RACE, RELIGION, GENDER, AND INTERSTATE FEDERALISM: SOME NOTES FROM HISTORY

*By Akhil Reed Amar**

America today is a vast and far-flung empire, and some of its deepest political divisions implicate issues of race, religion, and gender. Superimposed on these divisions is the template of federalism, allowing different states and regions to try to resolve these divisive political issues differently. It was ever thus; and in a quick and broad way, I would like to sketch out for you a few examples of earlier historical flash points where interstate federalism met race, religion, and gender.

Begin with race. We have already heard a lot today about the idea of one country, with free interstate ingress and egress. This idea of a right to travel is quite prominent in Seth Kreimer's paper.[1] Even before we had the Constitution, we had the Articles of the Confederation; and one of the most central features of those Articles was Article IV—a precursor of our Constitution's own Article IV, which includes things like the Privileges-and-Immunities and Full-Faith-and-Credit Clauses. Under the Articles of Confederation, Article IV proclaimed that "the free inhabitants of each of these states, paupers, vagabonds, and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states."

Now, today we look at this from the perspective of the twentieth century and see the exclusions (for example, paupers), but I want you to see the inclusion. Granted, it says "free," so slaves were excluded, but here is what it does not say: it does not say "white." More than 200 years ago, that meant that free blacks, who were citizens of many northern states—recall the African American patriot Crispus Attucks,

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* Southmayd Professor of Law, Yale Law School. What follows is a lightly revised version of informal remarks delivered on September 6, 1996. I am especially grateful to Professor Jennifer Brown for inviting me to Quinnipiac—and for having invited me in May, 1993 to her wedding to Ian Ayres. At that wedding, Jennifer and I got to talking about marriage (naturally, enough), and at some point the conversation turned to the interstate issues raised by same-sex marriage. I am especially happy that, over the years, Jennifer has continued to involve me in these conversations.

1. *See* Seth Kreimer, *Territoriality and Moral Dissensus: Thoughts on Abortion, Slavery, Gay Marriage and Family Values*, 16 QUINNIPIAC L. REV. 161 (1996).

who fell at the Boston Massacre—would have all the rights of citizenship in southern states.

This did not sit particularly well with the South Carolina delegation, and they proposed an exception. They basically proposed inserting the word "white" between "free" and "inhabitants" because they did not want to have to recognize the status of free blacks as citizens in South Carolina. That proposal was rejected eight states to two, and "white" stayed out of Article IV of the Articles of Confederation; this, in turn, was the foundation of our own Article IV of the U.S. Constitution.[2]

Now I am going to fast-forward a bit. I am still talking about the problem of free blacks in the state of South Carolina; this is a continuing problem for South Carolinians. In 1820, of course, we have the Missouri Compromise, which constrained the expansion of slavery. North of a certain line, the territories would be free; south of that same line, slavery could exist. But at that point the U.S. had renounced any interest in Texas (things changed a bit later); and so southerners were worried that they had no elbow room for the westward expansion of slavery. At that time, they were also becoming increasingly obsessed by a perceived internal threat. There was a paranoid reaction to the threat of slave insurrection. In particular, in the early 1820s there was an alleged insurrection plot—historians are not sure exactly how real it actually was—involving Denmark Vesey in South Carolina. South Carolinians were convinced that this was all the work of outside agitators, especially free black persons coming down from the North to stir up the slaves.[3]

In response, South Carolina tried to pass a law, the Negro Seamen's Act. This Act said that when a Negro sailor came into port, he had to stay on the ship—if he left the ship and came ashore, he was basically clapped in irons, held in jail, and if the captain of the ship did not redeem him when the ship left port, he would be sold down the river into slavery.[4] Now, let me remind you, these black sailors were citizens, free citizens of northern states and free citizens of other countries like Great Britain. All this gave rise to a very important case decided by Circuit Justice Johnson, who invalidated the Act.[5] This cause

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2. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 572-85 (1857) (Curtis, J., dissenting).

3. *See generally* WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760-1848, at 126-32 (1977).

4. *See id.* at 132.

5. *See* Elkison v. Deliesseline, 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4,366). For general

celebre led to all sorts of assertions of nullification and interposition, with South Carolina simply refusing to be bound by federal treaties, treaties by which the United States had pledged to Great Britain that British citizens would be treated with dignity and respect when they happened to come to America. In South Carolina, Justice Johnson's ruling was widely defied for thirty or forty years; South Carolina worried that when free blacks came to the state, they would make it difficult for South Carolina to remain a slave state. Already you see the tensions of interstate federalism.

In the 1840s, the issue resurfaced. A Massachusetts lawyer named Samuel Hoar journeyed down to South Carolina to represent various free blacks subjected to this law. He traveled down with his daughter, and he was basically run out of town on a rail. The South Carolina legislature passed an act of attainder and banishment; they gave him a few hours to leave the state. Naturally, he high-tailed it out of there.[6] That major interstate encounter was one of the most notorious events of the day and was discussed over and over and over again in the legislative debates concerning the Fourteenth Amendment.[7] It was the backdrop against which the Fourteenth Amendment and its Privileges-or-Immunities Clause—which has some language very similar to the Privileges-and-Immunities Clause of Article IV—was drafted.[8]

So much for free blacks. What about allegedly unfree blacks? What do you do when a person who is in the North and who claims to be free is alleged by some white man to be a runaway slave? That was the problem in the 1842 case of *Prigg v. Pennsylvania*.[9] The real problem was, once again, an interstate federalism issue: black people in the North were presumed free, and the burden of proof was on someone else to prove otherwise, but in the South, blacks were presumed slaves. So what happened when a slave catcher unilaterally went up into (the free state of) Pennsylvania, grabbed some guy, said, "You are my slave," and then tried to yank him across the state line to (the slave state of) Maryland? Pennsylvania thought this was kidnapping. "If he is your slave, come into our courts and prove it. If so, under the Fugitive Slave Clause, alas, we may be obliged to render the slave. But, you

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discussion and analysis of the case and its aftermath, see W. WIECEK, *supra* note 3, at 133-39; 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 84-87 (1922).

6. For details, see W. WIECEK, *supra* note 3, at 140; Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1277 (1992).

7. *See* Amar, *supra* note 6, at 1277 n. 357.

8. *See id.* at 1229-30.

9. 41 U.S. (16 Pet.) 539 (1842).

have to prove that he is indeed a slave."

You can now see how the original constitutional solution of leaving race relations and slavery up to local option is starting to erode. South Carolina could not quite live with free law to the North, because, through sailors and the like, free law was being exported by dark-skinned folks; Pennsylvania, conversely, could not quite live with slave laws below it, because these laws were threatening to turn all free black Pennsylvanians into kidnap bait.

This problem arose again in the 1850s with great drama in the *Dred Scott* case, which once again posed the familiar problem of what to do when free law met slave law in a country that was divided geographically. Chief Justice Taney proclaimed that Congress had to enforce slavery in the territories. When a slave master voluntarily took a slave with him—now we are talking not about runaway slave, but about a slave master voluntarily taking his slave to free federal territory—Congress was obliged to enforce his mastery. To not enforce the slavery, the servitude, Chief Justice Taney said, was to violate due process of law.[10] The only thing standing between *Dred Scott's* logic and the utter nationalization of slavery—so that Dred Scott's master could take him into Massachusetts, into Pennsylvania, into New York, into Connecticut and live there forever—was a technical case called *Barron v. Baltimore*.[11] That case said that, technically, the Fifth Amendment Due Process Clause does not apply to state governments, but applies only to the federal government. However, every time a free state refused to enforce the servitude, under Taney's theory, it was violating due process.

Now, consider *Lemmon v. People*,[12] a case pending before the United States Supreme Court in 1861, when the Civil War broke out. In *Lemmon*, a master wanted to take a slave from one slave state to another, and he took a somewhat circuitous route, stopping off in New York City. He was going by ship, and in those days the best way to get from one southern port to another southern port was often through the entrepot of New York City. He took his slave with him, and then he alit from the ship, and he wanted to keep the slave with him in the hotel while they were waiting for the new ship to come in. But, New

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10. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857).

11. 32 U.S. (7 Pet.) 243 (1833).

12. 20 N.Y. 562 (1800). For general discussion, see 2 C. WARREN, *supra* note 5, at 82-83. *See also* Kreimer, *supra* note 1; Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105 (1996).

York said, in effect, "We do not want to enforce slavery here in New York. We are a free state." And so New York courts issued a writ of habeas corpus and ordered the release of this slave. The response was, "You can not do that. When people are involved in interstate transit and interstate commerce, it is the obligation of even a free state to enforce servitude." So again you can see in these race cases, the problems of this geographic house divided. In the short run, it seemed like a good solution to let each state choose for itself. But in the long run, because people move and we are one nation, the solution starts to break down.

Let us next consider religion, and here I will be somewhat shorter. Today, we think the Establishment Clause of the First Amendment reflects a national commitment against established churches. In fact, that is not quite so. If you look carefully at the clause, it says: "Congress shall make no law respecting an establishment of religion." In the 1780s, this was nothing more than a local option amendment. It basically said that each state should decide whether to have an established church or not. Congress would not create a national established church, but neither would it disestablish any existing state churches; it would pass no law respecting (i.e., concerning) the establishment of religion—no law one way or the other.[13] Most of the New England states already had established state churches at the Founding and the First Amendment said that Congress could not interfere with state establishment (or non-establishment) policies. It was the American equivalent of the Peace of Augsburg of 1555, or the Treaty of Westphalia in 1648, where religious warfare in Europe was resolved by allowing the religion of the local prince to determine the religion of the principality. There would be no imperial policy on religion; it would be left to local option. That was the original First Amendment vision—each state would decide for itself.

That system started to break down over time. Consider the territories. There, Congress had to decide one way or the other: was there to be government-sponsored religion in the territories or not? And here, the Establishment Clause started to take on an anti-establishment rather than simply agnostic hue.

Of course, with the territorial expansion westward in the nineteenth century, one of the big issues concerned polygamy and the Mor-

13. *See generally* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157-60 (1991); Akhil Reed Amar, *Some Notes on the Establishment Clause*, 2 ROGER WILLIAMS U. L. REV. 1 (1996).

mon movement. In 1856, the Republican Party condemned slavery and polygamy as twin relics of barbarism.[14] That is partly because Republicans were anti-Mormon, but also because they believed that slavery itself was a form of polygamy, giving southern white slave masters access to black women as concubines and mistresses.[15] So, the great party of freedom at the time, the Republican Party, was dead set against polygamy in the slaveholding South and in the Mormon West. Utah was essentially not allowed to become a state until the Mormon Church renounced even the idea of polygamy; as late as 1890, there was a statute on the books making it a crime merely to advocate polygamy. If you did, you would be disenfranchised. And this statute was upheld by the United States Supreme Court in the case of *Davis v. Beeson*.[16] Now, you might say, "Who cares about that? That was in 1890." But I should remind you that *Davis* was cited just this year by Justice Scalia in *Romer v. Evans*.[17]

Having discussed a few interstate issues implicating race and religion, let me conclude with just a few observations about gender. The word "male" gets put into the Constitution for the very first time in Section 2 of the Fourteenth Amendment. Here is the problem. After the Civil War, all the blacks were freed. It used to be the case that a southern (unfree) black only counted as three-fifths of a person when it came to national apportionment. After the Thirteenth Amendment, however, all those newly freed blacks counted one for one. When the confederate states sought to come back to Congress after the Civil War, they were going to claim more representation than they had had before. This seemed odd; they were not letting black people vote. So, you might think, "Okay, change the rule of representation. Instead of basing representation in Congress on a state's overall population, let us base the number of seats in Congress on the number of people who are actually allowed to vote." That seems like a sound theory. If southerners let blacks vote, then they could count them in the representation and apportionment base; but if they did not, they could not. The problem with that idea was that it would skew the balance among the northern states, because there were very few women in California but lots in Massachusetts. To solve this problem, Congress came up with compli-

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14. 1 NATIONAL PARTY PLATFORMS 1840-1956, at 27 (Donald B. Johnson & Kirk H. Porter, eds., 1973).

15. *See generally* Akhil Reed Amar and Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1366-68 (1992).

16. 133 U.S. 333 (1890).

17. 116 S. Ct. 1620, 1635-36 (1996) (Scalia, J., dissenting).

cated wording in Section 2 of the Fourteenth Amendment, which first puts the word "male" in the Constitution.

Fast-forward thirty years and we begin to see states individually giving women the vote. Utah was one of the first, along with Wyoming and Colorado and Idaho. Now, go back to the Fourteenth Amendment. If you had apportionment based on the number of people who voted, any state that—heaven forbid—let women vote would automatically double its representation in Congress. That, thought the men of the Thirty-Ninth Congress, would create perverse incentive: If you let women vote, you would automatically double your state's clout in the House of Representatives. If we had had direct election for the Presidency, any state that let its women vote would have doubled its impact in Presidential elections, too. However, we had—and still have—the Electoral College System, which basically says, "No matter how few or how many people a state lets vote, it still has the same number of electoral votes." But, something else did happen. State by state, women got the vote, in California, in Oregon, in New York, and elsewhere; at a certain point—and this connects with Evan's observation about contesting the map of America[18]—when there were enough states that let women vote, anyone who wanted to be President had to be for women's suffrage. If you were not in favor of women's suffrage, you could kiss those states' electoral college votes goodbye. Lots of senators at the time wanted to be President. (Some things do not change.) That is how we got the Nineteenth Amendment: first, state by state, and then, once enough of that map has been contested, we reached a tipping point.[19]

Let me conclude with the following observation on race, on religion, on gender: the initial strategy was often for the federal government to be neutral or agnostic, to leave certain things to local option. Those strategies worked for a while. But, in the long run, on the race question this country could not exist half slave and half free. In the long run, because of the territories, we had to decide whether the First Amendment was simply agnostic on the issue of establishment or was truly committed to an affirmative anti-establishment principle. And on gender, the initial strategy of local option, of course, gave way to the Nineteenth Amendment and a national vision of equality.

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18. Evan Wolfson, *The Freedom to Marry: Our Struggles for the Map of the Country*, 16 QUINNIPIAC L. REV. 209 (1996).

19. *See* AILEEN S. KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT 1890-1920, at 192 (1971).

I suggest that the long-term lesson then of all this is a hopeful one for Evan and his colleagues. They start state by state, but in the long run[20] the nation probably cannot exist half slave and half free on this question.

20. Of course, the long run can be long indeed.