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Free At Last

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"FREE AT LAST"?

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This is Part II of a Symposium on the Law of Freedom. Part I appeared in Volume 70, Number 2 of this Law Review. My introduction to the full symposium, *"Let Justice Be Done, Though the Heavens May Fall": The Law of Freedom*,[1] is in that volume. For Part II, a briefer introduction is in order.

In this symposium we have considered how the law has affected the creation of freedom after slavery. The backgrounds and employment of contributors—historians, law professors, civil rights litigators, documentary editors, Department of Justice personnel, judicial clerks, and practicing attorneys—underscore the importance of this topic beyond the academic world. Indeed, the questions we discuss in this symposium go to the heart of America's most pressing and difficult social and political problems. The enduring legacy of American slavery and its aftermath remains with us, as we approach the sesquicentennial of the Emancipation Proclamation.

In addition to the focus on the United States, Part II also contains an article on manumission in Jewish Law and one on the ending of slavery in the British Caribbean. These two articles, along with Renee Redman's discussion of the League of Nations and the Abolition of Slavery in Part I,[2] remind us that the problem of freedom after slavery is not unique to this nation or to the nineteenth century.

Some of the articles in Part II, like those in Part I,[3] are explorations of legal and constitutional history. Ellen D. Katz shows that

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1. 70 CHI.-KENT L. REV. 325 (1994).

2. Renee C. Redman, *The League of Nations and the Right To Be Free from Enslavement: The First Human Right To Be Recognized as Customary International Law*, 70 CHI.-KENT L. REV. 759 (1994).

3. Aremona G. Bennett, *Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Rights and Ambitions Following Emancipation, 1865-1910*, 70 CHI.-KENT L. REV. 439 (1994); Andrew Kull, *The Enforceability After Emancipation of Debts Contracted for the Purchase of Slaves*, 70 CHI.-KENT L. REV. 493 (1994); Donald G. Nieman, *African Americans and the Meaning of Freedom: Washington County, Texas as a Case Study, 1865-1886*, 70 CHI.-KENT L. REV. 541 (1994); Christopher Waldrep, *Black Access to Law in Reconstruction: The Case of Warren County, Mississippi*, 70 CHI.-KENT L. REV. 583 (1994); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI.-KENT L. REV. 627 (1994).

freedom, for some Southern blacks, preceded the Civil War. Her essay illuminates the struggle to make liberty meaningful for free blacks in antebellum Virginia.[4] Emily Field Van Tassel and Patricia Hagler Minter show how that struggle continued after the adoption of the Thirteenth Amendment.[5] Both articles follow up on themes Peter Wallenstein articulated in *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s* in Part I of the symposium. All three articles tie nineteenth- (and twentieth-) century concepts of gender to race relations, showing how ideas about the former exacerbated the deterioration of the latter.

Xi Wang takes the story of freedom and law into the realm of politics, where he examines the first attempts to enforce federal voting rights laws.[6] The document edited by Steven Miller, Susan O'Donovan, John Rodrigue and Leslie Rowland shows that even before former slaves had formal political rights, they were striving to participate in politics.[7] Similarly, Marianne L. Engleman Lado shows the way African Americans participated in the legal struggle to preserve the rights and protections emanating from the Fourteenth Amendment.[8] Her article on the *Civil Rights Cases*[9] also serves as a companion to Richard Aynes's discussion[10] of the *Slaughterhouse Cases*[11] in Part I of the symposium.

Although historical, the articles in this symposium have important present-day implications. The future of the Voting Rights Act remains uncertain as does the status of various Congressional districts designed to give African Americans a stronger voice in American politics.[12] Surely we can learn something from the history of voting rights after the Civil War that might better enable us to deal with

4. Ellen D. Katz, *African-American Freedom in Antebellum Cumberland County, Virginia*, 70 CHI.-KENT L. REV. 927 (1995).

5. Emily F. Van Tassel, *"Only the Law Would Rule Between Us": Antimiscegenation, the Moral Economy of Dependency, and the Debate Over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873 (1995); Patricia H. Minter, *The Failure of Freedom: Class, Gender, and the Evolution of Segregated Transit Law in the Nineteenth-Century South*, 70 CHI.-KENT L. REV. 993 (1995).

6. Xi Wang, *The Making of Federal Enforcement Laws, 1870-1872*, 70 CHI.-KENT L. REV. 1013 (1995).

7. Steven F. Miller et al., *Between Emancipation and Enfranchisement: Law and the Political Mobilization of Black Southerners During Presidential Reconstruction, 1865-1867*, 70 CHI.-KENT L. REV. 1059 (1995).

8. Marianne E. Lado, *A Question of Justice: African-American Legal Perspectives on the 1883* Civil Rights Cases, 70 CHI.-KENT L. REV. 1123 (1995).

9. 109 U.S. 3 (1883).

10. Aynes, *supra* note 3.

11. 83 U.S. (16 Wall.) 36 (1872).

12. *See* Miller v. Johnson, 115 S. Ct. 2475 (1995); Shaw v. Reno, 113 S. Ct. 2816 (1993).

modern issues involving race and the franchise. Black participation in politics during Reconstruction might also serve as a model for today. The rate of participation in electoral politics has become frighteningly low; this is even more true among African Americans. Those who fail to vote—and those scholars, lawyers, and civil leaders who fail to urge others to vote—can learn much about the meaning of democracy by recalling the profound struggle to gain the franchise of the 1860s and 1870s. It seems unthinkable that African Americans could be effectively disfranchised, as they were in the late nineteenth and early twentieth centuries. But, perhaps that is what voters also thought in the 1870s.

Other articles in this issue have a more modern tone and cast. Peyton McCrary's discussion of segregation and local school boards, which dovetails with Davison Douglas's article in Part I of the Symposium,[13] reveals the way in which the heritage of post-Civil War America remains alive in our own legal world. Similarly, Robert Cottrol and Raymond Diamond directly tie post-Civil War opposition to the ownership of weapons by blacks to modern questions about gun control.[14] Kathleen Cleaver's review of David Roediger's book *The Wages of Whiteness* leads us to think about the problems of race and employment in a changing, deindustrialized economy.[15] Cleaver's essay reminds us that issues of class and race were tied together in the nineteenth century, just as they are today. Freedom for African Americans, it would seem, can be measured at least in part by the absence of racism in the job market and the work place.

Richard Aynes and Sanford Levinson make compelling, but quite different, contributions to this symposium's exploration of the law of freedom.[16] Their articles are less about the legal history of freedom, and more about the way in which we understand that freedom today. Both point to the future, while at the same time taking into account the importance of the past.

13. Davison M. Douglas, *The Quest for Freedom in the Post-*Brown *South: Desegregation and White Self-Interest*, 70 CHI.-KENT L. REV. 689 (1994); Peyton McCrary, *Yes, But What Have They Done To Black People Lately? The Role of Historical Evidence In The Virginia School Board Case*, 70 CHI.-KENT L. REV. 1275 (1995).

14. Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to be Applied to the White Population": Firearms Regulation and Racial Disparity — The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307 (1995).

15. Kathleen N. Cleaver, *The Antidemocratic Power of Whiteness*, 70 CHI.-KENT L. REV. 1375 (1995) (book review).

16. Aynes, *supra* note 3; Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079 (1995).

Aynes demonstrates how Professor Charles Fairman and Justice Felix Frankfurter shaped the history of the Fourteenth Amendment through scholarly writings, Supreme Court opinions, and mutual cooperation. This article forces scholars to reconsider how we should interpret the Fourteenth Amendment. By showing the purposeful, and often slippery and disingenuous history of the Fourteenth Amendment that these two scholars wrote, he illustrates the dangers of "law office history," whether written by prominent leaders of the academic world or by judges.

Finally, Sanford Levinson asks us to consider the complex relationships between postslavery freedom, racism, the First Amendment, and the symbols of our history and culture. He correctly observes that we "live by symbols" including "tangible colored pieces of cloth and marble depictions." The symbols of racial oppression, such as monuments to Confederate heroes and the Confederate battle flag, are part of our heritage. Although offensive to many, they can perhaps also be turned to a positive use. By recalling a less than perfect past, such symbols can provide an opportunity to find meaning in our historical experience.

In a sense, the monuments about which Professor Levinson writes may in the end dovetail with the overarching goal of this symposium and one I edited on the Law of Slavery two years ago:[17] to explore and consider how slavery and the struggle for freedom have shaped our legal heritage. The many contributions to both symposia remind us that the first step toward improving race relations in this country is to recognize and understand how we got to where we are.

Nearly a century ago, the great black scholar W.E.B. Du Bois predicted that the central issue of the twentieth century would be the struggle over the color line.[18] Du Bois was, sadly, a better prophet than even he could have imagined. As this century draws to a close, race is perhaps even a greater concern than when Du Bois wrote. Certainly, our world is different from that of Du Bois. Segregation is not enforced by law and integration and affirmative action have been incorporated into our public policy for a generation. Blacks share political power in many places: African Americans sit on our Courts, in the House of Representatives, in the Senate, and in the highest councils of state. Two blacks, Thurgood Marshall and Clarence Thomas, have served on the United States Supreme Court, something

17. Symposium, *Symposium on the Law of Slavery*, 68 CHI.-KENT. L. REV. 1005 (1993).
18. W.E.B. DU BOIS, SOULS OF BLACK FOLK 13 (1903).

unfathomable a century ago, when only a few blacks were attorneys.[19] Douglas Wilder most recently served as the first African-American governor of Virginia, sitting in what was once the capital of the Confederacy. Black chiefs command integrated police forces, black officers command white soldiers, and General Colin Powell not only chaired the Joint Chiefs of Staff, but is also considered as a serious possibility for the presidency.

Yet, despite these changes, so much seems not to have changed. The articles in this symposium both illustrate progress we have made and underscore how far we have to go before race is no longer the central issue of American life. We are not, as Martin Luther King, Jr. hoped we would be, "Free at last."[20] If we are to become free, we must understand the past so we can learn from it. This symposium, we hope, will contribute to that understanding.

19. *See generally* Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers as Social Engineers*, 47 STAN. L. REV. 161 (1994).

20. Rev. Martin Luther King, Jr., Address During March on Washington, *quoted in* ADAM FAIRCLOUGH, MARTIN LUTHER KING, JR. 90-91 (1990).