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White Supremacy Part 2: A Slavery Constitution?

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8-2022

The White Supremacist Constitution

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[...]

I. THE CONSTITUTION'S WHITE SUPREMACIST UNDERPINNINGS

This Part discusses the strong current of white supremacy that has dominated American politics in every era. Part II shows how the courts have faithfully interpreted the Constitution to achieve this end.

The British kidnapped the first group of African people in 1619 and “dragged [them] to this county in chains to be sold into slavery.”⁴⁵ By the time of the American Revolution, the British had forcibly transported around three million African people to the American colonies to work as enslaved people.⁴⁶ Slavery formed the core of the Southern colonies’ agricultural economy.⁴⁷ “[T]he slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime.”⁴⁸

As thoroughly documented by Manisha Sinha, enslaved people always sought the abolition of slavery in the United States.⁴⁹ During the revolutionary era, they “accepted abolitionism in word and deed as an article of faith.”⁵⁰ They petitioned the government for the immediate abolition of slavery; they sought both compensation and redress.⁵¹ In comparison to the complaints of the white colonists against Great Britain, enslaved people thought their own sufferings were far more profound.⁵² Despite this resistance, slavery was deeply entrenched in the American colonies.⁵³ “Forgotten antislavery voices and actions of Quaker and African pioneers, slave rebels and runaways, radical, dissenting Christianity, English antislavery lawyers and judges, and early black writers all played a part in laying the foundation of revolutionary abolitionism.”⁵⁴ Abolition’s origins in the United States were interracial, even if not embraced by the propertied white men who wrote the Constitution.

Thomas Jefferson’s original draft of the Declaration of Independence contained some anti-slavery language, but it was “removed at the behest of lower south slaveholders from South Carolina and Georgia.”⁵⁵ Like Thomas Jefferson, both John Jay and Benjamin Franklin were slaveholders.⁵⁶ “Antislavery sentiment among the founding fathers may have been widespread, but committed abolitionists were few and far between.”⁵⁷ Despite his long-term sexual relationship⁵⁸ with Sally Hemings, with whom he fathered six Black children, Jefferson believed that Black people were “inferior in the faculties of reason and imagination” and that racial “mixing” should not take place after slaves were freed.⁵⁹ Jefferson’s racist views were used by

influential Virginia residents, like St. George Tucker, to justify the inappropriateness of allowing free Black people to join Virginia's privileged society.⁶⁰

The language of the U.S. Constitution, as it was adopted in 1787, makes it clear that the slaveholders controlled the narrative. The fact that the document did not use the words "slave" or "slavery" should not be misunderstood as any kind of vindication for abolitionists. Article One, Section Nine provided that the "migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight."⁶¹ Such "persons," of course, were African slaves. Their continued, forcible kidnapping from Africa to be held as slaves was permitted to continue until 1808. The Three-Fifths Clause⁶² refused to recognize slaves as persons entitled to hold citizenship and vote and also allowed the Southern colonies to dominate the national government. As David Waldstreicher has argued, we should consider the Constitution to be "Slavery's Constitution."⁶³

In 1808, the United States Congress abolished the importation of slaves, a year after Britain had outlawed the British Atlantic slave trade.⁶⁴ Thereafter, enslaved people already held in the United States, and their offspring, were rarely made free.⁶⁵

White owners of enslaved people still traded enslaved people and their children. With a population of four million enslaved people, slavery could thrive without the assistance of an African trade to bring newly enslaved people to the United States.⁶⁶ Seeds of anti-slavery sentiment always existed, and they gained more weight in the nineteenth century. In fact, the emerging anti-slavery view in the early eighteenth

century, especially among white politicians and activists, was arguably consistent with white supremacy because it did not seek to free or empower Black people. In the 1820s, the predominant anti-slavery position was that of colonization—freed Black people would be forcefully relocated back to Africa.⁶⁷ Thomas Jefferson, who was well known as the chief architect of the Declaration of Independence, favored the colonization position. While a draft of the Declaration of Independence had included the charge that the King has waged a "cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them in slavery in another hemisphere, or to incur miserable death in their transportation thither," that language was not included in the final document.⁶⁸ In his *Autobiography*, Jefferson took the position that "the two races, equally free, cannot live in the same government."⁶⁹

K-Sue Park, in a brilliant piece on U.S. historical self-deportation policy, argues that anti-slavery proponents in the late eighteenth and early nineteenth centuries could not imagine integrating Black people into U.S. life as a consequence of ending slavery.⁷⁰ "White northerners wished to ensure that blacks would stay in the South, and white southerners would not contemplate civic equality. These factors, together with the daunting expense and logistics of a mass expulsion, long stymied efforts during the early Republic to imagine a concrete end to slavery."⁷¹ The mass deportation of free Black people was a central point of deliberation along a broad political spectrum. "Indeed, Frederick Douglass remarked that 'almost every respectable man' in the north was in favor of black colonization. By the 1840s . . . eleven northern state legislatures had formally endorsed black colonization."⁷²

While Sinha's work⁷³ suggests that most free Black people opposed colonization, John Russwurm, one of the two Black editors of *Freedom's Journal*, favored colonization.⁷⁴ Further, Russwurm's publication often expressed the view "that lower-income Blacks had an inferior work ethic, inferior intelligence, and inferior morality compared to White people and Black elites like him."⁷⁵

Some anti-slavery advocates, however, began to oppose colonization. William Lloyd Garrison, a white man raised in New England in poverty, initially championed colonization,⁷⁶ but, by 1828, he began to support “a gradual abolition of slavery” rather than colonization.⁷⁷ He first thought that immediate emancipation was a “wild vision” but then moved to the position of supporting immediate emancipation.⁷⁸

Antislavery activist David Walker, who was a member of Boston’s Black community, agreed with Garrison that immediate emancipation was necessary. In fact, in his pamphlets, Walker urged Black people to mobilize for a revolutionary war.⁷⁹ Nonetheless, like Russwurm, Walker thought that slavery had made Black people inferior.⁸⁰ They were “the most degraded, wretched, and abject set of beings that ever lived since the world began.”⁸¹ Walker also drew on the Declaration of Independence, “imploping Americans to ‘See your Declaration!’”⁸² as part of his call for Black people to attain their freedom. Many Southern states tried to suppress his pamphlet because of its subversive appeal.⁸³

Although Nat Turner’s 1832 rebellion famously used force to free Black people from slavery, abolitionists, such as Garrison, criticized those efforts arguing that the “fury against revolters” would cause the public to forget the horrors of slavery.⁸⁴ The dominant message from anti-slavery activists was the importance of uplift suasion.⁸⁵ The newly formed American Anti-Slavery Society, for example, instructed their agents in 1833 to instill in free Black people “the importance of domestic order, and the performance of relative duties in families; of correct habits; command of temper and courteous manners.”⁸⁶

In a well-known and important historical disagreement, William Lloyd Garrison and Frederick Douglass debated whether the United States Constitution could be understood to be a proslavery document. Garrison called the Constitution’s failure to abolish slavery a “covenant with death and an agreement with hell.”⁸⁷ Both white and Black abolitionists disagreed with this interpretation of the Constitution, insisting that it could be used to challenge slavery even before the Reconstruction Amendments were ratified.⁸⁸ While initially agreeing with Garrison that the Constitution was inherently a “pro-slavery instrument” that abolitionists should not support, Douglass converted “to the antislavery side after years of careful consideration and abolitionist activism including publishing his paper, lecturing against slavery, and concealing fugitive slaves.”⁸⁹ As he described in his autobiography, he came to this conclusion after a:

course of thought and reading . . . that the Constitution of the United States—inaugurated to ‘form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty’—could not have been designed at the same time to maintain and perpetuate a system of rapine and murder like slavery.⁹⁰

It is wrong, however, to understand Douglass as underestimating the work required for genuine abolitionism irrespective of how the Constitution was interpreted. Douglass argued that the Civil War would ultimately decide “which of the two, Freedom or Slavery, shall give law to this republic.”⁹¹ But, as Jennifer McAward has noted, Douglass also wrote an article in the *Rochester North Star* in 1849 in which he expressed concern “that even after emancipation, there would be ‘long and dark . . . years through which the freed bondman will have to pass’ to cleanse himself of the badge of slavery.”⁹²

Unfortunately, history has shown that the U.S. Constitution has helped perpetuate the badges and incidents of slavery,⁹³ even after the ratification of the Civil War Amendments. Andrew Johnson reflected the white supremacy values of

his time when he ascended to the Presidency following Lincoln's assassination on April 14, 1865. In his December 1867 message to Congress, after the Thirteenth Amendment had been ratified, Johnson proclaimed that Black people possessed less "capacity for government than any other race of people. No independent government of any form has even been successful in their hands. On the contrary, wherever they have been left to their own devices they have shown a constant tendency to relapse into barbarism."⁹⁴ Historian Eric Foner characterizes this statement as "probably the most blatantly racist pronouncement ever to appear in an official state paper of an American President."⁹⁵

Not surprisingly, President Johnson used his veto authority to stall even modest improvements in the lives of newly freed people. He vetoed the Freedman's Bureau Bill of 1866, repudiating the very idea of Congress constituting a Freedman's Bureau. He argued that the limited economic assistance contemplated under the Act would produce "immense patronage" and criticized the notion that Congress would be "called upon to provide economic relief, establish schools, or purchase land for 'our own people'; such aid, moreover, would injure the 'character' and 'prospects' of the freedmen by implying that they did not have to work for a living."⁹⁶ Further, Johnson insisted that "clothing blacks with the privileges of citizenship discriminated against whites – 'the distinction of race and color is by the bill made to operate in favor of the colored and against the white race.'"⁹⁷ In a telling interplay, when Johnson asked during a rally, "What does the veto mean?" A voice from the crowd shouted, "It is keeping the n--- down."⁹⁸ As Foner observes, "Johnson voiced themes that to this day have sustained opposition to federal intervention on behalf of blacks."⁹⁹ Congress was not able to override his veto.¹⁰⁰

It is helpful to pause and consider Johnson's views in comparison to modern views about race discrimination. Notice how Johnson equated discrimination against white people as being as bad (or worse) than discrimination against Black people. He tied a concern about discrimination against white people with an attempt to keep "the n--- down." Today, by comparison, it is elementary that discrimination against white people is considered as constitutionally suspect as discrimination against Black people.¹⁰¹ The courts have abandoned an anti-subordination perspective¹⁰² under which they could understand the Constitution as a tool to help Black people overcome the legacy of slavery. Thus, it is no surprise that, as Asad Rahim's careful historical work demonstrates, Justice Powell's diversity rationale in *Bakke* was *not* rooted in "his longstanding commitment to integration and racial equality."¹⁰³ Before joining the Court, Powell "spent nearly two decades resisting compulsory integration . . . [and] traveled the country telling audiences that African Americans were owed nothing for injustices of the past."¹⁰⁴ While it would not be correct to equate Johnson's overt racism with Powell's opposition to compulsory racial integration, both provide helpful illustration of the early roots of the formal equality perspective that contends that society needs to protect white people from race discrimination. Historically, it is important to document the consistency of that formal equality view from the late nineteenth century to the present time.

In the nineteenth century, Johnson's opposition to reconstruction placed him at odds with the Republican majority in Congress. Johnson favored "almost total amnesty to ex-Confederates, a program of rapid restoration of U.S.-state status for the seceded states, and the approval of new, local Southern governments, which were able to legislate 'Black Codes' that preserved the system of slavery in all but its name."¹⁰⁵

Ironically, Johnson's resistance to racial equality may have helped spur the ratification of the Fourteenth Amendment.¹⁰⁶ Congress may have concluded that the ratification of the Fourteenth Amendment was more urgently needed because, without such an amendment, they would lack the authority to invalidate the Black Codes and enact civil rights legislation.¹⁰⁷ But the Fourteenth Amendment was, in many ways, a modest document. It did not guarantee suffrage to the people who were newly freed. It did invalidate the Black Codes and give power to Congress to enact a Civil Rights Act pursuant to its Section 5 powers.¹⁰⁸ Yet, as Foner argues, the Fourteenth Amendment did not reflect a break with the principles of federalism. "Most Republicans assumed the states would retain the largest authority over local affairs."¹⁰⁹ The Civil Rights Act placed enormous power in the hands of the judiciary to enforce civil rights.¹¹⁰ That mechanism "appeared preferable to maintaining indefinitely a standing army in the South, or establishing a permanent national bureaucracy empowered to oversee Reconstruction."¹¹¹ The judiciary, however, as we have seen in more recent times, can reflect Johnson's attitude that providing civil rights to Black people constitutes discrimination against whites.¹¹²

In 1869, Congress finally ratified the Fifteenth Amendment, providing the right to vote to Black men.¹¹³ But "the Amendment said nothing about the right to hold office and failed to make voting requirements 'uniform throughout the land,' as many Radicals desired . . . [It] did not forbid literacy, property, and educational tests that, while nonracial, might effectively exclude the majority of [B]lacks from the polls."¹¹⁴ The limitations of the reach of the Fifteenth Amendment are still with us today, as states are free to use various voting suppression tactics to disenfranchise large swaths of the Black electorate.¹¹⁵

Thus, the challenge for abolitionists, since the settling of the American colonies, is a power elite who castigated Black people if they were poor and also if they were well-educated and more affluent. During the colonial era, the power elite took the view that emancipation would lead to a large vagrant poor who would be the source of social disorder.¹¹⁶ In response, white abolitionists pushed for "model Black behavior" to deflect such concerns through the development of Black churches and schools.¹¹⁷ Such efforts, however, provoked rather than deflected racism. "Many whites took umbrage at African Americans who supposedly stepped out of their place by displaying economic independence, political assertiveness, and social skills."¹¹⁸ These views were not regional; they were found in the South as well as in New England.¹¹⁹

In fact, as Kendi has persuasively documented,¹²⁰ white supremacist ideology has been a major force in United States life since European settlers descended on and occupied Native American soil. Passage of various laws, election of various representatives, and ratification of various constitutional amendments did not magically cause that ideology to end. In fact, these events may have spurred additional energy to undermine any anti-racist advances. President Andrew Johnson based much of his presidency on undermining the anti-slavery efforts of President Abraham Lincoln,¹²¹ while President Donald Trump devoted much of his presidency to undermining the modest anti-racist reforms achieved under President Barack Obama.¹²² Racism and anti-racism have always co-existed in American life and politics. Gains by abolitionists have never dismantled white supremacy; at most, they have attained incremental reforms while simultaneously inflaming the seeds of white supremacy.

II. THE CONSTITUTION'S ROLE IN PERPETUATING RACIAL INEQUALITY

A. Slavery Not Ever Abolished

When drafted, the Constitution facilitated the continued existence of slavery. Slaves were defined as three-fifths of a person for purposes of political representation for white people.¹²³ This provision helped ensure that Black people in the South would remain enslaved while white southerners benefitted politically from their status and unpaid labor. The drafters of the Constitution were well aware of the purpose behind the Three-Fifths Clause. Gouverneur Morris unsuccessfully moved to require inhabitants to be “free” to be counted for the purposes of political representation, making the moral argument that:

[t]he admission of slaves into the Representation when fairly explained comes to this: that the inhabitant of Georgia and S.C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & damns them to the most cruel bondages, shall have more votes in a Govt. instituted for the protection of the rights of mankind, than the Citizens of Pa. or N. Jersey who views with a laudable horror, so nefarious a practice.¹²⁴

Morris argued that the continuation of slavery was the “curse of heaven.”¹²⁵

The Constitution also prevented any legislative interference with the slave trade until 1808¹²⁶ and made the Northern colonies complicit in the perpetuation of slavery by requiring the return of escaped slaves to their masters.¹²⁷ The United States Congress codified that rule in 1793 with the passage of the Fugitive Slave Act.¹²⁸ The Act “allowed for the capture and return of runaway enslaved people within the territory of the United States . . . [It] authorized local governments to seize and return escapees to their owners and imposed penalties on anyone who aided in their flight.”¹²⁹

Although the Fugitive Slave Act was enacted by the Second United States Congress, some Northern states, such as Pennsylvania, sought to defy the Act by passing their own laws that made it illegal for anyone to attempt to use force or violence to kidnap a “negro or mulatto” to take them out of state.¹³⁰

The Supreme Court interpreted the Constitution to preclude such efforts.¹³¹ Edward Prigg, upon the request of Margaret Ashmore, a slave owner, had gone to Pennsylvania to kidnap Margaret Morgan, an enslaved person and return her to the slave-holding state of Maryland. Prigg was indicted for violating Pennsylvania law.¹³² The United States Supreme Court, in an opinion authored by Justice Joseph Story (an anti-slavery northerner from Massachusetts), ruled that the Pennsylvania law was unconstitutional and could not be used to indict Prigg, because:

The act of the legislature of Pennsylvania upon which the indictment against Edward Prigg is founded, is unconstitutional and void; it purports to punish as a public offence against the state, the very act of seizing and removing a slave by his master, which the constitution of the United States was designed to justify and uphold.¹³³

The Court emphasized that the Fugitive Slave Clause was an essential aspect of the Constitutional design. Before the Constitution was ratified, some Northern states openly resisted the return of fugitive slaves.¹³⁴ According to the United States Supreme Court, the South relied on the expectation that regulation of fugitive slaves could only happen by Congress. “The history of the times proves, that the [S]outh regarded and relied upon it, as an ample security to the owners of slave property.”¹³⁵

By striking down the Pennsylvania legislation as unconstitutional, the Court made it clear that the Constitution did not merely preserve slavery in the South, but it precluded the northern states from taking any steps to assist people who were fugitive slaves. The North was required to allow the Fugitive Slave Act to operate within its borders to further the ends of the white supremacist constitution. And despite some Northern resistance, the Fugitive Slave Act was updated in 1850, decades after the Constitution permitted Congress to abolish slavery.¹³⁶

Some state courts tried to resist the use of the Constitution to perpetuate slavery, but those attempts were overturned by the Supreme Court. For example, the Wisconsin Supreme Court granted a writ of habeas corpus to an abolitionist who was arrested under the Fugitive Slave Act on the grounds that the Act was unconstitutional, holding that the Magna Carta was a proper source for defining the due process rights of the person arrested for seeking to assist fugitive slaves.¹³⁷ Those arguments were unsuccessful; the United States Supreme Court continued to conclude in 1859 that Congress's power to enact a fugitive slave law and have exclusive jurisdiction over those people who tried to assist fugitive slaves was essential to the constitutional design.¹³⁸

Nonetheless, it is important not to overstate the limited success achieved in some state courts. To the extent that the Wisconsin Supreme Court could imagine a violation of due process rights, its exclusive focus was on the rights of the person seeking to assist the fugitive slave. Whether slaves were actually "persons" who were entitled to be "free" when they entered the state of Wisconsin was beyond the scope of the Wisconsin court's consideration.¹³⁹ Thus, as of 1850, both anti-slavery Justice Joseph Story and the comparatively liberal Wisconsin Supreme Court declined to take any steps that would have directly freed slaves that escaped to the north. They did not question the Constitutional design that permitted and protected slavery while never mentioning the word itself.

In a little-told story, the lawyers who represented fugitive slaves in the 1850s understood the futility of their legal arguments.¹⁴⁰ They saw fugitive slave cases "as a venue for a vigorous rhetorical proxy battle against slavery."¹⁴¹ The lawyers "used the procedural tools within that system both to achieve the best possible outcomes

for their clients, *and* to obstruct and dismantle the system itself."¹⁴² They understood the premise of this Article that the white supremacist constitution was not a likely source of legal relief, but nonetheless, they concluded that making arguments against the barbarity of these laws could be a step in an important political struggle to end slavery.¹⁴³

The Supreme Court's insistence that the Fugitive Slave Act (as a federal statute) was presumptively supreme was in stark contrast to the Court's infamous decision (two years earlier) in *Dred Scott v. Sandford*.¹⁴⁴ In *Dred Scott*, the Court, in a 7-2 decision, ruled that a federal statute, the Missouri Compromise of 1820, was unconstitutional.¹⁴⁵ That conclusion invalidated Dred Scott's claim to state citizenship.¹⁴⁶ Pursuant to the Missouri Compromise of 1820, Dred Scott became a free man when his owner took him to Illinois (a state where slavery was forbidden by its state constitution) and to Fort Snelling (where slavery was forbidden by the Missouri Compromise).¹⁴⁷ Arguing that he was a citizen of Illinois, Dred Scott sought to sue for his freedom under the federal court's diversity jurisdiction.¹⁴⁸

For the first time since *Marbury v. Madison*¹⁴⁹, the Supreme Court in *Dred Scott* invalidated a federal statute. Further, the Court expansively interpreted the Fifth Amendment's Due Process Clause to conclude that the federal government was

seeking to deprive citizens (i.e., slave owners) of their property (i.e., slaves) without just compensation and due process of law.¹⁵⁰

For our purposes, the most important part of the *Dred Scott* decision was its originalist methodology. The Court concluded that free Black people could not be citizens because they “were at [the time the Constitution was drafted] considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race . . . [having] no rights or privileges but such as those who held the power and the Government might choose to grant them.”¹⁵¹ This was considered to be the “fixed and universal” view of the ratifiers of the Constitution.¹⁵²

The *Dred Scott* decision is probably glossed over in many constitutional law courses as a politically disastrous decision that was a key factor in leading the United States to a civil war. While that description may, in hindsight, be accurate, the more important point is that the decision *was structured in originalist methodology that was consistent with the longstanding understanding of the Constitution’s original intent regarding slavery and the rights of all Black people*. Black people were considered a “subordinate” and “inferior” class of beings, even by many who described themselves as abolitionists.¹⁵³ To argue, as did some anti-slavery advocates,¹⁵⁴ that slavery should end because it was immoral was not necessarily to argue that Black people were equal to white people. The Constitution was founded on the premise that Black people were inferior to white people.

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Constitutionally, Slavery Is No National Institution

nytimes.com/2015/09/16/opinion/constitutionally-slavery-is-no-national-institution.html

Sean Wilentz

September 16, 2015

THE Civil War began over a simple question: Did the Constitution of the United States recognize slavery — property in humans — in national law? Southern slaveholders, inspired by Senator John C. Calhoun of South Carolina, charged that it did and that the Constitution was proslavery; Northern Republicans, led by Abraham Lincoln, and joined by abolitionists including Frederick Douglass, resolutely denied it. After Lincoln's election to the presidency, 11 Southern states seceded to protect what the South Carolina secessionists called their constitutional "right of property in slaves."

The war settled this central question on the side of Lincoln and Douglass. Yet the myth that the United States was founded on racial slavery persists, notably among scholars and activists on the left who are rightly angry at America's racist past. The myth, ironically, has led advocates for social justice to reject Lincoln's and Douglass's view of the Constitution in favor of Calhoun's. And now the myth threatens to poison the current presidential campaign. The United States, Bernie Sanders has charged, "in many ways was created, and I'm sorry to have to say this, from way back, on racist principles, that's a fact."

But as far as the nation's founding is concerned, it is not a fact, as Lincoln and Douglass explained. It is one of the most destructive falsehoods in all of American history.

Yes, slavery was a powerful institution in 1787. Yes, most white Americans presumed African inferiority. And in 1787, proslavery delegates to the Constitutional Convention in Philadelphia fought to inscribe the principle of property in humans in the Constitution. But on this matter the slaveholders were crushed.

James Madison (himself a slaveholder) opposed the ardent proslavery delegates and stated that it would be "wrong to admit in the Constitution the idea that there could be property in men." The Constitutional Convention not only deliberately excluded the word "slavery," but it also quashed the proslavery effort to make slavery a national institution, and so prevented enshrining the racism that justified slavery.

The property question was the key controversy. The delegates could never have created a federal union if they had given power to the national government to meddle in the property laws of the slave states. Slavery would have to be tolerated as a local institution. This hard fact, though, did not sanction slavery in *national* law, as a *national* institution, as so many critics presume. This sanction was precisely what the proslavery delegates sought with their failed machinations to ensure, as Madison wrote, that "some provision should be included in favor of property in slaves." Most of the framers expected slavery to gradually wither away. They would do nothing to obstruct slavery's demise.

The South did win some concessions at the convention, but they were largely consolation prizes. The notorious three-fifths clause tied slaveholding to political power, but proslavery delegates, led by South Carolinians, repeatedly pressed for slaves to be counted as full persons, which Charles Pinckney professed was "nothing more than justice." They finally conceded to the three-fifths compromise. Over time, the congressional bulwark of the slave power became the Senate, where the three-fifths rule did not apply.

The proslavery delegates desperately wanted the Constitution to bar the national government from regulating the Atlantic slave trade, believing it would be an enormous blow against slavery. The first draft of the Constitution acceded to their bluster. But antislavery Northerners erupted in protest and proposed that the new government have the power not only to regulate the trade but also to abolish it after 1800. The proslavery men, over Madison's furious objection, got the date extended to 1808, but it was a salvage operation. In the convention's waning days, proslavery delegates won a clause for the return of runaway slaves from free states. Yet the clause was a measure of slavery's defensiveness, prompted by then landmark Northern gradual emancipation laws, and was so passively worded that enforcement was left to nobody, certainly not the federal government. Antislavery Northerners further refined the wording to ensure it did not recognize slaves as property.

As slavery was abolished throughout the North and as Southern slavery became an internal empire, proslavery advocates tried to reverse the framers' work, claiming that, with the fugitive servant clause, the Constitution actually established slaves as property in national law. "[H]ave we not a right, under the Constitution, to our property in our slaves?" Senator Calhoun declared in 1840. This became the foundation for proslavery arguments about the expansion of slavery into the national territories that divided the nation in the 1850s.

Antislavery leaders answered with chapter and verse that the framers had refused to extend a constitutional right to property in slaves, and that therefore Congress was empowered to halt slavery's expansion, putting slavery, in Lincoln's phrase, on "the course of ultimate extinction." Douglass broke with those abolitionists who, he said, "hold the Constitution to be a slaveholding instrument." Running for president in 1860, Lincoln asserted that the framers had operated "on purpose to exclude from the Constitution the idea that there could be property in man." He added that "[t]o show all this is easy and certain." It was so well understood in 1860 that it provoked the Civil War.

Far from a proslavery compact of "racist principles," the Constitution was based on a repudiation of the idea of a nation dedicated to the proposition of property in humans. Without that antislavery outcome in 1787, slavery would not have reached "ultimate extinction" in 1865.

How the Constitution Was Indeed Pro-Slavery

A theatlantic.com/politics/archive/2015/09/how-the-constitution-was-indeed-pro-slavery/406288/

September 19, 2015

Politics

Unlike Sean Wilentz suggests in *The New York Times*, the Constitution was not originally anti-slavery.

By David Waldstreicher

September 19, 2015

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On Monday, Senator Bernie Sanders told his audience at Liberty University that the United States “in many ways was created” as a nation “from way back on racist principles.” Not everyone agreed. The historian Sean Wilentz took to *The New York Times* to write that Bernie Sanders—and a lot of his colleagues—have it all wrong about the founding of the United States. The Constitution that protected slavery for three generations, until a devastating war and a constitutional amendment changed the game, was actually anti-slavery because it didn’t explicitly recognize “property in humans.”

Lincoln certainly said so, and cited the same passage from Madison’s notes that Wilentz used. But does that make it so? And does it gainsay Sanders’s inelegant but apparently necessary voicing of what ought to be obvious, what David Brion Davis, Wilentz’s scholarly mentor and my own, wrote *back in 1966*—that the nation was “in many ways” founded on racial slavery?

If the absence of an ironclad guarantee of a right to property in men really “quashed” the slaveholders, it should be apparent in the rest of the document, by which the nation was actually governed. But of the 11 clauses in the Constitution that deal with or have policy implications for slavery, 10 protect slave property and the powers of masters. Only one, the international slave-trade clause, points to a possible future power by which, after 20 years, slavery might be curtailed—and it didn’t work out that way at all.

The three-fifths clause, which states that three-fifths of “all other persons” (i.e., slaves) will be counted for both taxation and representation, was a major boon to the slave states. This is well known; it’s astounding to see Wilentz try to pooh-pooh it. No, it wasn’t counting five-fifths, but counting 60 percent of slaves added enormously to slave-state power in the formative years of the republic. By 1800, northern critics called this phenomenon “the slave power” and called for its repeal. With the aid of the second article of the Constitution, which

numbered presidential electors by adding the number of representatives in the House to the number of senators, the three-fifths clause enabled the elections of plantation masters Jefferson in 1800 and Polk in 1844.

Just as importantly, the tax liability for three-fifths of the slaves turned out to mean nothing. Sure the federal government could pass a head tax, but it almost never did. It hardly could when the taxes had to emerge from the House, where the South was 60 percent overrepresented. So the South gained political power, without having to surrender much of anything in exchange.

The refusal to mention slavery as property or anything else in the Constitution means something. But what it meant was embarrassment—and damage control. Indeed, all the powers delegated to the House—that is, the most democratic aspects of the Constitution—were disproportionately affected by what critics quickly came to call “slave representation.” These included the commerce clause—a compromise measure that gave the federal government power to regulate commerce, but only at the price of giving disproportionate power to slave states. And as if that wasn’t enough, Congress was forbidden from passing export duties—at a time when most of the value of what the U.S. exported lay in slave-grown commodities. This was one of the few things (in addition to regulating the slave trade for 20 years) that Congress was forbidden to do. Slavery and democracy in the U.S. were joined at the 60-percent-replaced hip.

Another clause in Article I allowed Congress to mobilize “the Militia” to “suppress insurrections”—again, the House with its disproportionate votes would decide whether a slave rebellion counted as an insurrection. Wilentz repeats the old saw that with the rise of the northwest, the slave power’s real bastion was the Senate. Hence the battles over the admission of slave and free states that punctuated the path to Civil War. But this reads history backwards from the 1850s, not forward from 1787. The shaping policies of the early republic were proslavery because the federal government was controlled by southern expansionists like Jefferson and Jackson, who saw Africans as a captive nation, a fifth column just waiting to be liberated (again) by the British.

The refusal to mention slavery as property or anything else in the Constitution means something. But what it meant was embarrassment—and damage control. Domestic and foreign critics had lambasted Americans for their hypocrisy in calling themselves a beacon to human freedom while only a few states moved on the slavery question. The planters didn’t need or even want an explicit statement that slaves were property; it would have stated the obvious while opening up the United States to international ridicule in an era when slavery was coming into question.

On balance, the Constitution was deliberately ambiguous—but operationally proslavery. Perhaps more so than Madison wanted, as Wilentz maintains. But Madison's putative intentions are all that matters to Wilentz. He's outdone original-intent jurisprudence in reducing history to a morality play of good founders, bad critics. He loses sight of what actually happened when the ambiguously worded but slavery-suffused Constitution was finally released to an anxious public.

What happened was that anti-federalists in the North understood that that the federal government had been strengthened, but that slavery in particular had been shielded from an otherwise-powerful Congress. Ratification ran into trouble in the states where the antislavery criticisms of the Constitution were most articulate and widely publicized: Pennsylvania, Massachusetts, and New York. Some southern anti-federalists such as Patrick Henry, most concerned about local control, tried to argue that any stronger government would eventually threaten slavery, but the more persuasive people in the South were those such as Charles Pinckney, who testified upon returning to South Carolina that he couldn't imagine a better bargain could have been made for the planters.

Was Madison outraged? Hardly. He went down to the Virginia ratifying convention to assure delegates that Henry was dead wrong: The original intent was indeed to protect slave property. Much of what we know of the Constitutional Convention comes from his notes—which, recent scholarship suggests, he carefully edited for a posthumous audience. He made sure, for example, that posterity would know that he objected to the slave trade being guaranteed for another 20 years—but this was a common Virginia position at the time, since Virginians were already net sellers of slavers rather than importers by 1787.

But there's more. When it came time to deal with the matter of slave representation in Federalist 54, Madison obliquely distanced himself from the three-fifths clause by saying that one had to admit that slaves were, irrefutably, both people and property. He actually argued that the three-fifths clause was a good example of how the Constitution would lead to good government—by protecting property. He looked forward to the honest census that would result from slaves and other people being both taxed and represented. He put the defense of the proslavery clauses in the voice of a Virginian and then called them "a little strained," but just.

When we see things like this in today's politics, we call it damage control. I give Madison credit for a kind of honesty about his ambivalence, at least for those who could read between the lines—but this is far from the bold antislavery stand Wilentz would have us see in Madison's words. Wilentz is an astute student of politics, and has often praised pragmatism in the figures he admires. Why his Madison has to be an antislavery truth teller when there are other candidates for that historical role—even in 1787—is beyond puzzling.

Americans and their leading historians still find it hard to account for how their Revolution, considered as a quarter-century of resistance, war, and state-making, both strengthened slavery and provided enough countercurrents to keep the struggle against it going. Tougher still is understanding how the work of 1787 constitutionalized slavery—hardwired it into the branches, the very workings, of the federal government. Given the subsequent history of disfranchisement and policing in this country, it's not a stretch to say that it is hardwired there still.

If Sean Wilentz prefers to celebrate what the Founders did not do—that is, write something like the Confederate Constitution—that's the beginning of a potentially interesting conversation, even if it takes a counterfactual as its starting point. But the fact that it took a civil war to settle the debate about the Founders' intentions for slavery's future shows that, as John Quincy Adams came to understand and assert during the 1830s, there was no constitutional way except the exercise of war powers to end slavery in the United States. You can call that the founders' design, but it seems more a design flaw than something to celebrate. When it takes a war to resolve something, humane persons call it a failure or a tragedy. They don't blame the people who point out the roots of the problem, unless their agenda is less historical than political. When Wilentz raps the knuckles of Bernie Sanders for saying what his teachers said 50 years ago, he isn't doing his favorite any favors.

Slavery, the Constitution, and the Origins of the Civil War

On December 20, 1860, the delegates to the South Carolina secession convention voted to leave the Union. In the declaration explaining the causes of their momentous decision, they charged that “an increasing hostility on the part of the non-slaveholding States to the institution of slavery has led to a disregard of their obligations, and the laws of the General Government have ceased to effect the objects of the Constitution.” “Thus,” they concluded, “the constituted compact has been deliberately broken and disregarded by the non-slaveholding states, and the consequence follows that South Carolina is released from her obligation.” As almost all historians have increasingly recognized, the institution of slavery was the primary cause of secession and, consequently, of the Civil War. At the same time, as the South Carolina declaration suggests, the debate over slavery and secession was framed in constitutional terms (Figure 1).

The “objects” of the U.S. Constitution referred to the various protections for slavery written into the document in 1787. In the decades leading to the 1860 Charleston convention, Southern extremists claimed that those protections were increasingly weakened by Northern state laws, court decisions, and abolitionist activity. By 1860, alarmed at the scope of these trends, secessionists argued that Northern states had violated the “compact” underlying the Constitution. In contrast, newly elected President Lincoln argued that the Union was “perpetual,” had been created by the people of the nation, and could not be unilaterally dissolved by the act of any group of states. Despite Confederate charges of abolitionism, Lincoln correctly asserted that neither he nor the national government threatened slavery because both lacked the constitutional



Figure 1. This wartime certificate for Union Army volunteers stresses the role of the Constitution in popular understanding of the sectional conflict. Printed in Philadelphia in 1861, the lithography depicts Columbia bearing two laurel crowns, the flag, and the Constitution, all symbols of national pride. With the Constitution in hand, Columbia protects a family that leans in distress at her side, while a Union volunteer stands attentively. (Courtesy of Library of Congress)

power to touch slavery in the states. Only when the war came and the Confederacy proclaimed its independence from the United States did Lincoln claim constitutional authority to end slavery. In all these respects, a consideration of constitutional issues is vital to an understanding of the origins of the Civil War.

The Antebellum Period

Most Americans believe that secession was about “states’ rights,” but the South Carolina delegates’ complaints about the “increasing hostility” to slavery suggests quite the opposite. In the four decades before the outbreak of Civil War, Southern leaders had called for Northern states to support and enforce the federal fugitive slave law, change their own state laws to allow Southerners to travel with slaves in the North, and suppress abolitionist speech. In the constitutional debate over slavery, that is, Southerners wanted states’ rights for *their* states, but not for the Northern states.

Starting in the mid-1820s, most Northern states had passed personal liberty laws, which were designed to prevent the kidnapping or removal of free blacks who were wrongly seized as fugitive slaves. These laws required southerners to provide evidence to a state court before they could take a fugitive slave out of the state, and the state laws had a much higher standard of proof than the federal Fugitive Slave Act of 1793. Thus, the laws often frustrated southerners who were trying to recover their slaves. In 1842, the U.S. Supreme Court struck down all the state personal liberty laws in *Prigg v. Pennsylvania*. In his opinion Justice Joseph Story, who was from Massachusetts, declared that Southerners had an almost unlimited right to hunt down their fugitive slaves, and while the Northern states could actively help them do so by enforcing the 1793

federal law, they could not pass their own laws adding requirements to the process. This should have satisfied the South, but it did not, and it only infuriated Northern state leaders who began withdrawing all support for the return of fugitive slaves. This undermined the ability of slaveholders to recover runaway slaves.

The Latimer case illustrates their predicament (Figure 2). In 1842, Virginia slaveowner James Grey discovered that his slave, George Latimer, had escaped to Boston. Upon apprehending him, Grey handed Latimer over to the local sheriff, who jailed him while Grey waited for papers to prove he owned Latimer. Public pressure forced the sheriff, who was an elected official, to release Latimer. The sheriff delivered Latimer to Grey, but then Grey was forced to "sell" Latimer to a group of abolitionists for a small amount. The upshot was that Massachusetts had refused to help a slaveowner recover his slave. In 1843, Massachusetts passed the "Latimer law," which closed all jails to slave catchers, thereby taking the state judicial authorities entirely out of the business of enforcing the federal Fugitive Slave Act. This was completely in line with the Supreme Court's decision in *Prigg*, which held that the states did not have

to enforce the federal law. But since there were few federal judges in Massachusetts, enforcement of the law was stymied. Other states followed with similar laws. After passage of the Fugitive Slave Act of 1850—which created a corps of federal commissioners stationed in Northern states—local and state governments were even more hostile to slave catchers. Meanwhile, Northern juries almost never convicted people who rescued fugitive slaves from masters or federal officers.

Riots and dramatic rescues in Boston, Syracuse, rural Pennsylvania, Oberlin, Ohio, Milwaukee, and elsewhere angered Southerners, and made them believe that the Constitution was not working to protect their rights. Legally, of course, the system was working fine. The U.S. Supreme Court had held that the states did not have authority to enforce the federal Fugitive Slave Act and the Northern states were acting accordingly. From 1850 to 1861, under the stronger federal law written by slaveholders in Congress, more than 350 fugitive slaves were returned to their Southern masters. More could have been returned if the federal government had been willing to spend more time and money in doing so. Southerners were right that the North was not being cooperative, but the Constitutional provisions for separate state and federal authority allowed this. A new fugitive slave law that provided due process to alleged slaves might have led to a different outcome, but Southerners opposed that as well.

The issue of slave transit was similar. The Southern states all agreed, at least in 1787, that, except for not freeing fugitive slaves, each state was free to regulate slavery as it wished. For decades, most Southern states acknowledged that if a slave was taken to a free state to live, that slave became free. Starting in the 1830s, however, Northern courts began emancipating slaves brought to their jurisdictions by visiting masters. In the 1840s, New York and Pennsylvania passed legislation to require this outcome. In *Lemmon v. The People*, an 1860 landmark case upholding such state legislation, New York's highest court ruled that eight Virginia slaves became free the moment their master brought them into the state. The New York Court reached this decision even



Figure 2. After escaping from his master in Virginia, George Latimer (1818–c.1880) found his way to Boston where he became the protagonist of a benchmark personal liberty case. Incited by Latimer's apprehension, a series of popular protests culminated with his freedom and the passing of the "Latimer Law," which prohibited state officials from enforcing the federal fugitive slave law. (Courtesy of New York Public Library)

though the master came to the state for just one night so he could change ships for direct passage to New Orleans (1). Decisions such as *Lemmon* were consistent with both a century of Anglo-American law and notions of federalism and states' rights. The states had the right to decide who was a slave and who was not under such circumstances. As could be expected, a number of slave states objected to these decisions; some mentioned *Lemmon* in their secession documents. These states argued that the Constitution had failed them by not protecting their right to travel with their slave property.

Ironically, these same Southern states denied any rights to free blacks who lived in the North. When Northern ships docked in Charleston or New Orleans, any free black sailors on them were arrested and held in the local jail. They were allowed to leave only if the ship captain paid the jailer for their upkeep. In the 1840s, Massachusetts sent commissioners to South Carolina and Louisiana to negotiate an agreement on the status of free black sailors, but officials in both states forced the commissioners to leave without even discussing the issue. At this time, slave jurisdictions also arrested visiting white Northerners if they were

found in possession of antislavery literature. Thus, Southern states had a view of interstate relations that protected the rights of slaveowners, but not free blacks or whites from the North who were not sufficiently supportive of slavery.

Finally, secessionists complained about abolition societies in the North. In effect, they wanted to prevent the North from allowing free speech to opponents of slavery, just as the South did. Almost every Southern state had banned Harriet Beecher Stowe's 1852 popular anti-slavery novel, *Uncle Tom's Cabin*. The South wanted to impose that sort of censorship on the North as well.

On the Eve of War

By the time Lincoln took office in March 1861, seven states had declared themselves no longer a part of the Union. South Carolina had been the first to leave and it had set out the arguments the other seceding slave states would follow. In its secession declaration, the South Carolina delegates singled out Northern states whose actions had allegedly undermined the Constitution:

The States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, Illinois, Indiana, Michigan, Wisconsin and Iowa, have enacted laws which either nullify the Acts of Congress or render useless any attempt to execute them. In many of these States the fugitive is discharged from service or labor claimed, and in none of them has the State Government complied with the stipulation made in the Constitution. The State of New Jersey, at an early day, passed a law in conformity with her constitutional obligation; but the current of anti-slavery feeling has led her more recently to enact laws which render inoperative the remedies provided by her own law and by the laws of Congress. In the State of New York even the right of transit for a slave has been denied by her tribunals; and the

States of Ohio and Iowa have refused to surrender to justice fugitives charged with murder, and with inciting servile insurrection in the State of Virginia. Thus the constituted compact has been deliberately broken and disregarded by the non-slaveholding States, and the consequence follows that South Carolina is released from her obligation (2).

In the face of this ominous portrait painted by secessionists, Lincoln denied that slavery was threatened by either the free states or his administration (Figure 3). He used his first inaugural address to plead with the Southern states to return to the Union. He began by noting that "Apprehension seems to exist among the people of the Southern States that by the accession of a Republican Administration their property and their peace and personal security are to be endangered." He insisted there was no "reasonable cause for such apprehension," reiterating that he had "no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists." He reaffirmed the constitutional issue that he had "no lawful right to" interfere with slavery, even if he wanted to do so. Because he had no lawful or constitutional right to interfere with slavery, and because he was pledged to preserve the Constitution—and with it the Union—he also reaffirmed that he had "no inclination" to harm slavery. Lincoln's constitutional thought dovetailed with the politics of the moment. His goal was to bring the seven seceding slave states back into the Union, and to prevent any more from leaving the Union. He could only do this if the people of these states were convinced that a Republican administration did not threaten slavery.

The rest of his statement—that he had "no lawful right" to interfere with slavery—was an assertion of both constitutional principles and well understood constitutional law. From the writing of the Constitution in 1787 until Lincoln's inauguration, virtually every legal scholar, jurist, politician, and lawyer in America agreed that the national government had no power to regulate slavery in the states where it existed. Lincoln quoted from the 1860 Republican Party platform to underline his own commitment to this constitutional principle:

Resolved, That the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend; and we denounce the lawless invasion by armed force of the soil of any State or Territory, no matter what pretext, as among the gravest of crimes (3).

This statement of orthodox constitutional law mirrored the analysis offered by General Charles Cotesworth Pinckney, the influential pro-slavery leader of the South Carolina delegation at the 1787 Constitutional Convention. After the Convention, Pinckney bragged to the

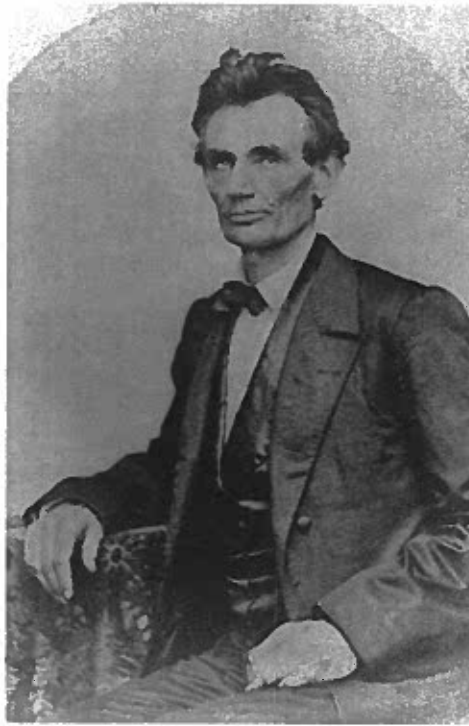


Figure 3. Abraham Lincoln, shown here days after winning the 1860 Republican Party nomination, took a position on slavery that is still a contested topic among historians and laypersons alike. As a presidential candidate, Lincoln faced critics who accused him of being inconsistent in his approach to abolition. However, Lincoln's commitment to defend his interpretation of the Constitution did not falter. With the advent of war, Lincoln found ways to interfere with the institution of slavery without compromising the integrity of the Constitution. (Courtesy of Library of Congress)

South Carolina legislature: "We have a security that the general government can never emancipate them, for no such authority is granted and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states" (4).

In part Lincoln had "no inclination" to touch slavery in the states because he had no power to do so. An orthodox Whig on constitutional principles, Lincoln had no interest in gratuitously trampling on the Constitution. He believed—as did virtually every member of Congress and the Supreme Court—that the national government had no power to regulate or abolish slavery in the states. At the same time, Lincoln also firmly asserted that no state could leave the Union on its own. Here his constitutional theory was also fairly orthodox and, until his own election, generally accepted on both sides of the Mason-Dixon line: "I hold that in contemplation of universal law and of the Constitution the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our National Constitution, and the Union will endure forever, it being impossible to destroy it except by some action not provided for in the instrument itself" (5). Thus, Lincoln pledged to support the Constitution by preserving the Union, just as he asserted he would support the Constitution by not threatening slavery in the existing states.

In making this argument, the incoming president reiterated that secession could never be possible under the Constitution: "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. Whoever rejects it does of necessity fly to anarchy or to despotism. Unanimity is impossible. The rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left" (6). In other words, the whole Southern claim of a right to secession was in essence a claim against any continuing form of government. If the South wanted to leave the Union, then the process would have to be followed within the Constitution. Congress might pass legislation allowing states to leave the Union; the states might petition Congress for a constitutional convention, or Congress might pass a constitutional amendment to allow secession and send it on to the states for ratification.

Significantly, almost all of Lincoln's First Inaugural was about the Constitution. The word itself appears thirty-four times in the speech. And there are additional references to it with phrases such as "frame of government." Lincoln's goal in the address was to convince the South to return to the Union, where slavery was protected. Near the end of his speech he made the obvious point that the old Constitution remained in place, unchanged and unlikely to be changed. The so-called Confederate

states claimed the North and the Union threatened slavery in violation of the Constitution, but as Lincoln pointed out, "Such of you as are now dissatisfied still have the old Constitution unimpaired, and, on the sensitive point, the laws of your own framing under it; while the new Administration will have no immediate power, if it would, to change either" (7). In other words, since both the Administration and the states of the Deep South conceded that the Constitution protected slavery, and that Lincoln was obligated to uphold and protect the Constitution and to enforce the Fugitive Slave Law, there was no reason for secession.

Lincoln's pleas, of course, fell on deaf ears. As he would observe in his second inaugural, "Both parties deprecated war, but one of them would make war rather than let the nation survive, and the other would accept war rather than let it perish, and the war came" (8).

War, Constitution, and Slavery

Once the guns started blazing, the existing constitutional restraints changed. Lincoln argued that under the Constitution slavery was secure, but once the seceding slave states left the Union and made war on their own country, they could no longer claim the protections of the Constitution. Thus, while Lincoln had no power to end slavery when he took office—because the national government could not interfere with slavery in the existing states—he could interfere with slavery in those states that had made war on the national government. Thus, starting in early 1861, a new constitutional reality developed around slavery.

The first change came on May 23, 1861, when three slaves owned by Confederate Colonel Charles K. Mallory escaped to Fortress Monroe, then under the command of Major General Benjamin F. Butler. A day later Confederate Major M. B. Carey, under a flag of truce, arrived at the Fort, demanding the return of the slaves under the Constitution and the Fugitive Slave Law of 1850. Butler, a successful Massachusetts lawyer before the war, told Carey that the slaves were contrabands of war, because they had been used to build fortifications for the Confederacy, and thus Butler would not return them to Mallory (9). Ironically, Butler informed Major Carey that "the fugitive slave act did not affect a foreign country, which Virginia claimed to be and she must reckon it one of the infelicities of her position that in so far at least she was taken at her word." Butler then offered to return the slaves if Colonel Mallory would come to Fortress Monroe and "take the oath of allegiance to the Constitution of the United States" (10). Not surprisingly, Colonel Mallory did not accept General Butler's offer.

This ended Colonel Mallory's attempt to recover his slaves, but it was the beginning of a new policy for the United States. Butler, in need of workers, immediately employed the three fugitives, who had previously been used by Mallory to build Confederate defenses. Taking these slaves away from Confederates served the dual purposes of depriving the enemy of labor while providing labor for the United States. The events at Fortress Monroe were the beginning of an entirely new understanding of the powers of the United States on the central constitutional issue of the age: slavery.

Even before General Butler brilliantly devised the contraband policy, the issue of emancipation had been on the table. Many abolitionists and antislavery Republicans wanted Lincoln to move against slavery immediately, but Lincoln could not act for a variety of reasons. He first needed a constitutional theory under which he could act to end slavery in the Confederacy. This theory evolved throughout 1861 and early 1862. By the spring of 1862, Lincoln accepted the notion that as Commander-in-Chief of the Army and Navy, he could move against the Confederacy's most important military asset: its slaves. What General Butler could do for three slaves, Lincoln could do for the more than three million slaves in the Confederacy (11). He would issue the Emancipation Proclamation in January 1863.

But before taking this fateful step, Lincoln needed to prepare the way for a constitutionally legitimate change. First, he had to secure the four loyal slave states (Maryland, Delaware, Missouri, and Kentucky) in order to prevent them from seceding. Second, he had to have support from the Congress and the people, including Northern conservatives. Thus, initial Republican forays against slavery were partial and eminently constitutional. In April 1862, for instance, Congress ended slavery in the District of Columbia through compensated emancipation. This did not violate the Fifth Amendment because the taking of property was done with "just compensation." Nor did it violate the limitations on the power of Congress, because the Constitution gave Congress the power to regulate the District of Columbia. Third, Lincoln had to have some expectation of winning the war, or at least partially defeating the Confederacy. An emancipation proclamation without victory would be nothing, "like the Pope's bull against the comet" (12). By July 1862, Lincoln believed the war was going his way. Two Confederate state capitals, Nashville and Baton Rouge, were in U.S. hands and, with the exception of Vicksburg, the entire Mississippi River was controlled by Lincoln's Navy and Army. The Confederates had been forced from their largest city, New Orleans, and United States troops were firmly encamped on the Sea Islands off the coast of South Carolina. Raiding parties from those islands were bringing the war home to the very citadel of secession. Lincoln only awaited a big victory—which he would get at Antietam in September 1862—to announce his plan for ending slavery in the Confederacy.

Thus, when it came to ending slavery *inside* the United States, Lincoln and Congress narrowly hewed to the constitutional understandings that had existed before the war. The slaves in the Confederacy, however, were another matter. They were property, used by the enemies of the United States to make war on the United States. Furthermore, the Constitution could not be applied in the Confederate states. There was no "law" there anymore, except martial law and the law of war. Under that theory, General Butler declared runaway slaves to be contrabands of war, and thus legitimately seized and freed. Congress did the same in both Confiscation Acts and in other laws and regulations. Lincoln followed suit in the Emancipation Proclamation, narrowly limiting it to those places that were still at war and not under national jurisdiction.

Significantly, Lincoln issued the proclamation "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" (13). This was, constitutionally, a war measure designed to cripple the ability of those in rebellion to resist the lawful authority of the United States. It applied only to those states and parts of states that were still in rebellion. This was constitutionally essential. The purpose of the proclamation was "restoring the constitutional relations" between the nation and all the states.

The irony of secession was that it allowed Lincoln do what he had always wanted. He had always believed slavery was wrong and immoral. But, as a lawyer, a Congressman, and an incoming president he understood that the national government could only regulate or end slavery in the District of Columbia and the territories. In a famous letter published in the *New York Tribune*, Lincoln repeated his "oft-expressed personal wish that all men everywhere could be free" (14). He later told a correspondent, "If slavery is not wrong, nothing is wrong" (15). Without secession, however, he could never have acted on these personal views, because, as he told the South in his first inaugural address, the Constitution guaranteed their property rights in slaves. But, once the slave states abandoned the Constitution, they could no longer expect it to protect them.

The end of slavery could not, of course, come through a presidential proclamation or a congressional act, because even as the war ended, slavery remained constitutionally protected in those slave states

that had never left the Union and those places that had come under U.S. control *before* the Emancipation Proclamation. Thus, a constitutional amendment was needed. Lincoln urged Congress to pass such an amendment, which it did in early 1865. By December it had been ratified, slavery was ended, and the Constitution was permanently altered to forever favor freedom and to never protect or legitimize bondage. Two more amendments, ratified in 1868 and 1870, would make former slaves and their children citizens with the same voting rights as other Americans. These were the final steps in the constitutional revolution that began with South Carolina's unconstitutional act of declaring itself separate from the Union. □

Endnotes

1. For a discussion of this case, see Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: University of North Carolina Press, 1981).
2. "Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union" found at <http://avalon.law.yale.edu/19th_century/csa_scarsec.asp>; see also James W. Loewen and Edward H. Sebesta, eds., *The Confederate and Neo-Confederate Reader* (Jackson: University of Mississippi Press, 2010), 111.
3. Abraham Lincoln, "First Inaugural Address—Final Text," *Collected Works* (New Brunswick: Rutgers University Press, 1953), 4:263.
4. Pinckney quoted in Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 5 vols. (New York: Burt Franklin, 1987, reprint of 1888 edition), 4:286.
5. Lincoln, "First Inaugural Address—Final Text," *Collected Works*, 4:264–65.
6. Lincoln, "First Inaugural Address—Final Text," *Collected Works*, 4:268.
7. Lincoln, "First Inaugural Address—Final Text," *Collected Works*, 4:271.
8. Lincoln, "Second Inaugural Address," March 4, 1861, *Collected Works*, 8:332.
9. Benjamin F. Butler, *Butler's Book* (Boston: A.M. Thayer, 1892), 256–57.
10. Maj. Gen. Benjamin F. Butler to Lt. Gen. Winfield Scott, May 24/25 1861, in *The War of the Rebellion: The Official Records of the Union and Confederate Armies*, 127 vols., index, and atlas (1880–1901), ser. 2, vol. 1:752 [hereafter cited as *O.R.*]
11. For a more elaborate discussion of how Lincoln moved towards Emancipation, see Paul Finkelman, "Lincoln and the Preconditions for Emancipation: The Moral Grandeur of a Bill of Lading," in William A. Blair and Karen Fisher Younger, eds., *Lincoln's Proclamation: Race, Place, and the Paradoxes of Emancipation* (Chapel Hill, NC: University of North Carolina Press, 2009) 13–44; Paul Finkelman, "Lincoln, Emancipation and the Limits of constitutional Change," *Supreme Court Review*, 2008: 349–87; and Paul Finkelman, "The Civil War, Emancipation, and the Thirteenth Amendment: Understanding Who Freed the Slaves," in Alexander Tsesis, ed., *The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment* (New York, NY: Columbia University Press, 2010), 36–57.
12. *Ibid.*, 423.
13. Lincoln, "Emancipation Proclamation," January 1, 1863, *Collected Works*, 6:29.
14. Lincoln to Horace Greeley, August 22, 1862, *Collected Works*, 5:388–89.
15. Lincoln to Albert G. Hodges, April 4, 1864, *Collected Works*, 7:281.

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White supremacists declare war on democracy and walk away unscathed

 [theguardian.com/commentisfree/2021/nov/10/white-supremacists-war-on-democracy-unscathed](https://www.theguardian.com/commentisfree/2021/nov/10/white-supremacists-war-on-democracy-unscathed)

November 10, 2021

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Carol Anderson

The United States has a terrible habit of letting white supremacy get away with repeated attempts to murder American democracy

American democracy's most dangerous adversary is white supremacy. Throughout this nation's history, white supremacy has undermined, twisted and attacked the viability of the United States. What makes white supremacy so lethal, however, is not just its presence but also the refusal to hold its adherents fully accountable for the damage they have done and continue to do to the nation. The insurrection on 6 January and the weak response are only the latest example.

During the war for independence, after the British captured Savannah, the king's forces set out to capture a wholly unprepared South Carolina. John Laurens, an aide-de-camp of George Washington, pleaded with the South Carolina government to arm the enslaved because the state didn't have enough available white men to fight the 8,000-strong British force barreling toward Charleston. This was a crisis born of South Carolina's decision to divert most of the state's white men from the Continental Army to fight the Redcoats and, instead, enlist them in the militia to control the enslaved population, whom they defined as the primary threat.

The response to Laurens' plan was, therefore, "horror" and "alarm". Umbrage even. The state's political leaders were so appalled that they questioned whether "this union was worth fighting for at all". The United States of America was not nearly as important as maintaining slavery. They, therefore, toyed with the idea of surrendering to the British, making a separate peace. For that flat-out refusal to fight with every resource at its command, and clear willingness to sacrifice the United States simply to maintain slavery, South Carolina suffered no consequences. It wasn't ostracized. It wasn't penalized. Instead, the state's leaders were fully embraced as Founding Fathers and welcomed into the new nation's halls of power.

Several years later, at the 1787 constitutional convention, the south once again put white supremacy above the viability of the United States. In tough negotiations, South Carolina, North Carolina and Georgia's representatives were willing to hold the nation hostage and risk

its destruction unless protection of slavery and the empowering of enslavers was embedded in the constitution. The negotiators acknowledged exactly what was going on and even, sometimes, how reprehensible it was. When, for example, the delegates bowed down to the south's demands for 20 additional years of the Atlantic slave trade, James Madison admitted that without that concession, "the southern states would not have entered into the union of America". And, therefore, as "great as the evil is" he added "the dismemberment of the Union would be worse".

The same refrain played after the infamous three-fifths clause passed under the southern threat to walk away and, thus, scuttle the constitution and the United States. Massachusetts delegate Rufus King called the nefarious formula to determine representation in Congress one of the constitution's "greatest blemishes" while lamenting that it "was a necessary sacrifice to the establishment of the Constitution".

The enslavers' extortionist threats – white supremacy as the price for the nation to come into being – should have created a massive backlash. But it didn't. There was no retribution, only compliance and acquiescence. The demonstrated lack of accountability for threatening the viability of the United States served only to embolden the slaveholders, who bullied, harangued and pummeled other congressional leaders, including the brutal 1856 beating of Senator Charles Sumner by southerner Preston Brooks on the Senate floor, to get their way.

When the bullying and beatings no longer worked, and the nation dared elect a president opposed to slavery spreading any further, the slaveholders launched a military attack against the United States. They wanted, according to Alexander H Stephens, vice-president of the Confederate States of America, the "disintegration" of the Union. He said that the United States had to be destroyed because, unlike the US, the Confederacy's "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 normal condition".

To wage its war for white supremacy, the Confederates killed and wounded more than 646,000 American soldiers. In addition to the loss of life, fending off the CSA's devastating military assault cost the United States billions of dollars. The CSA also tried to badger and entice the British and French to ally with the Confederacy and attack the United States.

For doing so much to destroy this nation, after the CSA's defeat, the consequences were disproportionately minimal. President Andrew Johnson granted many of the Confederacy's leaders amnesty and allowed them to resume positions of power in the government. The entrée into American society for the traitors was also paved by the way the US supreme court dismantled many of the protections put in place by Congress for post-civil war Black citizenship – the 13th, 14th and 15th amendments, as well as laws banning racial segregation and white domestic terrorism – and allowed the bureaucratic and lynching violence of Jim Crow to eviscerate the "self-evident" principles of equality. And to ensure that

a narrative of white supremacy's innocence permeated the nation's textbooks, the Confederacy's treachery became the "war of Northern aggression" and the south's "Lost Cause" became nothing less than noble. The forgiveness tour continued as the states, not just in the south, allowed the erection of statues in the public square honoring those who committed treason.

The 6 January invasion of the US Capitol, provoked by the lie that cities with sizable minority populations, such as Atlanta, Milwaukee and Philadelphia, "stole" the 2020 election is, at its core, white supremacists' anger that African Americans, Hispanics, Asian Americans and Native Americans not only voted but did so decisively against Donald Trump. The invaders constructed gallows, stormed the US Capitol, wanted to hang Vice-President Mike Pence, who would not hand the election to Trump, and hunted for the speaker of the House, Nancy Pelosi. They beat police officers, yelled "nigger" at others, carried the Confederate flag through the halls of the building and decided that those defending the Capitol were the actual "traitors" who needed to be killed.

This horrific attack on American democracy should have resulted in a full-throttled response. But, once again, white supremacy is able to walk away virtually unscathed. US senators and representatives who were at the rally inciting the invaders were not expelled from Congress. Similarly, in shades of the post-civil war Confederacy, several politicians who attended the incendiary event at the Ellipse were recently re-elected to office. And those who stormed the Capitol are getting charged with misdemeanors, being allowed to go on vacations out of the country, and, despite the attempt to stage a coup and overturn the results of a presidential election, getting feather-light sentences.

It also took months to establish a congressional committee to investigate 6 January, but it's already clear that its subpoenas, as Steve Bannon and Jeffrey Clark so brazenly demonstrated, can be violated and mocked at will with no consequences. And, like the Lost Cause, its adherents have tried to rewrite this assault on America as "a normal tourist visit" or simply "law-abiding, patriotic, mom and pop, young adults pushing baby carriages".

In other words, this nation has a really bad habit of letting white supremacy get away with repeated attempts to murder American democracy. It's time to break that habit. If we don't, they just might succeed next time.

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