

# Title VII at 50: The Landmark Law has Significantly Impacted Relationships in the Workplace and Society, but Title VII has not Reached its True Potential

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**TITLE VII AT 50: THE LANDMARK LAW  
HAS SIGNIFICANTLY IMPACTED  
RELATIONSHIPS IN THE WORKPLACE AND  
SOCIETY, BUT TITLE VII HAS NOT  
REACHED ITS TRUE POTENTIAL**

CYNTHIA ELAINE TOMPKINS<sup>†</sup>

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## INTRODUCTION

July 2, 2014 marked the fiftieth anniversary of the enactment of the Civil Rights Act of 1964.<sup>1</sup> The legislation, set forth in eleven titles, prohibited the unequal application of voter registration requirements, discrimination based on race, color, religion, or national origin in places of public accommodations, and made provisions for the desegregation of public schools.<sup>2</sup> The Act's seventh provision, Title VII—the title examined in this Article<sup>3</sup>—opened the door to equal employment opportunities.

Prior to Title VII, no single piece of legislation effectively regulated equal employment opportunities in the workplace.<sup>4</sup> Enacted to prohibit employment discrimination based on race, color, religion, sex, or national origin, Title VII is arguably the most significant employment legislation ever written.<sup>5</sup> In order to thoroughly appreciate why Title VII legislation was necessary, this Article chronicles African Americans' pursuit of basic God-given civil rights by examining the nation's laws, which failed to provide adequate equal protection and civil rights to African Americans from slavery until the enactment of the Civil Rights Act of 1964.<sup>6</sup> Certainly, racial oppression, segregation, and discrimination subjugated and disenfranchised African Americans for nearly 345 years, precipitating the need for the landmark civil rights legislation.<sup>7</sup> The Reconstruction Amendments, state and federal laws, and other initiatives

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<sup>1</sup> Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2012)).

<sup>2</sup> Additionally, under the Act, the Commission on Civil Rights was reauthorized to develop national civil rights policies and to investigate and research allegations related to the deprivation of the right to vote and other issues. *Id.* Further, the Act established the Community Relations Service to assist communities in resolving disputes. *Id.*

<sup>3</sup> See *infra* Parts II, III (discussing Title VII).

<sup>4</sup> Historically, federal legislation has heavily regulated various workplace objectives, such as occupational and health safety needs, wages and hours, labor relations, and so on. See, e.g., Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206–07 (2012).

<sup>5</sup> See *infra* Part II (discussing Title VII's impact on race relations in the workplace and society).

<sup>6</sup> See *infra* Part I.A–D, for a discussion of the history of race relations in the United States, specifically, African Americans' quest for civil rights—the primary impetus for the Civil Rights Act of 1964.

<sup>7</sup> See *infra* Part I. The Abolitionist Movement is not covered in this Article. However, it is important to note that several notable abolitionists tirelessly labored for the abolition of slavery and equal rights for African Americans.

implemented after the Civil War were not broad enough to adequately address the widespread discrimination that African Americans faced in the workplace prior to Title VII; the historical chronicle addresses the shortfalls of the earlier laws and initiatives.

Several United States Supreme Court cases, statutes, and events are examined, including the Constitutional Convention of 1787, the Missouri Compromise, the election of President Abraham Lincoln, the Civil War, Emancipation Proclamation, Reconstruction-era initiatives and laws, the Montgomery Bus Boycott, the social climate in the 1950s and 1960s, and Title VII's congressional debates. Also, this Article analyzes the collective efforts of civil rights advocates and public officials who supported Title VII legislation. Combined, these providential events, among others, set the stage for the milestone civil rights legislation.

Additionally, Part I's historical chronicle discusses many notable American leaders—examining their strengths, weaknesses, and key decisions that shaped American culture and society from 1619 to 1964. Significant attention is devoted to the nation's founders, elected officials, and Justices of the United States Supreme Court, as their influence on the nation's laws and national government's structure is fundamental to the African-American pursuit of civil rights. Various activists from the 1950s to 1960s Civil Rights Movement are also examined, in consideration of their central role in the African-American pursuit of civil rights.

The individuals examined in this Article were extraordinary, but like all human beings they were flawed; as such, this Article endeavors to present each—slave, slaveholder, segregationist, activist, church leader, judge, political official, and representative—with compassion, as all human beings are made in the image of God,<sup>8</sup> deserving kindness and forgiveness for offenses and imprudent decisions. However, it is equally important to recount history without omitting necessary facts. Certainly, no historian or scholar should omit the essential truth, sway or bend the facts, or spin the dark chapters of our collective past. Indeed, presenting history compassionately and truthfully are not mutually exclusive objectives.

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<sup>8</sup> See *Genesis* 1:27 (New American); *James* 3:9.

The United States' history of African Americans leading up to Title VII covers approximately four centuries. While this Article could not examine all of the historic individuals and events from the era, innumerable facts and several pertinent footnotes have been added for the benefit of those seeking additional information; particularly since various details examined are marginally observed in other works and books—the diverse and selective accounts of American race history are astounding.

Moreover, to effectively convey the depth and measure of the extraordinary individuals described, significant quotations from publications, speeches, and letters have been added. Fortunately, many of the nation's founders, leaders, and activists left their own written words—their truths—denoting many of their views and reasons behind key decisions that shaped our nation; some of the decisions still impact race relations in America today. As such, various quotes and a detailed examination of the founders' and leaders' viewpoints are included throughout this Article for readers to examine.

Notably, few sources account the African-American quest for civil rights as comprehensively and explicitly as the late historian John Hope Franklin's writings.<sup>9</sup> Additionally, historians Evelyn Brooks Higginbotham, Darlene Clark Hine, William C. Hine, and Stanley Harrold have made tremendous contributions to this area of scholarship. This Article contains several citations to their published works, *From Slavery to Freedom: A History of African Americans*<sup>10</sup> and *The African-American Odyssey*.<sup>11</sup>

A common misinterpretation needs to be dispelled: Some—perhaps many—maintain that those who speak, write, and dedicate scholarship to a historical examination of the

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<sup>9</sup> This author was privileged to meet the late Dr. John Hope Franklin. The conversations held with Dr. Franklin were enlightening and memorable. Dr. Franklin spent innumerable years researching and writing about the history of African Americans in the United States. He freely shared knowledge and invaluable research with students, colleagues, and his widespread readership. With gratitude, Dr. Franklin is remembered for his enormous contributions to the research, examination, and documentation of African-American history.

<sup>10</sup> See generally JOHN HOPE FRANKLIN & EVELYN BROOKS HIGGINBOTHAM, *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* (9th ed. 2011).

<sup>11</sup> See generally DARLENE CLARK HINE, WILLIAM C. HINE & STANLEY HARROLD, *THE AFRICAN-AMERICAN ODYSSEY* (6th ed. 2014).

African-American quest for civil rights are absorbed with the past and a study of victimization. Generally, that belief is far from the truth. As in this Article, the narrative that follows is not an unnecessary focus on the past or the chronicle of a community of victims. Rather, Part I examines the history of an extraordinary people who have—as their song of liberation<sup>12</sup> foreshadowed—overcome as victors and champions, despite centuries filled with astonishing obstacles, blockages, and barriers. Moreover, while this Article’s historical chronicle highlights the history of African Americans in the United States, it is important to recognize that the African-American experience is an integral part of the American story.

Furthermore, as noted, the pertinent details of the African-American past have been marginalized in various works. The history—triumphs and failures—should be studied; as we look back, we see forward, enhancing our assessment of present and future events. Hence, this Article’s historical chronicle provides a valuable backdrop for an examination of Title VII.<sup>13</sup> Part II analyzes Title VII’s impact on race relations in the workplace and society.<sup>14</sup> While progress has been made in the

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<sup>12</sup> African Americans used music during slavery, and the years following, to express pain, joy, and hope. By most accounts, the most memorable song from the 1950s and 1960s civil rights movement was *We Shall Overcome*:

[The song] seems to have first been sung by striking tobacco workers in Charleston, South Carolina, in 1945. In the 1960s the song became the all-but-official anthem of the civil rights movement. . . . [C]redit of authorship [has been given] to, among others, Silphia Horton of the Highlander Folk School, who learned the song from the tobacco workers, and Pete Seeger, who helped to popularize the song and gentrified its title from “We Will Overcome.”

*African American Odyssey: The Civil Rights Era*, LIBR. CONGRESS, <http://lcweb2.loc.gov/ammem/aaohhtml/exhibit/aopart9b.html#0919-0922> (last visited Feb. 8, 2016). The popular chorus empowered and encouraged the 1950s and 1960s marchers and protestors who frequently sang:

We shall overcome, we shall overcome,  
 We shall overcome some day  
 Oh, deep in my heart, I do believe,  
 We shall overcome some day.

“*We Shall Overcome*,” NEGROSPIRITUALS.COM, [http://www.negrospirituall.com/songs/we\\_shall\\_overcome.htm](http://www.negrospirituall.com/songs/we_shall_overcome.htm) (last visited Feb. 8, 2016). Regarding the reference to the negro spirituals, in the centuries before the middle to late twentieth century, African Americans were generally addressed as “colored” and “negro.” In this Article, those terms will appear only in quoted text.

<sup>13</sup> See discussion *infra* Parts II, III.

<sup>14</sup> See *infra* Parts II, III, for a discussion of Title VII and its impact on race relations in the workplace and society.

effort to provide equal opportunities for all workplace employees,<sup>15</sup> Title VII legislation has not eliminated employment discrimination. As Title VII marches toward its sixtieth anniversary, this Article's final section, Part III, reviews unconscious bias<sup>16</sup> and other current challenges preventing Title VII from reaching its true potential.<sup>17</sup>

### I. THE UNITED STATES HISTORY OF RACIAL OPPRESSION, SEGREGATION, AND DISCRIMINATION THAT STIRRED THE NEED FOR LANDMARK CIVIL RIGHTS LEGISLATION

The Jamestown colony was the first English settlement in North America,<sup>18</sup> founded in 1607 in the Chesapeake area of Virginia.<sup>19</sup> By the mid-eighteenth century, there were numerous English settlements established in America.<sup>20</sup>

In 1776, delegates<sup>21</sup> ("Founders") of the Second Continental Congress met in Philadelphia, Pennsylvania.<sup>22</sup> The Founders adopted the Declaration of Independence on July 4, 1776—penned by Thomas Jefferson<sup>23</sup>—declaring: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."<sup>24</sup>

<sup>15</sup> See Civil Rights Act of 1964 § 705, 42 U.S.C. § 2000e-4 (2012) (creating the Equal Employment Opportunity Commission to implement Title VII's statutory purpose of prohibiting discrimination based on race, color, religion, sex, and national origin).

<sup>16</sup> See *infra* Part III.A, for a discussion of the unconscious bias theory.

<sup>17</sup> See *infra* Part III.B, for a discussion addressing additional challenges, including the Equal Employment Opportunity Commission ("EEOC") charge inventory backlog, preventing Title VII from reaching its true potential.

<sup>18</sup> See HINE, HINE & HARROLD, *supra* note 11, at 55.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 62 map.3-1.

<sup>21</sup> The drafters of the Declaration of Independence and the Constitution—the nation's founders—are also known as the Founding Fathers.

<sup>22</sup> See *Primary Documents in American History: Declaration of Independence*, LIBR. CONGRESS,

<http://www.loc.gov/rr/program/bib/ourdocs/DeclarInd.html> (last updated June 2, 2015); see also HINE, HINE & HARROLD, *supra* note 11, at 85.

<sup>23</sup> Jefferson was a prominent leader in the eighteenth and nineteenth centuries. See *infra* text accompanying notes 169–221, for a discussion of Thomas Jefferson's impact on the nation during the noted eras.

<sup>24</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Notwithstanding the principled declaration, from the time that African slaves were forcibly brought to the United States<sup>25</sup> until the enactment of the Civil Rights Act of 1964, most African Americans were subjugated and excluded from the American dream.<sup>26</sup> The renowned historian John Hope Franklin<sup>27</sup> aptly noted that “[i]t must have intrigued, if not perplexed, the slaves of Patrick Henry if they ever heard his stirring words”<sup>28</sup> leading up to the Revolutionary War for independence: “Is life so dear or peace so sweet as to be purchased at the price of chains and slavery? Forbid it, almighty God. I know not what others may wish, but as for me, give me liberty or give me death.”<sup>29</sup>

Despite the stirring words spoken by Patrick Henry and the principles pronounced in the Declaration of Independence,<sup>30</sup> for centuries, African Americans did not enjoy “[l]iberty [or] . . . the pursuit of [h]appiness,”<sup>31</sup> “peace so sweet,”<sup>32</sup> and basic civil and human rights “endowed by their Creator.”<sup>33</sup> This lamentable paradox began with the American institution of slavery in the seventeenth century Jamestown, Virginia colony.

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<sup>25</sup> See discussion *infra* Part I.A (detailing the origin of slavery in the United States).

<sup>26</sup> See discussion *infra* Part I.A–D (detailing the history of African Americans in the United States).

<sup>27</sup> See *supra* note 9 and accompanying text (providing details about Dr. John Hope Franklin).

<sup>28</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 85.

<sup>29</sup> *Id.* (internal quotation marks omitted); HARLOW GILES UNGER, LION OF LIBERTY: PATRICK HENRY AND THE CALL TO A NEW NATION 98–99 (2010). Historian Harlow Unger notes:

No actual transcript of Henry’s speech exists, and the words shown here represent a reconstruction by Henry’s first biographer William Wirt, who extrapolated its contents from recollections—forty years after the event—by those present at St. Paul’s, including Judge John Tyler, an intimate of Henry’s, Thomas Jefferson, Edmund Randolph, and Judge St. George Tucker, among others. Hardly a friend of Henry, Jefferson did not alter a word in Wirt’s reconstruction of the speech and reiterated his appraisal of Henry as the greatest orator in history. As I stated previously, I believe that word for word accuracy is less important than an accurate presentation of Henry’s meaning, his passion, and his eloquence.

*Id.* at 293 n.10.

<sup>30</sup> *Id.* at 97–99. Patrick Henry was revered as a great orator. See *id.* at 100. The words that Henry delivered in his “Give Me Liberty or Give Me Death” speech sealed his name in history as one of the most memorable orators. See *id.* at 99–100.

<sup>31</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>32</sup> UNGER, *supra* note 29, at 98.

<sup>33</sup> THE DECLARATION OF INDEPENDENCE para. 2.

## A. Slavery

Africans were brought to the colony of Jamestown in 1619.<sup>34</sup> In that year, John Rolfe, known for his role as secretary and recorder general for the Jamestown, Virginia colony,<sup>35</sup> reported that “a Dutch man of Warr” had “brought not any thing but

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<sup>34</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 51. African slaves were previously brought to America even before the colonists settled Jamestown. Portugal first “established trade networks with African merchants” starting in the fifteenth century. *Id.* at 23. Although initially European wares were traded for various African goods, including gold, ivory, and slaves, human cargo eventually “supplant[ed] gold as the most important and valuable African export.” *Id.* The European countries’ main interest was in exploiting the natural resources found in the New World; therefore, labor, especially cheap labor, was necessary. *Id.* at 25. Initially, European explorers used Native Americans for slave labor. *Id.* The Native Americans, however, were dying in great numbers due to the diseases brought over by the Europeans and because of the harsh labor conditions imposed upon them. *Id.* Madrid, as early as 1501, authorized Spanish explorers to bring Africans to the New World “to make up for the deficiency in [Native American] labor.” *Id.* England attempted “white indentured labor,” whereby an indentured servant agreed to serve for a certain term of years; at the end of the term, the servant would gain both freedom and land. *Id.* at 26–27. England realized by the late seventeenth century, however, that using Africans presented fewer problems than using white individuals for labor. *Id.* at 27. Not only could “Africans . . . be easily recognized and apprehended” if they attempted to escape, but “they could [also] be purchased outright, thus stabilizing a master’s labor supply.” *Id.* Since European countries were competing against one another over the New World and its natural resources, “finding acceptable workers in large quantities became the primary impetus for the growth of the Atlantic slave trade.” *Id.* at 25. Additionally, Europe saw the vast amount of wealth to be amassed from the slave trade. *Id.* at 27. While it is important to note that “[s]lavery and slave trading had existed in all cultures for thousands of years,” it typically was not as oppressive as it was in the Americas. HINE, HINE & HARROLD, *supra* note 11, at 26. “The voyage to the Americas, usually called the ‘middle passage,’ was a living nightmare.” FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 33. Overcrowding on those ships was to the extent that slaves hardly had room to stand, lie, or sit in the areas where they were kept. *Id.* They were shackled together both at their hands and feet such that they had no room to move. *Id.* The overcrowded conditions fostered sickness breaking out, as did hunger strikes and the filth caused by the close, unsanitary quarters. *Id.* If the slaves did not die during voyage either by disease or by committing suicide, then many were either disabled permanently by disease or maimed from the chains used during voyage. *Id.* It is believed that “approximately 12.5 million slaves were transported” to the New World by way of the middle passage. *Id.* at 35.

<sup>35</sup> Emily Jones Salmon, *John Rolfe (d. 1622)*, ENCYCLOPEDIA VIRGINIA (Dec. 6, 2011), [http://www.EncyclopediaVirginia.org/Rolfe\\_John\\_d\\_1622](http://www.EncyclopediaVirginia.org/Rolfe_John_d_1622) (last modified Nov. 30, 2015).

20 . . . odd Negroes” to the Jamestown colony.<sup>36</sup> For the next approximately 246 years, “[s]laves, mostly from Africa, worked in the production of tobacco crops and later, cotton.”<sup>37</sup>

Notably, by the mid-eighteenth century, all of the colonies participated in the institutional practice of slavery.<sup>38</sup> In the late eighteenth century, the colonies battled with Great Britain—largely seeking liberty and independence—while contemporaneously failing to liberate the African slaves.<sup>39</sup> Several northern states, generally reacting to this paradox, “abolished slavery by 1784.”<sup>40</sup> The stark contradiction, however, did not sway the southerners. Indeed, many, if not most, slaveholders apparently associated African Americans with chattel. This connection is noticeable in slaveholders’ writings. Even when drafting a final will and testament, slaveholders often listed slaves in sequence with farm animals; for example, “One-third of the Negroes, two-thirds of the cattle, one-third of the hogs and one-third of the sheep were assigned Mrs. Washington.”<sup>41</sup>

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<sup>36</sup> Letter from John Rolfe to Sir Edwin Sandys (Jan. 1619), in 3 LIBRARY OF CONG., THE RECORDS OF THE VIRGINIA COMPANY OF LONDON 241, 243 (Susan Myra Kingsbury ed., 1933), available at <https://www.loc.gov/resource/mtj8.vc03/?sp=267> (addressing the events taking place in the Jamestown colony, including the arrival of African slaves).

<sup>37</sup> *Slavery in America*, HISTORYNET, <http://www.historynet.com/slavery-in-america> (last visited Feb. 8, 2016). Some historians contend that up until about 1670, Africans, although sold to the Chesapeake, Virginia colonies, including Jamestown, served as “unfree indentured servants,” rather than as slaves. HINE, HINE & HARROLD, *supra* note 11, at 56; see also FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 51.

<sup>38</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 63.

<sup>39</sup> See, e.g., HINE, HINE & HARROLD, *supra* note 11, at 88 (discussing the contradiction generated from the colonists’ revolutionary principles of liberty and simultaneous practice of slavery); 1 AFRICAN AMERICAN HISTORY 1 (Carl L. Bankston III ed., 2006); see also THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>40</sup> 1 AFRICAN AMERICAN HISTORY, *supra* note 39. The following northern states abolished slavery early in the country’s founding: Vermont abolished slavery in 1777 in its constitution, and Pennsylvania abolished slavery in 1780. FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 98–99, 107. Massachusetts “weakened the institution of slavery beyond recovery” in 1783, and Rhode Island and Connecticut passed emancipation laws in 1784. *Id.* at 99. New York eventually abolished slavery in 1799, and New Jersey abolished it in 1804. *Id.*

<sup>41</sup> FRITZ HIRSCHFELD, GEORGE WASHINGTON AND SLAVERY: A DOCUMENTARY PORTRAYAL 219 (1997) (quoting 3 DOUGLAS SOUTHALL FREEMAN, GEORGE WASHINGTON: A BIOGRAPHY 20 (1951)). The Last Will and Testament language cited in the text accompanying this footnote was written by Martha Washington’s first husband, Colonel Daniel Parke Custis. See *id.* Following Custis’s untimely death in

1. The Constitutional Convention, United States Constitution, America's Founders, and Slavery Compromises

In 1787, fifty-five delegates from Connecticut, New York, New Hampshire, Massachusetts, New Jersey, North Carolina, South Carolina, Pennsylvania, Delaware, Maryland, Virginia, and Georgia were sent to the Constitutional Convention in Philadelphia, Pennsylvania.<sup>42</sup> At an earlier session, various delegates of the group gathered to revise the Articles of Confederation ("AOC"), and a majority decided that a United States Constitution was needed.<sup>43</sup> The Founders spent several months—from May to September 1787—debating pertinent issues.<sup>44</sup> Their vital objective was "to create a republican form of government that could encompass the 13 States and accommodate the anticipated expansion to the West."<sup>45</sup> The central governmental framework established in the Constitution has withstood the test of time for more than two centuries, strengthened over time by necessary amendments—in the case of African Americans, the Thirteenth, Fourteenth, and Fifteenth Amendments abolished slavery, addressed equal protection of the laws, and granted the right to vote.<sup>46</sup>

During the eras addressed in this Article's historical chronicle—from America's founding to the Civil Rights Movement—many of the nation's founders, leaders, officials, and activists spoke of God, the "Laws of Nature and Nature's God," Christian principles, and their respective biblical views when making important decisions that impacted the nation and America's foundational documents—the Constitution and the Declaration of Independence—by announcing their endeavor to apply the rule of law in accordance with natural God-given law.<sup>47</sup>

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1757, the estate passed to his wife, but it was eventually managed by George Washington after he married Martha Dandridge Custis. *Id.*

<sup>42</sup> 1 JOHN R. VILE, *THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA'S FOUNDING* 215, 223 (2005). Rhode Island refused to attend the Constitutional Convention of 1787. 2 *id.* at 677–78.

<sup>43</sup> The AOC "created a weak central government." HINE, HINE & HARROLD, *supra* note 11, at 109. The 1787 Second Constitutional Convention delegation revised the AOC, creating a structured government with executive, legislative, and judicial branches. *See generally* U.S. CONST.

<sup>44</sup> 1 VILE, *supra* note 42, at 77.

<sup>45</sup> H.R. DOC. NO. 110-50, at v (2007).

<sup>46</sup> *See infra* Part I.B for a discussion of the Reconstruction Amendments.

<sup>47</sup> *See infra* text accompanying notes 48–59 (examining many of the Founders' and other leaders' frequent statements about God and Christianity); *see also* U.S.

For instance, at the 1787 Constitutional Convention, the Founders' arguments over state representation in Congress—including how slaves would be counted—were among the most divisive issues considered.<sup>48</sup> Responding to the impasse, the elder statesman Benjamin Franklin addressed his fellow delegates. He spoke of their first few weeks at the convention, spent “groping, as it were, in the dark to find Political Truth,” without seeking God's guidance.<sup>49</sup> Franklin compared those times with the earlier years when they were preparing for the Revolutionary War.<sup>50</sup> He said:

In the Beginning of the Contest with Britain, when we were sensible of Danger, we had daily Prayers in this Room for the Divine Protection. Our Prayers, Sir, were heard;—and they were graciously answered. . . . I have lived, Sir, a long time; and the longer I live, the more convincing proofs I see of this Truth, *that God governs in the Affairs of Men*. And if a Sparrow cannot fall to the Ground without his Notice, is it probable that an Empire can rise without his Aid? . . . I therefore beg leave to move, That henceforth Prayers, imploring the Assistance of Heaven and its Blessing on our Deliberations, be held in this Assembly every morning before we proceed to Business; and that one or more of the Clergy of this city be requested to officiate in that Service.<sup>51</sup>

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CONST. pmb., art. VII; THE DECLARATION OF INDEPENDENCE paras. 1, 2, 5 (U.S. 1776). Moreover, many activists and civil rights leaders organized and led by acknowledging God, Biblical scriptures, and Christian principles. *See generally An Appeal to Canada: An Address Delivered in Toronto, Canada West, on 3 April 1851*, in 2 THE FREDERICK DOUGLASS PAPERS 326, 329–30 (John W. Blassingame ed., 1982) (discussing the sermons delivered in Southern churches on slavery and explaining the sin of slavery and God's just nature); Martin Luther King, Jr., Letter from a Birmingham Jail (Apr. 16, 1963) (on file with the Martin Luther King Jr. Research and Education Institute at Stanford University), *available at* [http://okra.stanford.edu/transcription/document\\_images/undecided/630416-019.pdf](http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf) (explaining the responsibility to defy unjust laws in a nonviolent manner based on biblical principles).

<sup>48</sup> *See* 1 VILE, *supra* note 42, at 7–9; 2 *id.* at 723–27 (explaining how certain delegates attacked the institution of slavery and, specifically, slave importation).

<sup>49</sup> BENJAMIN FRANKLIN, *Motion for Prayers in the Convention*, in BENJAMIN FRANKLIN: AUTOBIOGRAPHY, POOR RICHARD, AND LATER WRITINGS 398, 398 (Joseph A. Leo Lemay ed., 4th prtg. 1997).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 398–99; *see also* 100 CONG. REC. app. at 4419 (1954); JAMES MADISON, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787, at 253–54 (Jonathan Elliot, ed., 1845).

On January 11, 1788, referencing the difficulties faced and work accomplished “in devising a proper form of government” at the 1787 Constitutional Convention, Founder James Madison wrote in *The Federalist*: “It is impossible for the man of pious reflection not to perceive in it a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution.”<sup>52</sup>

Samuel Adams was one of the Founders who signed the Declaration of Independence; he served as governor of Massachusetts, attended Harvard College, and held other government positions throughout his lifetime.<sup>53</sup> Samuel Adams was viewed by some of his associates as a rebel.<sup>54</sup> While many of his contemporaries were slaveholders, he denounced the institution through his words and deeds.<sup>55</sup> Consider Adams’s decision: His niece recounts that in the mid-eighteenth century Samuel Adams’s wife was given a slave as a gift.<sup>56</sup> After hearing about the gift, he unhesitatingly responded, “A slave cannot live in my house. If she comes she must be free.”<sup>57</sup>

As governor of Massachusetts, Samuel Adams’s first address to the legislature was delivered on January 17, 1794.<sup>58</sup> Biographer Ira Stoll studied the inaugural speech, noting:

It was to . . . God, Adams said, that he looked for wisdom in performing his duties. He spoke to the elected representatives about “the laws of the Creator,” which he said, “are imprinted by the finger of God on the heart of man.” He concluded with a plea for the importance of “a virtuous education,” “calculated to reach and influence the heart, and to prevent crimes.” Such an education, he said, will impress young minds with “a profound

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<sup>52</sup> THE FEDERALIST NO. 37, at 179, 184 (James Madison) (Ian Shapiro ed., 2009).

<sup>53</sup> Encyc. of World Biography, *Samuel Adams*, ENCYCLOPEDIA.COM, [http://www.encyclopedia.com/topic/Samuel\\_Adams.aspx#2](http://www.encyclopedia.com/topic/Samuel_Adams.aspx#2) (last visited Feb. 8, 2016); *Signers of the Declaration of Independence*, U.S. NAT’L ARCHIVES & RECORDS ADMIN., [http://www.archives.gov/exhibits/charters/declaration\\_signers\\_gallery\\_facts.pdf](http://www.archives.gov/exhibits/charters/declaration_signers_gallery_facts.pdf) (last visited Feb. 8, 2016).

<sup>54</sup> See IRA STOLL, SAMUEL ADAMS: A LIFE 13–39 (2008).

<sup>55</sup> *Id.* at 55.

<sup>56</sup> *Id.* (citing 1 WILLIAM V. WELLS, THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS 138 (1866)).

<sup>57</sup> *Id.* (internal quotation marks omitted) (citing WELLS, *supra* note 56).

<sup>58</sup> *Id.* at 243.

reverence for the Deity” and “will excite in them a just regard to Divine Revelation, which informs them of the original character and dignity of Man.”<sup>59</sup>

While debating the terms of the Constitution,<sup>60</sup> convention delegates disagreed over key issues,<sup>61</sup> including the institution of slavery.<sup>62</sup> Specifically, northern and southern state delegates debated how to count slaves for purposes of state taxation and congressional representation, as state representation is based on a state’s total population.<sup>63</sup> In addition, disputes centered on how long the slave trade with Europe would continue<sup>64</sup> and how states would handle slaves that escaped.<sup>65</sup> Most delegates believed that “slavery was among these domestic institutions that ought to be left to the states,”<sup>66</sup> not the federal government. Connecticut delegate Oliver Ellsworth conveyed the Constitutional Convention’s general reluctance to “intermeddle” with States’ affairs: “Let every State import what it pleases. The morality or wisdom of slavery are considerations belonging to the States themselves—what enriches a part enriches the whole, and the States are the best judges of their particular interest.”<sup>67</sup>

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<sup>59</sup> *Id.* at 244 (footnote omitted) (quoting 4 THE WRITINGS OF SAMUEL ADAMS 356, 359 (Harry Alonzo Cushing ed., 1908)).

<sup>60</sup> After the Constitution was signed in 1787 and ratified in 1788, a few years later, in 1791, the first ten constitutional amendments, known as the Bill of Rights, were added. *See generally* U.S. CONST. amends. I–X.

<sup>61</sup> *See* THE FEDERALIST NOS. 1, 6–9, 11–13, 15–17, 21–36, 59–61, 65–85 (Alexander Hamilton), NOS. 2–5, 64 (John Jay), NOS. 10, 14, 37–48, 58 (James Madison), NOS. 18–20 (Alexander Hamilton & James Madison), NOS. 49–57, 62–63 (Alexander Hamilton or James Madison).

<sup>62</sup> THE FEDERALIST NOS. 1, 6–7 (Alexander Hamilton), NO. 54 (James Madison).

<sup>63</sup> THE FEDERALIST NO. 54 (James Madison). Northern representatives did not want slaves to be counted because it would give more representatives to the southern states; they also found it objectionable since southerners viewed slaves as property, not human. *Id.* Conversely, southerners wanted slaves to be counted in the same manner as whites, even though they did not view them as human beings, so that they would have more representatives in Congress. *Id.*; *see* 1 VILE, *supra* note 42, at 4–5.

<sup>64</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 101.

<sup>65</sup> 1 VILE, *supra* note 42, at 4.

<sup>66</sup> DONALD L. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS: 1765–1820, at 224 (1971) (suggesting that most of the delegates likely deemed the international slave trade into the United States an easier issue for the national government to address, rather than the domestic slave trade); *see also* 1 VILE, *supra* note 42, at 6–7.

<sup>67</sup> 1 VILE, *supra* note 42, at 7.

Delegate George Washington<sup>68</sup> served as president of the 1787 Constitutional Convention.<sup>69</sup> Washington believed that “a powerful and lasting federal union” was paramount, and he considered many of the other issues at the Constitutional Convention—including the abolition of slavery—“points of inferior magnitude.”<sup>70</sup> Undeniably, as “a lifelong slaveholder, [Washington] had a substantial private stake in the economic slave system of the South.”<sup>71</sup> Thus, the continuation of the slave institution was essential to the preservation of his personal estate that was maintained with slave labor.

An examination of Washington's role as a lifelong slaveholder is not presented to cast aspersions on America's first President. Rather, as historian and teacher Jim Smith notes:

[Americans] live in a diverse and complex world, and all of us need to understand that world in order to survive. One of the best ways to understand our world is to understand its history, an understanding that is vital not only to our personal happiness, but also the health of our society. . . . Since all of us must live with both the vulgarity and the nobility of human existence, we should understand that studying people from the past is one of the best ways to prepare ourselves to live with other human beings, at both their best and their worst.<sup>72</sup>

Given Washington's leadership role at the 1787 Constitutional Convention and, later, as the nation's first President—serving two terms—his viewpoints and decisions,

<sup>68</sup> George Washington was elected to serve as the nation's first President in 1789. HIRSCHFELD, *supra* note 41, at 179.

<sup>69</sup> HIRSCHFELD, *supra* note 41, at 171 (citing 5 THE DIARIES OF GEORGE WASHINGTON 162 (Donald Jackson & Dorothy Twohig eds., 1979)).

<sup>70</sup> *Id.* at 174, 177–78.

<sup>71</sup> *Id.* at 1. Washington owned hundreds of slaves during his lifetime. *Id.* at 20, 210 (citing George Washington's handwritten will); MATTHEW T. MELLON, EARLY AMERICAN VIEWS ON NEGRO SLAVERY: FROM THE LETTERS AND PAPERS OF THE FOUNDERS OF THE REPUBLIC 80–81 (1969) (discussing Washington's life as a slaveholder and how he attempted to continue controlling his slaves' destinies beyond his death through his will). The provisions of Washington's will were designed to apply “after his and his wife's death.” HIRSCHFELD, *supra* note 41, at 210; *see also id.* at 212–23 (discussing the actual parts of George Washington's will that were fulfilled according to his wishes).

<sup>72</sup> James L. Smith, *Why Teach History?*, WHYTEACHHISTORY.COM, [www.whyteachhistory.com/teachinghistory/whyteachhistory](http://www.whyteachhistory.com/teachinghistory/whyteachhistory) (last visited Feb. 8, 2016).

undoubtedly, influenced many people during his era and thereafter. As such, Washington's position on slaves and the institution of slavery should not be ignored or sidelined.

Noticeably, in the spirit of either patriotism, or for other reasons, various scholars and historians fail to mention or examine pertinent details of Washington's legacy, reflecting only on his notable achievements. And, many Americans often elaborate on the popular stories told about the first President, such as the "cherry tree," a tale shared with generations of children and found in many school history books.<sup>73</sup> Yet, historian Matthew Mellon studied the cherry tree story and concluded:

[It was] invented . . . to illustrate the "private virtues" of the great man. . . . The result of the . . . [story's author's work] was to take every bit of humanity out of Washington's life and to set him up on so high a pedestal, that generations of Americans could only regard him as a curious heaven-sent phenomenon having very little to do with lowly human beings like themselves.<sup>74</sup>

Certainly, Washington was an esteemed general and President; he made invaluable contributions to the establishment of the nation's republican form of government, but he was also human and thus flawed. Historian Fritz Hirschfeld notes:

The legacy that Washington left to the nation—and that includes his slave legacy—lives on whether or not we approve of it and whether or not we choose to ignore it. . . . [M]illions of African Americans . . . labored under the system of institutionalized slavery that Washington participated in, approved of, and actively promoted. Their descendants will carry the scars for generations to come.<sup>75</sup>

The nation's first President, George Washington, should be remembered for both his notable achievements and for his viewpoints and decisions concerning slaves and the institution of slavery, as there is much to admire and simultaneously many lessons to learn. Specifically, concerning the issue of African Americans in the eighteenth century—both free and enslaved—Washington's views seemed to ebb and flow between prejudiced dehumanizing opinions and respectful expressions

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<sup>73</sup> See MELLON, *supra* note 71, at 38.2

<sup>74</sup> *Id.*

<sup>75</sup> HIRSCHFELD, *supra* note 41, at xii.

over time.<sup>76</sup> This dichotomy is partly due to his upbringing and the slaveholding legacy he inherited, as Washington's family was rooted in the institution of slavery—he would become a fourth generation slaveholder.<sup>77</sup> In the Virginia colony, it was mandatory that all churches read a biannual proclamation reminding parishioners that slaves who attempted to forcefully escape from the homes of their masters would be in violation of the colony laws.<sup>78</sup> This was the era, environment, and instruction in which Washington was reared and came of age.<sup>79</sup>

Unlike some of his contemporaries, Washington never studied at a university, other than when he obtained a surveyor's license at the College of William and Mary; his educational opportunities emanated from primary and secondary schools, his family, and the colony community.<sup>80</sup>

Washington's exposure to African Americans throughout much of his life was limited to the slaves who served him and his family by maintaining the Washington estate without wages from sunrise to sunset each day.<sup>81</sup> On the one hand, "[t]he thousands of pages of his diaries, correspondence, and agricultural records include a seemingly unending litany of complaints, accusations, sarcastic remarks, and cynical observations with reference to his slave laborers."<sup>82</sup>

On the other hand, in 1775, Washington was the commanding general in the war against the British. He initially refused to allow free black men to enlist in the Continental Army;<sup>83</sup> however, in late December, he changed his mind after being outwitted by British army officials. Their army was successfully enticing black individuals to join their ranks; Washington feared that the British officials recruiting the black men "would become the most formidable enemy to the cause of independence."<sup>84</sup>

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<sup>76</sup> See HIRSCHFELD, *supra* note 41, at 34; MELLON, *supra* note 71, at 84.

<sup>77</sup> See HIRSCHFELD, *supra* note 41, at 11; MELLON, *supra* note 71, at 40–41.

<sup>78</sup> See MELLON, *supra* note 71, at 40–41.

<sup>79</sup> See *id.*

<sup>80</sup> *Id.* at 83, 91.

<sup>81</sup> HIRSCHFELD, *supra* note 41, at 11; MELLON, *supra* note 71, at 42.

<sup>82</sup> HIRSCHFELD, *supra* note 41, at 34.

<sup>83</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 90–91.

<sup>84</sup> *Id.* at 91–92; see HIRSCHFELD, *supra* note 41, at 224.

In January 1776, the Continental Congress approved Washington's decision to enlist free Black men.<sup>85</sup> Additionally, several states began enlisting both slaves and free black men after concerns grew over runaway slaves joining the British army.<sup>86</sup> At the end of the war, some of the slaves who served gained freedom.<sup>87</sup> Historian John Hope Franklin noted that 5,000 African-American men served in the War of Independence, contributing to "every phase of the war and under every possible condition."<sup>88</sup> The black soldiers served side-by-side with the white soldiers "in integrated but primarily white units."<sup>89</sup>

Serving alongside black men in the war, notwithstanding Washington's rank as the Army Commanding General, Washington observed the black soldiers' impressive courage and skills.<sup>90</sup> Notably, when Washington stood on the battlefield with black men, both enslaved and free serving together, his views of black people began to evolve.<sup>91</sup> Washington's decision—albeit initially made only for strategic tactical reasons—to authorize the enlistment of black soldiers opened the door for their entry in all subsequent wars; though after the War of Independence, black soldiers served in segregated units until World War II in 1950.<sup>92</sup>

The gradual apparent transformation of Washington's views is a fine example of why a diverse workforce is essential for the improvement of race relations in America—a point examined further in Part II of this Article. Historian Fritz Hirschfeld noted, "The personal and institutional prejudices toward slaves that Washington had brought with him from Virginia were considerably revised."<sup>93</sup> Another historian observed, "[W]e find a Washington with a much higher opinion of the [African American] as a fighter and as a man. As Washington who had learned by experience that a slave is also a human being and should be treated as such."<sup>94</sup>

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<sup>85</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 92.

<sup>86</sup> *Id.* at 93.

<sup>87</sup> HIRSCHFELD, *supra* note 41, at 224.

<sup>88</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 93.

<sup>89</sup> *Id.* at 94.

<sup>90</sup> HIRSCHFELD, *supra* note 41, at 225.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 225 & n.6

<sup>93</sup> *Id.* at 225; *see also* MELLON, *supra* note 71, at 63–64, 84.

<sup>94</sup> MELLON, *supra* note 71, at 64.

Regarding Washington's role as president of the Constitutional Convention, his evolving views did not, however, lead him to support the abolition of slavery in September 1787. In fact, Washington prepared a cover letter for the Constitution's final draft, expressing his view that the concessions—slavery and others—were “indispensable.”<sup>95</sup> He wrote:

We have now the honour to submit to the consideration of the United States in Congress assembled, that Constitution which has appeared to us the most advisable.

. . . .

In all our deliberations on this subject, we kept steadily in our view, that which appears to us the greatest interest of every true American—the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each State in the Convention to be less rigid on points of inferior magnitude than might have been otherwise expected; and thus the Constitution, which we now present, is the result of a spirit of amity, and of that mutual deference and concession, which the peculiarity of our political situation rendered indispensable [sic].<sup>96</sup>

Despite Washington's failure to support the abolition of slavery at the Constitutional Convention, a letter that he wrote to acquaintance John Francis Mercer a year before the Constitutional Convention deserves consideration. He stated: “[I]t being among my first wishes to see some plan adopted, by which slavery in this country may be abolished by slow, sure, and imperceptible degrees.”<sup>97</sup> He later sent a similar writing to his nephew in 1797, emphasizing: “I wish from my soul that the legislature of this state, could see the policy of gradual abolition of slavery. It might prevent much future mischief.”<sup>98</sup>

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<sup>95</sup> HIRSCHFELD, *supra* note 41, at 177–78; MELLON, *supra* note 71, at 66.

<sup>96</sup> Letter from George Washington to Congress (Sept. 17, 1787), in *PLAN OF THE NEW CONSTITUTION FOR THE UNITED STATES OF AMERICA, AGREED UPON IN A CONVENTION OF THE STATES 4–5 (1787)*; see also HIRSCHFELD, *supra* note 41, at 177–78.

<sup>97</sup> Letter from George Washington to John F. Mercer (Sept. 9, 1786), available at <http://memory.loc.gov/cgi-bin/ampage?collId=mgw2&fileName=gwpage013.db&recNum=175> (last visited Feb. 8, 2016); see also HIRSCHFELD, *supra* note 41, at 237.

<sup>98</sup> MELLON, *supra* note 71, at 80 (internal quotation marks omitted).

Therefore, over time, Washington seems to have personally desired that slavery be abolished; however, he wished only to gradually abolish the institution, not promptly end it.<sup>99</sup> “To set the slaves free at once was, he thought, a dangerous proceeding.”<sup>100</sup> Washington also chose to not push for the abolition of slavery during his two-term presidency, despite the prodding of Quakers who sought his influence to help advance the mission of abolition.<sup>101</sup> Washington’s commitment to preserving the Union remained paramount over all other matters.<sup>102</sup>

Washington’s own personal writings suggest that nearing the end of his journey, he resolved that the Creator did not create a superior race of people to rule and exploit other human beings; rather, liberty, civil rights, and equal opportunity are the inalienable rights of all human beings.<sup>103</sup> Some of Washington’s final acts and writings, including his Last Will and Testament, highlight his ostensibly transformed views of African Americans.<sup>104</sup> His final will noted that his slaves would be freed after his wife Martha’s death. He made provisions for all of the impaired, elderly, and child slaves to be taken care of if their condition prevented them from earning income once they were set free; he also attempted to make provisions for their education, although eighteenth-century laws and practices prohibited this provision. The will’s provisions also attempted to protect the slaves from being enslaved again.<sup>105</sup> Washington penned his final will in his own handwriting in 1799, only a short time before his death later that year; specifically, he wrote:

The Negroes thus bound, are . . . to be taught to read [and] write; and to be brought up to some useful occupation, agreeably to the Laws of the Commonwealth of Virginia, providing for the

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<sup>99</sup> *Id.* at 84.

<sup>100</sup> *Id.*

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

<sup>102</sup> *Id.* at 85.

<sup>103</sup> See HIRSCHFELD, *supra* note 41, at 209–13; MELLON, *supra* note 71, at 81–85.

<sup>104</sup> See HIRSCHFELD, *supra* note 41, at 209–13; MELLON, *supra* note 71, at 81–85.

<sup>105</sup> See HIRSCHFELD, *supra* note 41, at 209–13; MELLON, *supra* note 71, at 81–83.

support of Orphan and other poor Children. . . . Seeing that a regular and permanent fund be established for their Support so long as there are subjects requiring it . . . .<sup>106</sup>

Finally, as discussed, Washington was immersed in the practice of slavery as a fourth-generation slaveholder, never having had the opportunity to study the principles, philosophies, and ideas that many of his contemporaries, like James Madison and Thomas Jefferson, explored in academia. As such, it is significant that Washington appears to have transcended the inherited prejudiced views and practices from his upbringing before his journey's end. That triumph, together with his other exemplary achievements, is especially noteworthy.

Another prominent founder, James Madison, the fourth President of the United States, used his impressive education and intellect to become one of the most renowned leaders in our nation's history. Madison has often been recognized as the "Father" of the U.S. Constitution," given his elite education, political experiential background, and leadership skills displayed at the 1787 Constitutional Convention.<sup>107</sup> Throughout his lifetime, Madison kept a repository of his writings and public speeches. Notably, the words written and spoken by Madison, other founders, and public servants—from America's foundation up to the present—have greatly impacted many citizens and the state of affairs in American society. In particular, Madison's words concerning slavery, segregation, equal opportunities, and the human race are vital. During his political career and thereafter, Madison frequently wrote and spoke about the "dishonorable" impact of slavery on "the American character."<sup>108</sup> Indeed, during the 1787 constitutional debates, Madison impressively denounced the idea that slaves should be designated as taxable property, and he opposed the suggestion that the international slave trade should continue until 1808,

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<sup>106</sup> HIRSCHFELD, *supra* note 41, at 212.

<sup>107</sup> 1 VILE, *supra* note 42, at 427; *see also* MELLON, *supra* note 71, at 125–26; THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 69 (Marvin Meyers ed., rev. ed. 1981).

<sup>108</sup> WENDELL PHILLIPS, THE CONSTITUTION A PRO-SLAVERY COMPACT: SELECTIONS FROM THE MADISON PAPERS 30 (1969) (quoting Madison's remarks to his fellow delegates at the Constitutional Convention about the harm that would result if the transatlantic slave trade were allowed to persist for an additional twenty years after 1787); *see also* MELLON, *supra* note 71, at 128–29 (internal quotation marks omitted).

telling his fellow delegates: “Twenty years will produce all the mischief that can be apprehended from the liberty to import slaves. So long a term will be more dishonorable to the American character than to say nothing about it in the constitution.”<sup>109</sup>

While he publically denounced the long-term extension of slavery, Madison, a lifelong slaveholder,<sup>110</sup> did not believe that black and white Americans could coexist together in America if blacks were emancipated, given what he saw as “existing and probably unalterable prejudices . . . [i]f the blacks, strongly marked as they are by physical [and] lasting peculiarities, be retained amid the whites.”<sup>111</sup> As such, Madison wrote about the urgency of implementing a colonization plan so that “freed blacks . . . [would be] permanently removed beyond the region occupied by or allotted to a white population.”<sup>112</sup>

Arguably, the disparagingly biased words that Madison used when describing black people during the vital abolition of slavery discourse—for example, “lasting peculiarities” and his suggestion that blacks be viewed “as much as possible, in the light of human beings”<sup>113</sup>—weakened his persuasion on the issues concerning slavery among his peers and constituents, despite his notable efforts to gradually halt the practice of slavery in America. Indeed, leaders’ policies, and their messages, have integrity and greater influence when words are conveyed, and decisions are made, without bias—the theory of unconscious bias in employment discrimination cases is the subject of this Article’s Title VII discussion in Part III.

Consider the incongruity of Madison’s considerate words about justice and humanity juxtaposed with his biased and discriminatory words, spoken in December 1829, at the Virginia Constitutional Convention:

It is due to justice; due to humanity; due to truth; to the sympathies of our nature; in fine, to our character as a people, both abroad and at home, that [African-American slaves] should be considered, as much as possible, in the light of human

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<sup>109</sup> MELLON, *supra* note 71, at 127–28 (internal quotation marks omitted); PHILLIPS, *supra* note 108.

<sup>110</sup> See MELLON, *supra* note 71, at 124.

<sup>111</sup> JAMES MADISON: A BIOGRAPHY IN HIS OWN WORDS 372 (Merrill D. Peterson ed., 1974).

<sup>112</sup> *Id.*

<sup>113</sup> 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON: FOURTH PRESIDENT OF THE UNITED STATES 53 (1865).

beings, and not as mere property. . . . They may be considered as making a part, though a degraded part, of the families to which they belong.

If they had the complexion of the Serfs in the north of Europe, or of the Villeins, formerly in England; in other terms, if they were of our own complexion, much of the difficulty would be removed. But the mere circumstance of complexion cannot deprive them of the character of men.<sup>114</sup>

Indeed, James Madison is noted for his hard work and many outstanding achievements, including his efforts on the Virginia Plan that largely set forth the model for the Constitution's three branches of government, his repository of informative writings compiled in the Federalist Papers, the introduction of the Bill of Rights in Congress, his contributions to the Virginia Statute of Religious Freedom, and his two-term service as President of the United States. Additionally, Madison is remembered for his considered efforts to remove the stain of slavery that rested on "the American character" during his lifetime.<sup>115</sup> Yet, it is also necessary to reflect on the disparaging, discriminatory language that Madison and other leaders used to describe African Americans, recognizing how the words overtly expressed impacted the legislation, events, and people both during the era of slavery and long after the period. Certainly, Madison's official decisions, strategies, and his chosen words, concerning black people and slavery—addressed to his fellow delegates, colleagues, and the people of the United States—were significant to the slavery discourse during the eighteenth and nineteenth centuries.

It would be innumerable years before African Americans would gain legislation and laws mandating equal protection under the law and civil rights. As noted earlier, Madison, along with the other Constitutional Convention delegates, did not vote to abolish the slave trade at the time of the Constitutional Convention; instead, the Founders agreed to compromise on the vital issues.<sup>116</sup> Madison noted, "Where slavery exists, the republican theory becomes still more fallacious."<sup>117</sup>

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<sup>114</sup> *Id.*; see also MELLON, *supra* note 71, at 160.

<sup>115</sup> MELLON, *supra* note 71, at 127–29; PHILLIPS, *supra* note 108.

<sup>116</sup> See U.S. CONST. art. I, § 9; MELLON, *supra* note 71, at 127–28; PHILLIPS, *supra* note 108.

<sup>117</sup> PHILLIPS, *supra* note 108, at 17; see also MELLON, *supra* note 71, at 129.

During the Constitutional Convention, additional Founders expressed their views on the subject of the immorality of slavery—among those were Luther Martin<sup>118</sup> from Maryland and Gouverneur Morris of Pennsylvania.<sup>119</sup> Morris told his fellow delegates at the Constitutional Convention:

The admission of slaves into Representation when fairly explained comes to this: that the inhabitant of Georgia and S.C. who goes to the Coast of Africa and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections [and] dam[n]s them to the most cruel bondages, shall have more votes in a Gov[ernmen]t instituted for the protection of the rights of mankind, than the Citizen of P[ennsylvani]a or N[ew] Jersey who views with a laudable horror, so nefarious a practice.<sup>120</sup>

Concerning the counting of slaves for representation in Congress, the Founders decided in Article I, Section 2, of the United States Constitution that whites would be counted as “whole . . . free Persons,” while slaves were counted as “three

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<sup>118</sup> Martin did not sign the Constitution, opposing the proposal for a national government. U.S. Nat'l Archives & Records Admin., *Founding Fathers: Maryland*, CHARTERS OF FREEDOM, [http://www.archives.gov/exhibits/charters/constitution\\_founding\\_fathers\\_maryland.html](http://www.archives.gov/exhibits/charters/constitution_founding_fathers_maryland.html) (last visited Feb. 8, 2016). Although James Madison's family owned slaves during his childhood, and some sources report that he held slaves as a young adult, Madison, in later years, opposed slavery. MELLON, *supra* note 71, at 124–25 (“From the very first [Constitutional Convention], an opponent of slavery, he fought the postponement of the prohibition of the slave trade until the year 1808.”).

<sup>119</sup> Morris is said to have given more speeches than any other delegate at the Constitutional Convention, and he is believed to be the delegate that completed the draft of the Constitution. U.S. Nat'l Archives & Records Admin., *Founding Fathers: Pennsylvania*, CHARTERS OF FREEDOM, [http://www.archives.gov/exhibits/charters/constitution\\_founding\\_fathers\\_pennsylvania.html](http://www.archives.gov/exhibits/charters/constitution_founding_fathers_pennsylvania.html) (last visited Feb. 8, 2016); *see also* 1 VILE, *supra* note 42, at 7; 2 VILE, *supra* note 42, at 726.

<sup>120</sup> 1 VILE, *supra* note 42, at 8 (second alteration in original).

fifths of all other Persons.”<sup>121</sup> Consequently, slaveholders were able to count their slaves as three-fifths persons, even though most slaveholders viewed slaves as property, not human beings.

Conspicuously, the text of the Constitution's original seven articles does not include the words “slaves,” “slave,” or “slavery.”<sup>122</sup> Rather, terminology such as “all other persons,” “such persons,” and “person” is used to indirectly reference those blunt words.<sup>123</sup> The words used, nonetheless, concern slaves and slavery. Indeed, some of the Constitutional Convention's delegates rejected the use of the term “slave” in the Constitution, finding it embarrassing, unscrupulous, and shameful to include the word; thus, the substitute terminology was used.<sup>124</sup> The substitution was acceptable to most, if not all of the southern delegates, “[a]s long as they were assured of protection for their

<sup>121</sup> U.S. CONST. art. I, § 2, cl. 3; *see id.* § 2, cl. 1; *id.* § 9, cl. 1; *id.* art. IV, § 2; *see also* THE FEDERALIST NO. 54 (James Madison). Delegate James Madison summarized the distinct viewpoints articulated by various Founders at the 1787 Continental Convention, relating to the issue of counting slaves as three-fifths of all other Persons:

Slaves are considered as property, not as persons. They ought therefore to be comprehended in estimates of taxation which are founded on property, and to be excluded from representation which is regulated by a census of persons. This is the objection, as I understand it, stated in its full force. I shall be equally candid in stating the reasoning which may be offered on the opposite side.

“We subscribe to the doctrine,” might one of our Southern brethren observe, “that representation relates more immediately to persons, and taxation more immediately to property, and we join in the application of this distinction to the case of our slaves. But we must deny the fact, that slaves are considered merely as property, and in no respect whatever as persons. The true state of the case is, that they partake of both these qualities: being considered by our laws, in some respects, as persons, and in other respects as property.

. . . .

. . . Let the case of the slaves be considered, as it is in truth, a peculiar one. Let the compromising expedient of the Constitution be mutually adopted, which regards them as inhabitants, but as debased by servitude below the equal level of free inhabitants, which regards the *slave* as divested of two fifths of the *man*.

THE FEDERALIST NO. 54, *supra* note 52, at 277–79 (James Madison); *see infra* Part I.B (discussing the Fourteenth Amendment's modification of the designation of slaves as “three fifths of all other Persons” in 1868).

<sup>122</sup> *See generally* U.S. CONST.

<sup>123</sup> *See* U.S. CONST. art. I, §§ 2, 9; *id.* art. IV, § 2.

<sup>124</sup> *See* MELLON, *supra* note 71, at 128 (discussing delegate James Madison's views on the terminology omitted from the Constitution).

institution.”<sup>125</sup> The word “slavery,” however, is written in the Thirteenth Amendment—added to the Constitution in 1865: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”<sup>126</sup>

Another part of the Constitution that addresses the issue of slavery is Article I, Section 9. There, the Founders agreed that “[t]he Migration or Importation of such Persons [meaning slaves] as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight.”<sup>127</sup>

Particularly, Article I, Section 9 did not mandate that the transatlantic slave trade end immediately in 1788 or that it promptly end in 1808. Rather, the provision forbade Congress from banning the importation of slaves for twenty additional years after the Constitution was ratified;<sup>128</sup> additional laws would be needed to effectively end the international slave trade. As such, “more slaves entered the United States between 1787 and 1808 than during any other 20-year period in American history.”<sup>129</sup> However, in 1807, Congress passed the Act Prohibiting Importation of Slaves of 1807, outlawing the importation of slaves to the United States.<sup>130</sup> The new law

<sup>125</sup> Paul Finkelman, *Garrison’s Constitution: The Covenant with Death and How It Was Made*, PROLOGUE, Winter 2000, available at <http://www.archives.gov/publications/prologue/2000/winter/garrisons-constitution-1.html>.

<sup>126</sup> U.S. CONST. amend. XIII, § 1.

<sup>127</sup> *Id.* art. I, § 9, cl. 1. This section also noted that “a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.” *Id.*; see THE FEDERALIST NO. 42 (James Madison).

<sup>128</sup> See U.S. CONST. art. I, § 9.

<sup>129</sup> HINE, HINE & HARROLD, *supra* note 11, at 113.

<sup>130</sup> Act of Mar. 2, 1807, ch. 22, 2 Stat. 426; see *Act of 1807*, ABOLITION SLAVE TRADE, [abolition.nypl.org/content/docs/text/Act\\_of\\_1807.pdf](http://abolition.nypl.org/content/docs/text/Act_of_1807.pdf) (last visited Feb. 8, 2016); HINE, HINE & HARROLD, *supra* note 11, at 150 (discussing the transport and selling of slaves during the institution’s expansion to the west). The law was not effective until 1808, given the constitutional prohibition imposed in Article I, Section 9 of the Constitution. 2 Stat. at 426. Like the failure to ban the international import of slaves in 1788, the consequences of continuing the domestic slave trade were dire. HINE, HINE & HARROLD, *supra* note 11, at 149–50. Estimates of 72,745 slaves entered the United States from 1776 to 1807. *Id.* at 150. After the transatlantic slave trade was banned, the slave population continued to grow. *Id.* From 1808 to 1860, it is estimated that 3,953,761 African Americans were enslaved in the United States. *Id.* The significantly larger number of slaves in 1860 stemmed, in part, from the birth and growth of African-American children; many of them reached middle

imposed stiff penalties on transatlantic slave traders—who brought slaves to the United States—that violated the Act.<sup>131</sup> Despite the new Act's explicit prohibition, it “did not end the slave trade into the United States;” the illegal transatlantic trading of slaves continued up until the Civil War.<sup>132</sup> The Act also did not address the domestic trading of slaves from state to state in the thirteen original colonies; however, the domestic slave trade was deterred temporarily in certain new territories through the Northwest Ordinance of 1787, which, among other things, prohibited slavery in “the territory that would eventually form the states of Ohio, Illinois, Indiana, Michigan, and Wisconsin.”<sup>133</sup>

Further, in Article IV, Section 2, of the United States Constitution, the Founders agreed that an escaped slave would not be freed from bondage; instead, the escapee would be returned to the slaveholder:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.<sup>134</sup>

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age during those years. *See* WILMA KING, *STOLEN CHILDHOOD: SLAVE YOUTH IN NINETEENTH-CENTURY AMERICA*, at xvii (1995). Additionally, growth of the slave population resulted from the illegal importation of slaves into the United States, in violation of the Act Prohibiting Importation of Slaves of 1807. *See* ROBINSON, *supra* note 66, at 336, 338, 340–41 (discussing the illegal importation of slaves to the states after the enactment of the Act of 1807).

<sup>131</sup> *See U.S. Constitution and Acts: The Act of 1807, ABOLITION SLAVE TRADE*, [http://abolition.nypl.org/essays/us\\_constitution/5/](http://abolition.nypl.org/essays/us_constitution/5/) (last visited Oct. 3, 2015).

<sup>132</sup> *Id.*; ROBINSON, *supra* note 66, at 338.

<sup>133</sup> *See* FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 99; *see also* 2 Stat. 426; ROBINSON, *supra* note 66, at 338. Penalties were substantial for violating the importation prohibitions. Still, the buying and selling of slaves persisted for about fifty-seven additional years within the United States until the Constitution was amended by the Thirteenth Amendment, which abolished slavery in the United States; and, as noted, the Act of 1807 was frequently violated. *See supra* note 130 and accompanying text (discussing the Act Prohibiting Importation of Slaves of 1807); *see also* ROBINSON, *supra* note 66, at 336, 338, 340–41 (discussing the illegal importation of slaves to the United States after the enactment of the Act of 1807). Even though the Northwest Ordinance “prohibited [slavery] in that region,” it required people of the region “to return fugitive slaves” who escaped from the slave states. FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 101.

<sup>134</sup> U.S. CONST. art. IV, § 2, cl. 3, *amended by* U.S. CONST. amend. XIII. For a discussion of other clauses indirectly related to slaves, *see* 1 VILE, *supra* note 42, at 4.

From the late eighteenth century up to the present, Americans have disagreed over whether the Constitution—as ratified in 1788—was a proslavery document.<sup>135</sup> Nevertheless, as antislavery activist Frederick Douglass<sup>136</sup> noted in his celebrated 1852 oration, *What to the Slave Is the Fourth of July?*,<sup>137</sup> the Constitution “contain[s] principles and purposes, entirely hostile to the existence of slavery.”<sup>138</sup> Similarly, the Declaration of Independence establishes principles of liberty.<sup>139</sup> While delivering the address, Douglass shared these thoughts with his audience:

This, for the purpose of this celebration, is the 4th of July. It is the birthday of your National Independence, and of your political freedom.

.....

...I am not included within the pale of this glorious anniversary! Your high independence only reveals the immeasurable distance between us. The blessings in which you, this day, rejoice, are not enjoyed in common. The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you . . . [It] has brought stripes and death to me. This Fourth [of] July is *yours*, not *mine*. You may rejoice, I must mourn. . . Do you mean, citizens, to mock me, by asking me to speak to-day?<sup>140</sup>

The words that Douglass spoke in his Fourth of July speech indicate that he was not mocked. That is, although Douglass was certain that “the Constitution is a Glorious Liberty Document . . . contain[ing] principles and purposes, entirely hostile to the existence of slavery,” he also declared, “If the South

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<sup>135</sup> Frederick Douglass, *What to the Slave Is the Fourth of July?: An Address Delivered in Rochester, New York, on 5 July 1852*, in 2 THE FREDERICK DOUGLASS PAPERS, *supra* note 47, at 359, 386. See also discussion *infra* p. 748 of the Thirteenth Amendment to the Constitution, noting that after the original ratification of the Constitution in 1788, the Thirteenth Amendment abolished slavery in 1865.

<sup>136</sup> Frederick Douglass has often been cited as “the most important black American leader of the nineteenth century.” *Frederick Douglass*, HISTORY.COM, <http://www.history.com/topics/black-history/frederick-douglass> (last visited Feb. 8, 2016). After escaping from slavery, Douglass became a prolific antislavery abolitionist, writing innumerable books and articles and delivering many compelling speeches about slavery and race relations. *Id.*

<sup>137</sup> See Douglass, *supra* note 135, at 359–88.

<sup>138</sup> *Id.* at 386.

<sup>139</sup> See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>140</sup> Douglass, *supra* note 135, at 360, 368 (second alteration in original).

has made the Constitution bend to the purposes of slavery, let the North now make that instrument bend to the cause of freedom and justice."<sup>141</sup>

Certainly, Douglass was both principled and scrupulously strategic. Moreover, he clearly acknowledged that the principles of civil rights and liberty that were addressed in the Declaration of Independence and ensured via the Constitution had not yet been extended to him and other African Americans in 1852, when he delivered his Fourth of July oration.<sup>142</sup> Indeed, the United States Constitution—prior to the Thirteenth to Fifteenth Amendments—failed to address civil rights protection, or liberty for African Americans, as slaveholders lavishly squashed African Americans' God-given human rights.<sup>143</sup>

Interestingly, some historians, scholars, and educators maintain that the antislavery Founders had no choice but to compromise on issues concerning the counting of slaves and the abolition of the slave institution, otherwise—they insist—the Union would have disintegrated.<sup>144</sup> By contrast, other scholars argue that the Founders did have a choice, and they, therefore, should have acknowledged the immorality of slavery and abolished the sinful institution at the time of the Constitution's ratification. They maintain that if proslavery founders were not in concord, then the delegates who proposed immediate emancipation could have refused to sign the Constitution if the necessary abolition clauses were not included in the charter document,<sup>145</sup> leaving the disputes, including the preservation of the Union, in God's sovereign jurisdiction.<sup>146</sup> The vital question is whether preservation of the Union was more precious than the

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<sup>141</sup> *Id.* at 385–86; (1860) Frederick Douglass, "The Constitution of the United States: Is It Pro-slavery or Anti-slavery," BLACKPAST.ORG, <http://www.blackpast.org/1860-frederick-douglass-constitution-united-states-it-pro-slavery-or-anti-slavery#sthash.Ek5YRIHJ.dpuf> (last visited Feb. 8, 2016).

<sup>142</sup> Douglass, *supra* note 135, at 360, 368, 385–86.

<sup>143</sup> See generally FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 102.

<sup>144</sup> See MELLON, *supra* note 71, at 68–69 ("It was a time when great concessions had to be made in order that the Union be preserved. The outcome was that slaves were to be considered still as property; that each five Negroes should count as one white franchise; and that the slave trade should be allowed to continue for another twenty years until 1808. These were the three great compromises made between the North and the South regarding slavery.").

<sup>145</sup> 1 VILE, *supra* note 42, at 10.

<sup>146</sup> See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776); see also *Jeremiah* 32:17 (King James); *Jeremiah* 32:27; 2 *Kings* 3:18; *Matthew* 19:26.

African-American slaves' inalienable God-given rights to "[l]ife, [l]iberty, and the pursuit of happiness."<sup>147</sup> As one scholar observed, "The most striking failure of the Constitutional Convention was arguably its failure to eliminate the institution of slavery."<sup>148</sup>

Nevertheless, in 1787, the Founders' central disagreements were settled—temporarily—through give-and-take compromises, including the decision not to abolish slavery.<sup>149</sup> The Constitution was approved and the national government formed—after thirty-nine of the fifty-five delegates signed the charter government document, ratified in 1788.<sup>150</sup>

The preamble to the Constitution introduced its purpose:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>151</sup>

Basic civil rights, including "Justice" and "Blessings of Liberty," set forth in the Constitution's preamble were absolute for all white Americans.<sup>152</sup> Still, even though the Constitution's principles of liberty, as Frederick Douglass declared, are "entirely hostile to the existence of slavery," in 1788, civil rights and liberty were not granted to African Americans.<sup>153</sup> Additionally, the comparatively small number of free black individuals, living mostly in the northern colonies,<sup>154</sup> faced daily unjust inequality and blatant discrimination.<sup>155</sup> After the Constitutional Convention's compromises—surrounding issues of slavery—underlying unsettled issues resurfaced with significant harmful effects.

The failure to abolish slavery at the Convention resulted in the horrific, barbaric institution becoming more aggressive and brutal, as the slaveholders' abhorrent economic desires—on the

<sup>147</sup> See THE DECLARATION OF INDEPENDENCE para. 2.

<sup>148</sup> 2 VILE, *supra* note 42, at 726.

<sup>149</sup> MELLON, *supra* note 71, at 68–69.

<sup>150</sup> U.S. CONST. art. I, § 9; see 1 VILE, *supra* note 42, at 215–18.

<sup>151</sup> U.S. CONST. pmb. l.

<sup>152</sup> *Id.*

<sup>153</sup> Douglass, *supra* note 135, at 386.

<sup>154</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 104–05.

<sup>155</sup> Douglass, *supra* note 135, at 386.

backs of the slaves—increased.<sup>156</sup> The consequences were tragic—after approximately 169 years<sup>157</sup> of forced oppression and involuntary servitude, slavery flourished for seventy-seven additional years.<sup>158</sup> During that period, the slave institution burgeoned “almost six-fold between 1790 and 1860, from 697,897 to 3,953,760.”<sup>159</sup> And, with the late eighteenth-century invention of Eli Whitney’s cotton gin,<sup>160</sup> “the use of slaves in the South became a foundation of their economy,”<sup>161</sup> as southern slaveholders unyieldingly increased their slave population.<sup>162</sup>

While southern slaveholders persisted in their mission of enlarging the institution of slavery in the late eighteenth and early nineteenth centuries, many northerners—including some of the Founders—increasingly opposed the institution.<sup>163</sup> Notably, a few Founders, such as Alexander Hamilton, began to support antislavery causes in their home states even though they had

<sup>156</sup> HINE, HINE & HARROLD, *supra* note 11, at 137–39.

<sup>157</sup> As noted *supra* in note 37, some historians maintain that African slaves brought to the Virginia colony in 1619 served as indentured servants for many years. Given this uncertainty, the number presented is an approximation. Yet, at the very least, none dispute the fact that by the middle to late 1600s, most African Americans were not serving as indentured servants; instead, they were used as slaves.

<sup>158</sup> See discussion *infra* pp. 153–54 of the Thirteenth Amendment that abolished the institution of slavery. It is estimated that during the long years of the massive “Atlantic slave trade . . . more than 11 million Africans [were brought] to the Americas. . . . Most Africans went to the sugar plantations of the Caribbean and Brazil. Only 500,000 went to the British colonies of North America, either directly or after seasoning in the West Indies.” HINE, HINE & HARROLD, *supra* note 11, at 47.

<sup>159</sup> HINE, HINE & HARROLD, *supra* note 11, at 138.

<sup>160</sup> *Cotton Gin and Eli Whitney*, HISTORY.COM,

<http://www.history.com/topics/inventions/cotton-gin-and-eli-whitney> (last visited Feb. 9, 2016). Eli Whitney moved to the south after graduating from Yale College. *Id.* While living with a widow on a plantation near Savannah, Georgia, Whitney saw how difficult it was to remove seeds from cotton plants. *Id.* Whitney invented the cotton gin to remedy the problem—the machine “could remove the seeds from 50 pounds of cotton in a single day.” *Id.* “Although the cotton gin made cotton processing less labor-intensive, it helped planters earn greater profits, prompting them to grow larger crops, which in turn required more people. Because slavery was the cheapest form of labor, cotton farmers simply acquired more slaves.” *Id.*

<sup>161</sup> *Slavery in America*, *supra* note 37; see 1 AFRICAN AMERICAN HISTORY, *supra* note 39.

<sup>162</sup> See HINE, HINE & HARROLD, *supra* note 11, at 138.

<sup>163</sup> See HINE, HINE & HARROLD, *supra* note 11, at 109. Quakers were some of the earliest opponents of slavery; their arguments, however, did not deter the proponents of slavery who persistently argued the substantial economic benefits gained from slave labor. *Id.* at 71; see 1 AFRICAN AMERICAN HISTORY, *supra* note 39 (discussing southerners’ attempts to justify slavery by claiming that it was a “necessary evil”).

collectively chosen not to end slavery through the federal government in 1787. Hamilton was a “founding [member] of the New York Manumission Society in 1785.”<sup>164</sup>

Other northern opponents of slavery included Frederick Douglass, mentioned previously, and James McCune Smith.<sup>165</sup> Smith—considered by historian John Hope Franklin to be “[t]he most erudite and prolific abolitionist to challenge ideas of innate black inferiority”—and Douglass used their writings and speeches to bluntly oppose those who presented an ethnological argument that blacks were inferior beings lacking innate God-given intellectual ability.<sup>166</sup> Both men promoted their viewpoints primarily in the north, since those that spoke against proslavery theorists were generally ostracized and forced out of the southern states.<sup>167</sup> Believing that all men were created equal, Douglass spoke of the “oneness of man.”<sup>168</sup>

Conversely, many inferiority theorists used *Query XIV*, containing prejudiced views about black individuals, penned by Founder Thomas Jefferson in his late eighteenth-century

<sup>164</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 11, at 114. Manumission is defined as “[t]he act of liberating a slave from bondage and giving him freedom.” BLACK’S LAW DICTIONARY 870 (5th ed. 1979).

<sup>165</sup> Encyc. of World Biography, *James McCune Smith*, ENCYCLOPEDIA.COM, [http://www.encyclopedia.com/topic/James\\_McCune\\_Smith.aspx](http://www.encyclopedia.com/topic/James_McCune_Smith.aspx) (last visited Feb. 9, 2016). Smith, born in the early nineteenth century, is recognized as the first African American to practice medicine in the United States. *Id.* Smith’s father was a slave, but Smith never was. *Id.* Growing up in New York, Smith attended schools in New York City and Scotland, worked in Paris, France, and then returned to New York to open a pharmacy and work as a physician and surgeon until his death in 1865. *Id.*

<sup>166</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 11, at 198. There were eighteenth- and nineteenth-century southern physicians who maintained that black people were innately inferior in intellect and that black individuals possessed certain physical or anatomical differences beyond that of most humans:

Claiming the sanction of science, southern physicians asserted that the anatomy of blacks differed from whites in ways that enabled blacks to withstand punishment without feeling as much pain as whites and to work harder than whites under the hot southern sun. Such claims enabled masters to justify, without any moral qualms, savagely whipping slaves, overworking them, and restricting their movements, because “science” justified their actions.

*Id.* at 194.

<sup>167</sup> *Id.* at 195–96. Antislavery papers and pamphlets were generally burned by proponents of slavery. Some southern states offered awards for the arrest of abolitionist and publisher William Lloyd Garrison and others with antislavery publications; arrests were made of anyone distributing Garrison’s newspaper. *Id.* Indeed, free speech and other First Amendment freedoms were not respected in the proslavery areas of the country. *Id.*

<sup>168</sup> *Id.* at 198 (internal quotation marks omitted).

book—*Notes on the State of Virginia*<sup>169</sup> (“Notes”)—to support their theory that blacks were innately inferior to whites.<sup>170</sup> Jefferson,<sup>171</sup> like all human beings, was flawed. Born in Virginia in 1743, he was the revered public figure that penned the nation’s Declaration of Independence, beautifully recognizing the “Laws of Nature and of Nature’s God,” describing rights of “Liberty,” and acknowledging “that all men are created equal.”<sup>172</sup> Later, he was elected the third President of the United States, gaining much for America during his two terms in office, including successfully negotiating the Louisiana Purchase from France in 1803, which greatly increased the size of the United States.<sup>173</sup> He was also a lifelong slaveholder who never freed the majority of his slaves.<sup>174</sup> Historians recognize some of Jefferson’s abolition efforts, such as signing the Act Prohibiting Importation of Slaves of 1807 to end the transatlantic slave trade.<sup>175</sup> Yet, Jefferson’s influential impact on white Americans’ opinions and

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<sup>169</sup> See generally Robert P. Forbes, *Notes on the State of Virginia (1785)*, ENCYCLOPEDIA VIRGINIA (Mar. 25, 2014), [http://www.EncyclopediaVirginia.org/Notes\\_on\\_the\\_State\\_of\\_Virginia\\_1785](http://www.EncyclopediaVirginia.org/Notes_on_the_State_of_Virginia_1785) (last modified Apr. 15, 2014). Jefferson’s *Notes* were written in 1781 in response to a French diplomat’s questions and published in English in 1787. *Id.* While the publication contains informative notes on a number of topics, ranging from politics to law and education, it also is filled with notes setting forth Jefferson’s viewpoints—what he perceived as enhanced aesthetic attributes and innate intellectual and biological physical ability of whites in comparison to blacks. See THOMAS JEFFERSON, *Notes on the State of Virginia*, in JEFFERSON: WRITINGS 264–66 (Merrill D. Peterson ed., 1984) (1787); see *Notes on the State of Virginia by Thomas Jefferson*, FEDERALIST PAPERS PROJECT 18, <http://thefederalistpapers.integratedmarket.netdna-cdn.com/wp-content/uploads/2012/12/Thomas-Jefferson-Notes-On-The-State-Of-Virginia.pdf> (last visited Apr. 10, 2015).

<sup>170</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 194.

<sup>171</sup> Jefferson, like George Washington, was raised in a family that had been slaveholders for many years. MELLON, *supra* note 71, at 121. However, unlike Washington, Jefferson studied at universities and is said to have been under the tutelage of “liberal-minded teachers, one of whom . . . was strongly opposed to slavery.” *Id.* at 122. Most of Jefferson’s slaves—he owned approximately hundreds during his lifetime—were sold after his death, as his will only expressed his desire to free a few of them. *Thomas Jefferson*, HISTORY.COM, <http://www.history.com/topics/us-presidents/thomas-jefferson> (last visited Oct. 2, 2015).

<sup>172</sup> THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776); *Thomas Jefferson*, *supra* note 171; see also 1 VILE, *supra* note 42, at 375–76 (discussing Jefferson’s persistent prodding of James Madison on the issue of abolition).

<sup>173</sup> *Thomas Jefferson*, *supra* note 171.

<sup>174</sup> *Thomas Jefferson*, *supra* note 171.

<sup>175</sup> Act of Mar. 2, 1807, ch. 22, 2 Stat. 426; see MELLON, *supra* note 71, at 118.

treatment of African Americans, both free and enslaved, and his influence on the nation and the institution of slavery, merit closer scrutiny.

Scholars often contemplate whether an eighteenth- to nineteenth-century leader and Founder, like Jefferson, who lived during a time when discriminatory views were generally deemed acceptable by many American citizens should have his words and viewpoints concerning slavery and African Americans scrutinized. Like Samuel Adams, James Madison, and other Jefferson contemporaries who studied philosophy and intellectual ideas at renowned academies, Jefferson should have been knowledgeable of this truth: All human beings have worth and dignity. Indeed, in the Declaration of Independence, Jefferson stated, “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>176</sup> Therefore, while Jefferson’s many accomplishments are notable, and he should be remembered for them, at the same time, words are powerful and meaningful—such is the case with the Declaration of Independence that Jefferson penned and his *Notes on the State of Virginia*.

*Notes* was one of the most important and widely distributed publications printed in the late eighteenth and nineteenth centuries, impacting many people and circumstances, concerning several issues, including African-American culture and slavery.<sup>177</sup> One scholar, Robert Forbes, aptly summarizes the impact of Jefferson’s *Notes*:

Many consider it the most important American book written before 1800. . . . It profoundly influenced European understanding of the United States, as well as American views of Virginia. It established Jefferson’s international reputation as a serious scientist, a man of letters, and the principal

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<sup>176</sup> THE DECLARATION OF INDEPENDENCE para. 2. Jefferson studied at William and Mary College where he received instruction from a professor that he claimed had “a happy talent for communication, correct and gentlemanly manners, and an enlarged and liberal mind.” MELLON, *supra* note 71, at 88. This professor introduced Jefferson to George Wythe, who took “young Jefferson in as a student of law.” *Id.* Jefferson watched and studied Wythe’s opposition to slavery; Wythe desperately wanted the abolition of slavery, even to the point of emancipating his own slaves. *Id.*; see THE DECLARATION OF INDEPENDENCE para. 2.

<sup>177</sup> See generally Forbes, *supra* note 169.

spokesman for his "country," whether Virginia or the United States . . . . As the most detailed and influential portrait of any state or region of the United States for generations, *Notes* ensured that Virginia would be a primary focus of future studies of the American republic. The book contains Jefferson's most powerful indictments of slavery; it is also a foundational text of racism.<sup>178</sup>

In his *Notes*, Jefferson, among other issues that he considered, presented a gradual plan to emancipate and remove slaves from the Virginia colony—ultimately outside of the United States.<sup>179</sup> Specifically, Jefferson argued that African-American slaves "should be colonized to such place as the circumstances of the time should render most proper."<sup>180</sup> Additionally, Jefferson's *Notes* confirms that one of his reasons for writing the colonization proposal stemmed from his concern that blacks and whites would form interracial relationships if blacks were emancipated and left in America.<sup>181</sup> Jefferson recommended: "When freed, [the slave] is to be removed beyond the reach of mixture."<sup>182</sup>

In addition to discussing emancipation and colonization, Jefferson's *Notes* highlighted his belief that black people are visually less attractive based on complexion, hair, and other features; and, he maintained, black individuals are innately inferior to white individuals, both intellectually and anatomically.<sup>183</sup> Jefferson's words:

The first difference which strikes us is that of colour. Whether the black of the negro resides in the reticular membrane between the skin and scarf-skin, or in the scarf-skin itself; whether it proceeds from the colour of the blood, the colour of the bile, or from that of some other secretion, the difference is fixed in nature, and is as real as if its seat and cause were better known to us. And is this difference of no importance? Is it not the foundation of a greater or less share of beauty in the two races? Are not the fine mixtures of red and white, the expressions of every passion by greater or less suffusions of colour in the one, preferable to that eternal monotony, which reigns in the countenances, that immoveable veil of black which

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<sup>178</sup> *Id.*

<sup>179</sup> JEFFERSON, *supra* note 169, at 264–70.

<sup>180</sup> *Id.* at 264.

<sup>181</sup> *Id.* at 270.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 264–70.

covers all the emotions of the other race? Add to these, flowing hair, a more elegant symmetry of form, their own judgment in favour of the whites, declared by their preference of them, as uniformly as is the preference of the Oranootan [orangutan] for the black women over those of his own species. The circumstance of superior beauty, is thought worthy attention in the propagation of our horses, dogs, and other domestic animals; why not in that of man? Besides those of colour, figure, and hair, there are other physical distinctions proving a difference of race. They have less hair on the face and body.<sup>184</sup>

Jefferson's prejudiced views ran so deep that he even stated that an animal—the orangutan—preferred black women over its own species, and he suggested that black women are inferior even in their body odor.<sup>185</sup> It is remarkable that Jefferson was a prominent public figure and that his *Notes* were written and addressed to a "Foreigner of Distinction, then residing among us"<sup>186</sup> considering the opinions he offered, particularly on the obnoxious topic of body odor: "They secrete less by the [kidneys], and more by the glands of the skin, which gives them a very strong and disagreeable [odor]."<sup>187</sup>

Jefferson also drew comparisons about bravery and grief, and some of his words placed black people in the category of beasts.<sup>188</sup> He wrote:

They are at least as brave, and more adventuresome. But this may perhaps proceed from a want of forethought, which prevents their seeing a danger till it be present. . . . Their griefs are transient. . . . An animal whose body is at rest, and who does not reflect, must be disposed to sleep of course.<sup>189</sup>

Further, Jefferson argued that black individuals lacked the ability to effectively reason, responding "more of sensation than reflection."<sup>190</sup> He wrote:

Comparing them by their faculties of memory, reason, and imagination, it appears to me, that in memory they are equal to the whites; in reason much inferior, as I think one could

<sup>184</sup> *Id.* at 264–65.

<sup>185</sup> *Id.* at 265.

<sup>186</sup> *Id.* at 124. The infamous *Notes* was subsequently published for a widespread national and international readership. See generally Forbes, *supra* note 169.

<sup>187</sup> THOMAS JEFFERSON, *supra* note 169, at 265.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 265–66.

<sup>190</sup> *Id.* at 265.

scarcely be found capable of tracing and comprehending the investigations of Euclid; and that in imagination they are dull, tasteless, and anomalous.<sup>191</sup>

Despite Jefferson's exhaustive writing encompassing his pronounced derogatory and prejudiced views of African Americans, in the latter part of *Notes Query XIV*, he wrote that his assessments were left to "a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind."<sup>192</sup> Moreover, Jefferson's ultimate conclusion concerning emancipation and colonization was:

This unfortunate difference of colour, and perhaps of faculty, is a powerful obstacle to the emancipation of these people. Many of their advocates, while they wish to vindicate the liberty of human nature, are anxious also to preserve its dignity and beauty. Some of these, embarrassed by the question "What further is to be done with them?" . . . Among the Romans emancipation required but one effort. The slave, when made free, might mix with, without staining the blood of his master. But with us a second is necessary, unknown to history. When freed, he is to be removed beyond the reach of mixture.<sup>193</sup>

Although the *Notes* book was celebrated by many, there were critical reviews from notable readers, including Benjamin Banneker and Henri Gregoire. Banneker was a free black man from Maryland who wrote and published almanacs with valuable astronomical details.<sup>194</sup> He wrote to Jefferson in 1791, suggesting that Jefferson reconsider the "absurd and false ideas" written in the *Notes* and urging Jefferson to "recognize that one universal Father . . . afforded us all the same sensations and endowed us all with the same faculties."<sup>195</sup> Likewise, in 1809, Gregoire sent

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<sup>191</sup> *Id.* at 266.

<sup>192</sup> *Id.* at 270.

<sup>193</sup> *Id.*

<sup>194</sup> See HINE, HINE & HARROLD, *supra* note 11, at 90–91. Banneker was a self-taught writer of almanacs, which he published on astronomy and other literary pieces. *Id.*

<sup>195</sup> *Id.*; Letter from Benjamin Banneker to Thomas Jefferson (Aug. 19, 1791), available at <http://founders.archives.gov/documents/Jefferson/01-22-02-0049> [hereinafter Letter from Benjamin Banneker].

Thomas Jefferson a letter and a copy of his book, *The Literature of Negroes*, stating he “could not agree with his suspicion that the blacks were inferior to the whites in body and mind.”<sup>196</sup>

Gregoire was a French priest who believed in the “the essential unity of humanity.”<sup>197</sup> Anchored with that understanding, Gregoire attempted to educate and inform others that “[h]uman difference . . . resulted not from natural racial superiority.”<sup>198</sup> His efforts to demonstrate that there is no innate intellectual inferiority across racial lines led him to write his *The Literature of Negroes* book in 1808.<sup>199</sup> Featuring “the biographies of exceptional men and women of African descent, Gregoire aimed to prove that people of color [worldwide] could show great intellectual achievement, if only the world would encourage rather than oppress them.”<sup>200</sup>

Jefferson responded to both Banneker and Gregoire, cordially informing Banneker that he hoped to find proof that blacks were endowed with talents equal to whites.<sup>201</sup> In his response to Gregoire, Jefferson stated that his writings about black individuals in the *Notes* book were written with “great hesitation . . . [blacks] are gaining daily in the opinions of nations, and hopeful advances are making towards their re-establishment on an equal footing with the other colors of the human family.”<sup>202</sup>

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<sup>196</sup> MELLON, *supra* note 71, at 109; Nicholas E. Magnis, *Thomas Jefferson and Slavery: An Analysis of His Racist Thinking as Revealed by His Writings and Political Behavior*, 29 J. BLACK STUD. 491, 503 (1999).

<sup>197</sup> Alyssa Goldstein Sepinwall, *French Abolitionism with an American Accent*, HUMAN. & SOC. SCI. ONLINE (Dec. 1997), <https://www.h-net.org/reviews/showpdf.php?id=1589> (reviewing HENRI GREGOIRE, ON THE CULTURAL ACHIEVEMENTS OF NEGROES (1996)).

<sup>198</sup> *Id.*

<sup>199</sup> *See id.*

<sup>200</sup> *Id.*

<sup>201</sup> *See* THOMAS JEFFERSON, *Hope for “Our Black Brethren” to Benjamin Banneker* (Aug. 30, 1791), in JEFFERSON: WRITINGS, *supra* note 169, at 982. Jefferson’s letter was sent in response to a note he received from Benjamin Banneker. Banneker had read Jefferson’s *Notes*, which prompted him to write a letter denouncing the “absurd and false ideas” written in the *Notes* and urging Jefferson to recognize “that one universal Father . . . afforded us all the same sensations and endowed us all with the same faculties.” Letter from Benjamin Banneker, *supra* note 195.

<sup>202</sup> *See* MELLON, *supra* note 71, at 109–10.

Notable scholars have consistently questioned the sincerity of the letters that Jefferson wrote to Gregoire and Banneker, given Jefferson's subsequent letter that he wrote to acquaintance Joel Barlow in 1809.<sup>203</sup> In the Barlow letter, Jefferson challenged Gregoire's assessments of accomplished blacks written in *The Literature of Negroes*, finding the book's conclusions only imaginative "without judgment to decide,"<sup>204</sup> so Gregoire was given a "very soft answer," Jefferson wrote.<sup>205</sup>

Additionally, Jefferson mockingly disparaged Banneker.<sup>206</sup> Scholar Nicholas Magnis submits that since Jefferson's letter to Barlow continued to cast aspersions on the innate intellect of African Americans and he "complained that Gregoire had not disclosed the degree of interracial mixture of the authors included in his anthology," it is unlikely that Jefferson had abandoned the prejudiced views that he held of blacks.<sup>207</sup> Another scholar, Alyssa Goldstein Sepinwall, examined Jefferson's letters. Like Magnis, Sepinwall concludes that Jefferson simply found Gregoire's assessments naïve.<sup>208</sup>

Additional text from the letter written to Barlow amplifies the assessments of scholars Magnis and Sepinwall that Jefferson never changed his prejudiced views of blacks, despite his claim of "great hesitation." Jefferson wrote:

[Gregoire's] credulity has made him gather up every story he could find of men of colour (without distinguishing whether black, or of what degree of mixture) however slight the mention, or light the authority on which they are quoted. [T]he whole do not amount in point of evidence, to what we know ourselves of Banneker. [W]e know he had spherical trigonometry enough to make almanacs, but not without the suspicion of aid from Ellicot, who was his neighbor [and] friend, [and] never missed an opportunity of puffing him. I have a long letter from

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<sup>203</sup> Letter from Thomas Jefferson to Joel Barlow (Oct. 8, 1809), available at <http://founders.archives.gov/documents/Jefferson/03-01-02-0461>; see Magnis, *supra* note 196, at 504–06. Magnis's examination of the letter written to Jefferson's contemporary, Joel Barlow, points to an unapologetic Jefferson who remained committed to his black inferiority belief. *Id.*

<sup>204</sup> Letter from Thomas Jefferson to Joel Barlow, *supra* note 203.

<sup>205</sup> *Id.*

<sup>206</sup> See HINE, HINE & HARROLD, *supra* note 11, at 90–91. Banneker was a self-taught writer of almanacs, which he published on astronomy and other literary pieces. *Id.*

<sup>207</sup> Magnis, *supra* note 196, at 505–06.

<sup>208</sup> Sepinwall, *supra* note 197.

Banneker which shews him to have had a mind of very common stature indeed. [A]s to Bishop Gregoire, I wrote him, as you have done, a very soft answer. [I]t was impossible for doubt to have been more tenderly or hesitatingly expressed than that was in the Notes of Virginia, and nothing was or is farther from my intentions than to enlist myself as the champion of a fixed opinion, where I have only expressed a doubt. St Domingo will, in time, throw light on the question.<sup>209</sup>

Therefore, while Jefferson commendably accomplished much in his era for the new nation, including penning the Declaration of Independence in 1776, which affirmed principles of liberty and equality, as set forth in this Article, his subsequent widespread *Notes* publication, published in 1778, featured his injurious discriminatory beliefs, generated from deep-seeded prejudice and racist views.<sup>210</sup> Thus, as the nineteenth century pressed forward, immediate abolitionists diligently argued against Jefferson's troubling *Notes Query XIV* that continued to attract attention from countless American citizens, particularly proslavery southerners—they were “educators, scientists, politicians, literary figures, and ministers,”<sup>211</sup> who “used [Jefferson’s] book to buttress the idea of black inferiority and thus to justify slavery.”<sup>212</sup> Many “increasingly” championed the slave institution now claiming it was a “positive good” rather than a “necessary evil”—the former explanation given for most of the eighteenth century.<sup>213</sup> And some errant “[s]outhern ministers [improperly] preached that ‘blackness’ resulted from the ‘curse of Ham’ as related in the Book of Genesis’s story of Noah and that God had created blacks to make them slaves.”<sup>214</sup>

Historians record that Jefferson wanted to be remembered for these efforts: “Author of the Declaration of American Independence, of the statute of Virginia for religious freedom, and father of the University of Virginia.”<sup>215</sup> Jefferson—rightly so—is remembered for each of those worthy achievements,

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<sup>209</sup> Letter from Thomas Jefferson to Joel Barlow, *supra* note 203.

<sup>210</sup> See Forbes, *supra*, note 169; JEFFERSON, *supra* note 169, at 256–75.

<sup>211</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 194.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 195; see *Genesis* 9:20–25 (King James).

<sup>215</sup> THOMAS JEFFERSON, POLITICAL WRITINGS, at xxi (Joyce Appleby & Terence Ball eds., 1999) (internal quotation marks omitted), available at [http://assets.camb.riidge.org/97805216/40510/frontmatter/9780521640510\\_FRONTMATTER.pdf](http://assets.camb.riidge.org/97805216/40510/frontmatter/9780521640510_FRONTMATTER.pdf).

including signing the Act Prohibiting Importation of Slaves of 1807; but, additionally, he is remembered for his words penned on many other important issues. Arguably, the words that pronounced principles of liberty and equality, written in the Declaration of Independence, together with the racist words promoting the belief that black individuals were innately inferior in, among other things, intellect, complexion, hair, beauty, figure, and even body odor mattered more than almost any words spoken or written during the era, given Jefferson's influence, the significance of the Declaration of Independence, and the widespread readership of the *Notes* book.<sup>216</sup> The impact on the people and state of affairs in the new nation was substantial!

As the Founders approached old age and the end of their lives, many of them reflected on their work at the 1787 Constitutional Convention and the decisions made during their years of public service. The writings of some of the antislavery Founders appropriately reflect pride in their noteworthy establishment of a remarkable structure of government. Yet, for many of the Founders there was simultaneous regret, shame, or embarrassment about the glaring paradox—that an extraordinary country established for liberty and justice, and hailed as the land of the free, would enslave and exploit human beings for centuries.<sup>217</sup> That various Founders were concerned about this paradox was evident even during the earlier years of Constitutional Convention debates. Delegate William Paterson from New Jersey recounted that some of the delegates were ashamed of the Constitution's sections pertaining to slavery, so they used alternate words—other than slaves and slavery—to describe the clauses pertinent to the disgraceful institution of slavery.<sup>218</sup> Indeed, Gouverneur Morris of Pennsylvania boldly denounced the issues surrounding slavery at the Constitutional Convention stating, "He would sooner submit himself to a tax for paying for all the Negroes in the U[nited] States than saddle posterity with such a Constitution."<sup>219</sup> Consider James Madison's words on the matter as he approached his late senior years in 1821: "The Negro slavery is, as you justly complain, a sad blot on our free country . . . . No satisfactory plan has yet been devised

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<sup>216</sup> *Id.* at xxviii.

<sup>217</sup> See 1 VILE, *supra* note 42, at 4.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 8 (internal quotation marks omitted).

for taking out the stain. If an asylum could be found in Africa, that would be the appropriate destination for the unhappy race among us."<sup>220</sup> Like Jefferson, Madison seemed to recognize the slaves' right to be free, albeit through colonization off of the United States' land, that they—African Americans—and their ancestors in captivity had labored and toiled for centuries.<sup>221</sup>

## 2. Additional Slavery Compromises: Missouri Compromise of 1820, Compromise of 1850, Fugitive Slave Act of 1850, and Kansas-Nebraska Act of 1854

When complications from the Constitution's Three-Fifths Compromise arose again around 1820, Thomas Jefferson, George Washington, James Madison, Benjamin Franklin, and other key Founders were no longer serving in Congress, the executive branch, or any other key federal government positions; some were even deceased. Nevertheless, the costs of the 1787 Constitutional Convention compromises were considerable and still haunting the country as Congress continued to confront one calamity after another regarding the institution of slavery; by 1820, the North and South were sparring again, both attempting to maintain an equal number of free versus slave states.<sup>222</sup>

From 1816 to 1818, Indiana and Illinois joined the Union as free states, and Mississippi joined as a slave state.<sup>223</sup> But in 1819, when Missouri—acquired through the 1803 Louisiana Purchase—requested entry into the United States as a slave state, northern representatives vehemently objected since Missouri's entry meant that another area would become a slave state.<sup>224</sup> And, as such, there would then be more slave than free states in the Union, disrupting the eleven slave state to eleven free state total.<sup>225</sup> Antislavery representatives insisted that Congress had authority to disallow slavery in new states seeking to join the United States.<sup>226</sup> Conversely, proslavery states argued

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<sup>220</sup> MELLON, *supra* note 71, at 134–35.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 119.

<sup>223</sup> *Id.*

<sup>224</sup> HINE, HINE & HARROLD, *supra* note 11, at 127.

<sup>225</sup> *Missouri Compromise*, HISTORY.COM, <http://www.history.com/topics/missouri-compromise> (last visited Oct. 3, 2015).

<sup>226</sup> *Id.*

that Congress should not be granted authority to decide whether a state could own slaves, advancing a states' rights—self-governance—argument.<sup>227</sup>

The acrimonious congressional dispute lasted several months, finally ending in another compromise involving the institution of slavery: “[The] Missouri Compromise . . . permitted Missouri to [enter the Union as] a slave state; maintained a sectional political balance by admitting Maine, which had been part of Massachusetts, as a free state; and banned slavery north of the 36° 30 line of latitude in the old Louisiana Territory.”<sup>228</sup>

Thus, the 1820 give-and-take congressional concessions ensured the North one free state for each slave state granted entry into the Union, keeping the sectional balance intact.<sup>229</sup> Noted consequences of the decision to once again preserve the Union, despite the resulting costs to African Americans' human rights, included these circumstances: slavery expanded to another part of the United States, and innumerable slaves were forcibly brought to Missouri and other new regions of the country to toil in the fields for many additional years, generally breaking up many African-American families.<sup>230</sup> Moreover, the institution of slavery experienced continual exponential growth from 1,538,125 in 1820 to 3,953,760 in 1860.<sup>231</sup> And, like the earlier constitutional compromises concerning the institution of slavery, North and South concord would not last—other compromises would emerge.

Texas, a slave state, was granted entry into the Union in 1845—a victory for the South; however, when California asked to join the Union as a free state in 1850 after gold was discovered, bringing thousands of settlers to the region, southerners vigorously objected. Since there were “no equivalent slave territor[ies] ready to enter the Union, California's request

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<sup>227</sup> *Id.*

<sup>228</sup> HINE, HINE & HARROLD, *supra* note 11, at 127.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 138. “In contrast to the Far West, during the period of territorial expansion a tremendous increase in the number of African Americans in bondage occurred in the region stretching from the Atlantic coast to Texas.” *Id.* The numbers cited reflect the growth from the Atlantic coast to Texas.

provoked the most serious sectional crisis since Missouri.”<sup>232</sup> Hence, another slavery compromise was endorsed: California was granted entry into the United States as a free state under the Compromise of 1850.<sup>233</sup> In exchange for California’s entry and to appease Southern representatives, Congress implemented the Fugitive Slave Act of 1850,<sup>234</sup> requiring the return of escaping slaves to their slaveholders and imposing stiffer penalties and harsher terms than the Fugitive Slave Act of 1793.<sup>235</sup>

The Fugitive Slave Act of 1850, however, caused massive outrage in the North, since the federal government was now aggressively engaged in assisting with the capture of runaway slaves.<sup>236</sup> As one scholar suitably notes, the new Act was a “crackdown on those who had fled from slavery to freedom.”<sup>237</sup> Many free black people that were not runaway slaves were also in danger of being captured and placed into slavery after the passage of the new Act, advancing feelings of repulsion that the federal government seemed complicit—with slave states—in enforcing the new Fugitive Slave Act.<sup>238</sup> Southern slave owners, however, considered the new law another victory, given the additional provisions and stiffer penalties imposed on those that violated the Act.<sup>239</sup>

Two years later, sectional conflicts rose again, concerning slave states joining the Union, when proslavery democratic senator, Stephen Douglas, introduced a bill to take land that

<sup>232</sup> See JAMES CIMENT, *ATLAS OF AFRICAN-AMERICAN HISTORY* 78–79 (Carter Smith et al. eds., rev. ed. 2007); see also HINE, HINE & HARROLD, *supra* note 11, at 230–31.

<sup>233</sup> HINE, HINE & HARROLD, *supra* note 11, at 231.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 231–33. An interesting background note about the Fugitive Slave Acts: The United States Constitution included a fugitive clause that allowed for the capture of escaped slaves, but that did not satisfy various congressmen from the South; hence, “Bowling to further pressure from Southern lawmakers—who argued slave debate was driving a wedge between the newly created states—Congress passed the Fugitive Slave Act of 1793,” which generated criticism, but was “largely unenforced.” *Fugitive Slave Acts*, HISTORY.COM, <http://www.history.com/topics/black-history/fugitive-slave-acts> (last visited May 1, 2015); see Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302.

<sup>236</sup> HINE, HINE & HARROLD, *supra* note 11, at 231, 233–34.

<sup>237</sup> *Id.* at 234.

<sup>238</sup> See CIMENT, *supra* note 232, at 79; see also HINE, HINE & HARROLD, *supra* note 11, at 234.

<sup>239</sup> See HINE, HINE & HARROLD, *supra* note 11, at 234; see also discussion *supra* note 235 (describing the harsh penalties imposed on violators of the Fugitive Slave Act of 1850).

“had been part of the Indian Territory that the federal government had promised would not be open to white settlement.”<sup>240</sup> The bill’s objective became known as popular sovereignty, since it allowed “Kansas residents to decide for themselves whether to allow slavery;” after it passed into law, it—the Kansas-Nebraska Act of 1854—repealed the Missouri Compromise of 1820.<sup>241</sup> “The Whig Party disintegrated. Northern Whigs joined supporters of the Free-Soil Party to form the Republican Party, which was organized expressly to oppose the expansion of slavery. Southern Whigs drifted [to other parties].”<sup>242</sup> The new Act triggered violent attacks throughout Kansas; the area became known as “Bleeding Kansas” during the time of bloody battles between proslavery and antislavery settlers, both seeking to gain control of Kansas by popular sovereignty.<sup>243</sup>

With sectional tensions and abolitionists’ efforts increasing, by the mid-nineteenth century, nearly sixty-five years after the Constitutional Convention, it should have been evident to the nation’s leaders that they would not eliminate the numerous conflicts pertaining to slavery by continuing to approve one compromise after another. Indeed, at the 1787 Constitutional Convention, Founder George Mason stated:

Every master of slaves is born a petty tyrant. They bring the judgment of heaven on a Country. As nations can not be rewarded or punished in the next world they must be in this. By an inevitable chain of causes [and] effects providence punishes national sins, by national calamities.<sup>244</sup>

Over 600,000 men died in the American Civil War, which many historians argue began initially over preservation of the Union; in 1863, however, after the Emancipation Proclamation<sup>245</sup> was issued, noted historians maintain that the Union army fought for the African-American slaves’ right to be free in the “land of the free.”<sup>246</sup> But prior to the war’s ending, the case of *Dred Scott v.*

<sup>240</sup> HINE, HINE & HARROLD, *supra* note 11, at 239.

<sup>241</sup> *Id.*; *Kansas-Nebraska Act*, HISTORY.COM, <http://www.history.com/topics/kansas-nebraska-act> (last visited Apr. 30, 2015).

<sup>242</sup> HINE, HINE & HARROLD, *supra* note 11, at 239.

<sup>243</sup> *Id.* at 240.

<sup>244</sup> See 1 VILE, *supra* note 42, at 8.

<sup>245</sup> See *infra* pp. 149–53 for a discussion of the Emancipation Proclamation.

<sup>246</sup> *Civil War Facts*, HISTORYNET, <http://www.historynet.com/civil-war-facts> (last visited May 1, 2015).

*Sandford*<sup>247</sup> would move through the judicial system, eventually reaching the nation's highest court, following the efforts of a tenacious and courageous man, supported by abolitionists, named Dred Scott.

### 3. *Dred Scott v. Sandford*

In 1857, the United States Supreme Court addressed the status of slaves as well as free black Americans. At the time of this decision, it is startling that 238 years had passed since the first African Americans had been brought in chains to the United States; and yet, their descendants were still being held captive on white slaveholders' plantations in the United States. Tragically, the immoral practice of slavery that started in the original thirteen colonies had now spread to many middle and western regions of the country. As the nation's leaders continued to address conflicts arising in the expanded slave regions, a slave, Dred Scott, initiated an eleven-year court battle for freedom.

Prior to his court battle, Scott started his journey as a slave in the state of Virginia.<sup>248</sup> Later, he moved with his slaveholder, Peter Blow, to Huntsville, Alabama, and eventually to St. Louis, Missouri, in 1820.<sup>249</sup> Scott first sought freedom by attempting to escape from his slaveholder's St. Louis plantation in approximately 1828.<sup>250</sup> He was captured, flogged, and returned.<sup>251</sup> Scott changed his name to Dred Scott; he had previously been known as Sam Blow.<sup>252</sup> Two years later, he was sold to Missouri slaveholder, John Emerson.<sup>253</sup> Scott remained in Missouri for several additional years until around 1834, when he traveled with slaveholder Emerson to the free State of Illinois, and later, to the free territory, Wisconsin.<sup>254</sup>

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<sup>247</sup> 60 U.S. 393, 403, 432 (1856).

<sup>248</sup> See HINE, HINE & HARROLD, *supra* note 11, at 241. Scott's exact date of birth is unknown; however, many historians believe that he was born between 1799 and 1809. See *id.*; see also CHARLES MORROW WILSON, *THE DRED SCOTT DECISION* 108 (1973). The circuit court records of St. Louis recorded Scott's date of birth as April 12, 1809. *Id.*

<sup>249</sup> WILSON, *supra* note 248, at 110, 112.

<sup>250</sup> *Id.* at 112.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 114.

<sup>254</sup> 3 AFRICAN AMERICAN HISTORY, *supra* note 39, at 783.

Scott later returned to Missouri with Emerson.<sup>255</sup> He eventually asked the Emersons to voluntarily give him his freedom; this was not his first request, but they refused.<sup>256</sup> After Emerson's death, Scott again attempted to purchase his freedom from Emerson's widow in 1846.<sup>257</sup> Her refusal prompted him to file a lawsuit to gain freedom for himself, his wife, and his daughter.<sup>258</sup>

From 1846 to 1857, Scott's case moved through the courts; he argued that the time he spent in the free state and territory made him a free man.<sup>259</sup> Scott—and his wife and daughter—prevailed in the lower Missouri court, though they were only free three short weeks before an appeal was filed leading to a subsequent reversal by the Missouri Supreme Court.<sup>260</sup> Scott then took his case out of state court to federal district court.<sup>261</sup> Losing there, he still did not give up, seeking his “unalienable right” to be free.<sup>262</sup> In 1856, when Scott was thought to be in his fifties, his case went before the United States Supreme Court.<sup>263</sup> The Court issued its ruling on March 6, 1857;

<sup>255</sup> *Id.*

<sup>256</sup> WILSON, *supra* note 248, at 116.

<sup>257</sup> See 3 AFRICAN AMERICAN HISTORY, *supra* note 39, at 783.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* Scott had spent time in Illinois and Wisconsin, free states, in the mid-1800s:

In most cases, plaintiffs based their wrongful enslavement cases in a [F]ree [S]tate or territory. *Winy v. Whitesides* (1824) established Missouri's judicial criteria for eligibility for freedom: if a slave owner took a slave to free territory and established residence there, the slave would be free. Winy's case for freedom was allowed under the provisions of the 1787 Northwest Ordinance. The 1820 Missouri Compromise also included provisions to limit the spread of slavery. Under these legal mandates, a slave was free even if returned to slave territory, giving rise to the phrase “once free, always free.”

*History of Freedom Suits in Missouri*, ST. LOUIS CIRCUIT CT. HIST. RECORDS PROJECT, <http://stlcourtrecords.wustl.edu/about-freedom-suits-history.php> (last visited May 16, 2015).

<sup>260</sup> WILSON, *supra* note 248, at 2.

<sup>261</sup> 3 AFRICAN AMERICAN HISTORY, *supra* note 39, at 783. Scott argued that his case should be heard in the federal court since his slaveholder, Emerson, had died, leaving his estate to his widow. Because the estate was transferred to Mrs. Emerson's brother, John Sandford, in New York, Scott's lawyer brought the suit under federal diversity jurisdiction. *Id.*

<sup>262</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>263</sup> HINE, HINE & HARROLD, *supra* note 11, at 241.

citing to the United States Constitution, Justice Taney wrote the majority court opinion, joined by six of the other eight Justices. Taney began by framing the issues before the Court:

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

It will be observed, that the plea applies to that class of persons only whose ancestors were [N]egroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves.<sup>264</sup>

In short, the questions before the court were: As an African American, could Scott file suit in federal court, and since Scott was taken by his slaveholder to a free state and later to a territory that prohibited slavery was he then a free man?<sup>265</sup>

Justice Taney, writing for the majority, declared African Americans were “not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.”<sup>266</sup> Consequently, the Court decided that not only was Dred Scott not a citizen, but all African Americans—both free and enslaved—were not citizens.<sup>267</sup> The Court concluded:

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<sup>264</sup> Dred Scott v. Sandford, 60 U.S. 393, 403 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 404.

<sup>267</sup> *Id.* at 404–05.

They were at that time considered as subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.<sup>268</sup>

Justice Taney's majority court ruling that black Americans were not citizens and, therefore, barred from suing in federal court included many objectionable statements.<sup>269</sup> Historian Paul Finkelman appropriately concludes, "In one of the most notoriously racist statement[s] in American law, Taney declares that blacks are 'so far inferior, that they had no rights which the white man was bound to respect.'"<sup>270</sup> Taney also concluded that free black Americans were not citizens since they descended from slaves; yet, in some of the free states, various African Americans had experienced noticeable rights as citizens, including holding property titles and filing lawsuits in court.<sup>271</sup> As such, all African Americans had not been under the outright authority of white Americans; some free black men and women assumed certain rights of citizenship even though, generally, they were victims of discrimination and unequal opportunities.<sup>272</sup>

Taney's opinion also declared that the "language used in the Declaration of Independence" was not intended to apply to black Americans—enslaved or free. That is, he concluded, since the Founders deemed African Americans to be so inferior, or perhaps equivalent to chattel, the language "all men are created equal" applied only to white people.<sup>273</sup> Finally, Taney's decision declared "the Missouri Compromise itself unconstitutional: Congress, he ruled, could never ban slavery in the federal territories."<sup>274</sup> Thus, Justice Taney found it meaningless that Scott had temporarily resided in the free state of Illinois and a territory that prohibited slavery; according to the Taney court, he was still only property, not a person.<sup>275</sup> He further opined that the Fifth Amendment of

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<sup>268</sup> *Id.*

<sup>269</sup> *See generally id.*

<sup>270</sup> 2 MILESTONE DOCUMENTS IN AMERICAN HISTORY: EXPLORING THE PRIMARY SOURCES THAT SHAPED AMERICA 703 (Paul Finkelman et al. eds., 2008) [hereinafter 2 MILESTONE DOCUMENTS].

<sup>271</sup> HINE, HINE & HARROLD, *supra* note 11, at 242.

<sup>272</sup> *Id.*

<sup>273</sup> *Dred Scott*, 60 U.S. at 407, 410.

<sup>274</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 206.

<sup>275</sup> *Dred Scott*, 60 U.S. at 450.

the Constitution protected white citizens from having their property—African-American slaves—taken without due process of law.<sup>276</sup> Taney declared:

It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States.

. . . .

. . . The right to traffic in [slaves], like an ordinary article of merchandise and property, was guarantied to the citizens of the United States, in every State that might desire it, for twenty years. . . . The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.<sup>277</sup>

Southern slaveholders applauded the *Dred Scott* Supreme Court decision; they used the immoral ruling as a green light to move into many territories—previously unblemished by the sinful stain of slavery—and they established slavery through state constitutions.<sup>278</sup> The Northern Republican Party, however, objected to what many viewed as the most deplorable United States Supreme Court ruling ever rendered—numerous United States Supreme Court scholars maintain that the decision still holds this distinction.<sup>279</sup> Black Americans were especially appalled and disappointed.<sup>280</sup> Writers and advocates denounced the decision.<sup>281</sup> Activist Frederick Douglass offered these thoughts during his oration before the American Antislavery Society in May 1857:

You will readily ask me how I am affected by this devilish decision—this judicial incarnation of wolfishness? My answer is, and no thanks to the slave-holding wing of the Supreme Court, my hopes were never brighter than now.

I have no fear that the National Conscience will be put to sleep by such an open, glaring, and scandalous tissue of lies as that decision is, and has been, over and over, shown to be.

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<sup>276</sup> *Id.* at 450–51.

<sup>277</sup> *Id.* at 451–52.

<sup>278</sup> Melvin I. Urofsky, *Dred Scott Decision*, ENCYC. BRITANNICA, <http://www.britannica.com/EBchecked/topic/171273/Dred-Scott-decision/315150/Reception-and-significance> (last visited May 17, 2015).

<sup>279</sup> *Id.*

<sup>280</sup> David W. Blight, *David Blight on the Dred Scott Decision*, PBS, <http://www.pbs.org/wgbh/aia/part4/4i3090.html> (last visited May 17, 2015).

<sup>281</sup> Urofsky, *supra* note 278.

The Supreme Court of the United States is not the only power in this world. It is very great, but the Supreme Court of the Almighty is greater. Judge Taney can do many things, but he cannot perform impossibilities. He cannot bale out the ocean, annihilate the firm old earth, or pluck the silvery star of liberty from our Northern sky. He may decide, and decide again; but he cannot reverse the decision of the Most High. He cannot change the essential nature of things—making evil good, and good evil. Happily for the whole human family, their rights have been defined, declared, and decided in a court higher than the Supreme Court. “There is a law,” says Brougham, “above all the enactments of human codes, and by that law, unchangeable and eternal, man cannot hold property in man.”<sup>282</sup>

Douglass was correct; the day was fast approaching when African Americans would no longer be held as property by American slaveholders. Prior to that notable day, however, a few more events, such as the election of President Abraham Lincoln, would take place.

#### 4. Election of President Abraham Lincoln

Republican Abraham Lincoln was elected President in November 1860—prevailing in the northern states with a large enough margin to become the sixteenth President of the United States.<sup>283</sup> Lincoln eagerly read the Bible and other books throughout his lifetime.<sup>284</sup> Lincoln never attended law school, but he read *Blackstone's Commentaries on the Laws of England* and then was admitted to the Illinois bar in 1837.<sup>285</sup>

When Lincoln ran for President of the United States, Democratic southerners feared that he would abolish slavery, so they strenuously opposed his election.<sup>286</sup> Yet, before that time, in

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<sup>282</sup> *The Dred Scott Decision, Speech Delivered Before American Anti-Slavery Society, New York, May 14, 1857*, U. ROCHESTER FREDERICK DOUGLASS PROJECT, <http://www.lib.rochester.edu/index.cfm?PAGE=4399> (last visited May 17, 2015).

<sup>283</sup> *This Day in History: Abraham Lincoln Elected President*, HISTORY.COM, <http://www.history.com/this-day-in-history/abraham-lincoln-elected-president> (last visited Jan. 20, 2015).

<sup>284</sup> *Id.*

<sup>285</sup> See *Abraham Lincoln*, BIOGRAPHY.COM, <http://www.biography.com/people/abraham-lincoln-9382540> (last visited Apr. 20, 2015).

<sup>286</sup> See HINE, HINE & HARROLD, *supra* note 11, at 248.

1858, Lincoln participated in campaign debates against Senator Stephen Douglas during his run for an Illinois Senate seat.<sup>287</sup> During one of the debates Lincoln stated:

I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races . . . and I will say in addition to this that there is a physical difference between the races which I believe will forever forbid the two races living together on terms of social and political equality.<sup>288</sup>

Indeed, Lincoln, like Madison, Jefferson, and other noted Founders, could not envision equality and peaceful coexistence amongst blacks and whites in America. Equal opportunities under the law was, therefore, not imminent for African Americans in the nineteenth century, given the national leaders', officials', and citizens' biases. Southern slaveholding states worried that Lincoln's election would lead to the abolition of slavery; as such, one month after Lincoln's election, South Carolina seceded from the Union, followed in February, 1861 by Mississippi, Alabama, Florida, Louisiana, Georgia, and Texas—together, they formed the Confederate States of America.<sup>289</sup>

Lincoln was sworn in as president on March 4, 1861.<sup>290</sup> In his inaugural address, Lincoln confirmed that his primary objective was to preserve the Union: "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so."<sup>291</sup> The Confederate States of America did not accept Lincoln's declaration; instead, they attacked the federally occupied Fort Sumter in Charleston, South Carolina, after the United States army refused to surrender to the Confederates.<sup>292</sup> After Lincoln defended the fort, Virginia,

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<sup>287</sup> See *id.* at 243–45.

<sup>288</sup> *Id.* at 245.

<sup>289</sup> *Id.* at 248–49.

<sup>290</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 209.

<sup>291</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 209; HINE, HINE & HARROLD, *supra* note 11, at 249.

<sup>292</sup> See FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 209; HINE, HINE & HARROLD, *supra* note 11, at 250.

North Carolina, Tennessee, and Arkansas seceded from the Union.<sup>293</sup> At that moment in American history, the nation was involved in the Civil War.<sup>294</sup>

### 5. The Civil War and Emancipation Proclamation

In 1861, the Confederacy initiated the Civil War against the Union Army; the Confederate States of America's primary purpose was to preserve the institution of slavery.<sup>295</sup> Conversely, the Union force's chief concern was to preserve the Union.<sup>296</sup> Most northern white citizens feared that if the slaves were freed, they would have to compete with them for jobs.<sup>297</sup> Throughout the northern states, as the war commenced, riots and disputes about emancipation transpired, ranging from gradual to immediate abolition proposals.<sup>298</sup> President Lincoln promoted a colonization plan for black individuals to be sent to Haiti and Liberia.<sup>299</sup> When Lincoln met with free black individuals to ask them to support the plan, he maintained: "Your race suffer greatly, many of them, by living among us, while ours suffer from your presence."<sup>300</sup> Thus, while Lincoln proceeded to expressly support the abolition of slavery, his bias towards blacks prevented him from envisioning blacks and whites living peacefully together in America. As such, by late 1862, as the war progressed, Lincoln vowed to push for compensated emancipation payments for slaveholders who released their slaves for colonization outside of the United States or separate colonization within the Union.<sup>301</sup> Lincoln resolved that additional steps would be necessary to restore the Union and succeed in the war.<sup>302</sup>

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<sup>293</sup> See FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 209; HINE, HINE & HARROLD, *supra* note 11, at 250.

<sup>294</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 209; HINE, HINE & HARROLD, *supra* note 11, at 250.

<sup>295</sup> See CIMENT, *supra* note 232, at 86; see FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 209.

<sup>296</sup> See *Slavery in America*, *supra* note 37.

<sup>297</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 209–10.

<sup>298</sup> *Id.* at 210–13.

<sup>299</sup> *Id.* at 212.

<sup>300</sup> *Id.* (internal quotation marks omitted).

<sup>301</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 213; see HINE, HINE & HARROLD, *supra* note 11, at 261.

<sup>302</sup> See FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 213.

Faced with persistent prodding from abolitionists to immediately abolish slavery, believing that emancipation was warranted by the Constitution, and due to military necessity, on September 22, 1862, Lincoln issued the preliminary Emancipation Proclamation, granting freedom to all slaves in the rebellious states, effective January 1, 1863.<sup>303</sup> Lincoln's issuance of the worthy proclamation did not set all of the slaves free or abolish slavery laws throughout the United States.<sup>304</sup>

Historian John Hope Franklin's portrayal of the joy that filled the churches and many hearts the night before the January 1, 1863 reading of the Emancipation Proclamation, is worth observing:

On the night of December 31, 1862, blacks and whites gathered separately and together in churches in many parts of the country, holding watch meetings where they offered prayers of thanksgiving for the deliverance of the slaves. When the clock struck midnight at Tremont Temple in Boston, [abolitionists] Frederick Douglas, William Wells Brown, William Lloyd Garrison, Harriet Beecher Stowe, Charles B. Ray, and other fighters for freedom listened joyfully as the president's final Emancipation Proclamation was read, declaring freedom for more than three-fourths of the American slaves.<sup>305</sup>

Indeed, for many black people—free and enslaved—it was a day of jubilee. When President Lincoln reached out to sign the Emancipation Proclamation, he spoke these words: “I never, in my life, felt more certain that I was doing right than I do in signing this paper.”<sup>306</sup>

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<sup>303</sup> See HINE, HINE & HARROLD, *supra* note 11, at 262–63; *The Emancipation Proclamation*, NAT'L ARCHIVES & RECORDS ADMIN., [http://www.archives.gov/exhibits/american\\_originals\\_iv/sections/transcript\\_nonjava\\_preliminary\\_emancipation.html](http://www.archives.gov/exhibits/american_originals_iv/sections/transcript_nonjava_preliminary_emancipation.html) (last visited Sept. 16, 2015). Additionally, the issue of runaway slaves during the war years needed to be addressed. See FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 210–11. Congress passed a Confiscation Act in 1862—an earlier Act was passed in 1861—setting slave contrabands free who escaped from the rebellious states.

<sup>304</sup> HINE, HINE & HARROLD, *supra* note 11, at 265.

<sup>305</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 213.

<sup>306</sup> John Hope Franklin, *The Emancipation Proclamation: An Act of Justice*, PROLOGUE, Summer 1993, available at <http://www.archives.gov/publications/prologue/1993/summer/emancipation-proclamation.html>.

These are the key portions of the Emancipation Proclamation:

That on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free . . . .

. . . .

And I hereby enjoin upon the people so declared to be free to abstain from all violence, unless in necessary self-defence; and I recommend to them that, in all cases when allowed, they labor faithfully for reasonable wages.

And I further declare and make known, that such persons of suitable condition, will be received into the armed service of the United States to garrison forts, positions, stations, and other places, and to man vessels of all sorts in said service.

And upon this act, sincerely believed to be an act of justice, warranted by the Constitution, upon military necessity, I invoke the considerate judgment of mankind, and the gracious favor of Almighty God.<sup>307</sup>

Despite the notation included, indicating that the Emancipation Proclamation was drafted for military necessity, Lincoln made clear that justice and the Constitution warranted the action.<sup>308</sup> Thus, after the Emancipation Proclamation was issued, abolition of slavery was by most accounts a pertinent war issue and key concern of the national government.<sup>309</sup> The Emancipation Proclamation greatly contributed to the Union's success, as the Confederacy lost "much of its valuable labor force."<sup>310</sup> Many slaves were no longer willing to serve on the plantations; they escaped and several were subsequently enlisted to serve in the Union Army.<sup>311</sup> Moreover, in 1864, Congress repealed the Fugitive Slave Acts, which had imposed stiff penalties if anyone harbored or assisted runaway slaves.<sup>312</sup>

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<sup>307</sup> *The Emancipation Proclamation*, *supra* note 303 (internal quotation mark omitted).

<sup>308</sup> *Id.*

<sup>309</sup> See FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 209; *Slavery in America*, *supra* note 37.

<sup>310</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 214; see HINE, HINE & HARROLD, *supra* note 11, at 265.

<sup>311</sup> HINE, HINE & HARROLD, *supra* note 11, at 265–71.

<sup>312</sup> *Fugitive Slave Acts*, *supra* note 235

Noticably, African-American soldiers—free and emancipated slaves—serving in the Union Army were segregated in separate units and were paid less for performing the same duties as white male soldiers; when they resisted the lower wages, often they were shot and killed by white officers and soldiers.<sup>313</sup> Yet the black soldiers served their country with distinction.<sup>314</sup> At the 1864 ceremony honoring President Lincoln, Reverend S. W. Chase spoke of the loyal African-American soldiers: “Since [African Americans’] incorporation into the American family we have been true and loyal, and we are now ready to aid in defending the country, to be armed and trained in military matters, in order to assist in protecting and defending the star-spangled banner.”<sup>315</sup>

Historians note that Lincoln “came to appreciate the achievements and devotion of black troops.”<sup>316</sup> Once again, as demonstrated in the earlier observation of George Washington’s encounter with black soldiers, a diverse workforce opens the door for interactive engagement, and it often leads to positive changes of views and attitudes. Near the end of the war, Congress passed a law requiring black soldiers to be paid equal wages for their service, although the compensation was not retroactive back to the beginning of the war.<sup>317</sup>

On January 31, 1865, Congress proposed the Thirteenth Amendment to the Constitution of the United States, sent to the states for ratification.<sup>318</sup> The Civil War ended in 1865.<sup>319</sup> Confederate General Robert E. Lee surrendered the Confederate

<sup>313</sup> See HINE, HINE, & HARROLD, *supra* note 11, at 270–71.

<sup>314</sup> See CIMENT, *supra* note 232, at 84.

<sup>315</sup> ABRAHAM LINCOLN, *Reply to Loyal Colored People of Baltimore upon Presentation of a Bible*, in 7 COLLECTED WORKS OF ABRAHAM LINCOLN 543 (Roy P. Basler ed., 1953) (1864), available at <http://quod.lib.umich.edu//lincoln/lincoln7/1:1184?rgn=div1;submit=Go;subview=detail;type=simple;view=fulltext;q1=bible>.

<sup>316</sup> *Id.* at 284.

<sup>317</sup> *Id.* at 271. The back pay awarded to the black soldiers was retroactive to January 1, 1864. *Id.*

<sup>318</sup> *13th Amendment to the U.S. Constitution*, PRIMARY DOCUMENTS IN AMERICAN HISTORY (Nov. 30, 2015), <http://www.loc.gov/rr/program/bib/ourdocs/13thamendment.html> (last visited Sept. 30, 2015) (providing a timeline for the passage of the Thirteenth Amendment).

<sup>319</sup> It is estimated that approximately 1,556,000 soldiers served in the Union Army and about 800,000 Confederate soldiers. The total number of casualties is estimated at more than 600,000. Warren W. Hassler, *American Civil War*, ENCYC. BRITANNICA, <http://www.britannica.com/event/American-Civil-War/The-naval-war#toc229879> (last visited Sept. 30, 2015).

Army to Union General Ulysses S. Grant in Appomattox, Virginia, on April 9, 1865.<sup>320</sup> Shortly thereafter, John Wilkes Booth, a strong supporter of the Confederacy, assassinated President Lincoln on April 14, 1865.<sup>321</sup> Ultimately, at the conclusion of the war, the Union was preserved; however, over 600,000 soldiers died in the Civil War—more than half of the casualties were Union soldiers who, notably, died fighting not only to preserve the Union, but also, ultimately, for African Americans' freedom—innumerable others were injured, most of the southern states were in disarray, and, as noted, the President of the United States was assassinated only a few days after the Confederate surrender in Appomattox, Virginia.<sup>322</sup>

## B. Reconstruction

### 1. Thirteenth Constitutional Amendment

On December 6, 1865, the Thirteenth Amendment to the United States Constitution was ratified:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.<sup>323</sup>

After ratification, part of Article IV, Section 2—the Constitution's Fugitive Slave Clause—was no longer enforceable. The Thirteenth Amendment was the first of the Reconstruction Amendments that imposed prohibitions against involuntary servitude and race discrimination and granted authority to Congress to enforce the applicable legislation.<sup>324</sup> The national government initiated a restoration plan to bring the seceded Confederate states back into the Union.<sup>325</sup> For the first time

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<sup>320</sup> See CIMENT, *supra* note 232, at 86.

<sup>321</sup> *This Day in History: Lincoln Is Shot*, HISTORY.COM, <http://www.history.com/this-day-in-history/lincoln-is-shot> (last visited Sept. 30, 2015).

<sup>322</sup> See CIMENT, *supra* note 232, at 86.

<sup>323</sup> U.S. CONST. amend. XIII.

<sup>324</sup> See U.S. CONST. amends. XIII, XIV, XV.

<sup>325</sup> See FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 236.

since the nation's founding, African-American slaves—approximately four million—were free after nearly 250 years of institutional slavery.<sup>326</sup>

For the former slaves, there was much to accomplish; for most, the first objective was to reunite their families that had been torn apart on auction blocks.<sup>327</sup> Certainly, the brutal institution of slavery “had not destroyed the black family.”<sup>328</sup> One historian recounts the journey of a North Carolina “middle-aged black man ‘plodding along, staff in hand, and apparently very footsore and tired.’ . . . [H]e had walked almost 600 miles looking for his wife and children, who had been sold four years earlier.”<sup>329</sup> Indeed, African Americans purposely attempted to locate their loved ones, educate themselves and their children, find jobs to feed their families, find land to live on and farm, establish churches, set up schools, achieve equal rights under the law, and survive the immediate violence inflicted by bitter former slaveholders and proponents of slavery.<sup>330</sup> Undoubtedly, during the Reconstruction period, which lasted from 1865 to about 1877, former white slaveholders were bound and determined to keep black Americans oppressed.<sup>331</sup> Blacks resisted their attempts, as described in the discussion that follows, and a few African Americans were—for the first time—elected to serve in high level government positions.<sup>332</sup>

## 2. Black Codes, Freedman's Bureau, Civil Rights Act of 1866

Despite the election of a few black individuals to public office in state and national positions during the Reconstruction period, most African Americans could not break free from the oppressive conditions of unrelenting southerners consumed with malice and hatred.<sup>333</sup> Prominent southern state officials were unyielding; they enacted new laws and new state constitutions. They also changed government policies to circumvent and oppress African

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<sup>326</sup> See *id.*; HINE, HINE & HARROLD, *supra* note 11, at 288.

<sup>327</sup> See HINE, HINE & HARROLD, *supra* note 11, at 289.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 290.

<sup>330</sup> See *id.* at 288–301.

<sup>331</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 236; see also CIMENT, *supra* note 232, at 87, 92–94.

<sup>332</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 236.

<sup>333</sup> See *id.*

Americans.<sup>334</sup> The new laws—so-called Black Codes—generally deprived African Americans of basic civil rights.<sup>335</sup> The few legitimate rights restored, which included the right to purchase property and legally marry, generally had strings attached to harm black people, as most of the laws were contrary to their interest, such as, the laws that penalized black individuals for quitting jobs—white employees could quit jobs without facing negative consequences—by threatening them with arrest and even incarceration for breach of contract.<sup>336</sup>

Additionally, black individuals were not far removed from the *Dred Scott* court decision—which held that African Americans could not sue in federal court—as the new Black Codes “disallowed black testimony in court, except in cases involving members of their own race.”<sup>337</sup> Certainly, these laws resembled slavery; that was the purpose behind the Black Codes, which included requiring African Americans to carry passes and to reside only in certain designated locations and placement of black children with white employers “without any compensation to the child laborers or their parents,” if the state determined that the parents were unfit because they were unemployed or for other unjust reasons alleged.<sup>338</sup>

Moreover, southern extremists did not honor the Reconstruction Amendments and other initiatives implemented to assist the emancipated former slaves.<sup>339</sup> Consider the Freedmen’s Bureau<sup>340</sup> and Southern Homestead Act,<sup>341</sup> which

<sup>334</sup> *Id.* at 238.

<sup>335</sup> *See id.*

<sup>336</sup> *Id.*; HINE, HINE & HARROLD, *supra* note 11, at 303.

<sup>337</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 238.

<sup>338</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 238; *see* HINE, HINE & HARROLD, *supra* note 11, at 303; 2 MILESTONE DOCUMENTS, *supra* note 270, at 887.

<sup>339</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 239.

<sup>340</sup> *See* HINE, HINE & HARROLD, *supra* note 11, at 292. Congress established the Freedmen’s Bureau after slavery was abolished. *Id.* Yet, the funds allocated and personnel assigned to administer and monitor the activities of the Bureau were insufficient to address the intended mission of providing needs from land to education, food and transportation to not only blacks, but also to whites who suffered from diseases and poverty after the war. *Id.* After receiving land under the Freedmen’s Bureau, the freedmen were commanded by President Lincoln’s successor, Andrew Johnson, to get off of the land; Johnson returned the property to thousands of Confederates after granting them presidential pardons. *Id.*

<sup>341</sup> *Id.* at 293. Congress also implemented the Southern Homestead Act, designating land for innumerable black and white families, though most of the land was swampland. *Id.*

were implemented by Congress to help the emancipated Black citizens acquire land, education, basic needs, address legal disputes, and adjust to their new American experience as free men and women.<sup>342</sup> The United States Army managed the Bureau.<sup>343</sup>

Andrew Johnson, Lincoln's successor, was the President of the United States after emancipation.<sup>344</sup> Within a short period of time, it was clear that Johnson was a strong supporter of the former slaveholders.<sup>345</sup> After granting pardons and returning plantation land to most of the Confederates who simply swore allegiance to the United States, Johnson appointed many of the former slaveholders, including the office of governor, allowing the appointees to greatly impact the laws—implementing immoral Black Codes—and activities of the southern states.<sup>346</sup> Indeed, Johnson, and the former slaveholding lawmakers that he empowered, set in operation a system of laws and practices that diminished many of the Reconstruction rights and protections implemented for the protection of the free Black men and women. As such, President Johnson's strong support of states' rights, combined with his personal view of African Americans' inferiority,<sup>347</sup> contributed to the failure of Reconstruction, leaving African Americans unprotected and in jeopardy after slavery was abolished. Nevertheless, African Americans endured, as most were determined to remain in America as free men and women and forego any colonization plans proposed that would take them from the land that they and their ancestors spent centuries cultivating. Therefore, despite the oppressive new laws, opposition from political leaders, and the dangers faced, the emancipated former slaves kept moving forward, setting up churches and schools, such as Fisk University in Nashville, Tennessee and Virginia Union University in Richmond, Virginia.<sup>348</sup>

After the failure of the Freedmen's Bureau, the enactment of Black Codes, and the violent acts inflicted upon African Americans, Congress attempted to thwart the impact,

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<sup>342</sup> See HINE, HINE & HARROLD, *supra* note 11, at 292–93.

<sup>343</sup> *Id.* at 292.

<sup>344</sup> *Id.* at 302.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> See *id.* at 299.

particularly of the Black Codes and violent acts, by passing the Freedmen's Bureau Bill,<sup>349</sup> a second Freedmen's Bureau Bill, subsequent to the initial legislation, and Civil Rights Act of 1866.<sup>350</sup> The 1866 Act was the first civil rights legislation implemented by Congress; it was enacted to diminish the Black Codes that weakened the impact of the Thirteenth Amendment by legally subjugating Black Americans in all intents and purposes to their previous oppressed circumstances.<sup>351</sup> Moreover, the Civil Rights Act of 1866 was written to establish citizenship for African Americans born in the United States:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . .<sup>352</sup>

Further, the 1866 legislation imposed penalties and misdemeanor convictions, including possible imprisonment, for violations of the Act.<sup>353</sup> President Johnson vetoed the subsequent Freedmen's Bureau Bill and the Civil Rights Act of 1866.<sup>354</sup> Johnson objected, "In fact, the distinction of race and color is by the bill made to operate in favor of the colored and against the white race."<sup>355</sup> The Republican Party attempted to override the

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<sup>349</sup> See *id.* at 306. This bill proposed that additional financial funds and broader authority be given to the Freedmen's Bureau. *Id.*

<sup>350</sup> Civil Rights Act of 1866, ch. 31, 14 Stat. 27; FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 239.

<sup>351</sup> 2 MILESTONE DOCUMENTS, *supra* note 270, at 887.

<sup>352</sup> Civil Rights Act of 1866 § 1; 2 MILESTONE DOCUMENTS, *supra* note 270, at 886.

<sup>353</sup> 2 MILESTONE DOCUMENTS, *supra* note 270, at 886.

<sup>354</sup> *Id.* at 887.

<sup>355</sup> HINE, HINE & HARROLD, *supra* note 11, at 307 (internal quotation marks omitted).

vetoed and impeach Johnson two years later; their efforts failed by only one Senate vote.<sup>356</sup> Johnson's veto bolstered the attacks waged against the law by southerners.<sup>357</sup>

It is notable that Congress's authority to pass the 1866 law was acquired through the second provision of the Thirteenth Amendment: "Congress shall have power to enforce this article by appropriate legislation."<sup>358</sup> However, some of the Act's opponents maintained that the Thirteenth Amendment's first provision did not authorize the citizenship rights broadly set forth in the 1866 Act.<sup>359</sup> To overcome future challenges, the Fourteenth Amendment was proposed by Congress in 1866 and ratified in 1868.<sup>360</sup> Additionally, pertinent provisions included in the 1866 Act are applied in 42 U.S.C. § 1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.<sup>361</sup>

### 3. Fourteenth and Fifteenth Constitutional Amendments

On July 9, 1868, the Fourteenth Amendment was ratified, and the nefarious *Dred Scott v. Sandford* decision, which declared that Black Americans, both enslaved and free, were not citizens of the United States, was negated, granting citizenship to all persons born in the United States; additionally, citizenship was granted in the state where one resides.<sup>362</sup> Moreover, the Fourteenth Amendment's first section guaranteed due process and equal protection of the laws:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

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<sup>356</sup> *Id.* at 307.

<sup>357</sup> 2 MILESTONE DOCUMENTS, *supra* note 270, at 890.

<sup>358</sup> U.S. CONST. amend. XIII, § 2.

<sup>359</sup> See 2 MILESTONE DOCUMENTS, *supra* note 270, at 891

<sup>360</sup> *Id.* at 891; see also, HINE, HINE & HARROLD, *supra* note 11, at 307.

<sup>361</sup> 42 U.S.C § 1981 (2012).

<sup>362</sup> See HINE, HINE & HARROLD, *supra* note 11, at 307.

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>363</sup>

Further, the Fourteenth Amendment altered Article 1, Section 2 of the United States Constitution—the Three-Fifths Clause—by requiring that “Representatives shall be apportioned . . . counting the whole number of persons in each State,” instead of designating enslaved Blacks to be counted as three-fifths of a white person, as the Constitution permitted prior to the enactment of the Fourteenth Amendment.<sup>364</sup>

The Fifteenth Amendment was ratified on February 3, 1870: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”<sup>365</sup> Although this amendment allowed African-American men to vote, southern states reacted belligerently by adding literacy tests, poll taxes, property qualifications, and other barriers to their election laws to prevent African-American men from exercising their constitutional suffrage rights.<sup>366</sup> Though unjust, the impediments authorized in the southern states were legal state laws, and in most southern states, they lasted for nearly a century.<sup>367</sup> Finally, nearly a century would pass before legislation was enacted to outlaw unjust laws that imposed literacy tests, poll taxes, and similar obstacles.<sup>368</sup>

#### 4. Civil Rights Acts of 1871 and 1875

To enforce the provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments, Congress passed other civil rights acts during Reconstruction: The Enforcement Act of 1870 and the Civil Rights Act of 1871, also called the Ku Klux Klan Act, were both implemented by Congress to respond to the blockages and barriers imposed by southern officials. The latter Act addressed the violent white supremacist Ku Klux Klan's abuse directed at African Americans after the war.<sup>369</sup> Criminal prosecution and

<sup>363</sup> U.S. CONST. amend. XIV, § 1, *quoted in* HINE, HINE & HARROLD, *supra* note 12, at 307.

<sup>364</sup> *See id.* § 2; *see also* HINE, HINE & HARROLD, *supra* note 11, at 307–08.

<sup>365</sup> U.S. CONST. amend. XV, § 1.

<sup>366</sup> HINE, HINE & HARROLD, *supra* note 11, at 346.

<sup>367</sup> *Id.* at 347.

<sup>368</sup> *See id.*

<sup>369</sup> *See id.* at 326.

penalties were implemented against violators of the Act who “interfere[d] with a person’s right to vote, hold office, serve on a jury, or enjoy equal protection of the law.”<sup>370</sup> Numerous arrests were made and several Klansmen were tried and convicted under the Act, but many escaped severe punishment, given the limited resources available to pursue the massive number of white supremacists in the Ku Klux Klan.<sup>371</sup> Notably, part of the 1871 Act, designated as 42 U.S.C. § 1983, allows government employees to file § 1983 employment discrimination claims on the basis of race and other applicable protected categories.<sup>372</sup>

The last core congressional Reconstruction legislation was the Civil Rights Act of 1875—granting more rights and protections than earlier Reconstruction bills—which was enacted “to protect all citizens in their civil and legal rights.”<sup>373</sup> Pursuant to the Civil Rights Act of 1875, Congress declared:

Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore, Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons within the jurisdiction of the United States shall be entitled to the full and equal and enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.<sup>374</sup>

Violators of the Act faced misdemeanor charges and a fine of “not less than five hundred nor more than one thousand dollars, or . . . imprison[ment] not less than thirty days nor more than one year.”<sup>375</sup> Additionally, federal district and circuit courts of

<sup>370</sup> *Id.*

<sup>371</sup> *Id.* at 327.

<sup>372</sup> 42 U.S.C. § 1983 (2012).

<sup>373</sup> Civil Rights Act of 1875, ch. 114, 18 Stat. 335, 335, *quoted in The 1875 Civil Rights Act*, PBS (Dec. 19, 2003), [http://www.pbs.org/wgbh/amex/reconstruction/activism/ps\\_1875.html](http://www.pbs.org/wgbh/amex/reconstruction/activism/ps_1875.html) (last visited Sept. 15, 2015).

<sup>374</sup> *Id.* § 1.

<sup>375</sup> *Id.* § 2.

the United States were given exclusive jurisdiction over “all crimes and offenses against, and violations of, the provisions of this act.”<sup>376</sup> Finally, the Act provided that no person could be disqualified for grand or petit jury service “in any court of the United States, or of any State, on account of race, color, or previous condition of servitude.”<sup>377</sup> Officials who excluded or failed to summon citizens for jury duty “shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.”<sup>378</sup> The text of the Civil Rights Act of 1875 was noteworthy legislation. Several cases were filed after the 1875 Act’s enactment; regrettably, the law was seldom enforced, and some historians note that enforcement was never attempted.<sup>379</sup>

Notably, during Reconstruction in 1875, for the first time in the nation’s history, a few African-American men served in the United States Congress—seven were elected to the House of Representatives and two served in the Senate.<sup>380</sup> Nevertheless, this achievement—combined with the Reconstruction Amendments and civil rights legislation—did not stop white supremacists’ violent attacks. It is estimated that “[b]etween 1889 and 1932, 3,745 people were lynched in the United States . . . . Most lynchings happened in the South, and black men were usually the victims.”<sup>381</sup> Generally, African-American victims were savagely beaten and lynched without cause.<sup>382</sup> Noticeably, some were targeted because of their successful economic achievements.<sup>383</sup>

Moreover, white supremacists had little or no regard for human life, as they occasionally even lynched black pregnant women; one occurrence was in the state of Georgia in 1918 after a pregnant woman who was grieving her husband’s lynching

<sup>376</sup> *Id.* § 3.

<sup>377</sup> *Id.* § 4.

<sup>378</sup> *Id.*

<sup>379</sup> Melvin I. Urofsky, *Civil Rights Act of 1875*, ENCYC. BRITANNICA, <http://www.britannica.com/EBchecked/topic/119345/Civil-Rights-Act-of-1875> (last visited Sept. 29, 2015); see also HINE, HINE & HARROLD, *supra* note 11, at 328.

<sup>380</sup> PETER M. BERGMAN, *THE CHRONOLOGICAL HISTORY OF THE NEGRO IN AMERICA* 275 (1969). Reconstruction would come to an end in 1877 as a result of a compromise that decided the presidential election that year. HINE, HINE & HARROLD, *supra* note 11, at 331–32.

<sup>381</sup> HINE, HINE & HARROLD, *supra* note 11, at 352.

<sup>382</sup> *Id.* at 353.

<sup>383</sup> *Id.*

“publicly vowed to bring those responsible to justice.”<sup>384</sup> Afterwards, she was lynched.<sup>385</sup> Historians note that a mob “seized her, tied her ankles together, and hanged her upside down from a tree. Someone slit her abdomen, and her nearly full-term child fell to the ground. The mob stomped the infant to death. They then set her clothes on fire and shot her.”<sup>386</sup> This merciless, barbaric, and appalling conduct is detailed in this Article not to judgmentally recount disturbing events from the past but to make clear that legislation, such as the Ku Klux Klan Act of 1871 and the Civil Rights Act of 1875, and future civil rights lawsuits were certainly needed. Further, these laws should have been properly enforced.

Despite the enactment of the civil rights legislation, in the nineteenth and early twentieth centuries, reportedly, the perpetrators of barbaric violent acts were seldom, if ever, sought out and prosecuted since some of the events included, or were encouraged by, “[p]rominent community members” and other “White politicians, journalists, and clergymen” who silently stood aside as the lynching and other violations were initiated.<sup>387</sup>

When Reconstruction ended in about 1877, after federal troops were removed from the South, Blacks had gained their freedom and had their citizenship explicitly recognized in the Fourteenth Amendment to the United States Constitution. Additionally, black men gained the right to vote, albeit restricted by literacy tests and similar obstacles, started schools and churches, won a few elections to public office, and began uniting their families as heads of their own households.<sup>388</sup> Nevertheless, a number of historians deem the Reconstruction period initiatives a failure, given the barriers enacted, Black Codes, minimal enforcement of the Civil Rights Acts, violence, and horrific conditions that African Americans living in the South endured during the Reconstruction Era.

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<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Id.* at 352.

<sup>388</sup> *Id.* at 332, 347.

### C. *Supreme Court of the United States*

In the eighteenth century the nation's leaders regularly compromised with southern Congressmen who generally raised states' rights arguments in support of the institution of slavery.<sup>389</sup> Additionally, immediately following the Civil War in the nineteenth century, President Andrew Johnson often reinforced states' rights, rather than advance the Fourteenth Amendment and other Reconstruction initiatives.<sup>390</sup> In fact, as noted, Johnson "vetoed the Freedmen's Bureau bill and the Civil Rights bill, legislation aimed at protecting blacks," and he subsequently "urged Southern states not to ratify" the Fourteenth Amendment.<sup>391</sup> Similarly, states' rights and powers were often raised in cases before the Supreme Court of the United States during and after Reconstruction. The following chronicle examines several of the Supreme Court of the United States' Fourteenth Amendment clauses from the Reconstruction period up to the 1954 *Brown v. Board of Education* ruling.<sup>392</sup>

#### 1. *The Slaughter-House Cases*

The Supreme Court of the United States interpreted the Fourteenth Amendment in the *Slaughter-House Cases*.<sup>393</sup> The group of slaughterhouse cases reached the Supreme Court following the Louisiana state and appellate courts' rulings against butchers who were prohibited from participating in a monopoly that banned all slaughterhouses from operating in the state except for one company. The butchers argued that state law violated the Fourteenth Amendment's Privileges or Immunities Clause and denied them equal protection of the laws, as they, too, wanted the privilege to operate slaughterhouses in the state.<sup>394</sup> The United States Supreme Court's interpretation of the Privileges or Immunities Clause was restrictive and

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<sup>389</sup> See generally Frederick Dean Drake, *States' Rights*, ENCYC. BRITANNICA, <http://www.britannica.com/EBchecked/topic/564042/states-rights> (last updated June 30, 2014).

<sup>390</sup> See *Andrew Johnson*, HISTORY.COM, <http://www.history.com/topics/us-presidents/andrew-johnson/print> (last visited Sept. 30, 2015).

<sup>391</sup> *Id.*

<sup>392</sup> See *infra* pp. 163–75 for a discussion of the *Brown v. Board of Education* decision addressing inequality and discrimination.

<sup>393</sup> *Slaughter-House Cases*, 83 U.S. 36, 74 (1872).

<sup>394</sup> *Id.* at 66.

narrow.<sup>395</sup> Quoting the Fourteenth Amendment text, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,”<sup>396</sup> Justice Miller wrote:

It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose. Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.<sup>397</sup>

Accordingly, the Court ruled that the Fourteenth Amendment protected only national citizenship privileges; as such, it did not provide protection—privileges and immunities—against the State of Louisiana’s monopoly imposed on slaughterhouses.<sup>398</sup> The ruling was an obvious step backwards for civil rights and the Fourteenth Amendment’s broad application. In the decade afterwards, the Court often cited the *Slaughter-House Cases* in other cases when narrowly interpreting the Fourteenth and Fifteenth Amendments’ protections.<sup>399</sup>

## 2. *Strauder v. West Virginia*

One of the most notable Fourteenth Amendment cases decided by the United States Supreme Court during the Reconstruction period was *Strauder v. West Virginia*. In *Strauder*, the Court struck down a state decision, which allowed

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<sup>395</sup> *Id.* at 81.

<sup>396</sup> *Id.* at 74.

<sup>397</sup> *Id.* at 81.

<sup>398</sup> *Id.*

<sup>399</sup> See *United States v. Cruikshank*, 92 U.S. 542 (1875); see also *United States v. Reese*, 92 U.S. 214 (1875).

the exclusion of African Americans from juries. Under West Virginia law, "no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the State."<sup>400</sup>

After being indicted for murder on October 20, 1874, Strauder, an African-American man, sought to remove the case before trial, from the state court to federal court.<sup>401</sup> Strauder believed, and had reason to believe, that by virtue of being an African-American man and a former slave, "he could not have the full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens."<sup>402</sup> He also believed that, because he was not a white man, "he had less chance of enforcing . . . his rights on the prosecution" and that denial of his rights was also "much more enhanced than if he was a white man."<sup>403</sup> Upon denying his request for removal, Strauder was forced to go to trial and was subsequently convicted and sentenced in state court.<sup>404</sup> Strauder requested that the Supreme Court of the United States hear his case, arguing that he "was denied rights to which he was entitled under the Constitution and laws of the United States."<sup>405</sup> The Court found that West Virginia's law barring black men from serving on a grand or petit jury "amount[ed] to a denial of the equal protection of the laws to a colored man,"<sup>406</sup> and "[t]here was error, therefore, in proceeding to the trial of the indictment against him after his petition was filed."<sup>407</sup> The Court reversed Strauder's conviction.<sup>408</sup>

### 3. *United States v. Harris*

The impact of the ruling in the *Slaughter-House Cases* was significant. In the United States Supreme Court's 1883 decision, *United States v. Harris*,<sup>409</sup> the Court held:

It was never supposed that the section under consideration conferred on [C]ongress the power to enact a law which would punish a private citizen [Harris, a member of the Ku Klux

<sup>400</sup> *Strauder v. West Virginia*, 100 U.S. 303, 304 (1879).

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> *Id.* (internal quotation mark omitted).

<sup>404</sup> *Id.*

<sup>405</sup> *Id.*

<sup>406</sup> *Id.* at 310.

<sup>407</sup> *Id.* at 312.

<sup>408</sup> *Id.*

<sup>409</sup> *United States v. Harris*, 106 U.S. 629 (1883).

Klan,] for an invasion of the rights of his fellow-citizen, conferred by the state of which they were both residents on all its citizens alike.<sup>410</sup>

The Court reasoned: The Fourteenth Amendment does not “control the power of the state governments over [the rights of] its own citizens.”<sup>411</sup>

#### 4. *The Civil Rights Cases*

In 1883, five civil cases were consolidated and heard together by the Supreme Court of the United States. The Court’s majority opinion, written by Justice Joseph Bradley, was a setback for civil rights. The cases involved lawsuits filed by African Americans who had been denied service in public accommodations that included theaters, hotels, and public transportation railcars. The Court ruled: “[T]he Fourteenth Amendment . . . [is] prohibitory upon the States [only].”<sup>412</sup> Accordingly, the Court reasoned that the Fourteenth Amendment prohibited discrimination only by state authorities and not discriminatory acts of private individuals who denied African Americans access to public accommodations and services. Justice John Marshall Harlan wrote as the only dissenting Justice. He denounced the majority Court’s ruling as “entirely too narrow and artificial” and argued for a broad reading of the Reconstruction Amendments.<sup>413</sup> Congress did not pass another civil rights law until 1957.

#### 5. Jim Crow Laws

Following the Court’s decision in the *Civil Rights Cases*, states continued to pass what came to be known as Jim Crow Laws,<sup>414</sup> under which African Americans were excluded from

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<sup>410</sup> *Id.* at 644.

<sup>411</sup> *Id.* at 643.

<sup>412</sup> *The Civil Rights Cases*, 109 U.S. 3, 10 (1883).

<sup>413</sup> *Id.* at 26 (Harlan, J., dissenting).

<sup>414</sup> *See Jim Crow Laws*, NAT’L PARK SERV., [http://www.nps.gov/malu/learn/education/jim\\_crow\\_laws.htm](http://www.nps.gov/malu/learn/education/jim_crow_laws.htm) (last visited Oct. 2, 2015). Jim Crow was the term used to describe racial segregation laws in the South that required blacks and whites to occupy separate public places, schools, and so forth after Reconstruction ended in about 1877 and especially following the *Civil Rights Cases* of 1883 until the laws were eradicated, following the passage of the Civil Rights Act of 1964. *Id.* The term Jim Crow was first used in a minstrel show routine, *Jump Jim Crow*; this form of entertainment was designed to denigrate and belittle African Americans. Melvin

public accommodations, schools were segregated, interracial dating and marriage was prohibited, and blacks received medical assistance on segregated floors of hospitals. A few of the states' Jim Crow laws follow:

Marriage: "All marriages between a white person and a negro, or between a white person and a person of negro descent to the fourth generation inclusive, are hereby forever prohibited."<sup>415</sup>—Florida

Burial: "The officer in charge shall not bury, or allow to be buried, any colored persons upon ground set apart or used for the burial of white persons."<sup>416</sup>—Georgia

Nursing: "No person or corporation shall require any white female nurse to nurse in wards or rooms or hospitals, either public or private, where negro men are placed."<sup>417</sup>—Alabama

Schools: "[The County Board of Education] shall provide schools of two kinds; those for white children and those for colored children."<sup>418</sup>—Texas

Restaurants: "It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment."<sup>419</sup>—Alabama

Buses: "All passenger stations in this state operated by any motor transportation company shall have separate waiting rooms or space and separate ticket windows for the white and colored races."<sup>420</sup>—Alabama

## 6. *Plessy v. Ferguson*

African Americans continued their quest for equal rights in the United States by filing lawsuits to gain the right to sit in the front seats on trains and buses, to be served in hotels and restaurants where white citizens were lodging and dining, and so

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I. Urofsky, *Jim Crow Law*, ENCYC. BRITANNICA, <http://www.britannica.com/event/Jim-Crow-law> (last updated Apr. 21, 2015).

<sup>415</sup> *Examples of Jim Crow Laws*, YOURDICTIONARY, <http://examples.yourdictionary.com/examples-of-jim-crow-laws.html> (last visited Oct. 2, 2015).

<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

<sup>418</sup> *Id.* (alteration in original).

<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

on. In 1892, Homer Plessy “took possession of a vacant [railway] seat in a coach where passengers of the white race were accommodated,” and after he was faced with ejection from the train, Plessy refused to get up and move to the section designated only for blacks.<sup>421</sup> He was forcibly removed from the train by a police officer, taken to jail in New Orleans, Louisiana, and charged with violating the 1890 Louisiana law that provided “for separate railway carriages” for blacks and whites.<sup>422</sup>

In 1896, after losing in the state courts, Plessy’s case went before the Supreme Court of the United States.<sup>423</sup> The Court considered the constitutionality of the Louisiana law.<sup>424</sup> Plessy argued that the law violated the Thirteenth and Fourteenth Amendments.<sup>425</sup> In a seven-to-one ruling, Justice Henry Brown delivered the majority opinion holding that the Louisiana law requiring separate railway carriages did not violate the Thirteenth or Fourteenth Amendments.<sup>426</sup> The Court’s decision in the *Slaughter-House Cases* was cited in *Plessy*, and the *Plessy* decision also recognized states’ rights. Additionally, like earlier Supreme Court cases deciding constitutional issues, the Court’s opinion included discriminatory views regarding African Americans; among other things, Justice Brown declared that blacks and whites “commingling” in public places would be unsettling for both.<sup>427</sup> Brown’s words are etched into the Court’s historical record.<sup>428</sup> He wrote:

The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.<sup>429</sup>

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<sup>421</sup> *Plessy v. Ferguson*, 163 U.S. 537, 541 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>422</sup> *Id.* at 540–42.

<sup>423</sup> 163 U.S. 537.

<sup>424</sup> *Id.* at 540.

<sup>425</sup> *Id.* at 542.

<sup>426</sup> *Id.* at 543–44.

<sup>427</sup> *Id.* at 544.

<sup>428</sup> *See id.*

<sup>429</sup> *Id.*

Regarding states' powers, Justice Brown opined:

Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.<sup>430</sup>

Following those views and words, set forth in a Supreme Court of the United States decision, the idea that "separate" public accommodations, schools, and facilities for blacks and whites were "equal" empowered segregationists; overt discrimination increased with even more state segregation Jim Crow laws enacted, as white southerners obstinately refused to afford blacks the right to attend public schools, share facilities, and have equal public accommodations with whites.

Like the 1883 *Civil Rights Cases* Court decision, Justice John Marshall Harlan was the only dissenting Justice. His compelling opinion is worthy of note. Some of his dissenting words were:

Our [C]onstitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a [S]tate to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

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<sup>430</sup> *Id.*

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case.

.....

... We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens,—our equals before the law. The thin disguise of ‘equal’ accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.

.....

... Slavery, as an institution tolerated by law, would, it is true, have disappeared from our country; but there would remain a power in the states, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom, to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community, called the ‘People of the United States’ . . . .<sup>431</sup>

## 7. *Plessy’s* Impact on Society

The Court later denounced the *Plessy* “separate but equal” doctrine in the landmark 1954 *Brown v. Board of Education* decision.<sup>432</sup> But it was fifty-eight years before the *Brown* decision came down from the Court; during those years, the dichotomy “separate but equal” flourished and some of the glaring additional Jim Crow laws enacted after *Plessy* included a 1905 Georgia law requiring separate parks, a separate neighborhoods law in Baltimore, Maryland, and a South Carolina law mandating separate entrances, working facilities, pay windows, water glasses, and more in factories.<sup>433</sup> In addition to the massive outbreak of Jim Crow laws, blacks lost some of the limited rights gained during Reconstruction. Certainly, fifty years after the abolition of slavery, some of the most egregious practices and laws of the South were rising up again, as democratic white supremacists gained extensive control of local

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<sup>431</sup> *Id.* at 559, 562–64 (Harlan, J., dissenting).

<sup>432</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954); see *infra* text accompanying notes 469–73.

<sup>433</sup> CEMENT, *supra* note 232, at 119.

and state government.<sup>434</sup> Only a few black men held political office, and Black Codes were again dominant in many States, requiring literacy tests, poll taxes, and other election laws designed to disenfranchise African Americans.<sup>435</sup> The South started to closely resemble the pre-Reconstruction Era with even fewer black men eligible to vote and only a small number serving in political positions.<sup>436</sup>

Lynching continued in massive numbers into the twentieth century, leaving blacks terrified in their own homes; as one historian notes, "violence against blacks remained endemic; in the 1890s more than 1,100 blacks were beaten, hanged, or burned to death, often in festival-like surroundings . . . and the small minority who lived in the North . . . faced the day-to-day economic assault of poverty."<sup>437</sup> And, many African Americans remained illiterate, given the short passage of time since the abolition of slavery and the barriers to education that were still prevalent at the turn of the twentieth century.<sup>438</sup>

As black individuals began to migrate from the South seeking new opportunities in the early twentieth century, within a short period of time they were mostly greeted with "prejudice, hostility, and even violence," given the fear of competition for jobs and housing—various unions obstinately refused to allow blacks membership, as "racial differences [were used] to divide the labor force," and throughout those communities and others, white northerners rioted, expressing their disapproval of the populous presence of blacks in the North during the period now known as the Great Migration.<sup>439</sup> By 1932, during the Great Depression years, blacks and whites were both suffering economic hardships, but the impact was more significant for blacks, as they were generally the first to lose their jobs: "[A]t the depth of the depression, approximately one half the black work force in most of the major industrial cities of the Northeast and Midwest were without jobs."<sup>440</sup> Riots continued throughout the country, and

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<sup>434</sup> *Id.* at 117.

<sup>435</sup> *Id.* at 117, 120.

<sup>436</sup> *Id.* at 117.

<sup>437</sup> *Id.* at 121.

<sup>438</sup> *Id.* at 122.

<sup>439</sup> *See generally id.* at 129–31.

<sup>440</sup> *Id.* at 138.

advocates organized to address the issues; the most notable was the National Association for the Advancement of Colored People (“NAACP”).<sup>441</sup>

#### 8. *Guinn v. United States*

The NAACP filed its first major United States Supreme Court case brief in 1915 in the case of *Guinn v. United States*.<sup>442</sup> The State of Oklahoma, after being admitted to the Union, adopted a suffrage amendment to change the voting requirements under its Constitution.<sup>443</sup> Oklahoma required citizens to take literacy tests in order to register to vote.<sup>444</sup> This amendment, however, grandfathered in, exempting from the literacy test requirement, those who, on or before January 1, 1866, were entitled to vote, those who had been foreign residents, and those who were “a lineal descendent of such person.”<sup>445</sup> Essentially, those who were eligible to vote prior to the existence of the Fifteenth Amendment<sup>446</sup>—primarily only white men—were grandfathered in and exempted from the literacy test.<sup>447</sup>

The Supreme Court emphasized that the date set by the amendment was “based purely upon a period of time before the enactment of the 15th Amendment” which, in effect, would prevent most African Americans from being able to vote.<sup>448</sup> That is, in the early part of the twentieth century, many black citizens in Oklahoma and other southern states were illiterate since they had been denied access to books, were prohibited from learning to read until 1865, and had limited educational opportunities in the

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<sup>441</sup> *NAACP: 100 Years of History*, NAACP, <http://www.naacp.org/pages/naacp-history> (last visited Sept. 20, 2015). The organization, formed in 1909, was also founded in Springfield, Illinois, recognizing President Abraham Lincoln’s burial site. *Id.*

<sup>442</sup> 238 U.S. 347 (1915).

<sup>443</sup> *Id.* at 355.

<sup>444</sup> *Id.* at 356.

<sup>445</sup> *Id.*

<sup>446</sup> The Fifteenth Amendment, ratified in 1870, prohibited the United States and state governments from denying any citizens of the United States the right to vote “on account of race, color, or previous condition of servitude.” See U.S. CONST. amend. XV.

<sup>447</sup> *Guinn*, 238 U.S. at 364–65.

<sup>448</sup> *Id.*

latter part of the nineteenth century.<sup>449</sup> Consequently, most would not have been able to pass a literacy test or receive an exemption from the test.<sup>450</sup>

The United States Supreme Court concluded that the establishment of a literacy test for exercising suffrage was an "exercise by the state of a lawful power vested in it, not subject to [federal courts'] supervision."<sup>451</sup> However, the Court found that the Grandfather Clause exemption was void because "[The Fifteenth Amendment] restricts the power of the United States or the states to abridge or deny the right of a citizen of the United States to vote on account of race, color or previous condition of servitude."<sup>452</sup>

While the Court confirmed the constitutional right of African Americans to vote, pursuant to the Fifteenth Amendment, it did not "take away from the state governments . . . the power over suffrage which has belonged to those governments from the beginning."<sup>453</sup> As such, Oklahoma and several other states subsequently orchestrated additional voting measures to prohibit or limit African Americans from voting.

## 9. School Desegregation and NAACP

The NAACP legal team responded to the *Plessy* "separate but equal" ruling by filing a number of civil rights cases concerning Jim Crow public accommodations, voting rights, and employment discrimination.<sup>454</sup> However, the most notable decisions that set the stage for getting *Plessy* overruled were the school desegregation decisions,<sup>455</sup> which laid a strategic foundation for the landmark 1954 *Brown v. Board of Education*<sup>456</sup> decision that struck down the *Plessy* "separate but equal" doctrine. The NAACP legal team was led by Harvard Law School

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<sup>449</sup> CIMENT, *supra* note 232, at 121.

<sup>450</sup> *Id.* at 122.

<sup>451</sup> *Guinn*, 238 U.S. at 366.

<sup>452</sup> *Id.* at 362.

<sup>453</sup> *Id.* at 362.

<sup>454</sup> This Article's Part II and Part III examine pertinent employment law legal and policy concerns following the enactment of Title VII.

<sup>455</sup> See FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 502-08.

<sup>456</sup> 347 U.S. 483 (1954); see discussion *infra* Part I.C.13.

graduate, Charles Hamilton Houston, Thurgood Marshall—who later became the first black United States Supreme Court Justice—and attorney Robert Carter.<sup>457</sup>

#### 10. *Missouri ex rel. Gaines v. Canada*

Although he possessed the necessary qualifications to be admitted to the School of Law of the University of Missouri, Lloyd Gaines was denied admission to the all-white law school based solely on his race.<sup>458</sup> A Missouri statute allowed the State to arrange for attendance and to pay tuition for black residents of Missouri to attend a university in an adjacent state in order to receive the education Missouri refused to provide to the black residents.<sup>459</sup> Writing for the Court, Chief Justice Hughes explained that “[t]he admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State.”<sup>460</sup> Rejecting Missouri’s statute that required a student to attend school in an adjacent state, the Court held that where a state provides education for those who are white, the same must be provided for all, and such must be provided within that state.<sup>461</sup> It did not, however, require states to integrate their schools, but it did find that Gaines was “entitled to be admitted to the law school of the State University in the absence of other and proper provision for his . . . training within the State.”<sup>462</sup> While this case did not overrule *Plessy*, it did reflect the Court’s marginal movement toward abolishing the “separate but equal” doctrine.

#### 11. *Sweatt v. Painter*

The University of Texas Law School denied admission to Sweatt solely on the basis of his race, and “[a]t that time, there was no law school in Texas” that would offer admission to African Americans.<sup>463</sup> Although the Court did not overrule *Plessy v.*

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<sup>457</sup> See FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 502–08.

<sup>458</sup> *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 343 (1938).

<sup>459</sup> *Id.* at 342–43.

<sup>460</sup> *Id.* at 349.

<sup>461</sup> *Id.* at 351.

<sup>462</sup> *Id.* at 352.

<sup>463</sup> *Sweatt v. Painter*, 339 U.S. 629, 631 (1950).

*Ferguson*, it held that “the Equal Protection Clause of the Fourteenth Amendment require[d] that [Sweatt] be admitted to the University of Texas Law School.”<sup>464</sup>

### 12. *McLaurin v. Oklahoma State Regents for Higher Education*

At the behest of the District Court for the Western District of Oklahoma, McLaurin was admitted to the University of Oklahoma Graduate School to pursue a doctorate in Education,<sup>465</sup> however, the university still segregated McLaurin from the other, white, students.<sup>466</sup> Such means of segregation included requiring McLaurin to “sit apart at a designated desk in an anteroom adjoining the classroom;” requiring him to sit at a specific desk on the library’s mezzanine floor, but not allowing him to sit in the regular reading room of the library; and requiring him to eat at a separate time and at a designated table in the cafeteria, apart from the other students.<sup>467</sup> The Court held that “the Fourteenth Amendment precludes differences in treatment by the state based upon race” and required the state to treat McLaurin in the same way as it treats “students of other races.”<sup>468</sup> The Court’s rulings in *McLaurin*, *Gaines*, and *Sweatt* reflect movement during the period—each case broadened the window of equality, setting the stage for *Brown v. Board of Education* in 1954.

### 13. *Brown v. Board of Education (Brown I)*

In 1954, the U.S. Supreme Court handed down a landmark decision, *Brown v. Board of Education (Brown I)*.<sup>469</sup> Chief Justice Earl Warren rendered the Court’s majority opinion. In *Brown I*, school-aged children from Kansas, South Carolina, Virginia, and Delaware—assisted by NAACP lawyers, one of whom was Thurgood Marshall—brought suit to enjoin enforcement of statutes and provisions of their respective states that either permitted or required that black and white students attend separate schools.<sup>470</sup> The African-American children sought

<sup>464</sup> *Sweatt*, 339 U.S. at 636.

<sup>465</sup> *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 638–39 (1950).

<sup>466</sup> *Id.* at 639.

<sup>467</sup> *Id.* at 640.

<sup>468</sup> *Id.* at 642.

<sup>469</sup> 347 U.S. 483 (1954) (*Brown I*).

<sup>470</sup> *Id.* at 486 & n.1, 487

“admission to the public schools of their community on a nonsegregated basis,” believing that separate schools deprived them of “equal protection of the laws under the Fourteenth Amendment;” however, school officials denied each request.<sup>471</sup> The Court denounced the separate but equal practice sanctioned by *Plessy v. Ferguson*,<sup>472</sup> and held that “[s]eparate educational facilities are inherently unequal” and that students are “deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”<sup>473</sup>

#### 14. *Brown v. Board of Education (Brown II)*

In *Brown II*, the Supreme Court considered “the manner in which relief [was] to be accorded.”<sup>474</sup> The Court recognized that different localities, and therefore different concerns, were presented by these cases.<sup>475</sup> In light of these differences, the Supreme Court sent each of the cases, except the Delaware court’s decision<sup>476</sup> back to the district court from which each came in order for the lower courts to supervise integration and determine “whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.”<sup>477</sup> The Supreme Court was requiring that students be “admit[ted] to public schools on a . . . nondiscriminatory basis with all deliberate speed.”<sup>478</sup>

The *Brown II* decision sparked a national discourse on segregation and equal civil rights. But, southerners furiously refused to carry out the Court’s order to admit black students to white schools “with all deliberate speed.”<sup>479</sup> In fact, it took more than a decade for the majority of southern schools to integrate and open their doors to African-American students due to blockages and barriers initiated by crowds of segregationists that

<sup>471</sup> *Id.* at 487–88.

<sup>472</sup> 163 U.S. 537 (1896).

<sup>473</sup> *Brown I*, 347 U.S. at 494–95.

<sup>474</sup> *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 298 (1955).

<sup>475</sup> *Id.*

<sup>476</sup> *Id.* at 301. The Delaware court had ordered the immediate admission of the plaintiffs to schools previously attended only by white children; as such, the U.S. Supreme Court affirmed the Delaware court’s decision but remanded the case with directions.

<sup>477</sup> *Id.* at 299.

<sup>478</sup> *Id.* at 301.

<sup>479</sup> *Id.* Although the *Brown II* decision only addressed elementary schools, the ruling applied to high schools and colleges as well.

included prominent government officials, such as Alabama Governor George Wallace and Arkansas Governor Orval Faubus.<sup>480</sup> Many viewed the intolerant southern state governors, including the Alabama, Arkansas, Virginia, Louisiana, and Mississippi governors, as the leaders of the state-to-state masses of bitter segregationists since they symbolized many southern citizens' enormous resistance to desegregation.<sup>481</sup>

Specifically, in 1963, Mississippi Governor Ross Barnett blocked black student registration at the University of Mississippi, leading to mob violence and federal intervention with two people getting killed.<sup>482</sup> Moreover, Governor George Wallace's words confirm his presumed leadership role in the resistance to desegregation. Standing in front of the University of Alabama's Foster Auditorium schoolhouse in 1963, Wallace deliberately blocked the doorway entry so that black students could not enter the school. He stated: "I stand before you today in place of thousands of other Alabamians whose presence would have confronted you had I been derelict and neglected to fulfill the responsibilities of my office."<sup>483</sup> Wallace continued, averring that he was standing for the people of Alabama—unquestionably he meant any white people who shared his views, as he evoked a states' rights argument against what he insisted were the "illegal and unwarranted actions of the Central Government . . . contrary to the laws, customs and traditions of this State [that were] calculated to disturb the peace."<sup>484</sup>

On June 11, 1963, Wallace belligerently intended to carry out his initial inaugural promise, "segregation now, segregation tomorrow, segregation forever,"<sup>485</sup> while a few years earlier, in 1957, Wallace's fellow public official, Arkansas Governor Orval

<sup>480</sup> See Robert Andrew Dunn, *Stand in the School House Door*, ENCYC. ALA. (Nov. 25, 2008), <http://www.encyclopediaofalabama.org/article/h-1872> (last updated May 18, 2015); see also *Integration of Central High School*, HISTORY.COM, <http://www.history.com/topics/black-history/central-high-school-integration> (last visited Oct. 2, 2015).

<sup>481</sup> See *Eyes on the Prize: America's Civil Rights Movement 1954-1985*, PBS (Aug. 23, 2006), [http://www.pbs.org/wgbh/amex/eyesontheprize/story/03\\_schools.html](http://www.pbs.org/wgbh/amex/eyesontheprize/story/03_schools.html) [hereinafter *Eyes on the Prize*].

<sup>482</sup> *Id.*

<sup>483</sup> George Wallace, Statement and Proclamation at the University of Alabama (June 11, 1963), available at <http://digital.archives.alabama.gov/cdm/ref/collection/voices/id/2050>.

<sup>484</sup> *Id.*

<sup>485</sup> See Dunn, *supra* note 480 (internal quotation marks omitted).

Faubus, “called in the state National Guard to bar the black students’ entry into the [Arkansas] school,” causing President Eisenhower to dispatch federal troops down to Arkansas to escort the high school students into the school.<sup>486</sup> Noticeably, the governors’ stated reasons for their conduct echoed the states’ powers or states’ rights arguments used by slaveholders and segregationists from the time of the nation’s founding to the Missouri Compromise and western expansion period.<sup>487</sup> Moreover, southern governors who led their states to secede from the Union before the Civil War also used the same arguments in 1861.<sup>488</sup> And later, states’ rights was the chief argument of Reconstruction-era officials and politicians who imposed black Codes, and it was the argument used by the innumerable officials who implemented Jim Crow laws.<sup>489</sup>

Additionally, as the above case summaries confirm, several of the United States Supreme Court’s judicial decisions rendered narrow interpretations of the Reconstruction Amendments; in several instances, the Court cited states’ rights to limit equal protection for African Americans under the law.<sup>490</sup> Hence, Governor Wallace’s, Governor Faubus’s, and other governors’ states’ rights arguments during the Civil Rights Movement were not novel; rather, states’ rights arguments had been evoked since the nation’s founding, and when recognized in regard to civil rights, it generally led to African Americans’ oppression and clear unequal treatment.

Wallace’s and the other governors’ conduct—appalling to many—sparked several conversations and, ostensibly, songwriter Bob Dylan alluded that public officials should not “stand in the doorway” in the lyrics of his popular 1964 song, *The Times They Are A-Changin’*.<sup>491</sup> The song lyrics beseeched public officials—elected to serve all of the people—to gracefully accept the inevitable changes taking place in America:

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<sup>486</sup> See *Integration of Central High School*, *supra* note 480.

<sup>487</sup> See *supra* Part I.A (addressing the history of slavery).

<sup>488</sup> See *supra* Part I.A (same).

<sup>489</sup> See *supra* Part I.C.1–5 (discussing the Reconstruction Era and the Jim Crow laws).

<sup>490</sup> See *supra* Part I.C (summarizing Supreme Court of the United States cases).

<sup>491</sup> BOB DYLAN, *The Times They Are A-Changin’*, on *THE TIMES THEY ARE A-CHANGIN’* (Columbia Records 1964).

Please heed the call  
 Don't stand in the doorway  
 Don't block up the hall

....

There's a battle outside . . . ragin'  
 It'll soon shake your windows and rattle your walls  
 For the times they are a-changin'<sup>492</sup>

Indeed, the times were rapidly changing. It seems that Wallace ultimately accepted the changing times, as he informed the public before he died that "he had been wrong about 'race' all along."<sup>493</sup>

### D. *The American Civil Rights Movement*

The events examined in the final section of this Article's historical chronicle are often viewed as the full scope of activities that led to the African Americans' achievement of civil rights. However, the groundwork for change began several years earlier with the Reconstruction Amendments, work of abolitionists, the strategic NAACP case strategy, and more. The quest for African Americans' civil rights continued into the mid-twentieth century, gaining momentum in the 1950s.<sup>494</sup>

#### 1. Rosa Parks, Montgomery Bus Boycott, Dr. Martin Luther King, Jr.

In 1955, after Rosa Parks, known as a person of impeccable character and "one of the most respected people in the Negro community," refused to relinquish her city bus seat to a white man, she was arrested for violating the city segregation ordinance in Montgomery, Alabama.<sup>495</sup> Montgomery church

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<sup>492</sup> *Id.*

<sup>493</sup> Richard Pearson, *Former Ala. Gov. George C. Wallace Dies*, WASH. POST, Sept. 14, 1998, at A1, available at <http://www.washingtonpost.com/wp-srv/politics/daily/sept98/wallace.htm>.

<sup>494</sup> As noted in the Introduction, this Article addresses the nation's Founders—drafters of the United States Declaration of Independence and Constitution—elected officials, Supreme Court of the United States Justices, and various activists from the Civil Rights Movement, as their influence was central to the African Americans' pursuit of civil rights. As referenced earlier, the Abolitionist Movement is not covered in this Article. However, it is important to note that several notable abolitionists tirelessly labored for the abolition of slavery and equal rights for African Americans.

<sup>495</sup> MARTIN LUTHER KING, JR., *THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR.* 51, 55 (Clayborne Carson ed., Warner Books 1998).

leaders and activists, including the man who would soon become the leader of the Civil Rights Movement—Dr. Martin Luther King, Jr.—gathered and developed a strategy to address Parks’s arrest; they decided to encourage black Montgomery citizens to boycott city buses.<sup>496</sup>

Certainly, Parks’s refusal to give up her seat is often credited as the event that sparked the 1950s to 1960s Civil Rights Movement; yet, her action also brought Dr. Martin Luther King, Jr. to America’s attention. King provided a sound explanation of why the day Mrs. Parks refused to give up her bus seat was any different from the thousands of other days when she and other black citizens in Montgomery and other southern cities compliantly stood or sat in the backs of buses, while white citizens occupied the front passenger seats. King reasoned: “One can never understand the action of Mrs. Parks until one realizes that eventually the cup of endurance runs over, and the human personality cries out, ‘I can’t take it no longer.’”<sup>497</sup> King understood that “Mrs. Parks’s refusal to move back was her intrepid and courageous affirmation to the world that she had had enough.”<sup>498</sup> Indeed, King’s Christian upbringing, seminary training, and Christian worldview guided him to recognize that the movement must be a Christian and ethical one; he shared his reasoning concerning ethics and justice in his autobiography, writing: “We would use this method [of boycotting] to give birth to justice and freedom, and also to urge men to comply with the law of the land. Our concern would not be to put the bus company out of business, but to put justice in business.”<sup>499</sup>

On December 5, 1955, the first day of the bus boycott, the Montgomery, Alabama bus company buses were practically empty throughout the day; the black workers walked to their

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<sup>496</sup> *Id.* at 51. In 1956, in a separate case, after an Alabama district court found that the segregated city busing system in Montgomery, Alabama violated the United States Constitution, the United States Supreme Court affirmed the ruling; and on December 21, 1956, for the first time, the black people of Alabama and in other parts of the United States rode the buses and were allowed to sit in any chosen available bus seat. *See Eyes on the Prize*, *supra* note 481. Per the usual conduct during that time, following any small victory for African Americans, violence erupted, and prominent civil rights activist Reverend “Ralph Abernathy’s home and church were bombed.” *Id.*

<sup>497</sup> KING, *supra* note 495, at 50.

<sup>498</sup> *Id.* at 50–51.

<sup>499</sup> *Id.* at 53.

jobs—mostly service and labor positions.<sup>500</sup> The group of leaders that started the movement met later that day and formally established an organization called the Montgomery Improvement Association; they unanimously elected King as president and formalized additional protest strategies.<sup>501</sup> Before King stepped to the podium later that evening for the first combined meeting of protestors and leaders, he contemplated how to energize the group and get them to protest for their just rights, while concurrently keeping them centered on “the Christian doctrine of love.”<sup>502</sup> The former objective, he hoped, would not arouse bitterness and resentment, that “could easily rise to flood proportions,” which he understood many of the people likely felt after decades of oppression and inequality.<sup>503</sup> King guided the movement protestors with these words:

[W]e are here this evening because we are tired now. And I want to say that we are not here advocating violence. We have never done that. I want it to be known throughout Montgomery and throughout this nation that we are Christian people. We believe in the Christian religion. We believe in the teachings of Jesus. The only weapon that we have in our hands this evening is the weapon of protest. That's all.<sup>504</sup>

King closed with poise, confirming one of the principle points of the movement:

[W]hen the history books are written in the future, somebody will have to say, “There lived a race of people, a black people, ‘fleecy locks and black complexion,’ a people who had the moral courage to stand up for their rights. And thereby they injected a new meaning into the veins of history and of civilization.”<sup>505</sup>

The words that Martin Luther King spoke that evening met his purposed objective—they courageously energized the group of protestors and shaped the movement with a “Christian doctrine of love” and nonviolent resistance.<sup>506</sup>

<sup>500</sup> *Id.* at 55.

<sup>501</sup> *Id.* at 56.

<sup>502</sup> *Id.* at 59.

<sup>503</sup> *Id.*

<sup>504</sup> MARTIN LUTHER KING, JR., Address to the First Montgomery Improvement Association (MIA) Mass Meeting (Dec. 5, 1955), in *A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR.* 9 (Clayborne Carson & Kris Shepard eds., 2001).

<sup>505</sup> KING, *supra* note 495, at 61.

<sup>506</sup> *Id.* at 59–61.

It is worth observing that while Dr. King is the person that most people think of when considering the American Civil Rights Movement, he was not a one-man operation. Rather, other civil rights workers, church leaders, and providential grace surrounded him; indeed, the 1950s to 1960s Civil Rights Movement was an interracial operation, grounded in Christian principles, combining the efforts of African Americans and many white Americans, numerous from the churches and synagogues.<sup>507</sup>

King wrote about the providential grace that surrounded him: “I come to you with only the claim of being a servant of Christ, and a feeling of dependence on his grace for my leadership.”<sup>508</sup> Regarding many of the extraordinary men and women, both black and white, who sacrificed and labored together in unity to help achieve the liberties that African Americans gained, and to move the nation beyond the dark paradox of slavery and segregation, which existed for centuries, King penned these words:

While the nature of this account causes me to make frequent use of the pronoun “I,” in every important part of the story it should be “we.” This is not a drama with only one actor. More precisely it is the chronicle of fifty thousand Negroes who took to heart the principles of nonviolence, who learned to fight for their rights with the weapon of love, and who, in the process, acquired a new estimate of their own human worth.<sup>509</sup>

## 2. Movement Organizations

Following the first initial Montgomery meeting, Dr. King and the other civil rights leaders began to address the growing violent pushback from white segregationists who were bound and determined to resist the looming changes. The civil rights leaders moved beyond the issues of Montgomery and formed a national organization in January 1957—the Southern Christian Leadership Conference (“SCLC”).<sup>510</sup> The cofounders of the SCLC were Ralph Abernathy, Joseph Lowery, and Fred Shuttlesworth; many other civil rights workers joined the organization.<sup>511</sup> They

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<sup>507</sup> *Id.* at 48.

<sup>508</sup> *Id.* at 46.

<sup>509</sup> *Id.* at 50.

<sup>510</sup> CIMENT, *supra* note 232, at 158.

<sup>511</sup> *Id.*

organized to promote the movement's nonviolent protests for a change of the Jim Crow laws and treatment of African Americans.

Other protests and organizations formed as the movement moved throughout the United States. In Raleigh, North Carolina, the Student Non-Violent Coordinating Committee ("SNCC") formed in 1960 in addition to the Greensboro, North Carolina college students' sit-ins at the segregated Greensboro Woolworth's lunch counter—the activity inspired college students in several other states.<sup>512</sup> Around 300 students eventually participated in subsequent Greensboro Woolworth's sit-ins, hampering the operations of several local restaurants in the southern states.<sup>513</sup> The activity continued to spread throughout the country to reportedly "55 cities in 13 states."<sup>514</sup> Later, in 1961, blacks and whites presented a public display of unity by riding together as "freedom riders" on buses and then walking together into southern public restrooms, restaurants, and other public facilities.<sup>515</sup> Notably, Georgia Congressman John Lewis was a freedom rider and was considered one of the movement's leaders.<sup>516</sup> He was beaten, but undeterred, while participating in one of the freedom riders' events.<sup>517</sup>

### 3. 1963, Letter From a Birmingham Jail, and Birmingham Children's Campaign

In 1963, it had been nearly a decade since the pernicious "separate but equal" doctrine was overruled by the *Brown* Court and eight years since the courageous woman, Rosa Parks, decided that enough was enough and refused to give up her seat to a white man on a Montgomery city bus. Certainly, the innumerable marches, sit-ins, freedom rides, economic boycotts, school desegregation attempts, voter drives, and so on, had achieved much, including black citizens riding in seats, a few

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<sup>512</sup> *The Greensboro Sit-In*, HISTORY.COM, <http://www.history.com/topics/black-history/the-greensboro-sit-in> (last visited May 23, 2015).

<sup>513</sup> *Id.*

<sup>514</sup> *Id.*

<sup>515</sup> *Id.*

<sup>516</sup> *John Lewis*, BIOGRAPHY.COM., <http://www.biography.com/people/john-lewis-21305903> (last visited May 23, 2015).

<sup>517</sup> *Id.*; see also CIMENT, *supra* note 232, at 162.

integrated schools, and more restaurant lunch counters serving all citizens.<sup>518</sup> Despite the progress, Jim Crow laws were still dividing southern states.

King and other movement leaders—still abiding by the movement’s founding nonviolent resistance principles—decided that it was time to increase the number of protests, particularly because President John F. Kennedy had not followed through on his 1960 campaign promise to propose civil rights legislation that would bring about equal rights for African Americans.<sup>519</sup> And violent attacks from police and mobs—inspired by nothing more than racial prejudice, as the movement’s protests were designed to be nonviolent and peaceful—were escalating.<sup>520</sup> Fortunately, the movement started to receive more national media coverage; King and movement leadership seized the moment.<sup>521</sup> They initiated and participated in more protests and marches in the city that SCLC cofounder Fred Shuttlesworth considered “the most segregated city in the United States,” Birmingham, Alabama<sup>522</sup>—a noteworthy distinction, given the extensive segregation that existed throughout all southern states in 1963 under the Jim Crow laws and practices. Shuttlesworth told his movement colleagues that they could be assured that Birmingham Commissioner of Public Safety Director Eugene Bull Connor could be counted on to react [to the protests] in his usual heavy-handed fashion.”<sup>523</sup> King and the leaders were also hoping that the media coverage of Connor and his crew of segregationists would prompt President Kennedy to move forward with his long overdue campaign promise of civil rights legislation for black citizens.<sup>524</sup>

In April 1963, as SCLC leaders and other community members were in Birmingham preparing to peacefully protest the Jim Crow laws, Connor—whose work included oversight responsibility for police, fire departments, and other city agencies—applied for and received an injunction to block the protests, arrest protestors, and apply any additional measure

<sup>518</sup> See *supra* Part I.D.1–2 (examining the first eight years of the Civil Rights Movement).

<sup>519</sup> 4 MILESTONE DOCUMENTS, *supra* note 270, at 1711.

<sup>520</sup> *Id.*; see also FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 543.

<sup>521</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 543

<sup>522</sup> CIMENT, *supra* note 232, at 163 (internal quotation marks omitted).

<sup>523</sup> 4 MILESTONE DOCUMENTS, *supra* note 270, at 1711.

<sup>524</sup> *Id.*

available to “preserve the [Birmingham, Alabama] Jim Crow system [of inequality].”<sup>525</sup> Connor was known as an “outspoken segregationist.”<sup>526</sup> Soon thereafter, King and other SCLC leaders and protestors were arrested on April 10 for violating the provisions of the injunction, which “prohibit[ed] King and other civil rights leaders from participating in or encouraging any civil disobedience.”<sup>527</sup> King had been arrested in previous protests, but on this occasion, for the first time, King was placed in solitary confinement.<sup>528</sup>

Certainly, the excessively harsh placement was implemented to break King’s spirit. Nonetheless, from the unsavory jail cell, King—confined, but undeterred—penned his pivotal *Letter from a Birmingham Jail* on April 16, 1963, responding to disparagements made by resident religious leaders.<sup>529</sup> The Birmingham newspaper had previously printed the religious leaders’ letter, which denounced the movement’s protests as “unwise and untimely,” and they referred to Dr. King and other movement leaders as “outsiders coming in” to stir up the locals.<sup>530</sup>

Notably, in his *Letter from a Birmingham Jail*, King declared, “[W]e have not made a single gain in civil rights without determined legal and nonviolent pressure. History is the long and tragic story of the fact that privileged groups seldom give up their privileges voluntarily.”<sup>531</sup> Further, King honored the movement protestors, writing:

I wish you had commended the Negro sit-inners and demonstrators of Birmingham for their sublime courage, their willingness to suffer and their amazing discipline in the midst of the most human provocation. One day the South will recognize its real heroes. They will be the James Merediths, courageously and with a majestic sense of purpose, facing jeering and hostile mobs and the agonizing loneliness that characterizes the life of the pioneer. They will be old oppressed, battered Negro women, symbolized in a seventy-two year old woman of Montgomery, Alabama, who rose up with a sense of

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<sup>525</sup> *Id.*

<sup>526</sup> *Id.*

<sup>527</sup> *Id.*

<sup>528</sup> *Id.* at 1712.

<sup>529</sup> *Id.*

<sup>530</sup> King, *supra* note 47, at 1 (internal quotation marks omitted), *quoted in* 4 MILESTONE DOCUMENTS, *supra* note 270, at 1712, 1715.

<sup>531</sup> *Id.* at 5.

dignity and with her people decided not to ride segregated buses, and respond to one who inquired about her tiredness with ungrammatical profundity; “my feet is tired, but my soul is rested.” . . . One day the South will know that when these disinherited children of God sat down at lunch counters they were in reality standing up for the best in the American dream and the most sacred values in our Judeo-Christian heritage, and thusly, carrying our whole nation back to those great wells of democracy which were dug deep by the founding fathers in the formulation of the Constitution and the Declaration of Independence.<sup>532</sup>

After King’s release from the Birmingham jail, he joined other movement leaders and planned additional Birmingham marches and protests. On May 2, 1963, the leaders’ initiated their plan to have Birmingham school-aged children march in protest to the Jim Crow laws with the adults.<sup>533</sup> During the second day of what is often called the children’s march, Public Safety Director Bull Connor’s response was, by all decent citizens’ accounts, disgraceful. He directed police officers to use “attack dogs, electric cattle prods, and high pressure fire hoses capable of stripping the bark off trees against the protesters” to attack the nearly 1,000 African-American schoolchildren.<sup>534</sup> Notably, some of the children were only six, seven, or eight years of age.<sup>535</sup>

It is worth pausing to carefully consider this point: The city’s Public Safety Director and its police law enforcement officers brutally sprayed violent streams of water<sup>536</sup> on African-American children and adults who were protesting for their God-given civil rights that should never have been oppressed. Many historians and scholars note that the rights of liberty and equality that the children and adults marched for in Birmingham, Alabama, should have been restored to the

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<sup>532</sup> *Id.* at 19–20.

<sup>533</sup> See Kim Gilmore, *The Birmingham Children’s Crusade of 1963*, BIOGRAPHY.COM (Feb 14, 2014), <http://www.biography.com/news/black-history-birmingham-childrens-crusade-1963-video>.

<sup>534</sup> CIMENT, *supra* note 232, at 163.

<sup>535</sup> See Gilmore, *supra* note 533.

<sup>536</sup> *Id.*

protestors' great-great-grandparents 176 years earlier when the Founders signed the United States Constitution, promising to "establish Justice" and "secure the Blessings of Liberty."<sup>537</sup>

After the second children's march in Birmingham, the nation responded!<sup>538</sup> Many of America's citizens, particularly those living in the northern states, were horrified by the images they observed of police officers aiming streams of water on children, pushing their frail bodies down the hard asphalt streets.<sup>539</sup> Photographs portraying the event graphically reveal why even some of the most complacent, or disinterested, northern citizens became concerned about what was happening to innocent children simply marching down a city's streets in America, "the land of the free."<sup>540</sup> Many northerners who had sat back and watched the events of the movement unfold from afar for nearly a decade, now, attentively, placed their eyes on the southern protest marches, anxiously awaiting the President's response to the matter. And, the horror was also broadcast overseas, shocking people outside of the United States.<sup>541</sup>

Given the events of the Birmingham, Alabama children's campaign, Governor Wallace's schoolhouse doorway blocks, which also occurred in Alabama within weeks of the Birmingham children's marches, persistent bombings, mob violence throughout the South, the murder of civil rights worker Medgar Evers, and the realization that much of the nation's attention was now thoughtfully centered on the Civil Rights Movement, President Kennedy understood that his promised equal rights legislation could no longer be delayed.<sup>542</sup> It was now expedient that the concerns of African Americans' equal civil rights be addressed.

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<sup>537</sup> See U.S. CONST. pmbl.

<sup>538</sup> Gilmore, *supra* note 533.

<sup>539</sup> *Id.*

<sup>540</sup> *Id.*

<sup>541</sup> *Id.*

<sup>542</sup> CIMENT, *supra* note 262, at 164.

### E. *Civil Rights Act of 1964*

#### 1. President John F. Kennedy and Attorney General Robert Kennedy

After watching the 1963 violent mob and police attacks inflicted upon Civil Rights Movement protestors, John F. Kennedy, the fresh, new face that had ascended to the presidency in 1961, now faced a gargantuan challenge. Kennedy campaigned on the promise to “get the country ‘moving again.’”<sup>543</sup> Although Kennedy certainly intended to get things “moving” on foreign policy, he was not as interested in advancing civil rights issues.<sup>544</sup> In fact, it began to appear that “[t]he one thing Kennedy did not want was civil rights legislation.”<sup>545</sup> This reflected his political philosophy, which was based primarily on pragmatic considerations.<sup>546</sup> So while President Kennedy had campaigned on the promise of civil rights, he was “relatively uninterested in the problems of the blacks.”<sup>547</sup>

However, the president’s brother and Attorney General, Robert “Bobby” Kennedy, viewed the civil rights issue as a moral one.<sup>548</sup> He encouraged the President to pursue a civil rights bill.<sup>549</sup> President Kennedy wrestled with the issue and after watching the horrific action commenced by Bull Connor, he came to the conclusion that the bill should be put forward, despite the political dangers of doing so.<sup>550</sup> The political situation was indeed perilous, and the prospect of “[o]pen warfare between the races was more than likely.”<sup>551</sup>

After taking the action, President Kennedy joined with the effort that Bobby Kennedy had started.<sup>552</sup> They began to “meet[] with large groups of influential citizens—state governors, hotel and restaurant owners, theater operators, labor officials, educators, lawyers, and religious leaders—asking them to show

<sup>543</sup> CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE* 15 (1985).

<sup>544</sup> *Id.* at 15–16.

<sup>545</sup> *Id.* at 15.

<sup>546</sup> *Id.* at 15–16.

<sup>547</sup> *Id.* at 16.

<sup>548</sup> *Id.*

<sup>549</sup> *See id.* at 17–19.

<sup>550</sup> *Id.* at 16.

<sup>551</sup> *Id.*

<sup>552</sup> *Id.* at 18.

leadership by voluntarily desegregating their communities.”<sup>553</sup> President Kennedy developed a determination to see the Civil Rights Act pass.<sup>554</sup> He told a black leader that while the stance “could cost [him] the election,” they were “not turning back.”<sup>555</sup>

Both of the Kennedy brothers proved to be “fighters.”<sup>556</sup> Whenever President Kennedy would begin to doubt politically the course of action, Bobby Kennedy would reassure him that the tension that was giving rise to the civil rights movement was something that had to be addressed.<sup>557</sup> On June 11, 1963, Kennedy spoke directly to the American citizens about the urgent need for civil rights for African Americans. His message was clear and exacting:

One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free. They are not yet freed from the bonds of injustice. They are not yet freed from social and economic oppression. And this Nation, for all its hopes and all its boasts, will not be fully free until all its citizens are free.

We preach freedom around the world, and we mean it, and we cherish our freedom here at home, but are we to say to the world, and much more importantly, to each other that this is a land of the free except for the Negroes; that we have no second-class citizens except Negroes; that we have no class or cast system, no ghettos, no master race except with respect to Negroes?

Now the time has come for this Nation to fulfill its promise. The events in Birmingham and elsewhere have so increased the cries for equality that no city or State or legislative body can prudently choose to ignore them.

The fires of frustration and discord are burning in every city, North and South, where legal remedies are not at hand. Redress is sought in the streets, in demonstrations, parades, and protests which create tensions and threaten violence and threaten lives.

We face, therefore, a moral crisis as a country and as a people. It cannot be met by repressive police action. It cannot be left to increased demonstrations in the streets. It cannot be quieted by

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<sup>553</sup> *Id.*

<sup>554</sup> *Id.*

<sup>555</sup> *Id.* (internal quotation marks omitted).

<sup>556</sup> *Id.*

<sup>557</sup> *Id.* at 19.

token moves or talk. It is a time to act in the Congress, in your State and local legislative body and, above all, in all of our daily lives.<sup>558</sup>

Kennedy informed the American people that the following week he was going to “ask the Congress of the United States to act, to make a commitment it has not fully made in this century to the proposition that race has no place in American life or law.”<sup>559</sup> One week later, on June 19, 1963, President Kennedy sent a bill to Congress, asking for support of his civil rights bill to address equal rights for all Americans.<sup>560</sup> Of the eleven provisions set forth as titles, Title VII concerned equal employment opportunity—although, most would deem Kennedy’s employment equality provision limited in light of the final version of the bill’s employment title discussed in Part II of this Article.<sup>561</sup> Nevertheless, Kennedy’s seventh title, addressing employment, and the ten other titles were placed before the United States Congress, raising hopes for many Americans that the bill would pass through Congress and soon be signed into law.

## 2. Congressional Civil Rights Bill Debates

On June 20, 1963, “the administration’s comprehensive bill on civil rights, H.R. 7152, was introduced in the House by Representative [Emmanuel] Celler of New York.”<sup>562</sup> The legislation “contained no compulsory FEP [Federal Employment Practice] provisions respecting private employment.”<sup>563</sup> Title VII “merely authorized the President to establish another commission, to be known as the ‘Commission on Equal Employment Opportunity.’”<sup>564</sup> Kennedy’s proposed Title VII provision was significantly revised before the bill was signed into law.<sup>565</sup> Amendments, to Title VII and other titles, resulted from

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<sup>558</sup> President John F. Kennedy, Address on Civil Rights (June 11, 1963), available at <http://millercenter.org/president/speeches/speech-3375>.

<sup>559</sup> *Id.*

<sup>560</sup> Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 432–33 (1966).

<sup>561</sup> See WHALEN & WHALEN, *supra* note 543, at 14.

<sup>562</sup> Vaas, *supra* note 560, at 434; see WHALEN & WHALEN, *supra* note 543, at 4.

<sup>563</sup> Vaas, *supra* note 560, at 434.

<sup>564</sup> *Id.*

<sup>565</sup> See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. Public Law 88-352 is the original version of the Civil Rights Act of 1964, as signed on July 2, 1964,

numerous new proposed changes promoted by representatives, such as House Judicial Committee Congressman Emmanuel Celler—a Democrat from Brooklyn, New York and a strong proponent of the civil rights bill.<sup>566</sup> Celler had previously proposed civil rights legislation during earlier sessions of Congress, but his efforts were unsuccessful.<sup>567</sup> This time, as H.R. 7152 moved through the House, his efforts were invaluable. Celler worked closely on the bill's changes that would evolve over the ensuing weeks, holding effective discussions with essential Congressmen, including Republican Congressman William "Bill" McCulloch, the senior Republican on the House Judiciary Committee from Ohio.<sup>568</sup>

### 3. Civil Rights Leaders Lobbying and the Washington March for "Jobs and Freedom"

Outside pressure for stronger legislation was essential, as African Americans had waited approximately 344 years for their basic God-given civil rights; as such, the leaders of the movement were well prepared to assertively push Congress and other influential leaders for strong legislation.<sup>569</sup> Although President Kennedy's proposed employment legislation was a notable first step, it was not acceptable to the movement leaders who came to Washington, District of Columbia during the protracted legislative debates, renting hotel suites to jointly hold meetings with civil rights groups.<sup>570</sup> Represented at the meetings were "representatives from the NAACP, the National Urban League, the Congress of Racial Equality (CORE), the Southern Christian Leadership Conference (SCLC), and the Student Nonviolent Coordinating Committee (SNCC)," and many other civil rights groups affiliated with the Leadership Conference on Civil Rights.<sup>571</sup> Notable leaders included Clarence Mitchell and Roy Wilkins from the NAACP, Walter Reuther, United Automobile Workers labor union leader, and Whitney Young, executive

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before additional amendments were added in subsequent years after the law was enacted. *Id.*

<sup>566</sup> See WHALEN & WHALEN, *supra* note 543, at 4, 33–38.

<sup>567</sup> *Id.* at 4.

<sup>568</sup> *Id.* at 9–10.

<sup>569</sup> *Id.* at 14.

<sup>570</sup> *Id.*

<sup>571</sup> *Id.*

director of the Urban League.<sup>572</sup> Mitchell's role as the primary NAACP lobbyist from 1950 to 1978 was essential, such that he "became known as the '101st Senator,' a reflection of both his success and his constant presence in the Senate."<sup>573</sup> A. Philip Randolph was another prominent labor and civil rights leader.<sup>574</sup> He helped to organize the 1963 March on Washington, also known as the March for "Jobs and Freedom."<sup>575</sup> President Johnson would later award him the Presidential Medal of Freedom.<sup>576</sup>

President Kennedy was concerned that the civil rights leaders' push for stronger equal employment legislation would defeat the bill in the House; Kennedy stated, "I don't want the whole thing lost in the House."<sup>577</sup> But the civil rights workers saw the benefits of full equality in employment. To hopefully get Congress' attention and strengthen the proposed legislation, a march in Washington, District of Columbia was planned. In the fall of 1963, about 200,000 American citizens came from all across the United States to attend the "March on Washington for Jobs and Freedom."<sup>578</sup> In attendance was a diverse crowd of protesters, "white ministers, priests, nuns, and rabbis," in addition to the thousands of African Americans protesting for civil rights.<sup>579</sup>

Throughout this Article, the Declaration of Independence's proclamation of "unalienable rights of life, liberty, and the pursuit of happiness" and the United States Constitution's promised "Blessings of Liberty" and "Justice" have been examined. Indeed, African Americans endured the laws and degradation of slavery, the subsequent *Dred Scott* Supreme Court ruling denying citizenship to all African Americans, and even more barriers following the nullification of the nefarious court ruling, including the Black Codes, lynchings, and mob

<sup>572</sup> See *id.* at 22, 26.

<sup>573</sup> Kit Oldham, *Mitchell, Clarence M., Jr. (1911–1984)*, BLACKPAST.ORG, <http://www.blackpast.org/aah/mitchell-clarence-m-jr-1911-1984#sthash.50pvjHrB.dpuf> (last visited May 24, 2015).

<sup>574</sup> A. Philip Randolph, BIOGRAPHY.COM, <http://www.biography.com/people/a-philip-randolph-9451623#fighting-for-civil-rights> (last visited May 24, 2015).

<sup>575</sup> *Id.*

<sup>576</sup> *Id.*

<sup>577</sup> WHALEN & WHALEN, *supra* note 543, at 27.

<sup>578</sup> *March on Washington*, HISTORY.COM, <http://www.history.com/topics/black-history/march-on-washington> (last visited May 26, 2015).

<sup>579</sup> WHALEN & WHALEN, *supra* note 543, at 25.

violence. Then, there were decades of failed civil rights bills and Jim Crow laws' separate accommodations, workplaces, and facilities—all essentially sanctioned by the United States Supreme Court *Plessy* decision. And, even though the *Brown* decision finally struck down *Plessy's* separate but equal doctrine, the ruling still did not remove the hundreds of racial segregation statutes that infused throughout the southern states. Consequently, on August 28, 1963, in the nation's capital city, following admired gospel singer Mahalia Jackson's song "I Been 'Buked and I Been Scorned,"<sup>580</sup> Dr. Martin Luther King, Jr., stood before the massive crowd of American citizens to speak about the Constitution, the American paradox of slavery, segregation, and the Jim Crow laws that continued to hamper America's progress and character. King informed the crowd:

In a sense we've come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.

It is obvious today that America has defaulted on this promissory note in so far as her citizens of color are concerned. . . . [S]o we've come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice.

....

... I still have a dream. It is a dream deeply rooted in the American dream. I have a dream that one day this nation will rise up and live out the true meaning of its creed, "We hold these truths to be self-evident, that all men are created equal."

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... And if America is to be a great nation, this must become true.

So let freedom ring . . . .<sup>581</sup>

The questions posed in King's momentous oration are examined in Parts II and III of this Article: Title VII's Impact on the Workplace and Society. That is, has the landmark legislation

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<sup>580</sup> *Id.*

<sup>581</sup> Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), available at [http://okra.stanford.edu/transcription/document\\_images/InVol8/630828-005.pdf](http://okra.stanford.edu/transcription/document_images/InVol8/630828-005.pdf).

brought equality to the workplace for all Americans? This Section first discusses a few final historical points and events that are worth considering.

#### 4. Final Weeks of the Congressional 1963-1964 Civil Rights Bill Debates and Assassination of President Kennedy

Following the March on Washington for Jobs and Freedom, President Kennedy “admirably” acknowledged King’s speech and invited the civil rights leader to meet with him at the White House.<sup>582</sup> King and the other civil rights leaders once again addressed the need for stronger equal employment opportunities and Title VII legislation that would add more federal employment protections, but Kennedy resisted giving his support to the suggested employment proposals.<sup>583</sup> He maintained that the legislation would not pass through Congress if the proposed employment provision of the bill was modified.<sup>584</sup> Despite Kennedy’s reservations, over the course of the next month, additional amendments were proposed by various Congressmen.<sup>585</sup> The new proposals strengthened the bill, calling for Congress to “establish[] an Equal Employment Opportunity Commission with the power to (1) investigate any U.S. firm with 25 or more employees on charges of discrimination based on race, color, religion, or national origin and (2), after a hearing, order such practices stopped.”<sup>586</sup> The proposal was much broader than Kennedy’s proposed bill, which had no real enforcement provision.<sup>587</sup>

Despite Kennedy’s reservations surrounding Title VII and his initial reluctance to propose the full civil rights legislation, most of the activists believed that by June 1963, he was committed to seeing the bill become law. Regrettably, President Kennedy did not live to see the law’s final revisions and enactment into law. The President was assassinated on November 22, 1963 at the age of forty-six; his untimely death ostensibly sparked congressional support of the bill.<sup>588</sup>

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<sup>582</sup> See WHALEN & WHALEN, *supra* note 543, at 26.

<sup>583</sup> *Id.* at 27.

<sup>584</sup> *Id.*

<sup>585</sup> *Id.* at 35.

<sup>586</sup> *Id.*

<sup>587</sup> *Id.*

<sup>588</sup> *Id.* at 70, 77.

Following President Kennedy's assassination, Vice President Lyndon Baines Johnson was sworn in as President of the United States, avowing in his first public statement, "I will do my best . . . That is all I can do. I ask for your help—and God's."<sup>589</sup> Assessments of Johnson's record as President are mixed, but most historians agree that after Johnson became President of the United States until the Civil Rights Act of 1964 was enacted into law, he demonstrated his commitment to passing strong civil rights legislation by meeting with many civil rights leaders and congressional representatives to promote and generate support for the landmark legislation.<sup>590</sup> Within a week of Kennedy's assassination President Johnson informed the American people that it was time to pass a civil rights bill:

First, no memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest passage of the civil rights bill for which he fought so long. We have talked long enough in this country about equal rights. We have talked for one hundred years or more. It is time now to write the next chapter, and to write it in the books of law.<sup>591</sup>

Martin Luther King, Jr. and other civil rights leaders continued to advocate for the passage of the bill after Kennedy was assassinated.<sup>592</sup> Dr. King noted that the legislation "became the order of the day at the great March on Washington last summer [August 1963]. The Negro and his white compatriots for self-respect and human dignity will not be denied."<sup>593</sup> Eventually, the civil rights bill passed the House on February 10, 1964, nearly eight months after it was introduced.<sup>594</sup> Congressman Celler thanked his colleague, Congressman Bill McCulloch, maintaining that "the result [bill passing the House] would not have been the way it was were it not for the wholehearted support" of McCulloch.<sup>595</sup>

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<sup>589</sup> *Id.* at 71 (internal quotation marks omitted).

<sup>590</sup> *See id.* at 77.

<sup>591</sup> *Id.* at 79.

<sup>592</sup> *Id.*; see *Civil Rights Act of 1964*, NAT'L PARK SERV., <http://www.nps.gov/subjects/civilrights/1964-civil-rights-act.htm> (last visited May 23, 2015).

<sup>593</sup> *Civil Rights Act of 1964*, *supra* note 592 (internal quotation mark omitted).

<sup>594</sup> WHALEN & WHALEN, *supra* note 543, at 121.

<sup>595</sup> *Id.* at 122.

The Senate would prove to be a more difficult challenge due to the possibility of a filibuster.<sup>596</sup> Stopping a filibuster is particularly difficult, requiring an invocation of cloture, “a vote by two-thirds of the Senate to halt debate, or invoke fatigue and wear the filibusters out.”<sup>597</sup> With concerns over the expansion of federal powers growing, the opponents of the legislation launched a protracted fifty-seven-day filibuster, which is reported to be the longest in American congressional history.<sup>598</sup>

Although several House and Senate representatives opposed the civil rights legislation, none were as vociferous with objections as West Virginia Senator Robert Byrd, who began to filibuster by reading “an 800-page speech explaining why the Senate should not invoke cloture.”<sup>599</sup> Shortly after Johnson became President, Byrd wrote him a letter, stating that the proposed bill “impinges upon the civil and constitutional rights of white people.”<sup>600</sup> Byrd had been a former member of the Ku Klux Klan; on the occasion of the bill’s looming passage, he was determined to do all that he could to keep the civil rights bill stalled or completely stop the bill’s passage.<sup>601</sup> Senator Byrd spent “14 hours and 13 minutes” filibustering by reading his address until “just 9 minutes before the Senate was scheduled to convene for the historic vote on H.R. 7152.”<sup>602</sup> The Senate finally invoked cloture to end the southern representative’s filibuster after “534 hours, 1 minute, and 51 seconds, the longest filibuster in the history of the United States Senate was broken.”<sup>603</sup> More than two-thirds of the Senators voted in support of the cloture.<sup>604</sup>

The bill had been shepherded through the compromise and negotiations process by Senate minority leader Everett Dirksen. Dirksen’s compromise bill took some time, but it eventually passed the Senate “after 83 days of debate,” concluding in June

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<sup>596</sup> *Id.* at 124. Filibuster is defined as follows: “The use of obstructionist tactics, especially prolonged speechmaking, for the purpose of delaying legislative action.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 659 (4th ed. 2000).

<sup>597</sup> WHALEN & WHALEN, *supra* note 543, at 125.

<sup>598</sup> *Id.* at 193.

<sup>599</sup> *Id.* at 180, 195.

<sup>600</sup> *Id.* at 196 (internal quotation marks omitted).

<sup>601</sup> *Id.* at 195–96.

<sup>602</sup> *Id.* at 197.

<sup>603</sup> *Id.* at 200.

<sup>604</sup> *Id.* at 199.

and followed by House approval shortly thereafter.<sup>605</sup> After passing through Congress, the bill was sent to the White House for President Johnson's signature.<sup>606</sup>

#### 5. President Lyndon B. Johnson's Signing of the Civil Rights Act of 1964

Within hours of the civil rights bill's passage, on July 2, 1964, many of the House members and "almost all the members of the Senate, except the Southerners," entered the White House to join with members of the Executive Branch and invited civil rights leaders, including Dr. Martin Luther King, Jr., Clarence Mitchell, and several others.<sup>607</sup> It had been 100 years since the jubilant Emancipation Proclamation announcement and subsequent abolition of slavery. Now a century later, on July 2, 1964, joy filled the Executive Office room as President Lyndon B. Johnson walked in, surrounded by applause and the watchful eyes of Congress and prominent civil rights leaders.<sup>608</sup>

Before signing his name to the landmark legislation, President Johnson addressed the nation. His remarks included these words:

We believe that all men are created equal. Yet many are denied equal treatment.

We believe that all men have certain unalienable rights. Yet many Americans do not enjoy these rights

We believe that all men are entitled to the blessings of liberty. Yet millions are being deprived of those blessings—not because of their own failures, but because of the color of their skin.

The reasons are deeply imbedded in history and tradition and the nature of man. We can understand—without rancor or hatred—how this all happened.

But it cannot continue. Our Constitution, the foundation of our Republic, forbids it. The principles of our freedom forbid it. Morality forbids it. And the law I will sign tonight forbids it.<sup>609</sup>

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<sup>605</sup> *Civil Rights Act of 1964*, *supra* note 592.

<sup>606</sup> *Id.*

<sup>607</sup> WHALEN & WHALEN, *supra* note 543, at 226–27.

<sup>608</sup> *Id.* at 227–28.

<sup>609</sup> See President Lyndon B. Johnson, Radio and Television Remarks upon Signing the Civil Rights Bill (July 2, 1964), available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/640702.asp>.

After Johnson signed the bipartisan supported Civil Rights Act of 1964, the Jim Crow laws of segregation and racial discrimination were finally made illegal! As President Johnson noted in his remarks, “This Civil Rights Act is a challenge to all of us to go to work in our communities and our States, in our homes and in our hearts, to eliminate the last vestiges of injustice in our beloved country.”<sup>610</sup>

## 6. The Civil Rights Act of 1964

The landmark Civil Rights Act of 1964 was enacted to address the broad range of discrimination that African Americans encountered for centuries in America.<sup>611</sup> The legislation includes eleven provisions, identified as titles,<sup>612</sup> including Title I, which prohibits the unequal application of voter registration requirements.<sup>613</sup> Title II prohibits discrimination based on race, color, religion, or national origin in places of public accommodation.<sup>614</sup> Title III grants authority to the Department of Justice to file lawsuits to desegregate state or local public facilities,<sup>615</sup> and Title IV grants authority to the United States Department of Education to provide technical assistance for schools initiating desegregation programs.<sup>616</sup> Title VII is the focus of Part II and Part III in this Article.

## II. TITLE VII'S IMPACT ON RACE RELATIONS IN THE WORKPLACE AND SOCIETY

### A. *Title VII Overview*

#### 1. Broad Coverage

Prior to Title VII, several states had employment practice protection statutes. Additionally, federal Fair Employment Practice Committees were established to address discrimination complaints filed against businesses awarded federal contracts.

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<sup>610</sup> *Id.*

<sup>611</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.).

<sup>612</sup> *Id.*

<sup>613</sup> *Id.* § 101, 78 Stat. at 241–42.

<sup>614</sup> *Id.* §§ 201–07, 78 Stat. at 243–46.

<sup>615</sup> *Id.* §§ 301–04, 78 Stat. at 246.

<sup>616</sup> *Id.* §§ 401–10, 78 Stat. at 246–49.

None of the earlier state statutes or federal legislation and initiatives were broad enough to adequately address the widespread discrimination that African Americans faced in the 1950s and 1960s workplace. For that primary reason, Title VII legislation was necessary—it is the foremost federal law that prohibits employers, employment agencies, and labor organizations from discriminating against any individual based on race, color, religion, sex,<sup>617</sup> or national origin.<sup>618</sup> Title VII is comprehensive, as it prohibits discrimination in all facets of employment—job advertisements, recruitment, application and hiring, background checks, job referrals, job assignments and promotions, pay and benefits, discipline and discharge, employment references, reasonable accommodation and religion, training and apprenticeship programs, harassment, terms and conditions of employment, pre-employment inquiries, dress code, and constructive discharge or resignation.<sup>619</sup> Moreover, the prohibitions cover government employers and all private employers that have fifteen or more employees, broadening the law's scope.<sup>620</sup>

Congress's authority to enact Title VII derives from the United States Constitution's Commerce Clause, which authorizes Congress "to regulate Commerce with foreign Nations, and among the several States."<sup>621</sup> As such, the scope of coverage is not limited to only state action like the narrowly enforced Reconstruction Amendments that did not address private action, thus prohibiting victims of discrimination from obtaining relief from discrimination in the private sector. After years of failed Reconstruction Era initiatives—constitutional amendments and earlier narrow civil rights legislation—Title VII's broad application in both the private and public sectors is noteworthy.

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<sup>617</sup> Representative Howard Smith added the word and protected class "sex" to the list of discrimination under Title VII; he aimed to defeat the bill by recommending the prohibition, which afforded protection to women, but his plan backfired after a few Congresswomen supported the amendment and sex was added to the final legislation. WHALEN & WHALEN, *supra* note 543, at 115–17.

<sup>618</sup> 42 U.S.C. § 2000e-2(a)–(c) (2012).

<sup>619</sup> See *Prohibited Employment Policies/Practices*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/practices/index.cfm> (last visited May 26, 2015).

<sup>620</sup> Initially, as enacted in 1964, Title VII covered all employers with more than twenty-five employees. In 1972, the law was amended to cover employers with fifteen or more employees.

<sup>621</sup> U.S. CONST. art. I, § 8, cl. 3.

## 2. Objective To Prohibit Discrimination on the Basis of Race or Color

Given the extent of racial segregation and discrimination against African Americans in the 1960s, the primary impetus for Title VII was to prohibit discrimination in employment on the basis of race.<sup>622</sup> As President Kennedy addressed the nation on June 11, 1963, he noted that his proposed civil rights bill was written to deliver the promise of racial equality for African Americans.<sup>623</sup> While the segregation and discrimination examined in Part I's historical chronicle spurred Title VII legislation, the law applies to all employees working under a covered employer; an individual may seek the law's protection if the employee believes that an employer has engaged in discrimination based on race or color, as well as religion, sex, and national origin.<sup>624</sup>

## 3. Objective To Prohibit Discrimination on the Basis of Religion, Sex, and National Origin

In addition to the prohibitions against race or color discrimination, Title VII prohibits discrimination on the basis of religion, sex, and national origin.<sup>625</sup> Moreover, retaliation for initiating or filing discrimination complaints and participating in employment discrimination investigations or lawsuits is prohibited under the Act.<sup>626</sup> Employers must also accommodate employees' "sincerely held religious practices" if it is not an undue hardship to an organization's operation.<sup>627</sup>

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<sup>622</sup> See *35 Years of Ensuring the Promise of Opportunity*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/history/35th/history/> (last visited Sept. 30, 2015).

<sup>623</sup> See *Pre 1965: Events Leading to the Creation of EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/history/35th/pre1965/index.html> (last visited Sept. 30, 2015).

<sup>624</sup> *Laws Enforced by EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/statutes/index.cfm> (last visited Oct. 1, 2015).

<sup>625</sup> *Id.*

<sup>626</sup> *Id.*

<sup>627</sup> *Id.*

#### 4. Theories of Employment Discrimination—Disparate Treatment and Disparate Impact

The Supreme Court of the United States has recognized two primary theories that plaintiffs may use in a Title VII employment discrimination case—disparate treatment and disparate impact.<sup>628</sup> The disparate treatment theory of employment discrimination applies when employers treat their employees differently based on race, color, religion, sex, or national origin.<sup>629</sup> A disparate impact claim is viable when a facially neutral practice, such as an educational requirement or a written test, has a significant disparate impact on members of a protected class and the employment practice at issue is not shown to be related to the job or consistent with business necessity.<sup>630</sup>

#### *B. Title VII Changed the Workplace but Employment Discrimination Still Exists*

Title VII legislation may not have changed the perspective and hearts of the remaining workplace employees and employers who refuse to acknowledge equal intellectual and physical attributes across racial lines.<sup>631</sup> Nevertheless, Congress's bipartisan support and enactment of a federal law that prohibits employment discrimination based on race, sex, color, religion, or national origin has had a significant impact on the general workplace and society. Specifically, within a short time after Title VII was enacted, significant workplace changes were evident. Doors previously closed were opened for African Americans, particularly in the private sector, and by the end of the twentieth century, many blacks held positions outside of the typical domestic and low-level labor jobs that they previously occupied in corporations and other workplaces throughout the

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<sup>628</sup> See *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–31 (1971).

<sup>629</sup> See *Burdine*, 450 U.S. at 253; *Green*, 411 U.S. at 802.

<sup>630</sup> See *Griggs*, 401 U.S. at 433.

<sup>631</sup> See generally FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 584.

private sector.<sup>632</sup> Notably, significant numbers of African Americans moved to middle- and high-level positions in both the public and private sectors.<sup>633</sup>

Moreover, employers recognized the cost of Title VII complaint filings, which generally involves lengthy factfinding investigations and lawsuits; as such, many of the nation's innumerable private sector employers have endeavored to improve their organizations to avoid the expenses incurred from Title VII investigations or litigation. Consequently, some companies have implemented employment relations policies and procedures through their human resource divisions, hired more minority employees to fill high-level management positions, and conducted sensitivity training to address discriminatory, insensitive workplace comments.<sup>634</sup> Title VII's enactment has also led to more women gaining employment opportunities and advancing to higher levels in corporations.<sup>635</sup>

After being denied equal employment opportunities for centuries, most African Americans generally attribute improved workplace conditions and available employment opportunities to "the civil rights policies that had made upward mobility possible in the first place."<sup>636</sup> Further, given the historical treatment of blacks in America, many historians believe that "[a]ny retreat from the civil rights legislation of the 1960s stood to retard, even imperil, black progress."<sup>637</sup> Noted scholars agree that the enactment of Title VII has improved relationships across racial lines in the workplace, which transcends into society at large.<sup>638</sup> As the workplace became more integrated and diverse after Title VII's enactment, workplace dialogues and ideas began to flow across racial lines, ideally breaking down barriers and enhancing understanding.<sup>639</sup> Still, enhanced communication and improved

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<sup>632</sup> *See id.* at 585.

<sup>633</sup> *See id.*

<sup>634</sup> Jonathan S. Leonard, *The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment*, 4 J. ECON. PERSP. 47, 59–61 (1990).

<sup>635</sup> *Id.* at 60–61.

<sup>636</sup> FRANKLIN & HIGGINBOTHAM, *supra* note 10, at 584.

<sup>637</sup> *See id.*

<sup>638</sup> Cynthia L. Estlund, *The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law*, 1 U. PA. J. LAB. & EMP. L. 49, 52–54 (1998).

<sup>639</sup> *See id.* at 52–53

relationships across racial lines is needed, as racial conflict remains prevalent in the current American workplaces and communities, despite the gains noted.

Cynthia Estlund, Professor of Law at New York University School of Law, has written about the workplace in a racially diverse society and the role of labor and employment law.<sup>640</sup> Estlund's examination recognizes President Clinton's efforts to start "a national conversation about race" in the 1990s.<sup>641</sup> And she maintains that "[r]ace unquestionably divides Americans—particularly black and white Americans—in their experiences and in their perceptions of the world, of social policy, and of each other."<sup>642</sup> Estlund argues that there is a "need for a more honest discussion of racial divisions, their causes, and their potential cures," proposing that the conversation should not be a national dialogue as Clinton attempted to initiate.<sup>643</sup> Instead, Estlund's article aptly concludes that the "workplace is perhaps the most important sphere in which significant integration has taken place. A combination of legal pressures, primarily driven by Title VII of the Civil Rights Act of 1964, and voluntary efforts have made the workplace an arena of comparative integration."<sup>644</sup> As such, distinct groups of individuals from diverse neighborhoods, families, religions, and racial and ethnic groups come together.<sup>645</sup> Title VII made it possible for the workforce in America to become a more diverse arena where the potential for dialogue and improved relations exists.

Professor Estlund's assessment of the workplace is correct for many places of employment, although it is important to note that many employers have not integrated their organizations, particularly management positions.<sup>646</sup> Nonetheless, as this Article's historical chronicle demonstrates, when African Americans work together in equal employment positions, such as soldiers, both black and white, serving in the military in the

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<sup>640</sup> *Id.* at 49.

<sup>641</sup> *Id.* (internal quotation marks omitted).

<sup>642</sup> *Id.*

<sup>643</sup> *Id.* at 49–50.

<sup>644</sup> *Id.* at 52.

<sup>645</sup> *Id.* at 52–53.

<sup>646</sup> See Dan Fastenberg, *Study: Workplaces Increasingly Segregated, Dominated by White Men*, AOL JOBS (Oct. 16, 2012, 8:29 AM), <http://jobs.aol.com/articles/2012/10/16/study-workplaces-increasingly-segregated-dominated-by-white-me/>.

eighteenth century under the leadership of General George Washington, the experience and encounters can, in some instances, enhance understanding across racial lines.<sup>647</sup>

On the other hand, despite the positive collegiate bonds, open dialogue, and improved understanding across racial lines that often prevails in a diverse integrated workplace, bias and discrimination still exist in employment.<sup>648</sup> Indeed, the unemployment rate for blacks is consistently high; it is nearly two times the rate for whites.<sup>649</sup> In addition, not all workplace relationships have been positive since innumerable African Americans entered the private and public sectors after Title VII was enacted. That is, while an integrated workforce can—and often does—lead to positive workforce dialogues and enhanced understanding, conflicts and complaints of discrimination based on race are still rampant throughout private and public sector employment. Specifically, the Equal Employment Opportunity Commission’s (“EEOC”) percentage of private sector charges filed based on race discrimination was thirty-five percent in fiscal year 2014.<sup>650</sup> With the exception of filings based on retaliation, all other bases for discrimination had smaller percentages than discrimination based on race.<sup>651</sup>

Thus, Title VII has had a positive impact on the workforce and society, opening the door to greater employment opportunities and workplace dialogues that may not have been possible if diverse individuals were not integrated in the workplace. Yet, the objective to eliminate discrimination in employment and society has not been achieved due to various reasons, including the wide unemployment gap between black and white Americans, issues related to the implementation of

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<sup>647</sup> See *supra* Part I.A.

<sup>648</sup> See Press Release, New EEOC Report Examines Obstacles Facing African Americans in Federal Workplace (Mar. 14, 2013), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/3-14-13.cfm>; see also *infra* Part III.A.

<sup>649</sup> Drew DeSilver, *Black Unemployment Rate Is Consistently Twice That of Whites*, PEW RES. CENTER (Aug. 21, 2013), <http://www.pewresearch.org/fact-tank/2013/08/21/through-good-times-and-bad-black-unemployment-is-consistently-double-that-of-whites/>.

<sup>650</sup> See Press Release, EEOC Releases Fiscal Year 2014 Enforcement and Litigation Data (Feb. 4, 2015), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/2-4-15.cfm>.

<sup>651</sup> *Id.*

Title VII, the effect of unconscious bias in decision making, and the large number of unresolved charges of discrimination at the EEOC. Part III examines these concerns.

### III. CURRENT CHALLENGES PREVENTING TITLE VII FROM REACHING ITS TRUE POTENTIAL

#### A. *Unconscious Bias*

Fifty years after Title VII was enacted into law, discrimination based on race in the workplace includes less overt discrimination and more subtle and unconscious occurrences of discrimination.<sup>652</sup> The shift from blatant racist statements and other forms of overt race discrimination in the workplace may be attributable to education initiatives that prompted greater public disdain for racism and factors related to enhanced employers' knowledge of Title VII's prohibition against discrimination based on race.<sup>653</sup>

Numerous scholars have examined unconscious discrimination in the workplace. In particular, Professor Linda Hamilton Krieger has conducted extensive research on the subject, which addressed the cognitive origin of discrimination. She argues that "a broad class of biased employment decisions now analyzed under Title VII's disparate treatment theory results not from discriminatory motivation, but from a variety of categorization-related judgment errors characterizing normal human cognitive functioning."<sup>654</sup> Professor Krieger's argument advances from her study of social cognition, a theory initially proposed by social psychologists studying intergroup bias.<sup>655</sup> Drawing from the psychologists' studies, Krieger argues that the social cognition theory proposes that all people stereotype by

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<sup>652</sup> See Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 91-92 (2003); D. Wendy Greene, *Pretext Without Context*, 75 MO. L. REV. 404, 422 (2010); Trina Jones, *Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423, 429 (2010); Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 397 (2010).

<sup>653</sup> See Green, *supra* note 652, at 95-97; see also Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 418 (2000).

<sup>654</sup> Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1165 (1995).

<sup>655</sup> See *id.* at 1187-88.

placing people in categories “to simplify the task of perceiving, processing, and retaining information about people in memory.”<sup>656</sup> Further, social cognition theory proponents argue that intergroup judgment is impacted after stereotypes are formed, “biasing in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people.”<sup>657</sup> Ultimately, under the social cognition theory, formed stereotypes “operate absent intent to favor or disfavor members of a particular social group.”<sup>658</sup> Krieger’s scholarship addresses the consequences of unconscious bias in employment discrimination cases; biases stored in memory “‘sneak up on’ the decisionmaker, distorting bit by bit the data upon which his decision is eventually based.”<sup>659</sup>

In 2012, unconscious bias was identified by an Equal Employment Opportunity Commission (“EEOC” or “the Commission”) workgroup as the number one obstacle “that remain[s] in the federal workplace that hinder[s] equal employment opportunities for African Americans.”<sup>660</sup> Moreover, the concept has been noted in a few court cases, most notably, in *Thomas v. Eastman Kodak Co.*,<sup>661</sup> where the court directly referred to “less conscious bias” as a viable form of disparate treatment based on race.<sup>662</sup>

Despite the scholarship and studies that emphasize the pervasiveness of unconscious bias in the workplace, it is difficult for plaintiffs to meet their burden of proof relying upon the theory. Indeed, several scholars argue that because the historical origin of Title VII stemmed from overt race discrimination against African Americans, the problem of unconscious bias discrimination was not a topic of the legislation’s congressional debates.<sup>663</sup> Moreover, for Title VII’s most used theory—disparate treatment discrimination—proof of

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<sup>656</sup> *Id.*

<sup>657</sup> *Id.* at 1188.

<sup>658</sup> *Id.*

<sup>659</sup> *Id.*

<sup>660</sup> *EEOC African American Workgroup Report*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [www.eeoc.gov/federal/reports/aawg.cfm](http://www.eeoc.gov/federal/reports/aawg.cfm) (last visited Oct. 2, 2015).

<sup>661</sup> 183 F.3d 38 (1st Cir. 1999).

<sup>662</sup> *Id.* at 42.

<sup>663</sup> See McGinley, *supra* note 653, at 418 n.7; see also *supra* Part I (discussing African Americans’ pursuit of civil rights in America).

intentional discrimination is an extremely difficult standard when the conduct at issue is subtle or the result of unconscious bias discrimination.

Given the pervasiveness of unconscious bias in today's workplace, and the difficulty that plaintiffs face in meeting the burden of persuasion, without the smoking-gun evidence that frequently existed before Title VII was enacted into law, proving discrimination based on race will remain one of the looming challenges for plaintiffs. Other obstacles that plaintiffs face include the glaring number of cases with summary judgment dismissal rulings in recent years, where various judges appear to be responding to large overloaded court dockets by frequently issuing rulings in favor of employers without affording plaintiffs a trial.<sup>664</sup> While there are other challenges hindering Title VII's potential, one of the most longstanding issues has been the EEOC charge inventory backlog, which has loomed at over 70,000 annual charges for several years. Part III, Section B examines the Commission's charge inventory backlog.

### *B. EEOC Charge Inventory Backlog*

The Civil Rights Act of 1964 established the Equal Employment Opportunity Commission, requiring five bipartisan members; only three of the five Commissioners can concurrently serve from the same political party.<sup>665</sup> The President makes all appointments to the Commission for designated terms defined in the Act.<sup>666</sup> With a mission of "stopping and remedying unlawful discrimination" in the workplace,<sup>667</sup> the EEOC opened its doors on July 2, 1965—one year after Title VII was enacted into law.<sup>668</sup>

The Commission is responsible for regulating employment against "private and state and local government employers with 15 or more employees, labor organizations, employment agencies,

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<sup>664</sup> See Martin, *supra* note 652, at 315–16.

<sup>665</sup> 42 U.S.C. § 2000e-4 (2012).

<sup>666</sup> *Id.*

<sup>667</sup> *United States Equal Employment Opportunity Commission Strategic Plan for Fiscal Years 2012–2016*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [http://www.eeoc.gov/eeoc/plan/strategic\\_plan\\_12to16.cfm](http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm) (last visited Oct. 2, 2015).

<sup>668</sup> See *1965–1971: A "Toothless Tiger" Helps Shape the Law and Educate the Public*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/history/35th/1965-71/index.html> (last visited Oct. 2, 2015).

and the federal government.”<sup>669</sup> The procedures for filing a complaint in the federal government differ from the private sector.<sup>670</sup> The most notable difference is that federal agencies are responsible for investigating their own charges of discrimination filed by its employees.<sup>671</sup> Following the investigation, the employee may opt to have the case heard by an EEOC administrative judge.<sup>672</sup> Private sector procedures, on the other hand, require the EEOC to conduct charge investigations. While any person may file a charge if they believe that an employer has violated their rights, the filing must meet the technical requirements for filing; then, the EEOC is required to notify the employer of the filing within ten days of receipt of the charge.<sup>673</sup>

For the innumerable individual employees who are unable to afford to pay counsel to represent them in court, they rely on the EEOC to fulfill its mission of enforcing Title VII to eliminate all forms of discrimination in the workplace.<sup>674</sup> Yet, the EEOC has a dilemma that has troubled the agency from the time it opened for business in 1965—a staggering backlog of discrimination charges—attributable to a number of factors, including the following obstacles: The agency has been understaffed since it opened its doors in 1965<sup>675</sup> and the Commission was unable to file suit from 1965 to 1972, when Title VII was finally amended to strengthen the enforcement power of the EEOC.<sup>676</sup> Yet, even with the litigation authority, the backlog continued to grow in

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<sup>669</sup> *U.S. Equal Employment Opportunity Commission Strategic Plan for Fiscal Years 2012–2016*, *supra* note 667.

<sup>670</sup> *Id.*

<sup>671</sup> *Id.*

<sup>672</sup> *Id.*

<sup>673</sup> *Id.*

<sup>674</sup> *Id.* In addition to Title VII, the EEOC enforces the Equal Pay Act of 1963 (“EPA”), the Age Discrimination in Employment Act of 1967 (“ADEA”), Title I and Title V of the Americans with Disabilities Act (“ADA”), section 501 of the Rehabilitation Act of 1973, and the Genetic Information Nondiscrimination Act of 2008 (“GINA”). Additionally, the EEOC enforces two Title VII amendments, the Pregnancy Discrimination Act and sections 102 and 103 of the Civil Rights Act of 1991. *Laws Enforced by EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/statutes/index.cfm> (last visited Sept. 30, 2015).

<sup>675</sup> *1965–1971: A “Toothless Tiger” Helps Shape the Law and Educate the Public*, *supra* note 668.

<sup>676</sup> *Id.*

most years, as the EEOC's responsibilities increased after Title VII was amended again in 1991 to allow jury trials, compensatory damages, and punitive damages.<sup>677</sup>

Over the years, the EEOC has implemented several measures to try and resolve the case inventory backlog. Initiatives range from reorganization plans, improved case processing, hiring more staff, better staff training, expanding educational outreach and technical support, and enhancing employers' understanding of the law, which the agency hoped would lead to fewer charge filings.<sup>678</sup> Other measures to address the backlog were implemented in the 1990s when the EEOC assumed more responsibility for the enforcement of additional statutes, including Title I of the Americans with Disabilities Act of 1990; the Commission responded by setting up a task force to create a National Enforcement Plan.<sup>679</sup> The task force recommended more outreach and education, voluntary resolution of disputes, and if cases are not voluntarily resolved, enforcement was advanced through the Priority Charge Handling Procedural plan ("PCHP"), implemented in 1995.<sup>680</sup>

The PCHP "prioritized incoming charges into three categories according to the likelihood that discrimination occurred. The system expedited dismissal of charges over which the agency had no jurisdiction, and allowed early dismissal of those charges which were self-defeating or unsupported."<sup>681</sup> The PCHP started out with positive results. The charge backlog inventory dropped from 111,000 in 1995 to "a little more than 40,000 in 1999"—a significant decrease—but this was only temporary. By the 2000s the backlog started to increase again. Then, in 2011, the backlog was reduced by 8,000 charges, even though the EEOC continued to receive a huge number of complaints—100,000—in both 2010 and 2011. Despite the most recent charge reduction, the backlog remained at over 80,000

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<sup>677</sup> *The Civil Rights Act of 1991*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html> (last visited Feb. 13, 2016).

<sup>678</sup> *New Enforcement Strategies To Address Discrimination in the Changing Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/history/35th/1990s/newenforcement.html> (last visited Feb. 13, 2016).

<sup>679</sup> *Id.*

<sup>680</sup> *Id.*

<sup>681</sup> *Id.*

cases.<sup>682</sup> In 2014, the private sector charge inventory backlog remained at an astounding number—nearly 76,000 unresolved charges.<sup>683</sup> The EEOC 2012 to 2016 Strategic Plan notes that from 2010 to 2012, the Commission received approximately 100,000 charges of discrimination from private sector employees and 14,000 from the federal sector. With the massive numbers of new complaints needing redress each year, piled on top of the pending backlog of a steady 70,000 or more cases, the Commission’s prospect of eliminating the backlog of charges is remote unless drastic changes to the Commission’s operations are implemented.<sup>684</sup>

A possible solution to substantially reduce the EEOC charge inventory backlog is to follow the strategic plan recommendation and update the EEOC’s overall National Enforcement Plan since the Commission’s historical record reveals that the PCHP has had a period when it generated unprecedented positive reductions in the charge inventory backlog.<sup>685</sup> The success, or failure, of the charge inventory backlog will likely, therefore, be identified through an overall National Enforcement Plan that includes a thorough review of the PCHP. In addition, the EEOC’s continued promotion of mediation, which the agency notes is a “win for both employees and employers” should remain a top priority for the agency.<sup>686</sup> These priorities, and others that will hopefully come from an EEOC National Enforcement Plan update, will expectantly lead to a reduction and, ideally, eventual elimination of the EEOC charge inventory backlog as the EEOC moves forward towards the sixtieth anniversary of Title VII and the Commission.

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<sup>682</sup> See *U.S. Equal Employment Opportunity Commission Strategic Plan for Fiscal Years 2012–2016*, *supra* note 669; *EEOC Slowing Growth of Discrimination Complaint Backlog Despite Big Year*, FEDWEEK (Jan. 19, 2011), <http://www.fedweek.com/federal-managers-daily-report/eeoc-slowing-growth-of-discrimination-complaint-backlog-despite-big-year/>; *New Enforcement Strategies To Address Discrimination in the Changing Workplace*, *supra* note 678.

<sup>683</sup> U.S. EQUAL EMP’T OPPORTUNITY COMM’N, PRIORITY CHARGE HANDLING TASK FORCE LITIGATION TASK FORCE REPORT (Mar. 1998), *available at* [http://www.eeoc.gov/eeoc/task\\_reports/charge\\_handling.cfm](http://www.eeoc.gov/eeoc/task_reports/charge_handling.cfm).

<sup>684</sup> *U.S. Equal Employment Opportunity Commission Strategic Plan for Fiscal Years 2012–2016*, *supra* note 669.

<sup>685</sup> *See id.*

<sup>686</sup> *See id.*; U.S. EQUAL EMP’T OPPORTUNITY COMM’N, FISCAL YEAR 2014 PERFORMANCE AND ACCOUNTABILITY REPORT (2014), *available at* [http://www.eeoc.gov/eeoc/plan/2014par\\_performance.cfm](http://www.eeoc.gov/eeoc/plan/2014par_performance.cfm) (last visited Sept 30, 2015).

## CONCLUSION

The African Americans' pursuit of basic God-given civil rights from 1619 to 1964 was long and grueling. Systemic oppression and discrimination produced a segregated American society and profoundly unequal workplaces that endured for centuries. This Article marked the fiftieth anniversary of Title VII by examining the events and laws that subjugated, disenfranchised, and failed to provide adequate equal protection and civil rights to African Americans until the landmark Civil Rights Act of 1964—which included Title VII equal employment opportunity legislation—was enacted into law. The detailed historical chronicle aimed to demonstrate why comprehensive equal employment opportunity legislation was necessary.

Certainly, the positive steps taken over the past five decades on the road to ensuring equal opportunities in employment are noteworthy. Yet, it is important to recognize that the vestiges of oppression, inequality, and Jim Crow have not been fully eliminated within a mere 50-year period, following an extensive 345-year era of subjugation and discrimination. Indeed, the long years of oppression and “separate but equal” Jim Crow laws prevented African Americans from obtaining equal educational, economic, and employment opportunities, leaving them far behind their white colleagues in workplaces throughout the nation. And, today, despite the perplexing claims made by many that America has become a colorblind or post-racial society, there is still a disproportionate unemployment and income gap between black and white Americans. Additionally, the EEOC continues to receive thousands of annual filings of employment discrimination complaints based on race; retaliation and race discrimination mark the highest number of annual complaints.

The landmark Title VII legislation was essential in 1964, and it is still needed today. However, Title VII has notable limitations, as discussed in Part III of this Article, preventing the law from fully prohibiting employment discrimination based on race, color religion, sex, or national origin. In particular, the subtle unconscious bias that exists in today's workplaces, and other issues including the EEOC charge inventory backlog, must be resolved in order for Title VII to reach its full potential. As Title VII marches towards its sixtieth anniversary, the lessons learned from America's history should inspire all employers and

employees, throughout the nation, to purposely identify, denounce, and prevent all remaining discrimination and inequality in America's workplaces and society.