Slavery and Race: An Essay on New Ideas and Enduring Shibboleths in the Interpretation of the American Constitutional System

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God gave Noah the rainbow sign.
No more water, the fire next time.

African-American Spiritual

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1. This verse was the inspiration for the title of one of James Baldwin's books, The Fire Next Time (1962). That book, like the others Baldwin wrote a generation ago, deserves another reading.
The signers of the Declaration of Independence boldly announced that "[w]e hold these truths to be self-evident," but more than two centuries later the debate over the nature and meaning of "these truths" still is waged with vigor and, on many occasions, great passion. Indeed, the descriptive term "self-evident" is enough in itself to inspire fundamental disagreement. To Americans about to enter a twenty-first century era of ultra-technology, it sometimes must seem that unless an idea is as "self-evident" as the arithmetical concept that \(1 + 1 = 2\), it is not self-evident at all.

The "self-evident" truth that "all men are created equal" has illuminated and yet bedeviled the national experience of the United States. With its additional reference to an indeterminate list of "unalienable rights," the Declaration of Independence clearly implied the existence of certain rights that in some sense are absolute and eternal, rights that are essential for the preservation of mankind. "Governments are instituted among [m]en as the instruments for securing these rights, and as a mere instrument (and a discardable one at that), a government must bow to the ultimate sovereign—to the governed—in order to obtain the consent necessary for its continued legitimacy.

The combination of equality and popular sovereignty in the Declaration of Independence is a combustible mixture. For over two centuries, thoughtful Americans have struggled intellectually, and in their hearts, to reconcile the realities of their constitutional system with the radicalism of the Declaration of Independence. The struggle began with the unresolved doubts of some of the signers themselves, and it continues to this day. Alexis de Tocqueville, after touring the United States in 1831 and early 1832, was moved to write of the dangers of the human heart's "depraved taste for equality, which impels the weak to attempt to lower the powerful to their own level, and reduces men to prefer equality in slavery to inequality in freedom." He noted, however, the peculiarly American solution to the establishment of equality in the political world: that "every citizen must be put in possession of his rights, or rights must be granted

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3. Id.

4. Readers who are interested in the lives of the signers of the Declaration of Independence can find no better starting point than the life of Thomas Jefferson, and no greater resource than the wonderful six-volume biography of the nation's third president, Dumas Malone, Jefferson and His Time (1948-81).

5. Alexis de Tocqueville, Democracy in America 53 (Rev. ed. 1900).
De Tocqueville reached a remarkable conclusion concerning the American constitutional system.

At the present day the principle of the sovereignty of the people has acquired, in the United States, all the practical development which the imagination can conceive. It is unencumbered by those fictions which are thrown over it in other countries, and it appears in every possible form according to the exigency of the occasion.

The principle of the sovereignty of the people was encumbered, of course, by several very heavy burdens, some of which would not be removed until the twentieth century. In De Tocqueville's time, "sovereignty of the people" obviously meant sovereignty of some of the people. Women, as well as African-Americans (and Native Americans, too), were excluded from the playing field. To the extent that the Declaration of Independence promised something more with its reference to equality, the America that De Tocqueville found in 1831 did not match the apparent vision of 1776. The America of 1993 obviously is very different from De Tocqueville's America of 1831, but the promise (if that is what it was) of equality found in the Declaration of Independence is not yet wholly fulfilled. Was the vision of equality real or was it simply the product of empty words used to meet the political necessities of a particular moment? Did the Constitution itself destroy the authentic promise of the Declaration of Independence?

These questions are traditional topics of inquiry in the academic community, but their significance actually is far surpassed by another issue, which has received too little attention: Can the Declaration of Independence positively inform and instruct the interpreters (not just the courts, but the legislative and executive branches as well) of the American constitutional system? It is arguable that the true meaning of the Constitution is ascertainable only if the Constitution is viewed within the framework provided by the language of the Declaration of Independence.

The Declaration of Independence was the political reflection in 1776 of a Newtonian intellectual universe, a universe in which all things were rational and therefore subject to human understanding. Self-evident truths and the capacity for self-government existed because moral and political laws were included among the various laws of nature—of the Creator. The rational man of the late eighteenth century Newtonian universe, confident in the source of basic law, considered himself to be perfectly capable of applying those basic moral laws in the pursuit and realization of

6. Id.
7. Id. at 57.
the principle of equality. That confident spirit was apparent in the lan-
guage of the Declaration of Independence.

Only eleven years later, however, the draftsmen of the Constitution (in
large measure led by James Madison) took a fundamentally different
course. References to the Creator as the ultimate source of rights effec-
tively disappeared. Rights no longer even were entrenched—totally pro-
tected against the Constitution's formal amendment process—much less
considered to be "unalienable." The Constitution was in no sense a Ten
Commandments of government, handed down on stone tablets by the
Creator to some post-Revolution Moses.

An inherent tension clearly exists between the language of the Declara-
tion of Independence and the language of the Constitution. This tension,
contrasted against the veneration accorded to the Constitution during the
nineteenth century, even by Americans on opposite sides during the Civil
War, eventually was a major contributing factor in the development of
the various revisionist views of the Constitution that began to develop
during the early part of this century. Foremost among the revisionists, of
course, was Charles Austin Beard. In his renowned book, An Economic
Interpretation of the Constitution of the United States, Beard pro-
nounced the Constitution the product of rampant economic and class
elitism.

Even the arguments of the early revisionists, however, tended to over-
look the ultimate stress point in any attempt to reconcile the Declaration
of Independence and the Constitution. That stress point was, and is, slav-
ery and its malignant modern-day successor, racial strife. In the broad
sweep (but, in historical terms, rather short duration) of the evolution of
the American constitutional system, the impact of slavery simply has
been immense. The actual language of the Declaration of Independence
rather accurately reflected the developing Anglo-American legal tradition
concerning slavery. Gradually, but with increasing rapidity, this tradition
had been eliminating slavery since shortly after the end of the Middle
Ages, the colonial slave trade notwithstanding. Indeed, the enumeration
of the King's misdeeds set forth in the Declaration of Independence origi-

8. For an excellent new discussion of the Constitutional Convention, written with
James Madison as the focus, see William Lee Miller, The Business of Next May: James

9. Charles Beard, An Economic Interpretation of the Constitution of the United
States (1913).

10. Beard's influence has waxed and waned throughout this century, but he remains one
of the very few historians whose views absolutely must be considered when studying the
history of the United States Constitution.

Levy & Dennis J. Mahoney, eds., 1987).
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nally included a reference to the perpetuation of slavery in the colonies. In what justifiably might be described as the first of the great "slavery compromises," the authors withdrew that reference from the final version of the Declaration of Independence.\(^{12}\)

The draftsmen of the Constitution, however, not only avoided any use of the words "slave" or "slavery" in the document's text, they actually included in the Constitution three specific protective provisions for the institution of slavery. These protective provisions were:

1. Article I, Section 2, which provided in part that "[r]epresentatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."\(^{13}\) The effect of this section was that each slave counted as three-fifths of one person.

2. Article I, Section 9, which began with the declaration that "[t]he 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."\(^{14}\) This section, of course, guaranteed the continuation of the slave trade until 1808.

3. Article IV, Section 2, which stated in its third and final paragraph that "[n]o 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."\(^{15}\) This section sought to insure the return of fugitive slaves to their owners. It was a provision that eventually became a rallying point for Abolitionists.

Contemporary American political leaders could take lessons from their eighteenth-century predecessors in the precise, calculated manipulation of words.

Those provisions, adopted in large measure with the intention of preventing the new American nation from self-destructing at its inception, actually sowed the seeds for the greatest continuing crisis in the history of the United States: an on-going, two-hundred year racial conflict. Those seeds produced as their bitter fruit the various sectional com-

12. Readers who wish to review the history of the Declaration of Independence in detail can begin (and perhaps end) their inquiry with CARL BECKER, THE DECLARATION OF INDEPENDENCE (1922).
15. U.S. Const. art. IV, § 2.
promises attempted during the four decades preceding the presidential election of 1860, the horrendous carnage of the Civil War, the anguish of Reconstruction, the grim racial repression of the period from 1877-1941, and the unfulfilled expectations of the civil rights movement (a movement that at times now seems to have degenerated into an endless, grinding legal and political argument over affirmative action).

The most interesting (and, for most readers, probably the best) discussion of the handling of the slavery question by the Constitutional Convention appears in William M. Wiecek's *The Witch at the Christening: Slavery and the Constitution's Origins*, one of twenty-one essays by different authors included in an anthology entitled *The Framing and Ratification of the Constitution*. Wiecek provides a vivid description of the quandary left in the wake of the Constitution's adoption:

Southerners sidestepped the problem posed by the ideology of the Revolution by adopting the expedient of declaring blacks outside the scope of those principles. Chief Justice Roger B. Taney reaffirmed this evasion in the *Dred Scott Case* (1857) when he wrote that black slaves could not have been included within the terms of the Declaration of Independence, "for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the declaration of independence would have been utterly and flagrantly inconsistent with the principles they asserted." We read this passage and condemn Taney for failing to grasp the liberating potential of the Declaration; yet we should recognize that he was doing no more than speaking the mind of southern statesmen, both in his time and in 1776. Taney and other southern spokesmen failed to perceive that two interpretations of the American revolutionary experience were possible. They assumed that blacks were not a part of anything that happened between 1760 and 1790, and consequently played no active role in the struggle for human freedom that gave the American Revolution its only lasting meaning. Blacks saw the matter differently. As Benjamin Quarles has recently noted, the Revolutionary War was in effect "a black Declaration of Independence in the sense [that] it spurred black Americans to seek freedom and equality. [They] viewed the war as an ongoing revolution in freedom's cause."

In a sense, the failure of the Founding Fathers to come to grips with slavery was the failure of a dream that many of them held dear throughout their lives. In the words of William Freehling:

If men were evaluated in terms of dreams rather than deeds everyone would concede the antislavery credentials of the Founding Fathers. No

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17. *Id.* at 173-74.
American Revolutionary could square the principles of the Declaration with the perpetuation of human bondage. Only a few men of 1776 considered the evil of slavery permanently necessary. None dared proclaim the evil a good. Most looked forward to the day when the curse could be forever erased from the land. "The love of justice and the love of country," Jefferson wrote Edward Coles in 1814, "plead equally the cause of these people, and it is a moral reproach to us that they should have pleaded it so long in vain."18

II. Recent Literature

From 1787 to the present, Americans have been divided by the issue of slavery and its successor, racial strife. During the last two years, the academic community has produced a small but rich harvest of material that examines anew how these sore points of the past and present have affected and been affected by the American constitutional system. These fresh interpretative and analytical efforts are particularly valuable because they are not limited strictly to the topics of slavery or race or both, but instead take a broader view that avoids the erection of paper walls between law, economics, politics, and sociology.

Among these recent works, the most comprehensive in its overall goal is Bruce Ackerman's We the People: Foundations,19 the first volume of a projected three-volume work. We the People undertakes the extraordinary task of constructing a model to explain the complete evolution of the Constitution in both the legal and political arenas. Ackerman identifies three great periods of genuine constitutional evolution: the adoption and ratification of the Constitution itself, Reconstruction, and the New Deal.20 It was in those three periods, says Ackerman, that the power of the ultimate sovereign—the people—made itself felt in and through the Constitution in a truly lasting way. The politics that was part and parcel of these three periods of constitutional evolution is so clearly distinguishable from normal politics, argues Ackerman, that, as a governmental system, the United States actually functions as a dualist democracy. The politics of constitutional evolution is constitutional politics, as distinguished from normal politics.21 As Ackerman explains it, dualism is a political reality because it is a constitutional reality.

Above all else, a dualist Constitution seeks to distinguish between two different decisions that may be made in a democracy. The first is a decision by the American people; the second, by their government.

20. Id. at 58.
21. Id. at 58-80.
Decisions by the People occur rarely, and under special constitutional conditions. Before gaining the authority to make supreme law in the name of the People, a movement’s political partisans must, first, convince an extraordinary number of their fellow citizens to take their proposed initiative with a seriousness that they do not normally accord to politics; second, they must allow their opponents a fair opportunity to organize their own forces; third, they must convince a majority of their fellow Americans to support their initiative as its merits are discussed, time and again, in the deliberative fora provided for “higher lawmaking.” It is only then that a political movement earns the enhanced legitimacy the dualist Constitution accords to decisions made by the People.

[T]he dualist Constitution prevents elected politicians from exaggerating their authority. They are not to assert that a normal electoral victory has given them a mandate to enact an ordinary statute that overturns the considered judgments previously reached by the People. If they wish to claim this higher form of democratic legitimacy, they must take to the specially onerous obstacle course provided by a dualist Constitution for purposes of higher lawmaking. Only if they succeed in mobilizing their fellow citizens and gaining their repeated support in response to their opponents’ counterattacks may they finally earn the authority to proclaim that the People have changed their mind and have given their government new marching orders.22

For Ackerman, the lasting impact of slavery is found in the Reconstruction amendments to the Constitution, amendments that surely would not have been possible except in the unprecedented political conditions that prevailed in the immediate aftermath of the Civil War.23 Ackerman considers not only the substance of the Reconstruction amendments, but also the processes that brought them to life (particularly in the case of the Fourteenth Amendment) as vital to the evolution of the Constitution—equivalent in importance to the work of the Founders themselves in making a Constitution.24

In the case of the Fourteenth Amendment, many decades would pass before the American constitutional system would feel its full substantive weight. Indeed, use of the word “person” in segments of the amendment rather than “citizens” raised questions about the motivations of the amendment’s principal draftsmen. Were they really concerned about pro-

22. Id. at 6-7.
24. The vision of some of the Radical Republicans of the Reconstruction period as the successors of the Founders may be a bit amusing to many readers, but Ackerman’s focus is on process and substance, not on personalities. He makes no claim that the political leaders of Reconstruction were the intellectual and conceptual successors to Madison, Hamilton, and their compatriots at the Constitutional Convention.
tecting the former slaves, or was their primary interest the protection of property rights (of corporate "persons," in effect)? Approached from another direction, was the Fourteenth Amendment limited only to the former slaves in its application (a so-called race theory of the amendment's meaning), or did it have the potential for a broader impact? Ackerman accords relatively little attention to such issues of substantive legislative intent, issues that have received a huge amount of scrutiny in the historiography of the Fourteenth Amendment. Indeed, he does not even mention a case as famous as *Gitlow v. New York,* in which the United States Supreme Court took its first step toward the incorporation of the Bill of Rights into the Fourteenth Amendment. For Ackerman, however, other considerations are more profound than the traditional areas of focus. The constitutional politics that made possible the adoption of the Reconstruction amendments drastically revised the playing field on which the legal ramifications of racial issues eventually would be resolved, and Ackerman emphasizes that point. The processes of true constitutional change provide Ackerman's focus.

[T]he Reconstruction Republicans transformed the national separation of powers into an alternative to the Federalist system of constitutional revision that had been based exclusively on the division of powers between state and nation. [There were] . . . two important variations on this new nationalistic theme. The Thirteenth Amendment introduces the model of Presidential leadership that will bulk large in our subsequent analysis of the New Deal transformation. In this model, President and Congress cooperate with one another to secure the validation of a constitutional amendment, despite the amendment's questionable legality under the rules and principles laid down by the Federalist Constitution. Within the context of Reconstruction, however, a second model [developed], generated by the struggle over the Fourteenth Amendment . . . . As a result of the defection of President Andrew Johnson to the side of the constitutional conservatives, it fell to the Republicans to develop a model of Congressional leadership if they hoped to win higher law validation of their proposed Fourteenth Amendment.27

The Civil War and Reconstruction marked an end to slavery in the United States while, at the same time, signaling the beginning of a period
of racial division that continues, in various forms, to this day. In The Market Revolution: Jacksonian America 1815-1846, Charles Sellers provides one explanation for the diurnity of this racial division. During the Jacksonian era, Sellers contends, the triumph of a genuinely capitalist, property-oriented economic system occurred in America at almost exactly the same time that a populist political philosophy, which abhorred wealth, also reached its zenith. In this odd combination lay the basis for disaster. Sellers argues that the pro-capitalist "market revolution made slavery the great contradiction of the liberal American republic." The increasing significance of slavery in the economic system also insured the continuation of racial strife long after the end of slavery itself.

The rigors of capitalist slavery were most fully rationalized when the American cottonocracy utilized history's fullest freedoms of property and labor exploitation in harnessing human property to the industrial revolution's most dynamic sector. By dehumanizing black chattels most systematically as market commodities, a slave regime less brutal than some in other respects poisoned the liberal republic indefinitely with the most virulent white racism.

The "great contradiction" required more of the supporters of slavery than merely an economic justification, however.

The only proslavery doctrine that proved compatible with democratic liberalism for whites, and therefore widely acceptable to them, was black racial inferiority. Dehumanization of blacks, moreover, staved off the class shame of inequality for poor whites, justified ruthless exploitation of black labor, and muted class conflict to enlist the farmer majority in defense of the planters' imperiled labor system.

Sellers obviously is aware of and influenced by Marxist scholarship on American economic history. Needless to say, that fact makes it unlikely that he ever will be cited with approval on the electronic chautauqua circuit. By refusing to separate economic considerations from other facets of historical analysis, however, Sellers has made an important contribution to the continuing debate over the roles of slavery and race in the American constitutional system.

The intransigent nature of issues relating to slavery and race plays a key role in The Constitution in Conflict, by Robert A. Burt. The central thesis of Burt's book is that both an authoritarian Supreme Court and a

29. Id. at 396.
30. Id.
31. Id. at 396-97.
32. Id. at 409.
majoritarian political system are adverse to the true nature of the American constitutional system. Burt argues that a winner-take-all approach to racial issues has produced a range of negative consequences that amount to an unending "recriminatory cycle." The cycle, says Burt, now has reached the stage of black rage—almost 130 years after a prolonged outburst of somewhat comparable white rage beginning during Reconstruction:

This cycle still holds in the explosively bitter resentment of so many American blacks today. Their rage, I believe, is only indirectly linked to the nineteenth-century injustices of slave status; it has a more immediate source in the humiliations and terror vindictively imposed on them in this century by southern whites (tolerated and abetted by northern whites). Vengeful resentment may have faded among southern whites today because their Civil War defeat is no longer a lived recollection for any of them; and so they are prepared to jettison Jim Crow and its visible structure of retaliatory racial subjugation. But black resentment is fueled today by living memory among the elder generation who were directly subjected to the segregation regime and the younger generation who (like the children of Jewish Holocaust survivors) still see pervasive threats to their existence and, scorning or denying their elders' apparent past subservience, vow "Never again." And so, although the old retaliatory reasons have faded for white subjugation of blacks, whites now find new reasons to fear and to subjugate blacks: self-protection in response to blacks' expression of retaliatory vengeance toward whites.

The only resolution to this cycle, argues Burt, is the equality principle—the very opposite, in its meaning and operation, of the combination of judicial authoritarianism and political majoritarianism that he so deeply deplores. Burt presents a pessimistic analysis of the current state of the American constitutional system, as exemplified by activities in the political arena:

The core characteristic of . . . [the prevailing] Manichaean politics—whether in matters of race or morality—is unrelenting hostility among political opponents. Because these adversaries are unwilling to acknowledge even the possibility of common ground, they cannot imagine a relationship based on mutual respect. And thus, no matter who prevails in this raw conflict, the equality principle—the constitutive element of democratic life—is defeated.
For Burt, the ultimate constitutional scholar is none other than Abraham Lincoln. From Lincoln's words, Burt finds the basic limitations on both the majority-rule doctrine and the coercive decision making power of the Supreme Court. As a constitutional scholar, Abraham Lincoln has received much closer attention in recent years, especially in Garry Wills' remarkable book, Lincoln at Gettysburg: The Words that Remade America. English teachers will glory in Wills' outstanding display of linguistic analysis in this study of the place of the Gettysburg Address in the evolution of the American constitutional system. Wills' analysis is so thorough that it more properly might be described as a linguistic dissection! More important, however, is Wills' substantive conclusion that Lincoln's brief address brought the importance of the concept of "the People," as included in the Declaration of Independence, to the forefront of the American consciousness. Lincoln was redefining the Constitution by turning to the Declaration of Independence and, says Wills, Lincoln's words remain strong enough to make the redefinition stick.

Wills argues that Lincoln, influenced by the reference in the Declaration of Independence to "the People," used the Gettysburg Address to make the case "that America is a people . . . ." Lincoln's references to the people, therefore, were much more significant than they would have been simply as references to popular government. America, furthermore, was "a people" dedicated to the proposition that all men are created equal. According to Wills, "Lincoln changed the way people thought about the Constitution . . . ." and for both states' rights advocates and original intent advocates, "our politics has all been misdirected since that time." Such scholars as Robert Bork insist that, for all practical purposes, "equality as a national commitment has been sneaked into the Constitution."

Interestingly, Lincoln's understanding of America as a people compelled him, as a matter of constitutional philosophy and not just political shrewdness, to act with restraint in freeing slaves. The Emancipation Proclamation, Wills contends, was limited in scope in large measure because when he issued it Lincoln did not wish to make any pretense of acting under his civilian presidential powers, but rather only as com-

38. Id. at 81-86, 202. Burt's discussion of Lincoln's reservations about purely majoritarian rule is wonderfully erudite.
40. Id. at 145.
41. Id.
42. Id.
43. Id. at 146.
44. Id.
mander-in-chief of the army and navy. Emancipation, as promulgated by Lincoln, amounted to no more than a military action. Only through the amendment process could the Constitution be changed to bring about genuine, full emancipation. Wills states that “[p]aradoxically, the Declaration as a founding document tied Lincoln’s hands with regard to slavery.” The People could do what not even the commander-in-chief could do—change the Constitution.

Lincoln has been severely criticized, and understandably so, for the abuses of civil liberties that were a part of his effort to crush the Confederacy. Most recently, Mark Neely has dealt in great detail with the lengthy record of military arrests under Lincoln in The Fate of Liberty: Abraham Lincoln and Civil Liberties. It is worth remembering, as an illustration of the seriousness of this record, that many of the arrests occurred in states that did not secede from the Union. Yet Neely, in effect, confirms the understanding of Lincoln’s evolving attitude toward equality—and freedom—set forth in Wills’ discussion of the Gettysburg Address. Indeed, Lincoln moved from an attitude of reluctance concerning any change in the Constitution to a position of strong support for a formal amendment ending slavery. Neely notes the deep personal significance of this change for Lincoln.

This openness to constitutional amendment] was a major change in his constitutional thinking. The Constitution was last amended five years before Abraham Lincoln was born. He was on record in a speech in Congress recommending that the document be left alone and that the American people not get into the habit of changing it. In the desperate throes of the secession crisis, he did agree to a proposed amendment that would have explicitly guaranteed slavery where it already existed. But this was redundant in Lincoln’s view, merely reassuring the South of what it already had. In 1864, he wanted an amendment to guarantee that there would be nothing temporary about emancipation.

This ability to balance short-term practicality and long-term ideals is perhaps the essence of statesmanship. In Lincoln’s case, the one helped preserve the Constitution as the law of the land, and the other brought such changes as made it worth preserving “throughout the indefinite peaceful future.”

45. Id. at 136.
46. Id.
47. Id. at 137.
48. Id.
50. Id. at 221.
51. Id.
52. Id. at 221-22.
In *Lincoln at Gettysburg*, Garry Wills certainly does not endeavor to undertake a thorough exploration of the extremely complex, often even devious, methods employed by Lincoln to win the Civil War. The reader who wishes to examine those methods must go beyond Neely's book to the myriad of other volumes on Lincoln that have been published over the years. What Wills does accomplish, however, is to remind us that Lincoln looked to the Declaration of Independence—the one truly great document of the national history of the United States which predates even the Constitution—as his primary source of understanding of what the Constitution itself really means to us as a people. In a way that Ackerman, Sellers, and Burt do not, Wills offers a much needed intellectual basis for continued hope in an area of constitutional development that has been characterized for decades by bitterness, divisiveness, and hopes left unfulfilled. If Wills is correct, Lincoln's special brand of scholarship offers the most sound basis for reconciling the Declaration of Independence and the Constitution. Even a successful intellectual reconciliation, however, does not insure the implementation of the equality principle. Lincoln matched practical politics with constitutional scholarship in a way that no one else had done since the generation of the Founding Fathers, and that no one has equaled since his death. Today, however, almost 130 years after Lincoln spoke at Gettysburg, America still has not

53. The choice of what to read about Lincoln is a difficult one for the uninitiated. On the assumption that most readers do not wish to spend the rest of their lives immersed in the huge number of pages written about Lincoln, two specific suggestions are especially worth consideration. See generally Benjamin P. Thomas, *Abraham Lincoln* (1952). Forty years after its publication, it still stands as one of the best one-volume biographies ever written. (The Thomas book also was involved in a major academic controversy during the last two years, when another well-known Lincoln scholar was accused of having plagiarized Thomas' work). See generally James M. McPherson, *Abraham Lincoln and the Second American Revolution* (1991). It is an excellent addition to any library.

54. Garry Wills is an interesting figure in the modern world of scholarship for a variety of reasons, not the least of which is his reputation as something of a media star. Indeed, *Newsweek* recently included Wills in its tongue-in-cheek (maybe) list of the top one-hundred members of the "cultural elite." The magazine offered the following description of Wills: "A polymath specializing in America's intellectual history, he's the interpreter of current politics for the N.Y. Review of Books. You want a smart quote with a classy name attached: Who ya gonna call?" *The Newsweek 100, Newsweek*, Oct. 5, 1992, at 39. Wills now may be subject to the most scathing criticism that can be directed by scholars to a colleague who becomes too famous: that he is trendy.

55. In fact, almost exactly one-hundred years would pass before another American president, John F. Kennedy, would deliver a speech that genuinely was in the spirit of the Gettysburg Address. *Radio and Television Report to the American People on Civil Rights, June 11, 1963*, in *Public Papers of the Presidents of the United States: John F. Kennedy* 468 (1964). It is not a criticism of Kennedy to note that the speech, while memorable, was no Gettysburg Address—and the words, while very much Kennedy's political responsibility, did not originate from his pen.
come to grips unequivocally with the meaning of the equality principle. For example, does it mean a literally color-blind society as a matter of law, or does it mean a society in which affirmative action (clearly something other than color-blindness) is an appropriate tool in the pursuit of equality? Americans have not demonstrated that they have achieved a consensus even on the answer to that basic question. Robert Burt, for one, argues in The Constitution in Conflict that the best answer may be no answer—at least for now.

In our persisting racial conflicts, one proposition should, however, be clear: the political relationship between blacks and whites cannot be ended by unilateral secession on either side. So long as either disputant insists that commitments are owed, that past obligations must be honored, the relationship must persist until mutual satisfaction obtains. This was the fundamental proposition that Lincoln would not surrender, his bedrock understanding of the equality principle based on mutually acknowledged respect. Current affirmative action programs call this proposition into doubt, but in a complicated and confusing way. What is the relationship between blacks and whites when, forty years after Brown, there are no black faces in vast, privileged areas of American social life? But if blacks appear in these social enterprises only on rigidly separate tracks, what then is the relationship between blacks and whites? In addressing these complex, high-stake questions today, the judicious course—the best hope for protecting the possibility of equal relations between blacks and whites—would be to keep the controversy alive.\textsuperscript{66}

Whether the events of the next decade or two will allow the American constitutional system to leave such a basic question unanswered remains to be seen. One thing is certain, however. The application of the equality principle is an issue that far transcends the recent “war” over political correctness. That tempest-in-a-teapot conflict tends to trivialize the great issues of the American constitutional system. The equality principle deserves a better fate than to be consigned to the scrap heap of pop culture constitutionalism.

III. A Special Note: Freedom

This Essay would not be complete without a brief reference to Freedom,\textsuperscript{67} by Orlando Patterson. The first volume of Freedom, subtitled Freedom in the Making of Western Culture, was published in 1991. The second and final volume is scheduled for publication in 1993. Patterson’s examination of the history of freedom is exceptional, perhaps unprece-
dent, in its scope. His book, however, is much more than a history of freedom alone (as if that were not enough). It is, in addition, an exploration in the grand manner of what Patterson describes as a virtually symbiotic relationship between freedom and slavery. In Patterson's words:

The basic argument of this work is that freedom is generated from the experience of slavery. People came to value freedom, to construct it as a powerful shared vision of life, as a result of their experience of, and response to, slavery or its recombinant form, serfdom, in their roles as masters, slaves, and nonslaves.58

Patterson is quick to credit others for recognizing this unique (and troubling) relationship, but Freedom is well on the way to standing alone as perhaps the greatest display of scholarship ever produced in its field. While mentioned in this Essay only as a special note, Freedom may be the starting place for anyone interested in the millennia-long tension between freedom and slavery.59

58. Id. at xiii.

59. For the one work that probably deserves to be discussed in the same breath as Freedom, see D. Davis, The Problem of Slavery in Western Culture (1966). That book certainly influenced Patterson's efforts in Freedom.