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David Hall

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SYMPOSIUM

THE CONSTITUTION AND RACE:
A CRITICAL PERSPECTIVE*

David Hall**

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* This was the title of the conference sponsored by the Massachusetts Chapter of the National Conference of Black Lawyers at Harvard Law School on September 11-13, 1987. The conference was convened to commemorate the Bicentennial of the United States Constitution. This article attempts to capture and express the philosophical and theoretical foundations of that conference.

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INTRODUCTION AND PURPOSE

In the quiet stillness of an insignificant moment, an idea is born. Its roots are deep within the unconscious spirit of a particular person. Yet, the real originator of the idea is not the person within whom it is presently encased.¹ Its true origin was within the yearnings of previous generations; those who paid dearly for being Black in America. These yearnings have taken different shapes at various points throughout the history of this country. However, their purpose is the same today as it was centuries ago. They are reborn at this memorable juncture in American history to remind us that we are still not free.²

1. The idea for this Conference was presented by Attorney Geraldine Hines at a meeting of the Massachusetts Chapter of the National Conference of Black Lawyers. Her vision was great, and the enormous amount of work, energy and devotion which she invested into this idea made that vision a reality. The members of The National Conference of Black Lawyers are deeply appreciative of her vision and work. She is a symbol of this organization's mission.

2. One of the critical distinctions which must be made is between "freedom in form" and "freedom in substance." Freedom is often described as the legal determination that one is entitled to all the rights and privileges that a political entity provides to its inhabitants. Clearly American law now provides this form of freedom to Black people and other people of color. However, this description of freedom can be misleading, when by any measure of objective value one is effectively denied those rights and privileges. The concept of freedom must encompass one's real status within a society. It must include the ability of a group to influence, if not control, its destiny. The value that the society ascribes to the group, and that the group places on itself, are important indicators of freedom. If the group is disconnected from its true history, culture and unique contribution to the development of the society and the world, psychologically and spiritually the group is enslaved. If the society is responsible for this interruption in transmission, then it is the enslaving agent. Freedom does not only correspond to a group's legal status; it involves every aspect of life. One should not divorce the substantive issues of economics, politics, social and spiritual values from the legal determination of freedom and equality. When we examine some of these important factors in the United States it is clear that Black people have not transcended the substantive barriers of enslavement. A report published by The Center for the Study of Social Policy entitled, A Dream Deferred: The Economic Status of Black Americans, which was issued in July, 1983 concluded that "the economic gap between blacks and whites remains wide and is not diminishing." Id. at i. To support this conclusion the study stated that the "median
Throughout the history of this country it has been necessary for those who suffer from exclusion and denial to put forth their case to the society and to propose appropriate solutions. This conference is part of that tradition. It is a continuation of the

income for black families as a percentage of median income for white families was 55% in 1960, and . . . fell again to 56% in 1981. "Id. It also indicated that, "In 1981 . . . 55% of all black families had incomes under $15,000, while only 28% of all white families had such incomes." Id. at i. In addition to the above, the study disclosed that in 1981 45% of all Black children lived in poverty compared with only 14% of White children; 39% of all Black senior citizens lived in poverty as compared with only 13.1% of White elderly persons; and the unemployment rate since 1960 has been twice as high for Black people than it has been for Whites. The social consequences of these and numerous other economic disparities on Black people, according to this report, are higher infant and maternal mortality rates; shorter life spans; higher incidences of teenage pregnancy, overrepresentation in jails and prisons; and a greater likelihood of criminal victimization. Id. at ii. This is only one of numerous studies which verify that despite the gains of some segments of the Black population, Black people as a whole have not obtained "substantive freedom" in America.

3. There is a rich history of Black people convening conferences to protest the inequalities and injustices of the American legal system. One of the earliest occurred in Cleveland, Ohio in 1851, and was called the Ohio Convention of Colored Men. At this convention, a young H. Ford Douglas gained public attention for his forceful advocacy against the legitimacy of the United States Constitution. Though more reputable and senior Black abolitionists endorsed the validity of the Constitution and the "integrity of the founding fathers," the youthful Douglas proclaimed that "the Constitution of the United States is pro-slavery, considered to be so by those who framed it, and construed to that end ever since its adoption . . . . Now, I hold, in view of this fact, no colored man can consistently vote under the United States Constitution." See V. HARDING, THERE IS A RIVER, THE BLACK STRUGGLE FOR FREEDOM IN AMERICA 167 (1981). In that same year, the "self-educated black leader" and "best-known black exile[,]" Henry Bibb, convened the North American Convention of Colored Men in Toronto, Canada in order to protest against the United States Constitution's Fugitive Slave Law. Id. at 168. This conference is noted for the proposal by James T. Hally to create a "North American Union" of Black people which would serve as a representative assembly for all Black people of the United States and Canada. Id. This was the first recorded proposal for a "black government-in-exile." Id. It was a call for Black people "to declare their independence from a racist, persecuting American government." Id. at 168-69. The following is a list of some of the other early Black conferences and significant quotes from those in attendance. The National Convention of Colored Freedmen, Cleveland, Ohio (1848). The great Black nationalist Martin R. Delaney proposed that:

Whereas we find ourselves far behind the military tactics of the civilized world, Resolved that this Convention recommend to the colored Freemen of North America to use every means in their power to obtain that science, so as to enable them to measure arms with assailants without and invaders within.

Id. at 150. The Convention of Chicago Black People Protesting Fugitive Slave Laws (1850).

We do not wish to offer violence to any person unless driven to the extreme, in which case we are determined to defend ourselves at all hazards, even should it be to the shedding of human blood, and in doing thus, will appeal to the Su-
quest for understanding and action. Like many that preceded it,

preme Judge of the Social World to support us in the justness of our cause . . . .

We who have tasted of freedom are ready to exclaim . . . “Give us liberty or give
us death.”

Id. at 154. The National Black Convention of Cleveland, Ohio (1854). This convention
is remembered for the strong debates over the issue of emigration. In advancing his argu-
ments for the emigration of Black people from America, H. Ford Douglas warned that
“slavery is not a foreign element in this government . . . [i]t does not constitute a local or
sectional institution . . . but is just as national as the Constitution which gives it an
existence.” Id. at 188. Martin R. Delaney who also supported the emigration platform
stated that “[n]o people can be free who themselves do not constitute an essential part
of the ruling element of the country in which they live.” Id. at 186. The Ohio Conven-
tion of Colored Men (1857). In response to the Supreme Court’s ruling in the famous
case of Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), the delegates at this conven-
tion declared “that if the Dred Scott dictum be the true exposition of the law of the
land, then are the founders of the American Republic convicted by their descendants of
base hypocrisy, and colored men absolved from all allegiance to a government which
withdraws all protection.” Id. at 195. The National Equal Rights League, New Orleans,
Louisiana (1860). This conference stressed the ideal of unity.

The meeting of this convention has inaugurated a new era. It was the first politi-
cal move ever made by the colored people of the State acting in a body . . . .

Ministers of the Gospel, officers and privates of the U.S. Army, men who handle
the sword or the pen, merchants and clerks, all classes of society were repre-
sented, and united in a common thought: the actual liberation from social and
political bondage.

Id. at 266. The Black Convention at Charleston, South Carolina (1865). This conference,
one of the first held after emancipation, emphasized the international aspects of the
Black struggle for freedom.

[O]ur cause is not alone the cause of four millions of black men in this country,
but . . . it is also the cause of millions of oppressed men in other parts of God’s
beautiful earth,” who are now struggling to be free in the fullest sense of the
word, and God and nature are pledged to their triumph.

Id. at 326. The delegates also sounded a familiar note of forgiveness and loyalty to
America.

We are American by birth, and we assure you that we are Americans in feeling;
and in spite of all the wrongs which we have so long and silently endured in
this country, we can yet exclaim, with a full heart, “O, America, with all thy
faults we love thee still.”

Id. at 326 (emphasis added). During this period there was a proliferation of Black or-
ganizations and conferences. Through his travels in the South the Chief Justice of the
Supreme Court, Salmon Chase, commented on this phenomenon. He stated that “every-
where throughout the country colored citizens are organizing Union Leagues.” He went
on to say they constituted “a power which no wise statesman will despise.” Id. at 289-90.
There were various other conferences that raised some of the same issues. They included
the National Afro-American League (1887), Monroe Trotter’s National Equal Rights
League, Ida B. Wells’s Anti-Lynching League, and the Niagara Movement. See H. Cruse,
Plural But Equal 8-9 (1987); H. Sitkoff, The Struggle for Black Equality 6-7
(1981). This legacy of protest continued into the present era with the call for a “Black
Independent Political Party” at the Black Power conferences in Gary, Indiana in 1972,
the conference brought together some enlightened and dedicated scholars, practitioners and activists. They came together to continue a forum which has been in existence for over a century; at different times and different places. This ongoing forum has always grappled with the difficult legacy and consequences of slavery, segregation, discrimination, and racial oppression.

The conference was significant because it raised serious and poignant concerns about the flaws within the United States Constitution at a time when most Americans were praising the document in "flag waving fervor." Though many would admit that the Constitution is not perfect, they would not concede that it should be subjected to serious alterations as it relates to the lives and conditions of people of color. In this bicentennial year they would call upon all Americans to be thankful for the wisdom, vision and courage of the original framers of the Constitution. It is this sentiment which made this conference so essen-

4. They included: Professor Derrick Bell, Harvard Law School; Professor Denise Carty-Bennia, Northeastern University Law School; Professor John Brittian, University of Connecticut Law School; Margaret Burnham, Attorney; Dean Haywood Burns, CUNY Law School at Queens College; Professor Arthur Kinoy, Rutgers University Law School; Chokwe Lumumba, Attorney and Chairman of New Afrikan Peoples Organization; Richard F. America, Economist and Social Analyst; Professor Imari Abudakari Obadele, College of Wooster, and President of the Provisional Government of the Republic of New Afrika; Professor Julianne Malveaux, Department of Economics, University of California at Berkeley; Professor Charles Ogletree, Harvard Law School; Tanya Cooke, Attorney, NAACP Legal Defense Fund; Diane Rust Tierney, American Civil Liberties Union; Bob Moses, Civil Rights Activist; Don Tamaki, Attorney and counsel in the reopened case of Korematsu v. United States; Professor Juliet E.K. Walker, History Department, University of Illinois at Urbana; Dorothy Zellner, staff member at the Center for Constitutional Rights; Senator Henry Sanders, Alabama State Senator and Attorney; Rose Mary Sanders, Attorney; Barbara Arnwine, Executive Director of the Lawyers Committee for Civil Rights Under Law of the Boston Bar Association; Wilhelm Joseph, Administrative Director of Community Action for Legal Services in New York and co-chair of the National Conference of Black Lawyers, Adjoa Aiyetoro, Attorney for the American Civil Liberties Union's Prison Project and Co-Chair of the National Conference of Black Lawyers; Professor David Wilkins, Harvard Law School; Professor Winston Langley, University of Massachusetts, Boston; Gerald Horne, Attorney and Historian; Geraldine Hines, Attorney; Vinie Burrows, Actress and Social Activist; Professor Larry Smith, City College Urban Studies Program, New York; Charles Roach, Attorney. In addition to the above there were numerous other outstanding legal scholars, students and concerned individuals in attendance.

5. See supra note 3.


7. See First Report of the Commission on the Bicentennial of the United States Constitution (1985). This commission, headed by former Chief Justice Warren Burger,
tial. For in America, under the "star spangled banner," there still exists "two Americas." One which benefits from and bathes in the strength of this country's laws, values and customs, and another which suffers immeasurable harm and frustration from the glaring weaknesses. This conference occurred during this bi-centennial year to echo the sentiments and concerns of this "other America." Those individuals who because of their color "never made it into the melting pot." These celebrants sing a different song. Their voices join in the multitude of sounds which echo throughout the land this year, yet their rhythm is different. They sing of the horrors of the document and its subsequent interpretations. They lament that the Framers chose compromise over freedom and human dignity. Their song serves as a disturbing reminder that only through protest, legal and otherwise, was this country forced to make an unjust Constitution embrace the principle of justice.

If we could go back in time to the writing and ratification of the Constitution, we would find different voices. As some cele-

8. See M. Harrington, The Other America: Poverty in the United States (1969). Though this book was published nineteen years ago, many of the conditions Harrington described still exist today and some of them have deteriorated. See supra note 2; see also N.Y. Times, Jan. 26, 1987, at A27, col. 1, which stated that, "[p]oor Whites living in poverty areas declined 5 percent over the decade [1970—1980], to 1,106,166, but the number of poor Blacks living in poverty areas rose 23 percent. In 1980, 84 percent of poor Blacks lived in poverty areas, as against 47 percent of poor Whites." The article concluded that the "concentrated Black poverty in large cities has become a central concern of many political scientists, who see the increasing isolation of the poor as perpetuating the cycle of unemployment, broken families, teen-age pregnancy, crime and drug use." Id. at A27, col. 2.


[t]he experience of Negroes in America has been different in kind, not just in degree from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.

Id. at 400-01 (emphasis added).

10. See Part V, infra at notes 287-420 and accompanying text.
brated, others mourned. A momentous victory for some was a painful defeat for others. It is very easy to remember the accomplishment of those who drafted this important document, but history often fails to record and glorify the suffering of those whose rights were sacrificed at the altar of justice in order that "the blessings of liberty" would be secured for some and their "posterity." Today, the posterity of the Framers enthusiastically celebrate this two-hundredth anniversary, while the posterity of the "sacrificial lambs" question whether there is anything to celebrate.

The other Constitutional commemorations held this year celebrated the triumph of the Constitution over its original flaws and contradictions. However this conference paid homage to the individual and collective efforts that made the triumph possible, while recognizing that total victory has not been obtained. The other celebrations sang songs of the marvelous light which the Constitution has cast over this nation and the world. This Conference, on the other hand, sang "a song full of the faith that the dark past has taught us . . . full of the hope that the present has brought us."

11. See V. Harding, supra note 3, wherein he states that:
[in] spite of the onset of a gradual movement toward the freeing of the African slaves in the Northern states, and in spite of continued black uses of the Revolution's rhetoric and ideology, many blacks realized that they would have to look elsewhere for true revolutionary inspiration. The white American Revolution was not ours.

Id. at 46.

12. A classic example of this phenomenon is the compromise by the delegates at the Constitutional Convention on the issue of representational status of African people who were enslaved in the South. The North and South reached a compromise wherein an African would be considered as 3/5th of a person. See discussion, infra note 45.


15. Id.

16. This article will strongly suggest at a later point, that there is a great deal to celebrate. However, the celebration should focus on the "transformation of the Constitution," and those who made this transformation possible. See infra, text at notes 188-420.

17. The major celebration of the Bicentennial occurred on September 17, 1987 in Philadelphia, Pennsylvania. This commemoration included speeches from the President of the United States, former Supreme Court Chief Justice Warren Burger, a ceremonious ringing of a replica of the Liberty Bell and other gala events.

18. See Part V infra.

19. These lines are from a song written by James Weldon Johnson entitled, Lift Every Voice and Sing. This song is referred to as the Black National Anthem, and has
The purpose of this gathering involved more than the mere recognition that there exists another America in 1987. These distinguished individuals assembled so that collectively they could propose solutions to the lingering problems which resulted from the constitutional errors of the Framers and the Supreme Court. The Conference Planners selected five areas for the speakers to direct their attention. They were: Reparations, Economic Rights, Political Representation, Criminal Justice, and the Fourteenth Amendment. The speakers' insightful presentations generated intensive debates and discussions. Out of this process emerged very powerful and illuminating proposals. Contained in this volume are articles which elaborate and expound upon these concepts. These articles embrace ideals which voice the needs and aspirations of a "not yet free people."

The aims of this introductory article are quite modest, yet quite worthy. It intends to provide a general overview of the dynamics of racism in the origin and development of constitutional law in this country. It does not intend to provide an exhaustive analysis of any particular area, but to identify consistent themes. More importantly, it attempts to re-focus the attention of constitutional celebrants, in hopes that they might observe one of the most significant factors in the transformation of law in the United States. The "Black Freedom Struggle," this article submits, has been the key factor for the injection of sacred principles of liberty, equality and freedom into the Constitution's structure. It ushered in a social and legal reality which the

been a hallmark of the Black Struggle for Freedom in America. The first stanza reads:

Lift every voice and sing
Till earth and heaven ring,
Ring with the harmonies of Liberty;
Let our rejoicing rise
High as the listening skies,
Let it resound loud as the rolling sea.
Sing a song full of the faith that the dark past has taught us,
Sing a song full of the hope that the present has brought us,
Facing the rising sun of our new day begun,
Let us march on till the victory is won.

For full text of song see The City Sun, Feb. 15, 1988, at 3.

20. The National Conference of Black Lawyers is deeply indebted to Prof. Derrick Bell for his assistance in developing the background research and ideas for these areas. The genesis for the development of Constitutional amendments was a series of meetings between Professor Bell and the Planning Committee.
American Revolution and the "founding fathers" were unwilling and unable to secure. Therefore, one must examine this historical movement as a source for constitutional construction and interpretation.

Parts I, II and III of this article provide a critical analysis of the Framers and their Constitution. It draws upon their writings and upon the proceedings of the Constitutional Convention. Parts IV and V examine the "Black Freedom Struggle," and its contribution to the development of the Constitution and society. It draws upon the spirit and words of the various individuals who made this movement possible. Part VI briefly reviews some of the contemporary challenges that impede the freedom movement. These sections reflect some of the major goals of the conference and, hopefully, they elucidate its theoretical foundation.

I. CONSTITUTIONAL CHOICES: ECONOMICS OR IDEALS

Some commentators have strongly encouraged critics of the "founding fathers" and the Constitution to place them within the proper historical context before ascribing value to their important enterprise. The concern is that one cannot accurately judge the Framers by today's standards and values. As compelling as this argument may appear, it does not shield the Framers from a probing and demanding critique. Even when these men and their Constitution are placed within the proper historical context, there are numerous contradictions and fallacies in their reasoning and their results. This can be discerned by examining the provisions in the Constitution that affected

21. See, e.g., C. ROSSITER, 1787 THE GRAND CONVENTION (1966). The author in rebutting the critics of the Framers' decision not to abolish slavery, stated, "[a]ll such persons, in my opinion, have failed to "[t]hink themselves back into the twilight" of 1787 and to understand the limits under which the Framers were operating in this matter—limits that permitted them as builders of a nation to do nothing positive and only a few things negative about their potentially most explosive social problem.

22. D. BELL, AND WE ARE NOT SAVED (1987). Professor Bell cites historian William Wiecek's chronology of pro-slavery provisions in the Constitution as follows:

1) Article I, section 2: representatives in the House were apportioned among the states on the basis of population, computed by counting all free persons and three fifths of the slaves (the 'federal number' or 'three-fifths' clause); 2) Article I, section 2, and Article I, Section 9: two clauses requiring redundantly that direct taxes (including capitations) be apportioned among the states on the forego-
the rights and conditions of African people.

Certain scholars would like to dismiss the Framers's treatment of African people as a peripheral historical error, which detracted from an otherwise sound and magnificent document. To the contrary, these decisions affected the essence of the Framers's manifested objectives. When they decided to support the existing system of slavery and the European/American slave trade, they destroyed all possibilities for the original Constitution to embrace the principles of liberty, justice and equality. These ideals are destroyed when they are given to a certain segment of society and denied to others who are similarly situated. Either they exist fully or they do not exist.

A dispassionate analysis of the Framers would reveal that they were not attempting to create a moral or social declaration of human rights when they met in Philadelphia. They were engaged in the process of constructing a nation which respected and protected property rights. These men came together in

ing basis, the purpose being to prevent Congress from laying a head tax on slaves to encourage their emancipation; 3) Article I, section 9: Congress was prohibited from abolishing the international slave trade to the United States before 1808; 4) Article IV, section 2: the states were prohibited from emancipating fugitive slaves who were to be returned on demand of the master; 5) Article I, section 8: Congress was empowered to provide for calling up the states' militias to suppress insurrections, including slave uprisings; 6) Article IV, section 4: the federal government was obliged to protect the states against domestic violence, including slave insurrections; 7) Article V: the provisions of Article I, section 9, clauses 1 and 4 (pertaining to the slave trade and direct taxes) were made unamendable; 8) Article I, section 9, and Article I, section 10: these two clauses prohibited the federal government and the states from taxing exports, one purpose being to prevent them from taxing slavery indirectly by taxing the exported products of slave labor.

Id. at 34-35. [Quoting W. Wiecek, The Sources of Antislavery Constitutionalism in America 62-63 (1977)].


24. This tragedy is generally referred to as the African Slave Trade. This is a misnomer since Africans were not the "traders"; they were the ones traded. More importantly, to state it as the European/American Slave Trade places needed emphasis on the perpetrators of this travesty.

25. Despite the rhetoric of the time, it is clear from the writings of the Framers that they knew that African people were human beings who should have received the same rights, privileges and protections which the Constitution afforded to its white inhabitants. See infra text accompanying notes 116-17.

26. The classic support for this proposal is C. Beard, An Economic Interpretation of the Constitution of the United States (1960); see also T. Dye & L. H. Zeigler, The
1787 to correct the major deficiencies in the Articles of Confederation. Their primary concern was to create a "strong national government" which had the power to resolve existing commercial disputes between the various states, establish a strong monetary system in order to protect the economic viability of the new republic, and to build a strong militia which could quash internal uprisings and defend against external attacks. Their motivations were economical and political. The document they created was a very conservative document written by very conservative men, and did not place moral and social concerns as a

Irony of Democracy: An Uncommon Introduction to American Politics 27-56 (1972); see also Higginbotham, 4 The Black Journey: From Slavery To "Freedom" and Inequality 1619-1954, Part I at 43 (1984), (unpublished) [hereinafter Black Journey], wherein Judge Higginbotham states,

[t]he revision (of the articles of confederation) was necessary because of the critical lack of power and authority in the national government. It had been unable to enforce its laws or control the states in the essential functions of taxation, regulation of trade, protection of commerce, the common defense, and the enforcement of treaty obligations.

Further support can be found in M. Farrand, 2 The Records of the Federal Convention of 1787 18-19 (1911) [this four volume collection is hereinafter cited as M. Farrand with corresponding volume number, preceding]. In a letter from several gentlemen of Rhode Island to the Chairman of the General Convention on May 11, 1787, the purpose of the Convention becomes quite clear. They wrote:

[i]t is the general Opinion here and we believe of the well informed through this State, that full power for the Regulation of the Commerce of the United States, both Foreign and domestick, ought to be vested in the National Council. . . . As the Object of this Letter is chiefly to prevent any impressions unfavorable to the Commercial Interest of this State, from taking place in our Sister States from the Circumstance of our being unrepresented in the present National Convention, we shall not presume to enter into any detail of the objects we hope your deliberations will embrace and provide for being convinced they will be such as have a tendency to strengthen the Union, promote Commerce, increase the power and Establish the Credit of the United States.

Id. at 19. See also a letter from Madison to Jefferson on March 18, 1786 wherein he stated," . . . [m]ost of our political evils may be traced up to our commercial ones, as most of our moral may to our political." 9 The Papers of Thomas Jefferson 334 (J. Boyd ed. 1954). See also Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), wherein the Supreme Court stated, "[i]f there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among states free from all invidious or partial restraints." Id. at 231.

27. See C. Rossiter, supra note 21, at 270. Rossiter eloquently supports this conclusion when he states,

[t]he Constitution they wrote was not the first act of a second revolution; it was rather, a prudent set of rules for peaceful evolution of large ends upon which all men of good will would agree. It did not demand, it did not even anticipate an upheaval in the social order or a forced redistribution of property; it did not challenge any existing institution or arrangement in the American economy, so-
high priority. Therefore, to view and critique the original Constitution primarily as a moral or social document is to assign characteristics to it which were not central to its inception. Though the preamble appealed to principles of liberty and justice, these concepts had different meanings for the Framers than those normally ascribed to them.

One does not have to look very hard to find evidence that the Constitution was primarily an economic and political agreement. The starting point could be the status and position of those who were delegates at the “Grand Convention.” The delegates were men of great wealth who understood the importance of sound fiscal policies. Professors Thomas Dye and L. Harmon Zeigler stated:

The 55 men at Philadelphia formed a major part of the nation's economic elite. The personal wealth represented at the meeting was enormous... at least forty of the 55 delegates were known to be holders of public securities; fourteen were known to be land speculators; 24 were moneylenders and investors; eleven were engaged in commerce or manufacturing; and fifteen owned large plantations.

One of the delegates, Robert Morris, was so wealthy that he underwrote a substantial part of the American Revolution. Thus the financial survival and viability of the Nation had to be of utmost concern for him and others similarly situated. As Charles Beard points out in his classic book, An Economic Interpretation, culture, or pattern of religion. It was, I repeat, a conservative document, and the Framers were, although they did not know it, men of conservative style and temper. The refusal to engage in social engineering, the continuity of principle with the teachings of Cicero and Locke, the self-identification of the Framers as members of a ruling and serving aristocracy, the moderately pessimistic view of human nature that pervaded the debates, the cautiously optimistic view of human destiny that had persuaded these men to come together—all these qualities of the Convention led me inexorably, and rather against my will, to describe the Great Happening of 1787 as a triumph for the best kind of conservatism.

Id.

28. This is the title given to the Convention of 1787 by Clinton Rossiter and other scholars. It is also the title of Rossiter's book which analyzed the men and the proceedings of 1787. See supra note 21.


30. Id. at 37.
tion of the Constitution of the United States, the Framers represented distinct economic groups who would benefit from the principles and ideals enshrined into the Constitution. It should not be inferred from this analysis that the Framers were only seeking self-gratification and enrichment when they created the Constitution. These men had high and noble aspirations for their country, and they were very experienced and astute political scientists. They aspired to create a form of government which reflected their political vision. Furthermore, Beard's economic thesis has been subjected to serious criticism concerning the unreliability of his data and the narrowness of his approach. Nevertheless, it is beyond refutation that the protection of property rights was a critical concern of the Framers. How else does one explain their position on slavery? Even the Declaration of Independence when it was first drafted proclaimed that all men were endowed with certain inalienable rights, which included "life, liberty, and property." This philosophy tempered their vision and influenced their decisions.

Another major concern of the Framers was the creation of a

31. See C. Beard, supra note 26.
32. See L. Levy, Essays On the Making of the Constitution 88-91 (2nd ed. 1987), wherein he discusses one of the earliest critiques of Beard by Edward S. Corwin in 1914 in the History Teachers Magazine; see also R. Browne, Reinterpretation of the Formation of the American Constitution (1963); F. McDonald, We the People: The Economic Origins of the Constitution (1958).
33. The protection of property rights and the economic development of the nation were inextricably linked to the delegates' position on slavery in the Constitution. This point is made clear by C.C. Pickney, a delegate from South Carolina, in a speech wherein he explains his opposition to any restrictions in the Constitution concerning the slave trade. He stated:

while there remained one acre of swampland uncleared in South Carolina, I would raise my voice against restricting the importation of negroes... I am as thoroughly convinced... that the nature of our climate, and the flat swampy situation of our country, obliges us to cultivate our lands with negroes, and that without them South Carolina would soon be a desert waste.

See 3 M. Farrand, supra note 26, at 254. This statement demonstrates how economic development superseded humanity in the minds of some, if not all, the Framers of the Constitution. It also demonstrates the enormous contribution that Black people made to the economic advancement of this nation; a contribution for which they have never received any compensation. Yet the English and American legal traditions have always abhorred forfeitures and have developed sound rules against unjust enrichment.
34. Jefferson adopted Locke's natural rights rhetoric which emphasized "life, liberty and property." It has been said that Benjamin Franklin objected to the use of the word "property," and Jefferson inserted the "pursuit of happiness" clause. See L. Baldwin, Reframing the Constitution: An Imperative for Modern America 4 (1972).
government which respected the right of men to advance in power and prestige regardless of their lineage. They strongly resisted notions of “hereditary monarchy” and “governing nobility.” Yet they were not populist; they believed that governments should be directed by those who had acquired experience, power and wisdom. Their vision of the Constitution saw it protecting the rights of those who had property from the “animosities” and acts of those who had less property or none at all. 

They wanted a strong national government which could ensure that the avenues for obtaining wealth and power remained open and free from local, sectional and regional constraints.

[T]he men who wrote the Constitution believed that government had the obligation not only to protect private property but also to nourish it. They expected government to foster trade and commerce, protect manufacturing, assist in land development, and provide other positive economic assistance. And, to protect the rights of property, they expected government to enforce contracts, maintain a stable money supply, punish thievery, assist in the collection of debts, record the ownership of property in the form of deeds, punish counterfeiting and piracy, protect copyrights and patents, regulate the value of money, establish courts, and regulate banking and commerce.


36. See A. Hamilton, J. Madison, & J. Jay, The Federalist (Random House 1937) [hereinafter Federalist]. The Federalist papers were originally published under the name of Publius, and were written by some of the leading political scholars at the Convention in 1787, who intended the writings to aid in the ratification of the Constitution. They are considered a primary source for obtaining the “original intent” and meaning of the Framers. The Federalist contains eighty-five different letters written by either Hamilton, Madison or Jay in defense of the Constitution. In Federalist No. 10, Madison states that:

So strong is [the] propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. But the most common and durable source of factions has been the various and unequal distribution of property . . . The regulation of these various and interfering interests forms the principal task of modern legislation.

Id. at 56 (emphasis added).

These are primarily economic concerns which the Constitution embraced and still secures to this day. Even the Framers’s determination that governmental powers should be separated was rooted in their economic concerns that too much power in one branch could result in the confiscation of property or in unnecessary restraints on alienation. The writings of some of the Framers confirm the point that the political theory which supported the Constitution had significant economic connotations. James Madison in the Federalist letter No. 10, in describing the sources of divisions and “factions” within a society, indicated that the “most common and durable source of factions has been the various and unequal distribution of property.” In Madison’s view these “unequal distributions” of property derive from “the diversity in faculties of men.” He felt that it was the “first object of government” to protect these diverse faculties of men and their attempts to acquire different amounts and kinds of property. This process of “diverse” acquisition inevitably results in a “division of the society into different interests and parties.” It then becomes the “principal task of modern legislation” to regulate these divisions and “interfering interests” so they do not destroy “liberty”, which is the catalyst for this process. Madison concludes this portion of his analysis by stating that “the causes of factions [diverse acquisitions of property] cannot be removed, and . . . relief is only to be sought in the means of controlling its effects.” It is clear from their writings that the Framers saw the Constitution as providing a general framework through which man’s attempt to acquire property would be encouraged and protected. The fact that the Bill

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38. Federalist, supra note 36, No. 10 (J. Madison).
39. Id. at 56.
40. Id. at 55.
41. Id.
42. Id.
43. Id. at 56.
44. Id. at 57.
45. The writings of the Framers confirm this point at various times. Madison’s official record of the Convention contained a statement which reflected the views of one of the delegates from South Carolina who favored counting African people as equal to “freemen” for representational purposes. Madison wrote:

Mr. Butler insisted that the labour of a slave in S. Carol[ina] was as productive and valuable as that of a freeman in Mass[achusetts], that as wealth was the great means of defence and utility to the Nation they were equally valuable to it
of Rights, which is primarily concerned with the protection of human dignity, was not added to the Constitution until two years after the delegates met in Philadelphia, lends support to the idea that property rights superseded human rights.  

An awareness that the political and social philosophy of the Constitution supported the protection of individual property rights, makes it easier to understand the Framers's approach to the issue of slavery and the slave trade. They felt that it would be inconsistent and unfair to bring together men of property in order to create a nation which would destroy the property rights of some of those men. This point supports the earlier sugges-

with freemen: and consequently an equal representation for them [was appropri-
ate] in a Government which was instituted principally for the protection of property, and was itself to be supported by property.

See 3 M. FARRAND, supra note 26, at 580-81 (emphasis added). The above proposal was not adopted since the delegates settled on the 3/5th compromise, however the reasoning of Mr. Butler was never refuted and was incorporated into the Constitution by the adoption of the 3/5th compromise. In addition, even Madison recognized that the major division between the states was the type of property they controlled, and that this division had to be accommodated in the Constitution. He stated:

[T]he States were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from [the effects of] their having or not having slaves . . . and if any defensive power were necessary, it ought to be mutually given to these two interests.

Id. at 486. Madison was so concerned about accommodating this division that he also was in favor of "counting slaves as [if] free," in order to give the southern states an advantage in one house of Congress and the northern states the advantage in the other.

Id. at 486-87. This position by Madison and others confirms the point that property rights were an essential component of the new republic, and that the 3/5th compromise was an express recognition of the preeminent status of property. Furthermore, it demonstrates that the rights of African people were used to settle the divisions in society, which Madison felt naturally arose over the diverse acquisition of property.

46. Some of the delegates felt that it would be inconsistent to attach a Bill of Rights to the Constitution at the same time that they were subjugating the rights of other human beings. C.C. Pinckney, a delegate from South Carolina, stipulated that this was one of his reasons. He stated:

Another reason weighed particularly, with members from this state, against the insertion of a bill of rights. Such bills generally begin with declaring that all men are by nature born free. Now, we should make that declaration with a very bad grace, when a large part of our property consist in men who are actually born slaves.

See 3 M. FARRAND, supra note 26, at 256.

47. This sentiment was strongly expressed at the Convention by General Charles Pinckney, the delegate from South Carolina. In response to some of the Virginia delegates who were opposed to slavery, Pinckney declared, "South Carolina and Georgia cannot do without slaves. As to Virginia she will gain by stopping the importation. Her
tion that human equality and liberty were not the major concerns of the Framers, nor major elements of the original Constitution. If one accepts the above analysis, it becomes necessary to examine whether the Constitution still retains its original economic tone, or has it been transformed? And, if it has been transformed, then what forces were responsible for the transformation? This article strongly suggests that the Constitution has changed substantially in the last two hundred years, and the quest for freedom by Black people and other people of color has been a major contributing factor to this transformation. Though the economic legacy of the Constitution still affects the structure and operation of society, it clearly is a more humane instrument today than it was in 1787. The realization that the original Constitution was not drafted as a document of morality should not prevent critics from analyzing the Framers' decisions regarding African people. Instead, it should inspire a more probing inquiry into the reasoning processes of individuals who had the audacity to transform, through law, an entire people into property.

II. HISTORICAL THEMES

There are three concepts which appear to capture the Framers' *modus operandi* when confronted with the rights and conditions of African people. They were: Silence, Contradictions and Compromise. These themes consistently emerged from the actions, writings and decisions of the delegates to the Convention. They combined to create one of greatest human and legal tragedies in American history.

A. Silence

Although courage is an attribute often ascribed to the Framers, when confronted with the contradictions between slavery and their principle of equality they chose to remain silent. As Clinton Rossiter, the author of *The Grand Convention* and a strong defender of the Framers indicated, this contradiction was "one with which few white men were willing to grapple courageously. Slaves will rise in value and she has more than she wants. It would be unequal to require South Carolina and Georgia to confederate on such unequal terms." See C. Beard, *supra* note 26, at 177.
geously." Silence, omission and denial was the standard approach to the problem. When the issues of slavery and the slave trade were addressed there was never a call for the granting of "liberty" and "equality" to African people. The Framers constant concern was whether these individuals would take on some of the characteristics of personhood or be considered the equivalent of "horses and cattle." Even though the delegates came from varying geographical and economical backgrounds, all of them maintained the same general posture on the issue of freedom for African people: They forthrightly proclaimed invisible rights for invisible people, and hoped that history would justify their blindness and inhumanity.

Despite the continuous involvement of various states in the capturing, transporting, importing, selling and killing of millions of Africans, the delegates did not consider this as a major item for the Convention's agenda. The great historian and sociologist, W.E.B. Dubois, in his definitive work entitled The Suppression of the African Slave Trade, confirmed this when he stated:

"Slavery occupied no prominent place in the Convention called to remedy the glaring defects of the Confederation, for the obvious reason that few of the delegates thought it expedient to touch a delicate subject which, if left alone, bade fair to settle itself in a manner satisfactory to all. Consequently, neither slavery nor the slave trade is specifically mentioned in the delegates' credentials of any of the states, nor in Randolph's, Pickney's, or Hamilton's plans, nor in Paterson's propositions. Indeed, the debate from May 14 to June 19, when the Committee of the Whole reported, touched the subject only in the matter of the ratio of representation of slaves. With the same exception, the report of the Committee of the Whole contained no reference to slavery or the slave trade, and the

48. See C. Rossiter, supra note 21, at 32.
49. See Black Journey, supra note 26, at 54. A delegate to the Convention from Massachusetts stated that if African people who were being enslaved in the south were represented in the government, then "[h]orses and [c]attle ought to have the [r]ight of [r]epresent[ation]." Id.
50. For a description of the various economic and business endeavors of each of the Framers, see C. Beard, supra note 26, at 73-151; see also T. Dye & L. H. Zeigler, supra note 26, at 33-38.
twenty-three resolutions of the Convention referred to the Committee of Detail, July 23 and 26, maintain the same silence.\textsuperscript{51}

This “sound of silence”\textsuperscript{52} which covered the Convention floor and proceedings concerning the severest restriction on human liberty rendered a fatal blow to the moral validity of the Convention, the delegates and their Constitution.\textsuperscript{53} The contradiction between their stance on slavery and the slave trade and the pronouncement that their purpose was to “secure the blessing of liberty” are irreconcilable. This contradiction destroyed the moral force of the document, and set in motion events which would cripple the nation for centuries.

This “sound of silence” must not be interpreted to mean

\begin{itemize}
\item \textsuperscript{51} See W.E.B. DuBois, \textit{The Suppression of the African Slave-Trade to the United States of America 1638-1870} 53 (1896). This does not mean that the status of African slaves was not debated at various times throughout the Convention. However, these debates related more directly to the issues of taxation and representation than to slavery. This again demonstrates how the economic and commercial issues of the day took precedence over the moral and humanitarian ones.

\item \textsuperscript{52} The “Sound of Silence” was the theme of a recent law conference sponsored by Critical Legal Studies, in January 1987 in Los Angeles, California, following the Association of American Law Schools (AALS) Convention. Based on the discussions at that conference, it became clear that several in attendance felt that the issues of race and racism were being “silenced” by the legal community and society in general. The theme reflected not only the active denial of the existence of racism in American society today, but the passive resistance that many take to discussing, confronting and resolving these issues. Thus the approach which the original Framers to the Constitution adopted to the issue of slavery is still employed within the legal community today. The technique of avoidance is frequently used to resolve disputes that are distasteful or very disturbing to one or both of the disputants. The emotional and psychological aspects of the phenomenon of White Supremacy (racism) makes it a difficult topic for most individuals to discuss. Yet, the underlying hope behind this approach (i.e., that the problem will take care of itself) has not proven to be reliable or successful. Generally, the problem becomes worse when it is ignored. The Framers’s postponement of the issue only set the stage for a devastating civil war between the same states seventy-four years later.

\item \textsuperscript{53} Tench Coxe, a delegate to the Convention from Pennsylvania, explained after the Convention how he worked to prevent a resolution, which restricted the slave trade, from being presented. In a letter to James Madison in 1790, he wrote:

I will mention to you confidentially that great pains have been heretofore taken to restrain Application to the general Government on the subject of the slave trade. A very strong paper was drawn and put into my hands to procure the signature of Dr. [Benjamin] Franklin to be presented to the federal convention—I enclosed to the Dr. with my opinion that it would be a very improper season and place to hazard the Application considering it as an over zealous act of honest men.

\textit{See} 3 M. Farrand, \textit{supra} note 26, at 361.
\end{itemize}
that the delegates totally ignored the issue of slavery or the status of African people within the newly created republic. It means that slavery was not addressed directly. There were no resolutions put forth for discussion concerning its total prohibition or gradual abolishment. Instead, the Framers chose to ensure the continuation of this inhuman institution, and to sup-

54. These are only two of the possible alternatives that the delegates could have explored. See Black Journey, supra note 26, at 41-42, wherein Judge Leon Higginbotham explores the various options available to the Framers.

One could debate endlessly the theoretical options before the Constitution Convention in 1787 as to lessening the plight of blacks. As a matter of theory, the framers could have required the immediate abolition of all slavery, or they could have provided for a system of gradual abolition of slavery similar to the plan subsequently adopted by Pennsylvania in 1790. Furthermore, even if they did not take a forthright position on recognizing the inhumanity and immorality of slavery, they could have inserted some type of "bill of rights" for slaves. As an example, they could have provided that slaves had the right to marry, or that slave families could not be broken up, or that, without provocation, slaves could not be assaulted by their masters or others, or that slaves could under no circumstances purchase their freedom. All of these provisions were in fact adopted by various jurisdictions at different times. The possibility of enacting provisions to abolish slavery or to limit its cruelty would be contingent upon the founding fathers having such goals as a high priority. However, justice for blacks was not their predominant concern.

Id. (emphasis added).

55. This was done by the inclusion of article I, section 9, clause 1, which stated:

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.

U.S. CONST. art. 1, § 9, cl. 1. The "founding fathers" thereby "ordained" the continuation of the butchery, torture and enslavement of free human beings. One must keep in mind that this section did not require the abolishment of the slave trade by 1808, but ensured that the states (especially Georgia and North Carolina), could continue in the trade without fear of restriction for at least 20 years. This was done despite their knowledge of the horrors and inhumanity of this enterprise. See W.E.B. DuBois, supra note 51, at 54, wherein he quotes Colonel George Mason of Virginia who denounced the traffic in slaves as "infenal," and Luther Martin of Maryland who regarded it as "inconsistent with the principles of the Revolution, and dishonor our knowledge of the horrors and inhumanity of this enterprise. See W.E.B. DuBois, supra note 51, at 54, which supported the enslavement of African people by white Europeans and Americans. This philosophy was enshrined throughout the Constitution; however, it was more vividly manifested in article I, section 2, clause 3, which "ordained" that Black people were only 3/5th of a person. U.S.Const. art. 1, § 2, cl. 3. This political compromise between the Northern and Southern delegates to the Convention was possible because neither side was willing to recognize Africans as human beings. The partial recognition was made not for the benefit of the Africans, but for the benefit of the Southern delegates who wanted their slaves counted for purposes of increasing the number of representatives they could send to Congress, and for the Northern delegates who wanted to generate additional revenue for
the National government by making sure that "direct taxes" were apportioned according to the number of free persons and slaves. Article I, section 2, clause 3 stated that:

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.

Id.

56. White Supremacy/Black Inferiority were the main tenets of the philosophy which supported the enslavement of African people by white Europeans and Americans. This philosophy was enshrined throughout the Constitution; however, it was more vividly manifested in article I, section 2, clause 3, which "ordained" that Black people were only 3/5th of a person.

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Id.

57. One of the major practices of the institution of slavery was the process of recapturing African people who had escaped from a particular slave owner. The customs of the time supported this practice throughout the south. However, a famous English case, Somersett v. Stewart, 98 Eng. Rep. 499 (K.B. 1772), cast serious doubt on the legal validity of this practice. In Somersett, the court refused to uphold Mr. Charles Stewart's attempt to forcibly return Mr. James Somersett (African) back to Jamaica. Mr. Somersett had escaped from Mr. Stewart when he was brought to England in 1769. The court in rendering its decision, not only commented on the practice of "recapturing" persons who had escaped human bondage, but also gave its views on the entire institution of slavery. The opinion reads in part:

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons; moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law.

Id. at 510. This decision and especially the above passage was "repeated and followed in hundreds of American decisions and pamphlets for the next several decades," See L. Higginbotham, In the Matter of Color 354 (1980). The delegates at the Convention wanted to ensure that there was "positive" law available to support the practice which had been denied in Somersett. Therefore, they included article 4, section 2, clause 3, into the Constitution which stated:

No Person held to Service or Labour in one State, under the Laws thereof, es-
“Silence” was also present by the manner in which the Framers avoided the use of words, phrases and concepts which would expressly reveal that they were sanctioning slavery and promoting white supremacy. At various points throughout the Constitution there are provisions which relegate free human beings to the status of property, yet nowhere in the document is slavery or the nationality of these individuals mentioned. The obvious reason for this omission was the delegates’s awareness that their support for slavery was in contradiction to the major professed ideals of the Revolution and the Constitution. They wanted to shield themselves from criticism, and ensure that the Northern states, some of whom had already abolished slavery or restricted the slave trade, would ratify the document. The three classic provisions of the Constitution which supported

caping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. Const. art. 4, § 2, cl. 3. The delegates through the above provision ensured that the insidious institution of slavery would be protected and maintained, and that one of its essential practices would be preserved.

58. See U.S. Const., supra notes 55-57.

59. According to Clinton Rossiter, the Framers’s use of the phrase “such persons,” was a polite way of saying “slaves.” See C. Rossiter, supra note 21, at 210. He also stated that “the Framers, like almost all men of their time, may have had trouble thinking of slaves as persons.” Id. at 266. It is very disturbing that these “noble” men could not view their subjects as persons but were willing to label them as such in order to avoid criticism. What is even more unacceptable is that those who were offended by the institution of slavery would vote to ratify the Constitution, even though it maintained this inhuman institution, as long as there was no references made to it within the Constitution. Id. at 267. For a summary of the proceedings at the Convention wherein the term “slave” was deleted, see 2 M. Farrand, supra note 26, at 415-16.

60. The Declaration of Independence of 1776, which was signed by many of the same delegates at the Constitutional Convention in 1787, stated that

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it . . . .

The Declaration of Independence para. 2 (U.S. 1776).

61. See 3 M. Farrand, supra note 26, at 210. Luther Martin, a delegate from Maryland, confirmed that the fear of criticism “influenced them . . . to guard against the word ‘slave.’ ” He stated: “They anxiously sought to avoid the admission of expressions which might be odious in the ears of Americans, although they were willing to admit into their system those things which the expression signified.” Id.

62. See supra notes 55-57.
the institution of slavery used the word "Person" or "Persons" when referring to African People. The irony of their choice of this word is that each provision created a legal determination that these individuals were not persons, but property. This appeal by the Framers to the use of "neutral" terminology probably demonstrated a deep psychological aversion to the reality and the humanity of African people. They preferred avoiding any reference to these "people of color" who they were subjugating, as though the process of omission would somehow humanize the tragedy, and legitimize their action.

B. Contradictions

It is not difficult to find the contradictions in the original Constitution. The preamble's declarations of "liberty" and "justice" clashes dramatically with the various provisions in the body of the document which embraced slavery and upheld the continuation of the slave trade. What is even more revealing are the inconsistencies in the reasoning and writings of the delegates as they attempted to justify their major decisions.

The inconsistencies can be traced back to the principles of the "American Revolution." When the Framers assembled in

63. Webster defines "person" as, "[a] human being as distinguished from things or animals." WEBSTER'S NEW COLLEGIATE DICTIONARY 628 (2d ed. 1960) [hereinafter WEBSTER] (emphasis added). Though Webster distinguishes "person" from "things" and "animals," some of the Framers had difficulty making this distinction. Despite their use of the word "persons" in article I, section 2, clause 3, they determined that Africans would only amount to 3/5th of a person for purposes of representation. Certain delegates were adamant that African people were things. Delegate Patterson from New Jersey stated during the debate over the above provision that he regarded Negroes in no light but as property. They are no free agents, have no personal liberty, no faculty of acquiring property, but on the contrary are themselves property, and like other property entirely at the will of the master . . . and if Negroes are not represented in the States to which they belong, why should they be 'in the General Government . . . .' See Black Journey, supra note 26, at 53. Governor Morris of Pennsylvania expressed the contradiction with property. They are no free agents, have no personal liberty, no faculty of acquiring property, but on the "[h]orses and cattle ought to have the right of representation" in the North. Id. at 54. It is evident from these remarks and many others, that the Framers of the Constitution did not define "Person" according to Webster's definition when they inserted it into the Constitution at certain points.

64. For an interesting discussion of the dynamics of racism in American society and the deep psychological effects that it has upon the perpetrators of this system of oppression, see Welsing, The Cress Theory of Color Confrontation, BLACK SCHOLAR 32-40 (May 1974).
1787 they were attempting to strengthen a nation which had declared its independence on principles of "liberty" and the "equality of man."\textsuperscript{65} Even though African people fought and died in the Revolutionary War,\textsuperscript{66} they never received their freedom when the war ended. The contradictions in the Revolutionary rhetoric are dramatically displayed in the sentiments of Patrick Henry. He is often hailed as the human symbol of freedom and liberty because of his famous pronouncement: "Give me liberty or give me death."\textsuperscript{67} Yet during the ratification of the Constitution in Virginia, he sternly warned that to give freedom to the Africans who were held in human bondage in the Southern states would create "the most dreadful and ruinous consequences."\textsuperscript{68} Eight of the delegates to the Constitutional Convention signed the Declaration of Independence\textsuperscript{69} in 1776 which declared that "all men are created equal," yet none of these delegates attempted to incorporate this axiom into the Constitution.

The writings of the Framers extolled the virtues and benefits of "liberty" for the development of man and society,\textsuperscript{70} yet fifteen of the delegates were owners of other human beings.\textsuperscript{71} Despite the overwhelming evidence of the horrors and inhumane
conditions of the European/American slave trade, and its devastating effects on African people, many delegates felt it “unfair” to South Carolina and Georgia to prohibit the importation of African people as slaves.\textsuperscript{72} Their understanding of unfairness and inequality clashed with the human rights of millions of people whom their decision affected.

The social reality the Framers adopted and created also clashed with their political theories. An essential attribute of the federal republican form of government proffered by the Framers was its inherent safeguards against the dangers of the majority. In the \textit{Federalist} letter No. 51, James Madison indicates that there are two methods of “oppression” which must be combated in a republic: oppression by the rulers of the society and oppression by the majority.\textsuperscript{73} It is the latter evil which he was concerned about in his defense of the Constitution. He stated, “[i]f a majority be united by a common interest, the rights of the minority will be insecure.”\textsuperscript{74} According to Madison there were only two processes for combating this potential evil. The first solution could be employed by “creating a will in the community independent of the majority,”\textsuperscript{75} and the second “by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable.”\textsuperscript{76} It was the second of these two solutions which Madison and his compatriots attempted to implant into their new republic. Through the use of a representative form of democracy\textsuperscript{77}—a bicameral structure of the legislature, with somewhat insulating terms of office\textsuperscript{78}—and the “separation of powers,”\textsuperscript{79} the Framers felt that they were creating a system where “the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.”\textsuperscript{80}

\textsuperscript{72} Id. at 177.
\textsuperscript{73} \textit{Federalist}, \textit{supra} note 36, No. 51, at 339-41 (J. Madison).
\textsuperscript{74} Id. at 339 (emphasis added).
\textsuperscript{75} Id.
\textsuperscript{76} Id. (emphasis added).
\textsuperscript{78} Id. at 13.'
\textsuperscript{79} Id.
\textsuperscript{80} \textit{Federalist}, \textit{supra} note 36, No. 51, at 339 (J. Madison).
Unfortunately, none of these safeguards were strong enough to uproot the racism which had been implanted into the hearts and minds of the Framers and the society. More importantly, as they constructed this governmental system, they violated the theories and principles they extolled. The safeguards were intended to create a process where wise men would come together and deliberate on behalf of "the people," without sacrificing their wisdom to "temporary or partial considerations." However, the Framers acted contrary to their own prescription. The vulnerability of the delegates to the social mores of their time is often cited as the rationale for their treatment of African people. Yet this defect was the very evil which their form of government was structured to prevent. At the "Grand Convention," the rights of individuals and groups were violated by the "unjust combination of the majority." If the Framers were not able to eschew this evil, then how could their successors overcome it? The Framers failed to realize or admit that there are certain common interests which cut across other social divisions and classes, and can thereby endanger the rights of individuals. That common interest in 1787 was white supremacy. That same commonality still afflicts this country, and continues to subvert the Framers' safeguards.

At the root of the Framers's contradiction was their attempt to create a "separate class of persons" in a society which rebelled against this same type of classification a decade earlier. Despite the glaring inconsistency between this determination and the revolutionary ideals, the Supreme Court later upheld the reasoning of the delegates. Chief Justice Taney, writing for the Court in the *Dred Scott* case, felt that the Framers were

82. See C. Rossiter, *supra* note 21, at 68.
83. *Dred Scott* v. Sandford, 60 U.S. (19 How.) 393 (1857). The issue in this famous case was whether individuals of African descent were entitled to the rights, privileges and immunities provided other citizens. The Court held that they were not and justified the decision by indicating that the laws in existence at the time the Constitution was framed did not recognize African people as equal human beings. The case arose when Dred Scott was taken to territory in the United States which had been designated as "free." He petitioned the Court to recognize his freedom. The case has been highly criticized for its procedural errors; the involvement of politicians in the Supreme Court's decision-making powers; its misconstruction of the laws pertaining to slavery at the time of the enactment of the Constitution; and its incorporation of white supremacy into the judicial processes of the Supreme Court. See, e.g., Black Journey, *supra* note 26, at 224-
quite clear and consistent in their purpose and resolve. He stated:

The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It declares that it is formed by the people of the United States; that is to say, by those who were members of the different political communities in the several states; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity . . . But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.84

This explanation and interpretation by the Court suggests that the Framers were not creating a contradiction when they used the term "persons" when referring to Africans within the United States. They intended to create a "separate class of persons," one not equal to all others, but not quite the equivalent of animals.85 The fallacy in the Framers' reasoning is that this category did not exist. It was one of many legal fictions which serve some overriding social interest. From a legal perspective this dual classification of individuals was possible.86 However, from a moral standpoint there was an inherent contradiction in the Framers' reasoning. A Constitution which emerges from a movement that embraced the sanctity of individual freedom and liberty, contravenes those principles when it upholds the enslavement of other human beings.

The preamble to the Constitution declared that its purpose

84. Dred Scott, 60 U.S. at 411 (emphasis added).
85. This process of creating new categories for Black people and other people of color is one of the constant themes of white supremacy. The history of segregation statutes in this country is another good example of this process.
86. There are numerous legal classifications which separate individuals into categories. For example, Minor/Adult, Sane/Insane, Consumer/Merchant, Married/Divorced, etc. Unlike the Framers' classification there are reasonable justifications for these distinctions. The Framers' classification attempted to deprive African people of their humanity.
was the "establishment of justice." This new union could have only established justice by making the slave trade illegal, abolishing slavery, compensating the Africans and Africa, and granting full rights of citizenship and protection to all Africans who chose to remain in this country. Clearly, this was a price that the delegates were not willing to pay and instead chose to establish the nation on a foundation riddled with contradictions and injustice. Despite subsequent amendments and numerous legislative enactments, the consequences of their choice still remains.

87. It has been argued that any alternative, other than the one chosen by the Framers, would have resulted in a destruction of the confederation and a more severe treatment for Black people in the South. See Black Journey, supra note 26, at 117-20. The assumptions upon which this argument rest are: (1) the South would refuse to ratify the Constitution if it abolished slavery, (2) they would have eventually formed a separate confederation with harsher laws and severer treatment of African people, and (3) by remaining in the Union the South became subject to the later amendments to the Constitution (i.e., 13th, 14th and 15th), which provided certain political rights to African people in America. Though there is clearly some validity to the above argument, it overlooks the great need that the South had for the North. One of the primary incentives for the South to enter the Union was the guarantee that a strong national government could provide them protection against slave insurrections. The South also needed the North to provide security against foreign invasions. The North was the primary consumer of the products produced by the South. Thus the South could not easily dismiss its relationship with and dependency on the North. More importantly, the above argument does not consider the possible outcomes at the Convention if the North was totally unified and clear on its position on slavery and the slave trade. As W.E.B. DuBois points out in The Suppression of the African Slave Trade,

[t]he slavery side was strongly entrenched, and had a clear and definite demand. The forces of freedom [Northern delegates] were, on the contrary, divided by important conflicts of interest, and animated by no very strong and decided anti-slavery spirit with settled aims. Under such circumstances it was easy for the Convention to miss the opportunity for a really great compromise, and to descend to a scheme that savored unpleasantly of "log-rolling." The student of the situation will always have good cause to believe that a more sturdy and definite anti-slavery stand at this point might have changed history for the better.

W.E.B. DuBois, supra note 51, at 57-58. Even if DuBois's optimism is misplaced, one should not justify the tremendous harm that was inflicted upon Africans and all humanity by stating that the "Framers had no choice." They all had a choice, but chose not to take it. All of the delegates, Northern and Southern, must be judged by the same moral standard. History has demonstrated that all of them failed to obtain an acceptable standard.

88. The criminal justice system is one example of how those consequences are still present today. The disproportionate number of Black persons who are arrested, 28%; incarcerated, 46%; given the death penalty, 41%; has lead many to label the criminal justice system as the "criminal injustice system." See Hall, The Elimination of Institutional Racism in the Criminal Justice System in 1 INSTITUTIONAL RACISM AND BLACK AMERICA 121-23 (1985). See also economic statistics, supra note 2 and 8. The Framers'
The preamble also declared that the Constitution would "insure domestic tranquility." However, the unresolved contradiction eventually brought about a civil war seventy-four years after the delegates signed their names to the document. This war extracted a high price in the form of lives, resources and pride. The contradiction which the Framers chose to ignore, had to be partially resolved on the battlefield.  

The greatest contradiction in the preamble is found in its declaration that the Constitution would secure "the blessings of liberty" for the people of the United States. "Liberty" is defined as an "exemption from slavery, bondage, imprisonment, or control of another." Clearly the "blessings of liberty" could not exist in a society that sanctioned and glorified slavery. Liberty did not exist for the African people who were held in bondage in the South, nor did it completely exist for those who were fortunate enough to live in or escape to the North. The Constitution, by embracing "liberty" and sanctioning the European/American slave trade and a Fugitive Slave provision, created an irreconcilable moral dilemma. This was a true dilemma for the Framers, because from their perspectives all "alternatives were unsatisfactory." They were not willing to give up their appeal to the ideals of individual freedom, nor were they willing to give up slavery. Their resolution was to hold on to the principle of liberty but to insure that it was allotted on the basis of one's skin color. This was not a resolution of the contradiction, but the total misappropriation of an important ideal.

In addition to the inherent inconsistency in the Constitution's use of the liberty concept, there was another contradiction between the preamble's guarantee of liberty and its promise of "domestic tranquility." The evidence is very convincing that the Framers did not intend to usher in the full exercise of liberty by all of its inhabitants, but to the contrary, wanted to guard against the full expression and quest for liberty by those who

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89. See Black Journey, supra note 26, at 119. "Because the abolitionist made a moral compromise of their position in 1787 by refusing to run the risk of creating two separate sovereigns, the slavery problem was partially solved on the battlefields of the 1860s."

90. WEBSTER, supra note 63, at 484.

91. Id. at 232. Webster defines dilemma as, "[a] situation involving choice between equally unsatisfactory alternatives." WEBSTER, supra note 63, at 317.
were being oppressed by existing social arrangement. A "strong national government" with an effective and efficient militia provided security to the various states against the possibility of "debtor uprisings" and "slave revolts." Madison in the *Federalist* letter No. 43 strongly encouraged ratification of the Constitution on this basis. He stated:

I take no [little] notice of an unhappy species of population abounding in some of the states, who, during the calm of regular government, are sunk below the level of men; but who, in the tempestuous seeds of civil violence, may emerge into human character, and give a superiority of strength to any party with which they may associate themselves.

This fear and concern was so great that a specific provision was included in the Constitution which guaranteed that the Federal Government would protect the states against "domestic violence." This provision had tremendous appeal to the Southern states who feared that the large number of African people in their midst would soon engage in a systematic quest for freedom.

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92. Alexander Hamilton begins the ninth Federalist letter by indicating that a strong national government would provide a "barrier against domestic faction and insurrection." *Federalist*, supra note 36, No. 9, at 47 (A. Hamilton). This was a direct reference to Shay's Rebellion which occurred in the summer of 1786 in Springfield, Massachusetts. A group of angry debtors and farmers led by Daniel Shay captured various courthouses and engaged in an open rebellion against tax collectors who were attempting to repossess their farms on behalf of creditors. This uprising was quashed by mercenaries who were hired by the business establishment who feared that this outburst would result in an uncontrollable attack against property rights. "The growing radicalism in the states was intimidating the propertied classes, who began to suggest that a strong central government was needed to 'insure domestic tranquility,' guarantee 'a republican form of government,' and protect property 'against domestic violence.'" *T. Dye & L. H. Zeigler*, supra note 26, at 32.

93. For a description of some of the slave revolts which occurred prior to the Constitution, see *infra*, text at notes 310-25. Those that occurred subsequent to the Constitution are found *infra* notes 332-43 and accompanying text.

94. *Federalist*, supra note 36, No. 43, at 285 (J. Madison). The Federalist version of this quote does not include the word "little." However, other versions of the statement do include this word. See *T. Dye & L. H. Zeigler*, supra note 26, at 48. The sentence makes more sense when the word little is included.

95. *U.S. Const. art. IV, § 4*. "The United States shall guarantee to every state in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence." *Id.*
and liberty. This guarantee was so important to the Southern states that they were willing to submit to commercial regulations which were contrary to their interest in exchange for this extra security. Viewed in this light it becomes clear that there was a direct conflict between the "liberty" and "domestic tranquility" precepts in the preamble. Instead of promoting liberty, the Framers intended to create a form of government which could curtail the expression of liberty by those who could upset existing economic and social arrangements. When the preamble referred to "domestic tranquility" in 1787, it was laying the foundation for the contemporary concept of "law and order." "Law and order" had the same meaning and effects on the aspirations and activities of Black people during the 1960s, as "domestic tranquility" had on their ancestors who aspired to be free in the 1780s. Thus, the contradictions in the Constitution were not only there at its inception, but have remained as a continuing

96. See C. Beard, supra note 26, at 30. He states
[t]he southern planter was also as much concerned in maintaining order against slave revolts as the creditors in Massachusetts were concerned in putting down Shay's "desperate debtors." And the possibilities of such servile insurrections were by no means remote. Every slave owner must have felt more secure in 1789 when he knew that the governor of his state could call in the strong arm of the federal administration in case domestic disturbance got beyond the local police and militia. The North might make discriminatory commercial regulations, but they could be regarded as a sort of insurance against conflagrations that might bring ruin in their train. It was obviously better to ship products under adverse legislation than to have no products to ship.

97. The concept "law and order" became very popular during the 1960s after various cities erupted in urban protest. The riots of the late 1960s in most major cities throughout the country were a quest for freedom and liberation against White domination. Like the earlier slave revolts they met with the same response. The security and protection of property rights and interests become critical and the underlying social injustice was dismissed or rationalized away. Many public officials were elected because of their stance on the issue of domestic violence.

"Law and Order" and "Get tough with Blacks" candidates triumphed in almost every city that had experienced a riot, and even in some that had not suffered racial turmoil. For the first time in a decade, Congress rejected a proposed civil-rights bill in 1968. The House of Representatives in 1967 refused to seat Harlem Congressman Adam Clayton Powell, Jr., for illegal payroll practices that Whites in Congress went unpunished for, . . . appealing to those weary of protest, Richard Nixon rode the backlash into the White House. He campaigned against open housing and busing for racial balance. He promised to slow federal efforts at school integration and to appoint only conservative justices to the federal courts. Nixon particularly solicited the support of traditional Democratic voters disgruntled with the excesses of the black struggle.

H. Sitkoff, supra note 3, at 222-23.
legacy of the document's glory and peril.

Contradictions are not inherently wrong or immoral. Many scholars have recognized that antagonistic forces are not only a staple of life, but can be very beneficial for the overall development of society. Therefore, one should not criticize the Framers because they were forced to develop a Constitution in a society that contained glaring contradictions. It is their failure to seize the conflicting forces and marshal them in the direction of moral and social advancement that exposes them to criticism. It is the effective moral resolution of conflict that advances society. The Framers’ decision to ignore and preserve the contradictions repressed the moral growth of this nation. The same “conflicting ideals” which lead to war, destruction and racial domination, were also the seeds for the development of a just society. To the detriment of society, the Framers chose the former instead of the latter.

C. The Compromise

It is expected that politicians will compromise their positions on various issues in order to achieve a desired result. Compromise in a political forum is as predictable and acceptable as flowers from an estranged spouse. The Constitution, like all political documents, is the product of numerous compromises and concessions. One of the essential prerequisites for settlement is the availability of resources or positions which the parties are willing to “sacrifice” in order to secure other advantages or to consummate the agreement. In many of the key compromises at the Constitutional Convention, the humanity and political rights of African people became the expendable item. The delegates

98. See, e.g. R. Dahrendorf, Class and Class Conflict in Industrial Society 258-72 (1959) [wherein the author refers to the extensive writings of Karl Marx and Friedrich Engels on the subject]; R. Appelbaum, Theories of Social Change (1970).

99. The concept of “conflicting ideals” has become a focal point of discussion in the legal academic community due to the scholarly efforts of those involved in the Critical Legal Studies movement. This concept basically suggest that in the structure of legal doctrine and rules there exist opposing ideals which could lead a decision maker to decide a case in diametrically different ways and still remain within the bounds of the text. Thus, there is no inherent logic in law which always produces a certain result. There are choices, and the society can develop along totally different lines depending on the ideal which is chosen. An analysis of the Constitution in the context of slavery suggests that there is considerable validity to this theory.
were eagerly willing to create this "more perfect union"\textsuperscript{100} at the expense of the lives of millions of people of African descent. The sacrifice of their lives and liberties was the glue that held this fledgling nation together. They were the "sacrificial lamb,"\textsuperscript{101} which reconciled the northern and southern delegates. The Framers willingly compromised the rights of people who had no voice in the process, yet these same men led a revolution against England because they were being "taxed without representation" in the political processes of their mother country.\textsuperscript{102} This contradiction is glaring and the compromises were clearly inhumane and deplorable.\textsuperscript{103}

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100. U.S. Const. preamble.
101. Professor Derrick Bell has described this phenomenon of "Involuntary Sacrifice" in his writings and speeches. He explains how the rights of Black people have continuously been sacrificed in order to reconcile differences between competing white groups in America. He states:

\begin{quote}
In the resolution of racial issues in America, black interests are often sacrificed so that identifiably different groups of whites may settle a dispute or reestablish their relationship. We have observed the phenomenon at work in seventeenth century Virginia, and in the settlement of the sectional differences that enabled the United States Constitution to be signed by the delegates and ratified by the states. Arguably, Chief Justice Taney tried to use the technique in his \textit{Dred Scott} opinion, but the sacrifice of black interests in that situation was so heavy-handed that it damaged many white interests as well. In the Hayes-Tilden Compromise of 1877, on the other hand, the sacrificial technique worked to perfection.
\end{quote}

\textit{See} D. Bell, \textit{supra} note 13, at 29-30.
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102. The protest slogan of the Revolution was "No Taxation Without Representation." This slogan is attributable to James Otis, a Massachusetts lawyer and Stamp Act activist. He wrote that "[n]o part of his Majesty's dominion can be taxed without their consent." Otis, \textit{The Rights of the British Colonies Asserted and Proved}, in \textit{The Democratic Spirit: A Collection of American Writings from the Earliest Times to the Present Day} 59 (B. Smith ed. 1941).
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103. From the perspective of the delegates at the Convention the compromises were acceptable. However, their action cannot be judged just from the standpoint of their subjective interest. From the perspective of the African and any reasonable human being, there is no "defense" for the Framers' immoral action. During the bicentennial year it is imperative that we judge the document and the Framers not from the perspective of those who benefited from their actions, but more importantly from the perspective of those who were victimized because of their action and inaction. W.E.B. DuBois echoed this perspective when he stated:

\begin{quote}
[1]Instead of calling the whole moral energy of the people into action, so as gradually to crush this portentous evil [slave trade/slavery], the Federal Convention lulled the Nation to sleep by a "bargain" and left to the vacillating and unripe judgment of the States one of the most threatening of the social and political ills which they were so courageously seeking to remedy.
\end{quote}


The factors and forces behind Article I, Section 9, Clause 1 of the Constitution are a classic example of the compromise process. The northern delegates, being loyal to their constituents, were strongly concerned with the "free flow of commerce" between the states. They represented the industrial businessmen of the north who wanted no restrictions on their rights to sell their products to other states. The southern delegates, being loyal to their constituents, were very concerned about maintaining the institution of slavery, including the importation of more Africans, which they felt was essential to their economic and social stability. There were delegates from the North and South who spoke out against the slave trade. However, since much of their protest was rooted in concerns other than morality and humanity they easily gave up their positions. Luther Martin, a delegate to the Convention from Maryland, later explained this compromise in uncompromising terms. He stated:

"I found the Eastern states, notwithstanding their aversion to slavery, were willing to indulge the Southern states, at least with the temporary liberty to prosecute the slave trade, provided the Southern states would in their turn, gratify them, by laying no restriction on Navigation acts . . . and after a very little time, the Commit-

104. See Black Journey, supra note 26, at 68.
105. There were certain Southern delegates who were not in favor of the continuous importation of African people, but their objections were rooted more in economic factors than in humanitarian ones. States such as Maryland and Virginia had less use for the labor of Africans than the states in the deep South. Therefore, they were engaged in the business of selling the Africans who they had imported as slaves to the states who had a greater need for them. A restriction on the future importation of Africans would greatly increase the value of those who they already possessed. This economic factor motivated the delegates to argue against the slave trade. However, they eventually were willing to compromise their economic concerns in exchange for other economic considerations (i.e., no restrictions on the free flow of commerce between the various states). See Black Journey, supra note 26, at 72, wherein he observes:

[States of the upper South wanted the international slave trade stopped as soon as possible. In 1790 there were 293,000 slaves in Virginia, 103,000 in Maryland, 107,000 in South Carolina, 29,000 in Georgia. With their depleted tobacco lands and overstocked with slaves, Maryland and Virginia were interested in highest prices for the sale of their slaves. These areas could serve as breeding places which would export their surplus blacks to the newer and more fertile slave-operated agricultural areas south and west of their frontiers.

106. Id. at 79-80.
107. Id. at 70-71.
tee, by a great majority, agreed on a report, by which the general government was to be prohibited from preventing the importation of slaves for a limited time, and the restrictive clause relative to navigation acts was to be omitted.108

The dynamic could not be clearer. No matter how offensive the slave trade was to some, they would not allow it to override their own self interest. In the process, they sentenced thousands of African people to death through the “Middle Passage.”109 This provision in the Constitution relating to the importation of African people as slaves is considered the “second major compromise”110 of the Constitutional Convention. Even though it was an “essential step toward constructing a government that delegates from every part of the country could take home to their

108. Luther Martin’s letter, in J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 373 (1941); see also W.E.B. DuBois, supra note 51, at 59; Black Journey, supra note 26, at 68; M. FARRAND, supra note 26, at 210-11.

109. The “Middle Passage” is the term used to describe the journey between Africa and America. Many scholars have described the horrors and inhumane experience of these slave ship voyages. See P. FINKELMAN, SLAVERY IN THE COURTROOM (1985). He states,

[i]t is estimated that only one out of every three potential slaves actually survived to reach America. The rest died in Africa or on board ship in what was known as the “Middle Passage.” During the middle passage slaves were crowded into the hulls of ships under conditions that led to disease and often death . . . Profits from the slave trade were so great that even with a high mortality rate those who financed the trade could expect a good return on their investment. Id. at 211.

One of the most eloquent arguments against the slave trade and vivid description of the “Middle Passage” was given by Justice Joseph Story in his charge delivered to the grand jury of the circuit court, at an October term in 1819, in Boston, Massachusetts, concerning the enforcement of a recently enacted Slave Trade Prohibition Act. (The case was not reported so there is no record of the facts or specific charges in the case). He stated:

[i]t is impossible to stand erect in most of the vessels, and in some scarcely to sit down in the same posture . . . Some go down apparently well at night and are found dead in the morning. Some faint below and die from suffocation before they can brought upon deck . . . [t]he motion of the ship rubs the flesh from the prominent parts of their body and leaves their bones almost bare . . . [Often] the whole place becomes covered with blood and mucus like a slaughter house . . . [It is] a picture of human wretchedness and human depravity, which the boldest imagination would hardly have dared to portray, and from which (one should think) the most abandoned profligate would shrink with horror.

Id. at 216.

110. See C. ROSSITER, supra note 21, at 218.
constituents,” it was not the major compromise of the summer of 1787.

In the words of Rufus King, a delegate from Massachusetts, the “3/5th provision” was the “greatest concession” made by the delegates in order “to secure the adoption of the Constitution.” This provision declared that for purposes of taxation and representation, only 3/5th of African people who were held as slaves would be counted. The Framers through the compromising process defied nature and logic by creating a new category of human beings. They were not disturbed by their violation of the laws of nature but were content in the realization that they had found a formula which would satisfy the interest of all parties involved. This compromise allowed the South to receive political benefits from the enormous number of African people who lived in its states, yet also provided the newly formed government with potential tax revenue since “direct tax-

111. Id.

112. The roots of this conflict emerged as issues of representation and taxation were considered at the Convention. The presence of Africans in the South who were held in a state of bondage gave the Southern delegates another bargaining chip which from their perspective had advantageous and disadvantageous aspects. Since the laws of the land had already created this special category for African people, which possessed some of the characteristics of personage and of property, then the Southerners could employ this dichotomy to their advantage. If the Africans were counted as persons for purposes of representation, this would greatly enhance the Southerner’s political power in Congress. The 1790 census indicated that about 94.3% of the African population that was enslaved was located in the South and only 5.7% were in the North. See Black Journey, supra note 26, at 50. This additional political strength would not be ignored by the South or the North. On the other hand, if taxation was going to be imposed on the states based on the number of its inhabitants then it would be best for the Southerners if Africans were considered property. The 3/5th compromise allowed the Southerners to “have their cake and eat it too.” This formula allowed them to enjoy a political advantage by counting the Africans which they held in bondage as persons, yet avoid some of the burden of taxation. The fact that the formula was totally inconsistent with the type of democratic government that the Framers were attempting to create did not dissuade them. Many scholars have commented on the history and wisdom of this compromise.

After the competing theories had been argued in detail, a compromise was finally arrived [at]. The Framers at the Constitutional Convention were familiar with the ratio which had been embodied by the Congress of the Confederation in the revenue amendment of 1783, where five slaves were counted as the equivalent of three free men or the slave as three-fifths of an inhabitant. Thus, the three-fifths rule for representation surfaced at the Constitutional Convention at various times.

Id. at 59. See also D. Bell, supra note 13, at 22; J.H. Franklin, From Slavery To Freedom: A History of Negro Americans 98-101 (4th ed. 1974).

113. See C. Rossiter, supra note 21, at 173.
tion” was tied to representation. This dual classification of African people as persons and property is a vivid example of the contradictions and compromises of the Framers as they attempted to avoid the great moral issue of their day. The inconsistencies and illogical reasoning become more apparent when one examines the explanations given for the compromise. James Madison in *Federalist* letter No. 54, meticulously justifies their decision. He stated: “But we must deny the fact that slaves are considered merely as property, and in no respect whatever as persons. The true state of the case is, that they partake both these qualities: being considered by our laws, in some respects, as persons, and in other respects as property.” After expounding upon the legal variables which supported the conclusion that African people were property, Madison then explained how the law had recognized and respected the humanity of these same people. It is at this point where the crisis in his reasoning began. He stated: “[T]he slave is . . . regarded by the law as a member of society, not as a part of the irrational creation; as a moral person, not as a mere article of property.” This admission that the law recognized African people as possessing the human qualities of “rationality” and “morality,” forecloses any argument that the Framers’ treatment of African people in the Constitution was based on their belief that these individuals were “inferior beings.” Since morality and rationality were deemed by the political philosophers of that period as the sources and justifications for natural rights, how could the

114. See Black Journey, *supra* note 26, at 60. This compromise turned out to be a windfall for the South since the states were never taxed nor required to finance the Federal government. *Id.* at 62.

115. *Federalist, supra* note 36, No. 54, at 354 (J. Madison).

116. *Id.* at 355 (emphasis added).

117. See *Dred Scott v. Sandford*, 60 U.S. at 407, wherein Justice Taney determined that African people were not entitled to the rights of citizenship under the Constitution because the Framers and the laws of the land considered them as “beings of inferior order.”

118. Many of the Framers were heavily influenced by the writings of John Locke who exposed a “liberty-oriented political philosophy,” based on the “natural law” or “natural rights” of man. According to this philosophy, man was a rational and moral being who should be free to exercise his will. The government was therefore required to protect the exercise of this will, and the natural rights which flowed therefrom. *See C. Rossiter, supra* note 21, at 59-60, 68, 71. It is not surprising that the “students” could not see the contradiction in this reasoning since the “teacher” got it wrong also. Locke’s philosophy permitted slavery. The “liberties” which Locke extolled only belonged to those who were
Framers justify denying these individuals their rights? The answer is found in Madison’s vision of law. Instead of confronting the contradiction in his reasoning, he chose to conclude that “[t]he federal Constitution . . . decides with great propriety on the case of our slaves, when it views them in the mixed character of persons and of property.” Madison’s “majoritarian vision” emerges clearly in the above conclusion. The socially acceptable norm that African people could be denied their humanity overrode Madison’s own admission that they were rational and moral human beings. The power of the majority to defy nature, God and humanity was firmly embraced by Madison. He conceded that this was an unnatural determination when he stated:

it is only under the pretext that the laws have transformed the negroes into subjects of property, . . . and it is admitted, that if the laws were to restore the rights which have been taken away, the negroes could no longer be refused an equal share of representation with the other inhabitants.121

It is crystal clear from the above passage that Madison’s view of law would permit it to nullify the natural rights of individuals. If the law could deny the natural rights of human beings because

119. FEDERALIST, supra note 36, No. 54, at 355 (J. Madison).
120. Madison did not totally embrace majoritarianism; he realized that the majority could easily oppress the minority. Yet he felt that in a large republican form of government, based on representational democracy instead of direct democracy this evil could be curbed. In the famous FEDERALIST No. 10 he stated
[t]he smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; . . . the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.

FEDERALIST, supra note 36, No. 10, at 60-61 (J. Madison). Maybe this form of majoritarianism makes it “less likely” that the majority will act in concert to oppress the minority, but clearly it does not make it impossible. The best evidence of this was the Framers’ action at the convention; the delegates were not precluded from invading the rights of Black people who resided in the republic at that time. Madison’s safeguards have not prevented this drama from being a recurring nightmare to the rights and interest of people of color, and other subjugated groups.
121. FEDERALIST, supra note 36, No. 54, at 355 (J. Madison) (emphasis added).
the majority deemed it appropriate, then clearly there was tremendous danger in the majoritarian form of government that Madison and others were proposing. The history of this country demonstrates that this danger was more real than imagined. Therefore, those contemporary scholars and judges who adhere to "Madison's majoritarian vision" of Constitutional law, or to an "original intent" formula of judicial review pose a tremendous threat to various groups in society.

The Framers' 3/5th compromise created a precedent for future policies and practices. They sanctioned the practice of in-

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122. Edwin Meese III, Attorney General of the United States adheres to both of these ideas and has been very outspoken about Supreme Court decisions which he feels do not adhere to the "original intent" of the Framers. In a speech before the Washington, D.C. Chapter of the Federalist Society, Lawyers Division, on November 15, 1985, he stated: Constitutional adjudication is obviously not a mechanical process. It requires an appeal to reason and discretion. The text and the intention of the Constitution must be understood to constitute the banks within which constitutional interpretation must flow. As James Madison said, if "the sense in which the Constitution was accepted and ratified by the nation . . . be not the guide in expounding it, there can be no security for a consistent and stable government, more than for a faithful exercise of its powers."

See The Federalist Society, The Great Debate: Interpreting Our Written Constitution 36 (Occasional Paper No.2 1986) [hereinafter The Great Debate]. In another speech before the American Bar Association in Washington, D.C. on July 9, 1985 he stated, "[I]n my opinion a drift back toward the radical egalitarianism and expansive civil libertarianism of the Warren Court would once again be a threat to the notion of limited but energetic government. What, then, should a constitutional jurisprudence actually be? It should be a Jurisprudence of Original Intention." Id. at 9. What the Attorney General and others fail to comprehend is that it was this so-called "radical egalitarianism" of the Warren Court which allowed this country to at least approach the principles which the Framers espoused. The Brown decision of the Warren Court was the first significant vindication by the Court of the rights of those who had been subjugated by the law and by a jurisprudence of "original intention." See Brown v. Board of Educ., 374 U.S. 483 (1954). The Constitution had to be "expanded" in order to serve the needs of the entire society and especially those who had been the victims of this "energetic majoritarian government." There are other prominent scholars who adhere to the principle of "original intent." In a speech before the University of San Diego Law School, November 18, 1985, Judge Robert H. Bork stated, "[t]he only way in which the Constitution can constrain judges is if the judges interpret the document's words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments." The Great Debate, id. at 45.

123. The fourteenth amendment precludes any strict adherence to the "original intent" and vision of the Framers. Yet these ideas lead to a very strict and neutral interpretation of the Constitution which results in a preservation of the status quo. Since the past injustices which the fourteenth amendment was intended to correct are still present, theories that tend to preserve present social, economic and political arrangements are a serious threat to the rights and aspirations of Black people and other people of color.
voluntarily sacrificing certain parts of humanity in exchange for what they felt was in the best interest of the whole.\textsuperscript{124} This practice has become a pattern in the arena of race relations in this country.\textsuperscript{125} The interests of Black people have constantly been offered as a sacrifice by individuals and groups on theories of political expediency, economic efficiency\textsuperscript{126} and white superiority.\textsuperscript{127} This approach to compromise and its numerous negative consequences are attributable, at least in part, to the beliefs and actions of the Framers of the United States Constitution.

\section*{III. An Evaluation of the Framers: Praise or Condemnation}

This brief excursion into various provisions of the Constitution and the writings of the Framers revealed numerous injurious compromises and contradictions. This is by no means a definitive analysis of the Constitution, yet it does provide a basis for certain general assessments. If one could somehow remove the presence of millions of Africans and Native Americans from the history pages, the evaluation given to the Framers would be impressive.\textsuperscript{128} These men came together with various competing interests and backgrounds and created a framework of government which has lasted for two hundred years and which enshrined some important ideals and principles.\textsuperscript{129} Nevertheless,

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\item[124.] Delegate Ellsworth from Connecticut in defending the continuous involvement of the South in the slave trade reminded his Northern brethren that “what enriches a part enriches the whole.” See W.E.B. DuBois, supra note 51, at 56. Ellsworth and others failed to consider the opposite side of his axiom: “what stains a part stains the whole.”
\item[125.] See note 9, supra.
\item[126.] See W.E.B. DuBois, supra note 51, at 56. Economic efficiency was given as a reason for the North’s acquiescence to the slave trade. Rutledge of South Carolina reminded his Northern delegates that if they “consult their interest, they will not oppose the increase of slaves, which will increase the commodities of which they will become the carriers.” Id.
\item[127.] Many of the segregation laws in the South served as an appeasement for poor Whites. Unable to secure real economic advantages from the established order, they settled for the hollow belief that they were “better-off” than Black people, even those who earned and achieved more than them. See D. Bell, supra note 13, at 39.
\item[128.] Clearly, their grade should also be drastically reduced by the position that they took with regards to the rights of women. Just as the rights of African people were relegated to an inferior position under the Constitution, so were those of the feminine gender. An exhaustive analysis of this moral defect is also a desirable task for this bicentennial year.
\item[129.] Despite the weaknesses in the original Constitution, there are important ideals
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their actions cannot be measured and evaluated in a vacuum. They must be responsible for their failures as well as their successes. It has been suggested that it is unfair to judge an entire Constitution and its drafters on the basis of one weakness. When the travesty inflicted upon African people under the sanction of the Constitution is considered, the above argument loses all of its force. The action of the Framers was not de minimus. It was not a harmless error which could be easily corrected at a later stage in history. The error was fundamental and universal. It related to the essence of the Framer’s declarations and therefore must be a deciding factor in any deliberation.

From the perspective of those who attended the Convention the Framers did an outstanding job. The words of Benjamin Franklin eloquently express the above sentiment:

I doubt too whether any other Convention we can obtain may be able to make a better Constitution. For when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an Assembly can a perfect production be expected? It therefore astonishes me, Sir, to find this system approaching so near perfection as it does . . . .

Contrary to Franklin’s admonition, the dominant prejudice of the time did not put the Framers at odds with each other.

and principles contained therein. Freedom of Speech, Separation of Powers, Safeguards against Self-incrimination, and many other rights were created and preserved by the Framers. Unfortunately, certain groups have had a more difficult time securing and exercising these rights.

130. The impact that slavery and the slave trade had on African people and the African continent is immeasurable. The economic, cultural, educational and human deprivation which occurred is unsurpassed in the annals of history. In addition, the psychological and spiritual injuries were also overwhelming and have not been fully documented or explored. The millions of lives lost in the “middle passage” and the horrors of this experience is alone enough to justify the condemnation of all who participated in it or sanctioned its continuation. The long and devastating history of slavery, segregation and discrimination in this country makes it impossible to categorize the Framers action as a minor incident.

131. That essence can be found in the language of the Declaration of Independence, dedicated to the proposition that “all men are created equal.” The Declaration of Independence para. 2 (U.S. 1776).

132. See Black Journey, supra note 26, at 111 (emphasis added).
Regardless of their political, geographical and economical differences, they all agreed on one thing: the inherent superiority of the white race. Even those who opposed slavery did not view African people as equal to them, but objected to their subjugation on humanitarian, economical and political grounds. The Framers had recognized the humanity of African people but still felt compelled to elevate themselves beyond humanity. This prejudice blinded them to the fallacy of their own actions and turned what should have been praise into condemnation. Some attempted to blunt this charge by claiming that morality was not an acceptable standard by which to judge the Framers. Congressman Smith of South Carolina stated at the first session of Congress: “When we entered into this Confederacy, we did it from political and not from moral motives.” Though this is a persuasive defense on behalf of the Framers, it is not dispositive of the issue. It is clear from the proceedings of the Convention and other writings of the time that the formation of a strong national government was the major priority and motivation of the delegates. Yet, one cannot dismiss morality from law that easily. Especially when those who defend or praise the Constitution and its Framers invoke adjectives which have heavy moral overtones. More importantly, a constitution is more than a political compact, it is the embodiment of the sacred and cherished principles of a society. Therefore the Constitution of the United States should be judged according to this standard.

One of the most eloquent defenses of the Framers’ decisions regarding slavery is provided by Clinton Rossiter, author of the classic book *The Grand Convention*. He stated:

Most who criticize the Framers for not acting boldly in

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133. *Id.* at 117.
134. *Id.* at 111.
135. There is strong support for this distinction in the legal literature. The Positivist theory of jurisprudence accept the notion that law should be judged not by its connection to some moral standard, but by the mere fact that it is law.
136. A contemporary writer captures this grand legacy when he states, “[t]o a scripturally-based people, it [the Constitution] has been a sacred text. John Marshall, the great Supreme Court Chief Justice, spoke for many Americans when he described the Constitution as having sprung from a historically unique moment, *guided by a force larger than its authors.*” See Higgins, *Motherhood, apple pie and the Constitution*, The Boston Globe, Sept. 13, 1987, (The U.S. Constitution At 200: Conflict And Consensus), at 15 (emphasis added).
this matter [slavery] see them as men they never were or could have been—audacious heralds of a social revolution—rather than as the men they were—prudent builders of a nation. Both the angry men of the North and troubled men of the South, who went along with the four offensive clauses and the silences of the Constitution in defiance of principle and disregard of conscience, were blocked by a whole array of circumstances—inertia, tradition, sectionalism, poor timing, lack of imagination, the preferences for "essential principles only," and above all, their passion for nationhood—from striking for the emancipation of a misunderstood, and, for that matter, feared description of men.  

Instead of condemning the Framers, Rossiter passionately suggests that these men did as much as they were humanly capable of doing. The Framers did not come together in 1787 to challenge existing institutions, redistribute wealth, nor to "make the world over." They came together to "make their corner of the world secure."

Rossiter's argument overlooks the fact that this difficult problem was not thrust upon the Framers, but was one which many of them helped to create. These misunderstood and feared men which Rossiter spoke of did not voluntarily show up in the American colonies. African people were feared because the Framers and the society were keenly aware of the injustice and inhumane treatment that had been leveled against them. As

137. See C. Rossiter, supra note 21, at 268 (emphasis added).
138. Id.
139. Id.
140. There is overwhelming evidence that Africans did travel to the American continent long before Europeans arrived. See, e.g., I. Van Sertima, They Came Before Columbus (1976). However, those who were the focus of Rossiter's comments were forcibly brought against their will.
141. This awareness and the inevitable consequences were reflected in Luther Martins' summary of the proceedings of the Convention, which was delivered to the Maryland Legislature on November 29, 1787. While describing the opposition to the clause permitting the importation of Africans who were enslaved, he stated:

   It was said, that we had just assumed a place among independent nations, in consequences of our opposition to the attempts of Great Britain to enslave us . . . that now we scarcely had arisen from our knees, from supplicating [God's] aid and protection, in forming our government over a free people, a government formed pretendedly on the principles of liberty and for its preservation—in that
Thomas Jefferson stated, "[i]ndeed, I tremble for my country when I reflect that God is just; that his justice cannot sleep forever . . . ." This problem which existed in the Framers' "corner of the world" should not be dismissed because they were not willing to confront it.

Furthermore, Rossiter's defense de-values the lives of African people. Their suffering, crucifixion and death becomes a necessary price that had to be paid in order to build the nation. This attitude is a classic example of white supremacy disguised as political practicality. The argument expressly negates the fact that the Framers' decision sanctioned and condoned the killing of millions of human beings. In addition, the fact that certain sectional and regional interest would have fought against the ratification of a constitution which abolished slavery does not excuse the Framers. The criticism of the Constitution's stance on slavery is not a criticism of the fifty-five men who assembled in Philadelphia. It is a condemnation of the values, customs and ideals of the entire nation. The Framers, as the society's representatives to the Convention, have received the thrust of the cri-

government, to have a provision not only putting it out of its power to restrain and prevent the slave-trade, but even encouraging that infamous trade, by giving the States power and influence in the Union, in proportion as they cruelly and wantonly sport with the rights of their fellow creatures, ought to be considered a solemn mockery of, and insult to that God whose protection we had implored, and could not fail to hold us up in detestation, and render us contemptible to every true friend of liberty in the world. It was said, it ought to be considered that national crimes can only be, and frequently are punished in this world, by national punishments.

See M. FARRAND, supra note 26, at 211. A better statement for the development of a general collective theory of redress can not be found. Luther was clearly stating that the wrong was not an individual wrong but a national violation. It was private as well as public. Thus any remedy to address this problem should not focus on individual acts of discrimination, nor on specific victims. The entire governmental system, including all citizens, who through their respective representatives, created and ratified this national deprivation of life, liberty and property are responsible for compensating the "collective victims," and specific individuals. Contemporary theories of affirmative action must have at their base the above rationale in order to be effective.

142. See Black Journey, supra note 26, at 112. The remainder of Jefferson's statement reads:

[What incomprehensible machine is man! who can endure imprisonment, and death itself, in vindication of his own liberty, and the next moment be deaf to all those motives, whose power supported him through his trial, and inflict on his fellow men a bondage, one hour of which is fraught with more misery than that which he rose in rebellion to oppose. . . .

Id.
tique. Yet the critique, if understood, is aimed at all sections and regions of the country, regardless of whether they had abolished slavery in their particular state. Their representatives, along with the representatives from the other states, allowed a nation to come into existence with one of the greatest crimes against humanity hanging over its head. Slavery was not just a southern problem, it was a problem for the entire nation. Ros- siter’s defense only provides more evidence that the American Revolution did not strike a blow for true freedom and equality, but only cleared the way for the establishment of an “aristo-cratic government.”

There have been numerous critics of the Constitution and the founding fathers, but few were as eloquent and prophetic as William Lloyd Garrison. He stated:

The Union that can be perpetuated only by enslaving a portion of the people is “a covenant with death and an agreement with hell” and destined to be broken in

143. See C. Rossiter, supra note 21, at 270; see T. Dye & H. Zeigler, supra note 26, at 27-56.
144. Some of them include:
Frederick Douglass:
The Constitution of the United States. What is it? Who made it? For whom and for what was it made? Is it from heaven or from men? . . . . We hold it to be a most cunningly devised and wicked compact, demanding the most constant and earnest efforts of the friends of righteous freedom for its complete overthrow. It was conceived in sin, and shapen in inequity.
Black Journey, supra note 26, at 113.
Sojourner Truth:
Now I hear talk about the Constitution and the rights of man. I come up and I take hold of the Constitution. It looks might big. And I feel for my rights. But they aren’t there. Then I say, “God, what ails this Constitution?” And you know what He says to me? God says, “Sojourner there’s a little weevil in it.”
See V. Ortiz, Sojourner Truth, A Self-Made Woman 67-68 (1974). The major critics of the Framers when the Constitution was drafted were the Anti-Federalists. They were opposed to the amount of power which was given to the federal government under the Constitution. They felt that the model for government should be the “old town meeting,” were citizens had more direct input into the operation of government. The anti-federalists were also concerned about the role that commercial development played in the decision to abandon the articles of confederation. The model the Framers offered was inconsistent with the Revolution, according to the anti-federalist, because it removed the people from the political process. See Constitutional Law, supra note 77, at 5-6; For an exhaustive analysis of the anti-federalist position, see H. Storing, What the Anti-Federalist Were For (1981). Though the anti-federalist criticized the 3/5th compromise in the Constitution and the provision that provided protection to the slave trade, these issues were not the primary focus of their critique.
pieces as a potter’s vessel... The Republic that depends for its stability on making war against the government of God and the rights of man, though it exalt itself as the eagle, and set its nest among the stars, shall be cast into the bottomless deep, and the loss of it shall be a gain to the world. There must be no compromise with slavery—none whatever. Nothing is gained, every thing is lost, by subordinating principle to expediency... The apologist for oppression becomes himself the oppressor. To palliate crime is to be guilty of its perpetration. To ask for a postponement of the case, till a more convenient season, is to call for a suspension of the moral law, and to assume that it is right to do wrong, under present circumstances.145

“A covenant with death, and an agreement with hell” is the first part of Garrison’s statement which deserves close attention. This phrase could be easily dismissed as flowery exaggerated rhetoric of an overly enthusiastic abolitionist. To the contrary, Garrison’s words have proven to be an accurate precursor of American history. When one reflects on the numerous lives that have been lost because of racial oppression, racially motivated violence, and a civil war, it is clear that the “founding fathers” were signing death certificates when they penned the Constitution.146 Certainly, Black people have been the primary victims of this compact with death,147 yet Whites have also been forced to pay the ultimate price for the Framers’ agreement.148 The Framers refusal to give protection in the Constitution to the Africans in

145. See Black Journey, supra note 26, at 114.
146. For a brief overview of the history of racially motivated violence in America, see D. Bell, supra note 13, at 207-09. See also C. Cobb, Racially Motivated Violence in America, United Church of Christ Commission for Racial Justice, New York (1980).
147. D. Bell, supra note 13, at 207-209.
148. Many whites have also lost their lives because of the existence of racial domination in this country. Some, like John Brown, who led a slave revolt in Harper’s Ferry, Virginia, sacrificed their lives to bring about change. Others like, Goodman and Schwerner, two civil rights workers in Mississippi, were killed because they chose to align themselves with the cause of racial justice. Many others lost their lives on the battlefield during the Civil War as this country struggled to resolve its major contradiction. Throughout the history of this country many White Americans have had to make the supreme sacrifice in order to bring attention to the lingering injustices of the “founding fathers” and their “posterity.” For additional incidents and victims, see infra notes 406, 407, 415.
their midst was in essence the signing of their death warrants. Black people in America were made vulnerable to any violent and inhumane act which Whites could conceive. Their vulnerability was even recognized and sanctioned by the Supreme Court in *Dred Scott*, when Justice Taney pronounced that Black people "had no rights which the White man was bound to respect." This custom earlier invoked by the Framers of the Constitution became a license for many to impose the ultimate punishment of death without any subsequent retribution.

The easiest way to support the second part of Garrison's prediction (i.e., an agreement with hell) would be to cite the conditions that Black people have been forced to live under in this country. "Hell" has been frequently invoked by African American people as a metaphor to describe their feelings of being Black in a country whose laws and customs attributed only negative connotations to that color. Historical evidence strongly suggest that their usage of this metaphor is not fanciful exaggeration. Yet Garrison's words have a much deeper meaning than just the misery that Black people would encounter in America. Garrison was predicting that the entire nation would be subjected to forces of misery, divisiveness, fear and discomfort. The country, not just people of African descent, has suffered greatly because of the Framers' decisions. Racial strife, division, and confusion have constantly threatened the tranquility and stabil-

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149. *Dred Scott v Sanford*, 60 U.S. at 407. This statement by the Court has generated enormous criticism. There is overwhelming evidence that Black people did have rights at the time the Constitution was enacted. The colonial laws of the various colonies provided protection to "free Black persons," and some protection was afforded even those in slavery. For a full discussion of this point, see D.E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (1978). This statement by Justice Taney, though literally and legally incorrect, expressed the general sentiments and attitudes of the society. A review of the history of crimes committed against Black people is strong support for Taney's proposition. Furthermore, this proposition had to be at the heart of any decision which precipitated and sanctioned the capture and enslavement of African people. Clearly the Framers were operating on this proposition when they wrote the Constitution.


151. One of the songs produced by the Nation of Islam at two separate points in its history was entitled; "A White Man's Heaven is a Black Man's Hell."

152. *See supra* notes 2 and 8.

153. *See supra* notes 147 and 148.
ity of this nation. The country's survival is due more to the humanity of those oppressed than to the virtues and strengths of the Constitution. Hell does not only refer to the physical and psychological conditions which Black people have been subjected to in America, but is also an appropriate depiction of the state of mind of many Whites who have been nurtured on the hollow belief of white superiority, only to have their self-concept shattered when confronted with a Black person whose talents and abilities serve as an automatic destruction of that myth. Furthermore, hell describes a contemporary fear that some Whites have faced when confronted with the notion that their children would have to go to school with Blacks, or even

154. American history is filled with incidences of riots, civil disobedience, sit-ins, boycotts, demonstrations, marches, wars, police brutality, and individual acts of violence which were produced by the unjust racial stratification within the society. See H. Sitkoff, supra note 3; V. Harding, supra note 3; D. Bell, supra note 13.

155. This point is supported by the fact that the Constitution and the Supreme Court were the sources of injustice, inequality, and civil disobedience for close to two centuries. It was not until 1954 that any major changes were made in the overall legal status of Black people in America. How does one account for the one hundred and sixty seven years of limited Constitutional advances in behalf of Black people? What type of patience, humility and humanity would a people have to have in order to "wait" that long without resorting to extreme, though justifiable forms of violence? See V. Harding, supra note 3, at 327. A classic example of the humanity of African people is found in the following passage which was drafted by delegates at the Black Convention in Charleston, South Carolina in 1865, following the emancipation of African people from slavery.

As American chattel slavery has now passed forever away, we would cherish in our hearts no malice nor hatred toward those who were implicated in the crime of slaveholding: but would extend the right hand of fellowship to all; and would make it our special aim to establish unity, peace and brotherhood among men. Id. at 327. The non-violent civil rights movement of the 1950s and '60s is another example of this tremendous capacity to "turn the other cheek." Still, it has been often stated that it was the constitutional form of government in America that was responsible for the stability and survival of the nation. However, even those who don't adhere to the "unlimited capacity to suffer" thesis, realize that the Constitution alone has not ensured the nation's survival. Leland Baldwin writes:

[Indeed, Americans have been a little too smug about having experienced only one serious revolution in almost two centuries. The fact is that the abundant resources of this continent have enabled the government to buy off the discontented, at first with land and now with welfare payments and subsidies. It may be suggested that this, even more than the virtues inherent in the Constitution, has ensured peace and more or less orderly progress. See L. Baldwin, supra note 34, at 17.

156. The fierce resentment and anger that was expressed when various educational institutions were finally integrated supports this idea. The reaction by Whites to the integration of public schools in Little Rock, Arkansas, and Boston, Massachusetts, and of universities in Mississippi and Alabama can easily be described as periods of "torment
worse, marry one. The fact that many Whites do not feel safe in certain segments of various cities and must go to extreme lengths to protect themselves from the "undesirable elements" of the society is a manifestation of this miserable fate which Garrison predicted. The conditions of Black people which were sanctioned by the Framers two hundred years ago has become a thorn in the side of White America and a burden to the country's economy. The self-righteous critics must remember, as they bemoan the Black family, governmental social programs, and the timidity of the criminal justice system; that the same "founding fathers" whom they praise should be the object of their condemnation. Many of the Framers personally initiated and benefited from this problem. Furthermore, they had the opportunity to resolve this critical social injustice centuries ago, but instead "asked for a postponement of the case, till a more convenient season." That season has still not arrived. America

157. This is seen by the recent moves to curtail, if not eliminate, various social programs. This point is demonstrated in the significant curtailment of various governmental programs. Programs which were initiated to correct many of inequities that Black people, the poor and other people of color confronted in this country have been reduced in the name of new economic theories. Former Speaker of the House, Tip O'Neill, commented about the severity of these cuts in his recent book, MAN OF THE HOUSE. He states:

[A]mericans were hurt through cuts in various social, health, and education programs. Goodbye to public service jobs under the Comprehensive Employment Training Act. . . . Medicare payments were lowered. . . . Child nutrition programs were slashed. . . . Unemployment compensation was reduced. . . . A million food-stamp recipients were struck from the rolls, and the rest had their benefits cut.

See The Boston Globe, Sept. 13, 1987, (Magazine) at 12, 59 (wherein excerpts from Tip O'Neill's book appear). Though these reductions affected people across the spectrum, their impact on Blacks was significant.

158. This accusation is supported by numerous authorities. The following quote is a very balanced description of the Framers' involvement in slavery and the slave trade.

We have to take men in their time. Some there were in the South, and in the Constitutional Convention, who deplored slavery . . . But most were persuaded by their selfish interest . . . Numbers of states to the north had slaves, and northern shipowners and ports were heavily engaged in the slave trade. In picturing the case to ourselves today we are helped by remembering that George Washington, the president of the convention, was the owner of many slaves. We know his integrity, but we are compelled to include, in his noble nature and correct conduct, his steady practice of holding human beings in bondage, profiting by their unrequited labor, buying and selling them at will.

See B. Mitchell & L. Mitchell, supra note 23, at 75.

159. See Garrison's quote, supra, text at note 145.
still refuses to correct the sins of the fathers, by providing complete justice to the thirty million descendants of the Africans whom their fathers constitutionally condemned to hell. Ironically, the long delay makes it even more unlikely that justice will occur. Time has led many to believe that the wrong happened so long ago that no one today should be held responsible. Yet Garrison’s admonition still rings true and this state of misery, though more subtle in form, appears to be destined to remain in America as it continues to extract high prices.

Another portion of Garrison’s statement, which was very prophetic, is his warning that the country was “destined to be broken in pieces as a potter’s vessel.” The clearest proof of this was the Civil War. Seventy-four years after the Constitution was signed, the Union was torn apart by a bloody and devastating war. Many of the same states that swore total allegiance to the Union, seceded. At the root of their secession was the issue of slavery; the same issue which served as the impetus for Garrison’s warning. Americans who once lived, worked and studied together were now divided into factions; committed to the destruction of each other. The Civil War not only divided the Union, but it divided families. Like before, Garrison’s words rang true to form. It is also necessary to appreciate and understand the esoteric meaning behind his warning. Garrison, on a very intuitive and deep level, knew that unless the issue of racial oppression was completely and satisfactorily resolved, there could never be one America. There would always be a dividing line which would separate the country into “pieces.” As W.E.B. DuBois reaffirmed a century later, the issue of the twentieth century is the color-line. The famous “Kerner Report” poignantly made this point when it concluded in 1968 that the nation “[was] moving toward two societies, one black, one white—separate and unequal.” Despite the integration phe-

160. Id.
162. Full title of this report was, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDER (1968). This was one of the most comprehensive studies of the major urban riots of the 1960s. It gave a detailed discussion of the social forces and factors which caused the disruptions and offered recommendations for avoiding them in the future.
163. Id. at 1. The report also indicated the cause of this division. It stated, “... white society is deeply implicated in the ghetto. White institutions created it, white in-
nomenon of the 1960s and '70s, America is still a divided nation. Significant numbers of Black people and other people of color are still cordoned-off into certain segments of all major cities and many small ones. Not only is there still physical separation, but more importantly there are deep psychological, cultural, political, economic and educational divisions and disparities. These divisions are not the type that one would normally attribute to a pluralistic society. These divisions are much deeper, and are attributable to this country's long history of sanctioning and promoting white supremacy, "under law." The potter's vessel is clearly in pieces, even in nineteen hundred and eighty-seven. During this bicentennial year, significant numbers of Black people and other people of color in their most honest moments of reflection will silently paraphrase Frederick Douglass: "This [Bicentennial] is yours, not mine . . . the sunlight that brought light and healing to you, has brought stripes
and death to me."  

A. Redemption

Even those who agree that Garrison’s predictions were accurate, contend that the Civil War Amendments rehabilitated the country. If the “founding fathers’” original compact could be characterized as an “agreement with hell,” then the passage of the thirteenth, fourteenth and fifteenth amendments should be viewed as their redemption. After fighting a bloody war, in part over the issue which the delegates to the Federal Convention of 1787 failed to address and correctly resolve, the nation was ready to heal its wounds and redeem itself from the sins of the fathers. However, just as the process of compromise prevented the Framers of the Constitution from effectively avoiding the sin, so did it prevent the members of Congress from effectively redeeming the Constitution. Yet, on its face the Constitution no longer carried any signs of the blemishes of slavery and inequality. Furthermore, the history, purpose and

169. F. DOUGLASS, The meaning of the Fourth of July to the Negro; 1852, in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS (P. S. Foner ed. 1950). The original quote read: “This Fourth of July is yours, not mine . . .” Id. at 189.


171. Redemption is defined as “deliverance from the bondage and consequences of sin . . .” WEBSTER, supra note 63, at 709 (emphasis added).

172. Though slavery was the central issue of the Civil War, there were strong economic and political and geographical factors that contributed to this dispute.

173. The fourteenth amendment was drafted in such general and ambiguous language that it resulted in more protection for corporations than for Black people recently relieved of bondage. See D. BELL, supra note 13, at 33. Professor Bell emphasizes the effects of compromise at this juncture in history when he states, “[t]he Fourteenth Amendment, unpassable as a specific protection for black rights, was enacted finally as a general guarantee of life, liberty, and property of all persons. Corporations, following a period of ambivalence, . . . received more protection from the courts than did blacks.” Id. at 33.

174. Article I, section 2, clause 3 (3/5th provision) was changed by section 2 of the fourteenth amendment; article IV, section 2, clause 3 (fugitive slave provision) was superseded by the thirteenth amendment; article I, section 9, clause 1, (importation of Africans as slaves) was already obsolete due to federal legislation. See W. E. B. DU BOIS, supra note 51, at 245-46 for a list of the various federal laws introduced and passed by Congress concerning the slave trade.

175. See Kinoy, The Constitutional Right of Negro Freedom, 21 RUTGERS L. REV. 387 (1967). Professor Arthur Kinoy in his classic essay demonstrates how the purpose and history of the Civil War Amendments were geared solely and primarily to guarantee equal citizenship to Black people. He states:

The simple fact of the matter is that the main thrust of the Thirteenth, Four-
language of the Amendments created sufficient legal power to make freedom a reality for African people recently released from bondage. To insure that the redemption process was effectuated, Congress passed various Civil Rights statutes.\textsuperscript{77}

Nevertheless, the change which many had envisioned and hoped for did not occur. After a brief period of "constitutional enlightenment"\textsuperscript{78} in a country struggling to outgrow the dark

\textsuperscript{77}See also Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), wherein the Supreme Court for the first time clearly articulated the meaning and purpose of the thirteenth, fourteenth and fifteenth amendments. The Court stated, after an extensive discussion of the events leading up to the passage of the amendments, that in light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; \textit{we mean the freedom of the black race to this status of freedom was the simple and central objective of the Reconstruction Amendments.}

\textsuperscript{78}See infra notes 370-77; In more recent years, these same amendments which the Court in Slaughterhouse boldly ordained as the purveyor of Black rights, have been frequently and forcefully used to thwart the appeals of Black petitioners. See, e.g. Bakke, 438 U.S. 265; Wygant v. Jackson Bd. of Educ. 476 U.S. 267 (1986).


\textsuperscript{78}During this period, which is referred to as Reconstruction, there were significant societal advancement. With the protection of federal troops, who were stationed throughout the South, Black people began to receive some of the rights and protections the Constitution provided to all other citizens. Many were elected to serve in the state and national government. Education was made available in a manner that had never
ages\textsuperscript{179} of law, another part of the legal trilogy began to unfold. The Supreme Court, through numerous decisions\textsuperscript{180} and political involvement,\textsuperscript{181} returned the nation to the "bottomless deep"\textsuperscript{182} of legalized racial oppression, and any hope of constitutional redemption was again postponed for another century.\textsuperscript{183} The Court not only failed to uphold the clear meaning and purpose of the Civil War Amendments, it developed doctrines and ideas\textsuperscript{184} existed before, and some "freedmen" were able to acquire land and engage in economic development. See D. Bell, supra note 13, at 34-38. [B]lack literacy increased from 10 percent in 1860 to 30 percent . . . the number of Black children attending school increased from two to 34 percent . . . no Black man held public office in 1867, but by 1870 at least 15 percent of all Southern public officials were Black . . . Blacks were clearly at the bottom of the economic ladder, but the 20 percent who did own land represented an increase from 0 in 1865, greater than in any comparable period of American history. \textit{Id.} at 38.

\textsuperscript{179} The use of this concept, "dark ages" to depict a period not known for progress, advancement and human achievement is a classic example of how the language and culture has been imbued with the ideas of white supremacy. Those things which are considered negative and undesirable are often assigned "dark" or "Black" characteristics; (i.e., Blackmail, Blacksheep of the family, devil food cake (dark), dark ages, black devil, dark day, etc.); whereas those things that are good and acceptable are assigned white or light characteristics, (i.e., white angel, angel food cake (white), little white lie, etc.).

\textsuperscript{180} See e.g., \textit{Civil Rights Cases}, 109 U.S. 3 (1883); United States v. Cruikshank, 92 U.S. 542 (1875); United States v. Harris, 106 U.S. 629 (1883); Plessy v. Ferguson, 163 U.S. 537 (1896); Cumming v. Richmond County Bd. of Educ. 175 U.S. 528 (1889); Berea College v. Ky., 211 U.S. 45 (1908); United States v. Reese, 92 U.S. 214 (1876). There were cases during this period where the rights of Black people were vindicated by the Court. See \textit{Strauder v. W. Va.}, 100 U.S. 303 (1880); \textit{Ex parte Virginia}, 100 U.S. 339 (1880); \textit{Ex parte Yarbrough}, 110 U.S. 651 (1884).

\textsuperscript{181} One of the interesting points in the history of the Supreme Court is Justice Joseph P. Bradley's involvement in the Hayes/Tilden Compromise of 1877. Through the process of political compromise, the Republican party agreed to withdraw federal troops from the South if the disputed presidential election of 1876 was determined in their favor. To pass on the disputed votes Congress created an electoral commission consisting of five Senators, five Representatives and five Supreme Court Justices. There is strong evidence that Justice Bradley cast the deciding vote in the compromise decision which gave Rutherford Hayes (Republican) the White House and gave Democrats (primarily Southerners) the "South" back. Hayes fulfilled his promise once he took office and withdrew the federal troops from all Southern states. This brought an end to Reconstruction, reversed the gains that Blacks were beginning to make and removed the only source that could protect their newly gained constitutional rights.

\textsuperscript{182} This was part of Garrison's warning about the future of the Constitution. See supra, text at note 145.

\textsuperscript{183} The postponement lasted until 1954 when the Supreme Court finally began to enforce the Constitutional rights of Black people in a significant and sweeping manner. See \textit{Brown v. Board of Educ.}, 347 U.S. 483 (1954).

\textsuperscript{184} The Civil Rights Cases, 109 U.S. 3 (1883) were the primary sources for these concepts and ideas. In holding that the Civil Rights Act of 1875 was unconstitutional,
which virtually paralyzed the Constitution and Congress for years. Many of these concepts have become fundamental parts of modern constitutional theory and still serve to impede the progress of racial reform. Even though the structural changes that occurred in the Constitution were intended to cleanse it and society of all evidence of racial subordination, it appears that the sins of the fathers remained through the generations.

One could conclude from this additional glance at the development of Constitutional law that it was very deficient in its understanding and embodiment of the sacred principles of a democratic society. Though it made glowing references to some of these ideals its structure and application were diametrically opposed to them. We cannot praise the Framers for implanting these concepts into the country's foundation or history. We must look to other events and individuals for these gifts. These processes, legal and otherwise, provided the foundation for an expansive understanding and interpretation of the Constitution. If modern judges are limited to the vision and wisdom of the Framers, then they are trapped by a document which contained a distorted perception of liberty and equality. If one accepts the benefits of the Framers, she/he must also accept their burdens. The only way out of this predicament is to utilize one of the Framers' major benefits as a tool for eliminating the burdens. The flexibility and adaptability of the document the Framers

Justice Bradley developed and propagated doctrines such as "state rights" (id. at 13), "state action" (id. at 11), and "reverse discrimination" (id. at 25). These concepts in various forms are still used by the Court as barrier against the full enforcement of the general purpose of the fourteenth amendment. This decision can also be credited for suggesting that civil rights laws could be valid if they were based on the Commerce Clause. Id. at 18. This became the major strategy for congressional action during the 1960s when various civil rights laws were passed. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252 (1964). All of the above ideas demonstrates the tremendous influence of this case.


186. The ideas of Judicial Review and Constitutional Amendments are the two primary characteristics of the Constitution which allow for change and developments. This aspect of the Framers' vision has been very instrumental in the struggle to obtain and secure equal rights for all citizens.
created allows for the injection of a “new meaning” a meaning which reflects a true and accurate understanding of liberty and justice, and one which embraces the hopes and aspirations of all the country’s inhabitants.

IV. CONSTITUTIONAL TRANSFORMATION

When the history books are written in future generations, the historians will have to pause and say, “There lived a great people—a black people—who injected new meaning and dignity into the veins of civilization.” This is our challenge and our overwhelming responsibility.

Dr. Martin Luther King
Montgomery Bus Boycott

187. This view is soundly rejected by many lawyers and legal scholars today. The Attorney General of the United States, Edwin Meese III, devotes attention to this idea of “new meaning,” yet dismisses it as an improper use of law. He stated in a speech before the American Bar Association, July 9, 1985:

[I]t is our belief that only “the sense in which the Constitution was accepted and ratified by the nation,” provide[s] a solid foundation for adjudication. Any other standard suffers the defect of pouring new meaning into old words, thus creating new powers and new rights totally at odds with the logic of our Constitution and its commitment to the rule of law.

THE GREAT DEBATE, supra note 122, at 10 (emphasis added). Without the “pouring of this new meaning,” which Meese abhors, the nation would be tied to hollow words and concepts which could not satisfy the real purposes of the rule of law: the establishment of justice and an ordered way of life. The Framers’ “old words” and their actions haunt the nation today. The wisdom of the Framers does not lie in their choice of petrified concepts which bind the nation to their era and their sins, but in their choice of dynamic ideals that contained the potential to develop a strong nation, that could one day redeem the “fathers” from their sins.

188. H. SITKOFF, supra note 3, at 50 (emphasis added). This statement is part of the speech given by Dr. King at the start of the historic Montgomery Bus Boycott. After a Black woman by the name of Rosa Parks refused to give up her seat on a public bus to a White man, as all Black people were required to do in Montgomery and throughout the South, a massive boycott of the Montgomery City Line ensued. Dr. King rose to national prominence as the leader of the boycott and president of the Montgomery Improvement Association. The boycott lasted for 381 days. Through a dynamic and courageous show of unity and resistance the Black people of Montgomery, Alabama were able to pressure the city officials to alter the system of segregated bus travel. The final blow to the system came in Browder v. Gayle, 142 F. Supp. 707 (N.D. Ala. 1956), aff’d per curiam, 352 U.S. 903 (1956). There the Supreme Court held that the Alabama laws requiring segregation on buses were unconstitutional. The “day after” was described by Sitkoff in the following manner:

Shortly before 6 A.M. on December 21, 1956, King and his aides boarded a Montgomery bus and sat in the front, black next to white. Droves of news re-
One could easily conclude from the preceding sections that there is very little to celebrate during this bicentennial year. Though this would be a reasonable conclusion to reach, especially for those who have been the “victims of democracy,” it is not the appropriate response. It is proper and mandatory to celebrate the people and the process which transformed the Constitution from a shallow testament of human and political rights into a credible statement of political democracy. This process and these individuals should be the object of our veneration. The original Framers of the Constitution must be given credit for the general form of government which they created, yet it is improper to attribute to them all of the positive consequences which have developed over the years. Their actions created the need for reform. As Justice Thurgood Marshall stated:

The men who gathered in Philadelphia in 1787 could not have envisioned these changes. They could not have imagined, nor would they have accepted, that the document they were drafting, would one day be construed by a Supreme Court to which had been appointed a woman and the descendant of an African slave. We the People no longer enslave, but the credit does not belong to the Framers. It belongs to those who refused to acquiesce in outdated notions of “liberty,” “justice” and “equality,” and who strived to better them.”

These individuals and this process are the focus of this section. The transformation of the Constitution finds its roots within the inherent contradictions which existed within the document. As stated earlier, the evidence is overwhelming that the Framers were more concerned with protecting and securing the economic viability of the country than they were with protecting

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porters and cameramen recorded the historic event, proclaiming its significance throughout the world. “For the first time in this ‘cradle of the Confederacy’, all the Negroes entered buses through the front door,” the New York Times reported . . . . The 381 day struggle which began as a hope for simple courtesy and convenience ended as a major triumph for desegregation.”

H. Sitkoff, supra, at 58.


and securing individual rights and liberties. On the other hand, it cannot be disputed that individual freedom and liberty were major themes of the American Revolution and the Constitution. The Conventioners' appeal to ideals of "justice," "the blessings of liberty" and other sacred notions created a platform upon which all who opposed slavery and other forms of human oppression could forever stand. Though the country has been able to avoid closing entirely the horrendous gap between the ideals and the reality, the mere existence of the ideal produced a tension which created fertile ground for the transformation process. Certainly, the transformation was not always attributable to the country's true acceptance of the ideal. At various points in the development of the Constitution and the society, the ideals of "equality and freedom" were given as the reason for the change, yet a closer analysis would reveal that other factors were the real motivation. Regardless of the motive, the ideals made it more difficult to avoid the issue. The

191. See supra notes 26-47 and accompanying text.

O! ye that love mankind. Ye that dare oppose not only tyranny but the tyrant, stand forth. Every spot of the old world is overrun with oppression. Freedom hath been hurled round the globe. Asia and Africa have long expelled her. Europe regards her as a stranger, and England hath given her warning to depart. O! receive the fugitive, and prepare in time an asylum for mankind.

Id. at 199.
194. Two classic examples of this dynamic are the Emancipation Proclamation and the landmark case of Brown v. Board of Education. President Lincoln clearly expressed his motivation for signing the Emancipation Proclamation when he stated, "[m]y paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing any slave, I would do it . . . ." See Dillard, The Emancipation Proclamation in the Perspective of Time, 23 LAW IN TRANSITION 95, 97-98 (1963). Prof. Derrick Bell has strongly suggested that the Brown decision was a product of other social forces and not a humanitarian gesture on the part of the Court or society. He points to the following as the catalyst for Brown: (1) The country's opposition in World War II to forces that exposed race superiority doctrines, (2) The country's need to make friends with emerging third world nations, (3) Black men's refusal to return to segregation after fighting war abroad, (4) The negative effects of segregation on industrial development. See D. BELL, supra note 13, at 93. These are only two examples where ulterior motives contributed to, if not controlled, the processes of racial reform in this society.
The history of the "Black Struggle for Freedom in America" is filled with eloquent and compelling appeals to the ideals which were enshrined into the Declaration of Independence and the Constitution. The force of this appeal along with courageous and defiant acts of protest and pressure brought about a tremendous transformation in social arrangements and the Constitution.

This transformation cannot be totally understood by examining various theories of law. Though the structure of law and one's philosophical orientation affect development, the real source for change lies outside of the law. The ideals which were placed within the Constitution could not usher in the transformation. The source for the change existed within the structure of the society and its manifestation was inevitable. This process of transformation began long before the delegates met in Philadelphia in 1787. The seeds which would bring about the dramatic alteration in the Constitution and the society had already been planted. They were sown when African people were brought to the American continent against their will in violation of the laws of nature and humanity. They were sown when Native Americans were deprived of their land and resources without just compensation. Thus, the causes for the changes in the Constitution were inherent in the broader society. Social change theorists have long recognized the validity and breadth of this idea.

[W]hether the system is scientific or religious, aesthetic or philosophical, whether it is represented by a family, a business firm, an occupational union, or a state, it bears within itself the seeds of incessant change . . . The whole series of changes it undergoes throughout its existence is to a large extent an unfolding of its inherent potentialities.

195. This is the sub-title to Vincent Harding's book, There Is a River. See V. Harding, supra note 3. He provides an excellent analysis of the struggle for freedom from the slave trade experience to the Reconstruction era.
196. See infra note 392, and accompanying text.
197. See generally infra Part V.
198. See R. Appelbaum, supra note 99.
199. Id. at 102 (quoting Pitirim SoroKin) (emphasis added).
Clearly, the dominant political theories of the day greatly influenced the Framers' construction of the Constitution and the American form of government. Yet it was the human and social reality which they confronted which exposed the limits and contradictions in the theories. It was this same human reality which forged new theories and gave life to the old ones. Therefore, in order to understand Constitutional transformation, one must examine the human actors who reside inside, and especially outside of the law. For it is their human activities, efforts, struggles, weaknesses and conflicts which produce the transformation.

Assuming that the impetus for Constitutional transformation rests primarily outside the law within the broader societal conflict, one must still discern how these changes take shape within the law. An examination of the "Black struggle for freedom" reveals that these changes are shaped in various manners. Sometimes they are the result of strategic planning, while other times they occur through the fortuitous forces of nature. A superficial analysis would reveal that the changes have taken the shape of Constitutional amendments, congressional legislation and landmark cases. The true impact of this movement on the Constitution was much broader and deeper than the above. This movement not only altered the external structure of the Constitution, but it dramatically affected the methods of judicial interpretation; expanded the meaning and application of various provisions; altered the public's perception of the Court; precipitated and determined important conflicts between the various branches of government; created the platform for the resolution of political issues of federalism and the division of legal authority between national and state governments; greatly influenced major political decisions; and ultimately provided a certain degree of legitimacy for the entire

201. See Civil Rights Acts of 1860s & 1870s supra note 177.
203. See infra notes 209-19 and accompanying text.
204. See infra notes 227-59 and accompanying text.
205. See infra note 351.
207. Id.
208. See infra notes 356-57.
constitutional system of governance. Although the next section of this article will explore how most of these changes have occurred throughout the history of this movement, there are two areas which deserve special attention. They are: Judicial Review and Substantive Rights.

A. Judicial Review

In its attempt to reconcile the conflict between the Constitution's ideal that African people were less than human, and the true reality, the Court appealed to "natural rights." Though the political and legal theories of the Framers were rooted in the recognition that all citizens possessed certain inalienable rights which could not be trammled by law, "slavery challenged and" just about "defeated the jurisprudence of natural law and rights." However, the righteousness of the appeal for liberty forced some courts to use this doctrine as a basis to ignore fugitive slave laws, provide freedom to Africans who were enslaved, and as a weapon against the notorious slave trade.

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209. The theory of Natural Rights is rooted in the belief that all human beings are entitled to certain rights and protections regardless of their status in society. These rights do not derive from a written agreement, but are vested in the "nature of humanity and morality." These rights are to be preserved for all individuals and governments are not entitled to contravene them. See C. Antieau, CONSTITUTIONAL CONSTRUCTION 153-86 (1982).


211. See In re Booth, 3 Wis. 1 (1854).

212. Various states in the North abolished slavery based on the principle of "Natural Law." See D. Bell, supra note 13, at 8-10.

[S]lavery was abolished by constitutional provision in Vermont (1777), Ohio (1802), Illinois (1818), and Indiana (1816); by judicial decision in Massachusetts (1783); by Constitutional interpretation in New Hampshire (1857); and by gradual abolition acts in Pennsylvania (1780), Rhode Island (1784), Connecticut (1784 and 1797), New York (1799 and 1817) and New Jersey (1804).

Id. at 8; see also Somersett v. Stewart, 98 Eng. Rep. 499 (K.B. 1772), where an English court invoked the principle of "natural rights" to free an African who had been enslaved, but who was brought to England where slavery had been abolished. The court held that slavery was so odious and against the natural rights of man "that nothing can be suffered to support it, but positive law." Id. at 510.

213. See P. Finkelman, supra note 109, at 211-49. Chief Justice Joseph Story appealed for an end to the slave trade by imploring America to "restore the degraded Afri-
This theory of law, though generally ignored during this period, was kept alive and given real content by the "freedom struggle." The appeal and use of natural laws took on greater significance after the passage of the fourteenth amendment. Even though the Supreme Court rejected this idea by narrowly construing the amendment in the Slaughter-House Cases,\textsuperscript{214} the dissenters planted a strong seed for the recognition of certain "fundamental rights."\textsuperscript{215} This seed took root, and according to Professor Laurence Tribe, "by the 1890's the Supreme Court was clearly on the verge of embarking upon a full-scale substantive due process review . . . ."\textsuperscript{216} The fourteenth amendment, which was clearly a result of the efforts to restore human dignity to Black people, became the mechanism through which this doctrine was employed. The Court's recognition of substantive due process (natural rights), is attributable "to the jurisprudential impact of the antislavery movement, which recognized the transcendent importance of liberty and gave legitimacy to arguments from moral absolutes."\textsuperscript{217} Unfortunately, as has been the pattern of racism in this country, the Court was more willing to apply these moral absolutes on the behalf of Whites than Blacks.\textsuperscript{218} Despite this limitation, judicial review was expanded tremendously, and remains so to this day, despite strong opposition.\textsuperscript{219}

In addition to natural rights rhetoric, and the use of substantive due process review, the method of judicial review has
can to his Natural Rights, and strike his manacles from the bloody hands of his oppressors." Id. at 216-17 (emphasis added).
\textsuperscript{214} 83 U.S. (16 Wall.) 36 (1873).
\textsuperscript{215} Id. According to the dissenting opinion, the privileges and immunities clause of the fourteenth amendment should have a natural rights construction. To gain relief under this clause from unwarranted governmental intervention was "the natural and inalienable rights which belong to all citizens." at 83 U.S. 36, 96 (Field, J., dissenting). This concept of natural rights has been taken on the label of "fundamental rights" in modern judicial terminology. See C. Antieau, supra note 209, at 162.
\textsuperscript{216} See L. Tribe, AMERICAN CONSTITUTIONAL LAW at 434 (1978).
\textsuperscript{218} Most of the cases cited for their use of this expansive notion of judicial review did not involve issues of racial discrimination. For a general overview, see L. Tribe, supra note 216, at 427-55; see also C. Antieau, supra note 209, at 160-64.
\textsuperscript{219} See infra notes 423, 428s.
also been expanded by the Court’s use of “history” and “sociological jurisprudence”\textsuperscript{220} as a basis for interpreting the fourteenth amendment and other laws. On numerous occasions the Court has made reference to the historical forces which existed prior to the thirteenth and fourteenth amendments in order to construe their intent.\textsuperscript{221} In the celebrated case of \textit{Jones v. Alfred H. Mayer},\textsuperscript{222} the Court cited the history of the thirteenth amendment in order to utilize it as a ban against private discrimination. In the landmark case of \textit{Brown v. Board of Educ.},\textsuperscript{223} the Court based its decision on “psychological” and “sociological”\textsuperscript{224} data, in holding that segregation in public schools violated the Constitution. In addition to providing relief to deserving Black plaintiffs, these decisions became forceful attacks against the “strict constructionist”\textsuperscript{225} method of judicial interpretation. Even though these same devices were and can be used to impede Black progress, their mere invocation enriched the procedure of judicial decision-making immensely. These methodologies were not confined to “race cases,” but their usage there provided them with more legitimacy because the ends sought were generally very laudable. As these limited examples indicate, the struggle for freedom by Black people contributed to the alteration in the nature and structure of judicial interpretation. It highlighted an aspect of law which was often ignored. In the word of Milton Konvitz, it demonstrated that: “Law itself

\textsuperscript{220} Sociological jurisprudence is described as the “need to consider the social consequences of alternative rulings open to a court, and the obligation to identify, balance and adjust the opposed societal interest or values involved in a particular case.” See C. Antieau, \textit{supra} note 209, at 198.

\textsuperscript{221} See \textit{e.g.} Slaughter-House Cases, 83 U.S. 36. The presentation of historical data to support various conclusions has been a hallmark of the court, especially in the area of race relations. Justice Thurgood Marshall’s opinions are renowned for their vivid description of the historical events and conditions which affected the lives of Black people in America. See \textit{e.g.} Bakke, 438 U.S. at 387-402 (1987). On the other hand, history has also been used to justify decisions which were very detrimental to the Black struggle for freedom. See Dred Scott v. Sandford, 60 U.S. 393 (1857).

\textsuperscript{222} \textit{Jones v. Alfred H. Mayer Co.}, 392 U.S. 409 (1968).

\textsuperscript{223} 347 U.S. 483 (1954).

\textsuperscript{224} \textit{Id.} at 494.

\textsuperscript{225} Strict constructionalism is described as the belief that “when the language of a constitution provides a clear, plain meaning which does not contradict any other provision of the organic law, or result in a ruling that is manifestly unjust or absurd, the plain meaning of the language is to be applied and there is no room for judicial construction.” See C. Antieau, \textit{supra} note 209, at 3.
is subject to moral judgment; and justice, human dignity, and human rights are more fundamental than law."  

B. Substantive Rights

Another point which is central to this thesis is the enormous impact of the "freedom movement" on the expansion of rights for all citizens. Constitutional transformation does not relate only to the area which is traditionally labeled as "Civil Rights," but involves almost every aspect of Constitutional law. Blacks and other people of color raised the ante in the game of human rights and dignity in America. The issues they raised forced the entire country to re-examine the principles it espoused. Through cases like *NAACP v. Alabama*, the right of freedom of association took on "new meaning." In 1958 the Supreme Court held "for the first time that freedom of association was a fundamental right to be protected against the states as a necessary part of liberty in the due process clause of the Fourteenth Amendment." This expansion of the first amendment by Justice Harlan not only affected constitutional practices but also altered the Framer's original theory. When Harlan wrote that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters," he was revising Locke's original understanding that this freedom should be limited to religious associations. Cases brought to safeguard the Black movement from governmental attacks forced the judiciary to develop ideas and concepts which responded to the emerging social need, even though they altered established legal and political theories.

A case that grew out of the tragic events of the "Scottsboro Boys" drama, firmly established the Constitutional right to

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227. See Kinoy, supra note 175, at 389 n. 5.
228. Civil Rights generally refers to those rights guaranteed by the Post War Amendments to the Constitution and subsequent acts of Congress.
229. See infra notes 241-59 and accompanying text.
231. See C. Antieau, supra note 209, at 167.
233. Id.
234. The events surrounding this drama are classic examples of the existence of
counsel. In Powell v. Alabama, the Court gave deeper meaning to the sixth amendment by declaring that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Subsequent decisions expanded this right by holding that it applied to an indigent criminal defendant, because it provided him with a fundamental safeguard against state invasion through the due process clause of the fourteenth amendment. Although the story behind the case is a human tragedy and a disturbing indictment of the criminal justice system, the efforts of these petitioners provided important safeguards for American citizens. However, the liberty and dignity of Black people were again sacrificed in order to secure liberty and dignity for all.

Through the due process clause of the fourteenth amendment the Supreme Court methodically made certain fundamental rights specified in the Bill of Rights binding upon the states. Rights which were thought to be safeguarded only from federal intervention were now protected against state intrusion. American citizens received a windfall of rights due to the exis-

White supremacy in the criminal justice system. Eight Black youths ranging from the ages of thirteen to twenty were indicted for the rape of two White girls in Alabama. Despite the weakness in the prosecution's case, including an admission by one of the girls that the alleged acts did not occur, most of the defendants spent over thirteen years in prison for a crime they did not commit. Their case received national and international attention. See H. Patterson & E. Conrad, Scottsboro Boys (1950).

235. 287 U.S. 45 (1932).
236. Id. at 68-69.
238. See Perlin, Dulling the Axe, 3 N.Y.L.SCH. HUM. RTS. ANN. 91, 140 (1985). The continued growth of this doctrine is described in the following quote from the above article.

Following Gideon, the Supreme Court—on various due process and equal protection theories—has expanded the indigent's rights to counsel both horizontally (through other stages of the criminal process) and vertically (beyond mere placement of a "warm body with a legal pedigree next to an indigent defendant"). A constitutional right to counsel has thus been found to attach to misdemeanor prosecutions where a defendant is subject to actual imprisonment, to appeals "as to right" and at "critical stages" in the criminal prosecution. It has also been found to apply to parole or probation revocation hearings, where needed to ensure "the effectiveness of the hearing rights guaranteed by due process."

Id. at 140. This is a compelling example of the impact of the "struggle for freedom" on the substantive and procedural rights of all citizens. Powell and its progenies brought "new meaning" to the sixth amendment.

239. See infra note 418.
240. See L. Tribe, supra note 216, at 567-69; and C. Antieau, supra note 209, at 171.
tence of a Constitutional Amendment which was primarily enacted to protect the rights of African people. Professor Laurence Tribe provides an extensive list of these rights. He states:

The due process clause has been held to protect the right to just compensation; the first amendment freedoms of speech, press, assembly, petition, free exercise of religion, and the non-establishment of religion; the fourth amendment right to be free of unreasonable search and seizure and to exclude from criminal trials evidence illegally seized; the fifth amendment rights to be free of compelled self-incrimination and double jeopardy; the sixth amendment right to counsel, to a speedy and public trial before a jury, to an opportunity to confront opposing witnesses, and for the purpose of obtaining favorable witnesses; and the eighth amendment right to be free of cruel and unusual punishment.

When all of the rights and the myriad advantages they provide are considered, it is clear why leading constitutional scholars would conclude that the Black struggle for freedom has had a "catalyzing effect" upon "the development of constitutional rights and liberties applicable to all citizens—White and

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241. See L. Tribe, supra note 216, at 567-68.
244. See, e.g., Near v. Minn., 283 U.S. 697 (1931).
255. See In re Oliver, 333 U.S. 257 (1948).
256. See Duncan v. La., 391 U.S. 145 (1968).
260. Professors Arthur Kinoy and Derrick Bell are two leading proponents of this idea.
Black alike." Furthermore, it should serve as an awakening message to the present generation of lawyers that "the struggles to eliminate the remaining pervasive influences of the institution of human slavery are inextricably linked to the efforts to broaden the base of constitutional liberties for all citizens, and to defend those already achieved."

In addition to the above, this movement for Black rights created social reforms, generated other movements and changed the Constitution in form, and to a certain extent in substance, into a different document than the one signed by the Framers in 1787. Therefore, it is ludicrous for some scholars and judges to attempt to interpret the Constitution based on the "original intent" of the Framers. It's not the same document. And the society is better today because of the transformation. The vision of the Framers cannot be totally transported into this age and used as the basis for solving all contemporary social problems. The general framework they created should be respected and adhered to until some major alteration in the form of government occurs. However, their understanding was quite limited and their vision was clearly blurred by their own interests, prejudices and egos. To place a fixed notion in

261. See Kinoy, supra note 175, at 389 n.6.
262. Id. (emphasis added).
263. See infra notes 400-416 and accompanying text.
264. Various social movements were inspired by the civil rights movement in general and the specific acts of various Black individuals who attempted to secure their rights under the Constitution. These groups include women, other people of color, the handicapped, prisoners, labor, veterans and farmers. As one scholar stated,

[t]he civil rights movement encouraged women, prisoners, and eventually, the disabled to define themselves as oppressed minorities and to search for constitutional, not political, grounds for winning their rights. It taught them to think of themselves not as poor unfortunates who should be the object of paternalism, but as competent individuals who had entitlements. D. Rothman & S. Rothman, The Willowbrook Wars 51-52 (1984). These groups had a significant impact on the transformation of the Constitution. It is not only the "river of freedom," but the streams and tributaries that river produces that enrich the land.
265. See, e.g. U.S. Const. amend. XIII, U.S. Const. amend. XIV, U.S. Const. amend. XV. For most of the history of this country the thirteenth, fourteenth, and fifteenth amendments were merely symbols of freedom.
267. See C. Antiear, supra note 209, at 71-105.
269. Id.
270. Id.
271. Id.
the Constitution is to destroy the most valuable elements the Framers' carved into it: flexibility and change. The following analysis by Walter Murphy expresses this idea in a most compelling manner.

The American Constitution is a flexible, developing charter for government that must be viewed as an organic whole. To interpret it, a judge must... play its music as well as recite its words... among the Constitution's substantive values, I believe the most fundamental has become human dignity. One can respond that the framers did not see it that way... when faced with a choice between slavery and national unity they chose the latter, sacrificing black people's dignity. Confronting much the same problem, Thomas Jefferson, John Marshall, and, for a time, Abraham Lincoln each made the same choice... Because I agree that the framers... put national unity ahead of the dignity of blacks (at least), I do not rest my case on original intent, but on the internal logic of the polity as the framers built it and as its values have developed since 1787. The preamble's goals of liberty and justice were not mere rhetorical flourishes, but meaningful articles of hope—even faith, as William O. Douglass wrote—that have, albeit with painful reverses, become more and more real over ensuing generations.273

However, the Framer's internal logic could not have produced the constitutional changes mentioned earlier. These changes came about through social forces274 and not through internal legal development.275 Law cannot change by itself. Histor-

272. They insured for flexibility by making the Supreme Court the final interpreter of the Constitution. The process of Judicial Review creates the possibility for change, especially when compared to a system where the legislative body which passed the act also determines its constitutionality (e.g., South Africa).

273. See Murphy, supra note 210, at 155-56.

274. See infra Part V.

275. The idea that law is a closed system with internal logic has been embraced by prominent legal scholars. Justice Joseph Story, the first Dean of the Harvard Law School and Chief Justice of the United States Supreme Court was one of the early proponents of "formalism." Though this idea has been modified and severely criticized over the years, it still remains as a fundamental jurisprudential perspective.
ical forces and human need transform the law. The Constitution is no exception to this general maxim. The ideals which the Framers employed, and the flexibility which they implanted into the structure of the document are two primary factors which kept the Constitution alive. These two forces, joined with the humanity and humility of those who were oppressed to create a reservoir of faith, hope and patience. This reservoir was near depletion when the country finally realized it had to change or be destroyed from within. This movement to correct the contradiction, which began centuries earlier, reached its apex in the 1960s, and the forces of denial had finally backed themselves into a corner. The Constitution, standing in the shadows of this great social upheaval, could not answer the pangs and cries of hunger, humiliation and distress. Only could the forces of self-reliance, determination, and God lead a people to confront their enemy, not with weapons of steel, but with words taken from the enemies' mouth. Though the victory was not final, the triumph will live forever as one of the greatest movements for social justice that this country, and maybe the world, have ever witnessed. Through legislative and judicial reform the

276. See Holmes, Book Review, 14 AM. L. REV. 233, 234 (1880) (reviewing C.C. Langdell, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1879)).

277. This statement refers to the Civil Rights/Black Power movement of the 1960s. There was no way that the country could have halted these movements without totally abandoning all of the principles of democracy and liberty which it had professed. The changes that occurred were not to save Black people, but again, as in Lincoln's day, "to save the Union."

278. The Federal government could no longer afford to support the practices of the Southern States. President Eisenhower's intervention into the desegregation of schools in Little Rock, Arkansas, and President Kennedy's involvement in the integration of the Universities of Alabama and Mississippi are some classic examples of this trend. Other issues such as Federalism, and the division of power between the state and national government were at the core of these disputes. The movement for freedom for Black people in the South became the platform upon which these recurring issues would be addressed and resolved.

279. Even the most militant Black groups and individuals did not engage in armed struggle during this period.


Constitution took on a new meaning. A meaning which had been injected into the "veins of civilization" by a people who had been despised and trampled under foot. This new meaning of the Framers' ideals should govern the understanding and interpretation of the Constitution. The Framers' definition of liberty and equality are inadequate. They must be discarded if the Constitution is going to stand the test of time. The entirety of the meaning of the words and the purpose of the Constitution cannot be found in the proceedings of the Constitutional Convention, the Federalist papers, the ratifying state conventions, nor the preamble. It must also be found in the spirit and movement of an oppressed people, whose position in society make them the best measure of the values proclaimed.

Generally, one would survey the cases, legislative acts and political maneuvers when discussing Constitutional transformation. Though great emphasis on the above elements is deserving and necessary, it would not reflect the source of the change, but only its final encasement. It is "fitting and proper" to focus on the individuals and movements that continuously injected a deeper meaning into the Constitution. It is their words and actions which eventually compelled the legislative and judicial reforms. So praise must be given to those forgotten heroes and heroines who sacrificed their lives so that liberty would not ring completely hollow in this country.


283. See infra notes 399-409 and accompanying text.

284. Id.

285. See Federalist, supra note 36.

286. See infra notes 415-16.
V. THE BLACK FREEDOM STRUGGLE: THE AMERICAN REVOLUTION

The real "American Revolution" began when the first Africans resisted the restrictions that American slave merchants imposed upon their liberty and freedom on the coast of the African continent. Long before Patrick Henry made his courageous cry, "Give Me Liberty or Give Me Death," Africans who were being brought to America in chains in the holds of slave ships exercised the latter option of Henry's declaration. They loved freedom and liberty so much that many chose to jump overboard instead of submitting to enslavement. They under-

287. The point to be made here is that the revolution of 1776 did not drastically change the existing social order. Though it clearly defeated the ideas of "hereditary monarchy" and "privileged nobility" as the foundation of society, it did not alter the fundamental values and beliefs of the people or their institution. The greatest evidence of this is its disregard of the rights of Black people, women and the debtor classes. Though it proclaimed the ideals of "liberty" and "equality," it didn't usher in this reality, nor implant the ideals into the social structure. The society's view on property remained constant. The theories that inspired the "revolution" were not new but derived from the tradition of England. With the exception of placing the power of government "with the people" instead of "with the King," the "American revolution" was a mere re-affirmation of what already existed. Furthermore, it didn't truly shift the power to the people since, a significant number (Black people and women) were not included in the political processes.

Other scholars have reached this same conclusion, though employing a somewhat different method of analysis:

Not only did Locke adopt the compact theory, but he went on to portray property as the rock on which social order was founded. Locke drew much of his inspiration from Hooker and thus his ideas were evolutionary rather than revolutionary . . . Some writers have attributed the American Revolution to Locke, and in a sense this is true, but in another sense the American Revolution was not a revolution but a confirmation of an existing condition.

L. BALDWIN, supra note 34, at 3.

288. See V. HARDING, supra note 4, at 3-23.

289. See H. WIRT HENRY, supra note 67, at 266.

290. See V. HARDING, supra note 4, at 13-23.

291. A captain of a slave ship described one of these incidents in the following manner, "We stood in arms, firing on the revolted slaves of whom we kill'd some and wounded many . . . and many of the most mutinous, leapt over board, and drowned themselves in the ocean with much resolution, showing no concern for life." See V. HARDING, supra note 4, at 18 (quoting from E. DONNAN, 2 DOCUMENTS ILLUSTRATIVE OF THE SLAVE TRADE (1931)). Vincent Harding responds to the Captain's statement that the Africans had no concern for life by stating that:

[Those who threw themselves resolutely into the ocean in fact had great "concern for life." That was why they fought so relentlessly in a seemingly hopeless situation, driven by a vivid urgency that only those who face bondage can know. They were incited by a wild and terrible hope which winds its way through all of
stood the ideal of equality so well that they frequently attempted to rebel against their captors in the midst of the Atlantic, even though the odds were severely stacked against them.\textsuperscript{293} This drama was an American drama. It was a resistance movement that future Americans would confront for centuries. The American captors were implanting into the land some very powerful seeds; human beings who would never totally accept the contradictions in the American creed. It was their non-acceptance at this early point which set in motion the dynamics which would eventually transform the nation and its Constitution.\textsuperscript{293}

The contradictions in the American creed were apparent at the point when ships arrived off the coast of Africa, bearing the names \textit{Hope},\textsuperscript{294} \textit{Liberty}, \textit{Justice} and \textit{Dignity},\textsuperscript{295} though they came for no other purpose than to destroy the liberty and dignity of other human beings, and dispense to them the bitter pangs of enslavement. Africans confronted this contradiction then as they have for generations, and this constant resistance became America's "saving grace."\textsuperscript{296} When asked what prompted them to resist against such tremendous odds, one African, speaking for a group that rebelled, stated that they "were re-

\begin{itemize}
\item the history of our struggle against white domination. They lost the battle to live and be rid of their captors, but they won the struggle to die and be free.
\end{itemize}

\textit{Id.} This eloquently expresses the major thesis of this section of the article. The struggle of these Africans for freedom is the greatest symbol of courage and heroism that America has ever known. Many Whites (abolitionist and modern day liberals) have willingly joined the "Black struggle" because they identified it as the "true" quest for freedom in America. Only when the country fully appreciates the severity of the bondage and captivity of Africans in America can it understand how sacred liberty and freedom are to the entire nation and the world.

\textsuperscript{292} For an excellent description of how difficult it was for Africans to overthrow their captors while at sea, see V. HARDING, \textit{supra} note 3, at 11-15.

\textsuperscript{293} See \textit{infra} notes 399-409 and accompanying text.

\textsuperscript{294} This was the name of a Rhode Island-based vessel. This ship sailed during the apex of the Independence Movement in America. See V. HARDING, \textit{supra} note 3, at 22.

\textsuperscript{295} \textit{Id.} at 3. Though many of these vessels were owned by Europeans, their cargo was generally headed for the "new land"—America.

\textsuperscript{296} If for some inhuman reason Africans would have totally submitted to the oppression of White domination, then the country would never have willingly corrected the inherent contradiction which existed between its claim of equality and the institution of slavery and second class citizenship. The evidence is overwhelming, especially during the Civil Rights Movement that America had to be forced to live up to its creed that "all men are created equal." Without the great tradition of "Black protest" it is unlikely that this would have occurred.
solved to regain their liberty if possible." The historian, Vincent Harding, explains the deep human, political and legal significance of this response:

The captives were challenging the justice, authority, and legitimacy of their captors. Their words, which surely represented the speeches—and the screams—of many other men and women on those voyages, were among the earliest forms of what we shall call the Great Tradition of Black Protest. As such, the speakers and others like them were the first bold face-to-face petitioners against slavery . . . Essentially, they declared that for them this system had absolutely no legitimacy; they persistently acted accordingly and often took the consequences. This was black radicalism at the outset.

This beginning of the Black struggle for freedom and liberty was also the beginning of the "transformation movement" of American law and policy. Even though the Declaration of Independence and the Constitution would not be declared and written for two centuries, the real struggle for freedom and equality had already begun. When compared with the grievances of Africans who were enslaved, dehumanized and butchered, the cries of the "founding fathers" against "taxation without representation" seem mild and superficial indeed. It is within the struggle of these Africans, against hopeless situations, that one must look for a clear understanding of bondage and freedom. Although their rebellions were generally quashed, they re-

297. See V. Harding, supra note 3, at 14.
298. Id. at 14-15.
299. Otis, supra note 102.
301. Many of the revolts were successful, despite the tremendous odds they faced. Harding describes a few of these instances. "In 1730 the captive Africans of the Massachusetts schooner William conspired together and killed almost all the crew, then made their way back to the nearby shores." See V. Harding, supra note 3, at 13. He continues: On another Massachusetts ship of the same period, "the Negroes got to the powder and Arms, and about 3 o'clock in the morning, rose upon the whites; and after wounding all of them very much . . . ran the Vessel ashore a little to the Southward of Cape Lopez and made their escape." So too, near the end of 1732, a contemporary account reported that a group of captives from Guines on board a Bristol slaving ship "rose up and destroyed the whole crew, cutting off the Captain's Head, Legs and Arms." Id. at 13-14. For additional information on these revolts see Greene, Mutiny on the Slave Ship, 5
mained resolved to gain their "liberty." "Like the independence struggles of the American colonists—indeed; more than the White battles in America—the issue was simply freedom."302

Africans resisted the inhuman and evil conditions of the "middle passage."303 This despicable drama seeped into the courtrooms as laws were eventually passed to curtail it,304 and as some judges denounced it as a "picture of human wretchedness and human depravity, which the boldest imagination would hardly have dared to portray."305 Judicial pronouncements such as these provided fuel to the abolitionist flames in the North. Yet these African freedom fighters did not rely on the law to liberate them, but continued to seek their liberty by courageously overtaking slave ships.306 The most famous of these incidents reached the American legal system in The Amistad307 wherein the Court determined that the Africans who had seized a Spanish vessel that ended up off the coast of Long Island, were "free," and should be "dismissed from the custody of the Court . . . ."308 This case which was persuasively argued by John Quincy Adams on behalf of the Africans, "brought to the United States living proof of the horrors of the African slave trade."309

The African resistance movement continued on the shores of America, despite the complete domination which the institution of slavery imposed upon their lives. There were numerous instances where Africans fought against the institution of slavery before the Constitution was written.310 The Stono Rebel-
lion\textsuperscript{311} of 1739 in South Carolina was one of the most famous of this period. Twenty miles outside of Charleston an enslaved African by the name of Jemmy led about twenty other Africans in an attack against their master.\textsuperscript{312} After having acquired arms and ammunition they methodically executed everyone who came within their reach as they marched "like a disciplined company"\textsuperscript{313} to the beat of drums. It was reported that as they marched "they called out liberty."\textsuperscript{314} Historian Vincent Harding again described the significance of their action. He stated:

In the annals of our struggle for freedom in America, this tradition of black men marching flamboyantly in military formation is persistently repeated . . . at Stono and elsewhere it was more likely a radical statement of identity, a message of self-possession, for what was ultimately at work was a movement toward self-transformation. A group of Black people whom the White world had identified as slaves chose to organize and see themselves as soldiers of liberty, crusaders for freedom. Living under the White man's menace, but no longer in his time, they


\textit{made of one Blood, and kindred, all the nations of the Earth; we perceive by our own Reflection, that we are endowed with the same Faculties with our masters, and there is nothing that leads us to a Belief, or Suspicion, that we are any more obliged to serve them, than they us, and the more we Consider of this matter, the more we are Convinced of our Right . . . to be free . . . and can never be convinced that we were made to be Slaves.}

\textit{Id. at 24. It is interesting to compare the previous statement with the following quote from the trial judge in the famous decision in Loving v. Va. 388 U.S. 1 (1967). In upholding Virginia's ban against interracial marriages the lower Court stated:}

\textit{Almighty God created the races white, black, yellow, malay and red, and placed them on separate continents. And but for the interference with His arrangement there would be no cause for such marriages. The fact that he separated the races, shows that He did not intend for the races to mix.}

\textit{388 U.S. at 3. (This holding was subsequently reversed by the Supreme Court). Both individuals are appealing to a higher authority to support their position on race relations in this country. The Black petitioner in 1779 was using God as the rationale for destroying the system of slavery and White domination, whereas the White Judge in 1967 was using God as the rationale for upholding the system of White domination. It is clear that the Black petitioner, in his captive state had a deeper and more pressing understanding of the ideals of liberty and equality than the judge who was trained in the American legal system.}

\textit{311. See V. HARDING, supra note 3, at 34.}

\textit{312. Id.}

\textit{313. Id. (quoting an observer of the revolt.)}

\textit{314. Id.}
had declared their own small but significant revolutionary war.\footnote{315. Id. at 34-35.}

The resistance movement did not always take the form of organized rebellions as in Stono. Africans consistently sought their freedom and liberty through numerous individual acts. They poisoned plantation owners;\footnote{316. Id. at 38.} burned buildings;\footnote{317. Id.} escaped through various means;\footnote{318. Id. at 37-38. One astounding example of the determination of African people to acquire their freedom is found in the life of a man named Caesar who was enslaved in New England. It has been reported that Caesar, who lost both of his legs, managed to escape and join with a group of fellow runaways in 1769. Id. at 40.} refused to work or cooperate with overseers;\footnote{319. Id. at 38.} and conducted an extensive underground community of “outlyers.”\footnote{320. Id. at 30, 39-40, 48-49, 72-73, 81, 196-97. These were organized groups of individuals who escaped from slavery and formed “communities” outside the reach of the slave system. These bands of men and women would serve as a base for others who were seeking freedom from slavery. The “outlyers” would secure food and other essentials by raiding plantations at night. They also made frequent visits to those who were still in bondage, either to help them escape or to provide information about the “freedom movement.” The “outlyers” were a constant threat and menace to the system of slavery. They sent a strong message to others that one could defy white domination and survive. These groups were often well organized and armed; their presence was a permanent fixture on the landscape of slavery. Vincent Harding describes their importance in the following manner. “Throughout the history of slavery, their existence and widespread activities demonstrated the willingness of relatively large numbers of black men and women to live outside the nets of white law and order . . . [T]heir very existence was an act of radical disobedience.” Id. at 39.} Though many paid dearly\footnote{321. Id. at 39.} for these rebellious acts, no punishment could deter the quest for freedom. Collectively these acts continued to undermine the immoral system of slavery. They forced some of the colonies to impose more restrictive and inhumane legislation,\footnote{322. Id.} which

\begin{itemize}
  \item \textit{Id.} at 34-35.
  \item \textit{Id.} at 38.
  \item \textit{Id.}
  \item \textit{Id.} at 37-38.
  \item \textit{Id.} at 30, 39-40, 48-49, 72-73, 81, 196-97. These were organized groups of individuals who escaped from slavery and formed “communities” outside the reach of the slave system. These bands of men and women would serve as a base for others who were seeking freedom from slavery. The “outlyers” would secure food and other essentials by raiding plantations at night. They also made frequent visits to those who were still in bondage, either to help them escape or to provide information about the “freedom movement.” The “outlyers” were a constant threat and menace to the system of slavery. They sent a strong message to others that one could defy white domination and survive. These groups were often well organized and armed; their presence was a permanent fixture on the landscape of slavery. Vincent Harding describes their importance in the following manner. “Throughout the history of slavery, their existence and widespread activities demonstrated the willingness of relatively large numbers of black men and women to live outside the nets of white law and order . . . [T]heir very existence was an act of radical disobedience.” \textit{Id.} at 39.
  \item \textit{Id.} at 39. An exhaustive analysis of the various laws developed to deal with “runaways and rebels” is found in \textit{L. Higginbotham, supra} note 57. After analyzing the laws in South Carolina which were intended to deter and stop those who sought freedom from slavery, Judge Higginbotham concludes:
    \begin{itemize}
      \item One must be mindful that these statutes directing the branding, mutilation, amputation, and killing of blacks were imposed by whites under English law, a legal process supposedly notable for its sensitivity to the rights of mankind. But to the extent that this sensitivity existed it was for whites alone; the most brutal displays of inhumanity to blacks were sanctioned under the colony's rule of law.
    \end{itemize}
  \item \textit{Id.} at 177.
  \item \textit{Id.}
\end{itemize}
eventually brought about more public condemnation of the entire institution. The greatest legal legacy of these defiant acts was the incorporation of a Fugitive Slave provision into the United States Constitution.\footnote{U.S. Const. art. IV, § 2, cl. 3.} This provision and similar legislative enactments\footnote{The first fugitive slave law was passed by Congress in 1793, and was upheld by the United States Supreme Court in Prigg v. Pa., 41 U.S. 345. See also Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850) (repealed, ch. 165, 13 Stat. 200 (1864)).} were a direct result of African people's refusal to submit to the illegitimate domination of white people. In addition, the resistance movement led to the passage of various anti-slave-trade statutes in northern states.\footnote{See, e.g., Connecticut (1769). The preamble to the act stated: "Whereas the increase of slaves is injurious to the poor, and inconvenient thereof . . . ."; Delaware (1776); Rhode Island (1774); see W.E.B. DuBois, supra note 51, at 201-24 for an extensive listing of all acts by the colonies in relation to the Slave Trade.} These individual and collective human acts precipitated positive and negative changes in American law. Despite these numerous regulations, Africans continued to seek their freedom. Since those who resided in southern states, and most in the North, could not find sanctuary in the courts, or through law in general, they sought their liberty "by any means necessary."\footnote{This statement was popularized by Malcolm X, a latter day American revolutionary, in the 1960s. His analysis was rooted in the tradition of the early freedom fighters during this period of American slavery. He often referred to this era as he attempted to reawaken the militant aspects of the resistance movement. See Malcolm X, By Any Means Necessary (G. Breitman ed. 1970).}

The dawn of the revolutionary era in America and the appeal to morals of "the equality of man" made it clear to some Africans that a free America included them.\footnote{Declarations made by the leaders of the American revolution raised the expectation of Africans that the slave trade and slavery would end if the colonists won their freedom. The following quote is indicative of this revolutionary rhetoric. During the first Continental Congress in 1774 it was proclaimed that, we will neither import nor purchase any slave imported after the first day of December next, after which time we will wholly discontinue the slave trade and will neither be concerned in it ourselves nor will we hire our vessels nor sell our commodities or manufacture to those who are concerned in it. See J. H. Clarke & V. Harding, Slave Trade and Slavery 58 (1970). This promise, like so many others, was not kept. Even Thomas Jefferson in his first draft of the Declaration of Independence included an indictment against the King of England for his authorization and support of the European Slave Trade. However, this statement was deleted from the final draft of the document, due to pressure from Southern delegates at the Convention. This was another example of the "involuntary sacrifice" of the rights and}
participated in the Revolution and fought valiantly against England.\(^\text{328}\) However, they were unable to benefit from these declarations of equality when the Framers met in Philadelphia in 1787.\(^\text{329}\) Even though the Constitution declared that Africans

humanity of African people in order to secure the resolution of conflict between competing whites.

On a local level various colonies were taking a stand against the importation of Africans as slaves. Massachusetts passed anti-slave-trade legislation in 1771 and 1774, but the royal governor would not allow them to be enacted. Rhode Island and Connecticut passed laws which placed a tremendous obstacle to the slave trade by “stipulating that any slave brought within her boundaries would immediately become free.” See B. Quarles, The Negro in the Making of America 44 (1964). Pennsylvania levied a stiff tax on each imported African, and even some of the Southern colonies (Virginia (1774), North Carolina (1774), Georgia (1775)) passed restrictive measures. Id. For an exhaustive list of the various measures of the Colonies in regards to the importation of Africans, see, W.E.B. DuBois, supra note 51, at 201-29. An interesting point about many of these measures is that they were passed to 1) avoid the possibility of slaves measures is that they were get back at the Mother country for passing objectionable laws. See B. Quarles, id. at 44. Therefore, the existence of the history of Black resistance and its commitment to the ideals of freedom and liberty was initiating a “transformation” in American law.

The revolutionary spirit that engulfed the colony also increased the quest for freedom on the part of Blacks. “The slogans of liberty that became fashionable on the eve of the Revolution had their effect on the slaves, particularly in New England, where they made use of two techniques, freedom suits and petitions.” Id. at 44-45.

328. The Revolutionary spirit of the time encouraged many Africans to fight for their freedom as the colonists fought for theirs. This point has been documented in various sources. See V. Harding, supra note 3, at 42; see also B. Quarles, supra note 327, at 46-47. Yet many knew that their freedom was not intricately interwoven with that of the colonist, so they chose to join armed bands of Blacks who were fighting for their own independence against their white captors. Both types of “resistors” are captured in the following quote by Harding: There were, of course, thousands of black men who considered service in the Revolutionary armies as a possible path to their own freedom and, eventually, to the freedom of their people. But it was not until the British colonial governors—especially Virginia’s royal governor, Lord Dunmore—began appealing for black support, that George Washington and other American leaders saw fit to permit blacks officially to enlist. Even then, there were fewer blacks fighting for white American Independence than were engaged in the large, unorganized, fugitive army in flight toward their own independence. See V. Harding, supra note 3, at 41-42.

329. The Framers of the Constitution not only failed to remember the valiant acts of those Blacks who helped them win their freedom, but they also ensured that the institution of slavery and the importation of Africans as slaves remained unaltered. The American Revolution did not destroy the slave trade. To the contrary, the frequency and volume of the trade increased after the Revolution. The following letter from a British governor in Sierra Leone to an American abolitionist confirms this point. He wrote in 1796 that:

You will be sorry to learn that during the last year, the number of American slave traders on the coast has increased to an unprecedented degree. Were it not for their pertinacious adherence to that abominable traffic, it would in consequence of the war, have been almost wholly abolished in our neighborhood.
were chattel\textsuperscript{330} and that their liberty and freedom could be restricted,\textsuperscript{331} the Africans did not accept this antiquated notion of equality. Nat Turner,\textsuperscript{332} Denmark Vesey,\textsuperscript{333} Gabriel Prosser,\textsuperscript{334}

\textit{See V. Harding, supra note 3, at 46 (quoting from E. Donnan, 3 Documents Illustrative of the Slave Trade in America (1935; rpt. 1965)).}

\textsuperscript{330} U.S. Const. art. I, § 2, cl. 3. \textit{See discussion of 3/5th compromise, supra note 56.}

\textsuperscript{331} U.S. Const. art. 4, § 2, cl. 3. \textit{See discussion, supra note 57.}

\textsuperscript{332} Nat Turner was the leader of the most famous revolt by Africans against the institution of slavery. The revolt occurred on August 21, 1831 in Southampton County, Virginia. It is estimated that seventy Africans were involved in this revolutionary act and that fifty-nine whites were killed. Turner escaped and stayed at large for over two months, hiding during the day and coming out at night to acquire water and food. His "escape" sent terror through the South, as many suspected that a full scale revolution was afoot. Turner was eventually caught and his confession remains as a lasting testament to his vision, courage and determination. The following excerpt is indicative of the spiritual aspect of his struggle.

\hspace{1em} I heard a loud noise in the heavens, and the spirit instantly appeared to me and said the serpent was loosened, and Christ had laid down the yoke he had borne for the sins of men, and that I should take it on and fight against the serpent, for the time was fast approaching when the first should be last and the last should be first. And by signs in the heavens that it would make known to me when I should commence the great work; and until the first sign appeared, I should conceal it from the knowledge of men. And on the appearance of the sign, (the eclipse of the sun last February) I should arise and prepare myself, and slay my enemies with their own weapons.

\textit{See F. Freedman, supra note 280, at 78.}

\textsuperscript{333} Denmark Vesey was one of the wealthiest Black men in Charleston, South Carolina, and purchased his own freedom in 1800. He became a skilled carpenter and leader of the African Church, and planned one of the most intricate revolts to free Africans from slavery in America. The plan involved a Black takeover of Charleston, for the second week of July, 1822. Vesey, through his intelligent and powerful leadership ability, recruited free Africans and those enslaved to be part of this massive insurrection. The plan was spoiled when a potential recruit exposed the plans to a plantation owner. Despite his arrest and conviction, Vesey died a gallant and courageous man in the cause of Black freedom. The Magistrate at his trial could not understand why a person in Vesey's position would attempt this type of act. He stated: "It is difficult to imagine what in fatuation could have prompted you to attempt an enterprise so wild and missionary. You were a free man; were comparatively wealthy; and enjoyed every comfort, compatible with your situation. You had, therefore, much to risk and little to gain."

\textit{See J. O. Killens, The Trial Record of Denmark Vesey 135-36 (1970). Contrary to the Magistrate's understanding, Vesey had a "lot to gain." The liberty and freedom of his people were at stake. He was willing to pay the highest price possible to secure "the blessings of liberty;" not so much for himself but for his people who were still in bondage. Vesey's vision of liberty equals, if not exceeds, that of the "founding fathers."}

\textsuperscript{334} Gabriel Prosser was the leader of one of the largest conspiracies to overthrow slavery during this period. In the spring of 1800 in the area surrounding Richmond, Virginia, Prosser and his two brothers began organizing a resistance movement which involved over a thousand individuals. The plan called for several hundred men to attack Richmond; capture necessary arms; create civil unrest; and take the Governor as a hostage. Some accounts indicate that Prosser's eventual aim was "to subdue the whole of
Sojourner Truth, Harriet Tubman and countless others were committed to injecting a new meaning into the Constitution and the society. They courageously continued and conducted the real American Revolution. They refused to accept this country's attempt to create two classes of human beings. This did not coincide with their intuitive understanding of life and liberty. Without the support of foreign governments and the country where slavery was permitted..." See V. Harding, supra note 3, at 56. The motto of the group that Prosser organized was "Death or Liberty." Id. at 46. An unexpected and unprecedented rain storm, coupled with a few informants, prevented the conspiracy from taking place. The discovery of it sent shock waves throughout Virginia and other parts of the South. The Governor of Virginia believed that the plot "embraced most of the slaves in this city and neighborhood, ... there was good cause to believe that the knowledge of such a project pervaded other parts, if not the whole state." Quoted in W. Cheeks, Black Resistance Before the Civil War 111 (1970). See also V. Harding, supra note 3, at 57. The real effect of this conspiracy was the message it sent to whites in Virginia and throughout the South, that Black people would never totally submit to white domination. Whites would always have to worry about the "next insurrection" and prepare accordingly. The Governor of Virginia expressed this view after Prosser's death. "Unhappily, while this clas[] of people exist among us we can never count with certainty on its tranquil submission." Id. at 57.

335. Sojourner Truth was one of the most influential and famous abolitionists during this period. She was also an important stateswoman and adviser to an American President. After having escaped from slavery, she traveled to the North (particularly New England), where she spoke out and fought vigorously against the institution. Her speeches fueled the flames of abolitionist fervor. She also worked diligently to enforce the desegregation of public transportation facilities in the North, and was very dedicated to improving the lives of Black people after the Civil War. See J. Noble, Beautiful, Also, Are the Souls of My Black Sisters: A History of the Black Woman in America (1978); V. Ortiz, Sojourner Truth, A Self-Made Woman (1974).

336. Harriet Tubman was the conductor of the "underground railroad." She escaped from slavery, but returned to liberate those whom she left behind. It was estimated that she liberated over three hundred African people from slavery. She accomplished this enormous task, generally by herself (with some aid from sympathizers who were scattered along the way), and "never lost a passenger" throughout her attempts. She was secretly conducting a major portion of the American Revolution. She once stated:

I grew up like a neglected weed—ignored of liberty, having no experience of it... I was not happy or contented... everytime I saw a white man I was afraid of being carried away. I have seen hundreds of escaped slaves, but I never saw one who was willing to go back and be a slave. I think slavery is the next thing to Hell...


337. During the period of American slavery it has been estimated that there were over a hundred recorded slave revolts. This is probably a conservative number since many of these incidents were not recorded, and many others never reached the point where the plantation owners would classify it as a revolt. In addition, this number clearly does not include all the individual defiant acts which challenged the system of slavery.

338. Various foreign governments helped to finance the American Revolution. At the
wealthy financiers.\textsuperscript{339} they struck a blow for democracy and constitutional reform. They put needed pressure on the institution of slavery, and highlighted the glaring contradictions between the reality and the ideal.

The magnitude\textsuperscript{340} and potential upheaval of the conspiracy to take over Charleston, South Carolina led by Denmark Vesey had a tremendous impact on the development of American law. First, it led to the passage of the "Negro Seaman Act"\textsuperscript{341} which restricted the importation of free Blacks into South Carolina by declaring that they would be "taken as absolute slaves."\textsuperscript{342} It was thought that free Black seamen were responsible for inspiring Vesey's conspiracy.\textsuperscript{343} This act was later held unconstitutional by the United States Supreme Court in Elkinson v. De- liesseline.\textsuperscript{344} This was one of the earliest instances where the Court upheld the rights of Black people because a state law in-


\textsuperscript{340} Robert Morris, one of the delegates to the Constitutional Convention, was one of the richest men in America and had invested greatly in the revolutionary effort. He was often referred to as "the patriot financier," because he underwrote a large share of the debt of the United States during and after the Revolutionary War. See T. Dye & L.H. Zeigler, supra note 26, at 37.

\textsuperscript{341} It has been estimated that Denmark Vesey and his co-conspirators recruited over nine thousand Africans to participate in his rebellion against the citizens of Charleston. He organized them into various cells, and no one knew anyone outside of their cell except the leaders of the conspiracy. Vesey planned for six simultaneous attacks on the city, and recruited some of the "most trusted" persons of the white plantation owners. He gained access to the store that sold guns and ammunition, and to the stable where the horses were kept. See P. Finkelman, supra note 109, at 204.

\textsuperscript{342} P. Finkelman, supra note 109, at 256.

\textsuperscript{343} This concern was misplaced since Vesey was inspired by forces beyond those of "free seamen." Even though he was at one time a sailor and traveled throughout the Caribbean and Africa, Vesey felt that his mission in life was to liberate his "brethren." See V. Harding, supra note 3, at 66. He planned his first insurrection in 1817 while heading an all-black church in Charleston. His plan was disrupted when whites forced the church to disband. However, by 1821, a new church was organized and See P. Finkelman, supra note 109, at 202.

\textsuperscript{344} 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4366).
terfered with the commerce clause. Secondly, the plot led many South Carolinians to believe that there was a general conspiracy to overturn the system of slavery throughout the South. Many of them also believed that northern states, especially abolitionists, were responsible for initiating this social revolution. One historian concluded that, "the discovery of Vesey's planned rebellion also led to a polarization of the North and the South. In the years after the Vesey plot, South Carolina would lead the South on the road from nullification to secession." Thus, this courageous and brilliantly designed quest for freedom was in part the impetus for the Civil War, which eventually ushered in a new era in Constitutional law and policy.

During this era, the courtroom also became a major arena for the advancement of liberty, and indirectly precipitated an eventual change in the structure of society. The infamous *Dred Scott* decision of Chief Justice Taney contributed to the forces for social change. By declaring that Blacks could not become citizens of the United States, because they had "no rights which white men were bound to respect," Chief Justice Taney brought tremendous criticism upon the Court; fueled

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345. *Id.* This is one of the earliest recorded cases wherein the Court used the commerce clause so that it protected the rights of Black individuals. However, the federal government's involvement in the case was due to its fear that the act would create havoc in interstate commerce and would possibly lead to international conflict with England and other countries that employed Black seamen. See P. Finkelman, *supra* note 109, at 256. In modern congressional initiatives, the commerce clause has been used as a basis for various Civil Rights statutes. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). This avenue was chosen in part because the Supreme Court restricted the powers of the fourteenth amendment to provide relief and protection to Black citizens. See The Civil Rights Cases, 109 U.S. 3 (1883).

346. They were wrong on this point. See *supra* discussion at note 343.


349. In *Dred Scott v. Sandford*, Judge Taney wrote that it "[i]t is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States." *Id.* at 407. Therefore only the federal government was empowered to bestow this right upon a person. After an extensive analysis of existing laws, customs and attitudes at the time of the Constitution's formation, Chief Justice Taney concluded that the Framers did not intend to include people of African descent as members of the political community.

350. *Id.* at 407.

351. See C. Swisher, *supra* note 83, at 631-52. The author also cited the N.Y. Tribune, Mar. 7, 1857, at 5 col. 2, which read, "If epithets and denunciation could sink a judicial body, the Supreme Court of the United States would never be heard of again . . .
public opinion against slavery; and created a platform for the election of a President who would later sign the Emancipation Proclamation. Carl B. Swisher, in Volume V of the definitive historical record of the United States Supreme Court, confirmed this last point. He stated:

Lincoln failed to oust Douglass as United States Senator, but the Lincoln-Douglass debates, with the Dred Scott decision at their core, led to his nomination and election as President in 1860, and thereby precipitated the Civil War. In that sense, at least, the Dred Scott decision played its part in the irrepressible conflict.

A few state courts began to contravene the decisions of the United States Supreme Court during this era. Following the courageous act of a white Wisconsin citizen to free an African

Justice Taney's opinion was long, elaborate, able and Jesuitical. His arguments were based on gross historical falsehoods and bold assumptions, and went the whole length of the extreme Southern doctrine." Id. at 633. Three days later, on March 10, 1857, the same newspaper declared, "Alas! that the character of the Supreme Court of the United States, as an impartial judicial body, has gone! It has abdicated its just functions and descended into the political arena. It has sullied its ermine; it has dragged and polluted its garments in the filth of Pro-Slavery politics . . . ." Id., Mar. 10, 1857, at 5, col.6.

Many people in the North were outraged with the decision by Justice Taney. The flames were fueled even higher when Justice Curtis released his dissenting opinion to the press which revealed tremendous factual errors in the majority opinion. The newspapers were filled with criticisms of Taney and his reasoning. See N.Y. Tribune, Mar. 7, 1857, as cited in C. SWISHER, supra note 84, at 633-34. "[T]he Court, instead of planting itself upon the immutable principles of justice and righteousness, has chosen to go upon a temporary and decaying foundation . . . ." Carl Swisher stated that, "when the Supreme Court became anathema to growing numbers of people in the North because of a proslavery decision, the South, however great its own reverence for the Court . . . could no longer count on effective judicial protection." Id. at 650. Not only did the decision make the North more upset with slavery, but it also made the South more unsure about the Union.

The Dred Scott decision entered the political debate arena when Stephen A. Douglass, a Senator from Illinois, running for re-election, endorsed the decision in a speech given in Springfield, Illinois on June 12, 1857. Abraham Lincoln, a candidate for Douglass' seat, challenged his position on the Dred Scott decision. This issue became the core of the famous debates between Douglass and Lincoln.

See C. SWISHER, supra note 83, at 646-50.

Id. at 650 (emphasis added).

A Black man by the name of Joshua Glover escaped from slavery in Missouri and went to Wisconsin were he established himself as a "faithful laborer and an honest man." His former enslaver came to his house with two United States Deputy Marshals. After an attempted escape, Joshua was placed under arrest in Milwaukee. Sherman Booth, a local abolitionist and editor of the Milwaukee Free Democrat, began to rally the
who had escaped from slavery, the Wisconsin Supreme Court in *In re Booth*, “nullified” the Fugitive Slave Law by holding that it was an unconstitutional deprivation of liberty without due process.\textsuperscript{357} Though the United States Supreme Court\textsuperscript{358} eventually overturned the Wisconsin decision, the flames of public resentment to these laws were already fueled.\textsuperscript{359} More importantly, the Wisconsin Supreme Court decision was strong evidence that the American legal system was reaching a stage where, “the rule of law was to give way to the enforcement of sentiments, not yet embodied in law.”\textsuperscript{360}

One of the most eloquent spokespersons for freedom during this era was David Walker. In his famous *Appeal* of 1829 he stated:

\begin{quote}
I speak Americans for your good. We must and shall be free . . . in spite of you. You may do your best to keep us in wretchedness and misery, to enrich you and your children, but God will deliver us from under you. And woe, woe, will be to you if we have to obtain our freedom by fighting.\textsuperscript{361}
\end{quote}

local townspeople in Joshua’s defense. On the evening of March 10, 1854, a huge crowd, led by Booth, broke into the jail, rescued Joshua Glover and placed him on a ship for Canada. Five days later Booth was arrested along with some of the other leaders of the group, and charged with aiding in “the escape of a fugitive slave.” Booth eventually applied to Associate Justice Abram D. Smith of the Supreme Court of Wisconsin for a writ of habeas corpus, asking for release on the ground of the unconstitutionality of the Fugitive Slave Law. On June 7, 1854, Justice Smith ordered Booth’s release. Federal authorities took the case to the full Supreme Court of Wisconsin on writ of certiorari. The Supreme Court of Wisconsin unanimously upheld Justice Smith’s opinion. \textsuperscript{Id. at 653-57.}

\textsuperscript{357} See *In re Booth*, 3 Wis. 1, 48 (1854).


\textsuperscript{359} See C. Swisher, supra note 83, at 665-69. The same newspaper that attacked the *Dred Scott* decision also attacked *Booth* as another political document emanating from the Judicial branch. The N.Y. Tribune on Apr. 1, 1859, at 4, col. 3, stated that the *Booth* case was “destined to become quite as famous as the *Dred Scott* case, and forming a part of the same system of usurpation tending to the concentration of all power in the Federal Judiciary.” \textsuperscript{Id. at 665.} Furthermore, the Wisconsin legislature passed a resolution condemning the United States Supreme Court’s decision as a denial of liberty. The resolution was signed by the Governor. \textsuperscript{Id. at 668.} Booth, though eventually arrested after the Court’s decision, was able to avoid imprisonment for a long time due to the public sentiment in favor of his actions. He was eventually pardoned by President Buchanan in 1860. \textsuperscript{Id. 671-72.}

\textsuperscript{360} Id. at 675 (emphasis added).

\textsuperscript{361} See V. Harding, supra note 3, at 75. David Walker was an organizer and spokesperson for a black abolitionist organization in Massachusetts, and the Boston agent for
This revolutionary voice was appealing to the American creed for justice. He was sounding a consistent theme of protest and victory, urging America to transform itself. Yet Walker, like other revolutionaries of this era, knew that the source for this change rested inevitably with those who were victimized "under color of law." Thus, he hoped that the appeal would "awaken in the breasts of my afflicted, degraded and slumbering brethren, a spirit of inquiry and investigation respecting our miseries and wretchedness in this Republican Land of Liberty." Exposing the contradictions, raising the consciousness of the oppressed and the oppressor, continuing the flow of the river that leads to freedom, was the legacy of Walker and the other American revolutionaries.

During the Civil War and Reconstruction era, the source of the "transformation movement" shifted to the battlefield, the White House and the Congress. This period marked the first Black newspaper in America, The Freedom's Journal, which began its publication in 1827. Walker's appeal is the most famous and eloquent uncompromising critique of slavery and the Black quest for freedom. Id. at 82.

One of the major issues, if not the major issue of the Civil War, was the issue of slavery. Clearly the rhetoric of Lincoln demonstrates that there were issues other than the humanity of Black people at stake during this dispute. The power of the federal government versus the state's ability to control its own destiny was clearly at stake. The equality of Black people was not the issue for the North. Slavery no longer served any viable purpose for them. The possibility of slave revolts and the mere presence of Black people within the republic created numerous discomforts. Lincoln, in explaining the real issue stated: "The sooner national authority can be restored, the nearer the Union will be 'the Union as it was.' If there be those who would not save the Union unless they could at the same time save slavery, I do not agree with them." See D. Bell, supra note 13, at 4. Despite these motivations, Lincoln, along with those who were involved in this tremendous struggle, were attempting to correct the contradictions that the Framers implanted into the Constitution. They were forced to resolve this contradiction in great part because Black people, regardless of the forces released against them, would not submit to the contradiction. Their efforts, and those of courageous abolitionists, created a situation where military intervention was necessary in order to secure the basic rights of humanity for Black People.

The Emancipation Proclamation was issued by President Abraham Lincoln on January 1, 1863. 12 Stat. 1268-1269. This Executive order emancipated "all persons held as slaves within any State . . . the people whereof then shall be in rebellion against the United States . . . ." Although limited in its breadth, this was an important catalyst for the culmination of the Civil War and the recognition of Black people as free human beings.

During this period three amendments were passed by Congress and ratified by the states which had a tremendous impact on the legal status of Black people in America, and eventually on the entire constitutional structure. The thirteenth amend-
cleansing of the Constitution of overt racial oppression. The Emancipation Proclamation and the Post War Amendments, despite their limitations, signaled a significant transformation in American life and law. Unfortunately, the vision and platform of various advocates for justice were not incorporated into the final solution. Though Blacks again fought for freedom and dignity, they ended up with moderate and temporary changes. However, the greatest change occurred in the form of the law. The Framers' original vision was finally rejected, and the Constitution's general framework was expanded. The Black struggle for freedom and equal treatment resulted in the passage of the fourteenth amendment which changed the nature of Supreme Court decisions and provided tremendous protection for American citizens and corporations.

In the years following Reconstruction, Blacks took their protest to the Court, attempting to enforce the new promises of equality which were ushered in by the war. Unfortunately, many received the same response as before. These petitioners, de-
spite their losses, were instrumental in changing the Constitution.\textsuperscript{371} The Supreme Court was forced to grapple with difficult questions which they would have preferred avoiding. The successful petitioners\textsuperscript{372} clearly advanced the cause of human freedom by carving out different areas in this country's structure where all human beings would be respected before the law.\textsuperscript{373} The Court was able in \textit{Plessy v. Ferguson}\textsuperscript{374} to "postpone judgment,"\textsuperscript{375} on many of the vital issues to another generation.\textsuperscript{376} But in their sleight-of-hand maneuvering they exposed even more the hypocrisy and contradictions within the American creed.\textsuperscript{377} These petitioners must be memorialized for their court-

holding unconstitutional the Civil Rights Act of 1875, the Court stated:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . .\textsuperscript{371}  

\textit{Id.} at 25. This was a very clear message that Black people could not look to the Court to safeguard those new rights which had been granted. This response, though absent the white supremacy rhetoric, was as devastating as the message in \textit{Dred Scott}.\textsuperscript{372} The following is a list of some of the cases during this period wherein the Court denied the Black petitioner's plea for relief and protection. \textit{See United States v. Cruikshank, 92 U.S. 542 (1876); United States v. Harris, 106 U.S. 629 (1883); James v. Bowman, 190 U.S. 127 (1903); Plessy v. Ferguson, 163 U.S. 537 (1896).} Even though the Court did not rule correctly it was forced to grapple with these issues, and in some cases, generated dissenting opinions which would one day become the majority opinion.\textsuperscript{373} Some of the victories occurred in \textit{Strauder v. W.Va., 100 U.S. 303 (1880), and Ex parte Virginia, 100 U.S. 339 (1880)} (The right of Black people to serve on juries was established.); \textit{see also Ex parte Yarbrough, 110 U.S. 651 (1884),} (Court denied a writ of habeas corpus to whites who had violated a civil rights statute by intimidating Black people who were attempting to vote); \textit{see also United States v. Waddell, 112 U.S. 76 (1884), and Logan v. United States, 144 U.S. 263 (1892).}\textsuperscript{374} Though even these small areas of legal recognition had to be repeatedly defended in practice.\textsuperscript{375} In this landmark decision the Court upheld the principle and practice of "separate but unequal." Though the Court reasoned that it was enforcing a statute that provided for "equal but separate" passenger cars on trains in Louisiana, it was clear that none of the facilities that operated on this basis were truly equal. This decision helped to ensure that the system of white domination would be preserved for some time into the future.\textsuperscript{376} This is part of William Lloyd Garrison's condemnation of the actions of the Framers. \textit{See supra,} text at note 145. The Court in \textit{Plessy} was continuing the same pattern inherited from the "founding fathers."

\textsuperscript{377} This postponement lasted until \textit{Brown v. Board of Educ., 347 U.S. 483 (1954).}\textsuperscript{378} The development of the "Separate but Equal" doctrine is a good example of the hypocrisy. It was clear that this was a doctrine created to uphold the status quo and not a fulfillment of the purpose behind the fourteenth amendment. Even the Court's reasoning was very specious when it concluded that the inferi-
Tremendous strides in the transformation of the American Constitution emerged through the powerful litigation strategy of the NAACP Legal Defense Fund. These brilliant lawyers and social activists set out to make Justice Harlan’s dissenting opinion in Plessy the law of the land. This protracted struggle culminated in the landmark decision of Brown v. Board of Education. The status of Black Americans, at least in form, was raised to the level of White Americans. The Constitutional protection enshrined in the fourteenth amendment eighty-six years earlier was finally enforced by the highest judicial body in the country. This was a victory for America more than it would ever be a victory for the Black plaintiffs who initiated the litigation, or their successors. This landmark decision shortened the wide gap between the Constitution’s declaration of equality and the country’s practice of “separate but unequal.” One of the origin that Black people felt from segregation laws was due to their own subjective determination and not because of the law. Id. at 551. Though Justice Harlan in his dissenting opinion argued that the segregation statute was unconstitutional because the Constitution was “color blind,” he also exposed the contradiction in the American creed when he stated, “[t]he white race deems itself to be the dominant race in this country. And so it is . . . [and] will continue to be for all time . . . .” Id. at 559. Although he made a distinction between law and the other aspects of social life, this distinction is meaningless since one’s ability to enjoy the benefits and protections of the law are so intimately tied to one’s economic, political and social status in the society.

375. See R. KLUGER, SIMPLE JUSTICE (1977) for an excellent discussion of the people and the strategy behind the NAACP Legal Defense Fund efforts; see also L. MILLER, THE PETITIONERS (1966).

379. See supra note 374. Justice Harlan in his dissenting opinion declared that, “. . . in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” Id. at 558.

380. 347 U.S. 483 (1954). The Supreme Court in a unanimous decision held, “. . . that in the field of public education the doctrine of ‘separate but equal’ has no place. Therefore, we hold that the plaintiffs and others similarly situated . . . are . . . deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.” Id. at 495.

381. None of the plaintiffs in the Brown litigation ever attended integrated schools. This was due primarily to Brown v. Board of Educ., 349 U.S. 294 (1955) (Brown II), wherein the Court tempered the effects of the first decision by declaring that the transformation should occur with “all deliberate speed.” Id. at 301. The saga of integration was an ugly and painful one for Black children, and it is still very questionable whether the educational welfare of Black children has been completely addressed. See Hall & Henderson, Thirty Years After Brown: Looking Ahead, 24 WASHBURN L.J. 227 (1985).
most horrendous stigmas and obstacles of liberty and freedom was being ushered out, through the courageous and brilliant advocacy of individuals like Thurgood Marshall, Howard Jenkins, James N. Nabrit, Spotswood W. Robinson III, Frank Reeves, Jack Greenberg, Louis Redding, U. Simpson Tate and George E.C. Haynes,\(^\text{382}\) individuals\(^\text{383}\) who would not accept the corrupted definition of equality which the Framers and their "posterity" imposed upon Black people and the entire nation. This breakthrough was the fruit of the immeasurable labor of individuals like Charles Hamilton Houston, William Hastie, and so many others who paved the way; those who trained and inspired the lawyers who won the battle.\(^\text{384}\)

The victory was still far off. \textit{Brown} did not completely transform the Constitution or the nation as many envisioned.\(^\text{385}\) The same Court which apparently closed the door on the long history of racial oppression in America, left it cracked enough so that the same practices could continue unabated for some time to come.\(^\text{386}\) The stage for the "transformation movement" shifted from the courtroom to the streets. Protests, sit-ins, demonstrations, boycotts, marches, and uncompromising will, be-

\(^\text{382}\) These are the lawyers who argued the case before the Supreme Court. \textit{See Camper, The Quest For Liberty} \textit{Black Enterprise}, July 1987, at 51, 54.

\(^\text{383}\) Tremendous credit must also be given to the plaintiffs in the \textit{Brown} litigation and others who were courageous enough to take a stand for equality and liberty. Their names must be remembered. Oliver Brown, Mrs. Richard Lawton, Sadie Emanuel, Charles and Kimberly Smith, Cordellia Mitchell, Connie Maxwell, Barbara Mitchell, Arlene Jackson, Charlene Burkes, Carlesia and Cheryl Robinson, Rufus and Michelle Kelly, John, Jackie, Johnny and Viola Davis, Ruby Davis, Inez Davis, Wesley Williams, Mary Parker, Robert Faulkner, Margaret Butler, Harold Haynes, Francis Gebhart, William Horner, Spottswood Bolling, Arcadia Phillips, Walter Tobuner, et.al.

\(^\text{384}\) For an extensive analysis of the contributions of Charles Hamilton Houston (Dean of Howard Law School/first Black lawyer representing the NAACP to have won before the Supreme Court), William Hastie (first Black Federal Judge), and other early attorneys in the period preceding \textit{Brown v. Board of Educ., see R. Kluger, supra note 378}, at 105-366.

\(^\text{385}\) Despite the Court's declaration that separate was inherently unequal in the field of education, many of the nation's schools remained segregated. In addition, other aspects of life in America also remained on a segregated basis. Black people in America were still viewed as second class citizens and the Constitution's promise of equality remained unfulfilled in some of the most vital areas of life: voting, employment, housing and even education.

\(^\text{386}\) The "all deliberate speed" formula of \textit{Brown II}, 349 U.S. 294, allowed for Southern Courts and school officials to drag their feet. For an excellent overview of many of the maneuvers that lower courts employed to avoid the mandate of \textit{Brown}, \textit{see D. Bell, supra note 13}, at 381-82 n.16.
came the new vehicles for Constitutional change. The Civil Rights/Black Power Movement was a continuation of the struggle for freedom, liberty and human dignity which began centuries earlier when Africans refused to submit to their captors. Rosa Parks, Fannie Lou Hamer, Martin Luther King, and Stokley Carmichael became the new American revolutionar-

387. The Montgomery Bus Boycott of 1955 is viewed as the beginning of this new stage of the Civil Rights movement. The success and spirit of this victory spread like wild fire. Other protests and boycotts sprang up across the country. Some of the notable ones were: student lunch counter sit-in at Greensboro, North Carolina in February of 1960; student sit-in at Orangeburg, South Carolina in the same month; The Freedom Rides of 1961 led by James Farmer, the Director of CORE (Congress of Racial Equality); Student Nonviolent Coordinating Committee (SNCC) Voter Registration School in Mississippi in 1962-63; the marches to desegregate Birmingham, Alabama in 1963; the historic march from Selma to Montgomery in 1965; the March on Washington; the riots in Watts, Detroit, Newark, etc. For a general overview of these activities and others, see H. Sitkoff, supra note 3; see also A. D. Morris, The Origins of the Civil Rights Movement (1984).

388. Rosa Parks initiated the Montgomery Bus Boycott when she refused to give up her seat to a white person as it was customary and mandatory to do in Montgomery. This silent courageous act changed the course of American law and history.

389. Fannie Lou Hamer was instrumental in the formation of the Mississippi Freedom Democratic Party, which attempted to be seated at the National Democratic Convention in 1964. Since Blacks were not allowed to participate in the election of delegates to the Democratic Convention, Ms. Hamer, along with others, held their own convention wherein delegates were chosen to represent “all of the people” of the State of Mississippi at the National Convention. The delegates were not officially seated at the Convention, yet their presence forced the National Democratic Party to change their rules and policies concerning the elections of delegates. The personal history of Ms. Hamer in Ruleville, Mississippi—especially her struggle to become a registered voter—is a dramatic triumph of the human will over the forces of white domination in America. She, like so many others, paid a tremendous price for attempting to inject the true meaning of liberty and equality into the Constitution. She was severely beaten on numerous occasions for attempting to become a registered voter in Mississippi.

390. Dr. Martin Luther King was the symbol of this stage of the American Revolution. His deeds and contributions to the development of American society and constitutional law are immeasurable. He was America’s “savior,” the true American Revolutionary. The movement which Dr. King inspired affected every aspect of life in America: voting, housing, public accommodations, criminal justice, health and human welfare. It is this movement which ushered in the “new meaning” in Constitutional interpretation. See, e.g., S. B. Oates, Let The Trumpet Sound, The Life of Martin Luther King, Jr. (1982).

391. Stokley Carmichael was one of the founders of SNCC (Student Non-Violent Coordinating Committee). He is most famous for his popularization of the concept of Black Power. Carmichael was symbolic of the militant aspect of the “American Revolution.” The pressure that his stance placed on the traditional Civil Rights leadership, and on America, precipitated much progress in legal reform. The same could be said for Malcolm X, and Elijah Muhammad. Though these men were not involved in direct action against the inequalities in society in the same manner as the Civil Rights movement,
ies. They, along with countless others, tested the ability of the
nation to change, galvanized the masses to throw off the yoke of
oppression and gave new meaning to the American ideals. Dr.
King latched on to the ideals which the Framers had enshrined
into the Constitution and used them as a platform upon which
to build his appeal for justice. He eloquently stated at the fa-
mous March on Washington that:

When the architects of our republic wrote the magnifi-
cent words of the Constitution and the Declaration of In-
dependence, they were signing a promissory note to
which every American was to fall heir. This note was a
promise that all men—black men as well as white
men—would be guaranteed the unalienable rights of life,
liberty and pursuit of happiness. But it is obvious that
America has defaulted on this promissory note insofar as
her citizens of color are concerned. Instead of honoring
this sacred obligation, America has given the Negro peo-
ple a bad check . . . We refuse to believe that the bank of
justice is bankrupt. We refuse to believe that there are
insufficient funds in the great vaults of opportunity in
this Nation . . . Now is the time to make real the promise
of democracy . . . Now is the time to make justice a real-
ity for all of God’s children.392

It is clear that at the time King made this speech in 1963, that
justice, equality and liberty were not part of American society. If
the country denied them to a certain segment of its population
then it has denied the ideal entirely. The movement which King
was a part of was attempting to make these ideals a reality in
America. Through these protest efforts,393 coupled with judi-

392. Excerpts from Martin Luther King’s famous “I Have a Dream” speech given at
the Lincoln Memorial during the historic “March on Washington,” on August 28, 1963
(quoted in F. Freedman, supra note 280, at 252).
393. See supra notes 387-91.
cial and legislative enactments, social and constitutional transformation began to occur. The most sacred element of citizenship was finally given to Black people. Up to this point democracy did not exist in America. This is the bicentennial of the Constitution, but it is certainly not the bicentennial of the principles of liberty, equality and democracy. It is inaccurate for scholars to refer to the source of democracy in America as the strength of the Constitution, when for one hundred and seventy eight of this two-hundred year tradition, a significant number of the population were virtually precluded from participating in the political process. The Framers referred to this concept in


395. For a list of the various Civil Rights laws which were passed during this period, see Civil Rights Acts of 1960s, supra note 281. For an analysis of the relationship between the passage of these laws and the “protest movement,” see infra notes 400-14.

396. This point is very critical in understanding the meaning of the Constitution, and this bicentennial celebration. The Black struggle for freedom is the central axis upon which the “transformation” in American law and society has occurred. Without it there would be very little, if anything, to celebrate this year. This idea is eloquently captured by the historian Benjamin Quarles when he states:

[What the overwhelming majority of Negroes wanted was their full rights as American citizens. . .

... the vision of the founders of this republic was still a vital force. Americans to the core, they believed that freedom and equality for all could be achieved in their native land. . .

This belief had been one of their significant contributions to the making of America. In enlarging the meaning of freedom and in giving it new expression, the Negro had played a major role. He had been a watchman on the wall. More fully than any other American, he knew that freedom was hard-won and could be preserved only by continuous effort. The faith and work of the Negro over the years had made it possible for the American creed to retain so much of its deep appeal, so much of its moving power.

See B. Quarles, The Negro in the Making of America 264-65 (1964) (emphasis added). Quarles’ statement is very eloquent, yet he understates the contribution of the “Black Struggle” to American Constitutional law. The struggle did not “enlarge” the meaning of freedom, it gave the correct meaning for the first time. The meaning of the Framers was totally incorrect. Without this process the contradiction in American law would have remained so glaring that there would be no “appeal” to its “creed.”

397. After tremendous social upheaval in Alabama and throughout the South the Voting Rights Act was passed by Congress in August 1965. This act eliminated many of the barriers that Southerners constructed in order to prevent Black people from voting. This law, more so than any other, provided them with a viable tool with which to secure advancement in society. When the act was finally enforced the number of registered voters and Black elected official increased dramatically. See Civil Rights Acts of 1960s, supra note 281.
their declarations, but they prevented it from taking root by their actions. This principle was added to the foundation a couple of decades ago, and must still be nurtured.

It is amazing how a “bright line” can be drawn between specific historical events, and the enactment of various laws and judicial decisions. The efforts of Rosa Parks and the Montgomery Improvement Association were directly responsible for the desegregation of public bus lines in Montgomery, Alabama. The “Sit-in” movement conducted by the Student Non-Violent Coordinating Committee (SNCC) and various other individuals and groups brought an end to segregation in lunch counters and other public facilities throughout the South. Although the Supreme Court had already decided that segregation in interstate travel was unconstitutional in Boynton v. Virginia it took the courageous efforts of the “Freedom Riders” to make this an enforceable right. The historic March on Washington precipitated the passage of the 1964 Civil Rights Act. The Freedom Summer of 1964, the tragic death of three civil rights workers, coupled with the Selma to Montgomery March of 1965.

398. Justice Thurgood Marshall supports this conclusion. He has stated:
I do not believe that the meaning of the Constitution was forever “fixed” at the Philadelphia Convention. Nor do I find the wisdom, foresight and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights we hold as fundamental today.

See Marshall’s Speech, supra note 6.

399. These principles were added beginning with the Brown decision and culminating in the passage of a series of Civil Rights Acts. Though these were not Constitutional amendments, these cases and statutes substantively altered the meaning of the Constitution.

400. See H. SITKOFF, supra note 3, at 41-68.
401. Id. at 69-96.
403. See H. SITKOFF, supra note 3, at 97-114.
404. Id. at 165-66.
405. Id. at 168-97. This project sponsored by Student Non-Violent Coordinating Committee and The Congress of Racial Equality, sent numerous individuals—mostly students both black and white—into the South (Mississippi) in order to educate and register Black people who were being denied the franchise by various legal maneuvers, intimidation and violence.

406. Three students who were participating in the Freedom Summer project were brutally murdered by white public officials in Philadelphia, Mississippi. Their bodies were found after an extensive search that drew national media attention. The names
were the catalyst for the passage of the Voting Rights Bill. The assassination of Martin Luther King spurred the passage of the Fair Housing Law. The urban riots of the mid-1960s produced various social reform programs, and some link them to the Court’s invalidation of miscegenation statutes in Loving v. Virginia.

President Lyndon Johnson recognized the deeper political and historical meaning of these various human acts when he compared the Selma March to the Revolutionary War battle at “Lexington and Concord.” In urging the passage of the Voting Rights Bill he proclaimed that the “real hero of this struggle is the American Negro. His action and protest, his courage to risk safety, and even to risk life, have awakened the conscience of this nation.”

It was again the sacrifices of Black lives at the altar that made change possible. Yet it was often the death of white protesters or supporters of the movement which generated the greatest public outcry and the swiftest response. These are the

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Chaney, Schwerner, and Goodman took on divine significance. They became the symbols of the atrocities of white supremacy and hatred. H. SITKOFF, supra note 3, at 172-79.

407. Id. at 187-97. This march was part of the strategy of the Southern Christian Leadership Council (SCLC) to force the federal government to pass a strong voting rights bill. They chose a city, Selma, Alabama, which was notorious for its treatment of Black people and its constant denial of their political rights. Defying an order from the Governor of Alabama, Hosea Williams lead 500 protesters on a march from Selma to Montgomery. At the Edmund Pettus Bridge, just outside of Selma, one of the most violent attacks by policemen on peaceful Black protesters occurred. Television cameras carried these scenes into homes across America. Although the march was violently and abruptly terminated, it generated an outpouring of sympathy. The assault on three Unitarian ministers and the death of one, who came to participate in the march, kindled federal support for the demands of Black people. With protection from federalized Alabama State Troopers, Dr. Martin Luther King led over five thousand marchers on the now historic “Selma to Montgomery” march. The death of Viola Liuzzo, a White participant in the march, generated more public support in favor of the passage of a Voting Rights Bill.


409. See H. SITKOFF, supra note 3, at 222; see also Civil Rights Act (Fair Housing Title) of 1968, supra note 281.

410. See H. SITKOFF, supra note 3, at 199-217.

411. See D. BELL supra note 13, at 61.


413. See H. SITKOFF, supra note 3, at 193.

414. Id.

415. This pattern can be discerned by reviewing the events which lead to the passage of various laws during this period. See supra notes 405-07. The deaths of President Ken-
Constitutional heroes and heroines who must be memorialized during this bicentennial year. American history is full of men and women who insured this country’s future. It is vital for this nation to insure that people like Dred Scott, the Scottsboro boys, and the victims of the Grant Parish Massacre did not

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416. The names are too numerous to mention, and so many never made it into the history books. The following is just a few who represent the spirit of so many. Medgar Evers, Emmitt Till, Jimmy Lee Jackson, Ralph Featherstone, Bobby Hutton, Fred Hampton, Sammy Younge Jr., Rev. and Mrs. Moore, the four Black girls in a church in Alabama, William Moore, Herbert Lee, William Franklin and the countless ones who lay at the bottom of rivers, creeks and unmarked graves; Andrew Goodman, James Chaney, Michael Schwerner, Malcolm X, Dr. Martin L. King, Viola Liuzzo, Rev. James Reeb; the men of Attica and Soledad, the numerous ones who died in the gas chambers and electric chairs by order of a court for crimes they didn’t commit; Paul Robeson, Fannie Lou Hamer, Elijah Muhammad, Ella Jo Baker, Marcus Garvey, those who stood up and challenged the contradictions regardless of the price; James Meredith, Ada Lois Sipuel Fisher, the students in Little Rock, Arkansas, and the University of Alabama, the courageous ones who went through the doors first so that the rest of us could follow; those whose necks were placed in a noose and hung from a tree because their color was resented and despised; Nat Turner, Denmark Vesey, Gabriel Prosser, John Brown, those who loved liberty so much that they willingly and courageously faced their tyrants despite overwhelming odds... These are the heroines and heroes who through their lives and sacrifices taught us the real meaning of ‘liberty’ and ‘justice,’ and thus made this country great. It is their spirit that we must revere this bicentennial year.

417. This is the name of the petitioner who sought his freedom in the famous Dred Scott v. Sandford decision.

418. In 1931 nine Black men were accused of rape in Scottsboro, Alabama. Despite compelling evidence that they did not commit the crime, eight were sentenced to death. After years of tremendous protest and litigation some were released, while others remained in jail for over nineteen years. Two Supreme Court cases grew out of the litigation of the Scottsboro incident: Powell v. Ala., 287 U.S. 45 (1932), and Norris v. Ala., 294 U.S. 587 (1935). The first case established the right of counsel for criminal defendants, and the second overturned the conviction of one of the defendants because of the systematic exclusion of Blacks from jury service. Both cases, especially Powell, were very important in advancing the rights of all criminal defendants and transforming the American criminal justice system. Unfortunately, the defendants were retried and again convicted. During one stage of these lengthy proceedings, one of the white girls involved in the case admitted that the alleged incident did not occur. This confession did not result in an acquittal for any of the defendants. The last of the Scottsboro defendants, Andrew Wright, was released by the Alabama State Pardon and Parole Board on June 9, 1950. A compelling description of the events surrounding this famous case is found in a book co-
live and die in vain. These individuals and so many other petitioners and wrongfully accused defendants, who suffered under the banner of the American legal system and its glorious Constitution, should be canonized. They must not be remembered as insignificant victims caught up in the processes of constitutional development. As this country celebrates this year, it should also celebrate the survival of people of color in a society where color has been, and still is an invitation for abuse, denial and destruction. During slavery, and the many years following, African people would take that which was discarded and turn it into something useful and divine. Through these same creative forces, their descendants have taken the document which the “founding fathers” held out to the world, with all its glaring weaknesses and contradictions, and made it real. They did what was often described in southern metaphors as “the impossible.” They got “blood from a turnip.”

The river to freedom still flows. It bends and winds, sometimes flowing slowly, other times profusely, but it always flows. It is this river which has enriched the soil of Constitutional law in this country.\(^{420}\) The overflowing of its banks has made a na-

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419. This is the incident out of which one of the first Supreme Court interpretations of the fourteenth amendment occurred, United States v. Cruikshank, 92 U.S. 542 (1876); Professor Derrick Bell describes this incident of white violence against Blacks in the following manner:

In Louisiana during the election of 1872 there were numerous disputes over the results of local elections. In the town of Colfax, where an election dispute over the position of Sheriff and Judge had arisen, the Sheriff, on the Governor's order, seized a building which was to be used as the Courthouse. The seizure was made with the assistance of a posse of blacks. Rumors spread that the blacks were about to attack local whites, and on April 15, 1873, the Courthouse was burned down and the blacks were shot as they came out. The Governor took no action, but the Department of Justice investigator secured evidence, and ninety-six people were indicted under the Civil Rights Act of 1870 (now 18 U.S.C. Sec. 241). The Justice Department succeeded in arresting nine of them. They were found not guilty of murders but guilty of conspiracy to prevent blacks from the free exercise and enjoyment of rights and privileges granted and secured by the Constitution, including the right to assemble peacefully for lawful purposes, to bear arms, vote, and not be placed in fear of bodily harm for voting . . . The Supreme Court reversed as to each count of the indictment. See D. Bell, supra note 13, at 211-12 n.4 (emphasis added).

420. A most moving description of this “river” can be found in Vincent Harding’s book, There Is A River, The Black Struggle for Freedom in America. See V. Harding supra note 3.
tion that was created to protect economic concerns into a place where the battle for liberty, justice and the equality of people, has been a constant drama. As the drama unfolds in a more sophisticated form, let those who understand the "transformation of law," assume their appropriate places on the stage of human history.

VI. PRESENT DILEMMAS, FUTURE CHALLENGES

Despite the tremendous transformation which has occurred in the Constitution and in American society, serious inequities still remain. The overt forms of discrimination have all but disappeared, but the lasting consequences of centuries of subordination linger on. These consequences, coupled with more subtle forms of discrimination, create a tremendous challenge for all of us during this bicentennial year.

One of the legal challenges which this country presently face is the new crisis in constitutional construction and interpretation. The call for a return to the jurisprudence of original intent is at the core of this crisis. This call is based on the premise that the only way the Constitution can constrain judges, is for them

421. See supra notes 2 and 8.
422. Various legal scholars have commented on this new form of discrimination. John Calmore, in describing how meritocracy has replaced overt discrimination writes, "[b]eyond stereotypic characterizations blacks are seen simply as unable to compete fairly for goods and services because so many of them, as individuals, are flawed: uneducable, untrainable, immoral, violent, criminally inclined. They lack job experience; they do not test highly; they live in slums. See Calmore, Exploring the Significance of Race and Class in Representing the Black Poor, 61 Oregon L. Rev. 201, 207 (1982); Professor Derrick Bell states, "while slavery and segregation rested on the need to exploit white as well as black labor, wealth in this country is now produced through the exploitation of technology. No longer needing their basic labor, the society feels free to offer long disadvantaged blacks and poor whites, "equal access" to jobs, schools, housing, and public accommodations, that they are ill-prepared to accept or unable to afford.

This statement is taken from a speech given by Professor Bell at Jackson State University, Jackson, Mississippi, November 1, 1984, entitled, No Hiding Place: A Traditional Role for Black Colleges in a Still Hard World, at 7. Professor Alan Freeman writes, [f]or as surely as the law has outlawed racial discrimination, it has affirmed that Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing, and have very little political power, without any violation of anti-discrimination law.

to interpret the document according to the intentions of those who drafted, proposed and ratified it and its various amendments. The earlier analysis in this article demonstrates the danger and weaknesses in this method of judicial review. This perspective ignores the tremendous transformation which has occurred in the nature and spirit of the document. The change is the product of the freedom movement which has been detailed herein. Any valid form of constitutional interpretation must take this movement and its consequences into consideration. It has altered the focus of the Constitution so that human dignity is now a valuable component of the text. Within the words handed down by the Framers are additional values which they did not totally understand. Nor did they intend for them to be placed within the text. The “legitimate right of the majority to govern” in a manner that destroys the fundamental rights of individuals has a deeper meaning than Madison imagined. This appreciation emerged from the history of racial domination in this country. If the Supreme Court was authorized to balance this tension between individual freedom and the power of the majority, then it cannot be limited by a vision that allowed the major-

423. This statement paraphrases portions of a speech given by Judge Robert H. Bork before the University of San Diego Law School, November 18, 1985. THE GREAT DEBATE, supra note 122, at 43-52.

424. Proof that there are values within the Constitution which the Framers did not intend the document to ever possess is found in a speech given by C.C. Pinckney before the South Carolina House of Representatives in 1788. While explaining to this body the benefits and promises that the South received at the Convention, he stated:

We have a security that the general government can never emancipate them [Africans], for no such authority is granted; and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.

See 3 M. Farrand, supra note 26, at 254. Pinckney reiterated these intentions in 1820 before the same legislative body.

He stated, it was an agreed point, a solemnly understood compact, that on the Southern States consenting to shut their ports against the importation of Africans, no power was to be delegated to Congress, nor were they ever to be authorized to touch the question of slavery; that the property of the Southern States was to be sacredly preserved, and protected to them, as any other kind of property in the Eastern States were to be to their citizens.

Id. at 443. Therefore, the thirteenth amendment is in total contradiction to the original intent of the Framers. How much of the original intent did this amendment carve away? How much of the remaining original intent dampens the spirit of this amendment? These questions are as elusive to the intentionalist as morality is to the expansionist.

425. THE GREAT DEBATE, supra note 122, at 44.
Constitution and Race

ity to violate the natural rights of other human beings. Thus greater safeguards than those envisioned must be incorporated into these broad parameters that the Framers constructed. The judge's search for these new safeguards are no more elusive than his/her search for original intent. The spirit and philosophy of the Constitution can be found in the tumultuous history of this country, as well as it can be found in the journals of the Framers and the Federalist papers. Neither search produces total certainty, yet the first, when conducted by individuals who are sensitive to the complete function of law, can produce more equitable results. It is a "Constitution that we are expounding," but in order for it to fulfill its true mission, those who interpret it must search for the best meaning of the ideals enshrined therein. If the Constitution only provides us "with a premise," then the minor premises which lead to a conclusion must incorporate history, humanity, and philosophy along the way. There is clearly a danger in allowing nine men and women to make these types of decisions for an entire nation. Yet there is also a danger in allowing one hundred senators and four hundred and thirty-five representatives to make decisions for a nation. The Framers did not intend to construct a government that was free of dangers, they only attempted to create certain "checks" on these powers. History teaches that original intent provides no greater restraint than an expanded jurisprudence. The jurisprudence of original

426. See discussion of Madison's majoritarian vision of law, supra notes 119-21 and accompanying text.

427. Original intent is a very elusive search because even the manifested intent of those who drafted, proposed, and ratified the Constitution or an amendment is so varied. Whose intent governs? There are numerous sources which contain that intent: legislative histories; state ratifying convention proceedings; the papers and writings of the Framers or other legislators, etc. These sources are often in conflict and they don't always reflect all of the discussions and sentiment which were embodied in a provision, but never placed in writing. Justice William J. Brennan, in a speech to the Text and Teaching Symposium, Georgetown University on October 12, 1985, described the quest for a jurisprudence of original intent as "arrogance cloaked as humility." The Great Debate, supra note 122, at 14.

428. The Great Debate, supra note 423 at 46. Judge Bork, in defending his position against claims that original intent does not aid in the resolution of contemporary problems which the Framers did not contemplate, stated "the Constitution provides him [the intentionalist] not with a conclusion but with a premise. The premise states a core value that the framers intended to protect. The intentionalist judge must then supply the minor premise in order to protect the constitutional freedom in circumstances the framers could not foresee." Id.
intent did not restrain the judges in *Dred Scott*, the *Civil Rights Cases*, or *Plessy*. Original intent was the basis for these appalling decisions against liberty and humanity. This new era of original intent will likely produce similar results; results not as offensive as the cases cited above, but results which circumvent the movement for racial justice. The contribution that the Black Freedom movement and others have made to the development of Constitutional law and jurisprudence is too precious and important to be discarded for promises of certainty and predictability.

This era in American constitutional law fits the description of the time in Charles Dickens's *Tale of Two Cities*. For it is "the best of times" for some and "the worst of times" for others. It is the best of times for those who would prefer to forget the past Constitutional injustices and their consequences, and it is the worst of times for those who are forced to live every day with those consequences. It is a time of celebration, but is also a time for rejoicing over the liberties that are enjoyed in this country, but it is also a time for a sober, critical analysis of the Constitution's past and its future. In this era of economic recovery, some see things as they are and like it, knowing that for them it can only get better. Others see things as they are and pray for change, for they know that things could soon be worse. Therefore, how one views this bicentennial year, this Constitution, depends entirely on which side of the coin one's life, interests and aspirations lie. For there are many who will examine this document and reach very different conclusions than the one offered here.

The purpose of the conference on

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429. See *C. Dickens, A Tale of Two Cities* (Bantam Books 4th ed. 1983). Dickens describes the period of the French Revolution in the following manner.

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way.

Id. at 1.

430. See supra notes 2 and 8.

"The Constitution and Race: A Critical Perspective," was to make sure history records that there was a dissenting opinion.

We are living in a time where the Supreme Court upholds an affirmative action plan that insures the promotion of Black state troopers in Alabama,432 yet fails to uphold the rights of a teachers' union in Michigan to voluntarily correct racial imbalances in the hiring and termination of teachers.433 The Court has recognized that peremptory challenges can be used by the prosecution to deny Black defendants a fair and impartial trial,434 yet it failed to recognize that the most severe penalty that the legal system can impose is disproportionately applied to Blacks and other people of color.435 It appears that there are mixed messages coming from the Court. A closer and deeper examination will reveal that these are the same messages. The message is that the inherent contradiction that existed within the Constitution at its inception has not been totally resolved. The contradiction produces a little bitter and a little sweet. It is not until the contradiction is finally resolved that the Court and this Country will be able to rectify the crimes that have been inflicted upon people of color in this society in the name of the Constitution. During this bicentennial year, we gathered at this conference to propose resolutions436 to the contradictions, and to ponder our alternatives. This is the legacy of the "river;" this is our challenge for the future.

436. Resolutions were proposed and approved at the final Plenary session of the conference in regards to the following areas: Reparations, Economic Rights, The Fourteenth Amendment, Criminal Justice, and Political Representation.