable to fully escape the danger of enslavement posed by the federal fugitive slave laws.⁴⁷

At the federal level neither slaves nor free blacks could hope for any protection. In *Dred Scott*⁴⁸ Chief Justice Roger B. Taney nationalized Southern concepts of race. He found that under the Constitution blacks "had no rights which the white man was bound to respect."⁴⁹ Applying a rigorous, although not necessarily accurate, intentionalist argument to determine the rights of blacks under the Constitution,⁵⁰ Taney found "that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument."⁵¹

40. BERLIN, *supra* note 37, at 304-05, 96-97.

41. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 325 (1991).

42. For example, most Southern states prohibited free blacks from entering their jurisdiction, even on a temporary basis. Most of the Southern coastal states provided for the imprisonment of free black sailors from the North or the British Empire, if the sailors entered their ports. The black seamen would be released only when their ship sailed, and after their captains had paid for their maintenance while in jail. The only litigation on this was *Elkison v. Delieesseline*, 8 F. Cas. 493, 494 (D.S.C. 1823) (No. 4,366). For discussion of this problem, see Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 386-90 (1989).

43. 1860 Ark. Acts 62, 99.

44. Finkelman, *supra* note 12.

45. See generally LITWACK, *supra* note 12.

46. Finkelman, *The Crime of Color*, *supra* note 33. For a discussion of the non-legal aspects of race and slavery in colonial America, see generally DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* (1964); EDMUND MORGAN, *AMERICAN SLAVERY-AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975); WINTHROP JORDAN, *WHITE OVER BLACK* (1968).

47. See James Oliver Horton & Lois E. Horton, *A Federal Assault: African Americans and the Impact of the Fugitive Slave Law of 1850*, 68 CHI.-KENT L. REV. 1179 (1993).

48. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

49. *Id.* at 407. For a thorough history of this case, see DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN LAW AND POLITICS* (1978).

50. Finkelman, *supra* note 42, at 390.

51. *Dred Scott*, 60 U.S. (19 How.) at 407.

Even emancipation and over a century of freedom has not removed the stigma of enslavement for African Americans. After the Civil War the Fourteenth Amendment presumably protected blacks from state sanctioned discrimination. But, as Andrew Kull notes, only one court in the post-Civil War era seems to have interpreted the new amendment to prohibit segregation in public schools.⁵² Derrick Bell believes that to this day African Americans see their "slave heritage . . . more [as] a symbol of dishonor than a source of pride. It burdened black people with an indelible mark of difference as we struggled to be like whites."⁵³ In the end, American slavery was peculiar because all the slaves were defined by race.⁵⁴

III. AMERICAN IDEOLOGY AND SLAVERY

The Nation's self-proclaimed political credo made American slavery especially peculiar. Yet, Americans were able to accommodate slavery within their ideology. The ideological peculiarity of American slavery emerges out of the essential conflict between human bondage and the philosophical basis of the United States as a nation-state: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty, and the pursuit of Happiness."⁵⁵ On its face Jefferson's fine phrasing seems to be the essence of antislavery rhetoric. Thus, "[e]ven the most radical abolitionists could not free themselves from the reverential awe with which their generation looked back upon the demigods of 1776."⁵⁶ In urging slaves to throw off their chains (and urging whites to assist them) even the radical black abolitionist David Walker quoted the Declaration of Independence in his revolutionary *Appeal*.⁵⁷

A. Northern Responses to the Declaration

Certainly in the Northern part of the new Nation, some people acted on the premises of the Declaration of Independence. During and after

52. Andrew Kull, *A Nineteenth-Century Precursor of Brown v. Board of Education: The Trial Court Opinion in the Kansas School Case of 1881*, 68 CHI.-KENT L. REV. 1199 (1993).

53. Derrick Bell, *Learning the Three "I's" of America's Slave Heritage*, 68 CHI.-KENT L. REV. 1037, 1038 (1993).

54. Although most premodern societies did not define slavery by race, the most horrible example of modern slavery—Nazi Germany's use of slave labor—also used race (as the Germans defined it) as the criterion for enslavement.

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

56. DAVID BRION DAVIS, *SLAVERY AND HUMAN PROGRESS* 150 (1984).

57. DAVID WALKER, *APPEAL, IN FOUR ARTICLES, TOGETHER WITH A PREAMBLE TO THE COLORED CITIZENS OF THE WORLD . . .* (1829).

the Revolution various opponents of slavery relied on the language of natural rights and the experience of the War to explain or justify their views.⁵⁸ Thus, the Massachusetts Constitution of 1780 echoed Jefferson's language, declaring that, "All men are born free and equal, and have certain natural and inalienable rights, among which may be reckoned the right of defending their lives and liberties; that of acquiring, possessing and protecting property, and in fine of seeking and obtaining their safety and happiness."⁵⁹ Three years later, in *Commonwealth v. Jennison*,⁶⁰ the Supreme Court of Massachusetts interpreted this clause, in light of the Revolution, to have ended slavery. Chief Justice William Cushing wrote:

Sentiments more favorable to the natural rights of mankind, and to that innate desire for liberty which heaven, without regard to complexion or shape, has planted in the human breast—have prevailed since the glorious struggle for our rights began. And these sentiments led the framers of our constitution of government—by which the people of this commonwealth have solemnly bound themselves to each other—to declare—that all men are born free and equal; and that every subject is entitled to liberty, and to have it guarded by the laws as well as his life and property. In short . . . slavery is in my judgement as effectively abolished as it can be by the granting of rights and privileges wholly incompatible and repugnant to its existence.⁶¹

Pennsylvania's legislature also acknowledged the force of Revolutionary ideology and rhetoric. Thus, the preamble to the Pennsylvania Gradual Abolition Act of 1780⁶² notes:

When we contemplate our abhorrence of that condition, to which the arms and tyranny of Great-Britain were exerted to reduce us, when we look back on the variety of dangers to which we have been exposed, and how miraculously our wants in many instances have been supplied, and our deliverance wrought, when even hope and human fortitude have become unequal to the conflict, we are unavoidably led to a serious and grateful sense of the manifold blessings, which we have undeservedly received from the hand of that Being, from whom every good and perfect gift cometh. Impressed with these ideas, we conceive that it is our duty, and we rejoice that it is in our power, to extend a portion of that freedom to others, which hath been extended to us, and release from that state of thralldom, to which we ourselves were tyrannically doomed, and from which we have now every prospect of being

58. See, for example, the discussion in DAVID BRION DAVIS, *SLAVERY IN THE AGE OF REVOLUTION, 1780-1823*, at 332-33 (1975).

59. MASS. CONST. of 1780, art. I.

60. The text of this unreported 1783 Massachusetts case is reprinted in PAUL FINKELMAN, *THE LAW OF FREEDOM AND BONDAGE* 36 (1986).

61. *Id.* at 36-37.

62. *An Act for the Gradual Abolition of Slavery*, Act of Mar. 1, 1780, reprinted in FINKELMAN, *supra* note 60, at 42-45.

delivered.⁶³

The Pennsylvania legislators noted that it was their duty to end bondage, because the institution deprived "Negro and Mulatto slaves . . . of the common blessings that they were by nature entitled to" and also led to the "unnatural separation and sale of husband and wife from each other and from their children, an injury, the greatness of which can only be conceived by supposing that we were in the same unhappy case."⁶⁴

Massachusetts and Pennsylvania led the way towards abolition in the North. By 1804 Massachusetts, New Hampshire, and the new states of Vermont and Ohio had abolished slavery outright, while Pennsylvania and the rest of the North had passed gradual emancipation statutes which placed the institution on the road to extinction.⁶⁵ From the adoption of the Pennsylvania Gradual Emancipation statute until the eve of the Civil War opponents of slavery would turn to the Declaration of Independence to support their cause. For these visionaries, at least, American slavery was peculiar because freedom and equality were the true basis of the Nation.

B. *Southern Slave Owners and the Declaration*

Thus, as slavery was becoming "peculiar" in the United States during the Revolution, the contradiction between the rhetoric of freedom and the reality of bondage in the new Nation was readily apparent. The man who wrote the Declaration, after all, owned some 175 slaves, and took no steps to liberate them during the contest with England, or at any other time in his long life.⁶⁶ While thousands of individual Southern slaves gained their freedom during the Revolution,⁶⁷ the states south of Pennsylvania remained committed to slavery. The best Virginia could offer was a statute allowing masters to free their slaves⁶⁸ and an act to protect the freedom of former slaves who had served in the Revolution-

63. *Id.* § 1.

64. *Id.* § 2.

65. These laws were adopted in Pennsylvania (1780), Connecticut (1784), Rhode Island (1784), New York (1799), and New Jersey (1804). The history of this is discussed in ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* (1967).

66. Paul Finkelman, *Jefferson and Slavery: "Treason Against the Hopes of the World" in JEFFERSONIAN LEGACIES* 181 (Peter S. Onuf ed., 1993). During his life and in his will Jefferson freed a total of eight slaves—all of whom were members of the Hemings family. These slaves were the children and grandchildren of Jefferson's father-in-law, John Wayles, and thus related to Jefferson through marriage. Jefferson made no effort to change the status of the three to four hundred other slaves he owned in the fifty years between the signing of Declaration, on July 4, 1776, and his death, exactly fifty years later, on July 4, 1826. *Id.* at 204-07.

67. See generally BENJAMIN QUARLES, *THE NEGRO IN THE AMERICAN REVOLUTION* (1961); BERLIN, *supra* note 37, at 16-25.

68. An Act to authorize the manumission of slaves, 1782 Va. Acts ch. LXI.

ary armies.⁶⁹ Moreover, with slave owners like Washington and Jefferson leading the struggle against Great Britain, there was little likelihood of any dramatic change in the status of human bondage in the new Nation.

These ironies were not lost on British opponents of American independence. The English tory Samuel Johnson pointedly asked, "How is it that we hear the loudest *yelps* for liberty among the drivers of negroes?"⁷⁰ Even some of America's British friends were concerned by the hypocrisy of revolutionary slaveholders. Thomas Day, an English supporter of independence, thought it "truly ridiculous" to see "an American patriot, signing resolutions of independency with the one hand, and with the other brandishing a whip over his affrighted slaves."⁷¹

The Southern masters who were fighting so hard for their own liberty dodged such criticism. Virginia's first constitution contained a Declaration of Rights which had a "free and equal" clause that mirrored the Declaration of Independence.⁷² However, the Virginia framers carefully drafted their Declaration to finesse the issue of slavery. The document declared that:

All men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.⁷³

In his first draft of this clause George Mason had written that all men were "born equally free." Virginia's slaveholders were uncomfortable with this language. Robert Carter Nicholas, for example, declared this was "the forerunner or pretext of civil convulsion."⁷⁴ Thus, the delegates replaced "born equally free" with "are by nature equally free."⁷⁵ The legislature also added the phrase "when they enter into a state of society" to qualify when natural rights actually attached to individuals.⁷⁶

69. An Act directing the emancipation of certain slaves who have served as soldiers in this state, and for the emancipation of the slave Aberdeen, 1783 Va. Acts ch. CXC.

70. Quoted in DONALD L. ROBINSON, *SLAVERY IN THE AGE OF REVOLUTION, 1765-1820*, at 80 (1971).

71. Quoted in DAVIS, *supra* note 58, at 398-99.

72. But actually predated it. Virginia's legislators agreed to the final draft of the state bill of rights on June 12, 1776. 1 A.E. DICK HOWARD, *COMMENTARIES ON THE CONSTITUTION OF VIRGINIA* 58 n.2 (1974). See also 1 *THE PAPERS OF GEORGE MASON, 1725-1792*, at 275-77, 283-89 (Robert A. Rutland ed., 1970).

73. VA. CONST. of 1776, art. I, § 1, reprinted in 10 *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* 49 (William F. Swindler ed., 1979).

74. Quoted in 1 HOWARD, *supra* note 72, at 61 (footnotes omitted).

75. *Id.* at 62.

76. *Id.*

These two changes avoided declaring that slaves were free, but acknowledged that they might have some future claim to freedom that could be grounded in natural rights. Significantly, this language also implicitly acknowledged that slavery violated the natural rights doctrines at the foundation of the new Nation.

Edmund Randolph noted that these changes were "not without inconsistency."⁷⁷ However, Virginia's politicians were unconcerned about a foolish consistency.⁷⁸ Revolutionary-era Virginia, was, after all, a slaveholding republic.

In *Hudgins v. Wrights*⁷⁹ Virginia's highest court adopted this position, even though the author of the opinion personally would have preferred a different analysis. The case involved a family (the Wrights) of mixed racial ancestry, claimed as slaves by Hudgins.

At trial Chancellor George Wythe of the Richmond District Court of Chancery, declared the Wrights free on two grounds. The first was racial: they lacked any visible features of Negroes, and appeared to be of white and American Indian ancestry. As such, they could not be held as slaves. Second, Wythe declared that slavery itself was illegal in Virginia, because it violated the state's Declaration of Rights.⁸⁰

Virginia's highest court upheld Chancellor Wythe's decision to free the Wrights with an important analysis of the role of race in American slavery. However, Judge St. George Tucker, who was one of the few politicians in Virginia to publicly propose an end to slavery in the state,⁸¹ emphatically rejected Wythe's abolitionist application of the Virginia Declaration of Rights:

I do not concur with the Chancellor in his reasoning on the operation of the first clause of the Bill of Rights, which was notoriously framed with a cautious eye to this subject, and was meant to embrace the case of free citizens, or aliens only; and not by a side wind to overturn the rights of property, and give freedom to those very people whom we have been compelled from imperious circumstances to retain, generally, in the same state of bondage that they were in at the revolution, in which they had no *concern, agency or interest*.⁸²

77. *Id.*

78. "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines." Ralph Waldo Emerson, *Essays: First Series*, quoted in JOHN BARTLETT, FAMILIAR QUOTATIONS 497 (Emily Morrison Beck ed., 15th ed., 1980).

79. 11 Va. (1 Hen. & M.) 134 (1806).

80. Wythe's opinion has not survived, but the nature of it is made clear by Tucker's opinion in *Hudgins*, 11 Va. (1 Hen. & M.) at 141, 144.

81. ST. GEORGE TUCKER, A DISSERTATION ON SLAVERY: WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT, IN THE STATE OF VIRGINIA (1796). See also Wedgwood, *supra* note 15.

82. *Hudgins*, 11 Va. (1 Hen. & M.) at 141.

Virginia's most important modern state constitutional theorist, A.E. Dick Howard, argues that "in Lockean terms" the changes made in the final draft of the Declaration of Rights were "hardly tenable, and the fact that revolutionary Virginians held slaves remained an anomaly."⁸³ Certainly at first glance the language seems merely cumbersome, rather than particularly exclusionary. But contemporary Virginians, as Judge Tucker's opinion showed, clearly understood the significance of the change. If they were out of step with Locke, they were in step with their own society. There was clearly nothing anomalous about Virginians owning slaves—they had been doing so for more than a century. However, slavery was clearly anomalous within the context of Lockean notions of natural rights,⁸⁴ and to that extent it was "peculiar" in the new Nation.

Eventually Southerners went further, with some categorically rejecting the ideology of the Declaration of Independence. In 1826 John Randolph of Roanoke asserted that the Declaration was "a most pernicious falsehood."⁸⁵ Edmund Ruffin, one of the South's earliest secessionists, thought the Declaration was a dangerous document. John C. Calhoun "labeled the idea of equality a 'false doctrine,' only 'hypothetically true,' that had been 'inserted' in the Declaration of Independence 'without any necessity.'⁸⁶ James Henry Hammond of South Carolina sneered at the "fine sounding and sentimental" language of the Declaration.⁸⁷

In 1854 George Fitzhugh provided an elaborate proslavery attack on the Declaration. Fitzhugh believed that the United States was founded on "abstractions" that were "professed falsely."⁸⁸ He candidly asserted that "men are not born physically, morally or intellectually equal" and, contrary to the ideology of the Declaration, "[t]heir natural

83. 1 HOWARD, *supra* note 72, at 62.

84. Although it is not at all clear what Locke would have thought, he helped draft, along with his patron, Anthony Ashley Cooper, Earl of Shaftsbury, the Fundamental Constitutions of Carolina. That document provided, "Every freeman of Carolina, shall have absolute power and authority over his negro slaves, of what opinion or religion soever." The Fundamental Constitutions of Carolina § 110 (1669), *reprinted in* 1 STATUTES AT LARGE OF SOUTH CAROLINA 55 (1836). Tucker's opinion also hints that continued ownership of slaves was not inconsistent with regard to Lockean notions of property and the formation of political communities. *Hudgins*, 11 Va. (1 Hen. & M.) at 141.

85. *Quoted in* WILLIAM S. JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH 60 (1935).

86. 2 THE FREDERICK DOUGLASS PAPERS: SERIES ONE: SPEECH, DEBATES, AND INTERVIEWS, 1847-54, at 488, n.15 (John W. Blassingame ed., 1982).

87. *Quoted in* HARVEY WISH, GEORGE FITZHUGH: PROPAGANDIST OF THE OLD SOUTH 96 (1943).

88. GEORGE FITZHUGH, SOCIOLOGY FOR THE SOUTH, OR THE FAILURE OF FREE SOCIETY 177 (1854).

inequalities beget inequalities of rights.”⁸⁹ Some people, including all blacks, were born “weak in mind or body.”⁹⁰ Fitzhugh believed that “[n]ature has made them slaves; all that law and government can do, is to regulate, modify and mitigate their slavery.”⁹¹ He argued that on historical grounds “‘[l]ife and liberty’ are not ‘inalienable;’ they have been sold in all countries, and in all ages, and must sold be so long as human nature lasts.”⁹² Slavery, in Fitzhugh’s mind, was not peculiar, but fundamental to society. He believed the North, not the South, had a peculiar institution—freedom. He argued that the purpose of government was “to restrict, control and punish man ‘in the pursuit of happiness.’”⁹³ Thus, the preamble to the Declaration was “verbose, newborn, false, and unmeaning.”⁹⁴ The Declaration was “exuberantly false, and arborescently fallacious.”⁹⁵ Fitzhugh and other proslavery theorists argued that all men were not created equal, but that inequality was common, natural and universal. Rejecting the Declaration and its theories of equality, many Southerners instead developed their own proslavery arguments, ultimately asserting that slavery was a positive good for the slave and the master.⁹⁶

Other Southerners continued to endorse the Declaration, but denied it could affect slavery. Some Southerners took the road marked out by the Virginia Court in *Hudgins*.⁹⁷ They argued that the Declaration—like its Virginia counterpart—only applied to citizens or political communities. Slaves were naturally excluded from these.⁹⁸ One Virginia Congressman argued that “no ingenuity” could “torture the Declaration of Independence into having the remotest allusion to the institution of domestic slavery.”⁹⁹ Alexander Stephens, the future vice president of the Confederacy, believed the Framers had established “the first great principles of self-government by the governing race.”¹⁰⁰

The key for Stephens, and other Southern supporters of the Declara-

89. *Id.* at 177-78.

90. *Id.* at 178. The implication of Fitzhugh’s analysis is that some whites were fit for slavery as well. *See id.*

91. *Id.*

92. *Id.* at 179.

93. *Id.* at 180.

94. *Id.*

95. *Id.* at 182.

96. *See generally* JENKINS, *supra* note 85; EUGENE D. GENOVESE, *THE WORLD THE SLAVEHOLDERS MADE* (1969).

97. 11 Va. (1 Hen. & M.) 134 (1806).

98. JENKINS, *supra* note 85, at 156-57.

99. *Quoted in* JAMES OAKES, *THE RULING RACE: A HISTORY OF AMERICAN SLAVEHOLDERS* 143 (1982).

100. *Quoted in id.*

tion, was of course race. Race made it possible for slave owners to accept the credo of America because they could reject its application to their own slaves. Thus, one Louisiana slave owner affirmed that all men were created "free and equal as the Declaration of Independence holds they are."¹⁰¹ He then added, "But all men, niggers, and monkeys *aint*."¹⁰²

While Calhoun, Fitzhugh, and other white Southerners rejected the Declaration because it undermined slavery, other masters "frequently made the Fourth of July a holiday for their slaves."¹⁰³ It may seem ironic that masters took their slaves to barbecues and other celebrations of the signing of the Declaration of Independence. But for the master class this probably seemed appropriate. Independence, after all, allowed the American slave owner to develop the political and legal system that perpetuated and strengthened slavery.

No one understood this better than the Nation's best known black abolitionist, Frederick Douglass. He admitted that the Declaration did not apply to him. Douglass asked, "What have I, or those I represent, to do with your national independence? Are the great principles of political freedom and of natural justice, embodied in that Declaration of Independence, extended to us?"¹⁰⁴ Douglass wished "to God" that an "affirmative answer could be truthfully returned to these questions!"¹⁰⁵ But it could not. With a "sad sense" Douglass admitted:

I am not included within the pale of this glorious anniversary! Your high independence only reveals the immeasurable distance between us. The blessings in which you, this day, rejoice, are not enjoyed in common. The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not by me. The sunlight that brought life and healing to you, has brought stripes and death to me. This Fourth [of] July is *yours*, not *mine*. You may rejoice, I must mourn. To drag a man in fetters into the grand illuminated temple of liberty, and call upon him to join you in joyous anthems, were inhuman mockery and sacrilegious irony.¹⁰⁶

IV. THE ISOLATION OF AMERICAN SLAVERY

Compounding the conflict between American ideology and slavery was the evolution of slavery as a sectional institution. Although the sign-

101. *Quoted in id.*

102. *Quoted in id.*

103. *Id.* at 142.

104. Frederick Douglass, *What to the Slave is the Fourth of July? An Address Delivered in Rochester, New York, on 5 July 1852, reprinted in 2 THE FREDERICK DOUGLASS PAPERS: SERIES ONE: SPEECH, DEBATES, AND INTERVIEWS, 1847-54*, at 359, 367 (John W. Blassingame ed., 1982).

105. *Id.*

106. *Id.* at 368.

ers of the Declaration of Independence represented thirteen slaveholding states, by the time of the ratification of the Constitution, five states had ended slavery outright or were gradually abolishing it; by 1804 half the Nation had taken steps to end slavery.¹⁰⁷

This geographical isolation also led to increasing political weakness for slavery. By 1810 the Northern population had surpassed that of the South, and thus the free states dominated the House of Representatives.¹⁰⁸ In the next half century this Northern domination of the House became overwhelming. After the admission of California to the Union in 1850, there were sixteen free states in the country and only fifteen slave states. By the time of Lincoln's election in 1860 eighteen of the states prohibited slavery, while in fifteen the institution remained legal. When the Civil War began American slavery was geographically and culturally peculiar; more free states were on the horizon, with Kansas and Colorado joining the Nation before the end of the Civil War.¹⁰⁹

In addition to controlling the House, the North now controlled the Senate as well. The 1860 presidential election showed that the North could control the White House. Without getting a single electoral vote from any slave state, Abraham Lincoln won 180 electoral votes, while the combined total of his three opponents was only 123.¹¹⁰ By 1860 slavery's geographical isolation undermined its political position within the country.

By this time American slavery was also peculiar because it was isolated in an international context. Orlando Patterson is clearly correct that, with the exception of the present era, slavery has always been widespread. Throughout most of human history there has been nothing "peculiar" about human bondage. But, by 1861 the racially based slavery of the United States was "peculiar" because it could be found only in the

107. See generally ZILVERSMIT, *supra* note 65; PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* chs. 1-2 (1981). By this time Massachusetts (1780), New Hampshire (1784), and two new states, Vermont (1791) and Ohio (1803) had abolished slavery outright in their constitutions, while Pennsylvania (1784), Connecticut (1784), Rhode Island (1784), New York (1799), and New Jersey (1804) had adopted gradual emancipation statutes which would end slavery over time.

108. The whole population of the country was 9,638,453 in 1820. In that year the ten Southern states had a total population of 4,298,199. The free population in the South was 2,802,010 and the slave population was 1,496,189. The North had a free population of just under 5,340,000 people. U.S. CENSUS BUREAU, *NEGRO POPULATION, 1790-1915*, at 57 (1918).

109. West Virginia also joined the Union during the Civil War, but the addition of this free state could not have been anticipated before the War, and indeed happened only because of the War.

110. Stephen Douglas won 12 electoral votes, including 3 from the Northern state of New Jersey. John C. Breckinridge won 72 votes from the Deep South, while John C. Bell got 39 electoral votes from the Upper South. *THE WORLD ALMANAC AND BOOK OF FACTS* 103 (Mark S. Hoffman et al. eds., 1992).

American South, Spain's few remaining New World colonies, and Brazil.¹¹¹ By this time England, France, and the Netherlands had abolished slavery in their New World colonies. South of the Rio Grande, Spain's once gigantic mainland empire was now independent and without slavery. In the context of the Atlantic community, slavery was increasingly considered cruel and uncivilized. Symbolic of the South's isolation was the 1856 Republican Party pledge "to prohibit in the Territories those twin relics of barbarism—Polygamy, and Slavery."¹¹² Once the dominant form of labor in the New World, slavery was now an isolated relic of a less enlightened and barbaric age.

V. THE PECULIARITIES OF AMERICAN SLAVE LAW

The political and geographic isolation of the slave South had a significant impact on the development of Southern legal culture.¹¹³ Southern legal culture was distinctive in a variety of ways, but at the root of this distinctiveness was slavery.

As some of the essays in this symposium demonstrate, Southern courts and legislatures developed special—peculiar—legal rules to accommodate slavery to Anglo-American¹¹⁴ legal traditions.¹¹⁵ Politicians also made legal and constitutional arguments peculiar to their own section, to support the defining economic and social institution of the South.

Judith Schafer¹¹⁶ and Thomas Morris¹¹⁷ show how Southern jurists and legislators shaped certain aspects of the criminal and civil law not only to accommodate slavery, but also to rationalize and bolster it. American slavery was sufficiently different from the common law that

111. Eugene Genovese argues that slaveholders "stood alongside the slaveholding planters of Brazil and Cuba, alongside the Russian lords . . . [a]nd as late as 1861 the southern slaveholders also stood alongside such dying but still deadly landholding classes as those of Poland, Hungary, Italy, and Japan, which commanded unfree or only technically free labor in regimes even then looked upon as barbarous by both the bourgeois and laboring classes of Western Europe." Eugene D. Genovese, *Slavery—The World's Burden*, in *PERSPECTIVES AND IRONY IN AMERICAN SLAVERY* 30 (Harry P. Owens ed., 1976). He also compares Southern slave owners to the Junkers of Germany. But, these comparisons do not work well. Certainly, most Southern masters did not see themselves in the same camp with despotic, antidemocratic landowners of Europe or Asia.

112. Republican Party Platform, 1856, *quoted in* JAMES M. MCPHERSON, *ORDEAL BY FIRE* 99 (2d ed. 1993). The reference to polygamy was an attack on the Mormon community in Utah.

113. Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77 (1985); *AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH* (Kermit Hall & James W. Ely, Jr. eds., 1989); *AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH* (David J. Bodenhamer & James W. Ely, Jr. eds. 1984).

114. Or, in the case of Professor Schafer's article to both Franco-American and Anglo-American traditions. Judith K. Schafer, "*Details Are of a Most Revolting Character*": *Cruelty to Slaves as Seen in Appeals to the Supreme Court of Louisiana*, 68 CHI.-KENT L. REV. 1283 (1993).

115. *E.g., id.*; Morris, *supra* note 37; Wedgwood, *supra* note 81.

116. Schafer, *supra* note 114.

117. Morris, *supra* note 37.

Southern law makers had to develop their own peculiar rules to accommodate the institution. Schafer's article and the case she has edited¹¹⁸ both reveal the willingness of Southern judges to allow treatment of slaves that violated both traditional notions of human decency and well-developed common law rights of individuals. Morris shows how the status of slaves and the racial prejudices of whites limited the testimony of blacks and created contradictions within the common law that made it impossible to prosecute anyone for some crimes.

Despite internal contradictions, William Fisher finds many "coherent" aspects of American slave law which to a great extent defined slaves and blacks.¹¹⁹ Thomas Russell's discussion of the role of South Carolina's courts in the sale of slaves underscores the internal rationality and coherence of American slave law by describing how the normal, everyday functioning of commercial and probate law affected slavery. Seen through Russell's lens, slavery, and especially the law of slavery, is not peculiar, or strange. It is common, banal. While the whip remains the symbol of the authority of the master class for the day-to-day operations of slavery, Russell teaches us that the auctioneer's hammer is not an inappropriate symbol for the effect of law on slaves and masters alike.

Russell's article also sheds further light on the role of the slave auction in Southern society. Slave owners "recoiled from the spectacle of the slave auction" and "masters frequently—though by no means always—faced the necessity of selling slaves with sincere if effusive hand-wringing."¹²⁰ The courts, as Russell demonstrates, often relieved masters of the unpleasant task of selling slaves. The courts also provided an orderly mechanism to insure that slaves would be sold to satisfy debts, settle estates, and in other ways keep the system going. For the courts there was nothing peculiar about slaves—they were property to be sold like any other form of property. James Oakes argues persuasively that, "Slave auctions were ceremonies of degradation, symbolic reenactments of the violence of original enslavement, potent reminders of the slave's powerlessness and dishonor."¹²¹

Thus, through the mundane courthouse auction the legal system threw its weight, and its not inconsiderable symbolic representation of law, justice, and fairness, behind the buying and selling of slaves. Rus-

118. Judith K. Schafer, *Sexual Cruelty to Slaves: The Unreported Case of Humphreys v. Utz*, 68 CHI.-KENT L. REV. 1313 (1993).

119. William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, 68 CHI.-KENT L. REV. 1051 (1993).

120. JAMES OAKES, *SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH* 22 (1990).

121. *Id.* at 24.

sell's article, combined with the analysis of Oakes and other historians of slavery, presents us with the frightening image of blind justice with the chains of a slave in one hand and an auctioneer's hammer in the other.¹²²

Despite the application of normal rules of probate, contract, and foreclosure to slavery, the use of courts to buy and sell people in United States is jarring. Still it underscores the foreignness—the peculiarity—of slavery to American legal culture. Indeed, the “coherent” American slave law that Professor Fisher finds had one main thrust: to fit slavery into the system of Anglo-American common law, which of course had traditional restraints and rules that were absolutely antithetical to most aspects of slavery. Thus, as Fisher notes, unlike the common law rule that children followed the status of their father, the status of African American children was determined by that of their mother. Furthermore, slaves were “deprived of many civil rights and liberties: they could not make contracts or other legally binding choices, sue or be sued, acquire property, legally marry, or (with rare exceptions) testify against whites.”¹²³

Andrew Fede's recent book, *People Without Rights*, reviewed by Ruth Wedgwood in this symposium, goes well beyond Fisher's analysis of the rights of slaves, concluding they had no rights at all. Professor Wedgwood finds Fede's position too extreme, and she reminds us that custom and day-to-day practice created rights for some slaves.¹²⁴ Certainly Wedgwood is correct that not all rights are legal rights. Indeed, Wedgwood shows, that at least on some occasions Southern courts seem to have protected the customary rights of slaves even when there was no institutional reason to do so.¹²⁵ However, the very fact that this protection is so rare supports the thrust of Fede's argument, even though he may have overargued his case.

Underscoring the debate about American slavery is Alan Watson's *Thinking Property at Rome*, which shows that in a different legal regime a slave might in fact acquire property, make a contract, and even bind his master to an agreement.¹²⁶ Jacob Corré, looking at cases from Tennessee, notes in *Thinking Property at Memphis*,¹²⁷ that American judges also

122. Northerners were particularly disgusted by slave auctions in the District of Columbia. Thus, one of the “victories” for the North in the compromise of 1850 was the abolition of the slave trade in the Nation's capitol. In return the South gained the infamous fugitive slave law of 1850, which, as James and Lois Horton show in this Symposium, imperiled the lives of blacks throughout the North. Horton & Horton, *supra* note 47.

123. Fisher, *supra* note 119, at 1052 (footnotes omitted).

124. Wedgwood, *supra* note 15, at 1391-92.

125. *Id.* at 1392-93.

126. Watson, *Thinking Property*, *supra* note 7.

127. Corré, *supra* note 7.

faced problems when slaves acted as "thinking property," but that a key difference between Rome and the United States was that Roman "slaves performed functions that slaves in the United States were likely never to have performed."¹²⁸ They could not perform these tasks because the racial basis of slavery in republican Tennessee and elsewhere in the South precluded acknowledging that slaves were capable of such tasks.¹²⁹ If they could routinely perform "thinking" tasks, then slaves would have been "created equal" to whites, and thus deserving of their freedom.

Similarly, the peculiarity of slavery in the American South forced masters to create an ideological defense of their institution that was rooted in theories about the race of those who were enslaved.¹³⁰ This defense, like the effect of slavery on Southern society, was ultimately seamless. A defense of slavery based on scientific theories of racial inequality,¹³¹ for example, justified the institution in the minds of those who bought the argument,¹³² but did not protect the institution from those who remained unpersuaded by the proslavery racial theory. The same was true for the elaborate biblical justification of slavery articulated by armies of Southern ministers.¹³³ Southerners accepted the argument, which comforted them with the knowledge that their behavior was sanctioned by God; Northerners generally rejected this interpretation of the Bible, and abolitionists rooted their opposition to slavery in Judeo-Christian values.

Not surprisingly, Southerners developed their own peculiar notions about the meaning of the Constitution in order to defend slavery. As Michael Kent Curtis demonstrates, because they could not win the debate over slavery on the merits of the institution, Southerners sought to stop the debate altogether.¹³⁴ Southerners would limit the meaning of the First Amendment and the Speech and Debate Clause of the Constitu-

128. *Id.* at 1387.

129. Another reason why slaves could not be allowed to do such tasks stemmed from the security needs of the South. The master class feared that if slaves could read, write, and perform professional tasks—such as practicing medicine or pharmacy—they would be in a position to escape from slavery, poison their masters, or lead revolts.

130. Fisher, *supra* note 119, at 1056-57.

131. *E.g.*, WILLIAM R. STANTON, *THE LEOPARD'S SPOTS: SCIENTIFIC ATTITUDES TOWARD RACE IN AMERICA, 1815-1860* (1960); JOSIAH NOTT, *TYPES OF MANKIND* (1854); and various articles in 15 *ARTICLES ON AMERICAN SLAVERY: MEDICINE, DEMOGRAPHY, AND SLAVERY* (Paul Finkelman ed., 1989).

132. *E.g.*, GEORGE FITZHUGH, *SOCIOLOGY FOR THE SOUTH* (1854); I.A. NEWBY, *CHALLENGE TO THE COURT: SOCIAL SCIENTISTS AND THE DEFENSE OF SEGREGATION, 1954-1966*, at 8-9 (1967).

133. *E.g.*, Thorton Stringfellow, *A Scriptural View of Slavery*, reprinted in *SLAVERY DEFENDED: THE VIEWS OF THE OLD SOUTH* 86 (Erik McKittrick ed., 1963); and various articles 11 in *ARTICLES ON AMERICAN SLAVERY: RELIGION AND SLAVERY* (Paul Finkelman ed., 1989).

134. Michael Kent Curtis, *The 1859 Crisis over Hinton Helper's Book*, *The Impending Crisis*:

tion to preclude any meaningful discussion of slavery. Thus, Hinton Rowan Helper, a white native son of North Carolina, could not remain in his home state after publishing his attack on slavery, *The Impending Crisis*, and Southern congressmen attempted to punish their Northern colleagues for endorsing or supporting that book.¹³⁵

That Helper accepted prevailing Southern views of the racial inferiority of African Americans only underscored the threat his book posed to the peculiar institution. Since the creation of the American Nation, thoughtful Southerners like Thomas Jefferson,¹³⁶ and less thoughtful ones like Senator James Henry Hammond,¹³⁷ had argued that race made slavery necessary, proper, and possible. Slavery, they argued, was not in the end peculiar, precisely because the race of people who made up the slaves was peculiarly suited for enslavement. Helper threatened slavery precisely because he accepted the racism of the slave owners, but turned it into an argument against the perpetuation of the institution.

VI. SLAVERY AND AMERICAN CONSTITUTIONALISM

The debate over Hinton Helper's book suggests the importance of slavery in American public law. Here we see in sharp focus the peculiarity of slavery and its simultaneous centrality to American society and American life from the Revolution to the Civil War. Its legacy remains with us today. Judith Shklar, for example, acknowledges the importance of sexism and the destructive results of "ungenerous and bigoted immigration and naturalization policies" in shaping American concepts of citizenship.¹³⁸ But she notes that the "effects and defects" of these policies "pale before the history of slavery and its impact upon our public attitudes."¹³⁹

Essays in this symposium reach similar conclusions. Sanford Levinson powerfully argues that our Constitutional structure developed around slavery and we cannot fully understand modern Constitutional law without devoting some time and effort to studying the law of slavery.¹⁴⁰ Similarly, James and Lois Horton's discussion of responses to the

Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment, 68 CHI.-KENT L. REV. 1113 (1993).

135. HINTON ROWAN HELPER, *THE IMPENDING CRISIS OF THE SOUTH AND HOW TO MEET IT* (1857).

136. For a discussion of Jefferson's defenses of slavery and his racism, see Paul Finkelman, *supra* note 66, at 181-221.

137. James Henry Hammond, *supra* note 16.

138. JUDITH SHKLAR, *AMERICAN CITIZENSHIP THE QUEST FOR INCLUSION* 13-14 (1991).

139. *Id.* at 14.

140. Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-KENT L. REV. 1087 (1993).

Fugitive Slave Law of 1850¹⁴¹ illustrates how slavery made the Constitution come alive—in often horrible ways—for antebellum Americans who might otherwise have happily never encountered the Constitution or the legislation it spawned.¹⁴² Michael Kent Curtis shows how slavery collided with ideas of freedom of speech, freedom of press, and representative government, and thus helped shape the antebellum constitution.¹⁴³ Even after the Civil War, slavery shaped constitutional interpretation, as the document edited by Andrew Kull shows.¹⁴⁴ And, Derrick Bell reminds us here,¹⁴⁵ and in much of his other work,¹⁴⁶ that the legacy of slavery, and the racism it spawned, continues to haunt our social and political structure as well as our legal system.

The word slavery does not appear in the Constitution until the Thirteenth Amendment, which abolished the institution.¹⁴⁷ Nevertheless, the main body of the document is littered with references to slaves as “other Persons,”¹⁴⁸ “such Persons,”¹⁴⁹ and “person held to Service or Labour.”¹⁵⁰ Through these clauses the South gained representation in Congress (and the electoral college) for its slaves; Congress was prohibited from interfering with the slave trade before 1808;¹⁵¹ and masters gained the right to recover fugitive slaves from other states. Throughout the Constitutional Convention the framers talked frankly about slavery, although in the end they decided not to use the term in the final document because they feared it would undermine support for ratification in the North.

In addition to those clauses specifically relating to slavery a number of other provisions of the document protected the institution by empowering Congress to call “forth the Militia” to “suppress Insurrections,”

141. 9 Stat. 462 (1850).

142. Horton & Horton, *supra* note 47, at 16.

143. Curtis, *supra* note 134.

144. Kull, *supra*, note 52.

145. Bell, *supra* note 53.

146. DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992).

147. “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1.

148. U.S. CONST. art. I, § 2, cl. 3.

149. U.S. CONST. art. I, § 9, cl. 1.

150. U.S. CONST. art. IV, § 2, cl. 3.

151. The Migration and Importation Clause of Article I, Section 9 of the Constitution has often been misconstrued to have required the end of the slave trade in 1808. It did not in fact require anything; it merely prohibited a ban on the trade before 1808. Article V reinforced this provision by prohibiting any amendment of the slave trade provision before 1808.

including slave rebellions;¹⁵² prohibiting taxes on all exports and prohibiting state taxes on imports, thus preventing an indirect tax on slavery by taxing the staple products of slave labor, such as tobacco, rice, and eventually cotton;¹⁵³ providing for the indirect election of the president through an electoral college based on congressional representation, which incorporated slaves into the scheme through the Three-Fifths Clause, thus giving whites in slave states a disproportionate influence in the election of the president.¹⁵⁴

Finally, the structure of the Constitution ensured against emancipation by the new federal government. Article V requires a three-fourths majority of the states to amend the Constitution, thus ensuring that the slaveholding states would have a perpetual veto over any constitutional changes.¹⁵⁵ Because the Constitution created a government of limited powers, Congress lacked the power to interfere in the domestic institutions of the states.¹⁵⁶ Thus, during the ratification debates only the most fearful Southern anti-Federalists opposed the Constitution on the grounds that it threatened slavery.¹⁵⁷ Most Southerners, even those who opposed the Constitution for other reasons, agreed with General Charles Cotesworth Pinckney of South Carolina, who told his state's house of representatives:

We have a security that the general government can never emancipate

152. U.S. CONST. art. I, § 8, cl. 15. The abolitionist Wendell Phillips considered this clause, and a similar one in art. IV, § 4, to be among the five key proslavery provisions of the Constitution. WENDELL PHILLIPS, *THE CONSTITUTION A PRO-SLAVERY COMPACT; OR, SELECTIONS FROM THE MADISON PAPERS* vi (2d ed. 1845).

153. U.S. CONST. art. I, §§ 9, cl. 5, 10, cl. 2.

154. U.S. CONST. art. II, § 1, cl. 2. Without the extra electoral votes that the South received by counting slaves under the three-fifths clause, Thomas Jefferson would not have been elected President in 1800. Rather his nonslaveholding opponent John Adams of Massachusetts would have been re-elected President.

155. Had all 15 slave states remained in the Union, they would to this day be able to prevent an amendment on any subject. In a 50-state union, it takes only 13 states to block any amendment.

156. Under various clauses of the Constitution the Congress might have protected, limited, or prohibited the interstate slave trade, art. I, § 8, cl. 3, slavery in the District of Columbia or on military bases, art. I, § 8, cl. 17, or slavery in the territories, art. IV, § 3, cl. 2. None of these clauses permitted Congress to touch slavery in the states. Some radical abolitionists argued that under the Guarantee Clause, art. IV, § 4, Congress had the right to end slavery in the states. WIECEK, *supra* note 11 at 269-71. For further discussion of slavery and the Guarantee Clause, see WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 133-65 (1972). The delegates in Philadelphia did not debate these clauses with slavery in mind, although, the Commerce Clause was accepted as part of a bargain over the African slave trade. Finkelman, *supra* note 11, at 209-23.

157. One such southerner was Patrick Henry, who used any argument he could find to oppose the Constitution. Henry asserted at the Virginia ratifying convention that, "among ten thousand implied powers which they may assume, they may, if we be engaged in war, liberate every one of your slaves if they please." 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 589 (Jonathan Elliot ed., 2d ed. 1836). Ironically, the implied war powers of the president would be used to end slavery, but only after the South had renounced the Union.

them, for no such authority is granted and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.¹⁵⁸

VII. CONCLUSION

In 1863 Abraham Lincoln would reflect on the creation of the American Nation. It began, according to Lincoln, in 1776 as one "dedicated to the proposition that all men are created equal."¹⁵⁹ Lincoln was rhetorically brilliant in reinterpreting the Declaration into a libertarian credo that supported the Union war effort. But, as a matter of history and law Lincoln was far from the mark.

Since the founding, slaves had constituted the second most valuable form of privately held property in the Nation, after real estate. Furthermore, slaves constituted about twenty-five percent of the population of the South. In 1790 the census found 697,642 slaves in the United States.¹⁶⁰ Most of them lived in the South. By 1860 this population had grown to 3,922,760, all of them in the South.¹⁶¹

It would have been unnatural and unreasonable for the Founders, who were keenly aware of the importance of private property, not to have protected this most important kind of property in their constitutional and legal structure. As the articles in this Symposium show, the Founders, and subsequent judges, legislators, and lawyers were not unmindful of their property interests in slavery and they protected them at every level of their legal system.

Equally important, many of the Founders, and subsequent generations of Southern judges and politicians, also understood the racial basis of slavery. Beyond the economic value of the system were its peculiar racial characteristics that prevented southern whites from contemplating abolition. With leaders like Thomas Jefferson refusing to even consider the possibility of racial equality or emancipation within the United States, the South created a legal regime for its section—and a constitutional regime for the Nation—that protected slavery at every turn. The result was a hardening of legal doctrine and constitutional interpretation that precluded any peaceful end to slavery. This made slavery peculiar in terms of American ideology and the liberalism of the mid-nineteenth-

158. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 286 (Jonathan Elliot ed., 2d ed. 1836).

159. Abraham Lincoln, *Address Delivered at the Dedication of the Cemetery at Gettysburg*, in 7 COLLECTED WORKS OF ABRAHAM LINCOLN 23 (Roy P. Basler ed., 1953).

160. U.S. CENSUS BUREAU, *supra* note 108, at 57.

161. *Id.*

century Atlantic community; but it also made slavery a fundamental and entrenched legal and social institution that was impervious to legal or political assault.