

**Samford University**

---

**From the Selected Works of David M. Smolin**

---

2008

# The Civil War as a War of Religion: A Cautionary Tale of Enslavement and Emancipation

David M. Smolin



Available at: [https://works.bepress.com/david\\_smolin/18/](https://works.bepress.com/david_smolin/18/)

## THE CIVIL WAR AS A WAR OF RELIGION: A CAUTIONARY TALE OF ENSLAVEMENT AND EMANCIPATION

DAVID M. SMOLIN<sup>1</sup>

This article recounts the nineteenth century religious conflict over slavery in the United States, particularly as occurred among Evangelical Protestant Christians. This historical drama raises several significant questions.

First, what is the significance of the nineteenth century slavery debate for contemporary activism concerning modern-day slavery, trafficking, and slavery-like practices? Evangelical Christians within the United States have invoked the strong evangelical Christian role in British abolitionism, particularly referencing William Wilberforce as inspiration for their significant anti-trafficking efforts.<sup>2</sup> It is not clear, however, that they have absorbed the significance of the evangelical divisions over slavery within eighteenth century America. The historical evangelical Christian division over slavery reminds us that it is much easier to identify egregious injus-

---

<sup>1</sup> Harwell G. Davis Professor of Constitutional Law, Cumberland School of Law, Samford University. Thanks to Richard Aynes, Tom Berg, Trisha Olson, Lorle Porter, Desiree Smolin, and Howard Walthall for their comments on earlier drafts of this essay, and to Bobbie Christine, Donald Oulsnam, Karl Shoemaker, and Christopher Zulanas for their research assistance. Thanks to Desiree Smolin for her very helpful insights on the issues raised by this essay. This paper was presented to faculty colloquia at Washington and Lee, the University of Alabama, and Cumberland law schools, and the author is grateful to the various participants who offered their comments and criticisms.

<sup>2</sup> The association between Wilberforce and contemporary American anti-slavery efforts is reflected by the naming of the latest federal act reauthorizing anti-trafficking efforts as the “William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007.” See H.R. 3887, 110th Cong. (2007), *available at* <http://www.govtrack.us/congress/billtext.xpd?bill=h110-3887>. The term trafficking in this series of federal acts generally refers to slavery. See *infra* notes 128-124 and accompanying text. The contemporary fondness of American evangelicals for Wilberforce is reflected not only by evangelical press biographies, see, for example, KEVIN BELMONTE, *HERO FOR HUMANITY, A BIOGRAPHY OF WILLIAM WILBERFORCE* (Navpress 2002), but also by the well-known evangelical Charles Colson naming a public policy forum “The Wilberforce Forum.” See *id.* at 13 (foreword by Colson). The role of evangelicals in contemporary American anti-slavery efforts, including the link to Wilberforce, is documented in part in E. BENJAMIN SKINNER, *A CRIME SO MONSTROUS: FACE-TO-FACE WITH MODERN-DAY SLAVERY* 49-61, 107-15, 252-62 (2008). For a working definition of the term evangelical Christian, with supporting citations, see David M. Smolin, *Religion, Education, and the Theoretically Liberal State: Contrasting Evangelical and Secularist Perspectives*, 44 J. CATH. LEGAL STUD. 99, 99-102 (2005).

tices in historical retrospect, where a consensus has emerged condemning past practices, than to correctly identify those contemporary practices constituting such great wrongs. Even when one has correctly identified a large-scale injustice, implementing a successful strategy against that injustice is extraordinarily difficult. How, then, do religious, and non-religious, individuals and communities correctly identify the great injustices and wrongs of their day and act effectively against them?

Second, this examination of the religious conflict over slavery is another avenue to explore the mindset of the time and individuals who gave us Section One of the Fourteenth Amendment. The body of the paper will focus particularly on the religious influences on John Bingham, the primary author of Section One of the Fourteenth Amendment.

Given this article's focus on John Bingham, the constitutional issues raised by the paper will be raised throughout, beginning with the next section. The other issues raised by this introduction will be addressed at the end of the paper, after the historical drama of the religious divisions over slavery has been presented.

#### I. THE RELIGIOUS CONFLICT OVER SLAVERY IS A SIGNIFICANT BACKGROUND FOR UNDERSTANDING THE CIVIL WAR AMENDMENTS

The Civil War, and consequent enactment of the Civil War Amendments, is perhaps as significant an event, for the meaning of America, and her Constitution, as the founding of the nation and enactment of the original Constitution. Whatever may be said about the greatness of the original Constitution, it must be admitted that it countenanced the institution of racial slavery.<sup>3</sup> The American system of racial slavery had become, by the mid-1800s, anomalous and backward, particularly since the British Parliament in 1833 had enacted a law abolishing slavery in the colonies.<sup>4</sup> What claims America may have as a world leader in the historical pro-

---

<sup>3</sup> U.S. CONST. art I, § 2 (three-fifths clause); U.S. CONST. art I, § 9 (Congress disabled from banning slave trade before 1808); U.S. CONST. art. IV, § 2 (fugitive slave clause); U.S. CONST. art. V (preventing constitutional amendment affecting slave trade prior to 1808).

<sup>4</sup> See WILLIAM HAGUE, WILLIAM WILBERFORCE 502-03 (2007). The Abolition of Slavery Bill was passed in 1833, to be effective in August 1834, although there was originally to be a period of apprenticeship with wages. The former owners were financially compensated for the loss of their slaves. See *id.* One of the ironies of history is that slavery theoretically would have been peacefully abolished in the United States if the states had remained British colonies, although of course it is entirely speculative whether the act of abolition would have been obeyed there, or been an occasion for rebellion.

gress of liberty and democracy are dependent in significant part on this second great moment of constitutional enactment, by which the libertarian aspects of the original Constitution were strengthened and broadened, and the unfortunate countenancing of racial slavery was explicitly repudiated.<sup>5</sup>

It is therefore not surprising that most significant contemporary constitutional law issues are rooted either in the Civil War Amendments or in the relationship of those Amendments to the Bill of Rights. Unenumerated fundamental rights or liberties, doctrinally labeled as substantive due process and/or the right of privacy, are generally litigated and analyzed as Fourteenth Amendment issues.<sup>6</sup> The Equal Protection Clause of the Fourteenth Amendment has also become one of the most important sources of modern constitutional law.<sup>7</sup> Structural constitutional issues, particularly federalism, were profoundly altered by the “no state shall” language of the Fourteenth Amendment, empowering the federal government to protect individuals from discrimination and rights deprivations by the states.<sup>8</sup> These doctrinal issues have made interpretation of the Fourteenth Amendment important to the broader jurisprudential issues endemic to contemporary constitutional law. These include the dispute concerning the proper methodology of constitutional interpretation, embodied in the interpretivism/originalism debate, questions related to an unwritten constitution or natural law understanding of the written constitution, and various critical approaches based on race, gender, and class.<sup>9</sup>

Given the centrality of the Fourteenth Amendment to contemporary American law, it would seem that all reasonable avenues of exploration toward its understanding should be pursued. If the nineteenth century had been a primarily secular age, or an age which strictly segregated religious, political, and legal concerns, then exploring religious aspects of the time might be of little sig-

---

<sup>5</sup> See U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

<sup>6</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Loving v. Virginia*, 381 U.S. 1 (1967); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>7</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003); *United States v. Virginia*, 518 U.S. 515 (1996); *Graham v. Richardson*, 403 U.S. 365 (1971); *Brown v. Bd. of Educ.*, 347 U.S. 497 (1954).

<sup>8</sup> See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (summarizing precedents which use the Fourteenth Amendment to incorporate various of the Bill of Rights and apply those rights against the States; majority discusses selective incorporation criteria, while Justice Black’s concurrence discusses alternative theory of total incorporation).

<sup>9</sup> See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 17-26 (3rd ed. 2006) (reviewing originalism v. nonoriginalism debate).

nificance. However, the Civil War era which produced the Fourteenth Amendment was a deeply religious era in which Christianity was assumed to constitute or underlie the public identity of the nation. This does not necessarily mean that Americans were pious, or moral; it does mean that Americans thought and spoke in religious terminology and categories and assumed that religion was the basis of their institutions, including their political institutions.<sup>10</sup>

Broadly stated, it would seem that an understanding of nineteenth century American religion would be helpful to a full understanding of nineteenth century legal documents. This study particularly seeks to understand the *religious aspects of the conflict* that produced the Civil War Amendments.

---

<sup>10</sup> The comments of Alexis de Tocqueville, based on his observations of America in the early 1830s, describe the American intertwining of religion and republican institutions, and the belief in a common, national destiny:

Religion in America takes no direct part in the government of society, but it must be regarded as the first of their political institutions; for if it does not impart a taste for freedom, it facilitates the use of it. Indeed, it is in this same point of view that the inhabitants of the United States themselves look upon religious belief. I do not know whether all Americans have a sincere faith in their religion—for who can search the human heart?—but I am certain that they hold it to be indispensable to the maintenance of republican institutions. This opinion is not peculiar to a class of citizens or to a party, but it belongs to the whole nation and to every rank of society. . . .

The Americans combine the notions of Christianity and of liberty so intimately in their minds that it is impossible to make them conceive the one without the other . . . .

I met with wealthy New Englanders who abandoned the country in which they were born in order to lay the foundations of Christianity and of freedom on the banks of Missouri or in the prairies of Illinois. Thus religious zeal is perpetually warmed in the United States by the fires of patriotism. These men do not act exclusively from a consideration of a future life; eternity is only one motive of their devotion to the cause. If you converse with these missionaries of Christian civilization, you will be surprised to hear them speak so often of the goods of this world, and to meet a politician where you expected to find a priest. They will tell you that all the American republics are collectively involved with each other; if the republics of the West were to fall into anarchy, or to be mastered by a despot, the republican institutions which now flourish upon the shores of the Atlantic Ocean would be in great peril. It is therefore our interest that the new states should be religious, in order that they may permit us to remain free.

1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 305-07 (Alfred A. Knopf ed., 1946) (1835).

## II. AN OUTLINE OF THE RELIGIOUS CONFLICT OVER SLAVERY

President Lincoln appeared to be stating a commonplace when he noted in his Second Inaugural Address that both sides “read the same Bible, and pray to the same God; and each invokes His aid against the other.”<sup>11</sup> The eighteenth century in America was the evangelical age, a time when Protestant Christianity sought, and to a large degree succeeded, in shaping the goals and identity of the nation. This was the age when the Supreme Court would declare (without so much as a dissenting comment) that Christianity was a part of the common law, and that America was a “Christian nation.”<sup>12</sup> Evangelical Protestant Christianity, in large part through the first Great Awakening of the 1730s and 1740s, and the second Great Awakening of the early 1800s, had served as a culturally-unifying force and thus contributed to the building of the nation. In this sense, it should not be surprising that Evangelical Christians saw the progress of the nation as serving more than merely temporal or political ends and often hoped that the Christianization of America presaged the dawning of the millennial age.<sup>13</sup> It is, as C.C.

---

<sup>11</sup> President Abraham Lincoln, Second Inaugural Address, *available at* [http://memory.loc.gov/cgi-bin/query/P?mal:2:/temp/~ammem\\_47bw::](http://memory.loc.gov/cgi-bin/query/P?mal:2:/temp/~ammem_47bw::) (last visited Jan. 6, 2009).

<sup>12</sup> See *Vidal v. Girard's Ex'rs*, 43 U.S. (1 How.) 127, 198 (1844) (Story, J., writing for unanimous Supreme Court); *Holy Trinity Church v. United States*, 143 U.S. 457, 465-71 (1892) (Brewer, J., writing for unanimous Supreme Court).

<sup>13</sup> I have previously outlined this religious history, including the preceding colonial and revolutionary eras. See David M. Smolin, *The Judeo-Christian Tradition and Self-Censorship in Legal Discourse*, 13 U. DAYTON L. REV. 345, 367-85 (1988); David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067, 1069-72 & nn.15-18 (1991). There is an extensive body of historical writings on the role of religion in the nineteenth century. See, e.g., 1 SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 468-592 (Image Paperback ed. 1975); 2 SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 75-139 (Image Paperback ed. 1975); ROBERT T. HANDY, *A CHRISTIAN AMERICA* (1971). Relevant works on religion in the colonial and revolutionary era include 1 AHLSTROM, *supra*; ALAN HEIMERT, *RELIGION AND THE AMERICAN MIND* (1966); PERRY MILLER, *ERRAND INTO THE WILDERNESS* (1956); HARRY S. STOUT, *THE NEW ENGLAND SOUL* (1986).

For a definition of “Evangelical” Protestant Christianity primarily focused on contemporary America, see Smolin, *supra* note 2, at 99-102. The term is often used to describe the unifying features of Protestant religion during the nineteenth century. The term is often associated with emphases on revivalism, yet generally includes some (such as Old School Presbyterians) who largely rejected revivalism. A proper definition would therefore have to describe the common core of the most important denominations, including Presbyterians, Methodists, and Baptists. It is useful to note that the various forms of “evangelical” Protestant Christianity were at the religious center of American political and cultural life during the nine-

Goen noted, this initial religious unity in America during the first thirty years of the nineteenth century that makes the later religious demonization and divisions so remarkable. Somehow, the ideal of a Protestant Christian America divided into two contradictory ideals, that of Southern and Union religious nationalism.<sup>14</sup>

The European Wars of religion followed the divisions of the Reformation, and thus involved civil and regional wars primarily between Roman Catholic, Reformed, and Lutheran adherents. By contrast, the American Civil War pitted Baptist against Baptist, Methodist against Methodist, and Presbyterian against Presbyterian. It is startling that those who shared so much in the way of religious belief and identity, as well as language and culture, could within little more than a generation find religious reasons for fighting and killing one another.<sup>15</sup>

The initial thesis of this project is that the significant commonalities among Southern and Northern co-religionists hide the emergence of two startlingly different religious worldviews. Upon reflection, we find that although both sides in the war did, as Lincoln said, “pray to the same God,”<sup>16</sup> they had sharply contradictory understandings of the manner in which their common God related to, and ordered, human society.

The Southern religion that emerged in the critical period from 1830 to 1860 can be described, in a word, as hierarchical. God related to humankind largely by sanctioning a system of social order. The order centered around the planter, a figure envisioned as a kind of new-world Abraham beneficently caring for his charges, including his wife, children, and slaves. God wisely placed slaves under the beneficent care of such patriarchs because they were by divine ordination and natural propensity unsuited to govern themselves. Economic production and trade should, this religion taught, undergird, rather than undermine, God’s intended order for society.<sup>17</sup>

---

teenth century; thus, the later contrast between “mainline” religion and evangelicalism would be inapplicable to this period.

<sup>14</sup> See C.C. GOEN, *BROKEN CHURCHES, BROKEN NATION* (1985).

<sup>15</sup> See *id.* at 65-139.

<sup>16</sup> See Lincoln, *supra* note 11.

<sup>17</sup> See, e.g., Elizabeth Fox-Genovese & Eugene D. Genovese, *The Religious Ideals of Southern Slave Society*, 70 GA. HIST. Q. 1 (1986) [hereinafter Fox-Genovese & Genovese, *The Religious Ideals of Southern Slave Society*]; Elizabeth Fox-Genovese & Eugene D. Genovese, *The Divine Sanction of Social Order: Religious Foundations of the Southern Slaveholders’ World View*, 55 J. AM. ACAD. RELIG. 211, 288-89 (1987) [hereinafter Fox-Genovese & Genovese, *The Divine Sanction of Social Order*].

It is a remarkable feature of Southern life that the small minority of large-scale planters could culturally dominate so much of Southern society. This dominance, of course, varied from region to region, as is illustrated (for example) by the mixed reaction of northern Alabama to secession. Geographical areas distant from the plantations often created a distinct culture based on the values of small-scale white farmers. Nonetheless, the majority of non-planter whites largely accepted the ideals (and religious values) of planter society. This can be seen, for example, in the crumbling of early Methodist and Baptist opposition to slavery; thus, even the religious denominations with roots in the lower classes by the 1850s had become strong apologists for racial slavery and eventually emerged as religious enthusiasts for Southern nationalism. The great mass of Southern whites apparently accepted the concept of a divinely-sanctioned order placing the planter class at the top and the slave at the bottom. Many whites apparently hoped to rise to the status of slave-owning planters, if only on a small scale; many apparently gained a sense of personal satisfaction from their permanent superiority to the large class of slaves.

Hierarchy dominated relations among whites nearly as much as it did black-white relations. This was apparently due in large part to the absence of non-hierarchical economic or cultural institutions. Southern capital was primarily used to undergird and extend the plantation system, rather than to develop factories and industries, improve technologies, or facilitate the development of a middle class.<sup>18</sup> The limited production that occurred in the South often centered on serving plantations; thus, Southern mills primarily produced inexpensive clothes for slaves.<sup>19</sup> The lack of a substantial industrial base or middle class left small-scale farmers, industrialists, and merchants inordinately dependent on the planters as their primary market.<sup>20</sup> Thus, the normal business of economic production and trade generally reinforced, even among whites, an apparently permanent hierarchy.

The Southern economy could appear stable, orderly, and relatively uncompetitive, compared to the massive rush to wealth in the North. From the Southern perspective, it was good that economic exchange reinforced, rather than undercut, what they perceived as

---

<sup>18</sup> See EUGENE D. GENOVESE, *THE POLITICAL ECONOMY OF SLAVERY: STUDIES IN THE ECONOMY AND SOCIETY OF THE SLAVE SOUTH* 21-22 (1965) ("Southern banking tied the planters to the banks, but more important, tied the bankers to the plantations.").

<sup>19</sup> See *id.* at 24.

<sup>20</sup> See *id.* at 20, 30-31.



God's divine ordering; it was a social good that the production centered within the beneficent institution of the "family" (meaning the plantation), rather than within the uncontrolled environment of the factory, market, or city. The North, from the Southern perspective, appeared willing to sacrifice God's ordering of society for the love of mammon (money). Thus, Southerners came to believe that their economic system served the virtues of personal and family honor, elite beneficence, high culture, and social order, whereas the North lay prostrate before a crass, greedy commercialism.<sup>21</sup>

The South also lacked cultural institutions where people might meet one another as equals. America during the nineteenth century was profoundly energized by innumerable local, regional, and national voluntary associations. These voluntary religious, civic, and charitable associations created opportunities for Americans to meet one another on relatively equal terms; the volunteer, like the free laborer, could be judged in large part based on ability and energy, rather than upon a pre-ordained "place" in society. The South, however, lagged far behind the North in such associations. Southern women especially lagged behind their Northern counterparts in their participation in women's religious, civic, and charitable associations centered outside of the home. The ideal of the Southern plantation mistress emphasized her beneficent actions within, rather than without, the plantation.<sup>22</sup>

The various regions of the North tended to possess an economic and cultural dynamism which encouraged individuals to improve themselves, and their place in the world, through hard work and skill. Under these circumstances, the Southern norm of a divinely-sanctioned hierarchical norm appeared aberrant. These differing perspectives can be seen in the opposing social interpretations that Northern and Southern Calvinists gave to their shared doctrine of predestination.<sup>23</sup>

---

<sup>21</sup> See, e.g., *id.* at 29-30.

<sup>22</sup> See Fox-Genovese & Genovese, *The Religious Ideals of Southern Slave Society*, *supra* note 17, at 10-11, 14.

<sup>23</sup> The relationship between an economic system and religion seems too complex to fix a simple determinism in either direction. Thus, though one might argue that the disparities between the plantation economy and the Northern economy "caused" Northern and Southern religion to develop in divergent ways, one could also argue, particularly as to the North, the inverse: that Calvinist religion fostered (as the familiar argument goes) a dynamic capitalism. Moreover, whatever "determinisms" are present, the sincere adoption of religious justifications introduces, it would seem, new elements, for which account must be taken. Thus, it is hard to explain in purely economic terms why large numbers of individuals would risk (and frequently suffer) death, for an economic system that only modestly rewarded most of them. Religion apparently introduced elements into the eco-

John Calvin taught that God predestined (or elected) some to eternal life, and others to eternal damnation.<sup>24</sup> This doctrine was not as heartless, or radical, as may first appear. All orthodox Christians confessed that God, standing beyond time, foreknew who would make the choices of faith and life leading to salvation; virtually all Orthodox Christians confessed that original sin rendered all human beings damned, and unable to choose God, unless He provided, by the Holy Spirit, a special gift of “grace” to the human heart. Many Christian theologians, however, have taught that God provides all human beings with such grace, and that whether each individual chooses God and gains salvation depends on whether that individual “cooperated” with God’s grace. By contrast, Calvin insisted that God’s grace was irresistible, and that the necessary voluntary cooperation of the human will was itself a gift of (and consequence of) God’s grace for which humans could take no credit. Calvin considered the question of why God provided this irresistible grace to some, and not others, to be a great, inscrutable mystery.<sup>25</sup> Nonetheless, he taught that it was possible for the individual believer to gain the assurance that she was one of the “elect;” this knowledge was to be gained by looking to Christ and His promises, rather than by vainly and improperly seeking access to the inner counsels of God.<sup>26</sup> Calvinist spirituality thus developed a rich tradition of searching for signs, within one’s heart and actions, of the working of God’s grace.

Calvin’s doctrine of predestination thus embodied, within a profound tension, elements of extreme passivity and extreme activism. On the one hand, the Christian must wait upon God to save him or her; the individual was entirely impotent to do anything but recognize his or her impotence, and even that realization was a gift from God. Calvinists could become highly introspective as they searched their hearts for signs of sincere and true repentance, sorrow for sin, and love and awe of God. On the other hand, true repentance and love of God were expected to produce good works; those good works included, moreover, participation in Calvin’s broad program of glorifying God by bringing the creation and all

---

conomic disputes between North and South that shaped the form of the political and legal debates; indeed, it seems likely that the participants would not have sustained the extreme costs of the conflict, and continued the war, without the intensifying motivations of religion.

<sup>24</sup> See JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 920-87 (John T. McNeill ed., 1960) (1559).

<sup>25</sup> See *id.* at 951-53.

<sup>26</sup> See *id.* at 964-74.

of human society under the reign of God. Thus, the elect were expected to be religious activists.

The doctrine of predestination is apparently a subset of Calvin's broader doctrine of providence.<sup>27</sup> Calvinists believe that the entire course of history, down to the minutest detail, was decreed by God before the creation of the world. The doctrine of providence simultaneously views God as sustaining and ruling over, moment by moment, with personal care, all of His creation; the doctrine thus should not, despite its emphasis on God's decrees, be confused with a deistic emphasis on God's rule through the establishment at creation of impersonal laws.<sup>28</sup> At first blush, such a teaching would seem to produce a brooding, inactive fatalism. Why do anything if all is preordained and under God's control? Calvin, however, rejected such fatalism in favor of an activist response to God's promise that He will establish His kingdom largely through the means of human instrumentality. In Calvin's view, the Christian is not only on the winning side, but also has been preordained by God to be a primary instrument, or means, of that victory. An individual told that a slot machine in Reno has been fixed to secure vast winnings for him or her would likely catch the first available plane to Reno; in somewhat analogous fashion, Calvin's doctrine of providence encouraged Christians to actively seize the moment for God.<sup>29</sup> Thus, Calvin's followers, including Knox, the English Puritans, and many Americans at the time of the revolution, became armed revolutionaries, who were willing to risk all in the hope that they were striking a (providential) blow for the reign of God.

Prominent among the religious defenders of slavery were two well-respected Southern Presbyterian theologians, Robert L.

---

<sup>27</sup> Calvin's Institutes treats the subject of providence in Book One, *see id.* at 197-237, and the subject of predestination in Book Three, subsequent to the discussion of salvation, *see id.* at 920-932. This separation of the two doctrines occurs because of the broader organization into four "books," the first of which concerns the knowledge of God the Creator. Predestination pertains to redemption, and the manner in which "we receive the grace of Christ," therefore is taken up much later in the Institutes. Nonetheless, the two doctrines are clearly closely related.

<sup>28</sup> *See, e.g.,* THE WESTMINSTER CONFESSION OF FAITH ch. III & V (1646).

<sup>29</sup> The comparison is intended to awaken the sleepy reader. Calvinists obviously consider a motivation to obtain gambling winnings and a motivation to bring glory to God as inherently dissimilar. The comparison underscores the simple principle that a belief that a certain event is foreordained can lead to an active rather than a passive response. The comparison is also apt in that Calvinism taught that God generally uses "secondary causes" or means to accomplish his purposes; in practice, this means that we must do something, at least if we hope to be the means by which God accomplishes His purposes.

Dabney and James Henley Thornwell. The doctrines of predestination and providence, in their hands, became religious rationale for a hierarchal society. God, in His providence, had created human beings suited to different places in society, and His Bible described the various duties attendant (for example) to master and slave. Therefore, providence and predestination demanded a passive acceptance of one's God-given place in the world. Thornwell drafted the following defense of slavery to justify the Southern Presbyterian Church's secession from the parent church, and it was adopted by the first General Assembly of the Presbyterian Church in the Confederate States of America in late 1861:

[T]he law of love is simply the inculcation of universal equity. It implies nothing as to the existence of various ranks and gradations in society. The interpretation which makes it repudiate slavery would make it equally repudiate all social, civil, and political inequalities. Its meaning is not that we should conform ourselves to the arbitrary expectations of others but that we should render unto them precisely the same measure which, if we were in their circumstance, it would be reasonable and just in us to demand at their hands. It condemns slavery, therefore, only upon the supposition that slavery is a sinful relation – that is, he who extracts the prohibition of slavery from the Golden Rule begs the very point in dispute.

....

We feel that the souls of our slaves are a solemn trust, and we shall strive to present them faultless and complete before the presence of God.

Indeed, as we contemplate their condition in the Southern states, and contrast it with that of their fathers before them and that of their brethren in the present day in their native land, we cannot but accept it as a gracious providence that they have been brought in such numbers to our shores and redeemed from the bondage of barbarism and sin. Slavery to them has certainly been overruled for the greatest good. It has been a link in the wondrous chain of providence, through which many sons and daughters have been made heirs of the heavenly inheritance. The providential result is, of course, no justification if the thing is intrinsically wrong; but it is certainly a matter of devout thanksgiving, and no obscure intimation of the will and purpose of God and of the consequent duty of the church. We cannot forbear to say, however, that the general operation of the system is kindly and benevolent; it is a real and effective discipline, and, without it, we are profoundly persuaded that the African race in the midst of us can never be elevated in the scale of being. As long as that race, in its comparative degradation, coexists, side by side with the white, bondage is its normal condition.

As to the endless declamations about human rights, we have only to say that human rights are not a fixed but a fluctuating quantity. Their sum is not the same in any two nations on the globe. The rights of Englishmen are one thing, the rights of Frenchmen, another. There is a minimum without which a man cannot be responsible; there is a maximum which expresses the highest degree of civilization and of Christian culture. The education of the species consists in its ascent along this line. As you go up, the number of rights increases, but the number of individuals who possess them diminishes. As you come down the line, rights are diminished, but the individuals are multiplied.

....

Now, when it is said that slavery is inconsistent with human rights, we crave to understand what point in this line is the slave conceived to occupy. There are, no doubt, many rights which belong to other men – to Englishmen, to Frenchmen, to his master, for example – which are denied to him. But is he fit to possess them? Has God qualified him to meet the responsibilities which their possession necessarily implies? His place in the scale is determined by his competency to fulfill its duties. There are other rights which he certainly possesses, without which he could neither be human nor accountable. Before slavery can be charged with doing him injustice, it must be shown that the minimum which falls to his lot at the bottom of the line is out of proportion to his capacity and culture – a thing which can never be done by abstract speculation.

The truth is, the education of the human race for liberty and virtue is a vast providential scheme, and God assigns to every man, by a wise and holy degree, the precise place he is to occupy in the great moral school of humanity. The scholars are distributed into classes according to their competency and progress. For God is in history.<sup>30</sup>

Thus, Southern Presbyterians saw individual humans providentially assigned to racial and national classes of differing levels in the “scale of being,” just as God providentially elected some to eternal life, and others to eternal damnation. Yet, paradoxically, those on the lower “scale of being” could attain the “greatest good” of eternal life, whereas some higher up whites presumably would end up damned. Moreover, the “Africans” who attained salvation did so by embracing, rather than attempting to rise above, their divinely-

---

<sup>30</sup> JAMES HENRY THORNWELL, 1 MINUTES OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE CONFEDERATE STATES OF AMERICA 55-59 (1861), *reprinted in* 9 THE ANNALS OF AMERICA 298-303 (1976), *available at* <http://www.teachingamericanhistory.org/library/index.asp?document=1124>.

sanctioned place at the bottom of the human “scale of being.” In this sense, Southern Presbyterianism cut the traditional Calvinistic cord between salvation and personal improvement.

By contrast, at least some Northern Calvinists took a very different social message from the related doctrines of predestination and providence. For this purpose we can examine the views of the Rev. John Walker. Rev. Walker was never a national anti-slavery leader, although as Vice-President of the Ohio Abolitionist Society, he was quite active within his home state. He is, however, of particular interest because of his apparent influence on John Bingham, the primary author of Section One of the Fourteenth Amendment. Rev. Walker’s influence on Bingham is unsurprising, given their remarkably similar religious and cultural backgrounds. Both Bingham’s and Walker’s parents and grandparents lived in Western Pennsylvania and were members of a small, Scottish-Presbyterian denomination known as the “Associate Presbyterian Church.” This denomination represented a conservative splinter group from the Church of Scotland, and thus, they were called “Seceders;” they claimed to carry on the heritage of the older Scottish Covenanter tradition. Not surprisingly, both Bingham and Walker had ancestors who had been active in the religious controversies of Scotland. Rev. Walker eventually embraced this tradition. He was ordained and served the rest of his life within the intensely conservative Associate Presbyterian Church. Rev. Walker’s first pastorate was in the Associate Presbyterian Church in Mercer, Pennsylvania. Bingham’s grandparents and parents apparently were members of this specific congregation, and Bingham’s father served the congregation at some point as a ruling elder. Rev. Walker stayed at this pastorate for four years, and he apparently left about a year before John Bingham’s birth.<sup>31</sup>

Rev. Walker then moved to Eastern Ohio, where he pastored four churches and co-founded Franklin College. When Bingham’s mother died, he was sent to live with his uncle in Cadiz, Ohio, a village containing one of Rev. Walker’s four churches and situated only about seven miles from Franklin College. Bingham later attended Franklin College, which apparently proved to be a forma-

---

<sup>31</sup> See ERVING E. BEAUREGARD, *BINGHAM OF THE HILLS* 1-3 (1989) [hereinafter *BEAUREGARD, BINGHAM OF THE HILLS*]; ERVING E. BEAUREGARD, *REVEREND JOHN WALKER* 1-14 (1990) [hereinafter *BEAUREGARD, REVEREND JOHN WALKER*]; BASIL G. MCBEE & REID W. STEWART, *HISTORY OF THE ASSOCIATE PRESBYTERIAN CHURCH OF NORTH AMERICA* 62 (1983); Richard L. Aynes, *The Antislavery and Abolitionist Background of John A. Bingham*, 37 *CATH. U. L. REV.* 881, 912 n.241 (1988) (quoting CHARLES A. HANNA, *HISTORICAL COLLECTIONS OF HARRISON COUNTY IN THE STATE OF OHIO* 133 (1900)).

tive experience. Rev. Walker was largely responsible for creating the fierce anti-slavery environment, which Bingham found at Franklin College; in addition, Walker arranged for Franklin College to admit Titus Basfield, who was an ex-slave and Bingham's classmate. In 1837, Basfield was the first African-American to graduate from an Ohio college. At this point in time, it was extremely rare for a white man to have the experience of attending college with a black man; the experience would have been intensified by the small size of each class (approximately eleven students). In addition, Bingham was a student in Rev. Walker's world history class, which included discussions of significant topics such as slavery, John Locke, and the Due Process Clause of the Fifth Amendment.<sup>32</sup>

Rev. Walker linked his abolitionism to his Calvinistic predestinarian beliefs by noting that some among the slaves were chosen by God for salvation, and as such, the slaves had a duty to express their salvation by good works. Yet, according to Rev. Walker, under slavery, the slaves had little opportunity to do so: they were too overwhelmed by their labors and too limited in their liberties. Rev. Walker thus seized upon the democratic implications of a predestinarian position: God, not being a "respector of persons," chose without regard to social class or race. These "elect" possessed a God-given capacity and duty to express their salvation in good works, and thus society must give them the liberty necessary to improve themselves and their society. The saved slave, in other words, was, in God's eyes, "higher" than his sinning, and likely reprobate (damned) Master.<sup>33</sup>

Indeed, as early as 1823 Walker expressed views coinciding with those of the slaves, when he identified their plight with that of the ancient enslaved Israelites. Not only were the Africans like the Israelites of old, but the stubborn slave-holding whites of the South were like the ancient (pagan) Egyptians, whom God had judged. God in His providence would presumably, at the right time, judge (and punish) the South, which was condemned not only as a stub-

---

<sup>32</sup> See BEAUREGARD, BINGHAM OF THE HILLS, *supra* note 31, at 3-10, 28; BEAUREGARD, REVEREND JOHN WALKER, *supra* note 31, at 1, 70-72, 87-106; Aynes, *supra* note 31, at 906-14; Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589, 595-97 (2003).

<sup>33</sup> See BEAUREGARD, REVEREND JOHN WALKER, *supra* note 31, at 87-89 (citing Rev. John Walker, *God's Will Must Prevail: A Sermon Delivered at Unity Congregation, 15th December, 1822* (Mount Pleasant, OH: B. Wright and B. Bates 1823); Rev. John Walker, *Babylon Must Go: A Sermon Delivered at Unity Congregation, 30th March, 1823* (Mount Pleasant, OH: B. Wright and B. Bates 1823)).

born, slaveholding, God-defying Egypt, but also as a “licentious Babylon” and akin to a New World Sodom and Gomorrah.<sup>34</sup>

Implicit in Walker’s predestinarianism was a mild individualism. Thornwell had presumed that individuals occupied places in the “scale of being” by virtue of their race and nationality. Walker by contrast concentrated on the individuality of God’s election, and assumed that morality, hard work, and achievement would thereby follow. Thus, while Thornwell expected position and achievement to follow racial, national, and class groupings, Walker made the opposite assumption that God’s elect individuals, chosen out of every race, nationality, and group, would by work and morality find achievement and position. Rev. Walker’s oversight of the admission and college career of the ex-slave Titus Basfield illustrates in a concrete way Walker’s belief that a black man elected for salvation was capable of great achievement. Basfield did not disappoint this confidence, as he went on from Franklin College to seminary and was ordained, like Walker himself, as a pastor in the Associate Presbyterian Church.<sup>35</sup>

Rev. Walker himself was, not surprisingly, an example of the Calvinistic ethic at work. Walker somehow managed to simultaneously pastor several churches, co-found a college (and with it a village), serve the college variously as chairman and member of the board of trustees, vice-president, and professor, practice medicine, work actively on behalf of abolitionism, serve as a “conductor” on the underground railroad, and be (apparently) a loving father and husband to a large family.<sup>36</sup> Walker lived most of his adult life in the still-young state of Ohio, at the center of the developing, dynamic West. Religiously, and as a matter of life experience, the notion of God assigning his elect a fixed station in life for them to passively accept was entirely foreign. Rev. Walker was exceptional in his ability to transcend, to a significant degree, the overwhelming racism of his time which permeated both North and South and act upon the belief that a black man could not only be chosen by God for salvation, but could also express that salvation with the same level of works, morality, and excellence as the white man. Politically, this meant that Walker favored not only immediate, un-

---

<sup>34</sup> BEAUREGARD, REVEREND JOHN WALKER, *supra* note 31, at 88-89 (citing Rev. John Walker, *Babylon Must Go: A Sermon Delivered at Unity Congregation, 30th March, 1823* (Mount Pleasant, OH: B. Wright and B. Bates 1823)).

<sup>35</sup> *Id.* at 70.

<sup>36</sup> See generally BEAUREGARD, REVEREND JOHN WALKER, *supra* note 31.



compensated abolition, but also “integration of the blacks, and full American citizenship for all races.”<sup>37</sup>

From the Southern evangelical perspective, abolitionists like Rev. Walker were extremists reading heretical, philosophical views into the scriptures. Thus, one commentator on Southern Calvinists has noted their view that anti-slavery ideas were

derived from heretical notions of inalienable natural rights and of people’s rights to change society at will. [Southern Calvinists] portrayed the slavery controversy as the crux of a worldwide struggle between libertarian radicalism and hierarchical social traditions. Since their side was God’s, they reasoned, the world would eventually discard its errors, return to traditionalism, and recognize slavery as a legitimate system. The heresies’ downfall . . . would usher in the millennium. It would at least eliminate the source of antislavery criticism – the chief obstacle to slavery’s perpetuity.<sup>38</sup>

Southern Presbyterians were generally optimistic “postmillennialists” during the first two-thirds of the nineteenth century.<sup>39</sup> Christianity was viewed as a social force gradually improving the social order.<sup>40</sup> Christianity was expected to advance gradually over the next one-hundred and fifty years until it ushered in “the thousand happy years which would prepare humanity for Christ’s subsequent return.”<sup>41</sup> During this millennial period preceding Christ’s return, “Christianity would become universal, and piety and morality would intensify. War, vices, and social evils would pass away, and Christian influence would reform governments and social institutions.”<sup>42</sup>

The attachment of Southern Calvinists and Evangelicals to slavery is dramatically illustrated by their pronouncements that slavery probably would continue throughout this happy millennial period.<sup>43</sup> Slavery was no longer viewed as a temporary evil, but rather became the best means, short of the return of Christ and destruction of the sinful nature, of ordering labor and society.<sup>44</sup> Slavery would be improved, but in this improved form would spread throughout the world.<sup>45</sup> Indeed, Southerners speculated that a free labor system necessarily would fail and tend toward so-

<sup>37</sup> *Id.* at 98.

<sup>38</sup> Jack P. Maddex, Jr., *Proslavery Millennialism: Social Eschatology in Antebellum Southern Calvinism*, 31 AM. Q. 46, 51 (1979).

<sup>39</sup> *Id.* at 48.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 49-50 (noting that some believed slavery to be perpetual or indefinite).

<sup>44</sup> *Id.* at 52-53.

<sup>45</sup> *Id.* at 53-54.

cial disintegration; all societies eventually would be forced to reinstitute some kind of “bound-labor” system.<sup>46</sup>

Thus, what men like Bingham decried as the “slaveocracy” was, from the Southern Calvinist perspective, the bastion of Christian civilization battling for God against a nation and world gone mad with heretical notions of natural right and social equality. Many Northern evangelicals, by contrast, associated the progress of Christian civilization and the march toward the millennial kingdom, with the march of liberty; from their perspective Southern attempts to involve the federal government in the protection of slavery and to spread slavery to the territories, represented a diabolical conspiracy to reverse the progress of the kingdom of God and undo the American revolution. Thus, the religious nationalism and millennial fever which had served to unify the colonies and the young nation divided into contradictory and conflicting religious visions. The War that followed was not merely a civil and political war: it was a war of religion, a war motivated by the collision of two contradictory visions of God’s will for society and history.

### III. PRAY TO THE SAME GOD: DIFFERING SOUTHERN AND NORTHERN CONCEPTIONS OF GOD

The conflict between Northern and Southern coreligionists was not merely about God’s ordering of society; underlying that dispute, ultimately, was a dispute about how human beings were intended to worship and relate to the living God. For evangelicals, there was not a ready separation between formal worship services and life, given the New Testament command to give oneself to God as a living sacrifice.<sup>47</sup> The human relationship to God was further entangled in relations with other mortals by the scriptural insistence that love of God be expressed by love of “neighbor.”<sup>48</sup> Thus, questions of the social order, and of daily life, were not easily disengaged from questions of right worship of, and relationship to, God.

---

<sup>46</sup> See *id.* at 48-59; Fox-Genovese & Genovese, *The Divine Sanction of Social Order*, *supra* note 17, at 218-19, 224-25; Fox-Genovese & Genovese, *The Religious Ideals of Southern Slave Society*, *supra* note 17, at 6-7.

<sup>47</sup> See *Romans* 12:1-2.

<sup>48</sup> William H. Brisbane, Speech of the Rev. Wm. H. Brisbane, Lately a Slaveholder in South Carolina; Containing an Account of the Change in His Views on the Subject of Slavery 8 (Feb. 12, 1840), available at <http://dlxs.library.cornell.edu/cgi/t/text/pageviewer-idx?c=mayantislavery;idno=07838007;view=image;seq=1> (“It is because slavery is a wrong to man, that it is a sin against God: for God has said *Love thy neighbor as thyself*.”).

Calvinism further emphasizes that human beings can know God only as he reveals Himself to us; in this sense, God's essence is inscrutable to humankind, except insofar as He has chosen to reveal Himself.<sup>49</sup> Moreover, God reveals Himself not only by the scriptures, but also by His ordering of human relationships and human institutions, including the church, family, and civil government. Thus, Evangelicals to a large degree find and relate to God through the human institutions that God has established. God ordains and creates families, gives us experiences as fathers, mothers, and children, and then tells us that we are his "children;"<sup>50</sup> God ordains marriage, gives us the experience of marriage, and then explains that Christ is the "bridegroom" and the church his "bride."<sup>51</sup> Thus, although Evangelicals often emphasize the individual's direct relationship to God, historic Protestantism, as represented by Calvinism and Lutheranism, subtly reminds the individual that her relationship to God is mediated by the human categories and institutions through which God has chosen to reveal Himself.<sup>52</sup>

The Southern ideal of the plantation as an extended family ruled by a beneficent new world Abraham therefore had profound consequences for the Southern understanding of how humans relate to God. In the Old Testament story of the Patriarch, God makes His covenant with Abraham;<sup>53</sup> it is easy to perceive, therefore, Abraham's wife, children, and slaves as relating to God through their relationship with the great patriarch. Christians believe that Abraham was uniquely chosen by God to begin the covenantal process through which the great mediator, Jesus Christ, was decreed to be born; thus the scriptures declare that all peoples will

---

<sup>49</sup> See, e.g., CALVIN, *supra* note 24, at 197 (quoting *Deuteronomy* 29:29). This concern to note the lack of a direct human access to the *essence* of God is evident in Rev. Walker, who complained to another pastor, whom he had engaged in theological debate: "I am astonished you believe that every man partakes of the Divine Essence. Should your sentiment in this be accurate. Then God and man are essentially the same. . . . If we can comprehend the moral perfections of Deity, we can easily give him all merited praise – and if we are all essentially the same with the Divine Being, we can not only make praise, but deserve praise." Letters from Rev. John Walker to Rev. T.D. Baird 55 (Printed by J.W. White Cadiz 1817).

<sup>50</sup> See, e.g., 1 *John* 3:1.

<sup>51</sup> See *Revelation* 19:7; *Mark* 2:18-20; *Ephesians* 5:25-33.

<sup>52</sup> See, e.g., CALVIN, *supra* note 24, at 1009-1525 (Calvin's discussion in Book IV of church and civil government as "external means or aids by which God invites us into the society of Christ and holds us therein."). Lutheran doctrine similarly speaks of the "orders of creation" and of serving God through those orders. See, e.g., PHILIP MELANCHTHON, THE AUGSBURG CONFESSION art. XVI (1530).

<sup>53</sup> See *Genesis* 12:1-3; 15:1-18.

be blessed through Abraham.<sup>54</sup> When the planter envisioned himself as Abraham he subtly transformed the Biblical concept of “office.” Evangelicals generally have viewed the holder of a scriptural “office,” such as parent, elder, or civil ruler, as receiving their authority from God;<sup>55</sup> Southern evangelicals transmuted this concept of office by implicitly viewing those with *authority from God* as *standing in the place of God*, and thus as mediating, in a sense, between God and those under their authority. This is not to say, of course, that Abraham, or a planter, were ever viewed as *God*, but rather that the planter’s wife, children, and slaves in large part were expected to express their loyalty to and worship of God through a dutiful subservience to God’s representative. Some of the awe and reverence associated with God became associated with God’s representative. Thus, for example, Thomas Cobb, a legal commentator, wrote in 1858:

[T]he slave is incorporated into and becomes a part of the family. . . . Southern slavery is a patriarchal, social system. The master is the head of his family. Next to wife and children, he cares for his slaves. He avenges their injuries, protects their persons, provides for their wants, and guides their labors. In return, he is revered and held as protector and master.<sup>56</sup>

Eighteenth century Evangelicals would understand God to be the avenger, protector, and provider of His people, who guides their labors in this world, and demands, in response, the worship of His people, who are to call Him Lord, or Master. Southern evangelicals reading Cobb’s words, or those like them, would have understood that the role assigned to the master in the lives of his slaves corresponded with God’s role in the lives of His people. The evangelical Southerner would of course deny that the master takes the place of God, or demands actual worship; nonetheless the concept of “master” created a practice of encouraging those hierarchically placed below the planter to relate to God *through* their reverence for and obedience to their earthly “master.” Indeed, Southerners took the analogy so far as to envision the wife and children as slaves, as expressed in this Southern “sociology” from the 1850’s:

[Abraham’s] wives and his children, his men servants and his maid servants, his camels and his cattle, were all equally his

---

<sup>54</sup> *Genesis* 12:3.

<sup>55</sup> See, e.g., *Romans* 13:1-7.

<sup>56</sup> Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187, 193 n.21 (1987) (quoting THOMAS COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA ccxvii-ccxviii (1858)).

property. . . . Who would not desire to have been a slave of that old Patriarch, stern and despotic as he was? . . . Pride, affection, self-interest, moved Abraham to protect, love and take care of his slaves. The same motives operate on all masters, and secure comfort, competency and protection to the slave. A man's wife and children are his slaves, and do they not enjoy, in common with himself, his property?<sup>57</sup>

Thus, the image of the slave as a part of the master's family could be taken so far as to permit the master's wife and children to, in turn, be numbered among the master's slaves. The concept of a beneficent slavery, and a beneficent husbandly and fatherly authority, became closely associated.

This is not to say that in practice the slaves incorporated this view into their own religion, although a minority may have done so. The point here is that the Southern evangelical defense of slavery became so encompassing as to transform its concept not only of the family, but also of God, or at least of the individual's relationship to God. For the planter class, at least, it perhaps is not stretching the point to say that they began to envision God in their own image. Given their theological and social assumptions, moreover, this may have possessed a compelling logic. If God chose to represent Himself to His people through the beneficent rule of patriarchal masters, and if God can best be known through His self-revelation in scripture and history, then it was logical to view the planter's rule of his slaves and family as a proper analogy for, and model of, God's relationship to His people.

Rev. Walker expressed the Calvinistic opposition to American slavery when he declared, as early as 1822, that slaveholders were committing idolatry. Walker's biographer describes his views as follows:

The slave-holders control every aspect of their slaves' lives. The slaves are veritably puppets, playthings of their masters. The latter, indeed, had set themselves up as deities. They were defying the Lord's edict: "Thou shalt not have strange gods before Me."<sup>58</sup>

Walker's concern that the planters set themselves up as gods was almost literally realized among the "many Southern masters [who] whip[p]ed slaves for praying to God for this or that and . . . demand[ed] that they address all grievances and wishes to their

---

<sup>57</sup> Burnham, *supra* note 56, at 195 n.27 (quoting GEORGE FITZHUGH, *SOCIOLOGY FOR THE SOUTH* 297 (1854)).

<sup>58</sup> BEAUREGARD, REVEREND JOHN WALKER, *supra* note 31, at 87.

earthly masters.”<sup>59</sup> The alternative concern that a false “planter-like” god replaced the God of the scripture was apparently realized in those slaves who “could think of no better way to refer to God than as ‘de Big Massa.’”<sup>60</sup> It seems that even the more pious of the plantation class, who earnestly desired the Christian salvation of their slaves, believed it their duty to play a role so encompassing in their slaves’ lives as to be nearly god-like. Thus, one Southerner, reflecting on the demise of slavery, noted: “The great load of accountability was lifted, and we could save our souls alive. God would not require the souls of the Negros at our hands. Everyone would give account of himself to God . . . .”<sup>61</sup> Genovese noted that this statement was not an acknowledgment of guilt, but rather a reflection of the “theologically doubtful” proposition that the “Christian God could ever have demanded that one person assume responsibility for another’s soul.”<sup>62</sup>

The more responsible masters thus experienced and described their role as a great “duty and burden;” they persuaded themselves that it would be cruel to set free a people who required their benevolent care.<sup>63</sup> Judge Thomas Ruffin of the North Carolina Supreme Court regretfully admitted that in practice, this meant that the slave must have “no will of his own” and that he “surrenders his will in implicit obedience to that of another.”<sup>64</sup> Judge Ruffin believed that “[s]uch obedience is the consequence only of uncontrolled authority over the body;” therefore the law must permit the master to forcibly punish his slaves.<sup>65</sup> The belief that blacks were naturally suited to be the slaves of whites was enforced by the extensive use of the whip and other disciplinary techniques designed to bend the slave’s will to that of his master.

Calvinists objected to Armenian doctrines of the will as unconstrained by the sinful nature, and yet still taught that human beings possessed a will by which they chose between good and evil. Calvinists like Walker taught that God refuses to reduce human beings to puppets or force them against their will to do either good or evil; thus, each person remained accountable for their freely chosen acts. Walker believed that Southern slaveholders, by contrast, sought to reduce slaves to puppets and extensions of their own will.

---

<sup>59</sup> EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 165 (1976).

<sup>60</sup> *Id.* at 167.

<sup>61</sup> *Id.* at 84-85.

<sup>62</sup> *Id.* at 85.

<sup>63</sup> *See id.*

<sup>64</sup> *State v. Mann*, 13 N.C. (1 Dev.) 263, 266 (1829).

<sup>65</sup> *Id.*

The master was not merely a false god because he attempted to take the place of God in the lives of the slaves; he was also a false god because his pretensions to rule another reasonable being went even beyond the limits the Creator of humankind had set for Himself.<sup>66</sup>

#### IV. APPLICATION OF THE RELIGIOUS THESIS TO QUESTIONS OF CONSTITUTIONAL LAW AND ORIGINAL INTENT

The religious conflicts concerning slavery were apparently well-known to the legislators who debated the Civil War Amendments, as their religious language was, for the time, common currency, known even to those with little personal piety.<sup>67</sup> In fact, much of the political, military, and popular rhetoric of the time was explicitly religious, including the Battle Hymn of the Republic, the South Carolina cry that “resistance to Lincoln is obedience to God,” and President Lincoln’s use of religious speculations and Biblical quotations in his Second Inaugural Address. Other apparently less religious language was actually rooted in, and echoed, the religious arguments. A good example is Lincoln’s famous aphorism: “As I would not be a slave, so I would not be a master. This expresses my idea of democracy, whatever differs from this, to the extent of the difference, is no democracy.”<sup>68</sup> The first part of the aphorism is simply a pithy rewrite of one of the most used religious anti-slavery arguments; that slavery violates the golden rule and Christians are called to “love thy neighbor as thyself.”<sup>69</sup> These commands were not merely ethical aphorisms: they were commands of the savior recorded in the sacred scriptures. Thus, the religious proslavery writers felt obligated to respond in religious terms to invocation of these commands, as illustrated by the response of the Southern Presbyterians quoted above. Lincoln’s aphorism effectively built upon the foundation of one of the most effective religious anti-slavery arguments and went a step further by implying that the South, to the degree it embraced slavery, violated Jesus’ commands and democratic ideals. The rhetoric of the time, in other words, frequently is best read as part of a broader debate over whether the Southern Confederacy or the Union was the

---

<sup>66</sup> See BEAUREGARD, REVEREND JOHN WALKER, *supra* note 31, at 87-89.

<sup>67</sup> See U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

<sup>68</sup> QuoteDB.com, Lincoln Quote, <http://www.quotedb.com/quotes/4083> (last visited Jan. 8, 2009).

<sup>69</sup> See *Matthew* 22:35-40.

proper heir of the early claims of America to be a Christian nation.<sup>70</sup>

It is this early nationalistic religion which forms the background for the political rhetoric which so often combines religious and political themes. Some of this rhetoric closely tracks the theological debates on slavery. For example, during the Senate debates on the Thirteenth Amendment, Senator Harlan and Senator Salsbury entered into a debate regarding the Old Testament (Mosaic) law of slavery.<sup>71</sup> Senator Harlan used the Mosaic Code to argue that a central tenet of American slavery law, that the child of a slave is a slave, violated the Mosaic Code; Senator Salsbury responded with the typical Southern argument that slavery was endorsed in the Mosaic Code.<sup>72</sup> After airing both sides, Senator Hale of New Hampshire promised not to dwell on “the theological branch of this discussion,”<sup>73</sup> but he was at least as religiously rhetorical when he posited:

Are you not glad that this nation, blind and deaf so long to the teachings of history and the commands of God, has at length aroused itself from its lethargy, listened to the voices which heaven and earth, God and nature, are proclaiming, and is preparing to put itself in alliance with the Power which cannot be resisted and whose fiat will most surely be executed.

. . . [I]f we cannot put away from us the great sin and the great crime which has separated us not only from the sympathies of the Christian world, but from the blessings of the God of the Christian world, then indeed is our cause hopeless and our struggle desperate.

But sir, whenever unconditionally and without equivocation we come up to the mark and place ourselves on the high standard of Christian duty and resolve that despite of all extraneous circumstances, of all doubtful contingencies, of all questions of expediency, we will place ourselves firmly upon the everlasting rock of duty and our action shall be in accordance with our conscientious convictions, then, and not till then, will that pillar of cloud by day and fire by night which led the chosen people

---

<sup>70</sup> Another example of the common currency of concepts and language across political and theological speech is the parallel between Justice Taney’s phrase, “scale of created beings,” in *Dred Scott v. Sandford*, 60 U.S. (1 How.) 393, 409 (1856), and the phrase “scale of being,” in the statement of the Southern Presbyterian Church quoted above. THORNWELL, *supra* note 30. Thus, churches and politicians alike used similar language in describing their view of the inferiority of blacks.

<sup>71</sup> See CONG. GLOBE, 38th Cong., 1st Sess. 1437-42 (1864).

<sup>72</sup> See *id.*

<sup>73</sup> *Id.* at 1443.



from the house of bondage to the land of promise be ours. Then we shall indeed and in truth be worthy of our genealogy and our history. Then the sublime teachings of the Pilgrim fathers who left everything behind them that they might come hither and plant in this wilderness a temple of liberty and throw wide open its doors for the oppressed of earth to enter and be at rest – then will all that be realized. Then . . . we can stand in this nineteenth century, soldiers of the new civilization and of an old Christianity, going forth to battle . . . with the best wishes and hopes of the good on earth and of the God in heaven . . .

. . . .

When the Saviour of man with the sympathy and pathos with which He loved the chief city of His native land wept over Jerusalem His lamentation was, "If thou hadst known this thy day the things that belong to thy peace!" . . . [B]y a vigorous prosecution of this measure we shall evidence to heaven and earth that we do understand and mean to perform the things which belong to our nation's peace. When we have done that, and not till then, can we look forward with any confident hope to the termination of this war.<sup>74</sup>

Senator Hale's speech is not merely a rhetorical religious flourish or the chance use of religious imagery for its familiarity and power. Rather, Senator Hale's allusions to the Israelites' journey to the Promised Land and Jesus' tears over Jerusalem invokes the nationalistic religion that perceived America as a kind of new Israel. Other Senators argued that the Thirteenth Amendment would be destructive to the war effort; in response, Senator Hale relied on the doctrine of providence, and argued that success in the war depended on pleasing God, regardless of expediency, and thus, the Amendment should be adopted.<sup>75</sup> Senator Hale followed an old tradition in colonial and revolutionary America of calling the people to repentance as a means of winning the war; however, Senator Hale did not demand a day of fasting and prayer, but repentant acts in the form of the legal abolition of slavery.<sup>76</sup>

The religious imagery and concepts in the political rhetoric of the time implicate a core interpretative debate regarding the meaning of the Fourteenth Amendment: does the Amendment represent a significantly new and different philosophy of law and government than that of the original Constitution and Bill of Rights? Is the Fourteenth Amendment primarily individualistic and founded on Enlightenment views of natural rights, as opposed to

---

<sup>74</sup> *Id.* at 1443-44.

<sup>75</sup> *See id.* at 1437-42.

<sup>76</sup> *See id.*

allegedly more communitarian, republican eighteenth century provisions? These issues are relevant not only to the incorporation debate, but also to the controversial issues relating to unenumerated rights under the doctrine of substantive due process.<sup>77</sup>

The theological debates in an important sense paralleled the legal debates on this point. Both the Confederate and Unionist sides claimed, religiously and politically, to be primarily conservative Restorationists. Proslavery Christians claimed that in sacred scripture, God established and regulated the master-slave relationship during the various dispensations (Noahic, Mosaic, and New Testament) of human history; they claimed to defend this divinely-sanctioned social order from heretical philosophical innovations emphasizing natural rights. Similarly, Southern patriots claimed to defend an originally republican, states-rights Constitution from a usurping federal government; they claimed, as in Chief Justice Taney's opinion in *Dred Scott v. Sandford*, that the anti-slavery proponents misread the Declaration of Independence to embrace the equality of all humankind, when the framers intended to refer only to whites.<sup>78</sup> Thus, the Confederate Constitution was, from the

---

<sup>77</sup> See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); cf. Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347 (1995). Of course, the intellectual origins of the eighteenth-century Constitution and Bill of Rights also remain controversial. My comments on these constitutional issues should be viewed as tentative, as the task of integrating my thesis on the religious conflict of the time into the constitutional issues is difficult, and this entire project remains at its formative stages. Moreover, I obviously do not adequately treat here the question of whether a structural change in the enforcement context of a right in some way fundamentally alters the nature of that right.

Nonetheless, my initial thesis is that the history of the Fourteenth Amendment would support, as a matter of originalist methodology, a doctrine of family privacy, but it would be incompatible with a constitutional doctrine of privacy as individual (or sexual) autonomy. See David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQ. L. REV. 975 (1992). In addition, I am also persuaded that an originalist methodology would support, at a minimum, some kind of "incorporation" of the free exercise and free speech clauses. More broadly, it seems correct that Bingham and his allies intended something like "incorporation" of the Bill of Rights.

The fundamental issue, then, is largely one of whether the post-cultural revolution conception of rights, which rely on an extreme view of individual autonomy, can be fairly read into the intent of the nineteenth-century framers. I am not sure how far Professor Amar wants to go in this direction, but it seems to me a stretch to read the intensely individualistic, amoral, secular conception of rights that dominates contemporary constitutional law and jurisprudence back into the more republican, Victorian, moralistic, and religious nineteenth century. See Amar, *supra*.

<sup>78</sup> See *Dred Scott v. Sandford*, 60 U.S. 393, 403-12 (1857).

Southern perspective, true to the principles of the eighteenth-century Federal Constitution, differing primarily in its more explicit embrace of slavery and states' rights. From the Southern point of view, the Confederacy was restoring, within her borders, the framers' original vision and rescuing that vision from the distortions and usurpations of the North.

The anti-slavery and Unionist North also claimed a Restorationist mantle. Garrison repudiated the Constitution as a proslavery compact; he had similarly been willing to innovate religiously and, where necessary, depart from the scriptures. Republicans such as Bingham and Chase, however, rejected a Garrisonian revolutionary approach. They interpreted the scriptures as incompatible with slavery, and especially the existing system of Southern slavery. They interpreted the Constitution, in its deepest principles, as anti-slavery and as intended to place slavery on a course of extinction. To make these claims credible, anti-slavery advocates had to make a more subtle Restorationist argument. History was given a progressive reading; God may have permitted slavery, due to the hardness of the human heart, but he had also permitted polygamy and other evils. The principles of the New Testament, as progressively realized in history, became normative, based on the assumption that the nascent church could not be expected to overcome the legal relations established in the pagan world. Similarly, anti-slavery advocates acknowledged that practically, the framers of the Constitution could not have achieved an abolition of slavery in the original Constitution. Instead, the framers referred to slavery in euphemistic language as a part of a broader program of placing liberty on a progressive path. The pre-war Republican program of confining slavery to the existing southern states and eliminating all federal support for and involvement in slavery was seen as consistent with the framer's broad anti-slavery intent. Lincoln's pre-war view that the federal government lacked authority to interfere with slavery within the South placed him, he believed, in line with the gradualist, progressive strategy of the framers.

The Fugitive Slave Act of 1850,<sup>79</sup> the Kansas-Nebraska Act of 1854,<sup>80</sup> and the *Dred Scott* decision, had, from the Republican perspective, overturned the plan of the framers. Slavery, and the anti-libertarian principles it contained, had come to dominate the federal government and threatened, according to Lincoln, to eliminate even the right of a state to exclude slavery. The South was succeeding in setting the nation on a vastly different course than

<sup>79</sup> Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

<sup>80</sup> Kansas-Nebraska Act of 1854, ch. 59, 10 Stat. 277 (1854).

that intended by the framers, and the principles of the Declaration of Independence, and of the original Constitution, were threatened with extinction. The Republicans, faced with the events of the 1850s, viewed themselves not as radicals, but as Restorationists.

The Thirteenth Amendment and Section One of the Fourteenth Amendment reflect this Restorationist, non-revolutionary impulse, and linguistically both borrow heavily from existing legal documents. The language of the Thirteenth Amendment borrows from the anti-slavery provision of the Northwest Ordinance of 1787,<sup>81</sup> while Section One of the Fourteenth Amendment borrows language from the Privileges and Immunities clause of Article IV, Section 2, the “No State shall” language used repeatedly in Article I, Section 10, and the Due Process Clause of the Fifth Amendment.<sup>82</sup> Therefore, these amendments seem to focus on a restoration and extension of existing principles rather than an introduction of revolutionary innovations.

Any view of Bingham and his fellow Republicans as intending or enacting an individualistic, primarily enlightenment natural rights theory must face the religiously traditionalist, natural law, Restorationist aspects of their intent. Terms like “natural rights,” even when used by Bingham and others, retained a natural-law orientation to virtue and God. “Rights” fundamentally include a liberty to act in conformity with, rather than against, God’s law. Under these circumstances, “rights” talk and “morals” talk can merge, due in part to the dual meaning of the word “right” in the English language. Bingham explained:

. . . I am for the proposed amendment from a sense of right – that absolute, eternal verity which underlies your Constitution. The right is the law of the Republic. So it was proclaimed in your imperishable Declaration by the words, all men are created equal; they are endowed by their Creator with the rights of life and liberty: to secure these rights Governments are instituted among men, deriving their just powers from the consent of the governed; and by those other words, these States may do what free and independent States may of right (not of *wrong* but of *right*) do.<sup>83</sup>

The Restorationist agenda of Bingham and the Republicans gains credibility with the radical shift of Southern thought in the period from 1830 to 1860. With Southerners declaring openly that

---

<sup>81</sup> Northwest Ordinance of 1787, art. V, 1 Stat. 51, 53 (amended 1789).

<sup>82</sup> U.S. CONST. art. IV, § 2; U.S. CONST. art. I, § 10; U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. V.

<sup>83</sup> CONG. GLOBE, 39th Cong., 1st Sess. 429 (1866) (emphasis in original).

a system of free labor must collapse, and be replaced by some kind of worldwide slave system, lovers of freedom could plausibly fear for the future of democracy and freedom. A South Carolina minister and slaveholder, describing the process by which he was converted to the anti-slavery position, tellingly described why he gave up his efforts to rebut an anti-slavery writer:

I received a paper containing Dr. Wayland's chapter on Personal Liberty . . . [which] produced a powerful effect on my feelings, and I began to doubt the correctness of the [proslavery] views I had been entertaining. I thought, however, after reading the article a second time, I had detected its errors, and I sat down to write something in reply. After writing three pages on human rights, I found my own argument leading to such anti-republican conclusions as to startle myself. I then made a second effort at reply, but was, despite of myself, compelled to modify my views of slavery. I saw that I must either give up my republican principles, or admit that slavery in its origin was unjust, and that if freedom be a good, slavery is an evil.<sup>84</sup>

Most Southerners unfortunately chose to reconcile this tension, felt so strongly at one time by men like Jefferson, by accommodating their "republicanism" to slavery. The political philosophy that emerged, with its strangely distorted interpretation of the Declaration of Independence, repudiation of free labor as an institution, and obsession with enforcing an allegedly divinely-sanctioned racial and class hierarchy, was viewed by Republicans as a threat to democracy. The Restorationist impulse of the framers of the Fourteenth Amendment is credible in view of the extremity of the pro-slavery South.

The contrasting twentieth-century view of the Republicans as fundamentally altering the design of the original Constitution through enactment of a Constitution based on Enlightenment natural rights ironically endorses the Southern pro-slavery view and fails to account for the anti-democratic shift in Southern thought between 1791 and the middle of the nineteenth century. The *Dred Scott* decision was wrong as a matter of original intent because it erroneously transposed the intensely pro-slavery philosophy of Southerners in the 1850s into the rationale of the eighteenth-century framers. The Confederate Restorationist claim, despite its appeal to some in the twentieth century, profoundly distorts the eighteenth-century understandings of slavery and republican government.

---

<sup>84</sup> Brisbane, *supra* note 48.

A full understanding of the Union Restorationist agenda should take into account the prevalent critiques of slavery and the impact of slavery on Southern society. Theologians and politicians emphasized the failure of slavery to honor the marital, parental, and familial bonds of the slaves. The Apprenticeship provisions of the post-slavery black codes, by which the children of the freed slaves were forcibly “apprenticed” to their former masters, made parental rights a particular concern of the framers of the Fourteenth Amendment.<sup>85</sup> Both theologians and politicians emphasized the restrictions on educating slaves and free blacks; the restrictions on teaching reading were particularly scandalous in a Protestant society dedicated to the individual’s access to the Bible. Restrictions on the religious practices and meetings of slaves and free blacks, instituted in part in response to the various slave rebellions of the eighteenth century, made the free exercise of religion both a religious and political concern. The political critiques of slavery noted the restrictions on freedom of speech which stemmed, in part, from the Southern fear that anti-slavery materials would incite the slaves to violent rebellion.<sup>86</sup> Thus, anti-slavery proponents criticized the loss of freedom, even of whites, necessitated by the Southern defense of slavery.

These concerns with marital and parental rights, the free exercise of religion, and freedom of speech, were not perceived as radical innovations because they were traditionally protected under state law, common law, or were fundamental liberties enumerated in the Bill of Rights. The South’s repudiation of the common law tradition and the Bill of Rights through its defense of slavery, a system declared incompatible with common and natural law,<sup>87</sup> necessitated the federal protection of traditional common law rights. The Restorationists admittedly required new enforcement powers for the federal government and thus altered the structural context of rights, but they did not require new rights, or new philosophies of rights, in their struggle against the slaveocracy.<sup>88</sup>

---

<sup>85</sup> See, e.g., 1866 Miss. Laws page no. 82-83, available at <http://chnm.gmu.edu/courses/122/recon/code.html>.

<sup>86</sup> See Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper’s Book, the Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113 (1993) (discussing the restriction on speech regarding the slavery debate).

<sup>87</sup> See *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.) (slavery is incompatible with natural and common law and therefore can be recognized only where established by positive law).

<sup>88</sup> I realize that I do not adequately answer here the claim that a new structural and enforcement context for a right necessarily alters the right.

The anchoring of so many of the Republicans, and their constituents, in evangelical religion further makes it unlikely that they were enacting a radically individualist notion of rights. As Rev. Walker illustrated, the most theologically-conservative were sometimes the fiercest opponents of slavery. Anti-slavery theological innovators of this time also were fiercely moralistic crusaders persuaded of their calling to improve society; there was, for groups like the Garrisonians, no “right” to immorality. Most anti-slavery Americans in 1868 still rooted law broadly in morality and morality in Christian religion. “Rights” were still associated with the (ethically) “right,” and the individual was still rooted in a broader series of communities. The lone rights-bearer facing the state with the autonomy to determine, for herself, what is right and wrong, was still foreign to most Americans. The unsettling of the class-based traditions of Europe, with their trappings of titles, status, monarchy, and nobility, and in many instances a corollary rejection of “Popery” and even Episcopacy, cannot be made equivalent to a rejection of the highly confining moralisms of Victorian Christian America. Frontier America escaped from European class structures and traditions, only to be cast on the vast shores of an unsettling, dynamic, and “righteous empire.”<sup>89</sup>

It seems deeply discordant to suggest that those who conducted a bloody war to preserve and improve this “righteous empire” by this means sought to make America into a land of rights-bearing individualists. Lincoln and his fellow Republicans believed in the “Union,” and they were, in the end, willing to countenance great sacrifice to keep white Southerners, against their will, in the Union. They envisioned and attempted further coercive measures to force this same South, against its will, to morally progress. The religious interpretation of the Civil War thus requires, it would seem, a theory of rights that embraces this sense of a national bond and moral responsibility. A simple theory of rights that plays the individual against various collectivities seems inadequate to explain a war fought in the name of a political collectivity, the Union. What is needed, instead, is a theory of rights in the service of nation, rights in the service of community, and rights in the service of morality.

The Civil War is paradoxically not only about breaking the bonds of slavery, but also about political, religious, social, and moral bonds that cannot or should not be severed. A theory of

---

<sup>89</sup> See generally MARTIN E. MARTY, *RIGHTEOUS EMPIRE: THE PROTESTANT EXPERIENCE IN AMERICA* (1970).

rights that comes to terms with this paradox will do justice not only to the framers, but also to the causes they hoped to serve.

#### V. MODERN DAY ABOLITIONISM IN THE LIGHT OF THE NINETEENTH CENTURY RELIGIOUS CONFLICT OVER SLAVERY

Nearly a decade ago Kevin Bales estimated that there were 27 million slaves worldwide.<sup>90</sup> The phenomenon of modern day slavery, as described by Bales and others, is different in important ways from the slavery of the nineteenth century. Most significantly, nineteenth century slavery was explicitly legal, supported or countenanced by the Constitution, statutes, and case law. Today slavery is officially illegal in every country, and repeatedly condemned by international law. Contemporary slavery is an illicit activity sometimes associated with organized crime and endemic government corruption; contemporary slavery is often hidden from view, and its existence and extent frequently denied or minimized by governments.<sup>91</sup>

The differences between contemporary slavery and historical forms of slavery have strategic importance for contemporary abolitionists. The goal of legal abolition, so significant in the context of historical, state-sanctioned slavery, is meaningless in the context of large-scale but illicit contemporary slavery. Modern-day slavery offers its own distinct challenges.<sup>92</sup>

The geographic locus of contemporary slavery presents significant challenges. The overwhelming majority of contemporary slaves are in developing nations or transition economies (generally meaning formerly communist economies). Most of the minority of slaves who are present in the United States or other developed economies also come from developing nations or struggling transition economies. Further, many of the minority of slaves present in rich, developed nations are in Europe, Japan, or Australia, rather than in the United States.<sup>93</sup> Finally, although a significant minority

---

<sup>90</sup> KEVIN BALES, *ENDING SLAVERY: HOW WE FREE TODAY'S SLAVES* 5 (2007) [hereinafter *ENDING SLAVERY*].

<sup>91</sup> See generally KEVIN BALES, *DISPOSABLE PEOPLE* (1999) [hereinafter *DISPOSABLE PEOPLE*]; KEVIN BALES, *UNDERSTANDING GLOBAL SLAVERY* (2005) [hereinafter *UNDERSTANDING GLOBAL SLAVERY*]; *ENDING SLAVERY*, *supra* note 90; SKINNER, *supra* note 2; Free the Slaves, <http://www.freetheslaves.net> (last visited Jan. 6, 2009) (web site of NGO headed by Bales).

<sup>92</sup> See, e.g., *ENDING SLAVERY*, *supra* note 90, at 5-20; *UNDERSTANDING GLOBAL SLAVERY*, *supra* note 91, at 1-23.

<sup>93</sup> See, e.g., *UNDERSTANDING GLOBAL SLAVERY*, *supra* note 91, at 183-86 (including estimates of the number of slaves in countries, and ranking countries by flow of human trafficking).



of slaves provide goods or “services” that are directly or indirectly consumed by individuals from wealthy nations, most do not. Thus, while the Civil War American abolitionism was primarily about slavery within the United States, the new American abolitionism is primarily about slavery in other countries. Americans seeking to be a part of a new abolitionist movement find themselves delving into surreptitious situations in Asia, Africa, the Middle East, Latin America, and Eastern Europe.<sup>94</sup> It is one thing to abolish a publicly acknowledged institution centered primarily in one’s own country, but it is quite another thing to abolish an illicit practice primarily centered in foreign countries and cultures.

The United States governmental strategies involved in trying to impact slavery predictably conflict with broader foreign policy aims. Thus, while under federal statute the United States government must annually identify and sanction nations that fail to act sufficiently against human trafficking, the law has provisions that permit the president to waive such sanctions.<sup>95</sup> In practice the government reportedly has been reluctant either to identify or to sanction nations where such actions might imperil broader foreign relations goals.<sup>96</sup> A related difficulty is the apparent heavy-handedness of the United States taking on the role of world judge, jury, and policeman in relationship to human trafficking issues. Anti-slavery activists understandably are eager to employ the power and prestige of the United States government to combat slavery and human trafficking. However, the current methodology under which the United States government annually issues a public report claiming to evaluate the anti-trafficking efforts of virtually all other nations, with possible sanctions to follow, may appear self-righteous and arrogant to many in the world, particularly given controversies about the human rights record of the United States.

Modern day slavery is closely related to poverty and issues of economic development. Thus, anti-slavery efforts can be viewed as merely a small sub-set of broader efforts to eliminate poverty, as

<sup>94</sup> See, e.g., SKINNER, *supra* note 2; see also World Vision, Asia Mekong Human Trafficking Strategy, <http://wvasiapacific.org/human-trafficking/asia-mekong-human-trafficking-strategy.html> (last visited Jan. 6, 2009) (World Vision survey found that even among people living in high trafficking areas, many were unaware of extent of trafficking).

<sup>95</sup> See Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified as amended at 22 U.S.C. § 7101); Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 22 U.S.C. § 7101).

<sup>96</sup> See SKINNER, *supra* note 2, at 197-98, 254-59; ENDING SLAVERY, *supra* note 90, at 111-12.

exemplified by the Millennium Development Goals and other international efforts.<sup>97</sup> Placing slavery within this broader context, however, can minimize the importance of focused anti-slavery efforts, and ignore the other factors involved in slavery. Only a small minority of the billion or more poor are slaves, and many who are slaves come from transition economies and do not meet the international definition of extreme poverty, even if they are still, in a broader sense, poor. Thus, while it is accurate to state that poverty is usually the context in which slavery occurs, reducing slavery to one of many poverty issues tends to delay abolition to the day when extreme poverty is eliminated, while ignoring much of what is distinctively wrong about enslavement.

Official, state-sanctioned slavery was easy to identify and define, as a slave's status was a clearly visible matter of public record. By contrast, defining modern slavery and identifying contemporary slaves is more difficult and contentious, given modern slavery's illicit, hidden nature.<sup>98</sup> One definition of modern-day slavery employed by Kevin Bales has three principle elements. Slaves are defined as human beings (1) forced to work; (2) under threat of violence; (3) for no pay.<sup>99</sup> Upon closer examination, however, these elements are complex and raise difficult issues. Since slaves, even in traditional slavery, are typically provided for by their "masters," the element of "no pay" turns out to include situations where slaves receive some kind of subsistence from their masters.<sup>100</sup> Once "no pay" becomes "mere subsistence," the issue of slavery becomes somewhat blurred, given that perhaps close to half of humanity works for subsistence, or indeed, less than subsistence. At that point, the definition of slavery turns upon the concepts of being forced to work through force.

This concept of being forced to work through force, upon closer examination, also contains further complexities, as some

---

<sup>97</sup> Thus, just as Kevin Bales proposes *Ending Slavery*, see ENDING SLAVERY, *supra* note 90, Jeffrey Sachs has proposed *The End of Poverty*. See Jeffrey D. Sachs, THE END OF POVERTY (2005). For more sources on extreme poverty, see David M. Smolin, *Intercountry Adoption and Poverty: A Human Rights Analysis*, 36 CAP. U. L. REV. 413, 413-15 & n. 3-5 (2007). See SKINNER, *supra* note 2, at 200 (discussing conflicting views among prominent American anti-slavery activists about anti-poverty efforts as an anti-slavery strategy).

<sup>98</sup> See, e.g., UNDERSTANDING GLOBAL SLAVERY, *supra* note 91, at 40-68 (reviewing various definitions of slavery with the purpose of developing a "dynamic and universal" definition).

<sup>99</sup> See SKINNER, *supra* note 2, at xv (citing DISPOSABLE PEOPLE, *supra* note 91). Bales's more recent work uses a slightly different set of definitions. See UNDERSTANDING SLAVERY, *supra* note 91, at 40-68.

<sup>100</sup> See SKINNER, *supra* note 2, at xvii, 1.

define the element of “force” to be satisfied by force or fraud.<sup>101</sup> Thus, a slave includes a person forced to work through fraud for mere subsistence. Unfortunately for this definition, many of the nearly half of humanity who labor for mere subsistence are defrauded on a regular basis by those with more economic, social, or political power.

The definition of slavery employed by Bales therefore may obscure, within the concept of being “forced to work,” what amounts to the critical component of slavery, which one might call ownership. Ownership involves one person exercising extraordinary control over another, a kind of control well beyond that involved in a legal employment or independent contractor relationship. In traditional slavery, ownership meant that the slave had none of the typical liberties we associate with freedom, such as freedom of movement and travel, freedom of contract in relationship to one’s own labor, and freedom to form and maintain families, because the owner controlled (or at least could control) all these aspects of the slave’s life. The slave’s movements and day to day activities were controlled by their master. The essence of slavery is this extreme control, which reduces the slave to the status of mere property.<sup>102</sup> Judge Ruffin’s famous opinion for the North Carolina Supreme Court recognized that this kind of control over the slave was made possible by the legal right of the master to physically discipline the slave, to the end that the slave has “no will of his own.”<sup>103</sup> Thus, the 1926 Slavery Convention stated: “Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>104</sup>

Bales attempted to capture this essence of ownership through the concept of being forced to work. The broader point of being a slave, however, is that the slave not only is forced to work, but also is under this extraordinary moment to moment control of where

---

<sup>101</sup> *Id.*

<sup>102</sup> In 1883 the Supreme Court provided a description of the rights slaves had lacked:

Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master’s will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities were the inseparable incidents of the institution.

The Civil Rights Cases, 109 U.S. 3, 22 (1883). While the list is incomplete and fails to convey the depth of oppression, it is in legal terms a useful list. *Id.*

<sup>103</sup> See *State v. Mann*, 13 N.C. 167, 169 (1829).

<sup>104</sup> Slavery Convention, art. 1(1), T.S. No. 778, 1926.

the slave is and what the slave does; further, the essence of slavery is that the slave cannot choose to terminate the relationship with his or her “master.” This extraordinary power over the slave also renders the slave vulnerable to a whole host of wrongs, including coerced sexual exploitation and the enslavement and exploitation of the slave’s spouse and children. Thus, while being forced to “work” is an important aspect of being a slave, it is not of the essence; the point is not the owner forces the slave to work, but rather that the owner may force the slave to do essentially whatever the master pleases, whether that constitutes “work” or not. For example, we need not determine whether sexual acts between an enslaved person and his or her “master” constitute work in order to label a person owned for purposes of sexual exploitation a “slave.”

In traditional slavery this extraordinary control, or ownership, was state-sanctioned; in modern slavery, this “ownership” is officially illegal, although it often occurs with the implicit support of local government actors, such as the police. Despite the fact that this kind of ownership and control constitutes a kind of crime, the slave-holder creates a practical reality where he or she can exercise such control, from moment to moment, over his or her slaves.<sup>105</sup> Modern slavery is often a product of organized criminal activity because it generally takes more than one person to make this kind of control practical and real.<sup>106</sup> A criminal organization that can threaten the slave’s family, transport the slave across borders, and corrupt police, border guards, and government officials, creates an alternative reality where slavery is the norm and the official law of freedom meaningless.<sup>107</sup> Similarly, customary hierarchical social and economic practices such as the caste system and landlord-peasant relationships may render ownership merely one step beyond, or even a part of, long-standing social norms, supported by the combination of local economic elites and local police and government.<sup>108</sup> Thus, modern day illicit slavery frequently becomes a kind of shared social reality between the slave, owner, and some broader subset of people.

---

<sup>105</sup> See Stephanie Holmes, *Trafficking: A very modern slavery*, BBC NEWS, Feb. 15, 2008, <http://news.bbc.co.uk/2/hi/europe/7243612.stm> (sex trafficking victim describes extreme control of criminal trafficker over her, noting that “I was under his control – mentally, physically, I was under his control. I couldn’t even sneeze without him knowing.”).

<sup>106</sup> See UNDERSTANDING GLOBAL SLAVERY, *supra* note 91, at 79 (“United Nations estimates that human trafficking . . . ranks as the third largest profit center for transnational criminal groups.”); SKINNER, *supra* note 2, at 117-91.

<sup>107</sup> See SKINNER, *supra* note 2, at 117-91.

<sup>108</sup> See *id.* at 203-51 (describing bonded labor practices in North India).

Bales himself rejected ownership as the key component of slavery, but he did so because he conceived of ownership exclusively as a legally-recognized arrangement.<sup>109</sup> To make the term “slave” include both the legally-legitimated slavery of the past and modern forms of illicit “slavery,” it is necessary to recognize that the term “ownership” itself can include both legally-recognized and illicit arrangements. This seems to be the approach of anti-slavery conventions, which are best interpreted as applying to both *de jure* and *de facto* forms of ownership.<sup>110</sup> Thus, the kinds of extreme control that Bales described in contemporary slavery can best be understood as a kind of *de facto* ownership.

Interestingly, the Thirteenth Amendment of the United States Constitution recognizes the possibility that slavery could exist absent positive governmental action or sanction. Hence, the Thirteenth Amendment states that “[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.”<sup>111</sup> It is generally recognized that there is no “state action” requirement in the Thirteenth Amendment.<sup>112</sup> Hence, the Amendment bars modern-day forms of slavery that involve private parties illicitly enslaving others without state sanction. Further, the Amendment gives Congress the authority to ensure that both *de jure* and *de facto* slavery shall not exist in the United States. Case law goes beyond authorizing Congress to abolish all forms of slavery, to extending Congressional authority to abolish “all badges and incidents of slavery.”<sup>113</sup> This concept of eliminating the badges and incidents of slavery is somewhat analogous to the

---

<sup>109</sup> See ENDING SLAVERY, *supra* note 90, at 18-19 (“[t]he essence of slavery is neither legal ownership nor the business of selling people; the essence of slavery is controlling people through violence and using them to make money.”).

<sup>110</sup> See Slavery Convention, art. 1(1), *supra* note 104 (defining slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”); UNDERSTANDING GLOBAL SLAVERY, *supra* note 91, at 52 (ownership is common theme of treaties concerning slavery and slavery-like practices).

<sup>111</sup> U.S. CONST. amend. XIII.

<sup>112</sup> See, e.g., CHEMERINSKY, *supra* note 9, at 290-92. Even the *Civil Rights Cases*, 109 U.S. 3 (1883), while heavily criticized today, acknowledged that Congress under the Thirteenth Amendment may enact legislation “necessary and proper to eradicate all forms and incidents of slavery and involuntary servitude . . . whether sanctioned by State legislation or not.” 109 U.S. at 23. At the same time, the Court had a very limited concept of the badges and incidents of slavery, and stated in passing that “slavery cannot exist without law, any more than property in land and goods can exist without law.” *Id.* at 20. Modern cases would take a broader view of the reach of Congressional Authority under the Thirteenth Amendment. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

<sup>113</sup> See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

international law concept of abolishing all “institutions and practices similar to slavery.”<sup>114</sup>

Thus, one difficulty for the contemporary abolitionist movement is clearly identifying, defining, and locating slaves and slavery. In order to do so, slavery must be distinguished from related wrongs, such as extreme poverty, child labor, and exploitative labor practices. This set of distinctions is difficult for modern day abolitionists in part because, from their perspective, sometimes modern slavery is given other names, such as forced labor, bonded labor, trafficking, and slavery-like practices, while other times the word “slavery” is used loosely to describe any kind of economic or labor exploitation.<sup>115</sup> Giving slavery other names is problematic because those other terms fail to evoke the same horror and fail to fully make the desired link from historic abolitionism to present day abolitionism. Calling other phenomena slavery is problematic because it dissipates the abolitionist cause in the endless quest against all forms of exploitation, while potentially lessening the rhetorical force of the word “slavery.”<sup>116</sup>

This propensity to analogize to slavery is illustrated by the International Labour Organization’s (ILO) approach to child labor. Between 1919 and 1972 the ILO created and promoted two generations of “Minimum Age Conventions” which treated the subject as a regulatory matter, determining the appropriate age for children to be employed within specific categories of employment, including Industry, Sea, and Agriculture.<sup>117</sup> In 1973 the ILO created a new Minimum Age Convention, designed to consolidate and replace prior multiple conventions with a single, all-encompassing instrument. The 1973 Minimum Age Convention for the first time defined the “effective abolition of child labour” as an official goal and governmental undertaking, thereby wrapping what remained a regulatory approach to children’s work within abolitionist language which evoked the slavery issue.<sup>118</sup> Without ever giving a clear defini-

<sup>114</sup> See, e.g., Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3 [hereinafter *Supplementary Slavery Convention*].

<sup>115</sup> See, e.g., UNDERSTANDING GLOBAL SLAVERY, *supra* note 91, at 58; SKINNER, *supra* note 2, at 105.

<sup>116</sup> See UNDERSTANDING GLOBAL SLAVERY, *supra* note 91, at 43.

<sup>117</sup> See David M. Smolin, *Strategic Choices in the International Campaign Against Child Labor*, 22 HUM. RTS. Q. 942, 943-44 (2000) [hereinafter *Strategic Choices*]; David M. Smolin, *Conflict and Ideology in the International Campaign Against Child Labour*, 16 HOFSTRA LAB. & EMP. L.J. 383 (1999).

<sup>118</sup> Convention Concerning Minimum Age for Admission to Employment, ILO No. 138 (1973), art. 1 [hereinafter *Minimum Age Convention*]; *Strategic Choices*, *supra* note 117, at 945-50.

tion of the term “child labour,” the concept of “effective abolition of child labour” within the ILO came to mean perfect conformity to a set of regulations that in practice permitted a significant amount of formal and informal work by minors.<sup>119</sup> The ILO continued this rhetorical mode in its 1999 Worst Forms of Child Labour Convention, in which the Worst Forms of Child Labour included bonded child labour, a form of either slavery or slavery-like practice, and in which the core undertaking included “immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.”<sup>120</sup> Hence, the ILO’s highly publicized child labour activism embraced both the rhetoric of abolition for forms of child labour that were clearly neither slavery nor slavery-like practices, and a promise of elimination of de facto enslavement of children.

The difficulty of wrapping any contemporary movement, including the contemporary campaign against de facto “slavery,” in the rhetorical mantle of historical abolitionism, is the confusion over strategy and results that ensues. Virtually every social movement wants to wrap itself in the mantle of social movements of the past that are viewed as historically just and successful causes. Doing so, however, creates the expectation that the kinds of tactics that succeeded in the past will work against the contemporary phenomenon. This approach is even more ironic in relationship to nineteenth century American abolitionism, because the movement was to a large degree a failure. While British abolitionism succeeded in effecting de jure abolition in 1833, American abolitionism faced an increasingly successful and defiant pro-slavery movement from 1830 to 1860. Absent secession and the Civil War, it seems very unlikely that abolitionism would have prevailed in the United States much earlier than 1900. Obviously, however, an extremely bloody and destructive civil war is not a strategy one would normally emulate. Anti-slavery activism within the United States did produce some notable victories before the civil war, including the abolition of slavery in Northern states where it was never economically significant, the legal abolition of the slave trade foreseen in the Constitution, and the increasingly normative character of anti-slavery viewpoints in Northern states. The anti-slavery movement, however, utterly failed to prevent the advance of slavery within the Southern states during the nineteenth century. Indeed, slavery was far more ideologically and economically entrenched

---

<sup>119</sup> See Minimum Age Convention, *supra* note 118; *Strategic Choices*, *supra* note 117, at 945-50.

<sup>120</sup> Worst Forms of Child Labour Convention, C182, art 1, 3 (1999).

within the south in 1860 than it had been in 1800. Slavery, in short, grew stronger in the United States in the face of the anti-slavery movement.

Even when succession and victory in the Civil War created the opportunity for emancipation, the implementation was in important respects a failure. Thus, the contemporary abolitionist Kevin Bales stated that “[p]erhaps no other country in the world so dramatically demonstrates the consequences of a botched emancipation.”<sup>121</sup> According to Bales, the failure to sustain the educational and economic assistance to the slaves begun by the Freedmen’s Bureau, including the program of “forty acres and a mule,” left the slaves vulnerable to the subsequent multi-generational oppression of Jim Crow segregationism that followed. Thus, Bales noted that “America has suffered, and continues to suffer, from the injustice perpetrated on ex-slaves.”<sup>122</sup>

Hence, United States abolitionism was more successful as a kind of prophetic movement defining and decrying an evil set of practices than as a movement effectively abolishing those evil practices. Admiration for the moral prescience of American abolitionism should not blind us to its inability to carry out or effect its goals. Modern day abolitionism has the advantage of virtually universal agreement that modern day “slavery” is an evil and thus has little opportunity or need to be prophetic in the same way. To the degree contemporary abolitionism is prophetic, it is simply in documenting the widespread existence of practices that many have been unaware of, rather than in having to make the case that those practices are unjust.<sup>123</sup> Given that contemporary abolitionism has largely succeeded in documenting the widespread existence of slavery and slavery-like practices, the fundamental task of contemporary abolitionism centers on how to effectively implement legal and social norms against those practices, which includes both emancipating slaves and providing for their economic and social rehabilitation and success as free persons. Modern day abolitionism therefore must be strong precisely where historical American abolitionism failed: in the areas of implementation, assistance to freed slaves, and strategic success.

The profound differences between the practice and context of nineteenth century American slavery, and those of contemporary

---

<sup>121</sup> See UNDERSTANDING GLOBAL SLAVERY, *supra* note 91, at 6.

<sup>122</sup> *Id.*

<sup>123</sup> See SKINNER, *supra* note 2, at 106 (John Miller as head of State Department Office on Trafficking in Persons had initial task to “convince the world that [slavery] even existed.”).



forms of “slavery” or slavery-like practices, thus suggest that nineteenth century abolitionists should not be the strategic models for contemporary abolitionists. Use of the word “slavery” to describe the de facto slavery and exploitation of millions of people around the world today is effective rhetorically to mobilize concern for contemporary victims. The rhetoric can be misleading if allowed to shape strategies against contemporary slavery.

Ironically, contemporary abolitionists might be able to learn more from a study of nineteenth century pro-slavery advocates than they could from a study of nineteenth century American anti-slavery activists. Particularly as to those forms of contemporary slavery and slavery-like practices that are, within their social milieu, long-standing and socially supported (even if officially illegal), the parallels in attitudes can be striking. Compare, for example, the pro-slavery justifications and attitudes of Southern Christians described earlier in this article, to the words of a North Indian slaveholder, within a context where bonded labor had existed for generations:

Of course I have bonded laborers: I’m a landlord. I keep them and their families, and they work for me. When they aren’t in the fields, I have them doing the household work . . . . After all, they are from the Kol caste; that’s what they do, work for Vasyas [people of higher caste] like me. I give them food and a little land to work . . . .

Anyway, they’re doing fine. Look, with the grain I give them and the land, they are getting a lot more than the official farm labor rate . . . . After all, there is nothing wrong in keeping bonded labor. They benefit from the system and so do I; even if agriculture is completely mechanized, I’ll still keep my bonded laborers. You see, the way we do it I am like a father to these workers. It is a father-son relationship; I protect them and guide them. Sometimes I have to discipline them as well, just as a father would.<sup>124</sup>

Here, as in historical American slavery, we have the same strained analogy to the family, the same argument that slavery is benevolent, and the same sense that slavery is simply the order of things, reflecting the inevitable hierarchy between racial or caste groups. While the parallels between the white supremacy of nineteenth century American slavery and the caste-based bonded labor practices of India are controversial, they should be explored by contemporary abolitionists, particularly since the vast majority of

---

<sup>124</sup> UNDERSTANDING GLOBAL SLAVERY, *supra* note 91, at 33.

contemporary slaves live in South Asia.<sup>125</sup> Contemporary abolitionists should explore the failure of historical abolitionists to persuade white Southerners that slavery and white supremacy were morally wrong, as they consider how they might work effectively within the context of South Asia, where efforts to overcome the caste system have had mixed results.

Of course these possible parallels between race-based and caste-based slavery have little relevance to some forms of contemporary slavery, such as the trafficking and forced prostitution of Eastern European women. Forced prostitution of Eastern European women often involves criminal organizations exploiting the vulnerabilities created by recent economic and social changes in former Communist countries, rather than long-standing social and economic hierarchies involving race or social caste. Such criminal organizations presumably have no pretense that they are somehow benefiting their victims, but recognize that they are destroying the lives of their victims for the sake of illicit financial gain.<sup>126</sup> In such instances, the analogy to nineteenth century slavery, however rhetorically effective, may have very little strategic value, and likely plays little role in trying to understand the mindset of the criminal organizations functioning as slave-holders and slave-traders.

Thus, the rhetorical use of the term slavery by contemporary abolitionists is problematic not only because of the differences between nineteenth century slavery and contemporary slavery, but also because the contemporary phenomena termed slavery are themselves quite diverse. The common thread of a certain kind of de facto control exercised over human beings belies the profound differences in social contexts of diverse phenomena such as bonded agricultural labor in North India and forced prostitution of Eastern European women. It is therefore necessary to separate the public relations campaign, which benefits from the broad use of the word "slavery" to cover diverse contemporary phenomena, and the operational methods of contemporary abolitionism, which require close attention to the different contexts in order to develop effective strategies. There can be no single, common strategy against contemporary slavery, because the practices labeled as slavery are so profoundly different from one another.<sup>127</sup>

<sup>125</sup> See UNDERSTANDING GLOBAL SLAVERY, *supra* note 91, at 183-86.

<sup>126</sup> See SKINNER, *supra* note 2, at 162 (describing interaction between enslaved Eastern European woman and the criminal involved in her enslavement); UNDERSTANDING GLOBAL SLAVERY, *supra* note 91, at 79 (five to eight thousand Russian criminal groups involving up to 3 million people operating transnationally).

<sup>127</sup> See, e.g., ENDING SLAVERY, *supra* note 90, at 231-32 (comparing difficulties involved in ending different kinds of slavery).

## VI. THE PROBLEM OF "TRAFFICKING" IN CONTEMPORARY ABOLITIONISM

The term "trafficking" and its various uses, including "human trafficking," "child trafficking," "trafficking in persons," and "sex trafficking," have become key terms in contemporary human rights and anti-slavery discourse.<sup>128</sup> The terms are sometimes closely associated with slavery, and in that sense sometimes have been used as a synonym for the slave trade. Hence, trafficking in persons has sometimes meant trafficking in slaves.<sup>129</sup> Within anti-slavery discourse over "trafficking," one major issue has concerned the status of prostitution. At times, prostitution has not been considered a form of human trafficking, based on the viewpoint that it was a consensual transaction and the prostitute a free actor, and possibly a criminal, rather than a victim or slave. Other times, the term trafficking has been meant to apply particularly to the de facto enslavement of women for prostitution, as a form of forced prostitution; thus, sometimes "trafficking" has meant primarily sex trafficking. This issue of forced versus voluntary prostitution has led to conflicts over the role of force or coercion in the lives of prostitutes, and of whether prostitution typically includes coercion of the prostitute by others. Historically this concern for forced prostitution of women sometimes received a racial terminology, being called the "white slave trade," to distinguish it from the prior Western enslavement of black Africans for labor.<sup>130</sup> Among contempo-

<sup>128</sup> See, e.g., Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, Art. 35 ("State Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.") [hereinafter CRC]; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49 [hereinafter Trafficking Protocol]; Worst Form of Child Labour Convention, *supra* note 120, art. 3(a); Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 22 U.S.C. § 7101 (2000)) [hereinafter Trafficking Victims Protection Act of 2000]; SKINNER, *supra* note 2, at 107 ("To the modern State Department, slavery was 'trafficking.'").

<sup>129</sup> See, e.g., UNDERSTANDING GLOBAL SLAVERY, *supra* note 91, at 126 ("Human trafficking is the modern term for a phenomenon—that of forcing and transporting people into slavery . . ."); Trafficking Victims Protection Act of 2000, *supra* note 128, § 102(a) & (b)(1) (describing trafficking in persons as a "contemporary manifestation of slavery" and as a "modern form of slavery"); SKINNER, *supra* note 2, at 107 ("To the modern State Department, slavery was 'trafficking.'").

<sup>130</sup> See, e.g., UNDERSTANDING GLOBAL SLAVERY, *supra* note 91, at 46, 58, 62-68, 167; International Convention for the Suppression of the "White Slave Traffic," May 4, 1910, 211 Consol. T.S. 45, Gr. Brit. T.S. No. 20, *as amended by* Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and

rary United States abolitionists there have been tensions between those who wanted anti-trafficking efforts to focus entirely upon forced prostitution (of persons of all races) as opposed to those who wanted to encompass both forced prostitution and forced labor. The end result in the State Department's Office of Human Trafficking, and under its enabling legislation, has been to focus attention and efforts solely upon trafficking for purposes of either commercial sexual activity, or labor.<sup>131</sup>

The anti-slavery activities of the government of the United States are therefore accomplished under the rubric and authority of "anti-trafficking" legislation.<sup>132</sup> The result has been to define trafficking, or more technically the "severe" forms of trafficking that the State Department anti-slavery office is empowered to combat, as enslavement for purposes of labor and commercial sex acts.<sup>133</sup> Trafficking in these forms becomes *de facto* slavery, nothing more, and nothing less.

This brief analysis of the role of the term "trafficking" in modern anti-slavery discourse illustrates the struggles that occur within a movement over definitions and priorities. Terms such as trafficking are used or defined differently, depending on the priorities and goals of the speaker. Definitions become in large measure a surrogate for policy, as key words are defined according to different policy emphases.

The struggles within the anti-slavery movement over the proper meaning of the word "trafficking" have unfortunately come at the expense of other wrongs. In particular, there are some wrongs that can be encompassed within the term "trafficking" but are not a form of slavery. Thus, the problem with reducing "trafficking" to "forcing and transporting people into slavery,"<sup>134</sup> and essentially into the two categories of forced prostitution and forced labor, is that the term also has a broader usage to denote other situations in which human beings are sold.

---

Amending the International Convention for the Convention of the White Slave Traffic, May 4, 1949, 2 U.S.T. 1999, 30 U.N.T.S. 23, entered into force June 21, 1951.

<sup>131</sup> See SKINNER, *supra* note 2, at 282-83, 289-90; Trafficking Victim Protections Act of 2000, *supra* note 128, §§ 102 & 103(8)-(9).

<sup>132</sup> See Trafficking Victims Protection Act of 2000, *supra* note 128; Trafficking Victims Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified as amended 22 U.S.C. § 7101 (2003)); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005) (codified as amended 22 U.S.C. § 7101).

<sup>133</sup> See Trafficking Victims Protection Act of 2000, *supra* note 128, §§ 103(8) & 104.

<sup>134</sup> UNDERSTANDING GLOBAL SLAVERY, *supra* note 91, at 126.

Thus, one specific controversy has been over what to term the sale and/or kidnapping of human beings for purposes of adoption. The systematic purchase and kidnapping of babies and children for purposes of adoption, generally conducted by intermediaries operating for monetary profit, has been documented as a persistent problem in the intercountry adoption system for several decades.<sup>135</sup> Given that human beings are being sold, some have termed such practices a form of trafficking in persons, or human trafficking, even where the children were ultimately going to be adopted daughters and sons, rather than slaves.<sup>136</sup> Such seems to have been the approach of the Hague Convention on Intercountry Adoption, the preeminent international law instrument in the field of intercountry adoption, which asserts as an object of the Treaty to “prevent the abduction, the sale of, or traffic in children.”<sup>137</sup> The Hague Convention thus implements, within the field of intercountry adoption, the mandate of the Convention on the Rights of the Child, which requires State Parties to take appropriate measures “to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”<sup>138</sup> Thus, the international instruments addressing this harm of child buying or selling for adoption name it as a form of trafficking. In international law, then, the term trafficking includes the slave trade but is not limited to it. The term “trafficking” has a broader meaning encompassing other situations where human beings are sold, or commodified, even in the absence of forced labor or forced commercial sex acts.

The United States State Department, however, has taken the position that buying or selling children for purposes of adoption is not a form of child trafficking or trafficking in persons.<sup>139</sup> This refusal to name such child selling as trafficking has had the effect of minimizing the significance of such acts of child stealing and child selling, which is particularly unfortunate, given that the United States State Department is charged under international law to im-

---

<sup>135</sup> See, e.g., David M. Smolin, *Child Laundering*, 52 WAYNE L. REV. 113 (2006) [hereinafter *Child Laundering*]; Jorge L. Carro, *Regulation of Intercountry Adoption: Can the Abuses Come to an End?*, 18 HASTINGS INT'L & COMP. L. REV. 121 (1994).

<sup>136</sup> See, e.g., *Child Trafficking: Why Can't the Immigration Service Prove It?*, ETHICA, June 6, 2003, <http://www.ethicanet.org/INSEvidence.pdf>.

<sup>137</sup> See Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1138, pmbl. & art. 1(b) [hereinafter *Hague Convention*].

<sup>138</sup> CRC, *supra* note 128, art 35.

<sup>139</sup> See OFFICE OF THE UNDER SECRETARY FOR GLOBAL AFFAIRS, U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT* 21 (2005).

plement the Hague Convention on Intercountry Adoption.<sup>140</sup> It sends the wrong message for the governmental entity charged with guarding against child trafficking in adoption to refuse to properly name the wrong in question. While it is true that adopted children are not slaves, the actions of kidnapping or buying children from their parents and then selling those children to adoption agencies or facilitators do reduce human beings to a kind of commodity. It is also literally a kind of sale, or trade, in human beings. Such forms of trafficking do exploit birth families deeply, perhaps sometimes as deeply as some forms of slavery. An individual who steals a child from her family, and then sells the child to an adoption intermediary, such that the parents forever lose their daughter, is arguably committing as great a wrong as the slave-holder who takes another's labor by force during a several year period of enslavement.<sup>141</sup> As I have described at length elsewhere, the various forms of child trafficking related to the intercountry adoption system do deeply exploit birth families, children, and adoptive families and hence should be widely recognized as a form of trafficking, even if they do not involve the enslavement of the child.<sup>142</sup> Further, the absence of national laws that label such trade in human beings as a form of trafficking creates rhetorical and practical difficulties, as it allows those who systematically steal and/or buy children for adoption to minimize their wrongs as merely regulatory violations of visa and immigration rules.<sup>143</sup>

<sup>140</sup> See Hague Convention, *supra* note 137, art. 6 (requirement that contracting parties have a Central Authority); Authorities, [http://www.hcch.net/index\\_en.php?act=authorities.details&aid=757](http://www.hcch.net/index_en.php?act=authorities.details&aid=757) (last visited Jan. 8, 2009) (United States State Department generally performs Central Authority functions under Hague Convention).

<sup>141</sup> Kevin Bales considers one of the defining features of contemporary forms of de facto slavery to be that it often lasts "just a few years or even months." See UNDERSTANDING GLOBAL SLAVERY, *supra* note 91, at 9. I am not trying to minimize the gravity of the wrong of temporary enslavement, but simply asking whether losing one's child forever could be viewed as an equivalent wrong to some forms of contemporary slavery.

<sup>142</sup> See David M. Smolin, *Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, 32 VT. L. REV. 1 (2007) [hereinafter *Child Laundering as Exploitation*].

<sup>143</sup> See *Child Laundering*, *supra* note 135, at 137-38 (citing Richard Cross, Rushton Distinguished Lecture Series – Reforming Intercountry Adoption: Present Realities and Future Prospects, Cumberland School of Law, Samford University (Apr. 15, 2005), *available at* [http://cumberland.samford.edu/files/rushton/Richard\\_Cross\\_transcript.pdf](http://cumberland.samford.edu/files/rushton/Richard_Cross_transcript.pdf)); Thomas Fields-Meyer et al., *Whose Kids Are They?*, PEOPLE, Jan. 19, 2004, at 74, 76; *Child Laundering as Exploitation*, *supra* note 142.

Thus, the eagerness of the anti-slavery movement within the United States to seize upon the word “trafficking” for its own purposes, and use that term for internal debates about matters such as forced versus voluntary prostitution or the relative priorities to be given forced prostitution versus forced labor, has apparently had the unintended consequence of encouraging the United States government to narrow the scope of the word “trafficking” and refuse to apply the term trafficking to other wrongs. This is an unfortunate result, which potentially creates a conflict between United States and international law.

The decision to use the term “trafficking” as the primary legal term for slavery within recent American anti-slavery statutes, and the accompanying failure to use the term “slavery” as the primary legal term in those statutes, may reflect some uncertainty whether modern forms of de facto enslavement can really bear, in a strict legal sense, the same legal name as historical forms of legally-sanctioned, or de jure, “slavery.” John Miller, who served as director of the State Department’s anti-trafficking office, reportedly considered the term “trafficking” a “euphemism” for slavery. Other State Department officials, however, reportedly were reluctant to use the term slavery, in part from fear this would “trivialize” the historical sufferings of African-Americans, in part because slavery, unlike trafficking, was a crime against humanity under international law that would require a greater response from the United States government.<sup>144</sup> The word “trafficking” may have been seen as offering a firmer legal foundation, given the broad use of the term “trafficking” in contemporary international law. Unfortunately however, the tendency of the anti-slavery movement in the United States to limit trafficking to slavery alters and distorts the borrowed international law term of trafficking to the harm of other causes that also seek to safeguard human dignity by prohibiting various other situations where human beings are sold and commodified.

It is a commonplace for different causes, including different human rights causes, to compete with one another for the limited pool of available attention and funds. The controversies over the word “slavery” and “trafficking” suggest that causes also compete over the lexicon, or dictionary. Just as there is a shortage of funds, there are also a limited number of words and terms that carry with them the combined condemnations of history and contemporary society. To label a wrong as slavery, or trafficking, or genocide, is to evoke the power of a historically-developed contemporary consensus against a practice. Words, as well as funding and attention,

<sup>144</sup> See SKINNER, *supra* note 2, at 106-07.

are therefore fought over, for they comprise some of the key weapons against contemporary wrongs.

Words, like slogans, can both embody and avoid analysis. Employing words that originally denoted one form of wrong and applying them to another, as occurs when *de jure* and *de facto* forms of bondage are both called “slavery,” is a verbal practice which employs both analogy and conclusory labeling. The underlying issue they address (or avoid) is the relationship between the unjust practices of the past and present practices. The issue implicitly raised (or hidden) by the use of words like “slavery” or “trafficking” is identifying, and acting effectively against, the great injustices of our own time. The issue of identifying and acting against the great evils and injustices of one’s own time is briefly addressed in the following conclusion.

#### VII. CONCLUSION: IDENTIFYING WRONGS IN OUR OWN TIME

While it is one thing to work against an injustice based upon a broad consensus of social condemnation, it is quite another thing to identify those contemporary practices, which are similarly unjust, despite broad social acceptance. It is similarly difficult to identify, within the great controversies of the present, the correct side of an issue when both sides offer analogies to past injustices.

Abortion serves as one example of a contemporary controversy where both sides invoke analogies to the great injustices of the past. Although elective abortion until viability has been established as a constitutional rule in the United States for over thirty-five years,<sup>145</sup> the legal and ethical controversy has continued. Amidst this social controversy, both sides seek to analogize to the past. Thus, anti-abortion activists typically perceive their cause as analogous to the anti-slavery movement and its descendent, the civil rights struggle against Jim Crow segregation. Anti-abortion activists perceive the unborn child, or fetus, as a class of human being suffering profound discrimination and denied protection of their most basic right to life. They also perceive women as disadvantaged by an abortion “liberty” that asks women to purchase their equality at the cost of choosing and undergoing a procedure which kills their offspring. By contrast, pro-choice activists suggest that if women lack the legal right to abortion they are suffering a kind of slavery, or at least the badges and incidents of slavery, because the legal prohibition of abortion would strip women of the liberty to control both

---

<sup>145</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).



their own bodies and their future life course. In a broader sense, some abortion rights advocates see the right to abortion as part of the broader “emancipation” of women from oppressive forms of patriarchy. Thus, both sides bring the weight of the past, and modern condemnations of past injustices, into the already difficult abortion debate.

Such usage of historical analogy proves nothing, particularly to the opposing side of a debate. One cannot settle contemporary controversies such as abortion by analogies to past injustices, for such analogies are accepted only by those who already subscribe to one side of the debate. Further, for whichever side, if any, for whom the analogy is, in justice terms, accurate – for whichever side is on the right side of either history, or truth – or as John Bingham would have said it, “right,”<sup>146</sup> the analogy will also prove misleading in important ways. If the analogy between historical and contemporary “slavery” is misleading for purposes of understanding and eliminating contemporary slavery, then analogies between slavery and abortion are far more misleading for understanding and reducing the widespread use of elective abortion. It is instructive that Kevin Bales, the contemporary anti-slavery activist, urged: “[w]e have to put behind us the picture of slavery most of us hold in our minds, that of slavery in the antebellum South.”<sup>147</sup> The differences between historical and contemporary slavery, it turns out, are as significant as the similarities. Even where the analogy is as close as the different forms of slavery, the differences between the past and present are determinative in the sense that differences must be emphasized in order to understand, and act effectively within, the present. Historical examples can inspire and instruct, but even the greatest student of history can misapply history’s lessons to the tests of the present. Discerning and correcting the great wrongs of our time requires an understanding of the present as something new and different and not merely a recapitulation of the past.

Discovering, understanding, and combating the wrongs of one’s own time requires attention not merely to the past, but also to something binding in both past and present, which is to say, to Bingham’s “eternal verities and right.” To stand for right and truth against a contemporary consensus, or to discern right and truth in the midst of a contemporary controversy, requires judging the present against some standard. The past alone cannot be that standard, both because the present is a different circumstance and because the past is merely another historically-conditioned circum-

<sup>146</sup> See *supra* note 83 and accompanying text.

<sup>147</sup> ENDING SLAVERY, *supra* note 90, at 11-12.

stance. The capacity to judge correctly the present requires that there be some standard applicable across time and place. If no such transcendent standards exist, the search for a counter-cultural truth is in many respects an illusion. Without a transcendent standard, right and wrong are separately defined by each time, culture, or perhaps each individual. From that perspective, being “ahead of one’s time” becomes merely another way of being wrong. Regardless, who is to say that history necessarily progresses, particularly if there exists no transcendent standard for determining what change constitutes progress and what change constitutes regress?

The nineteenth century slavery debate reminds us that those who believe in transcendent truth can misconstrue that truth. Some may view the story of pro-slavery Christianity as counseling for moral relativism, because adhering to the concept of transcendent truth, or even to a specific set of transcendent beliefs, does not prevent egregious error; worse, a belief in absolutes may induce some to cling more absolutely to their errors, even when those errors involve an unjust and inhumane practice such as the nineteenth century American system of racial slavery. Upon reflection, it also becomes clear that moral relativism and skepticism are themselves no protection against unjust practices. Moral relativism and skepticism, involving the abandonment of the search for or belief in transcendent truth, and involving the abandonment of concepts such as natural law, offers no guarantee of discernment as to the unjust practices of the present. Slavery’s defenders, after all, relied upon a “pro-choice” relativist argument that the South should be permitted to maintain its way of life. One need not search far for prominent skeptics who embraced such injustices. For example, the skeptic Oliver Wendell Holmes, often embraced as one of America’s greatest jurists, defended the insidious practices of eugenics and forced sterilization, which apparently seemed rational and scientific to the mind of Holmes and his contemporaries. Perhaps Holmes’s skepticism contributed to his embrace of what might have been seen, at the time, as a possible advance for humanity, given the sheen of scientific respectability which eugenics enjoyed at that time.<sup>148</sup> Thus, the moral relativist faces, both in principle or practice, the same risk of committing great injustice as the believer in some transcendent truth. Moreover, moral relativism, as a philosophy, provides no standing against unjust contemporary practices or majority viewpoints. This is because moral rela-

---

<sup>148</sup> See *Buck v. Bell*, 274 U.S. 200 (1927); VICTORIA F. NOURSE, IN *RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS* 15-37, 68, 84, 147,171 (2008).

tivism provides no ground to render the belief or practice of a time, place, or person as “wrong.” Moral relativism can say only “they thought that then, we think this now,” which is of very little use when attacking the unjust practices of the present. Perhaps this is why so many of the great documents of American history, created in the crucible of crisis, reference a transcendent truth or standard as justification for controversial action. Whether it is (i) the Declaration of Independence’s justification of political revolution, (ii) Lincoln’s justification for the Civil War found in the Gettysburg Address and Second Inaugural Address, or (iii) Martin Luther King’s justification of civil disobedience found in the Letter from a Birmingham Jail, the American tradition has justified bold actions by reference to transcendent sources of authority, such as God, nature, scripture, justice, or natural law. Mere personal or cultural preference is simply too weak a justification for upsetting an existing order, fostering political revolution, maintaining the union by military force, emancipating slaves, nurturing civil disobedience, or challenging white supremacist oppression.

While some perceive a disagreement among religious individuals, or among natural law adherents, as proof that there is no such thing as either religious truth or natural law, this is an odd inference. When historians, scientists, and lawyers disagree about the facts, we do not infer that facts do not exist or are entirely arbitrary, relative, or subjective. When lawyers, judges, and law professors disagree over the content of the law, we do not thereby come to believe that there is no such thing as law or that the content and interpretation of the law is entirely arbitrary, relative, or subjective. The insight that there are different ways to perceive an elephant, as the proverb about the blind men and the elephant teaches, does not mean that there is no elephant or that no “true” or “false” statements exist regarding the elephant.<sup>149</sup> The fact that we are subjects does not require that truth be merely subjective, in the sense of being arbitrary and entirely created or altered at will; that we perceive as subjects does not negate the existence of that which we see. Reality has a way of hitting us in the face when we ignore or defy it, and this is true not only of car accidents, unhealthy eating habits, and poor financial choices, but also of an individual’s or culture’s fundamental moral choices. Religious disagreements, in short, do not disprove the existence of religious truth including religiously-based ethical truths.

---

<sup>149</sup> See, e.g., UNDERSTANDING GLOBAL SLAVERY, *supra* note 91, at 12 (employing metaphor of the blind men and the elephant in relationship to attempts to understand contemporary slavery).

Unfortunately, the gift of discerning right amidst controversy, or against consensus, is deeply influenced by self-interest. For example, it was easier for a Northern Christian, as opposed to a Southern Christian, to discern the evil of slavery because it wasn't his evil and he didn't have any economic interest in the continuity of slavery. The most impressive individuals are those who correctly discern, and act against, an evil despite self-interest or against self-interest. This is perhaps why we refrain from making heroes of Northern abolitionists and demonizing Southern slave-holders. We continue to recognize that self-interest, family obligations, and community loyalty drown out the often too-faint call of conscience and the deeper principles of natural "right" or "law." Of course, when someone acts heroically against an evil – even someone else's evil – the cost to that individual becomes in a sense an act against self-interest. We do deeply respect the committed Northern abolitionist, because his self-sacrifice over time about an evil that is not entirely his problem is an action against self-interest, simply because to trouble oneself about someone else's oppression is in itself something exceptional. Yet even then it is often a mixed matter of self-interest, in the form of self-justifying pride, intertwined with self-sacrifice, in the form of altruistic devotion to the good of others.

The rarest – and best – heroes are those who act directly against personal self-interest: for example, the Southern white who realized, against family, neighbor, self, and Southern pride that slavery was an abomination, and subsequently acted in accordance with this realization. The stories of such heroes are rarely told, because they are all too rare, despite the truths of natural law and conscience. Ironically, this purest form of heroic devotion to transcendent moral truth usually requires opposing one's kin and community in a way that leaves these heroes open to the charge of being traitors to their own people.

The common failure of human beings to discern and act against the evils from which they personally benefit is a cautionary story we must tell ourselves again and again in the hope that we will prove ourselves to be exceptions to this sad rule of self-interest and thereby provide the clearest human testimony to the existence of transcendent moral truth. The surprise is not that self-interest so often drowns out conscience and right, but rather that sometimes conscience and right manage to triumph against self-interest. The ghosts of slaveholder and slave, anti-slavery activist and pro-slavery apologist, call us into the drama of the present; for our time is now, and there is no escaping the coming judgment.