

When Is The Time of Slavery?

The History and Politics of Slavery in Contemporary Legal Argument*

“[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* 226 (2000).

“The freed slaves then began another journey, this time not from captivity to slavery, but from slavery to citizenship and equality under the law....the dark clouds following the War were giving way to a future brighter than the great majority could have imagined in 1865.”
In re African American Slave Descendant Litigation, 375 F.Supp. 2d 721, 780 (N. Dist. Ill. 2005).

When is the time of slavery? Is slavery a part of our nation’s experience best buried in the deep past, or are its echoes still being felt today? 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? 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

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political efficacy, in arguments over affirmative action programs or reparations for slavery. This essay begins from the premise that much of what polarizes legal and political debate are very different narratives of our nation's history.

This essay will explore the way histories of slavery have been used in judicial opinions, legal scholarship and popular political tracts arguing over redress, racial justice, and reparations for African Americans. It is not surprising that advocates of reparations for slavery depend on historical arguments to make their case; perhaps more surprising is the prevalence of history in conservative discussions of race. 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.¹ Further, I suggest that liberals have not fully engaged with the historical premises of the conservatives' anti-redress arguments. In this respect, pro-reparations arguments are better historically grounded than the pro-affirmative action jurisprudence that came before. Most promising are those pro-redress arguments that rely on histories of reparations movements themselves "from the bottom up."

I do not attempt in this brief essay, however, to spin alternative histories of my own, nor to fully critique each of the historical strategies I catalogue here. It will be quite apparent that my own sympathies lie with arguments in favor of redress for racial injustice, but my purposes here are primarily descriptive and interpretive, to reveal the

¹ I am using the terms "conservative" and "liberal" rather loosely here in their conventional contemporary political senses, to represent political "right" and "left" broadly construed. 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 commentators off the Supreme Court.

rhetorical strategies and historical moves that underly legal and political positions, and to suggest some of the questions they raise, rather than to prove that they are right or wrong.

In Part I, I examine three chief strategies in conservative historical argument: first, depicting slavery as part of a teleological progression towards freedom, glossing over Jim Crow and post-slavery racial injustice; second, portraying slavery and Jim Crow as temporary deviations from a continuous American tradition of freedom and color-blindness; 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. The first two strategies may appear somewhat at odds, and they are certainly in tension. In my view, that is because the “slavery to freedom” progress story—which is in some ways our national narrative—fits uncomfortably with reverence for, and fidelity to, the 1787 Constitution. *Legal* conservatives, therefore, must explain why 1787 was a high point despite slavery. The “continuity of the color-blind principle with slavery as a deviation” story fits the originalist constitutional narrative better.

Part II 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, emphasizing 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 invaluable antidote to the “slavery to freedom” story, and yet it has rarely been elaborated to take on the celebration of antislavery as the Christian West’s gift to the rest of the world. The “living

Constitution” view is opposed to the “continuous color-blindness” history that celebrates the 1787 Constitution, yet most proponents of the evolving Constitution do not directly take on the view that slavery was a temporary aberration from a continuous color-blind principle. Finally, the most promising and least-developed historical narrative is the “black slavery/white privilege” story, which counters the “decouple slavery from race” strategy.

I will also consider several other liberal or radical approaches to history, neither of which is represented in judicial opinion, but both of which have found articulation among legal academics: first, a more pessimistic approach, in some ways an anti-progressive view of history, emphasizing the static nature of racism and inequality in the U.S; second, 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 stronger arguments in favor of remedies for racial injustice need not only to refute the conservative histories, but to build on histories of slavery, anti-slavery and movements for racial redress "from the bottom up." Second, I argue that even structural, forward-looking remedies require historical grounding, and that the most compelling historical narratives are those that make clear the connections between the relatively recent past of Jim Crow with continuing inequality, as well as the links between black slavery and white freedom.

I. CONSERVATIVE HISTORIES OF SLAVERY

A. SLAVERY TO FREEDOM

Slavery as deep past

One conservative version of history is the teleological “slavery to freedom” story. According to this history, slavery was the great and terrible wrong, and Jim Crow is glossed over – slavery has no permanent legacies, unless they are cultural legacies, which cannot be remedied by law. In this version of history, the horror of slavery is readily acknowledged, but it is left firmly in the past, as when George W. Bush spoke in Senegal about the horrors of the slave trade, without mention of post-slavery racial wrongs.²

Paying great attention to slavery can actually minimize one’s sense of contemporary racial injustice by helping to distance oneself from the harms of the past, leaving them comfortably in the deep past. Indeed, 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.

Continuous progress towards freedom

Furthermore, 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

² See “President Bush Speaks at Goree Island in Senegal,” July 8, 2003, at <http://www.whitehouse.gov/news/releases/2003/07/20030708-1.html>.

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.

Glossing over Jim Crow

One corollary of leaving slavery in the deep past and celebrating freedom is to gloss over Jim Crow and the legacies of slavery. Omitting or eliding the history of Jim Crow makes African Americans the only possible targets 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...?” Affirmative action for Mexican Americans makes no sense if one does not acknowledge the harms of Jim Crow.³

Glossing over Jim Crow and the legacies of slavery also allows opponents of reparations for slavery to minimize the connections between the time of slavery and now. Another conservative strategy in the argument against reparations is to demonstrate that other problems are the “proximate cause” of continuing racial inequality; in other words, to break the chain of causation between slavery and contemporary inequality. Their main point is that current inequality is caused by “pathologies” of black culture, not by the legacy of slavery. This argument only makes sense if one denies the history of Jim Crow, for even if one accepts their 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.

³ *Fullilove v. Klutznick*, 448 US 448, 553 n30.

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 a uniquely Western/American/Christian/white phenomenon.⁴ By the twisted logic of this story, rather than the slave trade and commercial slavery being the great wrongs perpetrated by the Western powers against the peoples of Africa, instead it is anti-slavery which was the gift of the West to Africa.

This version of history undergirds the strongest argument waged against slavery reparations by political conservatives, as well as by the only court to consider reparations claims to date, the Northern District of Illinois in 2005, the argument that “the debt has been paid already.”⁵ 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. Furthermore, they argue that the very affirmative action programs against which they have fought are themselves repayment for the debt of slavery.

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. In dismissing the cases last year, the District Court made exactly this historical argument, weighing the harm of slavery against the harm of the Civil War:

⁴ Dinesh D’Souza, *The End of Racism* 100 (1995).

⁵ The phrase “the debt has been paid already” comes from David Horowitz, Zinmeister, and others. 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 (1995). The consolidated case in Illinois has rendered the first substantive legal opinion on reparations in a Federal court. *In re African American Slave Descendants Litig.*, 375 F. Supp. 2d 721 (2005).

It is beyond debate that slavery has caused tremendous suffering and 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.⁶

In the history told by the Illinois Court, slaveholders paid for any debt the nation owed to slaves with "great personal and economic loss" during the Civil War; Union soldiers paid with their lives, and future generations paid the "social, political, and financial costs" of the War. Interestingly, the historical link that is assumed here – that the Civil War was in fact fought to end slavery – is one challenged on the political left and right. Many Southerners continue to argue that the South fought for states' rights rather than to defend slavery, and 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.

⁶ In re African American Slave Descendant Litigation, 375 F. Supp. 2d 721, 780 (2005).

The Illinois Court's argument also relies on the "slavery to freedom" story, in which ex-slaves faced a bright future, and we can move right from the horrors of slavery to a celebration of freedom:

The freed slaves then began another journey, this time not from captivity to slavery, but from slavery to citizenship and equality under the law....the 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, among ourselves and with all nations."⁷

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 even suggests blacks should be grateful to whites for the course of American history: 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

⁷ Id.

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?⁸

Somewhat less tendentiously, but to the same effect, Karl Zinmeister argues in the pages of *The American Enterprise* that the “bill was finally paid off, in blood,” but also in anti-poverty spending targeted at the black underclass. Zinmeister, like other conservatives, cites Walter E. Williams’ figure of \$6.1 trillion as the debt repaid to African Americans in government programs since the Great Society.⁹

1964: The irenic moment

Finally, the conservative slavery-to-freedom story describes the course of American history as an upward sweep up to a peak in 1964 or 1965, followed by decline in the forty years since. This version of history is described in detail by the conservative historian Herman Belz. In it, the story of slavery morphs into the story of freedom, and Jim Crow falls away. “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.” Slavery is not the story; that was merely the circumstance for blacks’ “labor and service” in the U.S. 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.” Belz argues that emancipation was not a “social revolution” but rather,

⁸ David Horowitz, *Uncivil Wars: The Controversy Over Reparations for Slavery* 15 (2002). Horowitz also writes: “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.

⁹ Karl Zinmeister, “Has the debt been paid?”, 12 *The American Enterprise* 4, 6 (July-August 2001).

“the abolition of slavery and the enfranchisement of blacks [was] a *completion* of the Constitution.” (emphasis added) By contrast, “[r]ace-preferential affirmative action...can fairly be described as a revolutionary project against the Constitution and the laws of the nation.” In this way, conservatives marry the “slavery to freedom” story to the notion that both slavery and affirmative action were deviations from a timeless principle of color-blindness. 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”; these are the “principles of the Founding, grounded in reason and justice in the tradition of western civilization,” which 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].”¹⁰

And to conservatives, it was downhill after that, at least until the last decade, when courts began to undo affirmative action. As Clint Bolick, an assistant to Clarence Thomas at the EEOC and now prominent conservative litigator, wrote in *The Affirmative Action Fraud*, “Slavery was a stark anomaly in the midst of the American conception of civil rights,” and the Civil Rights Act of 1964 was “the apex of the golden decade in the quest for civil rights...Equal opportunity had triumphed”; that apex was immediately followed by “crisis” in which the “quest [was] abandoned.”¹¹ The year 1964-65 is the conservatives’ “irenic moment” of perfect color-blindness, despite the fact that most of those who were old enough to do so opposed the Civil Rights Act and Voting Rights Act

¹⁰ Herman Belz, “Conservative Principles and Black History: Affirmative Action and Identity Politics,” <http://members.cox.net/wcampbell14/belzbh.htm>.

¹¹ Clint Bolick, *Changing Course: Civil Rights at The Crossroads* 13, 49, 53 (1988).

at the time.¹² 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.”¹³ This view, that color-blindness 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.

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 John McWhorter explains, “for almost forty years America has been granting blacks what any outside observer would rightly call reparations.”¹⁴ David Horowitz argues, “Reparations to African-Americans Have Already Been Paid. Since the passage of the Civil Rights Acts and the advent of the Great Society in 1965, trillions of dollars in transfer payments have been made to African-Americans in the form of welfare benefits and racial preferences...all under the rationale of redressing historic racial grievances.”¹⁵ This argument fits uneasily with their own opposition to such government programs.

¹² Robert Gordon has called 1964-65 the “irenic moment.” Robert W. Gordon, *Undoing Historical Injustice*, in Austin Sarat & Thomas R. Kearns, eds., *Justice and Injustice in Law and Legal Theory* ## (1996). For another view of 1964 as the “apex,” see Charles Fried, *Order and Law: Arguing The Reagan Revolution, A First-Hand Account* (1991), 90-91 (“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.”)

¹³ Clint Bolick, *The Affirmative Action Fraud: Can We Restore The American Civil Rights Vision?* 38 (1996).

¹⁴ John McWhorter, “Against Reparations: Why African Americans can believe in America,” *New Republic*, July 23, 2001, p. 32.

¹⁵ Horowitz, *Uncivil Wars*, at 14.

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. In the past, we departed from our principles in the direction of discriminating against blacks, by legally mandating slavery and segregation on the basis of race. After 1965, we have been deviating in the other direction of discriminating against whites, by legally mandating "preferences" in employment and education on the basis of race. As 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 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." And what this narrative does is to "establish that America's traditional, indeed Constitutional, Grundnorm of legal equality means color blindness and nothing else."¹⁶

There are two important corollaries to this history: First, the Constitution of 1787 was an anti-slavery document; the Reconstruction Amendments and Civil Rights Acts of 1964 and 1965 completed it, and brought its principles to fruition. However, those principles were already immanent in the 1787 Constitution; it was not a flawed document and it should be revered and celebrated in its original form. Second, there is parity between slavery/Jim Crow and affirmative action/ "reverse discrimination": both are deviations

¹⁶ Gordon, *Undoing Historical Injustice* 51-52.

from the norm of color-blindness, and they are parallel harms. I will consider each of these corollaries in turn.

Timeless principles of the 1787 Constitution

This first point, 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 Constitution of the Framers from criticism by historians or advocates of a jurisprudence of “living constitutionalism.” When Supreme Court Justice Thurgood Marshall gave his famous speech on May 6, 1987, cautioning against the “flagwaving fervor” of the bicentennial celebration of the Constitution, then-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.¹⁷ The 1787 Constitution was great because it provided for amendment, and even if it did acknowledge or even lend support to slavery, that support was necessary to the political compromise that secured the document’s ratification. Similarly, Dinesh D’Souza, in a chapter provocatively entitled, “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

¹⁷ William Bradford Reynolds, Another View: Our Magnificent Constitution, 40 Vand. L. Rev. 1343, 1352 (1987).

deference to consent, but nowhere given any moral approval, in recognition of the slave's natural rights."¹⁸ His notion of "popular consent" here is of course limited to those propertyholding white males eligible to vote at the ratifying conventions.

Frederick Douglass and Dred Scott

The conservatives' favorite African American leader of the past is Frederick Douglass, who sought to work within the political structures of the Union to fight slavery, and eventually rejected William Lloyd Garrison's view of the Constitution as a pro-slavery document. Reynolds, for example, quotes Frederick Douglass's pronouncement that "[i]n that instrument, I hold there is neither warrant, license, nor sanction of the hateful thing," in order to bolster the argument that "the Constitution, by its omission of any mention of slavery, did not tolerate slavery."¹⁹

Other legal conservatives, as well as political pundits, have followed Reynolds in invoking Frederick Douglass to back up their view of the 1787 Constitution as anti-slavery document. Yet Douglass makes an awkward standard-bearer for conservatives because 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. "The 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."²⁰

¹⁸ D'Souza, *The End of Racism*, at 109.

¹⁹ *Id.* At 1358.

²⁰ Frederick Douglass, "The Unconstitutionality of Slavery," Lecture Delivered in Glasgow, Scotland, 26 March 1860 (1860).

Conservatives also rely on Frederick Douglass for the proposition that anti-slavery requires only the freedom to own one's own labor and to contract in the marketplace, rather than any affirmative steps to insure equality. Dinesh D'Souza writes, for example, "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."²¹ The brief for the United States as amicus curiae in *Wygant v. Jackson*, a 1985 affirmative action case, quotes Douglass for the proposition that "Peace between races is not to be secured by degrading one race and exalting another." Justice Thomas's 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." Douglass's speech, presumably the same one to which D'Souza referred, was made in the context of paternalist Freedmen's Bureau agents coercing ex-slaves into year-long employment contracts and marriage contracts. He 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!"²² Douglass' call for justice and an end to mischief, in this context, hardly seems like an argument for color-blindness of the kind conservatives have in mind.

²¹ D'Souza, *The End of Racism*, at 113. See also Seymour Martin Lipset, "Equal Chances versus Equal Results," 523 *Annals of the Amer. Acad. Of Pol. & Soc. Sci.* 63, 73 (1992), and Clint Bolick, *Changing Course*, 34-35 (citing Douglass and Booker T. Washington as his heroes, 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.")

²² *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Thomas, J., Dissent).

Conservative histories, in arguing for timeless *constitutional* principles of color-blindness must reckon not only with the text of the original Constitution, and the evidence of the debates and compromises that led to its ratification, but also with the jurisprudence of slavery in the decades afterward, especially *Dred Scott v. Sandford*. 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, rejecting Thurgood Marshall's assertion that Taney only "reaffirmed the prevailing opinion of the Framers regarding the rights of Negroes in America."²³ Instead, Taney's opinion becomes, for conservatives, not only wrong but the symbol of "judicial activism" because Taney departed from the timeless principles of color-blindness always immanent in the Constitution.

William Bradford Reynolds, in his 1987 critique of Thurgood Marshall, went on to equate the Supreme Court's overreaching in *Dred Scott* and *Plessy v. Ferguson* with "judicial activism," which ought to be avoided when "the present Court . . . struggles with similar issues involving race and gender discrimination."²⁴ (Rhetorically, affirmative action and slavery are placed in parallel here again.) Christopher Eisgruber has called this the "*Dred* Again theory" of Judge Robert Bork, Justice Scalia and other legal conservatives about substantive due process. As Bork stated the theory, "Who says *Roe* must say *Lochner* and *Scott*."²⁵ Bork argues that "Taney intended to read into the

²³ 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/constitutional_speech.htm (visited on 9/6/06).

²⁴ 40 Vand. L. Rev. at 1348-49.

²⁵ Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990) 32; Christopher Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 *Constitutional Commentary* 37, 38 (1993).

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.”²⁶ One irony of Bork’s repudiation of *Dred Scott*, of course, as Eisgruber points out, is that Taney’s opinion was an originalist one; perhaps not an excellent example of originalism, but a thoroughgoing exercise of it.

The conservative strategy, however, is to determine a timeless principle, and then to consider all contrary evidence to be aberrant deviations from that principle, indeed, 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.”²⁷ Thus, for conservatives, *Dred Scott* not only represents a deviation from the true Constitution rather than an expression of the Court’s antebellum jurisprudence of slavery, but it represents the precedent for future deviations in the other direction, namely, “judicial activism” on behalf of women, African Americans and other minorities.

²⁶ Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 30-31 (1990).

²⁷ Bolick, *Changing Course*, 20-22.

Deviations from color-blindness: slavery and affirmative action

Many examples of the “continuity of color-blindness” history can be found in the conservative jurisprudence of strict scrutiny for “benign” racial classifications – in other words, in anti-affirmative action opinions. For example, Justice Antonin 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.”²⁸ Justice Clarence Thomas, in his concurrence, wrote that “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.”²⁹ Scalia’s opinion emphasizes the parallelism between slavery and affirmative action, both deviations from color-blind equality; Thomas’s opinion focuses on the timelessness of the color-blind principle, which he dates back to the Constitution, as read through the Declaration – a technique favored by Frederick Douglass. This rhetorical technique of equating affirmative action with slavery, Allen Kamp calls the “vertical flip.”³⁰

Even the Powell opinion in *Bakke v. UC Board of Regents*, which we now view as a liberal opinion although much of it was a vigorous argument 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. Powell wrote “This [colorblind] perception of racial and

²⁸ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995). This is also the opinion in which he wrote that “there can be no such thing as either a creditor or a debtor race.”

²⁹ 515 U.S. at 240.

³⁰ Allen Kamp, “Vertical Flip” (unpublished paper on file with author, 2005).

ethnic distinctions is rooted in our Nation's constitutional and demographic history." In his view, the color-blindness principle went into "dormancy" during the late nineteenth century, "'strangled in infancy by post-civil-war judicial reactionism,'" but 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.³¹

By considering both slavery and Jim Crow, on the one hand, and affirmative action, on the other hand, as deviations from the principle of color-blindness, 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.'"³² As Carol Horton suggests, in Glazer's "formulation, Jim Crow and affirmative action were moral equivalents, as both violated the principle of color-blindness . . ."³³ His formulation quickly became the neo-conservative paradigm.

Conservative pro-reparations arguments

The "timeless color-blind principle" also provides the undergirding for conservative arguments *in favor* of reparations for slavery. 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 – but those who have rely on this version of history. According to Krauthammer, reparations are a better remedy for racial injustice than affirmative action; first, because slavery, not Jim

³¹ *Bakke v. U.C. Board of Regents*, 438 US 265, 291 (1976).

³² Nathan Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* 43-44 (1975).

³³ Carol A. Horton, *Race and The Making of American Liberalism* 202 (2005).

Crow, is the great harm to be redressed; and second, because a one-time rather than a continuing remedy can return us quickly to the American tradition/norm of colorblindness. Krauthammer has written: “It is time for a historic 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.”³⁴

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 incitement to counterproductive strife.”³⁵ 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, weakening 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, or that by the time of the Founding, that slavery and race were not inextricably enmeshed. Few historians of New

³⁴ Charles Krauthammer, “Reparations for Black Americans,” *Time* 136 (31 December 1990): 18; Keyes Proposes to Exempt African-Americans from Tax, *Chicago Tribune*, Aug. 20, 2004.

³⁵ Thomas Sowell, “The Real History of Slavery,” in *Black Rednecks and White Liberals* 114 (2006).

World slavery would take the logical jump from the fact of 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.³⁶

Yet this is precisely the historical argument many conservatives seek to defend. According to Dinesh D'Souza, who devotes 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. D'Souza, David Horowitz, John McWhorter and other conservatives all emphasize that slavery was practiced all over the world; that it was uncontroversial at the time it was introduced to the American continent; that African slavery was widespread; and that there was free black slaveholding in the U.S. Indeed, they 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. McWhorter writes, "Africans themselves were avid and uncomplaining agents in the selling of other Africans to whites," and then asserts that slavery was not a racial institution.³⁷

Ironically, this version of history makes strange bedfellows, because it is the Marxists among historians – Eugene Genovese and Barbara Fields in particular -- who most strongly make the argument that class rather than race motivated the course of Southern history. D'Souza even cites Eugene Genovese approvingly for the argument

³⁶ In fact, many ancient historians today would dispute the notion that the ancient world was not a racialized context. See, e.g., Susan Lape, *Racializing Democracy: The Politics of Sexual Reproduction in Classical Athens*, 9 *Parallax* 52 (2003).

³⁷ John McWhorter, *Losing the Race: Self-Sabotage in Black America* 222 (2000).

that profit, not racism, explains slavery – “The Marxist view contains a good deal of truth,” he writes.³⁸

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”: Americans are not legally or morally responsible for an institution perpetrated by people who are now dead. While 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, the claim 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. 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 farther to absolve white people today from responsibility for the past of slavery: 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; few whites owned slaves or benefited from slavery; most blacks did not suffer from slavery; therefore, whites as a group do not “owe” blacks anything.³⁹ Of course, this argument elides the question of whether the government of the United States, which has had a continuous existence since the time of slavery, and which represents all its citizens, should take responsibility for slavery; or

³⁸ D’Souza, *The End of Racism*, at 80. See also Thomas Sowell, *Race and Culture: A World View* 220 (1994) (“It is a distortion of history to assume a priori that social problems affecting contemporary blacks in the US are the ‘legacy of slavery’”).

³⁹ David Horowitz, “Ten reasons why reparations for slavery is a bad idea for blacks – and racist too,” reprinted in 31 *The Black Scholar* 48 (Summer 2001).

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.

II. LIBERAL/RADICAL HISTORIES OF SLAVERY

The liberal justices of the Burger Court also 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, and more likely to see them as transformative moments, changing the Constitution and the polity through blood, sweat and tears. They have also emphasized 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 began to gesture at the ways in which American institutions were built on slavery. Yet it is in the arguments of reparations advocates that the connections between black slavery and white freedom and privilege have been drawn most closely.

A. REMEMBER JIM CROW AND THE LEGACIES OF SLAVERY

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 "color-blindness" 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.”...even 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....we cannot...let color blindness become myopia...⁴⁰

In Brennan’s opinion, Jim Crow is as prominent as slavery; and color-blindness can be achieved only if progress 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. He further noted that even favorable court decisions “did not automatically end segregation, nor did they move Negroes from a position of legal inferiority to one of equality. The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated.”⁴¹ Finally, he concluded that “[t]he experience of Negroes in America has

⁴⁰ *Bakke v. U.C. Board of Regents*, 438 U.S. 265, 326-27 (1976).

⁴¹ *Id.* at 394.

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.”⁴² The liberal history of slavery focuses on slavery’s legacy and aftermath as much as the institution itself.

Liberal judges have connected this longer view of racial injustice with an argument against “color-blindness” 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.”⁴³ 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.”⁴⁴

Randall Robinson summed up this position with his claim, “slavery itself did not end in 1865, as is commonly believed, but rather 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...”⁴⁵ This history extends the time of slavery beyond 1865.

⁴² Id. at 400.

⁴³ 515 U.S. at 245.

⁴⁴ 515 U.S. at 273.

⁴⁵ Randall Robinson, *The Debt: What America Owes to Blacks* 226 (2000).

Reparations Advocacy and The Legacies of Slavery

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; others draw causal connections between slavery and present-day inequality involving cultural or material deprivations inherited by the descendants of ex-slaves.

The idea of a debt to be repaid has aspects of a contract rationale as well as elements of a fairness argument. Randall Robinson's book, *The Debt: What America Owes to Blacks*, makes the argument most forcefully: "Black people worked long, hard, killing days, years, centuries – and they were *never paid* There is a debt here."⁴⁶ 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.⁴⁷ 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.

⁴⁶ Id. at 207.

⁴⁷ Ogletree, *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).

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. The remedy of restitution focuses not on the loss to the slave but on the benefit to the 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, “Belief in the fairness of reparations requires at the intellectual level acceptance of the principle that the victims of unjust enrichment should be compensated.”⁴⁸

Finally, reparations for slavery can be conceived as morally necessary as a matter of corrective justice broadly conceived, 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 depends heavily on drawing the causal connections between past and present, the harms of slavery and the harms of today.⁴⁹

Some reparations advocates accept quite controversial historical views about slavery’s role in creating a destructive black culture, “pathological” family structure, and so forth. 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.”⁵⁰ Posner and Vermeule also mention barriers to education, “economic relationships with peonage-like

⁴⁸ Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C.L. Rev. 429, 436 (1998). See also Hanoch Dagan, Andrew Kull, Emily Sherwin.

⁴⁹ For the best summary of reparations arguments, see Alfred L. Brophy, *The Cultural War Over Reparations for Slavery*, 53 DePaul L. Rev. 1181 (2004) and *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. Ann. Surv. Am. L. 497 (2003).

⁵⁰ 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 (2004) (“The Causal Relationship to Historic Discrimination,” at 697); 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).

elements,” and “negative stereotypes about blacks which have been passed down from generation to generation, and most advocates have tended to focus on these kinds of historical legacies.”⁵¹ 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.⁵²

When Is The Time of Slavery? Reparations Critics Remember 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, and for as specific claims as possible. 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.⁵³

Shifting the temporal focus from slavery to Jim Crow not only reduces the practical problems of lawsuits, as Jordan emphasizes, 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

⁵¹ Posner & Vermeule, “Reparations,” at 742.

⁵² 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).

⁵³ Emma Coleman Jordan, A History Lesson: Reparations for What?, 58 NYU Ann Surv Am L 557, 557 (2003).

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...to 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.”⁵⁴ By contrast, 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.”⁵⁵

Critics of slavery reparations who urge reparations for Jim Crow fear that a focus on slavery will minimize continuing racial harms, allowing us to believe that injustice was part of the deep past. These critics urge us to remember Jim Crow, and argue that the most direct cause of present-day inequality are these more recent harms.

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

⁵⁴ Boris I. Bittker, *The Case for Black Reparations* (1973) 9-12.

⁵⁵ 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.”)

he did not “believe that the meaning of the Constitution was forever ‘fixed’ at the Philadelphia Convention”; instead 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 government, and its respect for the individual freedoms and human rights, we hold as fundamental today.”⁵⁶ According to Marshall, today’s Constitution is a different document from the 1787 Constitution; it has literally 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. Bruce Ackerman and Akhil Amar are probably the leading proponents of the view that that Reconstruction was a “second American revolution.”⁵⁷

Yet while numerous critical race theorists and historians have taken on, to devastating effect, the notion of constitutional color-blindness as a principle, the direct counter-history to the “timelessness of color-blind principles” has not yet been written.⁵⁸

C. WHITE FREEDOM & PRIVILEGE DEPEND(ED) ON BLACK SLAVERY

⁵⁶ Remarks of Thurgood Marshall, *supra* note 23.

⁵⁷ Bruce Ackerman, *We The People*, Vol. 2: Transformations (2000); Akhil Amar, *America’s Constitution: A Biography* (2005). See also Richard Primus, “In The Beginnings,” *The New Republic*, 4/24/06, at 27 (reviewing Amar 2005). 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, 103 *Colum. L. Rev.* 1992 (2003).

⁵⁸ See, e.g., Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 *STAN. L. REV.* 1, 30 (1991), and many others.

A final history that the liberal judges of the Burger Court began to articulate, and that more recent pro-reparations advocates have begun to make more explicit is that slavery was what made “freedom” (for whites) possible – it was NOT a deviation. This is the least developed of the liberal histories, 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.”⁵⁹

This history has been elaborated quite extensively in the scholarly literature on the history of slavery and the slave trade, from 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, to more recent histories of the world slave trade, such as David Eltis’ *The Rise of African Slavery in the Americas*, which reveal the dependence of modern capitalism on slavery.

The liberal judges of the Burger Court, in historicizing the need for racial redress, 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

⁵⁹ Robinson, *The Debt*, at 6.

compromised this principle of equality with its antithesis: slavery.”⁶⁰ Likewise, in Justice Marshall’s dissent in that case, he 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....The implicit protection of slavery embodied in the Declaration of Independence was made explicit in the Constitution...”⁶¹ Brennan and Marshall, however, did not actually argue that slavery in any way, ideologically or materially, enabled white freedom, democracy, or prosperity.

Pro-reparations arguments

Reparations advocates take the argument one step further. 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, they draw on a history of slavery in which freedom and capitalism *depended on* slavery. The past-present connection is not only in the harms suffered by blacks under slavery, but in the benefits conferred on whites. White privilege today, and white institutions today, have their roots in slavery. As the eminent historian John Hope Franklin wrote in response to David Horowitz’s anti-reparation arguments, 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

⁶⁰ 438 US at 326-27 (1976).

⁶¹ 438 U.S. at 387-89.

control....Most living Americans do have a connection with slavery. That 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.⁶²

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.” As a legal matter, the lawsuits he filed sought to hold corporations responsible for their role in slavery.⁶³

Reparations advocates remind us to remember Jim Crow as well as 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.”⁶⁴ He goes on to tell the history of ex-slaves’ demands for “forty acres and a mule,” and Callie House and the ex-slave pension drive in the late nineteenth century. By this history, Conyers counters the claims that anti-slavery was the gift of whites to blacks, but rather something claimed by blacks themselves.⁶⁵

⁶² Horowitz, *Uncivil Wars*, 79-80.

⁶³ Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. Davis L. Rev. 1051, 1069 (2003).

⁶⁴ John Conyers, Jr., “Reparations: An Idea Whose Time Has Come,” in Raymond Winbush, ed., *Should America Pay? Slavery and The Raging Debate on Reparations* 15 (2003).

⁶⁵ *Id.* at 17. See Martha Biondi, “The Rise of the Reparations Movement,” 87 *Radical History Review* 5 (2003), for an excellent history of reparations advocacy in the U.S.

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. 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.” 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.” By adopting a “perpetrator-victim model of racial wrongs as harmful deviations from the norms of equal treatment and meritocracy,” 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.*”⁶⁶ (emphasis added)

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

I have great sympathy for this argument, in a world in which one could defend

⁶⁶ Gordon, *Undoing Historical Injustice*, at 70-72.

affirmative action and other aggressive programs to achieve racial justice as efforts to radically restructure American racial hierarchy, looking to the future.⁶⁷ But in a world in which affirmative action is nearly dead, and can only be defended on the problematic and wispy ground of “diversity,” 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 resentment, than any other approach. It is hard to sustain the idea that affirmative action has been any more politically palatable to the white majority or any less likely to incite white men to resentment. 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 the jurisprudence but finds articulation in the academic literature is the pessimistic position taken by Derrick Bell in *And We Are Not Saved* and *Faces at the Bottom of the Well*, among other writings. This is a history of deep continuity: racism is constant, and progress is nearly impossible; reparations are as unlikely today as they were in 1866.

Derrick Bell, in a recent article entitled, “Racism is Here to Stay: Now What?” asserts that “Black people will never gain full equality in this country.” He argues that we have let ourselves be “comforted and consoled . . . with the myth of ‘slow but steady’ racial progress,” but in fact the history of racism in the U.S. is cyclical rather than

⁶⁷ 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).

progressive, and that 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,” to “continue the fight against racism” although it will always be with us.⁶⁸

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 back the Constitution.”⁶⁹ Whether because liberal theorists have come to see the merits of other branches of government besides the judiciary, or because we look towards 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 of the new work, such as that of Reva Siegel and Robert Post, draws heavily on that historiographic tradition.⁷⁰ 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.⁷¹ 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*, are historical but emphasize specific historical episodes and skirt

⁶⁸ Derrick Bell, *Racism is Here to Stay: Now What?*, 35 *Howard L.J.* 79, 79-80, 91 (1991).

⁶⁹ See, e.g., Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004); Mark Tushnet, *Taking The Constitution Away from The Courts* (2000).

⁷⁰ See note 75 *infra*.

⁷¹ Mark Graber, *Dred Scott and The Problem of Constitutional Evil* (2006).

the antebellum era in particular. These two works also take an aggressively favorable view of popular constitutionalism.

In the view of popular constitutionalism's proponents, the Constitution should not be read through this Supreme Court's lens of timeless colorblind principles, but rather we should look to the people for the meaning of the Constitution. This liberal history itself, however, tends to gloss over both the very strong tradition of pro-slavery popular Constitutionalism, as well as the limitations of anti-slavery constitutionalism as a vision of liberty and full citizenship.

Two strands of the new popular constitutionalism literature by legal historians, however, suggest potential uses for the history of slavery in contemporary jurisprudence. The first strand is the tradition of looking to social movements for alternative constitutional visions, and in particular, in the antebellum era, to the labor movement and the anti-slavery movement. The second is recent historical work that suggests the seamier side of popular constitutionalism, with a focus on pro-slavery politics.

Alternative constitutional visions

During the 1980s, when 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." William Forbath is perhaps the most

prominent legal historian to have articulated this history in constitutional terms, arguing 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.”⁷² Forbath, Amy Stanley and Eric Foner among others have shown that this “free labor” ideal encompassed more than merely the narrow notion of self-ownership and freedom of contract, but ideas of economic and political independence, civic capacity, and control over one’s working life.⁷³ They put this in sharp 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.” In the tragic turning point of this history, unionists respond to the courts’ hostility by abandoning their alternative republican constitutional vision and buying into laissez-faire, with Samuel Gompers asking that labor simply be left alone with its freedom to contract.⁷⁴

Recently, legal historians have continued to suggest that social movements’ alternative constitutional visions – some of them directed at the courts, and others at other branches of government, or completely outside government – should be a source of inspiration to us today. Reva Siegel and Robert Post remind us that the Warren and early Burger Courts worked in tandem with Congress, relying on the fact of progressive legislation on behalf of women and many states’ passage of the Equal Rights Amendment

⁷² 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).

⁷³ Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage and the Market in the Age of Slave Emancipation* (1998); Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (1995).

⁷⁴ Forbath, *Law and The Shaping of the American Labor Movement*.

as important evidence of the meaning of equal protection for women; they show that the women's rights movement played a major role in defining equality under the constitution in the 1970s.⁷⁵ 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 Brandeis and Pound, rather than the other way around.⁷⁶ And Kenneth Mack and Risa Goluboff have demonstrated that alternative visions of civil rights for African Americans came from the grass roots 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.⁷⁷ This alternative free-labor vision, drawing more on the Thirteenth than the Fourteenth Amendment, had its historical antecedents in the early labor movement.

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; earlier traditions could be reclaimed. But it is also an important corrective to some of the more work on popular constitutionalism by con-law scholars that assumes a dichotomy between popular and legal means that wasn't there. As Kenneth Mack shows, for example, NAACP lawyers intertwined courtroom performance, mass politics and legal reform in their litigation

⁷⁵ See Reva Siegel & Robert Post, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 YALE L.J. 1943-2059 (2003); Siegel & Post, Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power, 78 IND. L.J. 1-45 (2003); Siegel & Post, Equal Protection By Law: Federal Antidiscrimination Legislation After Morrison and Kimel, 110 YALE L.J. 441-526 (2000).

⁷⁶ Felice Batlan, The Popularization of American Law: The Settlement House, Gender, and the Roots of Sociological Jurisprudence (unpublished paper on file with author, 2005).

⁷⁷ Kenneth W. Mack, Rethinking Civil Rights Lawyering and Politics in the Era Before *Brown*, 115 Yale L.J. 256 (2005); Risa L. Goluboff, The Thirteenth Amendment and The Lost Origins of Civil Rights, 50 Duke L.J. 1609 (2001).

strategies. Charles Houston and Thurgood Marshall both wrote in 1934 that civil rights litigation would “arouse and strengthen the will of the local communities to demand and fight for their rights” and “build a body of public opinion” in support of change.

Litigation strategies and mass politics went hand-in-hand.

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 those 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 color-blindness.

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, and 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 Gary Rowe, Barry Friedman, Richard Primus, and Daniel Hulsebosch.⁷⁸

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.” In brief, in the wake of Denmark Vesey’s 1822 slave revolt, South Carolina and six other

⁷⁸ See, e.g., Gary Rowe, “The Negro Seaman’s Affair” (unpublished paper on file with author, 2005); Barry Friedman, Mediated Popular Constitutionalism, 101 Mich. L. Rev. 2596 (2003); Richard Primus, The Riddle of Hiram Revels, 119 Harv. L. Rev. 1680 (2006); Daniel Hulsebosch, Bringing The People Back In, 80 N.Y.U. L. Rev. 653 (2005).

southern states passed laws requiring all free black sailors passing through state ports to report to jail. 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. Judge Johnson, the author of the opinion, as well as his opponents, used the newspapers to argue over the law's constitutionality. 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." This was popular constitutionalism in action, but it hardly resolved the constitutional issues over slavery. And it reminds us that ignoring judicial supremacy was hardly always weighed on the side of good in the scales of justice. Indeed, Rowe and other historians caution us to remember the force of popular constitutionalism for nullification in the 1830s as well as the 1950s.⁷⁹

Both Rowe and Hulsebosch point out the way Kramer's history skirts slavery. Kramer focuses on the early history of judicial review and popular constitutionalism, forays in the 1830s only to emphasize party politics and Andrew Jackson's battles with the Supreme Court over judicial supremacy, but quickly skips past the major constitutional crises over slavery. Kramer also downplays the role of violence, migration, and other physical acts in "popular constitutionalism." 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

⁷⁹ Gary Rowe, "The Negro Seamen Affair" (unpublished paper in possession of the author); see also Gary Rowe, *Constitutionalism in the Streets*, 78 *So. Cal. L. Rev.* 401 (2005).

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.”⁸⁰

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. There were a range of proslavery and antislavery constitutional theories, and their advocates used the legal system to forward their political goals. 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. 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.

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 pro-slavery constitutionalism that

⁸⁰ Hulsebosch, *Bringing The People Back In*.

presents a cautionary tale. For if we attend to the histories of “free labor,” we can see that the “anti-slavery idea of liberty” itself contributed to the narrow vision of equality embodied in *Lochner v. New York*. A history of anti-slavery constitutionalism reminds us both of the emancipatory potential of claims on the Constitution, from William Crafts’ plea for the “sacred rights of the weak” to Frederick Douglass’s insistence that the Constitution could be “claim[ed] for liberty,” and of 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.

III. CONCLUSION

By this time, 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 more closely our own histories, and to build on those that most effectively take on conservative myths and shibboleths. Reparations movements will not succeed until we 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 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 they met. At the same time, any effort to counteract this Court's timeless color-blind 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-one 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.