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UNFINISHED BUSINESS: RACIAL JUNCTURES IN US HISTORY AND THEIR LEGACY

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“Unfinished Business: Racial Junctures in US History and Their Legacy,” by David Lyons

Abstract.

This paper traces the creation and perpetuation of racial hierarchy in the US. It focuses on the most crucial developments that affected African Americans, because they most profoundly determined racial stratification here. It concerns four brief periods in US history – one in each century since British colonies were established in North America.

(1) When Africans first came to the colonies, they did not enter chattel slavery. There was no such system, and social mobility was not foreclosed to African servants. By the end of the 17th century, colonial legislatures had created the legal framework for chattel slavery, to which they consigned people of color. (2) After the War for Independence, the slave system was protected by the new Constitution, in a settlement that was not mandated by circumstances and that might have been avoided entirely. (3) After the Civil War, slavery was formally abolished, but decisions were very soon made that undermined a genuine reconstruction of Southern society, well before the 1877 Hayes-Tilden agreement made way for the full reestablishment of White supremacy. (4) After the “second reconstruction,” of the 20th century, the legacy of slavery and Jim Crow were never fully addressed but were left fundamentally undisturbed.

US history permits the following observations: (a) during the racial junctures, alternatives were available that were understood well enough by those who made the relevant decisions; (b) the racially stratified character of the US was therefore not inevitable; (c) the decisions were made first by colonial governments and later by their successors, the United States; (d) the responsibility for rectifying any persisting injustice therefore lies with the nation as a whole.

The final section of the paper considers some principled approaches to addressing the persisting legacy of slavery and Jim Crow, such as the promotion of democracy and the provision of reparations. To minimize grounds for disagreement, it suggests that the (seemingly innocuous, “color-blind”) principle of equal opportunity for our children has directly relevant, radical implications.

UNFINISHED BUSINESS: RACIAL JUNCTURES IN US HISTORY AND THEIR LEGACY¹

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Introduction.

This paper concerns the creation of racial hierarchy in the US, its perpetuation, and its persisting consequences. The “racial junctures” are brief periods in US history that saw some crucial developments – one period in each of the four centuries since British colonies were established in North America. I focus here on decisions that affected African Americans directly because their enslavement and subsequent history most profoundly determined racial stratification in the US.³

In the first three of these periods, racial stratification was embraced and alternative paths rejected. When Africans first came to the colonies, they did not enter chattel slavery, for there was no such system; it had to be created. Social mobility was not at first foreclosed to African laborers, but their prospects were violently altered as colonial legislatures constructed the

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³I shall not defend this claim here. A defense might begin with the fact (touched on below) that racial categories largely displaced religious ones in the creation of a system based on slavery. A more complete study of related developments would review the decisions that most directly concerned Native Americans, Mexicans, and various immigrant groups.

statutory framework for chattel slavery, to which they consigned people of color (Section I). After the War for Independence, the slave system was protected by the new Constitution. The concessions made to slavery exceeded what was required for a constitutional settlement under the most unfavorable assumptions, and it is possible that such concessions could have been avoided entirely (Section II). After the Civil War, slavery was formally abolished, but decisions were very soon made that foreclosed a genuine reconstruction, well before the federal government tacitly sanctioned the reestablishment of an oppressive race-based social order (Section III).⁴

Quick and inspiring histories that are familiar to educated Americans tend to neglect or misrepresent these stages in the development of American race relations. This paper reviews that history more closely, but it offers no new historical revelations. The several junctures have been studied separately by historians, and this paper's descriptions of them do not, I believe, diverge from contemporary understanding. The hope is that, by viewing them together and considering their implications systematically, we may gain a better measure of the history and issues we have inherited.

The first point, then, is that the deeply rooted racially stratified character of the US was not inevitable. I do not mean merely that we can now, in retrospect, imagine different directions that might conceivably have been taken. My point is rather that alternatives were understood well enough by those who made the relevant decisions. Morally more desirable alternatives would no doubt have been difficult to achieve, in part because the interests of those who would

⁴Although judicial decisions tended to undermine Reconstruction legislation and constitutional amendments, I shall say little about them here because it would be difficult to establish that they were calculated to promote such stratification.

be adversely affected by the decisions actually made -- African Americans most directly -- were not represented by those who made them -- the colonial elite, the founders of the republic, et al. But that sort of practical difficulty is not relevant here. Compare the examples to be discussed below with a more recent case. By the time of the 1942 Wannsee conference in Nazi Germany, it had been decided to exterminate Jews, Roma, and others. But the conference participants understood the alternative well enough, and the road taken was not so unavoidable as to exclude them, and others, from responsibility for genocide.

Second, my concern here is not with the blameworthiness of specific individuals but with the responsibility of continuing political entities. The relevant decisions were made on behalf of, and thus *by*, governments such as the United States. The principal responsibility for rectifying any persisting injustice lies, therefore, with the nation as a whole. I do not mean to prejudge the responsibility of non-governmental entities, be they individuals or corporations; they are simply not the focus here.

Third, it is arguable that the pattern persists – that something like a fourth racial juncture occurred in the last quarter of the 20th century. America then faced its most promising opportunity to eliminate the legacy of slavery and Jim Crow, and it has left the racial hierarchy substantially undisturbed (Section IV).

In the final section (V) I discuss some principled approaches to addressing the persisting legacy of slavery and Jim Crow. These include the promotion of democracy, compensatory or reparative justice, and the provision of a fair share of life prospects for each of our society's children. Given the legacy of slavery and Jim Crow, it seems clear that any serious attempt to realize such ideals would have radical practical implications.

I. The Creation of Chattel Slavery.⁵

In 1619, “20 and odd Negroes” were bought from a Dutch ship in Jamestown (Kingsbury 243).⁶ It is plausible to suppose that this was the beginning of chattel slavery in the British North American colonies. After all, those Africans were not voluntary immigrants but were *purchased*. This suggests that they were property, could be bought and sold, were destined for perpetual servitude, and their children would suffer the same fate. Furthermore, this importation of Africans, while a new feature of the young Virginia colony, was not a novel development in the Americas. As the British colonists were well aware, the shipment of slaves from Africa to the Americas had begun a century earlier. (African slaves had even earlier been brought to Europe, and some had been brought to Britain.) The exploitation of slaves from Africa was an established aspect of Spanish and Portuguese enterprise in the Americas (RED 144-51).

In time, African slavery would become the economic engine of the North American economy, providing the single most important basis not only for Southern agriculture but also for shipping, industry, and finance generally. In 1619, however, the Virginia colonists had just begun to learn how they might survive, and that they might even prosper, by cultivating tobacco as a cash crop for export. For that purpose, agricultural laborers were needed. Virginia planters initially relied primarily on European “indentured servants” who contracted to work for a period of years in return for their passage to America. But the conditions of indentured servitude were typically harsh enough and the mortality rate of servants was high enough to give pause to those

⁵I consider only Virginia here. That colony was the first to import Africans for labor and it became the leading colony with a slave-based economy.

⁶Sources are listed at the end.

potential servants who had a choice in the matter. Inducements for potential servants to immigrate had to be enhanced, and the costs of importing servants from Britain increased considerably (Blackburn 230, 256-8; Kolchin 8-10; RED 51).

When, in the last third of the 17th century, Britain became a major participant in the slave trade, the purchase of an African slave began to seem economically more attractive to Virginia planters than the price of a temporary servant. Ex-servants' rights to "freedom dues" and their need for land of their own at the termination of their service, as well as their propensity to rebel violently in pursuit of those interests against the landed colonial establishment, increased the attractiveness to planters of substituting slave for indentured labor. By the end of the 17th century, Virginia's labor force was shifting from European indentured servants to African slaves. The same applies to Maryland, where tobacco could likewise be cultivated profitably. Before long, the Carolinas, where conditions favored rice and indigo plantations, imported substantial numbers of African slaves (Berlin 109f, 143f; Blackburn 315-22; Kolchin 10-14; RED 154-8).

The development of chattel slavery in the British colonies was more complex than such a capsule history suggests. For one thing, many European immigrants came without indentures and were auctioned at dockside upon arrival. So talk of "buying" Africans from the Dutch ship in 1619 could be misleading. Furthermore, we can find no reference to "slaves" in Virginia records prior to 1659.⁷ We also know from case reports as late as the 1670s that some servants of African ancestry served only for limited periods under indentures and could use the courts to secure their freedom as well as compensation for service beyond the period for which they had

⁷A 1659 Virginia statute (Act XVI) offered incentives for the importation of "Negro slaves," and the provisions of a 1660 Virginia statute (Act XXII) assume that some "Negroes" are servants for life (Higginbotham 34).

contracted.⁸ None of that would have been possible if the claimants had been chattel slaves.

Without knowing more, however, we might regard the first two facts as inconclusive and the cases involving African indentured servants merely as evidence that Virginia encompassed some exceptional arrangements. That would not be surprising; after all, the slave colonies and slave states always included free people of color.

But we do know more. The records of colonial legislation imply that the legal institution of chattel slavery simply did not exist in 1619 or, for that matter, through most of the 17th century in Virginia, but was deliberately constructed during the later decades of the 17th century by those who ruled the colony. The Virginia legislature began the process with this 1662 enactment:

Whereas some doubts have arisen whether children got by any Englishman upon a negro woman should be slave or free, *Be it therefore enacted and declared by this present grand assembly*, that all children borne in this country shall be held bond or free only according to the condition of the mother....(Act XII, Hening 170)⁹

The uncertainty referred to in the statute is not the result of legal ignorance. The enactment represents a deliberate departure from the common law.¹⁰ The Virginia legislature evidently decided that servitude for Africans should become inheritable – an essential feature of chattel slavery in the colonies and the US.

Seen in the context of existing English law and subsequent Virginia legislation, the

⁸See, e.g., *Re Edward Mazingo* (1672) and *Moore v. Light* (1673) in LAW 13.

⁹Legislative excerpts reproduced here follow the spelling and punctuation of the originals.

¹⁰Henry Swinburne's *Brief Treatise of Testaments and Wills* 109f (SLAVERY 43; Blackburn 265f)

enactment reveals a legislature that is beginning to create a body of slave law. Unlike Spain and Portugal, Britain had no laws regulating slavery, and thus the British colonists, unlike their Spanish and Portuguese counterparts, had no body of slave law, or even any clearly relevant legal traditions, upon which to draw when they began to import Africans to labor in their American colonies.¹¹

The colonists had the legal freedom to create such laws, regardless of prevalent legal doctrine within Britain. Unlike the Spanish and Portuguese colonies, which were projects of their respective home governments, the British colonies began as private ventures which were chartered by the Crown. As royal domains, they were not subject to parliamentary control until the middle of the 18th century. They were free to create their own laws, subject only to a possible Crown veto (Bush).¹² And neither the Crown nor, later, Parliament was motivated to interfere with such legal developments in the colonies, whose slave economies engaged the British in quite profitable activities, including the slave trade itself.

Another consideration suggests that the first Africans brought to Virginia could not all have been treated as slaves. As a result of prior contact with Europeans, some Africans had been baptized, and Christian religious doctrine made them ineligible for enslavement.¹³ There was

¹¹English case law itself vacillated, from the 16th through the 18th century, over whether the common law allowed anyone to hold a slave in Britain -- from Cartwright's Case (1569) to *Somerset v. Stewart* (1772) and *King v. Inhabitants of Thames Ditton* (1785).

¹²In 1624 the King revoked Virginia's charter and it became a Crown colony, but that made no effective difference to the colony's autonomy.

¹³This doctrine, traceable to the Crusades, accompanied Europeans in their later colonial adventures in Africa and the Americas. Thus in the 15th century Portugal and Spain were authorized by the Pope to kill or enslave "infidels," to destroy or appropriate their property, and to assume jurisdiction and monopolistic economic control over such lands as had not yet been claimed by other Christian nations. In somewhat similar terms, Henry VII authorized the Cabots'

uncertainty among the protestant churches as to whether the baptism of someone who was already a slave had the same effect (Blackburn 231f, 240, 250; Higginbotham 20f, 36f; Kolchin 15). That helps to explain a 1667 enactment of the Virginia legislature:

Whereas some doubts have risen whether children that are slaves by birth, and by the charity and piety of their owners made partakers of the blessed sacrament of baptisme, should by vertue of their baptisme be made ffree; *It is enacted and declared by this grand assembly, and the authority thereof*, that the conferring of baptisme doth not alter the condition of the person as to his bondage or freedome.... (Act III, Hening 260)

This measure permitted not only the continued enslavement of someone after baptism but the enslavement of Africans who became Christians before they arrived in America.¹⁴

Conditions for indentured servants in the rigidly hierarchical Virginia colony have been characterized as “nightmarish” (Red 51), but there were presumably limits to the disciplinary methods used by masters. One might expect lesser protections for chattel slaves, who, unlike indentured servants, were the full property of masters. Furthermore, the extension of servitude was a punishment available against indentured servants but not against those who served for life. It was therefore natural for the Virginia legislature to accommodate the difference in duration of servitude by permitting more severe corporal punishments for those whose servitude could not

voyage across the Atlantic. See *Bull Romanus Pontifex of Pope Nicholas V, January 8, 1455* (Ehler & Monall 144-51); *Bull Inter Caetera of Alexander VI, May 3, 1493* (Davenport 60-3); *The First Letters Patent Granted to John Cabot and His Sons, 5 March 1496* (Williamson 204f).

¹⁴The statute eliminated a consideration that discouraged masters from permitting their slaves to convert, which was seen by some as desirable since Christian teaching was regarded as aiding in their control (Higginbotham 37; Kolchin 55f). Nash reports, however, that many slaves associated baptism with emancipation and that slaveowners were worried that baptism would make slaves less subservient (RED 187).

be extended. One of its principal measures was the following enactment of 1668:

Whereas the only law in force for the punishment of refractory servants resisting their master, mistris or overseer cannot be inflicted upon negroes, nor the obstinacy of many of them by other than violent meanes suppress, *Be it enacted and declared by this grand assembly*, if any slave resists his master (or other by his masters order correcting him) and by the extremity of the correction should chance to die, that his death shall not be accompted ffelony, but the master (or that other person appointed by the master to punish him) be acquit from molestation, since it cannot be presumed that prepensed malice (which alone makes murther ffelony) should induce any man to destroy his owne estate. (Act I, Hening, 270)¹⁵

This statute gave owners maximum physical control over those held in lifetime bondage and thus adds to the law another aspect of what we know as chattel slavery. As the enactment itself suggests, it is unlikely that a master could be proved to have deliberately or maliciously killed a slave. As it even more clearly indicates, the owner's property interest in a slave would in any case inhibit a master's use of lethal force as a method of control.¹⁶

Thus three familiar features of chattel slavery in North America have been provided by the Virginia legislature. A slave code is beginning to take shape.

¹⁵Although this enactment identifies "negroes" as those bound to serve for life, other evidence, considered above and below, implies that some of African birth or ancestry did not serve for life and that others sometimes did.

¹⁶Although the elaborate colonial slave codes that began to appear early in the 18th century treated slaves as disposable property, laws were occasionally enforced against extreme brutality leading to a slave's death. See, e.g., *Thomas B. Chaplin Sits on a Jury of Inquest* (Rose 210-2).

But the legislation so far fails to address one crucial feature of chattel slavery in America: its racial dimension. With some difficulty, the Virginia legislature addresses the issue. The difficulty stems from an evident change in the colonists' orientation: having begun with the assumption that non-Christians alone are eligible for slavery, they must now employ different social categories in order to construct a color-coded social system. The first legislative attempt is made in 1670:

... It is resolved and enacted that all servants not being christians imported into this colony by shipping shall be slaves for their lives; but what shall come by land shall serve, if boyes or girles, untill thirty yeares of age, if men or women twelve years and no longer. (Act XII, Hening 283).

Thus, non-Christians who come by sea are condemned to lifetime servitude, and that condition is reserved for them alone. The non-Christian servants who come by sea are, presumably, Africans. If this is what the statute's drafter had in mind, its point is to consign Africans alone to lifetime servitude.¹⁷

Subsequent legislation indicates that in 1670 the legislature had failed to consider complications, which must soon have led to unintended consequences. Africans might already be Christians when they enter the colony and they might also enter it from an adjacent colony, and thus by land, rather than by sea. These complications are explained by a 1682 enactment that replaced the 1670 statute. The most directly relevant segments of the later enactment reads as follows:

¹⁷What non-Christian servants might come by land? Perhaps Native Americans. It is unclear, however, why they would be treated differently from other non-Christians, especially as the 1682 substitute enactment (discussed below) does not so provide.

...for as much as many negroes, moors, mollattoes and others borne of and in heathenish, idollatrous, pagan and mahometan parentage and country have heretofore, and hereafter may be[,] purchased, procured, or otherwise obteigned as slaves of, from or out of ... their heathenish country by some well disposed christian, who after ... their obtaining and purchaseing such negroe, moor, or mollatto as their slave out of a pious zeale, have wrought the conversion of such slave to the christian faith, which by the laws of this country doth not manumitt them or make them free, and [after] their conversion, it hath and may often happen that such master or owners of such slave being by some reason inforced to bring or send such slave into this country to sell or dispose of for his necessity or advantage, he the said master or owner of such servant[,] which notwithstanding his conversion is really his slave, or his factor or agent[,] must be constrained to carry back or export againe the said slave to some other place where they may sell him for a slave, or else depart from their just right and tytle to such slave and sell him here for noe longer time then the English or other christians are to serve, to the great losse and damage of such master or owner, and to the great discouragement of bringing in such slaves for the future, and to noe advantage at all to the planter or buyer... *Bee it therefore enacted by the governour councell and burgesses of this grand assembly, and it is enacted by the authority aforesaid, that [the] act of the third of October 1670¹⁸ be, and is hereby repealed and made utterly voyd to all intents and purposes whatsoever. And be it further enacted by the authority aforesaid that all servants ... which from and after publication of this act shall be brought or imported into this country, either by sea or land, whether*

¹⁸The statute last quoted.

Negroes, Moores, Mollattoes or Indians, who and whose parentage and native country are not christian at the time of their first purchase of such servant by some christian ... are hereby adjudged, deemed and taken, and shall be adjudged, deemed and taken to be slaves to all intents and purposes, any law, usage or custome to the contrary notwithstanding. (Act I, Hening 490-493)

While one finds here the vestiges of the faith-based criterion for enslavement, it is clearly subordinated to a determination that lifetime, inheritable slavery shall be confined to people of color.¹⁹ The Virginia legislature has created a color-coded, two-tier labor system.

What difference did it make? The colonial records indicate that, for much of the 17th century, economic and social stratification was not tightly color-coded and social mobility was accessible, as in Spanish and Portuguese colonies. We know, for example, that some African slaves in Virginia acquired the wherewithal to raise crops and domestic animals, engage in commerce, accumulate capital, and purchase their own freedom. Then they might purchase the freedom of spouses and children, acquire land and servants, have their children baptized, and be recognized as community members. Marriages with European Americans were not uncommon (Berlin 29-46; Blackburn 228, 240, 266).

These developments were made possible, in part, by the cooperation of European American masters, who would allow a slave or other servant to use some land in exchange for being released from the responsibility of providing for the servant's subsistence. With very hard

¹⁹This division of humanity became a feature of US law as, e.g., Congress in 1790 limited naturalized citizenship to "white" persons. The restriction remained for nearly two centuries (save for the exception made in 1870 for persons of African ancestry, The Naturalization and Enforcement Act of 1870, 16 Stat. 254, 256).

work and a good deal of luck, such a servant might eventually gain his freedom and even become an independent farmer. This approach seems to have been attractive to masters during hard economic times, such as the 1630s. Thus, in the 17th century, Virginia included communities of free African Americans and interracial families (Berlin 45f).²⁰

Another factor promoting social mobility in these first decades is that most of the African immigrants came to the colonies from the west coast of Africa, where for a century and a half there had been considerable contact with Europeans. Many had been in other European colonies prior to arriving in Virginia. They differed from the vast majority of those who came later, during the height of the slave trade to North America. The later immigrants came mainly from the African interior, after being captured or kidnaped, and were unfamiliar with Europeans, their language, or their culture. The earlier African immigrants came in small numbers and lacked some characteristics that later made African chattel slaves seem alien to European Americans (Berlin 102-5; Blackburn 255, 258; Kolchin 16f.).

Three properties are understood to have set Africans apart in the eyes of European Americans: their physical appearance, their culture, and their religion (Kolchin 14f). It may be assumed that the early immigrants from Africa presented an alien appearance to the British settlers. But many of the early arrivals were neither culturally nor religiously so different as those who came during the height of the slave trade. Many knew the ways of Europeans, and

²⁰In these respects, the British colonies initially resembled those of Spain, which came to include substantial populations of free people of color. Although that development stems in part from local conditions, it should be noted that the Spanish slave code favored and facilitated the movement of individuals out of slavery and their integration into the larger community (Berlin 212-14; Tannenbaum 53-61).

many had already been converted to Christianity (Berlin 29, 44f).²¹

There has been some dispute among historians concerning cause and effect relations between chattel slavery and White racist attitudes (Allen 3-21). My point here is that, despite notions of White superiority among some portion of the European American population, it was initially neither assumed nor ordained that people of color should become a rigidly subjugated caste.

But those who shaped the direction of the colony evidently decided, starting in the 1660s, to color-code the social system. I want now to suggest another factor that may have encouraged that decision.

In 17th century Virginia, servants and slaves from Europe and Africa cooperated in many settings. They worked together, shared living conditions and grievances, and ran away from bondage together (Berlin 45; Higginbotham 26-30). In 1676, they joined together in Bacon's Rebellion (Berlin 45; Washburn 80). Many landless European Americans participated with the aim of making more land available by dispossessing Native Americans, either by killing them or driving them further inland. Many African Americans participated, presumably because Bacon promised them freedom.²² They opposed the governing landed elite, who had less need for land

²¹As Kolchin notes (15), cultural differences decreased when people of African ancestry were raised in the colonies, and physical differences blurred as Whites and Blacks had joint progeny.

²²Two related interests might have increased African Americans' willingness to participate. Insofar as they could envisage the possibility of gaining their own freedom, they too wanted land to be available. But, given colonial enactments such as those we have reviewed, by the 1670s those prospects were being extinguished by the colonial government. They accordingly had serious grievances against the colonial elite, who became the principal target of the rebellion.

than for maintaining peaceful relations with the neighboring Native Americans. The rebels forced the governor to flee Jamestown and then burned it to the ground. British troops crossed the Atlantic to put down the rebellion, which faltered when Bacon fell ill and died.

Bacon's Rebellion was not the first uprising against the colonial elite, but it was undoubtedly the most threatening and traumatic before the 1770s. I suggest that the experience contributed to the determination of those who shaped the policies of the colony to drive a wedge between Europeans and Africans by creating a color-coded social system. By forcing servants of color to the bottom, they accorded relative privilege, dignity, and opportunity to those on the second tier. In 1682, as we have seen, the Virginia legislature consigned people of color to slavery. This divide-and-conquer strategy enabled the elite to pit one potentially rebellious group against another.

To cement a color-coded system that would reduce solidarity among laborers and decrease effective combined opposition to the colonial elite, it was necessary to do more. Those who shaped colonial policy decided to sanction fully White supremacist sentiments. In 1691 the Virginia legislature banned interracial marriages and severely punished interracial procreation (Act XVI, LAW 18). It is noteworthy that this measure was not universally approved by the European American community, but was opposed by some of its propertied members (Berlin, 44). But official policy was now actively encouraging somewhat inchoate racist notions to intensify and congeal. The same enactment sanctioned the killing of runaway slaves, restricted severely the freeing of slaves, and required that freed slaves be transported out of the colony at the owner's expense. African Americans were to occupy a bottom caste, deprived of the rights claimed and the aspirations indulged by indentured servants and excluded from romantic and

other relationships with European Americans. They were to be identified with slavery. And they were fair game.

These efforts achieved some measure of success. As European Americans were acculturated in a system that consigned African Americans to the bottom and actively discouraged fraternization, they were encouraged to believe that the social hierarchy had a valid foundation. Racism provided the ideological cement.

In sum, the system of chattel slavery that developed in Virginia was not inevitable.²³ It was neither inherited by the colonists nor brought over from Britain. For several decades, social mobility was possible in Virginia society even for African slaves. African Americans were able to acquire economic independence and respected social status. Faced with this prospect – and, I suggest, faced with the prospect of a unified laboring class – the ruling elite imposed a rigid, color-coded caste system. It is impossible to say how clearly that elite imagined the possible alternatives. It would have been clear, however, that any alternative would have involved a wider distribution of political power, economic opportunity, and social mobility. Positive measures were required to avoid those eventualities, and they were effectively taken.

II. The Legal Entrenchment of Slavery.

Until it was abolished in 1865, slavery was not expressly mentioned in the Constitution. But several provisions were understood by the framers and later by state and federal officials to refer to slavery. Here are the clearest examples:

²³For a discussion of 17th century alternatives, see Blackburn 350-63.

The three-fifths clause (Article I, Section 2, paragraph 3) provided that representation in Congress “shall be apportioned among the several States ... according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.” Thus indentured servants were expressly included in the category of “free persons” and Native Americans were expressly excluded from the apportionment, so that only those in lifetime, hereditary slavery occupied the category “other persons.” While suffrage was denied slaves, their numbers contributed to slave owners’ influence within all three branches of government -- not only in Congress but also in the executive branch (as the electoral college reflected congressional representation), and the federal judiciary (selected by the president) (*Covenant* 199f, n. 23; *Founders* 441-3).

The slave trade provisions. Article I, Section 9, paragraph 1 prevented Congress for twenty years from banning “the migration or importation of such persons as any of the States now existing shall think proper to admit,” and Article V exempted this provision from amendment for the same period.

The fugitive slave clause (Article IV, Section 2, paragraph 3) provided for the return of “person[s] held to service or labour” to those “to whom such service or labour may be due.” The provision was understood to concern runaway slaves. Implementing legislation was first enacted in 1793 (Fugitive Slave Act of 1793, 1 Stat. 302), and persons accused of running away from slavery or of trying to aid them were prosecuted in the courts (Cover 159-91).

The constitutional accommodation of chattel slavery seems to clash with the doctrine of universal human rights that a decade earlier was invoked to justify the colonial rebellion. The

contradiction was frequently noted, especially by friends of the rebels when the latter complained of being reduced to “slaves” by Crown or Parliament (Litwack 7-9).

In his *Dred Scott* opinion, Chief Justice Roger Taney claimed that there was in fact no contradiction. According to Taney, the founders never dreamed of including people of African descent within the body politic. Thus he wrote:

It is difficult at this day [1857] to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. *This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute;* and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, *without doubting for a moment the correctness of this opinion* (Scott v. Sandford, 60 U.S. 393, 407 (1857), emphasis added).

However much the founders were influenced by notions of White supremacy, Taney would seem

to have indulged in some exaggeration. Part of the more familiar story of the constitutional framing is that, in order to achieve a settlement, a North-South compromise on slavery was necessary. The North is understood to have opposed slavery, or at least its extension, and to have made concessions in order to achieve a stronger central government. Concessions to slavery would not have been necessary, however, unless abolition had been perceived as a threat. If it were, it seems likely that some people were disputing the notion that African Americans “had no rights which the white man was bound to respect” and “might justly ... be reduced to slavery for his benefit.”

Taney was mistaken. By the time chattel slavery had been consolidated, in the late 17th century, objections to it were being publicly expressed in America. In the 18th century, anti-slavery sentiment was disseminated in print and from the pulpits of various denominations, South as well as North. By 1787, three Northern states had abolished slavery, three had enacted gradual emancipation statutes, and three others would follow (as would three of the states that would soon be carved out of the Northwest Territory). This helps to explain why some delegates from slave states expressed the fear that slavery might be attacked or undermined by a stronger central government. It helps to explain why they demanded that slavery be protected (see RED 7-20).²⁴

Let's review what was done for slavery at the convention. The general structure of the Constitution provided a partial solution to the perceived problem. As the federal government

²⁴Not that European Americans were committed to equality. By the late 18th century, racial stratification was firmly entrenched and racist attitudes were widespread throughout the US. Many European Americans objected to slavery, nonetheless, on self-interested or moral grounds.

was to be accorded only a limited set of enumerated powers, slavery could be protected by excluding its regulation from the list of enumerated powers and making sure that no enumerated power implied such an authority. That was done (*Covenant 9; Founders 443f*).

The importation of slaves had been suspended during the revolutionary period. The Lower South (Georgia and the Carolinas) had lost many slaves during the war, and it wanted the slave trade protected. It was worried not only about anti-slavery agitation but also about the economic interests of Virginia and Maryland, which opposed the external slave trade. The demand for tobacco had not kept up with its expanded cultivation, and the Chesapeake region now had a surplus of slaves. Chesapeake planters could profit from the internal slave trade if the Constitution protected slavery but banned (or even permitted the banning of) the traffic in slaves from abroad (*Covenant 26-8; Founders 418, 421*).

The Lower South was insistent on this point. Merely omitting regulation of the slave trade from the list of federal powers would not solve the problem. That's because Northern states wanted the federal government to regulate external commerce, which could include the external slave trade. As a compromise, the North accepted the twenty-year slave trade provision of Article I, a ban on the taxation of exports (such as the slave states' cash crops), and Article V's entrenchment of the slave trade clause (perhaps because the three Lower South states could not alone have been able to block a constitutional amendment canceling Article I's slave trade clause) (*Covenant 22-34; Founders 433-41*).

But no such bargaining can account for the other accommodations made to slavery. Consider the three-fifths formula for representation in Congress and the electoral college. Once proposed, it was embraced by the slave states, but they did not lay down its acceptance as a

condition for union in the way that delegates from South Carolina insisted upon protections for slavery and the slave trade. The idea of counting slaves for purposes of representation lacked any precedents in Confederation practice (*Covenant* 429),²⁵ and slaves were not counted towards representation in the legislatures of the slave states. To the argument that slaves should be counted because they were part of the population, it was replied that they were excluded from the political process and were treated as property, while no other property was a basis for representation. Moreover, the three-fifths formula was arbitrary, lacking any rationale. The North agreed to it, however, without securing any concessions in return (*Covenant* 10-20, 22-5; *Founders* 427-30).

The fugitive slave clause was even more readily accepted. It was not proposed until the very end of the convention, and was subjected to neither bargaining nor debate. And yet it was bound to rankle not only anti-slavery interests but those who feared federal encroachment upon state autonomy and sovereignty. Like the three-fifths formula, it was a gift to the South (*Covenant* 30-2; *Founders* 438f).²⁶

Why was the North so accommodating?²⁷ There is reason to regard the Northern delegates as unrepresentative of northern sentiment. A principal aim of the convention was to design a stronger, more centralized union that shielded property from popular leveling

²⁵The formula had been proposed under the Articles of Confederation as a basis for calculating a direct tax, but not as a basis for representation.

²⁶In the ante bellum period, Northern states applied “personal liberty laws” to frustrate enforcement of the Fugitive Slave Act (FREE). These efforts were finally halted by the Supreme Court in *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

²⁷In addition to the provisions mentioned, several others supported slavery, e.g, Art. I, Sec. 8, para.15, which conferred on Congress the authority to “suppress Insurrections,” such as slave revolts (*Covenant* 7f; *Founders* 439-43).

movements, and the delegates largely represented affluent commercial and plantation interests. Although abolition was becoming official policy of the Northern states, their convention delegates proved uninterested in the issue (RACE, 37-42). A few delegates, such as Gouverneur Morris of Pennsylvania, were opponents of slavery; but they were very much in the minority. The delegates from New England almost always favored concessions for slavery and voted with South Carolina. Connecticut's Oliver Ellsworth explained the position when he declined to consider the merits of slavery and said, "what enriches a part enriches the whole" (*Covenant 26; Founders 432, 434*).²⁸

I would not be the first to suggest that the convention went too far in accommodating slavery. Nor to suggest that the convention need not have done so at all. Feasible alternatives were available, and at least some of the alternatives that I shall mention were laid before the convention. A significantly different settlement would no doubt have required a somewhat different set of delegates; but that is not relevant to the present point. The question is, in part, what those in a position to decide could at the time have readily imagined happening and, in part, what it would have been reasonable to demand that they do. It is a question about what they might have done if they had so chosen – even if they were in fact determined to prevent by all available means some of the imagined states of affairs.

The North might have refused to compromise so much on slavery, and it might have refused to compromise at all. To understand how this might have been possible, and where it might have led, we have to look more closely at the differences between the Upper and the

²⁸New England shippers of course profited from the slave trade as well as from trade in goods produced by slaves (*Covenant 23*).

Lower South.

The Chesapeake region was not only home to many leaders of the new nation but also a center of anti-slavery sentiment. This helps to account for the rapid growth of a free Black population in the Upper South during the late 18th century. Between 1782 and 1790, those states repealed bans on the private manumission of slaves and permitted the freed slaves to remain. Meanwhile, demand for slaves continued to grow in the Lower South, where plantations dedicated to rice and indigo were expanding. Under those circumstances, Upper South slave owners could have secured high prices selling slaves to the Lower South. The fact that many Upper South slave owners chose to free slaves rather than offer them for sale seems evidence of anti-slavery sentiment. And, indeed, manumission documents express those sentiments explicitly (RACE 17-9; but see *Founders* 424f).

This means that an abolitionist North had potential allies in the Upper South. Could those two sections have formed a united front against the constitutional accommodation of slavery? The traditional view is that a viable union required incorporation of all the former colonies and the Lower South absolutely insisted on protections for slavery (RACE 3-6). That view can be challenged.

The Lower South was not in a good bargaining position. There is reason to discount their threats to abandon the union if the convention refused to accommodate slavery. Georgia and South Carolina wanted the protection a strong union could afford them against powerful Native American nations, and Georgia also felt vulnerable to Spanish Florida on its southern border, which was an escape route for runaway slaves and a staging area for opponents of the slave state. The Lower South thus might have agreed to much less than they got – perhaps a constitution that

tolerated but did not support slavery (*Founders* 425-45).

It is unclear that the Lower South had the strength to succeed on its own as a tiny pro-slavery union, even if they were assured that a larger and much stronger union, comprising the Upper South and the North, would have tolerated their separate existence. Even if the Lower South would have been able to form a slave-based union with the Upper South, one separate from a non-slave Northern union, its prospects would have been dubious. A Northern union would have had a diverse agricultural base, a shipping industry, and a textile industry, which could have used domestic wool and imported cotton. By contrast, a Southern union, dependent on cash crops and little industry, would have faced greater difficulty (RACE 28f, *Founders* 415f).

In fact, given the weakness of the Lower South and attitudes within the Upper South, it has been suggested that a more representative convention could have endorsed a national program of abolition.²⁹ South Carolina's expressed anxieties about slavery tend to confirm that abolition was a threat. If so, it was imaginable.

As Madison made clear, one of the principal conflicts to be addressed by the convention was between those with substantial property and those lacking it – identified aptly as the “minority” and “majority” respectively. Those who sought a stronger union desired that property be made more secure. We might imagine an uncompensated emancipation of slaves, but at the time it might have been unimaginable for many potential delegates, including most of those who were opposed to slavery. It may be reasonable to assume that any imaginable

²⁹In the 1780s and for a few years thereafter – until the cotton gin changed all calculations (RACE 36f, 42-7; but see Ellis 104-8).

abolition program at the time would have included compensation for slave owners.³⁰ That was not beyond the imagination even of the actual delegates to the convention, for Gouverneur Morris proposed a federal tax for the very purpose (*Covenant* 24; Ellis 92).³¹

If we assume that compensation for slave owners would have been part of any national abolition program, we have to imagine a source of revenue. Here's one suggestion that has been made. The Northwest Territory was just then being opened for settlement, and it contained half a billion fine acres. That land was a national asset which might have generated the revenue in question. A modest addition to the price per acre of one dollar would in a relatively short time have raised a considerable portion, if not all, of the estimated ninety million dollars that would have been required for compensation (RACE 36f).³²

In sum, the Constitution that was agreed upon and ratified accommodated slavery. It did so excessively, beyond what was required for an agreement between those who represented slave owners' interests and those who were opposed to slavery. Furthermore, it is possible that no accommodation was necessary. A union comprising states without slavery – which might have included the Upper South – would seem to have been viable, whereas a union of slave states

³⁰The idea of not only freeing but also compensating *the slaves* would presumably have been less imaginable than emancipation without compensation for the owners. But the idea was certainly imaginable a century later.

³¹The convention did not pursue the idea; neither did Congress when Elbridge Gerry of Connecticut made such a proposal in 1790; as Ellis notes (86f, 90, 105), “several emancipation schemes” were proposed from the 1770s on.

³²Ellis suggests (104-8) that the cost of compensation could be met by spreading it over a number of years, but that relocation of emancipated slaves presented insuperable difficulties. Note that such revenue-raising schemes concerned land that was being appropriated by force from Native Americans, who had no part in the treaty that transferred Great Britain's land claims to its former colonies.

would have had less favorable prospects. Alternatively, despite South Carolina's intransigent rhetoric, we can imagine a union embarked instead on a national anti-slavery project. There was widespread popular support for such a program at the time, and the new nation possessed the assets to effect it successfully.

III. The First Quasi-Reconstruction.

An op-ed piece appeared recently in the *New York Times* under the headline, "The Enduring Legacy of the South's Civil War Victory."³³ One who judged the past by military outcomes or by formal changes in the law might have supposed that a headline writer's slip had turned history upside down. But there was no mistake. The Old South had in fact prevailed. Not only had the planter class largely been restored to control of a system built upon coercively extracted Black labor; by systematically discrediting the period of Reconstruction that followed the Civil War, historians had effectively presented the continued subjugation of African Americans as justified.

For most of the century following its demise, Reconstruction was portrayed as disastrous rule by incompetent ex-slaves and corrupt Northern meddlers (Foner xixf). Although that picture persists, it is no longer conventional wisdom among historians. Reconstruction was deficient, but not in those ways, and for different reasons. Reconstruction secured, temporarily, a number of basic rights for four million African Americans who under slavery had lacked any such rights at all. Freedmen were aided in fending off some of the brutal violence to which they

³³By David Brion Davis, August 26, 2001. See also Foner 608-10.

were subjected. Ex-slaves voted and held public office.³⁴ State governments were very substantially reformed, and public services, including public education, were created. When Reconstruction was followed by “Redemption,” modest taxes on land were drastically reduced, along with state services, and by the early 20th century Blacks were excluded from political participation. The South was permitted to ignore federal law and to create a new, distinctively brutal form of White supremacy (Foner 587-601).

The nation’s withdrawal from Reconstruction is generally associated with the Hayes-Tilden agreement of 1877, which settled a disputed presidential election by allocating decisive electoral votes to the Republican candidate in exchange for an end to federal enforcement of African Americans’ rights (Foner 575-82). Those developments were significant, but they alone do not account for Reconstruction’s failure. Crucial decisions that undermined Reconstruction were made a decade earlier. I’ll explain this after sketching some of Reconstruction’s principal features.

As the Civil War drew to a close, it was clear that the abolition of slavery had become one of the War’s principal aims.³⁵ A central issue for those developing national policy was how to deal with the states that had seceded – what to require of them as conditions of their restoration to full status. Another issue was the fate of four million freedmen – ex-slaves.

Tentative measures were adopted during the war, especially when Confederate territory came under Union control. Primarily concerned with successfully ending the War and restoring

³⁴For a brief account, see Franklin & Moss 227-31, 237-44. Until this century, of course, women were excluded from the suffrage.

³⁵The 13th amendment to the US Constitution, prohibiting slavery, was proposed and ratified in 1865, the same year the War ended.

the Union, Lincoln issued a Proclamation of Amnesty and Reconstruction in 1863 (Urofsky & Finkelman 442f; Foner, 35f), which offered to restore all rights, except property rights in slaves, to those who swore future loyalty and accepted the abolition of slavery. The Proclamation appeared to offer freedmen nothing but the prospect of laboring for a reestablished planter class. Lincoln privately favored suffrage for some freedmen, but he took no forceful or public steps in that direction (Foner 61f, 73-5).

After Lincoln's assassination, President Andrew Johnson supported the maintenance of White supremacy in the South. With his blessing, new state governments established "Black Codes," which much resembled the former Slave Codes. Discrimination was in some respects amplified in order to insure that ex-slaves would be forced back to the plantations. Freedmen were coerced into year-long labor "contracts." Widespread violence enforced the new system (Foner 119-23, 198, 209).

Dismayed by Johnson's policies, Congress sought to end the most glaring inequities that were inherited from a society built upon chattel slavery and racist ideology. It mandated equality for Blacks under the law, freedom in economic relations, and universal manhood suffrage. In 1866, for example, Congress enacted the first Civil Rights Act, over Johnson's veto (14 Stat. 27; Foner 243-7). Besides outlawing race discrimination in the economic and adjudicative spheres, the Act reversed *Dred Scott* by granting US citizenship to those born in the US.³⁶ Congress renewed the Freedmen's Bureau, again over Johnson's veto (Supplementary Freedmen's Bureau Act of 1866, 14 Stat. 173; Foner 243-51). Established in 1865 to provide emergency relief,

³⁶"excluding Indians not taxed." The Naturalization and Enforcement Act of 1870, 16 Stat. 254, 256, allowed persons of African "nativity" and "descent" to become US citizens.

which the Bureau afforded Southern Whites as well as Blacks, it now helped to enforce the new legal rights and to establish new public institutions, most notably public schools (Freedmen's Bureau Act of 1865, 13 Stat. 507; Foner 68-70, 143-53, 157-70).

In response to violence against Blacks and their allies, and to promote reconstructed state governments, in 1867 Congress created military districts in the South and laid down criteria for new state constitutions (Reconstruction Act of 1867, 14 Stat. 428), including universal male suffrage and acceptance of the 14th amendment (which was proposed in 1866 and ratified in 1868). The 15th amendment (proposed in 1869 and ratified the following year) prohibited racial exclusion from voting, and Congress provided for its enforcement by further legislation (Enforcement Acts of 1870, 16 Stat. 140, 16 Stat. 254, 255-6; Enforcement Act of 1872, 17 Stat. 347). Other measures included the Civil Rights Act of 1875, 18 Stat. 335, which mandated equal access to public accommodations.

An electoral crisis following disputed elections in Louisiana and South Carolina was ended by the 1877 Hayes-Tilden agreement. Federal troops were withdrawn from the capitals of those states, decisive electoral votes were assigned to the Republican candidate, and federal supervision of Southern elections was subsequently ended. Over the next generation, through force, fraud, and various legal devices, Blacks were driven from political participation, and the federal government declined to intervene (Foner 575-601; Franklin 168f, 174f).

While some freedmen migrated to cities, most became sharecroppers on land that had been restored to its original owners. The lynching of Blacks was widely practiced (Dray, Zangrando), reaching a peak in the 1890s, when a lynching occurred every two or three days. Many lynchings were public, and many were publicized in advance. Photographs of victims,

participants, and spectators were widely circulated, some on printed postcards sent through the US mail. Anti-lynching legislation, frequently proposed, never made it through both houses of Congress. White supremacy was thus violently re-established. Racial segregation was firmly imposed (Foner 404f, 537), and was sanctified by *Plessy v. Ferguson* in 1896 (163 U.S. 537).

Long before *Plessy*, however, many of the legal changes that were entrenched in the Constitution or mandated by Congress had already been undermined by the Supreme Court. The Court would not accept the constitutional expansion of federal power and interpreted new rights narrowly. Changes that would have been effected by the 14th amendment were limited severely in the *Slaughterhouse Cases* of 1873 (83 U.S. 36); guarantees of voting rights against private parties' violent interference were nullified, starting with *US v. Reese* in 1875 (92 U.S. 214); and public accommodations were treated as immune to federal regulation by the *Civil Rights Cases* in 1883 (109 U.S. 3). Those decisions did much to defeat Reconstruction, but more sympathetic judicial action would not have prevented its demise. Or so I shall argue.

What would a genuine Reconstruction have involved for African Americans? I assume it would have insured full political rights, guaranteed equal treatment under equal laws, created an effective regime of uncoerced labor, and banned discrimination in the public sphere. Nothing less was due the ex-slaves – or, for that matter, any members of the society. But none of these things was secured by Reconstruction.

The next question is how such changes might have been achieved. Federal legislation might assert, as it did, that Blacks had economic, political, and adjudicative rights equal to those enjoyed by Whites; but such rights could be enforced, if at all, only with a struggle. Active federal intervention, including military force, was required to achieve some measure of

democracy and the rule of law; but federal military intervention could not be sustained indefinitely. When federal assistance was withdrawn, it was clear that virtually all gains (save the formal end to chattel slavery) would be reversed.

Judicial cooperation would have helped a great deal. But it would not have insured a reconstruction that respected the rights of African Americans. In the absence of more profound political and economic reform there was little prospect for Blacks to effectively exercise any rights that might formally be conferred by law.

Concentrated wealth acquires (or retains) political power. In the South, after as well as before the Civil War, wealth and political power were concentrated in the planter class – those who still possessed the largest land holdings, which had previously been worked by their slaves. So long as the large planters retained so much of the land and Blacks were forced to work it for them, in one capacity or another,³⁷ the planters would maintain economic dominance and, even in the best of accompanying circumstances, they would maintain political dominance too.

A reconstruction program with a reasonable hope of insuring Blacks (and poor Whites) the opportunity to effectively exercise their nominal rights would have had to end planter control of the South. It would have included a good measure of political democracy, which would have required the redistribution of resources. That meant land reform – the confiscation of large land

³⁷During Reconstruction, freedmen worked the land in one of three ways: as wage laborers under White drivers; as tenants, for a set rent; or as sharecroppers, for a portion of the product. Many freedmen initially preferred sharecropping because it seemed to afford the most autonomy; and most Blacks who remained in agricultural labor, as most freedmen did, became sharecroppers. After Reconstruction, when planters controlled the accounts and could use fraud with impunity, sharecroppers became mired in debt (Foner 103-9, 171-5, 404f, 537).

holdings and some distribution to the freedmen.³⁸

Freedmen wanted control over their own work and the products of their labor. They frequently “insisted that their past labor entitled them to at least a portion of their [former] owners’ estates” (Foner 105, 160-4, 374f). They recognized that their labor had paid for the land, had cleared it, and had earned cash for the crops they raised upon it.

Their demands and expectations – forty good acres – appear quite reasonable. They had a just claim to compensation from those to whom they had been enslaved, and the means of compensation were available – the very land they had cleared and had worked as slaves. Given the ground and moderation of their claims, problematic calculations of just reparations would not seem to have been necessary.

It is important to emphasize that the idea of land reform is not a recent notion, but was in the air for much of Reconstruction. And it was begun, though much was reversed. From early on, freedmen agitated for a workable share of the land, and they renewed their appeals time and again. They understood freedom to involve farming independently, free of White drivers and planters’ rules. Their land reform proposals were supported by some poor whites, who likewise sought land; by some agents of the Freeman’s Bureau, who distributed land when possible; and by some prominent political leaders, such as Benjamin F. Butler, George W. Julian, Wendell Phillips, Thaddeus Stevens, and Charles Sumner, who endorsed large-scale land reform (Foner 68f, 302, 309f, 329).

Land was available, or could become so, in four ways. A great deal of land in the West

³⁸Foner remarks (109) that effective land reform would also require access to reasonable credit and to markets.

and South (e.g., in Florida) was owned by the federal government. In addition, much acreage was abandoned during the War; much was seized for nonpayment of taxes; and a vast amount was potentially subject to confiscation (Foner 51).

The Second Confiscation Act of 1862 (12 Stat. 589), contemplated forfeiture of Confederates' lands for at least one generation and, before the War ended, Congress came close to making forfeitures permanent (Foner 68). But even earlier, plantation land had begun to come under Black control.

When the US Navy occupied Port Royal, South Carolina, in 1861, most Whites fled the area. The thousands of slaves who remained rejected the idea of maintaining cotton production and instead raised food crops for their own consumption. For a time it seemed that the land would remain in their possession (Foner 51).

In 1862, after the ten thousand acre plantation at Davis Bend, Mississippi, was abandoned by its owner, slaves took it over. The following year General Grant authorized their development of an autonomous community, which then became a refuge for displaced freedmen. Initially aided by some government supplies, the freedmen grew cotton profitably for several years (Foner 58f).

In 1865 General Sherman allocated the Sea Islands and coastal land south of Charleston to freedmen, each family to have forty acres and the loan of a mule. Forty thousand Blacks soon settled on the four hundred thousand acres that were available. They were led to believe the land was theirs (Foner 78f).

The Freedmen's Bureau gained control of more than 850,000 acres of abandoned land. Authorized by federal law to rent abandoned and confiscated land in forty acre lots, for eventual

sale, with long-term credit, it distributed some land to freedmen (Foner 158f, 69f).

Some Southern Reconstruction governments addressed the issue. “Texas offered free homesteads to settlers on the state’s vast public domain, and Mississippi provided that land seized by the state to satisfy tax claims would be sold in tracts of no more than 160 acres.”

Louisiana adopted a similar measure, setting a limit of fifty acres. The most ambitious program was established by South Carolina, which purchased and resold land on long-term credit, enabling fourteen thousand Black families to acquire homesteads permanently (Foner 329).

In 1865 Thaddeus Stevens proposed a comprehensive program that would have involved seizing four hundred million acres that were owned by the wealthiest ten percent of Southern landowners. Forty acres would have been allocated to each adult freedman and the remaining ninety percent of the acreage to be seized would have been sold in lots of up to 500 acres. The proceeds would have provided pensions for Civil War veterans, compensation to loyal unionists for property losses in the war, and retirement of the national debt. This program would have made possible a genuine reconstruction of the South. It would have broken the planters’ oligarchic control and promoted widely diffused wealth and political power (Foner 235f, 308f). But Stevens’ proposal was rejected by Congress in 1866, which enacted instead the Southern Homestead Act (14 Stat.1866; supplementing the Homestead Act of 1862, 12 Stat. 392), offering public land for settlement (Foner 234f, 246).

The war-time measures adopted by Sherman and Grant and the efforts of sympathetic Freedmen’s Bureau agents, allocating lands to ex-slaves, were atypical. Most military officers helped to force freedmen back to work for the planters under labor contracts (Foner 54f, 58f, 153-5).

A very small portion of the land that was initially assigned to freedmen, an even smaller portion of the land that was practically available, and a very tiny percentage of the land that might have been made available was ultimately transferred to freedmen. Most of what seemed to have been transferred to them, during and after the War, was auctioned to investors and speculators or returned to its former owners.

In 1863 and 1864, most of the land near Port Royal that slaves had been allowed to take over was auctioned off by government agents, and only a couple of thousand freedmen were able to retain land. “Many plantations ended up in the hands of army officers, government officials, and Northern speculators and cotton companies” (Foner 52f, 159-61).

At Davis Bend, title to the land had never passed to the freedmen who successfully developed an autonomous community and large-scale cotton production, and in 1878 the property was returned to the Davis family (Foner 162).

In violation of the Confiscation Act and Freedmen’s Bureau legislation, President Johnson ordered that all land that had been distributed be returned to its previous owners (Foner 159-63).³⁹ Blacks appealed, to no avail. When they tried to retain the land, the US Army removed them by force (Foner 162-4).

One should not infer from this record that the federal government was opposed in principle to the reallocation of land. On the contrary. For example, although little of the land that had been made available under the Southern Homestead Act went to freedmen, the land did not go unclaimed. Congress repealed the Act in 1876, so that lumber and mining companies could secure the public land, and most of it went to those interests. That measure was not

³⁹Johnson also vetoed a bill that would have facilitated land reform (id.).

isolated. From 1862 to 1872, the federal government gave more than a hundred million acres of public land, plus many millions of dollars, to railroad companies. Under the National Minerals Act of 1866 (14 Stat. 251), it gave millions of acres of mineral-rich public lands to mining companies (Foner 246, 465-7, 568).

In sum, land reform was an essential element of genuine reconstruction, along with legal and political reform. But a land reform program was never endorsed by most congressional Republicans, many of whom believed that the institution of universal manhood suffrage and wage labor would transform Southern society. Land reform was opposed by Northern investors, and even by some Blacks who had been free under slavery. Many Whites in a position to affect policy believed that freedmen should resume their previous work, should even serve their previous masters, only now for wages. White policy makers generally wished to restore the money machine of Southern monoculture and the associated profitable enterprises, North and South (Foner 105, 235-7, 308-11, 376f).

Planters wanted Blacks available for labor. Southern Whites were generally determined to prevent the freedmen from achieving economic independence. They would refuse credit to freedmen and would sell land to Whites for half the price offered by Blacks, in order to insure that the land would not come under Black ownership (Foner 403f).

It is unclear how many White policy makers considered the possibility that those who had been enslaved *had a right* to compensation for it. Some positively disapproved of programs to aid the freedmen. They argued that it would hurt the freedmen to be given land and that they must learn to save and work for it. Some Whites argued that federal aid – even emergency relief through the Freedmen’s Bureau – would create dependency upon the government. President

Johnson even condemned governmental services for ex-slaves as discrimination against Whites (though Whites too were served by the Bureau) (Foner 247f).

During the 17th and 18th centuries, respectively, the colonies created and the new nation resolved to protect the system of racial subjugation and exploitation that we know as chattel slavery. The abolition of that system in the 19th century represents a significant shift in US public policy. The First Reconstruction may be seen, in part, as an attempt to carry that reformation further. It was however aborted. The US officially committed itself to civil rights, including political rights, for Blacks, to the point of entrenching those rights in its basic law, but it failed to enforce them. In this respect, the 19th century resembles the 18th: the nation's public policy fell drastically short of its rhetoric, promises, and pretensions. The opportunity to address White supremacy was permitted to pass, the freedmen were betrayed, a brutally oppressive regime was permitted to replace chattel slavery, and the need for a Second Reconstruction soon became evident to people of good will (Franklin 211-9; Foner 582-612).

IV. The Second Quasi-Reconstruction.

Reconstruction did not end all at once. Despite the pressures, fraud, and violence, many freedmen continued to vote, some were elected to public office, and they persisted in their struggle for economic and political autonomy. For a while it appeared that they would create an effective political coalition with poor Whites in the People's Party; but the arrangement proved to be unstable. Even so, great effort and brutality were required to exclude African Americans from the public sphere and to minimize their economic independence (Woodward 53, 65; Marable 9-11).

By the turn of the century, White supremacy had acquired a new form, known as Jim Crow. The Southern states adopted new constitutions along with various legal devices to insure the exclusion of Blacks from the ballot box and public office: the White primary, the poll tax, the understanding requirement, etc. These devices supplemented terror, of which lynching was the horrific, frequently public representative. Blacks and their allies campaigned unsuccessfully for federal legislation against lynching. Once Jim Crow was firmly established, however, lynching declined gradually. Political power had been restored to economically powerful Whites. Increasing numbers of freedmen migrated to urban areas, but most became locked as sharecroppers in a modified plantation system. The federal government averted its eyes. Its Reconstruction amendments and civil rights legislation were all but dead letters (Woodward 82-93; President's Committee 35-40).

Although occasionally inconvenienced by legal challenges, the Jim Crow system survived into the second half of the twentieth century. Following World War Two, however, several developments combined to undermine the explicitly racist regime. Black veterans returned to civilian life determined (once again) to realize the nation's democratic promises. Wartime propaganda against racism had generated more enlightened attitudes among Whites. The newly founded United Nations embraced a Universal Declaration of Human Rights. Colonial liberation movements gave rise to independent nations whose populations of color were appalled at Jim Crow in America, which film and video made more visible than ever. Cold War competition between the US and the USSR led American statesmen to deplore such unfavorable images of our domestic arrangements, especially the brutal suppression by police and other public servants of peaceful civil rights demonstrations. In this confluence of circumstances,

heroic challenges to Jim Crow began to achieve success, despite lethal violence (indeed, sometimes because of lethal violence – when it took the lives of White civil rights workers) (Harding 452-4, 513f; Woodward 130-4; Marable, 86f).

With the *Brown* decision of 1954 (*Brown v. Board of Education of Topeka Kansas*, 347 U.S. 483), the federal judiciary began seriously to contemplate vigorous enforcement of Blacks' civil rights. By the mid-1960s, Congress felt obliged to enact significant civil rights legislation, including the Civil Rights Act of 1964 (102 Stat. 31), the Voting Rights Act of 1965 (79 Stat. 437), the Fair Housing Act of 1968 (82 Stat. 81), and the Equal Employment Act of 1972 (86 Stat. 103). During the same period, increasing embarrassment and concern about the scandal of deep and widespread poverty within the exceptionally affluent US (see, e.g., Harrington) helped lead to the creation of social programs funded all or partly by the federal government, such as food stamps (78 Stat. 703 [1964]), Medicare (for the elderly and disabled, 79 Stat. 286 [1965]), Medicaid (for children and the poor, 79 Stat. 343 [1965]), Supplemental Security Income (serving needy aged, disabled, and blind, 86 Stat. 1465 [1972]), the Comprehensive Employment and Training Act (subsidizing low wage jobs in non-profit and public settings, 87 Stat. 839 [1973]), and Head Start (95 Stat. 499 [1981]), and the expansion of existing programs, such as Aid to Families with Dependent Children⁴⁰ (or “welfare,” 88 Stat. 2337, 2359 [1975]). Because of African Americans' disproportionate share of economic disadvantages, such programs are of special relevance here.

That brings us to a brief assessment, from the perspective of the present essay, of this

⁴⁰Formerly Aid to Dependent Children, established under the Social Security Act of 1935, 49 Stat. 620.

Second Reconstruction. Like the First Reconstruction, the Second constitutes a significant departure from established public policy. Despite substantial dissent and massive resistance, the nation committed itself (once again) to equal rights; anti-discrimination law was enacted and enforced; and Blacks were enabled to vote and hold public office. Blacks faced new opportunities not only in education but also in skilled trades and the professions. Political rhetoric was reformed: explicitly racist appeals became unacceptable, at least for mainstream candidates, and explicitly racist comments were no longer found in public policy statements. While neither overt discrimination nor anti-Black violence disappeared, they were reduced (Marable 149f). The practice as well as the ideology of White supremacy were officially rejected. And, unlike the First Reconstruction, these changes have come to seem irreversible.

There are other striking parallels between the First and Second Reconstruction. Criticism of government aid to Blacks resembled that of the 19th century, to the point of regarding such measures as discrimination against Whites (Marable 221). By the early 1980s, government policy had reduced interventions on behalf of Blacks and government assistance was reduced (Marable 152, 206-13). At the same time, corporate welfare was expanded (Marable 207).

For present purposes, the chief similarity between the two Reconstructions is their failure to undo much of the formidable economic and social legacy of slavery and Jim Crow, that is, the disadvantages of African Americans that largely flowed from past public policy. After slavery, freedmen with minimal resources, facing overt discrimination, were driven into peonage or menial urban occupations, while nutritional, educational, and medical programs that had been created mainly to aid them were eliminated (Foner 587-601). Generation after generation, the vast majority of African Americans entered working lives without a decent share of the nation's

resources and with significantly lower life prospects than their White peers (President's Committee 53-79).

After Jim Crow, anti-Black discrimination was lessened and opportunities for Blacks were increased. But nutritional, educational, medical, employment, and housing programs that were developed in the 1960s likewise faced cutbacks, which were severe by the 1980s and are continuing today. For example, the real benefits of Medicare and Medicaid have been reduced (Harding 599).⁴¹ Government continues to resist the development of comprehensive medical insurance, and thus preventive medicine, which is now unavailable for 40-odd millions (Harding 130). Federal subsidies for low income families to rent private housing (Section 8) have decreased (Massey & Denton 231). The Comprehensive Employment and Training Act programs have ended (Massey & Denton 230; Harding 599). Eligibility for food stamps has been restricted (116 Stat. 312, 315 [2002]). Aid to Families with Dependent Children has been eliminated; its replacement, Temporary Assistance to Needy Families (Personal Responsibility and Work Opportunity Reconciliation Act, 110 Stat. 2105 [1996]), sets lifetime limits on receipt of aid, requires more work from mothers of young children, and denies four-year college study as a⁴⁰ means to improved employment (Harding 599). Despite such work requirements, the government has made woefully inadequate provision for child day care (Harding 599).

Most important, the social programs of the 20th century, including those generated by the War on Poverty and the Second Reconstruction, have failed to address the deep, systemic character of Jim Crow's legacy. After three hundred and fifty years of slavery and Jim Crow,

⁴¹But note that Medicaid has been expanded for children.

African Americans entered the Second Reconstruction with wealth, income, and life prospects disproportionately lower than that of their White peers. Despite less overt discrimination and more school and job opportunities, that deficit remains substantial (Marable 227-30).

This is not to disparage the social programs themselves, which aided many. Bandages are useful when you're bleeding. US public policy, however, has more consistently favored inequality than equality. As the recent Luxembourg Income Study shows, whereas America's rich are the richest in the Western world, its poor are among the poorest. And the children among America's poor, mostly Black or Hispanic, are the very poorest.⁴¹

Consider one of the clearest legacies of Jim Crow – residential segregation.⁴² The Black ghetto has been a feature of those US cities with substantial Black populations for as long as anyone who is alive today might remember. It is therefore startling to learn that the Black ghetto did not exist until the 20th century. It was a product of Jim Crow. More severe in the North than the South, its creation was occasioned by increasing Black migration to the cities and was exacerbated by the lack of housing construction during World War Two (Massey & Denton 42-9).

The Black urban ghetto resulted most directly from, or was intensified by, actions of home owners, real estate agents and associations, mortgage and insurance providers, local officials, and federal agencies. The means used began with violence (including bombs, directed especially at middle class Blacks moving into White areas adjacent to ghettos), but expanded to include restrictive covenants, boycotts of real estate agents who served Blacks, realtors'

⁴¹See, e.g., the Luxembourg Income Study at www.lisproject.org.

⁴²I am grateful to Mark Tushnet for suggesting this issue to me.

systematic diversion of Black clients from White communities, “redlining” (which identifies Black neighborhoods, within which loans are denied), “block-busting” (whereby Blacks are brought into a neighborhood, leading intolerant Whites to leave, more Blacks are brought in, leading less intolerant Whites to leave, and so on, while Blacks gain housing at inflated rents and prices), government support for highways serving White suburbs, public housing policies (regarding their location and clientele), and resistance to integration by local officials when the prospect of it arises (Massey & Denton 26-42, 51f, 55-7).

By 1940, the isolation of Blacks within segregated urban communities was greater than had ever been experienced by any other ethnic group in America. European newcomers initially lived in communities of immigrants that were ethnically heterogeneous, most lived outside such enclaves, and the condition was temporary. Not so for African Americans. Following World War Two, as White suburbs expanded, Black ghettos increased in size and density, giving rise to “hyper-segregation.” And, in further contrast with other groups, income does not significantly ameliorate residential segregation for Blacks (Massey & Denton 32f, 74-8, 84-8).

Hyper-segregation persists, and it aggravates Jim Crow’s legacy. That is because, for example, public policies can adversely affect the Black urban ghetto without hurting a significant number of Whites. Diverting public services from the ghetto can seem politically prudent to politicians who rely primarily on the votes of Whites, whose communities reap the diverted benefits. Poorly endowed public schools are familiar features of the ghetto, along with less adequate public transportation for those who most need it. As poverty is more concentrated among Blacks, it is most concentrated in the Black urban ghetto, along with unemployment, the withdrawal of commercial institutions, and the reduced maintenance of real property. Social

contacts with Whites are minimized, along with job opportunities and business networking (Massey & Denton 153-60; Denton).

Most important here, public policies have intensified the ghettoization of Blacks. Redlining was not invented by federal agencies, but it was institutionalized by the Home Owners Loan Corporation, the Federal Housing Administration, and the Veterans Administration. “Slum clearance” programs destabilized conditions in the ghetto. Many public housing projects, typically high-density, were located within or adjacent to existing ghettos, and as they accommodated fewer ghetto dwellers than slum clearance displaced, more pressure was placed upon housing in the ghetto. The segregation policies of public housing authorities insured that Black isolation would be promoted further. Just when public housing authorities were ordered to stop promoting segregation, funding for public housing was halted (Massey & Denton 51-9, 227).

Federal legislation has addressed housing discrimination: the Fair Housing Act of 1968 (82 Stat. 84), strengthened in 1988 (102 Stat. 1619); the Housing and Community Development Act of 1974 (91 Stat. 1111); the Home Mortgage Disclosure Act of 1975 (89 Stat. 1125); and the Community Reinvestment Act of 1977 (91 Stat. 1147). But with inadequate resources devoted to their weak enforcement provisions, and with resistance by realtors and local politicians, these measures have had minimal effect (Massey & Denton 230-4).

Block-busting and White flight can occur only when some communities are maintained as White domains. When housing discrimination was prohibited, real estate agents developed covert measures to divert Black renters and home buyers from White communities. Such discriminatory practices can be identified, but private, non-profit organizations have carried the

burden of doing so. Their effective but labor-intensive “audits” were substantially reduced with the end of CETA, which had supported a variety of community-based anti-poverty jobs (Massey & Denton 229f).

Now, fifty years after the emergence to the wider public view of the Civil Rights Movement, we find poverty continuing disproportionately among African Americans. We also find a reduction and weakening of those public policies and social programs that might plausibly be regarded as addressing the systematic disadvantages that constitute the legacy of Jim Crow.

V. Addressing the Legacy.

I conclude with some comments on moral implications of the pattern I have described. These concern responsibility and rectification. The political community comprising the United States of America, including its direct forbears, through official action and morally relevant inaction, created, maintained, modified, and has declined to eliminate a deeply entrenched racial hierarchy. African Americans, in particular, are subject to disadvantages stemming from officially supported systems of chattel slavery and Jim Crow.

Within the framework of this paper, responsibility lies with the political community as a whole. It means, first, accountability for having created and sustained a morally indefensible hierarchy and tolerating its continuation; secondly, an obligation to end systemic discrimination and rectify any related wrongs. As a derivative matter, an obligation to promote rectification lies with all persons who have a moral duty to address injustice, and especially with the members of this political community.

The problem I shall discuss concerns rectification. Its theoretical aspect is to identify the

principled bases for corrective action; its practical aspect is to design and implement truly corrective measures. I shall comment mainly on the former.

In reviewing the First Reconstruction, I suggested two grounds for land reform, which are relevant more generally. The distribution of sufficient good land to freedmen in order to facilitate their economic independence and break the political as well as economic power of the planters would have (a) promoted democracy and (b) provided some compensation to freedmen for their enslavement. I shall comment briefly on these complementary rationales and mention a third.

(a) The aim of promoting democracy is not predicated on the just deserts of freedmen, nor would its effective pursuit have benefitted only African Americans. As many disfranchised poor whites recognized, they too would have benefitted from a land reform program that was occasioned by the need to reconstruct Southern society.

Contemporary characterizations of political systems as “democratic” suggest that great weight is often placed on the breadth of formal voting rights. Usage varies, and other factors are of course considered. Criticisms of current political systems as undemocratic, insofar as they exclude, say, women from the electoral process, are not uncommon; but systems have also been called democratic even though they disfranchised women and people of color. Thus the political systems of both ancient Athens and the ante-bellum US have conventionally been characterized as democratic, though most competent adults in them were disfranchised.

In any case, the US system is conventionally regarded as paradigmatically democratic, even though it is clear that effective political power attaches disproportionately to centers of economic influence. It is arguable that political democracy would be promoted by eliminating

racial (as well as economic) hierarchies. But this is not the occasion for such an argument, and I shall not pursue it further here.

(b) The principle of requiring wrongdoers to compensate those they have wronged and the correlative notion that those who have been wronged have a right to compensation, while applicable to those who have been slaveholders and slaves, is of course not limited to such cases. It would have conferred rights upon African Americans who had not been slaves but who had been subjected to the disadvantages and indignities suffered by free Blacks during slavery. It would also have supported claims by poor Whites who had suffered under the planters' oligarchy. I shall concentrate on claims made on behalf of African Americans.

An alternative term for compensation here is "reparation." Reparations for slavery have recently been claimed, though they may not always assume conventional notions of compensation, and may also involve considerations of unjust enrichment. I shall not survey the range of recent claims but shall comment on complications that arise when generations have intervened between the wrongdoing and the claim for reparations.

Justice requires that a wrongdoer compensate a party he has wronged. If I have taken something of yours, I owe you compensation for the loss, plus any disadvantage you suffered as a consequence. This applies not just to ordinary individuals but also to other entities that can do wrong or be wronged, such as governments and nations. If the US long ago took land that belonged to a Native American nation, then the US today owes compensation to that nation, even if the theft occurred generations ago, so long as the two nations continue to exist.⁴³

⁴³Owing compensation does not automatically determine what a party should do, as it may be subject to competing obligations.

The passage of time creates complications when parties are ordinary persons. Consider a claim for reparations made today by a descendant of slaves against a descendant of her ancestors' owners. The latter is not the wrongdoer and is not accountable for her ancestor's wrongdoing.⁴⁴ The claimant is not the party originally wronged and may be ineligible for compensation.

It is frequently assumed that the magnitude of a reparations claim is determined by a counterfactual test -- by how much worse off the claimant is than she would have been if the wrong had not been done. Two complications arise. First, when much time has passed and the current state of affairs has to a significant extent been shaped by decisions made by descendants of the party who was wronged, the counterfactual question may have no determinate answer. Second, it is arguable that current descendants of persons who were enslaved would not have existed had there not been slavery, which means that they cannot be worse off than they would have been had their ancestors not been enslaved, for in the latter case the current descendants would not have come into existence. This suggests that the descendants of slaves lack valid reparations claims based on their distant ancestors' enslavement.

Within the framework of this paper, those difficulties have limited force. The claims we are considering would be made, not against slaveholders but against the US government, on the grounds that it supported slavery, allowed slavery to be succeeded by Jim Crow, and has largely tolerated the racial hierarchy that constitutes an egregiously unjust legacy of those institutions. Claims by African Americans who currently suffer under that legacy need not be based simply

⁴⁴If she has benefitted from her ancestor's slaveholding, principles of unjust enrichment may be applicable.

on injustices of the distant past but can validly be grounded upon the uncorrected consequences of those wrongs, as well as any other continuing wrongs.

This paper offers no metric for reparations claims.⁴⁵ It suggests why they should be taken seriously.

(c) An implication of the picture I have presented is that many poor children – which includes disproportionately many Black children – grow up with systemically assured disadvantages. They embark on life without a fair share of the nation’s resources and with significantly worse life prospects than their more affluent and less stigmatized peers. They are not responsible for the conditions they have inherited. Nor is it plausible to suppose that their parents are responsible for disadvantages that stem from the racial hierarchy or that their parents can generally be expected to overcome the legacy and improve substantially their children’s life prospects. The Second Reconstruction never effectively addressed many of the systematic inequalities that derive from slavery and Jim Crow. The related War on Poverty was not won but abandoned; it never came close to ending widespread, deep poverty in the US. The responsibility for correcting the resulting injustice thus lies with the society as a whole. The government has a primary obligation to insure that social arrangements provide a fair share of life prospects for each of its children. No morally defensible system of social organization would fail in that responsibility.

The idea that a society has a primary obligation to provide a fair share of favorable life prospects for its children would seem innocuous. It would seem reasonable to go further and

⁴⁵Just compensation would not of course be determined by material disadvantages alone. The wrongs done by a racial hierarchy are not merely economic. They involve indignities and other failures to treat subjects with adequate consideration and respect.

suggest that a society is morally required to provide genuine equal opportunity for its children. Even so limited an egalitarianism would seem to have radical implications for practice. It may well require, for example, that bequests from wealthy parents to their children be severely restricted, so that resources can be shared.

But even the less explicitly egalitarian formula has radical implications. That it directly concerns only the life prospects of children may be misleading.⁴⁶ How can poor children's life prospects be improved? Part of the answer must refer to public services that aid children directly, such as schools, which today are not only grossly unequal but are frequently deficient for poor children and thus for many children of color. Another part of the answer must refer more broadly to community conditions as well as family circumstances. Children require adequate housing in well-tended neighborhoods, which vast numbers of poor children still lack. Children require adequate day care when their parents work, that their parents have work that affords a decent income (to provide whatever necessities are not given by public services), and that their parents' work leaves adequate time for them (which means, to begin, that adequate income must be provided by no more than one shift of one job per parent), all of which many families still lack. In brief, children's life prospects cannot be improved significantly without aiding their parents and communities. The implications of a minimally decent concern for children, and the public policies they require, are accordingly broad, deep, and radical.

Such an approach would address a good deal of the unfinished business that we face, and it flows from premises that seem difficult to deny.

⁴⁶A more satisfactory formula might in any case add "with a fair concern for the interests of adults and of future generations." A fully adequate formula would imply that corrective action be international in scope.

REFERENCES

- Allen, Theodore W., *THE INVENTION OF THE WHITE RACE*, Vol. 2 (Verso 1995).
- Berlin, Ira, *MANY THOUSANDS GONE* (Harvard University Press 1998).
- Blackburn, Robin, *THE MAKING OF NEW WORLD SLAVERY* (Verso 1998).
- Bush, Jonathan A., *The British Constitution and the Creation of American Slavery*, in *SLAVERY & THE LAW* (P. Finkelman ed., Madison House 1997).
- Cover, Robert M., *JUSTICE ACCUSED* (Yale University Press 1975).
- Davenport, F.G., ed., *EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES* (Peter Smith 1967).
- Denton, Nancy, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 *INDIANA LAW REVIEW* 1206 (2001).
- Dray, Philip, *AT THE HANDS OF PERSONS UNKNOWN* (Random House 2002).
- Ehler, S.Z., & J.B. Monall, trans. & eds., *CHURCH & STATE THROUGH THE CENTURIES* (Burns & Oates 1954).
- Ellis, Joseph, *FOUNDING BROTHERS* (Knopf 2001).
- Finkelman, Paul, *THE LAW OF FREEDOM AND BONDAGE* (Oceana Publications 1986) [cited as *LAW*].
- _____, *Making a Covenant with Death*, in *SLAVERY AND THE FOUNDERS* 2nd edn. (M.E. Sharpe 2001) [cited as *Covenant*].
- _____, *The Founders and Slavery*, 13 *YALE JOURNAL OF LAW AND THE HUMANITIES* 413 (2001) [cited as *Founders*].
- Foner, Eric, *RECONSTRUCTION 1863-1877* (Harper & Row 1988).
- Franklin, John Hope, *RECONSTRUCTION AFTER THE CIVIL WAR* 2nd edn (University of Chicago Press 1994).
- _____, & Alfred A. Moss, Jr., *FROM SLAVERY TO FREEDOM* 7th edn. (McGraw-Hill 1994).
- V. Harding, et al., *We Changed the World*, in *TO MAKE OUR WORLD ANEW* (R.D.G. Kelley & E. Lewis, eds., Oxford University Press 2000).
- Harrington, Michael, *THE OTHER AMERICA* (Macmillan 1962).
- Higginbotham, A. Leon, *IN THE MATTER OF COLOR* (Oxford University Press 1978).
- Hening, William Waller, ed., *THE [VIRGINIA] STATUTES AT LARGE*, Vol. 2 (Samuel Pleasants 1809-23).
- Kingsbury, S.M., ed., *THE RECORDS OF THE VIRGINIA COMPANY OF LONDON*, Vol. 3 (US Government Printing Office 1933).
- Kolchin, Peter, *AMERICAN SLAVERY 1619-1877* (Hill & Wang 1995).
- Litwack, Leon F., *NORTH OF SLAVERY* (University of Chicago Press 1961).
- Marable, Manning, *RACE, REFORM, AND REBELLION* (2d edn., University Press of Mississippi 1991).
- Massey, Douglas S., and Nancy A. Denton, *AMERICAN APARTHEID* (Harvard University Press 1993).
- Morris, Thomas D., *FREE MEN ALL* (Johns Hopkins University Press 1974) [cited as *FREE*].
- _____, *SOUTHERN SLAVERY AND THE LAW 1619-1860* (University of North Carolina Press 1996) [cited as *SLAVERY*].
- Nash, Gary B., *RACE AND REVOLUTION* (Madison House 1990) [cited as *RACE*].

- _____, RED, WHITE, AND BLACK (4th edn. Prentice-Hall 1999) [cited as RED].
President's Committee on Civil Rights, TO SECURE THESE RIGHTS (US Government Printing Office 1947).
- Rose, W.L., ed., A DOCUMENTARY HISTORY OF SLAVERY IN NORTH AMERICA (University of Georgia Press 1999).
- Tannenbaum, Frank, SLAVE AND CITIZEN (Beacon Press 1992).
- Urofsky, M.I., & P. Finkelman, eds., DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY, Vol. 1 (Oxford University Press 2002).
- Washburn, Wilcomb E., THE GOVERNOR AND THE REBEL (Norton 1972).
- Williamson, J.A., ed., THE CABOT VOYAGES AND BRISTOL DISCOVERY UNDER HENRY VII (Cambridge University Press, 1962).
- Woodward, C. Vann, THE STRANGE CAREER OF JIM CROW (3d edn., Oxford 1974).
- Zangrando, Robert L., THE NAACP CRUSADE AGAINST LYNCHING (Temple University Press 1980).