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Sojourners And Survivors: Two Logics Of Constitutional Protection

ROBERT MEISTER

Liberal political analysis is ordinarily based on a sharp distinction between domestic and international politics, and an assumption that domestic politics is the proper arena for democratic self-determination. But self-governing citizens have never exhausted the cast of characters who populate liberal states. Living alongside them there are often domestic aliens—permanent residents who are subject to the law, and may be protected by it, but who do not participate in making it. Refugees and remnants also inhabit liberal states. Whether citizens or not, they tend to bear the historical consciousness of victims or potential victims wherever they may live. A correlative fact is that in many now-liberal societies the meaning of citizenship itself is indelibly marked by the missing—the emigrant and the exile, the expelled and the extinct.¹ Such identities—and the historical presence or absence of individuals who claim them—are generally regarded as messy details in the state-centered conceptual framework that dominates liberal political thought.²

This Article contributes to an emerging argument that democratic legitimacy is essentially *interstate* in character, and that transnational membership

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1. See, for example, Jonathan A. Bush, "You're Gonna Miss Me When I'm Gone": *Early Modern Common Law Discourse and the Case of the Jews*, 1993 Wis L Rev 1225 (exploring the degree to which and why the legal status of Jews continued to be widely discussed throughout common law discourse following the Expulsion of the Jews in 1290). Similar work might be done on the missing Muslims in Spain, the missing Huguenots in France, and other groups.

2. See, for example, Ann Dummett and Andrew Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (Weidenfeld and Nicolson, 1990).

should become more central to democratic theory than it has been thus far. Other contributors to this argument have focused on the tension between seeing a constitution as the Law of the Land and as the Law of a People;³ on the legitimacy of international acts by democratic states;⁴ and on the potential conflict between openness to immigration and political self-determination.⁵ In recent years there has also been an impressive literature that relates issues of jurisdiction, choice of law, and interstate comity in American federalism to broader problems in both democratic theory and international law.⁶ The discussion that follows will expand upon this basic idea and identify contrasting approaches to the protection of individuals and groups in an interstate system in which territorially-based governments are presumed to be popular.

This Article will argue that American constitutional development reflects two fundamentally different ways of thinking about the problem of discrimination by democratic regimes. The first was based originally on the need to distinguish U.S. citizens living out of state—sojourners, as we shall call them—from internal groups that could be legitimately disadvantaged by local

3. See, for example, Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard, 1992). For a discussion of the U.S. see Gerald L. Neuman, *Whose Constitution?*, 100 Yale L J 909 (1991). This essay entertains such ideas as “global due process” in a world of interpenetrating nationalities.

4. See, for example, Lea Brilmayer, *Justifying International Acts* (Cornell, 1989); Lea Brilmayer, *American Hegemony: Political Morality in a One-Superpower World* (Yale, 1994); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L J 2347 (1991); and Neuman, 100 Yale L J 909 (cited in note 3).

5. See Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* ch 2 (Basic Books, 1983); Brian Barry and Robert E. Goodin, eds, *Free Movement: Ethical Issues in the Transnational Migration of People and of Money* (Penn State, 1992); William Rogers Brubaker, ed, *Immigration and the Politics of Citizenship in Europe and North America* (University Press of America, 1989); Yasemin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago, 1994); and Henry G. Schermers, et al, eds, *Free Movement of Persons in Europe: Legal Problems and Experiences* (Martinus Nijhoff, 1993).

6. Leading contributors are Lea Brilmayer, Douglas Laycock, and Gerald L. Neuman. See, for example, Lea Brilmayer, Carolene, *Conflicts, and the Fate of the “Inside Outsider”*, 134 U Pa L Rev 1291 (1986); Lea Brilmayer, *The William B. Lockhart Lecture: Consent, Contract, and Territory*, 74 Minn L Rev 1 (1989); Lea Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 Fla St U L Rev 389 (1987); Lea Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 Iowa L Rev 95 (1984); Lea Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 Mich L Rev 1315 (1981); Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 Yale L J 1277 (1989); Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 Mich L Rev 873 (1993); and, generally, Lea Brilmayer, *An Introduction to Jurisdiction in the American Federal System* (Michie, 1986). See also Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum L Rev 249 (1992); Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self Determination*, 135 U Pa L Rev 261 (1987).

majority rule. The second was based originally on the need to recover from the horrors of slavery and the Civil War and to protect the living victims—survivors, as we shall call them—from a repetition of past patterns of abuse.⁷

These two problems eventually became metaphors for other problems in U.S. history. The figure of the sojourner was generalized to encompass the believer in an alien creed, the member of a marginal group, and eventually the bearer of an alternative conception of human normality. The figure of the slave was similarly generalized to encompass other (but not all) victims of material and cultural oppression. Despite these transformations, however, each implicit paradigm of nondiscrimination has retained much of its original logic even as it has absorbed some elements of the other.

The following discussion will explore the sources of these logics, their different consequences, and the dynamics of their interaction and conflict. Our concern, however, will be less with the history of the ideas that motivate political actors than with the more or less deeply embedded patterns of thought that shape political arguments and the responses to them. These patterns of thought, derived from constitutional doctrine, are a source of familiar themes and progressions of our popular politics, but not exactly in the way that classical music might be shown to be a source of familiar themes and progressions in our popular music. Rather, my view is that the constitutional logics of protecting sojourners and of protecting survivors each has a tendency to undermine itself and, ultimately, to motivate the other. These self-subverting tendencies are concealed in popular discourse, and can be revealed by identifying the two logics and distinguishing between them.

This Article will not conclude, however, that the painful tensions in our own domestic liberalism can be overcome by either reconciling the two logics, or by choosing between them. I hope, rather, to sketch the beginning of a more transnational perspective on the conflict between the equality of *persons* and the equality of *peoples* in an interstate system based on liberal legalism. What follows then is an effort to redescribe the dynamics of U.S. constitutional development in terms that might make the emerging problems of world politics seem once again our own.

I. Sojourners and Citizens

We must begin by considering the very special context in which a constitutional right to nondiscrimination originated in this country. The world order in which the American colonies sought and won their independence was based upon a distinction between *international* law and *imperial* law. In the realm of public international law, sovereign states communed and negotiated as equals in an interstate society. This aspect of international law was supplanted within

7. We shall see, below, that this paradigm of survivorship placed the rights of indigenous peoples in jeopardy in post-Civil War America.

eighteenth century empires by an internal hierarchy of royal courts with jurisdiction over transnational claims arising from the diversity of cultural and political systems that might be ruled at any given moment by a common sovereign. The substance of imperial law was thus directly concerned with questions of private international law that often remained in the background of the relations of sovereign states that participated in the international legal order.⁸

By struggling for independence from England, the American colonies sought in effect to shift the context of their relations with Europe from the imperial to the international legal system, and to thereby extend the interstate community of sovereign states across the Atlantic. Recent scholarship suggests that the invention and development of American federalism may have been a redirection inward of these hopes and ideals as a result of disappointment with the promise of liberal internationalism in the years that followed American independence and the French Revolution.⁹

Whatever the merits of this particular thesis, it is clear that our federal system combined elements of preexisting international and imperial law into a new way of governing relations among the former colonies of a common monarch. Under the U.S. Constitution, the traditional role of *public international law*—a system of treaties—was to be replaced by the Constitution itself and federal legislation enacted under it.¹⁰ There remained, however, all of the issues that had been treated under the Empire as matters of *private international law*—especially the problems of jurisdiction and choice of law that arise in a transnational civil society consisting of many non-state actors with claims arising under foreign law.

The traditional subject matter of private international law concerns the way domestic courts should treat the conflicts between domestic and foreign law, and (at least since the seventeenth century) the prevailing view has been

8. See, for example, James Mayall, *Nationalism and International Society* ch 2 (Cambridge, 1990).

9. See Peter Onuf and Nicholas Onuf, *Federal Union, Modern World: The Law of Nations in an Age of Revolutions, 1776-1814* (Madison House, 1993). This study provides some evidence that the leaders of the American Revolution believed Vattel's claim that the eighteenth century community of autocratic states amounted to an interstate republic of equal sovereigns based on law and liberal ideas. See *id* at 16-19. In this account, a principal goal of American independence from the British Empire was to gain direct access to the world of international diplomacy, so as to negotiate treaties that would guarantee the former colonies security, promote trade, and bring about a more lawful world. *Id* at 95. The authors conclude that American federalism became necessary because the American revolutionaries who had gained their independence by "exploiting the old world balance of power" found that they could not negotiate advantageous mercantilist treaties with a Europe at war in the aftermath of the French Revolution. *Id* at 117, 161-62. The specifics of this argument are not entirely persuasive, but its broad contours are consistent with my claim below that American federalism is in large degree an involuntarily development of the view of international relations that prevailed at the time of American independence.

10. A prominent early example was the Northwest Ordinance of 1789.

that every sovereign state is free to decide on the basis of its own domestic and foreign policy how much diversity and uniformity there should be in the laws applied by its own domestic courts.¹¹ Within the newly formed United States, however, comity among jurisdictions was not merely a local judicial commitment, but a constitutional requirement.¹² This meant that apparent conflicts between federal or state laws,¹³ or conflicts among the laws of the various states,¹⁴ could raise questions of constitutional import. Resolving such questions called for a distinctive body of federal constitutional law on most of the traditional choice-of-law questions in the context of what Douglas Laycock calls "equal citizens of equal [and] territorial states."¹⁵ The development of a federal constitutional law to replace private international law was complicated by the fact that each U.S. citizen—initially subject to two equal sovereigns, state and federal—was also constitutionally entitled to live under federal protection as a domestic alien in other states. With a status between that of citizen and alien, this "inside-outsider" was to be legitimately subject to the scope of local state power "but *outside* the processes of political participation."¹⁶ This third basis of sovereignty over the individual, the sovereignty of *another* state, lies at the root of what I shall call the "sojourner" model of

11. The view that comity was a matter of positive law in each territorial forum was held by Justice Joseph Story, a member of the Marshall Court, whose *Commentaries on the Conflict of Laws* (Little, Brown, 2d ed 1841) should be read as a companion to his classic *Commentaries on the Constitution of the United States* (Little Brown, 2d ed 1851). For discussions of the importance of transnational law and its variable relation to intergovernmental agreements see Philip C. Jessup, *Transnational Law* (Yale, 1956); Albert A. Ehrenzweig, *Private International Law: A Comparative Treatise on American International Conflicts Law, Including the Law of Admiralty* (Oceana, 3d ed 1974); Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 Colum L Rev 1907 (1992); Anne-Marie Burley, *Toward an Age of Liberal Nations*, 33 Harv Intl L J 393 (1992); and Anne-Marie Burley and Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 Intl Org 41 (1993). For a discussion of transnational public law see Koh, 100 Yale L J at 2350-75 (cited in note 4).

12. US Const, Art IV, §§ 1-2.

13. See *McCulloch v Maryland*, 17 US (4 Wheat) 316 (1819).

14. If, for example, there was a conflict between the laws of state A and state B on enforcing some aspect of slavery, it was now in part a federal question when and whether the courts in A were obliged to apply the laws of B, how far they were free to reinterpret those laws in a way that might be subsequently binding in B, and how far a distinctive body of federal law might preempt both. In practice this federal question was often decided in state courts. For an extensive recent discussion of the role of interstate comity in the development of American slavery see Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (North Carolina, 1981). See also Robert Meister, *The Logic and Legacy of Dred Scott: Marshall, Taney, and the Sublimation of Republican Thought*, 3 Stud Am Pol Dev 199 (1989).

15. Laycock, 92 Colum L Rev at 250-51 (cited in note 6). See also Robert H. Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution*, 45 Colum L Rev 1 (1945).

16. See Brilmayer, 134 U Pa L Rev at 1293 (cited in note 6).

nondiscrimination.

What did it mean for a citizen of one state to live in another under federal protection? In answering this question, the pre-Civil War Supreme Court was careful to preserve the democratic power of the local majorities in each state to rule in their own interests. For this reason federalism could not, as a general matter, require the extraterritorial enforcement of the laws of one's own state when one resided elsewhere;¹⁷ neither could federalism prevent the states from denying equal rights to their own citizens.¹⁸ Federalism could, however, bar the local majority from imposing any legal disadvantage on out-of-state U.S. citizens that the local majority did not also impose on itself. Under this model of nondiscrimination the local majority would become the virtual representative of *some* minorities—those identified with a federally recognized claim to statehood elsewhere.

These specially protected minorities were not to be confused with the *minority* as described in democratic theory. Within the Madisonian theory of democracy on which the U.S. Constitution was based, the minority, as such, did not require special constitutional protection. Its members were identified only by the process by which the political majority itself is constituted at any given moment.¹⁹ These internal losers in the democratic process could be legitimately bound by laws that disadvantaged them, unless there was a conceded violation of the natural rights on which the state constitutions were based.²⁰ In addition to asserting the legally unenforceable natural rights that they shared with the local minority, members of the interstate diaspora could claim a right under the U.S. Constitution to be treated as well as the local majority treats itself.²¹

This idea marks a striking departure from the natural rights tradition that grounds the legitimate rule of one part of the population over others on a baseline of substantive moral rights that are held to be both natural and universal. In our dominant constitutional tradition originating with Marshall,

17. The exceptions were generally matters that had been fully adjudicated elsewhere. This was the meaning of the "full faith and credit" clause. US Const, Art IV, § 1. See Brilmayer, 70 Iowa L Rev at 95-97 (cited in note 6).

18. See John Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 Yale L J 1385, 1397-1433 (1992).

19. This contrasts with the Warren-era conception of permanent minorities as "discrete and insular" groups excluded from all possible majority coalitions. On this point see Ely's use of the *Carolene Products* footnote to interpret the jurisprudence of the Warren Court. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 75-77 (Harvard, 1980). For critical comments see Brilmayer, 134 U Pa L Rev at 1291 (cited in note 6).

20. See Sylvia Snowiss, *Judicial Review and the Law of the Constitution* ch 4 (Yale, 1990).

21. See, for example, Harrison, 101 Yale L J at 1398 (cited in note 18). There is also, however, a countertradition of constitutional interpretation that argues that natural rights were constitutionalized through the privileges and/or immunities clauses of the Constitution. See, for example, Justice Bushrod Washington's famous dictum on this point in *Corfield v Coryell*, 6 F Cas 546 (CCED Pa 1823) (No 3230).

the baseline is neither natural nor universal; rather, it is set by the level of beneficial entitlement that the majority in each sovereign state confers upon itself through positive law. Once the substantive baseline has been set by state law, the Comity Clause of the Constitution²² requires that the "privileges and immunities" of state citizenship (civil, but not political rights) be conferred on out-of-state U.S. citizens. The principle of interstate comity is thus the source of the tendency in American constitutional law to replace a substantive notion of directly enforceable natural rights with an equality-based notion of nondiscrimination.²³

Before the Civil War, this constitutional right to nondiscrimination was essentially limited to U.S. citizens living out-of-state. The claim that the local majority cannot legitimately discriminate against them *in a particular state* was a federally recognized consequence of their rights as citizens of *another* state where they could be legitimately subject to majority rule in the strong Madisonian sense. Federally protected constitutional rights were not rooted in the natural rights of individuals, but were rather the traces of one's own *state's* equal and alternative claim to sovereignty in the interstate system.²⁴ This idea is John Marshall's great contribution to world political thought.

Within Marshall's conceptual framework, the fundamental limitation of our original Constitution lay in its treatment of persons who were *stateless* sojourners. Such persons were subject to the law of any state in which they lived, and yet were outside the protections of the federal Constitution because they could not claim the rights of a people sovereign elsewhere. Three groups fell into this category in different ways, and to differing degrees.

The first group was legally resident aliens. They had limited rights as persons to live in the United States under the protection of its laws, but were not entitled to nondiscrimination with respect to the privileges and immunities of state citizens. As John Harrison puts it:

[C]itizens had rights that aliens, who were persons but not citizens, did not. Most importantly, aliens generally were not permitted to own real property except as specifically provided by state law. Indeed, the classic way of explaining the operation of the Comity Clause was to say that it would relieve visiting Americans of the disabilities of aliens and thus allow them to own real estate.²⁵

Under the Marshallian scheme, aliens would become entitled to nondiscrimina-

22. "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." US Const, Art IV, § 2.

23. This is the central thesis of Harrison, 100 Yale L J 1385 (cited in note 18).

24. See Brilmayer, 134 U Pa L Rev 1291 (cited in note 6). For a provocative discussion of "the possible uses of democratic theory in the interstate context" see *id* at 1298-1303. For a comprehensive view of the terrain see Laycock, 92 Colum L Rev 249 (cited in note 6).

25. Harrison, 101 Yale L J at 1442 (cited in note 18).

tion only if they were naturalized. The constitutional text itself does not expressly deny the states power to naturalize foreigners in the event that Congress failed to legislate a uniform rule. In 1817, however, the Marshall Court determined that the federal power of naturalization was preemptive,²⁶ thereby allowing Congress to expand the category of constitutionally protected sojourners to include naturalized federal citizens.

A second category of stateless residents was the descendants of the indigenous population of every state at the time of its white settlement. The treatment of such persons as dependent sovereign nations²⁷ was originally thought necessary to legitimate U.S. acquisition of their former territories,²⁸ and eventually became grounds for denying them birthright citizenship in the United States after the Civil War. Yet the theory of tribal sovereignty was never considered to be strong enough to support a claim to foreign citizenship, much less a claim to separate statehood, within the federal framework.²⁹ One can only speculate on the effect on U.S. Indian Law if tribally-identified Americans had acquired protection under international law. As a matter of fact, the tribal remnants that came to inhabit many states were frequently treated as *denizens* (a status in traditional English law falling between citizenship and alienage) until 1924, when all native-born Americans descended from indigenous tribes were *naturalized* by act of Congress. Almost a third of those covered by this Act had not previously been considered to be full American citizens.³⁰

The category of statelessness also covered the descendants of Africans who entered the country as slaves.³¹ The great antebellum constitutional scholar, John Codman Hurd, argued that Negroes had originally entered American territory not as chattel under local law, but rather as stateless persons who lacked standing in imperial courts to assert extraterritorial claims against those

26. *Chirac v Chirac*, 15 US (2 Wheat) 259, 269 (1817).

27. For Marshall's view of the sovereign status of indigenous peoples see *Cherokee Nation v Georgia*, 30 US (5 Pet) 1, 15-17 (1831).

28. The legitimacy of British (and later United States) title to its North American territory was always a troubling matter. For a frank recognition of the anomalies see Story, *Commentaries on the Constitution* ch 1 (cited in note 11). For the theoretical rationale of conquest see Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford, 1990).

29. Through much of U.S. history, opportunity for tribally identified individuals to acquire U.S. citizenship was determined by the treaties and statutes governing state and federal relations with their tribes. For a comprehensive discussion of recent cases and developments see Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U Chi L Rev 671 (1989). See also Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 Cardozo L Rev 959 (1991) (discussing issues of sovereignty in the context of tribal autonomy).

30. See James H. Kettner, *The Development of American Citizenship, 1608-1870* 287-300 (North Carolina, 1978).

31. For a discussion of the legal difficulties in using "denizenship" to describe the status of free Negroes in slave states before the Civil War see *id* at 320-22.

of slave-ship masters.³² Although he specifically mentions the existence of customary slavery among the African tribes, Hurd does not rest his argument on the comity owed to sovereign African states that recognized slavery. Neither does he argue that statelessness, as such, is what made Africans subject to enslavement when they arrived on these shores.³³ Rather, Hurd's point seems to be that American colonists might have reasonably *presumed* that Africans were *already* slaves at the time of their original purchase by Westerners, and that there was no recognized body of African positive law under which freshly enslaved Africans arriving in North America could claim to have been stolen property that may not be legally resold.³⁴ This would have eliminated the need for Hurd to ground North American slavery on either purchase or conquest—the trick could be turned by the extension of comity to the judicial notice that Portuguese or Dutch law took of repugnant local customs in Africa.

For Hurd, slavery posed legal and jurisdictional problems very similar to those posed by polygamy (or other culturally "abhorrent" practices) in a multicultural world.³⁵ Like today's multiculturalists, Hurd believed that the alternative to giving domestic legal recognition to barbaric foreign practices is a specious universalism that treats one's own particular customs as requirements of natural law. Legal positivism allowed him to ground transnational law on a respect for cultural diversity without committing him to moral approval of practices such as slavery. Hurd could thus be antislavery in a sense, while viewing the compromise between North and South as rooted in fundamental legal principles. Hurd's treatise thus provides the most coherent (and hence most troubling) account of how hereditary slavery could continue to exist in places where there is no recognized legal power of one person to

32. John Codman Hurd, 1 *The Law of Freedom and Bondage in the United States* §§ 163-68 (Negro Universities, 1968) (original publication Little, Brown, 1858). For a general discussion, see Meister, 3 *Stud Am Pol Dev* at 234-39 (cited in note 14). It is worth taking the trouble to work out Hurd's argument in some detail. His precise claim is that under imperial law it was a matter of local discretion whether to presume the validity of the original sale of Africans to the Portuguese and Dutch slavers, a point that was developed in the administration of formerly Portuguese and Dutch colonies subsequently acquired by Britain. See Hurd, 1 *The Law of Freedom and Bondage* at §§ 165-66, 170, 243 n 1, 286.

33. See Hurd, 1 *The Law of Freedom and Bondage* at § 243 n 1 (cited in note 32).

34. See *id.* at §§ 242-44.

35. Kurt Lash notes that beginning with a speech by Charles Sumner in 1853, the issues of slavery and polygamy were regarded as "twins"; that the Mormon-dominated government of Utah became pro-slavery before the Civil War in order to identify its cause with that of the South; that Lincoln himself spoke to the relation between the two issues in 1857; and that the antipolygamy law could only be passed over Democratic opposition after the outset of the Civil War. Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 *Nw U L Rev* 1106, 1125-26 nn 83, 89 (1994). For a discussion of the reasoning of *Dred Scott* as applied to the question of polygamy see Meister, 3 *Stud Am Pol Dev* at 242-44 (cited in note 14).

originally enslave another.³⁶ His answer rests on the notion of comity as a core principle of transnational private law; it also hinges, however, on his view that the principles of comity adopted in each forum are a matter of local positive law and thus can vary from state to state. In resting the presence of slaves here on the presumed legitimacy of the power to enslave elsewhere, Hurd sought to explain not merely how slavery could legally exist in places where it was regarded as a violation of natural law, but also how it could exist in *some* such places and not in others. His treatise was thus an indirect answer to Lincoln's "house divided" speech,³⁷ and also to Taney's unfounded assumption in *Dred Scott*³⁸ that to exist anywhere in the United States slavery must be recognized everywhere in the United States.

The continuation of hereditary slavery under the U.S. Constitution ultimately rested, according to Hurd, on the sublimation of these traditional questions of private international law into the jurisprudence of federalism.³⁹ He did not, however, see this as an anomaly in our constitutional development, but as part of its essential character. According to Hurd, the historical role of the U.S. Supreme Court had been to develop a substantive federal law based on the nondiscretionary application of the principle of sovereign coequality of states that had been the basis of private international law under the British Empire.⁴⁰

Hurd believed that the 1856 case of *Dred Scott* advanced this project by denying both Congress and free states the sovereign power to grant African-Americans federally recognized state citizenship that would have entitled them to nondiscrimination as sojourners elsewhere under the "privileges and immunities" clause of Article IV of the Constitution.⁴¹ There had been, for a time, considerable variation among the states (and some vacillation by them)⁴² on the question of whether manumission carried with it naturalization, as it did in Roman law.⁴³ Also in question was whether free-born Negroes had become citizens in the states of their birth on the same basis as whites and hence were

36. For a comprehensive treatment of the inadequacy of other explanations see Jonathan A. Bush, *Free to Enslave: The Foundations of Colonial American Slave Law*, 5 Yale J L & Human 417 (1993).

37. Abraham Lincoln, *A House Divided: Speech Delivered at Springfield, Illinois, at the Close of the Republican State Convention, June 16, 1858*, in Roy P. Basler, ed, *Abraham Lincoln: His Speeches and Writings* 372 (World, 1946).

38. *Dred Scott v Sandford*, 60 US (19 How) 393 (1856).

39. Hurd, 1 *The Law of Freedom and Bondage* chs 2, 7-16, especially §§ 502-23 (cited in note 32).

40. *Id* at chs 15-16.

41. See, for example, *id* at §§ 371-72, ch 16.

42. Compare *Rachael v Walker*, 4 Mo 350 (1836) and *Scott v Emerson*, 15 Mo 576 (1852).

43. The most illuminating discussions of the conceptual relations between emancipation and rebirth are by Orlando Patterson. See especially, Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Harvard, 1982), and Orlando Patterson, *Freedom: Volume I: Freedom in the Making of Western Culture* (Basic Books, 1991).

entitled to federal protection as sojourners in other states.

At a federal level these issues were resolved with apparent finality when the Supreme Court decided in *Dred Scott* that the Constitution must deny both Congress and free states the sovereign power to grant federally recognized state citizenship to African-Americans.⁴⁴ The constitutional right to nondiscrimination, according to the Taney Court, was rooted in the constitutional equality of states—and as long as this meant the constitutional equality of slave and free states, a free Negro could not be a federally recognized citizen of any state in which he or she might reside. If a free state could in principle create rights in a Negro American that would entitle him or her to come under federal jurisdiction in another state, then any Negro *asserting* such a claim would have a procedural right to have a federal court determine whether it had jurisdiction. Such a conclusion would in the long run have made the summary enforcement of fugitive slave laws (and ultimately of slave codes) a practical impossibility.⁴⁵

The kernel of truth in the *Dred Scott* opinion was that Marshallian federalism could only recognize rights in the interstate diaspora that were traceable to the federally recognized sovereignty of a *people*. In the fugitive slave cases the Court had already determined that the interstate diaspora of slaveholders would be federally protected in the exercise of its state-created rights. *Dred Scott* raised the question of whether parallel claims could be made on behalf of an interstate diaspora of Negroes who asserted their freedom through the effect of state liberty laws or equivalent federal legislation governing the territories. Giving the federal courts jurisdiction over such claims would have undermined the scheme of federal protection for slaveholders; but, within the framework of Marshallian federalism, this was not enough to justify the asymmetrical treatment of the rights conferred under Southern property laws and Northern liberty laws. Because he could not argue that slave and free

44. Under *Dred Scott* slaves could still be freed by the operation of state law in the sense that the rights of the master were no longer enforceable, but such private manumission was not to be construed as an act of naturalization. See *Dred Scott*, 60 US at 419.

45. Taney's legal point was in some ways a straightforward extension of that part of the reasoning of Justice Story in the fugitive slave case of *Prigg v Pennsylvania*, 41 US (16 Pet) 536 (1842), which denied fugitive slaves due process under the kidnapping laws of the state in which he or she was captured on grounds of federal constitutional supremacy. See *id* at 621-24. Taney, as he indicates in his concurring opinion, would have gone further in this direction than Story, *id* at 627 (Taney concurring), and did so in his opinion in *Dred Scott*.

Similar issues could arise today regarding the summary deportation of persons alleged to have entered the United States illegally. To what extent, for example, could state-created claims to due process undermine the practical ability of the U.S. government to control its own borders by deporting persons without a full judicial hearing of their immigration claims? This issue may become more pressing as federal immigration laws are modified to further limit the procedural rights of persons who may be subject to deportation or *refoulement*. See, for example, *Sale v Haitian Centers Council, Inc.*, 113 S Ct 2549, 2567 (1993) (Blackmun dissenting).

states were unequal in their power to confer individual rights, Taney was constrained to argue that blacks and whites were unequal in their standing to assert the sovereignty of a people for purposes of federal protection.⁴⁶

To support such an argument, Taney asserted that no black—free or slave—had ever been part of a people the sovereignty of which the United States was bound to recognize, and that neither Congress nor the states had the power to “naturalize” persons in this condition.⁴⁷ In Taney’s view, naturalization involving recognized transfers of allegiance under international law was simply an adjunct to the federal power in foreign affairs.⁴⁸ Accordingly, naturalized persons would be treated as if they had been born in the United States under the full protection of its laws. Taney’s conceptual leap was to assume that persons actually born in the United States without the protection of its laws must be constitutionally ineligible for naturalization. Under the regime established by *Dred Scott*, free African-Americans could *never* have become U.S. citizens through either naturalization or birth because they were not eligible for admission to the people who created and possessed the Constitution.⁴⁹ This reasoning was historically flawed and morally embarrassing, as Hurd well knew.⁵⁰

EQUALITY AS SOVEREIGNTY

With all its flaws, however, Taney’s reasoning in *Dred Scott* was based on a view of the principles of 1776 that has many adherents today. This is the view that constitutional government is essentially an alternative to foreign domination, and that it expresses the collective right of a sovereign people to self-determination. Unlike other heirs to Jefferson who stress the tension between majority rule and individual rights, Taney focused on the relation between the state and the nation. His premise was that, before imposing majority rule on individuals, our state and federal constitutions were first created by sovereign peoples who decided thereafter to impose limitations on the powers of the governments thus created.⁵¹ Liberalism, according to Taney, might define the relation of ruler and ruled within a people, but nationalism (in this case ethno-nationalism) would

46. *Dred Scott*, 60 US at 404-06.

47. *Id.* at 411-12, 417.

48. *Id.* at 417.

49. This may have been doctrinal overkill; Taney could have reached the same result by arguing that, even if naturalized, the descendants of slaves were ineligible for federal constitutional protection.

50. Hurd has many specific criticisms of *Dred Scott* throughout his treatise, some of which are to be found in 1 *Law of Freedom and Bondage* at 558-70 (cited in note 32).

51. Lincoln expressed the same premise in his July 4, 1861, speech to Congress, asking for endorsement of his use of the War Power to restore the Union. See James G. Randall, *Constitutional Problems Under Lincoln* 51-59 (Peter Smith, 1963). For a recent defense of this premise against simple majoritarianism, on the one hand, and “rights foundationalism” on the other, see Bruce Ackerman, 1 *We the People: Foundations* (Harvard, 1991).

create that people and define its boundaries. Membership in the national people was, according to Taney, essentially a matter of descent, and being of the right descent was a constitutional precondition for birthright citizenship.⁵²

The appeal of grounding nondiscrimination everywhere on the claim of a *people* to sovereignty somewhere is most clearly apparent in the thought of Woodrow Wilson, that most idealistic exporter of American ideals to the world. His internationalism describes a system for enforcing the sovereign coequality of self-determining *peoples*. "[A]ll peoples and nationalities," he said, "[have a] right to live on equal terms of liberty and safety with one another, whether they be strong or weak."⁵³ From an American standpoint, Wilsonian internationalism amounts to an extension of our pre-Civil War constitutional logic in order to create a new world order out of the breakup of multinational empires.⁵⁴

The connections between Wilson's internationalism and his views on pre-Civil War constitutional history become clear when we consider his background. Wilson was a child during the Civil War, grew up in the South during Reconstruction, and developed his political views as a leading scholar of American constitutional development in the antebellum period.⁵⁵ Among the books he

52. Taney argues that negroes "whose ancestors were imported into this country, and sold as slaves" can never be naturalized as U.S. citizens, even if they are free under state law. One strand of his argument is that the laws permitting slaves to be imported are inconsistent with treating such persons as immigrants, and that the power to naturalize "is, by the well-understood meaning of the word, confined to persons born in a foreign country, under a foreign Government." See *Dred Scott*, 60 US at 403, 411, 417-27. A corollary of Taney's view was that any laws passed by the states for the apparent benefit of freed slaves were, like the laws of slavery itself, enacted upon "the interest and convenience of the white race." See *id.* at 415. Compare Brubaker, *Citizenship and Nationhood* (cited in note 3).

53. Woodrow Wilson, *The Fourteen Points*, in E. David Cronon, ed, *The Political Thought of Woodrow Wilson* 438, 445 (Bobbs-Merrill, 1965) (text of Wilson's January 8, 1918 address to Congress).

54. Wilson's basic principle—a corollary to Jeffersonian self-determination—is that the relative size or strength of a people should not affect its right to self-determination, and that a sovereign people should not be expected to internalize the cost of defending its own borders. This view was, however, supplemented by a requirement that existing borders, however arbitrary or illegitimate, be preserved under the principle of *uti possidetis*. Wilsonian self-determination was thus not to be a basis for revising or violating whatever international borders might exist. See T. M. Franck, *Post-Modern Tribalism and the Right to Secession*, in C. Brolmann, et al, eds, *Peoples and Minorities in International Law* 3 (Martinus Nijhoff, 1993); and R. Higgins, *Comment*, in Brolmann, et al, ed, *Peoples and Minorities* 29. Akhil Reed Amar develops a similar argument about American constitutional development in *Some New World Lessons for the Old World*, 58 U Chi L Rev 483 (1991).

55. See, for example, Woodrow Wilson, *Division and Reunion, 1829-1889* (Longmans, Green, 1900); and Woodrow Wilson, 4-5 *A History of the American People* (Harper Bros, 1902). The possibility of Northern secession was in fact an option considered by Northern Abolitionists before the Civil War and reconsidered by some Unionists in response to *Dred Scott*. See Phillip S. Paludan, *A Covenant With Death: The Constitution, Law, and Equality in the Civil War Era* 79-84 (Illinois, 1975). This perspective is echoed in the

consulted on this subject during his Princeton years was the treatise by John Codman Hurd discussed above.⁵⁶

Wilson's view of the protection of minority rights in the international system was essentially a variant of Marshallian federalism as described by Hurd. Here, as we have seen, the local majority in a state became the virtual representative of resident out-of-state minorities. This principle was to be enforced in the various states by the federal courts under their diversity jurisdiction. In Wilsonian internationalism, however, the main mechanisms of enforcement would be political rather than judicial.⁵⁷ Therefore, the principle of virtual representation would have to be reversed. Instead of saying that foreign minorities were to be treated as well as the local majority treated itself, the implicit standard would be the treatment that foreign majorities accorded to their own minorities. If all nation-states functioned in world politics as the virtual representatives of their own peoples in diaspora, then each national state would protect its permanent minorities out of fear that members of its own people might suffer retaliation while living as minorities elsewhere. Sovereign peoples with no diaspora were presumably free of this constraint. But, as Wilson conceived it, the postimperial relation between national and international politics was in effect a kind of hostage arrangement based on the tacit acknowledgment that the peoples of the world were already dispersed, and that their potential ingathering was a fiction needed to protect their rights wherever they might be.⁵⁸

recent work of Allen Buchanan, who argues that it is legitimate to secede from a union that can only be preserved at the expense of liberal purity. See Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* 34-35 (Westview, 1991).

56. Arthur S. Link, ed, 11 *The Papers of Woodrow Wilson* 347 (Princeton, 1971).

57. One way to conceive this alternative ideal type of interstate regime would be to imagine the international system that might have resulted if the Confederacy had successfully negotiated its secession from the federal regime conceived in *Dred Scott*. Between the two newly independent successor states—the U.S.A. and the C.S.A.—there would have been no federal citizenship to protect an individual from discrimination when living in the other country, and no federal limitation on his own country's ability to retaliate. But the functions of the federal courts under the *Dred Scott* regime (and the Fourteenth Amendment system that succeeded it) would be replaced by the equal power of each sovereign people to threaten national minorities in its midst in order to protect its own co-nationals living elsewhere. This power would remain effectively equal only on the assumption that all states were somehow barred from attacks across borders in order to protect their respective peoples. What would have constituted such a bar in a partitioned United States? In the optimistic view of Southern secessionists, described at length by Wilson, it would have been bonds of culture, a common history, treaties, the rules of international law, and the threat of embargo by the British navy if the North attacked the South.

Wilson's *History of the American People*, devotes an entire section to what might have been—the political culture of the Confederacy and the contents of its constitution. See Wilson, 4 *History of the American People* ch 5 (cited in note 55). It is particularly interesting that the federal power within the Confederacy was stronger, and states' rights weaker, than in the United States. Id at 284. See also Charles Robert Lee, Jr., *The Confederate Constitutions* 145-49 (North Carolina, 1963).

58. For a discussion of the implementation of these ideas in the inter-war period see

As a member of a sovereign people, one would be entitled not merely to rule as a citizen somewhere, but to live elsewhere as a protected minority. The distinction between protected (state-possessing) and unprotected (non-state-possessing) internal minorities thus became the basis in domestic politics for the Wilsonian international order. This meant that those asserting protected minority status anywhere *had* to imagine themselves as hegemonic somewhere else. To their current oppressors they thus become hypothetical threats (people who could do the same to us), thereby allowing continuing oppression to be rationalized on the grounds of self-defense. This is always a danger in asserting otherness as a counterhegemonic claim. Within a Wilsonian framework, however, the danger is unavoidable—the sovereign right of each dispersed people to legislate its own conception of normality at home is the main basis of its claim not to be judged by the alien standards of its territorial rulers elsewhere.

We might call this claim “Cultural Wilsonianism”—the view that *difference* is a trace of sovereignty in a diasporic world. Although Cultural Wilsonianism can support liberal pluralism in many existing states, it rests on the presumed right of an ingathered people to exclude and dominate when it can do so without foreign interference. Culture wars are virtually inevitable when claims to equality must always be articulated as demands for sovereignty.

Perhaps the most glaring limitation of Wilson’s vision of world order was that a minority that was not sovereign anywhere would be legally subject to discrimination everywhere without any protection from the international system.⁵⁹ Subnational groups—groups with no state of their own—could thus be deported, expelled, or forcibly removed to other territories (even those still living in their traditional homelands, such as the Kurds and Armenians). And stateless groups in diaspora, such as Jews and African-Americans, could be denied ordinary civil and political rights in any country with little or no protection from the international system. Although these ideas were an important source of Nazism in Germany and apartheid in South Africa—both products of the interwar period—they were not unusual. In many societies during this period, intergroup conflicts were addressed by creating new categories of internal foreigners—domestic aliens whose legal immunities and privileges were at best temporary and revocable.⁶⁰

Inis L. Claude, *National Minorities: An International Problem* (Harvard, 1955); Charles S. Maier, *Unsafe Haven*, 207 *New Republic* 20 (Oct 12, 1992).

59. If the civil rights of a person in any state would depend upon whether he or she was part of a people that had a state of its own, then peoples without sovereignty could be consigned to the status of denizens wherever they were allowed to live on the sufferance of the local majority. This was the future as domestic aliens that John Codman Hurd foresaw for detribalized Indians and freed slaves if the U.S. Civil War had not occurred in the aftermath of *Dred Scott*. See Hurd, 1 *The Law of Freedom and Bondage* chs 11-13 especially at §§ 434, 445 (cited in note 32); John Codman Hurd, 2 *The Law of Freedom and Bondage in the United States* § 195 n 1 (Negro Universities, 1968) (original publication Little, Brown, 1858). See also Kettner, *The Development of American Citizenship* at 313, 319-20 (cited in note 30).

60: Jews were widely regarded as the minority to end all minorities in the Wilsonian

In a Wilsonian world, cultural minorities thus have little choice but to demand political autonomy whenever the states in which they live give up the pretense of multiculturalism. In the words of one scholar, "[t]he effort of the state to become a nation aroused the determination of the nation to become a state."⁶¹ The underlying problem is that the demand for cultural autonomy is iterative; any national group asserting it should be prepared to confront a parallel demand asserted by the subnational groups that it comes to rule.⁶² But if the point of demanding separate statehood is to express the cultural aspirations of a national people, then abstract consistency cannot *require* a national people to allow its achieved aspirations to be frustrated by the presence of cultural minorities in its midst. It follows that a national people does not violate Wilsonian principles by resisting (at least up to a point) attempts at self-help by separatist minority groups that threaten to strand members of the dominant culture. Wilsonian internationalism may have a bias against the use of international war for purposes of national (or ethnic) unification, but it has no bias against the use of force to preserve national unity against a separatist threat.⁶³

These intrinsic difficulties are apparent in Wilson's effort to construct a basis for world peace through the application of democratic theory to the interstate context. When he asserted the right of all peoples to self-government, Wilson understood that any state created to allow a previously subjugated minority to rule as a majority would almost inevitably have permanent minorities of its own. Yet he saw in the relations among such states a system for protecting internationally recognized internal minorities from discrimination. In such a system the power to threaten internal minorities without foreign interference was the principal mechanism, implicitly legitimate, by which each sovereign people could

system. In virtually every new state founded on the national principle, there were new outbreaks of anti-Semitism, rooted in the need to ground citizenship on some exclusive national identity. As Hannah Arendt points out, the treatment of the Jews was merely a paradigmatic case of the problems of any subnational group that had no sovereign homeland—they were the quintessential non-deportable group to whom almost anything could be done during the interwar period. See Hannah Arendt, *The Origins of Totalitarianism* ch 9 (Harcourt Brace, 1973).

61. Claude, *National Minorities* at 9 (cited in note 58).

62. For a discussion of this point see Michael Walzer, *Nation and Universe*, in Grethe B. Peterson, ed, 11 *The Tanner Lectures on Human Values* 507 (Utah, 1990). See also Michael Walzer, *Between Nation and World*, 328 *Economist* 49 (September 11, 1993) (special supplement, "The Future Surveyed"). Compare Amitai Etzioni, *The Evils of Self-Determination*, 89 *Foreign Pol* 21 (Winter 1992-93).

63. The philosopher Bernard Williams explains this in Wilsonian terms:

What the breakaway group claimed, after all, was the right to set up a culturally homogeneous state. This may commit the breakaway state to accepting the right of some minority to do the same thing, if they can; but if the minority cannot do that, it does not necessarily commit the new state to respect their rights to cultural self-expression, in the middle of what was precisely intended to be a culturally unitary state.

Bernard Williams, *Left-Wing Wittgenstein, Right-Wing Marx*, 1 *Common Knowledge* 33, 41-42 (Spring 1992).

protect oppressed co-nationals living elsewhere. The explicitly illegitimate mechanism, by contrast, was unilateral military intervention across borders. To enforce this contrast there had to be a credible multilateral commitment to protect weak states from military threats by their stronger neighbors. Otherwise, sovereign peoples, great and small, would not have an equal right to retaliate against internal minorities when co-nationals were endangered elsewhere.

A major goal of Wilson's interstate system was to contain civil wars that might develop into international wars. He thus regarded it as especially important that treaties protecting the rights of minorities within states be enforceable by multilateral action rather than direct military intervention by kin-states.⁶⁴ In a Wilsonian world in which international military interventions would be prohibited by agreement of the great powers, civil strife on both sides of an international border was to become the dominant and permissible form of permanent conflict.⁶⁵ This was the price (if not the meaning) of peace.

II. Survival and Recovery

Wilsonian internationalism is not, however, the only strand of U.S. constitutional theory that has implications for world politics. We have acquired other, perhaps deeper, national ideals as a result of our own experience of the Civil War. For us, the demand for political equality is no longer merely the trace of a claim to sovereignty by an autonomous people; we also think that sovereignty itself is valuable mainly as a means to achieve the kind of equality that can come from reuniting a divided people.

Since Lincoln's Gettysburg Address, America has stood for the possibility that a living constitution can be persuasively reinterpreted as a result of national trauma.⁶⁶ "Posttraumatic" constitutions, as we may call them, can take a variety of forms: Some are repressive, some are punitive, and some are based on a widespread denial of the past. Such a constitution will be liberal to the degree that it goes beyond victors' justice by foregrounding common survivorship as a bond uniting the victims and perpetrators of the historic atrocities that formed the nation. The forward-looking Lincoln (the Lincoln we remember) lifts the nation above the unendurable cycle of guilt and recrimination by imagining the

64. The preferred mechanisms for correcting excesses of popular sovereignty within the newly created states would be the further multiplication of states, the adjustment of borders with neighboring states, and the transfer of populations. Ethnic conflicts within states might then be superseded by international enforcement of the principle of nonaggression between them.

65. For a provocative reflection on the 'post-Cold War world see Hans Magnus Enzensberger, *Civil Wars: From L.A. to Bosnia* (New Press, 1993).

66. There has been a recent renewal of interest in the significance of Lincoln's Gettysburg Address in transforming American politics. See, for example, Garry Wills, *Lincoln at Gettysburg: The Words that Remade America* (Simon & Schuster, 1992). The view presented in this Article of the constitutional significance of Lincoln's stance on American history does not, to my knowledge, appear elsewhere in the literature.

United States as a nation in recovery from trauma in a way that anticipates the moral logic of today's personal recovery programs. Like a modern psychotherapist, Lincoln moves us from being unwilling perpetrators of evil to the recognition that we are all *victims*, to the common national identity of *survivors*.⁶⁷

The real Lincoln is, of course, a complex figure whose prewar views were tempered by political expediency, and whose postwar aspirations can only be inferred from his conduct during the last few weeks of his life.⁶⁸ There is, moreover, ample evidence that his war aims changed in the months before Gettysburg from the restoration of a *union* to the rebirth of a *nation*.⁶⁹ In structuring my argument around a rhetorical opposition between received Lincolnian and Wilsonian positions, I am admittedly exaggerating some features of the thought of Lincoln and Wilson and suppressing others. My Lincoln is in part a reflection of the image of slavery and the task of Reconstruction in the works of Robert Cover, Garry Wills, and Akhil Amar;⁷⁰ my Wilson is a reflection of the image of cultural self-determination in the works of Charles Taylor, Martha Minow, and many postmodern exponents of cultural politics.⁷¹ Put crudely, I am here using Lincoln and Wilson to stand for a distinction between a constitutional politics based on *identification* (with its attendant possibility of a national rebirth into a new identity) and a constitutional politics of *representation* (with its implication that pre-existing identities are fixed, or have become so and require recognition).⁷²

67. See, for example, Ellen Bass and Laura Davis, *The Courage to Heal: A Guide for Women Survivors of Child Sexual Abuse* (Harper Perennial, 1992). Compare Wendy Kaminer, *I'm Dysfunctional, You're Dysfunctional: The Recovery Movement and Other Self-Help Fashions* (Addison-Wesley, 1992).

68. The "Lincoln myth" and the debate over his true motives are well-discussed in J. David Greenstone, *The Lincoln Persuasion: Remaking American Liberalism* ch 1 (Princeton, 1993).

69. See William B. Hesseltine, *Lincoln's Plan of Reconstruction* 35-36 (Peter Smith, 1963); and James M. McPherson, *Abraham Lincoln and the Second American Revolution* viii and ch 4 (Oxford, 1990). See also Herman Belz, *Reconstructing the Union: Theory and Policy During the Civil War* (Cornell, 1969). A considerable amount of reconstruction was carried out in the Union-occupied portions of the Confederacy during the war (as well as in some of the border states that never seceded). The conditions imposed upon reconquered areas raised issues of constitutional significance for both sides. Sometimes these conditions were more, and sometimes less, stringent than might have been imposed once total victory was assured. See generally, Belz, *Reconstructing the Union*. See also, Eben Greenough Scott, *Reconstruction During the Civil War in the United States of America* (Houghton, Mifflin, 1895).

70. See Martha Minow, et al, eds, *Narrative, Violence, and the Law: The Essays of Robert Cover* (Michigan, 1992); Wills, *Lincoln at Gettysburg* (cited in note 66); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L J 1193 (1992); Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 Harv L Rev 124 (1992).

71. See Charles Taylor, *Multiculturalism and "The Politics of Recognition"* (Princeton, 1992); Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell, 1990).

72. These two divergent conceptions of American liberalism bear some relation to the

With this caveat I wish to describe a Lincolnian view of American constitutional development as one that foregrounds national trauma as a unifying experience, and that seeks to replace the moral logic of victim and perpetrator with the moral logic of common survivorship and collective rebirth. I am not prepared to argue that this Lincolnian view is ultimately less troubling than the Wilsonian alternative.

My point is rather that Lincoln's recasting of the Jeffersonian legacy—especially in the Gettysburg Address and the Second Inaugural Address—is different from Wilson's, and that it constitutes an important element in our constitutional tradition that is also relevant to world politics today. At Gettysburg, Lincoln introduced a note of subtle ambivalence into his concluding reprise of the Jeffersonian principle of popular self-determination (government of, by, and for the people) that was the basis of Southern secession. As he speaks, that very principle is threatening to kill a form of government dedicated to the achievement of equality as an aspirational goal. Americans, he declares, must rededicate themselves to the "unfinished work" of human equality so that Jeffersonian democracy "shall not perish from the earth."⁷³

It is Lincoln's sense of national survival and rebirth that empowers him at Gettysburg to reverse the order of ideas in Jefferson's Declaration of Independence. In a reborn United States, Lincoln suggests, liberty is no longer asserted as an inalienable right, but as a preconception (we were "conceived in Liberty"); just as important, the basic presupposition of natural rights theory—Jefferson's notion that "all men are created equal"—becomes for Lincoln a "proposition" to which "this nation" must "now" affirmatively rededicate itself.⁷⁴

Why us? Why now? Lincoln's implicit answer to these questions evokes the perspective of "the world," an international context in which our Civil War was already a notable event.⁷⁵ He had long believed that slavery "deprives our

nineteenth century differences between Whig/Republicans, on the one hand, and Jacksonian Democrats on the other, that are discussed in works such as Greenstone, *The Lincoln Persuasion* (cited in note 68) and Lawrence Fredrick Kohl, *The Politics of Individualism: Parties and the American Character in the Jacksonian Era* (Oxford, 1989). Unlike those writers, however, I do not base my interpretation on the cultural and ethical ramifications of the distinction between positive and negative liberty. Compare *Two Concepts of Liberty*, in Isaiah Berlin, *Four Essays on Liberty* 118 (Oxford, 1969). I agree, however, with Greenstone's general view that "although the central tenets of American liberalism are widely shared, they are interpreted in different ways. And these differences of interpretation may be of fundamental rather than secondary importance." J. David Greenstone, *Political Culture and American Political Development: Liberty, Union, and the Liberal Bipolarity*, 1 *Stud Am Pol Dev* 1, 28 (1986). For a particularly nuanced view of Lincoln's conception of liberty see McPherson, *Abraham Lincoln and the Second American Revolution* chs 3, 7 (cited in note 69).

73. See Abraham Lincoln, *Address Delivered at the Dedication of the Cemetery at Gettysburg November 19, 1863*, in Basler, ed, *Abraham Lincoln: His Speeches and Writings* 734 (cited in note 37).

74. See Lincoln, *Gettysburg Address* at 734 (cited in note 73).

75. *Id.*

republican example of its just influence in the world” which would ultimately inspire “all lovers of liberty everywhere” to embrace the egalitarian principles of our Declaration of Independence.⁷⁶ At Gettysburg, Lincoln implies that the commitment to human equality can and will survive the European defeats of 1848 and be reborn in the United States.⁷⁷ Our Civil War, he says, is really a *test* of whether “any nation so conceived and so dedicated, can long endure” in a counterrevolutionary world.⁷⁸

What is the moral logic of the perspective that I am choosing to call Lincolnian?⁷⁹ In the first instance, it essentially denies that the constitutional problem of the Civil War is how to fit the Negro into the framework of competing sovereigns on which our system is based. Such is the Southern (and Wilsonian) perspective on the conflict—a view that already concedes that partition could be a mutually agreeable alternative to the union of North and South, and that (on suitable terms) expulsion could be a plausible alternative to emancipation for the African-American. In the early 1850s, Lincoln, also, displayed an “inability to imagine a biracial future for America if the black race were free.”⁸⁰ He thus embraced for a time the plan of the American Colonization Society to resettle freed slaves in Africa.⁸¹ Fortunately for Lincoln’s future reputation, only one of his speeches on this subject survives, even though until his death he apparently viewed the colonization of emancipated slaves as a legitimate post-war outcome.⁸² The Lincoln we remember stands for the rejection of this view.

From this received Lincolnian perspective on the U.S. Civil War the problem is slavery, not sovereignty. Slavery is, moreover, a national problem—a problem for both North and South, for both black and white. The precise nature of that problem, however, is not necessarily to set things right for the individual victims of enslavement, but rather to help the entire nation recover from what pop psychologists might call its toxic guilt.⁸³

76. Abraham Lincoln, *Peoria Speech*, October 16, 1854, cited in Mark Neely, Jr., *The Last Best Hope of Earth: Abraham Lincoln and the Promise of America* 37-38 (Harvard, 1993).

77. This event had led many prominent refugees to immigrate to the United States. Lincoln was highly aware that the influx of immigrants had precipitated the crisis of the party system of the 1850s, although, as Tyler Anbinder points out, the bulk of the immigration from Germany in the 1850s was probably caused by potato blight rather than political defeat. See Tyler Anbinder, *Nativism and Slavery: The Northern Know Nothings and the Politics of the 1850s* 7-8 (Oxford, 1992).

78. See Lincoln, *Gettysburg Address* at 734 (cited in note 73).

79. Although I do not closely follow their interpretations of Lincoln, I am indebted to Wills, *Lincoln at Gettysburg* (cited in note 66) and Greenstone, *The Lincoln Persuasion* (cited in note 68). In revising this essay for publication I have benefited from McPherson, *Abraham Lincoln and the Second American Revolution* (cited in note 69).

80. Neely Jr., *The Last Best Hope* at 40 (cited in note 76). Neely’s discussion of this issue is quite perceptive. See *id.* at 34-42.

81. See Hesseltine, *Lincoln’s Plan of Reconstruction* at 91-92 (cited in note 69).

82. See *id.* at 91-94. For less conclusive, but more disturbing evidence see Belz, *Reconstructing the Union* at 282 (cited in note 69).

83. See, for example, John Bradshaw, *Healing the Shame that Binds You* (Health

For Lincoln himself, of course, the problem of redemption from national guilt was a secular version of the Pauline problem of enslavement to sin.⁸⁴ He said as much in his Second Inaugural Address, and in the Gettysburg Address he described the meaning of the Civil War—our new birth of freedom—as a rebirth from what St. Paul might have called our national enslavement to slavery.⁸⁵ Lincoln knew that abolitionists had also used this imagery and he appropriated it to represent our Civil War as one to free the Union from its own slavery, its own original sin.⁸⁶ Lincoln's Gettysburg Address became, in effect, our national survivor story, and his Second Inaugural Address became a national recovery program from the near-death experiences of slavery and the Civil War.

This was more than a rhetorical gesture. Lincoln succeeded in raising the U.S. Civil War to a higher moral plane than other wars over sectional self-determination by identifying the Union itself as the victim of slavery and the war as the Union's struggle for redemption and rebirth.⁸⁷ He believed that the

Communications, 1988); Charles L. Whitfield, *Healing the Child Within: Discovery and Recovery for Adult Children of Dysfunctional Families* (Health Communications, 1987).

84. Paul's conception of rebirth and immortality as freedom from our enslavement to sin is most fully explained in *Romans* 6. This idea is somewhat easier to grasp if we consider it to be a spiritual counterpart to the secular law of slavery and freedom in the Roman Empire. As Orlando Patterson points out, Paul's mission to the Gentiles was largely among the community of freed slaves who owed the expansion of their personal liberty to the growing sovereign liberty of the Emperor, Caesar Augustus, and his successors. Ordinary slaves who were redeemed or ransomed "for a price" would have been indentured to their redeemer until the lien could be repaid (This was the institution of the *postliminium*). They would be expected to glorify the master who freed them, and to become slaves to no other man. Patterson, *Freedom* at 331 (cited in note 43). Perhaps this is what Paul has in mind when he says, "whoever was called in the Lord as a slave is a freed person belonging to the Lord, just as whoever was free when called is a slave of Christ." *I Corinthians* 7:22.

In the present context we should note that, if the Old Testament Jews constitute the first "survivor story," the New Testament Church constitutes the first "recovery movement." Its "saving remnant" of recovered sinners conceived itself to be a spiritual community that transcended cultural divisions and political boundaries. Political survivorship, ever since, has generally been linked to broader claims of spiritual recovery. As vehicles of spiritual recovery, survivor stories are implicitly transcendental (a church), even when they also bear the weight of demands for territorial sovereignty (a state).

85. Abraham Lincoln, *Second Inaugural Address, March 4, 1865*, in Basler, ed, *Abraham Lincoln: His Speeches and Writings* 792-93 (cited in note 37). Orlando Patterson reminds us that Paul's Epistle to the Romans uses slavery as a metaphor for sin itself, and that Paul's theology of redemption tracks the logic of the Roman law of manumission. See Patterson, *Freedom* chs 18-19 (cited in note 43).

86. See Paludan, *A Covenant with Death* at 79-84 (cited in note 55). In fact, this imagery was the basis of the movement for Northern secessionism after *Dred Scott*.

87. As England's principal suppliers of cotton, the Confederate states hoped for military support from the foreign powers that depended on it. Their strategy was in some ways similar to that of Kuwait in gaining foreign support against Sadaam Hussein's effort to reunify Iraq through military action. Lincoln's decision to free the slaves, however, effectively eliminated whatever sentiment there was in England for interfering with his

reborn Union could itself become the survivor of slavery, and that the brutal cycle of victim and perpetrator could be finally broken. By asserting a moral basis of national renewal that transcended mere nationalism, Lincoln distinguished himself from Old World contemporaries, such as Bismarck and Cavour, who overcame both sectionalist and foreign claims to "reunify" their nations by means that were sometimes violent.⁸⁸

The Lincolnian idea of nondiscrimination as the identification of the entire nation with the historical victims of human rights abuse is the country's second important contribution to world political thought, rivaling John Marshall's discovery of a legal basis for nondiscrimination in the principles of interstate comity. Several important features of the Lincolnian survivor model of nondiscrimination are worth stressing as a contrast to the sojourner model, not all of which were realized by Lincoln himself.

The first point is, as we have seen, that the moral logic of survivorship operates through a mechanism of identification rather than representation. For Lincoln's survivor story to do its healing work, victims and perpetrators of past abuse must not regard themselves as different peoples for whom independence (or secession) is one plausible path to reconciliation. Rather, the perpetrator identifies with the victim so that the victim can identify with the perpetrator. When each successfully internalizes the other, the burden of guilt is shared. In a post-Reconstruction America, black and white, South and North, would cease to regard each other as victims and perpetrators; all would become *survivors* of slavery and of the war to end it.⁸⁹ The end of the story is the *unity* rather than the autonomy of victims and perpetrators. Lincoln's survivor story, however,

efforts to reunify the United States by force. For a brief account of the role of foreign recognition in the Confederate war plan see Stephen John Stedman, *The End of the American Civil War*, in Roy Licklider, ed, *Stopping the Killing: How Civil Wars End* 164, 177-78 (New York, 1993).

88. For a provocative comparison between Lincoln and such figures as Bismarck and Cavour, see Carl N. Degler, *One Among Many: The United States and National Unification* 89-119 in Gabor S. Boritt, ed, *Lincoln the War President* ch 4 (Oxford, 1992). For a historical treatment of Bismarck and Cavour see Otto Pflanze, *2 Bismarck and the Development of Germany* (Princeton, 1962); Denis Mack Smith, *Cavour* (Knopf, 1985); Massimo Salvadori, *Cavour and The Unification of Italy* (Van Nostrand, 1961).

89. The specific character of the slaves' experience is thus officially denied in a way that may reproduce some of the effects that we now associate with posttraumatic stress disorder, particularly depression, numbing of general responsiveness, anxiety, isolation, and hypervigilance. These symptoms are described in DSM-IV and discussed in many places. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, 4th ed 1994) (DSM-IV). For a comprehensive collection see John P. Wilson and Beverly Raphael, eds, *International Handbook of Traumatic Stress Syndromes* (Plenum, 1993). For a brief discussion see Tom Williams, *Diagnosis and Treatment of Survivor Guilt: The Bad Penny Syndrome*, in John P. Wilson, et al, eds, *Human Adaptation to Extreme Stress: From the Holocaust to Vietnam* 319 (Plenum 1988); and Kathy K. Swink and Antoinette E. Leveille, *From Victim to Survivor: A New Look at the Issues and Recovery Process for Adult Incest Survivors*, 8 *Women and Therapy* 119 (1986).

effectively blurs the distinction between uniting North and South and uniting black and white. This, as we shall see, is a problem that plagues his would-be successors to this day.

The second point is that the moral logic of Lincoln's survivor story puts former victims and former perpetrators on an equal moral footing so that they can survive together in the same place. To break the cycle of victimization, the historical victims of abuse are morally expected to dedicate themselves to the proposition that peace is victory enough.⁹⁰ Either party to the peace can then be equally accused of refighting the Civil War by returning to its former role of victim or perpetrator.

A third feature of Lincoln's story of national survival is that it expresses and, to a degree rewards, *ambivalence* about past victims, living and dead.⁹¹ This is different from the view of national recovery taken by such figures as Thaddeus Stevens and Charles Sumner, who thought of Reconstruction as a way to complete the conquest of the South by the North through a partial role reversal of blacks and whites.⁹² At Gettysburg, Lincoln honors "those who here gave their lives that that nation might live"⁹³ in words that have made the reborn nation consciously ambivalent about its near-death experience of slavery and Civil War.⁹⁴ For Lincoln the central point is that, together, we survived an experience that almost killed us, a theme to which he returns in his Second Inaugural Address in urging "malice toward none [and] charity for all."⁹⁵ This morally

90. The therapeutic advantages and limitations of the transition from victimhood to survival are an important dimension of the nonviolence of Gandhi and Martin Luther King. See Erik H. Erikson, *Gandhi's Truth: On the Origins of Militant Nonviolence* (W.W. Norton, 1969); M. K. Gandhi, *An Autobiography: The Story of My Experiments with Truth* (Jonathan Cape, 1966) (Mahadev Desai, trans).

91. Illuminating discussions of the pairing of slavery and death and emancipation and rebirth are contained in Patterson, *Slavery and Social Death* (cited in note 43) and Patterson, *Freedom* (cited in note 43).

92. See, for example, Hesseltine, *Lincoln's Plan of Reconstruction* at 76-77, 121-22, 136 (cited in note 69); Scott, *Reconstruction During the Civil War* at 268-72 (cited in note 69). For a broader account of the views of Stevens and Sumner see Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* 228-39 (Harper & Row, 1988).

93. Lincoln, *Gettysburg Address* at 734 (cited in note 73).

94. "The survivor is one who has come into contact with death in some bodily or psychic fashion and remained alive." Robert J. Lifton, *From Hiroshima to the Nazi Doctors: The Evolution of Psychoformative Approaches to Understanding Traumatic Stress Syndromes*, in Wilson and Raphael, eds, *International Handbook* 11, 16 (cited in note 89).

To identify oneself as a survivor is (from both a psychoanalytic and a moral point of view), to bring the idea of death into one's life in order to be reconciled to one's ambivalence about both. See generally Norman O. Brown, *Life Against Death: The Psychoanalytical Meaning of History* (Wesleyan, 1959).

95. Lincoln, *Second Inaugural Address* at 792, 793 (cited in note 85). "Fondly do we hope—ferently do we pray—that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue, until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood

grounded resistance to continuing the Civil War by other means distinguishes Lincoln's model of national recovery from those competing views in which past victims continue to be represented, as such, in the future. For Lincoln, national recovery is rooted in the ambivalent wish to remember a painful history without being reminded of it.

A fourth, and related, point is that the goal of Lincoln's story of national survival is not reparations, but rather a new beginning—a new covenant between former victim and the former perpetrator (who thus become equally capable of breaching it). America's national recovery from its collective trauma requires a collective pledge to remember the past in order to avoid repeating it—a limbic state that honors ambivalence about the necessary stages of our moral development as a nation.

This leads us to a fifth point: when a repetition of the historical pattern occurs, the *wrong* is a breach of this new covenant. We have in effect repeated the past in order to avoid remembering it. Identifying the wrong in this way allows us to distinguish between a Lincolnian liberalism of national recovery and those generic forms of liberalism that do not take traumatic history into account. In a generically liberal society based on free expression, giving offense through the expression of ideas must be broadly tolerated (although the Millian tendency to treat such expression as harmless symbolism gives too little recognition of the mental distress it may cause).⁹⁶

But in a society recovering from slavery there may be a specifically cognizable wrong in the intentional reenactment—however symbolic—of the role of an historic oppressor in a manner that forces the role of the victim on persons with historical reasons to fear it. The moral logic of Lincoln's survivor story would suggest that “the intentional trapping of a captive audience of blacks in order to subject them to face-to-face degradation,” might be proscribed as “temporary involuntary servitude, a sliver of slavery.”⁹⁷ To view the symbolic act of repetition as merely offensive behavior is to deny the continuing presence of the past, not merely in memory, but also in the construction of identity. The fact that our traumatic history of slavery is not behind us (and that we are *constitutionally* enjoined to avoid its repetition) is essential to understanding what is wrong with any replication of the pattern and practice of racial subordination, even through speech. At least part of the potential harm done by such a wrong is a return to the original trauma, a recovered memory of historical victimization.

drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said ‘the judgments of the Lord, are true and righteous altogether.’” *Id.* at 793.

96. See John Stuart Mill, *On Liberty*, in Marshall Cohen, ed., *The Philosophy of John Stuart Mill: Ethical, Political and Religious* 185 (Modern Library, 1961); H.L.A. Hart, *Law, Liberty, and Morality* 77-83 (Oxford, 1963); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 *Phil & Pub Aff* 204 (1972); Joel Feinberg, *Offense to Others: The Moral Limits of Criminal Law* (Oxford, 1985).

97. Amar, 106 *Harv L Rev* at 158 (cited in note 70).

It follows, as a sixth point, that what distinguishes historical repetition from other forms of offensive or distressing expression is not the *magnitude* of the harm (which may or may not be greater), but its *source*. A reiteration of patterns and symbols of enslavement (which are not slavery itself) can induce a repetition of the internalized trauma of slavery in the unconscious—where remembering and reliving are indistinguishable, and where slavery may never have been abolished or set right.⁹⁸ This suggests that a heightened *awareness* of the patterns and symbols of enslavement—itself a product of liberation—can actually increase the harm of racial discrimination, while also being a necessary stage in identifying the wrong.⁹⁹

A. SURVIVORSHIP AND VICTIMHOOD

We have now reached the moment, however, where we must acknowledge that there are at least two possible variants of Lincoln's survivor story, each of which carries its own interpretation of what it means to be a nation in recovery. The first is the variant that allows former perpetrators to identify themselves as victims in order to become survivors. This is the variant that promises "to bind up the *nation's* wounds"¹⁰⁰ by placing the North and South on an equal moral footing as survivors of slavery and the war to end it. A second variant requires former perpetrators to both identify *with* their victims and to see themselves from their victims' point of view. This is the variant that sees the war itself as recompense for "every drop of blood drawn with the lash."¹⁰¹ These two variants introduce a profound ambiguity in their depiction of who the historical victims are (slaves or Southerners) and of what would trigger a traumatic memory of the past (racism or the accusation of racism).

Although both variants depend upon a mutuality of identification, they differ significantly in how the new collective identity is defined. In the first variant, the healing comes through a dedication (for Lincoln, a rededication) to a set of higher principles originally embodied in the Declaration of Independence. In the second variation, the scourge of war atones for the national sin of slavery. Superficially, the latter claim resembles the abolitionist (and Radical Republican) idea that the victory of the Union Army represents an apocalyptic judgment on the sin of the South.¹⁰² In Lincoln's rendition, however, the *suffering* of the

98. This may be what Guyora Binder has in mind in Guyora Binder, *The Slavery of Emancipation*, Cardozo L Rev (forthcoming).

99. The Freudian literature on dominance and submission is relevant here. So too is the Marxian literature on exploitation and material reproduction. At their root, both literatures are grounded in our ambivalent desires to both dominate and submit, to both gain and lose, and reflect the ways in which this ambivalence is perverted and exploited to allow gains and losses to flow into different "accounts." For a further discussion of these points see Robert Meister, *Beyond Satisfaction*, 15 Topoi (September 1996) (forthcoming).

100. Lincoln, *Second Inaugural Address* at 793 (cited in note 85) (emphasis added).

101. Id.

102. According to Ernest Lee Tuveson, Lincoln's Second Inaugural Address is consistent

Union Army meant that the sin of slavery had been assumed by the North, implying that through this sacrifice the nation as a whole might be cleansed and reborn in the manner suggested by the first variant.¹⁰³

For a brief moment before his death, Lincoln thus achieved a shaky synthesis of both variants of mutual identification described above into a single narrative of survival and recovery. The genius of his Second Inaugural Address (crystallized in his own martyrdom and later legend) was to merge the Biblical language of judgment and retribution with that of sacrifice, forgiveness, and renewal. After quoting the passage "Woe unto the world because of offences!",¹⁰⁴ Lincoln insists that God "gives to *both* North and South, this terrible war, as the woe due to those by whom the offence came."¹⁰⁵ His well-known conclusion is not, however, that the post-war world will be a living hell—the final judgment of a righteous God on a sinful nation.¹⁰⁶ Rather than describing the aftermath of war as a deserved punishment for sin, Lincoln suggests that the living are the undeserving beneficiaries of the sacrifice of those who (as he said at Gettysburg) "gave their lives that [the] nation might live."¹⁰⁷ A Lincolnian attitude of "malice toward none" and "charity for all" is appropriate for a once-guilty people who have been forgiven through a redeeming act of grace.¹⁰⁸

Viewed as a peace strategy, Lincoln's national survivor story provided a moral framework under which many in the defeated South could accept a Northern victory as something other than a humiliating punishment for slavery and secession.¹⁰⁹ In Lincoln's vision, the vicarious sacrifice of the innocent dead

with the abolitionist view, represented by Julia Ward Howe's "Battle Hymn of the Republic," that the Civil War was an inevitable act of divine judgment that redeemed the American nation from the sin of slavery and allowed it to resume its millennial mission of saving the world. See Tuveson, *Redeemer Nation: The Idea of America's Millennial Role* 197-202, 206-07 (Chicago, 1968). Garry Wills, however, sharply distinguishes Lincoln's use of Biblical imagery, in the Second Inaugural Address and elsewhere, from Howe's: "Lincoln's distinctive mark . . . was his refusal to indulge in triumphalism, righteousness, or vilification of the foe. . . . Nothing could be farther from the crusading righteousness of Julia Ward Howe in her 'Battle Hymn of the Republic.'" *Lincoln at Gettysburg* at 183-84 (cited in note 66). For further discussion of Lincoln's distinctive use of Biblical imagery, see Garry Wills, *Under God* 207-21 (Simon & Schuster, 1990).

103. For a discussion of the vicarious sacrifice of Christ in pre-Civil War American theology see Ann Douglas, *The Feminization of American Culture* ch 4 (Alfred K. Knopf, 1977). For an argument that the Puritan jeremiad was a distinctively American ritual of consensus, see Sacvan Bercovitch, *The American Jeremiad* 132-175 (Wisconsin, 1978).

104. *Matthew* 18:7.

105. Lincoln, *Second Inaugural Address* at 793 (cited in note 85) (emphasis added).

106. This was in fact the view that many Southerners took of their impending defeat. See, for example, Richard E. Beringer, et al, *Why the South Lost the Civil War* 393 (Georgia, 1986).

107. Lincoln, *Gettysburg Address* at 734 (cited in note 73).

108. Lincoln, *Second Inaugural Address* at 793 (cited in note 85).

109. Compare Kenneth M. Stampp, *The Southern Road to Appomattox*, in *The Imperiled Union: Essays on the Background of the Civil War* 246 (Oxford, 1980); Beringer, et al, *Why the South Lost the Civil War* 368-397 (cited in note 106); and Stedman, *The*

would allow former enemies to live together, cheek-by-jowl, under a common government without engaging in an endless cycle of mutual reprisal and recrimination over the past.

The prospect of former enemies living in the same place under one government is a problem for peacemakers in any civil war. To the extent that this prospect is unthinkable, a final peace is also unthinkable.¹¹⁰ The argument that surrender will lead to severe retaliation, or even genocide, has always been used by wartime leaders to make the losing side fight on, especially when it knows that its aims and conduct in the war are seen as morally reprehensible by its enemy.¹¹¹ This was certainly the view that many Southern leaders took of the consequences of defeat. Exhorting his troops in November 1863, Lee said: "[A] cruel enemy seeks to reduce our fathers and our mothers, our wives and our children, to abject slavery, to strip them from their homes. Upon you these helpless ones rely."¹¹² From this perspective the only honorable peace was a negotiated settlement that preserved the capacity of both sides to make war, and thus ratified, at least implicitly, the existence of two nations.¹¹³

Lincoln's story of national survival presents the alternative vision of how a civil war can end.¹¹⁴ As the war progressed, Lincoln came to believe the only proper end to total war is total peace;¹¹⁵ that such peace requires both surrender by one side and forgiveness by the other; and that such forgiveness is in part an act of identification—if not with the guilt of the former enemy, at least with the shame.

This is a complex view, with moral and psychological dimensions that can only be briefly sketched within the scope of the present Article. The philosopher

End of the American Civil War 164-87 (cited in note 87). See also Richard E. Beringer, et al, *The Elements of Confederate Defeat: Nationalism, War Aims, and Religion* chs 12-15 (Georgia, 1988).

110. The range of conceivable outcomes are a fight to the death, a negotiated partition backed by the power to resume fighting, or *de facto* secession through continuing military stalemate between rebel and government forces. See Roy Licklider, *The Consequences of Negotiated Settlements in Civil Wars, 1945-1993*, 89 Am Pol Sci Rev 681 (1995).

111. This argument has been used in wars of empire, as well as in civil wars, and by leaders as diverse as Pericles and Hitler. See Wills, *Lincoln at Gettysburg* at 182-83 (cited in note 66).

112. Jonathan Truman Dorris, *Pardon and Amnesty under Lincoln and Johnson: The Restoration of the Confederates to the Rights and Privileges, 1861-1898* 37 (North Carolina, 1953).

113. See generally Stedman, *The End of the American Civil War* 164-87 (cited in note 87).

114. The discussion in this paragraph draws on Fred C. Iklé, *Every War Must End* 95-105 (Columbia, 1971); Paul Kecskemeti, *Strategic Surrender: The Politics of Victory and Defeat* part 1 (Stanford, 1958); Stedman, *The End of the American Civil War* 164-87 (cited in note 87); and Licklider, *The Consequences of Negotiated Settlements* (cited in note 110). See also Dorris, *Pardon and Amnesty* (cited in note 112).

115. See James McPherson, *Abraham Lincoln and the Second American Revolution* ch 4 (cited in note 69).

Bernard Williams tells us that shame internalizes the figure of the watcher and that “[t]he root of shame lies in . . . being at a disadvantage: in what I shall call, in a very general phrase, a loss of power. The sense of shame is a reaction of the subject to the consciousness of that loss.”¹¹⁶ To identify with the shame of those whom we have defeated is to be embarrassed for them; we empathize with their feeling of political nakedness before our gaze. Gandhi captures the difference between this feeling and its alternatives—righteous anger and abject fear—when he asks us each to imagine that the thief whom we have surprised in the night turned out to be our own father.¹¹⁷ By identifying with our father’s shame, Gandhi suggests, we step outside the categories of victim and perpetrator—the endless cycle of abuse—and find a truth in the situation that permits the transformation of our relationship and the creation of a new bond between us.¹¹⁸

One cannot write these words today without noticing the difference between the moral attitude that Gandhi intended to evoke with his example of the thief, and the apparently typical moral attitude of those who “recover” the memory that their childhood sexual abuser was their father. Here the element of incestuous erotic identification is part of what makes the relationship abusive (although one assumes that this would be true at the level of the unconscious even if the abuser were someone else). The recent literature on recovered memory insists that rage at the abuser is the appropriate moral response, and frequently suggests that empathy for the abuser’s shame (or embarrassment at having caused it) stands in the way of achieving full consciousness of oneself as a victim.¹¹⁹

The difference between these two perspectives is not, or not merely, cultural and historical—each recognizes the other as a possible, and understandable, moral response within its own framework. Are we then to overcome pathological anger through moral embarrassment, and pathological embarrassment through moral anger? Is moral appropriateness a matter of mental health, or is mental health to be achieved by means of the apparent reversibility of our moral attitudes in such matters? Abstracting from historical contexts (and perhaps from historical truths) there would seem to be only a hairsbreadth of difference between the mythic stories that allow the abuser to identify with the victim and make reconciliation possible and the mythic stories that allow the victim to identify with the abuser and make continuing oppression likely.

The historical truth, of course, may matter here for some purposes. Not all violence or abuse is an expression of unconscious incestuous love. The victim may be rightly offended by the suggestion that it is, and demand “the truth” as an antidote. In truth, there may have been no meaningful connection between the victim and perpetrator of abuse, and no unconscious compulsion on the victim’s part to experience or repeat the psychic injury (and its attendant humiliation) as

116. Bernard Williams, *Shame and Necessity* 219-20 (California, 1993).

117. Mohandas K. Gandhi, *Hind Swaraj or Indian Home Rule* 72-75 (Navajivan, 1938).

118. Id at 81.

119. See, for example, Bass and Davis, *The Courage to Heal* 58-59 (cited in note 67).

a way of maintaining their "wounded attachment" to the injurer.¹²⁰

Often, however, the history of abuse also means that the injury itself establishes a relationship of sorts, and that the process of healing creates an attachment. As victims integrate their injured status into their future lives, the unconscious fantasy of incestuous love *and* the mechanisms by which that fantasy is unconsciously repressed continue to be available in one or another form. In this respect all abusive relationships are implicitly erotic, and to this extent they are also *unconsciously* incestuous before or after the fact. But this only means that the search for reconciliation through recognition of the incestuous bond between the victim and perpetrator may involve denial (or even repression) of the historical injury, and that the desire to relive and remember the historical abuse may involve denial (or even repression) of the bond. In other words—whomever we can love, we also can hate.¹²¹ There is thus a frequent tension in therapy, and in therapeutic politics, between reconciliation and liberation, between healing and breaking free.¹²²

The foregoing discussion makes clear that the processes of identification

120. See Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* ch 3 (Princeton, 1995).

121. See Jerome Neu, *Odi et Amo: On Hating the Ones We Love* in John O'Neill, ed, *Freud and the Passions* (Pennsylvania State, 1996) (forthcoming).

122. This tension is reflected in the recent debate between Freudians and anti-Freudians over what weight to give to unconscious fantasy and repressed memory in accounts of childhood experiences of incest by adults undergoing therapy. The moral fervor of the debate seems to rest upon a degree of confusion by both sides about what follows from each position. For their part, Freud's critics seem to assume that describing incest as a memory makes it unforgivable—and that expressing appropriate anger allows the former victim to become a survivor and break free. Freud's defenders sometimes seem to assume that, whatever actually happened, the patient must still come to terms with her own unconscious ambivalence in order to be healed, and that the truth about what actually happened is relevant mainly for legal, rather than therapeutic, purposes. See Gerald N. Izenberg, *Seduced and Abandoned: The Rise and Fall of Freud's Seduction Theory*, in Jerome Neu, ed, *The Cambridge Companion to Freud* 25 (Cambridge, 1991); Jeffrey Moussaieff Masson, *The Assault on Truth: Freud's Suppression of the Seduction Theory* (Farrar, Straus and Giroux, 1984); Paul Robinson, *Freud and His Critics* (California, 1993); Frederick Crews, *The Memory Wars: Freud's Legacy in Dispute* (New York Review, 1995).

Does the truth really matter if the patient's overall goal is to achieve reconciliation? Anti-Freudians (such as Masson) are outraged by the possibility that Freud developed his theory to cover up the truth. At least implicitly, they challenge Freudians to explain just what is wrong with the actual occurrence of incest, once we assume that incestuous *fantasies* are at stake in the analysis of all erotic relationships and their pathologies. (To simply answer that real incest is a "betrayal of trust" by the adult would be to beg the question of why it is damaging to begin with.) A Freudian might respond, however, that actual occurrences of incest tend to be developmentally harmful because the existing capacity of the child for unconscious erotic identification with respect to infantile aims has been manipulated and damaged by a parent-figure whose desires are all too conscious. There are also non-psychoanalytic reasons why incest may be harmful. See Jerome Neu, *What's Wrong With Incest?*, 19 *Inquiry* 27 (1976).

(both conscious and unconscious) are no less part of the logic of victim and perpetrator than of the logic of forgiveness and reconciliation. Freudians know that sadistic violence would be mere exertion were it not for the unconscious identification of the sadist with the pain and humiliation he inflicts.¹²³ The unconscious ambivalence (between love and hate, pain and pleasure, destruction and survival) that underlies most abuse is what allows for the mutuality and forgiveness in which moral reformers like Gandhi and Lincoln have placed their trust. But this same ambivalence allows continuing abuse to be rationalized by ideologies of patriarchal, or even divine, love.

We must remember in this regard that slavery's apologists have always used the mutual identification and dependence that was (at least arguably) present between master and slave to expand upon the positive features of the Southern way of life.¹²⁴ Such nostalgic claims provoke understandable anger on the part of those who claim to speak for the victims of slavery. They insist upon the truth of lived experience as a necessary answer to the ideologies through which victims are expected to identify with their abusers.¹²⁵

B. FORGIVING AND FORGETTING

The potential conflict between reconciliation and truth in the construction of a post-traumatic political identity is the source of a further ambiguity in Lincoln's national survivor story. His story is, at the very least, a form of amnesty¹²⁶—an effort to take the nation past the divisive traumas of slavery and civil war. In the aftermath of civil war or revolution, amnesty is always an appealing alternative to purges, political prosecutions, and lustration laws.¹²⁷

123. This is, of course, an oversimplification of Freud's view of sadism as a redirection of primary masochism. See Jessica Benjamin, *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination* ch 2 (Pantheon, 1988). See also Sigmund Freud, *General Psychological Theory: Papers on Metapsychology* chs 4, 8, 11 (Collier, 1963).

124. For discussions of the psychic and political economy of slavery see Eugene D. Genovese, *The Political Economy of Slavery: Studies in the Economy and Society of the Slave South* (Wesleyan, 2d ed 1989); Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (Pantheon, 1974). For a reconsideration of the moral legacy of apologists for slavery see Eugene D. Genovese, *The Southern Tradition: The Achievements and Limitations of an American Conservatism* (Harvard, 1994).

125. For a further development of this idea see Binder, Cardozo L Rev (cited in note 98) (forthcoming).

126. On post-Civil War amnesties see Dorris, *Pardon and Amnesty* at 29-38 (cited in note 112) and Charles Fairman, *Reconstruction and Reunion 1864-88*, in Paul A. Freund, ed, 6-7 *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States* 94-96, 783 (Macmillan, 1971).

127. See, for example, George Weigel, *Their Lustration—and Ours*, 94 Commentary 34 (Oct 1992); Anthony D'Amato, *Peace vs Accountability in Bosnia*, 88 Am J Intl L 500 (1994); Jeri Laber, *Witch Hunt in Prague*, 39 NY Rev Books 5 (Apr 23, 1992); Note, *Problems with Forgiveness: Granting Amnesty under the Arias Plan in Nicaragua and El Salvador* 43 Stan L Rev 733 (1991); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L J 2537, 2595-606

But amnesties are generally based on both a desire to forget and a need to remember.

Recent amnesties have taken two distinct approaches to the relationship between forgiveness and the acknowledgment of truth. In the first approach, amnesty is offered as a political compromise. This is the kind of amnesty that Raúl Alfonsín eventually offered to Argentina's generals out of a fear that they would otherwise return.¹²⁸ Throughout Latin America, such broad-based amnesties were eventually viewed as preconditions to the restoration of democracy. Thereafter, national truth commissions were established in order to settle accounts with the past as far as possible, and perhaps to create an authoritative story of national survival for the future.¹²⁹

In the second approach, amnesty is offered only as a consequence of political cleansing. This has been Nelson Mandela's public view of amnesty. You will be forgiven, he promises, for any political crimes you confess, and prosecuted for those you conceal.¹³⁰ Unlike truth commissions elsewhere, the South African

(1991).

128. See David Pion-Berlin, *Between Confrontation and Accommodation: Military and Government Policy in Democratic Argentina*, 23 J Lat Am Stud 543, 560-65 (1991); Juan Mendez, *Truth and Partial Justice in Argentina: An Update: An Americas Watch Report* (Human Rights Watch, 1991); Elizabeth Jelin, *The Politics of Memory: The Human Rights Movement and the Construction of Democracy in Argentina*, 21 Lat Am Persp 38, 47 (Spring 1994); Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 Yale L J 2619, 2622-30 (1991); Rita Arditti and M. Brinton Lykes, "Recovering Identity": *The Work of the Grandmothers of Plaza de Mayo*, 15 Women's Stud Intl F 461, 466-67 (1992).

129. For a defense of this view, see José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 Hastings L J 1425, 1437 (1992). Zalaquett points out that some trials were allowed as exceptions to the amnesties, and that in Uruguay the amnesty itself was almost repealed in a popular vote. Id at 1432. For discussions of truth commissions see Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 Human R Q 597 (1994); Jo M. Pasqualucci, *The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 BU Intl L J 321 (1994). For a discussion of the politics of reconciliation in Brazil and Uruguay see Lawrence Weschler, *A Miracle, A Universe: Settling Accounts With the Torturers* (Pantheon, 1990). For the Chilean experience see *Report of the Chilean National Commission on Truth and Reconciliation* (Notre Dame, 1993). For general discussions of relevant issues see Alice Henkin, ed, *State Crimes: Punishment or Pardon* (Aspen Institute, 1989).

130. On May 17, 1995, the South African Parliament established a Truth and Reconciliation Commission with the authority to document past crimes, award reparations, and grant amnesties. *Viewing Apartheid Abuses*, NY Times A10 (May 18, 1995). President Mandela signed the legislation in July. Suzanne Daley, *Panel to Investigate Atrocities of the Apartheid Era*, NY Times A3 (Aug 27, 1995). For a brief discussion of the disagreements over the scope and effects of the earlier South African amnesty measures enacted between 1990 and 1994 see *South Africa Confronts its Past*, 331 Economist 39 (June 11, 1994). For a brief discussion of former President F.W. de Klerk's Further Indemnity Act see Christopher Merrett, *Amnesia by Decree*, 22 Index on Censorship 21-22 (1993). For fuller accounts of the issues dividing Mandela on the scope of amnesty see

Truth and Reconciliation Commission has the power to grant amnesties in return for disclosure, and to threaten the prosecution of persons who are found to have committed acts they did not disclose.¹³¹ Although it is too early to tell how this will work out, Mandela's view holds forth the possibility that forgiving does not require forgetting, and that the search for truth will bring a measure of historical justice.

Although the Lincoln we remember is generally credited with the sort of moral vision that we now ascribe to Mandela, Lincoln, the President, faced a very different task in linking amnesty to a military and political strategy for winning an ongoing Civil War. His wartime amnesty policy was partly based on the urgency of restoring loyalist governments in federally-occupied Louisiana and Arkansas, and of finding enough collaborators to avoid large-scale disorder in the rest of the occupied South. The specific features of this policy changed over time with military and political exigencies, and at war's end he may even have condoned General Sherman's policy of working through existing rebel governments—a policy embodied in the Sherman-Johnston peace convention signed three days after Lincoln's death.¹³²

There was, nevertheless, a principled basis for Lincoln's view of amnesty. Throughout the war, Lincoln disagreed with those in his own party who believed that at the moment of secession the Southern state governments ceased to exist (and that defeated Confederate states could henceforth be administered by Congress as federal territories). His position was, rather, that secession had been illegal because the union was indestructible. It followed that the states in rebellion continued to exist as members of the Union, but that *individuals*, especially political leaders, were engaged in illegal acts of rebellion. The task of reconstruction therefore required granting a sufficient number of individual amnesties so that the states (which had always consisted of their loyal citizens) could resume self-government.¹³³

Based on this constitutional theory, Lincoln issued his Proclamation of Amnesty and Reconstruction of December 1863.¹³⁴ It granted a full pardon to ordinary citizens and soldiers participating in the rebellion on condition that they sign an oath of loyalty to the United States, and that they agree to abide by all wartime acts of Congress and presidential proclamations on the subject of

Alex Boraine, et al, eds, *Dealing with the Past: Truth and Reconciliation in South Africa* (Institute for Democracy in South Africa, 1994).

131. Daley, *NY Times* at A3 (cited in note 130).

132. Lincoln's wartime policy was that a number of citizens equal to at least 10% of the 1860 electorate must be granted amnesty for self-government to be restored. Belz, *Reconstructing the Union* at 157 (cited in note 69). The evolution of Lincoln's wartime policy is summarized in id at 291-304, and Lincoln's probable attitude toward the Sherman-Johnston peace convention is discussed in id at 278-79.

133. See Belz, *Reconstructing the Union* at 154-166 (cited in note 69); Hesseltine, *Lincoln's Plan of Reconstruction* at 70-71 (cited in note 69).

134. Lincoln, *Proclamation of Amnesty and Reconstruction of Dec 8, 1863*, 13 Stat 737 (1863-65).

slavery.¹³⁵ Ineligible for the pardon were officials of the “so-called Confederate Government,” high-ranking Confederate military and naval officers, persons who resigned their seats in Congress or their military and naval commissions to join the rebellion in violation of their oaths of office, persons who resigned their judicial positions to help the rebellion, and all persons who mistreated prisoners of war.¹³⁶ These individuals were not entitled to an automatic pardon upon taking a voluntary oath, and could not have their rights restored without further action by the President or Congress.¹³⁷ The possibility of trials and/or amnesty for top Confederates and war criminals was thus left open by Lincoln during his lifetime.

Such trials were a serious possibility toward the end of the war, when stories were circulating widely in the North of atrocities in Southern prison camps in which the leaders of the Confederacy, including Jefferson Davis, were alleged to be personally implicated.¹³⁸ Andersonville prison camp in Georgia became the leading symbol of these atrocities. Its commanding officer died, however, in February 1865, and Captain Henry Wirz, the second in command, was the only person tried for war crimes in the aftermath of the Civil War. His trial and eventual execution did not, however, accomplish the intended purpose of establishing a definitive moral truth about Andersonville. Instead, the singularity of the prosecution, and the irregularities that occurred in the presentation of evidence, convinced some Southerners that Wirz had become a martyr of the Confederacy.¹³⁹

The question of what do with Jefferson Davis raised other problems for Lincoln’s theory of post-war responsibility. After Davis was captured in flight immediately following Lincoln’s assassination, a serious effort was made to try the President of the defeated Confederacy for treason in the federal court in Virginia—which (not coincidentally) was presided over by the Chief Justice of the United States, Salmon P. Chase.¹⁴⁰ The charge against Davis was motivated partly by a desire to prove that secession (and waging war to defend it) were themselves treasonous acts under the Constitution, and partly by the claim (never

135. Id.

136. Id.

137. Dorris, *Pardon and Amnesty under Lincoln and Johnson* at 34-36 (cited in note 112).

138. For examples see Robert H. Kellogg, *Life and Death in Rebel Prisons: Giving a Complete History of the Inhuman and Barbarous Treatment of Our Brave Soldiers by Rebel Authorities Inflicting Terrible Suffering and Frightful Mortality, Principally at Andersonville, GA., and Florence, S.C.* (L. Stebbins, 1865).

139. The trial and its context are discussed in Ovid L. Futch, *History of Andersonville Prison* 113-22 (Florida, 1968). For an account of the evidence by one of the presiding officers at the trial, and a response to the charge, inscribed on a monument erected to Wirz, that he was “judicially murdered,” see General N.P. Chipman, *The Tragedy of Andersonville: Trial of Captain Henry Wirz, the Prison Keeper* 11-18 (1911) (published by the author).

140. Dorris, *Pardon and Amnesty* at 295 (cited in note 112).

substantiated) that Davis may have been complicit in Lincoln's murder.¹⁴¹ Chase, however, had to preside over the impeachment trial of President Johnson, and for this and other reasons the Davis trial was delayed.¹⁴²

Before the trial took place, the Fourteenth Amendment was ratified, and Chase came to believe that Section Three, barring former federal officials who served the Confederacy from again holding federal office, constituted a legal punishment that precluded any further prosecution of those to whom it applied.¹⁴³ Chase's view on this matter was never finally upheld by the Supreme Court (his fellow-judge on the Circuit Court disagreed), but, fortified by the Chief Justice's position, President Johnson issued a universal amnesty proclamation for all unpardoned Confederates on Christmas Day, 1868, that effectively disposed of the treason charge against Davis.¹⁴⁴

In practical effect, if not intent, the Fourteenth Amendment had become a kind of amnesty that allowed those Confederate officials who had left U.S. government service to be punished for violating their oath of office, and for nothing else.¹⁴⁵ Chase's claim that Section Three of the Fourteenth Amendment is a self-executing punishment had only backward-looking implications for the nation as a whole, and for this reason the record of prosecutions and amnesties from 1865 through 1868 conveys no clear moral message about the Civil War's meaning.¹⁴⁶

The core argument of this Article suggests, however, that Lincoln's story of national survival was itself an effort to establish a national consensus on the meaning of the war—an "official truth" that is arguably more authoritative than truths established by political trials, and that would serve as the foundation of a practical program of post-war reconstruction.¹⁴⁷ In the words of one commentator, "[R]econstruction was . . . the basic issue of the Civil War. . . . In the fullest sense, secession was the South's effort to avoid . . . reconstruction."¹⁴⁸ To what extent does the amnesty implied by Lincoln's story of national survival contribute to a deeper view of the meaning of the Civil War and its aftermath

141. *Id.* at 295.

142. *Id.*

143. *Id.* at 311-12, 358.

144. It did not apply to the suspicion of conspiring to commit murder under which Davis was first arrested. That apparently false accusation, on which he was never indicted, reinforced Davis's lifelong refusal to seek or accept the individual clemencies that had earlier been accorded to other Confederate leaders. See Dorris, *Pardon and Amnesty* at 302-05, 311-12, 358 (cited in note 112).

145. For discussions of the entire matter see Roy Franklin Nichols, *United States vs Jefferson Davis, 1865-1869*, 31 *Am Hist Rev* 266 (1926); Dorris, *Pardon and Amnesty* at 135-52 (cited in note 112); Randall, *Constitutional Problems Under Lincoln* ch 5 (cited in note 51).

146. For a rough sense of the number of post-war treason indictments brought see Randall, *Constitutional Problems Under Lincoln* at 96-102 (cited in note 51).

147. For a forthright effort to accomplish a similar objective without political trials see *Report of the Chilean National Commission* at 13-15 (cited in note 129).

148. Hesselstine, *Lincoln's Plan of Reconstruction* at 12 (cited in note 69).

than his own wartime policies suggested to his immediate contemporaries? Before considering this issue at the level of constitutional theory, it is worth illustrating anecdotally the changing relationship between amnesty and reconstruction as the Civil War receded in memory.

In the years immediately following the enactment of the Fourteenth Amendment, amnesty served as a device to block radical reconstruction, and allow the large elements of the Confederate power structure to be restored in the defeated South. Congress, between 1868 and 1898, restored the right to hold office of almost all former Confederate officials by two-thirds vote, using a procedure specifically provided for this purpose in the Fourteenth Amendment itself.¹⁴⁹ The two notable exceptions were Jefferson Davis and Robert E. Lee, whose disloyalty had special symbolic weight for Northern politicians who were willing to restore the honor of other ex-Confederates.¹⁵⁰ Over the years Southern legislators repeatedly failed to reverse this symbolic disgrace of their two long-dead heroes.

The claims of Lee and Davis to a full restoration of the rights of citizenship took on new life during the debate over granting amnesty to Americans accused of draft evasion or military desertion during the Vietnam war. Politicians opposed to amnesty argued that amnesty was inappropriate for individuals who had been disloyal to their country in time of war, especially if such an amnesty were not accompanied by an obligation of national service.¹⁵¹ Evoking the figure of Lincoln, Senators Philip Hart and Mark Hatfield advocated full and unconditional amnesty for unpardoned Americans from both the Civil and Vietnam wars, including Robert E. Lee and Jefferson Davis.¹⁵²

It remained for Jimmy Carter—a century after the first Reconstruction ended—to articulate the now-settled meaning of the Lincolnian vision of national recovery. In restoring full citizenship to Jefferson Davis,¹⁵³ President Carter called upon Americans “to clear away the guilts and enmities and recriminations of the past, to finally set at rest the divisions that threatened to destroy our Nation and to discredit the great principles on which it was founded.”¹⁵⁴ This message applied equally to the amnesty President Carter granted to those who disagreed with their government on Vietnam: “I have a historical perspective about this question. I come from the South. I know at the end of the War Between the States there was a sense of forgiveness for those who had not been loyal to our country in the past”¹⁵⁵

Speaking as a Southerner, and as a U.S. President, Carter’s words reflect the

149. Francis MacDonnell, *Reconstruction in the Wake of Vietnam: The Pardoning of Robert E. Lee and Jefferson Davis*, 40 *Civil War Hist* 119, 121 (1994).

150. *Id.* at 119-20, 133.

151. *Id.* at 126-27.

152. *Id.* at 126, 129-31.

153. Lee’s right to hold office had already been restored by President Ford. *Id.* at 129.

154. *Id.* at 119, 131.

155. *Id.* at 129.

subtlety of the Lincolnian balance between forgiving and not forgetting. We remember, he suggests, in order not to be reminded; we forgive because we cannot forget. This is a morally creditable position, and not (despite the obvious logrolling on two symbolic issues) a mere political compromise. But forgiveness is relatively easy if the only crime is alleged disloyalty, and there are no surviving victims whose voices are silenced by amnesty.¹⁵⁶

Acknowledging this, however, should once again direct our attention to the fundamental fact that the Lincolnian survivor story is inherently a better way of coping with the guilt of perpetrators than of doing justice to victims.¹⁵⁷ Even if the survivor story unambiguously requires the perpetrator to identify *with* the victim, and even if forgiveness requires full confession, the survivor story invariably relies on *identification* to do its work. By putting those who committed abuse on an equal moral footing with their historical victims, these stories in effect authorize “us” to stop listening to the voice of the victim insofar as this is what it takes to recover from a traumatic history and to reunite. This conclusion ought to be disturbing for critical race theorists who argue that past atrocities can only be fully acknowledged by adopting a conception of human rights that listens to victims’ stories.¹⁵⁸

The foregoing discussion suggests, however, that in the politics of recovery the main alternative to identification is a form of representation that would stress the indelible difference between the victim and the perpetrator as the basis for a counterhegemonic claim to power. Those who reject the moral logic of reconciliation will tend to embrace the rhetoric of liberation and self-determination that we earlier identified as Cultural Wilsonianism. Whenever past victims claim as much sovereignty as it takes to turn the tables, the regressive logic of reprisal and counter-reprisal is set loose. No reader of Nietzsche can be sure that the perpetrators of past discrimination are wrong to hear “the voice of the victim” as a threat.¹⁵⁹

C. SOJOURNERS AS SURVIVORS: LINKS BETWEEN THE MODELS

Although our contrast between Lincoln and Wilson has revealed certain

156. For views of the Chilean dilemma see Robert J. Quinn, *Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model*, 62 Fordham L. Rev. 62, 905 (1994); José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in Alice Henkin, ed., *State Crimes: Punishment or Pardon* 23 (Aspen Institute, 1989).

157. Justice to victims may, of course, come in other ways, such as the achievement of meaningful majority rule in South Africa.

158. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, in Mari J. Matsuda, et al., eds., *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment* 17 (Westview, 1993).

159. See Meister, 15 Topoi (cited in note 99) (forthcoming); Wendy Brown, *States of Injury* 26-27 (cited in note 120).

essential features of the survivor and sojourner models, we must move beyond the ideas of these two figures to see more clearly the relation between the models themselves.¹⁶⁰ A dark implication of our discussions of both Lincoln and Wilson has been that survivor stories often rationalize abuses that produce new demands for secession based on the sovereign coequality of peoples. Secessionist movements in turn produce victims who may become survivors with new stories of their own.

The troubling truth is that many civil wars throughout the world are based on such a cycle, and that many nations that see themselves as Lincolnian survivors are doomed to fight civil wars against Wilsonian claims. This cycle is not universal, but it is observable, and suggests that the two distinct logics of equalization described above may be both interdependent and mutually subversive at a deeper level.¹⁶¹ By this I mean that each story has an observable tendency to undermine its own premises and to motivate acceptance of the other.

A more limited claim is that certain transnational aspects of modern nationalism are illuminated by the connection between our two models. The first aspect is that exiles and refugees are sojourners with the consciousness of survivors. The second is that many re-established national states are the products of transnational efforts by exiles and refugees who survived as individuals, recovered, and carried their stories with them.¹⁶² The third aspect is that newer nations such as the United States, Canada, South Africa, and some Latin American republics have forged multicultural identities based on stories of resettlement by survivors of Old World persecution.¹⁶³ These settler-states have been periodically open to

160. Not surprisingly, the Bible is the source of both models. In the Old Testament, the Children of Israel are sojourners who forge a new identity as survivors under the leadership of Moses. Having lived in bondage in a strange land, they make the transition from cult to nation to covenantal state where their survival becomes the basis of another story. This transformation has the character of both a journey and a return. The survivorship and national renewal of the Jews enables them to conquer the indigenous Canaanites who must live like sojourners in the land of their birth. Compare Michael Walzer, *Exodus and Revolution* (Basic Books, 1985), and Edward Said, *Michael Walzer's "Exodus and Revolution": A Canaanite Reading*, 8 Arab Stud 289, 293-94 (1986). The book of Exodus is not, however, our only canonical text of survivorship. The *Aeneid*, for example, is an effort to portray the founding of Rome as a survivor story.

161. See Meister, 15 Topoi (cited in note 99) (forthcoming).

162. For an illuminating comparison of the Jewish and Black "diasporas" see Paul Gilroy, *Black Atlantic: Modernity and Double Consciousness* 205-12 (Harvard, 1993). See also Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1983); Eric Hobsbawm and Terence Ranger, eds, *The Invention of Tradition* (Cambridge, 1992).

163. Refugees are different from ordinary sojourners or ordinary immigrants. By their own movements they manage to avoid some of the burden of guilt that comes when victims identify with persecutors in order to survive in the same place. As refugees, their claim is not necessarily to be sovereign somewhere, or to return to their "homeland," although some may be fortunate enough to have such options.

As suggested above, refugees are most likely to gain haven when significant elements of the local majority can identify with them and participate in the creation of a new myth

the claim of new minorities, seeking adoption rather than self-government, despite (or perhaps, because of) the traditional resistance of newly founded nations to the primordial claims of indigenous peoples.¹⁶⁴

For admirers of the Lincolnian tradition, however, it is a troubling fact that survivor stories are routinely invoked to legitimate the sovereignty of settler colonial states over now-dependent native communities on the basis of higher, transnational concerns with the human rights of refugees. In Lincoln's vision of America, for example, it was not essential for indigenous peoples to survive. He assumed that we, as their successors, were to *survive them* rather than identify with their experience of survival. Since Lincoln, we have become a *single* nation based on the equality of newcomers and natives, and on the denial of the general proposition that indigeness confers a special right to self-determination. This paradigm shift was a serious blow to our own indigenous peoples who fared particularly badly under Lincoln and his Republican successors, such as Grant.¹⁶⁵ Even today, the rights of dependent sovereign peoples—as distinct from groups—remain an anomaly under the logic of the Fourteenth Amendment, as we shall see below.¹⁶⁶

As a general matter, we cannot conclude our presentation of the sojourner and survivor models with the hope that clarity and progress are to be achieved by choosing between them. We can merely say that the two logics did in fact emerge at distinct periods in American history, and that at critical moments they have appeared as clear alternatives to each other. For this reason some of the binary choices that have marked our national politics—liberty or union, sovereignty or equality—reflect the difference between experiencing our formative national traumas as either a recovering survivor or a potential victim.

Ultimately, however, the distinction between the two models is grounded in the choice between reconciliation and self-assertion as moral styles, and between unification and liberation as political strategies. To see this, however, is to recognize that our two models are more than responses to different moments in our own national history—the moment of national liberation from colonial power and the moment of civil war. They are also logically and historically linked in ways that may illuminate, more broadly, the complex relationships

of common survival. Of course not all local majorities are willing to accept the new identity implied by the adoption of refugees for whom they were not responsible (consider the Palestinian example). And not all countries willing to accept refugees possess pre-existing survivor stories—Sweden, for example, does not.

164. See Louis Hartz, et al, *The Founding of New Societies: Studies in the History of the United States, Latin America, South Africa, Canada, and Australia* 3-23 (Harcourt, Brace, 1964).

165. For a popular account see Robert M. Utley and William E. Washburn, *The American Heritage History of The Indian Wars* (American Heritage, 1977). The role of the Civil War Generals Sherman, Sheridan, and Hancock in the waging of “total war” against native Americans is specifically discussed in id at 290-93, 255-56, 241-44.

166. For a general discussion of these issues outside the North American context see Richard Mulgan, *Should Indigenous Peoples Have Special Rights?*, 33 *Orbis* 375 (1989).

between independence struggles and civil wars in various political regimes.

We shall next explore this linkage as a formative element in American constitutional development. What happens when the distinctive Lincolnian logic of civil war and survivorship becomes intertwined with the Marshallian constitutional logic that gave meaning to our national independence? Does our experience of living with the two logics of constitutional development described thus far contain any lessons for the world?

III. The Jurisprudence of Reconstruction

Recent world events suggest that Americans should stop celebrating the global triumph of the ideals of our Revolution and begin to ponder the constitutional lessons of our Civil War and Reconstruction. Section III of this essay will demonstrate how the logic of sojourners and the logic of survivors are the sources of two distinct, but mutually parasitical, interpretations of the Fourteenth Amendment, based on two different conceptions of the Reconstruction that occurred after the Civil War.

In the discussion that follows, we shall first consider how the Fourteenth Amendment was originally interpreted by the Court as a development of Marshallian constitutionalism, and how this way of thinking was both expanded and preserved in *Brown v Board of Education*¹⁶⁷ and its progeny. We shall then consider what a Lincolnian version of Fourteenth Amendment jurisprudence would be, and demonstrate how *Brown* and its progeny embrace that second paradigm without thereby superseding the first. Finally, we shall illustrate the interaction and conflict of our two paradigms by considering some problems arising from the incorporation of the First Amendment under the Fourteenth Amendment. How do the origins of the Fourteenth Amendment, arising in a project of national reconstruction, affect the possibility that government can be truly neutral with respect to certain issues of religion and speech under the First Amendment?

A. THE FOURTEENTH AMENDMENT AND MARSHALLIAN RECONSTRUCTION

The first account of Reconstruction is an expansion of the paradigm of interstate sojourners that lies at the foundation of Marshallian federalism. Under this account, the judicial interpretation of the Fourteenth Amendment has functioned in effect as a negative template of the jurisprudence of *Dred Scott*¹⁶⁸—reversing its holding while preserving its structure.

To grasp this point we must recognize that *Dred Scott* did not foreshadow the arguments based on states' rights that Southerners made to defend segregation a century later.¹⁶⁹ Rather, Taney's reasoning was understood (and even

167. 347 US 483 (1954).

168. 60 US 393 (1856).

169. See Arthur Bestor, *State Sovereignty and Slavery: A Reinterpretation of Proslavery*

welcomed by writers such as Hurd) as an expansion of the *federal* power to equalize among states—a power that might eventually have been used to subject all state laws conferring rights on Negroes to a strict standard of federal judicial review of their adverse impact on the sovereign power of some states to preserve the institution of slavery.¹⁷⁰ For Americans who anticipated a future based on *Dred Scott* (and not the Fourteenth Amendment), the constitutional commitment to the equality of slave and free states would no longer be protected only by the veto power of the Senate over future legislative efforts to abolish slavery. The Court's opinion in *Dred Scott* meant that the laws of free states and federal territories could henceforth have been subject to federal judicial review on the issue of whether they discriminated against an interstate diaspora of slaveholders.¹⁷¹

Such judicial review would have focused not merely on the use of invidious classifications that banned slavery, but also on the intent of facially benign classifications (was their purpose to exclude slavery?) and the impact of those classifications (was this their effect?).¹⁷² Clearly, an affirmative constitutional commitment to extend equal federal citizenship to the holders of slave property would require the federal courts to deny similar protection to the privileges or immunities that local majorities in some free states extended to resident Negroes through their liberty laws.¹⁷³ These state-created claims of resident Negroes would then be viewed by federal courts as mere beneficial interests that must give way to the constitutionally protected rights of out-of-state slaveholders.¹⁷⁴

This horrifying vision of a future under *Dred Scott* was not confined to academic writers such as Hurd. In 1860, the U.S. Congress passed legislation introduced by Mississippi Senator Jefferson Davis that would have implemented *Dred Scott*'s promise of nondiscrimination against out-of-state slaveholders in much the way that the Civil Rights Act of 1964 implements the Warren Court's promise of nondiscrimination against the descendants of slaves.¹⁷⁵ This view of *Dred Scott*'s implications was partly shared by Lincoln who predicted in his debates with Douglas that "the next *Dred Scott* decision" would explicitly allow slaveholders to claim some of the benefits of Southern law while in the North when the Taney Court overturned a New York decision to the contrary.¹⁷⁶

Constitutional Doctrine, 1846-1860, 54 J Ill St Hist Soc 117, 167-72 (1961). For a general discussion of how the theory of state sovereignty evoked by Southern states before the Civil War differed from later doctrines of states' rights see Arthur Bestor, *The Civil War as a Constitutional Crisis*, 69 Am Hist Rev 327 (1964).

170. For a discussion of this and other issues surrounding *Dred Scott*, see Meister, 3 Stud Am Pol Dev 199 (cited in note 14).

171. Meister, 3 Stud Am Pol Dev at 199-200, 211 (cited in note 14).

172. See id at 255-56.

173. Id at 243, 247.

174. Id at 244-45.

175. Id at 248, 255-56.

176. Here Lincoln merely expressed the view of many antislavery Northerners who feared that *Dred Scott* would lead to further judicial decisions nationalizing the en-

Although the Fourteenth Amendment was originally drafted by politicians who sought to advance the rights of newly freed Negroes in the former Confederate states, it was eventually interpreted by judges immersed in the logical framework that had produced *Dred Scott*.¹⁷⁷ These judges were to be the final authority on the constitutional meaning of the Civil War for the Marshallian framework of federalism.

The Supreme Court was forced to address this issue in the *Slaughter-House Cases*,¹⁷⁸ where it interpreted the Fourteenth Amendment for the first time. The cases arose because a new populist majority in Louisiana, reflecting carpetbagger influence, decided to create a legislatively-chartered and regulated monopoly on slaughterhouses. Similar legislation had been regarded by pre-Civil War courts as a legitimate exercise of the police power,¹⁷⁹ but the Fourteenth Amendment raised new grounds for challenging this type of state action. In the *Slaughter-House Cases*, the Supreme Court was asked to decide whether the legislative ban on selling meat that had been slaughtered outside the publicly regulated scheme was a violation by the state of the privileges or immunities of U.S. citizens in regard to private property.

In this first case pitting individual rights against federalism after the Civil War, the Supreme Court ruled that the "privileges or immunities" clause of the Fourteenth Amendment did not add any substantive rights to those protected under the "privileges and immunities" clause of Article IV.¹⁸⁰ Writing for the majority, Justice Miller argued that the new constitutional protection for "the privileges or immunities" of U.S. citizenship simply reiterated the previous ban on discrimination by states in the context of the new national citizenship, while

forcement of slavery. For a convincing argument that these fears were plausible see, Finkelman, *An Imperfect Union* at 313-338 (cited in note 14). One case that raised such fears was *Lemmon v The People*. See *id* at 296-312. See also Paul Finkelman, ed, 3 *Southern Slaves in Free State Courts: The Pamphlet Literature* 549-694 (Garland, 1988) (case reprint with contemporaneous commentary).

177. Meister, 3 Stud Am Pol Dev at 248-50 (cited in note 14).

178. 83 US (16 Wall) 36 (1872).

179. The exception was *Wynehamer v The People*, 13 NY 378 (1856), in which a state prohibition law was struck down as an abridgement of the constitutionally protected property rights of distillery owners without due process of law. *Wynehamer* was decided while *Dred Scott* was being reargued, and may have influenced Taney to refer to the due process clause of the Fifth Amendment in striking down the Missouri Compromise as a violation of individual property rights (as well as the sovereignty of the state that had established them). See *Dred Scott* 60 US at 450. Hurd gives explicit consideration to, and rejects, the analogy between *Wynehamer* and *Dred Scott* in 1 *The Law of Freedom and Bondage* at 565 n 1 (cited in note 32). For further discussions of *Wynehamer* and *Dred Scott* as precursors of the doctrine of substantive due process, see Edward Corwin, *The Dred Scott Decision in the Light of Contemporary Legal Doctrines*, in Richard Loss, ed, 2 *Corwin on the Constitution* 299, 309-310 (Cornell, 1987), and Edward Corwin, *The Doctrine of Due Process of Law Before the Civil War*, in Loss, ed, 2 *Corwin on the Constitution* at 149, 170-73.

180. *Slaughter-House Cases*, 83 US at 74-76.

leaving open the possibility that Congress might legislate additional new rights for national citizens as a matter of positive law.¹⁸¹ In the absence of Congressional action, the Fourteenth Amendment would give a U.S. citizen a federally protected right to the non-abridgement of only those civil rights that a state already provided its own citizens.¹⁸²

In his dissenting opinion in the *Slaughter-House Cases*, Justice Bradley wished to move beyond the antebellum limitations on the range of substantive individual rights that could receive constitutional protection. He therefore argued that in opening the way for an amended Constitution, the Civil War had united the nation as never before, thus allowing the federal courts to enforce a set of common national rights, whether or not these had been declared by Congress.¹⁸³

Justice Bradley achieved a synthesis of the two opposing positions in the *Slaughter-House Cases* when he wrote for the Court in the so-called *Civil Rights Cases*.¹⁸⁴ This synthesis allowed him to reconcile the expanded judicial protection of individual rights made possible by the Fourteenth Amendment with the Marshallian framework of analysis based on federalism.¹⁸⁵

The *Civil Rights Cases* involved a constitutional test of the very type of legislation that the framers of the Fourteenth Amendment sought to legitimate—the Civil Rights Act of 1875¹⁸⁶ which effectively strengthened the Civil Rights Act of 1866¹⁸⁷ with respect to common carriers. In the *Civil Rights Cases*, however, Justice Bradley struck down portions of the Civil Rights Acts as themselves unconstitutional under the Fourteenth Amendment. Claiming that the enforcement authority of the Fourteenth Amendment covered only questions of public law (state versus individual) and not questions of private law (individual versus individual), he argued that the relevant portions of the Civil Rights Acts were an unconstitutional intrusion on the sovereign powers of the states to govern the private relations among state citizens.¹⁸⁸ Bradley's reasoning implicitly followed the *Slaughter-House Cases* (and *Dred Scott*) in viewing state sovereignty as the source of all constitutionally protected individual rights.

To post-Civil War jurists, such as Bradley, the real issue between Taney and

181. *Id.* at 77.

182. *Id.* at 74-79. The discussion in this section is adapted from Meister, 3 *Stud Am Pol Dev* at 249-51 (cited in note 14). For more recent treatments see Harrison, 101 *Yale L J* 1385 (cited in note 18) and William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 155-74 (Harvard, 1988).

183. *Slaughter-House Cases*, 83 US at 123-24 (Bradley dissenting).

184. 109 US 3 (1883).

185. My interpretation of the relationship between these two cases is indebted to Duncan Kennedy, *The Rise and Fall of Classical Legal Thought, 1850-1940* (unpublished manuscript on file with the author).

186. *Act to Protect all Citizens in their Civil and Legal Rights*, 18 Stat 335 (1875).

187. *Act to Protect all Persons in the United States in their Civil Rights*, 14 Stat 27 (1866).

188. *Civil Rights Cases*, 109 US at 3, 11, 13, 25.

Curtis, the principal dissenter in *Dred Scott*, was whether free blacks would have to be denied U.S. citizenship in order to be discriminated against on the basis of race. Curtis had argued, with no apparent irony, that legal discrimination against free blacks who were U.S. citizens would be no less problematic than legal discrimination against women and children:

[N]umerous persons, though citizens, cannot vote, or cannot hold office, either on account of their age, or sex, or the want of the necessary legal qualifications. The truth is, that citizenship, under the Constitution of the United States, is not dependent on the possession of any particular political or even of all civil rights. . . . What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same are to be determined [by each state].

One may confine the right of suffrage to white male citizens; another may extend it to colored persons and females; one may allow all persons above a prescribed age to convey property and transact business; another may exclude married women. But whether native-born women, or persons under age, or under guardianship because insane or spendthrifts, be excluded from voting or holding office, or allowed to do so, I apprehend no one will deny that they are citizens of the United States.¹⁸⁹

The following passage from Bradley's opinion in *The Civil Rights Cases* is a succinct, albeit unacknowledged, postwar restatement of Curtis's view of Negro citizenship in *Dred Scott*:

There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal *status* as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery.¹⁹⁰

By detaching the question of equal political rights from an exclusionary

189. *Dred Scott*, 60 US at 583 (Curtis dissenting). Justice McLean made a similar observation in the same case:

It has never been held necessary, to constitute a citizen within the act, that he should have the qualifications of an elector. Females and minors may sue in the Federal courts, and so may any individual who has a permanent domicile in the state under whose laws his rights are protected.

Id at 531 (McLean dissenting).

190. 109 US at 25 (emphasis added). See Curtis's opinion in *Dred Scott*:

[That the Constitution] was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration, that it was ordained and established by the people of the United States, for themselves and their posterity.

60 US at 582 (Curtis dissenting).

conception of national citizenship, Bradley's judicial paradigm for interpreting the Fourteenth Amendment implicitly treats it as an effort to make Curtis's *Dred Scott* dissent the law.¹⁹¹ In this view, a republic of unequal citizens would naturally accord differing political rights to citizens of different social status.¹⁹² States therefore retained the power under the Fourteenth Amendment to exclude certain categories of U.S. citizens—such as blacks, women, and children—from the right to vote and hold office. Nondiscrimination in this area would require an affirmative political choice to counteract a pre-existing social inequality. The Fifteenth, Nineteenth, and Twenty-Sixth Amendments to the U.S. Constitution implicitly reflect the view that the Fourteenth Amendment permits unequal political rights for U.S. citizens. Indeed, these later Amendments are in effect affirmative determinations of whether, and to what degree, the right to vote shall be denied or abridged on the basis of race, sex, and age.

Within this framework of judicial interpretation, the Fourteenth Amendment provided limited, but real, benefits to freed slaves in the area of civil rights. First, it “overturn[ed] the *Dred Scott* decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States.”¹⁹³ Second, it gave constitutional legitimacy to those portions of the Civil Rights Act of 1866 (potentially challengeable under *Dred Scott*) that struck down the specific provisions of the Black Codes.¹⁹⁴ These Codes—enacted in 1865 by almost all of the ex-Confederate states under the guise of granting civil rights to newly freed slaves¹⁹⁵—specifically denied to Negroes the freedom of contract,

191. The Fourteenth Amendment made birth or naturalization the sole bases of U.S. citizenship, replacing the premise underlying *Dred Scott* that federal citizenship was a benefit conferred mainly through citizenship in a state, and that the power of Congress to confer citizenship was limited to foreign citizens and indigenous tribes. Under the Fourteenth Amendment, a state was required to extend citizenship on an equal basis to all persons born or naturalized in the United States who resided within its borders. Having established birth or naturalization as the basis of federal citizenship, and residency as the only legitimate criterion of state citizenship, the Fourteenth Amendment went on to forbid the states from discriminating against their internal minorities based on identities and interests that were largely unspecified in the text.

192. “[N]ineteenth-century usage concerning political participation confirms the close connection between privileges and immunities and civil rights: neither was thought to extend to political rights, such as voting or serving on juries. Political rights were commonly distinguished from civil rights, and only a subset of the citizens had the right to participate politically. . . . Most Republicans agreed that neither civil rights nor privileges and immunities included political rights, and legal usage generally appears to have reflected this approach.” Harrison, 101 Yale L J at 1417 (cited in note 18).

193. The *Slaughter-House Cases*, 83 US at 73.

194. *Civil Rights Cases*, 109 US at 22. (“Congress, as we have seen, by the Civil Rights Bill of 1866 . . . undertook to wipe out these burdens and disabilities, the necessary incidents of slavery . . .”).

195. The exception was Texas, which delayed enactment. Fairman, *Reconstruction and Reunion* at 117 (cited in note 126). In several states, the effect of the Black Codes would have been to apply harsh vagrancy laws to those Negroes whose conditions of labor no longer resembled those of slavery. See, for example, *id* at 114.

property rights, judicial protection, and ordinary rights of mobility afforded under state law to free laborers who were white.¹⁹⁶ A recent commentator observes:

In the terminology of Reconstruction and the Fourteenth Amendment, a law abridged a state law right when it took that right away from only one group of persons. Black Codes served as the quintessential example of an abridgment of state law rights. . . . The privileges or immunities of citizens of the United States include the very rights deriving from state law that were restricted by Black Codes. Thus, an amendment that forbade the states from abridging privileges or immunities would ban caste legislation with respect to citizens' rights and place the principle of the Civil Rights Act in the Constitution.¹⁹⁷

This meant that, henceforth, states were to give the same civil rights (privileges or immunities) to *all* U.S. citizens that states had been previously required to give under the "privileges and immunities" clause of Article IV of the Constitution to U.S. citizens visiting from other states.

Viewed from a pre-Civil War perspective, the significance of this paradigm change was that every American was now in some respects to be treated as out of state—even while at home. Under this view of Reconstruction, the Fourteenth Amendment means that a right to nondiscrimination would no longer be directly linked to a collective right to self-determination elsewhere.¹⁹⁸ Rather, we take U.S. citizenship—not state citizenship—to be the foundation of a democratic right to be treated as well as the local majority treats itself in purely civil matters. It took nearly a century for the federal courts to reverse the decisions that excluded many voting rights issues and most questions of private discrimination from the scope of federal constitutional protection.¹⁹⁹

This was largely the work of the Warren Court, which addressed these matters only after its dramatic reinterpretation of the Fourteenth Amendment in *Brown v Board of Education*.²⁰⁰ In an earlier essay (written before I grasped the constitutional significance of Lincoln's story of national survival) I argued that the Warren Court's interpretation of the Fourteenth Amendment in *Brown* implicitly followed the logic of *Dred Scott*, even while reversing its moral content.²⁰¹ Both decisions view constitutional rights as intrinsically concerned with the problem of equalization among the primordial constituent groups that make up this nation.²⁰² In *Brown*, however, the Warren Court greatly expanded the

196. See Fairman, *Reconstruction and Reunion* at 110-17 (cited in note 126).

197. Harrison, 101 Yale L J at 1388-89 (cited in note 18).

198. For fuller discussion of this point see Robert Meister, *Political Identity: Thinking Through Marx* 119-22, 151-220 (Blackwell, 1991).

199. These matters lie outside the scope of this paper.

200. 347 US 483 (1954).

201. Meister, 3 Stud Am Pol Dev 199 (cited in note 14).

202. See *id* at 255-60.

Marshallian paradigm of constitutional protection to allow individuals to assert new bases of constitutional identity under the Equal Protection Clause that would trigger the kind of federal constitutional protection accorded only to out-of-state U.S. citizens before the Civil War.²⁰³ Through its interpretation of the Equal Protection Clause of the Fourteenth Amendment, the Warren Court steadily expanded the range of primordial identities that could be protected under the Marshallian model of non-discrimination far beyond the “sovereign peoples” who made up the original federal system.²⁰⁴

Even so, however, the logic of protecting sojourners, on which the Marshallian model is based, implicitly requires a parallel expansion of the range of legislatively created beneficial expectations that do *not* trigger heightened constitutional scrutiny. Examples abound. We cannot equalize in favor of minority religion without privileging religious over nonreligious needs.²⁰⁵ We cannot equalize between male and female workers without discriminating between employed females and homemakers.²⁰⁶ We cannot protect women and minorities from verbal abuse at work without discriminating against white male speakers on the basis of the content of their speech.²⁰⁷ The logic of this model of antidiscrimination is always to make one basis of inequality inevitable by denying the legitimacy of another.²⁰⁸ Viewed from the perspective of hindsight, the logical insight behind *Dred Scott* was simply that we cannot equalize among the citizens of slave and free states without discriminating against blacks on the basis of race. It was only the first of many decisions with a similar constitutional logic.

In the first version of our post-Civil War constitutional history, the principal effect of the Fourteenth Amendment that culminated in the Warren era was to transform the limited Marshallian techniques for protecting out-of-state citizens into a paradigm for all constitutional rights to political and social equality.²⁰⁹ This is why the developing right to nondiscriminatory treatment under the Fourteenth Amendment bears traces of the logic of separate peoplehood from which it originated. The conclusion of the story is that some Americans can now claim the right to nondiscrimination through identities based on race, religion, gender, age, disability, and national origin that do not necessarily correspond to the range of “peoples” that could plausibly assert alternative claims to sovereign statehood under Marshall’s unreconstructed Constitution. Nondiscrimination law

203. See *id.*

204. See *id.*

205. See, for example, *Sherbert v Verner*, 374 US 398 (1963).

206. See, for example, *Califano v Webster*, 430 US 313 (1977).

207. See, for example, *Meritor Savings Bank v Vinson*, 477 US 57 (1986).

208. See Robert Meister, *Discrimination Law Through the Looking Glass*, 4 Wis L Rev 937 (1985).

209. See Meister, 3 Stud Am Pol Dev at 250 (cited in note 14); Harrison, 101 Yale L J at 1410-13 (cited in note 18); Nelson, *The Fourteenth Amendment* 150-55 (cited in note 182).

within the United States is no longer *linked* to claims to sovereignty, but the structural *analogy* with claims to sovereignty is still preserved. In a sense, the claim to sovereignty has become a metaphor for constitutional equality rather than the basis of it.

This version of the expansion of rights that can be claimed under the Fourteenth Amendment (and statutes implementing it)²¹⁰ suggests that for every newly protected constitutional right ontogeny recapitulates phylogeny. We begin, that is, by imagining ingathered "nations" of the elderly, the disabled, women, blacks, and so forth able to make laws suitable to themselves, and under which their present legally created handicaps would be fully offset by legal advantages. This is the mythical moment of "separate but equal." Protection under the Fourteenth Amendment kicks in when federal courts recognize the diasporic nature of all such groups in order to enforce their rights not to be "handicapped" by laws as they presently exist. Under this paradigm of Reconstruction, individual rights appear as traces of the equality of sovereign and distinct peoples, some of whom, through brutality or historical accident, have imposed their concepts of normality on others. This view is a sublimated form of the Cultural Wilsonianism discussed above.²¹¹

B. THE FOURTEENTH AMENDMENT AND LINCOLNIAN RECONSTRUCTION

The efforts of the Warren and Burger Courts to extend the model of constitutional protection for out-of-state sojourners to groups such as women and the elderly have placed increasingly severe strains on the framework of Marshallian jurisprudence.²¹² Many of these strains reflect the fact that the moral logic of survivor stories constitutes a second version of Reconstruction in our Fourteenth Amendment jurisprudence that we may call Lincolnian.

According to this logic, slavery has become a metaphor for other claims to rights based on past stigmatization, exploitation, or abuse. Such an approach goes a long way toward explaining the inclusion of women, the handicapped, the elderly and other groups that are not nations in the moral logic of national recovery, and might easily justify the inclusion of gays as well. As a progressive

210. US Const, Amend XIV, § 5.

211. It implies that cultural difference is ideally a basis for territorial self-government, or since this is not possible, for the recognition that one cannot be judged by the standards of normality imposed by others. Although this anticolonial paradigm might seem on its face to embrace the desirability of multiculturalism, it rests, as we have seen, on the assumption that ultimately, all individual rights are based on the collective right to exclude or dominate "other" cultures in the name of preserving one's own. Among many intellectuals today, imperial domination is taken as a paradigm of all injustice, and every expression of cultural difference is asserted as a residue of a thwarted right to be ruled by one's own people. See, for example, Andrew Parker, et al, eds, *Nationalisms and Sexualities* (Routledge, 1992).

212. For further discussion see, Robert Meister, *Review of The Partial Constitution*, 23 Pol Theory 182 (1995).

instrument of Reconstruction, the Fourteenth Amendment can thus be said to extend the logic of survivorship from former slaves to other victimized groups that become capable of telling parallel stories in which the nation as a whole can potentially identify a common sense of victimhood and ultimate survival.²¹³

Although there is now a clear Lincolnian strand of Fourteenth Amendment jurisprudence, it was not fully apparent for nearly a century. This absence is partly attributable to the continuing influence of *Dred Scott* on the interpretation of the Fourteenth Amendment described above, and partly to the fact that the first successful survivor story was that of the defeated South that also fit the Marshallian model of Reconstruction discussed in the preceding section.²¹⁴ For seventy-five years, the combination of these two factors meant that the Fourteenth Amendment was interpreted on questions of race in a manner that was largely consistent with the treatment of stateless minorities in a world in which Woodrow Wilson's vision (what we might call "equal but separate") was considered an ultimate, if unattainable, ideal. This changed only in 1954 when the great case of *Brown*,²¹⁵ outlawing segregation in the public schools, began the Second Reconstruction.

One way to describe the significance of the paradigm shift engendered by *Brown* would be to say that the Warren Court implicitly adopted a Lincolnian view of Reconstruction and its implications for Fourteenth Amendment jurisprudence. We can appreciate the magnitude of this shift by remembering that Herbert Wechsler, a civil rights liberal, was troubled by the apparent fact that segregation laws²¹⁶ were equally restrictive on blacks and whites, while the Court's desegregation ruling seemed to burden whites for the benefit of blacks. In criticizing the Warren Court's reasoning in *Brown*, Wechsler called for a constitutional justification that was "neutral" between the desire of blacks to associate with whites and the desire of whites not to associate with blacks. His demand for "neutral principles" of constitutional adjudication²¹⁷ was implicitly based on the Marshallian model of constitutional rights as traces of sovereignty that require judicial decisions analogous to choice of law questions in private international law. If, however, the equal protection clause is interpreted through a model of Reconstruction as a survivor story commemorating the trauma of

213. For a suggestion that this may have been part of the original intent, see Note, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 Yale L J 1153, 1158-63 (1988).

214. The film, *The Birth of a Nation* (Epoch, 1915), tells the survivor story of the South. The works of post-Civil War Southern historians, such as Ulrich B. Phillips, contributed to the aura of the tragedy surrounding the "lost cause." See Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Antebellum South* 3 (Knopf, 1956); Genovese, *The Political Economy of Slavery* 70-84 (cited in note 124).

215. 347 US 483 (1954).

216. And also state antimiscegenation laws that were later struck down in *Loving v Virginia*, 388 US 1 (1967).

217. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1 (1959).

slavery, then neutrality of the kind demanded by Wechsler is not a serious concern. This was the deep significance of the Warren Court's decision to overrule *Plessy v Ferguson*²¹⁸ on the grounds that, as a matter of law, racial segregation is inherently stigmatizing to blacks.²¹⁹ In effect, the historical meaning of the Fourteenth Amendment was once again tied to the Thirteenth Amendment's abolition of slavery.

The great achievement of the Warren Court was thus to revive, if not wholly to endorse, the plausibility of a Lincolnian interpretation of the Fourteenth Amendment, and of Reconstruction generally.²²⁰ This interpretation is, in essence, that the United States survived its legacy of slavery by making a constitutional commitment not to repeat the patterns and practices deriving from it. From this perspective the Equal Protection Clause forbids discrimination against blacks even before it forbids discrimination on the basis of race. The Warren Court's success can be measured by the extent to which Wechsler's call for "neutrality" in equal protection jurisprudence was rejected by the courts, and eventually by large segments of legal academia.²²¹

There is still, however, no widespread agreement about whether the Fourteenth Amendment is essentially remedial in matters of race, or whether it merely represents the nation as having "survived" racism. The view that the Fourteenth Amendment is a remedy for a past violation of rights is strengthened if we read the Thirteenth Amendment as memorializing that violation.²²² If, however, the Fourteenth Amendment is read (via the Gettysburg Address) as part of a national survival story, then each new repetition of a pattern or practice of racism is a new violation of rights. When such a new violation can be shown, the presumption that it revives old traumas can justify the imposition of drastic remedies. But when a new civil rights violation cannot be found, federal courts will often be inclined to accept a more Marshallian model of nondiscrimination that makes local whites the virtual representatives of the local black minority, but protects those whites from being significantly disadvantaged for the benefit of blacks.

This is the dilemma of nonremedial affirmative action in a society in which

218. 163 US 537 (1896).

219. *Brown*, 347 US at 494-95.

220. Further research is needed to determine how far other constitutional departures of the Warren era were based on similar rationales. To what extent, for example, was the so-called "revolution" in criminal procedure based on an image of Americans, especially blacks and Hispanics, as survivors of police states, and to what extent was it based on neutral principles that would be extended to anyone living apart from his or her people?

221. See, for example, John Hart Ely, *Democracy and Distrust* 55 (Harvard, 1980). Ely, a former Warren clerk, upholds neutrality as a stricture of judicial method, but not as a matter of substantive content. In his view, the Equal Protection Clause has the *neutralizing* role of "facilitating the representation of minorities." *Id* at 135-79. Writing at the apogee of the post-Warren Court consensus, Laurence Tribe makes short shrift of Wechsler. See Laurence Tribe, *American Constitutional Law* 1517 n 23 (Foundation, 2d ed 1988).

222. See, for example, Guyora Binder, *Did the Slaves Author the Thirteenth Amendment? An Essay in Redemptive History*, 5 Yale J L & Hum Rts 471 (1993).

a numerical majority may someday consist of constitutionally protected minorities. We already face this dilemma insofar as women are entitled to protection under the Fourteenth Amendment.²²³ Can we say of the survivors of patriarchy that the law forbids discrimination against women even before it forbids discrimination on the basis of gender? The courts are not yet clear about whether discrimination on the basis of sexual difference is wrong, if and only if, it is discrimination against women. Are women entitled to whatever benefits men give themselves in a male-dominated world? Are they entitled to whatever they could reasonably expect in a female-dominated world? Or are they entitled to a renewed social union based on a shared memory of their special history of oppression and incestuous abuse?

Similar dilemmas are likely to appear as a growing number of immigrant “sojourners” become eligible for the preferential treatment originally intended for the domestic “survivors” of historical acts of persecution. Should one be able to immigrate into a constitutionally protected group if the original grounds for the protection was the creation of a new national identity for the victims and perpetrators of a past atrocity? Why not, if the basis of the atrocity was itself national origin or race?

A particularly disturbing implication of the Lincolnian version of Fourteenth Amendment history is that constitutional rights under the Fourteenth Amendment are generally extended to victimized groups only after they have already survived well enough to tell their story. One thing that blacks, Asians, Hispanics, and women have in common is that their civil rights received effective constitutional protection after their success at political mobilization, and not as an immediate response to their earlier experiences of oppression under the color of law.²²⁴

Perhaps a more disturbing implication, however, is that this view of Reconstruction has made it difficult to claim constitutionally protected status for victimized groups, such as indigenous tribes, that have *not* been able to survive. There are, as we have already seen, troubling connections between Lincolnian Reconstruction and the claims of the survivors in our national history to a

223. See *Frontiero v Richardson* 411 US 677, 682-84 (1973); Note, 97 Yale L J 1153 (cited in note 213).

224. In a provocative series of articles, Martin Shapiro has argued that, from 1937 through the Warren and Burger eras, the Supreme Court in effect gave constitutional status to the various interest groups making up the New Deal coalition—first, by upholding labor legislation, and then by protecting (and calling forth) other New Deal constituencies, such as blacks and women, that legislatures had previously failed to protect. See, for example, Martin Shapiro, *The Constitution and Economic Rights*, in M. Judd Harmon, ed, *Essays on the Constitution of the United States* ch 5 (Kennikat, 1978); Martin Shapiro, *The Supreme Court: From Warren to Burger*, in Anthony King, ed, *The New American Political System* ch 5 (American Enterprise Institute, 1978); and Martin Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, in Vincent Blasi, ed, *The Burger Court: The Counter-Revolution that Wasn't* ch 11 (Yale, 1983).

manifest destiny that may not have appeared inevitable to their absent victims.

The difficulties described above reflect the fact that the survivor model never fully eclipsed the sojourner model, even in the Warren Court's development of *Brown*. With the benefit of hindsight we can now see that both models were present in the original intent of the Fourteenth Amendment,²²⁵ and that both are present in *Brown*. Arguably, *Brown* would not have taken hold were it not for the emergence of independent African states and the Cold War imperative to repudiate racism.²²⁶ This is a Wilsonian point, consistent with the sojourner model. In embracing the Lincolnian model, however, the Warren Court made unavoidable the problem confronting the interactions and conflicts between the two models at the level of constitutional decision-making. The consequences of these interactions and conflicts are clearly apparent when we consider the problems that arise when the Court and its critics attempt to interpret the First Amendment according to the models of Reconstruction embodied in the Fourteenth Amendment.

C. THE INCORPORATION OF THE FIRST AMENDMENT UNDER THE FOURTEENTH

Recent advocates of regulating hate speech have placed American discussions of civil liberties within the broader gamut of constitutional responses to national histories of human rights abuse.²²⁷ Our national commitment to overcome a history of slavery, they argue, should give government an affirmative duty to keep anti-black advocacy off the political agenda in much the way that a post-Nazi Germany is appropriately committed to suppressing anti-Semitic advocacy.²²⁸

This is not merely a prudential argument for suppressing free speech so that history does not repeat itself. In its strongest form it is, rather, an argument that groups whose history of oppression have constitutional weight may also have a constitutional right to live in a nonhostile environment, and thus to be protected from even symbolic repetitions of the forms of their oppression. The argument

225. Prewar abolitionist sojourners and postwar slave survivors had both been denied rights in Southern states that the Fourteenth Amendment was enacted to protect. See Binder, 5 Yale J L & Hum Rts at 480 (cited in note 222); Binder, Cardozo L Rev (cited in note 98) (forthcoming); and Lash, 88 Nw U L Rev 1133-37 (cited in note 35).

226. See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 Stan L Rev 61 (1988); Derrick Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv L Rev 518, 524 (1980).

227. The work of Mari Matsuda is particularly notable in this regard. See, for example, Matsuda, *Public Response to Racist Speech*, 17 (cited in note 158). See generally, Matsuda, et al, eds, *Words That Wound* (cited in note 158); Catharine A. MacKinnon, *Only Words* (Harvard, 1993). Compare Henry Louis Gates Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, New Republic 37 (Sept 20 & 27, 1993).

228. See, for example, Marjorie Miller, *German Ban on Holocaust Denial Upheld*, LA Times A7 (Apr 27, 1994); Rick Atkinson, *Denial of Nazi Holocaust Brings 3-1/2-year Sentence*, Wash Post A18 (Aug 30, 1995).

advocates a jurisprudence of free speech that returns to the principles of national reconstruction generally, and of the unfinished business of our own Reconstruction in particular.

The foregoing discussion, however, allows us to see that appealing to a Reconstruction-based interpretation of the First Amendment conceals an ambiguity between the two approaches to the Reconstruction-based interpretation of the Fourteenth Amendment described above. Was the Fourteenth Amendment, and Reconstruction itself, a way to end the Civil War by including previously underrepresented groups, beginning with the defeated South, in the scope of national constitutional protection? Or were they, rather, a way of continuing the antislavery goals of the Civil War by other means? In what ways does the Fourteenth Amendment function as an amnesty for slavery and secession? In what ways is it a commemoration of those historical occurrences?

The questions about the nature and meaning of the Fourteenth Amendment become even more critical when we remember that the First Amendment became enforceable against the States only through a process of selective incorporation under the Fourteenth, and that the twentieth century debate over incorporation has turned in part on how and why the Fourteenth Amendment was ratified. Akhil Reed Amar has argued that correctly interpreting the present meaning of the Bill of Rights is largely a matter of fitting the Madisonian “pegs” of our antebellum constitution into the “holes” of Reconstruction.²²⁹ In a series of other provocative articles, Amar argues that a full acknowledgment of the antislavery origins of the Fourteenth Amendment will require major changes in the interpretation of the portions of the Bill of Rights incorporated under it.²³⁰ Interestingly, Amar’s account of the origins of the Fourteenth Amendment sometimes focuses on the antebellum experience of *abolitionists* whose freedom of speech and religion was denied when they were sojourners in slave states, and sometimes focuses on the experiences of freed *slaves* before and after the Civil War.²³¹

Using the framework developed in this Article, we can see that Amar’s view of the antislavery origins of the Fourteenth Amendment, for all its subtlety, obscures the fact that some moments of incorporation recast the original Bill of Rights to fit the model of Reconstruction as a survivor story, and that others recast the logic of the Bill of Rights within the sojourner model. There is thus, in

229. See Amar, 101 Yale L J at 1260-62 (cited in note 70).

230. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L J 1131, 1201-02 (1991); Akhil Reed Amar, *Some Comments on The Bill of Rights as a Constitution*, 15 Harv J L & Pub Pol 99, 102-08 (1992); Akhil Reed Amar, *Anti-Federalists, The Federalist Papers, and the Big Argument for Union*, 16 Harv J L & Pub Pol 16 111 (1993); and Amar, 106 Harv L Rev 151-60 (cited in note 70).

231. Compare Amar’s scholarship with Jacobus Ten Broek, *Equal Under Law* (Collier, 1965). For an important earlier discussion of the role of the civil rights struggle in First Amendment jurisprudence, see Harry Kalven, Jr., *The Negro and the First Amendment* (Ohio State, 1965).

what we call our First Amendment jurisprudence, evidence of the two versions of nondiscrimination described in this Article, and of the continuing tension between them. In the pages that follow I shall show how this redescription of First Amendment jurisprudence sheds new light on certain issues involving religion, speech, and pornography.

1. Religion.

Oddly, the only clause of the First Amendment that Amar thinks should not have been incorporated under the Fourteenth is the Establishment Clause.²³² He plausibly reads the original language forbidding Congress to legislate “*respecting* the establishment of religion” as a simultaneous bar to federal establishment of religion and to federal interference with religious establishments in the states (especially including state-sponsored religious schools).²³³ From this he concludes that the enforceability of the Establishment Clause against the states does not fit the “Reconstruction-based” logic of incorporation under the Fourteenth Amendment.²³⁴

In fact, however, the Fourteenth Amendment rationale for incorporating the Establishment Clause was an instance in which the Court explicitly extended the Lincolnian logic of survivor stories to a new area of law where it would eventually clash with the competing Fourteenth Amendment logic based on the rights of sojourners. Writing in the aftermath of World War II in 1947, Justice Black describes Americans as a nation of refugees from religious persecution:

[T]he early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions . . . With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects . . . and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be . . . in league with the government . . . men and women had been fined, cast in jail, cruelly tortured, and killed.²³⁵

We survivors of this history, Black suggests, adopted the Establishment Clause to commemorate, rather than to repeat it. In essence, Black is arguing

232. See Amar, 100 Yale L J 1131 (cited in note 230).

233. *Id.* at 1157.

234. See *id.* at 1158-60. Amar is not opposed to the conception of public secularism that Warren Court liberalism drew from the Establishment Clause. Rather, he argues that most of the current applications of the Establishment Clause against the states could have been better justified under the Equal Protection Clause of the Fourteenth Amendment. See Lash, 88 Nw U L Rev 1145-56 (cited in note 35), for a view of Reconstruction that supports the incorporation of the Free Exercise Clause under the Fourteenth Amendment.

235. *Everson v Bd of Educ.*, 330 US 1, 8-9 (1947).

that liberal constitutionalism is a rationale for excluding the promotion of certain historically troubling goals from the public agenda on straightforward Lincolnian grounds—national unity and a commitment not to repeat the past.

After it became enforceable against the states, the Establishment Clause was interpreted to require the asymmetrical treatment of religious and nonreligious speech in official contexts. The most notable example was the Court's decision to exclude certain types of devotional religious expression (such as prayer) from operating public institutions (such as public schools).²³⁶ Recently, some courts have viewed this exclusion as a silencing of religious values on the basis of content alone—a violation of the Speech Clause of the First Amendment as well as the Free Exercise Clause.²³⁷ This straightforward claim of persecution implicitly portrays religious speakers as members of an alternative political majority marooned in a secular humanist state that has no neutral basis for discriminating against religious speech.

Most constitutional liberals, however, are not embarrassed by this attack on the discriminatory implications of the Establishment Clause for free speech. They continue to insist, as Black did in 1947, that the United States was founded by survivors of religious persecution, and that our democratic tradition of free speech has flourished by excluding overtly religious projects from the public realm. Establishment Clause liberals argue that we have an historical commitment to show special solicitude for the historical victims of religious persecution elsewhere and for potential victims of religious persecution here. Under the historical circumstances of 1947, this commitment required a departure from the view that the United States has always been a Christian nation in order to accommodate and welcome Jews, and by implication, practitioners of other non-Christian faiths who might otherwise feel excluded from the national community. The Establishment Clause, for most liberals, is an affirmative constitutional commitment to treat religious and nonreligious speech asymmetrically.²³⁸

This rationale for incorporation of the Establishment Clause under the Fourteenth Amendment does not always govern its interpretation. Sometimes the argument for not discriminating against Christianity prevails over Hugo Black's survivor story. In several recent public forum cases, which tend to involve school buildings when school is not in session, the Court has used the sojourner logic of nondiscrimination to uphold the use of public facilities by religious

236. *Engel v Vitale*, 370 US 421 (1962); *Abington Sch Dist v Schempp*, 374 US 203 (1963); *Lee v Weisman*, 505 US 577 (1992).

237. See, for example, *Grossbaum v Indianapolis-Marion County Building Authority*, 63 F3d 581 (7th Cir 1995) (city's prohibition of the display of a menorah in a public building, which was predicated by concern over its religious significance, held to violate the First Amendment); *Doe v Small*, 964 F2d 611 (7th Cir 1992) (terms of an injunction against displaying religious paintings on public grounds held to be overbroad and case remanded to the District Court for a more "tailored" and "content-neutral" injunction).

238. For a version of Establishment Clause liberalism that responds to recent First Amendment counterarguments see Kathleen Sullivan, *Religion and Liberal Democracy*, in Geoffrey R. Stone, et al, *The Bill of Rights in the Modern State* 195-223 (Chicago, 1992).

groups.²³⁹ In these cases, the religious groups are viewed as strangers in a secular state who must be accorded the same right of access to public facilities that the secular majority gives itself—they cannot be denied the right to speak and associate merely because their speech and association is religious. This is a reflection of the first version of Reconstruction in which claims to constitutional equality are traces of the competing claims to sovereignty of locals and sojourners. In interpreting these cases, however, the federal courts have made it reasonably clear that the survivor story model of the Establishment Clause should still be dominant where it clearly applies, as it does in public elementary schools during the school day.

2. Speech.

The two logics of constitutional protection have a different relation in the judicial interpretation of the Speech Clause. Here the survivor story model has been generally subordinate to the sojourner model. This occurred, in part, because the Speech Clause was incorporated under the Fourteenth Amendment as a result of cases arising out of American involvement in World War I,²⁴⁰ a war in which the United States had chosen sides, first among the nations of the Old World and then against the revolutionaries in Russia.²⁴¹ Many of the cases leading to the incorporation of the Speech Clause arose because the government used the pretext of a foreign war and the possibility of a domestic revolution to persecute aliens and dissidents through state and federal laws forbidding the advocacy of certain beliefs that the government considered dangerous to political stability.²⁴²

In this context, it is admittedly odd to label the position of Holmes and

239. See, for example, *Lamb's Chapel v Center Moriches Union Sch Dist*, 113 S Ct 2141 (1993); *Widmar v Vincent*, 454 US 263 (1981); *Westside Bd of Educ v Mergens*, 496 US 226 (1990). These cases hold that governments may deny religious groups access to a public forum only if all other private groups are likewise denied access.

240. *Gitlow v New York*, 268 US 652, 666 (1925) states in dictum that First Amendment "freedom of speech and of the press" are enforceable against the states under the Fourteenth Amendment. This is a "Red Scare" case arising in 1919, and strongly influenced by the immediate aftermath of World War I and the Russian Revolution. The Speech Clause is finally incorporated in *Fiske v Kansas*, 274 US 380 (1927), and the Press Clause is incorporated in *Near v Minnesota*, 283 US 697 (1931).

241. World War I was a controversial war that followed a period in which the United States had experienced unprecedented levels of immigration from countries on both sides. Some of these immigrants were dissidents, even revolutionaries, against their former governments, while some were reluctant to take up arms against a former homeland, believing that the United States had entered the war on the wrong side. See, for example, Richard Polenberg, *Fighting Faiths: The Abrams Case, The Supreme Court, and Free Speech* ch 1 (Penguin, 1987).

242. See *Gitlow*, 268 US at 667-68. See also *Fiske*, 274 US at 386-87; *Schenck v United States*, 249 US 47, 52 (1919); Polenberg, *Fighting Faiths* ch 1 (cited in note 241); and Harry J. Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* chs 10-11 (Harper and Row, 1988).

Brandeis that speech should not be regulated on the basis of content as Wilsonian because it was Wilson's own repressive policies that they opposed. Nevertheless, we can plausibly say that the Holmes-Brandeis approach to the protection of speech was parallel in its logic to the protection of the rights of alien minorities in the Wilsonian international system and to the protection of out-of-state sojourners in Marshallian federalism. The familiar core of Holmes's approach was to forbid state and federal regulation of speech on the basis of content alone, and to require that government prove a "clear and present danger" on a case-by-case basis.²⁴³ Such an approach would allow suppression of any would-be subversive who was likely to succeed in imposing his or her will,²⁴⁴ while preventing official discrimination against the mere utterance of foreign beliefs—the speech (of those) we hate. Although Amar has argued that the Reconstruction-based rationale for incorporating the Speech Clause under the Fourteenth Amendment would have been to reverse the antebellum ban on abolitionist speech in the slave states,²⁴⁵ this view conflates the survivor story model of constitutional protection with the sojourner model in which the typical Northern abolitionist was an out-of-state citizen who had been denied federal protection in the South because the content of his speech had been banned by state law.²⁴⁶ Holmes's "clear and present danger test"—the version of speech-protection that was first incorporated under the Fourteenth Amendment—protects peripheral minorities whose views are merely foreign or unpopular, but would probably not have protected an abolitionist in the slaveholding South whose incitement of local slaves was both unpopular and dangerous to the established order.

A Holmesian ban on content-based discrimination requires, as I have written elsewhere, that a demonstration by the Ku Klux Klan in Harlem must be treated in the same way as a demonstration by Martin Luther King in Cicero.²⁴⁷ From this perspective it would not matter that the *state action* necessary to protect the rights of demonstrators in the first case could involve the use of police violence against blacks at the initiative of white racists, a repetition of the pattern of

243. Holmes first articulated the "clear and present danger" standard in *Schenck*, where the Court considered whether a conspiracy to obstruct the draft was punishable under the Espionage Act. As Holmes noted:

The question . . . is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

249 US at 52.

244. Judge Learned Hand would have required proof that there was also intent to subvert. See *Masses Pub Co v Patten*, 244 F 535, 539 (1917).

245. See Amar, 101 Yale L J at 1215-16 (cited in note 70).

246. The 1844 experience of the Northern abolitionist, Samuel Hoar, in South Carolina is sometimes cited to make this point. See Harrison, 101 Yale L J at 1465 n 305 (cited in note 18).

247. See Robert Meister, *Journalistic Silence and Governmental Speech: Can Institutions Have Rights?*, 16 Harv CR-CL L Rev 319, 373 (1981).

historical abuse that the Reconstruction Amendments arguably aim to prevent.²⁴⁸ More broadly, it would not matter whether historically dominant patterns of oppression are reinforced or offset by the state action necessary to promote free speech.²⁴⁹

If, however, we abandon the Holmesian model in favor of the survivor story model, these considerations *would* matter whenever the state has an affirmative duty to offset the continuing effect of past oppression. This suggests that the key to incorporating the logic of survivorship into the interpretation of the Speech Clause is the degree to which state action is involved in the imposition of the speech of one private actor on another.²⁵⁰

Recent scholarship suggests this issue is unavoidable. Contrary to prevailing First Amendment orthodoxy, the state is never neutral with respect to the private speech that it protects. Its actions and omissions always subsidize one side rather than another.²⁵¹ A "survivor story"-based approach would consider whether the nature and extent of that subsidy constitutes a repetition of an invidious historical pattern.

Our previous discussion of the Fourteenth Amendment incorporation of the Establishment Clause can help to illuminate this point. Establishment clauses are not generally a way of asserting government neutrality—they are rather a way to disestablish an institution about which government can never be truly neutral. The disestablishment of slavery through the Thirteenth Amendment is certainly an example of a subject on which the U.S. government may not be neutral (no more than the present German government can properly be neutral on Nazism or the occurrence of the Holocaust). Once the survivor story model of constitutional interpretation is taken seriously, we can see that the Thirteenth Amendment might require that the Speech Clause be interpreted asymmetrically for state-endorsed racist and non-racist speech, in much the way that the Establishment Clause now requires the Speech Clause to be interpreted asymmetrically for state endorsed religious and nonreligious speech.²⁵² By parallel reasoning one

248. Nor would it not matter in the case of Nazis marching through Skokie, a well-off Chicago suburb inhabited by a large concentration of Holocaust survivors, whether the demonstration was a protest by an unpopular minority in Chicago politics (the Nazis) or a further act of persecution of an oppressed minority in world history (the Jews). See generally, Meister, 16 Harv CR-CL L Rev at 374-75 (cited in note 247). But see Meister, *Political Identity* 168-75 (cited in note 198).

249. Meister, 16 Harv CR-CL L Rev at 373-76 (cited in note 247). Compare this view with Amar, 106 Harv L Rev 124 (cited in note 70).

250. In a recent article, Akhil Reed Amar has taken a similar view. Treading carefully through the hate speech debate, he argues that government protection of private hate speech involuntarily imposed upon blacks could be banned under both the Thirteenth and Fourteenth Amendments, which authorize courts to consider the broader effects of the private enslavement of one person by another. See Amar, 106 Harv L Rev at 156-61 (cited in note 70).

251. See Cass R. Sunstein, *The Partial Constitution* (Harvard, 1994); Cass R. Sunstein, *Democracy and the Problem of Free Speech* (Free Press, 1993); and Meister, 23 Pol Theory 182 (cited in note 212).

252. This is different from suggesting, as James Forman, Jr., does, that the racial

might argue that a post-Zionist Israel (or a post-Serbian Bosnia) could, for reasons of disestablishment, legitimately ban Salman Rushdie's *Satanic Verses*²⁵³ even though such an action would be illegitimate for most other countries, including Iran.

Allowing for this type of constitutional reasoning, however, does not mean that we must practice a First Amendment jurisprudence in which any analogy between a speech act and a previous act of identity-based oppression will "trump" the right to free speech as we now know it.²⁵⁴ The survivor story model, as explained above, should not rely on mere analogies between collective and individual recovery—the *causal links* between collective and individual traumas need to be carefully examined for every individual and group.²⁵⁵

Such causal claims may be, and often are, pretextual, but they are intelligible and cannot be dismissed without addressing in a lawyerly fashion the normal evidentiary questions about presumptions and burdens of proof. Such questions would structure our inquiry into the social psychology of trauma and transference: Does generational change erase trauma and cancel guilt? Or are there generation-skipping effects in the transmission of traumatic memories that can be subsequently recovered as a basis for new historical claims? On the basis of such a causal inquiry, we might plausibly conclude that a nation with a history of racial persecution, such as ours, has an affirmative duty to commemorate that history and to prevent past patterns from repeating themselves, much as the German state (as a successor to Nazism) has an affirmative duty not to be neutral in its treatment of antisemitic advocacy—a duty, for example, to de-

equivalent of the Establishment Clause would require government to be somehow nonpartisan in its official speech. See James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 Yale L J 505 (1991). For the origin of Forman's conception of a political version of the Establishment Clause, see Mark G. Yudoff, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 Tex L Rev 863 (1979); Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 Cal L Rev 1104 (1979). For a critique of Kamenshine and Yudoff, see Meister, 16 Harv CR-CL L Rev at 322-28 (cited in note 247).

253. Salman Rushdie, *The Satanic Verses* (Viking, 1988).

254. Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 Harv L Rev 1639 (1993). It is interesting that Kozinski and Volokh implicitly take a post-modern view of the plasticity of metaphorical thinking, and hence regard it as unsuitably arbitrary as a basis for legal argument. See *id.* at 1647, 1650, 1653-54, 1657.

255. The general nature of the causal claim to be examined is, however, relatively clear: in threatening the collective myth of survival, a new stressor has caused the former victim to unconsciously reenact the original traumatic experience and to regress to the unsuccessful mechanisms of defense against it. These defenses might include repetition-compulsion, anxiety, intrusive imagery, and exaggerated startle-responses. Note that the causal claim is *not*, for example, that a racial epithet repeats the harm of slavery—as stressors there is a world of difference between the two. The claim is rather that the racial epithet causes a harmful regression to the defenses against the unresolved trauma of slavery—harmful directly to the mental health of the former victim, and also because of its indirect effect on the behavior of the victim and others.

nounce such advocacy and not to honor the symbols of Nazi rule.²⁵⁶ Quite possibly, however, one's acceptance of any such conclusion would depend upon one's view of where the presumptions and burdens in the causal argument ought to lie.

3. Pornography.

We must, however, distinguish the foregoing discussion of hate speech from Catharine MacKinnon's well-known view that any pornographic representation of a woman as demeaned or oppressed is in itself an act that demeans or oppresses women.²⁵⁷ Her claim is that pornography is experienced *as* an act of sexual abuse by its female viewers, and that it discriminates against all women by marking them as persons to be raped and otherwise abused.²⁵⁸

MacKinnon's position has not always been so strongly grounded in the survivor story model. In her first book, dealing with sexual harassment in the workplace, she persuasively analyzed the impossibility of addressing gender-based oppression within a logic in which women are virtually represented by men.²⁵⁹ As an alternative, she advocated a version of Marshall's sojourner model in which male desires and attitudes would no longer be accepted as the standard of what is reasonable and normal for women. It would be equally valid, she suggested, to regard men as strangers in a world in which laws were made by and for women, and to view the difference between that world and this world as the precise measure of discrimination against women here and now.²⁶⁰

The device of seeing the world from a woman's point of view is not, however, a strong enough basis for regulating the pornography that some men see, unless it proves to be true that the female performers in pornography are not merely pretending to be demeaned by their performance.²⁶¹ This would justify the conclusion that the pornography industry really demeans *those* women, and that the public participation in such acts of humiliation via the market is no less obscene than paying to watch someone be tortured.²⁶²

256. Similar duties have already been recognized, in limited contexts in regard to "hostile-environment discrimination" in the workplace. To implement this duty there must be *some* regulation of overtly abusive speech directed against individuals, although, as Volokh notes, such regulation may have already gone beyond what the First Amendment should permit. See Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L Rev 1791, 1819-43 (1992).

257. See Catherine A. MacKinnon, *Pornography As Defamation and Discrimination*, 71 BU L Rev 793, 803-04 (1991).

258. *Id.* at 798-802.

259. See Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 144-46 (Yale, 1979).

260. *Id.* at 144.

261. Compare MacKinnon, 71 BU L Rev at 810-13, 815 (cited in note 257).

262. MacKinnon here conflates merely pretending to be engaged in what is, arguably, the sexual oppression of women with pretending to pretend. For an elaboration of this argument, see Robert Meister, *Vigilante Action Against Pornography: The Symbolic Destruction of Symbols*, Social Text 3 (Fall 1985). Compare this with Catharine A.

For a time, MacKinnon relied heavily on such an argument, thereby postponing First Amendment concerns.²⁶³ To address those concerns, she has now developed a claim that justifies the content-based censorship of devotional religious speech in public schools, and that might arguably ban derogatory racial epithets directed by a white against an unwilling “captive” audience of one or more blacks.²⁶⁴ To make such a claim, MacKinnon must tell a survivor story. Her most recent book begins by asking us all—victims and perpetrators alike—to identify ourselves with the collective survivors of sexual abuse:

Imagine that for hundreds of years your most formative traumas, your daily suffering and pain, the abuse you live through, the terror you live with, are unspeakable You grow up with your father holding you down . . . so another man can make a horrible searing pain between your legs.²⁶⁵

It would take a Lincolnian rebirth memorializing such a collective history of sexual oppression to make the restrictions on speech that MacKinnon advocates seem a natural way to protect women from the trauma of repetition within our present constitutional framework. If she is indeed propounding such a view, however, MacKinnon would have to argue that the trauma of rape—and the defenses against it—are *actually* relived in the course of every pornographic experience inflicted upon women. This is a burden of proof she has yet to meet.

IV. Conclusion

This Article has been a first effort to explore the tensions between two logics of constitutional development, to show that they are linked, and to suggest that they are deeply embedded in the ways we have come to think about politics.

I have suggested throughout this Article that the articulation of each model represents a distinctive American political contribution to world political thought. Our mode of constitutional discourse is partly responsible for this contribution, as is the fact that our war of national liberation and our civil war were historically discrete events that made quite different demands on constitutional thought.

I hope, however, that this Article serves to undermine the all-too-frequent assumption that American constitutional development took place in (blessed) isolation from the problems of international order that affected other parts of the world. Contrary to this prevailing view, I have argued that the American vision of an interstate system was a creative, but not wholly successful, solution to

MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 125-213 (Harvard, 1987).

263. See, for example, MacKinnon, *Feminism Unmodified* at 127-33 (cited in note 262).

264. For a suggestion of this kind, see Amar, 106 Harv L Rev at 157-58 (cited in note 70).

265. MacKinnon, *Only Words* at 3 (cited in note 227).

problems of jurisdiction and choice of law in a transnational civil society. In turning to Lincoln, however, I have also argued that American national identity has been based on a troubled marriage of the transnational logic of survivorship on which he drew, and the logic of protecting sojourners that links Marshallian federalism to Wilsonian internationalism.

Throughout this Article, I have used constitutional metaphors—originally American—to identify the inherent connections between domestic and international politics, and between past trauma and present identity. My concluding suggestion, however, is that in their fundamental logic the sojourner and survivor models are not uniquely American, and that their interaction lies at the root of political consciousness in countries where the moment of national liberation is much more difficult to distinguish from the moment of civil war. Even the most cursory survey would suggest that both models are frequently in play throughout the world, and that the combination of the two is often volatile.

Nowhere is the pervasive interaction and conflict between our two models better illustrated than in the case of Israel, which has attempted to weave a Lincolnian story of survival and redemption into the Wilsonian shell of Zionism and the Balfour declaration. The Second World War would probably not have been fought by Wilsonian national leaders to save the Jews and other Nazi victims, but the fact that it arguably accomplished this (if only barely) made it possible for postwar politicians to construct a story of survival and redemption from their “discovery” of the German record of genocide.²⁶⁶ Since 1947, it has been a covenantal element in the survivor story on which postwar Western unity was based that Israel—a place of refuge for the survivors and potential victims of the Holocaust—should not have to internalize the costs of its own defense.

This principle, however, has always been difficult to reconcile with the logic of the Wilsonian system of minorities that provided an independent, and earlier, rationale for the restoration of a Jewish national homeland in a partitioned

266. The memory of the German atrocities is a major factor that distinguishes the Lincolnian outcome of World War II from the Wilsonian outcome of World War I—the second time around Europe survived and recovered by shouldering and sharing a burden of German guilt that was potentially unbearable.

There is no single thinker who has articulated the pervasive role of the survivor story in the logic of European Recovery. Certainly, George C. Marshall took a Lincolnian stance after World War II, but his Harvard Speech is not the Gettysburg Address—it contains too much realpolitik and anticommunism, and too little sense of sin and redemption. The principal architects of post-war European recovery—figures such as Jean Monnet and Robert Schuman—were also Lincolnian in spirit, if not always in words (although the same can be said of Lincoln himself). In their Harvard addresses commemorating the Marshall Plan, both Willy Brandt and Richard von Weizsäcker came closer to articulating its meaning for European union and recovery than Marshall himself. But to my knowledge there is no public figure who has articulated a full alternative to Wilsonian internationalism by connecting what I have called the Lincolnian paradigm to global politics. See Stanley Hoffmann and Charles Maier, eds, *The Marshall Plan: A Retrospective* (Westview, 1984); Richard von Weizsäcker, *Speeches for Our Time* 31 (Johns Hopkins, 1992) (“The Marshall Plan”).

Palestine. Tragically, Israel became an example of that theory's most troubling implications as Zionism created, in its turn, a pan-Arabism around the issue of Palestinian statelessness.²⁶⁷ Yet, until recently, every effort to address this issue raised the specter for Jews, and for the Western democracies, of the Holocaust repeating itself. There is no nation in which the principle of "Never Again" is more deeply honored than it is in Israel.

In the contemporary world the most militant opponents of the self-determination of indigenous peoples—Serbians today, and only yesterday Afrikaners and Israelis—tend to see themselves as survivors and their politics as a covenantal commitment that history not be repeated. "Never again," they say, even if this means saying "never" to internal demands that may seem from an external perspective no less legitimate than their own claims.

As the example of Serbia illustrates, this phenomenon is not limited to new nations—former settler colonies in which sojourners with the consciousness of survivors forge national unity while opposing the autonomy of indigenous groups. The new nations, moreover, were themselves a product of global migrations that have by now largely erased the distinction between wars of national liberation and civil wars, except at the level of national myth. By now it is hard to deny that modern nationalism is itself a product of the interaction of sojourners and survivors, and that the pure moment of liberation from purely foreign power was largely an illusion of the imperialist age that came to a decisive end after World War II.²⁶⁸

It is, however, equally true that World War II resulted in an extension of the process begun at Versailles to most of the so-called "Third World." In almost every case the result has been to create problematic linkages between the territorial power that a people exercises somewhere and their rights (or lack of rights) somewhere else. The linkages have sometimes created external support for the self-determination of peoples in the homeland while contributing to the assimilation of representatives of those peoples in diaspora (Jews in Israel with

267. The works of Baruch Kimmerling and Meron Benvenisti are particularly instructive here. See especially, Baruch Kimmerling and Joel S. Migdal, *Palestinians: The Making of a People* (Free Press, 1993); Meron Benvenisti, *Conflicts and Contradictions* (New York, 1986). For further background see Baruch Kimmerling, *A Conceptual Framework for the Analysis of Behavior in a Territorial Conflict: The Generalization of the Israeli Case* (Jerusalem, 1979); Baruch Kimmerling, *Zionism and Territory: The Socio-Territorial Dimensions of Zionist Politics* (California, 1983); Baruch Kimmerling, *The Economic Interrelationships Between the Arab and Jewish Communities in Mandatory Palestine* (MIT, 1979); Meron Benvenisti, *Israeli Censorship of Arab Publications: A Survey* (Fund for Free Expression, 1983); Meron Benvenisti, *The West Bank Data Project: A Survey of Israel's Policies* (American Enterprise Institute for Public Policy Research, 1984); Meron Benvenisti, *Demographic, Economic, Legal, Social, and Political Developments in the West Bank: 1987 Report* (Westview Press, 1987); Meron Benvenisti, et al, *The West Bank Handbook: A Political Lexicon* (Westview Press, 1986).

268. See generally, J.H.H. Weiler, *The Transformation of Europe*, 100 Yale L J 2403 (1991).

Jews in America; Africans in Africa with African-Americans). In other cases, there have been more problematic links between sojourning peoples and their surviving co-nationals in the homeland (Tutsis in Uganda and in Rwanda; Eritreans in Eritrea and in Ethiopia; Muslims in Pakistan and in India; Tamils in India and in Sri Lanka). Throughout postindependence Africa, and in parts of South Asia, a continuing process of civil war has been deeply interwoven with unsatisfiable demands for national self-determination.²⁶⁹

In the aftermath of the Pax Atomica, the thirty or forty civil wars that seem to be active at any given moment²⁷⁰ are uneasy combinations of the Wilsonian demand for cultural self-determination and the struggle to create a new national unity based on the premise of shared guilt between the victims and perpetrators of historical abuse. Following the path of many recovery movements, the combatants in these wars also cultivate transnational linkages to other saving remnants around the world.

This is not, however, the place for yet another prediction of the obsolescence of nationalism, or the end of the territorial nation state as we know it.²⁷¹ My conclusion is, rather, that we do not know the nation state as well as we might think, and that the foregoing analysis of sojourners and survivors (and of the transnational and transtemporal dimensions of American democratic thought) may cast a somewhat different light on what the system of nation states has meant all along.²⁷² Instead of regarding international politics as a construct

269. See generally, Donald L. Horowitz, *Ethnic Groups in Conflict* (California, 1985).

270. As Hans Magnus Enzensberger points out, the Pax Atomica suspended these logics in some places for a time, partly by turning many local conflicts into truce lines in a global Cold War and partly, perhaps, by raising different questions of survival. See Enzensberger, *Civil Wars* at 14 (cited in note 65).

271. For arguments urging caution in reaching such conclusions see, John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 *Intl Organization* 139 (1993); Michael Mann, *Nation-States in Europe and Other Continents: Diversifying, Developing, Not Dying*, 122 *Daedalus* 115 (1993).

272. The current international system originated in a Thirty Years' War (really a series of civil wars) between Catholic and Protestant "Internationals" that emerged in the aftermath of the Reformation. The Peace of Westphalia of 1648 based local religion on territorial sovereignty, and marked an end to the period of European military and political alliances based on religion. The early modern system of states—combining sovereignty, territorial exclusivity, and confessional uniformity—was to a significant extent a response to the collapsing internationalism of the medieval Catholic world. The aftermath of that collapse produced its waves of sojourners and survivors—often victims of religious persecution—until religion partially gave way to nationalism as the basis of allegiance to the territorial ruler, and also as a new basis for territorial "cleansing". See Leo Gross, *The Peace of Westphalia, 1648-1948*, in Richard A. Falk and Wolfram Hanrieder, eds, *International Law and Organization: An Introductory Reader* 45 (Lippincott, 1968); F.H. Hinsley, *The Concept of Sovereignty and the Relations between States*, 21 *J Intl Aff* 242 (1967); Kalevi J. Holsti, *Peace and War: Armed Conflicts and International Order 1648-1989* 25-42 (Cambridge, 1991); Mayall, *Nationalism and International Society* 18-34 (cited in note 8). For a brief description of the transformation brought about by the Thirty Years' War, see, Theodore K. Rabb, *The Struggle for Stability in Early Modern Europe*

built on the foundation of pre-existing nations, we should regard the problems of jurisdiction, participation, and equality as originally, and still essentially, transnational in scope.

The abstractions of democratic theory that America proudly exports to the world tend to obscure this dimension in a way that American legal history does not. That history suggests that the central problems of democratic legitimacy will be frequently misunderstood if questions of exclusion and inclusion in a political order are taken to be *already* resolved before state action is legitimated. At any given moment the existing system of states represents only a partial, temporary, and essentially jurisdictional answer to questions that it cannot easily contain. This is, perhaps, the most enduring lesson for the world of the American experiment in democracy.