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The Slavery of Emancipation

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I. THE CLAIM: MANUMISSION IS NOT ABOLITION

The Thirteenth Amendment of the U.S. Constitution commands that "neither slavery nor involuntary servitude shall exist."[1] What has been the effect of this command?

It will serve my present purpose to offer the following too-simple answer to this complex question: the Thirteenth Amendment secured little more than the manumission of slaves already practically freed by the friction of war. It guaranteed, in Confederate General Robert Richardson's now well-known phrase, "nothing but freedom."[2]

Supposing this answer to be true, a further question presents itself: Did the Thirteenth Amendment's effect fulfill its command? Did universal manumission abolish slavery?

A full answer to this question would require a rich historical account of the evolving institution of American slavery, the features of that institution that survived the Reconstruction era, and how those features evolved in the ensuing century and a quarter. I have no intention of providing such a full history here. I intend only to argue for the indispensability of such a full history to the task of interpreting and applying the Thirteenth Amendment. I mean to argue *for* the relevance of remote and recent history to the meaning of the Thirteenth Amendment by arguing *against* the sophistry that would make General Richardson's crabbed account of abolition true by definition.[3] Thus, I will not argue that aboli-

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1 U.S. CONST. amend. XIII.

2 *See* ERIC FONER, NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY 6 (1983).

3 In his Comment, Professor Benedict reports—plaintively, as I read him—that this paper deconstructs and reconstructs the idea of freedom and slavery "until we wonder whether we know what we are talking about." Michael Les Benedict, *Comment Guyora Binder, "The Slavery Of Emancipation,"* 17 CARDOZO L. REV. 2103, 2103 (1996). I must confess that this paper is meant to provoke uncertainty about the meaning of freedom and slavery, at least insofar as the alternative to such uncertainty is a reductive definition of slavery that places it at a safe distance from contemporary American society. The meaning of freedom and slavery—and so the meaning of the Thirteenth Amendment—is a hermeneutic problem that confronts us with an obligation to interpret our national past and, in doing so, to "reconstruct" ourselves. A central claim of this paper is that when we speak of freedom and slavery we *do not* know "what we are talking about" and *should not* speak with self-assurance.

tion *must* mean more than universal manumission, but merely that it may. Abolishing the institution of slavery may entail more than manumitting slaves for the simple reason that manumission was itself an important feature of that institution. Thus, I propose the paradoxical possibility that the institution of slavery could persist without any individual being lawfully held as a slave.

II. THE PERSISTENCE OF SLAVERY AND THE CRISIS OF CONSTITUTIONAL INTERPRETATION

The claim that slavery may persist to this day obviously suggests that the Thirteenth Amendment retains unrealized emancipatory import. But I would draw attention to a second, less obvious implication of my thesis, an implication for constitutional theory rather than constitutional law or politics. Slavery's survival provides a novel explanation for the skepticism that pervades contemporary discussions of constitutional interpretation.

Epistemological skepticism about interpretive method in law is actually of relatively recent origin. For much of the nation's history, elites shared a conception of legal reasoning as a pragmatic process of adapting legal rules to evolving social custom.[4] This is the way Justice Joseph Story and Chancellor James Kent conceived the legal process,[5] and it is how the *Lochner*[6] era social Darwinists and their progressive critics, including Wilson,[7] Thayer,[8] Brandeis,[9]

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[4] *See* Guyora Binder, *Institutions and Linguistic Conventions: The Pragmatism of Lieber's Legal Hermeneutics*, 16 CARDOZO L. REV. 2169 (1995) (prominence of adaptive interpretation in antebellum Whig legal thought); PAUL KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 65-133 (1992) (arguing for the persistent commitment of constitutional theorists to the idea of an "evolving unwritten constitution" during the entire period from the Civil War through the New Deal); *see also* GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW (forthcoming 1997) (on file with author) (tracing the idea of adjudication as the interpretation of social custom in American legal thought). As Michael Les Benedict helpfully notes in his Comment, the key early cases narrowly construing the Civil War amendments, the Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873), The Civil Rights Cases, 109 U.S. 3 (1883), and Plessy v. Ferguson 163 U.S. 537 (1896), all turned on deference to custom and tradition. *See* Benedict, *supra* note 3, at 2103-04.

[5] *See* KAHN, *supra* note 4, at 41; Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, *in* PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 85-87 (Gerald L. Geison ed., 1983) (discussing the views of Chancellor James Kent and Justice Joseph Story on interpretation).

[6] Lochner v. New York, 198 U.S. 45, 64 (1905) ("the freedom of master and employé [sic] to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution").

[7] *See generally* WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (1911).

[8] *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

and Pound,[10] saw it as well. One finds this evolutionary conception of law as tradition in Cardozo's lectures on *The Nature of the Judicial Process*,[11] and in Levi's *An Introduction to Legal Reasoning*.[12] Adherents to this school disagreed about what were, to them, the important issues: the content of evolving custom, the institutions best suited to discern it, and most importantly perhaps, the arena in which social custom evolved—the bazaar, the forum, or the laboratory. All agreed, however, that the evolving needs and values of society were knowable and legally authoritative.

All this changed after *Brown v. Board of Education*,[13] a judicial decision that, because of its stress on the growing importance of public education, Paul Kahn has characterized as the swan song of the evolutionist tradition.[14] *Brown* provoked a firestorm of controversy, not just in the schoolhouses and statehouses, but also in the legal academy. Yet the academic controversy was strangely abstracted from the issue of race relations that animated the general public, and instead focused on whether judicial review could deflect the charge of being "counter-majoritarian"[15] by relying on a sufficiently "neutral"[16] interpretive method. As Charles Black noted at the time, underlying this anxiety about the legitimacy of judicial review was an anxiety about constitutional interpretation itself.[17] Constitutional interpretation was, for the first time, seen as intrinsically opposed to society's "felt necessities."[18]

The persistence of slavery suggests that this methodological crisis in constitutional interpretation may have had less to do with the *generally* discretionary or countermajoritarian character of judicial interpretation than is often supposed. If I am right in con-

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9 *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting) (footnote omitted) (stating that "[t]he Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function").

10 *See* Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907).

11 BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); *see also* BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW (1924).

12 EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

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

14 *See* KAHN, *supra* note 4, at 151-55.

15 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

16 *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

17 *See* CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 13 (1960).

18 *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

tending that the institution of slavery was deeply and persistently entrenched in American society and culture, then the condemnation of slavery challenged the legitimacy of the very traditions and customs on which constitutional interpreters had always relied for guidance. It was the Reconstruction Amendments' command to abolish one of American culture's defining customs that rendered them peculiarly uninterpretable.

The countercustomary thrust of the Reconstruction Amendments is not immediately evident if we look only at the language of the Fourteenth Amendment, which seems to invoke prior custom in its notions of due process of law and the privileges and immunities of citizens. To be sure, the Fourteenth Amendment admitted former slaves and free blacks to full citizenship and legal personhood, while implying that the content of these statuses was already provided by custom. But the Fourteenth Amendment, whatever else it was supposed to do, was clearly aimed to anchor the Civil Rights Act of 1866 in the Constitution; and the Civil Rights Act of 1866 in turn was passed to enforce the Thirteenth Amendment. While the Fourteenth Amendment has been the focus of so much more litigation and controversy, it is important to remember that the Fourteenth Amendment was first conceived as an instrument for enforcing the Thirteenth.

The Thirteenth Amendment's countercustomary thrust is clear. Slavery was a historically present institution of society that had emerged as custom before it was recognized as law.[19] To constitutionally abolish slavery was to disestablish and repudiate existing and enduring custom.

If the custom in question were readily definable and confined to a discrete community and region, one could imagine simply excising it, like an appendix or a mole. And that is, no doubt, how many Americans imagined slavery in the years before and after the Civil War—as the backward and deviant practice of a small elite in a discrete region against an insular and alien class of people. To those who saw slavery as essentially alien to America, abolition would have seemed like a same-day surgical procedure.

But let us make explicit what this seemingly simple surgical procedure would have been. Let us, in other words, extend the metonymic identification of the institution of slavery with the geographic region of the South or the ghetto of the slave quarters. To excise slavery thus conceived would have meant to let the South

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[19] *See generally* Jonathan A. Bush, *Free to Enslave: The Foundations of Colonial American Slave Law*, 5 YALE J.L. & HUMAN. 417 (1993).

go, as the Garrisonian abolitionists once proposed[20]; or to banish the slaves, a proposal developed by antislavery Southerners and embraced by antiextensionist Northerners like Lincoln.[21] The first proposal foundered on the economic, social, and cultural involvement of the North with the South, as the Civil War proved. Moreover, the presence of hundreds of thousands of nominally free African-Americans in the North and the problem of fugitive slaves would have continued to complicate the meaning of abolition even if the North had somehow managed to lose the Civil War.

To white Americans at midcentury, African-Americans were simply slaves, and to require white Americans to interact with Africans was to impose upon them the responsibilities of governance. The only way that the institution of slavery could disappear, leaving what the whites conceived as America unaffected, would be if African-Americans were to somehow disappear. Yet this second approach, although promising a "final solution" to the dilemma of white Americans, was always impractical, and became utterly impracticable as a consequence of African-Americans' military role in winning the Civil War and maintaining occupation of the South.[22]

Given the permanent presence of African-Americans, the abolition of slavery could not leave any part of American culture or society intact. The permanent presence of African-Americans precluded the one interpretation of abolition that could disguise the constitutive role of race in American culture and society. Accordingly, the constitutional abolition of slavery—explicit in the Thirteenth Amendment, although implicit in the Fourteenth and Fifteenth—did not simply repudiate a geographically and culturally insular custom. Abolition's challenge to antebellum society could not be so neatly confined. Abolition could not excise the "peculiar institution,"[23] without scraping every nook and cranny of antebellum culture and society. In this sense, abolition of the custom of slavery threatened the legitimacy of custom itself.

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20 *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 222 (1975).

21 *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 189, 267-80 (1970) (embrace by Lincoln and other antiextensionists of the colonization idea developed by American Colonization Society, founded and supported by antislavery slaveholders).

22 *See* Guyora Binder, *Did the Slaves Author the Thirteenth Amendment? An Essay in Redemptive History*, 5 YALE J.L. & HUMAN. 471, 484-92 (1993) (moral and practical implications of slaves' military role in Civil War and Reconstruction).

23 *See generally* KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956).

Constitutional interpretation could proceed by its customary method as long as the meaning of abolishing slavery was treated as self-evident. But as soon as the meaning of abolition was placed in controversy, constitutional interpretation was predictably thrown into methodological crisis. How could the inherently traditionalist enterprise of constitutional interpretation define the scope of the traditions that the Reconstruction Constitution condemned?

III. THE PROBLEM OF INTERPRETING EMANCIPATION

When the Constitution condemns society, where can we turn for aid in construing it? What aspects of American society authorize the Thirteenth Amendment and what aspects are amended by it? What was the essential feature of the slavery that the Thirteenth Amendment commands us to disestablish? Was slavery property in human beings? Did slavery necessarily involve the physical compulsion and corporal correction of the laborer? Was it the same as "involuntary servitude," also abolished by the Thirteenth Amendment? What makes servitude "voluntary"? As recently as 1897, the Supreme Court ruled that contractual consent justified specific enforcement of contracts for personal service.[24] As early as 1821, the Indiana Supreme Court ruled such enforced service "involuntary."[25] If slavery included any legally compellable service, was it better understood as a restriction on mobility or opportunity, that is, on what Blackstone had called "personal liberty,"[26] or on what Justice Peckham would call "liberty of contract"?[27]

Was slavery, in the argument inspired by Locke, the expropriation of the material fruits of the slave's labor?[28] Or perhaps, as

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[24] *See* Robertson v. Baldwin, 165 U.S. 275 (1897). For an earlier Scottish example, see *Knight v. Wedderburn*, 20 How. St. Tr. 1, 1-12 (1772) (explaining legality of lifetime bondage of colliers and saltminers on grounds of its voluntariness); *see also* DAVID B. DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823, at 490-92 (1975).

[25] *See* The Case of Mary Clark, a Woman of Color, 1 Blackf. 122 (Ind. 1821).

[26] *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 130-34 (U. Chicago ed. 1979) (1765).

[27] *See* Lochner v. New York, 198 U.S. 45 (1905).

[28] That [the slave trade] is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labour, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission.

The Antelope, 23 U.S. (10 Wheat.) 66, 120 (1825) (Marshall, J.). Locke himself never quite made this argument. In his eyes, slavery violated natural freedom rather than natural property rights and "a man not having the power of his own life cannot by compact, or his own consent, enslave himself to anyone, nor put himself under the absolute arbitrary

Harrington suggested, unfreedom was the economic and political dependence that inevitably attended propertylessness.[29] Or was it, as Rousseau suggested, an inability to participate in collective self-governance?[30] Did the institution of slavery, in other words, incorporate the noncitizenship that Chief Justice Taney believed made Africans vulnerable to enslavement?[31] Or was the slave's lack of political authority better explained in the sociological terms, offered by Orlando Patterson, of dishonor and social death?[32] All of these conceptions of slavery suggest very different visions of the society that has expunged slavery.

Does the abolition of slavery reject the racism that made slavery possible, or does it institutionalize the racism that most abolitionists shared with their opponents?[33] Whose understanding of the Thirteenth Amendment should we be guided by? Should we consult the rebels who fought to prevent it and were readmitted to the polity only on pain of ratifying it? Should we consult the slaves who also were admitted to the "political family" only as a consequence of its ratification? Or should we read the Amendment as having been imposed upon the two groups to whom it mattered most, by a Northern plurality hostile to both?

Even if only the North is ascribed authorship of the Thirteenth Amendment, the distributive implications of abolition remain open. Did the Thirteenth Amendment acknowledge to the victims that slavery had been a terrible crime and pledge to make them whole? Or was the expropriation of the South's "human property"

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power of another to take away his life when he pleases." JOHN LOCKE, TWO TREATISES OF GOVERNMENT ch. IV, ¶ 23 (J. Gough, 3d ed. 1966) (1690). On the other hand, natural freedom entailed the right to appropriate the fruits of one's labor. *See generally id.* ch. V. Locke's natural law critique of slavery was exceedingly attenuated, since he went on to justify the institution of slavery insofar as it arose from capture in a just war or punishment for a crime deserving death (in contrast to Hobbes, Locke distinguished the state of war from the state of nature). In addition, he distinguished perpetual service arising out of contract from slavery, a rejection of contractual slavery that was merely semantic—as soon as service proceeded on the basis of a contract, limiting the power of the master, Locke considered slavery to have ceased. *Id.* ch. IV, ¶¶ 24-25.

29 *See* THE OCEANA AND OTHER WORKS OF JAMES HARRINGTON WITH AN ACCOUNT OF HIS LIFE 496-97 (J. Toland ed., 1737).

30 *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 141 (Maurice Cranston trans., 1968) (1762).

31 *See* Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 403 (1857) (Taney, C.J.).

32 *See generally* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY (1982).

33 David Brion Davis concludes in his comparative study of abolitionism that: "[t]he desire to exclude Negroes often preceded explicit hostility to slavery." DAVIS, *supra* note 24, at 496. For a discussion of the predominance of racist sentiment in the antebellum North, including among Republicans, see FONER, *supra* note 21, at 261-74.

itself a final judgment exacted for the quite different crime of rebellion against a quite different victim, the Union? Worse still, was emancipation conceived as nothing more than a seizure of lawful property for the public good—less a moral rejection than an expedient transgression of the nation's covenant with hell—which the nation believed itself bound, sooner or later, to recompense? The Thirteenth Amendment tells us only that slavery will be abolished, leaving the distributive implications of abolition to the imagination.

If we think of emancipation in political rather than economic terms, we encounter additional ambiguities. By occupying the South and regulating agricultural labor, was the federal government asserting governmental authority over the masters and depriving them of the self-government in which they took such pride? And if so, did it permit the masters to continue governing the slaves, subject to federal oversight? Or did the Freedmen's Bureau stand in the masters' place, assuming authority over the slaves? Northerners may even have believed that freedom entailed self-government but that slaves could not govern themselves until they had been reformed by the guiding hand of republican government. Legally prescribed social change necessarily involves coercion—but whom does the Thirteenth Amendment authorize its enforcers to coerce?

Thus, for reasons intrinsic to its subject, not its linguistic form, the Thirteenth Amendment confronts interpreters with multiple dimensions of ambiguity. Interpreters of the Thirteenth Amendment must decide: (1) which of the deprivations imposed on slaves to regard as essential to slavery and which to legitimize as incidental to slavery; (2) which, if any, members of antebellum society to identify as exemplars of free status; (3) which sectors of postwar society, if any, were authoritative readers of the amendment; and (4) how the abolition of slavery redistributes the resources and power of the masters and what sort of historical narrative justifies those distributive consequences.

It is tempting to view the Thirteenth Amendment's inherent indeterminacy as liberating. Since the Thirteenth Amendment purported to abolish an institution crucial to the nation's antebellum identity, an interpreter could easily regard it as a *tabula rasa*, unmarred by the taint of antebellum tradition. But as I have elsewhere argued, interpretation cannot be "free" in that sense.[34] Interpretation inevitably takes place within some tradition—so

[34] *See* Binder, *supra* note 22, at 492-99.

that if interpretations of the Thirteenth Amendment can break free of particular traditions within antebellum society, they cannot break free of traditionality.

For this reason, Jacobus tenBroek, hardly a conservative, turned to history to expand the reach of the Civil War Amendments. TenBroek presented the Civil War Amendments as the political and rhetorical triumph of antislavery activists, whose intentions alone need be consulted in interpreting the text.[35] But historical consciousness, always divided, is never so neatly divisible. Where in our history can we hope to find visions of freedom untainted by slavery? We have come to think of a culture as something more than a collection of separable artifacts, viewing it as a "structure" or a "web" in which each element derives meaning from its relation to the rest.[36] How can we borrow meaning from any part of antebellum culture without perpetuating slavery?

We cannot simply assume that emancipation from slavery is logically incompatible with the perpetuation of the values that pervaded slave society and legitimized slavery. To the contrary, emancipation has often had a place within slave societies, arguments supporting it have frequently accepted the legitimacy of slavery, and methods of realizing it have often perpetuated important features of slavery. Only societies that have once accepted the legitimacy of slavery need design a social policy for eliminating it.

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35 *See* JACOBUS TENBROEK, EQUAL UNDER LAW (1965).

36 The image of the "web" is drawn from Quine's influential article "Two Dogmas of Empiricism" From a Logical Point of View (1953), in which he characterizes belief as a web in which every proposition depends upon all the others: change one proposition and adjustments will have to be made. If one removes the proposition "slavery is legal," the rest of the web must be altered somewhere—but just how or where is indeterminate. Thus, the elimination of "slavery" need not alter the condition of African-Americans, provided that adjustments in belief are made elsewhere in the web. The figure of the "structure" is taken from Levi-Strauss, who posits that a structure "exhibits the characteristics of a system. It is made up of several elements, none of which can undergo a change without effecting changes in all the other elements." CLAUDE LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY 279 (Claire Jacobson & Brooke G. Schoepf trans., 1963). For Levi-Strauss, a structure is not a culture, but a model which attempts to account for and predict change within a culture. It assumes that any action produces a predictable series of reactions, rather than opening up an infinite array of possible adjustments. A structuralist account of emancipation would require the assumption that the preexisting culture endured, but with all of its elements transformed in predictable ways. For Quine, by contrast, belief systems cannot be modeled because new data changes them into different belief systems. I am deliberately agnostic on the question of whether the culture of slave society was an open (Quinean) or a closed (Levi-Straussian) system, insisting only on its systemic quality, so that on either view slavery was deeply implicated in American culture, and thus, the real abolition of slavery would have ramified far beyond the arena of labor relations.

IV. THE SLAVERY OF EMANCIPATION: MANUMISSION AS MODEL

The institutional precedents occurring most naturally to white Americans imagining emancipation would have derived from societies deeply invested in slavery. Barely able to argue for emancipation without asserting the superfluity of black labor, their visions of a free society were circumscribed by the problem of finding something to do with the slave population. This anxiety could vary in nuance along the continuum of contempt between pity and fear: how could uncivilized hordes of masterless slaves be kept under control? Alternatively, how could they be protected from the hostility their presence would surely engender, or the sharp dealing of those of superior intelligence? How could their willingness to work for slave wages be prevented from degrading the lot of the white laborer? Alternatively, how could unsupervised savages compete in the marketplace with white workers or, for that matter, be motivated to work at all? The analysis of emancipation policy coursed through channels worn by proslavery apologetics, proceeding from the premise of the slaves' fundamental inadequacy to the paradox that slaves could only be rendered fit for freedom by the perpetuation of white supervision.

To see how the emancipation of slaves can nevertheless reenforce the culture of slavery, it is useful to distinguish two different senses of emancipation. We can use "emancipation" either to refer to the manumission of individuals within a society that retains the institution of slavery, or to refer to abolition of the institution of slavery itself.

Manumission does not necessarily benefit the manumitted: individuals may gain privileges as a result of migration across the boundary from one status to the other, but they may have to contract away these or other benefits as the price of manumission. Alternatively, individuals can change status while retaining the same privileges and disabilities, as a result of the redefinition of the boundary between the statuses. It is even possible for manumission to decrease the freedom of all if the privileges associated with both free and unfree statuses are reduced as freedom becomes more broadly available.

While the idea of manumission depends upon the persistence of status hierarchy, it does not require that such a hierarchy remain unchanged by the process of manumission. Instead, we may view the distinction between freedom and unfreedom as a temporally contingent battle front in an ongoing social struggle. In a society

defined and bounded by the possibility of unfreedom, free status may be nothing more than a trench, hastily dug to offer temporary protection from the assault of the privileged that, because it is too dangerous for its inmates to leave, fixes them within range of their oppressors' weapons. The success of some in reaching this refuge may merely reinforce the boundary between them and those who remain in the line of fire.[37]

While we can imagine emancipation from slavery as a movement across such a boundary, we can also conceive emancipation as the elimination of the boundary altogether: eliminating slavery and freedom alike.

The distinction between manumission and abolition may have been invisible from the Whiggish perspective shared by many opponents and supporters of slavery in antebellum America. Convinced that slavery had become economically precarious and historically anachronistic, both sides tended to assume that each individual released from slavery foretold and hastened slavery's eventual doom.[38] But, as Orlando Patterson reminds us, the release of individuals from slavery could be perfectly compatible with the perpetuation of the system of slavery as a whole, perhaps even necessary to it.

> [W]hile we normally think of manumission as being the result of the negation of slavery, it is also true that manumission, by providing one of the major incentives for slaves, reinforced the master-slave relationship. In material terms, no slave-holding class ever lost in the process of disenslavement or manumission: either the material compensation more than made up for the replacement cost of the slaves or, more frequently, the slave was made over into another, even more loyal and efficient retainer—or the master gained in both instances.[39]

In other words, the possibility of manumission often gave slaves an incentive to cooperate while the compensation provided by a government, a benefactor, or the slaves themselves might enable the master to buy more slaves. At the same time the social power of the slaveholder could be reenforced by the increase in number and rise in status of his retainers.

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[37] One example is the efforts of late twelfth century English peasants to establish their free status in the Royal courts, reinforcing the legitimacy of distinction between free and villein status. *See* R.H. Hilton, *Freedom and Villeinage in England*, *in* PEASANTS, KNIGHTS AND HERETICS: STUDIES IN MEDIEVAL ENGLISH SOCIAL HISTORY 174-91 (R.H. Hilton ed., 1976).

[38] *See* DAVID B. DAVIS, SLAVERY AND HUMAN PROGRESS 81 (1984).

[39] PATTERSON, *supra* note 32, at 341.

Part of Patterson's point is that the freeing of some individuals perpetuates the slavery of others. But we can take the point further: even wholesale emancipation may manumit individuals while leaving the cultural category of slavery intact. Thus, mass manumissions have often perpetuated slavery in a different form. Jamaican abolition transformed mature slaves into "apprentices" who remained under the authority of their masters[40]; abolition in our middle states delayed freedom a generation in order to give the enslaved race an opportunity to "mature."[41]

This cultural continuity between individual manumission and mass emancipation is important for any assessment of the place of manumission in American culture. According to received wisdom, the slave South, particularly in the decades preceding the Civil War, was virtually unique among slave societies in its hostility toward manumission.[42] It was also anomalous in its apparent reluctance to reincorporate freed slaves into a hierarchy of dependence and deference.[43] As I will argue, these conclusions may be exaggerated. Yet, even accepting them, the anomaly of the mid-nineteenth century Southern attitude toward manumission is considerably attenuated if we take a broader and longer view. Much of the South's exceptional intolerance for manumission can be explained as a dialectical moment in its controversy with the North over slavery itself. The abolition of the slave trade made manumission costlier by reducing opportunities to replace manumitted slaves.[44] Anxiety about antislavery agitation hardened the positions of Southern slaveholders during the brief period preceding the Civil War.[45] However, I think it is wrong to isolate Southern attitudes toward manumission from Northern attitudes, and to isolate the crisis period from earlier and later periods. Taken as a whole, antebellum white Americans were ambivalent about manumission and their attitudes toward former slaves ranged from horror to condescending tolerance. Eventually, Southerners did succumb to Northern pressure by manumitting all of their slaves while subjecting most of them to other forms of dependence and degradation.

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40 *See* FONER, *supra* note 2, at 16.

41 *See* COVER, *supra* note 20; DAVIS, *supra* note 24.

42 *See* PATTERSON, *supra* note 32, at 257-59; EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1972).

43 *See* PATTERSON, *supra* note 32, at 259.

44 *See id.* at 359.

45 *See generally* WILLIAM W. FREEHLING, THE ROAD TO DISUNION (1990).

When this "abolition" finally came to the South, it came in a form reminiscent of earlier mass manumissions in the United States, the Spanish and British Caribbean, and Brazil: in time of war many regimes have sought to preserve themselves and prevent slave unrest by placing slaves under military authority.[46] By the Civil War's end, even the Confederacy had developed plans to conscript, arm, and manumit slaves.[47]

Viewed as an ongoing process, American emancipation conformed to a tradition in which emancipation was more a variation on slavery than a rejection of it—an alternative strategy for mobilizing and managing an alien population. If emancipation is seen as an extension of slavery, the sincerity or insincerity of its supporters is beside the point. Even sincerely motivated moral crusades to suppress slavery carry risks to freedom. Implicit in the role of emancipator is a claim of political authority that may be grounded in cultural condescension to barbaric masters and helpless slaves alike. Thus the "international" crusade against the slave trade served to legitimize first British domination of Caribbean trade and finally British rule over much of Africa.[48] When American leaders finally recognized the obligation of white society to accept black participation, they conceived of it as a duty to share the educational benefits sure to arise from the company of caucasians.[49]

In sum, mass manumission, like individual manumission, has rarely ended the subordination of the slaves. Conceived as the manumission of individuals, mass manumission may deplete or even empty slavery as a social category without eliminating it as an institution and a set of cultural assumptions that structure power relations. When emancipation is conceived as the governance, education, assimilation, or rehabilitation of a socially or psychically disabled slave, slavery has not perished. While we may think of the Thirteenth Amendment as a victory for the antislavery movement, we must remember that this movement had to overcome the objections of a hostile majority. Criticizing slavery in terms designed to persuade that majority implicated slavery's opponents in the values

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46 *See* PATTERSON, *supra* note 32, at 287-93 (manumission for military service in classical societies, Islamic societies, Korea, Brazil, Spanish and British Caribbean, and American revolution); MARGARET WASHINGTON CREEL, "A PECULIAR PEOPLE": SLAVE RELIGION AND COMMUNITY CULTURE AMONG THE GULLAHS 121, 123 (1988) (freeing of slaves in return for service on both sides of revolutionary war).

47 *See* JAMES M. MACPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA (1988).

48 *See* DAVIS, *supra* note 24, at 235-42, 257-58, 298-309.

49 *See* Brown v. Board of Educ., 347 U.S. 483 (1954); U.S. Office of Education, Equality of Educational Opportunity (1966) (Coleman Report).

of slave society. To argue that African-Americans did not deserve slavery was to reinforce the flattering assumption that freedom was both evidence and reward for moral worth.[50] Taking a slightly different tack, Lincoln warmed the hearts of white audiences by arguing that if God had favored whites with greater endowments it was unbecoming of them to take away the little bit blacks had.[51] The critique of slavery as an unconscionable contract impugned either the courage or the competence of slavery's victims by implying that they "accepted" degradation. Just as many Northerners opposed the extension of slavery in order to avoid contact with slaves, expressions of contempt for slavery were often edged with contempt for slaves.

If opposition to slavery sometimes reenforced the racism on which slavery was based, that racism could also undermine the legitimacy of slavery. In importing slaves, white Americans could believe they were receiving not only laborers, but legal rights of African origin.[52] Believing that Africans had contempt for one another was a convenient crutch for racism; yet the implicit characterization of slaveholding as the barbaric invention of a contemptible people made that racism a double-edged sword, threatening the self-esteem of white slaveholders as well. The Colonial fear that Parliament might reduce British America to a condition of slavery was more than hyperbolic rhetoric. Painstakingly distinguishing the predominantly white and free population of America from the largely nonwhite and unfree population of the West Indies, revolutionary pamphleteers seemed genuinely afraid that the British public would associate them with their own slaves.[53] Their rhetorical

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50 *See* Jonathan A. Glickstein, *"Poverty is not Slavery": American Abolitionists and the Competitive Labor Market*, *in* ANTISLAVERY RECONSIDERED: NEW PERSPECTIVES ON THE ABOLITIONISTS 195-210 (Lewis Perry & Michael Fellman eds., 1979).

51 *See* Abraham Lincoln (July 17, 1858), *in* CREATED EQUAL?: THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 82 (Paul M. Angle ed., 1958).

52 *See* EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 295-337 (1975); WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at 71-82 (1968); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 108 (1985). For a particularly powerful illustration of this style of thinking, see Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827) (opinion of Justice Johnson arguing that debt-slavery, although a violation of the law of nature, is appropriate for such barbaric Africans as practice it).

53 *See, e.g.*, James Otis, The Rights of the British Colonies Asserted and Proved (1764), *in* 1 PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776, at 419 (Bernard Bailyn ed., 1965)

> Even their law books and very dictionaries of law . . . speak of the *British* plantations abroad as consisting chiefly of *islands*; and they are reckoned up in some of them in this order—*Jamaica, Barbados, Virginia, Maryland, New England, New York, Carolina, Burmudas*. At the head of all these islands . . .

revulsion at the prospect of being treated like slaves eventually combined with evangelical religion to temporarily erode the legitimacy of slavery during the later decades of the eighteenth century.[54]

V. THE SLAVERY OF EMANCIPATION: AN EXAMPLE

We can see the interpenetration of the critique and legitimation of slavery in antebellum American culture, by reflecting on the case of *The Antelope*.[55] This 1825 case applied federal statutes outlawing the importation of slaves, providing for the federal "safekeeping, support and removal beyond the United States"[56] of African slaves seized aboard slave trading vessels, and authorizing the President to appoint "agents in Africa" to "receive" them.[57] The Antelope, a slave trading ship registered in Spain, but perhaps owned by an American, was seized by American privateers off the coast of Africa, with scores of captives aboard. By the time it was in turn seized by a coast guard cutter off the coast of Florida, its population had been swelled by additional Africans. Some had been seized from a vessel under Portuguese registry; some had been taken from an American vessel that was probably being operated on behalf of a prominent Rhode Islander who, by the time the case reached the courts, was a United States Senator.[58] Representatives of Spain and Portugal sued for the return of these captives to the supposedly Iberian shipowners rather than to their own homelands.

Justice Marshall, writing for the Supreme Court, held in favor of those foreign shipowners who were willing to come forward and prove ownership of the slaves. Since *Somerset's Case*,[59] Anglo-American jurisprudence had assumed that slavery violated natural

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> stands *Jamaica*, in truth a *conquered* island; and as such this and all other little West India islands deserve to be treated for the conduct of their inhabitants and proprietors with regard to the northern colonies: divers of these colonies are larger than all those islands together, and are well settled, not as the common people of *England* foolishly imagine, with a compound mongrel mixture of *English*, *Indian*, and *Negro*, but with freeborn *British white* subjects, whose loyalty has never been suspected.

Id. at 435.

54 *See* DAVIS, *supra* note 24, at 262-326.

55 23 U.S. (10 Wheat.) 66 (1825).

56 *See* 3 STAT. 533 (1813).

57 *See* JOHN T. NOONAN, JR., THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS 21-22 (1977).

58 *See id.* at 27-31.

59 20 How. St. Tr. 1, 82 (1772).

law and could only be established by positive law.[60] While federal law recognized property in slaves, its prohibition of the importation of slaves, and its provision for their return to Africa suggested that American law would not recognize foreign title to slaves being imported into the United States.[61] British precedent indicated that the slave trade violated the law of nations and could no longer give rise to good title anywhere.[62] Yet Marshall reasoned that the statute's confiscatory sanctions could not be applied to foreign slave-traders who had never themselves attempted to import slaves into America.

Counsel for the United States argued that even if American positive law did not punish foreign slave trading, neither did it recognize foreign title to slaves. If no one could prove positive title to the Antelope's cargo, the Africans could assert a natural title to themselves.[63] Yet Marshall concluded there was no such vacuum in positive law: though condemned by natural law, the slave trade was sanctioned by the customary law of nations, a part of the positive law of the United States. Prefaced by an admonition that "this Court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law,"[64] Marshall's opinion has been read as an indication of the limited commitment of antebellum jurisprudence to natural law, an admission that courts were themselves enchained by slavery.[65]

Yet the opinion is far more interesting for the way in which a decision in favor of slavery emerges out of a critique of slavery. Associating liberty with tolerance, Marshall's opinion critiques slavery as an unseemly intolerance for inferiority. While condemning slavery, it also condemns slaves as inferior and thus tolerantly excuses the moral inferiority of slaveholders. The fulcrum upon which contempt and tolerance are thus balanced is the identification of slavery with its victims. This identification permits Marshall to present the enforcement of slavery as an expression of tolerance for its victims and contempt for its perpetrators.

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60 *See id.*; THE SCOT'S MAGAZINE 298-99 (1772). On the reception of *Somerset's Case* in America, see COVER, *supra* note 20, at 87-88. On the potentially quite narrow implications of the Somerset doctrine, see DAVIS, *supra* note 24, at 482-89. On U.S. Attorney General Wirt's invocation of the doctrine in the *Antelope Case*, see NOONAN, *supra* note 57, at 103-04.

61 *See* NOONAN, *supra* note 57, at 97.

62 *See id.* at 56.

63 *See id.* at 103-04.

64 23 U.S. (10 Wheat.) 66, 114 (1825).

65 *See* COVER, *supra* note 20, at 102-05.

In order to appreciate Marshall's astonishing rhetorical reversal, one should recollect the progress of antislavery opinion in the Western world at the time Marshall wrote. Slavery had been outlawed in England by judicial decision in 1772. In 1794, and again in 1804, French legislatures had ratified the results of the Haitian revolution by abolishing slavery in Saint Domingue. Britain, having begun to discourage the international slave trade in the late decades of the nineteenth century, prohibited it in 1807, the same year as the United States. Thereafter, Britain endeavored, by diplomacy and force, to impose this prohibition on other nations as well. Abolitionism was a powerful political force in England in 1825 when the abolition of slavery in all British territories stood just thirteen years away. The revolutions occurring in Latin America during the first quarter of the century resulted in the prohibition of slavery in Chile and Central America and in gradual emancipation plans in Argentina and Colombia. Three of the original American states had outlawed slavery during the revolution, four more had subsequently adopted gradual emancipation plans, but five more slave states had been admitted to the Union. Despite the illegality of slave importation, America's slave population was growing at about the same astronomical rate as its free population.[66] As Marshall wrote, the United States probably contained the largest concentration of African slaves in the world.[67]

Yet according to Marshall, the United States stood at the forefront of abolition. Nowhere admitting that Americans had engaged in the slave trade, Marshall characterizes this "abhorrent . . . traffic" as the vice of "nations who possess distant colonies," observing that "[t]he Christian and civilized nations of the world, with whom we have most intercourse, have all been engaged in it."[68] It was only "in America" that "[t]he course of unexamined opinion, . . . founded on this inveterate usage, received its first check."[69] America's civilizing intercourse first converted Britain. Soon other governments joined in condemning, or at worst "tolerat[ing]" this "detest[ed]" practice.[70] While not perhaps as civilized as America,

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66 *See* ROBERT W. FOGEL & STANLEY L. ENGERMANN, TIME ON THE CROSS: EVIDENCE AND METHODS—A SUPPLEMENT 33-34 (1974); PATTERSON, *supra* note 32, at 363 (providing proportion of South's unfree population by decades).

67 *See* 1 KEITH HOPKINS, CONQUERORS AND SLAVES: SOCIOLOGICAL STUDIES IN ROMAN HISTORY 101 (1978) (Brazil had 1 million in 1800, 2.5 million in 1850); *cf.* PATTERSON, *supra* note 32, at 483 (U.S. had 900,000 in 1800, 1.9 million in 1830, 3.1 million in 1850).

68 23 U.S. at 114-15.

69 *Id.*

70 *See id.* at 115-16.

the rest of the Western world had ultimately acknowledged the injustice of slavery: "[t]hroughout Christendom, . . . war is no longer considered as giving a right to enslave captives."[71] It soon emerges that the impropriety of thus enslaving a rival people is the fundamental principle of the law of nations: "[n]o principle of general law is more universally acknowledged, than the perfect equality of nations. . . . It results from this equality, that no one can rightfully impose a rule on another."[72] Yet the consequence of respecting the autonomy of other nations is tolerance for their barbarism. While the Christian nations have repudiated the right to enslave captives,

> this triumph of humanity has not been universal. The parties to the modern law of nations do not propagate their principles by force; and Africa has not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves.[73]

It is out of tolerance for African culture that Marshall purports to justify enforcement of the institution Europeans frequently referred to as "African slavery."

Piling insult upon injury, Marshall finally appropriates the doctrine of *Somerset's Case* to the defense of slavery, insisting that foreign slave traders can only be dispossessed of their customary rights by statute:

> [a]s no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it. If it is consistent with the law of nations, it cannot in itself be piracy. It can be made so only by statute.[74]

Perverse as Marshall's racist use of antislavery rhetoric may seem, it was typical of a culture so thoroughly identified with slavery that it could imagine emancipation only as the replacement of slavery with some other form of subjection. Consider the two parties purporting to act for the captive Africans in the *Antelope case*. The federal government appeared before the Supreme Court to contest the Spanish and Portuguese claims to the Africans. However, the government's belief that the Africans had a right to their freedom did not induce it to treat them as anything other than slaves. During the seven years that the litigation lasted, the Afri-

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71 *Id.* at 121.

72 *Id.* at 122.

73 *Id.* at 121.

74 *Id.* at 122.

cans were held in Savannah—even after the city was all but abandoned during an epidemic.[75] The Federal Marshal brutally compelled some to labor on his own plantation and hired others out to slaveholders or to local government, pocketing their earnings.[76] John Quincy Adams, then Secretary of State, later to become President and eventually the most prominent opponent of slavery in Congress, approved these arrangements as "[v]ery judicious and proper."[77] He altered his opinion only upon learning that the Marshal "intends to *swamp* the negroes—that is, to work them to death—before they shall be finally adjudicated out of his possession."[78] All in all, about half of the 281 slaves originally found aboard the Antelope survived the federal government's solicitude.[79] Neither the American privateers nor the Rhode Island senator from whom they had wrested some of the slaves were ever prosecuted for slavetrading, a capital offense.

The "Colonization Society," represented before the Supreme Court by Francis Scott Key, the author of our national anthem, also pled the Africans' cause. It was led and financed by Southern slaveholders. John Marshall was an active member,[80] and Justice Bushrod Washington, who apparently supported Marshall on all the issues in the case, was the Society's president.[81] Francis Scott Key informed the Court that the purpose of the federal statute authorizing colonization of recaptured Africans was that "[o]ur national policy, . . . perhaps our national safety, requires that there be no increase in this species of population within our territory."[82] Believing that the slaveholders' natural benevolence would induce them to manumit slaves, were it not for the danger that permitting a free black population would result in miscegenation, the Colonization Society supported repatriating freed slaves to Africa.[83] Yet

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75 *See* NOONAN, *supra* note 57, at 32, 47-48.

76 He also charged the federal government exorbitant amounts for their maintenance. *See id.* at 45-48.

77 *Id.* at 48 (quoting John Q. Adams).

78 *Id.* at 79 (quoting Adams) (emphasis in original). Throughout the case Adams was consistently resistant to the federal government's interference with foreign title to slaves. His posture had considerably altered by 1839 when he represented the successfully mutinous inmates of the slavetrader Amistad, suing for their freedom. *See* COVER, *supra* note 20, at 11.

79 *See* NOONAN, *supra* note 57, at 31 (281 counted upon capture of the Antelope); *id.* at 33 (258 make it to Savannah); *id.* at 65 (204 left in July 1821); *id.* at 122 (116 died in Savannah by May 1826).

80 *See id.* at 105.

81 *See id.* at 16, 115.

82 *Id.* at 96 (quoting Francis Scott Key).

83 *See id.* at 16.

assuming that African-Americans could not return to African society without being reenslaved, nor be expected to govern themselves, the Colonization Society established the American colony of Liberia on the African continent, for which they promulgated laws.[84] Such a colony should not be equated with the self-determination sought by African-American emigrationists, who consistently objected to being "part of any colony in which they would be subservient to white interests."[85] Instead, Liberia may be analogized to Britain's humanitarian crusade to eradicate African slavery by conquering Africa.[86]

Eventually 130 Africans—some born after the commencement of the litigation—were resettled in Liberia as a result of the case, through the cooperation of the federal government and the Colonization Society.[87] Here the adults were bound to serve for set wages and the older children apprenticed—none were permitted to leave the supervision of their employers for at least a year.[88] The remaining thirty-seven Africans were purchased cheaply from their Spanish claimants by an American Congressman[89] who, by a special act of Congress, was permitted to keep them in the United States, notwithstanding the prohibition on the importation of slaves. The bill was presented as a humanitarian measure since, according to Representative Dwight of Massachusetts, during the years of litigation, the Africans "had been put out on healthy plantations, where many of them had acquired the relations of husband and wife, parent and child, and had formed attachments to the

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84 *See id.* at 87.

85 V.P. FRANKLIN, BLACK SELF-DETERMINATION: A CULTURAL HISTORY OF THE FAITH OF THE FATHERS 89 (1984) (quoting Rhode Island free black emigrationists).

86 The colonization of Liberia yielded a complex dynamic between two cultures in which American blacks played a mediating role reminiscent of nothing so much as the experience of Jews colonizing Palestine. To the "benevolent" Southern whites of the Colonization society, American blacks were inalterably African. To their West African neighbors, the colonists were so altered as to appear "American" and even "white." Initially, settlers continued to live very much under the authority of the Colonization society. By the 1840s, however, settlers were largely self-governing, had developed strong community institutions, a good deal of economic autonomy, and a strong, even messianic national identity. Ironically, however, much of their national pride and personal honor was expressed in military exploits against their West African neighbors whom they regarded as barbarous slavetraders and heathens. At times, they joined forces with Britain in these conflicts. At the same time, their own religious communities and kinship systems continued to display a West African heritage. *See* RANDALL M. MILLER, DEAR MASTER: LETTERS OF A SLAVE FAMILY 39-57 (1990).

87 *See* NOONAN, *supra* note 57, at 135-38.

88 *See id.*

89 *See id.* at 140.

country."[90] According to the Speaker of the House, the purchaser acted "in the pure kindness of his heart."[91] Paradoxically, Congress sought to exclude Africans as a fearsome pestilence, while believing that the most desirable place in the world for Africans was the very country that held them in such contempt.

VI. MANUMISSION AND THE SLAVERY OF MARKET SOCIETY

The Antelope teaches us that belief in the propriety of white government of blacks traversed the political spectrum of antebellum America, and was as much part of the idea of emancipation as it was part of the idea of slavery. Yet the sectional conflict enabled Northern whites to deny the link between their own society and slavery. Forgetting that their own free status had been defined by contrast to the slavery they had protected and profited from, Northern whites imagined that their society was the product of contractual choice unfettered by status distinctions. At the Massachusetts constitutional convention of 1853, Henry Williams congratulated the delegates for the fact that

> [i]n a free government like ours, employment is simply a contract between parties having equal rights. The operative agrees to perform a certain amount of work in consideration of receiving a certain amount of money. . . . The employed is under no greater obligation to the employer than the employer is to the employed; and the one has no more right to dictate [outside of work] than the other. In the eye of the law, they are both freemen—citizens having equal rights, and brethren having one common destiny.[92]

In 1858 a Boston editor contrasted " 'two kinds of civilization in this country. One is the civilization of freedom, and the other is the civilization of aristocracy, of slavery.' "[93] And in the same year, a Cincinnati reporter called for "the introduction upon Southern territory of the Northern system of life."[94] Against the background of these beliefs, Northern Republicans were inclined to see the abolition of slavery as entailing a social revolution; the replacement

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90 *Id.* at 149.

91 *Id.* at 148-49.

92 1 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION ASSEMBLED MAY 4TH 1853, at 550 (1853) (statement of Henry Williams), *quoted in* Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 351 (1989) (alterations in original).

93 FONER, *supra* note 21, at 70 (footnote omitted).

94 *Id.* at 52.

of Southern status society with the contractual freedom of the North.[95]

But status and contract were not so easily distinguishable as Northern Republicans may have believed. On the one hand, we need the idea of status to make sense of the concept of contractual freedom. Thus the notion of a society ordered purely by contract is hopelessly vague: does it authorize specifically enforceable labor contracts or preclude them?[96] Only the characterization of some contractual relations as constrained by status can fix contrasting forms of contractual relations as "free."[97] On the other hand, the "status" of slavery can be characterized and was often justified as a contractual relationship.[98]

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95 The locus classicus of the association of abolition with progress from status to contract society is HENRY S. MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS (1891), originally published in Britain during the first year of the Civil War, in which Maine concluded that it is not

> difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origins in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals. In Western Europe the progress achieved in this direction has been considerable. Thus the status of the slave has disappeared—it has been superseded by the contractual relation of the servant to his master.

Id. at 163-64.

At the close of the Civil War, Maine's thesis received favorable notice from some American reviewers. John Fiske, for example, found confirmation of Maine's status to contract thesis in Herbert Spencer's doctrine that evolution in the social as well as the biological sphere was marked by specialization and differentiation. Fiske identified intelligence as the capacity for specialization which he believed enabled adaptation to diverse environments. *See* John Fiske, *The Laws of History*, 119 N. AM. REV. 197 (1869).

96 *See* ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATIONS IN ENGLISH AND AMERICAN LAW 1350-1870 (1991).

97 *See* the Civil Rights Cases, 109 U.S. 3 (1883); Muller v. Oregon, 208 U.S. 412 (1908); U.S. v. Hodges, 203 U.S. 1 (1905) (contrasting freedom of blacks to wardship of Indians); Lochner v. New York, 198 U.S. 45 (1905) (characterizing some workers as free in contrast to others); Holden v. Hardy, 169 U.S. 336 (1898); Robertson v. Baldwin, 165 U.S. 275 (1896).

98 This seems an appropriate place to note a regrettable confusion in Professor Benedict's otherwise illuminating comments. Benedict writes, "the very possibility of being able to make enough money to purchase one's freedom, Professor Binder argues, led masters and slaves to think of slavery in terms of contract *rather than status*." Benedict, *supra* note 3, at 2109 (emphasis added). The availability of negotiated manumission, and the prevalent bargaining over the terms and conditions of slavery, exposed to masters and slaves that contract and status were *perfectly compatible*. Contract and status may be mutually exclusive categories for Benedict, but they were not mutually exclusive categories in the experience of antebellum masters, slaves, and free blacks. Antebellum African-Americans who passed from slavery to "freedom" made what amounted to labor contracts while they were still slaves and continued to suffer subordinate status after they were nominally free.

Roman law recognized self-sale and capture as the two devices by which a free person could become enslaved.[99] While there is no indication that Roman law accorded captives any discretion to choose death rather than service,[100] nontechnical discussions of slavery have tended to treat capture as a variant of contract or self-

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In both of these respects, the experience of manumitted Americans resembled that of manumitted slaves in every other large-scale society.

Masters and slaves knew that status in Southern society was primarily a matter of honor and social power, and only secondarily a matter of jural personality. As in other timocratic societies, status was in large measure a collective rather than an individual condition. Status attached more to racial groups and to families than to individuals. *See* Guyora Binder, *Mastery, Slavery, and Emancipation*, 10 CARDOZO L. REV. 1435, 1449-75 (1989) [hereinafter Binder, *Mastery, Slavery, and Emancipation*] (convergent values of honor family and community in slave and slaveholder culture); Guyora Binder, *On Hegel, On Slavery, But Not On My Head!*, 11 CARDOZO L. REV. 563, 573, 577-83 (1990) (timocratic and communal values in slave community; slave's collective pursuit and conception of freedom).

For many slaves, slavery's legal and social nonrecognition of family relationships was a more important source of anguish than slavery's constraints on their capacity to dispose of their labor. Professor Benedict rightly points out that Southern law's nonrecognition of slave family relationships included depriving the slave of the capacity to enter into a marriage contract. But he neglects to observe that, by virtue of this disability, slaves were precluded not only from making certain *contracts*, but also from enjoying the status of husband and wife. Moreover, many of the familial statuses from which slaves were barred—parent, child, sibling, grandson—are not entered into contractually. Finally, the manumission of a slave, although it often conferred contractual capacity, did nothing to alter the legal nullity of her relationships to other family members held in slavery. Thus, to manumit an individual and confer upon her the legal right to enforce contracts did little to alter her familial status and nothing to alter her racial status. Moreover, universal manumission did not significantly diminish the importance in American society of these two form of ascriptive status.

The larger point here is that universal manumission did not represent the transformation of a society based on status relations into a society based on contractual relations. While controversy has raged over whether the antebellum South is best characterized as a tradition-bound, paternalistic community of padrones and peasants, *see, e.g.*, EUGENE D. GENOVESE, THE POLITICAL ECONOMY OF SLAVERY 13-40 (1967); BERTRAM WYATT-BROWN, HONOR AND VIOLENCE IN THE OLD SOUTH (1986); KENNETH S. GREENBERG, MASTERS AND STATESMEN (1985), or a modern, mobile market society, *see, e.g.*, JAMES OAKES, THE RULING RACE (1982); FOGEL & ENGERMANN, *supra* note 66, it was obviously both. It was a status society and a contract society and both the North and South remained such societies after the war.

The construction of status and contract as mutually exclusive categories was just that: an ideological construct. Its ideological significance lay in its implication that the mere conferral of contractual capacity on African-Americans tautologically entailed their liberation from the status of slavery. The grip of this ideological construct remains strong. It has impressed itself upon Professor Benedict's reading of this paper, causing him to equate my claim that slaves contracted with the silly claim that slavery was not a status.

99 The three lawful origins of slavery were capture during warfare, self-sale, and heredity. *See* T. WIEDEMANN, GREEK AND ROMAN SLAVERY 23 (1981) (citing M. DIG. 1.5; M. INST. 1.5).

100 Roman captors did, however, frequently choose to kill captives. *See* PATTERSON, *supra* note 32, at 108.

sale. According to Orlando Patterson, it is this persistent image of slavery as chosen that explains the contempt in which slaves were so often held:

> The idea that . . . to prefer life to honor betrays a degraded mind . . . is a theme that haunts western literature. . . . [I]t was the choice of life over honor that the slave or his ancestor made, or had made for him. The dishonor of slavery . . . came in the primal act of submission.[101]

Modern social contract theorists were particularly intrigued by the idea that slavery originated in such a cowardly contract. The organizing problem for this tradition was how subjection to authority could arise out of what was imagined as an original or natural condition of independence. Because the civilian tradition treated slavery as contrary to natural law but nevertheless permitted by positive law,[102] social contract theorists saw the passage from freedom to slavery as an apt metaphor for the passage from a natural state of independence to a civil state of political subjection. Thus, the cowardly contract was an obligatory theme for political theorists in the natural law tradition from the sixteenth to the nineteenth centuries. Initially, contractual analysis was deemed to legitimize slavery along with government.[103] Later those discussions evolved into condemnations of slavery based on the unconscionability of its underlying "contract."[104] These condemnations served to distinguish government from slavery, to show that by retaining her right to contract in the passage from a natural to a civil state, the citizen could retain her original freedom.

The contractual origins of slavery were usually more mythic than real. But in many slave societies, slave status was contingent on contractual consent in another sense. Contracting was often the

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101 *Id.* at 78.

102 *See* DAVIS, *supra* note 24, at 83.

103 *See* 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 103-04, 107-08 (Francis Kelsey trans., 1925) (1625) (justifying slavery as condition entered into voluntarily or imposed upon children to prevent starvation); THOMAS HOBBES, LEVIATHAN 132-33 (M. Oakeshott ed., 1962) (1651) (despotic dominion over captive justified by captive's consent in return for being spared); 2 SAMUEL PUFENDORF, ELEMENTOUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO 15 (William A. Oldfather trans., 1931) (1660) (lawful to enslave those liable for execution, in return for sparing their lives).

104 *See* LOCKE, *supra* note 28, at 88 (lawful captor may kill or enslave captive, but captive cannot contractually consent to slavery); BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 237 (Thomas Nugent trans., 1949) (1748) (captors may not lawfully kill captives and so may not enslave them; nor can slavery be created by contract because liberty is inalienable); ROUSSEAU, *supra* note 30, at 57-58 (liberty inalienable; captor has no right to kill; even if he did, spared captive would have no obligation to obey); 1 BLACKSTONE, *supra* note 26, 411-12 (repeating Montesquieu's arguments).

passageway from slavery to freedom, rather than vice-versa. The ability of slaves in classical societies to legally purchase their freedom made slavery seem less like a fixed status than the contingent outcome of a hard bargain, the fate of those too poor to purchase a better life in one type of market society.[105] Albeit with lesser force, the same point applies to antebellum American society. While redemption was probably[106] much less common in the slave South than in ancient Rome, we know that it frequently occurred and that it was a phenomenon familiar to many if not most slaves.

Given that some slaves purchased their freedom, the separability of status relations and contractual relations in Southern society depends on two difficult questions: how much manumission by purchase went on, and were the restraints upon it cultural or merely economic? If manumission was available to any slave who could afford the price, slave status could be viewed as contractual—which by no means implies that it was voluntary.

We have reason to think that considerable bargaining over slave "status" went on in the antebellum South. It is true that bargains with slaves were legally unenforceable throughout the South,[107] but enforceable bargains could often be concluded by free relatives or white intermediaries. In addition, slaves often had informal enforcement sanctions available. Ira Berlin reports that

> [t]he administrator of a Virginia estate found himself unable to employ a skilled slave profitably. The slave, who should easily have earned over $150 a year, instead returned a paltry $18 while accumulating medical bills for several times that amount. Exasperated by the steady drain on the estate, the executor offered the slave his freedom for $400, and the sum was promptly paid.[108]

Masters frequently stood to gain by permitting slaves to supervise themselves—by saving supervision costs, by allowing slaves to travel to markets where their labor would bring a higher price, or by enlisting the slave's economic judgment on behalf of the

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105 *See generally* 1 HOPKINS, *supra* note 67, at 115-32 (prevalence of self-purchase in ancient Rome); ALAN WATSON, SLAVE LAW IN THE AMERICAS 23-24 (1989).

106 I say "probably" because, despite the ubiquity of this assumption, no one has been able to quantify the frequency of manumission in ancient Rome. But the ease of manumission in Roman law, the easier access of slaves to lucrative skills, and the wealth of anecdotal accounts of self-purchase all suggest a very high manumission rate, whereas we know that the number of free blacks in America never exceeded one in seven—many of these were emancipated by the state, and some as a consequence of escape.

107 *See* PAUL FINKELMAN, THE LAW OF FREEDOM AND BONDAGE: A CASEBOOK (1986).

108 IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 153 (1974).

master's interests. However, a master could realize none of these advantages without providing the slave with credible incentives.

Masters had other reasons to bargain in good faith. One incentive for the master to honor a bargain was that it would increase his chances of selling manumissions in the future—manumitted slaves frequently proceeded to purchase their relatives. Another incentive was provided by the threat of escape. The experience of A.T. Jones reveals both forces at work.[109] While Jones' parents had been able to purchase their own freedom, they left several children in slavery. Jones and three of his siblings were inherited by their original owner's son, but Jones's eldest brother was sold to a miller who taught him the trade.

> After serving seven years, he was emancipated, and taken into partnership by the miller, and . . . saved considerable money. . . . This money bought two of us. I was the next oldest, and I made an agreement to give [the owner] $350 for my liberty, which was in proportion to what the others paid. Before the expiration of the time I was allowed to pay the $350, . . . Sam Bennett, told my master it was a shame for him to set those likely boys free; that it would have a bad effect upon the other slaves in the neighborhood, and that he would give him $400 for me. . . . [O]n hearing that . . . in fact, my master had taken the money, I left for Canada. I was satisfied he was going to cheat me.[110]

The case of Horace Hawkins reminds us that, while escape did not yield all the benefits of legal manumission, it dramatically decreased the value of the master's ownership rights and could greatly increase the bargaining power of the fugitive slave. Although a successful runaway, Hawkins concluded upon passage of the Fugitive Slave Law that "I didn't like to be pent up in Canada, and I saw they were determined to catch me if they could."[111] Accordingly, through intermediaries, he opened negotiations with his former master for his freedom papers, successfully bargaining him down from $500 to $200.[112]

The hostility of Southern law to the presence of free blacks has sometimes inspired or reenforced the assumption that manumission was rare.[113] Yet that hostility should not be equated with hostility to manumission itself. As Paul Finkelman reports "[v]irtually

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109 *See Interview with A.T. Jones*, *in* JOHN W. BLASSINGAME, SLAVE TESTIMONY: TWO CENTURIES OF LETTERS, SPEECHES, INTERVIEWS, AND AUTOBIOGRAPHIES 431 (1977).

110 *Id.*

111 *Interview with Horace H. Hawkins*, *in* BLASSINGAME, *supra* note 109, at 443.

112 *See id.*

113 *See* PATTERSON, *supra* note 32, at 284-85, 257-61.

all slave state legal experts agreed that because the owner had absolute control over the property right in his slave, the owner therefore had the right to free his slave and, in so doing, give up his property right."[114] Ira Berlin adds that masters saw manumission as "a mechanism of control and a means of encouraging divisions among blacks. The importance of the right to manumit made many slaveowners reluctant to relinquish it, although they disliked free blacks."[115] Nevertheless, by the 1830s, most state statutes required judicial or legislative permission to manumit a slave.[116] Some states impeded self-purchase by prohibiting slaves from "go[ing] at large and trad[ing] as a freeman."[117] Seven states eventually required freed slaves to leave the state within a short period of time,[118] although it is questionable how seriously these requirements were enforced.[119] Eight states ultimately prohibited most or all manumission within the state, although only Texas did so before 1857.[120] In any case, no state prevented an owner from freeing a slave by removing her from the state.[121] Mark Tushnet therefore concludes that it was always possible for "a properly written will [to] effectuate an intention to emancipate."[122] And what a dead master could do, a living one could accomplish more easily.

Masters and slaves bent on bargaining over "status" frequently found their way around the law, often with the assistance of third parties. Israel Jefferson, born on Monticello, bought "himself" in his wife's name so that they could remain in Virginia. She manumitted him years later, when they decided to move to Ohio.[123] Mr. Bradwell, a Methodist preacher and a shoemaker, donated most of his purchase price to his church, which bought him and held him in bondage "to meet the requirements of the law."[124]

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114 FINKELMAN, *supra* note 107, at 95.

115 BERLIN, *supra* note 108, at 149.

116 *See id.* at 138.

117 *See* MARK V. TUSHNET, THE AMERICAN LAW OF SLAVERY 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST 199 (1981) (citing Alabama case of *Stanley v. Nelson*).

118 *See* ALA. LAWS, ch. 44 (1883); K. LAWS I 305-08 (1850); LA. LAWS ch. 315 (1852); MD. LAWS chs. 281, 323 (1831); N.C. LAWS ch. 9 (1830); TENN. LAWS ch. 29 (1831), ch. 102 (1833), ch. 81 (1849), ch. 107 (1852), ch. 300 (1854), ch. 50 (1829); VA. LAWS ch. 63 (1805).

119 *See* BERLIN, *supra* note 108, at 147.

120 *See* ALA. LAWS ch. 36 (1859-60) (all); ARK. LAWS ch. 151 (1858) (almost all); GA. LAWS ch. 91 (1859) (all by will); LA. LAWS ch. 69 (1857) (all); MD. LAWS ch. 322 (1860) (all); MISS. REV. CODE 236 (1857) (all); N.C. LAWS 69 (1860-61) (all by will); REPUBLIC OF TEXAS LAWS 19 (1838) (all).

121 *See* TUSHNET, *supra* note 117, at 193.

122 *Id.* at 194.

123 *See Interview with Israel Jefferson*, *in* BLASSINGAME, *supra* note 109, at 481, 483-84.

124 *See Interview with Mr. Bradwell*, *in id.* at 391.

In the 1820s, Quaker organizations held 800 such nominal slaves in North Carolina.[125] We encounter wills requiring heirs to hold slaves as "free to all intents and purposes forever," or to ask "no other service or wages . . . than may be sufficient to pay their taxes,"[126] or to let them be "as free as the laws of the state will allow."[127] Some masters treated slaves this way during their lifetimes. A Tennessee planter noted that one family of nineteen " 'slaves' . . . 'have been living to themselves for about twenty years, they have supported themselves on the lands of their master and are tolerable farmers.' "[128] However, it should be noted that any such alternative to legal freedom left the nominal slave vulnerable to real enslavement by the nominal owner's creditors.

If masters and slaves intent on contracting sometimes worked their way around the law, they sometimes simply ignored it. Alabama attempted to discourage self-purchase by forbidding slaves to trade as freemen; yet the Alabama case of *Stanley v. Nelson* revealed a slave subleasing his own time from the man to whom he was hired, so that he could operate a painting business which in turn borrowed capital from yet another white hiring the time of other slaves from other masters.[129] Even in states permitting manumission, many masters freed their slaves informally to escape such burdensome obligations as posting bonds or paying their slaves' way to another state.[130]

Thus, while legal restrictions on manumission may have reduced the amount of bargaining over status, they may have simply driven it out of sight. Rather than reinforcing the credibility of the low manumission rates derivable from census data, legal impediments undermine it.[131] The censuses of 1850 and 1860 measured only legal manumissions taking place within the Southern states.[132] Thus, they missed slaves held in quasi-freedom by relatives, churches or masters, slaves manumitted informally, and slaves manumitted after migration to free states. The emancipation of Ella Shepard's stepmother, for example, would not likely have come to the attention of census takers as either a manumission or

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125 *See* BERLIN, *supra* note 108, at 143.

126 WATSON, *supra* note 105, at 76 (1989).

127 *See* TUSHNET, *supra* note 117, at 198 (quoting *Drane v. Beall*); *see also* BERLIN, *supra* note 108, at 144.

128 BERLIN, *supra* note 108, at 148 (footnote omitted).

129 *See* TUSHNET, *supra* note 117, at 199.

130 *See* BERLIN, *supra* note 108, at 145.

131 *See* FOGEL & ENGERMANN, *supra* note 66, at 151; PATTERSON, *supra* note 32, at 273.

132 *See* 1860 CENSUS at 137.

an escape.[133] Ella Shepard's father bought himself but was unable to negotiate the purchase of her mother who was sold South. Accordingly, he bought a new wife and held her as a slave so that they could remain in Tennessee where he had a prosperous business. Later, fearing that she would be claimed by his creditors, he absconded with her to Ohio, leaving all his property behind. Thus his wife ceased to be a slave without being formally manumitted and without becoming a fugitive.[134]

To the extent that legal impediments to manumission were effective, they provide a second reason for discounting the 1850 census on which many rely. These impediments increased greatly between the Revolution and the Civil War.[135] They were further reenforced by the new Fugitive Slave Law of 1850 which reduced the bargaining power of slaves by reducing opportunities for escape. If the law more effectively discouraged manumission in the decade before the Civil War, we must assume that manumission rates were higher at earlier points. Fogel and Engermann actually employ this assumption when they point to the precipitous drop in the growth rate of the free black population after 1840.[136] If escape and manumission were always as infrequent as the 1850 census asserted, it is difficult to explain the presence in 1860 of half a million free blacks.[137] Thus, it has been estimated that 50,000 slaves were manumitted in the state of Maryland alone.[138]

Moreover, in assessing manumission's presence in the imaginations of slaveholders and slaves alike, it is important to remember that past experience would be more important than future experience. Therefore, a temporary restriction of opportunities for manumission during the lifespan of the last generation of slaves may have little reduced the cultural importance of manumission as a permeable boundary of slave status.

If the legal impediments to manumission were surmountable, why weren't there even more manumissions? We can explain this result in economic terms. The closing of the foreign slave trade increased the replacement cost of slaves and so raised the prices masters could demand for—and from—their slaves. We may get a

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133 *See Interview with Ella Shepard*, *in* BLASSINGAME, *supra* note 109, at 611-14.

134 *See id.* at 611-13.

135 *See* GENOVESE, *supra* note 42, at 51; STAMPP, *supra* note 23, at 232-34.

136 *See* FOGEL & ENGERMANN, *supra* note 66, at 37.

137 *See* 1860 CENSUS at 131.

138 *See* BARBARA J. FIELDS, SLAVERY AND FREEDOM ON THE MIDDLE GROUND: MARYLAND DURING THE NINETEENTH CENTURY 15 (1985); Calderhead, *How Extensive Was the Border-State Slave Trade? A New Look*, 18 CIV. WAR HIST. 42 (1972).

rough idea of the odds facing a self-purchaser by considering the following hypothetical example. In 1850 a forty-year-old male slave could bring an average of about $650 on the open market.[139] During the previous twenty years of his working life, such a slave might have generated an average of $115 of gross annual income for his master, while costing his master an annual average of $40 for his subsistence.[140] To put by enough to purchase himself at the market price, such a slave would have had to be patient, disciplined and lucky enough to outproduce the average by thirty percent, over this twenty year period, and to retain all of this surplus. A skilled slave could, of course, earn more than the average slave, but would also have to pay more for his freedom. A free black artisan could perhaps earn the purchase price of a ten-year-old child in two years, if he lived alone—and lived no better than a slave.[141] In light of these economic barriers, it seems possible that the legal distribution of property between Southern whites and blacks, rather than legal restraints on the ability of whites to alienate their property, explains the relative rarity of manumission by purchase. If so, what we call status in Southern society was the product of a market, not a deviation from it.

While not every manumission was negotiated, not every negotiation led to manumission, so that the number of actual manumissions understates the importance of manumission in the culture of slavery. For every slave manumitted or purchased from slavery, there were countless others who may have aspired to such a fate and engaged their masters in explicit or implicit negotiations to achieve it. Frederick Douglass recalled that the co-conspirators in his first attempted escape "all . . . had dim hopes of being set free, some day, by their masters."[142] For example, John Hartwell Cocke, an avid colonizationist, managed a distant plantation by offering every slave freedom in return for honesty, fidelity, temperance—and $1400. Despite imposing rigorous regimes of religious instruc-

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139 *See* FOGEL & ENGERMANN, *supra* note 66, at 76.

140 These estimates are very rough, based on Fogel & Engerman's figures for the average net earnings of slaves by age in 1850, for the average inflation in the price of slaves between 1820 and 1860, and the average subsistence cost in 1850 for an adult male slave. *See id.* at 99, 151.

141 Berlin estimates that even skilled African-Americans faced enormous economic obstacles to earning enough to purchase themselves or loved ones. A skilled slave—or presumably free black—could earn a bit more than $200 per year in the decade before the Civil War. BERLIN, *supra* note 108, at 154-55; FOGEL & ENGERMANN, *supra* note 66, at 152. In 1850 the average price of a ten-year-old child was $300. *See id.* at 76.

142 FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 279 (Dover Pub. 1969) (1855).

tion and overtime work over a twenty-year period, Cocke apparently found only three of these privileged slaves worthy of manumission.[143]

Those who would deny the contractual element in master-slave relations must also contend with the various degrees of quasi-freedom that fell short of the also attenuated "freedom" of manumission, but that nevertheless gave slaves some authority to dispose of their labor. Despite the rigors of the slave regime, or even as part of it, most slaves had disposition over some of their labor. The maintenance of a labor force itself requires a certain amount of labor and expense—an expense which masters could reduce by offering the slaves barely adequate time for childrearing, housekeeping, crafts, gardening, and hunting.[144] Sometimes such slave autonomy profited the master in unexpected ways. Harriet Martineau recalled one slave asking his master "what he would give him for two bee-holes. 'You are a pretty fellow,' said his master, 'to ask me to pay for my own trees.' The negro urged that his master would never have found the bee-holes for himself; which was very true."[145] Many slaves were offered financial incentives "either as incentive bonuses designed to stimulate productivity, or more frequently, as a return for work done during time that was recognized as the slaves' own."[146] And as we have seen, some slaves were given wide discretion to dispose of their own labor, paying a monthly rent on themselves. In the case of those who purchased themselves, this rent often resembled a mortgage payment, with the slave acquiring title in herself before or after payment of the principal was complete.

Those who would define slavery as property in humans and freedom as self-ownership must therefore confront the paradox that all slaves had some property interest in themselves.[147] While I would not deny that self-ownership was an important index of free-

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143 *See* MILLER, *supra* note 86, at 23-36, 63, 110. The only three manumittees from the Hopewell plantation were Ann Sucky Faulcon and her children Agnes and George. Ann died en route to Liberia. The plantation population grew from 49 in 1840 to 70 in 1860. *See id.* at 142.

144 *See* GENOVESE, *supra* note 42, at 497-99, 503, 529-31, 535-40.

145 *Id.* at 306 (footnote omitted) (quoting Harriet Martineau).

146 *Id.* at 314; *see also* FOGEL & ENGERMANN, *supra* note 66, at 240-41.

147 Professor Benedict's Comment objects that slave status could not be viewed as contractual because a contract is an enforceable agreement. *See* Benedict, *supra* note 3, at 2109. Since I argue that slaves could bring to bear informal enforcement pressures, and that purchase contracts could be enforced by relatives or white intermediaries, I assume he means that a contract is enforceable by a court at the request of a party to it. Benedict similarly objects to my claim that slaves' disposition over some of their labor gave them a partial property interest in themselves, responding that "property consists of legally recog-

dom for all parties, I think we must recognize it as a continuum along which master and slave were engaged in a constant struggle. I *would* deny that the continuum ended with self-ownership. Instead, slave society recognized disposition over labor as a capital resource like any other—like land, seed, livestock, and equipment. Owning more of one's self meant more freedom, to be sure—but so did owning more land, more animals, and more people. In other words, the more access to capital resources one had, the more valuable one's property interest in oneself became. If slavery taught African-Americans the possessive individualist lesson that the self was a capital resource, it also taught the Hegelian lesson that access to capital was an essential part of the self.

This perspective on the self is starkly clear in the terse self-description offered by W. Hawley to the American Freedmen's Inquiry Commission in 1863.

> W. Hawley said he was formerly a slave, but bought himself, at the age of 24, for $1620, which was to be paid in eight years, and he earned it all and paid it all, and became free. He then went hard to work and earned more money, and bought his sister for $850. He now has two drays, two horses, owns his own house, and considers himself worth two thousand dollars.[148]

Here we have labor valued in terms of the property it secures, and property valued as an index of the labor that produced it, and both measures of self-worth fusing in Hawley's initial ability to earn the high price of his own purchase. The freedmen's inquiry commission interviews are full of such narratives of labor followed by self-

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nized and enforceable rights." *Id.* at 2110. And he argues that quasi-freedom enjoyed by some slaves "was more 'quasi' than 'freedom.' " *Id.*

These objections reveal a fundamental jurisprudential disagreement between Professor Benedict and myself. Professor Benedict apparently identifies legal rights with judicial remedies. In my view, the reality of rights depends on their enforcement by any means available, formal or not. Stateless societies such as medieval Iceland have had legal property regimes without state enforcement. *See generally* WILLIAM I. MILLER, BLOODTAKING AND PEACEMAKING (1990). Customary international law is a similarly decentralized system. Courts cannot effectively enforce rights in the face of mass resistance or noncooperation. The effectiveness of any right therefore depends upon its recognition not only or primarily by courts, but by myriad other social actors. The courts do not have a practical, and need have no theoretical, monopoly on the power to identify rights.

Thus, in assessing the practical difference of manumission made in the ability of African-Americans to dispose of their labor, we must factor in the informal powers exercised by slaves and the informal disabilities faced by freed persons. When we do so, we may find that the freedom enjoyed by free persons of color—both before and after slavery's "abolition"—was also more quasi than freedom. Freedom of contract would mean little to Southern Blacks if none but their former masters would employ them, or if vigilante violence was the price of exercising their rights.

148 *Interview with W. Hawley*, *in* BLASSINGAME, *supra* note 109, at 394.

ownership, the acquisition of property, and generous provision for the freedom, education or housing of relatives.[149] These phylogenies of freedom are reminiscent of, and surely drew upon, Republican propaganda depicting the metamorphosis of employee into employer.[150] But they demonstrate even more clearly the identification of freedom with prosperity and power, rather than disposition over labor, because these paragons of the puritan ethic *made labor contracts while they were still slaves.*

Economist Douglas North summarizes this interpretation of slavery as the labor contract made by an extremely impoverished but not completely unpropertied laborer:

> There is, in fact, an implicit contract between the . . . [master and slave]; to get maximum effort from the slave, the owner must devote resources to monitoring and metering a slave's output and critically applying rewards and punishments based on performance. Because there are increasing marginal costs to measuring and policing performance, the master will stop short of perfect policing and will engage instead in policing until the marginal costs equal the additional marginal benefits from such activity. The result is that slaves acquire certain property rights in their own labor. That is, owners are able to enhance the value of their property by granting slaves some rights in exchange for services the owners value more. Hence slaves became owners too. Indeed it is only this ownership that made it possible for slaves to purchase their own freedom, as was frequently done in classical times and even occasionally in the antebellum South.[151]

If the making of labor contracts was part of the slave experience, it follows that slaves could become wage laborers and yet still

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149 *See, e.g., Interview with Cox, in* BLASSINGAME, *supra* note 109; *Interview with Andrew Fredhew, in id.* at 391, *Interview with William Howard, in id.* at 394 (all prosperous self-purchasers who had purchased relatives and sent them to Oberlin College).

150 *See* Binder, *Mastery, Slavery, and Emancipation, supra* note 98, at 1448-49.

151 DOUGLAS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 32 (1990) (citing Barzel, *An Economic Analysis of Slavery*, 20 LAW & ECON. 87 (1977)). For a more elaborate analysis of the slave as a debt-peon, or contract-laborer, see Barzel, *supra*, at 91, 96-97. Barzel argues that the compulsory labor aspect of slavery should be viewed as a way of policing debt-contracts, not as an alternative to contracting. Assuming policing was costless to the employer, the employer would keep the slave working at the maximal effort consistent with the reproduction of the laborer's labor power simply by appropriating all of the slave's output until it reached the equivalent of the slave's maximal sustainable output minus the consumption necessary to sustain that maximum. But to the extent such policing can be more cheaply accomplished by the laborer than by the employer, the laborer can command additional compensation in the form of consumption, leisure, cash, workplace autonomy, or other amenities. In paying the laborer to guard the employer's property interest in the loan, the employer transfers some of that interest to the laborer, just as a small business owner gives up some of her ownership interest to the mobster to whom she pays protection.

feel enslaved. In contemporary Colombia, some descendants of slaves apparently still view plantation employment for wages as a cowardly contract, that is, contractual slavery. Believing that only by selling one's soul can a *wage* laborer earn enough to achieve economic independence, descendants of slaves report much contracting with the devil among plantation workers. Although personally enriching, such contracts break faith with the contractor's ancestry and posterity, since they do not involve maintaining and bequeathing a family estate. According to the traditions of this community, the devil's wages, no matter how remunerative, can only be consumed in the form of luxury items rather than passed on as capital. To these allodial farmers, subsistence agriculture is the only source of real wealth. Attempts to reinvest wages in land or livestock will therefore prove fruitless: the devil's seed is sterile and nothing it buys can grow or reproduce. The social isolation of the wage worker, reinterpreted in peasant morality as an excess of selfishness, results in the alienation of the very independence sought.[152] In this way, the wage contract reproduces the social death that was slavery.

I should make clear at this point what I am saying and what I am not. In stressing the role of bargaining in establishing the working conditions of slaves I am not saying that any aspect of slavery was voluntary. To the contrary, I am contesting the commonplace assumption that bargaining is a form of freedom rather than coercion. Nor am I saying that most slaves had as much bargaining power in slavery and as much prosperity in "freedom," as did W. Hawley.[153] But neither am I implying that Hawley's unusual economic autonomy meant that he was never a slave or that he ever

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152 *See* TAUSSIG, THE DEVIL AND COMMODITY FETISHISM IN SOUTH AMERICA 94-95, 133-34 (1980).

153 It is noteworthy that the federal writers' project interviews tell a very different story from the Freedmens' inquiry commission interviews. The former slaves interviewed by the federal writers' project in the 1930s had been children or young adults when emancipation came to the South and therefore had little opportunity to purchase themselves. By the Great Depression, even those few that had prospered in freedom for a time were generally as destitute and helpless as they were ancient. Looking back from this miserable retirement to a dimly remembered childhood in which most of the rigors of slavery had not yet been felt, many waxed nostalgic. Those who had achieved adulthood could look back on slavery as a time when they were vigorous, useful, and hence valuable: "You used to be worth a thousand dollars then, but you're not worth two bits now. You ain't worth nothin', when you're free." Armstrong, *quoted in* BULLWHIP DAYS: THE SLAVES REMEMBER, AN ORAL HISTORY 456 (J.J. Mellon ed., 1988). Because most former slaves had so little economic bargaining power after emancipation, they could actually feel less valued by their employers than when they were owned. When confronted with their economic vulnerability in a "free" labor market, a few former slaves actually experienced status degradation. According to Sara Debro,

became fully free. Finally, I am engaged in no insurgency against the concept of "status." Slave status was real, but had less to do with an individual's inability to bargain over the conditions of her labor than with the power she had in bargaining. Thus, slave status was a condition of social isolation and political powerlessness; one of the effects of this status was a degradation of the economic bargaining power of all African-Americans. Thus conceived, slave status was a collective condition, and hence not one that individuals could buy their way out of.

VII. RACE AS STATUS

Northern whites could believe that the right to make and break labor contracts eliminated status distinctions only by stripping status of its social dimension and reducing it to a relationship between the individual and the state. However hierarchical, social relations could then be viewed as private matters, determined by contractual consent between jural equals; social isolation was equally a function of contractual consent. By ignoring the relational quality of status evident to white and black Southerners alike, Northern Republicans could deny that emancipation affected the status of anyone but the slaves themselves. After the Civil War this belief made it possible for Northern whites to retreat from their bellicose view of the South as an alien society of sadists and self-proclaimed aristocrats, and return to the comfortable position that it was the presence of slaves rather than the practices of masters that was alien.

Thus, the notion of status often had an asymmetric application for Northern whites: only the subordinated were ascribed any status at all. Masters could therefore be deprived of their slaves with no loss of status because ownership of slaves conferred no special status upon them. Deprived of their human property, planters could remain proprietors—indeed implicit in the conception of slavery as property is the assumption that mastery is an accidental property of the owner, a property she can alienate without altering her own identity.

> [t]hem was bad days. I'd rather been a slave than to been hired out like I was, 'cause I wasn't no field hand, I was a handmaid, trained to wait on the ladies. . . . I ain't never forgot them slavery days, and I ain't never forgot Miss Polly and my white starched aprons.

Interview with S. Debro, *in* BEFORE FREEDOM: 48 HISTORIES OF NORTH AND SOUTH CAROLINA SLAVES 50-51 (Hurmence ed., 1990).

Conceived as property in humans, slavery is perfectly compatible with a society ordered by contract. It is contract rather than status that orders relations among the free, while the unfree have no social relations. From amidst the dynamism of market society, Northern whites may have envisioned the slave as economically valuable but socially inert—as object rather than agent.[154] Hence the presence or absence of slavery could be considered sociologically irrelevant, an accidental property of an essentially liberal market society. If slavery was indeed inessential, it could be abolished without affecting the character of society. Upon emancipation, slaves would simply drop into the fluid medium of contractual relations, where they would disappear without a trace.[155]

Imagining that contractual relations placed the participants outside of status hierarchy, Northerners were tempted to discard status as a modality for identifying all members of society. Instead, status came to be viewed as the accidental and undesirable property of an alien minority. In this way, the Republican party's aspiration to abolish slavery remained enslaved by the traditional understanding of emancipation as the manumission of individuals.

In its asymmetry, the concept of status came to be isomorphic with the concept of race. Despite the popularity of racial taxonomies of humankind during the nineteenth century, we find the concept of race being deployed as an adjectival rather than a modal quality, afflicting some people more than others. Emerson, for example, informed his admiring audiences that "race in the negro is of appalling importance."[156] Nineteenth century Americans equated "race" with the innate determination of personality, as opposed to the self-creation that romantics—like Emerson—associated with freedom.[157] Hence in ascribing more "race" to Africans, white Americans reassured themselves that the unfreedom of Africans was a natural fact rather than a social condition. One popular treatise on "the Negro Race" reported that: "All the facts which have been collected, concur to prove how constant and indelible are the natural and moral characteristics of negroes in every cli-

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154 Martin Luther King believed that this white image of blacks persisted to his own day: "Segregation, to use the terminology of the Jewish philosopher Martin Buber, substitutes an "I-it" relationship for an "I-thou" relationship and ends up relegating persons to the status of things." MARTIN L. KING, WHY WE CAN'T WAIT 85 (1964).

155 *See* ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 100-02 (1980).

156 RALPH WALDO EMERSON, *English Traits*, *in* II WORKS 21 (Bohn ed., 1856).

157 *See* CHARLES TAYLOR, HEGEL AND MODERN SOCIETY 1-23 (1979) (problem of defining freedom posed by romanticism, to which Hegel responds).

mate, notwithstanding a diversity of circumstances, which condemn him to indolence and degradation."[158]

Developmental stasis—an inability to progress by adapting to new circumstances—struck some northerners as a natural explanation for the legal affliction of status. Dr. John H. Van Evrie of New York, a Civil War era popularizer of "scientific" racism, explained variations in ability and achievement among caucasians by reference to environment, while assuming that the potential of all blacks was genetically limited.[159] But while Van Evrie was a supporter of slavery, the view that only whites were naturally fit for freedom also found expression among enthusiasts of abolition. In endorsing Henry Sumner Maine's celebrated claim that civilized society inevitably progressed from status to contract, John Fiske elided legal and biological evolution: "the progress of society, like that or organisms, is throughout, a process of adaptation."[160] Seeing the individual independence of contractual society as a source of flexibility, Fiske celebrated it as an evolutionary advantage, enabling the specialization that Herbert Spencer saw as the key to successful adaptation.[161] Yet flexible institutions seemed to Fiske as much the result as the cause of evolutionary progress, since adaptability was more characteristic of the Aryan than of other races.[162] For Fiske, the legal independence of whites was the product of their independence from nature. Whites could magnanimously extinguish the legal status of blacks, but not the biological stasis that had given rise to it.

If destined by nature, the degradation of Africans could be viewed as a circumstance beyond the power of whites to create or alter. Thus the impingement of necessity on the lives of whites could be externalized and embodied in the blacks among them. As the volatility of economic life made white Americans increasingly conscious of the fragility of their economic independence,[163] as the

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158 J. VIREY, NATURAL HISTORY OF THE NEGRO RACE 19 (1837).

159 *See* GEORGE M. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY 1817-1914, at 92-93 (1971).

160 Fiske, *supra* note 95, at 221.

161 *See id.* at 218-21, 228-29.

162 [W]here there has been marked social progress there has been marked ethnic differentiation. The widely spread tribes of unprogressive American Indians, now so rapidly disappearing, have retained to the end their ancient physical, intellectual, and moral homogeneity. But in the descendants of the primitive Indo-Europeans, from the flabby and pursy Hindu to the wiry and long-limbed Kentuckian, may be seen the immense heterogeneity entailed by long-continued differences of social organization and physical environment.

Id. at 217.

163 *See generally* STEINFELD, *supra* note 96.

accelerating conflict over slavery convinced Northerners and Southerners alike that they were losing control over their political destiny, this displacement of necessity onto "the Negro race" must have held increasing appeal. Just as masters began to view their slaves as "a duty and a burden,"[164] Northern yeomen saw themselves slipping into the grip of the ambiguously titled "Slave Power."[165] Both sides saw the slave as an emblem of necessity to be overcome, confined, cordoned off, or expelled. Even while viewing themselves as freer by nature than "the Negro," whites nevertheless identified "the Negro" with that nature by which they themselves felt enslaved.

This asymmetric ascription of race continues down to the present. The American system of racial classification remains unique in treating any proportion of African descent as a taint. As Neil Gotanda has pointed out, this peculiar asymmetry is a legacy of American slavery's association of race and status:

> [O]ur particular system of classification, with its metaphorical construction of racial purity for whites, has a specific history as a badge of enslaveability. As such, the metaphor of purity is not a logical oddity, but an integral part of the construction of the system of racial subordination embedded in American society.[166]

Professor Gotanda has argued that even in contemporary American culture only nonwhites are recognized as "having" race, while caucasians, the normal case, are raceless.[167] Thus, the assumptions persist to this day that "racial problems" are the problems of persons of color only, and that social policy should fix these afflicted individuals while leaving whites alone.

Neither the manumission of slaves nor the marketing of black labor challenged the fundamental assumptions of slave society, for neither posed a serious threat to white governance of blacks. Thus emancipation could merely extend practices already present in Southern society and already circumscribed by a racial ideology shared with the North. The identifications of Africa with slavery and of negritude with necessity suggest that freedom was in large

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164 *See* GENOVESE, *supra* note 42, at 49-70.

165 *See* DAVID B. DAVIS, THE SLAVE-POWER CONSPIRACY AND THE PARANOID STYLE (1969).

166 Neil Gotanda, *A Critique of Our Constitution is Color Blind*, 44 STAN. L. REV. 1, 34 (1991). For further discussions of the American system of racial classification, see VIRGINIA R. DOMÍNGUEZ, WHITE BY DEFINITION: SOCIAL CLASSIFICATIONS IN CREOLE LOUISIANA (1986); JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULLATOES IN THE UNITED STATES (1980); JORDAN, *supra* note 52; EDWARD B. REUTER, THE MULATTO IN THE UNITED STATES (1918).

167 *See* Neil Gotanda, Lecture at Critical Legal Studies Conference (Oct. 1988).

measure identified by antebellum whites as freedom *from* the black race. Against the background of these assumptions, emancipation could hardly have meant freedom *for* the black race. Instead, emancipation would remain the authority of whites to keep race under control by governing those afflicted with it.

CONCLUSION

Universal manumission does not necessarily abolish slavery. The institution of slavery has generally included mechanisms for the manumission of slaves and their passage into a limbo-like status combining freedom with social subordination and relative isolation. This was true of American slavery as well. If the institution of slavery is defined to include the process of manumission and the subordinate status of the manumitted, then the institution of slavery may be said to survive the reclassification of all slaves as manumittees. Arguably, that is what has occurred in the United States. If so, slavery persists, and the Thirteenth Amendment remains unenforced.

Slavery arguably survives in the institution of race. Conceived as a perpetuation of the institution of slavery, race is, like slavery, a hereditary status. It is the status into which all slaves were manumitted and which free blacks occupied before the Civil War. It is the status which all descendants of slaves occupy today. The legal disabilities associated with this status have been altered or eliminated since the Civil War, but the social status remains. To occupy this status is to be the object of ascription of race as a characteristic. The descendants of slaves are "raced," and others may be raced as well, by analogy to this paradigmatic group. Whites are not raced, so that on this view, talk of racial discrimination against whites involves a category error or rhetorical obfuscation.

The status of race is a group rather than individual disability. The vulnerability of African-Americans to enslavement reduced the economic opportunities, bargaining leverage, and political and social power of all African-Americans, whether or not enslaved. By reducing economic opportunity and bargaining leverage for free blacks, the institution of slavery reduced their property in themselves, placing them on a continuum with, rather than across a categorical boundary from, their enslaved but nevertheless enterprising compatriots. The status of race operates similarly to reduce but not eliminate the political and social power and the self-ownership of all African-Americans.

This way of conceiving racial subordination as a perpetuation of slavery highlights the institutional nature of both the liberty protected by the Thirteenth Amendment and the equality protected by the Fourteenth Amendment. It implies that conferring on individuals the right to sell their labor does not make them free, and that conferring on individuals the right to race-neutral treatment does not make them equal. This suggests the general implications for constitutional law of the embeddedness of slavery in cultural and social configurations that survived universal manumission: a more collective conception of liberty and equality rights and a readier resort to institutional reform to remedy their violation. These general recommendations are familiar albeit no less important for that.

More interestingly, if less importantly, the cultural and social persistence of slavery also accounts for the sense of crisis evident in constitutional theory since the advent of the "Second Reconstruction." American constitutional interpretation has always proceeded on the assumption that America's evolving society and culture were sources of authority and legitimacy for what were inevitably contingent, discretionary interpretations of America's designedly imprecise constitution. But the immanence of slavery throughout American society and culture imply that the constitution's most important and least precise passages—the Reconstruction Amendments—delegitimate the very society and culture upon which constitutional interpretation depends.