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WHITHER LIBERTY, EQUALITY OR LEGALITY?
SLAVERY, RACE, PROPERTY AND THE 1787 AMERICAN CONSTITUTION

Juliet E.K. Walker

"The rise of liberty and equality in America [was] accompanied by the rise of slavery . . . . To a large degree it may be said that Americans bought their independence with slave labor."

Edmund S. Morgan

In the history of freedom, universal recognition distinguishes two preeminent documents produced in Revolutionary War America. One proclaimed a philosophical basis for independence;

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1. E.S. MORGAN, AMERICAN SLAVERY AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 4-5 (1975). See J.R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 33 (1978), who said: "It is a popular but profound error to disregard the slave population when estimating the success with which white society solved the problems of combining economic subsistence with representative government." Id. See also J. APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790's (1984), for brief distinctions between the classical republican definition of liberty and the Lockean liberal concept of liberty. The former is political, associated with a republic under rule of law, the liberty of secure possessions, private vested interests, and "the enjoyment of legal title to a piece of property." Id. at 17. The latter is economic liberty "that undergirds the free enterprise system which received its political framework in America with the adoption of the constitution." Id. at 22. See generally Ross, The Liberal Tradition and the Republican Tradition Addressed, in NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY (J. Higham & P. Conkin eds. 1979).

the other promulgated political precepts for establishing a liberal constitutional republic. Even today, their unparalleled influence on human rights, social justice, and popular self-government persists as a basis for political liberation and national self-determination in the world community of nations. With the 1776 Declaration of Independence,3 liberty, equality, and the pursuit of happiness underscored a triad of unassailable philosophical concepts that legitimated the American Revolution.4 Under the 1787 Constitution,5 however, legality, property, and federalism emerged as the political precepts that delineated the governmental structure of the new nation.6

The 1787 Constitution was established as the supreme law of the land,7 and legality, as opposed to equality, assumed precedence as the formative principle shaping the political and socio-economic foundation of the new nation. Consequently for Afro-Americans, despite their protests for freedom and their military contributions throughout the Revolutionary Era,8 legality under the guise of

3. The Declaration of Independance (U.S. 1776).
5. U.S. Const. arts. I-VII
7. U.S. Const. art. VI.
American constitutional liberalism, as opposed to equality, would take precedence in determining the legal and societal status of blacks in the new nation. The political precepts, economic goals, and societal prejudices, which gave momentum to the drafting of the 1787 Constitution, and which underlay its failure to sanction national liberty and freedom for black Americans, would conclusively undermine and eventually defeat the equalitarian goals of the Revolution. Within little more than a half century after its ratification, the 1787 Constitution would be resolutely attacked for its failure to eradicate slavery.

As the supreme law of the land, the Constitution provided the framework for the legitimization of those existing societal institutions which would strengthen the new republic, promote unity of the thirteen states, and encourage a sustained economic growth. Therefore the American Constitution, while representing a body of organic law, is thus more than the document of 1787 and its subsequent amendments. Yet, at the same time, the absence of laws abrogating existing societal institutions, practices, or customs (in this instance, slavery and the subordinate legal status of blacks) sanctioned a defacto persistence of racism and slavery protected under the 1787 Constitution.

The perpetuation of slavery, hence racism, in an age of democratic revolution meant that, for Afro-Americans, the equalitarian spirit of the American Revolution had been compromised from the beginning in the building of the new nation. The expressed purposes of the Framers, as they sought to form a more perfect union, were to "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty for ourselves and our Posterity." Yet, almost one-fifth of the nation's population, black Americans, were excluded from securing either their freedom or liberty. Under the aegis of American constitutionalism, legality,

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10. Id. at 335.
11. U.S. Const. art. VI.
12. See W.D. Jordan, supra note 6, at 274-80.
which underscored the protection of private property, and,

federalism, which relegated residual powers to the states,\textsuperscript{15} provided the basis for the new republic to protect the institution of slavery.\textsuperscript{16} Consequently, the a priori inequality of the races was established. As emphasized by one analyst of the 1787 Constitution, the institution of slavery persisted in the new nation primarily as a result of the Framers "commitment to private property."\textsuperscript{17} The 1787 Constitution remained silent in response to the anomalous civil and legal position of free blacks and illuminated the colonial heritage of racism.\textsuperscript{18} The Revolutionary War Generation also found "a genuinely multi-racial society" inconceivable.\textsuperscript{19}

By 1787, in a land where, for over a century, societal and legal presumptions had existed which marked anyone of African descent as a slave, membership in a racially degraded group in which the great masses were relegated to forced involuntary servitude did little to encourage equality, even if a member of that group were free. Historic precedent found in the legal tradition and business practices of Colonial America had demonstrated that sustained national economic growth could be achieved through the protection and development of private property, especially property in slaves.\textsuperscript{20} Notwithstanding the limited recognition of the humanity of the slave or the limited freedom accorded non-slave blacks, the link between liberty for whites and protection of their private property in slaves was considered indissoluble.\textsuperscript{21}

In drafting the 1787 Constitution, the Framers proceeded from

\textsuperscript{15} 20 percent of the American population. \textit{Id} at 11-12. In the South, the 657,327 slaves comprised 33.5 percent of that region's population: the 32,457 free blacks made-up 1.6 percent. \textit{Id.} at 12.

\textsuperscript{16} U.S. Const. amend. X.

\textsuperscript{17} U.S. Const. art. I, § 2, cl. 3; art. I, § 9, cl. 1; art. IV, § 2. \textit{See} W.D. Jordan, supra note 6, at 349-51.

\textsuperscript{18} S. Lynd, \textit{Class Conflict, Slavery, and The United States Constitution} 181 (1967).


\textsuperscript{20} \textit{See} Western Culture, supra note 18, at 8-10, 127-64; \textit{Age Of Revolution}, supra note 8, at 259.

\textsuperscript{21} W.D. Jordan, supra note 6, at 350-51.
the imperative that a viable national economy, a commercial republic, underscored by private property and free enterprise, ranked paramount in the development of a strong central government. The imperative that a viable national economy, a commercial republic, underscored by private property and free enterprise, ranked paramount in the development of a strong central government. Inherent in that premise were both implied and expressed principles, a "public philosophy," that laid the foundation for the nation's future political and socio-economic development. That foundation did not preclude slavery, which was also indissolubly linked to the protection of private property. "The American colonists were fighting, after all, for self-determination. And it is now clear that slavery was of central importance to both the southern and national economies, and thus to the viability of the 'American System.'"

Notwithstanding the egalitarian and democratic goals of the Revolution, slavery was very much an issue of import for that generation. The 1787 Constitution reflects a greater interest in the protection and expansion of itself as an institution than in the immediate political goals of the Revolutionists. Existing historic socio-economic values and racial attitudes in Colonial America also shaped the priorities of the Framers. In particular, the new freedoms achieved by whites in the colonies and the expansiveness of their economic opportunities were contingent on, if not accomplished by, the extent to which colonial blacks had been denied liberty and equality. In the absence of freedom, blacks were also denied property. Under an agriculturally based economy, land was a source of wealth and power. Protected by the 1787 Constitution, slavery and racism precluded blacks from any

23. See Lowi, The Public Philosophy: Interest Group Liberalism, 61 AM. POL. SCI. REV. 5 (1967). See also D. Robinson, supra note 18, at 58 (citing Pamphlets Of The American Revolution 162 (B. Bailyn ed. 1965)). "The ideology of the American Revolution is often identified as 'constitutional liberalism,' and its adherents as Whigs. Its most appropriate slogan was 'Liberty and Property.'" Id. See also D.O. White, Connecticut's Black Soldiers, 1776-1783, at 57-64 (1973), who showed that of some 289 blacks in that state's militia, five reported Liberty as their surname and seventeen used Freedom or Freeman. Id at 58-59. See generally The Revolution In America: Documents On The Internal Development Of America In The Revolutionary Era, 1754-1788 (J.R. Pole ed. 1970).
26. See E.S. Morgan, supra note 1, at 316-37.
27. Id. at 4-5.
meaningful competition in the development of the vast resources of this new land for their own economic advantage.

Slavery thus survived the Revolution. It found protection under the guise of legality not only in the Declaration of Independence, but in the 1787 Constitution as well. The persistence of the institution, then, must first be understood within the historic context of the societal and legal status of blacks in pre-Revolutionary War America. Perhaps more than any other constitutional issue in American life, historical linkages are imperative to provide the conceptual framework necessary to examine American constitutionalism within the context of race, slavery, and property. Primary to any analysis of race and slavery, within the context of the framing of the Constitution, is John Locke's *Two Treatises of Government* (*Treatises*). That political tract propounded a social-political contract based upon principles of government by consent, the equality of all men, and their entitlement to inalienable rights. Locke's philosophy provided the American colonists with the basis by which they legitimated their Revolution. Yet despite Locke's insistence on freedom, both the Declaration of Independence and the 1787 Constitution sanctioned slavery. Historical debate has thus centered on whether or not Locke's *Treatises* provided the rationale for the new nation to endorse the institution.

On one side of that debate are the anti-slavery proponents who maintain that slavery represented an inherent contradiction to Locke's philosophy of inalienable rights and the equality of man. Locke's basic premise in the *Treatises*, which he did not qualify on the basis of race, was that all men are in "a state of perfect freedom," and "a state of equality, wherein all the power and jurisdiction is reciprocal." He further emphasized, "that being all equal and independent, no one ought to harm another in his life,

28. See supra note 16 and accompanying text.
30. Id.
31. W.D. Jordan, supra note 6, at 289.
32. See supra note 16.
33. See Western Culture, supra note 18, at 118-21.
34. Id.
35. J. Locke, supra note 29, ¶ 4, at 192.
health, liberty or possessions." In opposition to that position, a
general consensus exists that "[b]ecause John Locke celebrated the
importance of natural liberty, he had to place slavery outside the
social compact, which [he said] was designed to protect man's
inalienable rights."

Thus, while the social contract theory expressed in Locke's
political treatise provided the basis for the American colonists to
wage a revolution, paradoxically, it also provided a philosophical
basis for white Americans to prevent Afro-Americans from achieving
freedom in the formation of the new nation. Notwithstanding that,
a careful reading of the Treatises shows that Locke's discussion of
slavery did not embrace or endorse the institution of inheritable and
perpetual slavery that developed in the American colonies and found
protection under the 1787 Constitution. Admittedly, Locke placed
the enslavement of men captured in a "just war" outside the social
contract. Yet, by 1787, to what extent did this form of
enslavement apply to American born blacks or, indeed, to most
Africans, who became victims of the trade? In relation to race,
slavery, and the 1787 Constitution, the historical persistence of this
debate thus raises several questions. One would have to ask, first,
what was inherent in Locke's philosophy that suggested to the
Revolutionary War Generation that his theory of the social contract
excluded blacks? Considering Locke's position on the equality of
man, if his social contract had neither implicitly nor explicitly
sanctioned the enslavement of blacks, then what rationales, other
than that of virulent racism and economic necessity, provided the
basis for the protection of slavery under the 1787 Constitution?

The extent to which Locke's principles in the Declaration of
Independence were incorporated in the 1787 Constitution has thus
been a point of contention among legalists, scholars, and social
reformers. A basic issue in this debate is whether or not blacks
were included in the social contract and thus entitled to the
protection of inalienable rights by the government under the 1787

36. Id. ¶ 6, at 193-94. See also J. Dunn, THE POLITICAL THOUGHT OF JOHN LOCKE (1969);
37. AGE OF REVOLUTION, supra note 8, at 45.
38. See WESTERN CULTURE, supra note 18, at 119.
39. J. Locke, supra note 29, ¶ 196, at 293.
40. See WESTERN CULTURE, supra note 18, at 118-21.
Students of the American Revolution and the 1787 Constitution are thus challenged to answer that question, if possible, without prejudice. Just why did the Founding Fathers, who subscribed to Enlightenment philosophies, compromise the Revolution and the future economic and political stability of the nation by protecting slavery? That slavery persisted under the 1787 Constitution requires, then, that any analysis of that document must give consideration to the intellectual environment in which it was drafted. Prevailing values and virtues, customs, and traditions that existed in Colonial and Revolutionary War America, and which found expression in that document, are equally important for this analysis.

As a basis for understanding the racial motives of the Founding Fathers, particularly their reluctance to destroy the institution of slavery, one scholar provided the following perspectives in his analysis of those two documents, which he said were drafted in an age propelled by profits, prejudices, and the protection of property.  

"The Declaration of Independence, it is now argued, was a white man's document that its author rarely applied to his or to any slave [and] [t]he Constitution created aristocratic privilege while consolidating black bondage." The priority of the Founding Fathers, however, was the establishment of a more perfect union, and with independence secured, a viable national economy within the constraints of state federalism was foremost. Perhaps, most importantly, "[t]he master passion of the age was not with extending liberty to blacks but with erecting republics for whites." Certainly the Revolutionary War Generation recognized the incongruity of fighting for independence, liberty, and self-determination, while holding one out of five people in that land in slavery. That contradiction, however, was rationalized. The new Americans, most notably in the South, "were entirely satisfied--for reasons resting on their own reading of the Lockeian contract--that slaves and their descendants had never been parties to the contractual system and

41. Id.
43. Id. at 81-82.
44. See H. von Holst, supra note 22, at 43-44 (citing U.S. Const. art. VI, § 2).
45. Freehling, supra note 42, at 83.
that the rights due to English subjects did not extend to them. 47

Not surprisingly then, when one considers the three constitutional provisions which directly relate to slavery, all underscore the political and economic advantages of holding blacks in slavery, but under the guise of legality. 48 American constitutional liberalism rests on the protection of vested interests; foremost among them is private property. 49 And, slaves were property! Thus, paramount to any examination of the 1787 Constitution as the supreme law of the land, in relation to Afro-Americans, is consideration of the legal environment which provided the basis for slavery finding protection under that document. With its emphasis on legality, as opposed to equality, the issue of slavery must also be examined within the contextual framework of property as it related to concepts of liberty and the reality of the political economy that existed before the Revolutionary War Era. The "intellectual and constitutional" history of the Revolutionary War Era reveals that, "the protection of property had been one of the major considerations behind the writing of the Constitution and the creation of the federal union." 50

The Afro-American slave was legally recognized as property. 51 His dual status as human capital had been established under colonial law, having evolved from custom, tradition, and the mercantile values of an agrarian-based colonial society. 52 With their heritage of British common law, which made property rights indistinguishable from contract, 53 tempered by a heritage of slavery, the Framers of the 1787 Constitution viewed the inviolability of property as sacrosanct. 54 In review of the conception of property under the English common law, emphasis has been placed on the centrality of property to the

47. J.R. Pole, supra note 1, at 25.
48. See supra note 16 and accompanying text.
49. See AGE OF REVOLUTION, supra note 8, at 259.
51. See WESTERN CULTURE, supra note 18, at 30-35, 208-11.
54. See H. von Holst, supra note 22, at 19 (citing U.S. CONST. art. IV, § 3).
definition of liberty.55 "Like their British contemporaries, Americans
believed that just as private rights in property could not exist
without constitutional procedures, liberty could be lost if private
rights in property were not protected."56

Central to the American colonial experience, within the context
of British common law, liberty and property were also
indistinguishable.57 Within this prevailing societal and legal
consensus that conjoined liberty and property "[n]ot only was the
security of property the purpose of government, it was the very
definition of government by law, for a government that failed to
protect property ceased to be a government."58 In Colonial America,
consequently, the concept of property emerged as part of the
definition of liberty and constitutional government. One could not
have property without security; and, security in the protection of
property could only be achieved in those societies, which under law,
limited the confiscatory powers of the state. Governments, thus,
would have as their ultimate goal the protection of private property.
In the absence of those constraints property was not property if,
without the possessor's consent, a government could disturb its legal
possession.59

Within this contextual definition, which links liberty to property,
the extent to which slavery would or could continue to exist as a
viable institution in a nation, whose very foundation was secured by
declarations of liberty and equality, challenged the integrity of the
new nation. That slavery found support under the 1787 Constitution
not only compromised the liberal and republican principles on which
the nation was founded, but also established historic precedents
which have found expression in the present racial inequalities which
limit opportunities for people of African descent. Even with the
commemoration of the bicentennial of the 1787 Constitution of the
United States of America, legal ambivalence and societal
discrimination--the American dilemma--that has marked the African
presence in the colonies and Revolutionary War America persists.

55. See WESTERN CULTURE, supra note 18, at 207-11. See also AGE OF REVOLUTION, supra
note 8, at 258-59.
57. See AGE OF REVOLUTION, supra note 8, at 258-62.
58. J.P. REID, supra note 56, at 40. See also ESSAYS IN THE HISTORY OF EARLY AMERICAN
59. J.P. REID, supra note 56, at 41.
As emphasized in a discussion of American racism, "[t]hrough much of American history the shadowy presence of the slave was an irrepressible reminder of the systematic violence and exploitation which underlay a society genuinely dedicated to individual freedom and equality of opportunity." The ultimate paradox, then, is that a nation born in revolution, with the express purpose of achieving self-government, was in the final analysis, the last great repository of slavery among the western nations.

The issue, then, when race and slavery are considered within the context of American constitutionalism, is not whether the Framers, in drafting that document, attempted to legitimate the freedom of Americans to develop private property, including slavery, as a basis to promote laissez-faire capitalism under the Constitution. By 1787, that issue was moot, not only in terms of the historic commercial development of the nation, but especially because of Afro-American slavery which, it must be emphasized again, was as indissolubly linked to the American economy as liberty for whites was to the protection of private property. Thus, while the Framers might have viewed slavery as morally reprehensible, American constitutionalism, with its emphasis on legality, sanctioned the perpetuation of an institution, which clearly obviated racial equality. Underlying the basis of American constitutionalism, then, were historic forces in which the institution of slavery played a significant role, not only in the development of a viable colonial economy, but also in its impact on the social and economic white class structure which developed in Colonial America. In a discussion of the law of slavery, as a factor which encouraged the development of a racial hierarchy that distinguished slave blacks from both slaveowning and non-slaveowning whites, it has been explained:

To secure the allegiance of non-slaveowners to the political interests of the master class, they had to be assured that they would not be as subordinated as slaves. Law could provide such assurances by drawing rigid lines around the class of slaves, thereby guaranteeing that the lesser protections that
the law gave to slaves would not seep into the law governing non-slaveowners.\textsuperscript{63}

In the development of slavery in Colonial America, then, economic necessity and political imperatives would provide the fulcrum for the commingling of race, juxtaposed to class. This contributed to the process which saw the subordination of people of African descent, their exclusion from the body politic, and the legitimization of their status as slaves under the 1787 Constitution.\textsuperscript{64}

Yet, literally from the beginning of the importation of Africans into the American colonies in 1619, invidious racial discrimination and forced involuntary servitude had distinguished their presence in Colonial America.\textsuperscript{65} Even at the same time that the nation's first legislative body, the Virginia House of Burgess, was established in 1619, societal differences distinguished the races.\textsuperscript{66} The initial legal status of those first blacks is not known: eventually some became free; others continued in a state of life-time servitude. What is known, however, is that from their arrival, their status in the colonies differed substantially from whites.\textsuperscript{67}

According to one scholar, the development of slavery in Colonial America until the 1660s represented an "unthinking decision."\textsuperscript{68} That assessment, based on an analysis of private papers, wills, inventories of estates, bills of sale, and public records, including censuses, judicial decisions and legislative enactments, however, applies primarily to Virginia.\textsuperscript{69} In the other colonies, including Maryland, but excepting Georgia, slavery developed literally at the time of their origin and early development.\textsuperscript{70} In those


\textsuperscript{64} See supra note 16 and accompanying text.

\textsuperscript{65} See W.D. Jordan, supra note 6, at 44-98.

\textsuperscript{66} Id. at 44-45.

\textsuperscript{67} Id. at 44-45, 73-81.

\textsuperscript{68} W.D. Jordan, supra note 6, at 44. See generally id. at 44-98 (chapter entitled, "Unthinking Decision, Enslavement of Negroes in America to 1700").

\textsuperscript{69} Id. at 74-82.

\textsuperscript{70} Id. at 66-85.
two colonies slavery and racism developed simultaneously, mutually reinforcing each other, before statutory recognition of the institution in the 1660s. In Virginia, however, legal recognition that slavery existed in the colony was expressed in a 1661 law prescribing punishment for runaways. Specific reference was made to fugitives blacks "incapable of making addition of time." In the previous year, however, Virginia in 1660, had enacted into law a statute which limited the period of servitude for whites, providing that "for the future no servant coming into the country without indentures, of what christian [white] nation soever shall serve longer than those of our own country, of the like age." Racial gender discrimination, however, provided the statutory basis by which blacks were relegated to perpetual slavery, when in 1662 it was declared that "whereas some doubts have arisen whether children got by any Englishman upon a negrowoman shall be slave or free ... all children born in this colony shall be slave or free only according to the condition of the mother." That statute was significant in two ways. It provided legal recognition that the practice of enslaving blackwomen for life had existed prior to the 1662 enactment. Then by making the status of the child contingent on that of the mother's, Virginia had also translated into law another prevailing practice in the colony, that of relegating children born to black women to a period of lifetime servitude. Thus, even before blacks represented a significant numerical presence in that colony, Virginia had provided for the continuous reproduction of a permanent labor force of slaves through its black women, while establishing legal precedent that slavery would be the future societal condition of blacks.

71. Id. at 80.
72. 2 STATUTES OF VIRGINIA 26 (W. Hening ed. 1809-1823) "That in case any English servant shall run away in company with any negroes who are incapable of making satisfaction by addition of time," he must serve for the Negroes' lost time as well as his own. Id.
73. Id.
75. 2 STATUTES OF VIRGINIA, supra note 72, at 170.
76. W.D. JORDAN, supra note 6, at 75.
77. Id. at 76.
Discrimination against black women began quite early in the economic development of Virginia, as the white colonists quickly capitalized on their dual contributions to the colonial labor force, both for their labor and as reproducers of future supplies of lifetime laborers.\textsuperscript{78} Wills and inventories always show black females valued higher than men, black or white, and white women.\textsuperscript{79} Colonial tax laws enacted in the late 1620s and early 1630s affirm that black women, unlike white women, were put to work like men in the fields.\textsuperscript{80} Even when free, that tax distinction remained unchanged, not only as a basis to establish the legal inferiority of black women, but also to reinforce their subordinate societal status, while imposing additional economic burdens on their attempts to survive as free women, as seen in the Tax Act of 1668\textsuperscript{81} which announced:

Whereas some doubts have arisen whether negro women set free were still to be accounted tithable according to a former act, it is declared . . . that negro women, though permitted to enjoy their Freedome yet ought not in all respects to be admitted to a full fruition of the exemptions and impunities of the English, and are still lyable to payment of taxes.\textsuperscript{82}

While judicial decisions, laws, customs, and traditions in Virginia would suggest that, until the 1660s, blacks occupied a nebulous legal status between slavery and freedom,\textsuperscript{83} in Massachusetts Bay, slavery found legal sanction quite early in the history of that colony. In what could be viewed as its first constitution, the 1641 Massachusetts Civil Body of Liberties,\textsuperscript{84} slavery was established

\textsuperscript{78} E.S. MORGAN, \textit{supra} note 1, at 310.
\textsuperscript{79} W.D. JORDAN, \textit{supra} note 6, at 76.
\textsuperscript{80} \textit{Id.} at 77.
\textsuperscript{81} \textit{2 Statutes Of Virginia, supra} note 72, at 267. For additional information on law and free black women in colonial America see J.P. GUILD, \textit{supra} note 74, at 94-129, who notes that this 1668 statute was the first direct reference to free blacks in the law. \textit{Id.} at 129 n.6. In addition, Guild notes that a 1670 law which gave elective franchise to freeholders presumably included free black property holders. \textit{Id.} at 129 n.7. For information on and comparison to colonial white women see M. SALOM, \textit{WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA} (1986).
\textsuperscript{82} \textit{2 Statutes Of Virginia, supra} note 72, at 267.
\textsuperscript{83} See W.D. JORDAN, \textit{supra} note 6, at 71-82.
\textsuperscript{84} \textit{Mass. Body Of Liberties} (1641) (considered to be Massachusetts' first constitution), \textit{reprinted in} 5 W.F. SWINDLER, \textit{SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS} 46-67 (1975).
within only three years after the importation of blacks in 1638. However, that law was qualified by the admonition that "there shall never be any bond-slavery, villenage or Captivitie amongst us unless it be lawful Captives taken in just wares, and such strangers as willingly selle themselves or are solde to us . . . This exempts none from servitude who shall be Judged thereto by Authoritie."

That specific enactment has historic significance in yet another way. On its face, that statute established historic precedent which found expression in the tragic incongruity of racial and ethnic discrimination which has since distinguished American law, a legal system which, from inception, allowed for the protection of the freedoms of specially designated groups, while denying it to others. In a discussion of the origin of slavery in Massachusetts Bay, one writer emphasized that, "the Puritan settlers were seeking to guarantee in writing their own liberty without closing off the opportunity of taking it from others whom they identified with the Biblical term, 'strangers.'" In Massachusetts Bay Colony, then, historic precedent was thus established which enabled subsequent American legalists to enact into law, privileges and immunities for most whites, but which were understood by custom and tradition as exclusionary to "strangers." Quite early in the development of American law, then, euphemisms were quickly applied in reference to discriminated groups. Colonial lawmakers thus were able to cloak illiberalism, religious pluralism, ethnocentrism, racism, and their departure from English Common law, while establishing precedent in American law that would provide statutory justifications for ethnic, religious, and racial discrimination.

The Massachusetts Civil Body of Liberties specifically acknowledged that colony's support of African slavery although, when that document was drafted in 1641, blacks accounted for less than three percent of the labor force in New England. Moreover, while the economic survival of Massachusetts Bay would eventually depend quite heavily on the slave trade, the use of slave labor never

85. W.D. JORDAN, supra note 6, at 66-68.
86. MASS. BODY OF LIBERTIES § 72 (1641), reprinted in 5 SWINDLER, supra note 84, at 61.
87. W.D. JORDAN, supra note 6, at 67-68.
88. Id. at 68.
89. Id.
90. Id. at 67-68.
91. W.D. JORDAN, supra note 6, at 66.
figured prominently in its development. Even so, the necessity of slave labor was recognized as critical to the future success of the new land, as seen in a 1645 letter written to the governor of Massachusetts Bay colony in which the writer stated "I doe not see how wee can thrive untill wee gett into a stock of slaves sufficient to doe all our business." Recognition that white indentured servants, protected by legally contractual limitations of service, could never be reduced to lifetime servants, much less provide the basis of a permanent labor force, contributed to the demand for black slaves. As the writer tersely stated in his letter, unless slavery was encouraged to develop:

our children's children will hardly see this great Continent filled with people, soe that our servants [whites] will still desire freedome to plant for them selves, and not stay but for verie great wages. And I suppose you know verie well how wee shall maynteyne 20 Moores cheaper than one Englishe servant.

Thus, while the origin of slavery in seventeenth century colonial America was an "unthinking decision," the rapid legal sanction of slavery quite early in the settlement and development of Massachusetts Bay suggests otherwise. In that colony, the establishment of slavery was deliberate, systematic, and unabashedly specific in intent and purpose. Even in the one instance when slavery was statutorily prohibited in seventeenth century colonial America, as seen in a 1652 Rhode Island law, that statute had no force of law:

Whereas, there is a common course practised amongst English
men to buy negers, to that end they may have them for service or slaves forever, for the preventinge of such practices among us, let it be ordered, that no blacke mankind or white being forced by covenant bond, or otherwise, to serve a man or his assignes longer than ten yeares . . . . And, at the end or terme of ten yeares to sett them free, as the manner is with the English servants.\textsuperscript{99}

The Rhode Island Act was never repealed; nor was it ever enforced, as that colony's economic survival would soon depend quite heavily on the slave trade.\textsuperscript{100} At the time of its enactment, however, Rhode Island's black population was minimal, but the statute points to the early development of the slave trade in Colonial America.\textsuperscript{101} Implied in this 1652 law is the acknowledgement that the blacks who had been imported into the colony were recognized as slaves thus, underscoring the rapidity by which the American colonists accepted the institution of African slavery. Yet, the existence of a statute which specifically limited the term of servitude for blacks established a legal basis for that group's claim to freedom.\textsuperscript{102} In this respect, the Rhode Island statute does have historic significance. In yet another way the statute is important for it illustrates that quite early in the history of Colonial

\textsuperscript{99} 1 Records Of Rhode Island And Providence, supra note 98, at 243. See W.D. Jordan, supra note 6, at 70. Georgia, founded in 1732, in an expression of modern philanthropy, expressly prohibited slavery in its colonial charter until 1749, when the principal founder of the colony, George Oglethorpe, was forced by his colonists to allow the importation of slaves. Western Culture, supra note 18, at 144-50. Manager of the highly successful and profitable slave-trading Royal African Company, Oglethorpe's support of slavery on the one hand and his indictment of the institution on the other is representative of contradiction in thought and action of liberal reformers during the age of the Enlightenment. Id. at 145. See also F. Hutcheson, 2 A System Of Moral Philosophy 202 (1755), who argued against African slavery, but considered lifetime slavery for the English unemployed as appropriate for the "ordinary punishment of such idle vagrants as, after proper admonitions and tryals of temporary servitude, cannot be engaged to support themselves and their families by any useful labours." Id.

While laws could be passed to prohibit slavery, economic self-interest would turn the laws into a dead letter or they would be repealed. For the origin of slavery in all three groups of colonies see W.D. Jordan, supra note 6, at 66-84. For a bibliographic discussion of sources on the slavery and freedom of blacks in colonial and Revolutionary War America see Berlin, Time, Space, and the Evolution of Afro-American Society on British Mainland Northland North America, 85 Am. Hist. Rev. 44 (1980).

\textsuperscript{100} W.D. Jordan, supra note 6, at 70-71.

\textsuperscript{101} Id. at 66.

\textsuperscript{102} L.J. Greene, supra note 92, at 125. See also W.D. Jordan, supra note 6, at 70.
America, custom and tradition exerted more force than the rule of law in relegating blacks to lifetime servitude.

Consequently, apart from the southern colonies of Virginia and to a lesser extent Maryland, the rapid legal sanction of slavery in colonial America contravenes the assertion that the enslavement of blacks represented an "unthinking decision." In both instances, the assessments are based on the absence of a comprehensive body of slave codes. While British common law provided the basis for early American law on slavery and societal practices demonstrated the acceptance of involuntary lifetime servitude for blacks, a comprehensive body of slave codes for the American colonies would not be enacted until the period from the 1660s through the 1730s. Clearly, the absence of a specific body of laws defining the institution cannot sustain the fact that a statutory definition of blacks as slaves was required for the establishment of the institution: that indeed, de facto slavery preceded de jure slavery in both Virginia and Maryland. Codification only reflected the reality that for slavery to be economically profitable, the process of exploiting and subjugating a mass of unwilling laborers to forced lifetime servitude, based only on race, required systematic and deliberate oppression. That slavery was the desired legal status for blacks was also reflected in colonial laws and practices which discouraged slave manumissions.

A prevailing historical consensus does not deny the existence of pervasive racial prejudices in seventeenth century colonial America. Even when the black population was relatively negligible and their labor contribution minimal, white class distinctions and economic necessity commingled with white racism, precipitating the early development of black slavery in colonial America. Particularly, great extremes in wealth and a rigid class structure

103. See supra note 68-70 and accompanying text.
104. WESTERN CULTURE, supra note 18, at 208-10.
105. Id.
106. For slave codes see 1 STATUTES OF VIRGINIA, supra note 72, at 257, 435, 439-42; 2 id. at 113-14, 240, 388; 3 id. at 447-62; 1 ARCHIVES OF MARYLAND, supra note 74, at 53, 80, 352-53, 409-10, 428, 443-44, 453-54, 464, 469; 2 ARCHIVES OF MARYLAND, 147-48, 335-36, 527 (1883).
107. W.D. JORDAN, supra note 6, at 71-82.
108. WESTERN CULTURE, supra note 18, at 57.
109. W.D. JORDAN, supra note 6, at 44-98.
among whites encouraged a climate conducive to the acceptance of African slavery among the colonists. Moreover, precedent existed in English law under a statute enacted in 1547, which provided for the enslavement of Englishmen. That statute also detailed punishment that differed little from that prescribed for African slaves in the American colonies.

This statute was the Vagrancy Act, designed to combat vagabondage in England. If adjudged a vagabond, justice required the individual to be branded with a "V" on his chest and to be made a "slave" for two years. The citizen who brought the accused before the justices of the peace was given complete authority over the vagabond, and his legal responsibilities included giving "the said slave . . . bread, water or small drink, and refuse meat, and cause him to work, by beating, chaining or otherwise, in such work and labour as he shall put him unto, be it never so vile." To counter resistance from the "slave" the master could "put a ring of iron about his neck, arm or leg." If the "slave" ran away and was apprehended, the punishment by law was that he was to be branded on either the cheek or forehead and sentenced "to be slave to his said master for ever."

Loath to enforce the act, the English repealed it three years later as much for humanitarian and libertarian reasons as for


111. An Act for the Punishing of Vagabonds, and for the Relief of the Poor and Impotent Persons, 1 Edw. 6, ch. 3 (1547) [hereinafter Vagrancy Act].

112. Id. See also W.D. Jordan, supra note 6, at 51.

113. Vagrancy Act, 1 Edw. 6, ch. 3 (1547).

114. W.D. Jordan, supra note 6, at 51.

115. Vagrancy Act, 1 Edw. 6, ch. 3, §§ 2, 3 (1547); W.D. Jordan, supra note 6, at 51.

116. Vagrancy Act, 1 Edw. 6, ch. 3, § 3 (1547); W.D. Jordan, supra note 6, at 51.

117. Vagrancy Act, 1 Edw. 6, ch. 3, § 8 (1547); W.D. Jordan, supra note 6, at 51.

118. Vagrancy Act, 1 Edw. 6, ch.3, § 4 (1547); W.D. Jordan, supra note 6, at 51.
economic imposition. The pool of unemployed was so great that force was not necessary to secure cheap labor without the responsibility of lifetime supervision and provisioning, however meager, of recalcitrant vagabonds. While a labor system subsequently developed in England which led to apprenticeship, indentured servitude, and bound labor involving children of indigent parents, lifetime slavery was never again undertaken in that country. That a conceptual heritage of the of slavery existed in English law meant that the American colonist in the seventeenth century "possessed certain fairly consistent connotations which were to help shape English perceptions of the way Europeans should properly treat the newly discovered peoples overseas."

The subordinate status of the lower classes and the degradation of the dispossessed in England contributed to the ease by which the institution of slavery developed in colonial America. In addition to the class structure, precedent had been established in English law that allowed for the subordination of laborers, while sanctioning involuntary forced lifetime servitude. In a discussion of the origin of slavery in colonial Virginia, one writer explained that the treatment of white indentured servants "stopped short of actual enslavement." The enormity of their debasement, however, brought that writer to the conclusion that, initially, "[i]n Virginia too, before 1660, it might have been difficult to distinguish race prejudice from class prejudice." Yet, before the turn of the century, race became the common denominator to distinguish the free from the unfree and white labor from black labor. However, most importantly, while blacks could be forced into lifetime servitude, "there was never any such thing as perpetual slavery for any white man [despite their subordination] in any English Colony." On the other hand, had the possibility existed, white servants would have

119. W.D. JORDAN, supra note 6, at 51.
120. Id.
121. Id. at 52.
122. Id.
123. Id.
124. E.S. MORGAN, supra note 1, at 324.
125. Id. at 327.
been transformed into slaves, although "the transformation of free [white] men into slaves would have been a tricky business."127 In outlining the process, which could have resulted had attempts been made to force whites into lifetime slavery, one analyst noted:

It would have had to proceed by stages, each carefully calculated to stop short of provoking rebellion. And, if successful, it would have reduced, if it did not end, the flow of potential slaves from England and Europe. Moreover, it would have required a conscious, deliberate, public decision . . . the home government would almost certainly have vetoed the move, for fear of a rebellion.128

That decision would not be necessary despite the economies of labor shortages in Colonial America which initially made white labor an attractive alternative to red and black labor.129 Until the 1660s, less risk was involved in securing a man's labor for a period of five to seven years, as opposed to life.130 In the face of high mortality rates during the first half century of settlement there were no certainties that any laborer would live beyond that time.131 In addition, compared to the immigration and labor costs to secure white indentured servants, the high transportation rates and the purchase prices demanded for Africans as slaves seemed virtually prohibitive.132 Thus, in a newly developing economy, despite minimal laborer maintenance costs, only limited and uncertain profits could be realized in exploiting a scarce supply of involuntary lifetime African slave laborers. Then, too, the liabilities which ensued, specifically, protracted conflict and warfare, when whites attempted to extract labor from the indigenous Amerindian population, rendered their labor an unattractive alternative, despite their cultural values and economic stages of production.133

127. E.S. MORGAN, supra note 1, at 296-97.
128. Id.
129. W.D. JORDAN, supra note 6, at 91.
130. E.S. MORGAN, supra note 1, at 297-98.
131. Id.
132. Id. at 297 n.4. "A newly arrived English servant with five years or more to serve cost 1,000 pounds of tobacco . . . . The earliest surviving contract for importation of Negroes . . . called for their sale on arrival at 2,000 pounds apiece." Id.
133. W.D. JORDAN, supra note 6, at 89-91.
Thus, while blacks were enslaved before 1660, economic factors in conjunction with changing social and demographic factors would, after the 1660s, mark a turning point, which led to increased freedom for whites and a descent to slavery for blacks.\textsuperscript{134} Although colonial mortality rates declined, there was also a reduction in the immigration of white indentured servants.\textsuperscript{135} At the same time, the numbers of Africans imported as slaves increased substantially.\textsuperscript{136} Dutch ships carrying "Black Cargoes" were no longer required to pay import duties.\textsuperscript{137} With the addition of massive numbers brought in under the Royal African Company, a slave trading enterprise founded in 1672,\textsuperscript{138} African slavery became economically feasible. Most importantly, aside from legal limitations inherent in the indentured servant contracts,\textsuperscript{139} which the home government most certainly would have enforced, white labor imposed the additional burden of relegating to lifetime servitude an unfree labor force indistinguishable from free men in the colonies.\textsuperscript{140} With the reduction in importation costs, black labor imposed none of these disabilities.\textsuperscript{141}

White indentured servants remained an important source of labor throughout the colonial period. Yet, with a growing proportion of the population relegated to slavery, competition in the development of the new land was greatly reduced, thus enhancing the life chances of whites. Then, too, with the large-scale increase in African slave importations after the 1660s, Virginia's ruling class saw the necessity for whites to close ranks.\textsuperscript{142} Initially, the threat of slave insurrections was feared less than successful militant resistance from large numbers of oppressed subordinate whites.\textsuperscript{143} "The fear of a servile insurrection alone was sufficient to make slaveowners court the favor of all other whites in a common contempt for

\begin{itemize}
  \item \textsuperscript{134} See E.S. Morgan, supra note 1, at 299-315.
  \item \textsuperscript{135} Id. at 299.
  \item \textsuperscript{136} Id.
  \item \textsuperscript{137} Id.
  \item \textsuperscript{138} Id.
  \item \textsuperscript{139} W.D. Jordan, supra note 6, at 47-48, 52.
  \item \textsuperscript{140} See E.S. Morgan, supra note 1, at 296-97.
  \item \textsuperscript{141} Id. at 299.
  \item \textsuperscript{142} Id. at 328.
  \item \textsuperscript{143} Id.
\end{itemize}
persons of dark complexion." Consequently, "Virginia's ruling classes, having proclaimed that all white men were superior to black, went on to offer their social (but white) inferiors a number of benefits previously denied them." At the end of their period of indenturedness, white servants, under law, were given basic necessities which would enable them to become self-sufficient, including corn, money, a musket and, most importantly, fifty acres of land for them to establish a basis for economic self-sufficiency. Also, as freeholders, and with property requirements reduced for voting, former indentured servants then had an opportunity to become a part of the body politic. Without possession of slaves, however, attempts by whites in the South to improve their economic position were not always successful.

As the institution expanded in the South, the necessity of unchallenged white control over black labor, the unmitigated domination of blacks by whites, was nowhere more evident than in South Carolina. Unlike Virginia or Maryland, slavery was instituted with the origin of that colony even before official settlement began. And, from the beginning, under the 1669 Fundamental Constitutions of Carolina, the freemen of the colony were provided with "absolute power and authority over [their] negro slaves." While that proviso encapsulated what became the basic foundation of the American slave codes in giving whites absolute control over slaves, that document has historic significance in yet another way. Its author, John Locke, would subsequently publish in 1690, Two Treatises of Government. With its emphasis on the equality of men, all of whom were entitled to inalienable rights, the Treatises became the manifesto to justify the American Revolution. However, Locke's formulation of property, the basis of the social
contract,\textsuperscript{153} provided the Framers with a political mandate which was used to justify and sanction the institution of Afro-American slavery in the 1787 Constitution.\textsuperscript{154} Yet, some scholars would ask us to exonerate Locke, as one analyst explained in a discussion of the Fundamental Constitutions, which provided not only for slavery but also for an "extremely hierarchial distribution of land, status, and political power in Carolina."\textsuperscript{155} The monumental contributions he made to human freedom embodied in the Declaration of Independence it is argued, should be distinguished from the reality of his life. Locke's importance for the American Revolution was that, ultimately, he represented "the great enemy of all absolute and arbitrary power."\textsuperscript{156} Even though Locke was one of the leading thinkers of the Enlightenment, he was also "the last major philosopher to seek a justification for absolute and perpetual slavery."\textsuperscript{157}

While it can be conceded that Locke placed slavery outside the social contract, a careful reading of the \textit{Treatises} clearly shows that the conditions under which blacks were enslaved in America were never legitimated by Locke, either implicitly or explicitly.\textsuperscript{158} Yet, historians restate emphatically, and usually with limited discussion, their interpretation of Locke's support of slavery from the \textit{Treatises}.\textsuperscript{159} Locke imagined slavery as "the state of War continued between a lawful conqueror and a captive."\textsuperscript{160} Locke, however, prefaced that oft-repeated statement, so quickly seized upon by scholars who have attempted to justify the Framers' rejection of the equality of blacks, within a theoretical construct. In this passage from the \textit{Treatises} Locke insisted on freedom and views slavery as a state of forced involuntary servitude:

\begin{quote}
The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative...
\end{quote}

\textsuperscript{153} See generally id.
\textsuperscript{154} See \textit{Western Culture}, supra note 18, at 119.
\textsuperscript{155} J.R. Pole, supra note 1, at 9.
\textsuperscript{156} \textit{Age of Revolution}, supra note 8, at 45.
\textsuperscript{157} Id.
\textsuperscript{158} See generally J. Locke, supra note 29.
\textsuperscript{159} See \textit{Western Culture}, supra note 18, at 118-21.
\textsuperscript{160} J. Locke, supra note 29, ¶ 24, at 203. See also \textit{Age of Revolution}, supra note 8, at 559-60.
authority of man . . . . For a man, not having the power of his own life, cannot b[y] compact or his own consent enslave himself to any one, not put himself under the absolute, arbitrary power of another to take away his life when he pleases . . . . This is the perfect condition of slavery, which is nothing else but the state of war continued between a lawful conqueror and a captive.\textsuperscript{161}

Further, Locke distinguished between what constitutes a "just" war from an "unjust" war, emphasizing that involuntary slavery forced on victims conquered in an "unjust" war can never be justified.\textsuperscript{162} As he said in the following commentary, "[t]hat the aggressor, who puts himself into the state of war with another, and unjustly invades another man's right, can, by such an unjust war, never come to have a right over the conquered, will be easily agreed by all men."\textsuperscript{163} To make this distinction clear and unqualified, Locke provided an analogy between warfare and home invasion. First, he explained that a robber, who invades a man's home and then forces the owner to convey the deed to his property, under threat to his life, could under no circumstances claim legal ownership or a valid title in that property.\textsuperscript{164} Within the context of an "unjust" war, Locke admonished, "[j]ust such a title by his sword has an unjust conqueror who forces me into submission."\textsuperscript{165} Locke concluded this analogy by reemphasizing his objection to slavery stating unequivocally that, "[f]rom whence it is plain that he that conquers in an unjust war can thereby have no title to the subjection and obedience of the conquered."\textsuperscript{166} Yet, even if one were to accept that all Africans brought to the American colonies had been captured in "just" wars, Locke never sanctioned the enslavement of women or children, not even those who were the wives and sons of men conquered in "just" wars, for he cautioned, "I am conquered; my life, it is true, as forfeit, is at mercy, but not my wife's and children's. They made not the war, nor assisted in it. I could not forfeit their lives, they were

\textsuperscript{161} J. Locke, supra note 29, ¶¶ 22-24, at 202-03.
\textsuperscript{162} Id. ¶ 176, at 284.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id. ¶ 176, at 285.
In that only men who had been captured in a "just" war could be made slaves, American slavery then, from the beginning, should have existed only as a one-generation phenomenon, for Locke stood adamantly opposed to perpetual slavery. Thus in the Treatises, Locke, again, emphasized that the children of the conquered must remain free:

[C]hildren, whatever may have happened to the fathers, are free men, and the absolute power of the conqueror reaches no farther than the persons of the men that were subdued by him, and dies with them; and should he govern them as slaves, subjected to his absolute, arbitrary power, he has no such right or dominion over their children. . . . and he has no lawful authority, whilst force, and not choice, compels them to submission. 168

Thus, not only was Locke opposed to perpetual slavery, he was also opposed to inheritable slavery. As the following passage shows, Locke reiterated his opposition to the enslavement of any but those involved in a "just" war, conceding that, "[t]he conqueror, if he have a just cause, has a despotical right over the persons of all that actually aided and concurred in the war against him, and a right to make up his damage and cost out of their labour and estates." 169 Cautioning that slavery can never extend further than that individual, Locke emphasized that, "over the rest of the people, if there were any that consented not to the war, and over the children of the captives themselves . . . he [the conqueror] has no power, and so can have, by virtue of conquest, no lawful title himself to dominion over them, or derive it to his posterity." 170

Thus, while the enslavement of individuals captured in "just" wars might have been absolute, nowhere in the Treatises did Locke ever propose that slavery be perpetual or inheritable. 171 Since Locke had specifically denounced the enslavement of women and children, 172 without continuous slave importations, then, American

167. Id. ¶ 183, at 289.
168. Id. ¶ 189, at 291.
169. Id. ¶ 196, at 293.
170. Id. ¶ 196, at 293-94.
171. See generally J. Locke, supra note 29.
172. Id. ¶ 183, at 288-89.
slavery, within Locke's construct, would have been strictly a one-generation phenomenon, resting solely on the enslavement of African men alone. It was not! Most importantly, within the context of Locke's argument that women could not be made slaves, the only status that should have descended to black children was freedom. In Colonial America, the enslavement of black children thus represented the most reprehensible abrogation of common law presumptions, which is that "the law aids minors." 

In Revolutionary War America the colonists could hardly, in good faith, use the argument that their enslavement of blacks was justified on the basis that they had been captured in a "just" war. Few traders on the West African coast and even fewer purchasers of slaves in the American colonies knew or even concerned themselves with the circumstances under which those Africans had become victims of trade. Even fewer would have been in a position to determine, if indeed, an African had been conquered, whether or not that conflict constituted a "just" war, as opposed to one that was "unjust," as a basis for enslavement. Even in those instances, when English and American slave traders on the African coast instigated war themselves for the express purpose of capturing Africans for enslavement, their belligerence could hardly fall within the context of Locke's definition of a "just" war.

By the 1730s, among the leading thinkers of the Enlightenment, the "just" war rationale as a justification for enslavement was viewed as absurd. Even in the colonies, among the more enlightened thinkers, and Thomas Jefferson is representative of that group, few asserted that the Africans brought to America had been conquered in a "just" war or even consented to their enslavement. In the passage deleted from the Declaration of Independance, Jefferson said:

[H]e [George III] has waged cruel war against human nature itself, violating it's most sacred rights of life [and] liberty in the persons of a distant people who never offended him,

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173. BLACK'S LAW DICTIONARY 822 (5th ed. 1979) (Lex succurrit minoribus).
175. AGE OF REVOLUTION, supra note 8, at 45.
176. Id. at 46.
captivating [and] carrying them into slavery in another hemisphere or to incur miserable death in their transportation thither. This piratical warfare, the opprobrium of infidel powers, is the warfare of the Christian king of Great Britain. Determined to keep open a market where MEN should be bought [and] sold. . . .

The objections to the inclusion of this passage in the Declaration of Independance are well-known, and for reasons that had nothing to with whether or not Africans brought to the American colonists had been captured in a "just" war. As Jefferson said in his Notes, that passage was deleted, "in complaisance to South Carolina [and] Georgia, who had never attempted to restrain the importation of slaves, and who on the contrary still wished to continue it." Jefferson further explained the objections of the Northern colonies to that passage noting that, "our Northern brethren also I believe felt a little tender under those censures; for tho' their people have very few slaves themselves yet they had been pretty considerable carriers of them to others." While one observer viewed this passage as representative of "one of the unhappy legacies of British oppression," he too conceded the extent to which New England's economy was dependant on the institution, noting that, "[o]ne should add that New England's own prosperity and equalitarian society had been nourished by the carrying trade with the slave isles of the Carribean." At the time of the Revolution, slavery was still economically important to the New England colonies, including Massachusetts, which alone could boast sixty distilleries producing rum, the export of which provided the region with its chief supply of specie. And if Massachusetts contained no more than five thousand Negro slaves, its West Indian trade employed some ten

177. A.L. Higginbotham, Jr., supra note 52, at 381. See also G. Wills, Inventing America: Jefferson's Declaration Of Independence (1978).
179. Id. at 314.
180. Id. at 314-15.
181. Age Of Revolution, supra note 8, at 273.
182. Id. at 262.
thousand seamen, to say nothing of the workers who built, outfitted, and supplied the ships.\textsuperscript{183}

Historians thus acknowledge, that by deleting this passage, Jefferson not only avoided condemning slave traders in colonial New England, but also left the door open for the continuation of the slave trade once independance was achieved.\textsuperscript{184} From the colonists' perspective too, had that passage been included, it would have underscored the glaring inconsistency of a nation fighting for freedom while holding members of their community in slavery. Perhaps, most importantly, Jefferson was doing all he could "to avoid saying anything that would commit the signers, so many of whom held slaves themselves, to abolition."\textsuperscript{185} The more basic issue, however, particularly within the context of race, slavery, and the 1787 Constitution, is the legitimacy claimed by the Americans under Locke's social contract theory to maintain the institution of slavery. Notwithstanding that claim, American blacks had not been legitimately enslaved; this illegitimate enslavement should have been the basis for slavery's demise.

Thus, while Locke sanctioned the enslavement of men conquered in a "just" war, clearly American-born Africans, the first generation descendants and beyond, had never been conquered in any war and most certainly did not consent to their enslavement. Ignoring those distinctions in their own economic interest, the colonists rationalized their justification for the enslavement of blacks, men, women, and children through the following adage offered by Locke. Here he carefully distinguished between a servant who, "gives the master but temporary power over him" and a slave.\textsuperscript{186} The significance of this passage from the \textit{Treatises} is that it established the basis for the American revolutionists to sanction slavery, while excluding blacks from reciprocal benefits inherent in the social contract:

\begin{quote}
[S]laves, who being captives taken in a just war are, by the right of Nature, subjected to the absolute dominion and
\end{quote}

\begin{footnotes}
\textsuperscript{183} Id.
\textsuperscript{184} Id. at 164-84.
\textsuperscript{185} D. ROBINSON, \textit{supra} note 18, at 82-83.
\textsuperscript{186} J. LOCKE, \textit{supra} note 29, ¶ 85, at 233.
\end{footnotes}
arbitrary power of their masters. These men having, as I say, forfeited their lives and, with it, their liberties, and lost their estates, and being in the state of slavery, not capable of any property, cannot in that state be considered as any part of civil society, the chief end whereof is the preservation of property. 187

The colonists' endorsement of this view of slavery had repercussions for Afro-Americans far beyond that of excluding them from the social contract: they were denied access to property. As Locke said, the purpose of the social contract was that men united for "the mutual preservation of their property" which included their "lives, liberties, and estates."188 Yet, in the face of pernicious racism, few distinctions existed between slaves and free blacks, particularly when it came to securing property for profit. And Locke had stressed the difficulty men have in preserving their property when excluded from equal participation in an organized society under a social contract. 189

Despite Locke's inclusion of property as an inalienable right and his insistence that "government has no other end but the preservation of property,"190 Jefferson, in the Declaration of Independence, substituted Locke's "property" for the "pursuit of happiness."191 In answering the question, then, as to why Jefferson made that substitution, one writer provided the following perspectives: "Jefferson wanted eloquent symbols in his democratic manifesto, and stylistic sensibility alone might have made him prefer the phrase 'the pursuit of happiness' over the uninspiring and legalistic term 'property.'"192 Then, giving consideration to the pre-Revolutionary War class structure in which wealth was inequitably distributed, a more pragmatic reason for the deletion of property has been postulated: "Jefferson knew that the country would soon be asking loyal support of those without property as well as those with it, just as he knew that American Tories, who had refused to

187. Id. ¶ 85, at 233-34.
188. Id. ¶ 222, at 306-07.
189. See id. ¶ 120, at 254; ¶ 138, at 264-65.
190. Id. ¶ 94, at 239-40.
191. The Declaration of Independence ¶ 2 (U.S. 1776).
join the patriot ranks, might have their property confiscated. 193

The issue of property had consequences beyond private interests. British imperial challenges could compromise the sovereign integrity of the colonies and their future as independent states. It has been said, in explaining Jefferson's substitution from this perspective, that there was also his "concern to avoid an appeal to property on the eve of the repudiation of Great Britain's complicated claims that the colonies, founded on the basis of royal grants in many case, were and should remain her property." 194

Another factor must also be considered when looking at the omission of property in the Declaration of Independence. Within the literal meaning of Locke's Treatises, blacks should never have been enslaved. They, too, were entitled to inalienable rights, which would have included property, had they also been accorded their freedom in Revolutionary War America for, as Locke said, men enter society "with an intention in every one the better to preserve himself, his liberty and property (for no rational creature can be supposed to change his condition with an intention to be worse)." 195

Yet Colonial America had thrived on slave labor and Locke had tied property to labor. And, black labor had produced wealth, not only for the owners of slaves but also for those whose business interests were tied to the marketing of slave-produced goods, the carrying trade in slaves, and the provisioning of slave societies. 196

In an agrarian-based economy, the liberation of blacks, one fifth of the nation's population, 197 particularly during the Revolutionary War Era, would have upset the basis, as well as the balance of wealth in the new nation. As Locke stated, "whatsoever another gets from me by force, I still retain the rights of, and he is obliged presently to restore." 198 If unshackled from their chains of slavery and racism, able to compete freely and equally, Afro-

193. Id.
194. A. KOCH, supra note 192, at 28.
195. J. LOCKE, supra note 29, ¶ 131, at 258.
196. A great majority of slaves were agricultural laborers. R.W. FOGEL & S.L. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY 39-41 (1974). Their work included the planting, raising, and harvesting of virtually every type of crop including cotton, tobacco, sugar, rice, and hemp. Id. Some slaves were skilled craftsmen (blacksmiths, carpenters and coopers). Id. Others were engaged in semi-skilled and domestic jobs (teamsters, coachmen, gardeners, stewards, house servants, seamstresses, and nurses). Id.
197. See supra note 14.
Americans would have proved to be as capable as whites in developing the resources of the new land.  

The development of chattel slavery, however, provided a basis for colonial whites to deprive blacks from acquiring property, notwithstanding Locke's unqualified assertion that with all men "being furnished with like faculties, sharing all in one community of Nature, there cannot be supposed any such subordination among us that may authorize us to destroy one another, as if we were made for one another's uses." Enslaved and precluded from acquiring property, Afro-Americans were denied the means by which they could have participated on an equal basis with whites in the production of any significant amount of personal wealth.  

A society which legally sanctions slavery can deny economic freedom to an individual whom it defines as a slave, and thus deny the individual the right to pursue the property interest inherent in his own labor power. The rationale for this denial is simply that a slave’s economic freedom represents a deprivation of the liberty of another. As American common law developed, the individual who held ownership rights in a slave was also entitled to the value derived from that person’s labor under the statutory protection of private property. In a discussion of the constitutional protection of economic interests, one writer said, "[t]he most conspicuous lack of economic freedom is to be found where slavery exists." Chattel slavery as it developed in Colonial America thus represented a deprivation of the slave's right to property inherent in his life, liberty, and labor power, that is, the right to obtain a living through the use of his own property.  

First in Colonial America and then in Revolutionary War  

199. See Walker, Racism, Slavery and Free Enterprise: Black Entrepreneurship and Business Enterprise Before the Civil War, 60 BUS. HIST. REV. 343 (1983), who said, "the most distinctive feature of the American free enterprise system, access to and protection of private property, was also the most important factor allowing blacks, slave and free, to participate in the antebellum economy as entrepreneurs." Id. at 377.  

200. J. LOCKE, supra note 29, ¶ 6, at 194.  

201. See WESTERN CULTURE, supra note 18, at 58-59.  

202. R.L. HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER 189 (1952), who said: "Laws which work to anyone's economic disadvantage are nowadays frequently challenged as deprivations of liberty or property, in violation of the Fifth Amendment or the Fourteenth Amendment." Id. at 197. Since the 1964 Civil Rights Act, economic disadvantages have been linked to employment discrimination under the equality of the law provision of the fourteenth amendment. See D.A. BELL, JR., RACE, RACISM, AND AMERICAN LAW 591-94 (1980).
America, the protection of private property was paramount, notwithstanding that labor in itself was a property right, neither mutually exclusive to nor inseparable from an individual's right to life. Consequently, it was not just Jefferson's substitution of "the pursuit of happiness" in place of John Locke's "property" that compromised the integrity of the Revolution and the egalitarian principles on which it was based. Again, American common law, in its development, was compromised, as seen in the legal definition of property derived from Blackstone, which conjoined property not only with consent but also with contract. Afro-Americans neither consented to nor contracted for their enslavement. Yet, under the American constitutional precept of legality, with its emphasis on the protection of private property, the Framers sought to reconcile slavery with liberty, notwithstanding that contracts receive legal sanction only from the agreement of the parties. Most importantly, no contract is born of wrong doing. However, slavery nullified the right of Afro-Americans to contract to promote their own economic advancement by making them chattel property. Blacks were placed outside the social contract by the Framers in the 1787 Constitution. This failure to secure racial equality served equally well in depriving blacks, both slave and free, of what is considered a basic human right. To live one's life with dignity, accomplished through the consent of the individual to the use of his own labor power for value beyond subsistence, is paramount.

Had Lockean principles been strictly applied to provide liberty for blacks, as they had been to legitimate the Revolution and to provide the basis for liberal American constitutionalism, then Afro-American slavery should have been abolished with blacks being accorded the freedom and legal status of whites. With the construction of American law, slaves were property; non-slave blacks were not. In either case, Locke's endorsement of the right of men to profit from their labor would have provided blacks with a basis to acquire property had they been accorded full and equal status with whites.

Thus, while Jefferson failed to include property in his triad of inalienable rights, the protection of private property became the...
foundation of the new nation under the Constitution. The tragic consequence for the nation, then, is that the new Americans legitimated their Revolution on the basis of Locke's social contract philosophy. With a moral imperative for freedom, which pronounced the equality of men, the Framers then incorporated their manifesto for independence in the 1787 Constitution to protect their inalienable rights to the exclusion of blacks. What was viewed as economic necessity, a response to the vast expanse of land and the scarcity of labor, encouraged the development of involuntary hereditary labor based on race. Racism thus developed as the basis to justify the exclusion of blacks from participation in the body politic of the new nation.

Within the context of Locke's social contract theory and his assertion of the equality of men, it is evident that the Treatises provided no basis upon which the American colonists could justify slavery or the exclusion of blacks from participation as equals in the new nation. In itself, the perpetuation of slavery reflected not only an economic basis but also the persistence of racism which had intensified by the time of the American Revolution. That the infamous paragraph deleted from the Declaration of Independence concluded with the following indictment is revealing in the blatant acknowledgement that freedom for black Americans would not be a goal of the Founding Fathers, once independence had been achieved. As Jefferson said following his denunciation of the slave trade, "he [George III] is now exciting those very people to rise in arms among us, and to purchase that liberty of which he has deprived them, by murdering the people on whom he also obtruded them: thus paying off former crimes committed against the liberties of one people, with crimes which he urges them to commit against the lives of another."

In its entirety, the deleted section is remarkable for its appalling hypocrisy. Jefferson denounced the English for the horrors perpetrated on blacks because of the slave trade, while at the same time assailed what he considered their affrontery for

206. U.S. CONST. amend. IV.
207. See W.D. JORDAN, supra note 6, at 276-80.
208. Id. at 91-98.
209. See supra note 177, and accompanying text.
210. T. JEFFERSON, supra note 178, at 318.
providing blacks with the means to secure freedom. Whatever the horrors and brutality of slavery caused by the trade, that Afro-Americans should have been free from their involuntary servitude seemed far removed from the consciousness of those who profited most from their lifetime labor. But more than just the economics of slavery, racial prejudices underscored the white American apprehension of liberty and equality for the black American. As he indicated, Jefferson was fearful of what he perceived as racial retaliation if blacks achieved freedom:

Deep rooted prejudices entertained by the whites; ten thousand recollections, by the blacks, of the injuries they have sustained; new provocations; the real distinction which nature has made; and many other circumstances, will divide us into parties, and produce convulsions which will probably never end but in the extermination of the one or the other race.--To these objections, which are political, may be added others, which are physical and moral.211

Consequently, in response to the perennial historical question as to whether Jefferson's Declaration of Independence applied to blacks, or, more specifically, as one scholar has asked: "Did Jefferson’s self-evident truths contain an implicit racial exception? Did the lines, properly read in the light of American social conditions of 1776, contain the word ‘white’ before the word ‘men’?"212 His response was that "[c]ontemporaneous and later events in Jefferson's state suggested that they did."213

Locke's Treatises had provided the philosophical basis of protest found in the Declaration of Independence.214 The principles of freedom inherent in that document found protection in the 1787 Constitution and the subsequent 1791 Bill of Rights.215 Afro-Americans claimed that their inalienable rights also should have

213. W. Wieck, supra note 212, at 51.
214. See W.D. Jordan, supra note 6, at 289.
215. U.S. Const. amend. I-X.
found protection under the new government. But, they were not! The 1787 Constitution sanctioned slavery while obscuring the issue of the status of non-slave blacks. The debate over whether the social contract should apply to blacks continued for six decades. In 1857, the *Dred Scott* decision pronounced the position of the Federal government, which until then had remained silent in theory although not in action, on that issue. Consequently, in response to the question of whether or not the statement in the Declaration of Independence "all men are created equal" applied only to white men, Chief Justice Roger Taney responded emphatically that it did, emphasizing:

"It is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted . . . Yet the men who framed this declaration were great men—high in literary acquirements . . . They spoke and acted according to the then established doctrines and principles . . ."

By 1760, during the early years of the Revolutionary War era, the ideas of Montesquieu and Francis Hutcheson flourished and "were being repeated, developed and propagated by the cognoscenti

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217. The Declaration of Independence ¶ 2 (U.S. 1776).
219. Montesquieu was a French political philosopher who examined the political, social, and economic history of antiquity, and denounced the institution of slavery. See L. Levin, The *Political Doctrine Of Montesquieus Esprit Des Lois* 250-61 (1936). He was opposed to the concepts that slavery was in accord with the natural law and an economic necessity, and believed that slavery imperiled the principles of democracy. Id.
220. Francis Hutcheson argued that "nothing was so 'effectual' as perpetual bondage in promoting industry and restraining sloth, especially in the 'lower conditions' of society." *Age Of Revolution*, supra note 8, at 263 (quoting F. Hutcheson, 2 A *System Of Moral Philosophy* 202 (1755)). He argued that "slavery should be the 'ordinary punishment' of such idle vagrants." Id. at 264. However, his dominant ideology was that the utilitarian state should be at least nominally free. See *Western Culture*, supra note 18, at 375-78.
of the enlightened world." Montesquieu, regarded as the most influential political analyst of the day, denounced slavery and emphasized virtue as the basic operating principle of government. He, "more than any other thinker . . . put the subject of Negro slavery on the agenda of the European Enlightenment." Moreover, if Jefferson's deleted passage is representative of the thinking of the American colonists, then the Revolutionary War generation also understood, within Locke's context of slavery, that the Africans enslaved in the American colonies had been victims of an "unjust" or "cruel war" waged against them by people whom they never offended, which included not only the English, but themselves as well. In the Treatises, Locke had carefully outlined his theory of slavery, which could be sustained only when the conquered had been captured in a "just" war. Otherwise, as Locke said, "it is plain that he that conquers in an unjust war can thereby have no title to the subjection and obedience to the conquered."

Yet, just as the founding fathers had reshaped Locke's philosophy to support the Revolution, they again extrapolated what was necessary from the Treatises to lay the foundation for the new government. Locke reasoned that people unite into commonwealths under government, mainly for the protection of their property. Specifically, once ties with England had been severed the new Americans were determined that there would be no obstacles to their economic growth, which from the Colonial period on, had been contingent upon the existence of slavery. Protecting the institution in those areas where slave labor was the bedrock of the economy, then, was foremost. Thus Locke's insistence that the end of government is the goal of mankind and "the end of law is not to abolish or restrain, but to preserve and enlarge freedom," was seized upon by the Revolutionaries to justify their construction of

221. Age of Revolution, supra note 8, at 45.
222. See supra note 219.
223. Age of Revolution, supra note 8, at 45. See also C. Robbins, The Eighteenth-Century Commonwealthman: Studies In The Transmission, Development And Circumstance Of English Liberal Thought From The Restoration Of Charles II Until The War With The 13 Colonies (1959).
226. Id. ¶ 57, at 219.
a new government at the 1787 Constitutional Convention. Since slavery had provided the basis to justify the exclusion of all blacks from the social contract, blacks were also denied their inalienable rights: hence, equality under the law with whites. Denied protection of the law, blacks, standing outside the 1787 Constitution, existed in a state of tyranny, for as Locke said, "[w]herever law ends, tyranny begins, if the law be transgressed to another's harm."

In drafting the 1787 Constitution, the Framers produced a body of laws that relegated the great masses of black Americans to unconditional slavery until the Civil War's promise of freedom. With the Declaration of Independence, "[t]he American Revolution introduced an egalitarian rhetoric to an unequal society . . . . But the men who subscribed to the Declaration in 1776 did not feel themselves thereby mandated to transform American life." Nor did the Framers, whose political agenda at the 1787 Constitutional Convention reflected that of English philosopher James Harrington's construction of property as opposed to Locke's. As John Adams said, "Harrington has shown that power always follows property. This I believe to be as infallible a maxim in politics, as that action and reaction are equal, is in mechanics." Slaves were property! Thus, the issue of slavery in the Constitution, within the context of property, was of both political and economic concern to

227. See H. von Holst, supra note 22, at 218.
228. See W.D. Jordan, supra note 6, at 123-26.
229. J. Locke, supra note 29, ¶ 202, at 297.
230. The overthrow of slavery in the United States was accomplished by the Civil War (1861-65). W. Alexander, History of The Colored Race in America 537 (1968). It received its death blow from the Emancipation Proclamation of President Lincoln on January 1, 1863. Id. This led to the adoption of the thirteenth (1865), fourteenth (1868), and fifteenth (1870) amendments, added to the Constitution of the United States so that human slavery was finally and forever put to rest in this country. Id. at 538.
232. James Harrington was an English political philosopher whose major work, The Commonwealth of Oceana was a restatement of Aristotle's theory of constitutional stability and revolution. 5 Encyclopedia Britannica 718 (15th ed. 1985). He advocated the division of the country into landholdings of a specified maximum value. Id. His ideas are said to be responsible for such United States political developments as written constitutions, bicameral legislatures, and the indirect election of the president. Id.
the Founding Fathers.

National interest dictated that the institution would not be abolished in the southern states where it was most profitable. Thus, northern states provided for the emancipation of their slaves, either through gradual manumission laws, loose construction of their state constitutions or judicial decisions. In addition, Congress had made provisions that ruled against the expansion of slavery in the Northwest under the 1787 Ordinance. Thus, while precedent existed in the state constitutions in the North and a federal law was in force which limited that institution in the new northwestern territories, slavery found protection under the new federal Constitution. While the Framers avoided use of the term slavery in the 1787 Constitution, records of the debates at that convention reveal that the Framers dealt openly and explicitly with slavery and its ramifications for the new nation. From those discussions, it is difficult to suggest that they found protection of the institution

234. New York gradually abolished slavery through its manumission law of 1799. A. ZILVERSMIR, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH 208 (1967). In 1777, Connecticut passed a bill making it easier to manumit slaves. Id. at 122. Virginia revised its slave code in the 1780's allowing benevolent masters to manumit slaves. Id. at 155.

235. In 1817, New York adopted the New York Abolition Law which provided for the emancipation of approximately 10,000 slaves. Id. at 213-14. New Jersey passed an act to abolish slavery in 1846. Id. at 220. Connecticut followed suit in 1848. Id. at 202.

236. See, e.g., Commonwealth v. Aves, 35 Mass. (18 Pick.) 193 (1836); Lemmon v. People, 20 N.Y. 562 (1860); State v. Lasselle, 1 Blackf. 60 (Ind. 1820). See generally A. ZILVERSMIR, supra note 234; Fogel & Engerman, Philanthropy at Bargain Prices: Notes on the Economics of Gradual Emancipation, 3 J. LEGAL STUD. 377 (1974), who argued that the value of the labor of northern slaves subsidized the cost of their freedom, with some owners making a profit by selling their slaves in the South. Id. at 393.


238. See supra note 16 and accompanying text.

239. See generally 1 1787, DRAFTING THE U.S. CONSTITUTION (W.E. Benton ed. 1986) [hereinafter DRAFTING], which traces each article and section of the 1787 Constitution through the records of the convention, May 14 - Sept. 17, 1787, from the notes of some of the delegates and from official documents, including convention committee reports. See also 1-3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. 1966); Anderson, The Intention of the Framers: A Note on Constitutional Interpretation, 49 AM. POL. SCI. REV. 340, 343 (1955); Roche, The Founding Fathers: A Reform Caucus in Action, 55 AM. POL. SCI. REV. 799 (1961); C. ROSSITER, 1787, THE GRAND CONVENTION (1966); R.B. MORRIS, WITNESSES AT THE CREATION: HAMILTON, MADISON, JAY, AND THE CONSTITUTION 212 (1985). For biographical information, economic interests and voting of the constitutional convention delegates mentioned herein see F. MCDONALD, supra note 2, at 38-110.
incompatible with the liberal political principles of government structured in their Constitution.

While the institution found support, either directly or indirectly, in several sections of the 1787 Constitution, three sections of that document specifically applied to slavery. The three sections specifically related to slavery are presented below with comments from notes taken at the 1787 Constitutional Convention, primarily by Madison. Particularly striking in those discussions is the open acknowledgement and acceptance of the slave as property and the cool objectivity of the Framers in detaching the humanity of the slave from his status as property. Under the pretext of legality, both liberty and equality for blacks were subordinated in the interest of compromise to the southern states for their support of the 1787 Constitution. Reinforcing the legal status of slaves as property, while finding the most productive way to promote and protect the economic interests inherent in slaves as property, were issues that were also resolved in the 1787 Constitution, as seen in the discussion of those provisions at the Constitutional Convention:

ARTICLE I, Section 2: 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 [slaves] for a Term of Years, and excluding Indians not taxed, three fifths of all other persons.

MR. PINCKNEY [moved to make] . . . 'blacks equal to whites in the ratio of representation.' This, he urged, was more than justice. The blacks are the labourers, the peasants of the Southern States: they are as productive of pecuniary resources as those of the Northern States. They add equality

240. U.S. CONST. art. I, § 8; art. IV, § 3; art. IV, § 4. See infra notes 278-95 and accompanying text.
243. Id. at 507-08. See 2 RECORDS OF THE FEDERAL CONVENTION, supra note 239, at 415-17.
244. See H. VON HOLST, supra note 22, at 10-20 (citing U.S. CONST art. I, § 2; art. I, § 9; art. IV, § 2).
to the wealth, and considering money as the sinew of war, to the strength of the nation. It would also be politic with regard to the Northern States, as taxation is to keep pace with Representation.  

MR. PATTERSON . . . He could regard negro slaves 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 represented in the [General Government]. . . . He was also against such an indirect encouragement of the slave trade; observing that Congress . . . had been ashamed to use the term 'slaves' [and] had substituted a description.  

MR. MADISON . . . suggested as a proper ground of compromise, that in the first branch the States should be represented according to their number of free inhabitants; and in the [second] which had for one of its primary objects the guardianship of property, according to the whole number, including slaves.  

ARTICLE 1, Section 9: The Migration or Importation of such Persons [slaves] 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.  

MR. L. MARTIN, [Maryland] . . . In the first place as five slaves are to be counted as [three] free men in the apportionment of Representatives; such a clause [limiting the number of representatives in the large states] w[oul]d leave

246. J. MADISON, supra note 242, at 281. See also DRAFTING, supra note 239, at 389.  
247. J. MADISON, supra note 242, at 259. See also DRAFTING, supra note 239, at 368.  
248. J. MADISON, supra note 242, at 259. See also DRAFTING, supra note 239, at 368.  
an encouragement to this traffic. In the second place slaves weakened one part of the Union which the other parts were bound to protect: the privilege of importing them was therefore unreasonable. And in the third place it was inconsistent with the principles of the revolution and dishonorable to the American character to have such a feature in the Constitution.250

MR. RUTLEDGE did not see how the importation of slaves could be encouraged by this Section. He was not apprehensive of insurrections .... Religion [and] humanity had nothing to do with this question. Interest [property] alone is the governing principle with nations. The true question at present is whether the Southern States shall or shall not be parties to the Union. If the Northern States consult their interest, they will not oppose the increase of Slaves which will increase the commodities of which they will become the carriers.251

MR. ELLSWORTH was for leaving the clause as it stands. [L]et every State import what it pleases. The morality or wisdom of slavery are considerations belonging to the States themselves. What enriches a part enriches the whole, and the States are the best judges of their particular interest. The old confederation had not meddled with this point, and he did not see any greater necessity for bringing it within the policy of the new one.252

MR. PINCKNEY. South Carolina can never receive the plan if it prohibits the slave trade. In every proposed extension of the powers of the Congress, that State has expressly [and] watchfully excepted that of meddling with the importation of negroes. If the States be all left at liberty on this subject, S. Carolina may perhaps by degrees do of herself what is wished, as Virginia [and] Maryland have already done.253

250. J. MADISON, supra note 242, at 502. See also DRAFTING, supra note 239, at 946.
251. J. MADISON, supra note 242, at 502. See also DRAFTING, supra note 239, at 946.
252. J. MADISON, supra note 242, at 503. See also DRAFTING, supra note 239, at 946-47.
253. J. MADISON, supra note 242, at 503. See also DRAFTING, supra note 239, at 947.
GENERAL PINCKNEY declared it to be his firm opinion that if himself [and] all his colleagues were to sign the Constitution [and] use their personal influence, it would be of no avail towards obtaining the assent of their Constituents. S. Carolina [and] Georgia cannot do without slaves. As to Virginia she will gain by stopping the importations. Her slaves will rise in value, [and] she has more than she wants. ... He contended that the importation of slaves would be for the interest of the whole Union. The more slaves, the more produce to employ the carrying trade; The more consumption also, and the more of this, the more of revenue for the common treasury. ... 254

MR. SHERMAN said it was better to let the [Southern] States import slaves than to part with them, if they made that a sine qua non. He was opposed to a tax on slaves imported as making the matter worse, because it implied they were property. ... 255

MR. MADISON. Twenty years will produce all the mischief that can be apprehended from the liberty to import slaves. So long a term will be more dishonorable to the American character than to say nothing about it in the Constitution. 256

MR. GOVERNEUR MORRIS was for making the clause read at once, 'the importation of slaves into N. Carolina, S. Carolina [and] Georgia shall not be prohibited &c.' This he said would be most fair and would avoid the ambiguity by which, under the power with regard to naturalization, the liberty reserved to the States might be defeated. He wished it to be known also that this part of the Constitution was a compliance with those States. If the change of language however should be objected to by the members from those States, he should not urge it. 257

254. J. Madison, supra note 242, at 505. See also Drafting, supra note 239, at 949-50.
255. J. Madison, supra note 242, at 507. See also Drafting, supra note 239, at 952.
256. J. Madison, supra note 242, at 530. See also Drafting, supra note 239, at 954.
257. J. Madison, supra note 242, at 530-31. See also Drafting, supra note 239, at 954.
COL. MASON was not against using the term 'slaves' but against naming N. C. S. C. [North Carolina and South Carolina] [and] Georgia, lest it should give offence to the people of those States.\textsuperscript{258}

MR. WILLIAMSON said that both in opinion [and] practice he was against slavery; but thought it more in favor of humanity, from a view of all circumstances, to let in S. C. [South Carolina] [and] Georgia on those terms, than to exclude them from the Union.\textsuperscript{259}

MR. SHERMAN was against this [second] part, as acknowledging men to be property, by taxing them as such under the character of slaves.\textsuperscript{260}

MR. GHORUM thought that Mr. Sherman should consider the duty, not as implying that slaves are property, but as a discouragement to the importation of them.\textsuperscript{261}

MR. SHERMAN in answer to Mr. Ghorum observed that the smallness of the duty shewed revenue to be the object, not the discouragement of the importation.\textsuperscript{262}

MR. MADISON thought it wrong to admit in the Constitution the idea that there could be property in men. The reason of duties did not hold, as slaves are not like merchandize, consumed, \\&c.\textsuperscript{263}

MR. GOUVERNEUR MORRIS . . . . He never would concur in upholding domestic slavery. It was a nefarious institution. It was the curse of heaven on the States where it prevailed . . . . Upon what principle is it that the slaves shall be computed in the representation? Are they men? . .

\textsuperscript{258} J. MADISON, supra note 242, at 531. \textit{See also} DRAFTING, supra note 239, at 954.
\textsuperscript{259} J. MADISON, supra note 242, at 531. \textit{See also} DRAFTING, supra note 239, at 955.
\textsuperscript{260} J. MADISON, supra note 242, at 532. \textit{See also} DRAFTING, supra note 239, at 955.
\textsuperscript{261} J. MADISON, supra note 242, at 532. \textit{See also} DRAFTING, supra note 239, at 955.
\textsuperscript{262} J. MADISON, supra note 242, at 532. \textit{See also} DRAFTING, supra note 239, at 956.
\textsuperscript{263} J. MADISON, supra note 242, at 532. \textit{See also} DRAFTING, supra note 239, at 956.
Are they property? Why then is no other property included? . . . He would add that Domestic slavery is the most prominent feature in the aristocratic countenance of the proposed Constitution. The vassalage of the poor has ever been the favorite offspring of Aristocracy. And [w]hat is the proposed compensation to the Northern States for a sacrifice of every principle of right, of every impulse of humanity. They are to bind themselves to march their militia for the defence of the S. [Southern] States; for their defence against those very slaves of whom they complain . . . . On the other side the Southern States are not to be restrained from importing fresh supplies of wretched Africans, at once to increase the danger of attack . . . and are at the same time to have their exports [and] their slaves exempt from all contributions for the public service . . . . For what then are all these sacrifices to be made? He would sooner submit himself to a tax for paying for all the negroes in the U. [United] States, than saddle posterity with such a Constitution. 264

ARTICLE IV. Section 2: No person held to Service or Labour [slaves] in one State, under the Laws thereof, escaping 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. 265

MR. BUTLER AND MR. PINCKNEY moved 'to require fugitive slaves and servants to be delivered up like criminals.' 266

The records of the Convention show very little discussion of the Fugitive Slave Clause, 267 which had also found support in the Northwest Ordinance of 1787. 268 While that document proscribed

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264. J. Madison, supra note 242, at 411-12. See also Drafting, supra note 239, at 942-44.
265. U.S. Const. art. IV, § 2.
266. J. Madison, supra note 242, at 545.
268. An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio (Northwest Ordinance), ch. 8, art. VI, 1 Stat. 50, 53 (1787).
the establishment of the institution in the Northwest Territory, it also required that fugitive slaves escaping to that region must be returned, "[p]rovided, always, that any person escaping into the same, from whom labour or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labour or service as aforesaid." 

Thus, while the word slave was studiously avoided in the Constitution, precedent had been established in American law to resort to euphemisms in those instances when custom and tradition made legal or statutory intent clear, particularly in the instance of slavery. In a discussion of why the term slave was avoided by the Framers, one scholar emphasized that text must be distinguished from purpose in interpreting the 1787 Constitution, explaining that "[t]he law inheres most essentially in the text of the document, not in the purposes of those who wrote the document, although the purposes may be consulted to illuminate obscure meaning." 

In this instance, as seen within the context of the notes of the constitutional debates on slavery, the intent of the Framers, with few objections, was to protect the institution. Interestingly, when promoting a positive good, as in the case of the Northwest Ordinance, our lawmakers found little difficulty in explicitly referring to the term slavery, as that document said, "[t]here shall be neither slavery nor involuntary servitude in the said territory." 

The issue suggested then, is not that the word slave was omitted from the 1787 Constitution, because the Founding Fathers "were trying to frame two constitutions, one for their own time and the other for the ages." To accept that rationale, one would have to explain the constitutional silence of the Framers regarding the legal recognition of free blacks. One would also have to explain, within the context of judicial review, limitations in the construction of the fourteenth and fifteenth amendments when applied to blacks in

269. Id.
271. An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio (Northwest Ordinance), ch. 8, art. VI, 1 Stat. 50, 53 (1787).
273. U.S. CONST. amend. XIV.
274. U.S. CONST amend. XV.
the 1883, Civil Rights Cases, the 1896, Plessy v. Ferguson case and the 1898, Williams v. Mississippi case. Inevitably, the reality of American constitutional liberalism must also be perceived from that of the Afro-American, not only today in 1989, but also in 1787.

Presumably, the ultimate purpose of the 1787 Constitution was to protect and preserve liberty in the face of the abuses of political power. The Afro-American, however, was excluded by law, custom, and tradition from the American polity. To deny their status openly in the supreme law of the land would challenge the egalitarian imperative that legitimated the Revolution. Most importantly, it would raise the spectre, the possibility, that constitutionally protected slavery of blacks could establish a precedent, which might not preclude instituting political slavery for whites.

As previously noted, though only three provisions in the 1787 Constitution specifically referred to slavery, several other provisions, singly or combined, had either a direct or indirect impact in protecting the institution of slavery. In Article I, both sections 2 and 9 provided for direct taxes, which prevented Congress from imposing a head tax on slaves which could have served to encourage their emancipation. Then, there were two provisions in the Constitution which provided for the suppression of slave insurrections: Article 1, section 8, gave Congress the power "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;" and, Article IV, section 4, required that, "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."

Then, to prevent the federal government from levying an indirect tax on slavery, Article I, sections 9 and 10 prohibited both

277. Williams v. Mississippi, 170 U.S. 213 (1896). See also the following as they relate, respectively, to the fourteenth amendment, deprivation of civil rights, and fifteenth amendment voting rights for blacks: Slaughter-House Cases, 83 U.S. 36 (16 Wall.) (1872); United States v. Cruikshank, 92 U.S. 542 (1875); United States v. Reese, 92 U.S. 214 (1875).
279. Id. § 8.
280. Id. art. IV, § 4.
federal and state governments from imposing taxes on exports,\textsuperscript{281} which included slave-produced commodities. Moreover, the federal government had the power to contain slavery in the states where it existed under both Article I, section 8, which gave Congress the power to regulate interstate commerce,\textsuperscript{282} as well as in Article IV, section 3, which gave Congress the right to admit new states and to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.\textsuperscript{283}"

Also, under Article I, section 8, which gave Congress the power to establish a uniform rule on naturalization,\textsuperscript{284} the Federal government had the power to override property concerns in slaves and declare them citizens subject to all the privileges and immunities of citizenship.\textsuperscript{285} The Framers were, however, men of their own times and could not conceive of the existence of a free society unless, under law, the government's ability to confiscate private property was limited.\textsuperscript{286} While the status of black slaves as chattel property was ingrained in the customs, values, and common law traditions of American society, more than a revolution in national consciousness was necessary to abolish the institution. Simply put, the 1787 Constitution, as the supreme law of the land, had sanctioned what use and custom had approved: \textit{Jus vendit quod usus approbavit.}\textsuperscript{287}

Moreover, in guaranteeing to the states a republican form of government\textsuperscript{288} and relegating those powers not expressly delegated to the federal government to the states,\textsuperscript{289} slavery later found protection under the 1787 Constitution. Statutory laws in states where slavery continued after 1787 provide "probably the best single means of ascertaining what a society thinks behavior ought to be; they sweep up the felt necessities of the day and indirectly expound

\begin{itemize}
\item \textsuperscript{281} \textit{Id.} art. I, §§ 9, 10.
\item \textsuperscript{282} \textit{Id.} § 8.
\item \textsuperscript{283} \textit{Id.} art. IV, § 3.
\item \textsuperscript{284} \textit{Id.} art. I, § 8.
\item \textsuperscript{285} \textit{Id.}
\item \textsuperscript{286} \textit{Cf.} U.S. CONST. amend V.
\item \textsuperscript{287} The English translation is: \textit{The law dispenses what use has approved.} \textsc{Black's Law Dictionary} 779 (5th ed. 1979).
\item \textsuperscript{288} U.S. CONST. art. IV, § 4.
\item \textsuperscript{289} U.S. CONST. amend. X.
\end{itemize}
the social norms of the legislators." It is hard to perceive that the Framers, which included nineteen slaveholders out of the fifty-five delegates to the 1787 Constitutional Convention, despite their lofty aims, had not embraced those norms. Not only did they legalize the status of slaves as property, but they also profited from their labor, despite the anguish that it brought to their souls. James Madison, a slaveholder and considered the "father of the Constitution," pronounced what he perceived as the national consensus of the legal status of the slave:

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 of both these qualities: being considered by our laws, in some respects, as persons, and in other respects as property. In being compelled to labor, not for himself, but for a master; in being vendible by one master to another master; and in being subject at all times to be restrained in his liberty and chastised in his body, by the capricious will of another - the slave may appear to be degraded from the human rank, and classed with those irrational animals which fall under the legal denomination of property. In being protected, . . . against the violence of all others, even the master of his labor and his liberty; and in being punishable himself for all violence committed against others--the slave is no less evidently regarded by the law as a member of the society, not as a part of the irrational creation; as a moral person, not as a mere article of property. The federal Constitution, therefore, decides with great propriety on the case of our slaves, when it views them in the mixed character of persons and of property. This is in fact their true character. It is the character bestowed on them by the laws under which they live; and it will not be denied that


291. Delegates to the 1787 Constitutional Convention who were slaveholders included James Madison, see 7 ENCYCLOPEDIA BRITANNICA 657 (15th ed. 1985); George Washington, see 29 ENCYCLOPEDIA BRITANNICA 720 (15th ed. 1985); John Rutledge, see 10 ENCYCLOPEDIA BRITANNICA 264 (15th ed. 1985); Charles Pinckney see 9 ENCYCLOPEDIA BRITANNICA 448 (15th ed. 1985).

these are the proper criterion; because it is only under the pretext that the laws have transformed the Negroes into subjects of property that a place is disputed them in the computation of numbers; 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 . . . .

. . . Let the compromising expedient of the Constitution be mutually adopted which regards them as inhabitants, but as debased by servitude below the equal level of free inhabitants; which regards the slave as divested of two fifths of the man.293

Thus, when one considers how the Constitution protected the institution of slavery, it must be conceded that the humanity of the slave was made subordinate to the interests of white America. That the delegates at the 1787 Constitution could have provided freedom and civil liberties for the Afro-American remains moot in face of the politics of union, protection of private property, and the interests of the national economy. All took precedence over any consideration of the abolition of slavery. Inevitably, laws are enacted to embody, preserve, and enforce societal values. When the 1787 Constitution is considered within the context of the profit-oriented market system which paced America's economic growth, doubtless, "[t]he limitation of successful legal coercion in the economic sphere lies in the relative proportion of strength of private economic interests on the one hand and interests promoting conformance to the rules of law on the other. The inclination to forego economic opportunity simply in order to act legally is obviously slight."294 In this instance, laws conformed to societal practices. If the 1787 Constitution was to succeed as the supreme law of the land, and if the new nation was going to be distinguished by a rule of law, then the inclusion of laws which could neither be enforced nor promote a "more perfect union" would have defeated the legal authority of that document. Moreover, ratification required that the new Constitution intrude upon individual liberties as little as possible, which included

safeguarding property and other economic interests from infringement by both the federal and state governments.

The ultimate reality, the imperative that sustained slavery, that denied liberty and equality to Afro-Americans, that actuated legality as the basis of American constitutionalism in the Revolutionary War era then, was the desire of the Framers to avoid compromising those historic conditions which, if allowed to persist, might continue to promote the building of a strong national economy. Thus, while the Founding Fathers might feel a moral apprehension, might even ignore or deny the reality, that the federal Constitution protected slavery, doubtless the perpetuation of the institution was paramount. Slavery's continued existence obviously was neither viewed as antithetical to republican principles of government any more than the denial of liberty and equality to twenty percent of the nation's population represented a monumental contradiction to the forces of Enlightenment which were used to justify the Revolution.

Thus, in 1787, legality, under the guise of American constitutionalism, obscured the issue of race, while endorsing the expansion of slavery, which not only encouraged racial inequalities, but limited the economic achievements of blacks had they been able to participate equally in the development of the nation's wealth. What one must recognize, then, is the extent to which whites could define their freedom, as well as determine the limits of their economic opportunities in this nation, which was accomplished largely by the degree to which blacks were denied liberty, equality, and property under the guise of legality, the sine qua non of American constitutional liberalism. Thus, while an attempt was made to establish a laissez-faire, capitalist economic system, "the Constitution was not a victory of capitalism over slavery, but a compromise between capitalism and slavery."295

In Revolutionary War America, mercantilism, the use of state action to promote national economic growth, ultimately proved the impetus for the colonists to push for economic self-determination through national independence. In constructing the economic agenda for the new nation, agricultural development figured as prominently as the promotion of American commerce and industry.

particularly since, "[t]o a large degree it may be said that Americans bought their independence with slave labor." Considering the American historical experience from 1619 to 1787 within the context of the 1787 Constitution, perhaps the intent of the Framers was to sustain that independence, both political and economic, through slave labor. Slavery would also protect the societal status of white Americans through a perpetuation of the subordinate status of blacks. In a racist slave society, underscored by capitalism, propelled by private initiative, and resting on the protection of private property, the legal and societal status of Afro-Americans, both implied and expressed, in the 1787 Constitution, was as much a reflection of the achievement of doctrinaire mercantilist principles as it was of the absence of egalitarian laissez-faire economic goals. Despite what in retrospect might be perceived as the libertarian intent of the American Revolution, even when viewed within the construct of a loose interpretation of the 1787 Constitution, legality as opposed to equality, and the protection of private property, particularly in slaves, obviated the issue of freedom for blacks in the new nation.

Consequently, today, few serious students of the Afro-American historical experience accept the illusion that in Revolutionary War America, equality and freedom for blacks in the new nation could be achieved under the 1787 Constitution. The events which took place between 1776 and 1787, must be recognized not only as colonial war, but also as a civil war in which white Americans fought, not for the acquisition of some previously denied freedoms, but rather for the retention of what was viewed as their existing freedoms as Englishmen. In the final analysis, one reaches the conclusion in reviewing the American Revolution that the "inherent conservatism" of the war must be recognized as well as the fact that the denial of liberty and equality to blacks limited the revolutionary potential of the American War for Independence.

296. E.S. MORGAN, supra note 1, at 5.
297. M. FRIEDMAN, CAPITALISM AND FREEDOM 10 (1962), who said: "History suggests only that capitalism is a necessary condition for political freedom. [But societies exist which have] economic arrangements that are fundamentally capitalist and political arrangements that are not free." Id. See also J.E.K. WALKER, FREE FRANK: A BLACK PIONEER ON THE ANTEBELLUM FRONTIER (1983), for information on a slave and free black, who manipulated antebellum law to his advantage to acquire property for development on the Kentucky and Illinois frontiers, earning profits to purchase sixteen family members from slavery, including himself.
With the 1787 Constitution, the failure of the Framers to sanction the destruction of slavery and to provide liberty and equality for all people of African descent, then, not only compromised the philosophical integrity of the Revolution and the democratic political framework of the new government, but also provided the basis for what subsequently proved an irreconcilable conflict. Thus, upon reviewing events leading to the American Civil War, one writer emphasized that "the same principles used to justify the American Revolution, particularly John Locke's natural-rights philosophy, also condemned and doomed Negro slavery."298 At the height of that conflict, Abraham Lincoln reminded this nation, in his 1863 Gettysburg Address,299 that the United States of America had been "conceived in Liberty, and dedicated to the proposition that all men are created equal . . . . [and] that this nation, under God, shall have a new birth of freedom."300 In 1865, the thirteenth amendment ended chattel slavery;301 for black Americans, this represented an initial step in the fulfillment of the libertarian goals of the Revolution. Then, with passage of the fourteenth amendment in 1868, citizenship was granted to blacks, with the promise of equal protection of the laws.302 With the fifteenth amendment in 1870, a constitutional guarantee that suffrage would not be denied because of race,303 the egalitarian goals of the American Revolution should have been achieved, providing the nation with "a new birth of freedom."304

Still, the acquisition of full freedom, liberty, and equality for Afro-Americans remained an elusive dream. While slavery had ended, racism persisted in American life, which not only nullified the full expression of liberties by blacks, but also contributed to their denial of equal protection of the laws. Since Reconstruction,305 Afro-Americans have continued to press for freedom. And,
paradoxically, within a century following the Civil War's end, one scholar, while assessing the Civil Rights Movement,\textsuperscript{306} responded to the public outcry denouncing the strident militancy of Black Protest in the 1960's by stating: "If his action is explosive, this is not merely because of the world-wide equalitarian spirit of the present time which he reflects and shares. It is also because he is working with what has always been the one 'revolutionary' factor [the American egalitarian faith] in the national history."\textsuperscript{307}

In the two centuries since the 1787 Constitution, then, it is not enough to consider what the Revolutionary War generation thought and did about slavery. Under American constitutional liberalism, with its emphasis on legality, the issue of race needs explication as well. As we have seen in the record of the American past only civil war and civil upheaval have served to advance the cause of liberty and equality for Afro-Americans. Thus, as we move into the third century of our history under American constitutional liberalism, it is important when we trace the rise of liberty, democracy, and the expansion of equality in this nation, that we not forget the historic persistence of racial oppression, social injustice, and economic inequalities.

These powerful forces continue to pace our nation's history. They also mark the limits to which the Constitution of 1787 and its subsequent amendments have succeeded for Afro-Americans in fulfilling the social contract and implementing the principles of freedom, liberty, and equality on which this nation was founded. But the measure of success for Afro-Americans will not be where we stand in relation to our historic past. Rather, when the liberties, freedoms, and economic opportunities for Afro-Americans are equal to that of America's historically advantaged group, then the American Revolution, with its egalitarian imperative, will be fulfilled for Afro-Americans.

\textsuperscript{306} The Civil Rights Movement began in the late 1950's and continued powerfully into the late 1960's until the assassination of Dr. Martin Luther King, Jr. brought on a general dissipation of spirit in April 1968. \textit{Id.}

\textsuperscript{307} L. HARTZ, \textit{THE FOUNDING OF NEW SOCIETIES} 103 (1964).