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Reflections on From Slaves to Citizens Bondage, Freedom and the Constitution: The New Slavery Scholarship and Its Impact on Law and Legal Historiography

Robert J. Kaczorowski
Fordham University School of Law, rkaczorowski@law.fordham.edu

REFLECTIONS ON "FROM SLAVES TO CITIZENS"

*Robert J. Kaczorowski**

The thesis of Professor Donald Nieman's paper, "From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction,"[1] is that the nation experienced a revolution in the United States Constitution and in the consciousness of African-Americans. According to Professor Nieman, the Reconstruction Amendments represented "a dramatic departure from antebellum constitutional principles,"[2] because the Thirteenth Amendment reversed the pre-Civil War constitutional guarantee of slavery and "abolish[ed] slavery by federal authority."[3] The Fourteenth Amendment rejected the Supreme Court's "racially-based definition of citizenship [in *Dred Scott v. Sandford*[4]], clearly establishing a color-blind citizenship"[5] and the Fifteenth Amendment "wrote the principle of equality into the Constitution."[6] Professor Nieman also states that "in the course of a decade, the nation had moved from slavery to freedom, and from a constitutional order that sanctioned white supremacy to one that embraced equality of civil and political rights."[7]

Equally revolutionary "was the change in consciousness that occurred among African-Americans."[8] The "constitutional vision" of African-Americans was the inspiration for the "equalitarian constitutionalism" expressed in the Reconstruction Amendments and their guarantees of "color-blind citizenship" and "equal rights."[9] Professor Nieman traces the origins of these revolutionary changes to Northern African-American leaders who fought for equal rights during the era of slavery before the Civil War. These

* Professor of Law, Fordham University School of Law; B.S.C., Loyola University of Chicago; M.A., DePaul University; Ph.D., University of Minnesota; J.D., New York University.

1 Donald G. Nieman, *From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction*, 17 CARDOZO L. REV. 2115 (1996).

2 *Id.* at 2116.

3 *Id.* (footnote omitted).

4 60 U.S. (19 How.) 393 (1857).

5 Nieman, *supra* note 1, at 2116.

6 *Id.*

7 *Id.* at 2117.

8 *Id.*

9 *Id.*

leaders "pressed their constitutional vision on Republican policy makers in Washington," during the revolutionary years of the Civil War and Reconstruction, and they "took it to the South, where it found a receptive audience" among the former slaves who "eagerly embraced doctrines of color-blind citizenship and equal rights and used them to shake the foundations of the southern social order."[10] Indeed, commitment of African-Americans "to equalitarian constitutionalism reached far beyond Reconstruction and contained profound implications for American constitutionalism and African-American culture" far into the twentieth century.[11]

Equalitarian constitutionalism shook, but did not topple, the Southern social order. Adverse interpretations of the Reconstruction Amendments by the Supreme Court, combined with "the juggernaut of lynching, disfranchisement, and Jim Crow,"[12] succeeded in reducing African-Americans to second class citizenship. However, equalitarian constitutionalism and the activism of African-Americans in the twentieth century continued to challenge white hegemony through the post-World War II period.

There are several issues that are raised by, but not addressed in, Professor Nieman's paper. For example, what exactly was the nature of the "color-blind citizenship" that transformed the Constitution into an equalitarian document? This question encompasses several others of fundamental importance regarding American federalism and the scope of authority conferred by the Reconstruction Amendments on Congress, United States attorneys, and federal judges to enforce the rights of Americans. What kinds of rights violations did their framers intend to redress? That is, what rights did they intend to protect and from whom did they intend to protect them. What kinds of remedies did they contemplate? How did they envision the legal process through which often illiterate and impoverished Americans would enforce their rights?

Professor Nieman mentions some of the specific rights understood by the historical actors as the rights that the freedmen were to enjoy, as free men, and citizens of the United States. Some of the rights that were demanded and achieved included: the right to enter and enforce contracts, the right to own land, the right to the protection of their persons and property, and an equality in political rights, such as the right to serve as jurors, the right to vote, and the right to serve in public office. Professor Nieman asserts that

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10 *Id.*

11 *Id.*

12 *Id.* at 2136.

antebellum Northern African-American leaders insisted that African-Americans "were entitled to full equality."[13] After the Civil War, equal rights offered the former slaves "independence from white authority and, therefore, the autonomy . . . essential to freedom."[14] He thus notes that, in addition to equality in economic and political rights and equality before the law, African-Americans demanded and, to a significant extent, achieved social equality through laws and, at least in state law, in court decisions prohibiting racial discrimination in public schools, places of public accommodations, places of public amusement, and transportation. However, Professor Nieman acknowledges that the efforts of African-Americans to achieve social equality through the Fourteenth Amendment failed.[15] This failure raises some question concerning the nature of the "equalitarian constitutionalism" the framers of the Reconstruction Amendments had in mind. Did their framers possess the same "constitutional vision" of African-Americans or the same understanding of "color-blind citizenship" and "equalitarian constitutionalism"? What rights did the *framers* of the Reconstruction Amendments intend Americans to enjoy as free men and as citizens of the constitutionally revolutionized United States?

Constitutional scholars and historians have debated this question over the last one hundred years.[16] The difficulty in answering it is due to the lack of precision in the framers' understanding, a deficiency which is attributable, to a significant degree, to the ambiguities in nineteenth century theories of citizenship and citizens' rights.[17] While most constitutional scholars believe that the

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13 *See id.* at 2119.

14 *Id.* at 2128.

15 *See id.* at 2139.

16 *See* Robert J. Kaczorowski, *Searching for the Intent of the Framers of the Fourteenth Amendment*, 5 CONN. L. REV. 368, 368 (1972-73); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 864-71 (1986) [hereinafter Kaczorowski, *Revolutionary Constitutionalism*].

17 *See* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 (1978); Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 16, at 922-38. I argue that the framers' believed that the Constitution secured the generic rights to life, liberty and property, and rights incident thereto, as the fundamental rights of United States citizenship. They enumerated some of the rights they believed were incidents of these generic rights in section one of the Civil Rights Act of 1866: the right to make and enforce contracts, to sue, to serve as witnesses in court, to inherit, purchase, lease, sell, hold, and convey real and personal property, and the right to full and equal benefit of all laws and proceedings for the security of person and property. Ch. 31, 14 Stat. 27 § 1 (1866). It is my view that, although these were some of the rights the framers believed were necessary to the enjoyment of life, liberty and property, they did not intend to limit statutory and constitutional protection of citizens' rights to those enumerated in the Civil Rights Act. Rather, they had an evolutionary understanding of citizens' rights which would change

Supreme Court in the *Slaughter-House Cases*[18] interpreted the Fourteenth Amendment's privileges or immunities clause more narrowly than the framers intended in rejecting its apparent guarantee of fundamental rights, the question of what rights the framers intended to secure remains controversial.[19] This debate was revived in the 1940s by Justice Hugo Black in his dissenting opinion in *Adamson v. California*[20] where he insisted that the framers of the Fourteenth Amendment intended to incorporate the Bill of Rights as constitutionally enforceable rights against state infringements.[21] Raoul Berger and Michael Curtis have continued this debate into this decade,[22] and other scholars, such as Akhil Reed Amar, have also contributed to it.[23]

The Court in *Brown v. Board of Education*[24] attempted to resolve the question whether the framers of the Fourteenth Amendment intended to guarantee the right of African-American children to attend public schools on a desegregated basis. The N.A.A.C.P. retained constitutional historian Alfred Kelly, among others, to research this question. The Court ultimately concluded that this

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over time to include additional specific rights which, at a later time, might be deemed to be essential to life, liberty, and property even though they were not necessarily considered so in the framers' era.

18 83 U.S. (16 Wall.) 36 (1873).

19 Even Raoul Berger's polemical attack on the Warren Court for interpreting the Fourteenth Amendment too broadly in securing citizens' fundamental rights, acknowledges that Justice Miller's catalog of the privileges and immunities secured by the Fourteenth Amendment was "[s]o meager . . . as to move Justice Field to exclaim that if this was all the privileges or immunities clause accomplished, 'it was a vain and idle enactment.' " RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 37-38 (1977).

20 332 U.S. 46 (1947). Charles Fairman published a rebuttal to Justice Black in his article entitled Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949). William Crosskey rebutted Fairman in William Crosskey, *"Legislative History" and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954), to which Fairman responded in Charles Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954).

21 *Adamson*, 332 U.S. at 71-72 (Black, J., dissenting).

22 *See* BERGER, *supra* note 19, at 134-56; MICHAEL CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989); Michael Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981); Michael Curtis, *Further Adventures of the Nine-Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 84 (1982); Raoul Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis' Reply*, 44 OHIO ST. L.J. 1 (1983).

23 *See* Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

24 347 U.S. 483 (1954).

question could not be answered conclusively.[25] However, legal scholars and historians, including Professor Kelly,[26] Alexander Bickel,[27] and, most recently, Michael McConnell,[28] have attempted to resolve this issue on one side of the question or the other.

The concept of a constitutionally guaranteed right to "color-blind citizenship" raises a question of a different nature: what role did the framers envision the law playing in citizens' enjoyment of the new "color-blind citizenship"? This question not only relates to the issue of what rights were to be protected, but who would protect them and how. The federalism dimension of this issue is enormously important.[29] The framers of the Fourteenth Amendment understood it, and the Thirteenth Amendment, as securing the fundamental rights of free men as rights of United States citizenship.[30] It was their view that, in securing the generic rights to life, liberty, and property (and rights incident thereto), the Constitution delegated to Congress plenary authority to secure these rights directly, not simply an equality in state-conferred rights.[31] Indeed, Congress exercised plenary authority in enacting the Civil Rights Act of 1866,[32] the Enforcement Act of 1870,[33] and the Ku Klux Klan Act of 1871.[34] These statutes conferred on the federal courts primary civil and criminal jurisdiction to enforce the fundamental rights of United States citizens. Thus, the framers contemplated citizens enforcing their rights directly in the federal courts whenever they were unable to do so through the state and local legal process.[35]

For a brief period during Reconstruction, all three branches of the national government were united in an effort to enforce civil

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25 *See id.* at 489.

26 *See* Alfred Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049, 1079-86 (1956) (framers of the Fourteenth Amendment did not intend to prohibit segregated schools).

27 *See* Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 56-65 (1955) (framers did not intend to desegregate public schools in 1866, but they did leave open the possibility of future court-ordered desegregation).

28 *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (framers intended not to prohibit segregated public schools).

29 *See, e.g.*, Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45 (1987).

30 *See* Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 16, at 895-99, 910-17.

31 *See id.* at 884-99, 910-17, 922-35.

32 Ch. 31, 14 Stat. 27 (1866).

33 Ch. 114, 16 Stat. 140 (1870).

34 Ch. 22, 17 Stat. 13 (1871).

35 *See* Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1886: A Legislative History in Light of* Runyon v. McCrary, 98 YALE L.J. 565 (1989).

rights.[36] United States Attorneys General and lawyers in the Department of Justice accepted the congressionally mandated duty to enforce citizens' fundamental rights through federal legal process. In areas of the South where the Ku Klux Klan overwhelmed local officials, the only justice available was through the Department of Justice and the federal courts. Federal legal officers restored law and order in areas that had degenerated into anarchy. United States attorneys, assisted by federal marshals and remnants of the United States army, successfully prosecuted hundreds of Klansmen under federal civil rights statutes for violating citizens' rights, such as the First Amendment guarantees of freedom of speech and freedom of assembly, the Second Amendment right to bear arms, the right to the equal protection of the laws for the security of person and property. In addition, under the constitutionally guaranteed rights to life and property, federal prosecutors convicted Klansmen of violations of citizens' rights which, under state law, would have constituted crimes such as murder, assault with intent to kill, burglary, and the like. Federal judges uniformly upheld the constitutionality of these statutes and the plenary authority they conferred on federal courts to enforce citizens' civil rights. This was an enormous expansion of federal jurisdiction over fundamental rights. Any discussion of the revolutionary nature of the Reconstruction Amendments must address this aspect of their legal history.

This suggests that, notwithstanding the initiatives of African-Americans in defining and securing the revolutionary new "color-blind citizenship," this process was connected to ideas and to groups outside the African-American community. In stressing the African-American inspiration for the principles of the Reconstruction Amendments, particularly the Fourteenth Amendment, Professor Nieman gives insufficient attention to the broader legal and political culture of the period in shaping those principles and objectives.[37] For example, although African-Americans were the intended *primary* beneficiaries of constitutional and statutory guarantees of citizens' rights, they were not the only intended beneficiaries. The evidence is clear that the framers intended also to protect their white allies in the South.[38] This insight suggests sources of "equalitarian constitutionalism" beyond African-Ameri-

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[36] *See* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876 (1985).

[37] *See, e.g.*, Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 16, at 871-84; Kaczorowski, *supra* note 35, *passim*.

[38] *See* Kaczorowski, *Revolutionary Constitutionalism*, *supra* note 16, at 874-77, 897-98; Kaczorowski, *supra* note 29, at 50-51.

can activists, and that the Fourteenth Amendment was intended to accomplish more than a "color-blind citizenship." In my view, it was intended to nationalize citizenship and fundamental rights and thereby confer plenary authority to protect the rights of *all Americans*, not only those of African-Americans.

The fact that the constitutional changes brought about by the Reconstruction Amendments were so radical raises the additional question of what led to their failure. Why did the United States Supreme Court reject the most revolutionary aspects of these constitutional changes? Why did the American public acquiesce?[39] How does one account for the temporary suspension of ingrained racism and hostility to central power which permitted Republicans during Reconstruction to revolutionize the Constitution? How then does one explain the virulent resurgence of racism and states' rights that permitted the rejection of revolutionary constitutional guarantees by the end of the nineteenth century? Perhaps the answers to these questions will shed some light on why the struggle continues to realize the promise of freedom that Americans thought they had secured 130 years ago.

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[39] I have suggested some answers to these questions. *See* Robert J. Kaczorowski, *The Chase Court and Fundamental Rights: A Watershed in American Constitutionalism*, 21 NO. KY. L. REV. 151 (1993); KACZOROWSKI, *supra* note 36, at 199-227.