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NEGLECTED STORIES AND PROGRESSIVE CONSTITUTIONALISM

PEGGY COOPER DAVIS*

I. AN AGENDA

This symposium was convened to consider whether the Constitution of the United States was, is, or will be a progressive constitution. Although the meaning of progressivism has been held open for our exploration, we have been asked to take as a starting point the thought that progressivism entails commitment to three endeavors: 1) using law and collective action to remedy society's ills, 2) extirpating public and private sources of oppressive power, and 3) enabling individuals and groups to flourish by interacting freely, equally, and communally. To describe this understanding more concisely, we might say that progressivism entails commitments to social welfare, anti-subordination, and civic empowerment of a free citizenry.

I have spent a number of years promoting the idea of Antislavery Constitutionalism. I have gathered historical evidence that we in the United States came to a deeper understanding of civil freedom as we experienced chattel slavery. I have argued that an antislavery ideology was at the heart of the definitions of liberty and citizenship enshrined in our reconstructed constitution.¹ The work of this essay is to explore, in a preliminary way, the relationship between Antislavery Constitutionalism and Progressive Constitutionalism.

Part II will describe our Constitution as a document *reconstructed* in the post-Civil War years to guarantee, in a multi-cultural polity, an antislavery conception of liberty. Part III will relate this antislavery vision of the constitution to progressive traditions of anti-subordination and civic empowerment. Part IV will, in a more preliminary fashion, relate the antislavery vision of the Constitution to progressive traditions of social welfare. Finally, Part V will step back from the discussion of antislavery and progressive constitutional values to describe and defend the critical race and feminist theoretic methodologies exemplified by Parts II through V.

II. ANTISLAVERY AND THE RECONSTRUCTED CONSTITUTION

Congressional Reconstruction and the reconstructed Constitution that it produced were enactments of Orlando Patterson's complementary claims 1) that liberty is specially and poignantly understood in societies that have experienced slavery, and 2) that liberty is understood in those societies *as slavery's opposite*.² For

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1. *See generally* PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (1997) (encompassing the antislavery ideology argument).

2. DAVIS, *supra* note 1 at 236.

Patterson, and for many nineteenth century antislavery Americans, slavery was civil death, and liberty was the capacity to count as a member of civil society.³ Nineteenth century antislavery Americans also saw slavery as intellectual constraint and moral helplessness, and liberty as the ability to exercise intellectual and moral autonomy.⁴ Let me particularize these claims.

A. In What Sense Was United States Slavery Civil Death?

This was best explained by Major General John Palmer, Commander for the Union army of the Department of Kentucky. Writing shortly after the Civil War, Palmer explained that slaveholders in the American South understood government as having been formed, by their consent, to protect the "lives, liberty and property" of the white slaveholders' kind. African-American slaves were in a different social and political category, a category that encompassed, in the slaveholders' conception, all African-Americans, enslaved or free. Slaveholders did not embrace African-Americans within their conception of democratic governance. Rather they,

referred the government of that whole class to such individuals of the white race, as accident might select with the designation of masters. They gave to those masters, with but few limitations, and restrictions, full power over the persons of their subjects, and in turn held [the masters] responsible for their health, morals and conduct. The master was Governor to control them, lawgiver to furnish them rules of civil conduct, priest if he chose to be so, to prescribe the faith to be believed, and the code of morals to be observed, Chancellor to dissolve or prohibit marriage, control their domestic relations, and settle controversies amongst them.⁵

The slave was not a party to the social contract, but the subject, as well as the property, of one who was. This was the essence of civil death.

In my account of antislavery ideology, the denial of family is central to the slave's civil death and, correspondingly, the right of family is central to the antislavery vision of civic life. The slave's status as subject and property required, and flowed from, a denial of the family status that was thought natural in the case of free people. Free people began their lives under the direct protection and influence of families and were nurtured in those families to autonomous citizenship. However, slaves began their lives with a rupture of family ties and an assignment to the life long protection and governance of masters. As William W. Brown wrote in 1848, "I was born in Lexington Ky. The man who *stole me* as soon as I was born, recorded the births of all the infants which he claimed to be born his property, in a book which he kept for that purpose." In a

3. *Id.*

4. *Id.* at 128-36.

5. FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION 1861-1867, 646 (Ira Berlin et al. eds., Series No. I, 1985) (noting an excerpt of a letter from Mayor General John M. Palmer to Hon. Joseph C. Fowler dated Sept. 4, 1865).

statement irrelevant to the slaveholders' conception of the African-American's civic and social identity, but central to each person's sense of himself, Brown added, "My mother's name was Elizabeth."⁶

A child "stolen," in the manner described by Brown, lost the right to a family connection that was legally and socially honored. These stolen children also lost the right to particularized family and community nurturance. Subject to the control of masters rather than to the socializing influences of family, stolen children were discouraged from developing a capacity for independent thought and action. In the slaveholders' conception, stolen African-American children were neither destined nor expected to grow to full membership and influence in civil and social spheres.

B. In What Sense Did United States Slavery Come To Stand For Intellectual Constraint and Moral Helplessness?

This idea was vividly expressed by a fifty-year-old enslaved woman named Belinda as she petitioned the Massachusetts legislature for freedom. She said that although she was "a free moral agent, accountable for her own actions," she had not in fifty years of slavery "had... a moment at her own disposal."⁷ This was more than a request for leisure, it was a statement about the contradiction between enslavement and the human character. Belinda was saying that slaves were *people*, and enslavement was inconsistent with a proper respect for their humanity. The characteristics that distinguished people from all other creatures were the capacities to be self-governing and to assume moral commitments. Meaningful exercise of both intellectual and moral capacities was every person's birthright. Slavery was a denial of those capacities. As a reasoning being, the slave had a duty of moral responsibility, but lacked the liberty to fulfill that responsibility. For a thinking, feeling, moral being, it was intolerable, as Lunsford Lane said when recounting his enslavement, "[t]o know... that I was never to consult my own will, but was, while I lived, to be entirely under the control of another."⁸ As Massachusetts slaves argued as early as 1774:

By our deplorable situation we are rendered incapable of shewing our obedience to Almighty God. [H]ow can a slave perform the duties of a husband to a wife or parent to his child[?]. How can a husband leave master to work and cleave to his wife [?]. How can the wife submit themselves to there husbands in all things[?]. How can the child obey their parents in all things[?]⁹

6. WILLIAM W. BROWN, *NARRATIVE OF THE LIFE OF WILLIAM W. BROWN* (1848).

7. AM I NOT A MAN AND A BROTHER: THE ANTISLAVERY CRUSADE OF REVOLUTIONARY AMERICA 1688-1788, 428-29 (Roger Bruns, ed. 1977) (noting petition of Prince Hall and others, Jan. 13, 1777).

8. LUNSFORD LANE, *NARRATIVE OF LUNSFORD LANE* 8 (1842).

9. HERBERT APTHEKER, *A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES*, 8-9 (1951) (noting a petition to the Governor and Legislature of Massachusetts,

C. In What Sense Did The Nation Adopt An Antislavery Vision Of Civic Life And Individual and Family Autonomy?

When members of the Reconstruction Congress decided to put the civil rights of the people of the United States under federal protection, they had in mind the rights that slavery had usurped. As Senator Trumbull said when offering the amendment to the Civil Rights Act of 1865 that conferred citizenship rights upon emancipated people: "[I]t is difficult, perhaps, to define accurately what slavery is and what liberty is," but there was help in the knowledge that "[l]iberty and slavery are opposite terms; one is opposed to the other."¹⁰ Congressmen spoke specifically of citizenship and the rights to work,¹¹ to marry,¹² and to parent.¹³ They noted that denial of each was an incident of slavery and that each would be the entitlement of all persons born in the United States or naturalized according to its laws. It is fair to understand the legislative and constitutional work of the Reconstruction Congress as part of the work of antislavery and to link the themes of citizenship, work, and family formation, to an antislavery vision of civic life. For example, Representative Creswell nicely summarized the attributes of civil death and related it to a denial of the slave's humanity.

"The slave," he said, "could sustain none of those relations which give life all its charms. He could not say my wife, my child, my body. It is for God to say whether he could say my soul. The law pronounced him a chattel, and these are not the rights or attributes of chattels."¹⁴

D. A Caveat

In suggesting that antislavery traditions are relevant to understanding our reconstructed Constitution, I do not propose a new originalism. To be limited by the particular visions of Reconstruction legislators and ratifying conventions would be as crippling, and as inappropriate, as to be limited by the particular visions of the Founders. My argument is not that the Fourteenth Amendment permits and prohibits what antislavery activists or Reconstruction congressmen thought it permitted and prohibited. My argument is that the necessarily

dated May 25, 1774.)

10. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

11. See DAVIS, *supra* note 1, at 21.

12. *Id.* at 38-40.

13. *Id.* at 112-17.

14. CONG. GLOBE, 38th Cong., 2d Sess. 120 (1865).

perpetual work of judging the scope of constitutional liberty (and its relevance in each new controversy) is richly informed once we acknowledge that liberty, in our constitutional tradition, is, among a great many other things, slavery's opposite. At every step, the inquiry I recommend is general, rather than particular. It was not how Reconstruction figures would have decided a case in the then unimaginable context of the late twentieth or twenty-first century, but how their understanding of liberty or citizenship was deepened by their special capacity to imagine liberty or citizenship from the perspective of the slave.

In some contexts, the interpretive power of an antislavery vision is immediately manifest. We have only to recall the thin, almost guilty sounding declarations in *Loving v. Virginia*¹⁵ or *Griswold v. Connecticut*¹⁶ that Due Process liberty must *somehow* be understood to encompass the right to marry to know that it would have been helpful for the Justices to have considered the widespread antislavery sentiment that slavery's greatest outrage was its abrogation of marital and parental bonds and the repeated statements on the floor of the Thirty-Eighth and Thirty-Ninth Congresses to the effect that freedom and citizenship would, in the reconstructed Union, encompass the marriage right. Indeed, it is astonishing that Supreme Court jurisprudence concerning the marriage right is so impoverished, given the explicit Reconstruction commitment that "the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, . . . [would] be protected by the guardian spirit of that law which makes sacred alike the proud homes and lowly cabins of freedom."¹⁷ Surely the Justices could have made use of Senator Eliot's uncontradicted assertion that,

Slavery cannot know a home. Where the wife is the property of the husband's master, and may be used at will; . . . where man and woman, after twenty years of faithful service. . . are parted and sold at that owner's will, there can be no such thing as home. Sir, no act of ours can fitly enforce their freedom that does not contemplate for them the security of home.¹⁸

In other contexts, antislavery and Reconstruction traditions serve more subtly to illuminate the meaning of constitutional liberty, allowing us to see ourselves as beneficiaries of the teachings of antislavery and to understand, as a result, the special insult of laws that mimic slavery by inhibiting too much individual agency and self-governance.

15. 388 U.S. 1 (1967).

16. 381 U.S. 479 (1965).

17. CONG. GLOBE, 38th Cong., 1st Sess. 1479 (Senator Wilson).

18. CONG. GLOBE, 38th Cong., 1st Sess. 2778 (Senator Eliot).

III. THE RECONSTRUCTED CONSTITUTION AND PRINCIPLES OF ANTI-SUBORDINATION AND CIVIC EMPOWERMENT

The idea I will propose here is a modest one. I predict that it will disappoint many adherents of a progressive constitutionalism. Looking at the Constitution through the lens of antislavery and Reconstruction does facilitate interpretations that speak to anti-subordination and civic empowerment. But, at least in the account that I have fashioned, looking at the Constitution through the lens of antislavery and Reconstruction takes us only so far. It suggests an understanding of individual, family, and community autonomy such that homogenizing state influences must be checked. However, it does not provide an answer to the complaint that winner-take-all political processes will lead self-interested majorities to consolidate their wealth and power to the detriment of—will, in other words, subordinate—minority groups. I leave direct redress of this complaint to others, and console myself with the thought that a people somewhat less vulnerable to homogenizing or totalitarian influences is correspondingly, albeit inadequately, empowered in struggles against domination. But, in the process of warning against disappointment, I get ahead of my story. Let me backtrack to say why I believe the idea of a reconstructed, antislavery constitution is capable of addressing anti-subordination and civic empowerment at all.

The basic ingredients for this recipe were set out in Part II. Slavery removed enslaved people from what I will call the social dialectic by setting them outside the progression—understood to be natural to humankind—from child of a free, socially and legally acknowledged family to free member of a democratic society. The Fourteenth Amendment's guarantees of citizenship and freedom completed and solidified the Thirteenth Amendment's promise of emancipation. They placed all people squarely within a democratic social dialectic. Let me explain first what I mean by a social dialectic and then what relationship I posit between the dialectic and the issues of anti-subordination and civic empowerment.

The human self is defined in its interpersonal and social manifestations—in its relationships to others. The human self is actualized through cultural forms—forms of language, discourse, logic, narrative, and response to patterns of stimuli. There is a dialectic between the individual self and the community. On the one hand, individual development is constrained by the community's shared cultural forms. We are all very much products of our cultures and inclined to share culturally determined predispositions. On the other hand, cultural forms are the sum of, and are incrementally altered by, individual acts of meaning. Each of us is a unique manifestation of slightly different cultural influences and capable of effecting some degree of change in cultural norms.

Most of what a culture does to structure or constrain individual choice is informal, subliminal, and outside the reach of constitutional protection. It is

manifested by the very nature of the culture's markets, customs, scripts, words, and stories. Still, explicit and official constraints on individual choice are significant. The State controls private behavior with blunt effectiveness. Moreover, intrusiveness or restraint in the official control of private behavior is an important marker of a society's character. As the dialectic between individual choice and cultural form plays out in a culture, official restraints on private choice make the social environment more stable, predictable, and controlled. Protection of civil liberty, on the other hand, makes the social environment more open, responsive, and dynamic. Extremes in either direction are problematic.

Without social controls, government can not protect its subjects against internal or external harms, mobilize resources for the common good, or maintain a measure of stability and allegiance sufficient to make the social contract viable. Excessive social controls prove intolerable as government becomes unresponsive to the needs and values of its different subjects and unduly inhibiting of their efforts to make meaning. And, as I have said, rights of moral autonomy and self-definition seem necessary to the realization of human potential. Rational, morally conscious beings seem to require a place in the social dialectic, and a balance between its competing forces, so that community and cultural constraints do not freeze individual acts of meaning or foreclose incremental, bottom-up social change.

Stories of slavery and antislavery enliven the justifications for structuring the social dialectic so that official constraints do not overwhelm opportunities for personal choice. Enslaved people were constrained, but they were constrained as cultural outsiders. They were not expected to observe the cultural forms of the dominant culture. They were expected to observe cultural forms imposed upon their caste and the private "law" of their masters. And, perhaps most importantly, there was in the slaveholder's legal and cultural scheme *no* room for the individual agency of enslaved people to reshape either the dominant culture or the public and private codes governing the slave caste. This was the nature of what Patterson calls civil and social death.

Enslaved people and antislavery advocates responded to the civil death that slavery inflicted with demands for universal civil freedom. The Reconstruction Amendments were a culmination of struggle, not only to assure that no person's labor was owned, but also to assure that each person was autonomous and self-defining—free to act within and to act upon the culture. Slaves demanded freedom to make meaning by taking chosen, rather than dictated paths. Antislavery ideology demanded universal freedom, such that every citizen would have a role in the collective that could be chosen, rather than prescribed. Democracy, seen through the experiences of slavery and anti-slavery, contemplated what Du Bois called, "domination of political life by the intelligent decision of free and self-sustaining [people]."¹⁹

All that I have said with respect to individuals and the liberating, diversifying

19. See W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 29 (1995).

effects of a constitutionally prescribed principle of autonomy applies as well to subcommunities and the multicultural potential of a nation committed to such a principle. The diversity that is possible in the absence of homogenizing control by a master or a state expresses itself, not in infinite idiosyncrasy, but in individual differences that cluster according to the influences of families and groups with which individuals happen or choose to affiliate. The principle of autonomy facilitates multiculturalism as it facilitates individual difference.

Antislavery perspectives and ideology speak to this point as well. An African-American soldier, reacting to the news that marriages among his people were to be formalized by the Union said to a group assembled in response to the news:

Fellow Soldiers:

I praise God for this day! I have long been praying for it. The Marriage Covenant is at the foundation of all our rights. In slavery we could not have *legalized* marriage: *now* we have it. Let us conduct ourselves worthy of such a blessing—and all the people will respect us—God will bless us, and we shall be established as a people.²⁰

When this soldier spoke of being established as a people, he did not, I think, preclude allegiance to the Union for which he and his comrades had recently fought. At the same time, it is clear that he looked forward to, and took as an incident of his freedom, the opportunity that he and his comrades would have to identify, so long as they chose to do so, and to thrive according to their efforts, as an African-American subcommunity. Legal acknowledgment of family relations was a sign of civic recognition. Civic recognition was a sign of one's humanity. And, according to antislavery ideology, recognition of a person's humanity compelled recognition of that person's right to moral autonomy, for all members of the human community were worthy of being, and entitled to be, morally autonomous. The antislavery values of emancipated slaves led them to the expectations carried by the soldier quoted above. They and all other citizens of the reconstructed Union would grow in families that had been freely formed. They would affiliate freely. They would be established *as a people* free to pursue individual, family, and group identities.

It must be said that this antislavery vision of democratic liberty is, as yet, unacknowledged in the jurisprudence of the United States Supreme Court. Still, there are seeds in the Court's jurisprudence of an autonomy principle that stands for some of the values I have attributed to antislavery. *Meyer v. Nebraska*²¹ alluded to principles touching the relation between individual and state that caused the people of the United States to reject the Platonic idea of creating ideal citizens through official control of marriage and parenting. *Pierce v. Society of Sisters*²² identified a fundamental theory of liberty according to which the child

20. See DAVIS, *supra* note 1, at 36.

21. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

22. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (affirming injunctions of enforcement of Oregon's Compulsory Education Act of 1922).

must not be the creature of the State and subject to its standardizing practices. Harlan's *Poe v. Ullman*²³ dissent also makes a cautionary reference to the prospect of state standardization of childrearing and, in terms that have been repeated in many subsequent opinions of the Court, argues that the Due Process clause requires the Court to strike a balance between order and liberty that is appropriate to a nation "built upon postulates of respect for the liberty of the individual."²⁴ Justice Douglas, also writing in *Poe v. Ullman*, echoed *Poe's* caution against state standardization of private lives or values when he argued that the United States' constitutional scheme is anti-totalitarian.

The centrist Justices in *Planned Parenthood v. Casey*²⁵ came closest to offering a rationalizing principle for careful protection of individual and family autonomy when they added to the concern over state standardization or totalitarian control a description of the effect that control of this kind has upon individual human lives. The centrists said, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."²⁶ In these words, the centrist Justices echo the antislavery claim that it is the right of all people "to organize their lives in accordance with their own sense of propriety [and] establish their families as independent units."²⁷

Enforcement of this vision of Due Process liberty would assure that individual self-definition is not unduly sacrificed to collective self-definition. It would safeguard what antislavery activists called "rights of conscience" vouchsafed to all who "occupy space . . . in the moral world . . . as rational beings."²⁸ More significantly in terms of a progressive agenda, it would facilitate the development of, and support the viability of, subcommunities' sensibilities and ways of being and provide a context in which minority interests and preferences could be maintained and respectfully heard.

As I warned, this is modest comfort to those who aspire to a progressive constitutionalism. But it is worth something, for, as we know, the vision of the *Casey* centrists is under persistent assault. Consider the case of *Washington v. Glucksberg*, which concerned the prohibition of physicians' administration of drugs that would shorten the lives of dying patients.²⁹ My focus is the reasoning,

23. *Poe v. Ullman*, 367 U.S. 497 (1961).

24. *Id.* at 542.

25. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

26. *Id.* at 851.

27. See generally FREEDOM, *supra* note 5 (documenting the process of Emancipation and the reflections of both proponents and opponents).

28. *Id.*

29. I promise only to do my best at this task because I want to acknowledge the impossibility of describing *Glucksberg*—or any other matter—without imposing conceptualizations that skew analysis.

rather than the result of *Glucksberg*. The result, in my view, is consistent with an appropriately nuanced construction of the meaning of Due Process liberty. Criminalization of physician assisted suicide, although it compromises a fundamental right of self-definition and moral autonomy with respect to the manner of one's death, is justifiable in furtherance of a compelling state interest in avoiding systems of triage in which the lives of socially powerless people are too easily forfeited.³⁰ If we think through the relationships among ideals of liberty and equality that motivated the Fourteenth Amendment's passage, and the nature and strivings of humankind as we understand them, we will conclude that a measure of control over the manner of one's death is an aspect of liberty that deserves constitutional solicitude. But, if we consider the aims and methods we think appropriate in a democratic system founded on libertarian and egalitarian ideals, we will be entitled to conclude that states have legitimate interests in protecting patients who are vulnerable to medical neglect, self-denigration, and professional control. We can also conclude that the prohibition of assisted suicide is an appropriately measured way of providing that protection.

Chief Justice Rehnquist, writing for a majority in *Glucksberg* that included two of the *Casey* centrists, did not see a need to balance the individual interest in autonomy against the state interest in protecting vulnerable lives. Rehnquist found the questions of individual liberty presented by prohibition of physician assisted suicide insufficiently grave to warrant more than confirmation that the state acted with a rational basis in enacting them. More importantly, he was able to find support on the dark side of *Casey*: its determination that state enforcement of a right to life ideology—state enforcement, in other words, of a purely moral position—is both legitimate and compelling. Here, as in *Reynolds v. United States*, *Bowers v. Hardwick*³¹, and *Michael H. v. Gerald D.*, the Court was careless with the value of moral autonomy and embraced the dangerous notion that the State may decide for all of us what is odious and what is right.

In light of the persistence of this grudging view of liberty and autonomy, it may be of some use for those of us who oppose subordination and encourage self-determination to promote an antislavery vision of the Constitution. It is true, of course, that for many years after Reconstruction succumbed to Southern accommodation, the ideologies of antislavery and Reconstruction were too thoroughly discredited to have served as credible bases for interpretation of our constitutional traditions. But the time is right to break free of the mind set that for so many years caused us to belittle antislavery as radicalism, rather than to see

30. For especially insightful discussions of the difficult factual questions on which the sufficiency of state interests in prohibiting physician-assisted suicide must turn, See, Patricia A. King & Leslie E. Wolf, *Empowering and Protecting Patients: Lessons for Physician-Assisted Suicide from the African-American Experience*, 82 MINN. L. REV. 1015, 1017 (1998), and Susan M. Wolf, *Pragmatism in the Face of Death: The Role of Facts in the Assisted Suicide Debate*, 82 MINN. L. REV. 1063 (1998).

31. 478 U.S. 186 (1986).

it as one of our finest traditions. A wealth of scholarship running from W.E.B. DuBois's *Black Reconstruction*³² to Foner's *Reconstruction: America's Unfinished Revolution, 1863-1877*³³, to the Freedmen and Southern Society Project's *Freedom: A Documentary History of Emancipation*³⁴, has established that Reconstruction was a noble, if necessarily imperfect, experiment in interracial democracy, rather than the display of ignorance, incompetence, vindictiveness, and misrule that accommodationist historians so carelessly described. Progressive constitutional scholars are therefore able to provide the Court's centrists with perspectives and conceptualizations that will allow them to speak of liberty and moral autonomy with the explicit authority of one of our noblest traditions.

IV. PUTTING FOOD ON THE TABLE

When I presented these ideas about antislavery and constitutional autonomy at Harlem's Schomburg Library, members of the audience said that they were all well and good, but they would not put food on the table. *Touché*, I said.

Here, with another round of caveats respecting the meagerness of any gains that might be realized as a result of acceptance of my vision, are some preliminary thoughts about the relationship between understanding constitutional liberty through an antislavery lens and a progressive commitment to economic justice and social welfare. I begin by confessing, with some pain, that nothing I will say provides an argument that the Reconstruction Amendments hold, as more enlightened constitutions do, a requirement of economic justice and social welfare. Indeed, all that I will say falls within the old and tiresome discourse directed at explaining how we can protect liberty—as I have said we should—without risk of falling again into what Laurence Tribe once called the *Lochner* Error.

Here, as in the preceding section, I take on no more ambitious task than shoring up an argument of the *Casper* centrists. What they said that is relevant to economic justice and social welfare is that the *Lochner* Error was far narrower than had been feared. The early twentieth century justices who overruled marketplace regulations in defense of freedom of property and contract were right to acknowledge substantive liberty interests, though wrong in the balance they struck between those liberties and legitimate governmental interests. Recognizing that the *Lochner*-era Court had made "fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare," the plurality justices acknowledged that

32. See DuBois, *supra* note 19.

33. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988).

34. See FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION 1861-1867, *supra* note 5.

although marketplace regulations may impinge on constitutionally protected liberties, they are often justified.

In a humane and civilized nation, constitutional protection of the liberty to work, to hold property, to transact business, or to contract freely does not imply that employers and workers must be "free" to agree to eighty-hour work weeks and unhealthy work conditions or that consumers must be "free" to trade at predatory prices. The burden of this section of my article is to suggest that understanding Fourteenth Amendment liberty, as an antislavery concept, reinforces this interpretation of the *Lochner* Error. My argument is grounded in the history of Reconstruction's struggle to define and create a "free" labor system in the former Confederacy. I will make two points. The first grows out of an antislavery understanding of free labor. It is simply that protection of an emancipated, but still vulnerable labor force was a central, passionately held, and vociferously contested aim of antislavery and Reconstruction. The second grows out of the interaction of the antislavery understanding of free labor and a market conception of free labor. It is that the architects of Reconstruction, like the *Casey* centrists, came to understand that labor could not be free in any meaningful sense if freedom was understood as free participation in unregulated markets.

A. The Antislavery Understanding of Free Labor

The antislavery understanding of free labor is expressed in the emancipation story of a man, known to us only as Henry, whose life after the Civil War was described in these words by his son:

After the War ended and Tom Williams had come home, he called everybody together and tell them they was free, but that he want to hire them till Christmas—that was in May—to help lay the crop by. He said he'd pay good wages, too. Everybody stayed, but the next spring my daddy say he gonna leave.

Now, I guess he was one of the biggest niggers anywhere around, and he was right smart, too. He could run a gin, and was a right pert carpenter.

Tom Williams wanted him to stay, but my daddy didn't have much use for him, and so he say he gonna leave, anyhow. Then, Tom Williams got mad, and grabbed my daddy's hands, and tied them over his head to a branch on a oak tree, and holler to me, "By the Lord God who made Moses, go get my whip, you Frank!" He took the whip, what was made outen a gin belt, and lashed my daddy till the blood come. He say, "Now you change your mind and give up?" And my daddy say no.

He left him there three or four days, but all the time he made me stay with him and bring him water and bread. Then, he thought he might die, so he say, "Henry, I's gonna let you down and give you a nice soft bed on the porch, till you makes up your mind." But before he unties his hands, he put a chain on his legs.

Then, he carries him over to the porch and chains him to one of the posts. He say, "Henry, I'm gonna let you have one of Mrs. Martha's soft beds, and I'm gonna feed you fried chicken. Now, is you gonna stay?" He kept him there for about a week, but my daddy never did say he would stay.

So, finally, Tom Williams go out and tell everybody for miles around that my

daddy is a bad nigger and that he wouldn't work, and for none of them to hire him. Then, he come home and tell Daddy what he done, and turn him loose, and say, "Now go get a job, iffing you can." He thought all the time my daddy would have to come back to him, so's his family wouldn't starve to death.

We set out and come to Aberdeen, and all of us worked hard at first one thing and then another. I was a houseboy in two or three places, and my daddy worked a little farm and made horse collars to sell. We finally saved up enough to buy that little farm.³⁵

The man called Henry—the former slave who said "no" to subordination and *de facto* re-enslavement—embodies the free labor ideology of antislavery. Stories like Henry's both actualized the emancipatory vision of former slaves and served as motivation for antislavery advocates and Reconstruction legislators who struggled to secure, in the Fourteenth Amendment, a national charter of citizen rights. Antislavery Americans worked from the premise, expressed in the actions of Henry, the former slave who said "no" to *de facto* re-enslavement, that each person must have the freedom to work as s/he chooses. They began with acknowledgment of the stark realities of slavery's control of the enslaved person's life and labor. Frederick Douglass, the abolitionist activist who spoke of bondage in the United States with unexcelled authority and effect, described those realities as follows:

The slave is a human being, divested of all rights—reduced to the level of a brute—a mere "chattel" in the eye of the law. . . . He can own nothing, possess nothing, acquire nothing, but what must belong to another. To eat the fruit of his own toil, to clothe his person with the work of his own hands, is considered stealing. He toils that another may reap the fruit; he is industrious that another may live in idleness . . . and to this condition he is bound down as by an arm of iron.³⁶

Working from this understanding of slavery, antislavery advocates argued that people in the United States should be free to own, possess and acquire what they might by the work of their hands and the fruit of their toil.

Congressmen echoed this anti-slavery rhetoric as they abolished slavery and guaranteed the right of free market participation. One Senator put it this way:

I do not want to degrade a single man in the rebel States. [But] I do not want them to degrade others, and I do not mean that they shall do it. . . . [W]e must see to it that the man made free by the Constitution of the United States, sanctioned by the

35. BULLWHIP DAYS: THE SLAVES REMEMBER: AN ORAL HISTORY 349-50 (James Mellon, ed., 1988). This passage has been "translated" from a phonetic representation intended to reproduce the accent of the speaker, a survivor of slavery interviewed in the 1930s as part of a WPA writers' project. I shall repeat the practice of "translating" these phonetic reproductions of African-American speech whenever I cite such sources. This is appropriate to avoid exacerbating the marginalization that is both expressed and furthered by *selective* uses of phonetic reproductions of accented English.

36. Lecture on slavery, No. 1 (Dec. 1, 1850), in THE LIFE AND WRITINGS OF FREDERICK DOUGLASS at 135 (Philip S. Foner ed., 1950).

voice of the American people, is a freeman indeed; that he can go where he pleases, work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; that the rights and guarantees of the good old common law are his, and that he walks the earth, proud and erect in the conscious dignity of a free man, who knows that his cabin, however humble, is protected by the just and equal laws of his country.³⁷

B. *The Convergence of Antislavery and Free Labor Ideologies*

Free labor is a concept that was inconsistently and ambiguously defined in the antebellum and Reconstruction periods. The Union cause was, however, clearly associated with the idea that workers should be free, not only in the antislavery sense that they, as human agents should not be subordinated to owners, but also in the less well defined sense intended when people spoke of an ideology of free labor. According to this ideology, slavery was prohibited not only (and, for many, only incidentally) out of deference to the slave's humanity, but also to create a market in which entrepreneurs would be unable to own laborers, but forced to bargain with free men and women for their services. On the market view, slavery was disfavored primarily because of the unfair competition it pitted against wage labor. Still, free labor ideology offered no consistent explanation of what, other than slavery, would count as an unfair, and therefore prohibitable market practice. This was a significant omission, for the problem of determining when employment practices are so exploitive as to be prohibitable in a "free" market was dramatically and urgently posed as southern planters and emancipated labor began to interact.

A growing body of scholarship addressing the establishment of free labor in the former Confederacy suggests that the interaction between former slaves and Southern planters forced a reconciliation of free labor and antislavery thought. The realities of market competition in the post-bellum south caused architects of Congressional Reconstruction to reject the strict *laissez-faire* principle that underlay some versions—and peppered the rhetoric—of nineteenth century free labor ideology in favor of a version tempered by the need to address human welfare concerns in conditions of unequal bargaining.

Eric Foner describes a post-emancipation struggle between former masters attempting to "control labor" and "[B]lack seeking to infuse meaning into their freedom by carving out autonomy in every aspect of their lives."³⁸ The desire for control of labor was bolstered by a sense of entitlement carried over from slavery. Foner writes:

For those accustomed to the power of command, the normal give-and-take of

37. CONG. GLOBE, 39th Cong., 1st Sess. 111 (1865) (Senator Stewart).

38. FONER, *supra* note 33.

employer and employee was difficult to accept. "It seems humiliating to be compelled to bargain and haggle with our own servants about wages," wrote Fanny Andrews, the daughter of a Georgia planter. Former slaveowners resented the very idea of having to negotiate with the freedmen. The employer, many planters believed, should be the sole judge of the value of his laborers' services. One white North Carolinian hired a freedman in the spring of 1865, promising to give him "whatever was right" after the crop had been gathered; another, an ex-governor of the state, said he would pay wages "where I thought them earned, but this must be left to me." Behavior entirely normal in the North, such as a freedman leaving the employ of a Georgia farmer because "he thought he could do better," provoked cries of outrage and charges of ingratitude.³⁹

It is not surprising that in this environment, freedom sometimes required that Southerners be resocialized to the concept of liberty in the negotiation of contracts. Oliver Howard, founding Commissioner of the Freedmen's Bureau, described the stance he took toward wage negotiation and the reaction he got from Southern planters:

Negroes were declared in my letters sent them to be free to choose employers and receive pay for their labor. The old system of overseers was abolished. Cruelty and oppression were to be suppressed. It was easy to write and publish, but hard to carry such orders into execution.

From all directions anxious employers poured in letters upon me urging me to fix prices and enable the employer to exercise power, in one way or another, over the laborer. The majority did not believe the negro would work unless under compulsion. One prominent gentleman came all the way from Louisiana to Washington. He had been delegated by a score or more planters to visit me and show a schedule of prices which they had drawn up as liberal as they could make them *and live*. He asked for a formal approval.

Much to the astonishment and chagrin of the suggestors and their agent, the statement made and reiterated by me that *wages* must be free was adhered to, and that they were to be regulated by the assent of both parties of a contract verbal or written, or adjusted from the common market value. I repeatedly cautioned my officers against any substitute whatever for slavery.⁴⁰

Freedom was not so simple as unrestrained liberty of contract. Kwame Anthony Appiah recently speculated about whether, in a free democracy, it would be right to honor a "freely given" pledge of lifelong servitude.⁴¹ The lesson of the post-war period is that, at least in the labor market, such a pledge is not given in genuine freedom, but in a context of exploitation, and it should not be honored in a free democracy.

The planter class was so accustomed to controlling Black labor, and so

39. *Id.* at 131-32.

40. GENERAL OLIVER HOWARD, *The Founding of the Freedman's Bureau*, in IN THEIR OWN WORDS: ROBBER BARONS AND RADICALS 39, 42 (T.J. Stiles, ed. 1997)(emphasis in original).

41. See Kwame Anthony Appiah, *Cosmopolitan Patriots*, in 23 CRITICAL INQUIRY 617, 622 n.5 (1997).

convinced that control was necessary to productivity and profit, that it sought what Appiah's question imagines: to contract for pledges of *de facto* re-enslavement. As Foner writes:

Planters sought through written contracts to reestablish their authority over every aspect of their laborers' lives. "Let everything proceed as formerly," one advised, "the contractual relation being substituted for that of master and slave." These early contracts prescribed not only labor in gangs from sunup to sundown as in antebellum days, but complete subservience to the planter's will. One South Carolina planter required freedmen to obey the employer "and go by his direction the same as in slavery time." Many contracts not only specified modes of work and payment, but prohibited blacks from leaving plantations, entertaining visitors, or holding meetings without permission of the employer. Frequently, planters also drafted detailed provisions regulating blacks' personal demeanor. Contracts required employees "to establish a character for honest, industry and thrift," "behave in a gentle manner," and avoid "impertinence, all disorderly or unseemly noises, all vulgar or indecent words, all profane swearing and all quarreling and fighting." One provided that disputes among the laborers were to be "settled by the employer." . . . One group of planters sought to compel laborers to cook communally, as under slavery, since preparation of meals by individual families involved "extravagance in wood and loss of time."⁴²

For a time, Northern investment in the plantation economy, the promise of land distribution, and labor shortages (caused by the withdrawal of many Black women and children from the labor force and by the refusal of emancipated people to work slave hours) gave many emancipated people the leverage to resist provisions of this kind, and insist on a meaningful conception of freedom. But over time, the promise of land distribution proved false. Northern investors' enthusiasm cooled, crops failed, and cotton and rice prices fell. The leverage of planters improved. Throughout, planters had "persevered in the hope," as a Georgian put it, "that capital [would] someday control labor." A Texas planter urged that his fellows "'establish some maximum [wage] figure, stop 'enticing' each others' workers, and agree that anyone 'breaking the established custom should be driven from the community.'"⁴³

In this environment, it was clear that no semblance of freedom was possible if bargaining for plantation labor was unrestrained. As a Union general had written to abolitionist Gerritt Smith in 1863, "There must be no rule contracting the labor of the negro for one year or one month, it is strength contracting with weakness and results in oppression."⁴⁴ Post-war events proved him right, and people working to define freedom in a reconstructed Union proved themselves as subtle as the *Casey* centrists in their ability to appreciate what economic justice

42. FONER, *supra* note 33, at 135-36.

43. *Id.* at xix-xxvii.

44. Letter from Brigadier General John P. Hawkins to Honorable Gerritt Smith, October 21, 1863, in BERLIN II at 745.

required in real world markets. In Georgia, for example, "with a labor surplus and widespread rural violence, the 'free market' in 1865 produced contracts with wage rates so low—one tenth or one twentieth of the crop or two to four dollars per month—that Bureau chief Davis Tillson was moved to establish a minimum wage."⁴⁵ The difference in a constitutional system committed to freedom and anti-slavery between the legitimacy of minimum wage and the maximum wage proposed by former slaveholders should be as clear—to take a risky, but apt analogy—as the difference between quotas designed to secure racial justice and quotas designed to secure racial hegemony.

V. EPILOGUE IN DEFENSE OF A MALIGNED METHODOLOGY

I want clearly and explicitly to label the preceding analysis a work of critical race (and, to a lesser extent, feminist legal) theory. I do not do this because I have a definitive definition of critical race or feminist legal theory and know that my work meets it. There are no definitive definitions. Some who are called critical race or feminist legal theorists would undoubtedly define me out of the movement. There is no agreed upon set of category markers. I define myself as a critical race theorist because I attempt in all of my work, as I have attempted in the foregoing analysis, to cultivate and to draw upon three perspectives that characterize what I take to be the best of critical race and feminist legal theory writings:

an appreciation— common to broadly educated people of our generation and of subsequent generations— of the role of narrative (and narrative intelligence) in legal and political process and decisionmaking;⁴⁶

a focus on the cultural, social and, linguistic patterns according to which narratives are heard or dismissed, acted upon or neglected, in legal and political processes; and

an activist commitment to giving effect to neglected stories— to stories that have not had the hearing or effect they deserve to have⁴⁷—in legal and political discourse.

The critical race theory and feminist legal theory movements have suffered an egregious case of unflattering definition by intellectual, and, it seems, political opponents. I do not refer to the many fair and honest critiques that thoughtful scholars have offered in response to writings in these traditions, nor do I refer to the persistent critiques that writers in these traditions have posed to one another. I refer to the work of a small group of popular writers—most of them associated with conservative “think” tanks—who have enjoyed great success in

45. See generally *supra* note 5.

46. See JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE 23 (1993), and Jerome Bruner, *The Narrative Construction of Reality*, in 18 CRITICAL INQUIRY 1 (1991).

47. Desert is, in this context, a normative claim.

defining critical race and feminist legal theory as a dangerous collection of subjective whinings by people who reject any and all truth criteria, arguing that there is no truth, but only the power to legitimize one's self-serving "stories."⁴⁸

It would be wise, I suppose, to define one's self out of such a movement. Some have seen this. I recall speaking with a member of the hiring committee at a prestigious law school about an African-American scholar who seemed to be doing well on the interview and job talk circuit. "This candidate has the good sense," the hiring committee member said, "not to call herself a critical race theorist."

But it seems to me that we will never bring adequate attention and resources to remedying social ills, or expose and unseat oppressive power, or enable free and equal communal exchange, if we defer to the understandable defensiveness against hearing, empowering, and giving effect to neglected voices. So, hoping for the support of progressive constitutionalists, I admit, and even champion, the methodologies of critical race theory as I urge embrace of the neglected stories of antislavery and Reconstruction.

48. See Heather MacDonald, *Law School Humbug*, 5 *CITY J.* 46 (1995) (typifying this genre).