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When is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument

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“The freed slaves then began another journey, this time not from captivity to slavery, but from slavery to citizenship and equality under the law.”

In re African American Slave Descendant Litigation¹

“[S]lavery itself did not end in 1865, as is commonly believed, but rather extended into the twentieth century.”

Randall Robinson, *The Debt: What America Owes To Blacks*²

When is the time of slavery? Is slavery a part of our nation's experience, now safely buried in the deep past, or are its echoes too loud to ignore? Has our nation's trajectory been one of continuous progress from slavery to freedom, or did change happen fitfully and incompletely? And was slavery an institution defined by race, or was race only incidental to its origins and operation?

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1. 375 F.Supp. 2d 721, 780 (N. Dist. Ill. 2005).

2. RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 225 (2000).

Contemporary debates about racial justice, and in particular about redress for racial injustice, turn not only on moral and practical concerns, but on the answers to these questions. The jurisprudence of affirmative action and reparations draws on competing histories of slavery and its aftermath in the United States. Yet most scholars of constitutional law tend to focus on issues of corrective and distributive justice, or consequential questions of efficiency and political efficacy, in arguments over affirmative action programs or reparations for slavery. This Essay begins from the premise that very different narratives of our nation's history polarize legal and political debate.

This Essay will explore the way histories of slavery have been used in judicial opinions, legal scholarship and popular political tracts to support conflicting arguments about racial justice, affirmative action, and reparations for African Americans.³ While it is not remarkable that advocates of redress for slavery depend on historical arguments to make their case, the prevalence of history in conservative discussions of race is perhaps more surprising. I argue that we can better understand the distance between the conservative and the liberal positions on racial remediation if we understand the histories on which they rely. Further, I suggest that liberals have not sufficiently engaged the historical premises of the conservatives' arguments against measures designed to redress slavery's harms.

In this Essay, I use the terms "conservative" and "liberal" in their conventional contemporary political senses, to represent political "right" and "left" broadly construed. More specifically, I use them to represent those who support some form of government-sponsored redress for racial injustice, and those who oppose any such policies. It is certainly arguable that the political "conservatives" to whom I refer have an activist agenda that would reshape American law in a way that is not conservative at all; likewise, some of the "liberal" arguments I outline here may not be examples of liberalism strictly defined. I have tried to distinguish between the "liberal" arguments of Justices Brennan and Marshall and the more radical arguments of academic commentators. I have also tried to point out instances in which contemporary conservatives have adopted, or co-opted, arguments that were previously tenets of liberalism.

I do not attempt in this brief Essay, however, to spin alternative histories of my own, nor to critique fully each of the historical strategies I catalogue here. My own sympathies lie with arguments in favor of some form of remedy for racial injustice, but my purposes here are primarily descriptive and interpretive: to reveal the rhetorical strategies and historical moves that underlie

3. In this Essay, I use the terms "black" and "African American" interchangeably to refer to the descendants of slaves, and other people socially and politically identified as "black" in the United States. See Ariela Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 YALE L.J. 109 (1998), for an extended discussion of the historical legal construction of racial identity in the United States.

legal and political positions, and to suggest some of the questions they raise.

Part I explains briefly why history is so critical to contemporary discussions about racial injustice. Part II examines three chief strategies in conservative historical argument: first, depicting slavery as part of a teleological progression towards freedom, glossing over the Jim Crow era and post-slavery racial injustice; second, portraying slavery and Jim Crow as temporary deviations from a continuous American tradition of freedom and colorblindness; and third, decoupling slavery from race by arguing that slavery was not caused by racism, and emphasizing the blacks who owned or traded slaves and the whites who did not.

Part III of the Essay canvasses several approaches to history among liberals or radicals who defend efforts to redress racial injustice: first, an emphasis on the legacies of slavery, and in particular on the continuing harms of the Jim Crow era; second, a progressive view of American history, which emphasizes the “living Constitution,” not as ratified in 1787 but as it has evolved over the last two centuries to embody anti-subordination principles; and third, a history of the interdependence of black slavery and white freedom and privilege. The “remember Jim Crow” story is an effective counterpoint to the “slavery to freedom” story, and yet it has rarely been elaborated to argue against some of the conservative corollaries to this narrative. The “living Constitution” view is opposed to the “continuous colorblindness” history that celebrates the 1787 Constitution, yet most proponents of the evolving Constitution do not directly dispute the view that slavery was a temporary aberration from a continuous colorblind principle. Finally, the most promising and least developed historical narrative is the “black slavery/white privilege” story, which counters conservatives’ “decouple slavery from race” strategy.

I will also consider two other liberal or radical approaches to history, neither of which is represented in judicial opinions, but both of which have found articulation among legal academics. The first is a more pessimistic approach, in some ways an anti-progressive view of history, emphasizing the static nature of racism and inequality in the United States. The second is a more optimistic embrace of “popular constitutionalism” for alternative visions of the Constitution (in some ways building on the liberal justices’ version of “living constitutionalism”).

I will conclude by suggesting that liberals must not only refute the conservative histories but build their own histories of slavery, anti-slavery and movements for racial redress in order to strengthen arguments in favor of remedies for racial injustice “from the bottom up.”⁴ Furthermore, I argue that even structural, forward-looking remedies require historical grounding. The most compelling historical narratives are those that emphasize the links

4. For a perspective of “history-from-the-bottom-up,” see Robert W. Gordon, *The Struggle Over The Past*, 44 CLEV. ST. L. REV. 123, 138 (1996).

between black slavery and white freedom, as well as the connections between the relatively recent injustices of the Jim Crow era and the inequality that continues today.

I

WHY CARE ABOUT HISTORY?

A frequent response to the historical narratives embedded in legal and political arguments, from both liberal and conservative perspectives is: who cares? What difference does it make which historical narratives political or legal actors use to dress up their policy positions? The stories are outcome-driven—and they should be. Better yet, we should forget about history, and address contemporary problems of inequality as they exist right now, with forward-looking solutions. History cannot tell us whether or how to address injustice or inequality.

Yet the “forget about history” narrative itself has a view of history embedded in it. First, this perspective assumes that a historicist approach will inevitably involve casting blame, that looking backward will inevitably lock us into a perpetrator-victim model. Second, it assumes that history is too messy, too uncertain, too manipulable, or too open to disagreement to yield useful answers.⁵

These assumptions are misguided. A historicist approach does not necessitate a focus on individual perpetrators and victims of harm; it may go hand in hand with structural explanations for injustice that require structural remedies. Furthermore, the fact that many historical narratives are possible, and vie with one another in the public imagination, does not mean that we cannot distinguish among these histories. And we have an obligation to do so. For the “Who cares about history?” view ignores the real cultural resonance of the histories of slavery. Legal and political actors tell and re-tell these histories because they seek to persuade audiences of the moral force of their claims. Slavery has a hold on our imaginations because it is a nearly unimaginable horror. The way we tell the story of slavery and freedom matters to the arguments we make, and those arguments shape the histories we tell.

II

CONSERVATIVE HISTORIES OF SLAVERY

The narratives I am calling conservative histories of slavery actually cross the political spectrum to some extent. The “slavery to freedom” story, in particular, is so pervasive in our popular culture as to be almost a national

5. This is often the response of academic historians to the “misuses” of academic history by lawyers and law professors. See, e.g., Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L. J. 1663 (1988).

narrative. Political conservatives, however, play out the implications of this history in ways that are not so widely shared. It is also ironic that the first historical narrative, a story of progress from slavery to freedom, is borrowed in large part from mid-twentieth century liberalism. Indeed, co-opting colorblindness as a conservative slogan against liberal, race-based remediation was part of the neo-conservative transformation of the “slavery to freedom” story as an argument against, rather than in favor of racial redress.⁶

The themes of “slavery to freedom” and “continuous colorblindness” appear somewhat at odds, and they are certainly in tension. The “slavery to freedom” progress story fits uncomfortably with fidelity to the 1787 Constitution. Reverence for the Constitution forces *legal* conservatives to explain why 1787 was a high point despite the existence of slavery. The “continuous colorblindness” story fits the originalist constitutional narrative better.

Finally, the historical strategy of decoupling slavery from race has been an extremely effective rhetorical gesture to weaken a sense of moral responsibility for the past. Although there is no logical link between slavery as a racial institution and slavery as an institution for which today’s government, or today’s society, bears some responsibility, the omnipresence of slavery in world history has been part of many arguments against reparations for slavery.⁷

A. Slavery to Freedom

One conservative version of history is the teleological “slavery to freedom” story, in which the story of slavery is presented as almost a prelude to abolition and to the inevitable unfolding of freedom.⁸ According to this history, slavery was the great and terrible wrong, while Jim Crow is glossed over; slavery has no permanent legacies, unless they are cultural legacies, which cannot be remedied by law. While the horror of slavery is readily acknowledged, it is left firmly in the past, as when George W. Bush spoke in Senegal about the horrors of the slave trade but made no mention of post-slavery racial wrongs.⁹

6. See NANCY McLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 225-64 (2006); Ian Haney Lopez, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 996-1063 (2007).

7. See *infra* Part I.C.

8. Robert W. Gordon, discussing different versions of historicism, distinguishes between narratives of progress and teleological narratives: “a narrative of progress is one in which the legal system is seen as obeying a long-term process of historical transformation” and “a teleological narrative is one which shows legal forms working themselves pure over time to reveal their core of immanent principle.” Robert W. Gordon, *The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1023 (1997). See also Amy Kapczynski, *Historicism, Progress, and The Redemptive Constitution*, 26 CARDOZO L. REV. 1041, 1087 (stating that “[a]ppplied to the Constitution, Benjamin’s concept of progress is a marriage between what Robert Gordon calls progressive and teleological forms of history.”)

9. See President Bush Spcaks at Goree Island in Senegal (July 8, 2003),

Indeed, dwelling on the history of slavery, in isolation from the hundred years that followed it, can actually minimize one's sense of contemporary racial injustice, leaving the harms of the past comfortably in the past. When viewed in this light, slavery is safe to commemorate (and even to congratulate oneself for commemorating) precisely because it *cannot* be redressed, because we were not its perpetrators, because it was not us.

By emphasizing the movement from slavery to freedom and the inevitability of slavery giving way to freedom, telling the story of slavery can lead directly to celebrating the freedom story. In mainstream historiography (not so much in scholarly writing, but in textbooks, media representations, public hagiography), this plays out in the prominence given to histories of the Civil War and the end of slavery as compared to the three hundred and fifty years of the day-to-day experience of slavery. Think, for example, of the many movies featuring a white abolitionist leader as the hero rather than a black slave or ex-slave (most recently, *Amazing Grace*; *Glory*; *Amistad*). The viewer identifies with the triumph of liberation, rather than the shame, or the horror, of enslavement.

I. Glossing over Jim Crow

One corollary of leaving slavery in the deep past and celebrating freedom is to gloss over the Jim Crow regime of violence, segregation and exclusion from political, economic, and social life that held sway in the South and Southwest for a century after slavery. For example, omitting or eliding the history of Jim Crow makes African Americans the only possible beneficiaries of policies of redress. As Justice Potter Stewart wrote in his dissent in *Fullilove v. Klutznick*, "How does the legacy of slavery and the history of discrimination against the descendants of its victims support a preference for Spanish-speaking citizens?"¹⁰ Affirmative action for Mexican Americans makes no sense if one does not acknowledge the harms of Jim Crow, which targeted Mexican Americans as well as blacks in the Southwest. (Of course, reparations for slavery create the same limitation, redressing harm only to African Americans.)

Glossing over Jim Crow and the legacies of slavery also minimizes the connections between the time of slavery and now. One conservative strategy in the argument against reparations for slavery is to demonstrate that other problems are the proximate cause of continuing racial inequality, which breaks the chain of causation between slavery and contemporary inequality.¹¹ The

<http://www.whitehouse.gov/news/releases/2003/07/20030708-1.html> (last visited Jan. 28, 2008).

10. *Fullilove v. Klutznick*, 448 U.S. 448, 553 n.30 (1980).

11. The term "pathology" in this context originated in the writings of the mid-twentieth century liberal sociologist, E. Franklin Frazier (*The Negro Family*, 1939), and was adopted and made famous by Daniel Patrick Moynihan in the so-called "Moynihan Report," itself an argument for aggressive reinedial government programs. Daniel P. Moynihan, *The Negro Family: The Case for National Action*, *Office of Policy Planning and Research*, Department of Labor (1965).

main point of this argument is to show that current inequality is caused by “pathologies” of black culture, not by the legacy of slavery. Again, to accept this argument one must deny the history of Jim Crow, for even if one accepts a negative view of contemporary black culture, it is only possible to disconnect current conditions from the past by ignoring the century or more of Jim Crow practices. Thus, the conservative tendency to gloss over Jim Crow allows for arguments that disconnect current policies of redress for racial harms from historical oppression and slavery.

2. Celebrating anti-slavery as debt paid to ex-slaves

Another corollary of the “slavery to freedom” story in contemporary conservative writings is to celebrate abolitionism as uniquely Western, American, Christian, and/or white.¹² This focus downplays the concept of the slave trade as the great wrong perpetrated by the Western powers against the peoples of Africa; instead, it raises up anti-slavery as the West’s gift to Africa. Furthermore, this version of history undergirds the strongest argument waged against slavery reparations by political conservatives: that “the debt has been paid already.”¹³ By focusing on anti-slavery rather than slavery, the Civil War rather than the 350 years of enslavement, white abolitionists rather than black abolitionists, and white Union soldiers rather than black Union soldiers, conservatives can argue that the debt for slavery was repaid by emancipation. Additionally, conservatives argue that the very affirmative action programs against which they have fought are themselves repayment for the debt of slavery.¹⁴

In the last several years, civil rights litigators have brought numerous suits for reparations for slavery against the U.S. government, states, and corporations, many of which were consolidated in the Northern District of Illinois.¹⁵ In dismissing the cases two years ago in the first substantive legal opinion on reparations in a federal court, the Illinois court made exactly the historical argument outlined above, weighing the harm of slavery against the harm of the Civil War:

It is beyond debate that slavery has caused tremendous suffering and

However, conservative commentators and scholars adopted the concept of pathologies of black culture to argue against programs of racial remediation.

12. See, e.g., DINESH D’SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 100 (1995).

13. The phrase “the debt has been paid already” comes from David Horowitz, Karl Zinmeister, and others. See, e.g., *infra* notes 21-23.

14. *Id.*

15. See *In re African American Slave Descendants Litig.*, 375 F. Supp. 2d 721 (2005), *aff’d in part and rev’d in part and modified in part*, 471 F.3d 754 (7th Cir. 2006). There have been other isolated reparations claims brought by individuals, but these have always been dismissed summarily without reaching any of the central arguments over reparations more broadly. See, e.g., *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995).

ineliminable scars throughout our Nation's history. No reasonable person can fail to recognize the malignant impact, in body and spirit, on the millions of human beings held as slaves in the United States. Neither can any reasonable person, however, fail to appreciate the massive, comprehensive, and dedicated undertaking of the free to liberate the enslaved and preserve the Union. Millions fought in our Civil War. Approximately six hundred and twenty thousand died. Three hundred and sixty thousand of these individuals were Union troops . . . The enslavers in the United States who resisted or failed to end human chattel slavery sustained great personal and economic loss during and following the four years of the War. Generations of Americans were burdened with paying the social, political, and financial costs of this horrific War. Finally, in 1865, this great human and economic tragedy ended.¹⁶

In the history told by the Illinois Court, slaveholders paid for whatever debt the nation owed to slaves with the nation's financial losses during the Civil War; Union soldiers paid with their lives, and future generations continued to pay the War's "social, political, and financial costs."¹⁷ Interestingly, the historical link that is assumed here—that the Civil War was in fact fought to end slavery—is one challenged on both the political left and right. Many Southerners argue that the South fought for states' rights rather than to defend slavery,¹⁸ while revisionist historians argue that Union soldiers fought to defend white "free labor" from being swallowed up by the "Slave power" rather than to free black slaves.¹⁹

The Illinois Court's argument also relies on the more fundamental "slavery to freedom" story, in which ex-slaves quickly realized their promised future:

The freed slaves then began another journey, this time not from captivity to slavery, but from slavery to citizenship and equality under the law. . . . [T]he dark clouds following the War were giving way to a future brighter than the great majority could have imagined in 1865. The extremely difficult task of amending the Constitution three times was accomplished in approximately five years, granting former slaves freedom, citizenship, and the right to vote. The citizens of the Union would move onward to meet the challenge made by President Lincoln on March 4, 1865, "to achieve and cherish a just and lasting peace,

16. 375 F. Supp. 2d at 780.

17. *Id.*

18. For contemporary expressions of this popular view, see, e.g., ALBERT TAYLOR BLEDSOE, *THE WAR BETWEEN THE STATES, OR, WAS SECESSION A CONSTITUTIONAL RIGHT PREVIOUS TO THE WAR OF 1861-65?* (2005); "States' Rights," <http://www.civilwarhome.com/staterights.htm> (last visited Jan. 28, 2008); "The War for State's Rights," <http://civilwar.bluegrass.net> (last visited Jan. 28, 2008).

19. See, e.g., ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1971), for an elaboration of free labor ideology.

among ourselves and with all nations.”²⁰

Despite some kinks in the system, the Illinois Court tells us, ex-slaves could see a bright future as soon as slavery came to an end, and the real story is the freedom story.

At its most tendentious, the conservative argument against reparations suggests blacks should be grateful to whites for the course of American history: conservative writer and activist David Horowitz, in an advertisement widely distributed in campus newspapers, asks:

What About the Debt Blacks Owe to America? Slavery existed for thousands of years before the Atlantic slave trade, and in all societies. But in the thousand years of slavery's existence, there never was an anti-slavery movement until white Anglo-Saxon Christians created one . . . blacks in America . . . enjoy the highest standard of living of blacks anywhere in the world, and indeed one of the highest standards of living of any people in the world. . . . Where is the acknowledgment of black America and its leaders for those gifts?²¹

Ironically, conservatives opposed to reparations for slavery often extend the argument that the debt has been paid already to the claim that the debt has been paid through the government programs of the last forty years, including affirmative action. As black conservative pundit John McWhorter explains, “for almost forty years America has been granting blacks what any outside observer would rightly call reparations.”²² To the same effect, Karl Zinmeister, editor-in-chief of *The American Enterprise* and domestic policy adviser to President Bush, argues that the “bill [for slavery] was finally paid off, in blood,” but also in what he estimates to be \$6.1 trillion in government anti-poverty spending targeted at the black underclass since the Great Society.²³ This argument fits uneasily with conservatives own opposition to such government programs since it assumes that at some point the programs were warranted to pay back slavery's debt.

Thus, conservatives opposing slavery reparations have picked up on a sub-theme of the “slavery to freedom” story—the idea that anti-slavery, rather than slavery, was the West's unique contribution to world history—in order to argue that any debt for slavery has been paid.

20. 375 F. Supp. 2d at 780 (citing President Lincoln's Second Inaugural Address).

21. DAVID HOROWITZ, *UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY* 15 (2002). Horowitz also states that “America is the first predominantly white society to free its black slaves, and it did so long before black societies freed *theirs*. This is the history that needs recognition.” *Id.* at 74.

22. John McWhorter, *Against Reparations: Why African Americans Can Believe in America*, *NEW REPUBLIC*, July 23, 2001, at 32.

23. Karl Zinmeister, *Has the Debt Been Paid?*, 12 *AMERICAN ENTERPRISE* 4, 6 (July-August 2001). Zinmeister, like other conservatives, cites Walter E. Williams, an economist at George Mason University, for the figure of \$6.1 trillion. *Id.*

3. *The Party of Lincoln*

The “slavery to freedom” story also plays out in efforts to recruit blacks to conservative political causes. Conservatives seeking to attract African Americans to the Republican Party re-tell the history of slavery and freedom as a celebratory narrative about the Republican Party. Numerous Republican websites refer to the GOP as the “Party of Lincoln.”²⁴ George W. Bush has repeatedly compared his own war in Iraq with Lincoln’s battle to end slavery.²⁵ According to the New York Times, “Bush has adorned the White House with busts and portraits of Lincoln, and his [now former] political strategist, Karl Rove, keeps in his office a famous photograph of Lincoln, before he grew his beard, from the campaign of 1860.”²⁶ In 2005, the GOP released a “Republican Freedom Calendar” commemorating Republican civil rights achievements, beginning with the end of slavery. It portrays slavery as “the most egregious form of statism”²⁷ and states that it was the “Republican commitment to individual freedom” that “led our nation through Reconstruction.”²⁸ This Republican narrative seamlessly connects nineteenth century history to the more recent past of the civil rights movement and the supposed Republican role in passing the 1965 Voting Rights Act (VRA).²⁹ When President Bush addressed the NAACP in 2006, he acknowledged that the nation’s founding was “imperfect” because it excluded “whole categories of human beings” from its promise of equality, but also stated that there has been a “new founding” that “began with the civil rights movement and the Voting Rights Act of 1965.”³⁰ Republican Party websites consistently emphasize the segregationist Southern “Democrat” opposition to the VRA and other civil rights legislation.³¹

By drawing the connections between the Republican Party’s origins as an anti-slavery party and its “colorblind” policies today, and invoking the legacy of Abraham Lincoln, conservative politicians seek to re-tell their own history as part of a continuous trajectory from slavery to freedom.

24. See, e.g., <http://www.republicanbasics.com> (last visited Jan. 28, 2008); <http://www.gop.org/Teams/AfricanAmericans/> (last visited Jan. 28, 2008).

25. Warren Vieth, *Bush Harks Back to Lincoln's Example; The President Dedicates a Springfield, Ill., Museum to the Civil War-Era Leader, Drawing Comparisons to Struggles for Freedom Today*, L.A. TIMES, April 20, 2005, at A18.

26. David E. Sanger, *At Lincoln Library Dedication, Bush Relates to an Earlier Time*, N.Y. TIMES, April 20, 2005, at A20.

27. Christopher Cox, Unidentified Speech: Honoring 150 Years of Republican Civil Rights Achievements (introducing the 2005 Republican Freedom Calendar), available at <http://www.ccr.org/CivilRights.htm> (last visited Jan. 28, 2008).

28. *Id.*

29. *Id.* The calendar is available at http://www.carnellknowledge.com/pdfs/2005_calendarSM.pdf (last visited Jan. 28, 2008).

30. President Bush Addresses NAACP Annual Convention, (July 20, 2006), <http://www.whitehouse.gov/news/releases/2006/07/20060720.html> (last visited Jan. 28, 2008).

31. See, e.g., National Black Republican Association, www.nbna.info (last visited Jan. 28, 2008); Back to Basics for the Republican Party, <http://www.republicanbasics.com> (last visited Jan. 28, 2008).

4. 1964-65: *The Zenith of Race Relations*

The conservative “slavery to freedom” story describes the course of American history as a sweep upward to a peak in 1964 or 1965, followed by decline in the forty years since, perhaps with a brief recent upturn. This version of history is described in detail by the conservative historian Herman Belz.³² “Black history, as a part of American history, is the story of the Americanization of people brought to this country from Africa for purposes of labor and service.”³³ Such an interpretation makes slavery not a story in itself, but simply the circumstance underlying blacks’ “labor and service” in the United States.³⁴ To Belz, “[d]ecisive events in this story include the American Revolution, which led to the founding of the American Republic, and the Civil War, as a result of which blacks were emancipated from slavery and enfranchised as citizens of the United States.”³⁵ Belz argues that emancipation was not a “social revolution” but rather, “the abolition of slavery and the enfranchisement of blacks [was] a *completion* of the Constitution.”³⁶ By contrast, “[r]ace-preferential affirmative action . . . can fairly be described as a revolutionary project against the Constitution and the laws of the nation.”³⁷ This is one example of the way conservatives marry the “slavery to freedom” story to the notion that both slavery and affirmative action were deviations from a timeless principle of colorblindness. In Belz’s terms, slavery deviated from the Constitution, but abolition completed the Constitution; affirmative action is a project against the Constitution. The timeless principles of the Constitution, according to Belz, are “equal liberty and citizenship rights.”³⁸ These are the “principles of the Founding, grounded in reason and justice in the tradition of western civilization.”³⁹ They were then “written into the Reconstruction amendments” and “embodi[ed] and implement[ed] . . . in the Civil Rights Acts of 1964 and 1965,” which then “resolved the American Dilemma [of race].”⁴⁰

And to conservatives, history followed a downhill arc after 1964-65, at least until the last decade, when courts began to undo affirmative action. As Clint Bolick, an assistant to Clarence Thomas at the EEOC, Republican Justice Department lawyer, and now prominent conservative litigator, wrote, “Slavery

32. Herman Belz, *Conservative Principles and Black History: Affirmative Action and Identity Politics*, Address to the Philadelphia Society’s Fall Regional Meeting (October 2, 2004), available at <http://members.cox.net/weampbell14/belzbh.htm> (last visited Jan. 28, 2008).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* (emphasis added).

37. *Id.*

38. Belz, *supra* note 32.

39. *Id.*

40. *Id.*

was a stark anomaly in the midst of the American conception of civil rights,"⁴¹ and the Civil Rights Act of 1964 was "the apex of the golden decade in the quest for civil rights . . . Equal opportunity had triumphed."⁴² That apex was immediately followed by "crises" in which the "quest [was] abandoned."⁴³ The period 1964-65 is the conservatives' "irenic moment" of perfect colorblindness, despite the fact that most conservatives opposed the Civil Rights Act and Voting Rights Act at the time.⁴⁴ Bolick explains that "the great triumphs in the quest for civil rights—the abolition of slavery, the constitutional guarantee of equal protection, the repudiation of Jim Crow—all were informed by this [colorblind, classical liberal] vision."⁴⁵

The view that colorblindness is the timeless American principle keeps conservatives focused on what they consider the important story: not slavery but the end of slavery; not Jim Crow, but the end of Jim Crow; not whites as enslavers, but whites as abolitionists.

B. The Continuous Colorblind Principle

Bolick's portrayal of the Civil Rights Act of 1964 as the "apex" of the history of race in America, with a decline in the post-1964 years, points us toward the second version of conservative history: that slavery and Jim Crow were transitory deviations from the American tradition of freedom and color blindness.⁴⁶ In the past, we departed from our principles and discriminated against blacks by legally mandating slavery and segregation on the basis of race. Since 1965, we have been deviating in the other direction, discriminating against whites, by legally mandating what conservatives refer to as racial preferences in employment and education. As legal historian Robert Gordon has written,

The position seems at first glance completely antihistorical: After the Civil Rights Act of 1964, America is born anew and born into a

41. CLINT BOLICK, *CHANGING COURSE: CIVIL RIGHTS AT THE CROSSROADS* 13 (1988).

42. *Id.* at 49.

43. *Id.* at 53.

44. Robert Gordon has called 1964-65 the "irenic moment" for conservatives. Robert W. Gordon, *Undoing Historical Injustice*, in *JUSTICE AND INJUSTICE IN LAW AND LEGAL THEORY* 35 (Austin Sarat & Thomas R. Kearns, eds., 1996). For another view of 1964 as the "apex," see CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION, A FIRST-HAND ACCOUNT* 90-91 (1991):

The Civil War Amendments and the Reconstruction-era civil-rights acts abolished slavery and were supposed to remove race-based legal disabilities, but blacks were not equal before the law until 1954, when, in *Brown v. Board* and its progeny, the Supreme Court made clear that state segregation, by way of the separate-but-equal sophism, was constitutionally forbidden. But this was not enough . . . For blacks finally to enjoy real equality, private as well as government racism had to be rooted out, and under Hubert Humphrey's leadership this was the simple purpose of the Civil Rights Act of 1964.

45. CLINT BOLICK, *THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION?* 38 (1996).

46. BOLICK, *CHANGING COURSE*, *supra* note 41, at 49.

presumptive condition of color blindness; the past has become simply irrelevant. . . . Yet inspected more closely, the position . . . is rooted in a conservative historical narrative of deep continuities subjected to temporary interruptions and deviations. [This narrative] establish[es] that America's traditional, indeed Constitutional, Grundnorm of legal equality means color blindness and nothing else.⁴⁷

There are two important corollaries to this history: first, that the Constitution of 1787 was an anti-slavery document; the Reconstruction Amendments and Civil Rights Acts of 1964 and 1965 completed the Constitution, bringing its principles to fruition. According to this view, those principles were already imminent in the 1787 Constitution; it was never a flawed document and it should be revered and celebrated in its original form. Second, that there is parity between slavery and affirmative action (or what conservatives call "reverse discrimination"): both are deviations from the norm of colorblindness, and they are parallel harms. I will consider each of these corollaries in turn.

1. Timeless principles of the 1787 Constitution

The view that the 1787 Constitution contained within it timeless principles of anti-slavery and equality is especially important to legal conservatives who are anxious to vindicate the Framers' Constitution from criticism. Generally, this narrative is wielded against historians and advocates of a jurisprudence of living constitutionalism, who claim that the original Constitution was flawed by its support for slavery. When Supreme Court Justice Thurgood Marshall, who popularized the term "living constitution," gave his famous speech on May 6, 1987, cautioning against the "flag-waving fervor" of the bicentennial celebration of the Constitution,⁴⁸ then-Assistant Attorney General William Bradford Reynolds responded in a speech later that month at Vanderbilt Law School. Reynolds agreed that Justice Marshall was "absolutely right to remind us of . . . the most tragic aspects of the American experience" but rejected the idea that there "are two constitutions, the one of 1787" and a new amended one.⁴⁹ According to legal conservatives such as Reynolds, the 1787 Constitution was great because it provided for amendment. Even if it did acknowledge or lend support to slavery, that support was necessary to the political compromise that secured the document's ratification.⁵⁰ Similarly, popular conservative writer Dinesh D'Souza, in a chapter provocatively entitled

47. Gordon, *supra* note 44, at 51-52.

48. Remarks of Thurgood Marshall at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii, May 6, 1987, available at <http://www.thurgoodmarshall.com/speeches>, reprinted in *Commentary: Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987).

49. William Bradford Reynolds, *Another View: Our Magnificent Constitution*, 40 V AND. L. REV. 1343, 1345 (1987).

50. *Id.* at 1346-47.

"An American Dilemma: Was Slavery A Racist Institution?," seeks to vindicate the Constitution by portraying the compromises over slavery not as a deal with the devil, but as a nod to democracy. According to D'Souza, "[t]he American framers found a middle ground . . . between antislavery and popular consent . . . [b]y producing a Constitution in which the concept of slavery is tolerated, in deference to consent, but nowhere given any moral approval, in recognition of the slave's natural rights."⁵¹ Of course, his notion of popular consent here must necessarily be limited to those property-holding white males eligible to vote at the ratifying conventions, as other Americans had no meaningful opportunity to agree to the constitutional compromise. Thus, in D'Souza's and Reynold's narratives, the 1787 Constitution was not flawed by its support for slavery, and did not require transformation.

2. *Frederick Douglass and Dred Scott*

In order to support this rosy view of the 1787 Constitution, many conservative commentators invoke their favorite African American leader of the past, Frederick Douglass. Douglass is attractive to conservatives because he sought to work within the political structures of the Union to fight slavery, and eventually rejected the view that the Constitution was a pro-slavery document.⁵² Reynolds, for example, bolsters the argument that "the Constitution, by its omission of any mention of slavery, did not tolerate slavery," by quoting Douglass' pronouncement that "[i]n that instrument, I hold there is neither warrant, license, nor sanction of the hateful thing."⁵³

Invoking Frederick Douglass to support the view of the 1787 Constitution as an anti-slavery document has obvious attractions. Yet Douglass makes an awkward standard-bearer for conservatives. His anti-slavery interpretation of the Constitution rested on a resolute textualism and anti-intentionalism that are problematic for advocates of originalist modes of constitutional interpretation, who not only revere the 1787 Constitution but seek to interpret today's Constitution in light of its original meaning in 1787. Douglass famously argued that "[t]he paper itself and only the paper itself, with its own plainly written purposes, is the constitution. . . . What will the people of America a hundred years hence, care about the intentions of the men who framed the constitution of the United States?"⁵⁴

Conservatives also rely on Frederick Douglass for the proposition that

51. D'SOUZA, *supra* note 12, at 109.

52. See, e.g., Frederick Douglass, *The Unconstitutionality of Slavery*, Lecture Delivered in Glasgow, Scotland (March 26, 1860), available at <http://medicolegal.tripod.com/douglassuos.htm> (last visited Jan. 28, 2008). Douglass was arguing against the view of prominent abolitionist William Lloyd Garrison that the Constitution was "a covenant with death, an agreement with hell." *Id.*

53. Reynolds, *supra* note 49, at 1347.

54. Douglass, *supra* note 52.

ending slavery required only the freedom to own one's own labor and to contract in the marketplace, rather than any affirmative steps to ensure equality. Dinesh D'Souza, for example, writes, "What do Americans today owe blacks because of slavery? The answer is: probably nothing . . . Frederick Douglass, who better than anyone understood the lasting harms inflicted by slavery, argued that it entitled blacks to nothing more than the freedom to help themselves."⁵⁵ Clint Bolick quotes Douglass for the proposition that "[p]eace between races is not to be secured by degrading one race and exalting another."⁵⁶ Justice Thomas' dissent in *Grutter v. Bollinger* begins by quoting Douglass' 1865 speech, "What The Black Man Wants," for the proposition that African Americans want only to be "let alone."⁵⁷ However, Douglass made this speech, presumably the same one to which D'Souza referred, in response to Freedman's Bureau agents' paternalist coercion of ex-slaves into year-long employment and marriage contracts. Douglass remonstrated with abolitionists:

What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us . . . I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played great mischief with us. Do nothing with us!⁵⁸

Douglass' call for justice and an end to mischief, in this context, hardly seems like an argument for colorblindness of the kind conservatives have in mind.

Conservative histories arguing for timeless *constitutional* principles of colorblindness must reckon with the text of the original Constitution and the evidence of the debates and compromises that led to its ratification.⁵⁹ They must also deal with the jurisprudence of slavery in the decades afterward, especially *Dred Scott v. Sandford*, the case in which a severely divided U.S. Supreme Court declared that even free blacks could not be citizens, and held

55. D'SOUZA, *supra* note 12, at 113 (citing Frederick Douglass in PHILIP S. FONER, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 188-90* (1950)). See also BOLICK, *CHANGING COURSE*, *supra* note 41, at 34-35 (showcasing Douglass and Booker T. Washington as the only beacons for "progress and leadership" in U.S. black history, and noting that blacks who followed Washington's accommodationist lead in the Jim Crow era "scored impressive gains . . . in terms of both economic and educational growth."); Seymour Martin Lipset, *Equal Chances versus Equal Results*, 523 ANNALS AM. ACAD. POL. & SOC. SCI. 63, 73 (1992).

56. BOLICK, *CHANGING COURSE*, *supra* note 41, at 24.

57. *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (J. Thomas, dissenting) (citing Frederick Douglass, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts on 26 January 1865*, reprinted in 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (J. Blasingame & J. McKivigan eds. 1991)).

58. Frederick Douglass, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865*, reprinted in 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (J. Blasingame & J. McKivigan eds., 1991) (emphasis in original).

59. See, e.g., WILLIAM M. WIECK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* 62-83 (1977).

the Missouri Compromise to be unconstitutional.⁶⁰

Most conservatives take the position that *Dred Scott* was wrongly decided, and that Chief Justice Taney's interpretation of the Constitution as pro-slavery was incorrect. They thus reject Thurgood Marshall's assertion that Taney only "reaffirmed the prevailing opinion of the Framers regarding the rights of Negroes in America."⁶¹ Instead, Chief Justice Taney's opinion becomes, for conservatives, not only wrong but the symbol of "judicial activism" because Taney departed from the timeless principles of colorblindness they believe have always been immanent in the Constitution.

For example, in William Bradford Reynolds' 1987 critique of Thurgood Marshall, Reynolds went on to equate the Supreme Court's overreaching—its "failure to follow the terms of the Constitution"—in *Dred Scott* and *Plessy v. Ferguson* with "judicial activism," which ought to be avoided by "the present Court as it struggles with similar issues involving race and gender discrimination."⁶² (Rhetorically, affirmative action and slavery are placed in parallel here.) Constitutional scholar Christopher Eisgruber has called this the "*Dred Again* theory" of Judge Robert Bork, Justice Antonin Scalia and other legal conservatives regarding substantive due process.⁶³ As Bork stated the theory, "Who says *Roe* must say *Lochner* and *Scott*," damning the *Roe v. Wade* abortion rights case by equating it with *Dred Scott* as an equivalent example of judicial activism and substantive due process.⁶⁴ Bork argues that "Taney intended to read into the Constitution the legality of slavery forever," and did so in an opinion that was a "sham" because it transformed "the due process clause from a procedural to a substantive requirement" and "created a powerful means for later judges to usurp power the actual Constitution places in the American people."⁶⁵ Eisgruber points out the irony of Bork's repudiation of *Dred Scott*: Taney's opinion was a thoroughgoing exercise of conservatives' favorite interpretive theory, originalism, even if not an example of originalism at its best. Eisgruber calls it a "riot of originalism."⁶⁶

60. *Scott v. Sandford*, 60 U.S. 393 (1857).

61. Marshall, *supra* note 46.

62. Reynolds, *supra* note 49, at 1348-49.

63. See Christopher Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 CONST. COMMENT. 37, 38 (1993).

64. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 32 (1990).

65. *Id.* at 30-31.

66. Eisgruber, *supra* note 63, at 46. In his brilliant exegesis, Mark Graber points out that nearly every contemporary constitutional theorist considers *Dred Scott* to have been wrongly decided, evidenced by descriptions such as "a ghastly error," "a gross abuse of trust," "a lie before God," and "an abomination." MARK GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 16-17 (2006). Critics of judicial activism and originalists (what Graber calls "institutional theorists" and "historicists") criticize the Taney opinion from the right. "Aspirational theorists," like Eisgruber, argue the reverse, that "the Taney opinion demonstrates the evils that result when constitutional authorities are too tethered to precedent or the original meaning of the Constitution."

The conservative strategy, however, is to determine a timeless principle, and then to consider all contrary evidence to be aberrant deviations from that principle, or even examples of judicial activism, precisely because they departed from the supposed inherent principle. As Clint Bolick explained,

To their credit, the framers crafted a magnificent and enduring document creating a government of limited powers. The influence of the natural rights philosophy was apparent throughout the document . . . But on the matter of slavery, the framers were unable or unwilling to apply these general principles. The *Dred Scott* ruling thus utterly repudiated the principles of civil rights, and elevated into constitutional law the perverted ideology of the pro-slavery advocates.⁶⁷

Thus, for conservatives, *Dred Scott* represents a deviation from the true Constitution, rather than an expression of the Court's antebellum jurisprudence of slavery. It also represents the precedent for future deviations in the other direction, namely, so-called judicial activism on behalf of women, African Americans, and other minorities.

3. *Slavery and affirmative action as deviations from colorblindness*

Many examples of the "continuity of colorblindness" history can be found in the conservative jurisprudence of strict scrutiny for what used to be called "benign" racial classifications—in other words, in anti-affirmative action opinions. For example, Justice Scalia, concurring in *Adarand Constructors, Inc. v. Peña*, wrote: "To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege, and race hatred."⁶⁸ Justice Clarence Thomas, in his concurrence, wrote: "the paternalism that appears to lie at the heart of this [affirmative action] program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence."⁶⁹ Scalia's opinion emphasizes the parallelism between slavery and affirmative action, both deviations from colorblind equality; Thomas's opinion focuses on the timelessness of the colorblind principle, which he dates back to the Constitution, as read through the Declaration—a technique favored by Frederick Douglass. Allen Kamp calls this rhetorical technique of equating affirmative action with slavery, the "vertical flip."⁷⁰

Even the Powell opinion in *Bakke v. UC Board of Regents*, which many

67. BOLICK, AFFIRMATIVE ACTION FRAUD, *supra* note 45, at 16.

68. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995). Justice Scalia also states "there can be no such thing as either a creditor or a debtor race." *Id.*

69. *Id.* at 240.

70. Allen Kamp, *Vertical Flip* (2005) (unpublished paper on file with author). Kamp coins the phrase to describe the technique of transforming "the privileged . . . into the oppressed" by "equat[ing] liberalism with slavery." *Id.* at 1.

now view as a liberal opinion (although much of it argued vigorously against the four votes upholding UC Davis's affirmative action program), retells a history in which colorblindness is the timeless principle of U.S. constitutional history, punctuated by a series of unfortunate deviations.⁷¹ Powell wrote: "This [colorblind] perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history."⁷² In his view, the colorblindness principle went into "dormancy" during the late nineteenth century, "strangled in infancy by post-civil-war judicial reactionism."⁷³ In the meantime, "the United States had become a Nation of minorities," so it was appropriate for the Equal Protection guarantee to extend to all persons, including whites.⁷⁴

By considering both slavery and Jim Crow on the one hand, and affirmative action on the other hand, as deviations from the principle of colorblindness, these Justices adopted a well-established neo-conservative argument. Nathan Glazer wrote in 1975 that the Civil Rights Act of 1964 "could only be read as instituting into law Judge Harlan's famous dissent in *Plessy v. Ferguson*: 'Our Constitution is color-blind.'"⁷⁵ As historian Carol Horton suggests, in Glazer's "formulation, Jim Crow and affirmative action were moral equivalents, as both violated the principle of color-blindness."⁷⁶ This formulation quickly became the neo-conservative paradigm.

4. Conservative pro-reparations arguments

The timeless colorblind principle also provides the undergirding for conservative arguments *in favor* of reparations for slavery. Although few political conservatives have made this argument (only the journalist-pundit Charles Krauthammer and the erstwhile Senate candidate Alan Keyes have publicly argued for reparations), those who have rely on this version of history.⁷⁷ According to Krauthammer, reparations are a better remedy for racial injustice than affirmative action. First, because slavery, not Jim Crow, is the great harm to be redressed. Second, because a one-time remedy, rather than a continuing one, can return us quickly to the American tradition or norm of colorblindness.⁷⁸ Krauthammer has written: "It is time for a historic

71. *Bakke v. U.C. Board of Regents*, 438 U.S. 265, 291 (1976) (Powell, J., plurality).

72. *Id.*

73. *Id.* (citing Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 381 (1949)).

74. *Id.* at 292.

75. NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* 43-44 (1975) (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1886) (Harlan, J., dissenting)).

76. CAROL A. HORTON, *RACE AND THE MAKING OF AMERICAN LIBERALISM* 202 (2005).

77. See Allison Benedikt & David Mendell, *Keyes Has Plan for Reparations; He Would Exempt Blacks from Taxes*, CHI. TRIBUNE, Aug. 17, 2004, at C1; Charles Krauthammer, *Reparations for Black Americans*, TIME, December 31, 1990, at 18.

78. See Krauthammer, *supra* note 77, at 18.

compromise: a monetary reparation to blacks for centuries of oppression in return for the total abolition of all programs of racial preference. A one-time cash payment in return for a new era of irrevocable color blindness.”⁷⁹

The portrayal of U.S. history as the unfolding of a timeless principle of equality and colorblindness allows conservatives to accomplish several goals. On the one hand, if the 1787 Constitution already contained within it the principles of freedom and equality (despite its seeming support for slavery), then we should be faithful to its original meaning in our constitutional jurisprudence. On the other hand, when viewed in the light of timeless principles of colorblindness, race-conscious programs to benefit African Americans appear to be deviations from American norms, parallel to the deviation of slavery. While a few conservative commentators have followed this logic to argue for a one-time payment of slavery reparations, most reach the opposite conclusion about remedies.

C. Decouple Slavery and Race

The third conservative historical strategy is to argue that most slavery in human history has not been racial slavery; that even U.S. slavery was not a racial institution; that racism did not cause slavery; and that to talk about the links between slavery and race is a “distraction and an ineitement to counterproductive strife.”⁸⁰ By showing that slavery could exist without race, and that other factors besides race could lead to slavery, these authors seek to decouple slavery from race. This in turn serves to weaken the connection of whiteness to responsibility for slavery and of blackness to the harms of slavery.

While many historians would agree that U.S. slavery originated in the demand for labor in the Virginia tobacco fields and was not at first motivated by virulent racism, and many would agree that societal racism developed in early America out of the degradation of Africans and African Americans as slaves, few would follow those premises to the conclusion that U.S. slavery was not a racial institution. Nor would they claim that, by the time of the Founding, slavery and race were not inextricably enmeshed. Few historians of New World slavery would take the logical jump from slavery’s existence in the ancient world and other supposedly non-racialized contexts to the claim that in the New World—where by the early eighteenth century, no whites were enslaved and nearly all slaves had African ancestry—slavery was not a racial institution.⁸¹

Yet this is precisely the historical argument many conservative political commentators seek to defend. According to Dinesh D’Souza, who devotes

79. *Id.*

80. THOMAS SOWELL, *BLACK REDNECKS AND WHITE LIBERALS* 114 (2006).

81. In fact, many ancient historians today would dispute the notion that the ancient world was not a racialized context. See, e.g., Susan Lapc, *Racializing Democracy: The Politics of Sexual Reproduction in Classical Athens*, 9 *PARALLAX* 52 (2003).

several hundred pages of *The End of Racism* to the history of U.S. slavery, the Constitution was not a covenant with death; slavery was not a racist institution; slavery was not a uniquely Western form of iniquity; whites were not the only oppressors; and blacks were not the only victims.⁸² D'Souza, David Horowitz, John McWhorter and other conservative commentators all emphasize that slavery was practiced all over the world and that it was uncontroversial at the time it was introduced to the American continent.⁸³ Slavery in Africa was widespread, and, moreover, free blacks in the U.S. also held slaves. Indeed, these authors jump seamlessly from the African role in capturing slaves for the international trade to the tiny number of black slaveholders in the United States, most of whom owned family members.⁸⁴ McWhorter writes, "Africans themselves were avid and uncomplaining agents in the selling of other Africans to whites," and then uses this assertion to allege that slavery was therefore not a racial institution.⁸⁵

A history in which slavery is decoupled from race supports conservatives' second major argument against reparations for slavery, which falls under the general rubric of "no liability." According to this line of reasoning, Americans are not legally or morally responsible for an institution perpetrated by people who are now dead. As a legal argument, this could be put in terms of the statute of limitations having run on any crimes with which enslavers could be charged. More often, however, the claim against reparations is made by comparing current Americans to slaveholders, and arguing that today's Americans are not morally or legally liable for the evils of slavery, because most are not descendants of slaveholders.⁸⁶ Many current Americans are descendants of immigrants who were not present one hundred and fifty years ago. Others are descendants of people who did not own slaves or even people who fought against slavery. But many conservatives go even further to absolve today's white people from responsibility for the past of slavery. For example, both John McWhorter and David Horowitz directly link the "no liability" argument to the claim that "no single group" (i.e. whites) clearly benefited from slavery, that few whites owned slaves or benefited from slavery, that most blacks did not suffer from slavery, and therefore, that whites as a group do not "owe" blacks anything.⁸⁷ Of course, this argument elides two important questions: first, whether the government of the United States, which has had a continuous

82. See D'SOUZA, *supra* note 12, at 25-161.

83. See *id.*, at 70-74; HOROWITZ, *supra* note 21, at 12; McWhorter, *supra* note 22, at 75-76.

84. See D'SOUZA, *supra* note 12, at 74-79; HOROWITZ, *supra* note 21, at 12.

85. JOHN MCWHORTER, *AUTHENTICALLY BLACK: ESSAYS FOR THE BLACK SILENT MAJORITY* 75-76 (2003).

86. See, e.g., HOROWITZ, *UNCIVIL WARS* 13 (2002).

87. See David Horowitz, *David Horowitz's "Ten Reasons Why Reparations for Slavery is a Bad Idea for Blacks—and Racist Too"*, reprinted in 31 *THE BLACK SCHOLAR* 2, 48 (Summer 2001); John McWhorter, *Against Reparations; Why African Americans Can Believe in America*, *NEW REPUBLIC*, July 12, 2001, at 32 (reviewing RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2001)).

existence since the time of slavery, and which represents all its citizens, should take responsibility for slavery; second, whether corporations or other institutions that benefited from slavery, and which have had continuous existence since the time of slavery, should bear responsibility as well.

D. Conclusion

Whether one sees U.S. history as a teleological story of progress to an apex in 1964-65, followed by declension, or as the tale of immanent and timeless principles of colorblindness and equality coming to fruition, it is possible to portray slavery and contemporary race-conscious programs as parallel harms, deviations from colorblind ideals. Conservative histories support the idea that race-conscious efforts to redress the legacies of slavery are morally equivalent to slavery itself. And if slavery itself had no necessary link to race, some believe that weakens the case for redressing the harms of slavery, in the sense that African Americans as a class do not suffer the legacy of those harms.

III

LIBERAL/RADICAL HISTORIES OF SLAVERY

The liberal Justices of the Burger and Rehnquist Courts, like their conservative counterparts, brought history to bear on the problem of redress for racial injustice. The liberal version of history is generally a progressive narrative, of movement from injustice to justice, and from discrimination to equality. Yet liberal judges have been less likely to celebrate climactic moments in this history as reaffirmations of principles inherent in the 1787 Constitution. Rather, they have been more likely to see climactic historical moments as transformative, changing the Constitution and the polity through blood, sweat and tears. They have also emphasized both the continuing harms of race discrimination from the end of slavery through to the present, and the difficulty of redressing those harms. Finally, some of their opinions gesture at the ways in which American institutions were built on slavery. Yet it is commentators off the Court, and in particular advocates of slavery reparations, whose arguments draw most closely the connections between black slavery and white freedom and privilege.

A. Remembering Jim Crow and the Legacies of Slavery

One important strand in the liberal history of slavery is its insistence on tracing the aftermath and legacy of slavery. In Justice Brennan's dissent in *Bakke*, he argued against "colorblindness" by reminding us of the history of Jim Crow after slavery:

The Fourteenth Amendment, the embodiment in the Constitution of our abiding belief in human equality, has been the law of our land for

only slightly more than half its 200 years. And for half of that half, the Equal Protection Clause of the Amendment was largely moribund. . . . Worse than desuetude, the Clause was early turned against those whom it was intended to set free, condemning them to a "separate but equal" status before the law, a status always separate but seldom equal. Not until 1954—only 24 years ago—was this odious doctrine interred. . . . Even then inequality was not eliminated with "all deliberate speed." . . . [E]ven today officially sanctioned discrimination is not a thing of the past. Against this background, claims that law must be "colorblind" . . . must be seen as aspiration rather than as description of reality. . . . [W]e cannot . . . let color blindness become myopia.⁸⁸

In Brennan's opinion, Jim Crow is as prominent as slavery; and colorblindness can be achieved only if progress toward racial equality continues. After discussing slavery in his *Bakke* dissent, Justice Marshall went on to catalogue the sorry history of the Black Codes, the Civil Rights Cases, *Plessy v. Ferguson*, Jim Crow in the South and North, segregation in the military, public schools, and other institutions.⁸⁹ He further noted that even favorable court decisions did not put a stop to segregation or make African Americans equal. "The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated."⁹⁰ Finally, he concluded that "[t]he experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured."⁹¹

Liberal Justices have connected this longer view of racial injustice with an argument against colorblindness in racial redress. Justice Stevens, dissenting in *Adarand Constructors, Inc. v. Peña*, wrote: "The consistency [what I have called "color-blindness"] that the Court espouses would disregard the difference between a 'No Trespassing' sign and a welcome mat."⁹² Justice Souter's dissent added, "The divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects."⁹³ These Justices believed that the Constitution allowed race-conscious government action for the purpose of undoing the enduring legacies of slavery.

Reparations advocate and political activist Randall Robinson summed up this position by claiming:

slavery itself did not end in 1865, as is commonly believed, but rather

88. *Bakke v. U.C. Board of Regents*, 438 U.S. 265, 326-27 (1976).

89. *Id.* at 387-94.

90. *Id.* at 394.

91. *Id.* at 400.

92. 515 U.S. at 245.

93. *Id.* at 273.

extended into the twentieth century . . . Although they were not called slavery, the post-Reconstruction Southern practices of peonage, forced convict labor, and to a lesser degree sharecropping essentially continued the institution of slavery well into the twentieth century.⁹⁴

This history extends the time of slavery beyond 1865. The liberal history of slavery focuses on slavery's legacy and aftermath as much as the institution itself.

1. Reparations Advocacy and The Presence of the Past

An emphasis on the continuing legacies of slavery animates all arguments in favor of reparations for slavery, but these have taken three forms with regard to legal claim: debt (contract), unjust enrichment (restitution), or corrective justice (tort). All three of these legal and moral approaches rely on a version of history in which slavery is the direct cause of continuing harm. Some reparations advocates focus on continuing racial harms, while others draw causal connections between slavery and present day inequality inherited by the descendants of ex-slaves.

The idea of a debt to be repaid is based not only in the history of slavery and its legacy, but also on the history of ex-slaves' claims for compensation. In *The Debt: What America Owes to Blacks*, Randall Robinson argues most forcefully: "[B]lack people worked long, hard, killing days, years, centuries and they were *never paid*. . . . There is a debt here."⁹⁵ Similarly, Charles Ogletree, Jr., the Harvard Law professor who has coordinated recent reparations litigation efforts, argues that reparations require "acceptance, acknowledgment, and accounting" for the debt of slavery.⁹⁶ This argument builds not only on the history of slavery and its legacy, but also on the history of ex-slaves' claims for compensation for stolen labor, beginning with the demands of ex-slaves for "forty acres and a mule," through the ex-slaves' pension movement of the late nineteenth century.⁹⁷

The legal principle of restitution or unjust enrichment involves not a debt for a voluntarily assumed obligation, like a contract, but rather the disgorgement of a benefit it would be unjust to retain.⁹⁸ The remedy of restitution focuses not on the loss to the slave but on the benefit to the

94. ROBINSON, *supra* note 87, at 225 (internal citations omitted).

95. *Id.* at 207.

96. Charles J. Ogletree Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051, 1055 (2003). For an early exponent of this position, see Vincene Verdun, *If The Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597 (1993).

97. For example, Robinson cites the lawsuit filed in 1915 by ex-slave Cornelius J. Jones for the taxes levied by the federal government on cotton produced by slave labor. ROBINSON, *supra* note 87, at 206-07. Additionally, MARY FRANCES BERRY, *MY FACE IS BLACK IS TRUE: CALLIE HOUSE AND THE STRUGGLE FOR EX-SLAVE REPARATIONS* (2005) shows the deep roots of ex-slaves' claims for compensation.

98. RESTATEMENT OF RESTITUTION (1937) sec. 1.

slaveholder. In this sense, restitution may be a better model for slavery reparations than debt. Thus, legal commentators have been attracted to unjust enrichment theory. Robert Westley writes, “[B]elief in the fairness of reparations requires at the intellectual level acceptance of the principle that the victims of unjust enrichment should be compensated.”⁹⁹ Those who advocate an unjust enrichment theory also focus on history, but turn their lens towards the history of institutions and corporations that benefited from slavery. The recent efforts by universities to acknowledge the role that slavery and the slave trade played in building the institutions partake of this approach.¹⁰⁰

Finally, some advocates of reparations for slavery view it as morally necessary as a matter of corrective justice broadly conceived.¹⁰¹ These scholars see reparations as a remedy for the harms of slavery and its aftermath, akin to a tort remedy rather than damages for breach of contract. A corrective justice argument also depends heavily on drawing the causal connections between past and present, the harms of slavery and the harms of today.¹⁰²

Some reparations advocates accept quite controversial historical views about slavery’s role in creating a destructive black culture and pathological family structure. For example, Eric Posner and Adrian Vermeule write, “Slavery disrupted family relationships and social conventions among blacks, and these ruptures continue in the form of various family pathologies—illegitimacy and so forth.”¹⁰³ Yet even if one does not accept the characterization of black culture or family structure as pathological, there are other structural legacies that allow advocates to draw connections between past and present. Posner and Vermeule also mention barriers to education, “economic relationships with peonage-like elements,” and “negative stereotypes about blacks which have been passed down from generation to

99. Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 436 (1998). For other works discussing slavery reparations as restitutionary claims, see Hanoch Dagan, *Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions*, 84 B.U. L. REV. 1139 (2004); Andrew Kull, *Restitution in Favor of Former Slaves*, 84 B.U. L. REV. 1277 (2004); Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U. L. REV. 1443 (2004).

100. See Brown Focuses on Ills of Slavery, PROVIDENCE JOURNAL, February 25, 2007, at A1; Slavery Funds Helped Found Brown University, NEW YORK SUN, October 19, 2006, at 6; U-Va. Expresses Regret Over Past Link to Slavery, WASH. POST, April 25, 2007, at B6.

101. For the best summaries of reparations arguments, see Alfred L. Brophy, *The Cultural War Over Reparations for Slavery*, 53 DEPAUL L. REV. 1181 (2004) and Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497 (2003).

102. *Id.*

103. Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 742 (2003). See also Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CALIF. L. REV. 683, 697 (2004) (summarizing explanations of the causal relationship between historic discrimination and current harms); Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003) (laying out the litigation strategies that draw connections between past harms and present legacies).

generation,” and most advocates have tended to focus on these kinds of structural legacies.¹⁰⁴ For example, the sociologist of race Joe R. Feagin emphasizes the “transgenerational transmission of wealth” and “labor stolen under slavery” as well as government programs that benefited only whites, such as the Homestead Act and a variety of New Deal programs.¹⁰⁵ Whether they emphasize structure or culture, reparations advocates focus on the present-day legacies of slavery.

2. *When Is The Time of Slavery? Reparations Critics and the Memory of Jim Crow*

Some critics of reparations, especially those focused on the terrible harms of Jim Crow, have raised concerns about the exclusive focus on reparations for slavery, as opposed to more recent harms. The first major academic treatment of reparations, Boris Bittker’s *The Case For Black Reparations*, published in 1973, concluded that reparations should be paid for the harms perpetrated on African Americans under Jim Crow in the recent past, rather than for slavery.¹⁰⁶ More recently, Emma Coleman Jordan has urged reparations advocates to concentrate on the crime of lynching as a way to avoid the “formidable obstacles and conceptual challenges” of a slavery-reparations strategy.¹⁰⁷ Sociologist Ira Katznelson describes the period “when affirmative action was white” by characterizing the mid-twentieth century programs of the New Deal, especially Social Security and the GI Bill, as a massive wealth transfer to white Americans for which blacks should be repaid.¹⁰⁸

Shifting the temporal focus from slavery to Jim Crow not only reduces the practical problems of lawsuits, as Jordan emphasizes,¹⁰⁹ but undermines the moral weight of the “no liability” argument against reparations. As Bittker wrote:

This preoccupation with slavery, in my opinion, has stultified the discussion of black reparations by implying that the only issue is the correction of an ancient injustice, thus inviting the reply that the wrongs were committed by persons long since dead, whose profits may well have been dissipated during their own lifetimes or their descendants; and whose moral responsibility should not be visited upon succeeding generations, let alone upon wholly unrelated persons.

104. See Posner & Vermeule, *supra* note 103, at 742.

105. Joe R. Feagin, *Documenting the Costs of Slavery, Segregation, and Contemporary Racism: Why Reparations Are In Order for African Americans*, 20 HARV. BLACKLETTER L.J. 49, 55-62 (2004).

106. BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS*, 28 (1979).

107. Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557, 557 (2003).

108. IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA*, 157-8 (2005).

109. Jordan, *supra* note 107, at 558.

. . . [T]o concentrate on slavery is to understate the case for compensation, so much so that one might almost suspect that the distant past is serving to suppress the ugly facts of the recent past and of contemporary life.¹¹⁰

Critics of slavery reparations who urge reparations for Jim Crow also fear that a focus on slavery will minimize continuing racial harms, allowing Americans to believe that injustice was part of the deep past. These critics urge policymakers to remember Jim Crow, arguing that the most direct cause of present-day inequality are these more recent harms. Ira Katznelson, while advocating redress for more recent harms, contends that the harms of slavery are *too* great to be remedied: "There is no adequate rejoinder to losses on this scale. . . . In such situations, the request for large cash transfers places bravado ahead of substance, flirts with demagoguery, and risks political irrelevance."¹¹¹

By contrast, slavery reparations advocates argue that removing slavery from the set of harms to be redressed "eliminates the most compelling basis for claims and damages" and deals the reparations movement "a near-fatal blow."¹¹² This debate may be unresolvable, as people come to it with very different moral intuitions about where the most compelling claims for redress lie. But whether the harms of Jim Crow are seen as legacies of slavery or independent harms, liberals agree that they should not be glossed over in a triumphant story of unfolding freedom.

B. The Living Constitution

Probably the most prominent and powerful liberal jurisprudential version of history is a progressive one. In legal argument, it takes the form of a particular approach to constitutional interpretation that has become known as the living Constitution view. Thurgood Marshall, at the Bicentennial of the 1787 Constitution, famously evoked this metaphor when he explained that he did not celebrate the Constitution of 1787, because he did not "believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention."¹¹³ Instead, Marshall stated that the government of the Framers was "defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional

110. BITTKER, *supra* note 106, at 9-12.

111. KATZNELSON, *supra* note 108, at 157-58.

112. Rhonda V. Magee, *Note: The Master's Tools, from the Bottom Up: Responses to African American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 901 (1993):

[The] post-slavery focus, though it may appeal to some pragmatists, eliminates the most compelling basis for claims and damages. The reparations argument derives considerable moral and emotional power from the 'super-wrong' propagated by the institution of slavery, and any presentation of the case for reparations which concedes the impracticality of remedying the injury caused by slavery has likely dealt itself a near-fatal blow.

113. Marshall, *supra* note 48, 101 HARV. L. REV. at 2.

government, and its respect for the individual freedoms and human rights, we hold as fundamental today.”¹¹⁴ According to Marshall, today’s Constitution is a different document from the 1787 Constitution; it has been transformed, rather than merely amended. If the principles behind the Constitution have changed with the times, rather than being timeless traditions, then slavery cannot be seen as an aberrant deviation. Instead, we observe a continuous evolution and struggle from slavery towards freedom, as yet unattained.

This approach meets head on the conservatives’ reverential view of the 1787 Constitution. While most legal scholars have considered Marshall’s words in that speech to be an overstatement, they have nevertheless supported the idea that the post-Civil War Constitution was fundamentally transformed. Constitutional scholars Bruce Ackerman and Akhil Amar are the leading proponents of the view that Reconstruction was a “second American revolution.”¹¹⁵ This view, if not thoroughly conventional, is widely accepted.

Living constitutionalism also challenges the idea of colorblindness as a timeless principle, with slavery and affirmative action as parallel deviations from that principle. Yet while numerous critical race theorists and historians have taken on, to devastating effect, the notion of constitutional colorblindness as a principle, the direct counter-history to the “continuity of colorblindness” principle has not yet been written.¹¹⁶

At the same time, the progressive nature of this historical narrative makes it susceptible to the same kinds of problems as the conservatives’ “slavery to freedom” story. It assumes that we are on an upward trajectory, and can blind policymakers to the ways our society may have fallen backward. The progress narrative leads to the expectation that affirmative efforts to redress racial injustice should soon come to an end, even if not with as firm a date as Justice O’Connor proposed in *Grutter*.¹¹⁷

One commentator distinguishes Marshall’s version of history from Constitutional progressivism, calling it “redemptive” history rather than progressive history.¹¹⁸ According to constitutional scholar Amy Kapczynski, by

114. *Id.*

115. See BRUCE ACKERMAN, *WE THE PEOPLE*, VOL. 2: TRANSFORMATIONS (2000); AKHIL AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2005). See also Richard Primus, *In The Beginnings*, NEW REPUBLIC, April 24, 2006, at 27 (reviewing AMAR, *AMERICA’S CONSTITUTION*). For a wonderful reinterpretation of the meaning of Reconstruction for constitutional interpretation, taking Marshall’s “provocative reversal” as a starting point, see Norman W. Spaulding, *Reconstruction as Counter-Monument*, 103 COLUM. L. REV. 1992 (2003).

116. See, e.g., Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind”*, 44 STAN L. REV. 1, 30 (1991); Ian Haney Lopez, *Race and Colorblindness After Hernandez and Brown*, 25 CHICANO-LATINO L. REV. 61 (2005); Reva Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77 (2000).

117. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary”).

118. Kapczynski, *supra* note 8, at 1105.

focusing our attention on “the suffering, the struggle, and sacrifice” required to transform the Constitution, rather than “the original document,” Thurgood Marshall challenged us to practice what philosopher Walter Benjamin termed redemptive history.¹¹⁹ Kapczynski characterizes redemptive history as “us[ing] the past to free up rather than constrain interpretation, to make new meanings in the present, rather than reiterate meanings that were ostensibly fixed in the past,” or “brush[ing] history against the grain.”¹²⁰ Legal historians who have taken up Thurgood Marshall’s challenge to reimagine the Constitution as a new document after Reconstruction, and to interpret the Constitution through the suffering and sacrifice of those who fought to change it, include Richard Primus and Norman Spaulding, each of whose recent work recasts constitutional interpretation through a creative retelling of a moment in Reconstruction history.¹²¹ While not yet fully realized, redemptive history may provide a way out of the progressive bind.

C. White Freedom & Privilege Depend(ed) on Black Slavery

A third history that the liberal Justices of the Burger Court began to articulate, and that more recent pro-reparations advocates have begun to make more explicit, is that slavery made “freedom” (for whites) possible. It was *not* a deviation. Rather than slavery being an anomaly in an otherwise unbroken tradition of American liberty and equality, slavery was a fundamental building block of that tradition. This is the least developed of the liberal histories in contemporary jurisprudence, but the most important for moral claims of redress. Randall Robinson brings this argument to life by discussing the slaves who built the Capitol as a metaphor for slaves building freedom:

This was the house of Liberty, and it had been built by slaves. Their backs had ached under its massive stones. Their lungs had clogged with its mortar dust. . . . Slavery lay across American history like a monstrous cleaving sword, but the Capitol of the United States steadfastly refused to divulge its complicity, or even slavery’s very occurrence.¹²²

Robinson’s metaphor draws a close connection between slaves’ labor and whites’ liberty.

The liberal Justices of the Burger Court, in historicizing the need for racial redress, did not go as far as Robinson; however they called attention to the centrality of slavery in the Constitutional founding. Justice Brennan, concurring and dissenting in *Bakke*, wrote: “Our Nation was founded on the principle that ‘all Men are created equal.’ Yet candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly

119. *Id.*

120. *Id.* at 1102.

121. See Spaulding, *supra* note 115.

122. ROBINSON, *supra* note 87, at 6.

compromised this principle of equality with its antithesis: slavery.”¹²³ Likewise, Justice Marshall’s dissent in *Bakke* details the horrors of slavery and reminds us that “[t]he denial of human rights was etched into the American Colonies’ first attempts at establishing self-government.”¹²⁴ He then explains, “The implicit protection of slavery embodied in the Declaration of Independence was made explicit in the Constitution.”¹²⁵ Unlike more recent reparations advocates, Brennan and Marshall stopped short of arguing that slavery enabled white freedom, democracy, or prosperity. Reparations advocates, however, take their arguments one step further.

1. Pro-reparations arguments

By calling attention to the role of the state and of major institutions like universities, insurance companies, and major corporations in upholding slavery and slavery’s role in their success, reparations advocates draw on a history of slavery in which freedom and capitalism *depended on* slavery. The past-present connection exists not only in the harms suffered by blacks under slavery, but in the benefits conferred on whites. White privilege and white institutions today have their roots in slavery. As the eminent historian John Hope Franklin wrote in response to the anti-reparation arguments David Horowitz printed in college newspapers around the country:

All whites and no slaves benefited from American slavery. All blacks had no rights that they could claim as their own. All whites, including the vast majority who had no slaves, were not only encouraged but authorized to exercise dominion over all slaves, thereby adding strength to the system of control. . . . Most living Americans do have a connection with slavery. They have inherited the preferential advantage, if they are white, or the loathsome disadvantage if they are black; and those positions are virtually as alive today as they were in the nineteenth century.¹²⁶

Franklin here sums up a historical interpretation that has been elaborated quite extensively in the scholarly literature on the history of slavery and the slave trade. This interpretation can be found in the seminal books of the 1970s, Edmund Morgan’s *American Slavery, American Freedom* and David Brion Davis’s *The Problem of Slavery in the Age of Revolution*, which helped establish the political interdependence of white democratic institutions and black slavery.¹²⁷ It is also evident in more recent histories of the world slave trade, such as David Eltis’ *The Rise of African Slavery in the Americas*, which

123. *Bakke*, 438 U.S. at 326 (1976).

124. *Id.* at 387.

125. *Id.* at 389.

126. HOROWITZ, *supra* note 21, at 79-80.

127. See DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823* (1975); EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975).

reveal the dependence of modern capitalism on slavery.¹²⁸

Charles Ogletree, Jr. likewise emphasizes that as a matter of moral, rather than legal, responsibility, “if you have profited from the increased social prestige engendered by slavery, *de jure* segregation, or *de facto* discrimination, then you ought to recognize that fact. You need not have been a slave owner to benefit from the profits of slavery.”¹²⁹ As a legal matter, the lawsuits Ogletree filed sought to hold corporations responsible for their role in slavery.

Reparations advocates remind us to remember Jim Crow and also to remember the extent to which emancipation was claimed by blacks rather than given by whites. Representative John Conyers, who has been introducing a reparations bill in Congress every year since 1989, writes: “I believe that one of the best-kept secrets among Civil War historians is that the Union was losing to the Confederacy until enslaved Africans joined the Civil War to fight for the Union.”¹³⁰ He goes on to tell the history of ex-slaves’ post-Civil War demands for “forty acres and a mule,” and the campaign led by Callie House in the late nineteenth century for ex-slaves to receive pensions for their years of slave labor.¹³¹ By this history of ex-slaves’ demands for compensation for their stolen labor, Conyers counters the claims that anti-slavery was the gift by whites to blacks. Freedom was something claimed by blacks themselves.¹³²

2. Reparations Critiques

An important critique of reparations from a political left perspective also draws on the historical connections between white freedom and black slavery. Robert Gordon argues that forward-looking structural solutions to the problem of “undoing historical injustice” will work better than backward-looking solutions, such as slavery reparations, that rely on a perpetrator-victim model.¹³³ Gordon suggests that while it may seem as though structural approaches let the perpetrators off the hook morally, in fact, “in practice it has been the agency-based approaches, rather than the structural ones, that have tended to be exculpatory: the new regime turns on the bad agents as scapegoats for wrongs that derived from the routine functioning of an entire social system.”¹³⁴ He argues that reparations might actually be a “way of getting quit of all future African American claims on their republic’s moral sense or purse strings.”¹³⁵ By adopting a “perpetrator-victim model of racial wrongs as

128. DAVID ELTIS, *THE RISE OF AFRICAN SLAVERY IN THE AMERICAS* 85 (1999).

129. Ogletree, *supra* note 96, at 1069.

130. John Conyers, Jr., *Reparations: An Idea Whose Time Has Come*, in *SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS* 15 (Raymond Winbush, ed., 2003).

131. *Id.* at 17.

132. For an excellent history of reparations advocacy in the U.S., see Martha Biondi, *The Rise of the Reparations Movement*, 87 *RADICAL HISTORY REV.* 5 (2003).

133. Gordon, *supra* note 44, at 65-75.

134. *Id.* at 71.

135. *Id.* at 72.

harmful deviations from the norms of equal treatment and meritocracy,”¹³⁶ he believes that we:

deflect attention from the contribution made by those very norms to maintaining a dual economy. The condemnation of slavery as a departure from liberal norms obscures the extent to which, understood structurally and in context, slavery was indeed a departure from liberal norms and equality but also a precondition to their realization for most of the white population.¹³⁷

According to this argument, made a dozen years ago before the near-death of affirmative action in the United States, structural approaches will account for the history of slavery in which slavery was itself “a precondition” to freedom for whites better than agency models that accept the same classical liberal norms extolled by the conservatives.

I have great sympathy for this argument, at least in a world in which one could defend affirmative action and other aggressive programs to achieve racial justice as forward-looking efforts to radically restructure American racial hierarchy.¹³⁸ But this is a world in which affirmative action is nearly dead, and can only be defended on the problematic and wispy ground of diversity. Under these circumstances, it is hard to sustain the notion that affirmative action is more likely to succeed, more likely to focus people on structural issues, and less likely to incite white male resentment, than any other approach. In fact, while some perceive affirmative action programs as unfairly scapegoating a small group of victims of reverse discrimination, the costs of reparations would be distributed across all taxpayers or all shareholders of large corporations.

D. Radical Pessimist Position: Slavery Still With Us

One radical history that is not represented in jurisprudence but finds articulation in academic literature is the pessimistic position taken by Derrick Bell in *And We Are Not Saved* and *Faces at the Bottom of the Well*.¹³⁹ His history is one of deep continuity: racism is constant, and progress is nearly impossible; reparations are as unlikely today as they were in 1866.

In a recent article entitled *Racism is Here to Stay: Now What?*, Bell asserts that “[b]lack people will never gain full equality in this country.”¹⁴⁰ He argues that we have let ourselves be “comforted and consoled . . . with the myth of

136. *Id.*

137. *Id.* (emphasis added).

138. See, e.g., Kathleen Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1986) (urging a forward-looking structural rationale for affirmative action, rather than a backward-looking emphasis on the sins of the past).

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

140. Derrick Bell, *Racism is Here to Stay: Now What?*, 35 HOWARD L.J. 79, 79 (1991).

'slow but steady' racial progress,"¹⁴¹ but in fact the history of racism in the U.S. is cyclical rather than progressive, and civil rights law is simply part of that cycle. Bell asserts that this view need not lead to resignation or despair, but rather counsels us to "deal directly with American racism" as we "deal with death,"¹⁴² to "continue the fight against racism" although it will always be with us.¹⁴³ This position is notable because it is one of the few American histories that entirely avoids a progressive narrative. Because of this, it is hard to translate into strategies for action, and it has garnered few adherents. However, it is at least theoretically important to distinguish this position from the other liberal efforts to interpret the relationship between the past and the present.

E. Popular Constitutionalism

The other academic version of history recently in vogue flies under the flag of "popular constitutionalism." This liberal reaction to the conservative courts' recent reactionary decisions calls on "the people" to "take the Constitution away from the courts."¹⁴⁴ Whether because liberal theorists have come to see the merits of other branches of government besides the judiciary, or because liberals look to social movements to provide alternative constitutional visions, populism has a new life on the academic left. While in some ways this is a new phenomenon, it actually has strong roots in the legal history being done by both legal scholars and historians in the past several decades, especially those writing labor and civil rights history. Some new work, such as that of Reva Siegel and Robert Post, draws heavily on that historiographic tradition.¹⁴⁵ Other work, like that of Mark Graber, is more influenced by the political science writing of Keith Whittington and others on legislative and executive constitutionalism.¹⁴⁶ And some of the best-known books, Larry Kramer's 2004 *The People Themselves: Popular Constitutionalism and Judicial Review* and Mark Tushnet's 2000 *Taking The Constitution Away from the Courts*, do focus on history but emphasize specific historical episodes and skirt the antebellum era in particular. These two works also take an aggressively favorable view of popular constitutionalism.

Popular constitutionalism's proponents believe that the Constitution should not be read through the lens of a continuous colorblind principle, as the Rehnquist Court has done. Rather, they argue, we should look to the people for the meaning of the Constitution. This liberal history, however, tends to gloss over both the very strong tradition of pro-slavery popular constitutionalism, as

141. *Id.* at 79-80.

142. *Id.* at 89.

143. *Id.* at 91.

144. See, e.g., LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000).

145. See *infra* note 154.

146. See GRABER, *supra* note 66.

well as the limitations of anti-slavery constitutionalism as a vision of liberty and full citizenship.

Despite the limitations of this academic approach, legal historians have produced two strands of the new popular constitutionalism literature that suggest potential uses for the history of slavery in contemporary jurisprudence. The first strand involves looking to social movements for alternative constitutional visions, and in particular to the labor movement and the anti-slavery movement of the antebellum era.¹⁴⁷ The second includes recent historical work suggesting a seamier side of popular constitutionalism, with a focus on pro-slavery politics.¹⁴⁸

1. *Alternative constitutional visions*

During the 1980s, political historians as well as legal scholars found in “republicanism” an alternative vision of politics more conducive to the claims of community than liberal individualism. Historians of numerous marginalized groups—including white workers from the Workingmen’s Parties to the Knights of Labor, farmers from the Colored Farmworkers’ Alliances to the Populists, women from the temperance to the settlement-house movements, and freed slaves—discovered in their “rights talk” an alternative republican constitutionalism.¹⁴⁹ William Forbath is perhaps the most prominent legal historian to have articulated this history in constitutional terms. He argued that the labor movement in the nineteenth century presented a compelling constitutional vision with an expansive understanding of free labor contrasted to what William Seward called “the anti-slavery idea of liberty.”¹⁵⁰ Forbath, Amy Stanley and Eric Foner have shown that this “free labor” ideal encompassed more than merely the narrow notion of self-ownership and freedom of contract. It also included ideas of economic and political independence, civic capacity, and control over one’s working life.¹⁵¹ These ideas sharply contrast with the anti-slavery movement’s emphasis on freedom of contract, and its consequent compatibility with the Republican Party’s support for big business and hostility to labor, as well as the post-Civil War Supreme Court’s “*laissez faire* constitutionalism.”¹⁵² At the tragic turning point

147. See *infra* Part II.E.1.

148. See *infra* Part II.E.2.

149. For a history of “rights talk,” see Hendrik Hartog, *The Constitution of Aspiration and “The Rights That Belong to Us All,”* 74 J. AMER. HIST. 1013 (1987).

150. William E. Forbath, *The Ambiguities of Free Labor: Labor and Law in the Gilded Age*, 1985 WISC. L. REV. 767, 810 (1985).

151. See, e.g., ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1995); WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998).

152. For “*laissez faire* constitutionalism” see Charles McCurdy, *Justice Field and the*

of Forbath's history, unionists respond to the courts' hostility by abandoning their alternative republican constitutional vision and buying into *laissez faire* constitutionalism, with American Federation of Labor leader Samuel Gompers asking that labor simply be left alone with its freedom to contract.¹⁵³

Recently, legal historians have continued to suggest that social movements' alternative constitutional visions—some of them directed at the courts, some at other branches of government, and some at social institutions—should be a source of inspiration to us today. Reva Siegel and Robert Post note that the Warren and early Burger Courts worked in tandem with Congress. Those Courts relied on progressive women's rights legislation and many states' passage of the Equal Rights Amendment as important evidence of the meaning of equal protection for women. Thus, according to Siegel and Post, because the women's movement influenced Congress, and Congress influenced the Court, the women's rights movement played a major role in defining equality under the constitution in the 1970s.¹⁵⁴ Likewise, Felice Batlan shows that sociological jurisprudence came out of the practice of women settlement-house workers at the turn of the twentieth century, and filtered up to Justices Brandeis and Pound, rather than the other way around.¹⁵⁵ And Kenneth Mack and Risa Goluboff have demonstrated that alternative visions of civil rights for African Americans came from grassroots sources in the 1930s and the 1940s—from black lawyers' everyday practices and ideology of racial uplift, as well as from the ordinary people who claimed rights to free labor in petitions to the Justice Department and the NAACP.¹⁵⁶ This alternative free labor vision, drawing more on the Thirteenth than the Fourteenth Amendment, had its historical antecedents in the early labor movement.¹⁵⁷

This work all has an aspirational side to it—the narrow view of civil rights we have today is not the only possible meaning of the Constitution; it is possible to reclaim earlier traditions. However, this scholarship also serves as an important corrective to some con-law scholars' work on popular

Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 61 J. AMER. HIST. 972 (1975).

153. See FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT*, *supra* note 151, at 130-31.

154. Reva Siegel & Robert Post, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1984-2021 (2003). See also Reva Siegel & Robert Post, *Equal Protection By Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 514-15, 521-22 (2000); Reva Siegel & Robert Post, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 31-39 (2003).

155. See Felice Batlan, *Law and the Fabric of the Everyday: The Settlement Houses, Sociological Jurisprudence, and the Gendering of Urban Legal Culture*, 15 S. CAL. INTERDIS. L. J. 235, 248-50 (2006).

156. See Risa L. Goluboff, *The Thirteenth Amendment and The Lost Origins of Civil Rights*, 50 DUKE L.J. 1609 (2001); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256 (2005).

157. See Goluboff, *supra* note 156.

constitutionalism, which assumes a nonexistent dichotomy between popular and legal means. As Kenneth Mack shows, for example, NAACP lawyers intertwined courtroom performance, mass politics and legal reform in their litigation strategies.¹⁵⁸ Charles Houston wrote in 1934 that civil rights litigation would “arouse and strengthen the will of the local communities to demand and fight for their rights”¹⁵⁹ and Thurgood Marshall wrote five years later “build a body of public opinion”¹⁶⁰ in support of change. Litigation strategies and mass politics went hand in hand. Here again we have an example of what Amy Kapczynski, after Walter Benjamin, has termed “redemptive history” rather than progressive history.¹⁶¹

Several legal scholars have begun the promising project of re-reading the Constitution through the lens of the history of slavery and Reconstruction. Akhil Amar first paved the way for this work with a kind of neo-originalist reading of the Thirteenth Amendment.¹⁶² Richard Primus and Norman Spaulding have taken a more creative approach, re-imagining the meaning of federalism and other basic constitutional structures by re-imagining the history of Reconstruction from the perspective of the freed slaves, rejecting the Northern Democratic version of history espoused by the post-Civil War Court.¹⁶³ Political scientists Mark Graber and Pamela Brandwein have both begun to critique the way constitutional scholars use the history of *Dred Scott* and Reconstruction to argue for their own interpretive theories.¹⁶⁴ All of this work points to the possibility of a constitutional discourse that is historicist without being originalist.

While legal historians have not yet focused a great deal of attention on the history of African American movements for reparations, that history could be deployed in similar ways. The constitutional visions of blacks and their allies who demanded payment for the back wages of slavery, pensions for ex-slaves, and later, reparations for slave descendants, could be explored as alternatives to the prevalent jurisprudence of colorblindness.

158. Kenneth W. Mack, *Law and Mass Politics in the Making of the Civil Rights Lawyer, 1931-1941*, 93 J. AMER. HIST. 37 (2006).

159. MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 165 (2004) (quoting Charles Houston memorandum of Oct. 26, 1934, NAACP papers, part 3, series A, reel 1, frs. 859-60).

160. Mack, *supra* note 156, at 349 (quoting Thurgood Marshall, *Equal Justice Under Law*, 46 THE CRISIS 199, 201 (1939)).

161. Amy Kapczynski, *supra* note 118, at 1102.

162. Akhil Amar, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359 (1992).

163. See Richard Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680 (2006); Norman W. Spaulding, *Constitution as Counter-Monument: Federalism, Reconstruction and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003).

164. See PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH (1999); GRABER, *supra* note 66, at 15-90.

2. *Pro-slavery popular constitutionalism*

There are also a growing number of legal historians challenging the rosy view of popular constitutionalism put forward by Kramer and Tushnet.¹⁶⁵ These historians concentrate not on mid and late twentieth century social movements, but on the politics of slavery in the antebellum and immediate postbellum era. Among these, I count Daniel Hulsebosch, Barry Friedman, Richard Primus, and Gary Rowe.¹⁶⁶

For example, Gary Rowe's work on the "Negro Seamen Affair" of the 1820s-1840s reminds us of the importance of slavery to early American constitutionalism, and even "suggests that the weight of slavery caused popular constitutionalism to collapse."¹⁶⁷ To summarize his history: in the wake of Denmark Vesey's 1822 slave revolt, South Carolina and six other southern states passed laws requiring all free black sailors passing through state ports to report to jail.¹⁶⁸ In 1823, almost immediately after it went into effect, a federal court held South Carolina's law unconstitutional; nevertheless, South Carolina continued to enforce the law, paying the federal court no mind.¹⁶⁹ Judge Johnson, the author of the opinion, as well as his opponents, used the newspapers to argue over the law's constitutionality.¹⁷⁰ Even Roger Taney, then attorney general, weighed in, in an unpublished opinion, arguing that the Supreme Court's constitutional construction should not forever bind "the states & the legislature & executive branches."¹⁷¹ This was popular constitutionalism in action, but it hardly resolved the constitutional issues over slavery. And it reminds us that alternative constitutional visions ignoring the Supreme Court's constitutional interpretation were hardly always forces for good. Indeed, Rowe and other historians caution us to remember the force of popular constitutionalism for nullification—the theory that the constitution was a compact among states, which could "nullify" or withdraw from the compact whenever they chose—in the 1830s as well as the 1950s.¹⁷²

Both Rowe and Hulsebosch point out the way Kramer's history skirts slavery.¹⁷³ Kramer focuses on the early history of judicial review and popular constitutionalism, and forays in the 1830s only to emphasize party politics and Andrew Jackson's battles with the Supreme Court over judicial supremacy. He

165. See *supra* Part III.D.

166. See Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003); Daniel J. Hulsebosch, *Bringing The People Back In*, 80 N.Y.U. L. REV. 653 (2005) (book review); Primus, *supra* note 163; Gary Rowe, *The Negro Seaman's Affair* (2005) (unpublished paper on file with author).

167. Rowe, *supra* note 166, at 3.

168. *Id.* at 1.

169. *Id.* at 2.

170. *Id.* at 4-5.

171. *Id.* at 7.

172. See Gary Rowe, *Constitutionalism in the Streets*, 78 SO. CAL. L. REV. 401 (2005).

173. Rowe, *The Negro Seamen Affair*, *supra* note 166, at 3; Hulsebosch, *supra* note 166, at 683-84.

skips past the major constitutional crises over slavery.¹⁷⁴ Kramer also downplays the role of violence, migration, and other physical acts in popular constitutionalism.¹⁷⁵ This is an important point. Runaway slaves, especially fugitives to the North, brought constitutional conflict to a head by putting pressure on principles of comity in Northern and Southern state courts. John Brown's raid at Harper's Ferry, the caning of Sumner in the Senate, the Pottawotamie Massacre—all of these violent acts gave substantive meaning to popular sovereignty in the 1850s. As Hulsebosch argues,

Why write off mob violence as marginal bursts of racial, religious, and class resentments? . . . Race, religion, and class were important axes of the people's many identities. . . . It is no accident that so much of popular constitutionalism in America has involved racial slavery and its legacies.¹⁷⁶

Slavery was pivotal to the compromises and conflicts of national politics throughout the first half of the nineteenth century, and it was the central issue in the administration of a federal legal system. Runaway slaves pressed the legal system to confront the constitutional basis of slavery just as territorial expansion forced the political system to reckon with the conflict between slave labor and free labor.¹⁷⁷ There were a range of proslavery and antislavery constitutional theories, and their advocates used the legal system to forward their political goals.¹⁷⁸ Ultimately, the irreconcilability of their visions resulted in the ultimate constitutional crises, civil war.

Antislavery constitutionalism faced an uphill battle in the American legal and political arena, both within and outside the courts. From the controversy over antislavery petitions in Congress in the 1830s, through the debates over fugitive slaves in legislatures and courts, radical abolitionist positions on the Constitution were increasingly marginalized.¹⁷⁹ The contest over slavery became ever more a northern white struggle to head off the "Slave Power's" threat to their own freedoms, rather than a fight against black bondage.¹⁸⁰

A true history of popular constitutionalism must contend with the often violent and often ugly battles over slavery that raged in the streets, in the courts, and back to the streets. Popular constitutionalism was not always pretty, nor was it separate from constitutionalism in the courts. But it is not only proslavery constitutionalism that presents a cautionary tale. If we attend to the

174. KRAMER, *supra* note 144, at 145-206.

175. *Id.* Mobs, for example, are mentioned only in passing on pages 168 and 192.

176. Hulsebosch, *supra* note 166, at 683.

177. Ariela Gross, *Slavery, Antislavery, and the Coming of the Civil War*, in *THE CAMBRIDGE HISTORY OF LAW IN AMERICA*, VOL. 2 (Christopher C. Tomlins & Michael Grossberg, eds., forthcoming, 2008), available at <http://ssrn.com/abstract=934814>, at 32 (last visited Jan. 28, 2008).

178. *Id.*

179. *Id.*

180. *Id.*

histories of “free labor,” we can see that the “anti-slavery theory of liberty” itself contributed to the narrow vision of equality embodied in *Lochner v. New York*.¹⁸¹ A history of anti-slavery constitutionalism reveals both the emancipatory potential of claims on the Constitution, and the limits of the anti-slavery idea for any movement for full citizenship. Thus, proponents of redress for slavery must approach popular constitutionalism with caution.

F. Conclusion

Liberal and radical histories of slavery and Jim Crow have remained largely within the progressive framework set out by the conservative “slavery to freedom” story, but in a different key, emphasizing the struggle for equality rather than its inevitable unfolding. Liberal Justices arguing for affirmative action have told the history of slavery’s lingering harms in the regime of Jim Crow, recounting all the ways that slavery did not truly end in 1865, or even in 1965. These judges also pointed out the flaws in the 1787 Constitution, its support for slavery, and the necessity for our constitutional principles to grow and expand over time. To help justify new forms of redress today, reparations advocates have begun to expand on that history by highlighting the dependence of white freedom and white privilege on slavery. Constitutional scholars, by contrast, have looked to alternative historical meanings of equality by exploring the constitutional visions of social movements. One way to combine these new histories would be to uncover the alternative vision of early African American movements for slavery reparations.

CONCLUSION

At this point, it must be apparent where my sympathies lie in this expository project. Despite the supposed even-handedness of describing conservative and liberal historical strategies, each in turn, my criticisms have been leveled most directly at the conservative histories. My chief goal in this Essay has been to expose the historical assumptions and narratives that justify opposition to redress (of all kinds) for African Americans. For those who support redress efforts, it will be necessary to challenge those assumptions and narratives.

But I also want proponents of redress to examine our own histories more closely and to build on those that most effectively take on conservative myths and shibboleths. Reparations movements will not succeed until they effectively draw the connections between race and slavery, and between white freedom and black slavery. Arguments for redress must build upon the history of slaves and ex-slaves *claiming freedom for themselves*, so that the image of anti-slavery as whites’ gift to blacks cannot stand. Even if we believe in structural, forward-looking remedies, we need to be able to draw the links between our

181. See Forbath, *supra* note 150, at 810; *Lochner v. New York*, 198 U.S. 45 (1905).

history and our future, whether it is a celebratory story of people claiming the Constitution for themselves in the face of adversity, or a darker story that emphasizes the continuing violence and injustice those people met. At the same time, any effort to counteract the current Court's continuous colorblindness principle with alternative constitutional meanings must take care not to unduly romanticize popular constitutionalism. Slaveholders and former slaveholders also claimed the Constitution for themselves, as did their grandsons and great-grandsons in defense of Jim Crow—and they did so to tragic effect.

When is the time of slavery? To judge by the debates we are still having, one hundred and forty-two years after Appomattox, the time is now. Slavery is still the touchstone for all of our discussions about race in America—as it should be, because race was born out of slavery. It is our nation's original sin. Through the telling and re-telling of the history of slavery, we judge our own responsibility for the continuing injustices of racial inequality.

