SLAVE LAW, RACE LAW

GABRIEL J. CHIN*

INTRODUCTION

Many scholars have recognized broad connections between slavery and the contemporary criminal justice system.[1] For example, in different ways at different times, people of color have been subject to race-based criminalization, detention, or

* Edward L. Barrett Jr. Chair and Martin Luther King Jr. Professor, University of California, Davis School of Law. This Essay is an expanded version of remarks made at the 30th Annual Ira C. Rothgerber Conference, entitled "Looking Back to Move Forward: Exploring the Legacy of U.S. Slavery."

1. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 19 (2019) ("Many prison abolitionists have found the roots of today's criminal punishment system in the institution of chattel slavery. Even before I thought of myself as a prison abolitionist, my analysis of current criminal justice issues consistently led me to a discussion of slavery."); Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 907 (2019) ("This Article argues that cries for penal reform, while important, do not speak to the urgent issue of slavery behind bars and the externalities that pervade the broader consequences of prison labor markets."); Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 991 n.166 (2010) ("People of color have historically received unequal treatment within the U.S. criminal justice system.") (citing RANDALL KENNEDY, RACE, CRIME, AND THE LAW 76–134 (1997) (tracing the unequal treatment of Black people by state and federal criminal justice systems from slavery through the civil rights era)); CYNTHIA LEE, MURDER AND THE REASONABLE MAN 155–72 (2003) (demonstrating how stereotypes are deployed against Asian and Latino victims in criminal trials); IAN F. HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE (2003) (describing the "legal violence" perpetrated against Mexican-American political activists during their trials in the late 1960s); Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 844 (1997) ("I argue that but for the fruits of slavery and entrenched racism, African Americans would not find themselves disproportionately represented in the criminal justice system."); Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1138 (2010) ("[S]lavery was essentially reinstituted through the practice of peonage, black voters were disenfranchised, housing segregation was preserved, and blacks were openly discriminated against in the criminal justice system.")

expulsion[2]—something that has never systematically been inflicted on White people in the United States.[3] There are repeated historical resonances to slavery with respect to specific enforcement techniques. Thus, the Fugitive Slave Acts blessed by the Constitution[4] are said to be antecedents of the Chinese Exclusion laws, which required Chinese people to carry identification.[5] These laws in turn presaged the Arizona "show

2. *See generally* Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2068 (1993) ("Early in American history, legislatures and courts created categories of proscribed behavior that were based on race or influenced by race. In some situations, merely being of a certain race affected one's status, in essence making one a criminal. More commonly, behavior that was legal for whites became criminal if conducted by blacks. In other instances, race affected punishment, almost always to the detriment of blacks."). Slavery itself is a prime example of a situation where race imposed special criminal duties and punishments, but there are other historical race-based criminal laws where race was an element of the offense. *See* Hirabayashi v. United States, 320 U.S. 81, 104 (1943) (affirming conviction for violation of a race-based curfew); Pace v. Alabama, 106 U.S. 583, 585 (1883) (affirming conviction for interracial sexual contact), *overruled by* McLaughlin v. Florida, 379 U.S. 184 (1964); People v. Bray, 38 P. 731, 731 (Cal. 1894) (affirming conviction for "the crime of selling intoxicating liquor to an Indian"). Historically, banishment was a recognized punishment. *In re* Yung Sing Hee, 36 F. 437, 439 (C.C.D. Or. 1888) ("Banishment or exile is a recognized mode of punishment. The bill against the Earl of Clarendon, passed in the reign of Charles II., enacted that the earl should suffer perpetual exile, and be forever banished from the realm.") (citations omitted). Accordingly, relevant examples might include incarceration of Japanese Americans during World War II, Indian Removal, and extra-legal deportation of Mexican Americans, lawful residents, and U.S. citizens alike. DAVID STEPHEN HEIDLER & JEANNE T. HEIDLER, INDIAN REMOVAL (2006); ERIC K. YAMAMOTO ET AL., RACE, RIGHTS, AND NATIONAL SECURITY: LAW AND THE JAPANESE AMERICAN INCARCERATION (3d ed. 2020); Kevin R. Johnson, *Trump's* Latinx *Repatriation*, 66 UCLA L. Rev. 1442 (2019) (examining policies that target Latinx immigrants while remaining "colorblind" to avoid legal attacks).

3. Of course, White people have suffered individual tragedy and injustice, and sometimes were caught up in facially neutral laws targeting people of color. But the author is unaware of any systematic effort to, for example, eliminate White people from the United States through a "White Exclusion Act," to systematically reserve the best jobs, land, and education for non-White people to the exclusion of White people, to use the criminal justice system to control White people in general, or to deploy governmental power to systematically deprive White people of the right to vote so that some or all people of color could be in control.

4. U.S. Const. art IV, § 2, cl. 3.

5. David B. Oppenheimer et al., *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L.J. 1, 22 (2016) ("The language of the Chinese Exclusion Acts—as well as the willingness of the federal judiciary to look the other way while state and federal governments restricted or forced the movement of racially designated groups—also drew from the Fugitive Slave Act of 1793 and from antebellum state laws that had regulated the migration of slaves."); Henry S. Cohn & Harvey Gee, *"No, No, No, No!": Three Sons of Connecticut Who Opposed the Chinese Exclusion Acts*, 3 CONN. PUB. INT. L.J. 1, 56 (2003) (noting a Connecticut representative commented that the Chinese

me your papers" law, Senate Bill 1070, and other aspects of modern immigration enforcement.[6] Judges[7] and scholars have identified harsh slavery-era law enforcement practices as

Exclusion act "looked to him like the 'old fugitive slave law'"). During Jim Crow, the Supreme Court could not quite see it: "In slave times in the slave states not infrequently every free negro was required to carry with him a copy of a judicial decree or other evidence of his right to freedom or be subject to arrest. That was one of the incidents or badges of slavery. By the act of May 5, 1892 [27 Stat. at L. 25, chap. 60, U.S. Comp. Stat. 1901, p. 1319], Congress required all Chinese laborers within the limits of the United States to apply for a certificate, and any one who, after one year from the passage of the act, should be found within the jurisdiction of the United States without such certificate, might be arrested and deported. In *Fong Yue Ting v. United States*, 149 U.S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016, the validity of the Chinese deportation act was presented, elaborately argued, and fully considered by this court. While there was a division of opinion, yet [sic] at no time during the progress of the litigation, and by no individual, counsel, or court connected with it, was it suggested that the requiring of such a certificate was evidence of a condition of slavery, or prohibited by the 13th Amendment." Hodges v. United States, 203 U.S. 1, 19 (1906), *overruled by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

6. *See* Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 CATH. U. L. REV. 921, 952–53 (2012); Sandra L. Rierson, *Fugitive Slaves and Undocumented Immigrants: Testing the Boundaries of Our Federalism*, 74 U. MIA. L. REV. 598, 601–04 (2020); Jeffrey M. Schmitt, *Immigration Enforcement Reform: Learning from the History of Fugitive Slave Rendition*, 103 GEO. L.J. ONLINE 1, 34–35 (2013). As Dean Kevin Johnson has noted, current U.S. Supreme Court jurisprudence allows police to use apparent Mexican ancestry as evidence that an individual is an unauthorized migrant. Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1007 (2010). In the past, African appearance was presumptive evidence of slave status, just as Asian appearance imposed a duty to prove lawful presence in the United States. *See* A. Leon Higginbotham & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1985 (1989); Gabriel J. Chin, *"A Chinaman's Chance" in Court: Asian Pacific Americans and Racial Rules of Evidence*, 3 U.C. IRVINE L. REV. 965, 980 (2013) ("[T]he position of all Asians in the United States was precarious: at any moment they could be called upon to prove citizenship or lawful entry on pain of deportation because their race itself was evidence of deportability.")

7. United States v. Massenburg, 654 F.3d 480, 488 (4th Cir. 2011) ("Allowing officers to stop and frisk any individuals in the neighborhood after even the most generic of anonymous tips would be tantamount to permitting a regime of general searches of virtually any individual residing in or found in high-crime neighborhoods, where 'complaints' of 'random gunfire' in the night are all too 'usual[]' . . . James Otis famously decried general searches as 'instruments of slavery . . . and villainy,' which 'place [ ] the liberty of every man in the hands of every petty officer,' warning against abuses by '[e]very man prompted by revenge, ill humor, or wantonness.'") (quoting Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL'Y 711, 722 (2000)).

parallels to the contemporary police practice of stop and frisk.[8] Other aspects of historical legal practice continue to echo in contemporary jurisprudence and practice. Law professor Justin Simard recently documented that contemporary courts deciding cases continue to cite historical precedents determining the legal status of enslaved persons and resolving criminal and commercial cases involving slavery. Rarely do these modern courts pause to ask or analyze whether slavery-era precedents warrant reconsideration rather than reliance, given their unjust origins.[9]

These scholars make important points about patterns in American law. In support of their claims, rather than in derogation of them, this Essay proposes that the scholarly focus on slavery understates the nature of American racism in two ways, both of which were apparent in early U.S. law. First, not only enslaved persons, but free Black people were also subject to regulation in connection with the criminal justice system and in other domains. Second, not only persons of African descent, but other non-White people were also subject to legal domination across multiple areas of life. Perhaps the time has come to understand particular forms of racial oppression as component parts, which functioned as elements of a unified whole. A social institution such as slavery seems to stand alone because of its

8. Kaela R. Dunn, *Lessons from #metoo and #blacklivesmatter: Changing Narratives in the Courtroom*, 100 B.U. L. REV. 2367, 2377 (2020) ("[T]he slave patrols' method of stopping and searching both free and enslaved Black [people] can be considered a predecessor to modern-day stop-and-frisk.") (quoting *Adam Hudson, Beyond Homan Square: US History Is Steeped in Torture*, *in* WHO DO YOU SERVE, WHO DO YOU PROTECT?: POLICE VIOLENCE AND RESISTANCE IN THE UNITED STATES 49 (Maya Schenwar et al. eds., 2016)); Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57, 68 (2014) ("[T]he use of stop and frisk as a mechanism of racial subordination is not an isolated example of overreach by rogue police officers, or even a rogue police force, but is instead a mechanism deeply connected to the history of racial subordination . . . [It is a] connection between slavery, lynching, police brutality, and stop and frisk as all part of the same racial subordination scheme."); William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 62 (2004) ("[T]he argument for considering racial profiling an incident of slavery is that it results in a regime of race-based restraint on freedom of movement and that a similar regime existed during slavery."); Mary Anne Franks, *Beyond the Public Square: Imagining Digital Democracy*, 131 YALE L.J.F. 427, 439 (2021) ("[S]lavery and segregation excluded Black people outright from public spaces; later, selectively enforced surveillance and stop-and-frisk practices deterred Black people from entering them.")

9. Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79 (2020); *see also* CITING SLAVERY PROJECT, http://www.citingslavery.org [https://perma.cc/5XKS-X4ZB].

brutality, pervasiveness, and consequences in shaping the United States. But there is a case to be made that it was closely related to other institutions, such as the legal treatment of free Black people and other people of color.

After the Civil War, the reality of a multiracial regime of oppression was unmistakable—Jim Crow, Indian Removal, and Asian Exclusion effectively and systematically shaped the United States politically, economically, and socially. As historian Oscar Handlin explained,

> By the end of the [nineteenth] century the pattern of racist practices and ideas seemed fully developed: the Orientals were to be totally excluded; the Negroes were to live in a segregated enclave; the Indians were to be confined to reservations as permanent wards of the nation . . . .[10]

Similarly, Professor Milton Konvitz wrote decades ago that

> [a]fter 1876 the Negro problem and the Chinese question were linked when it came to voting in Congress on anti-Chinese measures . . . . The South, it has been said, "was quite willing to join with the Pacific Coast in fitting the Chinese into a caste system which, in many respects, closely resembled that which prevailed throughout the former slave belt."[11]

The observations of Professors Handlin and Konvitz may be underappreciated.

This Essay first observes that, in the slavery-era, free Black people were subject to legal restraint and discrimination, making clear that it was an individual's non-White race, not an individual's status as enslaved, that triggered restriction. This Essay then points out that antebellum law often regulated non-White races categorically—that is, Black people and Indigenous Peoples, or Mongolian and Black people. Notwithstanding the different languages, religions, places of birth, and ways of life of these groups, in the view of lawmakers there was still something making it appropriate to treat otherwise diverse and distinct groups of non-White people identically. This makes clear that at

10. OSCAR HANDLIN, RACE AND NATIONALITY IN AMERICAN LIFE 48 (1957).

11. MILTON R. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 12 (1946) (quoting CAREY MCWILLIAMS, BROTHERS UNDER THE SKIN 83 (1943)).

least an important strain of racial regulation was based on non-Whiteness, rather than Blackness per se. The parallelism among non-White races was very often black letter, not just analogical, ideological, or metaphorical. Arizona law declared that "all marriages of persons of Caucasian blood and their descendants, with negroes, Mongolians or Indians, and their descendants, shall be null and void."[12] A Nevada statute provided that "Negroes, Mongolians, and Indians shall not be admitted into the public schools . . . ."[13] A California statute providing that "that no Indian or Negro shall be allowed to testify as a witness in any action in which a white person is a party" was interpreted to apply to Chinese people.[14]

A forthcoming article proposes that the Naturalization Act of 1790, which limited naturalization to "free white persons," is fundamental to this regime.[15] Writing on this statute, the California Supreme Court ruled in 1854 that "[t]he word 'White' has a distinct signification, which ex vi termini, excludes black, yellow, and all other colors."[16] The California court's decision was followed by other high courts, north and south.[17] Such authorities suggest that the governing legal principle was not that Black people were denied rights but, more particularly, that only White people were granted them. This structure was not exclusively a post–Civil War development; instead, a functioning and mature legal ideology of White supremacy was present at the Founding and was deployed with little hesitation against enslaved persons and free people of color.[18]

---

12. Kirby v. Kirby, 206 P. 405, 406 (Ariz. 1922); *see also In re* Paquet's Est., 200 P. 911, 913 (Or. 1921) (discussing a statute prohibiting "any white person male, or female, to intermarry with any Negro, Chinese, or any person having one–fourth or more negro, Chinese, or Kanaka blood, or any person having more than one–half Indian blood"); State v. Treadaway, 52 So. 500, 504 (La. 1910) (discussing a Nevada statute prohibiting cohabitation between "white" and "any black person, mulatto, Indian or Chinese"). A post-*Brown* case discussed the rebuttal of the presumption that a husband is father of a marital child, based on the child's racial appearance. ("This should, of course, be true in clear cases as in cases involving a Negro child, mulatto child, a child of oriental features, Indian features, or, perhaps, Mexican.") Peters v. Campbell, 345 P.2d 234, 240 (Wyo. 1959).

13. State *ex rel.* Stoutmeyer v. Duffy, 7 Nev. 342, 346 (1872).

14. Speer v. See Yup Co., 13 Cal. 73, 73 (1859).

15. *See* Gabriel J. Chin & Paul Finkelman, *The "Free White Persons" Clause of the Naturalization Act of 1790 as Super-Statute* (work in progress).

16. People v. Hall, 4 Cal. 399, 404 (1854).

17. Rice v. Gong, 104 So. 105, 109 (Miss. 1925), *aff'd sub nom.* Gong Lum v. Rice, 275 U.S. 78 (1927); Doe *ex dem.* Lafontaine v. Avaline, 8 Ind. 6, 14 n.2 (1856).

18. *See infra* notes 46–66 and accompanying text.

The purpose of this Essay is not to decenter slavery either as a phenomenon or a body of law.[19] Slavery came first chronologically, and it may well be that the urgent demand on the part of the fair, just, and honorable people of the United States to rationalize the kidnapping, murder, and rape associated with slavery gave rise to American racism and White supremacy.[20] It may also be that the logic of slave law was so brutal and unjust, yet so profitable and functional, that it could not be confined to enslaved persons or to Black people—if race-based slavery was accepted or tolerated, how could other race-based regulatory regimes not arise? The claim is also not that there was no division of opinion in the White community, or that there were more and less intense regimes of discrimination in different states and territories. Instead, this Essay proposes that the various legal regimes of discrimination that came into force over the centuries—slavery and Jim Crow for Black people, Asian Exclusion, segregation of and discrimination against Mexican Americans, the brutal treatment of Indigenous Peoples—rested on a common foundation of White supremacy vigorously enforced through law over time. Although the details of the laws differed depending on the oppression thought to be necessary, all was in service of the protection of "the superior race, the white man."[21]

19. Professors Roy Brooks and Kirsten Widner propose that "[c]ritical theorists reject the black/white binary in large part because they reject the notion that African Americans have always been and continue to be the most racially subordinated group in America." Roy L. Brooks & Kirsten Widner, *In Defense of the Black/White Binary: Reclaiming a Tradition of Civil Rights Scholarship*, 12 BERKELEY J. AFR.-AM. L. & POL'Y 107, 130 (2010). But to recognize the unique harm of White supremacy to African Americans does not require either denying consequences for other groups or, more to the point, truncating examination of the multiracial system of racial subordination if, as this Essay proposes, there was one. Only by understanding racial subordinationt as a whole is it possible to evaluate its effects.

20. *See* Edward Franklin Frazier, *The Psychology of Race Prejudice*, FORUM 856, 857 (June 1927) (explaining why "White men and women who are otherwise kind and law-abiding will indulge in the most revolting forms of cruelty towards black people").

21. Minor v. State, 36 Miss. 630, 636 (Err. & App. 1859).

I. FREE BLACK PEOPLE AND ENSLAVED PERSONS

There can be little question that the legal status of enslaved people was grim.[22] However, free Black people were not treated as full citizens merely because they were not enslaved. Instead, the law often imposed many of the legal disabilities of enslaved persons. The rationale for this was evident. In his notorious *Dred Scott* decision, Chief Justice Taney explained the reasons why it was desirable to enslave Black people applied to free Black people as well: "[N]o distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race."[23] Scholars agree that free Black people were subordinated by law.[24] Many statutes of the era group free Black people and

22. *See generally* MARK V. TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810–1860: CONSIDERATIONS OF HUMANITY AND INTEREST (1981).

23. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 409 (1857) (enslaved party), *superseded by* U.S. CONST. amend. XIV. Professor Farber explains: "His argument was that blacks were outside the social compact entirely at the time of the Framing. For instance, Taney was at pains to establish that blacks were not covered by the Declaration of Independence's proclamation that 'all men are created equal,' and 'endowed by their Creator with certain unalienable rights.' This had no real relevance to the constitutional argument, but supported Taney's real point, which is that blacks are outside of the social compact and for that reason barely qualify as persons, let alone citizens. In Taney's view, a 'free' black was just a slave who happened to temporarily lack an individual master and therefore was owned by the white community as a whole." Daniel A. Farber, *A Fatal Loss of Balance:* Dred Scott *Revisited*, 39 PEPP. L. REV. 13, 29–30 (2011) (quoting *Dredd Scott*, 60 U.S. (19 How.) at 407, 410). Taney was not alone in this view: "Free negroes have always been a degraded race in the United States, having the right, it is true, of controlling their own actions and enjoying the fruits of their own labor, but deprived of almost every other privilege of the free citizen, and constituting an inferior caste in society, with whom public opinion has never permitted the white population to associate on terms of equality, and in relation to whom the laws have never allowed the enjoyment of equal rights, or the immunities of the free white citizen." State v. Claiborne, 19 Tenn. (Meigs) 331, 339 (1839).

24. *See* A. Leon Higginbotham, Jr. & Greer C. Bosworth, *"Rather Than the Free:" Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 17–18 (1991) ("Although Chief Justice Taney has been criticized often for his pernicious opinion in *Dred Scott v. Sandford*, he was probably accurate when he declared that even 'emancipated' blacks, at the time of the drafting of the Declaration of Independence and the United States Constitution, 'were identified in the public mind with the race to which they belonged and regarded as part of the slave population *rather than the free*.'"). There is much recent, important work on free Black people attempting to assert their rights. *See, e.g.*, KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION (2021); MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA (2018).

enslaved persons together for purposes of regulation and control.[25]

A good example of the reasoning behind the equation of enslaved persons and free Black people comes from *State v. Jowers*,[26] decided by the North Carolina Supreme Court in 1850. The question was whether insolence by a free Black person toward a White person was legal provocation for a battery, as it would be for a slave.[27] The court answered the question in the affirmative. The court explained,

> The same reasons, by which a blow from a white man upon a slave, is excusable on account of insolent language, apply to the case of a free negro, who is insolent. It is a maxim of the common law, where there is the same reason there is the same law.[28]

The court's view was that "[i]t is unfortunate, that *this third class* exists in our society. All we can do is to make it accommodate itself to the permanent rights of free white men."[29] Simple logic showed the necessity of authorizing White people to beat free Black people:

> If a slave is insolent, he may be whipped by his master, or by order of a justice of the peace; but a free negro has no master to correct him, a justice of the peace cannot have him punished for insolence, it is not an indictable offence, and unless a white man, to whom insolence is given, has a right to put a stop to it, in an extra judicial way, there is no remedy for it. This would be insufferable.[30]

---

25. *See* 1841 Ala. Laws 188 ("of slaves, and Free Negroes"); 1852–53 Ark. Acts 71 ("An Act to Prevent Slaves and Free Negroes from Being Employed in Retail Groceries or Dram Shops"); 1820 S.C. Acts 22 ("An act to restrain the emancipation of Slaves, and to prevent free persons of colour from entering into this State, and for other purposes"); 1842 Miss. Laws 65 (prohibiting immigration of free Black people and providing for their reenslavement).

26. State v. Jowers, 33 N.C. (1 Ired.) 555 (1850).

27. *Id.* (discussing whether a White person could physically assault a free Black person if the White person felt that the victim had been disrespectful in some way).

28. *Id.* at 556.

29. *Id.*

30. *See id.* at 556–57.

The court congratulated itself, or perhaps the law, for finding a flexible solution to the vexing problem of free Black people not being sufficiently subordinate to White people.[31]

Following the cases involving enslaved persons,[32] other judges recognized that the law allowed White people to beat Black people on lesser degrees of insolence than would be required if the provoking party were White.[33] Similar cases appear in the twentieth century, admittedly in a context more compatible with modern notions of fairness, granting motions for

31. *See id.* at 557 ("But the excellence of that 'perfection of reason' consists in the fact, that it is flexible and its principles expand, so as to accommodate it to any new exigence or condition of society, like the bark of a tree, which opens and enlarges itself, according to the growth thereof, always maintaining its own uniformity and consistency.").

32. Nelson v. State, 29 Tenn. (1 Hum.) 518, 524–25 (1850) (enslaved party) ("But in view of the actual condition of society, and the difference that exists between the two races, many circumstances that would not constitute a legal provocation for a battery by one white man on another, would justify it if committed on a slave, provided the battery were not excessive."); *see also* State v. Caesar, 31 N.C. (9 Ired.) 391, 400 (1849) (enslaved party) ("[F]rom the nature of the institution of slavery, a provocation, which, given by one white man to another, would excite the passions, and 'dethrone reason for a time,' would not and ought not to produce this effect, when given by a white man to a slave. Hence, although, if a white man, receiving a slight blow, kills with a deadly weapon, it is but manslaughter; if a slave, for such a blow, should kill a white man, it would be *murder*; for, accustomed as he is to constant humiliation, it would not be calculated to excite to such a degree as to 'dethrone reason,' and must be ascribed to a 'wicked heart, regardless of social duty.'"); State v. Will, 18 N.C. 121 (1 Dev. & Bat.), 161–62 (1834) (enslaved party) ("In judging of the capability of the slave to submit to correction, or the exercise of authority, even under circumstances of violence and indignity, we must not make ourselves the standard. If so, we should regard that privation of natural freedom which belongs to a state of slavery, at least as a sufficient provocation to extenuate a homicide to manslaughter; for to a freeman, the idea of slavery is more intolerable than that of death. But in general, one who is born and nurtured in slavery, is contented with his condition; and instances are not rare, where slavery is preferred to freedom. When under the punishment of the master, we seldom discover more than the writhings of bodily pain, and passive submission. The truth is, the slave being taught to believe that he is the property of his master, and that submission to his will is commendable, feels no degradation or sentiment of indignity common to the breast of a white man, under the severest chastisement. He knows that such belongs to his lot or condition.").

33. State v. Hill, 29 S.C.L. 150, 158–59 (Ct. App. 1843) ("Free negroes, as the law of South Carolina has been repeatedly ruled, have all the rights of property and protection, which white persons possess, with the exception that they cannot, with force, repel force, exhibited by a white man, and a less provocation might excuse a white man, in an assault and battery upon a free negro, than would in the case of a white person.").

a change of venue when African Americans were being tried in the presence of racist mobs.[34]

In deciding other legal issues, courts in slave states explained why free Black people had to be controlled. Some states prohibited free Black people from owning slaves themselves. Unlike White people, a free Black person

> is not of a different race of men who by the sword have subjugated their fellow men; but he finds among the slave population his brethren in blood, color, feelings, education and principle; they are of the same race with him, and have never been in subjection to him. Another and a strong reason beyond the mere question of policy why the free negro should not hold slaves is, that between the master and slave there must exist mutual and reciprocal obligations and duties, the slave owing obedience and fidelity to his master, and the master owing to the slave support and protection. But the negro is not such a freeman as to extend protection; he is though nominally free, almost as helpless and dependent on the white race as the slave himself . . . .[35]

Virginia's highest court explained that

> [t]he object of the law is probably to keep slaves as far as possible under the control of white men only, and prevent free negroes from holding persons of their own race and color in personal subjection to themselves. Perhaps also it intended to evince the distinctive superiority of the white race.[36]

---

34. McGee v. State, 26 So. 2d 680, 684 (Miss. 1946) (recognizing "impertinence and insolence on the part of negroes to[wards] white people . . . as fruitful sources of aggravation"); Mickle v. State, 213 S.W. 665, 666 (Tex. Ct. Crim. App. 1919) ("Impertinence and insolence on the part of negros to white people are recognized as fruitful sources of aggravation . . . .").

35. Tindal v. Hudson, 2 Del. (2 Harr.) 441, 442 (Super. Ct. 1838) (enslaved person at issue).

36. Dunlop v. Harrison's Ex'rs, 55 Va. (14 Gratt.) 251, 260–61 (1858); *see also* Individuals enslaved by Peter Fisher v. Dabbs, 14 Tenn. (6 Yer.) 119, 126 (1834) (enslaved party) ("Degraded by their color and condition in life, the free negroes are a very dangerous and most objectionable population where slaves are numerous; therefore no slave can be safely freed but with the assent of the government where the manumission takes place."); Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 702 (2005) ("There is, I believe, an important relationship between dignity and substantive racial justice . . . . A crucial aspect of those harsh truths is that slavery, segregation, and modern forms of so-

Disfavor of free Black people was not limited to slave states. California, for example, was nominally a free state.[37] But that did not mean that it was hospitable to free Black people.[38] In an 1852 decision rejecting a freedom suit by an African American, the California Supreme Court explained,

> [T]he increase of free negro population, has for some time past been a matter of serious consideration with the people of this State, in view of the pernicious consequences necessarily resulting from this class of inhabitants . . . who, in the language of a distinguished jurist, are "festering sores upon the body politic . . . ."[39]

Given the abolition of slavery in the state, the principal problem of free Black people was not that they would incite enslaved persons; they were undesirable for reasons intrinsic to themselves. Clearly, they were not part of the People of the State. The court warned that all persons of African ancestry might be excluded entirely, explaining that California "has certainly not entered into any contract with free negroes, fugitives, or slaves, by providing in the constitution that neither slavery nor involuntary servitude shall exist in this State, which would prevent her, upon proper occasion, from removing all or any one of these classes from her borders."[40]

Another case of the era, *Siemmsen v. Bofor*,[41] is also revealing about the California Supreme Court's views of race relations. The case is not important so much for its holding (the state supreme court held unconstitutional a treaty regarding inheritance rights of noncitizens) as it is for its reasoning. The

---

called societal discrimination involve extensive efforts to degrade, dishonor, isolate, and ostracize.").

37. CAL. CONST. art. I, § 18 (repealed 1974) ("Neither slavery, nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State.").

38. *See, e.g.*, STACEY L. SMITH, FREEDOM'S FRONTIER: CALIFORNIA AND THE STRUGGLE OVER UNFREE LABOR, EMANCIPATION, AND RECONSTRUCTION (2013); RUDOLPH M. LAPP, BLACKS IN GOLD RUSH CALIFORNIA (1977).

39. *In re* Perkins, 2 Cal. 424, 438 (1852) (enslaved party).

40. *Id.* at 440. There was also little suggestion that free Black people would be afforded equal rights while they suffered to remain in California. In an opinion holding that a board illegally appointed a boat pilot who did not have the statutory qualifications, the court explained that the board "could no more appoint a man as pilot who had not served two years or commanded a vessel, than it could appoint a free negro or a woman." People *ex rel.* Palmer v. Woodbury, 14 Cal. 43, 46 (1859).

41. Siemssen v. Bofer, 6 Cal. 250 (1856).

compelling ground to find that the United States had no power to make such a treaty is that if a federal treaty could control inheritance, perhaps a treaty could grant immigration privileges to free Black people, Asian people, and other undesirables. The court explained:

> By a treaty with England, her free black citizens may be introduced into South Carolina and other slave States of the Union, contrary to the police regulations of those States. The Asiatic, and the convicts of the penal colonies of the South Pacific, may be introduced into California on the same footing as the intelligent and virtuous population of the more favored portions of Europe; and every branch of trade, agriculture, commerce and manufactures, may be prostrated at the feet of this unconstitutional mastodon. Nay, more; by a treaty of amity and friendship with the Emperor Soulouque, of Hayti, every slave in the Southern States may be emancipated, and turned loose upon their present masters.[42]

Here, too, the court conflates free Black people, enslaved persons, and "Asiatics," and distinguishes all of them from White people.

Other free states also rationalized discrimination against free Black people. In an 1837 decision, the Connecticut Supreme Court ruled in favor of an enslaved person, holding that she was free by having been brought to the state.[43] Nevertheless, those judges, too, recognized the subordinate status of free Black people, noting that "when . . . all coloured persons are excluded from the privileges of electors, it would seem as if all such persons were considered as excluded from the social compact."[44] Eliminating slavery was, at least in part, for the benefit of White people. If tolerated,

> slave labour would then be brought into competition with the labour of poor whites, tending to reduce the price of their work and to prevent their employment, and to bring the free labourer, in some measure, into the ranks with slaves. Such,

42. *Id.* at 253.
43. Jackson v. Bulloch, 12 Conn. 38 (1837) (enslaved party).
44. *Id.* at 43

> we know, are the consequences of slavery, as it respects the free labourer.[45]

To be sure, there were advocates for full racial equality, even in the era of slavery. But to those looking out for the interests of the White population, free Black persons created economic and social difficulties warranting regulation of their status.

II. REGULATING ALL NON-WHITE PEOPLE

In the antebellum era, restrictions were often imposed on free Black people in both slave and "free" states. Similar restrictions were imposed on other non-White people including Asian and Indigenous Peoples. Thus, early on, it was clear that the law often preferred White people at the expense of people of color generally and systematically, rather than disadvantaging particular non-White races for some particular reason. For example, writing in 1831 on the Naturalization Act of 1790, one anonymous commentator had no question that granting the privilege of naturalization to "free white person[s]" excluded all of "the colored races of men . . . ."[46] The commentator argued for race-neutrality:

> Corrupt and ignorant foreigners of any color are not desirable citizens. But we are unable to perceive why a Chinese, an

45. *Id.* at 46; *see also* Anderson v. Poindexter, 6 Ohio St. 622, 639 (1856) (enslaved party) (Swan, J., concurring) ("It is against our policy, not only because it is a violation of the rights of man, and destroys all manliness, but because it brings a servile and degraded class into competition with mechanics and free laborers, who require higher compensation than the ordinary hire of slaves; because it creates a ruling class, the adjunct of wealth, whose position controls, and whose habits deprave public opinion, by making idleness respected, and labor the associate and the emblem of servility and degradation; thus sapping the very foundation of the virtue, wealth, and power of the state, by driving out the middle class—the mechanics and yeomanry of manly pride and enterprise—who are too poor to be masters; and dooming the poor and the ignorant who remain, to a base position, social, and even political, little better than fellowship with slaves.") This "free soil" argument against slavery—that it would degrade White labor—is consistent with a political position that simultaneously opposes slavery and the presence of free people of color. *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1872 (1993) ("The expressions of fear that free American labor could not compete with 'coolie' labor mirrored the traditional argument of the Free Soilers that coexistence with slavery—and sometimes even with free blacks—would degrade free white labor.").

46. *The Naturalization Laws*, 6 AM. JURIST & L. MAG. 11, 55, 61 (1831).

> African, a Malay, or an American Indian, if he has the intellectual and moral qualities which are requisite in a citizen, ought not to be entitled to the same privileges as an Englishman, an Irishman, a German, or a Spaniard?[47]

But the political community found an answer to this question—one way or another, the law concluded it was reasonable to discriminate against people of color and in favor of Caucasians. In 1922, the Supreme Court was tasked with interpreting the meaning of the 1790 law as applied to a Japanese person. The Court explained that it was not just about Black and White people:

> The provision is not that Negroes and Indians shall be excluded, but it is, in effect, that only free white persons shall be included. The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified. It is not enough to say that the framers did not have in mind the brown or yellow races of Asia. It is necessary to go farther and be able to say that had these particular races been suggested the language of the act would have been so varied as to include them within its privileges.[48]

Thus, with respect to the 1790 law, but with broader implications, the point is not that some races were denied rights, but "that only free white persons shall be included."[49] In operation of this statute, and, it turns out, many others, all non-White people often found themselves in the same boat. Before and after the Thirteenth Amendment, racial regulation of Indigenous Peoples was unquestionably nothing less than pervasive.[50] One special burden was loss of land; a recent study

47. *Id.* at 61.

48. Ozawa v. United States, 260 U.S. 178, 195 (1922).

49. *Id.*

50. *See* K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1068 (2022) ("[F]or nearly two and a half centuries, colonization and enslavement were primary modes of creating property in America."); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1793 (2019) ("Although there is much to learn from this Nation's tragic history with slavery and Jim Crow segregation, resting our public law on a single paradigm case that is defined by the black/white racial binary has led to incomplete models and theories. This Nation's tragic history with colonialism and the violent dispossession of Native lands,

concludes that 93.9 percent of land originally held by tribal nations was appropriated.[51] Notwithstanding the distinctive qualities and situations of the groups, many statutes treated Indigenous and other non-White people identically. Particularly telling are statutes that limited migration, such as the South Carolina statute that provided that "no slave, nor any negro, Indian, Moor, mulatto or mustizo, bound to serve for life or a term of years, shall be brought into this state."[52] Georgia law made special criminal provisions applicable to "any slave, free negro, Indian, mulatto or mestizo."[53] A Louisiana statute imposed special penalties for rape of a white woman on "any slave, Free negro, mulatto, indian or mustee."[54] Colonial Maryland regulated the testimony of "any negro or mulatto slave, or free negro, or mulatto born of a white woman, during their servitude appointed by law, or any Indian slave, or free Indian natives of this or the neighbouring provinces."[55] Colonial New Hampshire law provided that "Noe [sic] Indian, Negro, or Molatto, Servant or Slave may presume to absent from the where they Respectively belong or be found abroad in the Night time after Nine a Clock . . . ."[56] Many other statutes were to the same effect.[57] Just as free Black people were often regulated as

---

resources, culture, and even children offers different, yet equally important, lessons about how to distribute and limit government power.").

51. Justin Farrell et al., *Effects of Land Dispossession and Forced Migration on Indigenous Peoples in North America*, 374 SCI. 578, 578 (2021). In a *Playboy* interview, John Wayne famously justified taking Indian land: "I don't feel we did wrong in taking this great country away from them, if that's what you're asking. Our so-called stealing of this country from them was just a matter of survival. There were great numbers of people who needed new land, and the Indians were selfishly trying to keep it for themselves." David Mikkelson, *Did John Wayne Say Native Americans 'Selfishly' Tried to Keep Their Land?*, SNOPES (June 29, 2002), https://www.snopes.com/fact-check/john-wayne-native-americans [https://perma.cc/G3LT-R5A5]. Of course, neither John Wayne nor any other decent White American can be a socialist or reject property rights, which, after all, are enshrined in the Constitution. But if not for the race-based rationalization, in any other context, that is how his argument would have to be characterized.

52. 1816 S.C. Acts 22.

53. 1806. Ga. Laws 53.

54. 1818 La. Acts 18.

55. 1692–1720 Md. Laws 140.

56. 1702–1745 N.H. Laws 138; s*ee also* 1636–1748 R.I. Pub. Laws 52 (providing for punishment of "any negroes or Indians, Freemen or Slaves . . . found Abroad after Nine a Clock at Night").

57. 1839 Miss. Laws 28 ("[I]t shall not be lawful for any person to sell any vinous or spirituous liquors to any Indian or negro, either slave or free . . . ."); 1720–1740 Va. Acts 474 (regulating sentencing of "any Negro, Mulatto, or Indian whatsoever . . . convicted of any Offence . . . ."); *see also* State *ex rel.* Marsh v.

a group with enslaved persons, so too Indigenous Peoples were often regulated along with persons of African ancestry.

The question of the place of Asian people in U.S. society was not prominent when the Constitution was framed. Nevertheless, as Asian people began to immigrate to the United States, they were readily assimilated into a structure that subordinated non-White people. In 1840, in an important, largely overlooked case,[58] Chief Justice Roger B. Taney, holding trial in the District of Maryland, was compelled to construe the rules of evidence, which treated White Christians differently from other litigants.[59] The question was whether an Asian person, specifically a Christian "Malay," a Pilipino, was White.[60] Taney had little difficulty in answering the question in the negative.

A reason addressed only summarily, but which may have been sufficient in itself to justify the outcome, was that "the Malays have never been ranked by any writer among the white races."[61] However, Taney went on. Writing on Maryland but with broader implications, Taney deemed that the state had been founded as a White community:

> The colonists were all of the white race, and all professed the Christian religion; from the situation of the world at that time, no persons but white men professing the Christian religion could be expected to emigrate to Maryland; and if any person of a different color, or professing a different religion, had come into the colony, he would not, at that time, have

Managers of Elections, 17 S.C.L. (1 Bail.) 215, 216 (1829) ("But above all, our constitution expressly confines the right of voting to free white men; and there can be no doubt that the term was used as contradistinguishing the white man from the indian, and negro, or mulatto.").

58. Gabriel J. Chin, Dred Scott *and Asian Americans*, 25 U. PA. J. CONST'L L. 633 (2022) (discussing United States v. Dow, 25 F. Cas. 901, 903 (C.C.D. Md. 1840)).

59. *Dow*, 25 F. Cas. at 902.

60. *Id.* at 903 ("The only question is, whether he is to be regarded as a Christian white person?").

61. *Id.* Many later cases relied on allegedly "scientific" evidence about race to deny naturalization to Asian people. *See In re* Saito, 62 F. 126, 127 (C.C.D. Mass. 1894) ("Writers on ethnology and anthropology base their division of mankind upon differences in physical rather than in intellectual or moral character, so that difference in color, conformation of skull, structure and arrangement of hair, and the general contour of the face are the marks which distinguish the various types."); *In re* Ah Yup, 1 F. Cas. 223, 224 (C.C.D. Cal. 1878) ("Neither in popular language, in literature, nor in scientific nomenclature, do we ordinarily, if ever, find the words 'white person' used in a sense so comprehensive as to include an individual of the Mongolian race."); *In re* Kanaka Nian, 21 P. 993, 993 (Utah 1889) (citing numerous "scholarly" sources in denying naturalization to a Hawaiian).

> been recognized as an equal by the colonists, or deemed worthy of participating with them in the privileges of this community. The only nations of the world which were then regarded, or perhaps entitled to be regarded, as civilized, were the white Christian nations of Europe; and certainly emigrants were not expected or desired from any other quarter.[62]

Finally, he explained that enslavability of a particular race generated resentment by the entire race toward their supposed superiors. That resentment generated the need for regulation of all the members of that race, not just the particular ones who were enslaved:

> The political community of the colony was composed entirely of white men professing the Christian religion; they possessed all the powers of government granted by the charter. Christian white men could not be reduced to slavery, or held as slaves in the colony; but they might, according to the laws of the colony, lawfully hold in slavery negroes or

62. *Dow*, 25 F. Cas. at 903. This view was not idiosyncratic, even in the supposedly less racist North. The Pennsylvania Supreme Court opined that "no colored race was party to our social compact . . . . [O]ur ancestors settled the province as a community of white men, and the blacks were introduced into it as a race of slaves; whence an unconquerable prejudice of caste, which has come down to our day, insomuch that a suspicion of taint still has the unjust effect of sinking the subject of it below the common level." Hobbs v. Fogg, 6 Watts 553, 558 (Pa. 1837). After discussing disabilities and restrictions on free Black people, the court observed: "If freemen, in a political sense, were subjects of these cruel and degrading oppressions, what must have been the lot of their brethren in bondage? It is also true, that degrading conditions were sometimes assigned to white men, but never as members of a caste." *Id.* at 559; *see also* Pendleton v. State, 6 Ark. 509, 511 (1846) ("Are free negroes or free colored persons citizens within the meaning of [the Privileges and Immunities] clause? We think not. In recurring to the past history of the constitution, and prior to its formation, to that of the confederation, it will be found that nothing beyond a kind of quasi citizenship has ever been recognized in the case of colored persons."); Collins v. Hall, 1 Del. Cas. 326, 328 (Sup. Ct. 1793) ("This witness is a Negro, and it has always been the policy of the State to exclude Negroes from the rights of citizenship and from giving evidence where whites are concerned."); Bryan v. Walton, 14 Ga. 185, 202 (1853) ("Our ancestors settled this State when a province, as a community of white men, professing the christian religion, and possessing an equality of rights and privileges. The blacks were introduced into it, as a race of Pagan slaves. The prejudice, if it can be called so, of caste, is unconquerable. It was so at the beginning. It has come down to our day. The suspicion of taint even, sinks the subject of it below the common level. Is it to be credited, that parity of rank would be allowed to such a race? Let the question be answered by our Naturalization Laws, which do not apply to the African.").

> mulattoes, or Indians. The white race did not admit individuals of either of the other races to political or social equality; they were regarded and treated as inferiors, of whom it was lawful, under certain circumstances, to make slaves.[63]

Accordingly, it was

> dangerous for the white population to receive as witnesses against themselves the members of the two races which it had thus degraded . . . No one who belonged to either of the races of which slaves could be made, was allowed to be a witness where any one was concerned who belonged to the race of which the masters were composed.[64]

One might wonder why the enslavability of Indigenous Peoples or persons of African ancestry was relevant to the status of Pilipinos. Taney, though, found it important that "Malays might lawfully be held in slavery in the colony of Maryland."[65] Because Taney concluded that Asian people, like African people, were members of an enslavable race, they therefore should be treated as such.

As noted above, after the Civil War, Jim Crow regulated people of color generally.[66] But the foundation for regulating all non-White people was already in place.

CONCLUSION

The law of slavery was influential and important in and of itself. But it rested on ideas of White supremacy which had implications beyond the institution itself. In 1859, the North Carolina Supreme Court boasted that the genius of the common law was its flexibility,

> [It] expands so as to embrace any new exigence or condition of society; so that, while on the principle of self-protection, the paramount rights of the white population are secured, the

63. *See Dow*, 25 F. Cas. at 903.
64. *Id.*
65. *Id.* at 904.
66. *See supra* notes 11–12 and accompanying text.

> rights of this inferior race are made to give place, as far, but no farther, than is necessary for that purpose.[67]

Surely the common law displayed its flexibility with respect to White supremacy in North Carolina and beyond. The White population exercised its "paramount rights" with regard to all non-White groups as they presented challenges and problems to the interests of the White community. The techniques and methods were sometimes identical and sometimes different, but they all rested on a common idea—that this was a White country, and the law should benefit White people.

The principal point of this Essay is about understanding the history of White supremacy. It also, potentially, has implications for the substance of equal protection law. In invalidating a measure designed to promote school integration, Chief Justice Roberts famously wrote that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[68] Perhaps, constitutionally, the history of discrimination in this country is so much water under the bridge and as legally obsolete and irrelevant as the Articles of Confederation. On the other hand, the Chief Justice has apparently, not in any opinion or elsewhere, accounted for and evaluated the ways in which the United States has been shaped by race. The system of regulation of people of color cannot be appreciated and appraised until its contours are at least roughly comprehended. One would hope that constitutional doctrine would be based on an accurate understanding of the facts, and that the Supreme Court would not conclude that the United States has overcome its past of discrimination before seriously examining that history.

67. State v. Davis, 52 N.C. (7 Jones) 52, 54 (1859).

68. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).