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THE RELIGION OF RACE: THE SUPREME COURT AS PRIESTS OF RACIAL POLITICS

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Abstract

The tumultuous summer of 2020 opened the eyes of many Americans, leading to a general consensus on one issue—racism still exists. This Article offers a new descriptive account of America's history that can contextualize the zeitgeist of racial politics. It argues that the Founding Fathers created a national civil religion based on racism when they compromised on the issue of slavery in the creation of the Constitution. This religion, called the Religion of Race, is built on a belief system where whiteness is sacred and Blackness is profane. The sacred text is the Constitution, and it is interpreted by the Supreme Court who uses the adjudication of cases as a ritual to advance this religion.

This Article argues that the Reconstruction Amendments and attendant Civil Rights Acts can best be understood as an attempt by Congress to end this Religion of Race and put all citizens on a path to equality. The Supreme Court resisted this attempt, however, as evidenced by cases adjudicated immediately following the Reconstruction period. Thus, a contest ensued that has shaped American racial politics ever since—whether the Supreme Court is interpreting the Constitution of Slavery or the Constitution of Reconstruction and, therefore, whether it will perpetuate or dismantle the Religion of Race.

INTRODUCTION

The summer of 2020 ushered in a national reckoning on race and racism unparalleled in recent history. The protests and uprisings in the wake of the murder

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of George Floyd[1] exposed the wounds of a troubled American history that refuses to heal. More than ever before, people are questioning core democratic institutions and traditions as they relate to race. A national conversation about the nature and role of law enforcement, and its history rooted in slavery, began in earnest. There was confusion over which Independence Day to celebrate—Juneteenth or the Fourth of July. Monuments that at one time seemed permanent and immovable came tumbling down, as they were seen as odes to white supremacy and no longer acceptable. As the presidential election loomed large, there was an increased understanding of the history of the Electoral College—also rooted in slavery—and a debate over its continued use, as well as forceful calls to reenact key provisions of the Voting Rights Act of 1965 to protect against voter suppression. At the heart of this questioning, and these (louder) calls for justice is one undeniable fact: racism still exists.

Racism in the United States harks back to the arrival of Africans in colonial America and was integral in the founding of the nation.[2] The Founding Fathers compromised on the issue of slavery in the creation of the Constitution and, by doing so, established the custom and tradition of subordinating Black people[3] in American law and society. Following the end of the Civil War, the Reconstruction Congress focused on ending the "peculiar institution" and instituted constitutional amendments and civil rights acts to end the vestiges of slavery and advance citizenship rights and equal status of Blacks.[4] In this sense, Congress attempted to unwind the original Constitution's racial subordination and promote a new goal of equality.

This Article offers a new descriptive account of America's racial history that can helpfully highlight aspects of that history and contextualize the zeitgeist of racial understanding and politics. It argues that the subordination of Black people instituted by the Founders is more than just a notable consideration or an inquiry into the country's political commitments. Instead, the racism established by the Constitution is an ideology—a set of basic beliefs and values—woven into the very soul of the country by that foundational document. Indeed, the Founding Fathers created a national civil religion based on racism when they compromised on the issue of slavery. This religion, which I call the Religion of Race, is built on a belief system

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[1] Verdict, Count I–III, Minnesota v. Derek Michael Chauvin, (2021) (No. 27-CR-20-12646).

[2] *See* Audra L. Savage, *Defining the True Meaning of Racism: The Law & Religion of Colonial America, Parts I–III*, CANOPY F. (Mar. 23, 2020), https://canopyforum.org/2020/03/23/defining-the-true-meaning-of-racism-the-law-and-religion-of-colonial-america-part-1/ [https://perma.cc/V8A9-JCA4] (exploring the impact of law and Christianity on the development of race and racism in colonial America).

[3] I adopt the custom of capitalizing "Blacks" and "Black Americans" to denote them as a separate racial group, as articulated by Kimberlé Crenshaw. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

[4] *The African American Odyssey: A Quest for Full Citizenship*, LIBR. OF CONG., https://www.loc.gov/exhibits/african-american-odyssey/reconstruction.html [https://perma.cc/5T86-YKDU] (last visited May 11, 2021).

in which whiteness is sacred, and Blackness is profane. The sacred text is the Constitution, and it is interpreted by the Supreme Court who uses the adjudication of cases as a ritual to advance this religion.

This Article argues that the Reconstruction Amendments and attendant Civil Rights Acts can best be understood as an attempt by Congress to end this Religion of Race and remove the boundary between whites and Blacks. However, this attempt was resisted by the Supreme Court in the cases adjudicated immediately following the Reconstruction period—notably *The Civil Rights Cases* of 1883 and *Plessy v. Ferguson* of 1896. The Court's decisions introduced a conflict that has shaped American racial politics ever since—whether the Supreme Court is interpreting the Constitution of Slavery or the Constitution of Reconstruction, and, therefore, whether it will perpetuate or dismantle the Religion of Race.

This Article contributes to the field of Critical Race Theory by looking at the dynamic of power and subordination of Black people through the lens of a constitutionally established national civil religion built on racism.[5] Critical Race Theory is an area of legal scholarship directly examining and assessing the law's subordination of Black bodies and Black rights under the power of white privilege.[6] Developing from the Critical Legal Studies movement around forty years ago, Critical Race Theory questions whether the law is truly neutral and objective, especially as it relates to race.[7] It looks at ways in which race may, in fact, distort legal doctrine and how law and legal traditions impact people of color—not as individuals but as members of a group. By advancing the argument that the racism established by the Founders is a national civil religion, this Article provides a new narrative in the vein of Critical Race Theory about racial subordination and the seemingly inexplicable inability of the law to fully eradicate racism in America.

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[5] This work focuses on the racism against Black Americans. This is not to ignore the ugly history of racism against Native Americans, nor to deny their current plight that results from that history. I believe that the enslavement of Black Americans is this country's greatest moral failing and is the reason why America has never truly met its potential. The words of Thurgood Marshall in *Regents of the University of California v. Bakke* are notable on this point: "The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured." 438 U.S. 265, 400 (1978) (Marshall, J., dissenting). *But see* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1789 (2019) ("[A]rgu[ing] for a more inclusive paradigm that reaches beyond the black/white binary" and "highlight[ing] the centrality of federal Indian law . . .").

[6] *See generally* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Pelloer & Kendall Thomas eds., 1996); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2017); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 3d ed. 2013); CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes, Jerome McCristal Culp & Angela Harris eds., 2002); and DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS (3d ed. 2014).

[7] DELGADO & STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION, *supra* note 6, at 8–11.

The concept of a national civil religion describes the American experience of a democratic political community shaped by, and sometimes against, religious commitments and history. First postulated by French philosopher Jean-Jacques Rousseau,[8] it was developed by sociologist Robert Bellah in his seminal work, "Civil Religion in America," and in later works.[9] Bellah argues that there is a "well-institutionalized civil religion" operating in parallel with the confessional religion of the Christian church.[10] There was never a state religion or a set of dogma for each citizen to follow.[11] Instead, Bellah calls the expression of certain beliefs, symbols, and rituals of the American political reality the "American civil religion."[12] Furthermore, these beliefs, symbols, and rituals are related to "sacred things" and are "institutionalized in a collectivity."[13] Although this religion is not Christianity, Bellah argues that it derives from Christianity and the Founding Fathers' belief that the nation was directed by the will of a transcendent God, who held the ultimate sovereignty of the state.[14]

According to Bellah, Americans believe there is a divine superstructure overarching the nation, which has destined the country for greatness. Gary Laderman expands on this idea about the centrality of God in the American civil religion.[15] He explains that the combination of "myths, rituals, morality, God, and meaning" posited by Bellah drives American politics but operates under the public radar.[16] In other words, this divine superstructure is the silent operating system for the nation. Turning the traditional notion of the separation between church and state upside down and inside out, Laderman suggests that the American civil religion "sheds a different light on the relationship between the sacred and the profane in the political arena."[17]

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[8] *See generally* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT: OR, THE PRINCIPLES OF POLITICAL RIGHTS 202–21 (Rose M. Harrington trans., The Knickerbocker Press 1893) (1762) (introducing the term "civil religion" in his political musings). *See generally* ROBERT N. BELLAH, *Rousseau on Society and the Individual*, in THE ROBERT BELLAH READER 181–202 (Robert N. Bellah & Steven M. Tipton eds., 2006).

[9] ROBERT N. BELLAH, *Civil Religion in America*, *in* THE ROBERT BELLAH READER, *supra* note 8, at 225 [hereinafter BELLAH, *Civil Religion*]; ROBERT N. BELLAH, *Religion and the Legitimation of the American Republic*, *in* THE ROBERT BELLAH READER, *supra* note 8, at 246 [hereinafter BELLAH, *Religion and the Legitimation*]; and ROBERT N. BELLAH, THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL 4 (2d ed. 1992) [hereinafter BELLAH, BROKEN COVENANT].

[10] BELLAH, *Civil Religion*, *supra* note 9, at 225.

[11] BELLAH, *Religion and the Legitimation*, *supra* note 9, at 248.

[12] BELLAH, *Civil Religion*, *supra* note 9, at 228.

[13] *Id.* at 233.

[14] *Id.* at 228, 232.

[15] *See generally* GARY LADERMAN, AMERICAN CIVIL RELIGION (2012) (analysis of civil religion as a force that continues to shape American society at the intersection of politics and religion).

[16] *Id.* at 26.

[17] *Id.* at 27.

A central feature of the civil religion is to serve as a tool of social solidarity. Laderman argues the following:

> [Civil religion] invigorates the social bonds uniting individual citizens into a common social group and providing them with a shared sense of purpose and meaning in the midst of historical experience and cultural diversity. These are two key functions of American civil religion: to unite and to orient.[18]

For Bellah, American society is unified by citizens who agree to subordinate the nation to a set of ethical principles that transcend the nation itself.[19]

This Article argues that beyond the idea of a transcendent G/god as the core of the American civil religion, race is the central, unifying, and orienting factor. Bellah believes that the civil religion exerts pressure on the populace to find a solution to the treatment of Black Americans, what he terms as "our greatest domestic problem."[20] This Article advances a theory contrary to this assertion. The historical treatment of Blacks is not a problem or issue. Instead, it is the core of American life and American law.[21] The Founding Fathers positioned the American political structure along the axis of race—institutionalizing the ability of one group of people to dominate another group and use that other group to create wealth.

When defining a national civil religion, both Robert Bellah and Gary Laderman draw upon the foundational work of Émile Durkheim, a French sociologist and leading founder of the field of sociology of religion.[22] Durkheim's contributions to the concept of American civil religion are threefold. First, "[h]e too was concerned with social structures and the question of collective coherence in modernity and modern nations. Like Rousseau, Durkheim understood religion as an integral ingredient for social solidarity. His definition of religion emphasized social realities over theological beliefs."[23] Second, Durkheim posited that the definition of religion contains two elements—the sacred and the profane.[24] Further, and most importantly, Durkheim transitioned the idea of religion as something experienced by an individual as part of the collective into something experienced by the group.[25]

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[18] *Id.* at 32.

[19] BELLAH, *Civil Religion*, *supra* note 9, at 226.

[20] *Id.* at 241.

[21] Bellah acknowledges the horrific treatment of Native Americans and Black Americans at the founding of the nation as America's "double crime." BELLAH, BROKEN COVENANT, *supra* note 9, at 37. *See* BELLAH, BROKEN COVENANT, *supra* note 9, at 36–60, for Bellah's discussion on slavery in the American experience.

[22] *See* THE CAMBRIDGE COMPANION TO DURKHEIM (Jeffrey C. Alexander and Philip Smith eds., 2005). *See generally* ROBERT N. BELLAH, *Durkheim and Ritual*, in THE BELLAH READER, *supra* note 8, at 150–80; LADERMAN, *supra* note 15, at 35–37.

[23] LADERMAN, *supra* note 15, at 35.

[24] *Id.*

[25] BELLAH, *Civil Religion*, *supra* note 9, at 225–26.

Durkheim's construct is a useful analytical tool to describe the racial subordination of Blacks in the law, and this Article focuses on the core concepts of this construct.

Part I describes the original Constitution as a proslavery compact by detailing the debate over slavery in the Constitutional Convention and the compromises made by the Founding Fathers, namely, the Three-Fifths Compromise, the Slave Importation Clause, and the Fugitive Slave Clause. It then details key considerations during the ratification process related to the status of Black people. I will call the Constitution that was produced by the Founding Fathers, the Constitution of Slavery.

Using the construct of religion provided by Durkheim, Part II argues that the Founding Fathers established a national civil religion I call the Religion of Race. Each element of the Religion is described, including the authority (Constitution and Supreme Court), beliefs (whiteness as sacred, Blackness as profane), and ritual (adjudication of law). The section then illustrates the development of the Religion of Race by examining case law in the period after the Constitution was created and before the Civil War, including *Grove*, *Prigg*, *Van Zandt*, and *Dred Scott*.

Part III presents the Reconstruction Amendments and Civil Rights Acts as shining a new light on the equality of Blacks contrary to the previous dogma of the original Constitution. This new light I call the Constitution of Reconstruction. The section then argues that the Supreme Court incorrectly narrowed the Reconstruction Amendments and Acts and limited their application, leading to the unfulfilled promise of equality for Blacks by creating the doctrine of "separate but equal."

Part IV describes the promise of a new civil religion engendered by the Constitution of Reconstruction and how the Court and Congress denied that promise. The section then details the transition of the Religion of Race from a civil religion to a dis/civil religion by the Supreme Court when it adopted the doctrine of state action and sanctioned private discrimination.

I. THE CONSTITUTION OF SLAVERY

Racism was a custom, a cultural tradition of society against Native Americans and Africans that took root on this continent in seventeenth-century British America. It existed for a century before the American republic was founded. The drafting of the U.S. Constitution did something new, however. It ensconced, encapsulated, and established the custom and tradition of racism into American law by the Founders.

This section describes the debate over slavery in the Constitutional Convention and the compromises made by the Founding Fathers. It then details key considerations during the ratification process related to the status of Black Americans.

A. The Debate and Compromise over Slavery

During the Enlightenment period of the eighteenth century, certain thinkers and writers, like John Locke and Thomas Paine, began positing the doctrine of inherent

human equality in American society.[26] The idea of created equality was profoundly influential to American revolutionaries as they began to articulate their grievances against King George III.[27] By his own testimony, Thomas Jefferson, in drafting the Declaration of Independence, "appropriated" the ideas espoused by Locke.[28] Using these ideals, American colonists expressed the desire for freedom from a tyrannical British monarchy that continued to levy burdensome taxes and other heavy impositions on the colonists and did so without representation of the colonists in Parliament.[29] Once revolutionary ideals began to foment, many started to question the legitimacy of slavery, especially as they were pressing for their freedom from the Crown.[30] The Revolution brought a division over the morality of slavery.[31] For some, it was further evidence of the evil of the monarchy. As revolutionaries, Americans engaged in self-scrutiny as they began to define who they were and whom they would become.[32] Some wondered whether the nation would be cursed because of its hypocrisy for enslaving Africans while claiming that the nation was a land of liberty and equality.[33]

The tension between revolutionary ideals and the morality of slavery is best exemplified by the varying thoughts and actions of the men who were instrumental in drafting the documents that defined the nation—from the Declaration of Independence to the Articles of Confederation to the U.S. Constitution. No two men held the same opinion on the morality of slavery and the question of emancipating American slaves.[34] They held confused and often conflicting views on slavery.[35]

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[26] THOMAS S. KIDD, GOD OF LIBERTY: A RELIGIOUS HISTORY OF THE AMERICAN REVOLUTION 138–40 (2010).

[27] Prior to this time, the "doctrine of created inequality" was prevalent among the seventeenth-century elites of America and Europe. According to this prevalent belief, God created all humans to need God's grace equally, but God made people in different stations and situations in life. *Id.* People were unequal in their different capabilities and roles in society. *Id.* at 132. The idea that all men [people] were created equal in value and talents was profound at the time.

[28] *Id.* at 139.

[29] *See* KIDD, *supra* note 26, at 140.

[30] Sally E. Hadden, *The Fragmented Laws of Slavery in the Colonial and Revolutionary Eras*, *in* 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: VOLUME 1 EARLY AMERICA (1580–1815) 275 (Michael Grossberg & Christopher Tomlins eds., 2008).

[31] *Id.* at 255.

[32] WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812 269–311 (2d ed. 2012).

[33] *Id.*

[34] *See* DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 170–72 (1966); KIDD, *supra* note 26, at 154–55. *See also* BENJAMIN RUSH, AN ADDRESS TO THE INHABITANTS OF THE BRITISH SETTLEMENTS IN AMERICA, UPON SLAVE-KEEPING (2d ed. 1773).

[35] Any discussion of the confusing, and at times, contradictory stances of the Founding Fathers regarding slavery must begin with the ultimate scribe on equality—Thomas Jefferson. It is no understatement to suggest that Jefferson offered the most baffling view on,

This lack of consensus shaped the debate over the place of the institution in the new nation.

With a wide set of attitudes regarding the morality, continued existence, and legality of slavery, delegates of the thirteen colonies met in Philadelphia in the summer of 1787 to transition the confederation of states into a lasting federal government.[36] The debate among delegates at the Constitutional Convention was mostly between states interested in protecting the "peculiar institution" of slavery and states that wanted to abolish it, or at least limit the power of Southern states employing it.[37] The result was a compromise that would ensure the longevity of slavery for decades following.

Three key provisions of the Constitution directly protect, if not encourage, the institution of slavery. The "Three-Fifths Compromise" allowed Southern states to gain more political muscle by counting slaves in each state's population, thereby

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and life experience with, slavery. Throughout his lifetime, Jefferson expressed beliefs that African slaves were innocent, inferior creatures whose enslavement should be avenged by the Patriots against the British, yet later, he stated that slaves were devoid of beauty, intelligence, or affection. They were worthy of serving as unpaid labor and concubinage, yet such treatment would be avenged by God. As severe as this wrath might be, however, it was of little or no concern to Jefferson, as he made very little effort to assuage God's judgment by emancipating his own slaves (including his children). *See* Hadden, *supra* note 30, at 275; DAVIS, *supra* note 34, at 167–73; KIDD, *supra* note 26, at 146; Letter from Thomas Jefferson to Jean Nicolas Deméunier (June 26, 1786), *in* 10 PAPERS OF THOMAS JEFFERSON 63 (Julian Boyd ed., 1950); THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 138–39 (William Peden ed., 2d ed. 1982).

James Madison and Patrick Henry also held contradictory views on slavery. Each expressed moral repugnance and disgust at the institution and believed it was inconsistent with the liberty espoused by the new republic. Yet, they refused to repudiate it and emancipate their slaves, owing to their dependence on them and inability to live without them. *See* KENNETH MORGAN, SLAVERY IN AMERICA: A READER AND GUIDE 135 (2005); Letter from Patrick Henry to Robert Pleasants (Jan. 18, 1773), *in* THE FOUNDERS ON RELIGION: A BOOK OF QUOTATIONS 99–100 (James H. Hutson ed., 2009).

One of the few Founders to emancipate his slaves was George Washington who, in his will, mandated their freedom following his wife's death. Washington made antislavery professions but was cautious when lending his support to Quaker antislavery actions. Further, he was indignant when antislavery advocates sought to bring his slaves under the protection of Pennsylvania's antislavery laws, and he sent his slaves back to Virginia to avoid their liberation. Despite his attempts to protect ownership of his property, Washington often wished to rid himself of the "very troublesome species of property" and eventually did so, but only upon his death. KIDD, *supra* note 26, at 155; Letter from George Washington to Alexander Spotswood (Nov. 23, 1794), https://founders.archives.gov/documents/Washington/05-17-02-0136 [https://perma.cc/T9EG-NCYV].

[36] PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 7 (1996) [hereinafter FINKELMAN, SLAVERY AND THE FOUNDERS].

[37] The phrase "peculiar institution" is attributed to Kenneth M. Stampp and his seminal work, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956).

gaining more representatives in the House of Representatives than would be the case if only whites were counted.[38] This provision reads as follows:

> Representatives and direct taxes shall be apportioned among the several states which may be included within this union, 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*.[39]

Essentially, this provision mandates the counting of slaves—"all other persons"—as three-fifths of a person for the purposes of determining the number of representatives and the taxes allotted to each state. Whites, even those who were indentured, will be counted as a whole; slaves as a specified fraction; and Native Americans not at all.

No clause demonstrated the compromises on slavery more than Article I, Section 9, clause 1, related to the international slave trade. This "Slave Importation Clause" prevents Congress from ending the slave trade before 1808, although it does not require Congress to ban the slave trade after that date.[40] This clause provides that:

> The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.[41]

This provision is not self-enacting—the slave trade was not automatically terminated in 1808. Instead, Congress has to affirmatively create legislation to end the trade.[42] This provision is notable because it was a major exception to the general power granted to Congress to regulate commerce.[43]

Article IV, Section 2, clause 3, the "Fugitive Slave Clause," requires states to return runaway slaves to their owners on claim and prevents states from emancipating the slaves:

> No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation

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[38] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 36, at 7–18.

[39] U.S. CONST. art. I, § 2, cl. 3 (emphasis added).

[40] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 36, at 4.

[41] U.S. CONST. art. I, § 9, cl. 1.

[42] Congress terminated U.S. participation in the international slave trade in 1807, with the law taking effect on January 1, 1808. *See* JORDAN, *supra* note 32, at 7, 331.

[43] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 36, at 4.

> therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.[44]

This was a major win for the Southern states, as there had never been an affirmative duty of non-slave-owning states to return runaway slaves before this provision. The practice of capturing and returning runaway servants and slaves existed before the Constitutional Convention as agreements between the various colonies.[45] It was a matter of comity among states.[46] Now, all states were obligated to incur the cost of time and money in returning runaway slaves to their owners.[47]

Two ancillary provisions are related to the three above. Article I, Section 9, clause 4, states that any capitation or direct tax must take into account the Three-Fifths Compromise. If there should be any head tax, then slaves will count three-fifths of whites. Article V prohibits any amendment to either the Slave Importation Clause or the capitation tax clauses before 1808.

Other provisions of the Constitution indirectly support the institution of slavery.[48] The Domestic Insurrections Clause (Article I, Section 8, clause 15) allowed Congress to call the militia to "suppress insurrections," which ostensibly included slave rebellions, and the federal government promised to protect states against "domestic violence," including slave rebellions, in Article IV, Section 4. Certain provisions (Article I, Section 9, clause 5 and Article I, Section 10, clause 2) prohibited the federal government from excising taxes on goods imported or exported by any state. This prevented an indirect tax on goods produced from the fruits of slave labor, notably tobacco, rice, and cotton. Further, the Electoral College was created, in part, to ensure that the Southern states had voting rights equal to the North. As such, the same three-fifths formula used elsewhere in the Constitution was used in Article II, Section 1, clause 2, establishing the Electoral College. It gave whites in slave states disproportionate influence in the election of the President.

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[44] U.S. CONST. art. IV, §2, cl. 3.

[45] WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848 78 (1977).

[46] *Id.*

[47] *See id.* Slave patrols were a common feature of the peculiar institution, as they were assembled by plantation owners to patrol at night looking for slaves who were off-plantation and possibly attempting escape. These patrols gained more power and force under the auspices of the fugitive slave laws created pursuant to the Fugitive Slave Clause, and were the progenitors of the modern police force. *See* Eleanor Lumsden, *How Much Is Police Brutality Costing America?*, 40 UNIV. OF HAW. L. REV. 141, 146 (2017) ("Over time, these slave patrols eventually morphed into a form that is now recognized as modern-day law enforcement: '[t]he slave patrol, which began as an offshoot of the militia, and came to resemble the modern police, thus provides a transitional model in the development of policing.' It can be argued that from the beginning, law enforcement existed to control, not protect, blacks. Further, as African-Americans were literal property, policing that returned runaway slaves to their masters directly served the purpose of maintaining white property interests.") (footnote omitted).

[48] *See* Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009, 1030–31 (1993).

Other clauses protecting slavery included the clause on the admission of new states (Article IV, Section 3, clause 1), which was drafted in anticipation of adding new slave states to the Union, and the clause on ratifying the Constitution (Article V), which was drafted to ensure that slaveholding states would have a perpetual veto over any constitutional changes.[49]

B. Ratification

Drafting the Constitution was only the first part of the constitutional process. The second part required the delegates to return to their home states with the draft document and present it to their fellow citizens for ratification.[50] It would take a year for the Constitution to be ratified by the required number of states.[51] The debate notes, letters, pamphlets, and other writings during this time offer a deeper understanding of the meaning of the three major provisions regarding slavery and the perceived consequences of these provisions becoming law.[52] Four major themes are prevalent in these documents.

The most dominant theme is the status of slaves as both property and people, and, as property, their inclusion in the same category as plantation animals. For some delegates, the slave counted merely as property, and thus other property should be included in the count for representation and taxation purposes, or at least for taxation only.[53] Other delegates noted that slaves are both property and persons under law.[54] The slave laws allowed the slave to be vendible as property while also protecting the slave against harm and preventing slaves from harming others as persons.[55] This duality of character is bestowed by law, and, therefore, some believed it should be reflected in the Constitution.[56]

Another theme regarding the place of Blacks in American society focused on the importance of a truly representative government. Some opposed the Three-Fifths

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[49] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 36, at 3–7.

[50] *See* Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 466–68 (2009).

[51] *Id.*

[52] *See generally* THE FOUNDERS' CONSTITUTION, VOLS. 2–4 (Philip B. Kurland & Ralph Lerner eds., 2000), https://press-pubs.uchicago.edu/founders/help/about.html [https://perma.cc/BDM6-R2KF] (explaining the anthology "draw[s] on the writings of a wide array of people . . . . from the reflections of philosophers to popular pamphlets, from public debates in ratifying conventions to the private correspondence of the leading political actors of the day.").

[53] *See Letter from a Gentleman from Massachusetts (Oct. 17, 1787)*, in 2 THE FOUNDERS' CONSTITUTION 114 (Philip B. Kurland & Ralph Lerner eds., 2000) [hereinafter 2 THE FOUNDERS' CONSTITUTION].

[54] *See James Madison, Federalist, No. 54 (Feb. 12, 1788)*, *in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 53, at 126.

[55] *Id*.

[56] *Id.*

Compromise because of the lack of rights granted to slaves in order for them to participate in government.[57]

The third theme centered on the tension between a new nation founded upon the ideals of liberty and equality and the creation of a constitution sanctioning human bondage. The tension was based either on political views about America as a nation of equality[58] or religious views about America as God's nation.[59]

The fourth theme arising in the debates concerned the slave trade and confusion over the place of slavery in the nation. Some assumed that the trade would be prohibited once the twenty-year ban expired because slavery was a failing institution whose demise had already begun.[60] Others, however, felt that Americans would never give up their slaves, and thus Congress would not enact a ban once it was permitted to do so.[61] The debate also showed a nascent states' rights argument for the continuation of slavery.[62] By drafting this provision in the manner they chose, the Founders did not answer whether there should be a ban on the slave trade as part

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[57] *See Brutus, No. 3 (Nov. 15, 1787)*, *in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 53, at 115; *Luther Martin, Genuine Information* (1788), *in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 53, at 120; *see also A Republican Federalist, No. 5 (Jan. 19, 1788)*, *in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 53, at 126.

[58] *See Debate in Virginia Ratifying Convention (June 15, 1788) [Elliot]*, *in* 3 THE FOUNDERS' CONSTITUTION 292 (Philip B. Kurland & Ralph Lerner eds., 2000) [hereinafter 3 THE FOUNDERS' CONSTITUTION]; *Tench Coxe, An Examination of the Constitution (Fall 1787)*, *in* 3 THE FOUNDERS' CONSTITUTION. at 282; *Luther Martin, Genuine Information (1788)*, *in* 3 THE FOUNDERS' CONSTITUTION, at 285; *Debate in MA Ratifying Convention (Jan. 18, 25–26, 30, 1788) [Elliot]*, *in* 3 THE FOUNDERS' CONSTITUTION, at 288.

[59] *See A Countryman (Dec. 13, 1787)*, *in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 58, at 284; *Joshua Atherton, New Hampshire Ratifying Convention (1788) [Elliot]*, in 3 THE FOUNDERS' CONSTITUTION, *supra* note 58, at 286; *Luther Martin, Genuine Information (1788)*, in 3 THE FOUNDERS' CONSTITUTION, *supra* note 58, at 285. *But see Debate in Massachusetts Ratifying Convention (Jan. 17–19, 1788) [Elliot]*, *in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 53, at 288; *James Madison, Federalist, No. 42 (Jan. 22, 1788)*, *in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 58, at 289; and *Debate in South Carolina House of Representatives (Jan. 16–17, 1788) [Elliot]*, *in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 58, at 287 (rejecting the idea that slavery is against God's will).

[60] *See Debate in Massachusetts Ratifying Convention (Jan. 17–19, 1788) [Elliot]*, *in* 2 THE FOUNDERS' CONSTITUTION, *supra* note 53, at 123; *James Madison, Federalist, No. 42 (Jan. 22, 1788)*, *in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 58, at 289; and *Debate in VA Ratifying Convention (June 15, 1788) [Elliot]*, *in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 58, at 292.

[61] *See Luther Martin, Genuine Information (1788)*, *in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 58, at 286; *Debate in Virginia Ratifying Convention (June 15, 1788) [Elliot]*, *in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 58, at 292–94.

[62] *See Debate in South Carolina House of Representatives (Jan. 16–17, 1788) [Elliot]*, *in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 58, at 287, and *A Federal Republican (Oct. 28, 1787)*, *in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 58, at 282.

of the ideals of the country as embedded in the Constitution. Instead, they deferred the conflict to the future for others to resolve.[63]

Ultimately, the advocates in favor of the three provisions regarding slavery had the winning argument, and the Constitution was ratified as drafted. The Founders compromised on various issues regarding slavery, and in the end, the Constitution was a proslavery compact.[64]

Lawrence M. Friedman says a constitution is generally "in essence a frame, a skeleton, an outline of the form of government; it mostly held its tongue on specifics."[65] Perhaps the Constitution did not give many specifics, but it did not hold its tongue on slavery. That lack of restraint established several principles of racist attitudes toward Black people in this country. The Constitution could have been silent on the matter of slavery and let custom and tradition be the arbiter of how and in which state it continued. Writing it into the legal document, however, sealed the country's understanding of Blacks and legitimated racist attitudes. Race became one of the core features of how the new nation defined itself. For this reason, I call the Constitution the Constitution of Slavery.

The next section details the effect of the Founders' compromise on slavery and argues that the Founders established racist beliefs towards Blacks into something more than a social phenomenon. They established racism as the national civil religion.

II. THE RELIGION OF RACE

A. Defining the Religion

The Constitution contains the Founders' understanding and experience of law and custom as they had developed over two centuries of early American life. The words reflect their thoughts and ideas about certain concepts. Their individual experiences are incorporated. When constitutional scholars debate the legitimacy of certain ideals and principles based on whether they are in accordance with the original intent of the Founders, they are probing the public understanding of laws and words in eighteenth-century America to better understand the application of the constitutional provision to modern law. The underlying assumption is that the words have value, and that value continues to endure. This means that the impressions of the Founders continue to have a lasting impact.

In addition to probing into the thoughts and actions of the Founders to consider the meaning of the words and concepts in the Constitution, one need only review the words in the Constitution itself to fully understand what the Founders hoped to

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[63] *A Federal Republican (Oct. 28, 1787)*, *in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 58, at 282–94.

[64] *See* FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 36, at 31–33; *see also* Paul Finkelman, *Lincoln v. the Proslavery Constitution: How a Railroad Lawyer's Constitutional Theory Made Him the Great Emancipator*, 47 ST. MARY'S L. J. 63, 67 (2015) [hereinafter Finkelman, *Lincoln v. the Proslavery Constitution*].

[65] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 103 (2005).

achieve. The Constitution was meant to be the best possible way to develop a society of people united in the pursuit of justice and promoting their best welfare. According to the Preamble, the provisions of the Constitution ensure the most attainable version of liberty. The Founders' version of liberty and justice, however, contained provisions regarding the enslavement of a whole class of people—Black people. By drafting the provisions of the Constitution regarding slavery in the manner they did, the Founders fixed the practice of slavery into American culture and created guiding principles for how the country would think of Blacks, not only then but now.

Religion is a mechanism for ordering one's life and deciphering the ultimate meaning of life. The Founders ordered American life in a very specific way when creating the Constitution. Sanford Levinson observes, "the public rhetoric of American political culture remains organized, in substantial ways, as a faith community centered on the Constitution . . . ."[66] He continues by saying that the American civil religion is a "web of understandings, myths, symbols, and documents out of which would be woven interpretive narratives both placing within history and normatively justifying the . . . American community . . . ."[67] Racism is the core narrative defining the civil religion. This ordering of life in the U.S., where race is a distinguishing fact that privileges white people by denigrating Black people, is America's true national religion.

The Religion of Race is the American civil religion. In this religion, whiteness is sacred, and Blackness is profane. Following in the footsteps of Bellah and Laderman,[68] I use the work of Émile Durkheim to describe the Religion of Race and its development as America's true civil religion.

Durkheim provided the following construct for religion:

> A religion is a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden—beliefs and practices which unite in one single moral community called a Church, all those who adhere to them . . . religion must be an eminently collective thing.[69]

Religion, then, has three main components: (1) authority that defines the sacred and provides directives for religious practices; (2) beliefs about the sacred and the profane; and (3) rituals as ceremonies that elevate the sacred and reinforce a worldview for the believers.[70] The Religion of Race comprises these components, which are described in detail below.[71]

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[66] SANFORD LEVINSON, CONSTITUTIONAL FAITH 52 (2011).

[67] *Id*. at 10.

[68] *See supra* Introduction.

[69] ÉMILE DURKHEIM, THE ELEMENTARY FORMS OF RELIGIOUS LIFE 44–47 (Karen E. Fields trans., 1995).

[70] *See id.* at 34–44.

[71] *Id.*; *see supra* Introduction for Bellah and Laderman's use of this construct.

1. Authority

Authority is a necessary component of religion. Anthropologist Clifford Geertz suggests that religious belief is more than mere observation of everyday experiences.[72] Instead, it is a "prior acceptance of authority which transforms" the everyday experience.[73] This authority, which can reside in texts or people, defines what is to be worshiped as sacred and then defines the religious practices related to the sacred. As such, rituals can be performed only by "consecrated personages."[74] "There are words, phrases, and formulas that can be said only by consecrated personages; there are gestures and movements that cannot be executed by just anyone."[75] They are executed by those chosen by the group to have persuasive authority. The authority of the Religion of Race resides in a sacred text, the Constitution, and consecrated people, the Supreme Court.[76] Both forms of authority are discussed below.

(a) Authority of Text—The Constitution

The leading authority for the Religion of Race is the Constitution. As the oldest operating constitution in the world, the American Constitution has been venerated as a sacred document since its creation. According to President Woodrow Wilson, the Constitution became the object of "blind worship" almost instantly.[77] Bellah refers to the Constitution (as well as the Declaration of Independence) as "sacred scriptures."[78] The original copy of the Constitution is housed in the National Archives in what is called the "Shrine."[79] More important, early in the country's history, the Supreme Court referred to it as "sacred."[80] There is universal acceptance of the Constitution as the authority for the rule of law in this country.

As important as it is for external sources to refer to its authority, the reasons the Constitution is the persuasive authority of the Religion of Race are inherent in the

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[72] CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 109–12 (1973).

[73] *Id.*

[74] DURKHEIM, *supra* note 69, at 35.

[75] *Id.*

[76] It is possible for authority to reside in extralegal sources, such as academics, activists, businesses, or others who shape law and policy. I will explore this type of authority in future work.

[77] HANNAH ARENDT, ON REVOLUTION 198 (1963) (quoting Woodrow Wilson).

[78] ROBERT N. BELLAH, BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD 176 (1991) [hereinafter BELLAH, BEYOND BELIEF]. *See also* Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 23 (1984).

[79] PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE ix (1st ed. 1997).

[80] *See* Jackson v. Steamboat Magnolia, 61 U.S. 296, 307 (1858) (Daniel, J., dissenting) ("regarded . . . as the sacred authority of the Constitution"); Mount Pleasant v. Beckwith, 100 U.S. 514, 529 (1879) ("Contracts under the Constitution are as sacred as the Constitution that protects them from infraction . . .").

nature of the Constitution itself. As a self-proclaimed compact among the people, it replaced the God of the Declaration of Independence with the god of the *demos*. The Declaration announced the colonies' formal separation from the king of Great Britain and their intent to govern themselves, all under the auspices of divine direction and guidance.[81] Bellah notes that there are four references to God in the Declaration, including the famous (and at times infamous) statement that all men "are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[82] Jefferson calls upon higher law to legitimate the separation and creation of a new nation.[83] The Declaration also includes references to the "Laws of Nature and of Nature's God"; "the Supreme Judge of the World for the rectitude of our intentions"; and "a firm reliance on the protection of divine Providence."[84] This direct appeal to divine providence and guidance was not repeated in the Constitution, which was drafted just eleven years later.[85] Instead, the Constitutions states,

> *We the People* of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence [sic], promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, *do ordain and establish* this Constitution for the United States of America.[86]

Clearly, it is the "people" who ordain the creation of this document to form the union of the states and provide for its security going forward. Unlike the Declaration of Independence, the Constitution does not claim any transcendent spiritual authority higher than itself.[87] This is significant, as the Declaration was backward-looking in its termination of the rule of the previous regime, whereas the Constitution was forward-looking with the objective of establishing principles to guide the new nation.[88] These principles would be determined by the people. In this way, the Constitution was an agreement among the people—a true social compact. Robert Cover suggests that its status as a Lockean social contract is why the Constitution elicited such fidelity from the men of the 1780s and 1790s.[89]

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[81] *See* KIDD, *supra* note 26, at 75–96.

[82] BELLAH, BEYOND BELIEF, *supra* note 78, at 174.

[83] *Id*.

[84] THE DECLARATION OF INDEPENDENCE paras. 1, 5 (U.S. 1776).

[85] The appeal to the equal status of men proved troublesome for the slave societies of the South, as slaves and abolitionists began using the language of the Declaration in their rebellion against the peculiar institution. *See infra* Part III.A. (discussing the influence of abolitionists' belief in natural law rights (that is, equality) for slaves on the drafting of the Reconstruction Amendments).

[86] U.S. CONST. pmbl. (emphasis added).

[87] BELLAH, BROKEN COVENANT, *supra* note 9, at 4.

[88] MAIER, *supra* note 79, at 192.

[89] ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 28 (1975).

The Constitution is the moral authority of the nation. Bellah likens the founding of the nation to the Israelites search for the Promised Land.[90] Extending the metaphor, the Constitution represents a moral commitment of the covenant people to order their lives by the highest standards.[91] Cover suggests that its moral authority transcends its status as the supreme law of the land. Its authority arises from the very origins of the Constitution and its utility as a real social compact brought to life for the first time.[92] People adhere to its rules because it sets forth a government without coercion, where men have come to mutually depend on that agreement.[93] There is no king or pope using power and the threat of violence to command obedience. Instead, it is just the people contracting among themselves, and thus they have a moral obligation to obey their mutual agreement.[94]

The Constitution is a sacred text not only because it has moral authority as a social compact but also because it speaks to its importance as the preeminent guide for the nation. Clause 2 of Article VI, referred to as the Supremacy Clause, states the following:

> *This Constitution*, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the *supreme Law of the Land*; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[95]

The Constitution enumerates certain powers and rights for the branches of government, the states, and the people. By declaring itself the "supreme Law of the Land," it explicitly places itself above any other laws or rules. This is confirmed by the Tenth Amendment, which notes that any power not delegated to the United States by the Constitution is reserved to the states or to the people.[96] While ensuring state sovereignty, this amendment supports the supremacy of the Constitution—the first inquiry is always whether the Constitution addresses a particular power or law; if not, then state law has authority.

The use of the word "supreme" is significant. A universal etymological English dictionary in use in the eighteenth century defines "supreme" as "advanced to the highest Degree of Authority or Dignity," and "supremacy" as "the most transcendent Height of Power and Authority, more especially the Supreme or chief power of the King or Queen of England, in Ecclesiastical Affairs."[97] The religious aspect of this

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[90] BELLAH, BROKEN COVENANT, *supra* note 9, at 36–60.

[91] *Id.* at 62.

[92] COVER, *supra* note 89, at 132–33.

[93] *Id.* at 134.

[94] *Id.* at 151.

[95] U.S. CONST. art. VI, cl. 2 (emphasis added).

[96] U.S. CONST. amend. X.

[97] NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY, https://archive.org/details/universaletymolo00bail [https://perma.cc/QU48-LFXW] (last visited Oct. 6, 2020).

word is demonstrated in the Declaration of Independence when the colonists appeal for assistance to the "Supreme Judge of the world" (meaning God).[98] By declaring itself to be the "supreme Law of the Land," the Constitution declares that it is equal to God as the highest authority for guidance and direction.

The acceptance of this authority was consecrated by the ratification process, through which the people agreed that the Constitution would be the highest moral authority for the new nation. Through that process, "the people" were able to debate and understand the meaning of the provisions.[99] It took a year of meetings, pamphlet publications, and fierce exchange among the populace before the Constitution was accepted by the required number of states.[100] It was also quickly amended by the addition of the Bill of Rights, further safeguarding individual liberties.[101] This time of ratification and amending was a trial by fire, ensuring that the social compact met the needs of the new nation.

(b) Authority of People—The Supreme Court

Judges and the Supreme Court are consecrated personages in the Religion of Race. According to Article III of the Constitution, judicial power is vested in one "supreme court" and such inferior courts as needed, as ordained and established by Congress.[102] The courts will have judges exhibiting good behavior with compensation for their services.[103] Article III establishes two things. First, there will be a hierarchy of courts, with a bottom-rung consisting of courts of first appearance followed by a higher-level Supreme Court. The Supreme Court is the only final tribunal for controversies and challenges under the Constitution.[104] Whether it decides cases under original jurisdiction or appellate jurisdiction, the decisions of the Supreme Court are the final word on a particular matter. There is no higher appeal. Second, judges are the chosen people to interpret and explain the Constitution. Like priests, they spend years studying the sacred text and are called upon to provide exegesis[105] on its ultimate meaning. Judges, and the lawyers arguing

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[98] *See* THE DECLARATION OF INDEPENDENCE, *supra* note 84, at para. 5. *See also* Eugene Volokh, *The Declaration of Independence and God*, WASH. POST (July 5, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/05/the-declaration-of-independence-and-god/ [https://perma.cc/39H9-XC8F].

[99] *See supra* Part I.

[100] *See* Maggs, *supra* note 50, at 467–76.

[101] *See* Saul Cornell & Gerald Leonard, *The Consolidation of the Early Federal System, 1791–1812*, *in* 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: VOLUME I EARLY AMERICA (1580–1815), *supra* note 30, at 518, 522.

[102] U.S. CONST. art. III, §1.

[103] *Id.*

[104] Martin v. Hunter's Lessee, 14 U.S. 304 (1816) (holding that the Supreme Court of the United States overruled the courts of the states).

[105] *See* Christopher Rowland, *Biblical Exegesis: Christian Views*, 2 ENCYCLOPEDIA OF RELIGION 870–78 (Lindsay Jones ed., 2d ed. 2005) (defining "biblical exegesis" as involving "the interpretation, explanation, and exposition of the Bible's various books, in relation either to the time of their composition, or to their meanings for readers in subsequent centuries").

the cases before the Court, have the authority and responsibility to preserve the sanctity of the venerated document.

The supremacy and finality of the Supreme Court were confirmed relatively soon after the creation of the Constitution in *Marbury v. Madison*.[106] In that decision, the Court said the principles established by the people in the Constitution are fundamental and the supreme authority.[107] One such principle was the creation of different departments of the government, one of them being the judiciary. It is the "province and duty of the judicial department to say what the law is."[108] In doing so, the Court must be cognizant that "the Constitution is superior to any ordinary act of the legislature. . . ."[109] The Court acknowledged that the Constitution declares its own supremacy and that the courts are "bound by that instrument."[110]

The Constitution prescribes the manner in which judges will be consecrated. Article VI, clause 3, states that the judicial officers of the United States shall be bound by an oath or affirmation to support the Constitution.[111] Judges take this oath when they are sworn into office for the first time. In this way, the act of taking the oath converts a chosen person from lawyer to judge, whose responsibility it is not only to obey the Constitution but also to interpret and proclaim its meaning. The public acknowledges the exalted position of the judge in the routine ceremonies reenacted daily in the courtroom. All in attendance must stand upon entry of the judge or judges, whose entrance is announced by a designated person (for instance, "oyez, oyez, oyez" or "all rise"). In this gesture, the parties and the visitors acknowledge that the judge is L/lord of the proceedings. Indeed, the parties present their pleas for relief to the court in the form of "prayers." The courtroom is a sanctuary, and the judge its high priest.

2. Beliefs

Durkheim states that people conceive two separate classifications for beliefs, whether real or ideal: the sacred and the profane.[112] "Beliefs, myths, dogmas, and

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[106] 5 U.S. 137 (1803).

[107] *Id.* at 176 ("That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.").

[108] *Id.* at 177.

[109] *Id.* at 178.

[110] *Id.* at 180 ("[I]n declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank. Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.").

[111] U.S. CONST. art. VI, cl.3; *see* Marbury v. Madison, 5 U.S. 137, 180 (1803).

[112] *Id*. DURKHEIM, *supra* note 69, at 34.

legends are either representations or systems of representations that express the nature of sacred things, the virtues and powers attributed to them, their history, and their relationships with one another as well as with profane things."[113] Sacred things are not limited to gods or spirits—they can be anything that people endow with value and protect from things not sacred. The profane is anything that threatens the sacred; prohibitions must be applied to the profane, and the sacred must be protected from it.[114] There is a sense that the profane can contaminate or damage the sacred. The sacred is superior in dignity and power to profane things.[115] The difference between the sacred and the profane is absolute. A void separates them, with no mingling possible.[116] They are hostile and jealous rivals—two worlds with nothing in common.[117] This rivalry is "expressed outwardly by a visible sign that permits ready recognition of this classification, wherever it exists."[118]

By compromising on the issue of slavery in the Constitution, the Founders established the belief system of the Religion of Race. In essence, they sacralized whiteness and made Blackness profane.[119] The Constitution ordains the preferential treatment of whites over Blacks with the provisions maintaining and supporting Black subjugation, namely the Three-Fifths Compromise, the Slave Importation Clause, and the Fugitive Slave Clause, as well as the various supplemental provisions supporting these clauses or preventing the amendment of them.[120] Further, the Tenth Amendment, adopted in 1791, "reserved to the States respectively, or to the people" the powers not delegated to the national government by the Constitution "nor prohibited by it to the States. . . ."[121] As such, the Constitution affirmed the definition of slaves as property and persons under the various state slave codes. Taken together, these provisions established Black people as less than human beings, not deserving of the same treatment and rights as white people, with whites exercising control over the mind, body, and soul of Black people. Blacks are to be used for the economic success of other people and sacrificed for the wealth of the nation.

The overarching goal of creating the Constitution was the creation of a new nation. The new nation was desirable for economic benefits and defense against foreign enemies. The debates during the Constitutional Convention show how the northern delegates valued the possible wealth of the new nation over their own

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[113] *Id*.

[114] *Id*. at 38.

[115] *Id.* at 35.

[116] *Id.* at 36–7.

[117] *Id.* at 36–7.

[118] *Id.* at 37.

[119] Blackness refers to the physiology, culture, and lived experience of people arriving in America directly from Africa or descending from persons who did. Whiteness refers in a broad sense to American culture based on the dominant white Anglo-Saxon Protestant perspective, to which all other cultures should assimilate. *See* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind*,*"* 44 STAN. L. REV. 1, 4 n.12 (1991).

[120] *See supra* Part I for a full discussion.

[121] U.S. CONST. amend. X.

ideals, which argued against slavery.[122] The discussions during the ratification debate also demonstrate that the state leaders were aware that they were trading on the principles of the new republic in order to achieve the goal of nationhood.[123] They were sacrificing the liberty and equality of Blacks to ensure the success of the new nation.[124] The representatives from South Carolina explicitly stated that without slaves, the state would falter.[125] They needed Blacks to achieve their goals. Other delegates noted their own discomfort and outright repugnance with slavery but were willing to live with the hypocrisy in order to form a national government.[126] The delegates were also willing to risk the wrath of God for the promise of untold wealth.[127] Blacks were condemned as property to benefit the economy of the nation and, by extension, the wealth of whites.

Blacks were so debased that they were not mentioned by name in the Constitution. It does not use the word "slave" or "slavery" in any of its provisions. The words were avoided to make the document more agreeable to delegates from northern states.[128] Or, as James Iredell said at the ratifying convention, "the word *slave* is not mentioned . . . owing to the [northern delegates'] particular scruples on the subject of slavery."[129] This type of circumlocution is evident in the Three-Fifths Compromise, where slaves are referred to as "all other persons."[130] This euphemism continues in the Slave Importation Clause, which refers to slaves and the slave trade as "The Migration or Importation of such Persons."[131] The Fugitive Slave Clause refers to slaves as a "Person held to Service or Labour in one State."[132] The use of other words and phrases as euphemisms for slavery was a way for the southern delegates to appease their counterparts in order to receive the protection of slavery they sought.[133] Essentially, the Founders, who may have had qualms about the institution, accepted the oppression of Blacks as long as what was written in law did not directly support the oppression (that is, as long as it sounded good on paper). As Luther Martin stated, the drafters used language to avoid words "odious to the ears of Americans," although they were willing to allow the acts.[134] This practice created

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[122] WIECEK, *supra* note 45, at 73.

[123] *See supra* Part I.B.

[124] *Id.*

[125] *Debate in South Carolina House of Representatives (Jan. 16–17, 1788) [Elliot]*, *in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 58, at 287.

[126] *See supra* Part I.B; *supra* note 35 and accompanying text.

[127] *See supra* Part I.

[128] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 36, at 3.

[129] *James Iredell, Ratifying Convention (July 29, 1788) [Elliot]*, *in* 4 THE FOUNDERS' CONSTITUTION 526 (Philip B. Kurland & Ralph Lerner eds., 2000).

[130] U.S. CONST. art. I, § 2, cl. 3.

[131] U.S. CONST. art. I, § 9, cl. 1.

[132] U.S. CONST. art. IV, §2, cl. 3.

[133] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 36, at 3.

[134] *Luther Martin, Genuine Information (1788)*, *in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 58, at 285.

dangerous precedence for Americans to accept the suppression and subordination of Black people as long as the subordination did not sound as bad as it was in reality.

Whiteness is sacred because whiteness means freedom. As Professor Cheryl Harris states, "[w]hiteness was the characteristic, the attribute, the property of free human beings . . . ."[135] As the Three-Fifths Compromise makes clear, in America, there are "free persons" and "all other persons."[136] In other words, there are whites who are free and Blacks who are not. These are the polar constructs of "slave" and "free," "Black" and "white."[137] Harris continues: "white identity and whiteness were sources of privilege and protection; their absence meant being the object of property."[138] Whiteness means the exclusion and subordination of Blacks.[139] Further, as Neil Gotanda notes, "Black is the reification of subordination; white is the reification of privilege and super-ordination."[140] Under the Durkheim construct, the sacred is superior in dignity and power to profane things.[141] This precisely describes the nature of the relationship of whites and Blacks established by the Constitution, where whites are superior to Blacks. Whiteness is valuable because it confers citizenship and status as full human beings, which is denied to others.[142]

Slaves were chattel property, and thus the mind, body, and soul of the Black person were controlled to protect the sacredness of whiteness from contamination by Black skin and Black blood.[143] As mentioned above, the Tenth Amendment reserved to the states or to the people any powers not delegated to the national government by the Constitution or prohibited by it to the states.[144] The slave codes existing when the Constitution was drafted and ratified covered all manner of daily life for the slave and created a regulated society between whites and Blacks. In fact, the bulk of legislative acts or codes regarding slavery dealt not with the legal status of the slave but with the regulation of the rights of Blacks, the noncriminal policing of Blacks, and the law of slave crimes.[145] The codes covered not only slaves but all Black persons, who posed a perceived threat to the "purity and safety of whites."[146]

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[135] Cheryl I. Harris, *Whiteness as Property*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 6, at 276, 279.

[136] U.S. CONST. art. I, § 2, cl. 3.

[137] Harris, *supra* note 135, at 278.

[138] *Id*. at 279.

[139] *See id*. at 283.

[140] Gotanda, *supra* note 119, at 40.

[141] DURKHEIM, *supra* note 69, at 35.

[142] Harris, *supra* note 135, at 285.

[143] For a discussion of the transition of a Black person from indentured servant to slave as chattel property, see William M. Wiecek, *The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America*, 34 WM. & MARY Q. 258, 264–66 (1977) [hereinafter Wiecek*, Statutory Law*] and William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1777–78 (1996).

[144] U.S. CONST. amend. X.

[145] Wiecek, *Statutory Law*, *supra* note 143, at 264–65.

[146] *Id; see* Dana Berthold, *Tidy Whiteness: A Genealogy of Race, Purity, and Hygiene*, 15 ETHICS & THE ENVIR. 1 (2010) (discussing the representation of whiteness as pure).

Few codes outlined the positive rights of slaves,[147] but many negatively or at least indirectly secured the rights of slaves.[148] The laws proscribed cruel and inhumane treatment of slaves and mandated a bare minimum of clothing and food for them.[149] No aspect of life was too mundane for the notice of the law. Slave codes governed the sexuality of slaves, especially if white lovers were involved;[150] the ability of slaves to hire themselves out to third parties for wages;[151] the ownership of horses, cattle, sheep, and crops;[152] the ability of slaves to read or write;[153] and the type of clothing slaves were allowed to wear.[154] Laws also proscribed the participation of Blacks in the militia and military service and the use of their testimonies in court.[155]

Natural law is a set of principles based on the idea of natural rights possessed by people apart from the rights given to them by government or laws.[156] Contrary to natural law, positive law is law explicitly acknowledging or defining rights.[157] The language of the Declaration of Independence discussed in Part I above illustrates this distinction. The notion that all men have certain unalienable rights "endowed by their Creator" is an acknowledgment of natural law. These rights represent the power that a man has over himself. Such power emanates from a deity or from nature. On the contrary, the Constitution makes the allocation of power explicit and is positive law.[158] It specifies the consensual ordering of power among men within a society. Each person sacrifices some of their natural law rights to form the social compact and has an obligation to the social order. The Constitution is a tangible expression

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[147] For example, in South Carolina's code of 1740 and Georgia's derivative code of 1755, Blacks could bring suit to test the legality of their enslavement. Wiecek, *Statutory Law*, *supra* note 143, at 265.

[148] *Id*.

[149] The effectiveness of anticruelty laws is questionable, however, as statutes and judges were predisposed to assume that an owner would not willfully damage his own property (it would not make sense to damage a capital investment). *Id*. at 265–67.

[150] *See* Gotanda, *supra* note 119, at 6 ("The 'one drop of blood' rule typifies this stigma: Any trace of African ancestry makes one Black. In contrast, the classification white signifies 'uncontaminated' European ancestry and corresponding racial purity.") *See also* Kevin D. Brown, *The Rise and Fall of the One-Drop Rule: How the Importance of Color Came to Eclipse Race*, *in* COLOR MATTERS: SKIN TONE BIAS AND THE MYTH OF A POSTRACIAL AMERICA 44 (Kimberly Jade Norwood ed., 2013) (discussing the social and legal distinctions between Black and white in the United States, including in regards to intermarriage and sexual relations).

[151] Wiecek, *Statutory Law*, *supra* note 143, at 267.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 268.

[155] *Id.* at 268–69.

[156] COVER, *supra* note 89, at 10.

[157] *See generally* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 38–63 (providing a treatise on the common law of England on the rights of persons, the rights of things, of private wrongs and of public wrongs, which has proven to be an indispensable tool for American jurists and lawyers).

[158] COVER, *supra* note 89, at 27.

of that compact and establishes a "natural law obligation to obey . . . the Constitution."[159] In this way, although natural law rights are retained, positive law has primacy.

Slavery was contrary to natural law.[160] It denied the Black man[161] power over his own body and use of his labor. In fact, appeals to natural law were the tools used by antislavery groups for expressing moral doubt and concern about slave law.[162] The rights enjoyed naturally from God were denied and stolen from the Black man through slavery. All that was left were the rights and responsibilities delegated to the Black man by the white man through the positive law of the Constitution. For the Black man, the Constitution made positive law and natural law one and the same. By this maneuver, the white man became the god of the Black.

3. Rituals

Rites (rituals) define and maintain the boundaries between the sacred and the profane. According to Durkheim, rites are rules of conduct that prescribe how persons must conduct themselves with sacred things.[163] Rites are a way for the profane to become sacred.[164] Rites are ways for individual believers to lose themselves in the group, whereby their personal identities are willingly subsumed by the group identity. The group matters more than the individual.[165] Geertz suggests that rituals are ceremonies or cultural performances exhibiting beliefs to both worshipers and outsiders, with each group interpreting the performance differently.[166] It is in rituals where the moods and motivations attached to sacred things (Geertz calls them symbols) are generated and reinforced by the worshipers.[167] As these moods and motivations are reinforced, the individual perspectives of the believers fuse into a single worldview of the collective group.

Given the nature of beliefs and rituals, religion is a phenomenon conducted by a group. According to Durkheim, "[r]eligious beliefs proper are always shared by a

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[159] *Id.* at 28.

[160] *Id.* at 8.

[161] I am consciously using the phrase "Black man" here instead of a broader, gender-neutral approach of "Black person." Racism and the Religion of Race developed during a time of severe gender inequality when the laws and rules of society were dictated by men (one would be right to wonder whether sexism is its own form of a constitutional civil religion). Therefore, it seems more fitting to speak of the development of status and rights in terms of a man and not just a person. Also, I wish to pay tribute to Dred Scott and his tireless pursuit to be seen as a human being and respected as a man. This does not, however, diminish the fact that slavery also denied Black women agency, humanity and dignity.

[162] COVER, *supra* note 89, at 9.

[163] DURKHEIM, *supra* note 69, at 40.

[164] DANIEL L. PALS, NINE THEORIES OF RELIGION 96 (3d ed. 2015).

[165] *Id*. at 101.

[166] GEERTZ, *supra* note 72, at 113.

[167] *Id*. at 112.

definite group that professes them and practices corresponding rites."[168] Religion is an eminently social, collective thing.[169] Beliefs belong to the group and unify it.[170]

In the Religion of Race, the ritual is the adjudication of cases and controversies pertaining to the status and rights of Blacks in the nation. This adjudication confirmed the authority of the Constitution and reinforced the beliefs regarding each race. This is the Ritual of Law. Through decisions, the law maintained the boundaries between white and Black, the sacred and the profane. Each decision reinforced the specialness of white freedom and citizenship and defined the group identity for each race. Courts played an active role in determining who was or was not white enough to enjoy the privileges accompanying whiteness.[171] This determination, in turn, consistently confirmed the worldview that Blacks were second-class persons (if any class at all) and were beneficial to the growth of the nation. Blackstone provides a well-known definition of "law": "[a] rule of civil conduct prescribed by the supreme power in a state commanding what is right, and prohibiting what is wrong."[172] Law is the ritual by which the Supreme Court, as consecrated personages, divines the Constitution to command the manner in which the races will maintain the sacredness of whites and prohibit Blackness from contaminating their purity. Each case, with its briefs, oral arguments, and written opinions, is a cultural performance for those inside the judiciary, for the other branches of government, and for the public at large.

The Ritual of Law comprises several principles. Supreme Court justices interpret the sacred text using these principles as their hermeneutic, which is to say, through an interpretive lens.[173] The initial principles used by the Court in the pre-Civil War era were carried over from England and were adopted early into the American legal system.[174] These principles are: (1) common law/*stare decisis*; (2) federalism; and (3) judicial review. The Ritual of Law requires consistent use of these principles by the Court in each decision it adjudicates. The ideas and concepts embedded in the Court's decisions are concretized each time the ritual of adjudication is repeated. In this way, racism against Blacks is hardened as whiteness is continually sacralized.

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[168] DURKHEIM, *supra* note 69, at 41.

[169] *Id.* at 44.

[170] *Id.*

[171] Harris, *supra* note 135, at 283.

[172] COVER, *supra* note 89, at 26 (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 93). The supreme power Blackstone mentions, refers to the higher law of natural law and not the positive law of the Constitution; however, it is still a useful definition and important as established in the legal academy.

[173] *See* Rowland, *supra* note 105, at 876 (explaining hermeneutics as a discipline dedicated to the interpretation of human expressions).

[174] COVER, *supra* note 89, at 140. *See generally* James Henretta, *Magistrates, Common Law Lawyers, Legislators: The Three Legal Systems of British America*, in 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: VOLUME 1 EARLY AMERICA (1580–1815), *supra* note 30, at 555; Kathleen A. Keffer, *Choosing a Law to Live by Once the King Is Gone*, 24 REGENT U. L. REV. 147, 157–59 (2012).

(a) The Common Law and Stare Decisis

The common law system depends on the inherited body of past decisions by judges.[175] A judicial opinion is designed to persuade the parties and the world that the decision arrived at is just; that the evidence has been weighed; that the rules of law have been justly applied; and that the rules of law themselves have been fairly determined.[176] As the past decisions of judges become controlling on future cases, it is thought that *stare decisis* (that is, precedence) produces certainty.[177] The supremacy of the single tribunal of the Supreme Court lies in its uniformity in the interpretation and operation of the powers of constructing the law.[178] By relying on precedence, the Court reduces the challenge of judicial caprice in the lawmaking process.[179]

The mechanism of the common law is cumulative, in that a particular case builds upon the holding and decisions of the previous cases. It is also speculative, as it strikes new ground and teases out new interpretations of the Constitution. Each case decided in a particular area of law stands on the ground of previous cases while also adding its own mark on the law.

(b) Federalism

The Constitution provides checks and balances on the power it delegates between the national government and state governments. Federalism, the distribution of governmental authority between state and nation, has several values, namely, efficiency, promoting individual choice by allowing citizens to move from one state to another depending upon the laws they prefer, encouraging experimentation in social and economic matters, promoting democracy, and preventing tyranny.[180]

Maintaining the proper balance of national power and state power was the overarching concern of the Founders and the members of ratifying conventions.[181] The Court is tasked with ensuring that the exercise of power by the national government remains within proper boundaries. This is no easy task, as the boundaries often shift.

(c) Judicial Review

Although judges were the arbiters of the law, their power was not unfettered. The basic principle of judicial review is that only the people are sovereign, never the

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[175] *See also* "Common Law" in WOLTERS KLUWER BOUVIER LAW DICTIONARY: QUICK REFERENCE (2012).

[176] COVER, *supra* note 89, at 119.

[177] *Id.* at 137.

[178] *Id.* at 137.

[179] *Id.*

[180] CONSTITUTIONAL LAW 139–42 (Geoffrey R. Stone ed., 6th ed. 2009).

[181] *See* Part I.

government, and this principle implies that courts must implement only that law that was legitimately derived from the people themselves, not from the judges.[182] As such, judicial review is an extension of popular, not judicial, supremacy.[183] In the *Federalist No. 78*, Alexander Hamilton postulates that judicial review is tolerable because the instrument, which gives the judiciary its power to check the work of the legislative and executive branches, also limits what judges may do.[184] The Constitution is their master, and they may not act upon their own will. Instead, their job is to judge based on the wills of others.[185] Eugene Genovese suggests that the "law acts hegemonically to assure people that their particular consciences can be subordinated . . . to the collective judgment of society."[186] It denies the right of the individual to take action based on private conscience when in conflict with the general will.[187] It pits the morality of the law in question against the morality of obedience to authority.[188] The judge may express the immorality of a law but must still apply the law.[189] This is demonstrative of the Durkheim construct in which rituals tie individuals to the group and unify them. The individual sacrifices personal will for the benefit of the group.

B. The Development of the Religion of Race

In the first hundred years of the nation, the Ritual of Law developed and strengthened the Religion of Race. Each new case regarding the status and rights of Blacks ritualized the sacredness of whites and the profaneness of Blacks based on the Constitution as the sacred text.

Below is an analysis of the primary cases decided by the Supreme Court adjudicating provisions of the Constitution related to slavery and the status of Blacks.[190] The cases were decided after the Constitution was ratified but before the Civil War.

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[182] Cornell & Leonard, *supra* note 101, at 540.

[183] *Id.* at 542; *see also* Shlomo Slonim, *Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy*, 23 CONST. COMMENT. 7 (2006).

[184] COVER, *supra* note 89, at 27 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

[185] *Id.*

[186] EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 27–28 (1976).

[187] *Id*.

[188] *Id*.

[189] COVER, *supra* note 89, at 119.

[190] The analysis focuses only on the holding of the majority/plurality opinions. The concurrences and dissents are mentioned only for noteworthy points.

1. Slave Importation Clause—Groves

The case of *Groves v. Slaughter*[191] indirectly involved the Slave Importation Clause. The case involved a prohibition on importing slaves into the State of Mississippi and whether a contract for the sale of slaves was valid.[192] Although the case turned on state law, not federal constitutional law, the Court, in its opinion, acknowledged the Slave Importation Clause and noted that it was an exception to the power granted to Congress by the Commerce Clause.[193] In a nod to federalism, the Court also noted that it was a state's decision whether to allow or prohibit the importation of slaves.[194] Essentially, the Court confirmed the validity of the Slave Importation Clause and states' rights regarding the institution of slavery.[195]

2. Fugitive Slave Law—Prigg *and* Van Zandt

Prigg v. Pennsylvania[196] involved the issue of whether states could prohibit the capture of runaway slaves in their state. In Pennsylvania, slave captors apprehended a Black woman believed to be a slave contrary to the law in Pennsylvania prohibiting the forcible removal of escaped slaves.[197] The Supreme Court, led by Justice Story, ruled that this law violated the Fugitive Slave Clause of the Constitution,[198] which prohibited all states from creating laws impairing the ability of other states to apprehend slaves. Free states were prevented from lawfully assisting or protecting runaway slaves.[199] More importantly, this decision laid the legal foundation for the presumption that all Blacks, even those in free states, had the status of slaves.[200] Even legally free Blacks were under constant threat of being captured and forced into slavery.[201] *Prigg* declared that Blacks were not afforded the protection of the due process of law guaranteed to American citizens under the Constitution.[202]

The Court's analysis demonstrates the principles of the Ritual of Law. After stating the question presented, the Court notes the nature of judicial review and interpretation of the Constitution.[203] Upholding the principle of federalism, the Court

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[191] Groves v. Slaughter, 40 U.S. 449 (1841).
[192] *Id.* at 452.
[193] *Id.* at 505.
[194] *Id.* at 465–66.
[195] *Id*.
[196] Prigg v. Pennsylvania, 41 U.S. 539 (1842).
[197] 41 U.S. at 608–09.
[198] *Id*.; U.S. CONST. art. IV §2, cl. 3.
[199] 41 U.S. at 625–26.
[200] F. MICHAEL HIGGINBOTHAM, RACE LAW: CASES, COMMENTARY, AND QUESTIONS 135 (4th ed. 2015).
[201] Ariela Gross, *Slavery, Anti-Slavery, and the Coming of the Civil War*, *in* 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: VOLUME II THE LONG NINETEENTH CENTURY (1789–1920) 280, 305 (Michael Grossberg & Christopher Tomlins eds., 2008).
[202] *Id.*
[203] 41 U.S. at 610.

says that the states may not add to acts of Congress.[204] It then reviews the constitutional provisions regarding slavery and acknowledges the compromises over slavery made by the Founders.[205] These constitutional provisions prevent nonslave states from interfering with property.[206] The Court affirmatively states that the Constitution protects state regimes that authorize a "complete right and title of ownership in slaves, as property . . . ."[207] This statement is notable, as it makes explicit what is implicit in both the Constitution, the *Groves* decision, and the *Amistad* decision[208]—the Constitution sanctions slavery. Because the instrument never uses the word "slave" or "slavery," the Court exegetes and provides explicit guidance (although it is doubtful that there was any confusion on this point).

The Court makes another significant assertion. Without the Fugitive Slave Clause, the nonslave states could have made laws freeing runaway slaves or instituting certain safeguards to protect free Blacks.[209] However, because the Constitution mandated a duty and responsibility for all states regarding runaway slaves, the states could do nothing but acquiesce.[210] The Court reaffirms the supremacy of the Constitution—once it speaks, it must be obeyed. Further, once

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[204] *Id.* at 610–11, 618.

[205] *Id.* at 610–11.

[206] *Id.* at 611.

[207] *Id.*

[208] One of the first cases adjudicated by the Supreme Court regarding race was *United States v. Libellants & Claimants of the Schooner Amistad*, which centered on the status of Africans who were found aboard a ship marooned in New York harbor in 1839. 40 U.S. 518 (1841). Two Spanish citizens from Cuba on the ship claimed that the Blacks (forty-nine in total) were their slaves and, as such, were their property. *Id.* at 524. The Africans, represented by counsel, argued to the contrary. *Id.* at 519. They argued that they had been kidnapped and taken from Africa to Cuba illegally in contravention of laws against the slave trade. *Id.* In accordance with the terms of a treaty with Spain, the United States argued for the return of the ship and all cargo, including the Africans, to Spain as the property of Spain. *Id.* at 518–19. The Supreme Court agreed with the evidence that the two Spaniards had committed fraud, and that the Africans were indeed free natives of Africa who had been illegally thrust into the slave trade. *Id.* at 562. The Court ordered the Africans to be given into the custody of the United States for return to Africa. *Id.* at 597. The essential part of the case turned on whether the Africans were taken directly from Africa or were legal slaves. *Id.* at 596. If the former, then they were human beings and not subject to the treaty with Spain, as that treaty "never could have intended to take away the equal rights of all foreigners." *Id.* If the latter, then, as slaves, they were property "to be included under the denomination of merchandise" of the cargo of the ship, and thus could have been returned as property to Spain. *Id*. at 593.

This case was not the usual case involving the status of Blacks, and thus it did not employ the customary principles of law. Nonetheless, the Court's holding is significant, as it sets a blueprint for the Court's consideration of the citizenship and inclusiveness of Blacks. The Court acknowledged that Africans were people, and it was possible for them to have full protection of laws—but only if they were not previously designated as free labor for whites. *Id.* If marked for slavery before arrival in America, then their fate was sealed. *Id.* Blacks in America were presumed to be slaves.

[209] 41 U.S. at 612.

[210] *Id.*

Congress has the power to enact a certain law under the Constitution, states are forbidden to enact their own laws on the same matter, especially if those laws conflict with federal legislative acts or alter the meaning of such acts.

The Court in *Prigg* also notes that states cannot interfere with the property rights of owners in slaves, as their property, unless it is to police the slaves.[211] The dual nature of the slave asserts itself. When property, slaves exist for the wealth and pleasure of their masters, and states must refrain from interfering with a person's wealth. When people, fugitive slaves are criminals, and it is acceptable for states to do what they must to protect the health and safety of whites.

The issue of fugitive slaves came before the Court again in *Jones v. Van Zandt*.[212] Brought under a challenge to the Fugitive Slave Act of 1793, the Court repeated the holding in *Prigg* upholding the constitutionality of the act and the clause.[213] Again, the Court noted the provisions of the Constitution and the history of its creation when acknowledging the primacy of property rights in slaves.[214] The Founders compromised in the Constitution to protect states' rights in slave property.[215]

The case is notable for two reasons. First, using the principle of federalism, the Court states that the legality of slavery is a political question for individual states; thus, the Court was not to rule on this issue in accordance with prior case law (that is, *Marbury*[216]). Second, when reciting the history of the constitutional provision regarding runaway slaves, the Court says that the compromises of the Founders are "sacred compromises."[217] The Court reaffirms that the denigration of Black people was a necessary and vital component of the creation story of America and the Constitution.

3. Citizenship Rights for Three-Fifths Persons—The Dred Scott *Decision*

The archetypal pre-Civil War case is *Dred Scott v. Sandford*, known commonly as the "*Dred Scott* decision."[218] The *Dred Scott* decision concerned the citizenship status of Blacks and implicitly interrogated the Three-Fifths Compromise—whether people considered less than a whole person have citizenship rights. Dred Scott served as a slave to his owner for a number of years in states and territories that prohibited slavery and bringing slaves into the territory. His master, Dr. Emerson, and his family brought Scott and his family to Missouri. Upon the death of Dr. Emerson, Scott and his family were given to the widow as part of the estate. Scott sued in state and federal court, claiming a right to freedom under state and federal

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[211] 41 U.S. at 612–18.

[212] Jones v. Van Zandt, 46 U.S. 215 (1847).

[213] *See generally* Fugitive Slave Act of 1793, 1 Stat. 302, Ch. 7 (1793) (amended 1850) (repealed 1864).

[214] 46 U.S. at 224.

[215] *Id.*

[216] 5 U.S. at 137.

[217] 46 U.S. at 231.

[218] Dred Scott v. Sandford, 60 U.S. 393 (1857).

law. The case was complex, with a variety of issues spanning ten years.[219] The central issue of the case, as posed by Chief Justice Taney, was whether a "negro whose ancestors were imported into this country, and sold as slaves," can become a member of the political community such that he is "entitled to all the rights, privileges, and immunities, guaranteed by [the Constitution of the United States] to the citizen?"[220] Or, as Don E. Fehrenbacher restates it, can Dred Scott, as a free Black man, be regarded as a citizen of Missouri for the purposes of being eligible to bring suit in federal court under the diversity citizenship clause?[221]

The Court definitively asserted that Blacks, freed or enslaved, were not citizens of the United States. They could claim none of the rights and privileges under the Constitution.[222] This is so, according to Chief Justice Taney, because Blacks were considered "a subordinate and inferior class of beings," "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."[223] As a separate class of persons, Blacks were not, and were never intended to be, included as "people of the United States."[224] Further, the Constitution treated Blacks as property, and it was left to the states to decide how to deal with the Black race.[225]

Not all on the Court agreed with Taney's reasoning. Two justices vociferously dissented, noting that several colonies treated free blacks as citizens before the Constitution was adopted.[226] They asserted that free Blacks were indeed citizens of the United States. Justice McLean noted that "[a] slave is not mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man."[227]

One of the most consequential decisions in the long history of the Court, *Dred Scott v. Sandford,* is notable for several reasons. As a procedural matter, the Court did something unusual when it decided the citizenship question. Although the question was raised in the lower court, neither party pled the citizenship issue in its filings to the Supreme Court. Despite this fact, however, the Court reviewed this issue and justified doing so on the grounds that the parties were bringing the whole record before the Court, and the Court, therefore, had the prerogative to revisit this issue.[228] Once the Court ruled that Scott did not have standing to bring suit in court, the Court could have ended its inquiry into the matter and not opined on the other issues presented. It broke with its custom, however, and proceeded to answer the

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[219] Dred Scott, 60 U.S. at 393–94. *See also* DERRICK A. BELL JR., RACE, RACISM, AND AMERICAN LAW 31 n.2 (6th ed. 2004) (noting that Prof. Fehrenbacher's work, DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978), is the definitive work about this case).

[220] 60 U.S. at 403.

[221] BELL, *supra* note 219.

[222] 60 U.S. at 406.

[223] *Id.* at 407.

[224] *Id.* at 404–05.

[225] *Id.* at 411.

[226] HIGGINBOTHAM, *supra* note 200, at 167.

[227] Dred Scott, 60 U.S. at 550 (McLean, J., dissenting).

[228] *Id.* at 427–54.

other questions. It justified this decision by invoking the power of the appellate court to correct the judgment of the lower court.[229] As the authority, it could break with its custom when deciding cases.

Substantively, the Court used the history of the country's founding to rule on the question of Scott's citizenship. According to the Court, Africans were not considered citizens of America at the time of the drafting of the Declaration or the Constitution.[230] They were never part of the political community at the founding and have always been considered inferior.[231] In the Court's view, it was unfathomable that Blacks were included in the term "citizen of the United States," such that they could avail themselves of the privileges of the court system.[232]

Further, the Court reaffirmed the *Van Zandt* holding that the legality of slavery is a political question, and therefore the Court was not able to consider it (thereby confirming the importance of *stare decisis*).[233] Moreover, referencing federalism, it noted that the separation of powers does not allow states to confer U.S. citizenship upon people.[234] This authority is reserved solely for the federal Congress. Using another previous decision, *Strader v. Graham*,[235] the Court noted that the status of the slave depended upon the law of original residence and not the state into which he was brought.

Justice Taney hoped this decision would squash the issue over fugitive slaves and the peculiar institution embroiling the nation in never-ending controversy and increasing division.[236] He was sorely mistaken. Perhaps his hubris arose from the fact that the Constitution is the supreme law of the land and his faith that, once the Court interpreted it, all debate would end. While the law was settled, opinions were not. Ultimately, the legality of slavery was indeed a political question that could be solved only by the politics of war.

Many have questioned—both then and now—the Court's judgment in this case and have stated that it was wrongly decided.[237] Nevertheless, the Court used the Ritual of Law—*stare decisis* and federalism—to maintain the boundary between white and Black, the sacred and the profane. It maintained the belief that whiteness is sacred because whiteness means freedom. Scott was not allowed to enjoy the privileges and rights of positive law that would grant citizenship rights to people living and working within the United States. Instead, his rights were at the whim of first his master, and then the Court (comprising white men), thereby confirming that natural law and positive law were one and the same for the Black man.

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[229] *Id.* at 427–28.
[230] *Id.* at 406–07 (majority opinion).
[231] *Id*.
[232] *Id*.
[233] *Id*. at 405.
[234] *Id.* at 406.
[235] Strader v. Graham, 51 U.S. 82 (1851).
[236] Gross, *supra* note 201, at 310.
[237] *See generally* FEHRENBACHER, *supra* note 219.

C. Developing a National Civil Religion

With each adjudication, the Supreme Court inculcated the Religion of Race as a national civil religion. Returning to the concept provided by Bellah in the Introduction, a key ingredient of a civil religion is the way sacred things are institutionalized into the collective society.[238] When adjudicating Black rights under the Constitution of 1789, the Court used the three principles of *stare decisis*, federalism, and judicial review to reinforce the sacredness of whiteness.[239] The Court also reviewed the history of the Constitution as well as state laws, and considered the current social conditions of whites and Blacks as part of its decisions. Each adjudication reinforced the belief system. As lower courts and legislators later incorporated each decision of the Supreme Court regarding Blacks into their decisions and laws, the authority of the Supreme Court was reaffirmed and strengthened. This, in turn, lent ever more legitimacy to the beliefs about Blacks promulgated by the Supreme Court with each decision.

This process of reinforcing and inculcating the belief system of the Religion of Race is best exemplified by the example of the Fugitive Slave Law of 1850. Many landowners in the South felt that the Fugitive Slave Law of 1793 was weakened by the Court's decision in *Prigg*.[240] Although the Court confirmed the constitutional requirement for all states to adhere to the Fugitive Slave Clause by not creating laws that freed or protected runaway slaves, the Court ruled in that case that Congress did not have the power to require states to enforce the federal law.[241] This meant that while states could not interfere with the recapture of slaves, they were not affirmatively required to adjudicate fugitive slave cases in their courts or assist in the hunting or recapture of slaves.[242] As there were few federal courts at the time, slave masters had to incur the cost and time of pursuing runaways slaves on their own or hiring professional slave catchers.[243] Congress addressed the concerns of southern masters and legislators by enacting the Fugitive Slave Law of 1850 as part of the Compromise of 1850.[244] Essentially, the law created a national law enforcement system for the first time by providing for federal commissioners to be appointed in every county who were empowered to decide fugitive slave cases with the attendant power of the state to secure the return of runaway slaves.[245] The law provided harsh penalties (monetary fines and jail time) for anyone aiding fugitive slaves in any manner, and it included a very low standard for evidentiary proof and little to no due process for the slaves and freed persons charged with escape.[246] This

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[238] BELLAH, *Civil Religion*, *supra* note 9, at 233.

[239] *See* Part I.A.3.

[240] Paul Finkelman, *The Cost of Compromise and the Covenant with Death*, 38 PEPP. L. REV. 845, 879 (2011) [hereinafter Finkelman, *Cost of Compromise*].

[241] *Id*.

[242] *Id*.

[243] *Id*.

[244] *Id*.

[245] *Id*.

[246] *Id*. at 879–80.

law was affirmed, albeit indirectly, by the Supreme Court in *Ableman v. Booth*.[247] The belief that Black people are inferior and worthy to be chattel property owned by whites came full circle. The Supreme Court had affirmed the belief that Black people are chattel property to be owned by whites in *Prigg*.[248] Legislators then strengthened this belief further by creating the Fugitive Slave Law of 1850 to demand more forceful participation by all states and all people in the recapture of slaves, thus making the institution of slavery stronger.[249] The Supreme Court then reaffirmed the belief of Black inferiority by confirming the 1850 law in *Ableman*.[250] In this way, the authority of the Supreme Court and the Constitution was reinforced and, along with it, the belief about Black inferiority.

Another key feature of civil religion is its ability to serve as a tool of social solidarity, one that unites and orients the polity around a set of beliefs. The best demonstration that the Religion of Race united and oriented society around the belief of white supremacy is, interestingly enough, the story of eighteenth- and nineteenth-century abolitionists. On the surface, abolitionists appeared to reject the notion that whiteness was sacred, as they called for the emancipation of slaves and the end to the institution of slavery. Abolitionists, however, were not a monolithic group. They held different ideas about the speed of emancipation, the nature of the Constitution and its provisions on slavery, the use of the courts, and the aftermath of emancipation.[251] The last consideration is the most interesting difference. Until the end of formal slavery, some abolitionists believed in the total equality of the races and fought for rights for freed Blacks.[252] A second group of abolitionists believed that it was abhorrent to keep another human being in chains, but they did not view Africans as their equal and were content for freed Blacks to be treated as second-class citizens with restrictions on their liberty.[253] Some of these abolitionists advocated for "colonization," which would remove slaves from the country altogether and create colonies for them overseas.[254] Some of the Founding Fathers ascribed to this belief (as did President Abraham Lincoln).[255] The core idea that unites this second group of abolitionists is the belief that Africans were not fit to be in the same society as whites. Whiteness was still sacred. These abolitionists believed in the Constitution, even if they were disappointed with its proslavery leanings, and they were satisfied using the courts as a means for change. They were able to separate the status of Blacks as slaves from their status within society. They ought not to be in chains, but they also should not be one's neighbor.

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[247] Ableman v. Booth, 62 U.S. 506, 526 (1859).

[248] *See supra* Part II.B.2.

[249] *See* Finkelman, *Cost of Compromise*, *supra* note 240, at Part VII.

[250] *See generally*, 62 U.S. 506 (1859).

[251] Gross, *supra* note 201, at 298–304.

[252] *Id.*

[253] BELL, *supra* note 219, at 63.

[254] *Id.*

[255] *See* Eric Foner, *Abraham Lincoln, the Thirteenth Amendment, and the Problem of Freedom*, 15 GEO. J. L. PUB. POL'Y 59, 60–65 (2018).

Although many abolitionists rejected the ideas of white sacredness and Black profaneness,[256] the fact that many ascribed to them shows that a civil religion had taken root. The various groups of abolitionists in the 1800s all sought to end the practice of enslaving Blacks. However, they displayed varying degrees of repudiating the Religion of Race, demonstrating the power of this national civil religion to shape and guide beliefs—even those who fought against slavery still thought of whiteness as sacred. For Bellah, the unity provided by civil religion consists of an agreement to subordinate the nation to a set of ethical principles transcending the nation itself.[257] Even as the nation was fraying over the issue of slavery, the specialness of whiteness was still a salient and ever-present principle.

From the creation of the Constitution until the *Dred Scott* decision, the majority of the Court spoke and settled the law so that the belief about the profaneness of Blacks hardened. By the Civil War, the Religion of Race had developed into the national civil religion. Whether this national civil religion would continue was challenged in the aftermath of the war.

III. THE CONSTITUTION OF RECONSTRUCTION

The *Dred Scott* decision was a catalyst, or at least a significant factor, in igniting the Civil War.[258] It hardened the abolitionist and antislavery advocates' stance

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[256] One group of abolitionists not only rejected the belief of white sacredness, but also rejected the Constitution as a sacred text. The Garrisonians, named for their leader, William Lloyd Garrison, believed that the Constitution was a corrupted document. Garrison declared the Constitution to be a "covenant with death, an agreement with hell" because it sanctioned slavery. Gross, *supra* note 201, at 302. The Garrisonians believed that slavery could not be overthrown from the legal and constitutional order, and that extralegal measures would be required. *Id.* Garrison advocated for secession by the free states and individual repudiation of allegiance to the Union. *Id. But see* Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*, in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 477, 478 (Phillip S. Foner, ed., 1950) (Douglass disagreed with his friend, Garrison, about the nature of the Constitution. He saw it as inherently antislavery—a document that became corrupted because it was administered by slaveholders).

Black abolitionists also rejected white supremacy and worked outside of the usual methods, namely the court, to advocate for the end of slavery. Instead of legal activism, they engaged with the media at the time (for example, pamphlets and newspapers) to appeal directly to the public instead of legislators, as well as to build popular support by interacting with social organizations. *Id*. at 300. They ignited the advent of "immediatism" by demanding an immediate end to slavery and the granting of rights to Blacks. White abolitionists at the time relied on a strategy of gradual abolition, by which states would enact laws to free slaves over a period of time. *See* COVER, *supra* note 89, at 160. Gradualism was also a legal strategy that avoided broad legal attacks on slavery and its place in the Constitution. After the 1830s, white abolitionists began following suit with their Black colleagues and became more militant with their calls for the end of slavery.

[257] *See supra* Introduction.

[258] *See* Anthony V. Baker, *"The Authors of All Our Troubles": The Press, the Supreme*

against slavery and was further proof of the "Slave Power" that had overtaken the nation.[259] On the other side, proslavery apologists were emboldened in their intransigent belief that slaves were the most important property and that the prosperity of the South (and perhaps the nation) depended upon slavery.[260] The election of 1860 heralded a new Republican president, Abraham Lincoln, and the fear among southerners that the federal government would begin dismantling the slave institution.[261] The South seceded, and the Civil War began.[262] Lincoln, a moderate abolitionist at best, began dismantling the institution of slavery with the Emancipation Proclamation during the war.[263] In the war's aftermath, Congress continued the work by enacting the Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments—as well as the Civil Rights Act of 1866[264] and Civil Rights Acts of 1870–75.[265] I refer to all of these Amendments and Acts together as the "Constitution of Reconstruction."

These Amendments and ensuing legislation forever changed federal power by augmenting it to safeguard the civil and political rights of Blacks.[266] By doing so, they changed the fundamental belief system of the Religion of Race. These changes attempted to redefine the entire belief system of the Religion of Race so fundamentally that they represented a complete rebuff to the Religion altogether. By elevating the status of Blacks to full human beings with the accordant rights and responsibilities of whites, the new Constitution attempted to reduce the inferiority of Blacks and remove the boundary that existed between the sacred and the profane. This resulted in the dissonance that continues today—namely, whether Blackness remains profane and whiteness sacred, and whether Blacks will achieve the same level of citizenship status, rights, and privileges as whites.

This section details the Constitution of Reconstruction and discusses the Supreme Court's exegesis of the new Constitution.

Court, and the Civil War, 8 J. S. LEGAL HIST. 29 (2000); Roberta Alexander, *Dred Scott: The Decision that Sparked a Civil War*, 34 N. KY. L. REV. 643, 643–44 (2007).

[259] *See* Alexander, *supra* note 258, at 650–52.

[260] *Id.* at 657–58.

[261] *Id.* at 659–60; *see also* Finkelman, *Lincoln v. the Proslavery Constitution*, *supra* note 64, at 87 (quoting from South Carolina's declaration of secession that the state must leave the Union because Lincoln's "opinions and purposes are hostile to slavery" and his belief "that slavery is in the course of ultimate extinction").

[262] Paul Finkelman, *States' Rights, Southern Hypocrisy, and the Crisis of the Union*, 45 AKRON L. REV. 449, 469–77 (2012) (arguing that the Southern states' primary reason for seceding was the protection of slavery, and not "states' rights").

[263] Foner, *supra* note 225, at 69.

[264] Civil Rights Act of 1866, 42 U.S.C. § 1981 *et seq.* (2012).

[265] Civil Rights Act of 1870, 16 Stat. 140–46 (1870); Ku Klux Klan Act of 1871, 17 Stat. 13 (1871); and Civil Rights (Enforcement) Act of 1875 (Civil Rights Act of 1875), ch. 114, §§ 3–5, 18 Stat. 336, 337 (codified at 8 U.S.C. §§ 44, 45 and 42 U.S.C. § 1984 (1875)).

[266] *See* Earl M. Maltz, *The Civil Rights Act and the Civil Rights Cases: Congress, Court, and Constitution*, 44 FLA. L. REV. 605 (1992) (discussing the Reconstruction Amendments, Civil Rights Acts, and ensuing legal cases as a conflict over federalism).

A. Amending the Constitution

In the Religion of Race, authority rests upon the sacred text of the Constitution, which was created to define and establish the new nation. While this sacred text has been amended many times, the amendments instituted in the wake of the Civil War were the most consequential for Black Americans and, therefore, for the nation. What follows is a description of the Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments—as well as the Civil Rights Act of 1866 and Civil Rights Acts of 1870–75.

1. The Thirteenth Amendment and the 1866 Civil Rights Act

The Thirteenth Amendment formally ended the Constitution's protection of slavery:[267]

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.[268]

The Emancipation Proclamation (the "Proclamation") began the work of ending slavery; however, more was needed for emancipation to affect every state in the country and become a permanent solution to slavery. Issued on January 1, 1863, after a preliminary proclamation, the Proclamation emancipated only the slaves in states rebelling against the United States.[269] It did not free the slaves in states remaining part of the Union, including Delaware, Maryland, Missouri, and Kentucky.[270] Further, the Proclamation was enacted pursuant to the president's military powers during war as commander-in-chief. Accepting the argument that slaves were property, Lincoln claimed the military authority to seize the property as part of the conquest of war.[271] Many in Congress doubted that the Proclamation would remain law after the conflict was over. If not, then the South might be free to reinstitute slavery.[272] The war, with the Proclamation, wrought military destruction of slavery. The Thirteenth Amendment brought its legal destruction.[273]

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[267] *See* BELL, *supra* note 219, at 46.

[268] U.S. CONST. amend. XIII.

[269] *See generally* LOUIS P. MASUR, LINCOLN'S HUNDRED DAYS: THE EMANCIPATION PROCLAMATION AND THE WAR FOR THE UNION (2012).

[270] ALEXANDER TSESIS, THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 14 (2010).

[271] G. SIDNEY BUCHANAN, THE QUEST FOR FREEDOM: A LEGAL HISTORY OF THE THIRTEENTH AMENDMENT 4 (1976).

[272] *Id.*

[273] *Id.* at 2.

The Amendment was introduced in the House of Representatives by James M. Ashley, on December 14, 1863, a year before the war was over;[274] a month later, John B. Henderson of Missouri introduced the same proposal in the Senate.[275] It went through three debates in Congress, one in the Senate and two in the House of Representatives, before being passed to the states for ratification.[276] The Secretary of State, William H. Seward, announced the ratification of the amendment on December 18, 1865.[277]

The drafters of the Thirteenth Amendment used the natural law principles advocated by abolitionists when declaring slavery (and involuntary servitude) to be illegal. For decades, abolitionists had argued for the country to return to the words of the Declaration of Independence in its proclamation that all men were equal.[278] According to Alexander Tsesis, "the Declaration of Independence established equal liberty as a key national aspiration," but "[it was] an unenforceable policy that conflicted sharply with proslavery commitments."[279] "[A]bolitionists adopted natural rights principles from the Revolutionary generation but decried the Founders' willingness to accept inequality for the sake of national unity."[280] Abolitionist principles were influential during the Civil War, as a number of Republicans began to accept these principles and call for an eradication of slavery even before the war was over.[281] In fact, a number of abolitionists became influential politicians in the Reconstruction Congress and played a significant part in drafting and passing the Thirteenth Amendment.[282]

The drafters of the Thirteenth Amendment were cognizant that they were amending the most venerated governing document. They did not want to be seen as overthrowing the Constitution.[283] They chose language from older, national sources, namely the Northwest Ordinance of 1787,[284] to honor the Founders while also moving the country beyond the terrible compromise the Founders felt they had to

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[274] There is some debate among historians whether Ashley or Henry Wilson was the chief architect of the Amendment. *Compare* Lea VanderVelde, *Henry Wilson: Cobbler of the Frayed Constitution, Strategist of the Thirteenth Amendment*, 15 GEO. J.L. PUB. POL'Y 173 (2017), *with* Rebecca E. Zietlow, *James Ashley, the Great Strategist of the Thirteenth Amendment*, 15 GEO. J.L. PUB. POL'Y 265 (2017).

[275] BUCHANAN, *supra* note 271, at 3.

[276] TSESIS, *supra* note 270, at 11, 14–15.

[277] *Id.* at 15.

[278] *Id.* at 6–8.

[279] *Id.* at 5.

[280] *Id.* at 6.

[281] *Id.* at 8.

[282] *Id.*

[283] James Oakes, *"The Only Effectual Way": The Congressional Origins of the Thirteenth Amendment*, 15 GEO. J.L. PUB. POL'Y 115, 123–25 (2017).

[284] Northwest Territory Ordinance of 1787, 1 Stat. 51 (1787); *see generally* Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929 (1995).

make.[285] The Northwest Ordinance was a "touchstone of antislavery constitutionalism" and "occupied an almost sacred place" in constitutional politics of the antislavery movement.[286] Using the language of the ordinance embedded the Amendment with the call to natural law that was the hallmark of abolitionists.

For some, the Amendment did not do enough to protect natural law rights for Blacks. The proponents wanted to "protect the civil liberties of all persons, whites and emancipated Blacks."[287] Their arguments were based on the "Lockean presupposition of natural rights and the protective function of government."[288] The institution of slavery destroyed the natural rights the Constitution was designed to protect, so abolishing slavery would secure these rights.[289] As noted by Black antislavery advocates like Frederick Douglass, equality between the races required more than the abolition of slavery.[290]

This idea was on display in the legislative debates. Eliminating "slavery" was clarified to mean not just removing people from chains but also destroying the codes that turned people into chattel. Further, the Amendment was meant to address the "incidents of servitude."[291] This phrase, first coined by Senator James Harlan of Iowa, referred to the disabilities that the Amendment was meant to address, as Harlan saw slavery infecting the privileges of citizenship.[292] The Amendment would empower the federal government to prevent "human rights abuses."[293] As such, the Amendment would affect not just those who were enslaved but also free Blacks, who bore the incidents of slavery.[294] Additionally, it would also protect whites who were terrorized for antislavery speech and actions prior to the war and northerners who were kidnapped, abused, and murdered while traveling in the South.[295]

By calling upon natural law principles, the drafters of the Thirteenth Amendment were restoring God qua God for the Black man. The sacred text would acknowledge the inherent equality of Blacks while also acknowledging positive law. The interplay of natural law and positive law for whites would now be the same for Blacks.

The enforcement clause of the Thirteenth Amendment granted power to the federal government over civil rights—an area that had once been the province of the

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[285] Oakes, *supra* note 283, at 123–25. The first part of Article VI of the Northwest Territory Ordinance reads: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted." Northwest Territory Ordinance, *supra* note 284, art. VI.

[286] Oakes, *supra* note 283, at 124–25.

[287] BUCHANAN, *supra* note 271, at 8.

[288] *Id.*

[289] *Id.*

[290] Foner, *supra* note 255, at 69.

[291] BUCHANAN, *supra* note 271, at 11.

[292] *Id.*

[293] *Id.*

[294] *Id.* at 10.

[295] *Id.*

states. By doing so, it forever altered the fundamentals of federalism.[296] This was one of the biggest concerns expressed by the opponents. The Amendment gave the federal government power to affect more than just freeing forced labor.[297] Several members of the Democratic Party expressed concern about placing Blacks on equal citizenship footing with whites.[298] Blacks now "would be treated the same as other citizens in voting, holding political office, and serving on juries."[299] The supporters of the Amendment responded that Blacks "should not be barred from [political] participation because of racism."[300] Opponents were also concerned with the shift in relations between the federal government and the states.[301] They regarded the amendment as an "impermissible assertion of federal power," as Congress now could enact laws regarding public and private discrimination.[302]

In the end, the Radical Republicans were successful, and the Amendment was adopted. It was the first change to the Constitution in sixty-one years.

Unfortunately, this formal end to slavery did not automatically change the status of Blacks from noncitizens to full citizens with all attendant rights. Using the Enforcement Clause of the Thirteenth Amendment, Congress created the Civil Rights Act of 1866 (the "1866 Civil Rights Act")[303] in an attempt to protect civil rights against state and private interference and prevent Black people from slipping back into slavery. In a direct repudiation of the *Dred Scott* decision, the Act declared all persons born in the United States to be U.S. citizens, without regard to race or color or previous conditions of slavery or servitude.[304] Further, it explicitly granted all persons the same rights as white citizens, including contract rights, property rights, and rights to use and participate in the court system, and it stated that all are

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[296] TSESIS, *supra* note 270, at 10; *see also* Maltz, *supra* note 266.

[297] TSESIS, *supra* note 270, at 12.

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] Civil Rights Act of 1866, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2018)).

[304] Section 1 of the Civil Rights Act of 1866 as originally drafted reads:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding. *Id.* § 1.

"subject to like punishment, pains and penalties."[305] The Act also stated that persons who denied these rights on account of race, color, or previous enslavement were "guilty of a misdemeanor and, on conviction," faced a "fine not exceeding one thousand dollars or imprisonment not exceeding one year, or both."[306] The Act was monumental, as it was the first time that United States citizenship was clearly defined. This law also demonstrated a "new relationship between the federal and state governments."[307] Before the Act, states had discretion about whether to prohibit discrimination in any of these areas. This was no longer the case.[308]

Senator Lyman Trumbull, one of the drafters of the bill that would become the 1866 Civil Rights Act and a drafter of the Fourteenth Amendment, envisioned the Act as giving effect to the Thirteenth Amendment by securing to all persons within the United States practical freedom.[309] The Amendment and the Act were appropriate means of safeguarding individual liberty decreed by the abolition of slavery, and he believed that without them, Blacks would be pulled back into slavery.[310] Eric Foner notes that under the Act, "whiteness," which was previously a boundary of exclusion (that is, sacred), was now a baseline of citizens' rights—a standard to be applied to all Americans.[311]

As with the Thirteenth Amendment, there is a natural-rights philosophy underlying the 1866 Civil Rights Act. Trumbull elaborated by noting that the equal protection provisions give full expression to natural rights, which must be protected, lest the purposes of civil society are frustrated.[312] The Act was also concerned with equality of economic opportunity, which was noted as a vital function of the government.[313] Although drafted with the end of slavery and its vestiges in mind, the Act was designed to protect all races.[314] It was not limited solely to action by the state but was meant to capture the customs and traditions by which individuals discriminate against others.[315]

2. The Fourteenth and Fifteenth Amendments and Civil Rights Acts

With the passage of the Thirteenth Amendment and the 1866 Civil Rights Act, Blacks were emancipated and obtained rights of equality on par with whites. This status remained, however, a fact on paper, but not in reality. Soon after the end of the Civil War, states in the South began enacting Black Codes.[316] The sole purpose

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[305] *Id.*
[306] *Id.* § 2.
[307] TSESIS, *supra* note 270, at 15.
[308] *Id.*
[309] BUCHANAN, *supra* note 271, at 17.
[310] *Id.*
[311] Foner, *supra* note 255, at 70.
[312] BUCHANAN, *supra* note 271, at 18.
[313] *Id.* at 15, 21.
[314] *Id.*
[315] *Id.* at 15.
[316] BELL, *supra* note 219, at 46–47.

of the Codes was to curtail the freedom of the Black person in order to put Black people as close to slavery as possible.[317] In addition to the Codes, Blacks (and whites sympathetic to Black rights or showing sympathy for the ideas of the Republican Party) were the target of unfettered violence meted out by spontaneous mobs or the Ku Klux Klan.[318]

It was evident to members of the Reconstruction Congress that the promise and potential of the Thirteenth Amendment had yet to be realized. The solution was to enact the provisions of the 1866 Civil Rights Act into an amendment to guarantee that the citizenship rights so desperately needed by Blacks were concretized into the political community of the country and not subjected to the whims of the majority (which was the possibly fatal flaw of the 1866 Act).[319] There were, moreover, concerns that Congress lacked the constitutional power to pass the 1866 Civil Rights Act, and therefore an amendment was necessary to enforce the guarantees of the Bill of Rights for all citizens.[320]

The first and last sections of the Fourteenth Amendment read as follows:[321]

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[322]

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[317] Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments and the State Action Syllogism, A Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381, 1386–87 (2008).

[318] BELL, *supra* note 219, at 48–49.

[319] Curtis, *supra* note 317, at 1389.

[320] *Id.* at 1390.

[321] While the second through fourth sections of the Amendment are important, most of the jurisprudence surrounding this Amendment concerns the first and fifth sections. Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI.-KENT L. REV. 1019, 1022 (2014) [hereinafter Finkelman, *Original Intent*].

[322] U.S. CONST. amend. XIV, §§ 1–5. Sections 2, 3 and 4 read as follows:

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Fifteenth Amendment reads as follows:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation.[323]

The Fourteenth and Fifteenth Amendments furthered the goals of the Thirteenth Amendment of putting Black people in positions of true equality and made permanent the goals of the 1866 Civil Rights Act.[324] These Amendments addressed the more blatant disabilities for Blacks flowing from the institution of slavery.[325] By furthering the goals of the Thirteenth Amendment, these later Amendments expanded the meaning of the natural-rights philosophy undergirding the Thirteenth.

The Fourteenth Amendment was passed by Congress in 1866 and ratified by the states in 1868.[326] The first line of the Fourteenth Amendment addressed the outcome of the *Dred Scott* decision.[327] As mentioned previously, the Court in *Dred Scott* ruled that Blacks, whether enslaved or freed, could never be citizens of the United States.[328] By stating that any person born in the United States is a citizen, the Amendment directly repudiates the Court's decision. Next, the Amendment protects the privileges and immunities of United States citizens from encroachment.[329] Congress generally understood that this meant that "privileges and immunities" were all rights shared by all citizens of the United States, including those enumerated in

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Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void. U.S. CONST. amend. XIV, §§ 2, 3, 4.

[323] U.S. CONST. amend. XV.

[324] BUCHANAN, *supra* note 271, at 35, 36.

[325] *Id.*

[326] Finkelman, *Original Intent*, *supra* note 321, at 1020.

[327] Curtis, *supra* note 317, at 1394.

[328] *See supra* Part II.B.3.

[329] Curtis, *supra* note 317, at 1394–95.

the Bill of Rights.[330] Further, the Amendment protects these rights from being abridged by the states.[331] The Due Process Clause of the Amendment is one of the most important provisions, as it removed "one of slavery's most severe disabilities—the slave's legal incapacity to attack arbitrary action authorized or mandated by government."[332] The Equal Protection Clause furthered the protection noted in the 1866 Civil Rights Act.

Congress did not spend much time or energy debating Sections 1 or 5, the clauses related to citizenship, privileges and immunities, due process, equal protection, and enforcement.[333] The supporters agreed that it would protect the "civil rights" of Blacks and other races; however, they did not universally agree on the substantive meaning of the Amendment.[334] As Paul Finkelman notes, the idea of equality between the races was in flux after the Civil War.[335] For instance, although Republicans agreed that Blacks should have citizenship, there was a discussion on whether citizenship meant enfranchisement for Blacks.[336] Further, phrases such as "equal protection" or "privileges and immunities" were general ideas, but "no one completely described them, and no votes or reports assented or defined what they meant."[337]

The Fifteenth Amendment was passed by Congress in 1868 and ratified in 1870.[338] The denial of the right to vote on racial grounds was seen as an attribute of slavery, so the purpose of this Amendment was to strongly advance the goals of the Thirteenth Amendment by removing this badge.[339] Republican critics noted that the Fifteenth Amendment did not provide broad guarantees of the right to vote akin to universal male suffrage.[340] Michael Kent Curtis notes that they "presciently warned that the Fifteenth Amendment could be evaded by all sorts of methods that disenfranchised people on a basis other than race (literacy tests, for example)—but had the effect of disfranchising blacks."[341]

As with the 1866 Civil Rights Act, Congress enacted several civil rights laws pursuant to the Fourteenth and Fifteenth Amendments to make explicit the guarantees of the amendments. The Enforcement Act of 1870 was aimed at

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[330] *Id.* at 1389.

[331] Finkelman, *Original Intent*, *supra* note 321, at 1022.

[332] *Id*. This inability to protect against government action was clearly demonstrated in fugitive slave laws that did not grant due process protections to Black individuals accused of being runaway slaves. Freed Blacks—those never experiencing slavery and those formally emancipated—were always in jeopardy of being captured and thrust into the slave system simply on the word of slave captors, with no evidence or proof.

[333] *Id.* at 1022.

[334] *Id.* at 1026.

[335] *Id.*

[336] *Id.* at 1025.

[337] *Id.* at 1027.

[338] Curtis, *supra* note 317, at 1398.

[339] BUCHANAN, *supra* note 271, at 36.

[340] Curtis, *supra* note 317, at 1398.

[341] *Id.*

protecting the Fifteenth Amendment right to vote.[342] The act reached both state actors and private persons interfering with another's right.[343] Using the authority of the Fifteenth Amendment as well as the Fourteenth, the Enforcement Act also reenacted contracting and other legal rights from the 1866 Civil Rights Act.[344]

The Civil Rights Act of 1871 (the Ku Klux Klan Enforcement Act)[345] aimed at enforcing the Fourteenth Amendment against state actors and private individuals who used political terror to prevent Blacks and whites from enjoying their rights. It provided for a civil cause of action and punishment of private actors for criminal conspiracies to deprive persons of their civil rights.[346]

Finally, the Civil Rights Act of 1875 (the "1875 Act," and together with the Enforcement Act of 1870 and the Civil Rights Act of 1871, the "Acts") was the last attempt by the Reconstruction Congress to erase the last vestiges of slavery, which were racial discrimination in public places.[347] The 1875 Act, proposed by Senator Charles Sumner, prohibited racial discrimination in juries, churches, and places of public accommodations.[348]

With these Acts, Republicans overwhelmingly concluded that Congress could reach private conduct motivated by a specific intent to deprive people of constitutional rights.[349] This belief was based on a variety of theories—equal protection, the Bill of Rights, protection of less textually explicit civil rights, guarantee of a republican form of government, and, in some cases, all of these.[350] What was clear, however, was that Congress could pass a national statute to address the private oppression and violence perpetuated against Blacks and others in attempts to deprive them of constitutional rights.

The effect of the Reconstruction Amendments and Acts was a monumental shift in the political status of Black people, at least formally. The Amendments changed the Constitution and thus amended the sacred text. In summary, the Constitution of Reconstruction abolished slavery, granted citizenship to Blacks, granted the vote to Black men, ensured Blacks equal right to contract and property, ensured for Blacks all privileges accorded to whites, and allowed enforcement against the government and private individuals for any interference of these rights and privileges. The Constitution transitioned from one protecting slavery to one providing new light for the treatment of Blacks and their place in the political community of America by restoring natural law and the rights attendant to it. Blacks were no longer chattel property but fully human citizens, with all of the same rights and duties as other

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[342] Civil Rights Act of 1870, 16 Stat. 140 (1870); *see* BUCHANAN, *supra* note 271, at 37–39.

[343] Curtis, *supra* note 317, at 1400.

[344] Civil Rights Act of 1870, §§ 16–18, 16 Stat. 140, 144 (1870).

[345] Ku Klux Klan Act of 1871, 17 Stat. 13 (1871).

[346] BUCHANAN, *supra* note 271, at 39.

[347] Civil Rights (Enforcement) Act of 1875, 18 Stat. 335 (1875). BUCHANAN, *supra* note 271, at 43.

[348] BUCHANAN, *supra* note 271, at 43.

[349] Curtis, *supra* note 317, at 1414.

[350] *Id.*

citizens. The belief of Black inferiority was to be replaced with the belief of Black equality.

This new light of the Constitution of Reconstruction would need to be fully understood and interpreted. It was not long before the Supreme Court was asked to divine its meaning.

B. Supreme Court Interprets Amended Constitution

Soon after the passage of the Reconstruction Amendments and Acts, the Supreme Court was called upon to provide guidance and interpret the new sacred text. During this adjudication, the Supreme Court was dealing with the sensitivity of politics for the first time after the Civil War.[351] It was their role to determine the exact effect of the drastic shift of the federal-state relationship and the beliefs about Black Americans.[352] G. Sidney Buchanan speculated that the abundance of congressional legislation passed to raise Blacks to the status of legal equality of whites reflected a fear that the efforts of Congress would meet judicial opposition.[353]

1. Initial Cases

Early cases demonstrate that the fears of many were well-founded. In *The Slaughter-House Cases* in 1873, the Court completely eviscerated the meaning and potential of the Privileges and Immunities Clause of the Fourteenth Amendment, refusing to use it to apply most of the protections of the Bill of Rights to the states.[354] In *United States v. Cruikshank*, the Court declined to apply the Bill of Rights to the states.[355] In its first iteration of the state action doctrine, the Court stated that the Fourteenth Amendment applies to the federal denial of rights and that states still had jurisdiction over them.[356] The Court did show a little mercy to the Amendments later

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[351] BUCHANAN, *supra* note 271, at 60.

[352] *Id. See also* Maltz, *supra* note 266.

[353] BUCHANAN, *supra* note 271, at 60.

[354] Slaughter-House Cases, 83 U.S. 36 (1873). *See* Wilson R. Huhn, *The Legacy of Slaughterhouse, Bradwell, and Cruikshank in Constitutional Interpretation*, 42 AKRON L. REV. 1051, 1052 (2009); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 624, 627–28 (1994); and *see generally* David S. Bogen, *Rebuilding the Slaughter-House: The Cases' Support for Civil Rights*, 42 AKRON L. REV. 1129 (2009) (discussing the effects of the Slaughter-House cases).

[355] *See generally* United States v. Cruikshank, 92 U.S. 542 (1875) (discussing how the first amendment only operates on the national government); Huhn, *supra* note 354.

[356] *See* James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 388 (2014) ("Jurisprudentially, Cruikshank may well have been the single most important civil rights ruling ever issued by the United States Supreme Court. It was Cruikshank, not the far more famous Civil Rights Cases, that first limited the Fourteenth Amendment to protect only against specifically identified state violations, and not directly against private action.").

when it upheld the constitutionality of the Equal Protection Clause of the Fourteenth Amendment and the fourth section of the Civil Rights Act of 1875, which prohibited the exclusion of Blacks from jury service.[357] A few years later, however, it declared section 2 of the Ku Klux Klan Enforcement Act unconstitutional in *United States v. Harris*.[358] It thereby disallowed punishment for private conspiracies to deprive others of their equal-protection rights. Within eight years, the Court scaled back a few protections found in the new Amendments and the laws enacted pursuant to them. It left Blacks vulnerable to deprivation of rights at the state level and the interference of their rights by private individuals (for example, the Ku Klux Klan).

These initial cases diminished the new laws but left them intact. The Court was not finished, however. It continued to limit the meaning of the Reconstruction Amendments. Its decision in two key cases described below best demonstrates its interpretation of the new Constitution.

2. Fourteenth Amendment and the Civil Rights Act of 1875—The Civil Rights Cases

A few years after the enactment of the Reconstruction Amendment (and two short years after *Harris*), a challenge was brought to the Civil Rights Act of 1875, which had been created pursuant to the Fourteenth Amendment.[359] In the *Civil Rights Cases*, indictments were brought under the 1875 Act against different individuals who denied service to Blacks in various public accommodation settings, notably an inn, a theater, and a railroad.[360] The jury at the lower court found in favor of the defendants, and the suit was appealed to the Supreme Court.

The Court began its analysis with a discussion of the legislative history and text of the Fourteenth Amendment.[361] The Court then established the principle of state action and provided case support for it.[362] According to the Court, the Amendment

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[357] *See generally* Strauder v. West Virginia, 100 U.S. 303 (1880) and *Ex parte* Virginia, 100 U.S. 339 (1879) (cases discussing the constitutionality of discriminating against Blacks so that they could not serve on juries); BUCHANAN, *supra* note 271, at 69. *See also* Maltz, *supra* note 266, at 628–32. *But see* Virginia v. Rives, 100 U.S. 313, 323 (1879) (holding that the absence of Blacks from a jury did not in and of itself create a violation of the Equal Protection Clause that a criminal defendant could challenge, even if such absence was systematic).

[358] *See generally* United States v. Harris, 106 U.S. 629 (1883) (invalidating a law which made it a crime for two or more persons to deprive any person or class of persons equal protection of the laws). *See* Terri Peretti, *Constructing the State Action Doctrine, 1940–1990*, 35 LAW & SOC. INQUIRY 273, 275–76 (2010).

[359] BUCHANAN, *supra* note 271, at 43.

[360] U.S. v. Stanley, 109 U.S. 3, 4–5 (1883). *See* Stuart Chinn, *Race, the Supreme Court, and the Judicial-Institutional Interest in Stability*, 1 J.L. 95, 134–37 (2011). *See generally* Thomas P. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960) (discussing the adjudication of the *Civil Rights Cases* and various civil rights acts as part of the development of the concept of state action).

[361] *Stanley*, 109 U.S. at 10.

[362] *Id.* at 11.

provides a limitation on what a state may do to its citizens and is not concerned with the "individual invasion of individual rights."[363] Furthermore, the Court said the Fourteenth Amendment is for corrective action against the state and does not empower general legislation on the actions of individuals.[364] It then considered the Act in terms of the Thirteenth Amendment and stated that denying public accommodation is not slavery nor a badge of slavery.[365] The Court reached this conclusion by reviewing the history of slavery and describing the incidents of slavery.[366] According to the Court, the Thirteenth Amendment is not about race or class but about slavery only, while the Fourteenth Amendment does address race and class but only in terms of what the state may or may not do.[367] The Court clarified that discrimination against individuals by individuals was not in the purview of the Fourteenth Amendment:

> It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.[368]

For the reasons above, the Court found in favor of the defendants and declared void the Civil Rights Act of 1875, as the Thirteenth and Fourteenth Amendments did not provide authority for its passage.

The dissent by Justice Harlan was notable, as it used the principles of law employed by the Court prior to the Civil War.[369] As Taney had done in *Dred Scott*, Harlan considered the intent of the law and the constitutional provisions.[370] He then asserted the nature of the separation of powers to argue that the Court should void a law only when it clearly is not in the legislative power of Congress.[371] He described the history of the relationship between the federal government and slavery.[372] He also used *stare decisis* to argue that the national government has the power to protect the rights conferred or guaranteed by the Constitution (citing *Prigg* and *Dred Scott*).[373] Using these principles, Harlan would uphold the 1875 Civil Rights Act and provide relief for the discrimination faced by the Black plaintiffs based on the power conferred in the Reconstruction Amendments.[374]

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[363] *Id.*
[364] *Id.* at 13.
[365] *Id.* at 20–25.
[366] *Id.*
[367] *Id.* at 23–24.
[368] *Id*. at 24–25.
[369] *Id.* at 26 (Harlan, J., dissenting).
[370] *Id*. at 26–27 (Harlan, J., dissenting).
[371] *Id*. at 27–28 (Harlan, J., dissenting).
[372] *Id*. at 28 (Harlan, J., dissenting).
[373] *Id*. at 28–32 (Harlan, J., dissenting).
[374] *Id*. at 32–62 (Harlan, J., dissenting). *See also* Maltz, *supra* note 266, at 633–35.

3. Fourteenth Amendment—Plessy v. Ferguson

The infamous case of *Plessy v. Ferguson* begins with a Louisiana statute mandating railroad companies solely within the state to separate Blacks and whites by providing designated rail cars or areas.[375] If the races are not kept separate, the law prescribes fines and imprisonment for individuals and employees of the offending railroad company.[376] The petitioner, Homer Plessy, was of mixed race, believed to be seven-eighths white and one-eighth Black.[377] When he refused to leave a white car on a train, he was forcibly ejected and imprisoned. He brought a lawsuit challenging the state's law as a violation of the Fourteenth Amendment.[378]

The Court begins its analysis in the usual manner by discussing the Amendments at issue with prior case law.[379] It restates the holding of the *Civil Rights Cases* that discrimination against Blacks is not a badge of slavery, but only an "ordinary civil injury properly cognizable by law."[380] The Court then counters the Thirteenth Amendment argument by saying a statute making a mere legal distinction between the races does not destroy legal equality.[381] The Court repeats this sentiment when noting that the Fourteenth Amendment allows the distinction between social equality and political equality, while the Amendment is concerned only with the latter.[382] Further, the Court states that separation does not imply the inferiority of Blacks.[383] It then traces the separation of Blacks from whites under various state laws, particularly those known to be antislavery and more liberal, to argue that separation of races was acceptable.[384] It notes that the question is whether the statute at issue is a reasonable one in view of the established usages, customs, and traditions of the people.[385]

The Court continues the assertion that separation of races does not equate to a badge of inferiority. It states that the statute in question "stamps the colored race with a badge of inferiority" only if Blacks choose to put that construction on it.[386] Further, legislation cannot overcome social prejudices—only "natural affinities" will result in equality.[387] The Constitution is not responsible for putting the two races on the same plane.[388]

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[375] 163 U.S. 537, 538 (1896).
[376] *Id.* at 540–41.
[377] *Id.* at 541.
[378] *Id.* at 541–42.
[379] *Id.* at 542.
[380] *Id*. (quoting *Civil Rights Cases*).
[381] *Id*. at 543.
[382] *Id.* at 544.
[383] *Id.*
[384] *Id.*
[385] *Id.* at 544–51.
[386] *Id*. at 551.
[387] *Id*.
[388] *Id*. at 552.

Here again, Harlan has much to say in a dissenting opinion.[389] He frames the controversy as one where the state is putting restrictions on U.S. citizens.[390] He argues that railroads are public highways, and he uses case law to support this assertion.[391] He then discusses the Reconstruction Amendments and the Court's adjudication.[392] In a notable passage, he gives a real-world meaning to the statute at issue and states that it keeps Blacks from occupying the same car as whites.[393] His argument is based on infringement by the state of personal liberty.[394] He counters the Court's argument about reasonability by stating that it is not for the Court to say whether a law is reasonable but to determine whether it is valid (again employing an argument based on separation of powers).[395] He also counters the idea that law does not affect social relations. Instead, he believes that separating the races will profoundly affect the country, as it will lead to race hate.[396] Finally, he offers counterarguments to the Court's use of prior case law by noting that the cases discussed were made before the Civil War and Reconstruction Amendments.[397] In essence, Harlan argues, the Court is basing its decision on the "old light" of the previous Constitution and not the new light of the freshly amended one.

C. Dissonance Created

The outcome of these cases is well-documented, as they instituted the dreadful era of Jim Crow and the doctrine of separate but equal, by which *de jure* and *de facto* segregation of the races became a societal norm.[398] By interpreting the Constitution

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[389] *Id.* (Harlan, J., dissenting). *See* Nathaniel R. Jones, *The Harlan Dissent: The Road Not Taken—An American Tragedy*, 12 GA. ST. U. L. REV. 951, 972 (1996).

[390] *Plessy*, 163 U.S. at 553 (Harlan, J., dissenting).

[391] 163 U.S. at 553–54 (Harland, J., dissenting).

[392] *Id*. at 555 (Harlan, J., dissenting).

[393] *Id*. at 557 (Harlan, J., dissenting) ("Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.").

[394] *Id*. (Harlan, J., dissenting).

[395] *Id*. at 558–59 (Harlan, J., dissenting).

[396] *Id*. at 560 (Harlan, J., dissenting).

[397] *Id*. at 563 (Harlan, J., dissenting).

[398] *See* William M. Wiecek, *Synoptic of United States Supreme Court Decisions Affecting the Rights of African-Americans, 1873–1940*, 4 BARRY L. REV. 21, 21 (2003) (footnotes deleted) (arguing that in the late-nineteenth-century cases, the Court "gutted the substance of the Civil War Amendments, while preserving their façade as far as the freed people were concerned. In this way, the Court supported the destruction of their rights and the imposition of apartheid maintained by the forms of law, backed by legal and extra-legal violence . . . [t]hese decisions were in synch with the dominant social and attitudinal trends of the era in matter of race. One way of thinking about American social and political history in the last quarter of the nineteenth century is to see it as the time when a 'Jim Crow republic' was created: a nation dedicated to apartheid. The results of the Court's decisions were almost wholly congruent with that end.").

of Reconstruction in the manner they did, the Supreme Court not only disregarded the principles previously used by the Court but also instituted new principles that would endure to this day. The Court established the state action doctrine, which determined that constitutional inquiry should focus on whether discrimination occurred because of the state (that is, the government), rather than focusing on recourse against private discrimination.[399]

As keepers of the sacred text, the Supreme Court has the purported responsibility to correct error when it sees it. It did just that when interpreting the newly amended Constitution. By enacting the three Reconstruction Amendments and Acts, Congress was granting (or, from their point of view, restoring) to Blacks the natural rights proclaimed in the Declaration of Independence for all people. Through this legislation, Congress was placing Blacks on the same level as whites. The legislators were restoring god or nature as the giver of rights, and not the white man. The Court did not fully accept these changes to the belief system at the core of the Religion of Race and corrected what it perceived as an error. It did so by maintaining the ascendancy of positive law over natural law. The Court could not completely override the will of Congress and reinstitute slavery, and thus eradicate the natural law rights of Blacks. The Court could, however, delegitimize the new rights to maintain control over Blacks and thus reduce the importance of their natural law rights.

The next section explores further the dissonance between the ideals of the new Constitution and the Supreme Court's adjudication of cases in the aftermath of its creation.

IV. DIS/CIVIL RELIGION

The Constitution of Reconstruction was a turning point in this country. It was an opportunity for the words of the Declaration of Independence and the promises of the Constitution of 1789 to come to fruition. Instead, by maintaining the belief system of the Religion of Race, the Supreme Court blunted the opportunity for Blacks to be full and equal members of the community. This is not to diminish or ignore the fact that the Court has since progressed toward the ideals of the Constitution of Reconstruction and that Blacks gained more political rights in the last half of the twentieth century than previously experienced. However, the optimism inherent in the Constitution of Reconstruction has not been fully manifested, as evidenced by the current socioeconomic status of Black Americans, the continued drumbeat of racial discrimination cases brought by Black plaintiffs, and the disproportionate deaths of Black people at the hands of police officers.[400]

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[399] *See* Peretti, *supra* note 358, at 275–76.

[400] Black Americans hold less than three percent of the nation's total wealth, even though they account for 13 percent of the population. The median family wealth for white people is $171,000, compared with just $17,600 for Black people. Trymaine Lee, *A Vast Wealth Gap, Driven by Segregation, Redlining, Evictions and Exclusion, Separates Black and White America*, N.Y. TIMES MAG. (Aug. 14, 2019), https://www.nytimes.com/interactive

This section explores the dissonance between the intentions of the Reconstruction Congress and the Supreme Court's maintenance of the boundary between the sacred and the profane, leading to the creation of a contest between the promised new civil religion and the Religion of Race as a dis/civil religion.

A. The Promise of a New Civil Religion

After studying more than sixty different slave societies throughout world history, sociologist Orlando Patterson concludes that there are three constituent elements of slavery, each centered on the power dynamic of domination and control.[401] The first element is the extreme power and coercion used to bring slavery into existence and then sustain it.[402] The second element is "natal alienation," or the nature of the slave as a socially dead person who is alienated from all rights and claims from birth.[403] As such, the slave does not belong to any community or social order.[404] The third and final element is the status of slaves as dishonored—they have no honor because they have no power except through another person, the master; they are the "ultimate human tool" and "disposable."[405] These elements accurately describe the American slave system and provide context in helping to truly understand how the Constitution of Reconstruction was a revolution in the way people in this nation would relate to one another.

Members of the Reconstruction Congress were very clear that they were dismantling the economic, political, and social system of slavery and elevating the Black person to full humanity.[406] By creating three constitutional amendments and related acts, Congress was attempting to reverse the elements of slavery articulated so well by Patterson. By providing for punishment and consequences against the state, as well as individual actors, Congress was removing the systematic power and coercion used against Black people during slavery. There would now be recourse against those who would act against the will of the Black person. In addition, these amendments resurrected Black people from the socially dead and brought them into the fold as citizens with rights and claims. They were now part of the political community of America. They were no longer tools to be used by another person; now, because they had power against those who would take their agency away—

/2019/08/14/magazine/racial-wealth-gap.html [https://perma.cc/4FTN-2WQ7] (quoted in Brief for Respondents at 46, Comcast Corp. v. Nat'l Ass'n of African-American-Owned Media, 140 S.Ct. 1009, 206 L.Ed.2d 356 (2020)). *See also State of Black America 2018: Black-White Equality Index*, *in* NATIONAL URBAN LEAGUE, 2018 STATE OF BLACK AMERICA REPORT: POWERING THE DIGITAL REVOLUTION (2018).

[401] ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY, INTRODUCTION (1982).

[402] *Id*. at 2.

[403] *Id*. at 5.

[404] *Id*.

[405] *Id*. at 10.

[406] *See supra* Part III.A.

Blacks had honor. These were the lofty ideals embedded in the Constitution of Reconstruction.

In essence, this newly amended Constitution dismantled the belief system of the Religion of Race. Black people were no longer property but were acknowledged as human beings entitled to the same treatment and rights as whites. They would have control over their own mind, body, and soul. They would have rights to economic success by and for themselves, consistent with every other person's ability, and would no longer be explicitly sacrificed for the wealth of the nation. Unlike the Constitution of Slavery, the Reconstruction Amendments and Acts do specifically reference slavery and race. The Thirteenth Amendment refers to "slavery and involuntary solitude."[407] The 1866 Civil Rights Act explicitly ensures that "citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude," shall have the same rights and privileges "as is enjoyed by white citizens."[408] The Fifteenth Amendment ensures that the rights of all citizens will not be abridged "on account of race, color, or previous condition of servitude" (which echoes the enforcement provision of the 1866 Civil Rights Act, which uses the phrases "on account of such person having at any time been held in a condition of slavery or involuntary servitude" and "by reason of his color or race").[409] By mentioning slavery and race, the Constitution of Reconstruction acknowledges that the oppressive institution existed and had a deleterious effect on a portion of the population. The Constitution of Reconstruction intentionally and clearly rejected the previous belief system and instituted a new one built on freedom and complete equality.

B. Supreme Court Maintains Boundaries

Whiteness is sacred because whiteness means freedom. In a new world where slavery is outlawed, freedom takes a different form. No longer is it the absence of chains and the ownership of the fruit of one's own labor. In a postslavery world, freedom is the full expression of rights as citizens—the ability to speak, transport, assemble, and transact business in the manner of one's own choosing. In creating the doctrine of separate but equal, the Supreme Court limited the freedom of Black people and created physical boundaries to maintain the sacredness of whiteness and prevent the profane Black skin from contaminating those spaces. Segregation is not freedom. As Dr. Martin Luther King Jr. states, "[s]egregation . . . ends up relegating persons to the status of things."[410] Despite the attempts by the Reconstruction Congress to elevate Blacks to equal status with whites, Blacks were still objects to be maneuvered and controlled for the benefit of whites under Court-sanctioned

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[407] U.S. CONST. amend. XIII.

[408] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2018)).

[409] U.S. CONST. amend. XV, § 1. *See also* Civil Rights Act of 1866 § 2, 14 Stat. at 27.

[410] George H. Taylor, *Race, Religion and Law: The Tension Between Spirit and Its Institutionalization*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 51, 56 n.35 (2006) (quoting MARTIN LUTHER KING, WHY WE CAN'T WAIT 85 (1964)).

segregation. As noted previously, Durkheim suggests that sacred things can be anything that people endow with value and protect from things not sacred.[411] In a real sense, the profane can contaminate or damage the sacred. The sacred is superior in dignity and power to profane things.[412] In the Religion of Race created by the Founders, then, value was defined by the rights and acknowledgment of citizenship attached to whiteness. Distance between the races maintained by power and coercion allowed for this value and uniqueness. Had the Court embraced equality, it would have removed the distinction between white citizens and Black people and, thus, removed the barrier between the sacred and the profane. Whiteness would have lost its value. The Court may have allowed for liberty (albeit limited), but it did not allow for equality. The Court was not willing to fully eradicate the Religion of Race at that time.

Congress could have been a check on the Supreme Court when its interpretation of the sacred text was not in line with the ideals of the new Constitution. Congress represents the *demos*, the people, who voiced their will by ratifying amendments to the Constitution. Given the wide, sweeping changes Congress enacted with the Reconstruction Amendments and Acts and the passionate debates and speeches in favor of equality, one could suppose that Congress would amend the acts, if not the Constitution, to rectify the Supreme Court's adjudication, which resulted in maintaining boundaries between whites and Blacks. Indeed, Congress has a history of correcting Supreme Court decisions, as demonstrated in creating the Fugitive Slave Law of 1850 to correct *Prigg*.[413] Instead, Congress ceded control and remained silent. In fact, by the time of the *Civil Rights Cases*, it was clear that the federal government was unable or unwilling to halt the widespread violence against Blacks in the South during Reconstruction.[414] In 1876, Republicans, tired of involvement in southern affairs, negotiated with the Democrats to ensure that the Republican nominee, Rutherford B. Hayes, would become the U.S. President.[415] In return, Republicans promised that Hayes would withdraw federal troops from the South and not do anything when Democratic governors took office in several states of the South.[416] This was called the Hayes-Tilden Compromise, and it had a destructive effect on burgeoning Black equality. Political rights were not protected, and the economic and social rights of Blacks declined as well.[417] Reconstruction politicians were more interested in reconciling with white southerners than ensuring Black freedom.[418] Congressional leaders were no longer committed to guaranteeing the promises of the Constitution of Reconstruction by 1883 when the *Civil Rights Cases* were decided, and definitely not by the time of *Plessy*.[419] Thus, the decisions of the

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[411] DURKHEIM, *supra* note 69, at 38. *See supra* Part II.A.
[412] DURKHEIM, *supra* note 69, at 38.
[413] *See supra* Part II.C.
[414] BELL, *supra* note 219, at 42.
[415] *Id*.
[416] *Id*.
[417] *Id*.
[418] *Id.*
[419] *Id.*

Supreme Court went unchallenged, allowing its exegesis to shape the belief system. This exegesis meant there still needed to be a boundary between the sacred and the profane—between whites and Blacks.

The Court and Congress both seemed to be invested in moving quickly beyond the effect and meaning of Reconstruction (and thereby delaying full equality for Blacks). The work of Norman Spaulding analyzing the evolution of federalism offers a useful explanation for these actions. Spaulding argues that the Rehnquist Court interpreted federalism according to principles established in the Constitution at the nation's founding but diminished the important shift in federalism resulting from the Reconstruction Amendments.[420] Spaulding posits that the Reconstruction Amendments are unlike any other changes to the Constitution and are a fundamental shift in its framework.[421] The Amendments rectify the historical injustices of the original Constitution, namely slavery, and stand as a monument commemorating those injustices.[422] The Court's adjudication obscured this monumental shift and represented a "desperate desire to forget what defined the terms of Reconstruction before it even began."[423] Spaulding calls this desire to forget the "monumental historical consciousness," and he defines it as collective memory work "predicated on forgetting the structural significance of the Civil War and Reconstruction Amendments."[424]

The analytical tool provided by Spaulding is helpful when considering the Court's adjudication of Black rights after Reconstruction. Similarly, the Supreme Court acknowledged the changes brought by the new Reconstruction Amendments but continued to view relations among the races according to principles the Founders included in the original Constitution—the Constitution of Slavery. The Court diminished the effect of the Reconstruction Amendments by instituting the doctrines of state action and separate but equal,[425] while generally curtailing the power of the Amendments to remove the boundaries between the sacred and the profane. As it did with federalism, here, too, the Court obscured the radical shift in the treatment of Blacks memorialized by the Constitution of Reconstruction. It was enough to

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[420] Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003). *See also supra* Part III.A.1 (discussing the impact of the Reconstruction Amendments on federalism).

[421] Spaulding, *supra* note 420, at 2026 ("[The Reconstruction Amendments] are structurally significant, marking a new constitutional framework, a radical break with certain first principles of the Founding.").

[422] *Id*. at 2000 n.47 (quoting Robert Meister, Spaulding suggests that "in the aftermath of evil, liberal constitutions do not merely enshrine abstract principles of justice; they also memorialize particular histories of injustice"); Robert Meister, *Forgiving and Forgetting: Lincoln and the Politics of National Recovery*, *reprinted in* HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 135, 163–64 (Carla Hesse & Robert Post eds., 1999).

[423] Spaulding*, supra* note 420, at 2001.

[424] *Id*. at 2006.

[425] *See generally id.* (arguing that the Rehnquist Court's recent revival of robust antebellum federalism principles turn on a chillingly amnesic suppression of the structural significance of the Civil War and Reconstruction Amendments).

mark the injustices of slavery with the Amendments; the Court did not evince a desire to do the truly hard work of dismantling the belief system. As Spaulding might say, the Court's desire to forget showed a "chillingly amnesic" suppression of the significance of the Constitution of Reconstruction.[426]

C. Dis/civil Religion

In the immediate aftermath of the Civil War and the newly amended Constitution, the Court charted a path between the belief system of the Constitution of Slavery and the ideals of the Constitution of Reconstruction. Because the people had spoken and changed the sacred text of the original Constitution, the Court was beholden to the dictates of the prohibition of slavery and the grant of citizenship rights to Blacks. However, the Court curtailed the protections and gains promised in the amended Constitution by adding, for instance, the state action doctrine to the Ritual of Law. By doing so, the Court, as the consecrated personages of the sacred text, maintained the Religion of Race—with its belief in white supremacy. The Court transitioned the Religion of Race into a new form of civil religion, which I call the "dis/civil religion," as explained below.

Beginning with the *Civil Rights Cases*, the Court has used the state action doctrine to distinguish between public discrimination by state actors and private discrimination by private individuals. This distinction is based on the language of the Fourteenth Amendment, which prohibits the abridgment of equal protection under the law by the state.[427] With this in mind, the Court has declared private discrimination to be permissible as a matter of constitutional interpretation.[428] Essentially, with the state action doctrine, the Court provided a private right to discriminate, as the doctrine requires the Court to examine the status of the actor to determine whether there has been state action in racial subordination—to wit, whether there was state action in positioning the rights and status of Blacks below those of whites.[429] A state agent's discriminatory actions may be determined to be nongovernmental acts and therefore protected private conduct.[430] Neil Gotanda contends that "[u]nder this racial public-private distinction, public officials exercising state powers operate according to the rule that race is not to be considered. In the private sphere, however, race may be considered."[431] This is confirmed in

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[426] *Id*. at 2036. *See also* Justin Collings, *The Supreme Court and the Memory of Evil*, 71 STAN. L. REV. 265 (2019) (describing the engagement by the Court with the memory of slavery and segregation).

[427] U.S. CONST. amend. XIV.

[428] Minnick v. Cal. Dep't of Corr., 452 U.S. 105, 128 (1981) (Stewart, J., dissenting) ("So far as the Constitution goes, a private person may engage in any racial discrimination he wants.").

[429] Gotanda, *supra* note 119, at 11–12, 14.

[430] *Id*. at 14–16 (referring to Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) and Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) to note the "extraordinarily slippery character of the state actor designation process").

[431] *Id.* (emphasis omitted).

Plessy, where the Court argued that it is not for legislation or the Court to put the races on equal footing socially, and the Constitution allows for social discrimination.[432]

By limiting the application of the Reconstruction Amendments and Acts, as well as other civil rights laws, to actions by state actors, the Court maintains the boundary between whiteness as sacred and Blackness as profane. The status and treatment of Blacks are allowed to be subordinated to those of whites in private spheres. The public-private discrimination distinction is itself a boundary delineating when the sacred will be protected and when it will lose its value by mingling with the profane. This is proven to be problematic, however, as allowing there to be a sacred-profane distinction in the private sphere affects equality in other spheres because the application of rights is inconsistent. The Reconstruction Congress recognized and understood this problem and tried to eliminate all discrimination in all spheres by drafting the Amendments and Acts as they did.[433]

By adopting the state action doctrine, the Supreme Court changed the Religion of Race from a civil religion into what can be called a "dis/civil religion." As described earlier, Durkheim and Bellah posited civil religion as a tool of social solidarity to unite and orient the polity around a belief system.[434] By sanctioning private discrimination *vis-à-vis* the state action doctrine, that solidarity is fractured, as the polity is now oriented around two discordant belief systems. The first is engendered by the Constitution of Slavery, the Religion of Race, where whiteness is sacred, and Blackness is profane. The other is engendered by the Constitution of Reconstruction, the promised new civil religion, where racial superiority is abhorrent, and equality governs.

This fracturing accounts for the inconsistent and confusing adjudication of constitutional rights for Black Americans since *Plessy*. From that time until now, a large body of law has developed regarding antidiscrimination claims of Blacks and other racial minorities. The Court gradually dismantled the doctrine of separate but equal in several Court cases beginning in the late 1930s and culminating in the *Brown v. Board of Education* decision, which overturned segregation in education.[435]

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[432] *See supra* Part III.B.3.

[433] *See* Part III.A.

[434] *See supra* Introduction.

[435] *See generally* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (invalidating state laws that denied African-American students access to all-white state graduate schools when no separate state graduate schools were available for African-Americans); Smith v. Allwright, 321 U.S. 649 (1944) (holding by the Supreme Court in a voting rights case which required Texas to allow African-Americans to vote in primary elections, formerly restricted to whites); Morgan v. Virginia, 328 U.S. 373 (1946) (desegregating seating on interstate buses); Shelley v. Kraemer, 334 U.S. 1 (1948) (overturning racially discriminatory real estate covenants); Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631 (1948) (reaffirming and extending *Missouri ex rel. Gaines v. Canada*, ruling that Oklahoma could not bar an African-American student from its all-white law school on the ground that she had not requested the state to provide a separate law school for Black students); Sweatt v. Painter, 339 U.S. 629

Brown technically invalidated the separate but equal doctrine only as applied to education;[436] however, it was the fire that torched segregation in many different areas. After *Brown*, a series of Court decisions invalidated the separate but equal doctrine in public beaches and bathhouses, buses, parks, public parks and golf courses, athletic contests, airport restaurants, courtroom seating, and municipal auditoriums.[437] Advances toward the ideal of the Constitution of Reconstruction continued with Blacks having full status and rights equal to those of whites following the Civil Rights Act of 1964 and the Voting Rights Act of 1965.[438] However, after the civil rights movement, the story of civil rights is one of advancement followed by retrenchment, as several key legal victories were followed by narrowing the law or overturning and nullifying it altogether.[439]

Critical race theorists and constitutional law scholars have noted the inconsistent and incoherent adjudication of Black rights since *Plessy*.[440] For

(1950) (striking down an attempt by the University of Texas to circumvent *Missouri ex rel. Gaines v. Canada* with a hastily established inferior law school for Black students); McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950) (ruling against practices of segregation within a formerly all-white graduate school, insofar as they interfered with meaningful classroom instruction and interaction with other students); and Brown v. Bd. of Educ., 347 U.S. 483 (1954). *See also* Jonathan L. Entin, Sweatt v. Painter, *the End of Segregation, and the Transformation of Education Law*, 5 REV. LITIG. 3 (1986); Sherman P. Willis, *Bridging the Gap: A Look at the Higher Public Education Cases Between* Plessy *and* Brown, 30 T. MARSHALL L. REV. 1 (2004); Daniel T. Kelleher, *The Case of Lloyd Lionel Gaines: The Demise of the Separate but Equal Doctrine*, 56 J. NEGRO HIST. 262 (1971); Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55 (2001); Leland B. Ware, *Setting the Stage for* Brown*: The Development and Implementation of the NAACP's School Desegregation Campaign, 1930–1950*, 52 MERCER L. REV. 631 (2001).

[436] Brown, 347 U.S. at 497 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place.").

[437] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §14.8(d)(ii)(4), at 826 (8th ed. 2010) (footnotes omitted) (collecting cases). *See also* HIGGINBOTHAM, *supra* note 200, at 459.

[438] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Voting Rights Act of 1965, 52 U.S.C.A. § 10301 (1965) (formerly cited as 42 U.S.C. § 1973).

[439] *See generally* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (disallowing race-conscious methods to eradicate segregation in schools; limiting remediation to only *de jure* segregation); Shelby Cty. Ala. v. Holder, 570 U.S. 529 (2013) (removing preclearance requirements in Section 5 of the Voting Rights Act and thus allowing states and counties with a history of racial discrimination to change laws as they relate to voting without federal government oversight).

[440] *See generally* Crenshaw, *supra* note 3 (noting racial subordination continues despite ostensible civil rights reforms). Constitutional scholars Jamal Greene and Akhil Reed Amar each expound on the idea of Plessy v. Ferguson, 163 U.S. 537 (1896), being included in the "anticanon," cases which have been deemed the worst cases of the Court and stand as antithetical to sound judicial decision-making. *See generally* Akhil Reed Amar, Plessy v. Ferguson *and the Anti-Canon*, 39 PEPP. L. REV. 75 (2011); Jamal Greene, *The Anticanon*,

instance, Justin Collings describes this adjudication as the Court's engagement with memory regarding slavery and segregation.[441] This engagement, according to Collings, results in the Court primarily viewing the nation's past treatment of Black people as an aberration on an otherwise noble tradition of rights for all (termed the "parenthetical mode"). Because of this view, the Court often denies the redemptive power and authority of the Constitution as amended by the Reconstruction Amendments (as argued by Spaulding), resulting in a constrained expansion of constitutional rights for Black Americans.[442] At other times, however, the Court operates in a "redemptive mode," which does acknowledge the power of the amended Constitution, repudiates past wrongdoing, and sanctions strong judicial action.[443] Thus, there has been an inconsistent adjudication in the Court's history since *Plessy*.

The Religion of Race as a dis/civil religion offers an explanation for this inconsistent adjudication. It is "dis/civil" because it separates from the redemptive power of the Constitution of Reconstruction. It does not fully embrace the dismantling of slavery and all of its related vestiges but seeks, instead, to create new rituals of law to maintain the sacredness of whiteness. It is not an "anticivil religion" because it still functions as a way to unite and orient society beyond mere political commitments.[444] Despite this persistence, there are those on the Court, as well as outside the Court, who seek to dismantle the Religion of Race and fully embrace the promise of a new civil religion as attempted by the Reconstruction Congress. Essentially, the period after *Plessy*, continuing to this very day, can be seen as a persistent contestation between the dis/civil religion and the promised new civil religion. Any given session of the Court can see one of these civil religions ascendant over the other one. The challenge lies in knowing which one is ruling.

CONCLUSION

This Article attempts to offer a framework to better understand the confusion and anger felt by many regarding the persistent nature of racism in America. Despite numerous laws and a robust regime for antidiscrimination, white supremacy persists. This Article tells the story of the nation's foundational documents and ends with a discussion of the rocky start of the amended foundation provided by the Reconstruction Amendments. In future work, I will continue to explore the extent to which the Religion of Race is established in our law and society. This work will include a discussion on whether the Religion of Race can be disestablished and, if

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125 HARV. L. REV. 379 (2011). I assert that instead of being antithetical to traditional jurisprudence, *Plessy* is the most illustrative expression by the Court of the Religion of Race.

[441] Collings, *supra* note 426, at 269.

[442] *Id*. at 337.

[443] *Id*. at 270.

[444] *See generally, e.g.*, Frederick M. Gedicks, *American Civil Religion: An Idea Whose Time Is Past*, 41 GEO. WASH. INT'L L. REV. 891 (2010) (arguing for revising the idea of the American civil religion to focus more on civil society and less on religious components).

so, the mechanisms and institutions (especially those beyond the Supreme Court) required for that to happen.

In his dissent in *Plessy*, Justice Harlan proffered the idea that the Constitution is colorblind. At first, this idea sounds laudable, as it was a counterargument against the doctrine of separate but equal. Upon further thought, however, the idea that our Constitution does not recognize color or race is problematic. The colorblind approach itself maintains the boundary between sacred and profane, as its application means there is never a chance to apply equity—programs specifically aimed at addressing the disparity between white and Black by privileging Blacks. The past few years have demonstrated that equality is not enough. Under the rubric of equality, the Court has been able to use colorblindness to perpetuate the subordination of Blacks. Having the same rights on paper does not equate to fair and affordable housing, access to healthcare, a criminal justice system that does not target Black people, and lasting wealth.

Whiteness is sacred because whiteness means freedom. The Religion of Race is the national civil religion that subordinates Black bodies, Black minds, and Black souls to whites and white privilege. In a country that is becoming more diverse, and where nonwhites will become the majority in a few short decades, the central question is whether the Supreme Court will absolutely embrace the ideals and redemptive power of the Reconstruction Congress and firmly reject the racism established by the Founding Fathers. One hopes that the Supreme Court will seize the opportunity one day soon to fully dismantle this Religion of Race and successfully fulfill their duty as interpreters of that most sacred text—the United States Constitution.