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COMMENTARY: THE EXTRAORDINARY REVIVAL OF *DRED SCOTT*

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For well over a century, *Dred Scott v. Sandford*¹ was condemned as the most unjust, and ultimately the most disastrous, decision in Supreme Court history. Chief Justice Taney's 1857 opinion for the Court characterized blacks as little more than property, "so far inferior . . . that they had no rights which the white man was bound to respect."² What's more, Taney attributed that benighted view to the nation's founders, the drafters of the Declaration of Independence and the Constitution.³ Until

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1. 60 U.S. (19 How.) 393 (1857).

2. *Id.* at 407.

3. *Id.* at 407-12. Taney described the drafters of the Declaration as "great men."

This perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. *The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property*

This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.

. . . .
No one of [the black] race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise. The number that had been emancipated at that time [the drafting of the Constitution] were but few in comparison with those held in slavery; and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free. *It is obvious that they were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union.*

recently, we thought Taney was dead wrong—certainly wrong morally, but wrong also as a matter of history and of constitutional law.

Now Justice Thurgood Marshall has bewilderingly given *Dred Scott* new life. In a May 1987 speech, prominently reprinted in the *Harvard Law Review*,⁴ the *Vanderbilt Law Review*,⁵ the *Howard Law Journal*,⁶ and many other periodicals,⁷ Justice Marshall accepted the Taney opinion as an accurate reflection of the Founders' ideas. Although Justice Marshall ordinarily finds the search for original intention difficult (as well as misguided), he discovered an easy way to research the Founders' views on race: he simply reads *Dred Scott*.

The Founders were an extraordinary group of men. Whatever their faults, which we ought to face without blinking, in general they did not hold the views attributed to them by Taney.⁸ Of course, some of their racial beliefs cause us a great deal of embarrassment. They thought the black man inferior to the white in many ways, including intelligence,⁹ and criticism of the founders on that score is perfectly proper. That unfortunate view, coupled with the Founders' legitimate need to take popular prejudices into account in creating and preserving a nation, led them to doubt the possibility of a multiracial society.¹⁰ It has not been easy, but we are proving the Founders wrong on that point as well.

As uneasy as we might be with some of the Founders' beliefs, however, there is also much of which we can be proud. Taney's opinion in *Dred Scott* was wrong, dreadfully wrong, in its discussion of the Founders'

Id. at 410-12 (emphasis added).

4. Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

5. Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document*, 40 VAND. L. REV. 1337 (1987).

6. Marshall, *The Constitution: A Living Document*, 30 HOW. L.J. 623 (1987).

7. *E.g.*, Marshall, *What is There to Celebrate?*, Cleveland Plain Dealer, July 25, 1987, at 13-A. See also MacCrate, *Promises of Our Constitution*, A.B.A. J., Sept. 1, 1987, at 10 (interview with Justice Marshall conducted by American Bar Association president).

8. This commentary discusses the views of the Founders *as a group*, a method that requires generalization. Unanimity did not exist on matters of race, and this essay is not intended to suggest otherwise. Moreover, it is undeniable that some Founders, such as Charles Pinckney of South Carolina, would have found Justice Taney's opinion worthy of praise. See W. BERNIS, *TAKING THE CONSTITUTION SERIOUSLY* 42, 55 (1987).

9. *E.g.*, T. JEFFERSON, *NOTES ON THE STATE OF VIRGINIA*, queries vi & xiv, reprinted in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 210-12, 256-62 (A. Koch & W. Peden ed. 1944) [hereinafter *JEFFERSON'S SELECTED WRITINGS*].

10. *E.g.*, T. JEFFERSON, *NOTES ON THE STATE OF VIRGINIA*, query xiv, in *JEFFERSON'S SELECTED WRITINGS*, *supra* note 9, at 256, 262. See also *infra* notes 22-23.

understanding of the rights of blacks. The modern tendency to debunk heroes like the Founders is understandable, but we should examine our heroes for real warts, not imaginary ones.

The Founders (with some exceptions, to be sure¹¹) thought that no difference whatsoever existed between whites and blacks in one critical respect: all were “endowed by their Creator with certain unalienable rights.” Not only did the black man have “rights which the white man was bound to respect,” contrary to Taney’s assertion, but the black man had precisely the same natural rights as the white. As Thomas Jefferson put it, “[W]hatever be [blacks’] degree of talent it is no measure of their rights. Because Sir Isaac Newton was superior to others in understanding, he was not therefore lord of the person or property of others.”¹² Governments were not securing the rights of black men at the time of the nation’s founding, but, as the Declaration of Independence emphasized, natural rights do not cease to exist for that reason.

The natural equality of rights was a “self evident truth” to Jefferson, the primary drafter of the Declaration, and to the other signers of that document. Taney effectively denied the truth of that proposition by reading the black man out of the Declaration’s language. He was wrong, and he was known to be wrong by many of his contemporaries. Had Taney merely restated accepted wisdom, *Dred Scott* would not have been such a noteworthy decision. Because it departed dramatically from the common understanding, however, it was one of those unusual Supreme Court decisions whose merits enter daily public discourse.

Dred Scott inevitably became a prominent topic in the Lincoln-Douglas debates of 1858, and we therefore have evidence about the common understanding from a powerful source, Abraham Lincoln. In evaluating the following statement, remember that Lincoln was not discussing abstract principles comprehensible only to specialists in political philosophy. He was addressing a general audience during a political campaign, and he thought that his principled position would be acceptable to such a group of ordinary people:

[T]he other day, I said, in answer to Judge Douglas, that three years ago

11. For example, according to Madison’s notes of the constitutional convention, Charles Pinckney justified slavery’s continuation on the basis of “the example of all the world In all ages one half of mankind have been slaves.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 371 (M. Farrand rev. ed. 1937) (debates of Aug. 22, 1787) [hereinafter FARRAND].

12. Letter from Thomas Jefferson to Henri Gregoire (Feb. 25, 1809), reprinted in JEFFERSON’S SELECTED WRITINGS, *supra* note 9, at 595.

there had never been a man, so far as I knew or believed, in the whole world, who had said that the Declaration of Independence did not include negroes in the term "all men". I reassert it today. I assert that Judge Douglas and all his friends may search the whole records of the country, and it will be a matter of great astonishment to me if they shall be able to find that one human being three years ago had ever uttered the astounding sentiment that the term "all men" in the Declaration did not include the negro. Do not let me be misunderstood. I know that more than three years ago there were men who, finding this assertion constantly in the way of their schemes to bring about the ascendancy and perpetuation of slavery, *denied the truth of it*. I know that Mr. Calhoun and all the politicians of his school denied the truth of the Declaration. I know that it ran along in the mouth of some Southern men for a period of years . . . that the Declaration of Independence was in that respect a "self-evident lie," rather than a self-evident truth. But I say . . . that three years ago there never had lived a man who had ventured to assail it in the sneaking way of pretending to believe it, and then asserting that it did not include the negro. . . . I believe the first man who ever said it was Chief Justice Taney in the Dred Scott case, and the next to him was our friend Stephen A. Douglas.¹³

The evidence is thus quite strong that the founders considered blacks to have the rights of men.¹⁴ This is not to suggest that blacks and whites were equally able to exercise their natural rights in antebellum America. If veneration of the Constitution depended on such an absurd proposition, Justice Marshall's skepticism would be well-founded. To demonstrate the Founders' commitment to equality of rights, we must therefore deal with yet another fundamental question: if the Founders believed in the principle of equality, how could they reconcile that principle with the existence of slavery?

On a theoretical level, no reconciliation of equality and slavery was possible, but neither was it necessary. Slavery is a great moral evil, contrary to natural right, and the Founders knew that and said it repeatedly. Even most of those Founders who had slaves felt the injustice of the peculiar institution; the anguish in their writings and speeches is pervasive. For example, one of the most quoted passages from Jefferson's *Notes on the State of Virginia* discusses the debilitating effects of slavery

13. 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 301-02 (R. Basler ed. 1953) (speech at Alton, Illinois) (emphasis in original).

14. This commentary responds to Justice Marshall in kind, a brief general essay on a massive theme, and it is therefore incomplete. A few examples from speeches and writings cannot prove that the Founders on the whole held relatively enlightened views on race. That proof can be done, but it must be part of a much larger study.

on both masters and slaves and expresses Jefferson's fears about the possibility of future conflicts between oppressor and oppressed: "I tremble for my country when I reflect that God is just; that his justice cannot sleep forever. . . . The Almighty has no attribute which can take side with us in such a contest."¹⁵ The language of other Founders may not have been as eloquent, but the sentiments were the same.¹⁶

Words are cheap, and professed anguish in some cases may have been simple hypocrisy. But if the status of blacks as property was so clear and incontrovertible—if the Founders believed what Chief Justice Taney said they did—why should anyone have bothered with the hypocrisy?

In any event, the Founders' words cannot be characterized as mere hypocrisy unless we are willing to ignore the felt necessities of their time. Justice Marshall may be willing to do that,¹⁷ but his approach is ahistorical in the extreme. It is not an approach that a statesman can take in his own time, and it makes little sense for us to evaluate the actions of statesmen without regard to the constraints they faced. The "task of statesmanship," as Harry Jaffa has described it, is "to know what is good and right, to know how much of that good is attainable, and to act to secure that much good but not to abandon the attainable good by grasping for

15. T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA, query xviii, *reprinted in* JEFFERSON'S SELECTED WRITINGS, *supra* note 9, at 279.

16. Slaveholding anti-federalists, such as Patrick Henry, made similar pronouncements:

Is it not amazing that at a time, when the Rights of Humanity are defined & understood with precision, in a Country above all others fond of Liberty, that in such an Age, & such a Country we find Men . . . adopting a Principle as repugnant to humanity. . . . Would any one believe that I am Master of Slaves of my own purchase! I am drawn along by the general inconvenience of living without them, I will not, I cannot justify it.

Letter from Patrick Henry to Robert Pleasants (Jan. 18, 1773), *reprinted in* W. BERNS, *supra* note 8, at 41. The anti-federalists were, if anything, generally less willing than the supporters of the Constitution to consider any accommodations with slavery. See 1 H. STORING, THE COMPLETE ANTI-FEDERALIST 100 n.20 (1981). There were exceptions, however. For example, the anti-federalist Rawlins Lowndes of South Carolina was one of the few prominent members of the founding generation to justify slavery on moral grounds. *Id.*

For his part [Lowndes] thought this trade could be justified on the principles of religion, humanity, and justice; for certainly to translate a set of human beings from a bad country to a better, was fulfilling every part of those principles.

4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 272 (J. Elliot 2d ed. 1836) [hereinafter ELLIOT'S DEBATES], *reprinted in* 5 H. STORING, *supra*, at 150.

17. He dismissed the significance of arguments that "the Constitution was a product of its times, and embodied a compromise which, under other circumstances, would not have been made." Marshall, *supra* note 4, at 3.

more."¹⁸

It is true that, whatever their beliefs, the Founders did not abolish slavery; they made compromises both in the Constitution and in their own lives. Hypocrisy may have been involved to some extent. But the Founders provided us with reasons for what they did and what they did not do, and we should be able to evaluate those reasons on their merits.¹⁹ Perhaps the Founders were wrong, perhaps the reasons were not powerful enough to justify any compromises, perhaps more could have been done to hasten the end of slavery, but the compromises were made in light of real needs and real fears.

The Philadelphia convention was in general agreement that the union needed to be strengthened and that there would be no union without a temporary accommodation with slavery.²⁰ If a choice had to be made between a flawed union and no union—with no reason to think that the collapse of the convention would mean the destruction of slavery—there is little doubt about the choice statesmen should have made. This is not to say that the Founders merely bowed to the prejudices of their time, as Justice Marshall has suggested, but that they could not ignore those prejudices.²¹ As statesmen, the Founders could at best hope to establish

18. H. JAFFA, *CRISIS OF THE HOUSE DIVIDED* 371 (Washington paperbacks ed. 1973).

19. Justice Marshall asserted that "[m]oral principles against slavery, for those who had them, were compromised, with no explanation of the conflicting principles for which the American Revolutionary War had ostensibly been fought." Marshall, *supra* note 4, at 2 (emphasis added). To the contrary, the writings and speeches of the founders were filled both with anguish and with reasons for compromising with evil.

20. Particularly instructive on this point are the debates in the convention on limiting the importation of slaves. See, e.g., 2 FARRAND, *supra* note 11, at 95 (July 23), 220-21 (Aug. 8), 364-65 (Aug. 21), 369 (Aug. 22), 415-16 (Aug. 25). For example, Roger Sherman of Connecticut was for leaving the clause as it stands. He disapproved of the slave trade: yet as the States were now possessed of the right to import slaves, as the public good did not require it to be taken from them, & as it was expedient to have as few objections as possible to the proposed scheme of Government, he thought it best to leave the matter as we find it. He observed that the abolition of slavery seemed to be going on in the U.S. & that the good sense of the several States would probably by degrees compleat it. He urged on the Convention the necessity of despatch <ing its business>.

Id. at 369-70 (Aug. 22) (emphasis added). The convention was particularly concerned that the Carolinas and Georgia would refuse to join the Union without some temporary protection for slavery. See, e.g., *id.* at 415-16 (Aug. 25).

21. Justice Marshall would do well to ponder Herbert Storing's words on prejudice, politics, and statesmanship:

Prejudice—arbitrary liking and trust and, of course, also disliking and mistrust—is inherent in political life, and its role is greater as the polity is more democratic. To criticize a Jefferson or a Lincoln for yielding to, even sharing in, white prejudice is equivalent to demanding either that he get out of politics altogether—and leave it to the merely prejudiced—or that he become a despot.

the antislavery principle, which they did, while providing as little support as possible to the abhorrent practice.

The Founders accommodated slavery for other reasons as well. Few, if any, were confident that blacks and whites could live in the same society as equals; the effects of perceived differences in abilities, other prejudices, and smoldering resentment engendered by slavery were too strong.²² Many of the founders thought that securing equal rights for all men would therefore require removing blacks to their own country,²³ and colonization would take time. As believers in a multiracial society, we do not countenance such separatist arguments today. Nevertheless, it is important to stress that the Founders could reasonably see separation as fully consistent with equality of rights. Blacks would secure their natural rights in a country ruled by blacks; whites would secure theirs in a white society. As Herbert Storing explained, "There is nothing contradictory in arguing [as the Founders did] that while the Negroes have a human right to be free, they do not have a human right to be citizens of the United States."²⁴

The temporary survival of slavery was assured finally because no one saw how the institution could be simply and immediately abolished. It is difficult to discuss this issue without sounding hopelessly patronizing by

Storing, *Slavery and the Moral Foundations of the American Republic*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 231 (R. Horwitz 2d ed. 1979) (emphasis in original).

I emphasize that the argument made here is not intended to further what Professor Wiecek calls a "pernicious" myth: that slavery was "an anomaly slipped furtively into the Constitution . . . [and] that Americans were not responsible for enslavement here; it was foisted on us." Wiecek, *The Witch at the Christening: Slavery and the Constitution's Origins*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 167, 169 (L. Levy & D. Mahoney ed. 1987). The argument rather is that once slavery came to exist, for whatever combination of reasons, it could not be ignored by those forming a new nation—no matter how much they might have wished it to disappear.

22. Jefferson expressed the fears that others must have felt:

Why not retain and incorporate the blacks into the State . . . ? Deep-rooted prejudices entertained by the whites; ten thousand recollections, by the blacks, of the injuries they have sustained; new provocations; the real distinctions which nature has made; and many other circumstances, will divide us into parties, and produce convulsions, which will probably never end but in the extermination of the one or the other race.

T. JEFFERSON, *NOTES ON THE STATE OF VIRGINIA*, query xiv, reprinted in *JEFFERSON'S SELECTED WRITINGS*, *supra* note 9, at 256. See also note 23 *infra*.

23. Among the adherents of the American Colonization Society, founded in 1817 to further deportation of blacks to Liberia, were James Madison, John Marshall, and James Monroe. S. ELKINS, *SLAVERY* 178 (2d ed. 1968). Madison thought it impossible to incorporate freed slaves into American society because of "the prejudices of the whites, prejudices which proceeding principally from the difference of colour must be considered as permanent and insuperable." J. Madison, Memorandum of October 20, 1789, reprinted in W. BERNS, *supra* note 8, at 46.

24. Storing, *supra* note 21, at 229-30.

today's standards, but real concerns existed about what would happen if a huge black population, degraded by the conditions in which it had been forced to live, were suddenly released. Because the white population was outnumbered in many parts of the South, whites were concerned about self-preservation, of course. "[W]e have the wolf by the ears, and we can neither hold him, nor safely let him go," Jefferson wrote.²⁵ But humanitarian considerations were also involved. There were legitimate fears that one of the first results of immediate abolition would be extraordinary suffering among freed blacks.²⁶

Given these pressures, it is striking how minimally the Constitution accommodated slavery. Chief Justice Taney wrote in *Dred Scott* that "the right to property in a slave is distinctly and expressly affirmed in the Constitution."²⁷ Nothing could be further from the truth. As Justice Marshall recognized—although he gave insufficient weight to that fact—the Constitution contains no "distinct and express" reference at all either to slaves or to slavery.²⁸ Three well-disguised provisions in fact deal with slavery,²⁹ but the constitutional language "carefully avoided" (Justice Marshall's phrase)³⁰ any use of the tainted words. Care would have been unnecessary if the rightness of slavery had been accepted. Instead, the choice of words demonstrates that the Founders wanted no implication in the founding document that slavery and justice are compatible.³¹ It

25. Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820), reprinted in JEFFERSON'S SELECTED WORKS, *supra* note 9, at 698.

26. This concern was an old one. The state of Virginia, for example, prohibited a slaveholder from freeing any slave unless the holder could demonstrate that "the slave had a skill and a place to use it, or the means to leave the state." G. WILLS, *INVENTING AMERICA* 296 (1978). Without legislation protecting against selective manumission, the first slaves to be freed would have been those least able to care for themselves—the aged and the infirm. *Id.*

27. 60 U.S. at 451.

28. Marshall, *supra* note 4, at 2.

29. U.S. CONST. art. I, § 2, cl. 3 ("three-fifths of all other Persons" counted for purposes of apportionment); art. I, § 9, cl. 1 (postponement of power to prohibit "Migration or Importation of such Persons"); art. IV, § 2, cl. 3 (relating to "Person[s] held to Service or Labour in one State" who are fugitives in other states).

30. Marshall, *supra* note 4, at 2.

31. For example, in draft form, as reported by the Committee of Style, the fugitive slave provision read as follows: "No person legally held to service or labour in one state, escaping into another, shall in consequence of regulations subsisting therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labour may be due."

2 FARRAND, *supra* note 11, at 601-02. According to Madison's notes, the "term 'legally' was struck out and 'under the laws thereof' inserted <after the word 'State'> in compliance with the wish of some who thought the term <legal> equivocal, and favoring the idea that slavery was legal in a moral view." *Id.* at 628 (emphasis added).

was recognized, as John Jay emphasized, that “slavery was [discordant] with the principles of the Revolution”; the term “slaves” was omitted “from a consciousness of its being repugnant to the [self-evident] positions in the Declaration of Independence.”³² Moreover, the accommodations with slavery were indeed intended to be temporary; for example, the limitations on the federal government’s power to prohibit importation of “persons” into the original states expired in 1808.³³

If we are to look to thinkers of the mid-nineteenth century for guidance about the constitutional scheme, we would do far better to study the views of black abolitionist leader Frederick Douglass than those of Chief Justice Roger Taney. In an 1863 speech urging black enlistment in the Union forces, Douglass said:

I hold that the Federal Government was never, in its essence, anything but an anti-slavery government. Abolish slavery tomorrow, and not a sentence or syllable of the Constitution need be altered. It was purposely so framed as to give no claim, no sanction to the claim, of property in man. If in its origin slavery had any relation to the government, it was only as the scaffolding to the magnificent structure, to be removed as soon as the build-

32. Letter from John Jay to Elias Boudinot (Nov. 17, 1819), 4 *THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY* 430-31 (H.P. Johnston ed. 1890), reprinted in 3 *THE FOUNDERS’ CONSTITUTION* 297, 298 (P. Kurland & R. Lerner ed. 1987) [hereinafter *KURLAND & LERNER*]. Cf. text accompanying note 13 (Lincoln speech).

33. U.S. CONST. art. I, § 9, cl. 1. In Federalist No. 42, Madison wrote:

It were doubtless to be wished, that the power of prohibiting the importation of slaves had not been postponed until the year 1808, or rather that it had been suffered to have immediate operation. But it is not difficult to account, either for this restriction on the general government, or for the manner in which the whole clause is expressed. It ought to be considered as a great point gained in favor of humanity, that a period of twenty years may terminate forever, within these States, a traffic which has so long and so loudly upbraided the barbarism of modern policy; that within that period it will receive a considerable discouragement from the federal government, and may be totally abolished, by a concurrence of the few States which continue the unnatural traffic, in the prohibitory example which has been given by so great a majority of the Union. Happy would it be for the unfortunate Africans, if an equal prospect lay before them of being redeemed from the oppressions of their European brethren!

THE FEDERALIST No. 42, at 266 (J. Madison) (C. Rossiter ed. 1961). James Wilson, another of the primary architects of the Constitution, spoke similarly at the Pennsylvania ratifying convention on December 4, 1781:

I am sorry that [the limitation on the importation of slaves] could be extended no farther; but so far as it operates, it presents us with the pleasing prospect that the rights of mankind will be acknowledged and established throughout the Union.

If there was no other lovely feature in the Constitution but this one, it would diffuse a beauty over its whole countenance. Yet the lapse of a few years, and Congress will have power to exterminate slavery within our borders.

2 *ELLIOT’S DEBATES*, *supra* note 16, at 484, reprinted in *KURLAND & LERNER*, *supra* note 32, at 283.

ing was completed.³⁴

Herbert Storing added, “ ‘Scaffolding’ catches the intention exactly: support of slavery strong enough to allow the structure to be built, but unobtrusive enough to fade from view when the job was done.”³⁵

While of course constrained by the beliefs of their own time and place, as we are all subject to parochial pressures, the Founders pushed their society in a just direction. Their racial views contain much that we rightly repudiate, but we should recognize the justice of a central underlying principle: all men, of whatever race, have their unalienable rights. *Dred Scott* was wrong in every way it could have been wrong. It stated a morally repugnant principle—the black man as property—and it attributed that principle to a group of men that on the whole did not accept it. *Dred Scott* was properly interred long ago, and Justice Marshall should give up the effort to revive this foul-smelling corpse.

34. F. DOUGLASS, *Address for the Promotion of Colored Enlistments* (July 6, 1863), in 3 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 365 (P. Foner ed. 1950). Cf. D. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 27 (1978) (“It is as though the framers were half-consciously trying to frame two constitutions, one for their own time and the other for the ages, with slavery viewed bifocally—that is, plainly visible at their feet, but disappearing when they lifted their eyes.”); 1 J. KENT, COMMENTARIES ON AMERICAN LAW 193 (O.W. Holmes, Jr. 12th ed. 1873) (“The Constitution . . . laid the foundation of a series of provisions to put a final stop to the progress of this great moral pestilence.”), reprinted in 3 KURLAND & LERNER, *supra* note 32, at 305.

35. Storing, *supra* note 21, at 221.