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## I. INTRODUCTION

It is by now a familiar and well-evidenced historical claim that the Reconstruction Amendments were an outgrowth of the abolitionist political and constitutional theory of the antebellum period;[1] but such reasonable historical consensus on this matter does not, *pari passu*, tell us how this historical claim should guide our interpretation of the Reconstruction Amendments. Three main problems arise with such a simplistic interpretation. First, abolitionist political and constitutional theory was internally complex. It can be divided into at least three antagonistic schools of thought—radical disunionism, moderate antislavery and radical antislavery.[2] Presumably, however, good historical argument could discriminate among the various strands of abolitionist thought, and identify the one among them that crucially shaped the terms of the Reconstruction Amendments.

But second, even if we had such good historical analysis, the terms of such an abolitionist theory could be understood at various levels, some quite abstract and others quite concrete; complex internal disagreements

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1. *See generally* MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); HOWARD J. GRAHAM, EVERYMAN'S CONSTITUTION (1968); HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION (1973); HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875 (1982); ROBERT J. KACZOROWSKI, THE NATIONALIZATION OF CIVIL RIGHTS: CONSTITUTIONAL THEORY AND PRACTICE IN A RACIST SOCIETY 1866-1883 (1987); ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876 (1985); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988); JACOBUS TEN BROEK, EQUAL UNDER LAW (2d ed. 1969) (originally published as THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (Univ. of Cal. Press 1951)); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986); Robert J. Kaczorowski, *Searching for the Intent of the Framers of the Fourteenth Amendment*, 5 CONN. L. REV. 368 (1972-73).

2. For a good historical study of these various movements, see WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977).

will appear at all these levels, and it is not obvious what weight, if any, we should accord any one of them in the interpretation of the Reconstruction Amendments today. For example, some abolitionists were remarkably critical of American racism; others were less critical, and members of the Reconstruction Congress thus held diverse views about the degree to which the substantive terms of the amendments (like equal protection) should be understood to condemn concrete practices like state-sponsored segregation.[3] Senator Charles Sumner and some others regarded such segregation as inconsistent with equal protection;[4] most others arguably did not.[5] Whose concrete convictions should prevail in shaping constitutional interpretation today?

Finally, the interpretation of the Reconstruction Amendments must make sense of their interpretation over time, including our contemporary sense of grave interpretive mistakes like *Plessy v. Ferguson*[6] and corrections thereof like *Brown v. Board of Education*.[7] The best interpretation of such evolving interpretive practice cannot reasonably be understood as some simplistic tracking of a prior concrete historical understanding—indeed, on such a view *Plessy* would be right and *Brown* wrong.[8] Rather, our evolving and self-correcting interpretive experience must be understood in some other way in which various factors, including history, must be given appropriate weight in the larger interpretive project of American constitutionalism.

To address these questions reasonably, we need to ask meta-interpretive questions about constitutional interpretation as a complex, historically self-conscious practice of understanding the supreme law of the Constitution in the United States and the role the Reconstruction Amendments play or should be understood to play in that project. American constitutionalism is a complex genre of historically evolving interpretive practices aspiring to narrative integrity centering on the text and institutions that express a people's self-conscious historical struggle to achieve a politically legitimate government which would guarantee all persons equal human rights.[9] The Reconstruction Amendments express

3. *See* NELSON, *supra* note 1, at 133-34.

4. *See id.*

5. *See id.* at 134-36.

6. 163 U.S. 537 (1896).

7. 347 U.S. 483 (1954).

8. For a notable example of an approach under which *Brown* is wrongly decided, see RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 230-45 (1977).

9. On the role of integrity in legal interpretation in general, and constitutional interpretation in particular, see generally RONALD DWORKIN, LAW'S EMPIRE (1986).

the greatest struggle of the American people since the founding to remember and recover the narrative thread of that story. I shall argue that the study of abolitionist political and constitutional theory enables us to clarify the place of these amendments in our constitutionalism because it offers an enriched understanding of both that struggle and its resolution in a permanent constitutional legacy to posterity. The Reconstruction Amendments address central defects in the legitimacy of the Constitution as supreme law as it had been interpreted in the antebellum period—a period very similar in methodological spirit to the revolutionary constitutionalism that the Founders of 1787 had brought to bear on the British Constitution. Abolitionist political and constitutional theory was the vehicle of this critical reflection on our constitutionalism. Therefore, study of these theories advances understanding of what our traditions are and how we should think about the proper interpretive attitude to be taken as to the role of these amendments in the preservation and legitimacy of the Constitution as supreme law.

## II. ANTEBELLUM CONSTITUTIONAL AND POLITICAL THEORY

The appropriate framework for an analysis of these matters must be the growing sense of crisis in constitutional legitimacy during the antebellum period. This was initially marked by the claims of the success of Calhoun's proslavery constitutionalism[10] and then by its cumulative political successes. The success of Calhoun's constitutionalism is seen first in Congress's repeal of the Missouri Compromise in the Kansas-Nebraska Act of 1854 sponsored by Stephen Douglas's theory of popular sovereignty,[11] and then in the Supreme Court's adoption of the central claims of Calhoun's constitutionalism in *Dred Scott v. Sandford*.[12] The narrow issue of constitutional interpretation common to both these matters was the power or lack of power of Congress to forbid slavery in the territories. But the deeper question of constitutional legitimacy, posed by Lincoln among others,[13] was the interpretive attitude taken by Douglas and Taney to the text of the Constitution of the United States. This atti-

10. *See* JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT: AND SELECTIONS FROM THE DISCOURSE 44-45 (G. Gordon Post ed., 1943) (1853). For useful commentary, see AUGUST O. SPAIN, THE POLITICAL THEORY OF JOHN C. CALHOUN (1951).

11. *See* DAVID M. POTTER, THE IMPENDING CRISIS 1848-1861, at 145-76 (1976).

12. 60 U.S. (19 How.) 393 (1857). For commentary, see DON E. FEHRENBACHER, THE *DRED SCOTT* CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 46-47, 126, 140-41 (1978); POTTER, *supra* note 11, at 267-96.

13. *See, e.g.*, Abraham Lincoln, Fifth Joint Debate at Galesburg (October 7, 1858), *in* THE LINCOLN-DOUGLAS DEBATES 206, 219-20 (Robert W. Johannsen ed., 1965) (arguing blacks were included in Declaration of Independence).

tude disengaged its interpretation from the Lockean political theory of the Declaration of Independence, namely, that all persons subject to political power have inalienable human rights. Calhoun, in contrast to other Southern constitutionalists like John Taylor of Caroline,[14] had radically defended his positivistic reading of the Constitution on grounds of a self-conscious repudiation of the very idea of inalienable human rights, and thus consistently argued that the Constitution should not be interpreted, either at the state or federal level, as a document with a vision of equal human rights.[15] Lincoln and others granted that the best interpretation of the history and text of the Constitution protected slavery in the states that had it. They distinguished, however, this short-term political compromise from the more long-term ambition of the Constitution to protect human rights—requiring federal power to protect human rights by forbidding slavery in the federal territories and thus over time encouraging slavery's gradual abolition by the states that retained it.[16] Such an interpretation would put slavery, as Lincoln argued that the Founders intended, "in the course of ultimate extinction."[17] By contrast, Calhoun's radical rights skepticism disallowed an interpretive attitude which was sensitive to the ultimate long-term obligation of a constitutional government to respect the equal human rights of all persons subject to its political power.

Although the issue in dispute was ostensibly a matter of constitutional interpretation, in substance, the issue was the very legitimacy of the Constitution as the supreme law of the land. The Constitution, as supreme law, must have a basis that renders a respect for its terms more legitimate than the laws over which it reigns supreme. Rights-based political theory gave a natural and plausible substantive basis for such legitimacy. The Constitution, when properly interpreted, was consistent with this political theory, which secured conditions of respect for human

14. Taylor had offered a Jeffersonian rights-based theory of the Constitution that gave a central role to the states in the protection of human rights and a correspondingly narrow role to the federal government. *See* JOHN TAYLOR, NEW VIEWS OF THE CONSTITUTION OF THE UNITED STATES (Leonard W. Levy ed., 1971) (1823); JOHN TAYLOR, CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED (Leonard W. Levy ed., 1970) (1820).

15. For Calhoun's most explicit attack on the Declaration of Independence as embodying "the most dangerous of all political errors," and Jefferson's "utterly false view," see John C. Calhoun, Speech on the Oregon Bill, before the Senate (June 27, 1848) *reprinted in* IV THE WORKS OF JOHN C. CALHOUN 511, 512 (Richard K. Cralle ed., New York, D. Appleton & Co. 1861).

16. *See* Abraham Lincoln, Address at Jonesboro (September 15, 1858), *in* THE LINCOLN-DOUGLAS DEBATES, *supra* note 13, at 132.

17. *See* Abraham Lincoln, First Joint Debate, Ottawa (August 21, 1858), *in* THE LINCOLN-DOUGLAS DEBATES, *supra* note 13, at 55.

rights. This alone rendered any exercise of political power legitimate, and thus the claim of constitutional supremacy rested on the background political theory which defined when an exercise of coercive power was legitimate. The Constitution was supreme law because it enforced political power that de-legitimated exercises of a restrictive political theory which were inconsistent with its demands.

But how could one interpret the text and history of the Constitution of the United States as consistent with this political theory in light of its putative toleration of slavery, an institution resting on the abridgement of basic human rights? One response to this question was common to a proslavery radical like Calhoun and abolitionist radical disunionists like William Lloyd Garrison[18] and Wendell Phillips:[19] namely, abandon any attempt to interpret the Constitution in terms of rights-based political theory. Calhoun, who was skeptical of rights as defensible political values, did not conclude that the Constitution was illegitimate; rather he rested its legitimacy on other grounds, namely, a Hobbesian theory of state sovereignty.[20] Garrison and Phillips, however, believed in respect for human rights as ultimate political values and concluded that the Constitution, if not based on human rights, was illegitimate. The question became, was there a way that the Constitution could be regarded as legitimate on the basis of rights-based political theory?

The goal of giving an affirmative answer to this question motivated complex forms of internal and external criticism of the Constitution by various forms of abolitionist political and constitutional theory. By internal criticism, I mean the criticism of mistaken interpretations of the Constitution on the ground that the interpretations failed to elaborate properly the principles of the Constitution itself. By external criticism, I mean criticism of the Constitution, even properly interpreted, as inconsistent with enlightened critically defensible political values like respect for human rights. Thus, both advocates of moderate and radical antislavery internally criticized *Dred Scott v. Sandford*[21] as a mistaken interpretation of relevant constitutional principles. Although many advocates of moderate antislavery externally criticized slavery as a moral and polit-

18. *See* WILLIAM LLOYD GARRISON, SELECTIONS FROM THE WRITINGS AND SPEECHES OF WILLIAM LLOYD GARRISON (photo. reprint 1968) (Boston, R.F. Wallcut 1852).

19. *See* Wendell Phillips, *Introduction* to THE CONSTITUTION: A PRO-SLAVERY COMPACT 3-7 (photo. reprint 1969) (Wendell Phillips ed., New York American Anti-Slavery Society 1844); WENDELL PHILLIPS, CAN ABOLITIONISTS VOTE OR TAKE OFFICE UNDER THE UNITED STATES CONSTITUTION? (New York, American Anti-Slavery Society 1845).

20. For a good account of Calhoun's theory of sovereignty, see SPAIN, *supra* note 10, at 164-83.

21. 60 U.S. (19 How.) 393 (1857).

ical wrong, moderate—in contrast to radical—antislavery did not, however, take the same negative view of the interpretive claim that slavery was constitutional in the states that had adopted it.[22] Such forms of both internal and external criticism of the Constitution were grounded in the tension acutely experienced by all of these abolitionists between the Constitution and what they took to be its governing rights-based political theory. On the one hand, the text and history of the Constitution apparently contemplated the legitimacy of slavery at least at the state level;[23] on the other hand, the rights-based theory of the Constitution condemned slavery as a violation of inalienable human rights.[24] Various forms of abolitionist constitutional and political theory relieved this tension in different ways.

Perhaps the most plausible interpretive position was that of the moderate antislavery movement.[25] Fair interpretive weight was accorded the text and history legitimizing slavery in the states as a reasonable short-term compromise with an already entrenched institution that the states could fairly be expected to abolish in due course. On the other hand, fair interpretive weight was accorded the background political theory of human rights by forbidding any legitimization of slavery by the federal government in service of the long-term goal of respect for human rights everywhere in the United States—including eventual abolition of slavery by the states. The moderate antislavery theme—liberty national, slavery local or sectional—thus gave full interpretive scope to the political theory of human rights only at the national level; at the state level, the political theory afforded a ground for external criticism and set a long-term national goal of encouraging abolition.[26]

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22. For a good general study on the diverse forms of political abolitionism, see RICHARD H. SEWELL, BALLOTS FOR FREEDOM: ANTISLAVERY POLITICS IN THE UNITED STATES 1837-1860 (1976).

23. *See* U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . and excluding Indians not taxed, three fifths of all other Persons.").

24. *See, e.g.*, THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 162-63 (William Pedea ed., 1982) (1781).

25. For a seminal statement of the view, see Salmon P. Chase, The Address of the Southern and Western Liberty Convention (June 11 & 12, 1845), *in* SALMON P. CHASE & CHARLES D. CLEVELAND, ANTI-SLAVERY ADDRESSES OF 1844 AND 1845, at 1 (photo. reprint 1969) (n.p., Sampson Low, Son, and Marston 1867).

26. For a statement of this moderate antislavery theme, see CHASE & CLEVELAND, *supra* note 25, at 84-85.

In contrast, advocates of radical antislavery, for example William Goodell,[27] Lysander Spooner[28] and Joel Tiffany,[29] accorded the political theory of human rights decisive interpretive weight at both the national and state levels. The interpretive implausibility of this approach was the Constitution it claimed to be interpreting, in particular, the text and history of the Constitution bearing on the legitimacy of slavery at the state level. The interpretive primacy of political theory was sustained and defended by the most theoretically profound advocate of this position, Lysander Spooner, by denying any weight to the constitutional text or history in conflict with the claims of rights-based political theory. The clauses of the Constitution apparently recognizing state-endorsed slavery were to be interpreted not to recognize slavery on the theory that any interpretation should be accorded the words, no matter how textually strained, that did not recognize slavery.[30] Furthermore, history was to be disowned altogether, as a valid ground for interpretation, in favor of focusing exclusively on the text itself—a text to be interpreted anti-positivistically in whatever way gave best effect to rights-based political theory.[31] The Constitution was to be interpreted in this way because, otherwise, the Constitution could not be regarded as the supremely legitimate law of the land. If slavery in the states which condoned it was constitutional, such a constitutional claim would be a politically illegitimate abridgement of human rights, indeed a just ground for the right to revolution. As Joel Tiffany starkly put the radical antislavery point, "give us *change* or *revolution*."[32] To avoid such a crisis in constitutional legitimacy, the Constitution was to be interpreted in the mode called for by radical antislavery.

Both advocates of moderate and radical antislavery shared a common interest in analyzing how the interpretation of the Constitution could have been so decadently unmoored from its basis in the political theory of human rights—a national decadence reflected in the political

27. WILLIAM GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW IN ITS BEARING UPON AMERICAN SLAVERY (photo. reprint 1971) (Utica, Lawson & Chaplin, 2d ed. 1845).

28. LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (n.p. 1860).

29. JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY (photo. reprint 1969) (n.p. 1849).

30. Since the word "slave" was never expressly used, but rather "three fifths of all other Persons," *see* U.S. CONST. art. I, § 2, cl. 3, or "Migration or Importation of Such Persons," *see* U.S. CONST. art. I, § 9, cl. 1, or "Person[s] held to Service or Labour," *see* U.S. CONST. art. IV, § 2, cl. 3, the radicals ascribed to these texts meanings that did not protect slavery. For example, Spooner argued that the Three-fifths Clause applied not to Southern slaves, but mainly to resident aliens. *See* 1 SPOONER, *supra* note 28, at 73-81.

31. *See* 2 SPOONER, *supra* note 28, at 146.

32. TIFFANY, *supra* note 29, at 99.

successes of Calhoun's proslavery constitutionalism. The nerve of their analysis—the "slave power conspiracy"[33]—was an elaboration of the Founders' theory of faction,[34] only now applied to a form of faction that had been fostered by the Constitution itself. The theory of faction had identified pervasive tendencies of group psychology in politics to protect the interests of some political group at the expense of denying fair respect for the rights and interests of outsiders.[35] Madison had argued in *The Federalist* that the Constitution had structured the exercise of republican political power in order to better ensure that such factions would not achieve their mischievous ends at the expense of the governing political theory of republican constitutionalism—respect for human rights and pursuit of the public interest.[36] The antislavery analysis of America's constitutional decadence was that the Constitution, through augmenting the political power of the slave states by the Three-Fifths Clause,[37] had so constitutionally entrenched the political power of slave-owning interests that their power as an effective political faction had flourished to the degree that, inconsistent with the aims and theory of Madisonian constitutionalism, these factions actually had subverted the Constitution.

Radical antislavery gave a distinctively deep moral and constitutional analysis of the sources of the constitutional decadence in the Constitution and what would be required to remedy the underlying constitutional pathology. The premise of its distinctive approach was its view of the proper understanding of the relationship of Lockean political theory to constitutional interpretation. The foundation of this view had been laid earlier by the abolitionist Theodore Weld in his analysis of the wrongness of slavery; Weld's analysis invoked the Lockean political theory that legitimate government must protect equal rights. He made a similar appeal in explaining why Congress had the power to abolish slavery in the District of Columbia:

> It has been shown already that *allegiance* is exacted of the slave. Is the government of the United States unable to grant *protection* where it exacts *allegiance*? It is an axiom of the civi-

33. For a useful study of this idea, see DAVID B. DAVIS, THE SLAVE POWER CONSPIRACY AND THE PARANOID STYLE (1969).

34. THE FEDERALIST No. 10 (James Madison) (defining faction as some number of citizens united by common interest adverse to rights of other citizens or community). For further discussion of the Founders' theory of faction, see DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 32-39 (1989).

35. *See* RICHARDS, *supra* note 34, at 32-39.

36. *See* THE FEDERALIST No. 10 (James Madison). For further discussion, see RICHARDS, *supra* note 34, at 105-30.

37. *See* U.S. CONST. art. I, § 2, cl. 3.

> lized world, and a maxim even with savages, that allegiance and protection are reciprocal and correlative. Are principles powerless with us which exact homage of barbarians? *Protection is the CONSTITUTIONAL RIGHT of every human being under the exclusive legislation of Congress who has not forfeited it by crime.*[38]

This view assumed that black Americans, slave or free, were working members of the American political community and, as such, subject to its governing Lockean principles of a fair balance of rights and obligations as a condition of allegiance. But many Americans, Lincoln being one of them, wanted to distinguish the question of abolishing slavery in order to recognize the natural rights of slaves from the question of further empowering the slaves with rights of membership in the American political community.[39] This explains the view of moderate antislavery that the best theory of the Constitution would allow the national government to achieve its goals of respect for human rights by the long-term abolition of slavery and colonization of the freedmen abroad—thereby not including them in the American political community. They were able to take this view by ascribing decisional powers of the rights of American citizenship to the states alone; thus, the national government might constitutionally achieve the long-term abolition of slavery and colonize the freedmen abroad without violating any nationally guaranteed constitutional rights of the freedmen. But, if one believed, like Weld and many more radical abolitionists, that Lockean political theory guaranteed black Americans, slave and free, both their natural rights and their rights to citizenship, moderate antislavery constitutional theory reconciled the Constitution and its background political theory in an unappealing way. The distinction between national and state power over slavery, fundamental to the moderate antislavery view, could sensibly interpret the Constitution as serving its political theory of respect for equal rights only if national power could be read as achieving such rights by abolition and colonization. But, if Weld and the abolitionists were right, that interpretation of the Constitution would violate the rights of black Americans—earned by years of unremunerated labor in service of the national interest—to be free and to be citizens. Was there an interpretation of the Constitution that might better reconcile it with its background political theory?

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38. Theodore Weld, *The Power of Congress over Slavery in the District of Columbia* (New York, American Anti-Slavery Society 1838), *reprinted in* TEN BROEK, *supra* note 1, at 278.

39. *See, e.g.*, Abraham Lincoln, Speech on the Kansas-Nebraska Act (October 16, 1854), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832-1858, at 307-08, 315-16 (Don E. Fehrenbacher ed., 1989).

Radical antislavery constitutional theory responded to this question, as we have seen, by interpreting the Constitution to forbid slavery both at the national and state levels. Radical antislavery theory agreed with moderate antislavery that the proper interpretive attitude towards the United States Constitution must be Lockean political theory, but disagreed about the best account of such theory—in particular, about what rights black Americans in fact had in light of the wrongs inflicted on them by American slavery and racism. Taking the view of political theory that radical antislavery did, the moderate antislavery reading of the Constitution, in terms of a federal-state dichotomy on the slavery issue, could not be reasonably justified in light of protecting both human rights and the public interest. Such an interpretation would allow abolition on terms which violated the rights of black Americans as citizens. The better interpretation—the one that over-all enabled the Constitution to be read more coherently as in service of its political theory—was one that made all participants in the American political community national citizens and therefore bearers of the equal human rights of such citizenship.[40] Under radical antislavery, the national government—both the judiciary and Congress—thus had power to achieve the abolition of slavery, but, in stark contrast to moderate antislavery, only on terms that recognized the rights of black Americans to be both free and equal citizens.

Radical antislavery was, as we have seen, self-consciously proposed as an interpretive theory. However, its real force was its profound external criticism of the Constitution on the very grounds central to the distinctive methodologies of American revolutionary constitutionalism. In effect, the United States Constitution, constructed on the basis of a complex empirical and normative assessment of the genre of republican constitutionalism, was subjected to a comparably profound criticism by radical antislavery in terms self-consciously inspired by the critical achievement of the founding itself.

## III. AMERICAN REVOLUTIONARY CONSTITUTIONALISM AND THE RECONSTRUCTION AMENDMENTS

It is fundamental to the American legal and political experience that its revolutionary and constitutional project was conceived as a common enterprise.[41] Leading advocates of the American Revolution such as

40. Joel Tiffany generalized these arguments into a general constitutional principle "for the equal protection of all, individually and collectively." TIFFANY, *supra* note 29, at 87.

41. The following discussion of American revolutionary and constitutional thought is an abbreviated summary of the lengthy treatment of these matters in RICHARDS, *supra* note 34.

John Adams and Thomas Jefferson clearly saw constitutionalism at both the state and national levels as the test of the very legitimacy of the revolution. Accordingly, Jefferson wrote no less than three constitutions for Virginia, and Adams was the main author of the Massachusetts constitution of 1780 that was centrally used by the Founders in 1787.[42] The success of American constitutionalism was, for Adams and Jefferson, literally the test of the legitimacy of the revolution.

American revolutionary constitutionalism contained six critical ingredients—namely: (1) the Lockean political principles of the revolution; (2) the relationship of those principles to what Americans regarded as the pathological misinterpretation of the British Constitution by the British Parliament; (3) the analysis of political pathologies, for example, the theory of faction, in light of the history of British constitutionalism and the larger practice of republican and federal experiments over time; (4) the use of such comparative political science in constructing new structures of government free of the mistakes both of the British Constitution and republican and federal experiments in the past; (5) the weight placed on the experiments in the American states and in the nation between 1776 and 1787 in thinking about institutional alternatives; and (6) the historically unique opportunity self-consciously recognized and seized by Americans in 1787 to develop a novel republican experiment that established a new government which was more politically legitimate than the arguments of ordinary politics.

Radical antislavery brought the same critical ingredients of American revolutionary constitutionalism to bear when it criticized the Constitution in light of its antebellum decadence. First, the distinctive depth of its analysis derived from the remarkable moral independence of its articulation, on the basis of Lockean political theory, of basic human and constitutional rights of all persons subject to the political power of the United States.[43] Second and third, that perspective enabled radical antislavery to interpret the pathological misinterpretations of the Constitution as grounded not only in the slave power conspiracy,[44] but in the pathological construction of American racism that the Constitution had fostered,[45] in effect legitimatizing the monstrous faction of white

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For pertinent supporting arguments and citations, I refer the reader, in the text that follows, to that discussion, not repeating here the citations contained there.

42. *See id.* at 19-20, 95, 106, 123, 124, 141.

43. *See generally* TIFFANY, *supra* note 29, at 271 (criticizing interpretations that read Constitution as favoring slavery).

44. *See* DAVIS, *supra* note 33.

45. For the seminal analysis along these lines, see L. MARIA CHILD, AN APPEAL IN FAVOR OF AMERICANS CALLED AFRICANS (photo. reprint 1968) (New York, John S. Taylor

supremacy that Chief Justice Taney explicitly embraced as the proper measure of constitutional rights in *Dred Scott v. Sandford*.[46] Fourth and fifth, comparative reflection on the earlier abolition of slavery by Britain and the growing power of slave-holding interests in American politics, both state and national, led the radical antislavery movement to identify the crucial error of American constitutional design as the failure to take seriously Madison's original constitutional suggestions that the nation have the power to secure that states could not violate a nationally articulated conception of human rights and the public interest.[47] Madison's theory of faction focused on local interests at the state level as the loci of faction, and called for nationally representative institutions as a way of detoxifying the evils of local factions.[48] However, the most precisely oppressive of state factions—slavery at the state level—had been constitutionally immunized from national scrutiny in terms of enforceable standards of human rights and the public interest. This lacuna had, in the view of radical antislavery, over time led to the degradation of the Constitution by the worst form of factionalized insularity and oppression as reflected in the political appeal to Douglas and Taney, among many others, of Calhoun's proslavery constitutionalism with its denial of the role of rights-based political theory in constitutional interpretation. Finally, the appropriate remedy must accordingly be a conception of national institutions with adequate competence and power to ensure that the states, like the national government, respect the human rights of all Americans.

## IV. RADICAL ANTISLAVERY AND THE RECONSTRUCTION AMENDMENTS

Radical antislavery offered its analysis as internal interpretive criticism of dominant antebellum views of constitutional interpretation. It

1833). At the Constitutional Convention, Madison had himself described racism as one of the worst forms of faction: "We have seen the mere distinction of colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man." James Madison, Speech Before the Constitutional Convention (June 6, 1787), *in* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 135 (Max Farrand ed., 1966).

46. 60 U.S. (19 How.) 393 (1857). "[T]hey [blacks] had no rights which the white man was bound to respect." *Id.* at 407.

47. Joel Tiffany, for example, sharply posed the crisis of American constitutionalism in terms of the despotic powers of the states at home. *See* TIFFANY, *supra* note 29, at 55-56. It was not the states that required protection "but the *individual*, crushed, and overwhelmed by an insolent, and tyrannical majority, that needed such a guaranty; and to him, as a citizen of the United States, whether in the majority, or minority, is that guaranty given, to secure him, not only from *individual*, but also from *governmental* oppression." *Id.* at 110.

48. *See* RICHARDS, *supra* note 34, at 36-37.

was, however, regarded as a marginal view of constitutional interpretation even among mainstream political abolitionists, most of whom gravitated to moderate antislavery as the best theory of constitutional interpretation.[49] In the wake of the Civil War, the analysis of radical antislavery occupied center stage in the critical reflection on American constitutionalism culminating in the Reconstruction Amendments because it afforded the most reasonable analysis and diagnosis of the nation's constitutional crisis and its solution.[50] By the end of the Civil War, slavery had effectively been ended in the South, and the new task became forging a moral and constitutional vision that would memorialize the fruits of that war in an enduring legacy of constitutional principle for posterity. Both the North and the South had come to interpret the Civil War as a controversy over the meaning of American revolutionary constitutionalism ultimately justified by appeal to the right to revolution when constitutional structures had proven radically inadequate to their ultimate normative values. From the perspective of the Reconstruction Congress, Southern secession was based on a perverse interpretation of American revolutionary constitutionalism that appealed to the Constitution to justify the entrenchment of slavery, the ultimate violation of basic human rights, against any possibility of inhibition by the federal government under moderate antislavery's reasonable interpretation of the Constitution of 1787. Proslavery constitutionalism, when carried to this extreme, had become the systematic instrument for the permanent abridgement of basic human rights, and the Civil War was thus justified on the same grounds as the American Revolution had been justified against a decadent form of British constitutionalism—namely, to protect human rights and to forge constitutional forms more adequate to this ultimate moral vision of legitimate government.

If the legitimacy of the American Revolution required a form of constitutionalism, in contrast to the corrupt British Constitution, adequate to its normative demands, the legitimacy of the Civil War required a comparably profound reflection on constitutional decadence adequate to its demands for a rebirth of rights-based constitutional government. Radical antislavery's critical analysis of antebellum constitutional decadence met this need because it was the most profound such reflection culturally available in the genre of American revolutionary constitution-

49. For a good general treatment, see SEWELL, *supra* note 22, at 3-23.

50. I explore the argument merely sketched in this paragraph at much greater length in a work in progress, David A.J. Richards, Conscience and the Constitution: Abolitionist Dissent, The Second American Revolution and the Reconstruction Amendments (unpublished manuscript, on file with the author).

alism forged by the Founders of 1787. Its great appeal for the American constitutional mind was both its radical insistence on the primacy of the revolutionary political theory of human rights central to American constitutionalism and its brilliant reinterpretation of the ingredients of such constitutionalism in light of that political theory and the events of antebellum constitutional decadence and civil war. In light of its analysis, radical antislavery supplied the most reasonable interpretation of the Civil War as the second American Revolution, and offered, consistent with the genre of American revolutionary constitutionalism, remedies that plausibly could be and were regarded as the most justifiable way to correct central defects in the Constitution of 1787, defects some of which had been acknowledged by leading founders like Madison in 1787.[51] The Reconstruction Amendments, the most radical change in constitutionalism in our history, could thus be plausibly understood as a wholly reasonable conservative way to preserve the legitimacy of the long-standing project of American revolutionary constitutionalism.

The Reconstruction Amendments contain both negative and positive features: the abolition of slavery and involuntary servitude (Thirteenth Amendment) and the prohibition of racial discrimination in voting (Fifteenth Amendment); the affirmative requirements of citizenship for all Americans and nationally defined and enforceable guarantees applicable against the states of equal protection, privileges or immunities, and due process of law (Fourteenth Amendment). The political theory of these prohibitions and requirements was Lockean political theory as it had been articulated and applied in the antebellum period by radical antislavery: all political power, now including the power of the states, could be legitimate only if it met the requirement of extending to all persons subject to such power respect for their inalienable human rights and the use of power to pursue the public interest. And their constitutional theory was, in light of the critical analysis of antebellum decadence of radical antislavery, what such requirements of politically legitimate power clearly required—nationally articulated, elaborated and enforceable constitutional principles that would preserve or tend to preserve the required respect for rights and pursuit of the public interest. These guarantees thus textually included the central normative dimensions distinctive of radical antislavery: the demand that all persons subject to the burdens of allegiance to the political power of the United States be accorded both their natural rights as persons and their equal rights as citizens, based on the fundamental egalitarian requirement of politically

51. *See* RICHARDS, *supra* note 34, at 37-38.

legitimate government as stated by the Equal Protection Clause. If the Constitution of 1787 had made remarkably little textual reference to its background political theory, the Reconstruction Amendments textually affirmed and enforced that political theory with notable focus on the forms of political pathology that had motivated antebellum constitutional decadence—the untrammelled state power over abridgement of human rights that had given rise to the political pathologies of the slave power conspiracy in general and American racism in particular.[52] Both the Thirteenth Amendment's prohibition of slavery and the Equal Protection Clause of the Fourteenth Amendment's prohibition of racist subjugation were thus negative corollaries of the affirmative principle of equal respect for the rights of all persons subject to political power, and therefore required the national articulation, elaboration and enforcement of constitutional principles that defined the supreme law of the land because they secured the politically legitimate terms for the exercise of any political power.

The Reconstruction Amendments, thus understood, responded to the gravest crisis of constitutional legitimacy in our history, and are best understood and interpreted as negative and affirmative constitutional principles responsive to that crisis and any comparable crisis in the legitimacy of the Constitution as supreme law. Our interpretive attitude today to these amendments must make the best sense of them in light of the genre of American revolutionary constitutionalism that they assume and critically elaborate in service of the narrative integrity of the story of the American people and their struggle for a politically legitimate government that respects human rights. I have here argued that abolitionist political and constitutional theory played a crucial role in telling this story, and our interpretive attitude today should take account of this theory as part of an enriched sense of what our constitutional tradition is and how it should be carried forward on the terms that do justice to it.

It cannot do justice to this enriched understanding of our interpretive responsibilities to trivialize our interpretation of the Reconstruction Amendments to some fictive search for the concrete exemplars to which some suitably described majority of the Reconstruction Congress or the ratifying states or, for that matter, advocates of radical antislavery would or would not have applied the relevant clause under interpretation. The political and constitutional theory of the Reconstruction Amendments

52. For a good statement of this general concern at the time of the introduction of the Thirteenth Amendment on the floor of the House of Representatives, see Speech of Representative Henry Wilson (Mar. 19, 1864), *in* CONG. GLOBE, 38th Cong., 1st Sess. 1199-1204 (1864).

was rooted in the radically anti-positivist jurisprudence of radical anti-slavery. It responded to the antebellum crisis of constitutional legitimacy by requiring an interpretive attitude to the Constitution that would preserve its legitimacy on the grounds of the rights-based theory of human rights central to its claims to be the supreme law of the land.

Both Taney's originalism[53] and Stephen Douglas's majoritarian interpretation of popular sovereignty[54] were, from this perspective, equally illegitimate attempts to evade the interpretive responsibilities of making sense of the supremacy of the Constitution in terms of its protection of the human rights of all persons subject to political power. Taney's use of history and Douglas's majoritarianism substituted positivistic amoral facts or procedures for the deliberative rights-based normative judgments that could alone preserve the legitimacy of the Constitution as supreme law, namely, its principled protection of human rights to the fullest extent feasible. In light of the text and background of the Reconstruction Amendments, it would be, a fortiori, illegitimate today to make sense of these amendments in a comparably evasive positivistic way—by appeal to the concrete intentions of the founders (Bork)[55] or some picture of majoritarian democracy unconcerned with basic human rights (Ely).[56]

We mock our history and our traditions when we thus studiously unlearn everything that our history and traditions, properly interpreted, teach us. In contrast, we do interpretive justice to the role of the Reconstruction Amendments in the larger narrative integrity of American constitutionalism if and only if we ensure that the interpretation of the Constitution, in order to be supreme law, is based today on our best deliberative normative judgments about the principled protection of human rights in our circumstances. On this view, the enduring meaning of the

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53. Taney argues in *Dred Scott*:

> No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.

Scott v. Sandford, 60 U.S. (19 How.) 393, 426 (1857). In fact, as Justice Curtis points out in his dissent, Taney gets even his alleged originalist history of Founders' concrete intentions wrong. *See id.* at 572-74 (Curtis, J., dissenting).

54. Popular sovereignty, irrespective of constitutional or natural rights, allowed states to decide whether they would or would not have slavery. As one commentator observed, "Douglas looked upon popular sovereignty as essentially pragmatic and expedient." ROBERT W. JOHANNSEN, STEPHEN A. DOUGLAS 240 (1973).

55. *See* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 251-59 (1990). For criticism, see David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373, 1376-77 (1990) (book review).

56. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 4-7 (1980).

Reconstruction Amendments is that each generation of Americans must strive by its own best lights to constitute itself on the basis of the most inclusively reasonable understanding of universal human rights in its circumstances, not on the basis of indefensible conceptions of national identity, like Taney's white supremacy, that rest on the degradation of the dignity of the human person. It is in light of such critical reflection on the meaning of human rights in contemporary circumstances that *Brown v. Board of Education*[57] was interpretively correct. It is for the same reason that the contemporary interpretation of the Reconstruction Amendments must strive deliberatively to articulate and protect a similarly inclusive progressive conception of human rights in light of the best arguments of public reason elaborated in our circumstances as a matter of principle.[58]

The interpretive attitude that radical antislavery had taken to the Constitution was, as we have seen, insistent on the primacy of rights-based political theory in constitutional interpretation, disowning history and straining text in order to give maximum expression to the fullest possible protection of human rights. We, however, need neither disown history nor strain text to interpret the Reconstruction Amendments consistent with the requirements of rights-based political theory, for both the history and text of the Reconstruction Amendments make the best sense only when understood in that way. Indeed, the enduring moral legacy of radical antislavery to American constitutionalism is that its once implausible interpretive attitude to the Constitution of 1787 has been rendered, by virtue of the Reconstruction Amendments, the only plausible attitude to the Constitution, as thus amended.

Rights-based egalitarian political theory must therefore play a central role in the interpretation of the requirements of the Reconstruction Amendments in contemporary circumstances. Such interpretive responsibilities require us to take seriously what our rights are and how they are to be understood and elaborated today on terms of principle.[59] The abolitionists give us a model of the forms of political and constitutional theory that such responsibilities require us to generate in our circumstances.

Four features of abolitionist thought and practice are, in this connection, notable. First, the abolitionists were the most principled and

57. 347 U.S. 483 (1954).

58. For example, the protection of women and homosexuals from conceptions of national identity is based on the abridgement of their basic human rights. For further development of this approach, see generally DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986) [hereinafter RICHARDS, TOLERATION AND THE CONSTITUTION]; *see also* RICHARDS, *supra* note 34, at 252-72; Conscience and the Constitution, *supra* note 50.

59. *See* RICHARDS, TOLERATION AND THE CONSTITUTION, *supra* note 58.

morally independent advocates of the inalienable rights of conscience and free speech in the antebellum period against the hostile tyranny of majoritarian antebellum complacency so notably anatomized by de Tocqueville.[60] Second, their principled commitment to the inalienable right to conscience and free speech enabled the abolitionists to elaborate and extend the argument for toleration to identify critically new modes of unjust sectarian oppression of basic rights that could not be reasonably justified on the terms of public justification that were politically and constitutionally required. The abolitionist criticism of both slavery and racism rested on the remarkable moral and intellectual independence with which they made and pressed this argument.[61] Third, the forms of political and constitutional theory generated by the abolitionists critically tested conventionally popular moral and constitutional views against the most demanding standards of more abstract moral, political and constitutional argument. Consistent with the argument for toleration, they critically debunked what they found to be, on critical examination, polemical sectarian arguments for deprivation of human rights whose political force crucially depended on the viciously circular failure to allow any fair testing of the empirical and normative claims that allegedly justified the deprivation of basic rights, for example, slavery or racist subjugation. Finally, abolitionist argument, while often meeting and surpassing the highest intellectual and moral standards of the age, was not largely generated by mainstream politicians, judges or academics, but by remarkably courageous moral, political and constitutional activists whose concern was not with winning votes or securing judicial or academic tenure, but with confronting the American public mind and conscience with its failures of intellect, of morality and of civic republican fidelity to its revolutionary constitutionalism.[62] The abolitionists show us that the best theory and practice work in tandem stimulating one another to a more impartial realization of both the thought and practice of a political and constitutional community based on the normative demands of a principled commitment to basic human rights for all persons subject to its political power.

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60. *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 264-80 (Phillips Bradley ed., 1945) (1835).

61. For two notable examples of arguments along these lines, see William E. Channing, *Slavery, reprinted in* THE WORKS OF WILLIAM E. CHANNING 688-743 (Burt Franklin ed., 1970) (1839); CHILD, *supra* note 45, at 42.

62. For some important recent general studies, see MERTON L. DILLON, THE ABOLITIONISTS: THE GROWTH OF A DISSENTING MINORITY (1974); LOUIS FILLER, THE CRUSADE AGAINST SLAVERY (1960); JAMES B. STEWART, HOLY WARRIORS: THE ABOLITIONISTS AND AMERICAN SLAVERY (1976); RONALD G. WALTERS, THE ANTISLAVERY APPEAL: AMERICAN ABOLITIONISM AFTER 1830 (1978).

## V. CONCLUSION

The forms of interpretive argument, forged by the abolitionists, were precisely the same forms that have critically tested and transformed the interpretation of the Reconstruction Amendments often in service of the demands of activist civil rights advocates who in the twentieth century have played a role quite analogous to that of the abolitionists in the nineteenth century. The abolitionist argument of Frederick Douglass was very much, both in thought and practice, the tradition self-consciously carried forward by a civil rights advocate like Martin Luther King.[63] Our task surely is by our own lights to be intellectually and morally worthy of such a tradition or rather to embody in our thought and practice the standards of moral, political and constitutional independence and courage that will generate in our own terms and circumstances arguments of human rights adequate to identify and to challenge our corruptions, our decadent constitutionalism—whether the originalism of Bork or the majoritarianism of Ely. Abolitionist political and constitutional theory reminds us of how central to the American constitutional tradition that perennial challenge is, and also of our conservative responsibilities.

63. For the writings of Frederick Douglass, see 5 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS (Philip S. Foner ed., 1975); for commentary, see WILLIAM S. MCFEELY, FREDERICK DOUGLASS (1991); FREDERICK DOUGLASS: NEW LITERARY AND HISTORICAL ESSAYS (Eric J. Sundquist ed., 1990). For the writings of Martin Luther King, Jr., see A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. (James M. Washington ed., 1986); for commentary, see TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63 (1990).