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Slaves to Contradictions: 13 Myths That Sustained Slavery

Wilson Huhn*

Planters clung to their proslavery beliefs even when there were facts to the contrary because the stakes involved in abandoning them were too high. They could not reject or even compromise their central myths, for to do so would mean condemning a whole culture as a lie.¹

Introduction Evil and Myth

In her analysis of the rationalization of evil,² Jo-Ann Tsang of Southern Methodist University poses several important questions:

Religious scholars, philosophers, and lay-people alike have been puzzled for centuries over the problem of evil. When horrendous atrocities such as the Holocaust occur, people scramble for explanations, but they seem to raise more questions than answers. How could a group like the Nazis get away with such extreme immorality? Why did entire societies seem to close their eyes to the evil around them? How can we act to prevent such moral monstrosities in the future?³

Tsang notes that people often adopt a simple explanation for evil: “evil actions come from evil people.”⁴ But this does not explain how an entire society can embrace evil practices or institutions. It must be the case, as Tsang states, that “all of us have the potential to commit evil actions, given the right circumstances.”⁵ Tsang concludes, “Rather than originating from a few

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¹ James L. Roark, *MASTERS WITHOUT SLAVES: SOUTHERN PLANTERS IN THE CIVIL WAR AND RECONSTRUCTION* 107 (New York, W.W. Norton & Co., 1977). See also John Ashbrook, *What the South Got Wrong*, New York Times Opinionator (Feb. 16, 2011), at http://opinionator.blogs.nytimes.com/2011/02/16/what-the-south-got-wrong/?_r=0 (describing the many errors of Southerners in their beliefs about slavery and the slaves' longing for freedom).

² See Jo-Ann Tsang, *Moral Rationalization and the Integration of Situational Factors and Psychological Processes in Immoral Behavior*, Review of General Psychology 2002 Vol. 6, No. 1, 25-50, at Academia.edu, http://www.academia.edu/171600/Moral_rationalization_and_the_integration_of_situational_factors_and_psychological_processes_in_immoral_behavior.

³ *Id.* at 25.

⁴ *Id.*

⁵ *Id.*

evil people, evil arises from a combination of situational and psychological factors present in the majority of individuals.”⁶ As Solzhenitsyn says, “To do evil a human being must first of all believe that he is doing good, or else that it’s a well-considered act in conformity with natural law. Fortunately, it is in the nature of the human being to see *justification* for his actions.”⁷

Reviewing just the last few centuries of human history, consider how common mass crimes are: the Inquisition;⁸ the Witch Trials in Europe and America;⁹ the Reign of Terror;¹⁰ the Red Terror;¹¹ the deliberate famine in the Ukraine;¹² the Holocaust;¹³ the Dirty War in Argentina;¹⁴ and genocide and ethnic cleansing in the United States;¹⁵ Turkey;¹⁶ Cambodia;¹⁷

⁶ *Id.*

⁷ Alexander Solzhenitsyn, *THE GULAG ARCHIPELAGO* 173 (New York: Harper & Roe, 1974) (emphasis in original).

⁸ See American-Israeli Cooperation Project: The Jewish Virtual Library, *Christian-Jewish Relations: The Inquisition* at <http://www.jewishvirtuallibrary.org/jsource/History/Inquisition.html> (estimating that more than 31,000 persons were burned at the stake); Rice University, The Galileo Project, *The Inquisition* at

<http://galileo.rice.edu/chr/inquisition.html> (describing the Inquisition and the general scope of its activities);

⁹ See University of Missouri – Kansas City School of Law, Douglas Linder, *A Brief History of Witchcraft Persecutions before Salem*, at <http://law2.umkc.edu/faculty/projects/ftrials/salem/witchhistory.html> (stating that tens of thousands, perhaps hundreds of thousands of persons, 80 percent of them women, were killed in Europe during the 1500s); Jane Campbell Moriarty, *Wonders of the Invisible World: Prosecutorial Syndrome and Profile Evidence in the Salem Witchcraft Trials*, 26 VT. L. REV. 43 (2001) (describing the Salem witchcraft trials that led to the execution of 20 colonists).

¹⁰ See Encyclopedia Britannica, *Reign of Terror* at <http://www.britannica.com/EBchecked/topic/588360/Reign-of-Terror> (stating that during a nine-month period in 1793-1794 in France “17,000 were officially executed and many died in prison or without trial”).

¹¹ See History Learning Site, *The Red Terror*, at http://www.historylearningsite.co.uk/red_terror.htm (describing the thousands of executions carried out by the Cheka in 1918 and how Lenin ordered 50,000 people in the Crimea to be killed); S. Melgunoff, *The Record of the Red Terror*, at <http://www.paulbogdanor.com/left/soviet/redterror.pdf> (describing the scope of executions and other atrocities at the hands of the Bolsheviks during the Russian Revolution).

¹² See Holodomor, *The Famine-genocide of Ukraine, 1932-1933* at <http://www.holodomorct.org/index.html> (describing the famine engineered in the Ukraine during the 1930s, killing millions of people).

¹³ See William L. Shirer, *THE RISE AND FALL OF THE THIRD REICH* 937-934 (New York, Simon and Schuster, 1960) (Chapter 27, “The New Order,” describing the Nazis’ deliberate extermination of millions of Slavs and Jews during World War II).

¹⁴ See Encyclopedia Britannica, *Dirty War* at <http://www.britannica.com/EBchecked/topic/165129/Dirty-War> (estimating that from 1976 to 1983 between 10,000 to 30,000 Argentine citizens were killed by Argentina’s military dictatorship).

¹⁵ See USHistory.Org, *the Age of Jackson: 24f. The Trail of Tears – The Indian Removals* at <http://www.ushistory.org/us/24f.asp> (describing several forced removals of Indians from their lands, including the forced march of 20,000 Cherokees to Oklahoma, killing one-fourth along the way); History.Com, *American-Indian Wars* at <http://www.history.com/topics/american-indian-wars> (listing the long series of wars in America between whites and Indians between the 1620s and the 1880s, mainly for land); Marc Wortman, *The Bonfire: The Siege and Burning of Atlanta* 23-34 (PublicAffairs, 2009) (describing the forced removal of Native Americans from northern Georgia).

¹⁶ See Holocaust Museum Houston, *Armenian Genocide (1915-1923)* at http://www.hmh.org/ed_Genocide_Armenia.shtml (describing how more than a million Armenian civilians were murdered in Turkey during World War I).

¹⁷ See Yale University, *Cambodian Genocide Program* at <http://www.yale.edu/cgp/> (assembling information about the Cambodian genocide of 1975-1979); Holocaust Museum Houston, *Genocide in Cambodia (1975-1979)* at http://www.hmh.org/ed_Genocide_Cambodia.shtml (describing the genocide committed by the Khmer Rouge).

Yugoslavia;¹⁸ Rwanda,¹⁹ and the Darfur.²⁰ Atrocities on this broad a scale could not occur unless average, normal people had convinced themselves that the horrific crimes they were committing were right. How did they do this?

People have a fundamental need to think of themselves as “good people.” To achieve this we tell each other stories – we create myths – about ourselves and our society. These myths may be true or they may be false. The more discordant a myth is with reality, the more difficult it is to convince people to embrace it. In such cases to sustain the illusion of truth it may be necessary to develop an entire mythology – an integrated web of mutually supporting stories.

This paper explores the system of myths that sustained the institution of slavery in the antebellum United States.

James Truslow Adams captures the desperation of the antebellum South in its defense of slavery:

Even one who loves the South cannot fail to find something pathological in the intellectual life between 1830 and 1860. ... Southern churches, having to defend what those of the rest of world mostly condemned, were forced to separate themselves. Authors had to engage largely in painting in the most attractive colors what the rest of the world considered wrong. Statesmen had to continually fight for an institution which was doomed by world opinion. Every political act, every constitutional question, had to be considered in light of slavery.²¹

Slavery existed in the United States both in the North and in the South, and it persisted for more than two centuries. As a result the myths that sustained slavery are rooted deep in our national consciousness. This is apparent in our stories. The dominant art form of our civilization is the motion picture. Eric Foner describes how in the first half of the last century our leading movies routinely glorified slavery.²² In 1915 D.W. Griffith’s *The Clansman* (later renamed *Birth of a Nation*)²³ “glorifies the Ku Klux Klan as the savior of white civilization”²⁴ and was the first

¹⁸ See Holocaust Museum Houston, *Genocide in Bosnia (1992-1995)* at http://www.hmh.org/la_Genocide_Bosnia.shtml (describing the ethnic cleansing against the Bosniaks carried out by the Serbs, including the slaughter of 8,000 men and boys).

¹⁹ See Holocaust Museum Houston, *Genocide in Rwanda (1994)* at http://www.hmh.org/ed_Genocide_Rwanda.shtml (describing the mutilation, rape, and killing of hundreds of thousands of Tutsi by Hutus in 1994).

²⁰ See Holocaust Museum Houston, *Genocide in the Darfur Region of Sudan (2004-present)* at http://www.hmh.org/la_Genocide_Darfur.shtml (stating that “Nearly 400,000 people have been killed, women have been systematically raped, and millions of people have been displaced” as a result of Arab attacks against African civilians in the Darfur region of Sudan)

²¹ James Truslow Adams, in *CAUSES OF THE CIVIL WAR 216-217* (Kenneth M. Stampp, ed.) (New York, Simon & Schuster, 1991) (hereinafter *Causes*) (quoting from James Truslow Adams, *AMERICA’S TRAGEDY* (Charles Scribner’s Sons, 1934)).

²² See Foner, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION* (New York, Vintage Books, 2006), at xxiii-xxiv (discussing the portrayal of slaves and the institution of slavery in movies during the first half of the 20th century).

²³ See IMDb, *The Birth of a Nation*, at <http://www.imdb.com/title/tt0004972/>.

²⁴ Foner, note 21 *supra*, at xxii.

motion picture to be shown at the White House.²⁵ In 1939 *Gone with the Wind*,²⁶ “filled with stock characters reflecting Hollywood’s view of the era’s history – loyal slaves, unruly black soldiers, untrustworthy scalawags and carpetbaggers, noble Klansmen”²⁷ – won 8 Academy Awards.²⁸ These movies both reflected and influenced American attitudes towards slavery:²⁹ the American Film Institute ranks *Gone with the Wind* as the fourth greatest American movie of all time; *Birth of a Nation* ranks 44th.³⁰ The leading male African-American film actor of the 1930s – practically the only one – was Lincoln Theodore Monroe Andrew Perry, better known by his stage name “Stepin Fetchit.”³¹ The 1942 movie *Tennessee Johnson*:³²

portrays African Americans as little more than happy slaves, wrongly implicates Radical Republican Thaddeus Stevens in the assassination of Lincoln, and portrays [President Andrew] Johnson as a maligned defender of national reunion and constitutional government.³³

This pattern of distortion changed in 1977 when *Roots*³⁴ was broadcast on television, riveting the country with stories of the lives of American slaves over several generations.³⁵ Over 130 million Americans viewed the miniseries.³⁶ During the past quarter-century Hollywood has produced *Glory* (1989),³⁷ *Sankofa* (1993),³⁸ *Jefferson in Paris* (1995),³⁹ *Amistad* (1997),⁴⁰ and *Beloved* (1998).⁴¹ The pace is now quickening. In the past year four major motion pictures were released depicting slavery as a great evil, a cancer devouring our heart. *Django Unchained* (2012)⁴² is directed by Quentin Tarantino and to no-one’s surprise the movie is unrelentingly violent; it portrays a freed slave who set out to rescue his wife from a brutal slaveholder, played

²⁵ See *id.*

²⁶ See IMDb, *Gone with the Wind* at <http://www.imdb.com/title/tt0031381/>.

²⁷ Foner, note 21 *supra*, at xxiii.

²⁸ See IMDb, *Gone with the Wind: Awards*, at http://www.imdb.com/title/tt0031381/awards?ref=tt_ql_4.

²⁹ See Foner, note 21 *supra*, at xxii-xxiii (stating that at this time “nearly all Americans embraced the Dunning version of history,” *i.e.*, that of “negro incapacity,” and that these movies reinforced that view).

³⁰ See AFI.Com, *AFI’s 100 Years ... 100 Movies*, at <http://www.afi.com/100years/movies.aspx>.

³¹ See IMDb, *Stepin Fetchit*, at <http://www.imdb.com/name/nm0275297/> (describing the controversial career of Lincoln Perry).

³² See IMDb, *Tennessee Johnson*, at http://www.imdb.com/title/tt0036419/?ref=fn_al_tt_1.

³³ Foner, note 21 *supra*, at xxiv.

³⁴ IMDb, *Roots* (1977), at http://www.imdb.com/title/tt0075572/?ref=mv_sr_1.

³⁵ See *id.*; TVbytheNumbers, Zap2it: What to Watch, Where to Watch It, *Top 100 Rated TV Shows Of All Time*, at <http://tvbythenumbers.zap2it.com/2009/03/21/top-100-rated-tv-shows-of-all-time/14922/> (showing *Roots* Part VIII as gathering the third highest television viewing rating share of all time).

³⁶ See UPIbeta, Kate Stanton, ‘*Roots*’ remake in the works at History Channel (posted Nov. 6, 2013), at <http://www.upi.com/blog/2013/11/06/Roots-remake-in-the-works-at-History-channel/8351383725445/>; tvMediaInsights.com, *History to Remake “Roots”*, at <http://www.tvmediainsights.com/highlights/34187/history-to-remake-roots/>.

³⁷ See IMDb, *Glory* (1989), at <http://www.imdb.com/title/tt0097441/>.

³⁸ See IMDb, *Sankofa* (1993), at http://www.imdb.com/title/tt0108041/?ref=fn_al_tt_1.

³⁹ See IMDb, *Jefferson in Paris* (1995), at http://www.imdb.com/title/tt0113463/?ref=mv_sr_1.

⁴⁰ See IMDb, *Amistad* (1977), at http://www.imdb.com/title/tt0118607/?ref=mv_sr_1.

⁴¹ See IMDb, *Beloved* (1998), at http://www.imdb.com/title/tt0120603/?ref=mv_sr_1.

⁴² See IMDb, *Django Unchained* (2012), at http://www.imdb.com/title/tt1853728/?ref=mv_sr_1.

by Leonardo DiCaprio.⁴³ *Abraham Lincoln, Vampire Hunter* (2012),⁴⁴ has a silly premise but a serious theme; it depicts slaveholding as an unholy institution defended by the undead.⁴⁵ *Lincoln* (2013)⁴⁶ opens with the vicious, hand-to-hand mortal combat between black Union soldiers and white Confederate troops at the battle of Jenkins Ferry, in contrast to a scene near the end showing Thaddeus Stevens in bed with his housekeeper, the two of them treasuring the newly-adopted 13th Amendment.⁴⁷ And now recently released is *12 Years a Slave* (2013),⁴⁸ a horrifying true account of the kidnapping of a free black man and the cruel suffering he endured at the hands of slavery.⁴⁹

Thomas Jefferson wrote that slavery was “a perpetual exercise of the most boisterous passions, the most unremitting despotism.”⁵⁰ It is those passions and that despotism that makes the stories of slavery so compelling. I predict that there will be more movies and television shows about slavery; that we are finally ready as a society to confront an American holocaust. These stories will help us to explore our collective ancestral experiences, explain their meaning, and express our feelings. After a century and a half the reality of slavery is coming home to America. Our claim to “American exceptionalism” – and any moral authority we have in the world – depends on our ability to face up to the truth.

In the beginning of this article (Parts I through IV) I describe how the Civil War started because of the institution of slavery; how slavery weakened the South economically, politically, legally, educationally, and militarily; how Patrick Cleburne, a formidable general for the Confederate Army, proposed that if the people of the South truly valued independence they should free the slaves and enlist them in the Southern armies; and the fierce reaction to his proposal from his fellow officers and the Confederate leadership.

The central passages of this article (Parts V and VI) contrast the reality of slavery with the myths that people clung to – the lies they told each other – in order to justify slavery.

I conclude (Parts VII and VIII) by describing what happened to Patrick Cleburne and summarizing our duty to uncover, examine, and reflect upon the myths that he tried to dispel but died protecting.

I

⁴³ See IMDb, *Django Unchained: Plot Summary*, at http://www.imdb.com/title/tt1853728/plotsummary?ref=tt_ql_6; *id.*, *Parents Guide*, at http://www.imdb.com/title/tt1853728/parentalguide?ref=ttpl_ql_5.

⁴⁴ See IMDb, *Abraham Lincoln, Vampire Hunter* (2012), at http://www.imdb.com/title/tt1611224/?ref=mv_sr_1.

⁴⁵ See IMDb, *Abraham Lincoln, Vampire Hunter: Plot Summary*, at http://www.imdb.com/title/tt1611224/plotsummary?ref=tt_ql_6.

⁴⁶ See IMDb, *Lincoln* (2013), at http://www.imdb.com/title/tt0443272/?ref=mv_sr_2.

⁴⁷ See IMDb, *Lincoln: Plot Summary*, at http://www.imdb.com/title/tt0443272/plotsummary?ref=tt_ql_6.

⁴⁸ See IMDb, *12 Years a Slave* (2013), at http://www.imdb.com/title/tt2024544/?ref=mv_sr_1.

⁴⁹ See IMDb, *12 Years a Slave: Plot Summary*, at http://www.imdb.com/title/tt2024544/plotsummary?ref=tt_ql_6.

⁵⁰ Thomas Jefferson, NOTES ON THE STATE OF VIRGINIA 155 (Chapel Hill, 1955). Jefferson’s words are widely quoted, including in Foner, note 21 *supra*, at 14. For a description of southern responses to Jefferson’s critique of slavery see Eugene D. Genovese, “The Most Boistrous Passions”: *Southern Responses to Thomas Jefferson’s Critique of Slavery*, at <http://colonialseminar.uga.edu/EDG.pdf>.

The South Secedes to Preserve and Extend Slavery

By 1860 most of Europe and the Americas had abolished slavery,⁵¹ but in the Southern part of the United States the institution of slavery was more firmly entrenched than ever before.⁵²

⁵¹ See Encyclopedia Britannica, *abolitionism* at <http://www.britannica.com/EBchecked/topic/1448/abolitionism> (noting that slavery had disappeared in most of western Europe by the 11th century, was abolished in the northern states of the United States by 1804, in the British colonies in America in 1838, and in the French possessions in 1848); Atlas Caribbean, *Historical Evolution: Abolitions of Slavery* at <http://atlas-caraibe.certic.unicaen.fr/en/page-117.html> (detailing the timing of the abolition of slavery in the countries around the Caribbean basin); USHistory.Org, *American Anti-Slavery and Civil Rights Timeline*, at <http://www.ushistory.org/more/timeline.htm> (timeline describing the introduction of slavery and the abolition of slavery in the Americas).

⁵² Allen Nevins, *THE EMERGENCE OF LINCOLN: PROLOGUE TO CIVIL WAR 1859-1861* 468 (New York, Charles Scribner's Sons, 1950). Nevins states:

The South as a whole in 1846-1861 was not moving toward emancipation, but away from it. It was not relaxing the laws which guarded the system, but reinforcing them. It was not ameliorating slavery, but making it harsher and more implacable. The South was further from a just solution of the slavery problem in 1830 than it had been in 1789. It was further from a tenable solution in 1860 than it had been in 1830.

See also Abraham Lincoln, *THE COLLECTED WORKS OF ABRAHAM LINCOLN* (Roy P. Basler, ed. 1953), at <http://quod.lib.umich.edu/l/lincoln/> (hereinafter *Collected Works*). In his speech of June 26, 1857, Lincoln criticized Chief Justice Taney's opinion in the *Dred Scott* case by pointing out that Taney was mistaken in assuming that the legal rights of blacks were more circumscribed at the time of the founding than at the present time. Lincoln stated:

In these the Chief Justice does not directly assert, but plainly assumes, as a fact, that the public estimate of the black man is more favorable *now* than it was in the days of the Revolution. This assumption is a mistake. In some trifling particulars, the condition of that race has been ameliorated; but, as a whole, in this country, the change between then and now is decidedly the other way; and their ultimate destiny has never appeared so hopeless as in the last three or four years. In two of the five States---New Jersey and North Carolina---that then gave the free negro the right of voting, the right has since been taken away; and in a third---New York---it has been greatly abridged; while it has not been extended, so far as I know, to a single additional State, though the number of the States has more than doubled. In those days, as I understand, masters could, at their own pleasure, emancipate their slaves; but since then, such legal restraints have been made upon emancipation, as to amount almost to prohibition. In those days, Legislatures held the unquestioned power to abolish slavery in their respective States; but now it is becoming quite fashionable for State Constitutions to withhold that power from the Legislatures. In those days, by common consent, the spread of the black man's bondage to new countries was prohibited; but now, Congress decides that it *will* not continue the prohibition, and the Supreme Court decides that it *could* not if it would. In those days, our Declaration of Independence was held sacred by all, and thought to include all; but now, to aid in making the bondage of the negro universal and eternal, it is assailed, and sneered at, and construed, and hawked at, and torn, till, if its framers could rise from their graves, they could not at all recognize it. All the powers of earth seem rapidly combining against him. Mammon is after him; ambition follows, and philosophy follows, and the Theology of the day is fast joining the cry. They have him in his prison house; they have searched his person, and left no prying instrument with him. One after another they have closed the heavy iron doors upon him, and now they have him, as it were, bolted in with a lock of a hundred keys, which can never be unlocked without the concurrence of every key; the keys in the hands of a hundred different men, and they scattered to a hundred different and distant places; and they stand musing as to what invention, in all the dominions of mind and matter, can be produced to make the impossibility of his escape more complete than it is.

It is grossly incorrect to say or assume, that the public estimate of the negro is more favorable now than it was at the origin of the government.

2 *Collected Works* 403-404 (Speech at Springfield, Illinois, June 26, 1857). See also Eric Foner, note 21 *supra*, at 13. Foner states that “[a]s the nineteenth century progressed:”

However, as in the world around it, the balance of power within the United States was shifting against slavery.

The South had controlled the National Government for most of the nation's existence,⁵³ but by 1860 the political pendulum had decidedly swung north. Because the population of the North and West had increased much faster than the population of the South, in 1860 the slave states constituted a small minority in the House of Representatives.⁵⁴ In the Senate, there had been an equal number of slave and free states until California was admitted as a free state in 1850.⁵⁵ Fighting erupted in Kansas in 1856 when it became apparent that free-soilers outnumbered slaveholders and that they would vote to exclude slavery from the territory.⁵⁶ The slave states irretrievably lost control of the Senate when Minnesota and Oregon were admitted as free states in 1858⁵⁷ and 1859⁵⁸ respectively. As a result of all these developments by 1860 the slave states trailed badly in the Electoral College and the presidential popular vote, meaning that they would probably never again elect a President who would support their desire to extend slavery

White southerners found themselves more and more dependent on an institution under assault from within and without. In response, the southern states drew tighter and tighter the bonds of slavery, closing off nearly every avenue to freedom and increasing the severity of the laws under which slaves lived and labored.

⁵³ See generally Hinton Rowan Helper, *THE IMPENDING CRISIS OF THE SOUTH AND HOW TO MEET IT* (New York, Burdick Brothers, 1857), at <http://docsouth.unc.edu/nc/helper/helper.html>; *id.* at 292-293 (statistics on balance of power between free and slave states as of 1856); *id.* at 307-317 (showing that Southerners and slaveholders had dominated the Presidency, the Congress, the Supreme Court, and cabinet positions for most of the period 1789-1856).

⁵⁴ See *id.* at 292 (Tables XLIV and XLV demonstrate that in 1857 the free states had 144 seats in the House of Representatives, while the slave states had only 90 – and it was this close only because “Three-Fifths Clause” of the Constitution enhanced the representation of the South in the House).

⁵⁵ See PBS, *Africans in America: People and Events: The Compromise of 1850 and the Fugitive Slave Act* at <http://www.pbs.org/wgbh/aia/part4/4p2951.html> (stating that under the Compromise of 1850, “California would be admitted as a free state. To pacify slave-state politicians, who would have objected to the imbalance created by adding another free state, the Fugitive Slave Act was passed.”).

⁵⁶ See Carl Sandburg, *ABRAHAM LINCOLN: THE PRAIRIE YEARS AND THE WAR YEARS* 121 (New York, Harcourt, Brace, & World, Inc., 1954) (stating, “In 1856, on the Missouri and Kansas border, 200 men, women and children were shot, stabbed or burned to death in the fighting between free- and slave-state settlers and guerrillas. ... Each side aimed to settle Kansas with voters for its cause.”).

⁵⁷ See Office of the Minnesota Secretary of State, Mark Ritchie at <http://www.sos.state.mn.us/index.aspx?page=648> (describing admission of Minnesota) (stating that Minnesota was admitted to the Union as a free state in 1858). The site states:

The bill for admission encountered several obstacles. The Minnesota bill was coupled with the bill for the admission of Kansas. It was customary to admit states in pairs to preserve the balance of power in congress: a state that permitted slavery would be linked with a state that prohibited slavery. Minnesota was to be a free state, Kansas a slave state. The proposal to admit Kansas was made under its fraudulent Lecompton constitution. The fraud in the adoption of the Kansas constitution was so glaring that admission under it was abandoned, delaying the Minnesota bill for several months. Minnesota's bill also met with general opposition from congressmen from southern slave states.

⁵⁸ See Oregon Blue Book, *Act of Congress Admitting Oregon to the Union*, at <http://www.bluebook.state.or.us/cultural/history/historyact.htm> (dated 1859); Oregon Historical Society, *The Oregon History Project: Subtopic: The Great Divide: Resettlement and the new Economy: Slavery and Race*, at http://www.ohs.org/education/oregonhistory/narratives/subtopic.cfm?subtopic_ID=24 (stating that in 1857 Oregonians voted to defeat slavery but voted to exclude blacks from the state).

to the territories of the United States.⁵⁹ As the President and the Senate went, so would the Supreme Court; Lincoln had made it clear that he opposed the *Dred Scott* decision⁶⁰ which had held that Congress lacked the power to abolish slavery from the territories of the United States,⁶¹ and that he intended to do what he could to have the case overruled.⁶² If the Supreme Court were to overrule *Dred Scott*, the institution of slavery would be confined to the South, and anti-slavery agitation would eventually spread to that part of the country as well, challenging the existing order.⁶³

Lincoln himself, in his “House Divided” speech” of June 16, 1858, had said:

Either the *opponents* of slavery, will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in course of ultimate extinction; or its *advocates* will push it forward, till it shall become alike lawful in *all* the States, *old* as well as *new* – *North* as well as *South*.⁶⁴

The South seceded because its people quite reasonably believed that the national government had inevitably started down the road to the abolition of slavery.⁶⁵ Eleven states seceded, and four states explained their reasons for this action in Declarations of Secession:

⁵⁹ See *Helper*, note 52 *supra*, at 292 (Tables XLIV and XLV showing that the free states commanded 176 electoral votes, while the slave states had only 120); see *id.* at 293 (Tables XLVI and XLVII show that in the presidential election of 1856 the total popular vote in the free states was 3.0 million, while that of the slave states was 1.1 million). See also Roark, note 1 *supra*, at 10 (“the Southern minority had finally come face to face with a permanent antislavery Northern majority, dooming the dream of coexistence of slavery and Union.”).

⁶⁰ See 3 *Collected Works* 522-550 (Address at Cooper Institute, New York City) (laying out Lincoln’s legal, political, and moral critique of the *Dred Scott* decision).

⁶¹ See *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (striking down the Missouri Compromise as unconstitutional). A reconstituted Supreme Court might also overrule cases such as *Abelman v. Booth*, 62 U.S. 506 (1858) (upholding the Fugitive Slave Act of 1850 “in all of its provisions”) and *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (striking down a Pennsylvania law that prohibited any person from forcibly removing persons from the State for the purpose of enslaving them).

⁶² See 2 *Collected Works* 401 (speaking of the *Dred Scott* decision on June 26, 1857, Lincoln said, “We know the court that made it, has often over-ruled its own decisions, and we shall do what we can to have it to over-rule this.”)

⁶³ See Andrew S. Coopersmith, *FIGHTING WORDS: AN ILLUSTRATED HISTORY OF NEWSPAPER ACCOUNTS OF THE CIVIL WAR* 4 (New York, The New Press, 2004). Coopersmith states:

The prevailing view of South Carolina was that the election of an antislavery president was reason enough to put the wheels of secession into motion. Lincoln’s electoral victory in 1860 – which he achieved without carrying a single Southern state – betokened the political disenfranchisement of the south. With the North clearly holding the reins of political power now, it seemed only a matter of time before the federal government started creating laws to restrict slavery’s westward expansion, perhaps as a precursor to assailing it everywhere, even in the Southern states.

See also Jefferson Davis, *VOLUME I, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT* 85 (New York, D. Appleton & Co., 1881), at <https://play.google.com/store/books/details?id=qdcBAAAAMAAJ&rdid=book-qdcBAAAAMAAJ&rdot=1>. Davis stated that the South was driven to secede because after the election of 1860 “abolitionism, having triumphed in the Territories, would proceed to the invasion of the States.”

⁶⁴ 2 *Collected Works*, at 461-462.

⁶⁵ See Nevins, note 51 *supra*, at 466-467 (quoting Henry J. Raymond and Alexander Stephens on how the ultimate concern of the South during the Secession Crisis was not the immediate but rather the long-term threat to slavery).

Georgia, Mississippi, South Carolina, and Texas.⁶⁶ Each of the declarations maintains that that the state had seceded to protect and preserve the institution of slavery; no other reason is stated.⁶⁷ In the spring of 1861 in major addresses both the President and Vice-President of the Confederacy forthrightly explained that the Southern states had seceded in order to sustain slavery.⁶⁸

The South was willing to fight the Civil War to *defend* slavery, yet it lost the Civil War *because* of slavery. The institution of slavery weakened Southern society in several critical respects, preventing it from withstanding the power and efficiency of a free labor society.⁶⁹

When the Confederacy was faced with military defeat, why didn't it abolish slavery and enlist African-Americans in the Confederate Army? The following portion of this article describes just such a proposal.

II

General Cleburne's Proposal to Free and Enlist the Slaves

Patrick Cleburne – the Irish-born Confederate general - is one of my favorite figures of the Civil War, emblematic of the highest personal qualities on both sides of that conflict.⁷⁰ He was heroic not only in battle but in his support for the abolition of slavery. He expressed his position on slavery in a letter to his fellow officers dated January 2, 1864,⁷¹ which has come to

⁶⁶ See Constitution.Org, *Ordinances of Secession*, at http://www.constitution.org/csa/ordinances_secession.htm; University of Tennessee Knoxville, *Declaration of Causes of Seceding States*, at <http://sunsite.utk.edu/civil-war/reasons.html>.

⁶⁷ See *Declaration of Causes of Seceding States*, note 65 *supra*. The State of Georgia stated that its objections to remaining in the Union were “with reference to the subject of African slavery.” The State of Mississippi declared: “Our position is thoroughly identified with the institution of slavery.” South Carolina justified secession on the ground that the Northern states had violated the Constitution by failing to return fugitive slaves; it said: “[The Fugitive Slave Clause] was so material to the compact that without it the compact would not have been made.” Texas argued that it had entered the Union as a slaveholding state and intended to remain one: “[Texas] was received as a commonwealth holding, maintaining and protecting the institution known as negro slavery - the servitude of the African to the white race within her limits - a relation that had existed from the first settlement of her wilderness by the white race, and which her people intended should exist in all future time.” See also Nevins, note 51 *supra*, at 465 (stating, “In the official explanations which one Southern State after another published for its secession, economic grievances are either omitted entirely or given minor position.”)

⁶⁸ See note 233 *infra* and accompanying text (Confederate Vice-President Alexander Stephens’ “Cornerstone Speech” extolling the moral justification of the institution of slavery); note 341 *infra* and accompanying text (Confederate President Jefferson Davis’ economic justification for slavery and secession).

⁶⁹ See Part III of this article, notes 107-173 *infra* and accompanying text (describing a number of ways in which the institution of slavery weakened the South).

⁷⁰ See generally, Craig L. Symonds, *STONEWALL OF THE WEST: PATRICK CLEBURNE AND THE CIVIL WAR* (Lawrence, University Press of Kansas, 1997) (biography of Cleburne).

⁷¹ See Civil War Trust, *Patrick Cleburne's Proposal to Arm Slaves*, at <http://www.civilwar.org/education/history/primarysources/patrick-r-cleburne-et-al.html> (hereinafter “Memorial.”). See also Civil War Home, *A Proposal for Negro Enlistments in the Confederate Army*, at <http://www.civilwarhome.com/proposal.htm>. Civil War Home hosts not only Cleburne’s Memorial, at <http://www.civilwarhome.com/cleburneproposal.htm> but also supporting documents: Walker’s Letter to Davis, at <http://www.civilwarhome.com/walkertodavisor.htm>; Davis’s Letter to Walker, at <http://www.civilwarhome.com/davistowalkeror.htm>; Seddon’s Letter to Johnston, at

be known as “Cleburne’s Memorial.”⁷² The Southern leadership's reaction to his letter and what they did to Cleburne afterwards illustrates why the Confederacy lost the war.

Like many soldiers in the history of warfare Pat Cleburne was a far better man than the cause he fought for. Cleburne distinguished himself in battle countless times.⁷³ On November 25, 1863, in the Battle of Chattanooga at the northern end of Missionary Ridge, Cleburne stymied the attack of General William Tecumseh Sherman, who had four times as many troops;⁷⁴ at the same time his commander Braxton Bragg was unable to maintain his position at the center of the ridge against Union forces under General George H. Thomas.⁷⁵ Cleburne covered the headlong retreat of Bragg's army,⁷⁶ then held off vastly superior pursuing Union forces under General Joseph Hooker at Ringgold Gap to save it again.⁷⁷ But it is for his *moral* leadership that Cleburne is best remembered.

During 1863 the Civil War turned decisively in favor of the Union. The foundation for ultimate victory was laid in the summer of 1862 when Lincoln decided to free the slaves in the areas in rebellion.⁷⁸ The preliminary Emancipation Proclamation was made public on September 22, 1862.⁷⁹ On December 1, 1862, in his second annual address to Congress, Lincoln outlined an alternative plan for gradual, compensated emancipation.⁸⁰ Lincoln urged his countrymen to unmoor themselves from the ideas that had sustained slavery:

The dogmas of the quiet past, are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise -- with the occasion. As

<http://www.civilwarhome.com/seddontojohnstonor.htm>; and Johnston’s Letter to Davis, at <http://www.civilwarhome.com/johnstontoseddonor.htm>

⁷² See text accompanying note 180 *infra* (letter of Secretary of War Seddon to General Joseph Johnston, referring to Cleburne’s letter as a “memorial.”).

⁷³ See generally Symonds, note 69 *supra* (describing Cleburne’s military exploits at many battles, including Perryville, Chickamauga, Chattanooga, Ringgold Gap, Atlanta, and Franklin); *id.* at 158 (quoting Robert E. Lee praising Cleburne as “a meteor shining from a clouded sky” and Jefferson Davis calling him “Stonewall of the West”).

⁷⁴ See *id.* at 158-170 (describing Cleburne’s defense of the northern edge of Missionary Ridge); *id.* at 169 (stating, “For seven hours against odds of four to one Cleburne had used advantageous terrain, interior lines, and effective artillery fire to bolster first one threatened position and then another, repelling three separate assaults by a determined foe.”).

⁷⁵ See Shelby Foote, *THE CIVIL WAR: A NARRATIVE, VOLUME 2, FREDERICKSBURG TO MERIDIAN* 845-859 (Random House, New York, 1963) (describing the Battle of Missionary Ridge).

⁷⁶ See Symonds, note 69 *supra*, at 169-170 (describing Cleburne’s rear guard protection of Bragg’s army on the retreat from Chattanooga).

⁷⁷ See *id.* at 171-176 (describing Cleburne’s defense of Ringgold Gap); *id.* at 175-176 (stating, “As at Missionary Ridge, Cleburne’s Division at Ringgold Gap held off forces three or four times their number...”); Foote, note 74 *supra*, at 860-861 (describing Bragg’s order to Cleburne to hold the gap “at all hazards” as a “suicide assignment” yet one that resulted in a “complete repulse” of Hooker’s forces).

⁷⁸ See ANECDOTES AND SAYINGS OF ABRAHAM LINCOLN 209 (J.B. McClure, ed., Mechanicsburg, Stackpole Books, 2006) (Leonard Sweatt’s recollection of his visit to Lincoln’s office during which they discussed the proposed Emancipation Proclamation). Sweatt stated:

As soon as Lincoln saw that the negro slave could become a soldier he saw that he had the material out of which the Rebellion could be crushed, and it is my belief that from this time forward Lincoln had a clear sight of the victory that stood at the end of the War.

⁷⁹ See 5 *Collected Works* 433-436 (Preliminary Emancipation Proclamation, September 22, 1863).

⁸⁰ See *id.* at 518-537 (Annual Message to Congress, December 1, 1862).

our case is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country.⁸¹

On January 1 of 1863 Lincoln issued the Emancipation Proclamation, freeing the slaves in the areas in rebellion:⁸²

I, Abraham Lincoln, President of the United States, by virtue of the power in me vested as Commander-in-Chief, of the Army and Navy of the United States in time of actual armed rebellion against the authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion, ... do order and declare that all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free.⁸³

Lincoln added a paragraph that had not appeared in the preliminary Emancipation Proclamation; this new paragraph authorized the enlistment of African-Americans in the armed forces of the United States:⁸⁴ Lincoln ordered:

And I further declare and make known, that such persons of suitable condition, will be received into the armed service of the United States to garrison forts, positions, stations, and other places, and to man vessels of all sorts in said service.⁸⁵

In July of 1863 one army of the Confederacy, the Army of Mississippi, surrendered at Vicksburg,⁸⁶ and another, the Army of Northern Virginia, was more than decimated at Gettysburg;⁸⁷ as a result “Whatever Southern hopes of European intervention remained were shattered”⁸⁸ The state elections in the fall of 1863 were essentially a referendum on emancipation and the war.⁸⁹ The Republican Party prevailed throughout the north, and in Ohio it overwhelmingly defeated Clement Vallandigham for Governor.⁹⁰ Vallandigham had met with Southern officials and promised at a minimum a cease-fire, if not surrender of the war for the

⁸¹ *Id.* at 537.

⁸² *See* 6 *Collected Works* 28-30 (Emancipation Proclamation, January 1, 1863).

⁸³ *Id.* at 29-30.

⁸⁴ *See id.* at 30.

⁸⁵ *Id.* at 30.

⁸⁶ *See* Foote, note 74 *supra*, at 612 (stating that the Confederate soldiers taken captive at Vicksburg included 2166 officers and 27,230 enlisted men).

⁸⁷ *See* James McPherson, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 664* (New York, Oxford University Press, 1988) (stating that Southern casualties to Lee’s army at Gettysburg to be “28,000 men killed, wounded, or missing, more than a third of Lee’s army”).

⁸⁸ Norman A. Graebner, *Northern Diplomacy and European Neutrality*, in David Herbert Donald, *WHY THE NORTH WON THE CIVIL WAR 77* (New York, Touchstone, 1996).

⁸⁹ *See* McPherson, *Battle Cry of Freedom*, note 86 *supra*, at 591-625 (Chapter 20, entitled “Fire in the Rear,” describing the racist and defeatist elements in the North and Southern hopes that these elements would prevail); *id.* at 688 (stating that Republicans interpreted the election results “as signs of a transformation of public opinion towards emancipation”).

⁹⁰ *Id.* at 684-688 (campaign of Vallandigham and his defeat).

Union.⁹¹ The election results nearly extinguished the “fire in the rear” and dampened Southern hopes of securing a negotiated peace.⁹² In late November 1863 the Union Army broke the Confederate siege of Chattanooga, driving the third principal Confederate Army, the Army of Tennessee, from its “impregnable” positions overlooking the city at Lookout Mountain and Missionary Ridge.⁹³ At the end of the year, the Army of Northern Virginia held fast in front of Richmond,⁹⁴ but the Army of Tennessee stood with its back to the wall defending the approaches to Georgia from the vastly larger Union forces gathered against it.⁹⁵

After the reversals at Vicksburg, Gettysburg, and Chattanooga it was obvious that the Confederacy was doomed unless the South could find a way to counter the North's numerical and material advantage. On January 1, 1864, the North had 860,000 men in arms; the South had only 460,000.⁹⁶ On February 1, 1864, Lincoln would issue yet another order for an additional 500,000 soldiers from the North.⁹⁷ In the face of this impending tidal wave the South could do nothing. Shelby Foote, the renowned Civil War historian, states:

The bottom of the manpower barrel was not only in sight; it had been scraped practically clean to provide the army with every available [white] male within the conscription age-range of eighteen to forty-five.⁹⁸

Moreover, during 1863 the Union Army began recruiting and enlisting black soldiers. On August 9, 1863, Lincoln wrote Grant:

A word upon another subject. Gen. Thomas has gone again to the Mississippi Valley, with the view of raising colored troops. I have no reason to doubt that you are doing what you reasonably can upon the same subject. I believe it is a resource, which, if vigorously applied now, will soon close the contest. It works doubly, weakening the enemy and strengthening us. We were not fully ripe for it until the river was opened. Now, I think at least a hundred

⁹¹ See *id.* at 598 (“Before leaving the South [Vallandigham] spoke with several Confederate congressmen and army officers. He made clear to them his commitment to reunion through an armistice and negotiations.”); *id.* (Vallandigham “left [a Confederate] agent with the impression that if the South refuse to come back ‘then possibly he is in favor of recognizing our independence.’”).

⁹² See *id.* at 688 (describing how Lincoln’s optimism after the 1863 election “mirrored the despair that threatened to undermine the southern will to continue fighting”); Emory M. Thomas, *THE CONFEDERATE NATION 1861-1865* 258 (HarperCollins Publishers, New York, 2011) (stating “the returns from the [Confederate] Congressional elections in 1863 did indicate failing confidence in the Davis administration”); Foote, note 74 *supra*, at 880 (comparing the year-end messages of Davis and Lincoln).

⁹³ See Foote, note 74 *supra*, at 859. Foote states that years later when it was suggested to Grant that “Bragg must have considered his position impregnable, Grant agreed . . . though his comment was accompanied by a smile and a shrewd look. ‘Well, it *was* impregnable,’ he said.”). See also *id.* at 858 (stating that in his official report Bragg blamed his soldiers for not holding the line at Chattanooga, stating: “No satisfactory excuse can possibly be given for the shameful conduct of the troops . . . in allowing their line to be penetrated. The position was one which ought to have been held by a line of skirmishers against any assaulting column.”)

⁹⁴ Foote, note 74 *supra*, at 888 (stating, “All was quiet in the camps along the Rapidan”).

⁹⁵ *Id.* at 867 (describing the “relief” and “ruefulness” as Bragg’s army “reconsolidated” behind Rocky Face Ridge).

⁹⁶ See Foote, note 74 *supra*, at 953 (number of men in arms on both sides, January, 1864).

⁹⁷ See 7 *Collected Works* 164 (Order for Draft of 500,000 Men, February 1, 1864).

⁹⁸ Foote, note 74 *supra*, at 953.

thousand can, and ought to be rapidly organized along its shores, relieving all the white troops to serve elsewhere.⁹⁹

By the end of 1863 tens of thousands of escaped slaves had enlisted in the Union Army to fight for freedom.¹⁰⁰ On December 8, 1863, in his third annual address to Congress, Lincoln reported that the black soldiers had proven “as good soldiers as any,”¹⁰¹ that “public sentiment”¹⁰² in foreign countries had much improved, and that domestic opposition to negro enlistment had waned: “The crisis which threatened to divide the friends of the Union is past.”¹⁰³ The total of black troops in the Union Army would eventually reach nearly 200,000.¹⁰⁴

Cleburne proposed an obvious solution to the crisis facing the South. On January 2, 1864, he circulated a letter (“Cleburne’s Memorial”) to his fellow officers in the Army of Tennessee proposing that the South should free the four million slaves and enlist hundreds of thousands of them in the Confederate army.¹⁰⁵ The letter, addressed to his commanding general Joe Johnston (Bragg’s replacement), as well as the corps, division, brigade, and regimental commanders, recites the dire military situation that the Confederacy was in, stating: “There is a growing belief that some black catastrophe is not far ahead of us, and that unless some extraordinary change is soon made in our condition we must overtake it.”¹⁰⁶ Cleburne then cites the advantages that emancipation and enlistment of African-Americans would bring.¹⁰⁷

III Cleburne Describes How Slavery Weakened the South

⁹⁹ 6 *Collected Works* 374 (To Ulysses S. Grant, August 9, 1863).

¹⁰⁰ See 7 *Collected Works* 36-53 (Annual Message to Congress, December 8, 1863). Lincoln stated: Of those who were slaves at the beginning of the rebellion full 100,000 are now in the United States military service, about one-half of which number actually bear arms in the ranks, thus giving the double advantage of taking so much labor from the insurgent cause and supplying the places which otherwise must be filled with so many white men. So far as tested, it is difficult to say they are not as good soldiers as any. No servile insurrection or tendency to violence or cruelty has marked the measures of emancipation and arming the blacks. These measures have been much discussed in foreign countries, and, contemporary with such discussion, the tone of public sentiment there is much improved. At home the same measures have been fully discussed, supported, criticised, and denounced, and the annual elections following are highly encouraging to those whose official duty it is to bear the country through this great trial. Thus we have the new reckoning. The crisis which threatened to divide the friends of the Union is past.

Id. at 49-50.

¹⁰¹ *Id.* at 50.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See Dudley Taylor Cornish, *THE SABLE ARM: NEGRO TROOPS IN THE UNION ARMY, 1861-1865* 288 (New York, W.W. Norton & Co., 1966) (setting the figure between 180,000 and 200,000).

¹⁰⁵ See *Memorial*, note 70 *supra* (“we propose . . . that we immediately commence training a large reserve of the most courageous of our slaves, and further that we guarantee freedom within a reasonable time to every slave in the South who shall remain true to the Confederacy in this war.”)

¹⁰⁶ *Id.*

¹⁰⁷ See *id.*

Cleburne contended that slavery, the greatest economic strength of the Southern people, had under the stress of war become the South's greatest military weakness.¹⁰⁸ He stated that the Confederacy could never gain its independence so long as it was fighting to preserve slavery,¹⁰⁹ and that the South would have to choose one or the other: "As between the loss of independence and the loss of slavery, we assume that every patriot will freely give up the latter – give up the negro slave rather than be a slave himself."¹¹⁰ Cleburne described how slavery weakened the South and how emancipation would propel it to victory. Cleburne's reasoning is supremely realistic and his proposal was not only the right thing to do but the only reasonable choice. Cleburne laid out three principal arguments in favor of emancipation:

First, African-Americans, who constituted nearly half of all southerners, currently had no incentive to achieve victory for their homeland.¹¹¹ The slaves were not beholden either to the Confederacy or to the institution of slavery.¹¹² Wherever the northern armies invaded the South, the slaves eagerly defected to them.¹¹³ Slaves aided the Union armies by providing useful information about the terrain and disposition of southern forces,¹¹⁴ and 100,000 now served in the Union Army.¹¹⁵ If slavery were abolished, however, this weakness would be converted into a strength.¹¹⁶ As citizens of the Confederacy African-Americans would have every incentive to fight alongside white southerners for freedom.¹¹⁷ Confederate armies would outnumber and overwhelm northern forces.¹¹⁸

Second, although Britain and France and other countries had economic and military reasons to weaken and divide the United States, no foreign country would recognize the Confederacy so long as it was a slave nation.¹¹⁹ In contrast, if the slaves were freed, foreign

¹⁰⁸ *See id.* ("slavery, from being one of our chief sources of strength at the commencement of the war, has now become, in a military point of view, one of our chief sources of weakness.").

¹⁰⁹ *See id.* ("If this state continues much longer we must be subjugated.").

¹¹⁰ *See id.*

¹¹¹ *See id.* ("The hope of freedom is perhaps the only moral incentive that can be applied to [a slave]. It would be preposterous then to expect him to fight against it with any degree of enthusiasm.").

¹¹² *Id.*

¹¹³ *See id.* ("The approach of the enemy would no longer find every household surrounded by spies; the fear that sealed the master's lips and the avarice that has, in so many cases, tempted him practically to desert us would alike be removed. There would be no recruits awaiting the enemy with open arms, no complete history of every neighborhood with ready guides, no fear of insurrection in the rear, or anxieties for the fate of loved ones when our armies moved forward.").

¹¹⁴ *See id.*

¹¹⁵ *See id.* ("the President of the United States announces that 'he has already in training an army of 100,000 negroes as good as any troops'").

¹¹⁶ *See id.* ("Give him an earnest of our intentions such immediate immunities as will impress him with our sincerity and be in keeping with his new condition, enroll a portion of his class as soldiers of the Confederacy, and we change the race from a dreaded weakness to a position of strength.").

¹¹⁷ *See id.* ("[W]hen we make soldiers of them we must make free men of them beyond all question, and thus enlist their sympathies also. We can do this more effectually than the North can now do, for we can give the negro not only his own freedom, but that of his wife and child, and can secure it to him in his old home.").

¹¹⁸ *See id.* ("The immediate effect of the emancipation and enrollment of negroes on the military strength of the South would be: To enable us to have armies numerically superior to those of the North, and a reserve of any size we might think necessary; to enable us to take the offensive, move forward, and forage on the enemy.").

¹¹⁹ *See id.* ("Our country has already some friends in England and France, and there are strong motives to induce these nations to recognize and assist us, but they cannot assist us without helping slavery, and to do this would be in conflict with their policy for the last quarter of a century.").

countries would rush to support the liberation of the South.¹²⁰ As a former British subject, Cleburne knew that “no British government would sully its antislavery record by recognizing the South while she remained a slave-owning nation.”¹²¹ Amanda Foreman, in her comprehensive analysis of Britain’s role in the Civil War, states that “every Confederate sympathizer in Britain assumed that the South would abolish the ‘peculiar institution’ as soon as its economy could sustain free labor.”¹²² William Gladstone, perhaps the most ardent friend of the South in Britain, confirmed this:

“[N]o doubt,” [Gladstone] declared, “if we could say that this was a contest of slavery and freedom, there is not a man within the length and breadth of this room, there is, perhaps, hardly a man in all England, who would for a moment hesitate upon the side he should take.”¹²³

Third, Cleburne argued, the anti-slavery movement in the North had become a moral “crusade.”¹²⁴ Abolishing slavery would eliminate the “fanaticism” of the northern people,¹²⁵ and would renew the determination and strength of purpose of the southern people:

It would remove forever all selfish taint from our cause and place independence above every question of property. The very magnitude of the sacrifice itself, such as no nation has ever voluntarily made before, would appal [sic] our enemies, destroy his spirit and his finances, and fill our hearts with a pride and singleness of purpose which would clothe us with new strength in battle.¹²⁶

Cleburne characterized his proposal as “common sense,”¹²⁷ and from our vantage point he made perfect sense.

Slavery had other deleterious effects upon the South that Cleburne didn’t mention. Cleburne himself, as an Irish immigrant to the South, was an aberration. In 1860 the population of the North was over 21 million; that of the South, a little over 9 million, of whom 3.5 million

¹²⁰ *See id.* Cleburne stated:

But this barrier once removed, the sympathy and the interests of these and other nations will accord with our own, and we may expect from them both moral support and material aid. One thing is certain, as soon as the great sacrifice to independence is made and known in foreign countries there will be a complete change of front in our favor of the sympathies of the world.

¹²¹ Amanda Foreman, *A WORLD ON FIRE: BRITAIN’S CRUCIAL ROLE IN THE AMERICAN CIVIL WAR* 726 fn. (New York, Random House, 2012)

¹²² Foreman, note 121 *supra*, at 219.

¹²³ *Id.*

¹²⁴ *Memorial*, note 70 *supra*, Cleburne states:

The idea that it is their special mission to war against slavery has held growing sway over the Northern people for many years, and has at length ripened into an armed and bloody crusade against it. This baleful superstition has so far supplied them with a courage and constancy not their own.

¹²⁵ *Id.* (“The measure we propose will strike dead all John Brown fanaticism”).

¹²⁶ *Id.*

¹²⁷ *Id.* (referring to his proposal as a “concession to common sense”).

were slaves.¹²⁸ There were over 4.1 million foreign-born persons living in the United States,¹²⁹ but only 250,000 of them lived in the Confederate states.¹³⁰ The *foreign-born* population of the North nearly equaled the entire white population of the South.¹³¹ Immigrants did not migrate to the South because they would have had to work for slave wages. As a consequence the population of the North far outstripped that of the South.

Slavery depressed the South economically. In his 1856 masterpiece *The Impending Crisis of the South: How to Meet It*¹³² Hinton Rowan Helper conducted a careful and thorough economic analysis of the effect of slavery. He persuasively demonstrated that, while a few individuals had become rich as a result of slavery, on the whole slavery had impoverished the South.

Helper pointed out that while the South had great wealth in slaves, it had little else. The “entire wealth of the slave states” was \$2.9 billion, of which \$1.6 billion was in slaves; only \$1.3 billion represented non-slave assets.¹³³ In comparison, the total non-slave wealth of the free slaves was \$4.1 billion, more than three times as much.¹³⁴ Eric Foner states, “By 1860, the economic value of property in slaves amounted to more than the sum of all the money invested in railroads, banks, and factories in the United States.”¹³⁵ Yet the South did not leverage its wealth in slaves into more advanced forms of economic activity. Emory Thomas notes that although the South produced ample amounts of sugar, rice, tobacco, and hemp, and two-thirds of the world’s cotton, “Most of these staples left the South raw; Southerners seemed content to produce crops without all but the most elemental processing.”¹³⁶ Nor was the South’s wealth invested in other forms of capital such as manufacturing, shipping, or banking. Hinton Helper compared in detail the differences between the Free States and the Slave States in their levels of capital investment:¹³⁷

	Free States	Slave States
Value of Shipping Tonnage	\$236 M	\$24 M
Value of Manufactures	\$842 M	\$165 M
Miles of Canals	3,682	1,116
Miles of Railroads	17,855	6,859
Cost of Railroads	\$538 M	\$95 M
Bank Capital	\$230 M	\$102 M
New Patents (1856)	1929	268

¹²⁸ See USHistory.Org, *Pre-Columbian to the New Millennium: 33b. Strengths and Weaknesses: North vs. South*, at <http://www.ushistory.org/us/33b.asp> (population of northern and southern states).

¹²⁹ U.S. Census Bureau, *Nativity of the Population and Place of Birth of the Native Population, 1850 to 1990*, at <http://www.census.gov/population/www/documentation/twps0029/tab01.html>.

¹³⁰ See Ella Lonn, *FOREIGNERS IN THE CONFEDERACY* xii (Chapel Hill, University of North Carolina Press, 2002).

¹³¹ *See id.*

¹³² *Helper*, note 52 *supra*.

¹³³ *Id.* at 83.

¹³⁴ *See id.* at 84.

¹³⁵ Foner, note 21 *supra*, at 11.

¹³⁶ Thomas, note 91 *supra*, at 13.

¹³⁷ *Helper*, note 52 *supra*, at 283-285, 294.

Reliant upon slavery, the South had developed an agricultural economy designed to grow cash crops like tobacco, cotton, and sugar.¹³⁸ There was little industry;¹³⁹ the manufacturing base was far too small to meet the needs of war.¹⁴⁰ Emory Thomas explains why:

One reason for the South's industrial lag was top-heavy income distribution. Manufacturers require markets, and the majority of Southerners, slaves and plain folk, were not consumers in any significant sense.¹⁴¹

And even though the vast majority of the Southern population engaged in farming, the South did not grow enough food or at least distribute it efficiently enough to sustain its civilian population or its soldiers during the war.¹⁴²

Slavery distorted the distribution of political power in the South. Eric Foner states, "The wealthiest Americans before the Civil War were planters in the South Carolina low country ... and the Mississippi Valley cotton region"¹⁴³ Most slaves lived on large plantations as the property of the planter class,¹⁴⁴ who as a result came to dominate the political life of the South.¹⁴⁵ The planters were in effect an aristocracy who sought to preserve and promote an economic, social, and political system that can best be described as "feudal."¹⁴⁶ The planter class had much

¹³⁸ See Thomas, note 91 *supra*, at 13 ("Southern plantations produced mostly staple raw materials, and planters had to sell them on an open world market").

¹³⁹ See *id.* ("By 1860, industrial capitalism had made few inroads in the South.").

¹⁴⁰ See USHistory.Org, *Strengths and Weaknesses: North and South*, note 128 *supra*. The website states:

The North had an enormous industrial advantage as well. At the beginning of the war, the Confederacy had only one-ninth the industrial capacity of the Union. But that statistic was misleading. In 1860, the North manufactured 97 percent of the country's firearms, 96 percent of its railroad locomotives, 94 percent of its cloth, 93 percent of its pig iron, and over 90 percent of its boots and shoes. The North had twice the density of railroads per square mile. There was not even one rifleworks in the entire South.

¹⁴¹ Thomas, note 91 *supra*, at 14.

¹⁴² See *id.* at 206 ("The nation of farmers was growing hungry"); McPherson, *Battle Cry of Freedom*, note 86 *supra*, at 612 (stating that "despite the conversion of much acreage from cotton to food crops in 1862," there were severe food shortages caused by drought, breakdown of transportation, conquest of prime agricultural land, and inflation). See generally Andrew F. Smith, *STARVING THE SOUTH: HOW THE NORTH WON THE CIVIL WAR* (St. Martin's Press, New York 2011) (describing how a number of factors, including adverse weather conditions, failed Confederate policies regarding agriculture and transportation, and Northern military strategy directed against food production resulted in the defeat of the South).

¹⁴³ Foner, note 21 *supra*, at 13.

¹⁴⁴ See Kenneth M. Stampp, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 30 (New York, Vintage Books, 1956 (stating that nearly three-fourths of all whites in the South did not own slaves); *id.* (stating that 88% of slaveholders had fewer than 20 slaves); *id.* (stating, "The planter aristocracy was limited to some ten thousand families who lived off the labor of gangs of more than fifty slaves"); *id.* at 30-31 (stating, "The extremely wealthy families who owned more than a hundred slaves numbered less than three thousand, a tiny fraction of the southern population").

¹⁴⁵ See Foner, note 21 *supra*, at 13 (stating, "Planters dominated antebellum southern society and politics, and exerted enormous influence in national affairs as well."); Nevins, note 51 *supra*, at 60 (quoting Virginia Senator Hunter who stated "the master at the South, who owns the labor, wields the power of the government, and does justice to all." Nevins states, "To freemen of the western counties it seemed plain that while he did wield the rod of power, his justice was something less than even-handed.").

¹⁴⁶ See Pollard, text accompanying note 375 *infra* (praising the "Cavaliers" (the Southern aristocracy), and "their attachment to a sort of feudal life"); Calhoun, text accompanying note 490 *infra* (speaking approvingly of the

at stake in the Civil War – non-slaveholding whites, not as much. The common complaint was that it was “A rich man’s war and a poor man’s fight.”¹⁴⁷

The system of slavery created self-sufficient communities resistant to taxation, centralized government, and the building of public works. The planters opposed taxation of their source of wealth; slaves were taxed at far lower rates than land. For example, in North Carolina land was taxed at 1%, but ownership of slaves incurred only a small poll tax.¹⁴⁸ In that state land worth \$2,400 would be taxed \$24, while two slaves worth the same amount would be taxed \$5.82.¹⁴⁹ As a result, the Confederacy was unable to finance the war effort through taxation,¹⁵⁰ and relied instead upon the printing of paper money, leading to ruinous inflation.¹⁵¹ Furthermore, devotion to decentralized government weakened the ability of the Confederacy to fight the North. Richard Current states:

Always the southerners had to struggle with the incubus of John C. Calhoun, with the idea of states’ rights, with that fatal principle upon which their new government had been based. A Confederacy formed by particularist politicians could hardly be expected to adopt promptly those centralist policies – for marshaling resources and transportation – which victory demanded.¹⁵²

As a result of decentralization the Confederacy had trouble mobilizing its resources and coordinating its actions,¹⁵³ and even though it had the advantage of interior lines it was hampered by a vastly inferior system of roads, railroads and canals.¹⁵⁴ In many instances the northern

“communities” that comprise the Southern nation, revolving around the plantation and under the leadership of the “master”).

¹⁴⁷ See James McPherson, *American Victory, American Defeat*, in WHY THE CONFEDERACY LOST 28-29 (Gabor S. Boritt, ed.) (New York, Oxford University Press, 1992) (stating, “If the South had its conflict over the theme of a rich man’s war and a poor man’s fight, so did the North”); McPherson, *Battle Cry of Freedom*, note 86 *supra*, at 612 (stating, “Many of the men who deserted from Confederate armies during the winter of 1862-63 agreed with a Mississippi farmer who went AWOL because he ‘did not propose to fight for the rich men while they were at home having a good time.’”); *id.* at 603 (arguing that “in Ohio the laborers and farmers were more likely than men in white-collar jobs to avoid the draft. In this respect it does not seem to have been especially a poor man’s fight.

¹⁴⁸ See Nevins, note 51 *supra*, at 60 (comparing tax rates on land to that on slaves)

¹⁴⁹ See *id.* (same).

¹⁵⁰ See Richard N. Current, *God and the Strongest Battalions*, in Donald, note 87 *supra*, at 27 (stating that taxes paid for 21% of the war effort in the North, but only 5% of the war effort in the South); see also David M. Potter, *Jefferson Davis and the Political Factors in Confederate Defeat*, in Donald, note 87 *supra*, at 96 (stating, “only about one per cent of Confederate revenue was raised by taxation, which is a smaller proportion than any modern government in wartime has raised in this way.”).

¹⁵¹ See Current, note 150 *supra*, at 28 (“The general price level, in Confederate dollars, soared to ninety or a hundred times its original level.”).

¹⁵² *Id.* at 31.

¹⁵³ See *id.*

¹⁵⁴ See Thomas, note 91 *supra*, at 211 (stating that the Confederacy suffered from “the basic inadequacy of the South’s rail network, the attrition of wartime overuse, and the want of time and capacity to make necessary repairs”); see also Archer Jones, *Military Means, Political Ends: Strategy*, in Gabor S. Boritt, note 147 *supra* (describing how during the winter of 1863-1864 Grant developed the strategy of conducting raids against the Southern railroads to “isolate the armies from the farms, foundries, factories, and ports that sustained them.”).

armies were able to concentrate their forces more quickly at the point of battle despite having longer distances to travel.¹⁵⁵

Yet another problem was that as a result of slavery education in the south had withered.¹⁵⁶ James Truslow Adams states that the “aristocratic Southerner”¹⁵⁷ typically attended an excellent private academy and college. However, the young people of the different sections of the country studied different subjects: “Education for utility was steadily gaining ground in North; education for character and grace held sway in the South.”¹⁵⁸ There were relatively few public schools for the children of non-slaveholding whites,¹⁵⁹ and it was a criminal offense to teach the slaves how to read and write.¹⁶⁰ Hinton Helper’s statistics are telling as to the state of education and literacy in the South:¹⁶¹

	Free States	Slave States
Public Schools	62,000	18,000
Public School Students	2.7 M	580,000
Public Libraries	15,000	695
Volumes in Public Libraries	3.8 M	49,000
Newspapers & Periodicals	1,790	704
Copies Printed Annually	334 M	81 M
Illiterate Native White Adults	248,000	493,000

Slavery also weakened the rule of law.¹⁶² In Lincoln’s “Lost Speech” organizing the Republican Party in Ohio,¹⁶³ Lincoln described slavery in these terms: “I read once in a law

¹⁵⁵ See Christopher R. Gabel, *Railroad Generalship: Foundations of Civil War Strategy*, p. 6, U.S. Army Command and General staff College (1997), at <http://usacac.army.mil/cac2/cgsc/carl/download/csipubs/gabel4.pdf> (comparing the relative speed of concentration of Confederate and Union forces at Chickamauga and Chattanooga by rail, and concluding, “Thus, the more efficient Union railroads demonstrated the potential to nullify Confederate interior lines.”).

¹⁵⁶ See Adams, in Stamp, *Causes*, note 20 *supra*, at 215-216, 219-220 (contrasting the state of education in the South and the North).

¹⁵⁷ *Id.* at 215.

¹⁵⁸ *Id.* at 219; *see id.* at 216 (stating that upper class whites in the South generally studied history and classical literature).

¹⁵⁹ *See id.* at 220 (stating, “the South was a land without free public schools – a land where the poor man’s son was likely to go untaught, and the workingman or small farmer to be ignorant if not illiterate. Here lay one of the great gulfs separating North from South.”).

¹⁶⁰ See Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper’s Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI-KENT L. REV. 1123 (1993).

¹⁶¹ Helper, note 52 *supra*.

¹⁶² *See generally*, e.g., Mark V. Tushnet, *SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE* (Lawrence, University Press of Kansas, 2003) (describing the law of slavery and focusing on the case of *State v. Mann*); Stamp, *Peculiar Institution*, note 144 *supra*, at 192-236 (Chapter Five entitled “Chattels Personal” on law of slavery).

¹⁶³ *See* Sandburg, note 55 *supra*, at 122-123 (Harcourt, Brace, & World, Inc., New York, 1954) (describing the “Lost Speech”); Julie M. Fenster, *THE CASE OF ABRAHAM LINCOLN: A STORY OF ADULTERY, MURDER, AND THE MAKING OF A GREAT PRESIDENT* 118-123 (New York, Palgrave MacMillan, 2007) (same).

book, ‘A slave is a human being who is legally not a *person* but a *thing*.’¹⁶⁴ The reality was that the institution of slavery was not so much a system of laws as it was an *absence* of law.¹⁶⁵ Slaveholders could do with their slaves as they pleased and suffer no legal consequences.¹⁶⁶ Slaves had no legal right to property.¹⁶⁷ Slaves had no legal right to inherit from their parents, black or white.¹⁶⁸ Slaves had no legal right to appear in court as witnesses against white people.¹⁶⁹ Slave marriages were not recognized, and slave families were broken up by sale.¹⁷⁰ There was no law of contract, no law of tort, no family law, and virtually no criminal law to protect the slaves.¹⁷¹ Justice for African-Americans was a private affair, administered by white masters or white mobs.¹⁷² According to Frederick Schiller, “Das Gesetz ist der Freund des Schwachen”¹⁷³ – “The law is the protector of the weak”¹⁷⁴ – and in the South there was no law to protect the weak.

¹⁶⁴ Sandburg, note 55 *supra*, at 122. See also Stamp, *Peculiar Institution*, note 144 *supra*, at 193 (“legally, the slave was less a person than a thing”).

¹⁶⁵ See Foner, note 21 *supra*, at 13 (“Before the law, slaves were property with virtually no legal rights.”); Thomas, note 91 *supra*, at 19 (“law on slave plantations was essentially what planters said it was”).

¹⁶⁶ See *id.*

¹⁶⁷ See Foner, note 21 *supra*, at 13.

¹⁶⁸ See *id.*

¹⁶⁹ See Lawrence M. Friedman, *A HISTORY OF AMERICAN LAW* 226 (3d ed. 2001) (stating, “No slave could testify against his master. In some states, no black could testify against a white man at all.”); Kenneth S. Greenberg, *HONOR AND SLAVERY: LIES, DUELS, NOSES, MASKS, DRESSING AS A WOMAN, GIFTS, STRANGERS, DEATH, HUMANITARIANISM, SLAVE REBELLIONS, THE PRO-SLAVERY ARGUMENT, BASEBALL, HUNTING, AND GAMBLING IN THE OLD SOUTH* 11 (Princeton, Princeton University Press, 1996) (stating, “the testimony of blacks could never be used in legal cases involving whites”).

¹⁷⁰ See Finer, note 21 *supra*, at 16 (stating, “At the center of the slave community stood the family, even though the law did not recognize slave marriages and many were disrupted by sales.”); *id.* at 16-17 (stating that over a million slaves were transported from the Old South to the cotton plantations of the Deep South); *id.* at 17 (stating, “Slave traders gave little attention to preserving family ties.”).

¹⁷¹ See Tushnet, note 162 *supra*, at 1 (“*Mann*’s holding is easy to describe: slaveowners cannot be prosecuted for assaults on their slaves.”); *id.* at 34 (discussion of *State v. Hoover*, in which the court ruled that a master could not be prosecuted for the murder of a slave so long as the master had a “good intent, chastisement for example”).

¹⁷² See Stamp, *Peculiar Institution*, note 144 *supra* at 141. Stamp states:

If a bondsman ran away, if he stole the goods, injured the property, or disobeyed the commands of the master, he was guilty of a private and not a public offense; and the state left the prevention and punishment of such offenses to the owner. In governing his bondsmen, therefore, the master made the law, tried offenders, and administered penalties. Whether he exercised his authority benevolently or malevolently depended upon his nature.

See also *id.* at 190 (“Mobs all too frequently dealt with slaves accused with murder or rape. . . . Their more fortunate victims were hanged; the others were burned to death . . .”).

¹⁷³ See Friedrich von Schiller, *DIE BRAUT VON MESSINA, ODER DIE FEINDLICHEN BRUDER* 62 (Stuttgart, 1865), at Google Books, <https://play.google.com/store/books/details?id=ycFdAAAAIAAJ&rdid=book-ycFdAAAAIAAJ&rdot=1>.

¹⁷⁴ See also Rudyard Kipling, *THE FIVE NATIONS* 105 (New York, Doubleday, Page, & Co., 1903) (from the poem *The Old Issue*). Kipling wrote:

All we have of freedom, all we use or know—
This our fathers bought for us long and long ago.
Ancient Right unnoticed as the breath we draw—
Leave to live by no man's leave, underneath the Law.

In light of all of the deleterious effects that the institution of slavery had upon the South, the course of action that Cleburne proposed was both reasonable and long past due.¹⁷⁵ But Cleburne was not listened to; he was not even heard.

IV Cleburne Silenced But Vindicated

Cleburne was right. Because of slavery the South was going to lose the Civil War.

However, the other officers in the Army of Tennessee of equal or higher rank rejected his proposal out-of-hand.¹⁷⁶ Shelby Foote reports that “The corps and division commanders were unanimous in their condemnation of the proposal, which they saw as a threat to everything they held dear.”¹⁷⁷ Foote quotes one of Cleburne’s fellow officers who described the suggestion to free the slaves as a “monstrous proposition . . . revolting to Southern sentiment, Southern pride, and Southern honor,” and stated that “if this thing is once openly proposed to the army the total disintegration of that army will follow in a fortnight.”¹⁷⁸

Major General W.H.T. Walker forwarded Cleburne’s letter to Jefferson Davis, stating:

The gravity of the subject, the magnitude of the issues involved, my strong convictions that the further agitation of such sentiments and propositions would ruin the efficacy of our Army and involve our cause in ruin and disgrace constitute my reasons for bringing the document before the Executive.¹⁷⁹

Jefferson Davis replied to Walker:

I have received your letter, with its inclosure, informing me of the propositions submitted to a meeting of the general officers on the 2d instant, and thank you for the information. Deeming it to be injurious to the public service that such a subject should be mooted, or even known to be entertained by persons possessed of the confidence and respect of the people, I have concluded that the best policy under the circumstances will be to avoid all publicity, and the Secretary of War has therefore written to General Johnston requesting him to convey to those concerned my desire that it should be kept private. If it be kept out of the public journals its ill effect will be much lessened.¹⁸⁰

Secretary of War Seddon informed Joe Johnston, Cleburne’s commanding general, of “the earnest conviction of the President that the dissemination or even promulgation of such

¹⁷⁵ Too late, that is, for practical reasons. See *Memorial*, note 70 *supra* (“Negroes will require much training; training will require time, and there is danger that this concession to common sense may come too late.”).

¹⁷⁶ See McPherson, *Battle Cry of Freedom*, note 86 *supra*, at 833 (“Most generals in the Army of Tennessee disapproved of Cleburne’s action, some of them vehemently.”).

¹⁷⁷ Foote, note 74 *supra*, at 954.

¹⁷⁸ *Id.*

¹⁷⁹ Civil War Home, Walker’s Letter to Davis, at <http://www.civilwarhome.com/walkertodavis.htm>.

¹⁸⁰ Civil War Home, Jefferson Davis’s Letter to Walker, at <http://www.civilwarhome.com/davistowalker.htm>.

opinions under the present circumstances of the Confederacy, whether in the army or among the people, can be productive only of discouragement, distraction, and dissension,” and instructed Johnston to “[suppress] not only ... the memorial itself, but likewise of all discussion and controversy respecting or growing out of it.”¹⁸¹ Foote states:

[T]he suppression Richmond called for was so effective that nothing further was heard of the document for more than thirty years, when it finally turned up among the posthumous papers of a staff officer.¹⁸²

The total suppression of *any* opposition to slavery had been a hallmark of the South for thirty years prior to the Civil War.¹⁸³ In his book *The People's Darling Privilege* constitutional historian Michael Curtis describes the campaign in the antebellum South to stamp out any public discussion of ending slavery: the gag rule in Congress – the prohibition on sending antislavery materials through the mails – state and local laws prohibiting antislavery agitation – and lynch mobs ensured that all rational discussion of the subject was halted.¹⁸⁴ As a single example, Curtis details how Hinton Rowan Helper's 1857 book *The Impending Crisis of the South* – a reasoned economic analysis of the effects of slavery on southern whites – was outlawed, and the Reverend Daniel Worth was threatened with multiple prosecutions for circulating the book in North Carolina, Helper's home state.¹⁸⁵

The suppression of speech criticizing slavery crippled the democratic process. A decade before the war Francis Lieber, a leading American political philosopher and jurist who for many years was a Professor at South Carolina College,¹⁸⁶ had written to John C. Calhoun why it was wrong to suppress antislavery speech:

“If you fear discussion, if you maintain that the South cannot afford it, then you admit at the same time that the whole institution is to be kept up by violence only,

¹⁸¹ Civil War Home, Seddon to Johnston Correspondence, at <http://www.civilwarhome.com/seddontojohnstonor.htm>.

¹⁸² Foote, note 74 *supra*, at 954. See also McPherson, *Battle Cry of Freedom*, note 86 *supra*, at 833. McPherson states:

Davis ordered the generals to stop discussing the matter. So complete was their compliance that the affair remained unknown outside this small circle of southern officers until the U. S. government published the war's *Official Records* a generation later.

¹⁸³ See generally Michael Kent Curtis, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 131-299 (Durham, Duke University Press, 2000).

¹⁸⁴ See Curtis, *Free Speech*, note 182 *supra*, at 131-154 (describing the efforts of southern states to make public opposition to slavery illegal); *id.* at 194-215 (describing legal theories supporting suppression of slavery agitation); *id.* at 271-299 (describing the southern response to Helper’s *Impending Crisis* and the trials of Daniel Worth in North Carolina for circulating it); *id.* at 155-181 (describing federal efforts to silence opposition to slavery).

¹⁸⁵ See *id.* at 271-299 (describing the southern response to Helper’s *Impending Crisis* and the trials of Daniel Worth in North Carolina for circulating it). See also Shannon D. Gilreath, *The Technicolor Constitution: Popular Constitutionalism, Ethical Norms, and Legal Pedagogy*, 9 TEX. J. CIV. LIB. & CIV. RTS. 23, 34 fn. 63 (2003) (Angelina Grimke’s *Appeal to the Women of the South* publicly burned by South Carolina postmasters).

¹⁸⁶ See Encyclopedia Britannica, *Francis Lieber*, at <http://www.britannica.com/EBchecked/topic/339816/Francis-Lieber> (stating that Lieber edited the *Encyclopedia Americana* and authored the “Code for the Government of Armies in the Field” in 1863, popularly known as the “Lieber Code.”)

and is against the spirit of the times and unameliorable, which means, in other words, that violence supports it, and violence will be its end.”¹⁸⁷

Lieber’s correspondence with Calhoun was private; had it been publicly known, his life would have been in danger.¹⁸⁸

In January, 1864, at the same time that Jefferson Davis was suppressing Cleburne’s Memorial, Harper’s Weekly blamed the Civil War on that very type of suppression:

It was the knowledge that, if the right of free speech, guaranteed by the Constitution, were tolerated in the South, slavery would be destroyed by the common-sense of the Southern people, which made Calhoun and all his school insist upon suppressing it. Consequently, in its most important provision, the Constitution has been a dead letter in every slave State for more than thirty years.¹⁸⁹

As the reaction to Cleburne’s letter demonstrates, in early 1864 Southern leaders could not tolerate any public consideration that slavery might be wrong. But this changed as the year progressed. In late 1864 after devastating military defeats at Mobile Bay,¹⁹⁰ Atlanta,¹⁹¹ and Cedar Creek,¹⁹² Jefferson Davis proposed to the Confederate Congress a watered-down version of Cleburne’s plan.¹⁹³ On November 7, 1864 Davis suggested that the Confederacy should purchase 40,000 slaves and put them to work as noncombatants for the Confederate army, promising them emancipation if they should serve faithfully.¹⁹⁴ In light of this eventual proposal, why hadn’t Davis allowed Cleburne’s Memorial to be publicized and debated earlier in the year? Shelby Foote, one of the leading historians of the Civil War, offers this explanation:

[Davis] agreed with the underlying premise that slavery was doomed, no matter who won or lost the war, and had said as much to his wife. What alarmed him was the reaction, the “distraction and discussion,” that would follow the release of what one of his hearers had called “this monstrous proposition.” Knowing, as he did, how much more violent than the generals the politicians

¹⁸⁷ Curtis, *Free Speech*, note 182 *supra*, at 193.

¹⁸⁸ See THE LIFE AND LETTERS OF FRANCIS LIEBER 228-229 (Thomas Sergeant Perry, ed.) (J.R. Osgood & Co., 1882), Google Books, at <https://play.google.com/store/books/details?id=swJLAAAAMAAJ&rdid=book-swJLAAAAMAAJ&rdot=1> (stating that Lieber expressed his anti-slavery views in private letters because if he had expressed them openly “in South Carolina he would have been in danger of his life”).

¹⁸⁹ *The Truth Confessed*, Harper’s Wkly., Jan. 16, 1864, at 34 in Richard L. Aynes, 18 JOURNAL OF CONTEMPORARY LEGAL ISSUES 77, *Enforcing the Bill of Rights Against the States: The History and the Future* (2009).

¹⁹⁰ See McPherson, *Battle Cry of Freedom*, note 86 *supra*, at 761 (Farragut takes Mobile Bay, August 1864).

¹⁹¹ See *id.* at 774 (Sherman takes Atlanta, September 2, 1864).

¹⁹² See *id.* at 779-781 (Sheridan routs Early’s forces in the Shenandoah Valley, October 19, 1864);

¹⁹³ See *id.* at 833-834 (describing Davis’ proposal of November 7, 1864).

¹⁹⁴ See Thomas, note 91 *supra*, at 290. Davis stated: “The policy of engaging to liberate the negro on his discharge after service faithfully rendered seems to me preferable to that of granting immediate manumission, or that of retaining him in servitude.”

would be in their denunciations of such views – particularly the large landowners . . .-- he foresaw that the result would be calamitous in its effect on the fortunes of the Confederacy, which would be so torn internally by any discussion of the issue that, even though the army could be doubled in size by adoption of the plan, there would be nothing left for that army to defend but discord.¹⁹⁵

The public debate over emancipation and enlistment of the slaves had already commenced in October, 1864,¹⁹⁶ but it erupted in earnest after Davis’s proposal of November 7.¹⁹⁷ A broad range of newspapers fiercely condemned the idea¹⁹⁸ and the Confederate Congress “reacted angrily”¹⁹⁹ and “effectively buried” the proposal.²⁰⁰

On December 27, 1864, after suffering the massacre at Franklin,²⁰¹ the rout at Nashville,²⁰² and the fall of Savannah,²⁰³ as the Confederacy’s “military situation went from grave to desperate,”²⁰⁴ Davis took another step towards emancipation.²⁰⁵ After secretly consulting with selected Congressional leaders he dispatched Duncan Kenner, the Chairman of the Confederate House Ways and Means Committee, on a highly confidential mission to Europe.²⁰⁶ Kenner was to offer England and France emancipation of the slaves in exchange for recognition and support.²⁰⁷ On January 31, 1865, before Kenner even departed, the United States Congress approved the 13th Amendment freeing the slaves.²⁰⁸ The 13th Amendment had an electric effect on the British public,²⁰⁹ and Kenner’s mission was fruitless.²¹⁰ One British lord informed James Mason, the Confederate ambassador, that “slavery had *always* been the chief impediment to recognition.”²¹¹ Foreman concludes:

¹⁹⁵ Foote, note 74 *supra*, at 955.

¹⁹⁶ See Thomas, note 91 *supra*, at 291-296 (describing the debate in the South of the idea of freeing the slaves and enlisting them in the war effort).

¹⁹⁷ See *id.* at 293 (“The emancipation debate raged publicly in newspaper editorials and correspondence, in legislative debates, at mass meetings of concerned citizens, and in political speeches.”).

¹⁹⁸ See *id.* (“The immediate response to Davis’ November 7 address to Congress was a barrage of heavy attacks in the columns of some of the Confederacy’s most influential newspapers.”).

¹⁹⁹ Foreman, note 120 *supra*, at 712.

²⁰⁰ Thomas, note 91 *supra*, at 292.

²⁰¹ See Jacob D. Cox, X CAMPAIGNS OF THE CIVIL WAR: MARCH TO THE SEA - FRANKLIN AND NASHVILLE 81-98 (Edison, Castle Books, 1882, 2002) (describing the Battle of Franklin, November 30, 1864); *id.* at 96-97 (stating that the Confederates sustained 6,300 casualties, including 12 generals; the Union lost 2,326)

²⁰² See *id.* at 99-136 (describing the Battle of Nashville, December 15-16, 1864, and the Union pursuit of the remnants of the Confederate Army of Tennessee).

²⁰³ See *id.* at 21-61 (describing Sherman’s March through Georgia and the capture of Savannah, November 15 to December 21, 1864).

²⁰⁴ Thomas, note 91 *supra*, at 293-294.

²⁰⁵ *Id.* at 294 (describing Davis’s decision to send Kenner abroad); Foreman, note 120 *supra*, at 726, 729, 731, 742-743 (describing Kenner’s mission).

²⁰⁶ See Foreman, note 120 *supra*, at 726.

²⁰⁷ See *id.* (describing the purpose of Kenner’s mission).

²⁰⁸ See *id.* at 731-732 (Thirteenth Amendment adopted while Kenner was awaiting transport in New York).

²⁰⁹ See *id.* at 742 (“The news that the U.S. Congress had ratified the Thirteenth Amendment, abolishing slavery, had an even greater effect on British public opinion than the North’s recent military victories.”).

²¹⁰ See *id.* at 743 (describing the results of Kenner’s mission).

²¹¹ *Id.*

The South had squandered her only chance of achieving [recognition] by not emancipating the slaves in 1863, when Lee was the undisputed victor on the battlefield.²¹²

In February, 1865, Davis came full circle and openly supported enlistment and emancipation of the slaves.²¹³ On February 18, 1865, General Robert E. Lee, by this time the *de facto* leader of the South, wrote an open letter supporting enlistment and emancipation of the slaves.²¹⁴ The matter was again earnestly debated in the newspapers and in public meetings.²¹⁵ On March 13, three weeks before Appomattox, the Confederate Congress agreed to enlistment, but not emancipation.²¹⁶ In March of 1865 two companies of Confederate soldier-slaves were organized in Richmond.²¹⁷ According to the *Richmond Examiner*, “the colored soldiers are kept under strict surveillance, but many get away in spite of all precaution.”²¹⁸ They saw no action.²¹⁹ Richmond fell on April 3,²²⁰ and Lee surrendered on April 9, 1865.²²¹

The purpose of this paper is to examine why the South did not seriously consider freeing and enlisting the slaves when it might have made a difference. There is, of course, an obvious economic reason. In the South all white people could potentially use slaves to their own economic advantage; even many non-slaveholding whites cherished the opportunity to enrich themselves through slavery. This paper, however, focuses on the *rationalizations* for that economic system; the *belief system* that justified slavery.

The suggestion that African-Americans should be emancipated aroused outrage because it challenged a myriad of cherished myths.²²² I examine the cultural and psychological factors that made it impossible for the South to abolish slavery even though by perpetuating slavery the

²¹² *Id.* See also *id.* at 726 (footnote describing Cleburne’s and Kenner’s understanding of British attitudes towards slavery). Foreman states:

Like General Patrick Cleburne, Kenner had realized that no British government would sully its antislavery record by recognizing the South while she remained a slave-owning nation. In 1863, when her fortunes were at the high-water mark, he believed the South could have made the offer from a position of strength and probably dictated her own terms.

²¹³ See McPherson, *Battle Cry of Freedom*, note 86 *supra*, at 834 (in February, 1865, Davis supports emancipation and enlistment); Thomas, note 91 *supra*, at 295 (same)

²¹⁴ See McPherson, *Battle Cry of Freedom*, note 86 *supra*, at 836 (describing Lee’s letter of February 18, 1865, to Confederate Congressman Ethelbert Barksdale); Thomas, note 91 *supra*, at 296 (same)

²¹⁵ Thomas, note 91 *supra*, 296-297 (describing public reaction to Lee’s letter urging emancipation and enlistment of African-Americans).

²¹⁶ See Thomas, note 91 *supra*, at 297 (stating, “The Confederate Congress agreed to arm the slaves (by one vote in the Senate) but not to emancipate them.”); see also Geoffrey C. Ward, Ric Burns, and Ken Burns, *THE CIVIL WAR: AN ILLUSTRATED HISTORY* 363 (New York, Alfred A. Knopf, 1990) (“on March 13, the Confederate Congress authorized black troops largely because, as the *Richmond Examiner* said, “The country will not deny General Lee *anything* he asks for.”).

²¹⁷ See Coopersmith, note 62 *supra*, at 244-245 (describing the two companies of black soldiers organized by the State of Virginia in Richmond).

²¹⁸ *Id.* at 245.

²¹⁹ See McPherson, *Battle Cry of Freedom*, note 86 *supra*, at 837 (stating, “The two companies of black soldiers hastily organized in Richmond never saw action.”).

²²⁰ See *id.* at 846 (describing the fall of Richmond).

²²¹ See *id.* at 848-849 (describing Lee’s surrender).

²²² See Roark, note 1 *supra* and accompanying text.

white people of the South invited military defeat and economic disaster. First, however, it is appropriate to review what slavery really was.

V

The True Nature of Slavery and the Necessity for Myth

Slavery was a brutal economic system based on force and violence. It was theft of everything that other human beings had or made or earned. It was armed robbery. It was kidnapping. It necessitated assault and it facilitated rape and murder. Most of the founders of our country opposed slavery.²²³ Benjamin Franklin led an antislavery society²²⁴ and Alexander Hamilton helped to found one.²²⁵ Our first three Presidents, George Washington,²²⁶ John Adams,²²⁷ and Thomas Jefferson²²⁸ all wrote that slavery was wrong. However, by supporting the adoption of the Constitution²²⁹ each of these persons compromised with slavery and not only allowed it to remain in this country but to flourish.²³⁰

During the first 60 years of the 19th century the people of the South under the influence of their political and religious leaders, came to view slavery not as evil but as a “positive good.”²³¹

²²³ See Gordon S. Wood, *The American Revolution: A History* 128 (stating, “all of the Revolutionary leaders, including southerners like Jefferson, Patrick Henry, and Henry Laurens, deplored the injustice of slavery and assumed that it would soon die away.”); Alexander Stephens, note 231 *infra* and accompanying text; Genovese, note 387 *infra* and accompanying text. See also Lincoln, 2 *Collected Works* 404 (stating, “It is grossly incorrect to say or assume, that the public estimate of the negro is more favorable now than it was at the origin of the government.”).

²²⁴ See PBS, Benjamin Franklin: Citizen Ben, *Abolitionist*, at http://www.pbs.org/benfranklin/13_citizen_abolitionist.html (stating that “After Franklin returned from France in 1785, he joined and eventually became president of an abolitionist group”).

²²⁵ See PBS, American Experience: Alexander Hamilton, *Timeline: Alexander Hamilton chronology* at <http://www.pbs.org/wgbh/amex/hamilton/timeline/> (describing a letter Hamilton wrote in 1779 to John Jay stating that he “detests slavery”); *id.* (stating that Hamilton attended a meeting with other New Yorkers that founded an anti-slavery group, the New York Society for Promoting the Manumission of Slaves).

²²⁶ See PBS, Rediscovering George Washington, *Lesson Plan: George Washington and the Problem of Slavery* at <http://www.pbs.org/georgewashington/classroom/slavery3.html> (citing and quoting five letters Washington wrote expressing his desire to see the slaves freed).

²²⁷ See University of Dayton, *Citizenship Rights: Opinions of the Early Presidents, and the Fathers of the Republic, upon Slavery and upon Negroes as Men and Soldiers: John Adams* at <http://academic.udayton.edu/race/02rights/slave05.htm#Adams> (quoting letter of Adams to Robert I. Evans, June, 1819). Adams wrote:

I have, through my whole life, held the practice of slavery in such abhorrence, that I have never owned a negro or any other slave; though I have lived for many years in times when the practice was not disgraceful; when the best men in my vicinity thought it not inconsistent with their character; and when it has cost me thousands of dollars of the labor and subsistence of free men, which I might have saved by the purchase of negroes at times when they were very cheap.

²²⁸ See Jefferson, note 49 *supra* (Jefferson’s critique of slavery in *Notes on the State of Virginia*).

²²⁹ See U.S. CONST., art. I, sec. 3, cl. 3 (Three-Fifths Clause); art. I, sec. 9, cl. 1 (clause protecting the slave trade for a period of 20 years); art. IV, sec. 2, cl. 3 (Fugitive Slave Clause).

²³⁰ See NNDB, William Lloyd Garrison at <http://www.nndb.com/people/966/000049819/> (noting that because of his antislavery beliefs the abolitionist editor William Lloyd Garrison denounced the constitution as “a covenant with death and an agreement with hell”); New York Times, *Mr. Garrison’s Address* (January 15, 1862) at <http://www.nytimes.com/1862/01/15/news/mr-garrison-s-address.html> (noting that “the Liberator ... has lately struck its ancient motto of the Constitution as “A covenant with death and an agreement with hell,” Garrison explaining that “Death and hell have now seceded”).

²³¹ Stamp, *Peculiar Institution*, note 144 *supra*, at 28. Stamp states:

Those who supported and promoted slavery could not be honest about the institution. Their books, their speeches, their newspaper editorials, and their sermons are filled with deceit, not so much to fool others as to fool themselves. Looking back at Southern culture of this period it seems gripped by a mass neurosis, steeped in denial to the point of delusion. Slavery could not be justified in reality, so it was justified in myth.

VI The Myths Sustaining Slavery

What were the myths about slavery that pervaded southern society? There were many, and they formed an interlocking and mutually reinforcing worldview that composed the basis of southern nationhood.

Myth 1 African-Americans are an inferior race.

Racism was the “cornerstone” of the Confederacy. In his famous address of March 21, 1861,²³² Confederate Vice-President Alexander Stephens acknowledged that the framers of the Constitution had believed in the equality of humankind,²³³ but he declared that the Confederacy was built upon the opposite principle:

By the 1830s, the fateful decision had been made. Slavery, now an integral part of the southern way of life, was to be preserved, not as a transitory evil, an unfortunate legacy of the past, but as a permanent institution – a *positive good*. To think of abolition was an idle dream. Now even native Southerners criticized the peculiar institution at their peril.

See also Charles G. Sellers, *The Travail of Slavery*, excerpted in Stamp, *Causes*, note 20 *supra*, at 176. Sellers states:

So southern leaders of the Calhoun school began trying to convince themselves and others that slavery was a “positive good,” while southern legislatures abridged freedom of speech and press, make manumission difficult or impossible, and imposed tighter restrictions on both slaves and free Negroes. The Great Reaction was under way.

Thomas, note 91 *supra*, at 31. Thomas quotes John C. Calhoun as stating, in 1838:

Many in the South once believed that it [slavery] was a moral and political evil. That folly and delusion are gone. We see it now in its true light, and regard it as the most safe and stable basis for free institutions in the world.

Eugene D. Genovese, *A CONSUMING FIRE: THE FALL OF THE CONFEDERACY IN THE MIND OF THE WHITE CHRISTIAN SOUTH* 7 (Athens, The University of Georgia Press, 1998) (“Southern preachers defended slavery as a positive good for the beneficial uses to which genuinely Christian masters could put it.”).

²³² *See* Fordham University, Modern History Sourcebook: *Alexander H. Stephens (1812-1883): Cornerstone Address, March 21, 1861*, at <http://www.fordham.edu/halsall/mod/1861stephens.asp>.

²³³ *See id.* Stephens stated:

The prevailing ideas entertained by ... most of the leading statesmen at the time of the formation of the old Constitution were, that the enslavement of the African was in violation of the laws of nature; that it was wrong in principle, socially, morally, and politically. It was an evil they knew not well how to deal with; but the general opinion of the men of that day was, that, somehow or other, in the order of Providence, the institution would be evanescent and pass away. ... Those ideas, however, were fundamentally wrong. They rested upon the assumption of the equality of the races. This was an error. It was a sandy foundation, and the idea of a government built upon it -- “When the storm came and the wind blew, it fell.”

Our new government is built upon exactly the opposite ideas; its foundations are laid, its cornerstone rests, upon the great truth that the negro is not equal to the white man; that slavery, subordination to the superior race, is his natural and moral condition. This, our new Government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth.²³⁴

In contrast to Stephens, Abraham Lincoln made equality the cornerstone of his political philosophy. Here is but one small example: the closing words from Lincoln's opening speech in the 1858 campaign for the United States Senate, July 10, 1858, in Chicago:

My friends, I have detained you about as long as I desired to do, and I have only to say, let us discard all this quibbling about this man and the other man – this race and that race and the other race being inferior, and therefore they must be placed in an inferior position – discarding our standard that we have left us. Let us discard all these things, and unite as one people throughout this land, until we shall once more stand up declaring that all men are created equal.²³⁵

Lincoln and his political allies strove to embed the principle of equality into the Constitution. In the national election of November, 1860, the second plank of the Republican Platform asserted that the Constitution embodies the principles of the Declaration of Independence, specifically including the proposition “all men are created equal.”²³⁶ In the election of 1864 the Republican Platform went further and called for a constitutional amendment abolishing slavery.²³⁷ Lincoln campaigned that year against slavery. In his “Letter to Hodges,”²³⁸ in reality an open letter to the American people, Lincoln commenced with these words: “I am naturally anti-slavery. If slavery is not wrong, then nothing is wrong.”²³⁹ After his reelection, on January 31, 1865, Lincoln delivered on his campaign promise by securing Congress's approval of the 13th Amendment.²⁴⁰

At the same time that Lincoln was successfully persuading the United States Congress to abolish slavery,²⁴¹ and nearly two years after Lincoln ordered the emancipation of the black race and their enlistment into the armed forces of the U.S.,²⁴² Jefferson Davis was unable to make any

²³⁴ *Id.*

²³⁵ 2 *Collected Works* 501.

²³⁶ See John T. Woolley & Gerhard Peters, Political Party Platforms: Republican Party Platform of 1860, Am. Presidency Project, <http://www.presidency.ucsb.edu/ws/index.php?pid=29620> (presenting the 1860 Republican Party platform, which quoted the second sentence of the Declaration of Independence).

²³⁷ See John T. Woolley & Gerhard Peters, Political Party Platforms: Republican Party Platform of 1864, Am. Presidency Project, <http://www.presidency.ucsb.edu/ws/index.php?pid=29621> (presenting the 1864 Republican Party platform, which favored the adoption of a constitutional amendment “as shall terminate and forever prohibit the existence of Slavery within the limits of the jurisdiction of the United States”).

²³⁸ 7 *Collected Works* 281-282.

²³⁹ *Id.* at 281.

²⁴⁰ See William Lee Miller, PRESIDENT LINCOLN: THE DUTY OF A STATESMAN 394-395 (New York, Alfred A. Knopf, 2008) (stating that Lincoln “worked harder for the passage of the slavery-ending Thirteenth Amendment than he had worked for any other piece of legislation in his presidency, even to the point of twisting arms and doling out projects, dangling offices in front of congressmen to help them make up their minds.”).

²⁴¹ See *id.*

²⁴² See Emancipation Proclamation, notes 81-84 *supra* and accompanying text.

similar progress in the South. Davis failed in his attempt to persuade the Confederate Congress to purchase 40,000 slaves and give them the opportunity to earn their freedom.²⁴³ Much of the opposition to Davis's proposal of November 7, 1864, was because of the cornerstone myth: the theory of White Supremacy.²⁴⁴ Andrew S. Coopersmith has collected a wide range of Southern newspaper editorials reacting to Davis' proposal.²⁴⁵ Many of them sound the same theme – that emancipation would be an admission that the South had been wrong about the inequality of the races:

The *Columbus Sun* (November 18, 1864):

On what terms or ground to put them in the army is the great question. *If we free him*, would this not be giving him his freedom in lieu of his services, and would this not be a confession that his condition when free is better than when a slave? [This would be completely] antagonistic to the views and teachings of the country which prevailed when the States seceded and the war began.²⁴⁶

The *Richmond Whig* (November 10, 1864):

According to his message, it is a rich reward for faithful service to turn a negro wild. Slavery, then, in the eyes of Mr. Davis, keeps the negro out of something which he had the capacity to enjoy. [And if that were true] then slavery is originally, radically, incurably wrong and sinful, and the sum of all barbarism.²⁴⁷

The *Charleston Mercury* (November 12, 1864):

The African is of an inferior race, whose normal condition is slavery. ... The purchase of forty thousand male slaves by the Confederate Government ... might possibly be judicious if properly managed, but to emancipate them afterwards, would not merely disturb the *status* of our negro population, but would go a great way to justify the arguments and views of the abolitionists, which it would give the lie to our professions and surrender the strength of our position. We cannot believe that a policy so inconsistent, unsound and suicidal can meet the sanction of any respectable body of Southern men.²⁴⁸

The proposal to enlist black soldiers aroused even more strident opposition. Here is a passage from the letter of Georgia General Howell Cobb to Secretary of War James Seddon, on January 8, 1865.

²⁴³ See notes 193-199 *supra* and accompanying.

²⁴⁴ See notes 231-233 *supra* and accompanying text.

²⁴⁵ See Coopersmith, note 62 *supra*, at 236-245 (newspaper response to Davis's proposal to free the slaves and enlist them in the Confederate army).

²⁴⁶ *Id.* at 237.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

You cannot make soldiers of slaves, nor slaves of soldiers. . . . Use all the negroes you can get, for all the purposes for which you need them, but *don't arm them*. The day you make soldiers of them is the beginning of the end of the revolution. If slaves would make good soldiers then our whole theory of slavery is wrong, but they won't make soldiers. As a class they are wanting in every qualification of a soldier.²⁴⁹

That same month a letter published in the *Macon Telegraph and Confederate* agreed with Cobb that the proposal to arm the slaves was inconsistent with White Supremacy and the institution of slavery:

As a question of principle, this thing of negro soldiers for the Southern army is monstrous. It is a virtual abandonment of the long contested question, not only of the equality of races, but of the Negro's capacity for self-government and for freedom; for if the negro is worthy to *fight* for liberty, he is worthy of liberty itself; and if he is worthy to be free, he must, of necessity, be accorded [the] capacity for self-government. There is no escaping these conclusions, and the friends of negro recruits for our Southern army, either have failed to analyse the scheme in all its bearings, or they are prepared to abandon principles which lay at the foundation of this defensive war.²⁵⁰

Aside from a few abolitionists such as Charles Sumner and Thaddeus Stevens,²⁵¹ relatively few Americans at this time, North or South, believed in the equality of the races.²⁵² However, racism in the North differed from racism in the South in one critical respect. Under the leadership of Abraham Lincoln, many Americans came to believe that African-Americans were equal to whites in one fundamental respect: that is, equal in their constitutional rights.²⁵³ Here is what Lincoln had said in his speech at Springfield, June 26, 1857:²⁵⁴

Now I protest against that counterfeit logic which concludes that, because I do not want a black woman for a *slave* I must necessarily want her for a *wife*. I need not have her for either, I can just leave her alone. In some respects she certainly is not my equal; but in her natural right to eat the bread she earns with

²⁴⁹ JSTOR, *Georgia and the Confederacy, 1865*, The American Historical Review, Vol. 1, No. 1, 1895, at 97, at <http://www.jstor.org/stable/1834020>.

²⁵⁰ Coopersmith, note 62 *supra*, at 235 (letter to Macon Telegraph and Confederate, January 5, 1865).

²⁵¹ *See id.* at 111 (“For decades, Radical leaders such as Thaddeus Stevens and Charles Sumner had defended the unpopular cause of black suffrage and equality before the law for black Americans.”); *id.* at 46-48 (describing the efforts of the anti-slavery movement before and during the Civil War).

²⁵² *See Foner*, note 21 *supra*, at 31 (stating that Abraham Lincoln “shared many of the era’s racial prejudices” and that in this regard “he represented the mainstream of northern opinion, by now convinced that slavery posed a threat to ‘free society,’ but still convinced of the inherent inferiority of African Americans”); Henry Louis Gates, Jr., *LINCOLN ON RACE & SLAVERY* 321 (Princeton, Princeton University Press, 2009) (stating, “It should come as no surprise that racism tinged Lincoln’s public and private humor.”).

²⁵³ *See id.* “Lincoln maintained that slavery violated the essential premises of American life – personal liberty, political democracy, and the opportunity to rise in the social scale”.

²⁵⁴ 2 *Collected Works* 398-410 (Speech at Springfield, June 26, 1857).

her own hands without asking leave of any one else, she is my equal, and the equal of all others.²⁵⁵

Lincoln explained what the language in the Declaration of Independence stating that “all men are created equal” means:

I think the authors of [the Declaration of Independence] intended to include *all* men, but they did not intend to declare all men equal *in all respects*. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal – equal in “certain inalienable rights, among which are life, liberty, and the pursuit of happiness.” This they said, and this meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit.²⁵⁶

The acceptance of this single, limited belief in equality – that all human beings are possessed of certain inherent, inalienable rights, including the rights to life, liberty, and property – was sufficient to eradicate slavery.

Myth 2

The slaves are grateful and devoted to their masters.

The second myth that was used to justify slavery before, during, and after the Civil War was that the slaves were happy and content.²⁵⁷ This was perhaps the most common depiction of slaves. In his masterpiece *The Peculiar Institution* Kenneth M. Stampp alludes to the “nostalgia” for slavery, a “legend” created by slaveholders.²⁵⁸ Stampp writes:

Among white Americans the popular tradition about slavery days emphasizes the love that united benevolent “massas” and pampered servants, not the hostility that divided harsh overseers and disgruntled fieldhands. After a century, few remember that southern slavery was not so much a patriarchal institution as a practical labor system.²⁵⁹

²⁵⁵ *Id.* at 405.

²⁵⁶ *Id.* at 406.

²⁵⁷ See Stampp, *Peculiar Institution*, note 144 *supra*, at 322 (quoted in text at note 258 *infra*; *id.* at 86-140 (chapter entitled “A Troublesome Property” describing the resistance of the slaves to their legal status and their yearning for freedom); Foner, note 21 *supra*, at 14 (stating, “In the face of this grim reality, slaves never surrendered their desire for freedom . . .”). See also Coopersmith, note 62 *supra*, at 51 (quoting *South-Western Baptist*, stating that the slaves “are happier and better provided for in all respects, than equal number of laboring classes in any part of the world.”).

²⁵⁸ Stampp, *Peculiar Institution*, note 144 *supra*, at 322.

²⁵⁹ *Id.*

This myth too began to crumble in the cauldron of war. Wherever the Union Army penetrated the South, the slaves deserted their masters.²⁶⁰ Eric Foner states:

In 1861 and 1862, as the federal army occupied territory on the periphery of the Confederacy, first in Virginia, then Tennessee, South Carolina, Louisiana, and elsewhere, slaves by the thousands headed for Union lines.²⁶¹

After Jefferson Davis called for the slaves to be joined to the war effort, Southerners disagreed about whether it was possible to enlist the *loyalty* of the slaves. The *South Carolinian* was not in favor of emancipation, but it did support arming the slaves.²⁶² The editors imagined that the slaves would fight to defend slavery because of the “happy lives” they enjoyed under that system:

And too, the negroes have a vital interest, present and future, in defending the soil and climate, the products, and the system of slave labor which produces them, as the only reliable and permanent sources of their own subsistence and well-being. Nor should, nor will, they be unmindful of those “domestic relations” which bind them to their homes, their owners, their wives and children, of that lasting peace which is so essential to their happy lives and thriving condition. They may assuredly understand that Yankeedom will not leave them any of these blessings, and that the North intends to dispossess both them and their owners of their favored country.²⁶³

But the *Lynchburg Virginian* had a more pragmatic view of the situation. Its editors understood that the image of the loyal, contented slave was a fairy tale. It was, as Cleburne had stated, “preposterous” to expect the slaves to fight against the “hope of freedom.”²⁶⁴ Accordingly, the *Virginian* opposed arming the slaves:

Place our negroes in the field as soldiers, and they would surrender every position which they might be placed to defend, for it is idle to talk to sensible men about the fidelity of slaves. That is a subject which will do to amuse the brains of romancers, but the experience of this war as well as the teaching of common

²⁶⁰ See Ashbrook, note 1 *supra* (stating, “In the final months of the conflict the Southern social order unravelled [sic] as, given the opportunity presented by the oncoming Union armies, the slaves fled by the tens of thousands. “).

²⁶¹ Foner, note 21 *supra*, at 43.

²⁶² See Coopersmith, note 62 *supra*, at 241.

²⁶³ *Id.*, quoting the *South Carolinian* (January 16, 1865).

²⁶⁴ *Memorial*, note 70 *supra*. Cleburne had stated:

For many years, ever since the agitation of the subject of slavery commenced, the negro has been dreaming of freedom, and his vivid imagination has surrounded that condition with so many gratifications that it has become the paradise of his hopes. To attain it he will tempt dangers and difficulties not exceeded by the bravest soldier in the field. The hope of freedom is perhaps the only moral incentive that can be applied to him in his present condition. It would be preposterous then to expect him to fight against it with any degree of enthusiasm, therefore we must bind him to our cause by no doubtful bonds; we must leave no possible loop-hole for treachery to creep in. The slaves are dangerous now, but armed, trained, and collected in an army they would be a thousand fold more dangerous; therefore when we make soldiers of them we must make free men of them beyond all question, and thus enlist their sympathies also.

sense have shown that not one negro in a thousand will refuse to accept the proffered boon of freedom tendered by the Yankees when he can do so with impunity. To arm the slaves is to arm a powerful foe in our own midst!²⁶⁵

After the war, some planters had to acknowledge the truth. Eric Foner quotes A. L. Taveau, a South Carolina planter, who admitted:

“I believed that these people were content, happy, and attached to their masters.” [Why, then, did they desert their masters] “in [their] moment of need and flock to an enemy, whom they did not know?” The answer, of course was that for generations the slaves had been “looking for the Man of Universal Freedom.”²⁶⁶

Myth 3

Slavery is a humane economic system, and slaveholders are generous to their slaves.

Next to the fiction of White Supremacy and the fable of the contented slave, the fraud of the benevolent slaveholder was perhaps the most pervasive and psychologically necessary of all the myths sustaining slavery.²⁶⁷ The historian Kenneth Stampp concludes that by the 1830s the white people of the South had convinced themselves that slavery was “a positive good”²⁶⁸ and that slaveholders were benevolent to the people in their custody.²⁶⁹

Historians disagree about whether white Southerners, slaveholders and non-slaveholders alike, felt any guilt or remorse about slavery.²⁷⁰ Whether out of guilt or pride, it is nevertheless the case that Southerners campaigned constantly to justify the institution of slavery.²⁷¹ The lengthy poem *The Hireling and the Slave* authored by William Grayson and published in Charleston, South Carolina in 1856 was a popular work in the South that promoted many of the myths listed here, including the image of the happy slave and the contention that “hirelings” in the North and in England were treated worse than the slaves.²⁷² Grayson had hoped to dispel what he considered to be the lies of abolitionists. He states:

²⁶⁵ Coopersmith, note 62 *supra*, at 233.

²⁶⁶ Foner, note 21 *supra*, at 43.

²⁶⁷ See Greenberg, note 169 *supra*, at 108-109, 113-114 (describing the common notion that slaveholders protected their slaves from death; *id.* at 114 (stating, “Over and over they voiced the same refrain; in a world where death by violence or neglect threatened everyone, masters protected the lives of their slaves.”).

²⁶⁸ See note 230 *supra*.

²⁶⁹ See note 258 *supra* (quoting Stampp, *Peculiar Institution*, about the legend of benevolent masters).

²⁷⁰ See Genovese, note 230 *supra*, at 32 (stating that while many scholars have found that people felt guilty about slaveholding, others (including Genovese) argued that “the great mass of slaveholders – and nonslaveholders, for that matter – accepted slavery as ubiquitous in history, as sanctioned by Scripture, and as a fact of life.”); McPherson, *American Victory, American Defeat*, note 147 *supra*, at 32 (stating, “Historians who want to believe that southern whites felt guilty about slavery find this thesis attractive. But most of the evidence for it would seem to exist in the imaginations of these historians.”).

²⁷¹ See note 20 *supra* and accompanying text (James Truslow Adams on the “pathological” defense of slavery in the South).

²⁷² See William J. Grayson, *THE HIRELING AND THE SLAVE, CHICORA, AND OTHER POEMS* v (McCarter & Co., 1856), at <http://antislavery.eserver.org/proslavery/graysonhireling/graysonhireling.pdf>. See also Antislavery

“The malignant abuse lavished on the slaveholders of America by writers in this country and England can be accounted for but in one way consistently with any degree of charitable consideration for the slanderers. They have no knowledge of the thing abused.”²⁷³

Religious leaders in the South routinely praised slavery as ordained by God and a boon to society.²⁷⁴ Here is a typical southern religious editorial regarding slavery from the *Southern Christian Advocate*, February 2, 1865:

All of us agree that slavery is a providential institution, that it rests upon Christian ground, that we are solemnly responsible for its guardianship, and that its uses, if rightly employed, are mutually advantageous to slaveholder and slave.²⁷⁵

Kenneth Stampp reminds us “that slaveholders were more often ambitious entrepreneurs than selfless philanthropists.”²⁷⁶ In light of that obvious truth, how did slaveholders convince themselves that they were generous beings? Kenneth Greenberg explains how the myth of “gift-giving” was built into the structure of slavery:

Since a slave could make no contractual or other demands on a master, everything he or she received came as a gift. According the logic of the slave regime, masters did not give gifts to slaves only at Christmas. All transactions involved the giving of gifts; food, clothing, and shelter were supplied as gifts by the master.²⁷⁷

Greenberg quotes from the diaries of two planters:

“Gave the Negroes a part of the morning to get their corn”; “Gave ... [potatoes] out to the Negroes for allowance”; “gave out the cloth” “Gave the Negroes shoes”; “gave the negroes cappor ‘Blankets’”; “gave the negroes a dinner”; “gave the women a dress.”²⁷⁸

Furthermore, explains Greenberg, this imagined concept of generosity extended to all intercourse between master and slave: “Every ‘howdy’ or other kind word that a master bestowed on a slave assumed the form of a gift.”²⁷⁹ The greatest gift of all, of course, was emancipation; the truth was that the slaves deserved freedom, but the myth was that masters

Literature, at <http://antislavery.eserver.org/proslavery/graysonhireling>, describing Grayson’s poem and the South’s embrace of it as a justification for slavery.

²⁷³ Grayson, note 271 *supra*, at Preface [unnumbered page].

²⁷⁴ See notes 382-401 *infra* and accompanying text (Myth 10, the notion that slavery is ordained by God).

²⁷⁵ Coopersmith, note 62 *supra*, at 243

²⁷⁶ Stampp, *Peculiar Institution*, note 144 *supra*, at 322.

²⁷⁷ Greenberg, note 169 *supra*, at 65.

²⁷⁸ *Id.* at 66.

²⁷⁹ *Id.*

“gave” it to them.²⁸⁰ Cleburne himself modestly described his plan of emancipation as a “sacrifice ... such as no nation has ever voluntarily made before.”²⁸¹

Kenneth Stampp describes the psychological significance of all this “giving”:

This kind of paternalism (Fanny Kemble likened it to “that maudlin tenderness of a fine lady for her lapdog”), which often arose from the master’s genuine love for his slave, gave its recipient privileges and comforts but made him into something less than a man. The most generous master, so long as he was determined to *be* a master, could be paternal only toward a fawning dependent; for slavery, by its nature, could never be a relationship between equals. Ideally it was the relationship between parent and child. The slave who had completely lost his manhood, who had lost confidence in himself, who stood before his master hat in hand, head slightly bent, was the one best suited to receive the favors of a patriarch.²⁸²

What was the reality? Eric Foner states, “Even the most gentlemanly and prominent owners inflicted brutal, often sadistic punishments.”²⁸³ For example, in 1856 Robert E. Lee wrote to his wife that the institution of slavery was “a moral & political evil”²⁸⁴ yet the following year as executor of his father-in-law’s estate Lee did not free the slaves at Arlington, as they had been led to believe would happen.²⁸⁵ Instead, when a family of slaves tried to escape in 1859, Lee had them whipped.²⁸⁶ Wesley Norris, one of the family members, testified how Lee told the local constable to “lay it on well”²⁸⁷ and watched as the constable stripped them to the waist and gave them each 50 lashes.²⁸⁸ Lee then ordered the constable to rub their wounds with saltwater to increase the pain.²⁸⁹

²⁸⁰ See *id.* at 66-67; *id.* at 67 (speaking of “the deep connections between gift giving and emancipation”).

²⁸¹ *Memorial*, note 70 *supra* ; see text accompanying note 2.

²⁸² Stampp, *Peculiar Institution*, note 144 *supra* at 327.

²⁸³ Foner, note 21 *supra*, at 14. See also See Stampp, *Peculiar Institution*, note 144 *supra*, at 141-191 (chapter entitled “To Make Them Stand in Fear” describing the brutal measures necessary to sustain slavery).

²⁸⁴ Fair Use Repository, *Letter to his wife on slavery*, at <http://fair-use.org/robert-e-lee/letter-to-his-wife-on-slavery> (letter of Robert E. Lee to his wife, December 27, 1856).

²⁸⁵ See *Slavery at Arlington* (As executor of the estate of George Washington Parke Custis, Lee freed the Arlington slaves in 1962, accordance with Custis’s will, which stipulated that the slaves should be freed upon his death unless the estate was not in good financial standing, in which case they should be freed after five years); Fair Use Repository, *Testimony of Wesley Norris*, at <http://fair-use.org/wesley-norris/testimony-of-wesley-norris> (relating testimony of Wesley Norris that “it was the general impression among the slaves of Mr. Custis that on his death they should be forever free).

²⁸⁶ See Fair-Use.Org, *Testimony of Wesley Norris*, note 257 *supra* (testimony of Wesley Norris describing the whipping of his family); Foner, note 21 *supra*, at 14. Foner states:

Wesley Norris, a slave of Confederate general Robert E. Lee, later recalled how after he and his family had attempted to run away, Lee ordered a local constable “to strip us to the waist and give us fifty lashes each.” Lee, Norris added, “stood by, and frequently enjoined the constable to ‘lay it on well,’ then ordered him “to thoroughly wash our backs” with saltwater to increase the pain.”

²⁸⁷ *Id.*

²⁸⁸ See *id.* (describing the whipping).

²⁸⁹ See *id.* (describing the whipping).

Furthermore, Lee was also ultimately responsible for one of the most horrific events of the Civil War. During the Gettysburg campaign Lee's soldiers captured and enchained hundreds of African-American women and children living in Pennsylvania,²⁹⁰ and drove them "like ... cattle"²⁹¹ back to the South, to be enslaved or re-enslaved. This roundup was carried out with ruthless cold-bloodedness, as the women and children were marched, weeping and lamenting, back to slavery.²⁹² At least one young man was butchered for refusing to cross the Potomac River into slavery.²⁹³ Today, of course, we would consider these atrocities against civilians to be hideous war crimes. The "kindliness" of slavery was an especially cruel myth.

Myth 4

The slaves are docile and easily frightened, and cannot make good soldiers.

The myth that slaves would not fight was a more of a desperate hope – a myth that was a defense mechanism for the deep fear that Southerners harbored of their slaves. Dudley Taylor Cornish explains:

Long before the Union had begun to use Negroes as soldiers, it should have been clear what the Southern reaction to such a policy would have to be. The great and abiding fear of the South was a slave revolt.²⁹⁴

...

To the people of the South, arming slaves was a heinous crime. It seems to have been impossible for the majority of the people of the South to see it in any other light. Even the preliminary Emancipation Proclamation of September 22, 1862, was taken as a signal for the beginning of a war of extermination against Southern whites.²⁹⁵

²⁹⁰ See Ted Alexander, *A Regular Slave Hunt*, NORTH & SOUTH, September 2001, Vol. 4, No. 7, pp. 82-89 at <http://deadconfederates.files.wordpress.com/2013/07/slavehunt.pdf> (describing capture and enslavement of free and fugitive slave African-Americans by Lee's forces during the Gettysburg campaign); Kevin Levin, *The Terror of Being Black at Gettysburg*, at <http://hmn.us/articles/terror-being-black-gettysburg> (same); and Peter C. Vermilyea, *The Effect of the Confederate Invasion of Pennsylvania on Gettysburg's African-American Community*, at <http://www.gdg.org/gettysburg%20magazine/gburgafrican.html> (same); Stephen E. Woodworth, *BENEATH A NORTHERN SKY: A SHORT HISTORY OF THE GETTYSBURG CAMPAIGN* 27-28 (Wilmington, Scholarly Resources, Inc., 2003) (same); *id.* at 28 (estimating that 250 Chambersburg citizens of African descent were kidnapped, mainly women and children, and that "The story was much the same in other towns").

²⁹¹ Woodworth, note 289 *supra*, at 28 (quoting Rachel Cormany, a white resident of Chambersburg, as stating that she had seen blacks "driven by just like we would drive cattle").

²⁹² Levin, note 289 *supra*, (stating, "One young boy witnessed, 'a number of colored people' led away from their homes and friends, 'crying and moaning.'").

²⁹³ Woodworth, note 289 *supra*, at 212. Woodworth states:

Not far from the Potomac, one young black man resisted so stoutly his captors' intentions of carrying him south into slavery that the Rebels became enraged. They stripped him, hacked him with knives, disemboweled and mutilated him, and then doused him with turpentine and set him on fire. Pursuing Union troops found him lying in a barn, dying in extreme agony, 'grinding his teeth & foaming at the mouth.'").

²⁹⁴ Cornish, note 103 *supra*, at 158.

²⁹⁵ *Id.* at 160.

Lincoln's Emancipation Proclamation, and particularly his announcement that he intended to enlist African-Americans in the military forces of the United States, evoked fury and derision in the South.²⁹⁶ In his message to the Confederate Congress on January 12, 1863, Jefferson Davis denounced the Emancipation Proclamation as "the most execrable measure in the history of guilty man,"²⁹⁷ and vowed to punish captured Union officers as "criminals engaged in inciting servile insurrection."²⁹⁸ Southern newspapers speculated that the slaves would readily surrender, thereby giving Southern soldiers the opportunity to grow rich by capturing slaves.²⁹⁹ Once again, Andrew Coopersmith has conducted the basic research allowing us to sample Southern opinion:

From the *Confederate Union*, December 30, 1862:

One hundred thousand negroes to be had for catching!: A Good Chance to Get Negroes

We see that Lincoln's Congress is about to procure one hundred regiments of negroes (from Liberia, we suppose) to help his own white slaves whip the Southern "rebels." Here will be a good chance for poor men to make a fortune at short notice. Cuffie will not fight. He has'nt got the "widguncce" – "he can't stand the fiah sar" – He may run but it is more probable he will surrender, without firing a round. ... We like the idea prime, and hope old Abe and his Congress will give his new levies a good outfit, before he sends them into the field, as negroes are not valuable property just now unless they are well *endorsed on the back*, and footed up right.³⁰⁰

The *Southern Illustrated News*, November 21, 1863:

Cartoon of black soldier running away, saying, "No Sar! I can't go back dar – dis chile too 'motional for dat sorter thing."³⁰¹

The *Savannah Republican*, March 14, 1863:

It is reasonable to assume that by desertion, captures in war, and possibly by the voluntary surrender of them by the Yankee government, very many, if not a majority of these slaves, will again fall into our hands. We have testimony entirely reliable that a very large proportion ... would gladly return to their owners to-day were they allowed to do so. they will drop their guns and run

²⁹⁶ See Foote, note 74 *supra*, at 565 ("The southern response to emancipation and the enlistment of black troops was ferocious.").

²⁹⁷ McPherson, *Battle Cry of Freedom*, note 86 *supra*, at 566.

²⁹⁸ *Id.*

²⁹⁹ See Coopersmith, note 62 *supra*, at 148-150.

³⁰⁰ *Id.* at 148.

³⁰¹ *Id.*

after the first round, or desert in a body to the Confederate side. We have not a shadow of a doubt on this point.³⁰²

However, fear instead of derision seemed to rule the South on this question. On August 21, 1862, Jefferson Davis declared that Union officers who drilled, organized, or instructed black soldiers who had been slaves were outlaws, and if captured would be treated as felons, not as prisoners of war.³⁰³ In November, 1862, President Davis and Secretary of War Seddon ordered “summary execution” of four captured black prisoners as an “example” to others.³⁰⁴ In May of 1863 the Confederate Congress authorized the government to execute or reenslave captured black soldiers.³⁰⁵ Several slaughters of black troops resulted.³⁰⁶ Confederate General Nathan Bedford Forrest, who after the war would found the Ku Klux Klan,³⁰⁷ commanded the troops who captured Fort Pillow.³⁰⁸ After the battle Forrest’s soldiers massacred dozens of black soldiers who had surrendered.³⁰⁹ General Grant notes that in his initial dispatch Forrest had bragged:

“The river was dyed,” he says, “with the blood of the slaughtered for two hundred yards. The approximate loss was upward of five hundred killed, but few of the officers escaping. My loss was about twenty killed. It is hoped that these facts will demonstrate to the Northern people that negro soldiers cannot cope with Southerners.” Subsequently Forrest made a report in which he left out the part which shocks humanity to read.³¹⁰

Forrest’s assumption that black soldiers lacked the courage to fight Southerners was of course utter fantasy. After the massacre at Fort Pillow African-American soldiers fought with even greater fortitude.³¹¹ They fought with valor and distinction at Port Hudson,³¹² Milliken’s Bend,³¹³ Fort Wagner,³¹⁴ Olustee,³¹⁵ Nashville,³¹⁶ Mobile,³¹⁷ and myriad other locations.³¹⁸

³⁰² *Id.* at 149.

³⁰³ See Cornish, note 103 *supra*, at 159-160.

³⁰⁴ See McPherson, *Battle Cry of Freedom*, note 86 *supra*, at 566.

³⁰⁵ See *id.* at 792 (describing Confederate policy towards captured black soldiers).

³⁰⁶ See *id.* at 793 (“Many black captives never made it to prison camp . . . hundreds were massacred at Fort Pillow, Poison Spring, the Crater, and elsewhere.”).

³⁰⁷ See Foner, note 21 *supra*, at 53 (noting that Forrest was a founder of the Ku Klux Klan).

³⁰⁸ McPherson, *Battle Cry of Freedom*, note 86 *supra*, at 748 (Forrest commanded Confederate troops at Fort Pillow).

³⁰⁹ See *id.* at 748 (stating that some of Forrest’s men “murdered black soldiers after they surrendered”); *id.* at 748 n. 48 (stating that the fact of the massacre is “now well established and generally accepted”).

³¹⁰ Ulysses S. Grant, VOL. II, PERSONAL MEMOIRS OF U.S. GRANT 138 (New York, Charles L. Webster & Co., 1886), available at <http://www.wtj.com/archives/grant/grant47b.htm>.

³¹¹ Cornish, note 103 *supra*, at 177 (stating, “The results were the same everywhere: Negro soldiers only fought more stubbornly and ferociously”).

³¹² See *id.* at 142-144 (Battle of Port Hudson, June, 1863).

³¹³ See *id.* at 144-145 (Battle of Milliken’s Bend, June, 1863).

³¹⁴ See *id.* at 152-156 (Battle of Fort Wagner, July 1863).

³¹⁵ See *id.* at 267-269 (Battle of Olustee, February, 1864).

³¹⁶ See *id.* at 283-285 (Battle of Nashville, November, 1864).

³¹⁷ See *id.* at 285 (Battle of Mobile, April, 1865).

³¹⁸ See *id.* at 264-267 (summarizing battle experience of black troops).

Twenty African-Americans earned the Congressional Medal of Honor.³¹⁹ Desertion among black soldiers was substantially less than that of white troops.³²⁰

We have seen that when the Emancipation Proclamation was issued authorizing the enlistment of black soldiers, Jefferson Davis called it “the most execrable measure in the history of guilty man.”³²¹ Two years later very near the end of the war, we have also seen that Davis himself called for the same measure.³²² By that time he had to admit that African-Americans could fight. Frustrated in the refusal of the Confederate Congress to enlist black soldiers, Davis tells us that he responded as follows to a Confederate Senator:

To a member of the Senate (the House in which we most needed a vote) I stated, as I had done to many others, the fact of having led negroes against a lawless body of armed white men, and the assurance which the experiment gave me that they might, under proper conditions, be relied on in battle, and finally used to him the expression which I believe I can repeat exactly: "If the Confederacy falls, there should be written on its tombstone, ‘Died of a theory.’”³²³

Or, more accurately, the Confederacy died of a myth – the myth that blacks would not fight to gain their freedom.

Lincoln repeatedly drew strength from the example of the black troops. In his public letter of August 26, 1863, responding to those Northerners who refused to fight to free the slaves,³²⁴ Lincoln praised the determination and fighting spirit of black soldiers:

Peace does not appear so distant as it did. I hope it will come soon, and come to stay; and so come as to be worth the keeping in all future time. It will then have been proved that, among free men, there can be no successful appeal from the ballot to the bullet; and that they who take such appeal are sure to lose their case, and pay the cost. And then, there will be some black men who can remember that, with silent tongue, and clenched teeth, and steady eye, and well-poised bayonet, they have helped mankind on to this great consummation; while, I fear, there will be some white ones, unable to forget that, with malignant heart, and deceitful speech, they strove to hinder it.³²⁵

³¹⁹ See Mary Penick Motley, *THE INVISIBLE SOLDIER: THE EXPERIENCE OF THE BLACK SOLDIER, WORLD WAR II 17* (Wayne State University Press, 1987) (stating, “Twenty black soldiers won the Congressional Medal of Honor during the Civil War”).

³²⁰ See Cornish, note 103 *supra*. at 288-289 (estimating the proportion of black troops in the Union armies to be 12%, while constituting only 7% of desertions).

³²¹ See note 296 *supra* and accompanying text.

³²² See note 212 *supra* and accompanying text.

³²³ Davis, *The Rise and Fall of the Confederate Government*, note 62 *supra*, at 518.

³²⁴ 6 *Collected Works* 406-410 (To Roscoe Conkling, August 26, 1863).

³²⁵ *Id.* at 410.

A year later, in the darkest days of the war after the bloodletting at the Wilderness,³²⁶ Spotsylvania,³²⁷ and Cold Harbor,³²⁸ Lincoln returned to this theme of the courage of the black soldiers and the debt that the nation now owed them. In the late summer of 1864 war weariness threatened to overwhelm the North.³²⁹ In August many of Lincoln's staunchest supporters, including Henry J. Raymond, editor of the *New York Times* and party chairman, bluntly informed Lincoln that he could not be reelected unless he rescinded the Emancipation Proclamation,³³⁰ and Lincoln had his cabinet sign a letter whose contents were hidden from them (the "Blind Memorandum")³³¹ pledging them to fight on to save the Union after the election, whatever its outcome.³³² But on August 19, 1864, Lincoln met with Frederick Douglass for a second time and emerged re-energized, renewed to the struggle and determined to free as many slaves as he could before the election.³³³ Lincoln asked to Douglass develop a plan for informing slaves of the Emancipation Proclamation and "for bringing them into our lines."³³⁴ Historian William Miller summarizes what passed between Lincoln and Douglass:

The President of the United States was proposing to this private citizen, an ex-slave, the most extraordinary of all the features of this extraordinary meeting: that they collaborate in a kind of government-sponsored underground railroad that would get the word to slaves on plantations in the South and help them to get behind Union lines.³³⁵

Later that day, in an interview with Alexander Randall and Joseph Mills,³³⁶ Lincoln reiterated his determination to stand by the Emancipation Proclamation:

There have been men who have proposed to me to return to slavery the black warriors of Port Hudson & Olustee to their masters to conciliate the South. I should be damned in time & in eternity for so doing. The world shall know that I will keep my faith to friends & enemies, come what will."³³⁷

At a meeting on August 25, 1864, Lincoln told Raymond of his decision not to rescind the Emancipation Proclamation.³³⁸ After the election, in his fourth annual message to Congress,³³⁹ Lincoln restated his pledge:

³²⁶ See McPherson, *Battle Cry of Freedom*, note 86 *supra*, at 724-726 (describing Battle of the Wilderness, May 5-7, 1864); *id.* at 726 (the Union suffered 17,500 casualties).

³²⁷ See *id.* at 728-733 (Battle of Spotsylvania Court House, May 8-19, 1864); *id.* at 733 (Union suffered 44,000 casualties during the first four weeks of the campaign, starting May 5).

³²⁸ See *id.* at 733-736 (Assault on Cold Harbor, June 3, 1864); *id.* at 735 (in the assault on Cold Harbor on June 3 the Union sustained 7,000 casualties; the Confederates, fewer than 1,500).

³²⁹ See generally Miller, note 239 *supra*, at 370-395 (chapter entitled "Temptation in August").

³³⁰ See *id.* at 387 (quoting a letter from Raymond and citing other party leaders).

³³¹ See House Divided Project, Dickinson College, *The Blind Memorandum*, at

<http://housedivided.dickinson.edu/sites/lincoln/blind-memorandum-august-23-1864/>.

³³² See Miller, note 239 *supra*, at 386-387 (describing cabinet meeting of August 23, 1864).

³³³ See *id.* at 384-385 (describing meeting with Douglass, August 19, 1864).

³³⁴ *Id.* at 384.

³³⁵ *Id.* at 384-385.

³³⁶ 7 *Collected Works* 506-508 (Interview with Alexander W. Randall and Joseph T. Mills, August 19, 1864).

³³⁷ *Id.* at 507.

³³⁸ See Miller, note 239 *supra*, at 388-389.

I retract nothing heretofore said as to slavery. I repeat the declaration made a year ago, that ``while I remain in my present position I shall not attempt to retract or modify the emancipation proclamation, nor shall I return to slavery any person who is free by the terms of that proclamation, or by any of the Acts of Congress." If the people should, by whatever mode or means, make it an Executive duty to re-enslave such persons, another, and not I, must be their instrument to perform it.³⁴⁰

The courage of the black troops inspired Lincoln and the Union to hold fast on the question of emancipation.

At the close of his study of the role of the African-American soldiers in the Civil War, Dudley Taylor Cornish tells us that the myth that slaves would not fight was correct – but that white Southerners forgot that a man need not always be a slave. Cornish concludes:

The Southern position that slaves could not bear arms was essentially correct: a slave was not a man. The war ended slavery. The Negro soldier proved that the slave could become a man.³⁴¹

Myth 5 Slavery is an efficient economic system.

Supporters of slavery considered it to be vital to the economic prosperity of the South. Here is Jefferson Davis, on the eve of the Civil War, justifying secession on economic grounds.

[T]he productions in the South of cotton, rice, sugar, and tobacco, for the full development and continuance of which the labor of African slaves was and is indispensable, had swollen to an amount which formed nearly three-fourths of the exports of the whole United States and had become absolutely necessary to the wants of civilized man. With interests of such overwhelming magnitude imperiled, the people of the Southern states were driven by the conduct of the North to the adoption of some course of action to avert the danger with which they were openly menaced.³⁴²

Slavery may have enriched a few; however, its baneful effects were recognized as early as the Constitutional Convention. On August 8, 1787, Gouverneur Morris of Pennsylvania argued against the adoption of the “Three-Fifths Clause” because of the “poverty and misery”³⁴³ created by slavery. James Madison recorded these remarks of Morris:

³³⁹ 8 *Collected Works* 136-152 (Annual Message to Congress, December 6, 1864).

³⁴⁰ *Id.* at 152.

³⁴¹ Cornish, note 103 *supra*, at 291.

³⁴² THE NORTH AMERICAN REVIEW, VOLUME XCIII 217 (Boston, Crosby, Nichols, Lee & Co., 1861), Google Books at <https://play.google.com/store/books/details?id=r30FAAAAQAAJ&rdid=book-r30FAAAAQAAJ&rdot=1> (from the “Message of President Davis, May 7, 1861”).

³⁴³ Daniel A. Farber and Suzanna Sherry, A HISTORY OF THE AMERICAN CONSTITUTION 235 (Second Edition) (St. Paul, Thomson West, 2005).

He never would concur in upholding domestic slavery. It was a nefarious institution. It was the curse of heaven on the States where it prevailed. Compare the free regions of the Middle States, where a rich & noble cultivation marks the prosperity & happiness of the people, with the misery & poverty which overspread the barren wastes of Va Maryd. & the other States having slaves. Travel thro' ye. Whole Continent & you behold the prospect continually varying with the appearance & disappearance of slavery. The moment you leave ye. E. Sts. & enter N. York, the effects of the institution become visible, passing thro' the Jerseys & entering Pa. every criterion of superior improvement witnesses the change. Proceed Southwdly & every step you take thro' ye. Great region of slaves presents a desert increasing, with ye. Increasing proportion of these wretched beings. Upon what principle is it that the slaves shall be computed in the representation? Are they men? Then make them citizens and let them vote. Are they property? Why then is no other property included?"³⁴⁴

The most powerful portions of Hinton Rowan Helper's *The Impending Crisis of the South* are the compilations of economic data showing how far the slave states lagged behind the free states.³⁴⁵ In Chapter 1 of the book Helper painstakingly compares statistical indicators of economic progress of various states: New York to Virginia; Massachusetts to North Carolina; Pennsylvania to South Carolina; and finally, the free states to the slave states.³⁴⁶ Helper summarized his findings:

It is a fact well known to every intelligent Southerner that we are compelled to go to the North for almost every article of utility and adornment, from matches, shoepegs and paintings up to cotton-mills, steamships and statuary; that we have no foreign trade, no princely merchants, nor respectable artists; that, in comparison with the free states, we contribute nothing to the literature, polite arts and inventions of the age; that, for want of profitable employment at home, large numbers of our native population find themselves necessitated to emigrate to the West, whilst the free states retain not only the larger proportion of those born within their own limits, but induce, annually, hundreds of thousands of foreigners to settle and remain amongst them; that almost everything produced at the North meets with ready sale, while, at the same time, there is no demand, even among our own citizens, for the productions of Southern industry; that, owing to the absence of a proper system of business amongst us, the North becomes, in one way or another, the proprietor and dispenser of all our floating wealth, and that we are dependent on Northern capitalists for the means necessary to build our railroads, canals and other public improvements; that if we want to visit a foreign country, even though it may lie directly South of us, we find no convenient way of getting there except by taking passage through a Northern port; and that nearly all the profits arising from the exchange of commodities, from insurance and shipping offices, and from the thousand and one industrial pursuits of the country,

³⁴⁴ *Id.*

³⁴⁵ See Helper, note 52 *supra*, at 11-24 (narrative comparing the economy of the slave states to that of the free states); *id.* at 281-304 (tables comparing economic of the slave states to that of the free states).

³⁴⁶ See *id.* at 11-24 (Chapter 1, entitled "Comparison between Free and Slave States").

accrue to the North, and are there invested in the erection of those magnificent cities and stupendous works of art which dazzle the eyes of the South, and attest the superiority of free institutions!³⁴⁷

What caused this disparity between the North and the South? Helper concluded:

And now to the point. In our opinion, an opinion which has been formed from data obtained by assiduous researches, and comparisons, from laborious investigation, logical reasoning, and earnest reflection, the causes which have impeded the progress and prosperity of the South, which have dwindled our commerce, and other similar pursuits, into the most contemptible insignificance; sunk a large majority of our people in galling poverty and ignorance, rendered a small minority conceited and tyrannical, and driven the rest away from their homes; entailed upon us a humiliating dependence on the Free States; disgraced us in the recesses of our own souls, and brought us under reproach in the eyes of all civilized and enlightened nations--may all be traced to one common source, and there find solution in the most hateful and horrible word, that was ever incorporated into the vocabulary of human economy--Slavery!³⁴⁸

While slavery enriched a few Planters and reduced the toil of many other whites, it was devastating to the Southern economy because it failed to make the most efficient use of each person's talents and abilities. Far too many people were employed below their abilities and had no opportunity to succeed. As a result they earned less and consumed less than their free counterparts in the North. This was not an efficient economy.

Myth 6 **Slavery is justified by the principle of self-government.**

During the decade before the Civil War, Stephen Douglas of Illinois developed the concept of "popular sovereignty," – that is, idea that the people of every state, as well as the people of the territories about to become states, had the right to choose whether or not their state or territory should permit slavery.³⁴⁹ A related notion of Douglas was that the people of a state or a territory could prohibit slavery by refusing to enact laws protecting the right to hold slaves.³⁵⁰

³⁴⁷ *Id.* at 21-22

³⁴⁸ *Id.* at 25.

³⁴⁹ See House Divided: The Civil War Research Engine at Dickinson College, *Douglas, Stephen Arnold*, at <http://hd.housedivided.dickinson.edu/node/5585>, stating:

Douglas rejected both the northern antislavery position that the national government had the power to prohibit slavery in the territories and the southern proslavery argument that the Constitution sanctioned the existence of slavery in the territories. Instead he proposed, as the only fair and just course, to allow the people of the territories to decide the question for themselves without the intervention of the national government. This doctrine of popular sovereignty, Douglas believed, satisfied the yearnings of westerners for self-government and removed the divisive slavery question from national politics.

(quoting American National Biography).

³⁵⁰ See *id.* (describing Douglas' theory of popular sovereignty, which recognized the authority of each new state to permit or prohibit slavery).

This idea became known as the “Freeport Doctrine,” because Douglas explained it in his second debate with Lincoln at Freeport, Illinois.³⁵¹ Douglas said:

[S]lavery cannot exist a day or an hour anywhere, unless it is supported by local police regulations. Those police regulations can only be established by the local legislature; and if the people are opposed to slavery, they will elect representatives to that body who will by unfriendly legislation effectually prevent the introduction of it into their midst. If, on the contrary, they are for it, their legislation will favor its extension.³⁵²

In his 1854 Address at Peoria,³⁵³ Abraham Lincoln agreed that the principle of “self-government” is right, but he contended that Douglas had misapplied the doctrine:

The doctrine of self government is right – absolutely and eternally right – but it has no just application, as here attempted. Or perhaps I should rather say that whether it has such just application depends upon whether a negro is *not* or *is* a man. If he is *not* a man, why in that case, he who *is* a man may, as a matter of self-government, do just as he pleases with him. But if the negro *is* a man, is it not to that extent, a total destruction of self-government, to say that he too shall not govern *himself*? When the white man governs himself that is self-government; but when he governs himself, and also governs *another* man, that is *more* than self-government---that is despotism. If the negro is a *man*, why then my ancient faith teaches me that “all men are created equal;” and that there can be no moral right in connection with one man's making a slave of another.

... [N]o man is good enough to govern another man, *without that other's consent*. I say this is the leading principle – the sheet anchor of American republicanism. Our Declaration of Independence says:

“We hold these truths to be self evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, DERIVING THEIR JUST POWERS FROM THE CONSENT OF THE GOVERNED.”

³⁵¹ See House Divided, *Lincoln and Douglas hold their second debate in Freeport, Illinois*, at <http://hd.housedivided.dickinson.edu/node/16739>; *Lincoln-Douglas Debates*, at <http://hd.housedivided.dickinson.edu/node/9602>, stating:

The most famous debate came at Freeport, Illinois, where Lincoln nearly impaled his opponent on the horns of a dilemma. Suppose, he queried, the people of a territory should vote slavery down? The Supreme Court in the Dred Scott decision had decreed that they could not. Who would prevail, the Court or the people?...His [Douglas'] reply to Lincoln became known as the "Freeport Doctrine." No matter how the Supreme Court ruled, Douglas argued, slavery would stay down if the people voted it down.

³⁵² TeachingAmericanHistory.Org, *The Lincoln-Douglas Debates: 2d Debate*, at <http://teachingamericanhistory.org/library/document/the-lincoln-douglas-debates-2nd-debate/>.

³⁵³ 2 *Collected Works* 247-283 (Speech at Peoria, Illinois, October 16, 1854).

I have quoted so much at this time merely to show that according to our ancient faith, the just powers of governments are derived from the consent of the governed. Now the relation of masters and slaves is, PRO TANTO, a total violation of this principle. The master not only governs the slave without his consent; but he governs him by a set of rules altogether different from those which he prescribes for himself. Allow ALL the governed an equal voice in the government, and that, and that only is self government.³⁵⁴

We have already seen that slavery is not a system of law so much as it is an absence of law.³⁵⁵ Under slavery an entire race of human beings was deprived of the protection of the laws. After the Civil War the Equal Protection Clause of the 14th Amendment was written to address the fact that the law in many states did not protect the rights of African-Americans. A careful consideration of the language that the 39th Congress adopted brings the purpose of the Equal Protection Clause into focus. The Equal Protection Clause states:

No state shall ... deny to any person ... the equal protection of the laws.³⁵⁶

Consider for a moment how that sentence reads when we omit the word “equal”:

No state shall ... deny to any person the ... protection of the laws.³⁵⁷

The Framers of the 14th Amendment, who were Lincoln’s allies and supporters,³⁵⁸ knew that when the law protects some people but not others it violates the fundamental right of “self-government.” They adopted the 14th Amendment to ensure that all persons would enjoy the equal protection of the laws and that our government would truly be an exercise in “self-government” and not government over others.

Myth 7

Slavery is inevitable; all economic systems are based on slavery.

³⁵⁴ *Id.* at 265-266.

³⁵⁵ See text accompanying notes 165-171 *supra*.

³⁵⁶ U.S. Const. amend. XIV, sec. 1.

³⁵⁷ *Id.*

³⁵⁸ See Richard L. Aynes, *The 39th Congress (1865-1867) and the 14th Amendment: Some Preliminary Perspectives*, 42 AKRON L. REV. 1019, 1022 (2009) (describing how the Republican Party increased its majority in the 1864 elections). Aynes states:

The Union Party did well in the 1864 elections where Abraham Lincoln was re-elected President. When the 39th Congress convened in 1865, the Republican majorities increased in both the House and the Senate. According to a contemporary source, there were 155 Republican members in the House of Representatives and only 46 Democrats. There were 44 Republicans in the Senate and only 12 Democrats. Thus, between the 38th and 39th Congresses, the Republican percentage in the Senate had increased from 64% to 79% and in the House from 56% to 77%. From a Constitutional point of view, the Republicans not only gained a veto-proof Congress – something that would become important when Andrew Johnson became President – but they also gained the super-majority necessary to propose constitutional amendments.

Apologists for slavery frequently asserted that the slaves were better off than northern factory workers and that the system of “free labor” was, in fact, no different than slavery.³⁵⁹ The most well-known proponent of this argument was Senator James Henry Hammond of South Carolina, who laid out his “mud-sill” theory of economics in his speech on the floor of the Senate, March 5, 1858.³⁶⁰ Hammond said:

In all social systems there must be a class to do the menial duties, to perform the drudgery of life. That is, a class requiring but a low order of intellect and but little skill. Its requisites are vigor, docility, fidelity. Such a class you must have, or you would not have that other class which leads progress, civilization, and refinement. It constitutes the very mud-sill of society and of political government; and you might as well attempt to build a house in the air, as to build either the one or the other, except on this mud-sill. Fortunately for the South, she found a race adapted to that purpose to her hand. A race inferior to her own, but eminently qualified in temper, in vigor, in docility, in capacity to stand the climate, to answer all her purposes. We use them for our purpose, and call them slaves. We found them slaves by the common "consent of mankind," which, according to Cicero, "*lex naturae est.*" The highest proof of what is Nature's law. We are old-fashioned at the South yet; slave is a word discarded now by "ears polite;" I will not characterize that class at the North by that term; but you have it; it is there; it is everywhere; it is eternal.³⁶¹

On September 30, 1859, in a speech at the Wisconsin State Agricultural Fair in Milwaukee,³⁶² Lincoln responded to Hammond and contrasted the “mud-sill” theory with the theory of Free Labor.³⁶³ Lincoln pointed out that most people outside of South Carolina work for

³⁵⁹ See Greenberg, note 169 *supra*, at 85 (“many Southern writers wrote about the horrible working and living conditions experienced by the workers of England and the free Northern states.”); *id.* at 113-114 (describing how many proslavery writers extolled the institution of slavery for preserving the life of the worker, as compared to the free labor system which failed to protect its workers). Greenberg notes that these proslavery descriptions of the squalid lives of factory workers in England and the North are consistently made without any element of empathy. Greenberg states:

But despite all their descriptions of the misery experienced by the free workers of Great Britain and the North, no proslavery theorist ever suggested that Southern masters should do anything about it.

Id. at 86.

³⁶⁰ See PBS.Org, Africans in America: “*The ‘Mudsill’ Theory,*” by James Henry Hammond: *Speech to the U.S. Senate, March 4, 1858*, at <http://www.pbs.org/wgbh/aia/part4/4h3439t.html> (excerpt from speech). See also John C. Willis, *America’s Civil War: History 393: Documents: James Henry Hammond, On the Admission of Kansas, Under the Lecompton Constitution (“Cotton is King”)* at http://www.sewanee.edu/faculty/willis/Civil_War/documents/HammondCotton.html (setting forth the transcript of the entire speech of March 4, 1858). In the same speech Hammond argued that the strength of an economy should be measured by the value of its exports, not the amount of consumption; that the South could bring the world to its knees by withholding cotton; and that “Cotton is king.” *Id.*

³⁶¹ *Id.*

³⁶² 3 *Collected Works* 471-482 (Address before the Wisconsin State Agricultural Society, Milwaukee, Wisconsin, September 30, 1859).

³⁶³ *Id.* at 477-478. Lincoln stated:

The world is agreed that *labor* is the source from which human wants are mainly supplied. There is no dispute upon this point. From this point, however, men immediately diverge. Much

themselves.³⁶⁴ They and their families, laboring for themselves in shops or farms, create wealth through their own efforts.³⁶⁵ He then noted that most of these self-employed people had probably worked as laborers in their youth.³⁶⁶ This was, he said, “almost, if not quite, the general rule.”³⁶⁷ He concluded:

The prudent, penniless beginner in the world, labors for wages awhile, saves a surplus with which to buy tools or land, for himself; then labors on his own account another while, and at length hires another new beginner to help him. This, say its advocates, is *free* labor -- the just and generous, and prosperous system, which opens the way for all -- gives hope to all, and energy, and progress, and improvement of condition to all.³⁶⁸

Lincoln then linked “free labor” to universal education:

disputation is maintained as to the best way of applying and controlling the labor element. By some it is assumed that labor is available only in connection with capital -- that nobody labors, unless somebody else, owning capital, somehow, by the use of that capital, induces him to do it. Having assumed this, they proceed to consider whether it is best that capital shall *hire* laborers, and thus induce them to work by their own consent; or *buy* them, and drive them to it without their consent. Having proceeded so far they naturally conclude that all laborers are necessarily either *hired* laborers, or *slaves*. They further assume that whoever is once a *hired* laborer, is fatally fixed in that condition for life; and thence again that his condition is as bad as, or worse than that of a slave. This is the “*mud-sill*” theory.

But another class of reasoners hold the opinion that there is no *such* relation between capital and labor, as assumed; and that there is no such thing as a freeman being fatally fixed for life, in the condition of a hired laborer, that both these assumptions are false, and all inferences from them groundless. They hold that labor is prior to, and independent of, capital; that, in fact, capital is the fruit of labor, and could never have existed if labor had not *first* existed -- that labor can exist without capital, but that capital could never have existed without labor. Hence they hold that labor is the superior -- greatly the superior -- of capital.

³⁶⁴ See *id.* at 478. Lincoln stated:

They do not deny that there is, and probably always will be, a relation between labor and capital. The error, as they hold, is in assuming that the *whole* labor of the world exists within that relation. A few men own capital; and that few avoid labor themselves, and with their capital, hire, or buy, another few to labor for them. A large majority belong to neither class -- neither work for others, nor have others working for them. Even in all our slave States, except South Carolina, a majority of the whole people of all colors, are neither slaves nor masters. In these Free States, a large majority are neither *hirers* or *hired*. Men, with their families -- wives, sons and daughters -- work for themselves, on their farms, in their houses and in their shops, taking the whole product to themselves, and asking no favors of capital on the one hand, nor of hirelings or slaves on the other. It is not forgotten that a considerable number of persons mingle their own labor with capital; that is, labor with their own hands, and also buy slaves or hire freemen to labor for them; but this is only a *mixed*, and not a *distinct* class. No principle stated is disturbed by the existence of this mixed class. Again, as has already been said, the opponents of the “*mud-sill*” theory insist that there is not, of necessity, any such thing as the free hired laborer being fixed to that condition for life. There is demonstration for saying this. Many independent men, in this assembly, doubtless a few years ago were hired laborers. And their case is almost if not quite the general rule.

³⁶⁵ See *id.*

³⁶⁶ See *id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 478-479.

By the "*mud-sill*" theory it is assumed that labor and education are incompatible; and any practical combination of them impossible.

But Free Labor says "no!" ... In one word Free Labor insists on universal education.³⁶⁹

In short, Lincoln defended the dignity of the individual and promoted universal opportunity for advancement. The system of free labor makes far better use of people's talents than the system of slavery.

Northerners were aware of Hammond's low opinion of them. "The Mudsills Are Coming" was a popular song,³⁷⁰ and at Cedar Creek Union soldiers cried "Get out of the way! The mudsills are coming," as they chased the Confederate army across the farmlands after that decisive battle.³⁷¹

Myth 8

The white people of the South, and particularly the Planter class, are a superior people.

³⁶⁹ *Id.* at 479-480. Lincoln stated:

By the "*mud-sill*" theory it is assumed that labor and education are incompatible; and any practical combination of them impossible. According to that theory, a blind horse upon a treadmill, is a perfect illustration of what a laborer should be – all the better for being blind, that he could not tread out of place, or kick understandingly. According to that theory, the education of laborers, is not only useless, but pernicious, and dangerous. In fact, it is, in some sort, deemed a misfortune that laborers should have heads at all. Those same heads are regarded as explosive materials, only to be safely kept in damp places, as far as possible from that peculiar sort of fire which ignites them. A Yankee who could invent strong *handed* man without a head would receive the everlasting gratitude of the "*mud-sill*" advocates.

But Free Labor says "no!" Free Labor argues that, as the Author of man makes every individual with one head and one pair of hands, it was probably intended that heads and hands should cooperate as friends; and that that particular head, should direct and control that particular pair of hands. As each man has one mouth to be fed, and one pair of hands to furnish food, it was probably intended that that particular pair of hands should feed that particular mouth -- that each head is the natural guardian, director, and protector of the hands and mouth inseparably connected with it; and that being so, every head should be cultivated, and improved, by whatever will add to its capacity for performing its charge. In one word Free Labor insists on universal education.

³⁷⁰ See Cameron C. Nichels, *CIVIL WAR HUMOR 19* (Jackson, University Press of Mississippi, 2010). The refrain was:

The Union, the Union we're called on to save,
Fall in the ranks to join our brothers brave;
Chivalry, Chivalry, Old Abe's not a funning,
For six hundred thousand Mudsills are coming.
Now up, up, my boys, and be tramping along;
We ne'er will return til the victory's won;
We come from the mountains, the dells, and the hills,
To show Southern Chivalry Northern Mudsills.

See also id. at 19-20 (stating that Union troops occupying Yazoo City published the *Yazoo Daily Yankee* by "Mr. Mudsill, Mr. Small-Fisted Farmer, Mr. Greasy Mechanic & Co").

³⁷¹ Jeffrey D. Wert, *FROM WINCHESTER TO CEDAR CREEK: THE SHENANDOAH CAMPAIGN OF 1864 237* (Mechanicsburg, Stackpole Books, 1997)

Local pride is normal, as anyone who has attended a football game or a soccer match can attest. But there arose in the South something more than regional pride. There grew a conviction that the South had grown a superior breed of human being – that southern women were more beautiful than northern women,³⁷² that one southern man could whip ten Yankees,³⁷³ and most significantly that the leaders of the South, the Planter class, were altogether superior people. In part this conceit may have arisen because of the relative homogeneity of the Southern people; they could regard themselves as “purer” than people who exhibited more diversity.³⁷⁴

Daniel R. Hundley, in his 1860 book *Social Relations in Our Southern States*,³⁷⁵ ascribed the aristocratic nature of the Southern planter to his superior breeding:

“To begin with his pedigree, then, we may say, the Southern Gentleman comes of good stock. Indeed, to state the matter fairly, he comes usually of aristocratic parentage; for family pride prevails to a greater extent in the South than in the North.”³⁷⁶

Edward A. Pollard, a Southern apologist for the “Lost Cause” writing in 1867, echoed Hundley and traced the differences between Northerners and Southerners to their colonial forebears, the “Puritans” of the North and the “Cavaliers” of the South.³⁷⁷ In Pollard’s view, the Puritans were characterized by “intolerance,” “painful thrift,” “external forms of piety,” “jaundiced legislation,” “convenient morals,” “lack of sentimentalism, and an “unremitting hunt after selfish aggrandizement.”³⁷⁸ The Cavaliers, in contrast, were refined and greathearted:

On the other hand, the colonists of Virginia and the Carolinas were from the first distinguished for their polite manners, their fine sentiments, their attachment to a sort of feudal life, their landed gentry, their field-sports, and dangerous adventure,

³⁷² See Steven E. Woodworth, note 289 *supra*, at 29 (quoting one Confederate soldier on the Gettysburg campaign as stating “that he had not seen ‘a single pretty woman’ in his whole trek” through Pennsylvania, and another officer who “sneered, ‘Never in my life have I seen so many ugly women’”).

³⁷³ Civil War Book of Days: 150 Years Ago, This Week in the Civil War: September 29, 1861/2011, James M. McPherson, *Perhaps One Southerner Could Whip Ten Yankees*, at <http://archive.constantcontact.com/fs013/1102264498897/archive/1107893464563.html>. McPherson writes:

With all the advantages of fighting a defensive war on its own territory, in which stalemate would be victory, perhaps the South was right in its belief that one Southerner could whip ten Yankees – or at least three.

³⁷⁴ See Nevins, *Ordeal of the Union*, in Stamp, *Causes*, note 20 *supra*, at 218 (“The white population of the South ... was one of the purest British stocks in the world”). *But see* Ward, note 215 *supra*, at 15 (noting that African-Americans were even more “native” to the United States than whites: “only one percent were African-born. Only native Americans had deeper North American roots.”).

³⁷⁵ See D. R. Hundley, *SOCIAL RELATIONS IN OUR SOUTHERN STATES* (New York, Henry B. Price, 1860), at <http://docsouth.unc.edu/southlit/hundley/hundley.html>; *see* Stamp, *Causes*, note 20 *supra*, at 205-208 (quoting Hundley).

³⁷⁶ Hundley, note 374 *supra*, at 27.

³⁷⁷ *See generally* Edward A. Pollard, *THE LOST CAUSE: A NEW SOUTHERN HISTORY OF THE WAR OF THE CONFEDERATES* (Baltimore, E.B. Treat & Co., 1867), Google Books, at http://books.google.com/books/about/The_Lost_Cause.html?id=2bETAAAAAJ; Stamp, *Causes*, note 20 *supra*, at 202-205 (quoting Pollard).

³⁷⁸ Pollard, note 376 *supra*, at 50.

and the prodigal and improvident aristocracy that dispensed its stores in constant rounds of hospitality and gaiety.³⁷⁹

Pollard concludes: “Slavery established in the South a peculiar and noble type of civilization.”³⁸⁰

The myth of the exalted nature of the white people of the South found expression in fantastical dreams of conquest and empire. On February 28, 1860, the *Charleston Mercury* predicted that, having already wrested Texas and California away from Mexico:

[I]n the future, the Anglo Saxon race will, in the course of years, occupy and absorb the whole of that splendid but ill-peopled country, and to remove by gradual process, before them, the worthless mongrel races that now inhabit and curse the land.³⁸¹

We hear an echo of these beliefs in a speech that was delivered fifty years ago at the inauguration of the Governor of Alabama, on January 14, 1963:

Today I have stood, where once Jefferson Davis stood, and took an oath to my people. It is very appropriate then that from this Cradle of the Confederacy, this very Heart of the Great Anglo-Saxon Southland, that today we sound the drum for freedom as have our generations of forebears before us done, time and time again through history. Let us rise to the call of freedom loving blood that is in us and send our answer to the tyranny that clanks its chains upon the South. In the name of **the greatest people that have ever trod this earth**, I draw the line in the dust and toss the gauntlet before the feet of tyranny . . . and I say . . . segregation today . . . segregation tomorrow . . . segregation forever.³⁸²

For two centuries before the Civil War the myth of White Supremacy sustained slavery, and for a century after the war it was used to justify segregation and discrimination. The belief by some people that they are better than other people is both difficult to dispel and is a fertile breeding ground for oppression.

Myth 9 Slavery is a holy institution, ordained by God and expressly approved by the Bible.

Across the South it was an article of faith among all religious denominations that slavery was ordained by God and justified by the Bible.³⁸³ Slavery “distinguished [white Southerners] as

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ Coopersmith, note 62 *supra*, at 149.

³⁸² George C. Wallace, Jr., Inaugural Address (January 14, 1963), at http://web.utk.edu/~mfitzge1/docs/374/wallace_seg63.pdf (emphasis added).

³⁸³ See Genovese, note 230 *supra*, at 4 (“Southerners grounded the proslavery argument in an appeal to Scripture and denounced abolitionists as infidels who were abandoning the plain words of the Bible.”); *id.* at 5 (stating that the southern clergy “rallied their people to secession and war”). See also Coopersmith, note 62 *supra*, at 131 (“Slavery was sacred – literally a holy institution that could not be questioned or touched.”). Southern clerics cited the

a special and morally superior people – a point of faith that the Christian churches in the South fully endorsed.”³⁸⁴ Clerics “rallied their people to secession and war”³⁸⁵ and denounced those who opposed slavery as “infidels who were abandoning the plain words of the Bible.”³⁸⁶ The Southern churches were at the forefront of the movement dividing the Union; they seceded from their Northern brethren more than a decade before the Southern states did.³⁸⁷

The Southern churches developed and refined many of the central myths supporting slavery.³⁸⁸ An early and influential biblical justification for slavery is Richard Furman’s 1822

example of the Abrahamic household and the story of Ham in support of slavery. *See* Genovese, note 230 *supra* at 5, 55 (analogy to Abrahamic household as justification for slavery); Thomas, note 91 *supra*, at 22 (“Many Southern clergymen found divine sanction for racial subordination in the “truth” that Blacks were cursed as “Sons of Ham” and justified bondage by citing Biblical examples”); Greenberg, note 169 *supra* at 110-111 (describing how in the Bible Canaan, the son of Ham, was cursed to be a slave because his father, Ham, had seen his father Noah naked, and how there was a popular tradition that Canaan was black); Coopersmith, note 62 *supra*, at 50 (same).

³⁸⁴ Coopersmith, note 62 *supra*, at 50.

³⁸⁵ Genovese, note 230 *supra*, at 5. *See* Coopersmith, note 62 *supra*, at 34 (sermon delivered by Rev. Benjamin Palmer to soldiers in New Orleans, describing the impending conflict as “a war of religion against a blind and bloody fanaticism”); Thomas, note 91 *supra*, at 245 (“Southern churches ever served as staunch boosters of Confederate morale”).

³⁸⁶ Genovese, note 230 *supra*, at 4. *See id.* at 87 (the Southern clergy referred to Northerners as “baptized infidels”); *id.* at 40 (James Henley Thornwell denounced Northerners for abandoning the Bible and denouncing slavery as sin, while also condemning Southerners for supporting secession).

³⁸⁷ *See* Presbyterian Historical Society, *Presbyterians and the Civil War: Witnesses to a Great Moral Earthquake: Debate over slavery*, at http://www.history.pcusa.org/resources/exhibits/civil_war/section_001_002.cfm (stating that “In 1838 the Presbyterian Church in the U.S.A. split into the Old School and New School factions partially over the issue of slavery and abolition. Sermons of the time ranged from extolling slavery as a divine right to condemning it as a moral sin.”); Southern Methodist Church, *Our History*, at <http://www.southernmethodistchurch.com/ourhistory.html> (Southern Methodists split from the Methodist Church in 1844). The website states:

By the time the General Conference met in 1844, sectional differences had become so acute that many days were spent in debate on these questions. When it became apparent that no compromise could be made, the Plan of Separation was adopted. By a vote of 135 to 18 this general conference agreed that the delegates representing slave-holding states might set up a separate general conference. By a vote of 139 to 17 it was agreed that any minister might choose whether he would remain in The Methodist Episcopal Church or align himself with the southern delegates. By a vote of 148 to 10, it was agreed that there should be an equitable division of all property belonging to the Church. By agreement of the delegates from the southern states, the first General Conference of the Methodist Episcopal Church, South met in Louisville, Kentucky, on May 1, 1845. From that time until the meeting of the General Conference in Birmingham, Alabama, in May of 1938, this church made wonderful progress and numbered its members by the millions.

History of Campbell County, Tennessee, Dallas Bogan, *Southern Baptist History*, at <http://www.tngenweb.org/campbell/hist-bogan/SBaptistHistory.html> (“The Southern Baptist Convention was formed in 1845”). *See also* sbc.net, Official Website of the Southern Baptist Convention, Resolution on Racial Reconciliation on the 150th Anniversary of the Southern Baptist Convention (June 1995), at <http://www.sbc.net/resolutions/amresolution.asp?id=899> (apologizing for slavery and racism in the founding of the church and throughout the Civil Rights Era).

³⁸⁸ *See* Genovese, note 230 *supra*, at 125 (describing how framers such as George Mason and Thomas Jefferson had condemned slavery, but stating “Their voices did not prevail. Southerners, step by step, embraced the proslavery reading of Scripture and became ever more deeply committed to the way of life slavery made possible.”).

*Exposition of the Views of Baptists Relative to the Coloured Population.*³⁸⁹ Furman's view of the matter is straightforward: "the right of holding slaves is clearly established by the Holy Scriptures, both by precept and example."³⁹⁰ Accordingly, "In proving this subject justifiable by Scriptural authority, its morality is also proved; for the Divine Law never sanctions immoral actions."³⁹¹

Another influential southern Baptist leader and defender of slavery was Reverend Richard Fuller, one of the founders of the Southern Baptist Convention.³⁹² Fuller's book *Domestic Slavery Considered as a Scriptural Institution*³⁹³ appeared in 1845, at the same time he was leading the schism of Southern Baptists from their northern brethren.³⁹⁴ Fuller co-authored the book with Francis Wayland, the President of Brown University and a leader of the Northern Baptists. The book is arranged as a series of letters between the two divines, a theological argument over slavery. Like Furman, Fuller contends that because slavery appears in the Bible it must be morally correct. Fuller bases his principal argument on the inerrancy of the Bible, stating: "WHAT GOD SANCTIONED IN THE OLD TESTAMENT, AND PERMITTED IN THE NEW, CANNOT BE SIN."³⁹⁵ According to the scholar Nathan Finn, Fuller's arguments are "saturated with scripture references defending slavery,"³⁹⁶ while Wayland's letters are "largely absent of Scripture."³⁹⁷ Instead, Wayland relies "more on common sense and natural law arguments."³⁹⁸

³⁸⁹ Rev. Dr. Richard Furman's *Exposition of The Views of the Baptists Relative to the Coloured Population In the United States in a Communication To the Governor of South-Carolina* (Second Edition 1838), at <http://eweb.furman.edu/~benson/docs/rcd-fmn1.htm>.

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² See Baptist Convention of Maryland/Delaware, *Biography of Richard Fuller*, at <http://bcmd.org/richard-fuller> (stating that Fuller "chaired the committee that established the constitution" of the Southern Baptist Convention, and "preached the first convention sermon" in 1846). See also Founders Ministries: Committed to Historic Baptist Principles, Dr. Tom Nettles, *A Biographical Sketch of Richard Fuller*, at http://www.founders.org/library/sermons/bio_fuller.html. The author states:

In 1841 [Fuller] introduced a resolution to exclude debate on the subject of slavery from the proceedings of the society. Part of the resolution read, "that to introduce the subjects of slavery or anti-slavery into this body, is in direct contravention of the whole letter and purpose of the said Constitution, and is, moreover, a most unnecessary agitation of topics with which this society has no concern, over which it has no control, and as to which its operation should not be fettered, not its deliberations disturbed, . . ."

...

In 1859 he became president of the Southern Baptist Convention and was one of the main champions of its continued separate existence, even after the Civil War.

³⁹³ Richard Fuller and Francis Wayland, *Domestic Slavery Considered as a Scriptural Institution* (Lewis Colby, Boston, 1845), Google Books, at

http://books.google.com/books/about/Domestic_Slavery_Considered_as_a_Scriptu.html?id=YtogNDA2QpYC.

³⁹⁴ See note 386 *supra* (Southern Baptist Convention formed in 1845); note 391 *supra* (leading role played by Richard Fuller in the founding of the Southern Baptist Convention).

³⁹⁵ Fuller and Wayland, note 392 *supra*, at 170.

³⁹⁶ Nathan A. Finn, *Francis Wayland and Richard Fuller: Debating Slavery with Christian Civility* (May 10th, 2013), The Andrew Fuller Center for Baptist Studies, Historical Ecclesiastica, the Weblog of Dr. Michael A. G. Haykin & Friends, at <http://www.andrewfullercenter.org/blog/2013/05/francis-wayland-and-richard-fuller-debating-slavery-with-christian-civility/>

³⁹⁷ *Id.*

³⁹⁸ *Id.*

During the Civil War Southern newspapers and magazines were crowded with references to the holy nature of the institution of slavery. Andrew Coopersmith has gathered many such examples: “Christian morality is impracticable in free society, and is the natural morality of slave society;”³⁹⁹ “In the providence of God, about four millions of heathen have been thrown upon these Southern States, in the capacity of slaves”;⁴⁰⁰ “By Thy holy, wise and powerful providence, O Lord, Thou has introduced slavery into these Southern States;”⁴⁰¹ “All of us agree that slavery is a providential institution;”⁴⁰² “Christianity lived and triumphed because it was of God; and so slavery, and the South with it, will live and triumph because it is of God.”⁴⁰³ Coopersmith also quotes an article in the *Rome Weekly Courier* in the form of a letter from a master to a slave, stating “Don’t forget that you are a slave by the appointment of God himself, for the Bible plainly teaches it;”⁴⁰⁴

Northerners did not, of course, reject the Bible. Frederick Douglass rebutted the notion that to be against slavery is to be against the Bible:

“It is no evidence that the Bible is a bad book, because those who profess to believe the Bible are bad. The slaveholders of the South, and many of their wicked allies at the North, claim the Bible for slavery; shall we, therefore, fling the Bible away as a pro-slavery book?”⁴⁰⁵

One might suppose that religious fervor in the South would wane under the pressure of war, but instead it intensified. As the Confederate cause faltered, there was a massive religious revival in the Confederate Army.⁴⁰⁶ Eugene Genovese states:

The war strengthened religion among the Confederate troops, producing what W. W. Bennett, a Southern Methodist leader, claimed as the greatest revival in world history. Especially in 1863, when Confederate prospects turned bleak, conversions soared, with a plausible estimate of 140,000.⁴⁰⁷

³⁹⁹ Coopersmith, note 62 *supra*, at 49, quoting *Richmond Examiner*, July 17, 1861.

⁴⁰⁰ *Id.* at 50-51, quoting *South-Western Baptist*, May 30, 1861.

⁴⁰¹ *Id.* at 131, quoting *Charleston Courier*, January 31, 1863.

⁴⁰² *Id.* at 243, quoting *Southern Christian Advocate*, February 2, 1865.

⁴⁰³ *Id.* at 137, quoting *Christian Index* in *The Countryman*, March 29, 1864.

⁴⁰⁴ *Id.* at 53, quoting *Rome Weekly Courier*, June 7, 1861.

⁴⁰⁵ University of Rochester: Frederick Douglass Project, *The Dred Scott Decision, speech delivered before American Anti-Slavery Society, New York, May 14, 1857*, at <http://www.lib.rochester.edu/index.cfm?PAGE=4399>.

⁴⁰⁶ See generally W.W. Bennett, A NARRATIVE OF THE GREAT REVIVAL IN THE SOUTHERN ARMIES DURING THE LATE CIVIL WAR BETWEEN THE STATES OF THE FEDERAL UNION (Philadelphia, Claxton, Remson, and Haffelfinger, 1876), at <https://play.google.com/store/books/details?id=ZZ8HAAAQAAJ&rdid=book-ZZ8HAAAQAAJ&rdot=1> (describing the religious revival in the Confederate Army). See, e.g., Thomas B. Buell, THE WARRIOR GENERALS: COMBAT LEADERSHIP IN THE CIVIL WAR 362 (New York, Three Rivers Press, 1997) (describing how John Bell Hood “had been touched by the religious revivals sweeping the Confederate armies” and was baptized by Leonidas Polk); *id.* at 388-90 (describing Hood’s visit to the compound of Bishop Polk’s family upon the army’s return to Tennessee); *id.* at 409-410 (quoting Hood during the retreat from Nashville, “Let us go out of Tennessee singing hymns of praise.”).

⁴⁰⁷ Genovese, note 230 *supra*, at 45.

There was a stark contrast between the Presidents of the respective combatants in their characterization of the people of the opposite side.⁴⁰⁸ Jefferson Davis, like many others on both sides, characterized Northerners as “barbarous.”⁴⁰⁹ Lincoln, however, never indulged in such self-righteousness.⁴¹⁰ The historian William Miller contrasts the two. Davis’s utterances, says Miller, were “characteristic of the condemnatory vehemence of leaders in the violent passions of war.”⁴¹¹ Davis called Lincoln “an ignorant usurper.”⁴¹² Davis claimed that in the conduct of the war the Union fought with “a malignant ferocity and with a disregard and a contempt of the usages of civilization.”⁴¹³ Even before the fighting started Davis asserted that, for Union forces, “rapine is the rule”⁴¹⁴ and “Mankind will shudder to hear of the tales of outrages committed on defenceless females by soldiers of the United States now invading our homes.”⁴¹⁵

In contrast to Davis, Lincoln was respectful and evenhanded. Miller states that “Lincoln did not see evil concentrated exclusively on the other side or see his own side as altogether in the right; he recognized throughout his career the complicity of the North in the sin of slavery.”⁴¹⁶ In Miller’s estimation, Lincoln “did not deal in blame.”⁴¹⁷

At the same time, however, Lincoln made extensive use of the Bible in condemning slavery. Lincoln had always used biblical imagery to great effect in expressing his antislavery views,⁴¹⁸ and increasingly referenced the Bible as the war intensified.⁴¹⁹ However, Lincoln never condemned Southerners as evil or claimed that the people of the North were morally superior; he emphatically rejected the simple notion that God favored the North.⁴²⁰ The closest he came to

⁴⁰⁸ See Miller, note 239 *supra*, at 366 (contrasting Jefferson Davis’s torrent of invective against the North with Lincoln’s restraint). See also McPherson, *Battle Cry of Freedom*, note 86 *supra*, at 89 (noting that Harriet Beecher Stowe made Simon Legree, “a transplanted Yankee” the “most loathsome villain” of her masterpiece *Uncle Tom’s Cabin*. In doing so she “rebuked the whole nation for the sin of slavery.”).

⁴⁰⁹ Miller, note 239 *supra*, at 366 fn (quoting a speech in which Jefferson Davis described Northerners as “a traditionless and a homeless race,” who had disturbed the peace wherever they settled, “persecuted Catholics,” and “hung witches and Quakers.”); *id.* at 366 (noting that “[t]he word ‘barbarism’ and its cognates, which figure large in the rhetoric of both sides of the Civil War – Charles Sumner used it in the title of a famous address – appear only once in all the words that Lincoln wrote as president, and that once in the quite specific context of the order of retaliation for the enslaving or shooting of captured black Union soldiers.”).

⁴¹⁰ *Id.* See also *id.* (stating that the only time that Lincoln used the term “barbarism” or its cognates was in reference to the enslaving or shooting of captured black soldiers).

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.* at 352.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.* at 367.

⁴¹⁷ *Id.*

⁴¹⁸ See generally Wilson Huhn, *A Higher Law: Abraham Lincoln’s Use of Biblical Imagery*, 13 RUTGERS JOURNAL OF LAW AND RELIGION 1-62 (2011) (describing Lincoln’s use of biblical imagery to express the fundamental, transcendental truths of the Declaration).

⁴¹⁹ See *id.* at 238 (stating, “As the Civil War draws closer, Lincoln’s use of religious imagery in reference to the Declaration proliferates, and as the war progresses at such terrible cost Lincoln increasingly expresses, in religious terms, both his sense of personal moral obligation and his understanding of national purpose.” (footnotes omitted)).

⁴²⁰ See Alex Ayres, *THE WIT AND WISDOM OF ABRAHAM LINCOLN* 86 (New York, Penguin Group, 1992) (relating an anecdote about President Lincoln that has appeared in various forms in different sources). Ayers states:

At a White House dinner, a churchman offered a benediction and closed with the pious affirmation: “The Lord is on our side.”

criticizing the South on religious grounds was in the Second Inaugural,⁴²¹ when he calmly chastised slaveholders for their hypocrisy in “dare[ing] to ask a just God’s assistance in wringing their bread from the sweat of other men’s faces.”⁴²² He immediately followed that judgment, however, by reminding the North that *both* sides had been punished for the sin of slavery:

Both read the same Bible, and pray to the same God; and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces; but let us judge not that we be not judged. The prayers of both could not be answered; that of neither has been answered fully. The Almighty has His own purposes. “Woe unto the world because of offences! for it must needs be that offences come; but woe to that man by whom the offence cometh!” If we shall suppose that American Slavery is one of those offences which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South, this terrible war, as the woe due to those by whom the offence came, shall we discern therein any departure from those divine attributes which the believers in a Living God always ascribe to Him? Fondly do we hope – fervently 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 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.”⁴²³

Lincoln expressly included himself as among those who could not be certain of God’s purposes. Ten days after delivering the Second Inaugural, Lincoln wrote to Thurlow Weed that the speech would not immediately be popular because he had refused to say that God was on the side of the North:

Men are not flattered by being shown that there has been a difference of purpose between the Almighty and them. To deny it, however, in this case, is to deny that there is a God governing the world. It is a truth which I thought needed to be told; and as whatever of humiliation there is in it, falls most directly on myself, I thought others might afford for me to tell it.⁴²⁴

When President Lincoln did not respond to this sentiment, someone asked him, “Don’t you believe, Mr. President, that the Lord is always on the side of the right?”

I am not concerned about that,” was Lincoln’s answer, “for we know that the Lord is always on the side of the right. My concern is that I and this nation should be on the Lord’s side.”

⁴²¹ 8 *Collected Works* 332-333 (Second Inaugural Address, March 4, 1865).

⁴²² *Id.* at 333.

⁴²³ *Id.*

⁴²⁴ 8 *Collected Works* [unnumbered page] (To Thurlow Weed, March 15, 1865). Lincoln wrote:

Every one likes a compliment. Thank you for yours on my little notification speech, and on the recent Inaugural Address. I expect the latter to wear as well as---perhaps better than---any thing I have produced; but I believe it is not immediately popular. Men are not flattered by being shown that there has been a difference of purpose between the Almighty and them. To deny it, however, in this case, is to deny that there is a God governing the world. It is a truth which I

If the people of the South had not been so certain that slavery was divinely inspired, they might have tried harder to abolish it. For experience had shown that it was impossible to reform the institution, as the next portion of this article demonstrates.

Myth 10 **Slavery can be reformed on Christian principles.**

Virtually all Southern clergymen assumed that slavery was ordained by God and was intended to benefit both the white and the black race;⁴²⁵ at the same time, many of them recognized that in practice the institution of slavery fell short of the ideal.⁴²⁶ They acknowledged the excesses of slaveholders and sought to conform the institution to the ideal of “Christian slavery” that they worshipped.⁴²⁷ In particular these clergymen condemned brutal mistreatment of slaves⁴²⁸ and the breakup of slave families.⁴²⁹ Some divines also called for the education of slaves so that they would be able to read the Bible for themselves.⁴³⁰

These clergymen advocated reform but they did not insist upon it. Genovese states that he was unable to discover a single instance of a church expelling a slaveholder for abuse or amoral practices.⁴³¹ Somehow, the time was never ripe to agitate for legislation that would mitigate the obvious abuses of chattel slavery. The most common excuse that was given for soft-pedaling the need for reform was that to broadcast the mistreatment of slaves would validate the claims of abolitionists.⁴³² Eugene Genovese quotes a number of Southern ministers and political leaders who claimed that they *wanted* to reform slavery but that it could not be done so long as persons in the North clamored for its abolition.⁴³³ According to Genovese, “a perennial theme that reverberated among Southerners long after the War” was that “reformation of slavery would

thought needed to be told; and as whatever of humiliation there is in it, falls most directly on myself, I thought others might afford for me to tell it.

⁴²⁵ See notes 274, 382-403 *supra* and accompanying text (quoting several Southern books, editorials, and sermons promoting the notion that slavery was divinely inspired).

⁴²⁶ See Genovese, note 230 *supra*, at 5 (“The Southern divines ... could hardly deny that Southern slavery, as legally constituted and daily practiced, fell well short of biblical standards.”).

⁴²⁷ See *id.* (stating that “to retain God’s favor in a holy war, Southerners would have to prove worthy of His Trust, specifically, of the trust He had placed in them as Christian masters. Hence, the divines called for repentance and reform.”); *id.* at 9 (“In proslavery sermons, preachers demanded obedience from slaves but no less forcefully demanded responsibility and restraint from masters.”).

⁴²⁸ See *id.* at 5 (stating that “the proslavery divines and serious Christian laymen acknowledged [that the Bible] ... specifies the master-slave relation as a trust to be exercised in accordance with the Decalogue, the standards of the Abrahamic household, and the teachings of Jesus.”).

⁴²⁹ See *id.* at 17-22 (calls for reform to prohibit the breaking up of slave families).

⁴³⁰ See *id.* at 23-29 (calls to repeal the literacy laws).

⁴³¹ See *id.* at 52.

⁴³² See *id.* at 11-12, 52-53 (reviewing “apologetics” for the failure to reform slavery).

⁴³³ See *id.* at 11 (citing Vice-President Alexander Stephens and Bishop Nathaniel Bowen as contending that abolitionism was making reform difficult or impossible); *id.* at 12 (John Girardeau stated that “he had wanted the slaves to be taught to read, but he had to acknowledge the dangers posed by abolitionist contamination”); *id.* at 13 (George Tucker “fell into apologetics” and “complained that the abolition agitation had led to a worsening of conditions for slaves”); *id.* at 15 (Governor of North Carolina, same); *id.* (Congressman Kenneth Rayner, same); *id.* at 24 (Albert Taylor Bledsoe, same); *id.* at 53 (Reverend T.V. Moore, to the effect that “slavery had its evils, which the abolitionist agitation had made it difficult to root out.”);

have gone much further if the antislavery agitation had been put down.”⁴³⁴ Other reformers contended that slavery would be reformed once the South had gained its independence.⁴³⁵

What did the “Christian Slavery” movement accomplish? Genovese states, “Politically and at law, not much.”⁴³⁶ Only “a few feeble steps to check vicious masters and insure minimal comfort for slaves” were adopted;⁴³⁷ not a single major piece of reform legislation was enacted. The advocates of “Christian Slavery” never renounced slavery itself nor did they retreat from the proposition that the institution was divinely inspired.⁴³⁸ The godliness of slavery was instead a constant drumbeat in the white churches, and in the white-led black churches the refrain was “Slaves, obey your masters.”⁴³⁹ As a result, the plantation remained a feudal manor and the planter a Lord, not answerable to law.

The key question that Genovese addresses is the reason for the failure of the “Christian Slavery” movement: “Why did the many Southerners who long before the War saw the need for a drastic change in the social order fail so miserably?”⁴⁴⁰ One reason was that the democratic system had broken down in part *because* of religion. The constant reiteration of the notion that slavery was ordained by God gave religious imprimatur not only to slavery itself but to the violent efforts to eradicate abolitionism. Religion was used to silence debate, for if God favored slavery it was blasphemy to oppose it.⁴⁴¹ For example, in 1839 the Reverend George F. Simmons became pastor of a Baptist church in Mobile, Alabama, and he delivered a sermon “on the evils of slavery and the need for a program of gradual emancipation.”⁴⁴² That was the last sermon he gave in the South.⁴⁴³ Although the sentiments he expressed were common in the North and the West, in the South this was quite literally tantamount to heresy, for which he was exiled.

Furthermore there is no evidence that the Planters would have permitted any of these reforms to be adopted. As Genovese states, “With all the good will in the world, could the slaveholders, as a class, ever have countenanced the kind of reforms that were being urged upon them by their pastors and their own Christian consciences?”⁴⁴⁴ White southerners feared that

⁴³⁴ *Id.* at 11.

⁴³⁵ *See id.* at 52 (five Richmond judges stated that “only Yankee mischief had kept Southerners from educating their slaves and that proper steps would follow a Confederate victory”); *id.* at 52-53 (Reverend Charles Colcock Jones, stating “if we ever gain our independence there will be radical reforms in the system of slavery as it now exists. When once delivered from the interference of Northern abolitionism, we shall be free to make and enforce such rules and reformatations as are just and right.”).

⁴³⁶ *Id.* at 32.

⁴³⁷ *Id.* at 32.

⁴³⁸ *See id.* at 101. Genovese states:

When the Confederacy collapsed, the divines ruefully allowed that God had punished the South for failing to do justice to its slaves. Simultaneously, they reiterated their conviction that they had not sinned in upholding slavery *per se*.

⁴³⁹ *Id.* at 9 (referring to white preachers who “kept annoying” their black parishioners with the phrase “obey your masters”).

⁴⁴⁰ *Id.* at 104.

⁴⁴¹ *See* note 382 *supra* and accompanying text (references accusing Northerners of being “infidels” because of their opposition to slavery).

⁴⁴² Genovese, note 230 *supra*, at 113.

⁴⁴³ *See id.* at 113 (stating that Simmons’ sermon “led to his having to flee Mobile”).

⁴⁴⁴ *Id.* at 104.

loosening any of the threads of slavery would unravel the entire tapestry of the institution.⁴⁴⁵ If slaves had learned how to read and write in a society where many whites were illiterate, it would have impeached the cornerstone myths of black inferiority and white supremacy. If slave marriages and families had been legally recognized it would have denied the right of slaveholders to breed and sell slaves. If slaveholders had been prohibited from separating parents and children it would have called into question the concept of slaves as a form of property, as revenue-generating investments. If slaves had been granted any legal rights whatsoever it would have negated the absolute power of the master over them.

Myth 11 **The Confederacy was fighting for liberty.**

At the opening of the Civil War, southern newspapers almost universally contended that the war was necessary to protect the “liberty” of the Southern people. This Orwellian cry for “liberty” was often coupled with an unreflective claim that white Southerners were being treated like “slaves.” These claims were asserted without irony. Here are a few examples from Coopersmith’s *Fighting Words*:

The New Orleans Crescent, April 16, 1861:

Abolition rule destroys the spirit of the Constitution, and seeks to reduce us to the condition of slaves⁴⁴⁶

Southern Confederacy, May 29, 1861:

Liberty! beloved Liberty! ... Down with tyrants! Let their accursed blood manure our fields!⁴⁴⁷

Richmond Whig, May 2, 1861

Our Revolutionary Sires fought for and secured what they termed “*certain inalienable rights*.” ... They were – 1st. Government must *secure* to its subjects *life, liberty, and property*. ... It is a question of *freedom or slavery, of life or death*.⁴⁴⁸

Shreveport Weekly News, May 13, 1861:

Liberty – Jefferson – Hamilton –

⁴⁴⁵ See *id.* at 112 (stating, “The essential reforms would undermine the master-slave relation in a social experiment that threatened the power of the master class”); *id.* (stating, “the great difficulty in the way of a transition to a system of unfree labor other than slavery was that virtually all its features threatened the economic or political security of the slaveholders”).

⁴⁴⁶ Coopersmith, note 62 *supra*, at 26.

⁴⁴⁷ *Id.* at 28.

⁴⁴⁸ *Id.* at 29-30.

The first shout of the American freemen is ‘Liberty!’ It is a talismanic word.⁴⁴⁹

The *Augusta Constitutionalist*, April 24, 1861:

... fight for their children’s heritage of freedom.⁴⁵⁰

Richmond Dispatch, June 21, 1861:

The brutal war which is now ruthlessly urged against us, with a view to rob us of our liberties.⁴⁵¹

This refrain of “liberty” was repeated by many common soldiers who fought for the Confederacy. In researching his book *What They Fought For*, the noted Civil War historian James McPherson read over 25,000 letters and more than 100 diaries of civil war soldiers,⁴⁵² including those of 374 Confederate soldiers.⁴⁵³ Among the Confederate entries, McPherson found reference after reference to “liberty:”

“I am willing to fall for the cause of Liberty and Independence;” “if I fall Let me fall for I will fall in a good cose for if I cann git Liberty I prefer death;” “a struggle between Liberty on one side and Tyranny on the other;” “struggle for liberty;” “fighting gloriously for the undying principles of Constitutional liberty and self government.”⁴⁵⁴

Many other entries implicitly identified “liberty” with the preservation of the institution of slavery. McPherson quotes a soldier who was “battling for Liberty,” then complaining that his body servant had run away to the Yankees and stating “I cant account for it;” another who wrote of “the arch of liberty we are trying to build,” then telling his wife to sell a slave who was giving her trouble; another soldier, referring to his brother who, “died that we might live free men,” and then stating that he had been offered \$3,500 for his body servant but was holding out for more; and another soldier’s reference to “the land of liberty and freemen” who also complained that his body servant had run off before he could sell him.⁴⁵⁵

Still other Confederate soldiers’ letters and diary entries earnestly repeated the theme that the South was fighting *against* slavery – that is, against slavery to the North:

“Sooner than submit to Northern slavery, I prefer death” [McPherson reports that this phrase is repeated “almost verbatim” by many Confederate soldiers]; “the ruthless invader who is seeking to reduce us to abject slavery;” “The Deep and

⁴⁴⁹ *Id.* at 29.

⁴⁵⁰ *Id.* at 35.

⁴⁵¹ *Id.*

⁴⁵² See James M. McPherson, *WHAT THEY FOUGHT FOR 1861-1865* (New York, Anchor Books, 1995).

⁴⁵³ See *id.* at 14.

⁴⁵⁴ *Id.* at 10-11.

⁴⁵⁵ *Id.* at 51

still quiet peace of the grave is more desirable than Vassalage or Slavery;” “die as free men or live as slaves;” “to die rather than be slaves.”⁴⁵⁶

On April 18, 1864, in his speech to the Sanitary Fair in Baltimore,⁴⁵⁷ Abraham Lincoln gently but firmly discussed this evident contradiction in the use of the word “liberty,” illustrating it for us with a fable:

The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare for liberty; but in using the same *word* we do not all mean the same *thing*. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor. Here are two, not only different, but incompatible things, called by the same name – liberty . And it follows that each of the things is, by the respective parties, called by two different and incompatible names – liberty and tyranny.

The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as a *liberator*, while the wolf denounces him for the same act as the destroyer of liberty, especially as the sheep was a black one. Plainly the sheep and the wolf are not agreed upon a definition of the word liberty; and precisely the same difference prevails to-day among us human creatures, even in the North, and all professing to love liberty. Hence we behold the processes by which thousands are daily passing from under the yoke of bondage, hailed by some as the advance of liberty, and bewailed by others as the destruction of all liberty. Recently, as it seems, the people of Maryland have been doing something to define liberty; and thanks to them that, in what they have done, the wolf's dictionary, has been repudiated.⁴⁵⁸

In the last sentence of the foregoing passage Lincoln is referring to the fact that on April 6, 1864, the people of Maryland elected delegates to a convention that would draft a new state constitution that would abolish slavery.⁴⁵⁹ Within a year the United States Congress would follow Maryland's example, approving the 13th Amendment that abolished slavery throughout the nation,⁴⁶⁰ securing “the blessings of liberty” to all Americans.

Myth 12

**By opposing slavery, the North grievously dishonored the South.
This insult necessitated a violent response.**

⁴⁵⁶ *Id.* at 49-50.

⁴⁵⁷ 7 *Collected Works* 301-303 (Address at Sanitary Fair, Baltimore, Maryland, April 18, 1864).

⁴⁵⁸ *Id.* at 301-302.

⁴⁵⁹ See Archives of Maryland: Historical List: *Constitutional Convention, 1864*, at <http://msa.maryland.gov/msa/speccol/sc2600/sc2685/html/conv1864.html> (setting forth the list of members elected to the convention on April 6, 1864, to draft a new constitution that would end slavery within the state).

⁴⁶⁰ See Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment* 112 COLUM. L.REV. 1697 (2012) (stating, “On January 31, 1865, the United States House of Representatives voted to approve the Thirteenth Amendment”).

Much has been written about the “honor” culture of the South,⁴⁶¹ in particular the tradition of dueling and the resulting level of violence arising out of personal disputes.⁴⁶² The duel was “a central ritual of antebellum Southern life, embodying many core values of white society.”⁴⁶³ A “man of honor” could not allow another person to insult or diminish him in any way.⁴⁶⁴ Even practical jokes could lead to demands for “satisfaction.”⁴⁶⁵

“Honor” had significance not only on the personal level, but in politics and social institutions as well. There is an obvious relation between “honor” and slavery. As a stratified, feudal society, relations among people in the South were determined by “honor” rather than “rights.”⁴⁶⁶ Individual dignity was measured by the extent to which other people deferred to you rather than by your possession and exercise of legal rights.⁴⁶⁷ Because all slaves had to defer to all white persons, all white persons possessed “honor.”⁴⁶⁸

A leading scholar on Southern honor, Bertram Wyatt-Brown, explains that this concept of honor involved an extended sense of self – that it was the consequence of “the identification of the individual with his blood relations, his community, his state” and other associations he deemed important. Wyatt-Brown contrasts Northern and Southern conceptions of “honor:”

The close bonding of honor with an extended self... contrasts with the kind of honor that would place country before family, professional duty before other matters of importance. ... Unlike the man of conscience, the individual dependent upon honor must have respect from others as the prime means of respecting himself.⁴⁶⁹

⁴⁶¹ See generally, e.g., Bertram Wyatt-Brown, *YANKEE SAINTS AND SOUTHERN SINNERS* (Louisiana State University Press, Baton Rouge, Louisiana 1985); Greenberg, note 169 *supra*.

⁴⁶² See Thomas, note 91 *supra*, at 20 (“in the old South, violence tended to be more personal and more socially acceptable than elsewhere”); see also Mark Twain, *THE ADVENTURES OF HUCKLEBERRY FINN* 148-164 (Harper & Brothers, New York 1912) (describing the murderous feud between the Grangerford and the Shephardson families).

⁴⁶³ Greenburg, note 169 *supra*, at 7.

⁴⁶⁴ See *id.* at 25 (“The difference between having and not having honor was the difference between having and not having power. The man of honor was the man who had the power to prevent his being unmasked.”).

⁴⁶⁵ See Greenberg, note 169 *supra*, at 12-13 (describing how pranks such as pulling out a chair or leaving a tack on a chair could lead to violence or end a friendship).

⁴⁶⁶ See Wyatt-Brown, in Stamp, *Causes*, note 20 *supra*, at 241 (“Slavery was itself inseparable from other aspects of regional life, most especially from the southerners’ sense of themselves as people. That self-perception can be called the principle of honor”).

⁴⁶⁷ See *id.* at 242. Wyatt-Brown states:

In all societies where honor of this kind functions, the great distinction is drawn between the autonomy, freedom, and self-sufficiency of those in the body politic and the dependency, forced submissiveness, and powerlessness of all who are barred from political and social participation – that is, slaves or serfs.

⁴⁶⁸ See *id.* at 242. Wyatt-Brown states:

It is the nature of the ethic that it must be recognized by those with less status In the American South, common folk though not given to gentlemanly manners, duels, and other signs of superior elan, also believed in honor ... because all whites, nonslaveholders as well, held sway over all blacks. Southerners regardless of social position were united in the brotherhood of white-skinned honor. ...”

⁴⁶⁹ *Id.* at 241.

Why did the South find it necessary to separate from the United States? Why not discuss the issues, debate the consequences, and compromise the differing principles? The principal barrier to discourse, dialog, and peaceful resolution was the Southern preoccupation with “honor.” Honor does not call forth a determined effort to persuade; instead, honor demands “satisfaction.” Wyatt-Brown explains:

Antislavery attacks stained the reputation by which southern whites judged their place and power in the world. ... [Southern whites resented] ... any congressional measure which implied the moral inferiority of their region, labor system, or style of life. Such reflections on southern reputation were thought vile and humiliating.⁴⁷⁰

Kenneth Greenberg explains that in an honor society such as the South to contradict a person is equivalent to an insult.⁴⁷¹ To disagree with someone is the equivalent of calling that person a liar.⁴⁷² The subject matter of the dispute is secondary; it matters not what the truth of the matter is or the wisdom of a proposed course of action.⁴⁷³ What matters is that the other person must not “unmask” or diminish you by openly disagreeing.⁴⁷⁴ In other words, it is more important to have “**honor**” than to be right.⁴⁷⁵

In a stratified society such as the South, not everybody was a person of honor. Slaves were not men of honor, because they would not fight – they knew they would be killed if they raised a hand against their masters.⁴⁷⁶ Yankees also were not men of honor; they would not fight because they considered dueling to be pointless, if not ridiculous.⁴⁷⁷ When Senator Charles Sumner of Massachusetts, a man considered to have no honor, insulted the South, Congressman Preston Brooks of South Carolina attacked him from behind with a cane and clubbed him into unconsciousness.⁴⁷⁸ The South did not perceive Brooks’ assault as either cowardly or wrong;

⁴⁷⁰ *Id.* at 244.

⁴⁷¹ See Greenberg, note 169 *supra*, at 4-11 (describing how the dispute over the reality of the “Feejee Mermaid” evolved into a duel).

⁴⁷² See *id.* at 6 (stating, “To ‘give someone the lie,’ as it was called, has always been an insult of great consequence among men of honor.”).

⁴⁷³ See *id.* at 7 (stating that whether the Mermaid was real or not was not a matter of concern; rather, “the central concern of these men was to have their words, names, and pseudonyms treated with respect. ... Honor was at stake. Penetration into the secrets of nature was of little interest.”).

⁴⁷⁴ See note 463 *supra* and accompanying text (quoting Greenberg on “unmasking”); Greenberg, note 169 *supra*, at 24-50 (Chapter Two, entitled “Masks and Slavery,” explaining the relation between “masks” and “power”).

⁴⁷⁵ See Greenberg, note 169 *supra*, at 7 (stating, ““Honor was at stake. Penetration into the secrets of nature was of little interest.”).

⁴⁷⁶ See *id.* at viii (stating, “Southern gentlemen defined a slave as a person without honor”); *id.* (“I have concentrated on three ways in which men of honor distinguished themselves from slaves: they would never allow anyone to call them liars, they gave gifts, and they did not fear death.”).

⁴⁷⁷ See *id.* at 14 (citing Northern critics of dueling, including Benjamin Franklin, Timothy Dwight, and Lorenzo Sabine).

⁴⁷⁸ See CalPoly.Edu, The Forum, pp. 98-110, Daniel Lawrence Slusser, *In Defense of Southern Honor: Preston Brooks and the Attack on Charles Sumner*, at <http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1030&context=forum> (describing Brooks’ attack on Sumner and public reaction to it).

instead the South applauded Brooks because he had vindicated the honor of the South.⁴⁷⁹ Southern newspapers celebrated the assault on Sumner,⁴⁸⁰ and all but one Southern congressman voted not to expel Brooks from the House.⁴⁸¹ Daniel Slusser observes, “This broad support of Brooks was clearly a sign that the vast majority of Southerners believed strongly in the authority of the Southern Code [of Honor].”⁴⁸² Brooks was proud of what he had done: he later said: “The fragments of the stick are begged for as sacred relicts.”⁴⁸³

The vindication of Southern honor was frequently – in fact, almost invariably – cited by white Southerners as a primary reason justifying secession and war. John C. Calhoun, in his last speech of March 4, 1850, denounced the Compromise of 1850 on the ground that by admitting California as a free state, “you compel us to infer that you intend to exclude us from the whole of the acquired territories.”⁴⁸⁴ The Southern states would have to determine whether “they can remain in the Union consistently with their honor and safety.”⁴⁸⁵ Similarly, at the start of the war the New Orleans Bee made it clear that it was necessary to separate from the North because of its “false and pernicious theories” about the evil of slavery:

As long as slavery is looked upon by the North with abhorrence; as long as the South is looked upon as a mere slave-breeding and slave-driving community; as long as false and pernicious theories are cherished respecting the inherent equality and rights of every human being, there can be no satisfactory political union between the two sections.⁴⁸⁶

This celebration of Southern “honor” persisted long after the War. In his memoirs sixteen years after the Civil War Jefferson Davis echoed Calhoun, stating that after the election of Lincoln and a Republican Congress in 1860 it was clear that “abolitionism, having triumphed in the Territories, would proceed to the invasion of the States.”⁴⁸⁷ The South concluded, said Davis, that there could be no reconciliation with the North “consistent with the honor and safety of all parties.”⁴⁸⁸ In 1941 the southern historian Frank L. Owsley blamed the people of the North for starting the Civil War through their rhetoric:

[T]he *sine qua non* of the Civil War, was the failure to observe what in international law is termed the comity of nations, and what we may by analogy may designate as the comity of sections. That is, the people in one section failed

⁴⁷⁹ See *id.* at 104 (stating “Southerners on the whole agreed with Brooks’s actions in defense of his honor,” and noting that numerous canes were sent to Brooks encouraging him to use them on other abolitionists).

⁴⁸⁰ See *id.* at 104-105 (quoting Southern newspapers).

⁴⁸¹ See *id.* at 105

⁴⁸² *Id.*

⁴⁸³ *Id.* at 104.

⁴⁸⁴ John C. Calhoun, in *Stampp, Causes*, note 20 *supra*, at 45.

⁴⁸⁵ *Id.* at 43.

⁴⁸⁶ *Id.* at 150 (New Orleans Bee, December 14, 1860).

⁴⁸⁷ Davis, *Rise and Fall of the Confederate Government*, note 62 *supra*, at 85. In this book – whose purpose, according to Davis at page v of the Preface, was to demonstrate that “the Southern States had rightfully the power to withdraw from a Union into which they had, as sovereign communities, voluntarily entered” – Davis repeats the word “honor” 78 times.

⁴⁸⁸ *Id.*

in their language and conduct to respect the dignity and self-respect of the people in the other section. ...

Ten years after the Missouri Compromise debates the moral and intellectual leaders of the North, and notably those of New England origin, took up the language of abuse and vilification which the political leaders of that section had first employed in the Missouri debates. ... and thus was launched the so-called anti-slavery crusade, but what in fact was a crusade upon the southern people.⁴⁸⁹

Discussion cannot take place and democracy cannot work when disagreement is considered tantamount to an insult or a threat. In such a culture the only choices are to submit or fight. The South chose to fight rather than “submit” to listening to people say that slavery was wrong.⁴⁹⁰

The Southern conception of “honor” caused another miscalculation that contributed to the defeat of the South. Allen Nevins quotes a number of leading Southern radicals who were convinced that the people of the North would not fight to preserve the Union – that the North would allow the South to depart in peace.⁴⁹¹ In part their belief was based upon the assumption that Northerners did not possess sufficient “honor” to contest secession. It was said: “You may slap a Yankee in the face and he’ll go off and sue you but he won’t fight!”⁴⁹²

People immersed in a culture of “honor” misunderstand people who are devoted to “rights.” The Southern leaders construed a refusal to duel as cowardice, and underestimated the dedication of the Northern people to the Union and to principle that all people should be free.

Myth 13 **The Constitution protects the rights of communities,** **not the rights of individuals.**

By 1860 the South had rejected the concept of individual, personal rights that are universal to mankind. In its place the region had adopted a theory of “community rights” – the right of the people of a place to determine legal relationships and establish legal institutions as

⁴⁸⁹ Stamp, *Causes*, note 20 *supra*, 56-57 (quoting Frank L. Owsley, *The Causes of the Civil War: Egocentric Sectionalism*, printed in 1941 in the *Journal of Southern History*).

⁴⁹⁰ See McPherson, *What They Fought For*, note 451 *supra*, at 12 (noting a common tendency among Southern soldiers to write that if the Confederacy should lose the war, the people of the South would be “subjugated” or “enslaved.”)

⁴⁹¹ See Nevins, note 51 *supra*, at 334-335 (quoting Yancey, A.B. Longstreet, E.J. Arthur, and E. DeLeon to that effect);

⁴⁹² *Id.* at 335; see also Roark, note 1 *supra*, at 10 (“Northerners would probably not even fight, secessionists asserted, and if they did, Southern men would make short work of the Yankees.”); Ashbrook, note 1 *supra*. Ashbrook identifies a number of “misconceptions” Southerners harbored about the war:

The first was the likelihood of war. “I can conceive nothing more improbable,” wrote one secessionist, “than an effort by the North to keep the entire South in the Union by force” – a widespread view in late 1860 and early 1861. The second concerned the expected outcome of any war that might break out. It would be short and glorious – for the South. Southerners predicted that all the blood that would be spilt could be wiped up by a pocket handkerchief or contained in a lady’s thimble. The South, most secessionists believed, would be invincible.

that community saw fit. Furthermore, the leadership of those communities was assigned by race and by economic status.

The leading exponent of this theory of “community rights” was John C. Calhoun. In 1838 Calhoun described the composition of the South as “an aggregate ... of communities, not of individuals.”⁴⁹³

The Southern States are an aggregate, in fact, of communities, not of individuals. Every plantation is a little community, with the master at its head, who concentrates in himself the united interests of capital and labor, of which he is the common representative. These small communities aggregated make the State in all, whose action, labor, and capital is equally represented and perfectly harmonized. Hence the harmony, the union, the stability of that section which is rarely disturbed⁴⁹⁴

In his book after the war justifying secession, Jefferson Davis asserts that the Southern states, as “sovereign communities,” had the right to secede: “the Southern States had rightfully the power to withdraw from a Union into which they had, as sovereign communities, voluntarily entered.”⁴⁹⁵

Kenneth Stampp quotes a number of historians who confirm that in the decades before the Civil War the people of the South substituted “community rights” for “individual rights” as the foundation of society. Charles G. Sellers, Jr., described how southern radicals “did not ignore or reject the Revolutionary conception of liberty so much as they transformed it, substituting for the old emphasis on the natural rights of all men a new emphasis on the rights and autonomies of communities.”⁴⁹⁶ Rollin G. Osterweis observed that by 1860 Southerners perceived themselves as a separate community, superior to the North: “The Carolinian conviction that Southerners comprised a separate cultural unit grew stronger from the concomitant belief that the rest of the country possessed an inferior civilization,”⁴⁹⁷ and states that the purpose of secession was to “redraw boundaries that would conform to mythical but credited ethnographic needs.”⁴⁹⁸ Bertram Wyatt-Brown links the “honor” myth to “defense of community.” “In societies where honor thrives, death in defense of community and principle is a path to glory and remembrance, whereas servile submission entails disgrace.”⁴⁹⁹

In the North, American nationalism was identified with the protection of certain “universal” standards of “inalienable rights,”⁵⁰⁰ but nationalism in the South centered on “particular traditions and institutions.”⁵⁰¹ This limited definition of “community” is evident in

⁴⁹³ Thomas, note 91 *supra*, at 31.

⁴⁹⁴ *Id.* at 31-32.

⁴⁹⁵ Davis, *Rise and Fall of the Confederate Government*, note 62 *supra*, at v.

⁴⁹⁶ Sellers, *The Travail of Slavery*, note 230 *supra*, excerpted in Stampp, *Causes*, note 20 *supra*, at 173.

⁴⁹⁷ Osterweis, in Stampp, *Causes*, note 20 *supra*, at 223.

⁴⁹⁸ *Id.* at 225.

⁴⁹⁹ Wyatt-Brown, in Stampp, *Causes*, note 20 *supra*, at 244.

⁵⁰⁰ Osterweis, in Stampp, *Causes*, note 20 *supra*, at 225. (distinguishing Southern principles from “universal standards and values – ‘Inalienable Rights’ and ‘Laws of Nature’”).

⁵⁰¹ *Id.*

many respects. In his psychological and sociological study *Honor and Slavery* Kenneth Greenberg notes that Southern traditions of hospitality and generosity did not extend to strangers.⁵⁰² In the 1850s Frederick Law Olmsted traveled four thousand miles throughout the South and only twice was invited to stay the night without paying.⁵⁰³ In 1844, when Massachusetts sent Samuel Hoar to South Carolina to challenge the state laws that permitted the authorities to seize and enslave African-American sailors, “he received the greeting that a stranger would.”⁵⁰⁴ Greenberg notes that these proslavery descriptions of the squalid lives of factory workers in England and the North are consistently made without any element of empathy: “But despite all their descriptions of the misery experienced by the free workers of Great Britain and the North, no proslavery theorist ever suggested that Southern masters should do anything about it.”⁵⁰⁵ And Greenberg states, “the law and practice of ‘poor relief’ in the antebellum South also excluded strangers.”⁵⁰⁶

Two stories about military burials during the Civil War illustrate the differences between Northern and Southern understandings of “community.” After the battle of Chattanooga the victorious Union General George H. Thomas⁵⁰⁷ devoted himself to creating a military cemetery for the fallen troops.⁵⁰⁸ Thomas was asked by a chaplain whether he wanted the soldiers laid out by their home states. “‘Oh no,’ Thomas replied. ‘Mix them up. Mix them up. I am tired of states’ rights.’”⁵⁰⁹ And when Robert Gould Shaw was killed leading the 54th Massachusetts in the attack on Fort Wagner, Confederate authorities threw him into a mass grave with his African-American soldiers, proudly exclaiming that he had gotten what he deserved.⁵¹⁰ His parents, however, refused to have his body brought back north, his father saying:

We would not have his body removed from where it lies surrounded by his brave and devoted soldiers....We can imagine no holier place than that in which

⁵⁰² See Greenberg, note 169 *supra*, at 80-85; *id.* at 81 (“Men of honor gave no gifts to strangers. A stranger was someone to ignore, to laugh at – or to engage in trade.”).

⁵⁰³ See *id.* at 81.

⁵⁰⁴ *Id.* at 84.

⁵⁰⁵ *Id.* at 86.

⁵⁰⁶ *Id.* at 82.

⁵⁰⁷ See generally Benson Bobrick, *MASTER OF WAR: THE LIFE OF GENERAL GEORGE H. THOMAS* (New York: Simon & Schuster, 2009) (biography of George H. Thomas); The Civil War Roundtable, William F. B. Vodrey, *George H. Thomas Gets What’s Coming to Him: Review of Master of War: The Life of General George H. Thomas* (2011), at http://clevelandcivilwarroundtable.com/articles/comment/master_of_war.htm; Buell, note 405 *supra*, 261-295 (Chapter 22, “The Rock of Chickamauga,” describing how Thomas saved the Union Army of The Cumberland in the Battle of Chickamauga); *id.* at 389-403 (Chapter 30, “Franklin and Nashville,” describing the Union victories and Thomas’ successful planning and strategy at Nashville); *id.* at 404-411 (Chapter 31, “An Army Destroyed,” describing Thomas’ pursuit of Hood’s army after the Battle of Nashville).

⁵⁰⁸ See U.S. Department of Veterans Affairs, *Chattanooga National Cemetery: Historical Information*, at <http://www.cem.va.gov/cems/nchp/chattanooga.asp> (stating, “On Dec. 25, 1863, Maj. Gen. George H. Thomas, “The Rock of Chickamauga,” issued General Orders No. 296 creating a national cemetery in commemoration of the Battles of Chattanooga, Nov. 23-27, 1863.)

⁵⁰⁹ Buell, note 405 *supra*, at 294.

⁵¹⁰ See William Wells Brown, *THE NEGRO IN THE AMERICAN REBELLION: HIS HEROISM AND HIS FIDELITY* 203 (Boston: Lee & Shephard, Boston, 1867) (stating: “When inquiry was made at Fort Wagner, under flag of truce, for the body of Col. Shaw of the Massachusetts Fifty-Fourth, the answer was, ‘We have buried him with his niggers!’”)

he lies, among his brave and devoted followers, nor wish for him better company – what a body-guard he has!⁵¹¹

These burials illustrate a fundamental difference between the people of the North and the people of the South in how they defined the community. The North believed in the universal rights of all men.⁵¹² In the South, identity was defined by community⁵¹³ – and above all, community was defined by race.⁵¹⁴ These differences colored their respective understanding of the central meaning of the Declaration and the Constitution. Under the theory of community rights, the people of a community – in particular, the white people of a community – comprise the sovereignty and accordingly they have the right to enact legislation and create institutions as they wish.⁵¹⁵ This stands in contrast to the notion that sovereignty springs from the soul of the individual;⁵¹⁶ that every human being is equal and endowed with inalienable rights,⁵¹⁷ and that governments are formed with the consent of the governed.⁵¹⁸

The phrase “states’ rights” misdirects political thought and misconstrues the Constitution. “States’ rights” is a misnomer, and as law it is false doctrine.⁵¹⁹ States do not have rights. Only individuals have rights. This principle is expressly recognized in the distinctive language of the Ninth and Tenth Amendments:

Ninth Amendment: The enumeration in the Constitution, of certain **rights**, shall not be construed to deny or disparage others retained by the people.

⁵¹¹ Civil War Trust, *Robert Gould Shaw*, at <http://www.civilwar.org/education/history/biographies/robert-gould-shaw.html> (quoting Shaw’s father).

⁵¹² See note 486 *supra*.

⁵¹³ See notes 492-498 *supra* (describing Southern beliefs in “community rights”).

⁵¹⁴ See TeachingAmericanHistory.Org, *Stephen A. Douglas: Homecoming Speech at Chicago*, July 9, 1858, at <http://teachingamericanhistory.org/library/document/homecoming-speech-at-chicago/>. (setting forth Stephen Douglas’ racial emphasis on the rights of white persons in a community). Douglas stated: “this government of ours is founded on the white basis. It was made by the white man, for the benefit of the white man, to be administered by white men, in such manner as they should determine.”

⁵¹⁵ See *id.*

⁵¹⁶ See Lincoln, Peoria Address, text accompanying note 342 *supra* (“[N]o man is good enough to govern another man, *without that other’s consent*. I say this is the leading principle – the sheet anchor of American republicanism.”). See generally Wilson Huhn, *Constantly Approximating Popular Sovereignty: Seven Fundamental Principles of Constitutional Law*, 19 WM. & MARY BILL OF RTS. J. 291 (2010) (setting forth theory of sovereignty as basis for just powers of government)

⁵¹⁷ See Declaration of Independence (1776):

We hold these truths to be self-evident; that all men are created equal; that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed

⁵¹⁸ See *id.*

⁵¹⁹ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1520 (1987) (“Whenever the rhetoric of ‘states’ rights’ is deployed to defend states’ wrongs, our servants have become our masters; our rescuers, our captors.”); see generally Timothy Zick, *Active Sovereignty*, 21 ST. JOHN’S J. LEGAL COMMENT. 541, 543 (2007) (questioning the validity of the concept of “state sovereignty”); Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229 (2005) (same); Wilson R. Huhn, *Constantly Approximately Popular Sovereignty*, note 515 *supra*, at 292 (stating, “The American people are sovereign, not the states.”).

Tenth Amendment: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.⁵²⁰

People have rights. Governments have powers. The people are the source of all governmental power, and may create a government and grant it power, but rights are inherent to every individual person. A basic principle of the Constitution is that while the states and the federal government have certain powers, those powers may not be exercised to violate individual rights. Individual rights trump the powers of the state.⁵²¹

The myth of “community rights” is reflected in the tendency of some Southerners to refer to the Civil War as “The War Between the States,”⁵²² or “The War of Northern Aggression.”⁵²³ To perceive the war in this manner is to assume that the South was already a separate and distinct community ... that Northerners were outsiders who were invading the South.

Jefferson Davis also used the myth of “community rights” to denigrate the concept of “majority rule.” In the following 1864 newspaper interview⁵²⁴ Jefferson Davis was asked by Colonel Jaques of the Union Army, why not put secession to a vote of the entire American people: “If a majority votes disunion, our Government to be bound by it, and to let you go in peace; if a majority votes union, yours to be bound by it, and to stay in peace.”⁵²⁵ Davis rejects majority rule and indicates that the people of a community have the right to execute any person who would advocate it:

President Davis: "The plan is altogether impracticable. If the South were only one state it might work; but, as it is, if one Southern state objected to the emancipation, it would nullify the whole thing, for you are aware that the people of Virginia cannot vote slavery out of South Carolina, nor the people of South Carolina vote it out of Virginia."

Colonel Jaques: "But three-fourths of the States can amend the constitution. Let it be done in that way, in any way, so that it be done by the people. I am not a statesman or a politician, and I do not know just how such a plan could be carried

⁵²⁰ U.S. CONST., amend.s 9 and 10 (emphasis added).

⁵²¹ See, e.g., *United States v. Windsor*, 133 S.Ct. 2675 (2013) (striking down Section 3 of federal Defense of Marriage Act as unconstitutional); *id.* at 2695 (stating, “The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.”). See also Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* xi (Cambridge, Harvard University Press, 1977) (“Individual rights are political trumps held by individuals.”).

⁵²² See, e.g., Sons of Confederate Veterans, *What is the Sons of Confederate Veterans*, at <http://www.scv.org/about/whatis.php> (indicating that it is the “oldest hereditary organization for male descendants of Confederate Soldiers,” and stating that one of its purposes is to “discuss the military and political history of the War Between the States.”).

⁵²³ See Bill Hutchinson, *Nutty New NRA President Jim Porter still fighting war against ‘Northern Aggression’*, *New York Daily News* (May 2, 2013) (quoting Porter as saying, “Now y’all might call it the Civil War, but we call it the ‘War of Northern Aggression’ down South.”).

⁵²⁴ *The Globe and Traveller* (September 2, 1864), at <http://www.southernindependentparty.com/davisinterview.htm>.

⁵²⁵ *Id.*

out; but you get the idea - that the people shall decide the question."

President Davis: "That the majority shall decide it you mean. We seceded to rid ourselves of the rule of the majority, and this would subject us to it again."

Colonel Jaques: "But the majority must rule finally, either with bullets or ballots."

President Davis: "I am not so sure of that. Neither current events nor history shows that the majority rules, or ever did rule. The contrary, I think, is true. Why, Sir, the man who should go before the Southern people with such a proposition, with any proposition which implied that the North was to have a voice in determining the domestic relations of the South, could not live here a day. He would be hanged to the first tree, without judge or jury."⁵²⁶

Jefferson Davis's rejection of "majority rule" had many practical consequences. On the one hand, he did not accept the legitimacy of the election of Abraham Lincoln;⁵²⁷ on the other hand, he was unable to persuade the States in the Confederacy to make sacrifices for the good of the whole.⁵²⁸

In his First Inaugural Address,⁵²⁹ Abraham Lincoln pointed out that Jefferson Davis's objection to majority rule was self-contradictory. He said:

If the minority will not acquiesce, the majority must, or the Government must cease. There is no other alternative, for continuing the Government is acquiescence on one side or the other. If a minority in such case will secede rather than acquiesce, they make a precedent which in turn will divide and ruin them, for a minority of their own will secede from them whenever a majority refuses to be controlled by such minority. For instance, why may not any portion of a new confederacy a year or two hence arbitrarily secede again, precisely as portions of the present Union now claim to secede from it? All who cherish disunion sentiments are now being educated to the exact temper of doing this.

Is there such perfect identity of interests among the States to compose a new union as to produce harmony only and prevent renewed secession?

Plainly the central idea of secession is the essence of anarchy. A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people.⁵³⁰

In 1866 the Thirty-Ninth Congress approved the Fourteenth Amendment, and the people ratified the amendment in 1868. The first sentence of the Fourteenth Amendment provides: "All

⁵²⁶ *Id.*

⁵²⁷ See text accompanying note 411 *supra* (quoting Davis referring to Lincoln as an "ignorant usurper").

⁵²⁸ See text accompanying note 141 *supra* (quoting Emory Thomas stating that "particularist politicians could hardly be expected to adopt promptly ... centralist policies").

⁵²⁹ 4 *Collected Works* 262- 271 (First Inaugural Address, March 4, 1861).

⁵³⁰ *Id.* at 267-268.

persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”⁵³¹ The Citizenship Clause abolishes the power of the states to define who is and who is not a citizen of the state. Every American citizen is a citizen of the state where he or she resides. Under the Fourteenth Amendment, no state has the power to define who is and who is not a member of the community.

The Supreme Court reaffirmed this principle the same year that the Fourteenth Amendment was ratified in the case of *Crandall v. Nevada*.⁵³² The State of Nevada had imposed a tax on every railroad passenger who left the state.⁵³³ In striking down the tax, the Court stated:

The people of these United States constitute one nation.⁵³⁴

...

If the state can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one state can do this, so can every other state. And thus one or more states covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other.⁵³⁵

One of the purposes of the 1964 Civil Rights Act of 1964 was to protect the right to travel against discriminatory state laws.⁵³⁶ In the case of *Heart of Atlanta Motel v. United States*⁵³⁷ the Supreme Court ruled that statute was constitutional under the Commerce Clause of the Constitution.⁵³⁸ Under the heading, “*The basis for Congressional action*,” the Court stated:

“[O]ur people have become increasingly mobile, with millions of people of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations, and have had to call upon friends to put them up overnight, and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself “dramatic testimony to the difficulties” Negroes encounter in travel. These exclusionary practices were found to be nationwide ... There was evidence that this uncertainty stemming

⁵³¹ U.S. CONST., amend. XIV, sec. 1.

⁵³² 73 U.S. 35 (1868) (striking down a tax that the State of Nevada imposed on every person leaving the state by railroad, stage coach, or other vehicle).

⁵³³ *See id.* at 39 (stating, “The proposition to be considered is the right of a State to levy a tax upon persons residing in the State who may wish to get out of it, and upon persons not residing in it who may have occasion to pass through it.”).

⁵³⁴ *Id.* at 43.

⁵³⁵ *Id.* at 46.

⁵³⁶ *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-262 (1964) (upholding the constitutionality of the 1964 Civil Rights Act on the ground that under the Commerce Clause Congress has the power to remove impediments to interstate travel); *id.* at 361 (stating, “the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution.”).

⁵³⁷ *Id.*

⁵³⁸ *See id.*

from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community.”

... We shall not burden this opinion with further details, since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.⁵³⁹

There is no North, or South, or East, or West United States. We are all Americans. No region, state, or local community may bar any American from its territory, because it is all American land. As individuals we are each endowed with certain inalienable rights that no community may transgress.

Before, during, and after the Civil War the theory of “states’ rights” was used to violate people’s individual rights. At the commencement of the war the Southern states purported to withdraw from the Union so that they could exercise the “right” to oppress members of their own communities. And yet all sovereignty comes from the people – and the people **cannot** give up their “inalienable” rights. That is the meaning of the word “inalienable.”

Perhaps the most eloquent response to the parochialism of “states’ rights” is contained in Martin Luther King, Jr.’s *Letter from a Birmingham Jail*.⁵⁴⁰ The white clergymen to whom the letter is addressed had complained about “outsiders” coming in to Birmingham and fomenting discord.⁵⁴¹ King responded:

“I am cognizant of the interrelatedness of all communities and states. I cannot sit idly by in Atlanta and not be concerned about what happens in Birmingham. Injustice anywhere is a threat to justice everywhere. We are caught in an

⁵³⁹ *Id.* at 252-253.

⁵⁴⁰ Martin Luther King, Jr., *Letter from a Birmingham Jail* (Apr. 16, 1963), available at Stanford University Martin Luther King, Jr., Research and Education Institute, http://mlk-kpp01.stanford.edu/index.php/encyclopedia/documentsentry/annotated_letter_from_birmingham/

⁵⁴¹ See Teaching American History.Org, *Letter to Martin Luther King* (April 12, 1963) at <http://teachingamericanhistory.org/library/document/letter-to-martin-luther-king/>, (stating, “we are now confronted by a series of demonstrations by some of our Negro citizens, directed and led in part by outsiders.”). In his “Letter from a Birmingham Jail,” note 538 *supra*, King replied:

I think I should indicate why I am here in Birmingham, since you have been influenced by the view which argues against “outsiders coming in.” I have the honor of serving as president of the Southern Christian Leadership Conference, an organization operating in every southern state, with headquarters in Atlanta, Georgia. We have some eighty five affiliated organizations across the South, and one of them is the Alabama Christian Movement for Human Rights. Frequently we share staff, educational and financial resources with our affiliates. Several months ago the affiliate here in Birmingham asked us to be on call to engage in a nonviolent direct action program if such were deemed necessary. We readily consented, and when the hour came we lived up to our promise. So I, along with several members of my staff, am here because I was invited here. I am here because I have organizational ties here.

But more basically, I am in Birmingham because injustice is here. Just as the prophets of the eighth century B.C. left their villages and carried their “thus saith the Lord” far beyond the boundaries of their home towns, and just as the Apostle Paul left his village of Tarsus and carried the gospel of Jesus Christ to the far corners of the Greco-Roman world, so am I compelled to carry the gospel of freedom beyond my own home town. Like Paul, I must constantly respond to the Macedonian call for aid.

inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly. Never again can we afford to live with the narrow, provincial "outside agitator" idea. Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds."⁵⁴²

VII A Time to Break Silence⁵⁴³

The myths that sustained slavery must be acknowledged, confronted, and dispelled.

Alexander Solzhenitsyn admonishes us that if we do not reproach evil, then it takes root in our hearts and flourishes in the darkness:

“In keeping silent about evil, in burying it so deep within us that no sign of it appears on the surface, we are *implanting* it, and it will rise up a thousand fold in the future. When we neither punish nor reproach evildoers, we are not simply protecting their trivial old age, we are thereby ripping the foundations of justice from beneath new generations.”⁵⁴⁴

Martin Luther King, Jr., frequently reminded us of the moral consequences of remaining silent:

“In the end, we will remember not the words of our enemies, but the silence of our friends.”⁵⁴⁵

“Our lives begin to end the day we become silent about things that matter.”⁵⁴⁶

“Cowardice asks the question - is it safe?
Expediency asks the question - is it politic?
Vanity asks the question - is it popular?
But conscience asks the question - is it right?
And there comes a time when one must take a position
that is neither safe, nor politic, nor popular;
but one must take it because it is right.”⁵⁴⁷

⁵⁴² Martin Luther King, Jr., *Letter from a Birmingham Jail*, note 538 *supra*.

⁵⁴³ See American Rhetoric Online Speech Bank, Martin Luther King, Jr., *Beyond Vietnam: A Time to Break Silence*, at <http://www.americanrhetoric.com/speeches/mlkatimetobreaksilence.htm>, (King's speech of April 4, 1967, against the Vietnam War).

⁵⁴⁴ Alexander Solzhenitsyn, *GULAG ARCHIPELAGO 178* (Thomas P. Whitney trans.) (New York, Harper & Row, 1974).

⁵⁴⁵ Martin Luther King, Jr., *Loving Your Enemies*, Dexter Avenue Baptist Church, Montgomery, Alabama, November 17, 1957, at http://mlk-kpp01.stanford.edu/index.php/encyclopedia/documentsentry/doc_loving_your_enemies/.

⁵⁴⁶ Martin Luther King, Jr., The Quotations Page, *Quotation #30528 from Laura Moncur's Motivational Quotations*, at <http://www.quotationspage.com/quote/30528.html>.

⁵⁴⁷ Martin Luther King, Jr., *A Proper Sense of Priorities*, (February 6, 1968), at African-American Involvement in the Vietnam War: Speeches and Sounds, http://www.aavw.org/special_features/speeches_speech_king04.html.

In 1854, after years of silence about slavery, Abraham Lincoln suddenly appeared and publicly challenged Stephen Douglas over the extension of slavery into the United States territories.⁵⁴⁸ In the peroration of the Peoria Address Lincoln stated:

Argue as you will, and long as you will, this is the naked FRONT and ASPECT, of the measure. And in this aspect, it could not but produce agitation. Slavery is founded in the selfishness of man's nature – opposition to it, is [in?] his love of justice. These principles are an eternal antagonism; and when brought into collision so fiercely, as slavery extension brings them, shocks, and throes, and convulsions must ceaselessly follow. Repeal the Missouri compromise – repeal all compromises – repeal the declaration of independence – repeal all past history, you still can not repeal human nature. It still will be the abundance of man's heart, that slavery extension is wrong; and out of the abundance of his heart, his mouth will continue to speak.⁵⁴⁹

“Out of the abundance of his heart,” Abraham Lincoln spoke his mind on the evils of slavery.⁵⁵⁰

Our criminal justice system recently sentenced Ariel Castro to 1000 years in prison for his imprisonment and rape of three women over a period of ten years.⁵⁵¹ But slavery persisted for 250 years, and its badges and incidents continued in custom and in law for another century, and there was not any legal accounting for it. There was no prosecution for slaveholding, and no compensation to its victims.

Even worse, there has never been a *moral* accounting for slavery. I speak of the need for a political, cultural, religious, and educational recognition of what slavery really was and what it really did. The political, cultural, religious, and educational leaders of this country have never adequately addressed the myths that girded up slavery. We must confront, as Jo-Ann Tsang describes it, the “psychological factors”⁵⁵² that enabled our society to enslave an entire race of persons for centuries. That void, that keeping silent, still poisons our country.

The Planters of the South used to scorn public education, and as Solzhenitsyn tells us, “intolerance is the first sign of an inadequate education.”⁵⁵³ Children must be taught the truth about slavery. There must be a cleansing of these myths from our souls.

In dispelling these myths we will have to ask ourselves many questions. In the arena of politics there are still those who think of themselves “real Americans.” In 1858 Abraham Lincoln reminded us what it means to be an American. Speaking to a diverse crowd in Chicago who

⁵⁴⁸ See Huhn, *Lincoln's Use of Biblical Imagery*, note 417 *supra*, at 234-236 (noting that Lincoln spoke out against slavery at Peoria after years of public silence on the subject).

⁵⁴⁹ 2 *Collected Works* 271.

⁵⁵⁰ See Huhn, *Lincoln's Use of Biblical Imagery*, note 417 *supra*, at 240 (speculating that this passage of the Bible may have given Lincoln the courage to speak out against slavery after years of silence).

⁵⁵¹ See Peter Krouse, *Ariel Castro to Get 1,000-Year Sentence*, *Cleveland Plain Dealer* (July 30, 2013).

⁵⁵² See text accompanying note 2 *supra*.

⁵⁵³ Alexander Solzhenitsyn, AUGUST 1914 472 (Translated by Michael Glenny) (New York, Farrar, Strauss & Giroux, 1971).

included many foreign-born from many lands, Lincoln noted that the immigrants among us cannot trace their ancestry back to the Revolution or the Declaration, but yet, he noted, they are “flesh of the flesh, blood of the blood” because of their devotion to American principles:

We have besides these men – descended by blood from our ancestors – among us perhaps half our people who are not descendants at all of these men, they are men who have come from Europe – German, Irish, French and Scandinavian – men that have come from Europe themselves, or whose ancestors have come hither and settled here, finding themselves our equals in all things. If they look back through this history to trace their connection with those days by blood, they find they have none, they cannot carry themselves back into that glorious epoch and make themselves feel that they are part of us, but when they look through that old Declaration of Independence they find that those old men say that “We hold these truths to be self-evident, that all men are created equal,” and then they feel that that moral sentiment taught in that day evidences their relation to those men, that it is the father of all moral principle in them, and that they have a right to claim it as though they were blood of the blood, and flesh of the flesh of the men who wrote that Declaration, and so they are.⁵⁵⁴

Our churches must also take responsibility for the myths that sustained slavery. They must confront and examine how religion was perverted in the service of slavery. The religious justifications for slavery were not merely a matter of Biblical interpretation. They did not arise simply because some people took the Bible literally. These kinds of teachings arise out of a misunderstanding of the very purpose of religion. It is the difference between saying, “I go to church with other people *to learn how to be a better person*,” and “I and the people I go to church with *are better than other people*.” This unquestioned sense of superiority – unquestioned because it was supposedly divine – is what allowed the white churches of the South to elevate slavery to holiness – to declare evil to be good and good evil.

VIII

Conclusion: Cleburne’s Death and Our Duty

Despite his many brilliant military successes, Patrick Cleburne was never again promoted after he called for emancipation of the slaves and enlistment of African-Americans into the Confederate Army.⁵⁵⁵ When Jefferson Davis relieved Joe Johnston from command during the

⁵⁵⁴ 2 *Collected Works* 499-500 (Speech at Chicago, Illinois, July 10, 1858).

⁵⁵⁵ See Foote, note 74 *supra*, at 954-955 (“though [Cleburne] was considered by many to be the best division commander in either army, South or North, he was never assigned any larger duties than those he had at the time he proposed to emancipate the slaves of the South and enlist them in her struggle for independence.”); Thomas, note 91 *supra*, at 261 (“Three times within the next eight months Cleburne was passed over for command of an army corps and promotion to lieutenant general. In each case less distinguished, less controversial men received the honors.”); McPherson, *Battle Cry of Freedom*, note 86 *supra*, at 833 (stating, “The only consequence of Cleburne’s action seemed to be denial of promotion to this ablest of the army’s division commanders, who was killed ten months later at the battle of Franklin.”).

defense of Atlanta in July of 1864, he selected John Bell Hood to lead the Army of Tennessee.⁵⁵⁶ Hood was a courageous⁵⁵⁷ but incompetent general⁵⁵⁸ who knew but one tactic – headlong attack.⁵⁵⁹ He immediately launched a series of bloody, fruitless attacks against entrenched positions around Atlanta, greatly weakening his army, and as a result he had to abandon the Gateway City on September 1, 1864.⁵⁶⁰ Three months later at Franklin, Tennessee, Hood employed the same tactic; on November 30, he heedlessly ordered Cleburne and the soldiers who followed him to attack entrenched positions without any artillery support, sending Cleburne and thousands of his men to a senseless death.⁵⁶¹ In December, 1864, in his final battle, Hood advanced what remained of his army on Nashville against General George H. Thomas without adequate supplies or cavalry support, and as a result Thomas’s forces utterly destroyed the Army of Tennessee.⁵⁶² The key to that battle – the regiment that was most responsible for the Union’s victory at Nashville – was the 13th United States Colored Troops. Hood foolishly weakened his defenses on his left by shifting Cleburne’s old division to his right to defend Overton Hill.⁵⁶³ Despite facing overwhelming odds in favor of the defenders, the 13th Brigade courageously stormed the stout Confederate forces atop Overton Hill and briefly took the parapet amid frightful casualties.⁵⁶⁴ This allowed the Union Army to overwhelm the positions on Hood’s left,

⁵⁵⁶ See Buell, note 405 *supra*, at 365-366 (describing how Hood undermined Johnston and was appointed to replace him); Jacob D. Cox, IX CAMPAIGNS OF THE CIVIL WAR: ATLANTA 147-149 (Castle Books, Edison, N.J., 1882, 2002) (describing how Jefferson Davis replaced Johnston with Hood)

⁵⁵⁷ See Cox, *Atlanta*, note 554 *supra*, at 149 (“at Gaines’s Mills, Second Manassas, Antietam, and Gettysburg he had shown the kind of courage and dash which made him to be looked upon as a soldier of the [Stonewall] Jackson school.”).

⁵⁵⁸ See Foote, note 74 *supra*, at 417 (quoting Robert E. Lee, upon hearing that Hood would replace Johnston: “I regret the fact stated. It is a bad time to relieve the commander of an army situated as that of Tenne. We may lose Atlanta and the army too. Hood is a bold fighter. I am doubtful as to the other qualities necessary.”); McPherson, *Battle Cry of Freedom*, note 86 *supra*, at 753 (“Lee advised against [appointing Hood] on the grounds that while aggressive, Hood was too reckless. ‘All lion,’ said Lee of him, ‘and no fox.’”); Buell, note 405 *supra* at 365 (stating, “Hood was not a deep thinker, and he saw things in simple terms.”).

⁵⁵⁹ See Buell, note 405 *supra*, at 384-385 (describing how, at Franklin, Hood believed that “He could revert to the maneuver he had used in the glory days under Lee: the straightforward head-on assault.”);

⁵⁶⁰ See Cox, *Atlanta*, note 554 *supra*, at 144-210 (describing the battles leading to Hood’s retreat from Atlanta); Buell, note 405 *supra*, at 369-376 (same).

⁵⁶¹ See Buell, note 405 *supra*, at 384-385 (describing the outcome of the Battle of Franklin); Phil Leigh, *The Stonewall of the West*, New York Times Opinionator (September 3, 2012), at <http://opinionator.blogs.nytimes.com/2012/09/03/the-stonewall-of-the-west/> Leigh states:

Hood ordered a frontal assault against Yankee breastworks at Franklin, Tenn. Half- again as big as Gen. George Pickett’s Gettysburg charge, advancing over twice as much open ground, the attack was a slaughter. Seven generals were killed and 55 regimental commanders fell, along with over 6,000 other soldiers. ... Cleburne’s body was found only yards short of the Federal line.

⁵⁶² See McPherson, *Battle Cry of Freedom*, note 86 *supra*, at 813-815 (describing the Battle of Nashville); *id.* at 813 (referring to the outcome as “a devastating knockout that almost annihilated the adversary”); James McPherson, *TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER IN CHIEF* 253-254 (New York, Penguin Books, 2008) (“Having started his invasion of Tennessee with forty thousand men, Hood counted fewer than fifteen thousand by the time his retreat fetched up a Tupelo, Mississippi. As a fighting force the Army of Tennessee had virtually ceased to exist.”).

⁵⁶³ See Cornish, note 103 *supra*, at 285 (stating that “Hood withdrew Patrick Cleburne’s division from his left”); Buell, note 405 *supra*, at 404 (stating that the Union’s black soldiers “attacked valiantly” and “suffered immense casualties but nonetheless diverted reinforcements from moving to the collapsing Confederate left wing.”).

⁵⁶⁴ See Cornish, note 103 *supra*, at 285 (describing the second and decisive day of battle at Nashville). Cornish states:

sending the Army of Tennessee into headlong flight.⁵⁶⁵ The corps commander of the 13th, General James Steedman, said:

I was unable to discover that color made any difference in the fighting of my troops. All, white and black, nobly did their duty as soldiers, and evinced cheerfulness and resolution such as I have never seen excelled in any campaign of the war in which I have borne a part.⁵⁶⁶

The unit commander of the 13th, Colonel Charles Thompson, described what his regiment did:

These troops were here, for the first time, under such fire as veterans dread, and yet, side by side with the veterans of Stone's River, Missionary Ridge and Atlanta, they assaulted probably the strongest works on the entire line, and though not successful, they vied with the old warriors in bravery, tenacity, and deeds of noble daring.⁵⁶⁷

Out of 556 men and 20 officers, the 13th suffered 55 killed, 161 wounded, and one missing, a casualty rate of nearly forty percent.⁵⁶⁸ This was fifty percent higher than any other Union unit on the field.⁵⁶⁹

Cleburne was right about the value of emancipating and enlisting African-Americans, but the legal, economic, religious, and cultural myths that white southerners adhered to blinded them

The second day settled the fate of Hood's army. This was also the day of glory and high casualties for the colored brigade under Colonel Thompson. His particular objective was the strong Confederate position on Overton Hill. The plan of battle called for a feint by Thompson's troops while the main attack on the hill was begun on the right. But Thompson's Negroes became excited as they moved forward in their first battle and "what was intended as a demonstration was unintentionally converted into an actual assault." The white brigade on their right was repulsed, and Confederate fire was concentrated on Thompson's regiments. They lost 468 casualties. Hood withdrew Patrick Cleburne's division from his left, and the stage was set for a re-enactment of the Union successes of the first day. Overton Hill was taken in the second assault, and the whole of Hood's line was overrun.

Id. (speaking of the "severe loss" of men in the assault on Overton Hill).

⁵⁶⁵ See McPherson, *Battle Cry of Freedom*, note 86 *supra*, at 813 (stating, "Thomas's battle plan called for one division (including two brigades of black soldiers) to pin down Hood's right with a left jab while three Union infantry corps and the cavalry smashed the other flank with a roundhouse right. All worked as planned."); Cox, *March to the Sea*, note 200 *supra*, at 122-123 (describing the assault on Hood's left).

⁵⁶⁶ Cornish, note 103 *supra*, at 284-285.

⁵⁶⁷ Tennesseans in the Civil War: Federal Infantry Units: 13th U.S. Colored Infantry Regiment at <http://tngenweb.org/civilwar/usainf/usa13c.html> (quoting Colonel Thompson, commander of the 13th).

⁵⁶⁸ See *id.* (stating, "Colonel Hottenstein reported the regiment went into action with 556 men and 20 officers; Lieutenants John M. Woodruff, George Taylor, L. L. Parks, and James A. Ison, and 51 men were killed; four officers and 161 men wounded; and one missing; total casualties of 221. This was a loss of nearly 40 per cent of those engaged, a terrific percentage.").

⁵⁶⁹ See Cox, *March to the Sea*, note 200 *supra*, at 127 (stating that the losses in Colonel Thompson's colored brigade were "fifty percent heavier than in any other on the field").

to the truth. Cleburne's biographer Craig L. Symonds concludes that Cleburne "badly ... misread the society he called his own."⁵⁷⁰ Symonds states:

Cleburne's assumption that "every patriot will freely give up ... the negro slave rather than be a slave himself" failed to take into consideration the fact that many southerners viewed the loss of slavery as virtually synonymous with the loss of their own liberty. As James McPherson has asserted ... "most Confederate soldiers believed that they were fighting for liberty *and* slavery, one and inseparable."⁵⁷¹

The popular radio commentator Rush Limbaugh assures us that there is no need for white Americans to feel guilty about slavery:

If any race of people should not have guilt about slavery it's Caucasians. The White race has probably had fewer slaves and for a briefer period of time than any other in the history of the world. [...] [N]o other race has ever fought a war for the purpose of ending slavery, which we did. Nearly 600,000 people killed in the Civil War. It's preposterous that Caucasians are blamed for slavery when they have done more to end it than any other race ...⁵⁷²

Whether "white guilt" is justified is not the point. The purpose of examining the myths that sustained the institution of slavery is not to make people feel guilty about the practice. None of us were alive when slavery existed, and many Americans have ancestors on both sides of the Civil War. We do not study the justifications of slavery in order to assign blame. The point is rather that we have a duty to confront reality and to reject myth. It is possible that some of the myths that justified slavery still pollute our thoughts. As Americans let's clear the air – let's "disenthrall ourselves" – and learn from our mistakes.

⁵⁷⁰ Symonds, note 69 *supra*, at 191 (quoting McPherson, *What They Fought For*, note 451 *supra*, at 51).

⁵⁷¹ *Id.*

⁵⁷² The Rush Limbaugh Show, *Ivy League Professor Slanders This Show*, at http://www.rushlimbaugh.com/daily/2013/07/22/ivy_league_professor_slanders_this_show.