

## AFTERWORD: A REPLY TO COMMENTATORS

GABRIEL J. CHIN & PAUL FINKELMAN

We are extremely grateful to the distinguished scholars who have written reflections on the issues raised by our article; they, as well as other attendees at a symposium at the University of California, Davis School of Law asked helpful questions and offered challenging comments to which we now respond.

When contending that the Framers envisioned the United States to be a White nation, we agree that they did not necessarily mean the complete exclusion of non-White people. Moreover, as we note in our article, about one-fifth of all Americans in 1790 were either Black or Indian.<sup>1</sup> But the nation's legal policy and some favored social policies were designed to make it more White and less non-White. For example, the goal of the American Colonization Society, formed in 1816, was to resettle former slaves in Africa, which of course would make the nation less Black and more White.<sup>2</sup> Many of the leaders at the Society were Founders or what we might call second-generation Founders. The first national president of the Society was Supreme Court Justice Bushrod Washington, the nephew of President George Washington, who was appointed to the Court by President John Adams.<sup>3</sup> The leader of the Society in Virginia (the most important state branch) was Chief Justice John Marshall, who was a key figure at the Virginia Convention which ratified the Constitution.<sup>4</sup> Chief Justice Marshall was an important diplomat in

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1. See Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* 3, 19 (U.S. Census Bureau, Working Paper No. 56).

2. See Paul Finkelman, *American Colonization Society Through 1895*, in *ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY, 1619-1895: FROM THE COLONIAL PERIOD TO THE AGE OF FREDERICK DOUGLASS* (Paul Finkelman ed., 2009).

3. See *id.*

4. See CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE*

the 1790s and served as Secretary of State under President Adams before Adams nominated him as Chief Justice.<sup>5</sup> As Chief Justice, Marshall would never support Black freedom, but did not use the full authority of federal laws to suppress the African slave trade.<sup>6</sup> Henry Clay of Kentucky served as president from 1836 to 1849.<sup>7</sup> Clay was a United States senator during the Jefferson and Madison administrations, served as the Speaker of the House of Representative while James Monroe was president, and was Secretary of State under John Quincy Adams.<sup>8</sup> These three leaders of the Colonization Society—who were also slaveowners—were the younger generation while the Founders were presidents. After 1819, federal laws required that slaves illegally imported into the United States would be sent back to Africa,<sup>9</sup> but otherwise no federal laws required the forcible deportation of Black persons on the basis of race. Nor do we see in the early statements of the Founders the idea that the one and only possible fate of the Indians was extermination; assimilation and relocation west of the Mississippi River were also possibilities. The forcible removal of the tribes in the American South to what is today Oklahoma protected their tribal identity, even as it removed these Indians from American states, making the rest of the nation more White.<sup>10</sup>

On the other hand, it seems clear that Congress was not eager to encourage voluntary immigration to the United States of persons of African ancestry. While the immigration of Canadian Indians was protected by the Jay Treaty,<sup>11</sup> we see little indication that the Founders contemplated substantial Indian immigration from any source.

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OF LAW 164-65 (1996).

5. *See id.* at 6-7.

6. *See* PAUL FINKELMAN, *SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT* chs. 2-3 (2018).

7. *See* Finkelman, *supra* note 2.

8. *Public Office of Henry Clay*, BRITANNICA, <https://www.britannica.com/biography/Henry-Clay/Public-office> [<https://perma.cc/ZD68-TT5J>].

9. Act of Mar. 3, 1819, ch. 101, 3 Stat. 532.

10. Indian Removal Act of 1830, ch. 189, 4 Stat. 411.

11. Paul Spruhan, *The Canadian Indian Free Passage Right: The Last Stronghold of Explicit Race Restriction in United States Immigration Law*, 85 N. DAKOTA L. REV. 301, 304 (2009).

We do not question Professor Berger's proposition that the 1790 Intercourse Act was simultaneously both Indian-protective and paternalistic (or that it was itself a super-statute).<sup>12</sup> We are also open to the possibility that denial of citizenship to Indians who retained tribal identity may have had the purpose and/or effect of protecting tribal autonomy. Nor do we doubt the sincerity of Thomas Jefferson's remarkable statement inviting Indians to assimilate.<sup>13</sup> Even Andrew Jackson, most remembered for both making war on Indians and later forcing them to leave their homelands, was not opposed to the idea of individual Indians assimilating.<sup>14</sup> Nevertheless, we suspect Professor Berger might agree with our view that protections were offered to Indians who went along with the design of the Framers that the land theretofore belonging to the Indians would, one way or another, be made available to the Americans and the immigrants they hoped to attract to own, occupy, and develop it. Indeed, the Indian Removal Act, while creating the opportunity for tribal sovereignty in the Indian Territories, allowed the federal government to own (and distribute to White people) vast amounts of land previously owned by Indian tribes.<sup>15</sup> While some, many, or all cooperative Indians may have been invited to assimilate into the White communities, that assimilation would be on White terms. It was the Indians who would have to become "civilized," not a merger of equals.<sup>16</sup> There was also an assumption, by Jefferson and others, that as Indians assimilated, they would gradually melt into White society. Indian culture would disappear, and intermarriage—which

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12. Bethany Berger, Comment, *Separate, Sovereign, and Subjugated: Native Citizenship and the 1790 Trade and Intercourse Act*, 65 WM. & MARY L. REV. 1117, 1119-20 (2024).

13. See Letter from Thomas Jefferson to Captain Hendrick Apaumut & the Delawares, Mohiccons, and Munries (Dec. 21, 1808), <https://founders.archives.gov/documents/Jefferson/99-01-02-9358> [<https://perma.cc/ED52-Z73Z>].

14. See, e.g., ROBERT V. REMINI, *ANDREW JACKSON AND HIS INDIAN WARS* (2001). Jackson himself had an adopted Indian son. See *id.* at 64-65. It is of course impossible to imagine the slaveholding Jackson adopting a Black child.

15. See Indian Removal Act of 1830, ch. 189, 4 Stat. 411.

16. See *In re Mayfield*, 141 U.S. 107, 115-16 (1891) ("The policy of Congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization.").

had existed since at least 1614, when John Rolfe married Pocahontas<sup>17</sup>—would “solve” the Indian question. Illustrative of this is the fact the son of John and Pocahontas, Thomas Rolfe, would be the progenitor of many of the first families of Virginia, who were proud of their Indian foremother, even as they saw themselves as “White.”<sup>18</sup>

We agree that there was always an opposition, indeed, a meaningful opposition, to creating a “White” nation. In the judicial field, we all know of the modern icons like Justices Hugo Black, William O. Douglas, Earl Warren, William Brennan, and Thurgood Marshall, who articulated opposition to segregation and racism.<sup>19</sup> But we also note the Justices who spoke out against slavery and Jim Crow-era well before the modern era, such as Justices John McLean, Salmon P. Chase, and John Marshall Harlan and the arguments for racial justice made by Justices Oliver Wendell Holmes, Jr., Louis Brandeis, and Benjamin Cardozo, and Chief Justice Charles Evans Hughes during and after World War I. As is exemplified by the attack on slavery in the debate over the Naturalization Act of 1795, there were always White Americans who opposed such things as slavery,<sup>20</sup> appropriation of Indian tribal land, racial restriction on citizenship and immigration, Jim Crow, Chinese Exclusion, and incarceration of Japanese Americans. The problem was that racial egalitarians were usually in the minority, and usually lost the political and policy debates, and were outvoted on the Supreme Court.

We agree that racism was not the universal choice. As Professor Frost suggested, it appears that, as the Supreme Court held in *United States v. Wong Kim Ark*, the drafters consciously chose to make the birthright citizenship granted by Section 1 of the Fourteenth Amendment applicable to non-White people as well as to White

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17. Emily Jones Salmon, *John Rolfe (d. 1622)*, ENCYCLOPEDIA VA., <https://encyclopedia.virginia.org/entries/rolfe-john-d-1622/> [<https://perma.cc/4BHN-QPRZ>].

18. *See id.*

19. *See* Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 237-38 (1968); Lucius J. Barker, *Black Americans and the Burger Court: Implications for the Political System*, 1973 WASH. U. L.Q. 747, 752 (1973); *see also* Gabriel J. Chin & Paul Finkelman, *The “Free White Person” Clause of the Naturalization Act of 1790 as Super-Statute*, 65 WM. & MARY L. REV. 1047, 1067 (2024).

20. *See* Chin & Finkelman, *supra* note 19, at 1078.

people.<sup>21</sup> Rather than the product of loose drafting or the lack of attention to the question, this was an intentional civil rights triumph, in which supporters of equality out argued and outvoted the opponents of birthright citizenship for Chinese Americans.<sup>22</sup> But that did not mean that noncitizens would be invited or allowed to enter the United States without consideration of race. Birthright citizenship was available to the children of immigrants who could not naturalize.<sup>23</sup> Nevertheless, the government acted with alacrity to ensure that the vast majority of the people who might have the opportunity to give birth to a citizen in the United States were White.

In a number of ways, immigration and citizenship restrictions could have gone farther than they did. For example, it is somewhat surprising, and beneficial to people of color, that a racial restriction on naturalization was not in the Constitution itself. That fact allowed naturalization of Indians by treaty and statute, and extension of the privilege to non-White groups, as groups, over time. After the Supreme Court held that even children of Chinese immigrants, born in the United States were U.S. citizens under the Fourteenth Amendment in *United States v. Wong Kim Ark*, there were calls to amend the Constitution to overrule that decision, but such proposals never passed Congress.<sup>24</sup> Without a constitutional amendment, Congress could have imposed a racial restriction on derivative citizenship, that is, citizenship of children of U.S. citizens born overseas. The fact that U.S.-born people of Chinese ancestry were citizens, and their children born in China had the same status, allowed some migration from that country even in the exclusion era. Undoubtedly, there was some fraud associated with such migration, but Congress never cut it off.

Again, we see a distinction between people of color who are already in the United States, born in the United States, or born overseas to parents who were U.S. citizens, who may be recognized

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21. See Amanda Frost, Comment, *Paradoxical Citizenship*, 65 WM. & MARY L. REV. 1177, 1185-16, (2024).

22. For a discussion of the debate over this clause in Congress, see Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHICAGO-KENT L. REV. 1019, 1022-29, 1033 (2014).

23. See Chin & Finkelman, *supra* note 19, at 1070-71.

24. See *id.*

as having some rights, and those who sought to move to the United States or have the benefits of the U.S. Constitution. This distinction seems to help explain the *Insular Cases* and their treatment of some U.S. territories as “unincorporated,” and outside the area which would be entitled to rights, as Professor Cuison-Villazor points out in her paper.<sup>25</sup>

At the same time, the projects of racial domination were fantastically effective. Even if Asian Exclusion was imperfect and had some small loopholes, the effort to ensure that there would be no significant Asian presence in the United States worked. If, through the 1790 Intercourse Act and other legislation and policy, the federal government protected Indian tribes from some forms of exploitation by states and individuals, the government nevertheless was not hindered in its overall effort to acquire Indian land.

Professor Chen raised the provocative question of whether racial restriction was inevitable.<sup>26</sup> Given the lack of explicit debate over the word “White” in 1790, was there a possibility that naturalization could have been race-neutral? Instead of crudely classifying by race, could there have been case-by-case examination, perhaps even with special requirements for non-Whites?

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25. See Rose Cuison-Villazor, Comment, *Creating a Racialized Liminal Status: The 1790 Act and Interstitial Citizenship*, 65 WM. & MARY L. REV. 1157, 1160 (2024).

26. Ming Hsu Chen, Comment, *The Road Not Taken: A Critical Juncture in Racial Preferences for Naturalized Citizenship*, 65 WM. & MARY L. REV. 1137, 1139 (2024).