THE ROLE OF COMPROMISE IN THE DEVELOPMENT OF AMERICAN RACE RELATIONS

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I. INTRODUCTION

From the earliest Colonial times to the present day the history of people of color in America can be found in the law. This is especially true for African Americans but it also can be demonstrated that Native Americans, Asians, Filipinos, and people of Hispanic backgrounds or origins have been subjected to different treatment by operation of the law.

Explanations are in order at this point. First, in this discussion I mean to define "law" in its most expansive context. My definition includes, of course, the formal actions of the legislative, judicial and executive branches of government at the local, state and federal levels. But more than that I also mean to encompass not only the formal or de jure nature of the law but the equally important informal or de facto aspects as well. This dual structure of the American legal system is often unrecognized but it has a deep, long-lasting and telling impact on racial relations in the country affecting every dimension of our national life, including education, labor, business and commerce, social standing and status, religion and the influence of the media.

Secondly, I intend to use the word "compromise" in both of its meanings: (1) settlement of a dispute in which the adversaries agree to accept less than they originally sought, and (2) exposure to danger or risk or to lessen the value of something.

The harsh truth is that the founders of the country and law-makers since then have consistently settled their arguments and disputes about the status of people of color by making "deals" or reaching compromises. In each instance of such meeting of the minds, the rights, privileges, immunities and societal status of the people of color were totally denied or substantially minimized in comparison to the white population. People of color were thereby exposed to danger and risk; their rights, value and worth diminished or destroyed.

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It is our national boast that we are a nation of laws not men, but that is fiction. In reality, the law is a true reflection of the ambiguity and ambivalence of all human experience. From servitude to slavery, from segregation and discrimination to citizenship and civil rights, the law tells the story of the people of color in the United States. It is imperative that one not merely read the law but one must understand it in human terms. By doing so one will come to see its inconsistencies and contradictions, its hypocracies and ironies; one will note its viciousness and benevolence and its tragic and comic face.

Justice Oliver Wendell Holmes, Jr. expressed the point best, perhaps, in his monumental work, The Common Law, first published in 1881:

> The life of law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

The point was made even more directly by Professor Derrick A. Bell:

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[T]he measure of relief (to be afforded Blacks in legislation, or as a result of litigation) is determined, less by the character of the harm suffered by blacks than by the degree of disadvantage the relief sought will impose on whites.³

The purpose of this presentation is to document the accuracy of the insights of Justice Holmes and Professor Bell. It is at once instructive and uncanny to see how the politicians of the nation's earliest days (who are proclaimed to be our "Founding Fathers") and their successors over the years were able consistently to cause laws to be written or interpreted so as to protect the interests and advantages of the holders of power and at the same time to disadvantage black people, despite the "transcendent values"⁴ of freedom and equality proclaimed in the Declaration of Independence and, to some extent, the Preamble to the Constitution.

Let us then, review some of the major compromises that have been made.

II. COMPROMISES IN THE WRITING AND ADOPTION OF THE DECLARATION OF INDEPENDENCE

On July 2, 1776, the Continental Congress appointed a committee to draft a Declaration of Independence from Great Britain. It was composed of the venerable Benjamin Franklin of Pennsylvania, Thomas Jefferson of Virginia, John Adams of Massachusetts, Roger Sherman of Connecticut and Robert Livingston of New York: two men from New England, two from the central colonies and one Southerner. The Committee quickly assigned to Jefferson the task of composing the first draft. Franklin, and, to a lesser extent, Adams made some changes to the draft, but the eventual product which was submitted to the Congress, was overwhelmingly Jefferson's work.

When Jefferson prepared the first draft of the document which was to become the Declaration, he included a vivid denunciation of both the enslavement of African men and women and the slave trade in the enumeration of wrongs that King George III had imposed on the English Colonies. His words were strong and forceful:


"He [the King] has waged cruel war against human nature itself; violating its most sacred rights of life and liberty, in the person of a distant people who never offended him; captivating and carrying them into slavery, in another hemisphere, or to incur miserable death in their transporting 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; he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce; and that this assemblage of horrors might want no fact of distinguished dye, he is now exciting these very people to rise in arms amongst us and to purchase that liberty of which he has deprived them, by murdering the people upon 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 another."\(^5\)

The full body of delegates to the Continental Congress were critical of many specific items in the draft as it was read and debated, paragraph by paragraph. Adams, who presented the draft, proved very skillful in moving the discussion forward with an appropriate word or two of encouragement, a sharp grimace, a twist of his mouth or an ironic smile.

Then they reached Jefferson's strongly worded charge against King George III. The delegates sat silent for a moment. But the stillness was shortlived. The majority of the delegates were in sympathy with the sentiments expressed by Jefferson. In fact, with the exception of two colonies, all were opposed to slavery, in principle. Pennsylvania, with Franklin at its helm, was among the foremost. Franklin had approved Jefferson's draft language. The dissent began slowly. Some of the delegates questioned the harshness of the language. "It is too strong for such a dignified document." Said one. "Is it proper to blame George III for the slave trade?" Questioned another. The delegates from South Carolina and Georgia were adamant in their opposition to language of any kind prohibiting slavery. "The wisdom of slavery," proclaimed Edward Rutledge of South Carolina, "should be determined by the states themselves!" A spokesman from Georgia appealed: "Let us not meddle with it. Slavery may be wrong, but to prohibit it right now would be extremely unfair to Georgia. In time, it will disappear of its own accord. Right now the cultivation of our main crops depends on slave labor; we cannot do without it."

The arguments went back and forth, growing more forceful and heated. John Adams rose with fire in his eyes. "The whole thing is inconsistent with our principles." He stated firmly. Young Rutledge immediately challenged him:

"Morality and wisdom have nothing to do with this!" He declared emphatically. "Interest and interest alone, is the governing principle of nations. To condemn the slave trade at this time would be fatal to the interests of South Carolina." Rutledge turned his body so that he faced the

delegates from the northern colonies and continued: "If the gentlemen from New England will consult their own interests they will not oppose the importation of slaves. It will increase a traffic in which New England will become the chief carrier."

There was quiet in the room. Everyone knew that Rutledge was accurate. Shipowners in New England had grown very wealthy in the so-called triangular trade, whereby sugar and molasses from the West Indies was turned into rum in New England to buy slaves in Africa to be transported in Yankee-built clipper ships and sold in the South.

"The whole passage will have to be cut. If it stays, South Carolina can never agree to the Declaration." The delegates from Georgia were of the same opinion.

Adams realized with alarm that the proposed paragraph threatened the fragile unity of the Continental Congress. Jefferson was torn; he did not want his language altered. But, apparently, he did not consider it proper to rise to defend his own words. He had, after all, submitted the Declaration to the judgment of his peers. He was as aware as Adams that unanimity was essential. He sat seemingly composed but he was in physical and emotional turmoil. Benjamin Franklin had listened carefully to all of the arguments. He had rarely engaged in debates; he thought for a moment about rising to urge a way to preserve the language and maintain the unity of the body. But he had no solution to offer. Compromise of the principle of liberty was odious to him, yet it seemed unavoidable. It was clear to the wise old man that this issue would remain a source of friction and dispute for a long time after the events of June and July 1776. He knew that it would be a long struggle. Now he accepted the bitter pill: in order to attain the larger goal, compromise of principle was required.  

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7 This portion describing the debate on the draft declaration is based on Cornel Lengyel, Four Days In July, (1958), 174-179, and Joseph J. Ellis, American Sphinx, supra.
The action of the delegates was to be the first of a series of events wherein the self-interests of a small but single-minded minority would prevail over the wishes and principles of an insecure and ambivalent majority. Thomas Jefferson was the paradigm. In his journal he deplored the removal of the clause condemning King George for supporting and enhancing slavery and the slave trade. Yet he said nothing and did nothing to fight to save the language. Jefferson could entertain two contradictory ideas in his head and, what is more, act on both. Charles Krauthammer, called him "The Sublime Oxymoron," and reflected on his "very American contradictions."  

Wise old Benjamin Franklin, at the end of the day when the vote to delete the passage was tallied, sadly reflected:

> When you assemble a number of men to have the advantage of their joint wisdom you inevitably assemble with those men all their prejudices, their passions, their errors of opinion, their local interests and their selfish views.  

Late in the evening of July 4, 1776, the delegates to the Continental Congress adopted the Declaration of Independence, proclaiming the equality of all men but preserving the right to enslave those of a different color. That action set a pattern of duplicity and compromise which persists to this day. For generations the words of the Declaration of Independence have evoked a profound passion in the hearts of people in every part of the globe. No other national creed has had such an effect on people or produced such universal attraction. And yet, the bitter irony and inescapable conclusion is that a significant majority of the men who debated and then voted for this living inspiration never intended it to apply to any person of color. When the founders approved the Declaration of Independence the seeds of race and color prejudice were planted in the fertile land of freedom. With the writing of the Constitution those seeds became the roots of racism and discrimination for many Americans.

**III. COMPROMISES IN THE WRITING OF THE CONSTITUTION**

During the period of the Confederation, 1781 to 1789, the new "nation" was in reality a loose collection of "commonwealths" and states. Each one guarding its independence jealously. The Articles of Confederation, which the Continental Congress enacted in 1781, set up a one-house congress with each state or commonwealth having one vote. The national government, such as it was, had little power. It could make war and peace, run a postal service, coin money, set standards of weights and measures and manage affairs with the Indians. Most of the power of governance was in the several states and commonwealths. This was certainly true with respect to slavery.

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9. *FOUR DAYS IN JULY, supra 247.*

10. Actually, the New York delegation did not vote until July 9 at its convention.
The American Revolution did not abolish slavery, although the obvious contradiction between the ideal of freedom for all men and the reality of perpetual servitude for Black people was apparent to all. The discrepancy was even more troubling because many people of color fought for their freedom either on the side of the British or with the American revolutionaries. Following the end of the War, a few states abolished slavery outright, other states declared that slavery was to be abolished "gradually," in others the institution of slavery was unchanged although some slaves who fought against the British were granted freedom by the legislatures.\footnote{1}

Slavery was the looming issue as the states and commonwealths of the Confederation moved inexorably toward the creation of "a more perfect union." This issue permeated every question the leaders grappled with during the period, whether it be the interests of the small states versus the large states, the size and power of the federal government, federal versus state jurisdiction, taxation or how the states and the people were to be represented in the legislative branch.

In the Northwest Ordinance, adopted July 13, 1787, the Second Continental Congress defined a method for admitting new states to the Union. Among the principles declared in the Ordinance was a prohibition of slavery. However, representatives of the southern states, in anticipation of things to come, made certain that there were provisions in the Ordinance which required the "return to service or labor" of anyone who escaped to the territory\footnote{12}. This was the precursor of so-called fugitive slave laws which are found in the Constitution and two enactments of Congress in 1793 and 1850.

\footnote{11}George W. Williams, History of the Negro Race in America, 1619-1880 (1883) Chaps. XXX and XXXI. See also, John Hope Franklin, from Slavery to Freedom (3rd ed 1967) 131-141.

\footnote{12}"Art. 6. There shall be neither slavery nor involuntary servitude in the said territory,... Provided, always, That any person escaping into the same from whom labor 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 labor or service as aforesaid."
In both the Articles of Confederation and the Northwest Ordinance the founders demonstrated that they could accommodate slavery with their ideas of creating a national government. Indeed, the motivating factor in that quest was to address and solve the fundamental inadequacies of the Confederation. When the delegates met to deliberate the making of a constitution\textsuperscript{13}, proslavery advocates took advantage of the opportunity to engrat the document every protection of slavery possible. Thus, the final document was pregnant with compromise, ambiguity, obfuscation and innuendo regarding the status of people of color and the institution of slavery\textsuperscript{14}. The men who favored slavery came to realize that they held a unassailable veto over their fellow delegates. They therefore were able to insinuate their views into the national policy because of the felt need and desire for a unanimous vote on the seminal document of governance of what would become the United States of America.

The language of the Constitution, while never explicit, fundamentally embedded slavery and racial discrimination in state and federal laws to such an extent that even today, more than two centuries later, the nation is still engaged in social, legal and philosophical battles over race and color discrimination.

It is instructive to analyze specific provisions of the original Constitution to identify the approach the founders used to accommodate the institution of slavery. There are many instances of implicit acceptance of slavery and denial of rights to people of color. But the founders never explicitly used the words "African", "slave", "Negro", "black" or any other specific indication of the actual targets of their intentions.

A. Article I §2, cl.3: "Representatives and direct Taxes shall be apportioned among the several States within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a term of years,\textsuperscript{15} and excluding Indians not taxed, three-fifths of all other Persons."

\textsuperscript{13} Some scholars have argued that the Constitutional Convention was extra-legal since the specific call was to revise the Articles of Confederation, not replace the document.


\textsuperscript{15} By the time of the writing of the Constitution, it was clearly established in the law that there were two kinds of servitude: people of color were servants for life and were called slaves; white indentured persons were servants for a specific time and were called indentured servants or servants bound for a term. See, Eric W. Springer, The Unconquerable Prejudice of Caste – Civil Rights in Early Pennsylvania, 5 DUQ. L. REV. 31, 36-41, (1966-1967).
This clause establishes the so-called "federal number" which was to be used to determine how many Representatives each state would have in the House of Representatives. Many of the delegates from Northern states considered slaves to be chattel property and therefore not qualified to be represented. They argued that slaves should not be counted at all. The Southerners – especially the Georgia and South Carolina delegations – argued forcefully that Negroes (it was, of course, assumed that all black people were slaves) should be counted equally with whites. Obviously, if that were to be the way the Representatives were to be calculated, the South would overwhelmingly dominate the House and possess a decided advantage in legislative matters. Gouverneur Morris of Pennsylvania adamantly proclaimed that the people of his Commonwealth would revolt on being placed on an equal plane with slaves. Rufus King of Massachusetts vehemently condemned any proposal that would acknowledge slavery in the Constitution. The so-called "three-fifths compromise" was the solution finally agreed upon by the delegates. Although, it is likely that neither Northerners nor Southerners were completely satisfied with the outcome.

It should be noted that the delegates, especially those from the slave-holding states, inserted the federal number in several strategic places in the Constitution to limit Congress from laying various taxes on slaves. The purpose was to prevent any use of the taxing power to make the ownership of slaves or participation in the slave trade so burdensome that the practice would be ended.

In the bargaining and haggling that went on during the Convention, the most determined contingent – the deep South states – were able to gain more for their positions than any other group because they were clear and definitive in their demands. Although a distinct minority, the Southerners knew exactly what they wanted. For the most part the majority of the other delegates were conflicted, ambivalent and unclear about how to handle slavery and the slave trade. So they temporized, avoided direct confrontation and deferred to the wishes of the Southern bloc.

The significance of the three-fifths compromise is profound. It established a constitutional verity that all people of color – especially those of African origin – were to have none of the rights, privileges and immunities of citizenship in the new nation that was being created. People of color, slave or free, were of no importance.

B. Article I §8, cl 15: "The Congress shall have the Power...To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections..."

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16 A form of personal property. BLACK'S LAW DICTIONARY 299 (4TH REV. ED. 1968)

17 John Hope Franklin, From Slavery To Freedom,42.

18 THE FEDERALIST NO. 54 (JAMES MADISON).

19 THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760 - 1848, Ch. 3 Slavery in the Making of the Constitution, supra.
This provision gave Congress the power to call up state militias to quell insurrections, including slave rebellions and uprisings. The delegates were extremely concerned about slave insurrections and other uprisings, such as Shay's Rebellion, which began in the winter of 1786 and ended in the summer of 1787, just as the delegates to the Constitutional Convention were starting the process of creating a central government which would "establish justice and insure domestic tranquility." All of the delegates were acutely aware of the many instances of slave revolts and uprisings during the Colonial Period.20

C. Article I §8, cl. 17: "The Congress shall have the Power...To exercise exclusive Legislation in all Cases whatsoever, over [the District of Columbia]..."

This provision was important when the District was established as the seat of the government of the United States. The Congress, which maintained exclusive legislative power over the District, took no steps to end either slavery or the slave trade in the District. In 1801, Congress disfranchised residents of the District. While slavery was abolished after the Civil War, racial discrimination and segregation were prevalent until legal action was taken in 1953.21

D. Article I §9 cl. 1: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."

20 The seminal work on slave revolts and insurrections is HERBERT APTEEKER, AMERICAN NEGRO SLAVE REVOLTS (1943).

21 Racial discrimination in the District was eliminated by a legal anomaly. In 1872, during a short period when the District had self-rule, a law prohibiting discrimination in restaurants and other places of public accommodation was enacted. The law was not printed in the 1901 statutory codification. In the 1950's, several influential African Americans, including Mary Church Terrell, prodded the D.C. authorities to enforce that law. Ultimately, the Supreme Court held that the law was still in effect although it had not been printed in the statute books. Discrimination in places of public accommodation quickly disappeared in the District when President Eisenhower urged that all such practices be ended. See, Thompson v. District of Columbia, 346 U.S. 100 (1953).
This was another key compromise. Some Northern states had prohibited slavery and others, like Pennsylvania, had called for its gradual abolition. But the Southern delegates were firmly opposed to a provision prohibiting the slave trade. When the issue came before the Convention an incendiary debate took place. It was clear that the South would not yield on this issue, although several delegates from the upper South recognized that the days of slavery might well be numbered. In the face of such adamancy and the fear of fatal disruption of the deliberations of the Convention, the delegates from the Northern states and the upper South compromised with the lower South and agreed to extend the slave trade for twenty years. There were, however, strong sentiments among the delegates of some Northern states to end the slave trade more quickly.\footnote{The Sources of Antislavery Constitutionalism in America, 1760 - 1848, Ch. 3, Slavery in the Making of the Constitution, supra, 76.}

Once again, the artful language of the provision in no way uses any words that would clearly identify the true intent of the delegates. It is also to be noted that a limited duty (tax) is permitted on the importation of such "Persons".

\textbf{E. Article I §9 cl. 2: }"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

This is another example of the delegates' concerns about slave rebellions. Denial of the habeas corpus during times of threats to public safety is a classic governmental strategy.

\textbf{F. Article I §9 cl. 4: }"No Capitation or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

\textbf{G. Article I §9 cl. 5: }"No Tax or Duty shall be laid on Articles exported from any State."

\textbf{H. Article I §10, cl. 2: }"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports orExports, except what may be absolutely necessary for executing its inspection Laws..."

The three provisions relate in one way or another to the concerns the Southern states felt about the ability of the Congress or the anti-slavery states to impose certain taxes on slaves or the slave trade.

\textbf{I. Article IV §2 cl. 3: }"No Person held to Service or Labour 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."
This is a pro-slavery provision in every respect. It constitutionally protects the right of a slave owner to go into another state to capture his human property. Interestingly, this provision is in conflict with the first section of Article IV which provides that "full faith and credit" must be given by one state to the public acts, records and judicial proceedings of every other state. This provides an exception, that is, a slave owner cannot be denied to right to enter another state to retrieve his slave even when the state he enters has a law prohibiting such act. In effect, no one is bound to respect the anti-slavery laws of any state. This provision was the constitutional basis for the enactment of the Fugitive Slave Laws of 1793 and 1850. It was also relied upon by the United States Supreme Court in a fugitive slave case involving Pennsylvania:

In 1837, Edward Prigg and others attempted to find and return a female slave of a Maryland owner. The woman had allegedly escaped to Pennsylvania in 1832. The slave catchers found the woman and removed her to Maryland with her children, one of whom had been born in Pennsylvania. Prigg and his party were indicted for kidnapping and found guilty in conformity with a Pennsylvania law which essentially prohibited slave catching. The defendants appealed. In 1842, the United States Supreme Court ruled that Prigg was not guilty because the Pennsylvania law upon which the indictment was based was unconstitutional and void in light of Article IV section 2, cl 3, quoted above.\(^{23}\)

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\text{J. Article IV §3 cl. 1 and cl. 2: " New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.}
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"The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."
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These two provisions give power to the Congress and the states to control how new states may be permitted to join the Union and the conditions under which that may occur. This proved important during the westward expansion in the early years of the nation. It permitted the slave-holding states to urge compromises and bargains relating to the admission of slave and free states.

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\text{K. Article IV §4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."}
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\(^{23}\) Prigg v. Pennsylvania, 16 Pet. 536 (1842)
The domestic violence referred to is yet another indication of the fear of violence and insurrection by slaves.

I. Article V: "The Congress, whenever two thirds of both Houses deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two thirds of the Several States, shall call a Convention for proposing Amendments, ...Provided that no Amendment which may be made prior to [1808] shall in any Manner affect [Article I, §9 clauses 1 and 4]...."

The primary purpose of this Article was to describe how the Constitution could be amended. The slave-holding states successfully lobbied for a specific provision, as an additional safeguard, barring any attempt to prohibit the slave trade before the year 1808 as stated in Article I, §9, clause 1 which was discussed above.

The original United States Constitution is truly a work of art. The framers at one and the same time created a document which could be accepted by strong-willed men who held sharply differing opinions on most of the issues that were before them at the time, including the issue of how to handle slavery, the slave trade and their consequences. They contrived, somehow to produce a document full of ambiguity and indefiniteness in order to achieve a dubious consensus. But the founders also left for succeeding generations an on-going debate about their true intentions and what was to be the status and fate of people of color. That debate continues to this day; the pattern of compromise to the detriment of people of color has been and remains standard practice.

IV. COMPROMISING THE STATUS OF PEOPLE OF COLOR

The delegates left Philadelphia with a sense of accomplishment. They had somehow managed to create a new nation, first, out of the fire, destruction, death and confusion of violent revolution, and second, through the contentious, deliberative process of disagreement, debate compromise and consensus. Issues which could not be resolved were finally left for another day. The delegates, now turned founders – all men of position and almost all men of property – had in their minds done very well, indeed.

As they unanimously approved the federal Constitution they also assumed full responsibility for the new country and its people. They established a system which retained power and control in the hands of a small group of elite white men, continued the mistreatment of Native Americans, disfranchised women, and maintained the enslavement of people from Africa. At the birth of the United States, full freedom and equality belonged to very few. Professor John Hope Franklin noted the state of affairs: "Ironically enough, America's freedom was the means of giving slavery itself a
longer life than it was to have in the British empire." As we shall see, all people of color, slave or free, were subject to an "an unconquerable prejudice of caste", as one Pennsylvania jurist put it.

The founders had actually joined in an unwritten covenant to create a society in which people of color were to occupy an inferior status. Their initial legislative actions would be to enact laws which ensured that compromises in the Constitution would be reinforced by specific acts of the new Congress.

A. ACTS OF CONGRESS

1. The Naturalization Act of 1790.

The pertinent language of this legislation is simple, direct and clear:

Any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for a term of two years, may be admitted to become a citizen thereof." (Emphasis added.)

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24 FROM SLAVERY TO FREEDOM A HISTORY OF NEGRO AMERICANS, supra, 144.
25 NATURALIZATION ACT OF 1790 (MARCH 26, 1790, CH. 3, 1 STAT. 103.)
The Congress expressed no concerns about the exclusion of people of color. Their debates focused on whether persons of the Jewish or Catholic faiths, or "monarchists", former "nobles" or criminals should be included.26

2. The Militia Act of 179227

In this legislation the Congress organized the militia and restricted enrollment to "each and every free, able-bodied white male citizen." (Emphasis added.)

3. The Fugitive Slave Act of 179328

As I have mentioned in the discussion of the making of the Constitution, the question of how to deal with escaping slaves was an ever-present issue. It became even more pressing when Black people from the Caribbean began to escape into the land areas of the continental U.S. The revolt of slaves in a northern province of Haiti in 1791, caused fear among the whites and inspired slaves in this country to follow suit. Anti-slavery organizations, like the Pennsylvania Abolition Society and the Yearly Meeting of Friends in New York, presented memorials to the Congress requesting the immediate cessation of the slave trade.

Even more pressing was the issue of fugitive slaves. The frequency of escaping men and women was alarming, not only to slave holders, but to average citizens as well. There was wide-spread fear that the slaves in this country would emulate the Haitians and attempt to overthrow the institution of slavery. The Constitution gave no practical remedy. Something had to be done.

Thus, in 1793, Congress enacted a fugitive slave law. It empowered an owner of a slave who crossed state lines to seize him wherever he was found, carry him before any state or federal magistrate in the vicinity, and obtain a certificate authorizing his removal to the state from which he escaped. The law did not require trial by jury and permitted conviction on the oral testimony of the owner or on the sworn statement of a magistrate of the state from which the slave was alleged to have fled.

B. THE MISSOURI COMPROMISE 1820

The issue of slavery once again ignited a bitter debate in Congress, when the Territory of Missouri – part of the vast land mass acquired in the Louisiana Purchase of 1803 – applied for statehood in 1819. Northern congressmen were once more concerned that the South would have an


28 FUGITIVE SLAVE ACT OF 1793 (FEB. 12, 1793) CH.7, 1 STAT. 305 [Repealed June 28,1864, 13 Stat. 200].
advantage in the House of Representatives because Missouri would become a slave state. The issue was once again resolved by means of a compromise as a result of which the northern part of Massachusetts became the State of Maine and was admitted to the Union as a free state. At the same time Missouri was admitted as a slave state, thus maintaining a balance of 12 free and 12 slave states.

The compromise also provided that an imaginary line would be drawn at 35 degrees 30 minutes north latitude, and any portions of the Louisiana Territory lying north of the compromise line would be free territory. Nonetheless, in deference to the property rights of slave holders, the compromise contained a fugitive slave clause.

Representative Henry Clay played a major role in the making of this compromise. A moderate man, he tried to calm the smoldering bitterness about the slavery question by maintaining an equal balance between free and slave states. But each of these compromises were attempts to postpone the inevitable clash that was bound to come because of living contradiction built into our national values.

C. **HOBBS v. FOGG 1837**

In this period free black people lived a precarious existence which was often more dangerous than that of the slave. Slave catchers viewed any person of color as an escaped slave; often black men and women were kidnapped and shipped to the deep South, sometimes never to be heard from again. A few were able to regain their freedom and inform the world. Another continuing problem for free black people and former slaves was the threat they faced from attacks from angry white mobs who sacked and burned homes and businesses in the black sections of cities and towns. Urban riots erupted in New York City, Philadelphia, Detroit, Washington, DC, and Cincinnati where black people and their property were subjected to white mob violence. Such an event occurred in the Borough of Columbia, Lancaster County, Pennsylvania in 1834 and 1835.

Perhaps, most egregious was the way legislators and judges manipulated the law to the disadvantage of Negroes. The Pennsylvania case of *Hobbes v. Fogg* is an example. The Pennsylvania constitution at the time granted the right to vote to every freeman, twenty-one years of age, who lived in the Commonwealth and paid his taxes. William Fogg, a Negro, was denied the

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29 See, for example, **SOLOMON NORTHUP**, TWELVE YEARS A SLAVE: NARRATIVE OF SOLOMON NORTHUP, A CITIZEN OF NEW YORK, KIDNAPPED IN WASHINGTON CITY IN 1841, AND RESCUED IN 1853. (Auburn, N.Y.; Derby and Miller 1853).


31 6 Watts (Pa.) 553 (1837).
right to register to vote although he met all of the requirements. He sued the Registrars of Elections and prevailed in the lower court. The Pennsylvania supreme court overturned the lower court ruling. It held essentially, that, even though Fogg appeared to have met the criteria, it was not conceivable that the "colored race" was meant to be included. The court opined that people of color took no part in the "social compact" which was entered into by the founders of the commonwealth and the nation. Then the court pronounced the following:

[O]ur ancestors settled the province as a community of white men, and the blacks were introduced into it as a race of slaves; whence an unconquerable prejudice of caste, which has come down to our day, insomuch that a suspicion of taint still has the unjust effect of sinking the subject of it below the common level.32 (Emphasis added.)

The ruling in this case is a dramatic example of the accuracy of the observations of Justice O. W. Holmes, Jr. and Professor Bell quoted earlier. Not only did the Pennsylvania supreme court justices allow their prejudices to lead them to an erroneous interpretation of the plain language of the law, but their action had a direct adverse effect on the status of free Negroes throughout the Commonwealth.

32 Id. at 558.
To ensure that further consideration of the question of the right of Negroes to vote would not be raised again, the constitution was amended in the year following the decision; the pertinent language was revised to read: "In elections by the citizens, every white freeman of the age of twenty-one..." (Emphasis added.) People of color vigorously protested the ruling in Pittsburgh and Philadelphia, to no avail.

The Hobbes decision and the subsequent amendment sentenced free Negroes in Pennsylvania to a social and political purgatory. Twenty years later, the United States Supreme Court, in the Dred Scott case, would apply a similar ruling to every person in the country who was of African origin.

D. THE COMPROMISE OF 1850

By the 1840's, American leaders and politicians had fully committed themselves and the country to the concept of Manifest Destiny. It became the "mission" of the United States to extend the frontiers of freedom to others by sharing the optimism, idealism and reliance upon democratic institutions. However, that optimism and idealism and those institutions were not available to Native Americans, Africans and other non-Europeans.

The discovery of gold in California precipitated a mass stampede to all parts of the West. As territories applied for admission to the Union, the balance between slave states and free states once more became a contentious issue. Again, the need for a compromise arose and once more Henry Clay played a major role in bringing about a three-part resolution in order to avoid war.

1. ADMISSION OF NEW WESTERN STATES

The Compromise of 1850, which Congress adopted, again attempted to balance the competing interests. It provided that California would be admitted as a free-soil (non-slave) state; that the rest of the new annexation would be divided into two territories of New Mexico and Utah and would be organized without mention of slavery. Once again, new techniques for the return of fugitive slaves were to be developed. Included among the concessions: the slave trade – but not slavery – was to be abolished in the District of Columbia.

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2. FUGITIVE SLAVE ACT OF 1850

The second part of the Compromise of 1850 was the enactment of another, more stringent fugitive slave law. This legislation was an expansion and attempted tightening of the 1793 act discussed earlier. Among other things, the revisions allowed any claimants of a runaway slave to pursue and recapture the runaway once ownership was "proved" before a federal commissioner. No judicial safeguards, such as a hearing on the issue was provided. The act provided for fines of up to $1,000 and imprisonment for up to six months for any citizen or official who failed to aid in the capture of a fugitive. Interestingly, the law also provided the fee for a commissioner would be $10 where he ruled in favor of the slave catcher, but only $5 if the commissioner ruled that the proof of ownership was not sufficient.

Anti-slavery advocates were very upset by the enactment of the Fugitive Slave Law. Free Negroes in many cities in the North picked up stakes and moved to Canada, frightened by increased risks. Traffic on the Underground Railroad increased dramatically. The first recorded incident of violent, open defiance of the law occurred in the town of Christiana, Pennsylvania, and ended in the killing of a slave owner and the wounding of several men who accompanied him to recapture two of four runaway slaves who had absconded two years previously from Maryland. William Parker, a former fugitive slave, whose home was the refuge for the escaped slaves, was deeply involved in the resistance. Parker and the slaves escaped to Ontario, Canada. Several defendants were incarcerated but ultimately all of them, including a white neighbor who had tried to halt the bloodshed, were exonerated.

Southerners were infuriated with the verdict while anti-slavery advocates were encouraged to resist the act. This event was one of a series which added to the growing tension between North and South which led to the Civil War.


3. **KANSAS-NEBRASKA ACT 1854**\(^{37}\)

America's westward expansion continued apace and the organization of the vast regions of the Kansas and Platte rivers became imperative. Such planning called into play the on-going intersectional conflict over the extension of slavery into the territories and furthermore involved the location of the transcontinental railroad. The proslavery Congressmen were firmly opposed to free territory west of Missouri. Several attempts at organization of this area had met with defeat because of the Southern intransigence and opposition to the Missouri Compromise.

Senator Stephen A. Douglass, who chaired the Senate Committee on Territories, introduced legislation aimed at placating the South. Historians still debate Stephens' motives; but whatever the motivation, the bill he presented proposed that the question of slavery should be decided by the settlers in the territory. This was called "popular sovereignty". As finally enacted the legislation called for the creation of two new territories – Kansas and Nebraska – instead of one. It was obvious that the first would be a slave state and the second a free state. It was also clear that this compromise was direct contradiction of the Missouri Compromise, under which slavery was to be barred from the entire territory. The legislation also specifically repealed the earlier compromise.

The result was anything but a peaceful resolution of a conflict. Pro- and anti-slavery forces descended upon Kansas in order to pressure the "popular" decision. There was violence on such a great scale that the phrase "bleeding Kansas" was often used to refer to the catastrophe. Southern and Northern supporters were driven to fury and the angry passions that were aroused precluded any calm settlement. Out of this conflict the Republican party was founded by those who opposed the law. Pro-slavery adherents argued for further extension of slavery and the re-opening of the slave trade. The country took one more step towards Civil War. But still the nation's leaders continued to try to placate pro-slavery's adherents.

**E. ** **DRED SCOTT v. SANDFORD 1857**\(^{38}\)

This is one of the most important decisions ever rendered by the United States Supreme Court. It marks the high point for those who believe that a Negro – not merely a slave – had no standing in the United States. The ruling was a total victory for the Southern point of view.

Dred Scott was born a slave in Virginia. He went with his owners to St. Louis, Missouri in 1830 and was sold to an army doctor a few years later. Between that time and the doctor's death in 1843, Scott lived for extended periods of time in Illinois, the Wisconsin Territory, Louisiana and Missouri.

Those travels took him to free territory and to slave territory. In 1846, with the help of anti-slavery attorneys, Scott sued in the Missouri courts for his freedom on the grounds that his having lived in a free state (Illinois) and free territory (Wisconsin) made him a free man.

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\(^{37}\) Kansas-Nebraska Act, May 30, 1854, Ch. 59, 10 Stat. 277.

\(^{38}\) 60 U.S. (19 How.) 393 (1857)
The Missouri Supreme Court overturned a lower court ruling in Scott's favor. Then began a long and excruciating journey into the morass of the American justice system. The Supreme Court first heard arguments in the case of Scott v. Sandford in early 1856, but ordered that it be reargued in the next term. Perhaps this was done because a decision based on the first original argument would likely have been rendered on the eve of the 1856 presidential election. Candidates would have been forced to take a position, one way or the other on any such decision.

The case, however, was beginning to attract public attention by the time the Court had heard the first arguments. In Congress, debates resurfaced over the issue of congressional power to regulate slavery in light of the violent and bloody conflicts in Kansas. Adherents on both sides were grudgingly moving toward agreement that the issue was one for the Supreme Court, not the Congress.

Meanwhile, President-elect James Buchanan contacted friendly Justices about the position the Court would take on the case. He felt that he needed to have that information in order to take a position on the issue of slavery in the territories in his inaugural address, scheduled for March 4, 1857. Buchanan learned what the decision was going to be before Inauguration Day. In his address he threw his full support to the Court's decision, saying, essentially that there was no longer any need to be concerned about the question of slavery in the territories because the Supreme Court was going to settle it with dispatch.

Chief Justice Roger B. Taney delivered the opinion of the Court on March 6, 1857, just two days after Buchanan's inauguration. The decision dismissed Scott's appeal. Two Justices dissented. Not only did the majority declare that the Missouri Compromise of 1820 was unconstitutional but Justice Taney, with concurrence of the majority, ruled that a Negro was not entitled to rights as a U.S. citizen and that the individual states had the authority to determine whether or not a black could be a citizen of their state. This meant that people of color, slave or free, were constitutionally in limbo. Justice Taney went on to make the point crystal clear by stating:

The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people and a constituent member of this sovereignty. The question before us is, whether [Negroes] compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they
were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and Government might choose to grant them.\textsuperscript{39}

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In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of people who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

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"They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.\textsuperscript{40} (Emphasis added.)

\textsuperscript{39} Ibid. at 404, 405.

\textsuperscript{40} Ibid. at 407. See also, Don Feherenbacher. The Dred Scott Case: Its Significance in American Law and Politics (1978).
The Dred Scott ruling was an egregious blow to the anti-slavery forces who were dead set against the extension of slavery into the vast western territories. President Buchanan, the Southern supporters of slavery and the Supreme Court may have hoped the decision would end the controversy. Instead, the decision increased agitation in the North, led to John Brown's seizure of the federal arsenal in Harper's Ferry, and was the cause of the election of Abraham Lincoln. In fact each of the 10 years preceding the Civil War were tension-filled and dangerous. The compromises and evasions discussed above served only to put off the inevitable bloody confrontation.  

The Civil War itself raised ambiguous and ambivalent issues as to why it was being fought. For one example, there was lack of clarity about the actual meaning and impact of President Lincoln's "Emancipation Proclamation." The Reconstruction Period, too, witnessed conflicting policies of the Executive and Legislative branches which led to confusion, bitterness, revenge, promise and disappointment. This is a most important area, but from the specific perspective of my discussion it is appropriate now to move to the compromises in the Post-Reconstruction Period which demolished the gains made following the Civil War.

V. COMPROMISING THE CIVIL WAR GAINS

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41 FROM SLAVERY TO FREEDOM, supra, .265-270.

42 Ibid, Chap. XVI.


44 JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR (1961); FROM SLAVERY TO FREEDOM, supra, Ch. XVII.
The Reconstruction Period lasted from 1865 to 1877. During that time the Congress made serious attempts to mount a legal and administrative program to destroy slavery and racial discrimination which were essential elements of the Southern – but also the national – "way of life." The three Civil War Amendments to the Constitution and federal civil rights legislation from the 1860's through the 1870's were designed not only to protect the newly-freed slaves and all people of color from servitude and discrimination, but also to enable them fully to participate in public affairs on an equal basis with white persons. But Reconstruction proved to be too fleeting to make significant inroads into the patterns and practices of such long-standing that they had become part of the warp and woof of American law and culture. Before long, the laudatory aims were bargained away and once again the high hopes that victory in war produced were dashed with a cruel, callous vengeance.

**A. HAYES-TILDEN COMPROMISE 1877**

The Reconstruction was steadily contested. The federal government was unable to curb the terrorism and violence which the Southerners used to achieve political and social control. The two major presidential candidates were Rutherford B. Hayes, a Republican and Samuel J. Tilden, a Democrat. The election resulted in Tilden being one electoral vote short of the majority. Hayes was twenty electoral votes short. However, the election returns from Florida, Louisiana and South Carolina were challenged. The resulting recount was inconclusive; the matter was therefore, submitted to a special electoral commission consisting of five members from the Supreme Court, five from the Senate and five from the House. Of the fifteen Commission members eight were Republicans and each of the disputed issues was resolved in favor of the Republicans by party vote. Although the Democrats from the challenging states could have disputed this resolution, they did not because they had reached an "understanding" that if Hayes were to be called the winner of the election, his administration would (1) withdraw the remaining federal troops from the South, (2) not interfere with the election of Democratic governors in Florida, Louisiana and South Carolina, (3) include at least one Southern Democrat in his cabinet, and (4) support Southern businessmen in their efforts to obtain subsidies for railroad construction. President Hayes was true to his word.

The withdrawal of federal troops from the South would bring about the loss of Republican political power and provide ample opportunities for the South to return to a legally enforced system of white supremacy and Negro suppression. People of color would lose economic power and social status as well. Every advance Negroes had achieved would be forfeited: Negroes lost their farms and businesses, they no longer had access to public education or the courts and there were no easy opportunities for peer relationships between white and Negro. Northern whites actively or quietly

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45 It will be remembered that people of color suffered mistreatment and discrimination in the North and West as well as the South.

46 FROM SLAVERY TO FREEDOM, supra, Ch. XVII.
acquiesced in the acceptance of the Southern view of how blacks should be treated. Jim Crow became the law of the land.\textsuperscript{47} 

These losses, as in the past, began with a compromise.

\textbf{B. EMASCULATION OF THE WAR AMENDMENTS}

Following the Civil War, Congress enacted a series of constitutional amendments and civil rights statutes which aimed to bring full citizenship status to the Negro. These efforts failed because few realized how deep were the roots of racism in America. It was thought, perhaps sincerely, that legal pronouncements would eliminate race hatred and color prejudice. Congress, in workman-like fashion, therefore enacted the Thirteenth Amendment which aimed to end the Constitutional acceptance and protection of slavery. It provided, in pertinent part:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.\textsuperscript{48}

But that language did not resolve, or in any manner address the issue of the political status of former slaves – or of free Negroes, for that matter. There was deep opposition to black suffrage and to any civil rights for Negroes. Congress therefore enacted the Civil Rights Act of 1866\textsuperscript{49} to provide full protection of the civil and political rights of Negroes. It provided:

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

This, too, provided no protection from race riots, terror and intimidation by whites acting on their own or as governmental officials. All of the rights which were specifically described in the act as belonging to people of color, were of little practical value in the real world of the Black Codes which were rapidly enacted by white legislatures.

\textsuperscript{48} Ratified December 6, 1865.

\textsuperscript{49} Civil Rights Act 1866, April 9, 1866, 14 Stat. 27
The same thing can be said for the Fourteenth Amendment\(^{50}\) and the Fifteenth Amendment\(^{51}\). Although these Amendments and the Civil Rights Acts of 1870 through 1875,\(^{52}\) which the so-called Radical Republicans passed, are considered very important and meaningful today, they were little regarded at the time. As Professor Bell observes:

Within a decade it became apparent that the Thirteenth Amendment abolishing slavery was obsolete. Southern planters could achieve the same benefits with less burden through the sharecropping system and stark violence. The Fifteenth Amendment, politically obsolete at its birth, was not effectively enforced for almost a century. The Fourteenth Amendment, unpassable as a specific protection for black rights, was enacted finally as a general guarantee of life, liberty, and property of all 'persons.' Corporations, following a period of ambivalence, [footnote omitted] were deemed persons under the Fourteenth Amendment, [footnote omitted] and for several generations received far more protection from the courts [footnote omitted] than did blacks. Indeed, blacks became victims of judicial interpretations of the Fourteenth Amendment and the legislation based on it so narrow as to render the promised protection meaningless in virtually all situations, [footnote omitted.]

The Supreme Court chambers served as the surgical suite for the almost complete emasculation of the Civil War Amendments. A quick review of four decisions will demonstrate how the Justices relied on "...the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men..."\(^{54}\) and not the clear language of the law, to render their judgments.

\(^{50}\) Ratified July 9, 1868.

\(^{51}\) Ratified February 3, 1870.

\(^{52}\) Civil Rights Act of 1870 ("The Enforcement Act") May 31, 1870, Ch. 114, l6 Stat. 140; Civil Rights Act of 1871, Ku Klux Klan Act, April 20, 1871, Ch. 22, 17 Stat. 13; Civil Rights Act of 1875, Mar. 1, 1875, Ch. 114, 18 Stat. 335.

\(^{53}\) RACE, RACISM AND AMERICAN LAW, supra, 57-58.

\(^{54}\) THE COMMON LAW, supra.
1. **SLAUGHTER HOUSE CASES, 1873**

This case involved the rights of white butchers to do business in a New Orleans slaughter house, not the citizenship rights of Negroes. An 1869 Louisiana statute gave one named corporation a monopoly for slaughtering in three parishes. The law was opposed by those in the business who were not so favored by the legislation. The matter came before the Supreme Court because of a claim by the opponents that the law violated certain rights guaranteed by the Fourteenth Amendment in the following provision:

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

A sharply divided Court, decided that there were still two types of citizenship – national and state – and that the protection of the privileges and immunities of citizens appearing in the second sentence did not protect rights which may be considered to flow from state citizenship, but only those attributed to national citizenship. The majority opinion, written by Justice Samuel Miller, stated essentially that national citizenship rights were limited, but state citizenship rights were broadly defined to cover all civil rights and that it was not the purpose of the Fourteenth Amendment to transfer the security and protection of civil rights from the states to the federal government. It is at once apparent that this constricted reading of the language of the Amendment was directly contrary to the intent of Congress.

Twentieth (and twenty-first) century advocates of fairness and equality may find this kind of judicial behavior troubling. But it is consistent with the way that lawmakers thought and acted at the time.

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55 83 U.S., (16 Wall.) 36 (1873)

56 U.S. CONST, amend. XIV, § 1.

57 83 U.S. (16 Wall.) 36, 37.

58 Carter G. Woodson, "Fifty Years of Negro Citizenship as Qualified by the United States Supreme Court," *Journal of Negro History*, VI, No. 1 (Jan. 1921) 1-53.

2.  **UNITED STATES v. CRUIKSHANK 1875**

This case arose under the Civil Rights Act of 1870, known as "The Enforcement Act." The facts reveal that a violent group of one hundred or more white people broke up a political meeting of Negroes in Colfax, Louisiana. The building in which the black men were meeting was burned down and the Negroes were shot as they ran from the building. Several of the white men were convicted of violating the provision of the act which prohibited conspiracy "...to threaten, oppress or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution of the United States..." The Supreme Court overturned the convictions saying that the provisions of the Act did not apply to actions of private individuals, but only to acts of the state or persons acting under color of state law.

Essentially, the Court limited the broad protections of the act by requiring state action which was further narrowly defined. The net effect was to make it extremely difficult to prosecute infractions of a law that was enacted to enforce the civil and political rights of Negroes.

3.  **CIVIL RIGHTS CASES 1883**

This Supreme Court decision involved several cases which arose under the provisions of the Civil Rights Act of 1875, which contained a provision prohibiting discrimination on the basis of race and color in places of public conveyance, resort, amusement, and accommodation.

Justice Bradley wrote for the majority of the Court that Congress had no power or authority under the Fourteenth Amendment to enact such a law because the amendment covered state action of a particular type, not private action. The Justice opined that the amendment does not guard against private wrongs, the redress for which must be found in state laws. The Court went on to say, as well, that the Thirteenth Amendment did not grant Congress the authority to enact such legislation. In a masterful display of legal legerdemain, the Justice conceded that the amendment grants Congress the power to enact all laws necessary to obliterate slavery with all of its "badges and incidents," but, nevertheless concluded that full and equal access to places of public accommodations was not implied by the elimination of badges of servitude.

In language reminiscent of Justice Gibson of Pennsylvania in *Hobbes v. Fogg* and Justice Taney in *Dred Scott v. Sandford*, Justice Bradley wrote of the recently freed slaves:

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60  92 U.S. 92 (2 Otto) 542, 1876.
61  *Supra*, note 52.
63  109 U.S. 3 (1883).
64  *Supra*, note 52.
When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the process of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regard as badges of slavery.  

Justice John Marshall Harlan strongly dissented and pointed out the fallacies in the majority opinion, but to no avail.

4. **PLESSY v. FERGUSON 1896**

The factual background in this case is well-known: a man of mixed racial background sought to prevent a local judge from trying him for violating a Louisiana statute which provided for separate accommodations for white and colored passengers on trains. The state court denied his petition and the matter eventually came to the Supreme Court for final determination. The Court upheld the state court's ruling that Plessy's claim was without merit.

In doing so the Supreme Court took the next, and final step in the emasculation of the Civil War Amendments. In this case the Court enunciated the "separate but equal" doctrine which essentially permitted a state to discriminate on the basis of race despite the Fourteenth Amendment requirement that no state could deny to any person within its jurisdiction the equal protection of the laws. Thus, according to the Court, while Congress had no authority to enforce legislation aimed at increasing the rights of people of color, the states had unfettered power to deny equal protection of the laws to people of color.

The highest court in the land had ruled that even under a Constitution amended three times specifically to address: (1) slavery, (2) citizenship, privileges and immunities, due process and the equal protection of the laws, and (3) the right to vote, a person of color still had no rights which a white man was required to respect.

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66 163 U.S. 537 (1896).
Again, Justice John Marshall Harlan wrote a strong dissent. But his words of protest and prophesy fell, unheeded and unnoticed, like snow upon the desert's cruel and dusty face:

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case,... .The present decision ...will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but it will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution.... The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. ...The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. ...67

The ruling by the majority in this case signaled a complete victory for the cause of white supremacy in the United States. Conversely, it was the lowest point —the nadir— for the hopes, aspirations and dreams of people of color and their allies. There soon followed racial violence on an unprecedented scale. As professor Franklin observed:

67 163 U.S. 537, 562-563
The new century opened tragically with 214 lynchings in the first two years. Clashes between the races occurred almost daily, and the atmosphere of tension in which people of both races lived was conducive to little more than a struggle for mere survival, with a feeble groping in the direction of progress. The law, the courts, the schools, and almost every institution in the South favored the white man. This was White Supremacy.  

Race discrimination, *de jure* or *de facto*, became the law of the land – not just the South. It existed, in one form or another, in all parts of the country. After this decision and well into the 1930's, the policy of the national government was indifference to the Negroes' situation or active protective of the *status quo*.  

The long and tortuous road back from that terrible time led always to the Supreme Court which had assumed responsibility for overseeing and defining the status of the Negro. The Court, for almost fifty years rejected the claim of Negroes that the Constitution should be color blind. In case after case that body was coldly indifferent to the many petitions for fair and equal treatment under the law. Finally, in the middle 1930's, the Court began to reevaluate its earlier precedents and to interpret them somewhat more favorably to the interests of individuals, including people of color, instead of the interests of the state.  

This metamorphosis was caused by the hard work of an exceptional consortium of African American lawyers and their white allies who brought carefully planned suits on behalf of brave black citizens. Slowly, case by case, the stifling precedents of the past were overturned. *Brown v. Board of Education of Topeka, Kansas* was the apparent culmination of this legal effort. The Court declared in unequivocal language that the doctrine of "separate but equal" as it had been applied to the public schools violated the "equal protection clause" of the Fourteenth amendment.

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68 FROM SLAVERY TO FREEDOM 342, 343.

69 PAULI MURRAY, ED., STATES' LAWS ON RACE AND COLOR, (1951). As a college student, the author was fortunate, indeed, to have served as a research assistant on this project.


71 This part of American legal history is well documented in THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO, supra.

72 347 U.S. 483 (1954)
But that important, clearly articulated precedent turned out to contain troubling conditions. Once more a compromise in favor of white interests would adversely affect what had been considered a major victory over race discrimination.

VI. THE BROWN CASE COMPROMISE 1955

A. THE "ALL DELIBERATE SPEED" MESSAGE

In Brown I the Court expressed its concern about the difficulty of formulating proper remedies in the several specific cases which had been consolidated for the purpose of the litigation:

"Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity."73

In the next year the Court considered the briefs and arguments of all of the parties, as well as the Attorney General of the United States and the Attorneys General of states which required or permitted segregation in public education who were invited to appear as amici curiae. They were requested to respond to a set of specific questions propounded by the Court.74

On May 31, 1955 – one year and two weeks after its initial decision – the Court announced its opinion and judgment in Brown II75. Here the problematic "all deliberate speed" formula was articulated. This is what the Court said, specifically:

...[T]he courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17,1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest possible date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the

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73 347 U.S. 483, 495.
74 The questions can be found in RACE, RACISM AND AMERICAN LAW, 869, n. 13.
75 Brown v. Board of Education of Topeka, Kansas, 349 U.S. 294 (1955)
defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

The judgments below...are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed parties to these cases. [Emphasis added.]

There is little question that the addition of "with all deliberate speed" was unnecessary and unwarranted. It added nothing of value to the message the Court was sending, which was that it desired to have the defendants comply as rapidly as possible. (As I have highlighted in the quotation above.) The language was a completely gratuitous insertion of a confusing phrase which had an uncertain legal meaning. Whether or not the Court intended to do so, that phrase and the Court's delineation of the many problems that might arise, invited those who opposed the ruling to use every conceivable strategy and tactic to delay the operation of public schools on a nondiscriminatory bases.

In the years that immediately followed the decisions a strategy of massive resistance was mounted. The congressional delegations from most of the Southern states pledged themselves to "...use all lawful means to bring about a reversal of a decision which is contrary to the Constitution and to prevent the use of force in its implementation."77

B. FIFTY YEARS POST-BROWN

In 2004 there were celebrations throughout the country commemorating the fiftieth anniversary of the Brown decisions. Those triumphant convocations were well-deserved. The importance of the case in American jurisprudence is undenied. Race relations today are very different from the way things were fifty or sixty years ago. Brown I was an important impetus for the civil rights revolution of the 1960's. Racial barriers have fallen and racial attitudes have changed. There is more diversity and openness in almost all fields of endeavor and in the way people interact. And yet in many ways, as the French expression goes: "The more things change, the more they remain the same."

76 349 U.S. 299.

77 Text of 96 Congressmen's Declaration on Integration, N.Y. TIMES, Mar. 12, 1956, at 19.
Racism exists, segregation persists and prejudice can be found everywhere. The public school system is more segregated now than before. More importantly and ominously, a new conservatism is on the rise and federalism is once more in vogue. The current Supreme Court has moved significantly toward the nineteenth century view of the scope of Congress' power pursuant to the Commerce Clause and section 5 of the Fourteenth Amendment. The current Court has also given expanded authority to the states under the separation of powers concept.

VII. CONCLUSION

Professor Bell's insight is still accurate and pertinent. The consistent pattern of deference to white interests over the interests of people of color was evident at the birth of the nation and continues to this day. Professor Bell has recently written *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform*. In that book he suggests that there are racial issues which still remain to be resolved because the compromises of yesterday, have become the silent covenants of today.

As we consider the more than two hundred years of our nationhood and as we anticipate the future, there are serious questions to be faced about whether it is possible to continue to accept the compromises and covenants this paper discussed. The fundamental issue, it seems to me, is our general acceptance of the concept of white superiority. And the basic question, simply put, is whether it is possible to relate to one another as individuals, to govern our own nation, or to interact with other nations in this increasingly complex world by relying on white superiority (and all of its ramifications) as the guiding principle of American morality and statecraft.

The people of the United States and, indeed, the people of the world await the resolution of this issue.

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79 These issues are beyond the scope of this paper, but need to be explored.