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Claiming the Founding: Slavery and Constitutional History in Antebellum America

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Claiming the Founding:
Slavery and Constitutional History in Antebellum America

by

Aaron Roy Hall

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Professor Robin L. Einhorn, Chair
Professor Christopher Tomlins
Professor Karen Tani
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Abstract

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The Founding casts a long shadow over American life. Laden with cultural authority, the creation story of the United States Constitution figures prominently across public discourse, jurisprudence and historical scholarship. But the origins of this investment in original understandings, founding principles and framers' visions do not. This dissertation asks when, why and how this popular and juridical commitment to the constitutional Founding arose. It finds answers in antebellum America's searing conflicts over the future of slavery. It argues that as adversarial publics contested slavery's temporal and territorial boundaries, they refashioned the Constitution into an imagined archive. Grasping for greater authority and dispositive settlements, they invoked visions ascribed to venerated national fathers and sought to enforce imputed original meanings beyond the words of the document. Americans litigated slavery's future through their invention of a binding, revered and conclusive constitutional past. Providing a new history of constitutionalism from the early national period through Reconstruction, this dissertation traces how Americans produced, deployed and experienced the authority of the Founding around the central trauma of the age.

The first chapter depicts the post-Ratification world of public constitutional discourse before U.S. constitutional history ruled – before the genre even existed. In contrast, the following two chapters depict a transformation of vernacular constitutionalism and the construction of the Founding between the impasse over Missouri statehood and Nullification Crisis. The fourth chapter analyzes the everyday materials of constitutional learning that trained white Americans to revere and defer to the Founding, a posture central to antebellum constitutionalism. The fifth chapter examines the experiences of black Americans – free, fugitive and enslaved – as well as radical abolitionists as they variously defied the venerative consensus demanded by dominant constitutional culture. The sixth and seventh chapters consider the arena of formal law; they show how the authority of the Founding swept into courtrooms as a legitimating power, one that courts exercised aggressively but could not fully control. Turning to popular politics and government policy, the eighth chapter demonstrates how specific narratives about slavery at the Founding structured the unfolding sectional crisis. The Civil War broke open the Founding that had long constrained antislavery possibilities, and living Americans remade their Constitution after sixty years of textual stasis. As the epilogue argues, however, the Founding rose again to elide Reconstruction and sustain white reconciliation.

This dissertation expands U.S. constitutional history as a field and an object of study. Venturing deep into the everyday forums of constitutional life, it approaches the authority of the Founding

as a question rather than a predicate to make two novel contributions to our understanding of slavery and law in the nineteenth century. First, by demonstrating new dimensions of slavery's influence on political and legal life, it rewrites traditional chronologies of American constitutional development, yielding a sobering answer to the question of how citizens came to cherish their Constitution. In turn, the nexus of slavery and constitutionalism in this answer develops underrealized dimensions of the genesis of the Civil War. Second, in tracing how people reimagined the Constitution as an archive of promises about slavery, the dissertation exposes an epistemic transformation in how Americans perceived the nature and scope of the Constitution itself. This analysis raises a new model of popular constitutionalism characterized by deference to imagined, contested pasts. By studying authority instead of party-aligned disputes, it also shows an alternative way for historians and legal scholars to locate American constitutionalism in historical time. Finally, the dissertation tells a story of the Founding that speaks to our present. It studies how Americans claim the past and hold opposing truths; and it suggests that the allure and authority of original meanings cannot be separated from the United States' history of slavery and racialized tyranny.

FOR B. Z. L. AND F. B. L.

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ACKNOWLEDGEMENTS

Some years ago, I sat in an office at a "global law firm" and tried to write history. When the hour drew late and the floor emptied, the stacks of old library books would emerge from the filing cabinet. From contemporary case law, my online research would tumble back into the nineteenth century. To go to graduate school and become a historian, I needed to show some scholarship. A fair request for admission – but not so easy for a junior associate. In retrospect, I did not know what I was doing but was very intent on doing it. Although the task was solitary, I was not alone. At the firm, Kara aided the secret operation, and Tyler, David and Andrew gave moral support. My friends, especially Alexey and Matt, told me not to doubt, that this path was the right one for me. In the years since, they have kept up this refrain and even maintained interest in my research despite their very private sector lives. When I told my mom and dad about my afterhours plot to become a historian, they could have pointed to the risks involved and pressured me to continue performing class mobility. But they did not. They trusted fully and encouraged unstintingly, and they have never wavered in the ensuing years. California is a long way from West Virginia, but I have always been able to count on their love. And while Grandma and Grandpa did raise concerns about finances and jobs, they emphasized that my happiness was their greatest concern: as in all things, they simply wanted patient, reasoned analysis. It is their example of living with abiding curiosity that I have tried to follow, then and now. Whenever I would enter their home, a world of books and knowledge, of questions and conversations, they made me feel that I had entered mine. Grandpa did not live to see me start graduate school, and Grandma did not see me finish the dissertation that she would unfailing ask about. But their support has not only carried me through this part of my life; it will do so through all future ones.

After sending that "scholarly writing sample" into the world, a committee of professors in the UC Berkeley History Department decided to let me join them in Dwinelle Hall. For one inexorably drawn to thinking about the past, that committee gave me the chance to make it my career. I packed up my car, drove west and began reading history day and night – rather than just at night. At Berkeley, I have been the beneficiary of wonderful advising: it has given me freedom to roam and support when I have needed it. My primary adviser Robin Einhorn's incisive historical vision has been wonderful to behold. In her brilliant teaching, scholarship and guidance, she has shown me the work of a committed historian. With kindness and humor, she has helped me take steps toward becoming one. When Berkeley Law hired the singular Chris Tomlins, it had the unanticipated effect of transforming the life of this then-PhD student. As a mentor and interlocutor, Chris has been wise, generous and humane beyond all measure and beyond any call of duty. His efforts have made my work possible. At Berkeley Law, the brilliant Karen Tani dedicated her intellectual force and professional care to my scholarship early on, and her help has never ceased. I can neither imagine my time at Berkeley nor the development of this dissertation without Karen's lucidity and practicality. Finally, David Henkin has been an inspiration and superb reader of my work. He expanded my historical imagination at the beginning of graduate school, and then he helped its fruits take the form of better prose.

At Berkeley, I have also benefited from a community of faculty members who have volunteered the scare resources of time and energy to help my cause. Caitlin Rosenthal has been a sage consultant and sympathetic advocate. Brian DeLay and Elena Schneider have offered up a mountain of great advice. Tom Laqueur has gifted me with stimulating reflections and profound insights, often given off the cuff. Beyond the Berkeley campus, several scholars have been remarkably generous in helping me navigate both my own project and the larger academic

landscape. I am grateful to Jonathan Gienapp for enhancing, validating and supporting my work. As a scholar and a person, he is exceptional. Ryan Quintana has been a truly benevolent and learned presence, first as an anonymous reviewer and then as a friend. Giuliana Perrone has been a fount of good humor and scholarly conversation since I arrived at Berkeley. At my first ASLH conference, Sarah L. H. Gronningsater struck up a conversation and offered invaluable encouragement that has continued to this day.

Berkeley has been occupied by some magnificent people in my time. Robbie Nelson has been a comrade from beginning to end, from the Gorge to the Cuyahoga Valley; and Megan Svoboda was there for the best times, though not the longest Tweezer. Camilo Lund is a true mensch, faith-in-humanity restoring figure of uncommon hilarity, dignity and loyalty. It was a rare privilege to walk or night bike through graduate school together. Natalie Novoa has brought great joy to grim times and a helpful reality check to surreal ones. Brendan Shanahan, though younger than me, has been a role model for years. Sarah Stoller's humor and compassion have been a mainstay. It has been a true pleasure to cross paths with Ron Makleff, Yana Skorobogatov, Franklin Sammons, Danny Luzon, Yotam Tsal, Sam Wetherell and others. This dissertation would not be the same without them because I would not be the same without them.

Scholarship takes resources, and I have been incredibly fortunate to receive fellowships that enabled me to read and write for wildly long stretches. The McNeil Center for Early American Studies at the University of Pennsylvania awarded me a writing fellowship through which I was able to make substantial progress on this dissertation. More than funding, the McNeil Center let me spend an intellectually-formative year immersed in a community of scholars all thinking about early America, broadly construed. For the friendship and scholarship, I am thankful to all the folks there. Then New York University School of Law awarded me the Samuel I. Golieb Fellowship in Legal History, allowing me to finish my dissertation at last. Again, beyond funding, this fellowship came with stirring engagement and collegiality at long-running weekly colloquiums. It was my great fortune to have been able to learn from Bill Nelson, Daniel Hulsebosch, Marco Basile and David Golove over the course of the year. This dissertation has also benefited from an early research grant from the Gilder Lehrman Institute of American History. Finally, I have been the beneficiary of the constructive efforts of panelists and audience members at a number of conferences, particularly those of the Organization of American Historians, American Society for Legal History, Society of Historians of the Early Republic and the Missouri Crisis at 200. I appreciated all the good questions and hard deadlines. The ASLH, in particular, has been an essential academic home for me. At a student research colloquium that it sponsored, I was able to receive crucial comments on some of my first writing for this dissertation. I especially want to thank Chris Schmidt, Gautham Rao, Jeff Pasley, Jane Manners and Sarah Winsberg for their interest and friendship on the conference circuit.

Berkeley has been good to me. I have often felt and written in anger in recent years, looking at the past and present. But my own days have been filled with friends, fresh vegetables, bicycling in the hills, the miraculous dog Mocha Bean and the glorious dog Rudi. Most of all, they have been filled with love. There is one whom I want to acknowledge for everything that she does, but my words fail. All I can say is: With Sheer, I am happy. Thank you.

INTRODUCTION

CLAIMING THE FOUNDING

Inside a rented room at the Richmond Library Company on March 14, 1848, a cohort of Virginia men took their seats. A weekly meeting of the Patrick Henry Society debating club came to order. For this body of free white citizens, enjoying their associational liberties, the question of the day was one of constitutional abstraction and pointed interest. "Is a free negro, who has been made a citizen of Massachusetts by a law of that state a citizen within the meaning of that clause in the Constitution which confers on the citizens of each of the states all the privileges and immunities of the citizens of several states!" Their query called upon disputants and audience to contemplate obligations under the Federal Constitution on entwined issues of race, slavery, section and governmental power in the national polity to which they belonged. Neither judges nor congressmen, these well-heeled young southerners commenced the familiar activity of public constitutional interpretation. They would decide the rights of others and describe the architecture of government under their beloved Constitution. Topics broaching such themes were common fodder. The Society had recently pondered, "Is it constitutional or expedient for Congress to annex Texas to the United States by joint resolution," before finding that annexation indeed met those standards. After attendees debated away the specter of a nationally rights-bearing "free negro" on the 14th of the month, they took up congressional gag rules on antislavery petitioning. "Is the right of petition violated by the refusal of either House of Congress to receive memorials for the abolition of slavery in the District of Columbia," they asked. "[N]egative," they answered. A few weeks later, as national political attention fixed upon the future of slavery in the West, the club deliberated on whether it was constitutional "for Congress to inhibit the introduction of slavery into territory belonging to the US, not yet incorporated as a State or States." Assembled participants practiced answers to leading problems of constitutional meaning, problems that transformed slavery policy and its attendant sectional politics into matters of legal rights and fundamental law. Together, these Virginians called upon textual knowledge and received historical ideas to articulate their visions of nationhood and slavery in the authoritative domain of constitutionality.[1]

The Patrick Henry debaters were hardly an anomalous bunch. Across town, the Richard Henry Lee Debating Society met regularly to discuss kindred questions of slavery under law, responding to incidents that focused members' minds on what the Constitution must guarantee. Further south at the Forensic Club in Charleston, South Carolina, future proslavery leaders probed divisive political subjects and honed their oratory for disputes to come. Down in New Orleans, southern men gathered to contemplate constitutionality at the Jefferson Debating Society. Over the 1850s, the assembly moved from dissecting "unlimited freedom of the press" to determining the limits of constitutional obligation. They wondered, "Should the South acquiesce if the administration of a Republican Candidate is elected," weighing whether their constitutional responsibilities would be dissolved by the implications of constitutional breaches, perceived or anticipated. Empowered men of slave states arrived at these meetings conscious of

[1] Patrick Henry Society, Proceedings (BR 114) Robert Alonzo Brock Collection, Library of Virginia. On the Richmond Library Company, see Emily B. Todd, "Research Note: Antebellum Libraries in Richmond and New Orleans and the Search for the Practices and Preferences of 'Real' Readers," *American Studies*, 42:3 (Fall 2001): 195-209.

the dilemmas that marked their national political life, slavery chief among them, from which contested claims of constitutional authority were inseparable.[2]

In the North, amid a culture of civic participation, men and women assembled at schoolhouses, lyceums and municipal buildings to grapple with the nexus of slavery and the Constitution. As the abolitionist movement swelled in the mid-1830s, the Boston Debating Society pondered: "Is any course of conduct on the part of citizens of the non-slave holding states having a tendency to excite uneasiness and discontent among the Slaves of the South, consistent with the political obligations of such citizens?" A closely divided membership, which included young antislavery leader Wendell Phillips, found abolitionist mailings to indeed pose such a violation. But many participants subsequently condemned federal censorship when debating whether "a Law prohibiting the circulation in the Southern States through the mails of incendiary publications, as suggested in the President's Message, be constitutional or expedient?" At an assembly in Litchfield, Maine, disputants persuaded a majority of attending members to affirm "that American Slavery is contrary to the letter & spirit of the U. States Constitution." The Loudon Debating Society of New Hampshire decided "unanimously in the negative" against resisting the 1850 Fugitive Slave Law and then changed their minds, "on merits of argument" after a few months of experience. Both the Warner Debating Club and South Acworth Association for Mental Improvement similarly reflected on "the duty of every American Citizen to obey" the law. At Portland, Maine's Jefferson Legislature, men and female guests met twice weekly to emulate lawmakers. "Representatives" presented resolutions, debated the annexation of Texas and even mooted a gag rule on resolves for "abolishing Slavery in the District of Columbia," which predictably failed to pass. Attentive to incidents implicating constitutional rights, the mock Legislature responded to the notorious 1837 murder of abolitionist newspaper editor Elijah Lovejoy, condemning "the recent riot at Alton (Illinois) which in defiance of civil law and constitutional right, aimed to subvert the Freedom of Speech and of the press and resulted in the loss of life, and destruction of Property of those who hazarded everything in defending those sacred rights of freemen." Meeting in the wake of a fugitive slave proceeding that spilled from the courthouse into street violence, the town lyceum in Marion, Ohio found itself unable to discuss "Ought slavery to be immediately abolished in the United States?" on January 14, 1840. It did so weeks later only after much shouting and the arrival of civil authorities. In all these forums, citizens practiced constitutional knowledge and faith. They considered tensions between constitutional and moral strictures and articulated what they believed the Constitution allowed and demanded.[3]

Antebellum citizens approached slavery as a subject of constitutional rights and constitutional rules, concerning Americans everywhere. Neither robed nor elected, they nonetheless confronted the politics of slavery with a constitutional consciousness. This was true from Maine to Louisiana, from one Jefferson Society to another. People conceived of the

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[2] Richard Henry Lee Debating Society, Minute Book, Robert Alonzo Brock Collection, Library of Virginia. Minute book of the Forensic Club, Charleston, South Carolina, 1821-1828, New York Historical Society; Jefferson Debating Society of New Orleans, City Archives, New Orleans Public Library.

[3] Boston Debating Society minutes, 1832-1836, Massachusetts Historical Society; Jefferson Legislature Records, Maine Historical Society; Philomathian Society Records, Maine Historical Society; Loudon Debating Society records, New Hampshire Historical Society; Warner Debating Club records, New Hampshire Historical Society; South Acworth Association for Mental Improvement records, New Hampshire Historical Society; James H. Anderson, ed., *Life and letters of Judge Thomas J. Anderson and wife: Including a Few Letters from Children and Others; most Written During the Civil War; A History* (n.p. 1904). On this "moral-formal" dilemma in its familiar judicial context, see Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven, 1975);

Constitution as a governing force across a vast land, a repository of essential meaning, and a mechanism of control over distant Americans. As frontier attorney Joseph Baldwin recalled the omnipresence of Constitution talk in the Old Southwest, "Nor do I recollect of hearing any question debated that did not resolve itself into a question of constitution - strict construction, &c.,- the constitution being a thing of that curious virtue that its chief excellency consisted in not allowing the government to do anything; or in being a regular prize fighter that knocked all laws and legislators into a cocked hat except those of the objector's party." Debating clubs signify a public constitutional life that extended far outside the confines of a library hall or schoolhouse. Their proceedings documented a relatively formal instance of the diffuse immensity of popular constitutional engagement around the fraught subject of slavery. Members brought ideas absorbed from their textual and oral worlds, as communities forged local and sectional understandings on the most nationally divisive subject. Participants nurtured a constitutional vernacular for how to debate meaning, and they practiced ways of constitutional knowing that produced answers. In varied configurations and settings, in print and in speech, from childhood to old age, alone or en masse, near and far from government institutions, antebellum Americans honed their vernacular constitutionalism, practiced belief in their inherited Constitution and internalized its power.[4]

If the jotted-down proceedings of debating clubs named after national fathers represent points in a constellation of popular constitutional engagement, they raise an essential question about the workings of antebellum constitutionalism. How did people argue over meaning? When Virginians and Mainers sought constitutional answers to questions about slavery, they needed techniques and knowledge through which to find them. They required a shared set of concepts and language, a kind of cultural compass that would orient their posture towards the Constitution as they understood it.

The Founding was this compass. When most free white Americans approached the gravest questions of slavery under the Constitution during the antebellum era, they did so through the authority of a venerated past – when they envisioned national fathers crafting the Constitution and setting an unalterable course for the United States. As educator Arthur Stansbury explained to the rising generation of Americans at the turbulent turn into the 1830s, "though the glory of giving to their country such a Constitution as this, is what none but ["your fathers"] have been so blessed as to enjoy, yet you succeed to a task but one degree removed from it, that of preserving what they have committed to your virtue, unsullied and unimpaired." In other words, it was the duty of living Americans to revere and uphold the original constitutional commitments of the founding generation. From outside this venerative consensus guiding and constraining constitutional debate, free black leader Charles Remond Lenox testified to the overwhelming force of this cultural imperative. In 1844, as Massachusetts abolitionists argued over principles and policy at the New England Anti-Slavery Convention, Remond heard his ostensible ally, Dr. Walter Channing, defend the Constitution as a "sacred instrument." Moved to respond, he observed that it was easy for white men "to speak of the awe and reverence they feel as they contemplate the Constitution"; but as generation after generation of

[4] Joseph Glover Baldwin, *The Flush Times of Alabama and Mississippi: A Series of Sketches* (New York: 1853). On the development of associational life, see Johann Neem, *Creating a Nation of Joiners: Democracy and Civil Society in Early National Massachusetts* (Cambridge, 2008); on oral culture as constitutive of public life, including debating society participation, see Carolyn Eastman, *A Nation of Speechifiers: Making an American Public after the Revolution* (Chicago, 2009).

enslaved people went to their graves, it was impossible for him and his enslaved brethren to regard it with the "filial reverence" that dominated antebellum constitutionalism.[5]

Through the constitutional Founding, Americans visited wise national fathers and retrieved comprehensive answers that, via their reconstructive imaginations in the antebellum present, seemed to fit present needs. As Remond observed, this conjoined reverence for fathers and Constitution served those "for whose benefit the Constitution was made" but it was a millstone around the neck of those for whom honoring not only the text but the ascribed visions and promises of the framers meant slavery and exclusion. Judge Samuel Nelson of New York, later appointed to the Supreme Court, modelled how the Founding was a constitutional compass for antebellum Americans. In 1834, Jack, detained in New York, admitted his enslaved status in Louisiana but challenged the summary manner in which he was to be delivered up to his enslaver, Mary Martin, under the Fugitive Slave Act of 1793. Nelson turned to the Founding. The notion "that the framers of the constitution intended to leave the regulation of this subject to the states, when the provision itself obviously sprung out of their fears of partial and unjust legislation by the states," he wrote, "would present an inconsistency of action and an unskillfulness in the adoption of means for the end in view, too remarkable to have been overlooked by a much less wise body of men." Inhabiting the minds of imagined framers dedicated to ensuring the easy return of purported slaves, Nelson believed they "must naturally have seen and felt that the spirit apprehended to exist in the States which made this provision expedient would be able to frustrate its object… [and] that the remedy of the evil and the security of rights would not be complete unless this power was also vested in the national government." The 1830s present blurred with the 1780s past, as Nelson located authoritative constitutional meaning by invoking a Founding containing interests and directions that suited his moment. Reviewing this decision on appeal, Chancellor Christopher Walworth saw the Founding differently. Perhaps because he felt bound to leave in place the decision dooming Jack due to his confessed status, Walworth wrote freely: "I must still be permitted to doubt whether the patriots of the revolution who framed the constitution of the United States, and who had incorporated into the declaration of independence, as one of the justifiable causes of separation from our mother country, that the inhabitants of the colonies had been transported beyond seas for trial, could ever have intended to sanction such a principle as to one who merely *claimed* as a fugitive from servitude in another state."[6]

For jurists Nelson and Walworth, for the students of Arthur Stansbury, for Dr. Walter Channing in the antislavery convention, for members of Jefferson societies both North and South, and for most antebellum Americans, constitutional meaning on matters of slavery posed questions of history and a contest of fathers against fathers. It was a conflict that happened on the sacred ground of the Founding. And as Charles Remond bore witness, that structure left little room for freedom, equality and abolition, confining fights to available, circumscribed constitutional ground: "With all my knowledge of the origin and the progress, and my experience of the present practical workings of the American Constitution, shall I be found here advocating it as a glorious means to a glorious end?" Peering back at constitutionalism during the Early

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[5] Arthur Stansbury, *Elementary Catechism on the Constitution of the United States: For the Use of Schools* (Boston: 1828); "Speech by Charles Lenox Remond," in *The Black Abolitionist Papers, vol. 3*, ed. C. Peter Ripley (Chapel Hill, 1991), 442–45 (reprinted from *National Anti-Slavery Standard*, July 18, 1844).

[6] *Jack v. Martin*, 14 Wend. 407 (1835); An example of the abolitionist absorption of Walworth's argument is William Yates, *Rights of Colored Men to Suffrage, Citizenship, and Trial by Jury…* (Philadelphia, 1838), 93. On *Jack v. Martin*, see Peter Charles Hoffer, *The Law's Conscience: Equitable Constitutionalism in America* (Chapel Hill, 1990), 121-2.

Republic, at debates over slavery in public forums and courtrooms, at the power vested in an authoritative original moment and the oppression that it sanctioned, the Founding can be seen as essential to, indeed constitutive of, the force and form of the Constitution itself. The history of the Founding in antebellum America – its construction, propagation, uses and legacies – was an unfolding struggle over constitutional law, culture and power that reaches toward our present.[7]

Founding Questions

The folktale of the constitutional Founding goes something like this: To lead the United States out of its troubled post-Revolutionary wilderness, statesmen joined together in Philadelphia. Behind closed doors, these men studied the past, envisioned the future and crafted a new fundamental law for a new nation. Compromises were made and interests yielded. Then through a great campaign of persuasion and public deliberation, Americans overcame jealousy and doubt. They put aside the Articles of Confederation and adopted the Federal Constitution in 1788. A new national government commenced the following year under George Washington, and the United States could begin in earnest. So goes the story of the Founding, an arc familiar to generations of Americans. It has largely stuck to these terms since free white people began telling it to themselves in the early nineteenth century.[8] All the while, abolitionists, disenfranchised communities, Progressive Era critics and modern historians have challenged the triumphal strands woven into this tale, demonstrating deep commitments to racial slavery as well as anti-democratic and class-interested agendas that inhered in the project.[9] These voices have argued within the framework of the Founding story, seeking to reveal its true self and revise its meaning. The abiding narrative is a powerful one. As a moment in the national imaginary populated by wise framers and enduring principles, the Founding has cast a long shadow over American life. In multifarious ways, it enters into wide-ranging engagements on national identity, purposes, values, and the possibilities and limits of government in the United States.[10] Debates over what the future should hold often travel back to the Founding for justification. Constitutional adjudication and popular understandings of constitutional meaning both draw from its well of ascribed meanings. Indeed, the very contours of what constitutional history *is* and what questions of constitutional history matter reflect the enduring grain of a constitutional consciousness oriented towards the authority of the Founding.

Possessed of such enormous cultural power, the Founding figures prominently across contemporary scholarship, jurisprudence, and political discourse in American public life.[11] But

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[7] Remond, Marlboro Chapel Boston, MA, 29 May 1844, in *The Black Abolitionist Papers, vol. 3*, ed. C. Peter Ripley (Chapel Hill, 1991), 442–45.

[8] George Ticknor Curtis, *History of the Origin, Formation, and Adoption of the Constitution of the United States* (vol. 1, New York, 1854); George Bancroft, *History of the United States of America, from the Discovery of the American Continent* (Boston, 1854).

[9] Wendell Phillips, *The Constitution a pro-slavery compact; or, Extracts from the Madison papers, etc.* (New York, 1845); Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1913); David Waldstreicher, *Slavery's Constitution: From Revolution to Rati cation* (New York: Hill and Wang, 2009).

[10] Michael Kammen, *A Machine at Would Go of Itself,* (New York, 1986); Sanford Levinson, *Constitutional Faith* (Princeton, NJ 1988).

[11] David Sehat, The *Jefferson Rule: How the Founding Fathers Became Infallible and Our Politics Inflexible* (New York, 2015); Andrew M. Schocket, *Fighting over the Founders: How We Remember the American Revolution* (New York, 2015); Jill Lepore, The *Whites of Their Eyes: The Tea Party's Revolution and the Battle over American History* (Princeton, NJ, 2011); Eric Segall, *Originalism as Faith* (New York, 2018); Jamal Greene, "On the Origins of Originalism," *Texas Law Review* 88 (Nov. 2009), 1–89; Keith E. Whittington, "Originalism: A Critical

the origins of this investment in original constitutional visions, laden with expectations for legitimation, do not. While the history of the Constitution, if the chronicle contained within the Founding tale may be regarded as such, looms large, the history of the folktale of the Founding and all the power that it contains remains remarkably elusive. How did the period of constitutional genesis become the Founding, an elevated island in time? Why did Americans vest extraordinary authority, both popular and juridical, in their tale of the Founding? When did that story come to be told? How did the words, deeds, understandings and visions of the constitutional authors and ratifiers ascend in constitutional consciousness and concomitant constitutional power? To what effect was this power deployed? These are questions of the cultural life, social force and political violence of constitutional history *about* constitutional history. Yet they are not questions that can be answered by studying the period of drafting and ratification. The development of the Founding as a central narrative device, authorizing force and source of binding meaning in American constitutionalism belongs to another era. In other words, the original moment of the Founding, before it gained it capitalization and content, cannot speak to why Americans came to care so deeply about it.

This dissertation begins with a simple observation. Americans adopted the Federal Constitution in 1788; but it was left to later years and subsequent generations to write the Founding into existence – to imbue the U.S. Constitution with a public history. Recovering the construction of this mediating structure between people and Constitution requires entering antebellum political time. In the thick of political and legal life under the Constitution, the dissertation traces how people began producing, using and experiencing the weight of constitutional history – an exploration not of what they thought the Constitution meant but *how* they located that meaning with respect to the past. This inquiry requires seeing the Founding apart from the Constitution, invisibly conjoined as they have become, in order to observe how Americans remade their constitutionalism around historical authority that they came to believe in. This dissertation picks up American constitutional history after the national text was drafted, ratified, printed, circulated and put into practice. It asks how, why and to what effect the United States developed a constitutionalism *enthralled* and *enclosed* by its own origin story. It finds answers in the country's searing conflicts over the temporal and territorial future of slavery. In waging political and moral battle over the institution's national future, Americans produced a constitutionalism transfixed by the authority of the past.

Three decades after the ink of ratification had dried, Americans lived at a conjuncture. New sectional schisms yawned while a generation of post-Revolutionary leaders vanished.[12] In the intervening years, Americans had dramatically expanded racial enslavement across the extant southern United States – both in the vast number of individuals ensnared and in the institution's centrality to the economic and social aspirations of white southerners. Meanwhile, under gradual emancipation statutes in the northern and middle states, slavery was fast contracting. As the

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Introduction," *Fordham Law Review* 82 (Nov. 2013), 378–387; Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 Harv. J.L. & Pub. Pol'y 5, 7 (1988).

[12] Alfred Young, *The Shoemaker and the Tea Party*: *Memory and the American* Revolution (Boston, 1999); Andrew Burstein. *America's Jubilee: How in 1826 a Generation Remembered Fifty Years of Independence* (New York, 2001); Michael G. Kammen, *A Season of Youth: The American Revolution and the Historical Imagination (New York, 1978);* Michael F. Conlin *One Nation Divided by Slavery: Remembering the American Revolution While Marching toward the Civil War;* Thomas Chambers, *Memories of War: Visiting Battlegrounds and Bonefields in the Early American Republic* (Ithaca, 2012); Teresa Barnett, *Sacred Relics*: *Pieces of the Past in Nineteenth-Century America* (Chicago: 201); Amy Corning and Howard Schuman, *Generations and Collective Memory* (Chicago, 2015).

Revolution and then ratification became old memories and a new generation gazed upon western territory, incompatible expectations for the future United States and slavery's place within it emerged with new urgency.[13] In unfolding conflicts over slavery and sectional power, residents of the Early Republic sought to shape and bind their parlous present with a stable, dispositive past. Adversarial publics, grasping for authority beyond the will of living generations, began to invoke Founding visions ascribed to increasingly venerated constitutional fathers. They developed a vernacular constitutionalism animated by historical memory, elevating their inherited Constitution above their democratic body politic. Southern slaveholders pioneered such appeals, but it soon became a national discourse. In practicing devotion to a revered, historical Founding and demanding that others do the same, people not only constitutionalized their hopes and expectations for the future; they cast them as a matter of original constitutional principles, purposes and prescriptions. Through this process, Americans refashioned the Constitution into an imagined archive, one filled with binding meanings to unearth and obey. People stitched together impressions of the framers' secret deliberations, assembled interpretations of state conventions debates and, most potently, rehearsed speculations into received truths about the character and meaning of the era of national formation. Across the antebellum decades, Americans litigated slavery's future through their invention of a binding constitutional past: they sought to enforce imputed original intentions beyond the words of the document, making constitutional origin stories into constitutional law. Through struggles to enlarge, confine or constrict the domain of slavery across American land, law and life, a divided people produced a distinct United States constitutionalism, a politico-legal culture new in form, conception, language and intensity.

This rule by historical memory became formal law when judges enshrined slavery and erased black citizens via the "fixed opinions concerning that race upon which the statesmen of that day spoke and acted," as Chief Justice Roger Taney opined in *Dred Scott*.[14] The vernacular constitutionalism of the Founding became the expertise of legal professionals, as constitutional cases involving slavery roiled courts. More broadly, government by history came embedded in the warp and weft of political culture, such as the ten thousand constitutional handbooks Congress dispersed in 1850 pleading for reverent deference to the Founding. Addressing an imagined nation of constitutional believers, their very first words instructed: "The Constitution, as the fireside companion of the American citizen, preserves in full freshness and vigor the recollection of the patriotic virtues and persevering courage of those gallant spirits of the Revolution who achieved the national independence, and the intelligence and fidelity of those fathers of the republic who secured, by this noble charter, the fruits and the blessings of independence."[15]

Yet such constitutional poetics complicated political strife rather than quiet it. The constitutional past was no anodyne. By its possible meanings and perceived promises, it divided the nation even as it seemed to bind together the Union. Claimed and contested by a riven public, antebellum America's unstable constitutional history shaped how people understood schisms

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[13] Adam Rothman, *Slave Country: American Expansion and the Origins of the Deep South* (Cambridge, Mass 2005); Joanne Pope Melish, *Disowning Slavery: Gradual Emancipation and "Race" in New England, 1780–1860* (Ithaca, 2016); Margot Minardi, *Making Slavery History: Abolitionism and the Politics of Memory in Massachusetts* (New York, 2012); Michael Morrison, *Slavery and the American West: The Eclipse of Manifest Destiny and the Coming of the Civil War* (Chapel Hill, 1997); John Craig Hammond, *Slavery, Freedom, and Expansion in the Early American West* (Charlottesville, 2007); Matthew Mason, *Slavery and Politics in the Early American Republic* (Chapel Hill: 2006).

[14] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

[15] William Hickey, *The Constitution of the United States of America* (Philadelphia, 1853).

over slavery. This was true as Americans contested issues during the period: in the hands of southern partisans, temporizing unionists, and antislavery communities, the Founding governed distant bodies and deflect efforts to govern life closer to home. And it remained the case when southern states purported to secede via de-ratification conventions. As the antebellum era yielded to war, many Americans took up arms while spinning justificatory stories of an original proslavery Constitution or an indissoluble Union of their fathers.[16] To the point of national and constitutional rupture, they claimed the authority of the Founding.

And then reclaimed it. The Civil War eroded antebellum constitutional faith and power, making amendment practically and conceptually possible. Yet he worn pathways of a half-century of fervid constitutionalism, embedded in popular and legal culture, hardly disappeared.[17] As this dissertation concludes, a cross-sectional project to rekindle the Founding's authority became a subtle weapon against black freedom and Reconstruction. Affirming the original Founding denied the existence of a new one.

This dissertation ventures deep into the everyday forums of constitutional life – classrooms and legislatures, conventions and judicial proceedings, civic festivals and petitioning campaigns – to narrate how the Founding became a source of authority, site of veneration and arena of struggle. This constitutionalism was a production of the politically empowered; but it was also a field tactically negotiated by free people of color, a force resisted by antislavery radicals, and a phenomenon driven by the enslaved people who provoked cases, legislation and sectional conflict. For all their agency and adept negotiation, however, the Founding remained a historical trap in antebellum America for people seeking emancipatory action. It was laid by those who believed that their fathers' Constitution intended to perpetually withhold the political capacity to restrict slavery and by those who wished to extricate white society from responsibility for slavery's continued existence. To these ends, the Founding substituted the rule of ascribed history for moral reckoning and democratic responsibility, imposing the attributed constitutional visions of the dead in place of those of the living.

Structure and Arguments

The arc of this dissertation illustrates how Americans invented a prescriptive original constitutional moment in the course of fighting over slavery and state power; how this ascribed history became a locus of justificatory constitutional power both cultural and legal; how it structured unfolding conflicts over slavery; and finally how that authority was redeployed to undermine Reconstruction. *Claiming the Founding* unfolds in two parts. The first half, "Constitutional Exercises," traces the ascent of an authoritative, revered Founding in constitutional politics and culture. The second half, "Mobilizing Meanings," analyzes how Americans wielded narratives of constitutional history as binding precedent and law in fights over slavery that culminated in secession and war against rebellion.

The first chapter depicts the world of public constitutional discourse before U.S. constitutional history ruled – indeed, before the genre even existed. Covering the period between ratification and 1815, it plots the terrain of an early national culture that accepted the written

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[16] Timothy Huebner, *Liberty and Union: The Civil War Era and American Constitutionalism* (Lawrence, Kan., 2016); Mark E. Neely, *Lincoln and the Triumph of the Nation: Constitutional Conflict in the American Civil War* (New York, 2011).

[17] Michael Vorenberg, "Reconstruction as a Constitutional Crisis," in Thomas J. Brown, ed., *Reconstructions: New Directions in the History of Postbellum America* (New York, 2006); Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (New York, 2001); Harold M. Hyman, *A more perfect Union: the impact of the Civil War and Reconstruction on the Constitution* (New York, 1973).

Constitution's framework for government, elections and rights, but that hardly rested claims on authorial intentions or an obligating past. With limited exceptions, people employed a vernacular firmly imbued with the present tense, and people understood the Constitution as open-ended, amendable and leaving much to politics. Debates concerning slavery did not rely upon notions of constitutional history. In contrast to this initial moment, the following two chapters describe a transformation of constitutionalism between the impasse over Missouri's admission as a slave state and South Carolina's campaign to nullify the federal tariff (and any law deemed threatening to the political economy of plantation slavery). The chapters argue that the twinned sectional crises occurring in half a generation (1819-1834) were a crucible, inflicting a sustained, multi-part constitutional experience that produced new premises about where meaning resided. The Missouri Crisis inspired a competition for authority to support incompatible visions of the national future, as free and slave states interlocutors advanced incompatible spatial-temporal visions of the future United States. Original Founding intentions became the means through which many sought prescriptions for what they found familiar and desirable, giving rise to a new vernacular that located meaning beyond the text of the Constitution. The Nullification Crisis sealed open this discursive tap. Here, constitutional history was not only an instrumental idiom but also the very objective of contestation: Americans sought to fix precisely what had happened at the moment of constitutional origin, to declare a particular history as true and conclusive, because the Founding itself was taken to define the nature and limits of the Union. As constitutional narratives gave abstruse legalisms emotional heft and wider resonance, the Founding became indispensable to America's existential politics. Through constitutional history, people sought not only to control distant lands and communities but also to govern the chronologically remote contours of those places. This transformation in constitutional concepts and rhetoric echoed through American civic, legal and political life in the ensuing decades. Focusing on processes of educational dissemination and didactic reinforcement, the fourth chapter analyzes the everyday materials through which most free white Americans learned to revere and defer to their "fathers'" Constitution. Broadly surveying the period between 1819 and 1861, it depicts the contours of a constitutional landscape where the Founding loomed ever larger. In this movement, it locates the emergence of U.S. constitutional history as genre to meet the needs of a people newly invested in justificatory narratives. Concluding the first half, the fifth chapter examines the diverse experiences of African Americans and radical abolitionists as they defied the venerative consensus demanded by dominant constitutional culture or otherwise negotiated its power. To denigrate the Founding was to embrace political exile. A counterpoint to the preceding account of antebellum constitutional education, it shows how antislavery Americans contended with the delegitimizing strictures of the Founding. People disenfranchised by race, status and gender could be constitutional critics and actors. Fugitive slaves and radical abolitionists directly dissented from constitutional pieties by deed or rhetoric. This study includes enslaved people's acquisition and practice of jurisdictional knowledge, particularly in producing constitutional clashes.

The second part of the dissertation studies how constitutional veneration and Founding authority structured ensuing conflicts over slavery between 1835 and 1865. It argues that by developing constitutional faith as the center of an ambiguous nationalism, conceiving that national fathers imparted authoritative meaning, extending such meaning to promises concerning slavery, and speaking a language of reverence across sections, Americans perceived heightened sanction for their own positions and deeper constitutional treachery in others. Subjective constitutionalism allowed for surface agreement that history governed while fostering deeper

acrimony about what that past dictated.

As Americans contested slavery under law, beliefs about the Founding became real authorities, like legal rules and precedents, with specific influence in constitutional disputes in legislatures, courtrooms and public debate. The sixth and seventh chapters consider how this unfolded in the arena of formal law. The first shows how the public authority of the Founding swept into courtrooms, remaking constitutional jurisprudence. The second illustrates both the apotheosis and fragmentation of this authority, as courts aggressively exercised the Founding and lost control over its meaning. To litigate and adjudicate fraught cases implicating slavery, legal professionals seized upon the legitimating popular power of historical narratives and veneration, introducing elaborate and impassioned claims upon original meaning into oral arguments, briefs, opinions and high legal culture. In other words, popular constitutionalism around slavery remade American legal practice. This dynamic, dialogic influence between public and judiciary on historical authority reveals judicial adoption of original meanings as a fundamentally political act, one taken to legitimate decisions where institutional authority might have proven insufficient. Turning to the angry heart of constitutional conflict over slavery, the eighth chapter explicates the weaponization of the Founding in the arena of popular politics and legislative action, particularly around western expansion and slavery within federal jurisdictions. The Founding operated as a sword or shield in the hands adversarial publics and appeasing Unionists. A discourse of paternal reverence and specific Founding narratives mattered in tactics and consciousness, structuring how fault lines were drawn. Yet one community's shield was another community's sword, dissonance that was generative of deepening sectional alienation. This antebellum story culminated in secession and war: the South fashioned history that made disunion patriotic, enabling belief in "quit[ting] the Union, but not the Constitution" per Alexander Stephens.[18] Secessionists imagined reinstating an original proslavery compact of their fathers. In response, northerners who would have never sought to interfere with southern slavery rallied to defend an indissoluble union that they believed their fathers had founded. These narratives were the culmination of antebellum constitutional training. Lessons admonishing Americans to preserve their inherited Constitution, to treasure it as their birthright and to make good on the future it promised – in conjunction with the divergent content ascribed to that constitutionally-ordained future – made yet another ostensible "compromise" sustaining slavery unavailable. As delegates to the so-called Peace Conference of 1861 made clear, they would see war before free states would amend the Constitution to make slavery national and before the South would yield on what they imagined were rights and power that their fathers had bequeathed.[19] Constitutionalism facilitated a war for slavery and war for its greater self.

The carnage, statism and failure of the fathers' Constitution during the Civil War broke open strictures that had constrained antislavery possibilities: sixty years of textual stasis yielded to constitutional renovation by living Americans who seized responsibility for their fundamental law. The time when the war-ravaged and mutable present slipped the glove of the past was fleeting, however. In a closing epilogue, the dissertation suggests the Founding rose again. But not by its own accord. While political terrorism and white national reconciliation erased the

[18] Alexander H. Stephens, "Speech before the Virginia Secession Convention," April 23, 1861, in Henry Cleveland, *Alexander H. Stephens, in Public and Private: With Letters and Speeches, Before, During and Since the War* (Philadelphia, 1866), 735.

[19] L.E. Chittenden, *A report of the debates and proceedings in the secret sessions of the conference convention, for proposing amendments to the Constitution of the United States, held at Washington, D.C., in February, A.D. 1861* (New York: 1864).

political gains of African Americans, the Reconstruction Amendments yet remained inscribed on the Constitution. Renewed veneration of the original Founding, a reservoir of cultural power from antebellum days, reemerged to deny the potential scope and meaning of new constitutional text that bloodshed could not erase. In legal and popular literature, at the Constitutional Centennial and war memorials, white Americans reaffirmed the Founding and denied a new one. The effects on constitutional life have been lasting.

Contributions

Claiming the Founding tells a new history of constitutionalism in the United States from the early national period through Reconstruction. The dissertation is a work of constitutional history, but one that exists in some tension with that field. It studies neither the ideological influences nor the imperial practices that informed Revolutionary America. It is not about the creation of the constitutional text, its ratification or formative construction. This is because the actual founding cannot explain the authored Founding: indeed, to ask what the framers thought is to travel the same pathways and reproduce the same authority that once installed the Founding as the center of constitutional history. The dissertation is nevertheless keenly interested in the constitutional originary moment – not as it may have actually existed, but rather why later generations called it into being, imbued it with power and developed a distinct culture of veneration and deference. In taking up the authority of the Founding as a question rather than a predicate, it seeks to reconsider U.S. constitutional history as both a scholarly subject and a historical object. Constitutional history carries a double meaning for this work. It tells a story of change over time about the Federal Constitution in American life. And it explains how the cultural and political object became a work, and weapon, of popular history – how the text came to be known, deciphered, imagined and contested through visions of its past authorship.

Scholars have long segmented constitutional history by period. One body of scholarship has focused on the age before the Federal Constitution, examining British institutional roots, American colonial practices, Revolutionary legacies and ideological foundations that informed the constitutional project. In these works, the Constitution waits off stage, appearing as the finale of a long eighteenth-century journey through political and legal developments.[20] A second body of scholarship focuses more tightly of the creation of the Constitution. While looking back and occasionally forward in time from the 1780s, this form of constitutional history aims to recover the workings in and of the Convention.[21] This quest is ultimately one of historical meaning,

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[20] Bernard Bailyn, *The Ideological Origins of the American Revolution,* 2nd ed. (1967; Cambridge, Mass: 1992); Bernard Bailyn, "The Ideological Fulfillment of the American Revolution," in *Faces of Revolution: Personalities and Themes in the Struggle for Independence* (New York: 1990), 225–278; Gordon S. Wood, *The Creation of the American Republic, 1776–1787,* 2nd ed. (1969; Chapel Hill: 1998); Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York: 2007); Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: 1985); Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775–1787* (Philadelphia: 1983); Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607–1788* (Athens: 1986); Alison L. LaCroix, *The Ideological Origins of American Federalism* (Cambridge, Mass: 2010); Eliga H. Gould, *Among the Powers of the Earth: The American Revolution and the Making of a New World Empire* (Cambridge, Mass: 2012).

[21] Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution* (New York, 2016); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York, 1996*)*; Richard Beeman, *Plain, Honest Men: The Making of the American Constitution* (New York: 2009); David Brian Robertson, *The Original Compromise: What the Constitution's Framers Were Really Thinking* (New York, 2013); Max D.

identified through the interests, concerns, intentions and understandings of the authors, ratifiers and context of the times. Like the first body, this scholarship finds its narrative and analytical culmination in the finalization of the original constitutional text after the addition of the Bill of Rights. Everything afterwards belongs to a third body stretching from the 1790s through the present day. There is a certain symmetry to this division. Hundreds of years wrap around a keystone – the Founding – that lasted a single decade. There is also a certain logical coherence to this third category: it addresses the implementation of text. Whether through different judicial and congressional interpretations, rare moments of textual amendment, or what "the people themselves" thought the Constitution meant, constitutional history after the Founding becomes a matter of interpretation and practice across centuries and topics.

There is trouble lurking in this tidy segmentation, however. Complex forms of constitutional change beyond and beneath matters of interpretation and amendment appeared after 1789. The Constitution, as mediated by the constitutionalism that developed around it, was not fixed by the Founding in its nature and authority. In recent path-breaking work with which scholars are just begun to grapple, Jonathan Gienapp illuminates how much remained in flux during the decade after ratification. Studying the Constitution in Congress, the aptly named *The Second Creation* demonstrates a transformation in what he called, "constitutional ontology." From an open-ended system in which the new text occupied an uncertain identity and was subject to uncertain rules of interpretation, Congress argued its way toward a "fixed" text as the constitutional entirety, its meaning locked inside at creation and knowable by reading and, in some instances, by excavating it from first-hand recollections and documentary sources. This work, picking up where Jack Rakove's *Original Meanings* concludes, traces how the Founding moment lingered as the authorial generation dealt with the unstable tectonics of what the Constitution is and how its meaning should be derived.[22]

Yet the mid-1790s does not mark the stabilization of those tectonics. Constitutional history carried on. As the text would travel across generations into new circumstances and crises, new ontological – and epistemic – consequences would follow. In the 1790s, the Founding had yet to be authored. At the conjuncture of generational change and conflicts over slavery in a country far removed from the world of the founding, Americans vested authority in a constitutional past that they invented and venerated. While the meaning of the Constitution ostensibly remained fixed, it came to encompass vast narrative worlds unmoored from its words and capable of superseding them. Antebellum Americans imagined history as a workaround for fixity, expanding the scope of the Constitution by writing into the past authoritative constitutional settlements for questions that a text-rather-than-system could not provide. This dissertation begins where Gienapp's account leaves off, but his work points to two larger themes animating the project: first, constitutional language and consciousness are bound up together, and both are pulled along by the flow of events; and second, to understand features of constitutionalism that seem elemental from a present vantage, an original moment cannot be isolated in time and held back from what people made of it. As Mary Bilder has shown, the very sources used to tell that original history are unstable and unreliable, creatures of political time

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Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (New York, 2003).

[22] Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (Cambridge, Mass: 2018) Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: 1996); Jonathan Gienapp, "Making Constitutional Meaning: The Removal Debate and the Birth of Constitutional Essentialism," *Journal of the Early Republic* 35 (Fall 2015): 375–418

after the Founding.[23] Deep into the antebellum era, this dissertation charts tectonic change in how people understood authority and meaning to inhere within the Constitution. It tells a history of how the *authority* and *nature* of the Constitution shifted under pressure, rather than how interpretations and text were altered. By tracing the construction and career of the Founding, it finds an epistemic transformation at the heart of American constitutionalism well after the Founding itself.

In traditional chronologies of constitutional development, the Founding period quickly gives way to eras of warring parties that stand for opposing constructions. First, Federalists and Republicans struggled over political economy in the nascent United States. Then, after the triumph and subsequent fracturing of the latter party, Jacksonian Democrats and Whigs faced off until the decade before the Civil War. *Claiming the Founding* offers a different approach. By studying constitutional authority instead of party-aligned disputes, it shows an alternative way for historians and legal scholars to locate American constitutionalism in historical time. The dissertation finds that its contours remained molten well after the early national period; that it was dynamically produced through fights over slavery and the specter of national fragility during the 1820s and 1830s; and that the authoritative, venerated and expansive Founding that emerged in antebellum America neither disappeared neatly with emancipation nor carried on as an immutable feature of American constitutionalism. In turn, this chronology suggests a nuanced, sobering answer to the abiding question of how Americans built cultural walls for their freestanding constitutional roof, as John Murrin memorably described the popular embrace of the Constitution.[24] In moving from acceptance to reverence and from seeing a frame for government to beholding an ocean of prescriptive visions, Americans mirrored the increasing demands placed upon the Constitution's authority: in the presence of slavery, the people themselves became the walls that held aloft a sublime, unalterable, historical Constitution of their fathers.

This approach reintegrates constitutionalism into the thick of scholarship on nineteenth-century America. While impassioned constitutional claims thread throughout the historiography of the Early Republic, no substantial account explains how people developed such potent relationships to the Constitution and Founding. So too do the oft-brutal consequences and sheer force of these relationships upon public discourse and government policy lack explication. When historians treat the antislavery movement, antebellum politics, developing nationalism and the Civil War, constitutionalism is often present, even powerful; but rarely is it the object of study, leaving opaque its origins, shape and mechanics.[25] This work intervenes to reveal the emergence

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[23] Mary Sarah Bilder, *Madison's Hand: Revising the Constitutional Convention* (Cambridge, MA: Harvard University Press, 2015).

[24] John M. Murrin, "A Roof without Walls: The Dilemma of American National Identity," in *Beyond Confederation: Origins of the Constitution and American National Identity,* ed. Richard Beeman, Stephen Botein, and Edward C. Carter II (Chapel Hill, 1987); Lance Banning, "Republican Ideology and the Triumph of the Constitution," *William and Mary Quarterly* 31 (Apr. 1974), 167–188.

[25] For example: John Lauritz Larson*, Internal Improvement: National Public Works and the Promise of Popular Government in the Early United States* (Chapel Hill, 2001); Manisha Sinha, *The Slave's Cause: A History of Abolition* (New Haven, 2016); Harry L. Watson, *Liberty and Power: The Politics of Jacksonian America* (New York, 1990); Robert E. Bonner, *Mastering America: Southern Slaveholders and the Crisis of American Nationhood* (New York, 2009); David M. Potter, *The Impending Crisis, 1848–1861,* completed and ed. Don E. Fehrenbacher (New York, 1976); William Freehling, *The Road to Disunion: Volume I: Secessionists at Bay, 1776-1854*. (New York: 1991); William Freehling, *The Road to Disunion: Secessionists triumphant, 1854-1861* (New York: 2007); Corey M. Brooks, *Liberty Power: Antislavery Third Parties and the Transformation of American Politics* (Chicago: 2016); James Oakes, *The Radical and the Republican: Frederick Douglass, Abraham Lincoln, and the Triumph of Antislavery Politics* (New York, 2007).

and influence of a constitutionalism that stamped politics, jurisprudence and human experience. Through elaboration of the structure of antebellum constitutionalism, it develops underrealized dimensions of the long genesis of the Civil War. Constitutional claims permeated the flashpoints beckoning towards disunion, as numerous historians from Kenneth Stampp and Don Fehrenbacher to Elizabeth Varon and Michael Woods have shown. Such constitutionalism never represented a causal alternative to the overriding force of slavery: contestation over state power or sovereignty was a proxy for control over the future of slavery. As this dissertation argues, however, constitutional faith itself channeled and magnified ruptures over slavery. Belief in an ever-expanding proslavery Founding or indissoluble Union, and the shared cultural command to revere and defend such historically-ordained original meanings, sharpened clashes – making each eruption over a slavery a matter of preserving or betraying constitutional essence and the promises of the national fathers. The generation of white Americans and elected leaders who some historians have suggested "blundered" into war possessed a constitutional consciousness that belonged firmly to their generational conjuncture; it was one produced and inculcated over the whole half century before war broke out. Contingency operated through the structure of antebellum constitutionalism.[26]

This Founding-centered culture and consciousness should be understood as popular constitutionalism. That is, in their rhetorical and conceptual resort to the authority of history, "the people" espoused what they thought the Constitution was in its nature and its sources of meaning. It was an ironic, self-abnegating popular constitutionalism, however. Americans denied their own capacity to freely interpret the Constitution, instead imagining that meanings (generally those that they preferred) were historically ordained by the constitutional fathers – an authority higher than the Supreme Court. As such, popular constitutionalism appears in this account as a collective, indeterminate deference to the past, a posture endorsed and practiced by cultural and governing elites, rather than as a democratic understanding of meaning pitted against elite judicial control. This latter conceptualization of popular constitutionalism as a counter-judicial force, the prevailing view associated with Larry Kramer, appears ever more inapt in view of the manner in which courts leveraged the public authority invested in the Founding to authorize controversial decisions about slavery.[27] Put differently, the popular legitimating power of public faith in the Founding became a judicial instrument.

The image of antebellum constitutional culture that emerges from this project is quite different from the depoliticized ignorance depicted by Michael Kammen's landmark *A Machine that Would Go of Itself*. Kammen's work, arguably the only effort to relate the history of American popular constitutional culture and predominantly focused on the twentieth century,

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[26] Kenneth Stampp, *The Imperiled Union: Essays on the Background of the Civil War* (New York: 1980); Don E. Fehrenbacher; Michael F. Holt, *The Political Crisis of the 1850s* (New York: 1978); Elizabeth R. Varon. *Disunion! The Coming of the American Civil War, 1789-1859* (Chapel Hill, 2008); Michael Woods, *Emotional and Sectional Conflict in the Antebellum United States* (New York, 2014); Michael F. Holt, *The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War* (New York: 1999), William J. Cooper Jr., *The South and the Politics of Slavery, 1828–1856* (Baton Rouge: 1978); Leonard L. Richards, *The Slave Power: The Free North and Southern Domination, 1780–1860* (Baton Rouge: 2000); Susan-Mary Grant, *North Over South: Northern Nationalism and American Identity in the Antebellum Era* (Lawrence: 2000). William A. Link, *The Roots of Secession: Slavery and Politics in Antebellum Virginia* (Chapel Hill: 2003); Michael E. Woods, "What Twenty-First-Century Historians Have Said about the Causes of Disunion: A Civil War Sesquicentennial Review of the Recent Literature," *Journal of American History* 99 (Sept. 2012): 415–39.

[27] Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York, 2004)

asserts that veneration was minimal and constitutional illiteracy pervasive in the early republic.[28] This dissertation suggests revisions to both points. Americans did not need to have technical or even formally correct constitutional knowledge in order to have passionate constitutional convictions, particularly an open-ended faith in the work of their fathers. Building on Kammen's chronology, legal scholar Aziz Rana is currently writing about the "The Rise of the Constitution" in the twentieth-century, incisively showing how the cultivation of public veneration enabled security state developments and coercive domestic programs.[29] *Claiming the Founding* joins this research in considering the severe political consequences of American constitutional culture; but it finds that historical veneration performed critical work much earlier as an indispensable mechanism for sustaining slavery and defeating Reconstruction.[30]

Legal interpretation, Robert Cover observed, "takes place in a field of pain and death."[31] The official act causes and justifies its infliction in the past, present and future. Such was the driving logic of antebellum constitutionalism – the pain was not incidental but essential. As this dissertation contends, the history of American constitutionalism belongs to the history of American slavery. The justificatory work of the Founding operated upon the lives of enslaved African Americans, enshrining their captivity while reacting to their resistance. Slavery reverberated through the array of idioms, ideas and actions that coalesced in antebellum constitutionalism. Through an expanded body of ascribed historical meanings, free white Americans could buttress and obscure proslavery aims as pro-Union ones, a subject already resolved by the fathers' Constitution. Indeed, arguments that constitutional history mandated the extension and perpetuation of slavery arrived before the rise of confrontational proslavery ideology; and afterwards, they remained a more pervasive, effective justification across the Union for Americans who preferred to regard slavery as a settled reality rather than as a set of active choices. This analysis provides a new avenue to understand connections between slavery and the Constitution. Historians such as David Waldstreicher, Paul Finkelman, Robin Einhorn and George Van Cleve have carefully examined how commitments to slavery entered into the drafting and ratification of the Constitution, views resisted or qualified by others such as Sean Wilentz and Don Fehrenbacher.[32] This work, reflecting the segmented nature of American constitutional scholarship as well as the enduring import of the Founding, focuses on the moment of constitutional genesis. It does not consider how slavery impelled the antebellum construction of the Founding in public memory and constitutional authority. As this dissertation seeks to show, however, the scope and authority of the proslavery Founding was contingent on unfolding

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[28] Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York, 1986). See also Robert A. Ferguson, *Law and Letters in American Culture* (Cambridge, Mass., 1984).

[29] Aziz Rana, "The Rise of the Constitution" (University of Chicago Press, under contract); Aziz Rana, "Constitutionalism and the Foundations of the Security State," 103 *California Law Review* 335 (2015)

[30] Michael Les Benedict, *Preserving the Constitution: Essays on Politics and the Constitution in the Reconstruction Era* (New York, 2006); Pamela Brandwein, "Slavery as an Interpretive Issue in the Reconstruction Debates," *Law & Society Review* Vol. 34 (2000), 315-366; David Blight, *Race and Reunion: The Civil War in American Memory* (Cambridge, Mass 2001); Gaines M. Foster, *Ghosts of the Confederacy*: *Defeat, the Lost Cause, and the Emergence of the New South, 1865 to 1913* (New York, 1987).

[31] Robert Cover, "Violence and the Word," 95 *Yale Law Journal* 1601 (1986).

[32] David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (New York: Hill and Wang, 2009); Paul Finkelman, S*lavery and the Founders: Race and Liberty in the Age of Jefferson* (Armonk, NY, 1996); Robin Einhorn, *American Taxation, American Slavery* (Chicago, 2006); Don E. Fehrenbacher. *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery*. Completed and edited by Ward M McAfee (New York: 2001); Sean Wilentz, *No Property in Man: Slavery and Antislavery at the Nation's Founding* (Cambridge, Mass., 2018).

material and ideational processes: beyond the face of the text, Americans during the Early Republic imagined and contested an ever more proslavery Founding; and, in the process, they constituted a Founding that would remove political discretion from the living generation. Would American constitutionalism have incorporated a fixation upon its formative moment in the absence of slavery? Perhaps – to some extent, over some other fault line. But that is another universe, unknown, unknowable and not ours. In the history of the United States, slavery and American constitutional culture developed inextricably together. To analogize to scholarship on "slavery's capitalism": just as American economic life developed through the toil and expropriation of slavery, American constitutionalism – or slavery's constitutionalism – developed through its gravitational pull on political and legal life.[33]

This dissertation seeks to contribute a nineteenth-century volume of "new constitutional history." As Risa Goluboff characterizes this enterprise (rather long-running at this point), such history adopts "an expansive approach to the cast of historical actors, the arenas in which they acted, the types of sources that can provide information about them, and the questions one might ask about the past."[34] This kind of methodological expansion brings with it a wider, plural view of legal historical development. It embraces as constitutional actors those without bar admissions, high office or other badges of elite status; it takes seriously the constitutional experience and imaginations of marginalized people, including those without legal freedom. Much scholarship in this mode has focused on the twentieth century, particularly the civil rights movement, but Martha Jones, Sarah Barringer Gordon, Greg Ablavsky and others have brought this approach to nineteenth-century constitutional struggles with illuminating effect.[35] *Claiming the Founding* joins this project through its investigation of the granular mass of antebellum constitutional culture and consciousness. The Constitution, as people understood and experienced it, entered into the lives, communities, conflicts and discourse that run through the dissertation. By attending to the workings of authority in popular constitutionalism, it examines how people engaged with the ascendant power of the Founding in social, political and legal arenas. Hendrik Hartog, in a classic constitutional bicentennial essay, endorsed such a study of "constitutional rights consciousness" around the "Constitution of Aspiration" as a meeting-ground for social and legal history.[36] The new constitutional history has largely carried out this agenda.[37] In a less determinately emancipatory mode, however, that very inquiry also applies to the antebellum constitutional imagination around the Founding. As slaveholders, conciliatory unionists, white antislavery citizens and free people of color contested the bonds the past, conflicting imaginaries were in motion – and often aspirations for a proslavery constitutional history prevailed. *Claiming the Founding* examines how these coercive constitutional visions drew intensive engagement by enslaved people and free people of color. A growing body of

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[33] Sven Beckert and Seth Rockman, editors, *Slavery's Capitalism: A New History of American Economic Development* (Philadelphia, 2016).

[34] Risa Goluboff, "Lawyers, Law, and the New Civil Rights History," 126 *Harvard Law Review* 2312, 2326 (2013).

[35] Martha Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (New York, 2018); Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill, 2002); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale Law Journal 1012 (2015); Gregory Ablavsky, "'With the Indian Tribes': Race, Citizenship, and Original Constitutional Meanings, 70 *Stanford Law Review* 1025 (2018).

[36] Hendrik Hartog, "The *Constitution of Aspiration* and 'The Rights That Belong to. Us All'", 74 Journal of American History (1987) 1013, 1024

[37] Karen M. Tani, "Constitutionalization as Statecraft: Vagrant Nation and the Modern American," *Law & Social Inquiry* (2018).

work on antebellum black legal culture by scholars including Dylan Penningroth, Sarah Gronningsater, Kimberly Welch, Laura Edwards, Kelly Kennington and Anne Twitty has recovered varieties of participation by African Americans living in slavery and freedom.[38] This work has not address engagement with the hegemony of the Founding, however. Most saliently, Martha Jones's recent *Birthright Citizens* has shown the persistent organization and labor of free people of color as they pressed forward claims of constitutional rights.[39] This dissertation dovetails with that recovered past. It shows the world of constitutional authority that antebellum African Americans navigated, and it reflects on how individuals made the fraught choice to claim or disclaim the Founding.

On Originalism

Claiming the Founding studies constitutionalism in the nineteenth century, not the present. Yet like many features of that era, the echoes are strong enough to invoke Faulkner: the Founding "is not even past."[40] As a moment in the national imaginary, Americans have continued to imagine and invoke it to authorize all manner of legal violence: assault rifles for all-comers, unions undermined on First Amendment grounds, elected officials sponsored by billionaires, civil rights laws overturned and birthright citizenship under attack, along with more aggressive notions of sovereign citizens, constitutional sheriffs and white, Christian nationhood. But of course, so too does the "Constitution of Aspiration" survive, as people seek to redeem principles of freedom, equality and a more perfect Union. This dissertation cannot help but to speak to our present. It grapples with how Americans have invested in conflicting visions of the past, inhabited communities holding opposing truths and relied on history to command and legitimate the infliction of pain.

In tracing linkages between slavery, vernacular constitutionalism and discursive practices in legal arguments and judicial opinions, the research in this dissertation shows a deep history of originalism and contemporary constitutional culture. Most accounts of originalism's origins generally turn to the latter decades of the twentieth century to trace an internal process of interpretative refinement or an external story of conservative political backlash.[41] Constitutional contestation over slavery yields a historical perspective attuned to the roots of originalism's appeal. The question of *when* is the history of originalism depends on *what* the object is. Besides a legal theory, originalism can be understood as a form of constitutional engagement both in court and out of doors that integrates public memory culture and legal reasoning. As a

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[38] Dylan Penningroth, *The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South (Chapel Hill, 2003);* Sarah Gronningsater, *The Arc of Abolition: The Children of Gradual Emancipation and the Origins of National Freedom* (University of Pennsylvania Press, forthcoming); Kimberly Welch*, Black Litigants in the Antebellum American South* (Chapel Hill: 2018); Laura Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill, 2009); Kelly Kennington, *In the Shadow of* Dred Scott: *St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America* (Athens: 2017); Anne Twitty, *Before Dred Scott: Slavery and Legal Culture in the American Confluence, 1787-1857* (New York, 2016).

[39] Stephen Kantrowitz, *More than Freedom: Fighting for Black Citizenship in a White Republic, 1829-1889* (New York, 2012).

[40] William Faulkner, *Requiem for a Nun* (New York: 1951; Vintage ed. 2011).

[41] Logan E. Sawyer, III, "Principle and Politics In the New History of Originalism," *American Journal of Legal History* 57 (2017), 198-222; Eric Segall, *Originalism as Faith* (New York, 2018); Robert Post and Reva Siegel, "Originalism as a Political Practice: The Right's Living Constitution," *Fordham Law Review* 75 (2006), 545-574; Mary Ziegler, "Originalism Talk: A Legal History," *Brigham Young University Law Review* (2014), 869-926; Daniel T. Rogers, *The Age of Fracture* (Cambridge, Mass., 2011), 232-242.

jurisprudential discourse, it presents claims of historical meaning that, as several scholars argue, sound in ethical terms of national identity, defying ready classification in conventional modalities of constitutional argument.[42] More broadly, it is an instrument of power clutched at two ends: by a public who believes in the Founding's authority and by legal professionals who tender meanings labelled with the reassuring mark of "original," even as its theoretical methods mutate to evade criticism of its historical practices and to "escape history" itself.[43][44] Contemporary originalism works through these two faces: a broad popular identity and a complex jurisprudential one, a dualism that has been integral to its development. In this way, originalism sustains an intra-elite quest for theoretical legitimacy in the legal academy while securing popular legitimacy through the perceived promise of historical truths from the Founding Fathers.[45] A meeting point of these ends is visible in the persistent reliance on "Founders' and Framers' purposes, goals, expectations, and intentions" in argumentation by lawyers and judges, even as academic originalism abjures historical inquiry.[46] Approaching originalism as not only a theory of constitutional interpretation but also as a form of public constitutional engagement directs attention towards the formation of the constitutional culture that sustains originalism. The ethos of a venerated Founding had to develop, and legal professionals had to introduce the authority inhering in public memory into legal practice. Along channels documented by this dissertation, both occurred through contestation over slavery and state power. The origins of originalism lie in this past.

As antebellum constitutional struggles over slavery show, the authority of the Founding – and its judicial application – did not exist at the moment of constitutional genesis but rather was cultivated amid intractable political divisions and incalculable human trauma. Yet constitutional culture does not stand apart from the press of historical change. Cultivations of authority may wither without new sources of energy. The construction of a governing Founding during the Early Republic suggests that its persistent authority should be considered as a contingent project over time. Indeed, the Founding's sway has not been constant, waning in moments when living generations have taken more direct responsibility for their constitutional fate.[47] For the authority of the Founding to reach us and for antebellum vernacular constitutionalism to register with familiarity today, a tortuous history lies between now and the actual founding era. The authority of that past in subsequent moments and in our present has depended upon its revitalization and reproduction across wars, crises and social conflict.[48] In the past half century, these forces include the rise of the modern originalism movement itself, which has both encouraged and

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[42] Jamal Greene, "On the Origins of Originalism," Texas Law Review 88 (2009), 1-89; Jack M. Balkin, "The New Originalism and the Uses of History," *Fordham Law Review* 82 (2013), 641-719.

[43] Jonathan Gienapp, "Constitutional Originalism and History," *Process: A Blog for American History,* Mar. 20, 2017, available at http://www.processhistory.org/originalism-history/

[44] Jamal Greene, "Selling Originalism," *Georgetown Law Journal* 97 (2009), 657-721; Rebecca E. Zietlow, "Popular Originalism? The Tea Party Movement and Constitutional Theory," *Florida Law Review* 64 (2012), 483-511.

[45] Cf. Jeremy K. Kessler and David E. Pozen, "Working Themselves Impure: A Life Cycle Theory of Legal Theories," *University of Chicago Law Review* 83 (2016), 1886. The popular face of originalism complicates any effort to treat it as a teetering legal theory.

[46] Jonathan Gienapp, "Historicism and Holism: Failures of Originalist Translation," *Fordham Law Review* 84 (2015), 935-956; Balkin, "The New Originalism and the Uses of History," 653; Richard H. Fallon, Jr., "Legitimacy and the Constitution," *Harvard Law Review* 118 (2005), 1787- 1853.

[47] Bruce A. Ackerman, *We the People*, *Vol 2: Transformations* (Cambridge, Mass., 2000).

[48] Aziz Rana, "Constitutionalism and the Foundations of the Security State," *California Law Review* 103 (2015), 335-386.

drawn strength from popular faith in the Founding. In considering the production of constitutional authority in the United States over time, originalism appears as a recent participant in own longer history.

These recent dynamics are not the subject of this dissertation, but the connection should be made. *Claiming the Founding* tells the deep history of a familiar face of American constitutionalism. The originalism movement is far from the first community of actors in US constitutional politics to claim the exclusive authority of history. Neither is its denial of any legitimate alternative approaches to constitutional meaning, nor are the efforts of some outside the movement to direct its methods to liberal ends without parallel in antebellum America. Ultimately, this dissertation insists that the power of constitutional history arose in concert with the United States' most traumatic subject, slavery under law. The enduring allure of the Founding and the contemporary authority of original meanings grow from these fraught of antebellum roots.

CHAPTER ONE

U.S. CONSTITUTIONALISM BEFORE THE FOUNDING

As the struggle over ratification in 1787 yielded to a new governing order in 1789, American constitutionalism became United States constitutionalism. What this meant was an open question lurking in countless issues and arguments that immediately followed. It was a question to be answered through practice, one that lacked a single answer, and one that was continuously renewed over time by the flow of events. In 1788, the narrow defeat of antifederalist resistance and the abandonment the Articles of Confederation marked an indistinct rupture in constitutional culture. The conjuncture impelled "the people" to fashion a constitutionalism for the Federal Constitution in place of an agglomeration, written and unwritten, that had animated claims during the Revolutionary era. Yet this swift substitution could hardly determine how that new constitutionalism would think, sound, argue or establish meaning. The installation of a text as the supreme law of the land opened new pathways of constitutional thinking and discourse. For free Americans who had spoken of constitutional "principles" or "spirit," who vaunted "liberty" and "republicanism," and who understood their constitutions as systems of power and rights, the relationship between these persistent constitutional ideas and the Federal Constitution remained unsettled. The latter could not displace, subsume or extinguish the former in one fell swoop of words. Instead, the constitutionalism of the early national period was mutable and dynamic, its experimentation driven by partisanship and exigency. As this chapter relates, however, the new US constitutionalism can be defined in part by what it was not: in early national era, Americans experienced a constitutionalism without framers whose original intentions carried binding authority and constitutional fathers whose ascribed subjective understanding approximated the force of law. The Constitution and the Founding were born decades apart. Before the rise of the Founding, Americans did not know to defer to the constitutional past.

To generalize across the varied and changing terrain of early national constitutional culture is to invite over and under inclusion of popular understandings. But it may be fairly said that the free public in the 1790s quickly came to accept the written Constitution as articulating federal government powers, organizing institutional bodies and expressing national purposes. At the same time, however, the language of constitutional principles, liberty and spirit did not fall away. In 1811, for instance, New England educator, minister and Revolutionary veteran Hezekiah Packard published one of the very few early national civic instructors for youth, *A Political Catechism, designed to lead children into the Knowledge of Society, and to train them to the Duties of Citizens*. It made no mention of the written Constitution much less its authorial origins; rather it taught generally of republicanism and the virtues of civil government with separate branches of government. To the urgent question of how to keep liberty alive in the United States, the Harvard-trained author replied, "We may preserve these liberties, by studying the things which make for peace; by carefully exercising our civil rights; and by bringing into practice the principles of our holy religion."[49] For many, the Constitution contained or reflected such general notions without textual stipulation: they were either part of the Constitution

[49] Hezekiah Packard, *A Political Catechism, designed to lead children into the Knowledge of Society, and to train them to the Duties of Citizens* (Burlington, Vt. 1811); Rossiter Johnson, ed., *The Twentieth Century Biographical Dictionary of Notable Americans* (vol. 8, Boston, 1904).

implicitly, or the Constitution in its fullest sense incorporated principles beyond the words of the document. In making constitutional claims during these years, Americans hardly rested on authorial intentions or an obligating past. Crucially, debates concerning slavery did not rely upon notions of constitutional history. Citizens and officials approached slavery as a subject of policymaking discretion within constitutional bounds, not as a matter settled by original understandings. With limited exceptions, people employed a vernacular firmly imbued with the present tense: they spoke of what the Constitution *is*. Both rising Republicans and declining Federalists asserted what the Constitution means. To call this an original constitutionalism would impose a unity and uniformity that did not exist: these were a cluster of constitutional tendencies, persuasions, beliefs and practices that prevailed for a time. In broadly embracing the Constitution after its bare passage and original unpopularity, Americans incited a constitutionalism of overt struggle. They fought to interpret the Constitution and to control who – state government, courts, Congress, people assembled – could legitimately interpret it. In doing so, they also wrestled, consciously and unconsciously, with how meaning should be or ought not to be found.

Not Yet History

The past did not rule. For Americans in the years after ratification, there was no Founding severed from their own time. It was not evident to people that they lived beyond that creative moment. After the first ten amendments were ratified in 1791, two more textual adjustments were attached in 1795 and 1804 in response to an unwelcome Supreme Court decision and unwieldy presidential election process. As Representative Andrew Gregg of Pennsylvania remarked during the congressional debates on restructuring the presidential election provisions in 1803, "it is a Constitution of experiment. The wise framers of it, with all their sagacity, could not foresee how far its various provisions would in practice correspond with their views or answer their expectations."[50] Party interest weighed heavily in this debate: under the Constitution, the second-place finisher in the Electoral College became vice president, which would continue to give a toehold of power to the declining Federalist Party. Efforts by Federalist framers to present original rationales and insist upon persevering the particular forms of the original constitutional text found little resonance. To such an appeal, Samuel Smith of Maryland rejoined "Could that gentleman, who was a member of the Convention, object to render one of its fairest and best principles more safe and secure?" The Constitution's true principle, Smith indicated, was the electoral representation of the popular will, a principle that would be better served by textual alteration enabling Electoral College members to vote for both a presidential and vice presidential candidate. Noting that framers in Congress had already proposed various amendments, he argued that "it surely could not be deemed so extraordinary, if other gentlemen should wish to amend certain parts, when one of the framers of the Constitution had thought it susceptible of amendment."[51] In June of 1804, after three-fourths of the states had ratified the resulting new text, citizens could hardly anticipate that they had been party to the last textual alterations of the Constitution until 1865.

As the Constitution did not seem beyond amendment in this period, the practicability of its change over time seemed a source of strength. When framer and Supreme Court justice James

[50] *Annals of the Congress of the United States*, 8th Cong. 1st sess., 700.
[51] William Duane, ed., *Report of a Debate in the Senate of the United States: On a Resolution for Recommending to the Legislatures of the Several States, an Amendment to the Third Paragraph of the First Section of the Second Article of the Constitution of the United States, Relative to the Mode of Electing a President and Vice President of the Said States* (n.p., 1804), 58.

Wilson delivered a series of legal lectures at the College of Philadelphia in 1791 that reflected on the Constitution, he extolled the "one great principle, the *vital* principle I may well call it, which diffuses animation and vigour through all the others. The principle I mean is this, that the supreme or sovereign power of the society resides in the citizens at large; and that, therefore, they always retain the right of abolishing, altering, or amending their constitution at whatever time, and in whatever manner they shall deem it expedient."[52] In lectures discussing the purposes, principles and operation of the Constitution, the jurist said nothing of framers, the convention, original intentions and binding bargains. Virginia law professor St. George Tucker expressed a similar sense of constitutional time in 1803, asking his legal readership to "pause a moment, and reflect on the peculiar happiness of the people of the United States, thus to possess the power of correcting whatever errors may have crept into the constitution, or may hereafter be discovered therein, without the danger of those tremendous scenes which have convulsed every nation of the earth in their attempts to ameliorate their condition; a power which they have already more than once successfully exercised."[53] The amendment process, it seemed, would allow text to better match public needs and principles as experience allowed. "Notwithstanding the great attention that was given to the formation of this constitution, it was not supposed to be incapable of improvement," explained a lay commenter without training in law.[54]

Before the rise of the Founding, people could imagine the Constitution as a living system with a textual face. During the 1805 Fourth of July celebrations in Charlestown, Virginia, the local notable Ferdinando Fairfax delivered an illuminating paean to the nature of constitutional government that the Revolution had wrought. In the heart of his analysis, Fairfax beheld:

> A government, whose whole power is a trust, executed for the common good; whose several departments are so divided as not to interfere, yet so connected as to harmonize, with each other; and which contains in itself the seeds of durability; by providing for its perpetual improvement, without the necessity of commotion, or disorder. A government, whose fundamental principles are applicable, alike, to that form which prescribes, to the numerous delegates of the people of each state, the limits of their authority, in the regulation of its municipal concerns; and to that paramount constitution, which, by a more sparing representation, and a more strict definition of powers, provides for the common concerns, and general welfare of the United States, as one nation. — Here are some remarkable features. Each state is sovereign in itself, federal in relation to each other state, and united with each other, in relation to foreign powers: and yet the several governmental authorities are so organized, as to proceed in harmony! But the representative feature runs through the whole; for even the state sovereignties are represented in the federal government! What, then, are the political principles, which are capable of this extensive, complicated, and yet accordant application? They are these: That the sovereign power resides with the majority of the citizens; who retain all powers, not expressly granted by the respective constitutions; and who may, in an orderly

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[52] James Wilson, *The Works of the Honourable James Wilson, L.L.D., Late One of the Associate Justices of the Supreme Court of the United States, and Professor of Law in the College of Philadelph*ia (Vol. 1-2, Philadelphia, 1804).

[53] St. George Tucker, *Blackstone's Commentaries: With Notes of Reference* [. . .], vol. 1 (Philadelphia: William Young Birch and Abraham Small, 1803).

[54] Joseph Priestly, *Lectures on History, and General Policy: To which is Prefixed, an Essay on a Course of Liberal Education for Civil and Active Life : and an Additional Lecture on the Constitution of the United States* (Vol. 2, Philadelphia, 1803).

> manner, by their representatives fairly and equally chosen for the express purpose, change or alter the existing constitution; according to a principle, either expressed or implied, which they all contain.[55]

This passage communicated a core understanding of the Constitution that prevailed among many Americans. It did not necessarily require great familiarity with every textual provision and their application. The Virginian saw the Constitution as prescribing the architecture of his country's government, one composed of relational institutions and embedded in a wider constitutional architecture of states. In its parts and whole, the resultant structures were the fulfillment of republican principles and enabled republican governance. They permitted policymaking that would be consistent with, and legitimated by, their generation through this constitutional system. Critically, it was a system that anticipated change both in laws and in architectural parts, all of which would be validated by virtue of their development through constitutional mechanisms. In this sense, the Constitution was forward-looking and open-ended. This vision was virtually incompatible with locked-in, unwritten, substantive promises from a historical Founding. Indeed, Fairfax imagined the federal government might undertake compensated emancipation. When he published a plan for "liberating the negroes within the united states" in 1790, the slaveholding Fairfax beheld no constitutional hurdle with his proposal that "As an additional inducement, government may, as the resources of the country become greater, offer a reward or compensation, for emancipation." It was a question of policy and democracy, not of constitutional restraint.[56] Of course the danger of unconstitutionality was always present: the overleaping of bounds, the failure of officeholders to abide by textual restrictions of powers and the corrupt subversion of republican principles were immanent risks. And for Fairfax's neighbors, the very legislation that he had suggested might be seen as posing such encroachments. But this was a question effectively deferred to a later, violent day, when both the meaning of the Constitution and of unconstitutionality itself had shifted.

Before the Founding became history, the authors, framers, ratifiers and political leaders of the constitutional genesis held elected and appointed office in the new order, both implementing and arguing vehemently over its fundamental terms. In Congress during the 1790s, the Constitution underwent a process of profound definition as controversies such as the presidential removal power and Jay's treaty prompted awkward considerations of the role of framers' recent actions and memories. Through a "second creation," writes Jonathan Gienapp, politicians began taking the steps of "conceiving of the Constitution as a linguistic artifact," then "tethering its words to the archive of its creation," and finally casting the text as expressing "contingent, willful constitutional authorship."[57] For instance, attacking the criminalization of political speech under the Sedition Act in 1798, the largely unreconstructed anti-federalist Nathaniel Macon argued that "the best way of coming at the truth of the construction of any part of the Constitution, was, by examining the opinions that were held respecting it when it was under discussion in the different States."[58] The North Carolina representative then "proceeded to quote the opinions the leading members in several of the State conventions in order to show from the opinions the friends of the Constitution that it was never understood that prosecutions for

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[55] Ferdinando Fairfax, *Oration delivered in Charlestown, in Virginia, on the fourth of July,* 1805 (Washington, D.C. 1808).
[56] Ferdinando Fairfax, "Plan for liberating the negroes within the united states," *American Museum, or, Universal Magazine* (December 1, 1790): 285–287.
[57] Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (Cambridge, Mass., 2018).
[58] *Annals of the Congress of the United States*, 5th Cong. 2nd sess., 2151.

libels could take place under the General Government." Macon had vehemently opposed the Constitution and still disdained the powers it afforded a national government; but here would use pacifying statements from its ratification to constrain its meaning. This was the creation of a Constitution for which a Founding could be invented.

The discursive creation of the Constitution could be an awkward process, one that gained more or less traction across different debates. When former framer Abraham Baldwin of Georgia sought to undermine the making of the Alien Enemy Act of 1798, the representative introduced a convenient memory of the Convention into the House. He argued that Congress had no power to restrict immigration because when the provision of the Constitution popularly understood to concern the foreign slave trade was drafted – that "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" – the Convention knew that the text "would extend to other persons besides slaves." This argument drew scorn, not deference. Robert Goodloe Harper of South Carolina politely suggested that Baldwin's "memory had failed him." The text itself showed as much, he continued. It does not deny Congress the power but states that "it shall not exercise the power until the year 1808, which makes it pretty evident that the provision had only relation to slaves" with respect to the commerce power. The Speaker of the House, Jonathan Dayton of New Jersey, denounced Baldwin's argument more emphatically as passing off a false memory as authority – as "absolute forgetfulness or to wilful misrepresentation." Once the youngest member of the Federal Convention, Dayton said "he should not have risen on this occasion if no allusion had been made to the proceedings in the Federal Convention which framed the Constitution of the United States, or if the representation which was given of what passed in that body had been a perfectly correct and candid one." In this Congress, Dayton and Baldwin were the only members of the House who had served in the Convention. Accordingly, Dayton announced it his duty to correct "this novel construction of the article (made as it would seem to suit the particular purposes of the opponents of the Alien bill)" explaining that "no question arose, or was agitated respecting the admission of foreigners, but on the contrary that it was confined simply to slaves."[59]

The transformation of the Constitution in Congress that began in these years was piecemeal and partial. The steps, once taken, did not ensure that constitutional debates would rest on all these premises: most did not. Ad hoc, inconsistent and episodic efforts to invoke the internal authorial process or ratification debates behind the Constitution were contested on grounds of accuracy, reliability and authority. For instance, after James Madison raised his memory of "the sense of the Continental Convention" against the power to create a national bank, Representative John Vining of Delaware objected. He "showed that the opinion of gentleman, in this instance, was, if not singular, different from that of his contemporaries; at least a similar objection had not been started by those gentlemen of the Senate, who had been members of the Convention; but granting that the opinion of the gentleman from Virginia had been the full sense of the members of the Convention, their opinion at that day… is not a sufficient authority by which for Congress at the present time to construe the Constitution."[60] And while one premise might hold widely, such as the Constitution's identity as a text, others did not necessarily follow. Indeed, as the threat of war dominated Republican-led Washington in the early 1800s and more framers departed that arena, reference to Convention recollections and ratification sources declined.

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[59] *Annals of the Congress of the United States*, 5th Cong. 2nd sess., 1969, 1999-92.
[60] *Annals of the Congress of the United States*, 1st Cong. 2nd sess., 2007.

Most importantly for public constitutionalism, congressional recriminations over what had transpired in the Convention did not readily assimilate among the broader public. As the Republican farmer William Manning warned in his 1798 *Key of Libberty*, "The Federal Constitution by a fair construction is a good one prinsapaly, but I have no dout but that the Convention who made it intended to destroy our free governments by it, or they neaver would have spent 4 Months in making such an inexpliset thing."[61] Particularly offensive to the watchful Manning was the idea that the Convention proceedings should bear any weight in construing the Constitution. He objected that "As to the mening of the Convention that formed it, it has nothing to do in the question, & it was an insult on the peopel to keep their debates secret at that time, & a grater one to site us to them now for an explanation, as Worshington did to the house of Representitives." Here Manning found fault with a singular episode in which President Washington had spurned the Republican-influenced House's claim of constitutional authority to judge the 1795 Jay Treaty and argued that if "the plain letter of the Constitution" be insufficient, the rejection of that power was documented in the journals of the Convention over which he had held sole custody and placed in the office of the Department of State.[62] James Madison, whose own historical practices and claims upon his private notes were changing amid partisan skirmishing, wrote angrily that "the Journal of the Convention was by a vote deposited with the P. to be kept sacred untill called for by some competent authority. How can this be reconciled with the use he has made of it?"[63] This episode drew critique in juridical circles as well. In an appendix to his 1803 critical edition of *Blackstone's Commentaries*, the William and Mary law professor St. George Tucker lamented Washington's sanction of the national bank, which Tucker deemed unconstitutional. Noticing the anomalous, instrumental usage of the non-public constitutional archive, Tucker complained that, "the journals of that body were then a secret, and in his keeping. If it was proper to resort to those journals to give a proper interpretation to the constitution in one instance, it surely was equally proper in the other; and if the rejection of one proposition in that body, was a sufficient reason for rejecting the same, when made by either house of congress, it seems difficult to assign a reason why the other should not have been treated in the same manner."[64] Resorting to the journal had been an exceptional case, and in its relative visibility, it was one that stood at odds with popular interpretative practices. Americans did not welcome a constitutionalism in which only a few men could litigate internal proceedings as their interests, memories and documents allowed.

The sense of what a constitution was in this period placed state constitutions and the Federal Constitution on a shared plane: they were frameworks for government, not untouchable artifacts. That is, constitutional culture had yet to sacralize one constitution, elevating it from the direct interpretive and authorial hands of people, while leaving other constitutions as a matter of democratic control. Over the antebellum era, as the U.S. Constitution and the Founding became

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[61] William Manning, *The Key of Libberty: Shewing the Causes Why a Free Government Has Always Failed, and a Remidy against It* (Billerica, MA: Manning Association, 1922).

[62] "If other proofs than these and the plain letter of the Constitution itself be necessary to ascertain the point under consideration, they may be found in the journals of the General Convention which I have deposited in the office of the Department of State."

[63] "From James Madison to Thomas Jefferson, 4 April 1796," *Founders Online, National Archives*, accessed April 11, 2019, https://founders.archives.gov/documents/Madison/01-16-02-0191. [Original source: *The Papers of James Madison, vol. 16*, 27 April 1795–27 March 1797, ed. J. C. A. Stagg, Thomas A. Mason, and Jeanne K. Sisson. Charlottesville: University Press of Virginia, 1989, pp. 285–287.]

[64] St. George Tucker, *Blackstone's Commentaries: With Notes of Reference* [. . .], vol. 1 (Philadelphia: William Young Birch and Abraham Small, 1803).

an unamendable sacred object invested with historical meaning, state constitutions would be frequently revised, discarded and written anew as policymaking documents, not holy texts. Western Pennsylvania judge Henry Hugh Brackenridge contemplated both his state and federal Constitution when reflecting that "there are always ingenious men who will wish to try their hands at making a constitution, and the passion of constitution making will not be satisfied with one essay. Hence it is that no constitution will be lasting, and there is such a thing as a habit of instability…. It is an axiom that the people have a right to change their constitution, and a majority constitutes the people, and the motion towards a change must begin somewhere."[65] Constitutional change, both federal and state, it seemed was an inherent part of American constitutionalism. The common cultural plane occupied by early national state and federal constitutions was evident in William Smith's 1796 publication *A Comparative View of the Constitutions of the Several States with Each Other, and with that of the United States: Exhibiting in Tables the Prominent Features of Each Constitution, and Classing Together Their Most Important Provisions Under the Several Heads of Administration; with Notes and Observations*. Printed the year before Smith became a Democratic-Republican congressman from South Carolina and dedicated to "the People of the United States," the work did exactly as the title promised. Through a series of charts arranged by rows and columns, Smith represented the constitutional features of each polity in ways that allowed ready apprehension of their similarities and differences. To these, he appended extensive normative notes that described, compared, praised and critiqued constitutional provisions for their effects and consistency with republican principles. For instance, where one state provided for legislative trials, he enjoined, "These powers of a judicial and executive nature form another bad feature in this constitution."[66] As communicated by the horizontal structure and analysis of Smith's work, all American constitutions were composed of articles of texts subject to critical evaluation and improvement in keeping with policy and principle. Smith was explicit about the goals of this project: "To make the people of the several parts of the Union better acquainted with each other, and with their respective constitutional codes, and thus to lead their minds to a more attentive contemplation of this interesting subject," and to "incite the reader to an examination of their comparative merits." Smith conceived of one further benefit, preparing amendments: "Those of our fellow citizens, who may from time to time be delegated to revise these constitutions, will be furnished with a work which will assist them in the discharge of their duty and greatly facilitate their labours." With knowledge of the text, Americans could improve constitutional language and preserve constitutional principles. This purpose applied without qualification to both the U.S. and state constitutions.

The now-alien British Constitution offered the most salient contrast for those contemplating the young U.S. Constitution. In emphasizing the innovation of a lucid uni-textual fundamental law, writers endorsed a constitutionalism that ran counter to locating meaning in opaque narratives and unwritten actions set off in time. Henry Brackenridge observed the conceptual difference that had emerged from American constitution-writing and reflected on its significance. "The saying, therefore, that in England there is no constitution, means only that

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[65] Henry Hugh Brackenridge, *Law Miscellanies: Law Miscellanies: Containing an Introduction to the Study of Law* (Philadelphia, 1818), 103.

[66] William Smith, *A Comparative View of the Constitutions of the Several States with Each Other, and with that of the United States: Exhibiting in Tables the Prominent Features of Each Constitution, and Classing Together Their Most Important Provisions Under the Several Heads of Administration; with Notes and Observations* (Philadelphia, 1796).

there has not been a convention of the people within our memory, framing a constitution, uno ictu, and making a record in writing of the provisions therein contained; but it has grown up, and has been formed by time, until it has become, in some degree, fixed and understood."[67] A prominent scientist and long-term English refugee in Pennsylvania, Joseph Priestly, adjudged that "With respect to civil liberty, or the rights of individuals, to guard which is the great object of political liberty, every thing that is most valuable in the English constitution (which, before the establishment of this, was unquestionably the best in the world) is preserved and more effectually guarded." This security came not only through institutional changes but through the clarity and safety offered by textual commitments. More emphatically, St. George Tucker insisted, "There should be no hidden machinery nor secret spring" in the Constitution – unlike the "boasted constitution of England [which] has nothing of this visible form about it, being purely constructive and established upon precedents or compulsory concessions betwixt parties at variance."[68] One New England minister explained that "A written constitution in government, is almost as necessary as a positive and written revelation is, in religion" because in their absence "in both cases, the great body of the people, for whose happiness both religion and government are intended, would remain ignorant." Deploying the strongest terminology of the day, he concluded that "Where there is no written constitution, the people are comparatively slaves, and where there is no written revelation, mankind are generally atheists or idolaters."[69] Yet, as William Manning urged upon his fellow members of the "Many," text was rarely clear, safe and simple enough. "The few have a grate advantage over the Many in forming & constructing Constitutions & Laws, & are highly interested in haveing them numerous intricate & as inexplicit as possible. By this they take to themselves the right of giving them such explanations as suits their interests, & make places for numerous lawyers & Juditial & Executive officers which ads grately to their strength by numbers." Nonetheless, the apparent relative transparency of text seemed essential. The invisible and thus particularly malleable meanings available in the British system had yielded to the Constitution's words of relative clarity and solidity and to what Priestley deemed the "simplicity of its object, which is the security of each individual in the enjoyment of his natural rights." As an aspiration and as executed, such transparency was at odds with a world of unwritten meaning to which living generations must defer when announced by constitutional experts. Printed and circulated in plain sight, the Constitution seemed by its nature to be unencumbered by hidden historical meanings or undisclosed promises and privileges.

In the years following ratification, the United States possessed virtually no civic literature devoted to teaching the Constitution. Partisan papers, political societies, and politicians invoked the Constitution frequently in fierce debates, rituals and protests, giving it a prominent oral and textual presence.[70] But the Constitution had not been transformed – temporally, structurally and substantively – into a story for passive consumption. Unlike the celebrated Revolution, the Constitution did not have a historical, narrative form. There were no tales of the Founding, and Americans were not taught to look within the Convention or to defer to shrouded original visions

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[67] Brackenridge, *Law Miscellanies*, 85.
[68] St. George Tucker, *Blackstone's Commentaries: With Notes of Reference* [. . .], vol. 1 (Philadelphia: William Young Birch and Abraham Small, 1803);
[69] Elhanan Winchester, *A Plain Political Catechism. Intended for the Use of Schools, in the United States of America: wherein the Great Principles of Liberty, and of the Federal Government, Are laid down and explained, by way of Question and Answer* (Greenfield, 1796).
[70] David Waldstreicher, *In the Midst of Perpetual Fetes: The Making of American Nationalism 1776-1820* (Chapel Hill, 1997); Simon P. Newman, *Parades and the Politics of the Street: Festive Culture in the Early American Republic* (Philadelphia, 1997).

during the formation of text. This quality was evident in the little didactic civic literature that did appear. In 1796, Elhanan Winchester published the first introductory constitutional instructor, *A Plain Political Catechism. Intended for the Use of Schools, in the United States of America: wherein the Great Principles of Liberty, and of the Federal Government, Are laid down and explained, by way of Question and Answer*. The work did not press students to defer to the past and preserve bargains struck by their fathers. Students were asked "Upon what can the people depend for the support and preservation of their rights and freedom?"[71] Winchester counselled: "Upon no beings or precautions under heaven but themselves. The spirit of liberty is a living principle. It lives in the minds principles and sentiments of the people… [such that] with the corruption of public sentiment, bills of rights, constitutions written upon paper, and all the volumes of written law, will lose their force and utility." This living dynamic was resonated with the Constitution itself. To explain why the federal text would "secure the liberties and provide for the happiness and prosperity of the community at large," Winchester emphasized the flexibility of the Constitution over time: The amendment procedure, "a peculiar excellency in the federal constitution," he instructed, "not only in a great degree covers all defects that might otherwise be supposed to exist in the constitution, but tends to prevent all riotous proceedings in order to gain redress, as it may at all times be obtained in a legal way when desired." Winchester's book was no radical outpouring or fringe view. As the minister explained to a colleague, he had authored the volume at the urging of a prominent Federalist acquaintance "who observed that such a work was necessary in order to give instruction to the youth of these States in the true principles of government and liberty, and to prevent their being led away by designing men, or noisy demagogues."

The work was decidedly promotional literature for the Constitution. It posed such questions as "Is the government of these United States founded upon the social compact"; and it delivered the answer that "Yes, and it is the first trial of the kind, upon a large scale, that has ever been made since the origin of society; and its fate will determine the important question. Whether men are worthy of liberty or not?" The Constitution it promoted was less a sure thing to be followed or a set of instructions than an ongoing project to be realized. *A Plain Political Catechism*, which went through printings in Pennsylvania, Massachusetts and a final 1806 edition in Norfolk, Virginia, may have been the only elementary constitutional instructor circulating in the United States until the rise of the Founding during the 1820s. A few other more erudite works such as Vermont District Judge Nathaniel Chipman's *Sketches of Principles of Government* presented discussion of the Constitution amongst larger musings on natural rights, law and political philosophy across centuries.[72]

These early works of constitutional education arrived before a U.S. constitutional history existed that made the framers into a holy band. On inquiring "Who composed the convention that framed the constitution," Winchester did not describe a sanctified generation or cohort. Rather, they were "Not tyrants, conquerors, slaves, foreigners, nor those that were under foreign influence, but our fathers, our friends, fellow citizens, our worthy countrymen" who "were about to return and mix with the citizens and to be themselves and their children governed by the constitution." Winchester acknowledged the "venerable patriots who composed" the Constitution for producing such a fine text; but he did not assign their authorial act, deliberations or understandings any authority at all. This approach of admiration without authority was common when the Convention came up in considerations of the Constitution within other civic literature.

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[71] Winchester, *A Plain Political Catechism.*

[72] Nathaniel Chipman, *Sketches of Principles of Government* (Rutland, 1793).

In 1806 the fervent Federalist Noah Webster's schoolbook *Elements of Useful Knowledge* noted in passing that "venerable Washington" had participated, but it was otherwise silent on the actors inside the Convention. Instead, Webster briefly focused on events in public, relating how "ratification of the constitution was celebrated in the large cities with great and splendid exhibitions… attended by immense procession of citizens arranged according to their professions, while bands of music, streaming flags, and the roar of cannon manifested the enthusiasm with which the people received the authority of the national government."[73] During James Kent's first stint as a law lecturer at Columbia College, given to the financially-strapped lawyer by John Jay and other Federalist friends, he struck an effusive note before the smattering of students who attended. In introducing the Constitution, Kent remarked "Happily for this country, and probably for the liberties of mankind, this convention combined a very rare assemblage of talents, candor, patriotism, and the public confidence, and after several months of tranquil deliberation, they agreed with unexampled unanimity to the plan of government which now forms the constitution of this country."[74] While readily honoring the unnamed framers and connecting the country's liberty to their abilities, Kent offered no meaningful look into the Convention. Indeed, his gloss did not leave room for tales of sectional bargains and prescriptive understandings beyond the words they wrote. While the politically-informed public had some knowledge that some bargaining had taken place, they did not vest the Convention with especial authority and call upon those bargains, however understood, to perform hard political work.

Federalism and Constitutional Memory

The collision between emergent national political parties during the early national period incited popular constitutional discourse. After ratification, as most antifederalists ceased to affirmatively oppose the Constitution and as fissures arose within the broader Federalist alliance, the nature of constitutional conflict assumed a new form. Instead of organizing around adoption or rejection of the Constitution, its purported principles provided ground for a struggle over power and control.[75] As the insurgent then ascendant Democratic-Republicans faced off against Federalists who initially administered the new government, the parties articulated conceptions of the Constitution's identity, scope, and sources of meaning. In this discursive arena, partisans held out the Constitution as an object to be preserved from misinterpretation and as a measure of opponents' transgressions.

In their insistent claims for representation and liberty prior to gaining power, Democratic-Republicans treated the Constitution as embodying their vision of better government and guaranteeing their right to seek it. Without elaboration or specific textual bases, they called relentlessly for "restriction of Government within Constitutional bounds," as the Democratic Society of Pennsylvania wrote to the German Republican Society in 1794. The Society would soon present an *Address to the Citizens of the United States* urging that "a corrective should be applied to measures at enmity with our Constitution; and that they may prove an efficacious instrument to secure & perpetuate the glorious inheritance of the late Revolution!" The sense of history in such appeals cast the Constitution less as a discrete culmination than as a standard and symbol by which grievances could be recognized, expressed and validated. Writing in the

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[73] Noah Webster, *Elements of Useful Knowledge: Containing a Historical and Geographical Account of the United States for the Use of Schools* (Hartford, 1806).
[74] James Kent, *Dissertations: Being the Preliminary Part of a Course of Law Lectures* (New York, 1795).
[75] Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828* (Chapel Hill, 1999).

Newark, New Jersey *Gazette* that year, REPUBLICANISM reflected on the relationship between the Constitution and the people. "It is said that we have a good constitution – let us know it well – let us see whether we have a good constitution or not; and if we have, let us see whether the administration is agreeable to it or not; if so let us endeavor to make each other as happy under such a constitution as possible, if it is a good constitution let us take care that neither ruler nor ruled infringe upon it!" The author appeared willing to embrace the role of constitutional defender. "A good constitution is like good wine, unless it is kept corked tight, it will degenerate," he declared, warning that only the "mechanics and farmers, or the poorer class of people (as they are generally called)" would ever sustain "the freedom which they and their fathers purchased."[76] But the letter-writer was quite firm that the importance of upholding the Constitution was predicated on its underlying worthiness and that the Constitution itself deserved scrutiny. This was not a constitutionalism of deference, temporal or otherwise.

Public opposition in the mid-1790s to the appointment of Supreme Court Justice John Jay to negotiate with Britain and then to the treaty that he brought back to the United States revealed Republicans' flexible, active approach to constitutionality. It sounded in principles rather than Founding history or specific text, especially strictly construed text. Thus in resolutions condemning Representative Richard Bland Lee for supporting the treaty, the Democratic-Republican Society of Dumfries "Resolved, as the opinion of this Society, that it is contrary to the Spirit of the Constitution that the judges of the Supreme Court should be permitted to accept offices emanating from and at the disposal of the President, as it has a tendency to give the Executive and undue influence and to destroy the Independency of the Judges." That "offices of high trust and great emolument should be heaped on the same person," and that judges should make treaties that are the "Supreme Law of the Land" also transgressed constitutional principle because "it is improper for the same person to make and expound the Law." In this reading of the Constitution, its perceived spirit, principles and logic opened an amorphous space for constitutional assessment and condemnation, a space in which the public could determine unconstitutionality. Indeed, "reading" is too narrow a characterization of this engagement. This was constitution-knowing or even constitution-making. And what the living generation felt empowered to construe and make in such a fashion, it also felt more capable of unmaking. When news reached Charleston, South Carolina that the Senate had ratified the Jay Treaty, a writer expressed horror and dismay. "The alternative (at least in our minds) was a hand – A CONVENTION OF THE UNTIED STATES, to ALTER *and* AMEND *the Constitution!* – This must necessarily, lead to a DISSOLUTION OF THE PRESENT GOVERNMENT! – A government,… an uncontroulable power, subversive of our dearest, inalienable rights, both as men and citizens." The writer did not blame the Constitution but rather found it inadequate and thus in need of alteration. For deposing the current government, changing text was a desirable price.[77]

The rallying documents of the Republican movement, the Virginia and Kentucky Resolutions of 1798 and 1799, belonged to this present-oriented constitutionalism. These state papers, authored by James Madison and Thomas Jefferson respectively, denounced as unconstitutional the Alien and Sedition Acts and the broader Federalist administration. Arriving a decade after ratification as part of a protracted founding moment, they were aggressive, strategic moves to shape how people would see the Constitution. As Virginia claimed for

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[76] Philip S. Foner, ed., *The Democratic-Republican Societies, 1790-1800: A Documentary Sourcebook of Constitutions, Declarations, Addresses, Resolutions and Toasts* (1977), 73, 83, 145.
[77] *The Democratic-Republican Societies, 1790-1800*, 351, 400.

individual states, "it is their duty to watch over and oppose every infraction of those principles which constitute the only basis of that Union, because a faithful observance of them can alone secure its existence and the public happiness."[78] Those principles, in the Resolutions' telling, meant the "powers of the federal government as resulting from the compact to which the states are parties, as limited by the plain sense and intention of the instrument constituting that compact." New instructions for interpreting the text attached: "words meant by the instrument to be subsidiary only to the execution of the limited powers, ought not to be so construed as themselves to give unlimited powers." For grave cases where the federal government violated those principles by exercising powers that states perceived as outside of that "compact," state were "duty bound, to interpose, for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights and liberties, appertaining to them." The Resolutions proposed a constitutional system centered on enforcing the constitutional text yet that did not expressly arise from the text itself. In such assertions of what the United States is under the Constitution, how unconstitutionality should be identified, and how Americans ought to read the Constitution, the Resolutions participated in the ongoing making of the Constitution.

This project was not a change from a static equilibrium but a calculated strike in an ongoing struggle within an unsettled domain. In James Madison's report to the Virginia legislature justifying the Resolutions, he explained the constitutional stature of states and the unconstitutionality of Federalist attacks on political speech by turning to Virginia's act of ratification. After quoting the public act, he concluded that "Words could not well express, in a fuller or more forcible manner, the understanding of the convention, that the liberty of conscience and the freedom of the press, were *equally* and *completely* exempted from all authority whatever of the United States."[79] Here Madison sought to discipline constitutional meaning by making the ratification debates into a measure of the "compact" that his Resolutions depicted, an innovation that he had already attempted in Congress. At the same time and in the same document, however, this constraining use of ratification statements coexisted with other bold acts that drew on no such authority – the most prominent being the announcement of state interposition as part of the operation of the US constitutional system. Together, they comprised an attempted rewriting of the Constitution outside of the amendment procedure. To the extent that the Resolutions succeeded politically, they would carry out a textual transformation in which the writings would be implicitly annexed to the Constitution and ratified through popular understanding and practice. Both the friends and foes of this project recognized the constitutional malleability of the moment, with sources of authority and meaning were in flux. For instance, the Republican minority in the New Jersey legislature proposed on receiving the Resolutions that a new convention should "amend the Constitution of the United States in such sort, as accurately to define the powers given to the said government of the United States, and precisely to mark out the boundaries of power between the state and general governments, in such a way, if possible, as to leave nothing to construction and particularly to ascertain and specially define the powers of the general government relative to crimes."[80] In rejoining the means and ends of the Resolutions, Federalists meanwhile sought to present their preferred system as fixed truth. Thus Maryland lawmakers resolved that "in the opinion of this House the people of the United States have vested in their President and Congress, as well the right and the power of determining on

[78] *Elliot's Debates* (vol. 4, Philadelphia: 1901), 528
[79] *Elliot's Debates*, 578.
[80] Frank Maloy Anderson, "Contemporary Opinion of the Virginia and Kentucky Resolutions," *American Historical Review*, Volume 5, Issue 1, (October 1899).

the intent and construction of the constitution, as on the ordinary subjects of legislation, and the defence of the Union; and have committed to the Supreme Judiciary of the nation the high authority of ultimately and exclusively deciding on the constitutionality of all legislative acts."[81] This conjoined conflict over construction, textual change and judicial review showed a people continuing to author the Constitution – and striving to stop its development in a certain shape.

As Republicans swept into office after 1800, Federalists found themselves in an astonishing position of double exile. Not only was political power slipping from their grasp, but they also were losing status as constitutional stewards to those whom they associated with the very antifederalists who had opposed ratification. Republicans convincingly assumed the mantle of constitutionalists, attacking Federalists on their own ground. In 1803, for instance, Benjamin Austin, an author supportive of the Jefferson administration, took this fight to the heart of Federalism in Massachusetts. Among the claims of his pamphlet *Constitutional Republicanism, in Opposition to Fallacious Federalism*, Austin proposed: "let any man read the debates of Massachusetts, and he will find that those called anti-federal in Congress have acted more consistent with the sentiments of the state than those who have assumed the title of federalists" Urging citizens to "recur to first principles" and "peruse the debates" of the state ratification convention, the author concluded that "Mr. Jefferson is, strictly speaking, a New England federalist, and so is every man who has been abused by a body of railers under the deceptive mask of friends to order and good government."[82]

The constitutional past, as Austin's salvo suggested, mattered for politics in this partisan contest. The creation of the Constitution provided a resource to impugn and attack. Republicans like Austin sought to accuse Federalists of inconsistency and inconstancy, while Federalists wished to remind Americans who had given them the Constitution. As James Hopkins lamented at the Portland Fourth of July ceremony in 1805, the records of Congress show "incontestible proof that the dominant party in our country is the same faction which unsuccessfully opposed our constitution." The orator counselled that, "Carefully, to preserve the precious fragments of our constitution which remain, let no modern philosopher or reviler of Washington be elected to office."[83] In these usages, history did not provide an authoritative source of answers to constitutional questions. While free Americans celebrated the creation of the Constitution, there was no venerated Founding, remote in time, that could be imagined as a repository of consensual, original meanings.[84] Instead, there was an uninterrupted course of struggle. The recent past that was just far enough in time to be a site of recriminations.

As the Ohio Federalist-affiliated newspaper *The Supporter* complained in 1808, Republican leaders were simply anti-Federalists in disguise. The very names of the parties seemed to be a cover-up. "A more singular instance of the perversion of language can scarcely be found, than has been furnished in this country, in the misapplication and abuse of the terms federalism & republicanism," argued the writer, because the terms mean "the same thing" and rest on the "same foundation." This mournful editorial recalled that "those who opposed the constitution were called by themselves and others antifederalists, or enemies to the federal constitution – this is the origin of the present political parties, and here is to be found the origin

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[81] Anderson, "Contemporary Opinion of the Virginia and Kentucky Resolutions."
[82] Benjamin Austin, *Constitutional Republicanism, in Opposition to Fallacious Federalism* (Boston, 1803).
[83] James D. Hopkins, *An Oration Pronounced before the Inhabitants of Portland, July 4th, 1805, in commemoration of American Independence* (Portland, Mass. (Maine), 1805).
[84] *Crito's Letters to the Electors of the United States, on the Commercial Representation; and the Seat of Government* (Philadelphia, 1807).

and true meaning of the term federalist, which it is evident is synonymous with *friend of government*." To those who thought of themselves as the authors and administrators of constitutional government since securing ratification, claims like those of Austin sounded like a deliberate plot – one that was working. "By incessant professions of love for the people, and by their constantly extolling their own virtues, and uniformly denouncing their opponents, the people began to forget the origin of the party, and to repose confidence in their sincerity," and now they have "concluded that those declamatory zealots were in fact the veteran heroes of the land, the founders of both the revolution and the government," leading to the absurd outcome that "the original enemies of the constitution succeeded in displacing its friends, and those who had uniformly opposed the government were chosen to administer it." Such was the story Federalists told themselves about recent political developments. The writer sought to comfort a distressed readership with the notion that "the great body of the people are in principle and at heart federalists, and this, in many instances, without their even knowing it themselves."[85] Defeat was in the air, however. The gullibility of the people and fragility of popular memory suggested that constitutionalism had already failed the Constitution.

Even as federalists lost power and decried a Republican coup-by-deceit, they largely did not turn to rely on archival sources from the federal or state conventions or upon myths about their substantive proceedings to buttress their position. Losing control of the government and cultural ownership of the Constitution was felt as a blow to personal history and identity. But it did not transform how federalists thought about the Constitution. They continued to approach the Constitution as a matter of text and principle. In 1809 for example, an editor published *View of the Whole Ground*, bundling the loathed embargo laws of the Republican administration that decimated New England shipping along with the US Constitution and the Massachusetts Constitution and Declaration of Rights. His express goal was "making many acquainted with the instrument which should protect them in the enjoyment of their rights, and enabling all to compare with more facility the Articles of the Constitution with the late laws which have infracted them." The New England people themselves would inspect these documents and presumably perceive the manifest unconstitutionality of the emargo on the basis of their reading. Inspired by this study, the editor held out hope that the public would "arouse that redeeming spirit of public virtue, which like 'richest alchemy' can pour balm into the wounds, and strength into the heart of our Political Constitution; and rekindle the vestal fire which shall illumine and protect the PALLADIUM of our RIGHTS."[86]

The Founding could not coalesce as a venerated, authoritative moment nor serve as a popular source of constitutional meaning in part because its prime movers were at political war in the present. The extraordinarily divisive Thomas Jefferson signed the embargo bills into law, and James Madison succeeded him to the Presidency in 1809. Such figures could not be hallowed while in the midst of partisan combat. With the leading author of the Constitution heading the ascendant Republicans, attacks not apotheosis followed in a significant portion of the Union. Speaking to the Washington Benevolent Society in New York City on July 4, 1809, early in the Madison administration, Federalist Gulian Verplanck stuck a wary note after what he deemed the "bold imposture and many coloured lies by which the friends of Washington were driven from public confidence" during the Jefferson years. Quite cognizant of the framer turned president's constitutional role, Verplanck reflected, "From the character of our present chief

[85] *The Supporter* (Chillicothe, Ohio), Oct. 6, 1808.
[86] *View of the Whole Ground: comprising the Constitution of the United States, the Declaration of Rights, and Constitution of Massachusetts; together with all the Embargo Laws* (Newburyport, 1809).

magistrate, we have much to hope, and much to fear." He observed a duality that, "We behold in him the friend of our Hamilton – the supporter of the calumniators of Washington – the advocate of temperate liberty – the patron of the admirers of French licentiousness. We have seen him foremost among the early assertors of our national independence, and yet, content for a time, to submit in silence, to those plans of ruin that had almost brought us to the feet of Napoleon. Still perhaps his principles may be sound, though ambition may have led his steps astray."[87] For Federalists, this hope for a return to what they adjudged to be sound constitutional principles was soon dashed as war with Britain lurched closer. In two pamphlets in 1810 and 1812, Bostonian John Lowell decided that Madison's labor with "Mr. Hamilton and Mr. Jay in procuring the adoption of the Federal Constitution" had become "immaterial." Pressing was the fact, Lowell argued, that the politician had spent his career as a virtual French agent. After ratification and in various offices, "We there, again, find him true to his first opinions, and resolutely bent to promote the measures which favored the views and interests of France."[88]

In northern Republican circles, meanwhile, a faction associated with DeWitt Clinton aggrieved by the commercial effects of Republican foreign policy levied its own attacks. In an 1812 pamphlet from this source, *The Republican crisis; or, An exposition of the political Jesuitism of James Madison, President of the United States of America*, used information from the Convention to censure not venerate Madison. According to the anonymous author: "It will be recollected that the plan of a general government proposed to the convention by the state of Virginia, was not a federal, but that of a consolidated union, in which the distinction of states should be nearly abolished, and their sovereignty annihilated. This plan Mr. Madison warmly supported by every argument which his ingenuity could suggest; and in the course of the debates of the convention he strenuously advocated a proposition of Mr. Pinckney from South-Carolina, that the national legislature should have the power of putting a negative on all laws passed by the state legislatures, which the general government should disapprove of, and insisted that this power was absolutely necessary."[89] In effect, the writer accused the constitutional framer of being no republican at all. Madison's original intent had been monarchy and tyranny; and with his purported warmongering, damaging trade policies and plans to control state military manpower, he was now realizing it. Another pamphlet, *Perpetual War, the Policy of Mr. Madison*, developed this dramatic critique. The Massachusetts governor had resisted Madison's call for the state militia to prepare to invade Canada – thus making offensive war in violation of the Constitution's provision for militias to "execute the Laws of the Union, suppress Insurrections and repel Invasions."[90] The author wondered, "Is there no constitutional right in the executive judiciary, and people of the several states, to judge whether the militia are or are not constitutionally called into service," a question deemed "the most interesting which could possibly occur in our new republick." Madison issued a paper castigating the governor's constitutional opinion as novel. Yes, the author concluded: "That it is a novel one is true, because Mr. Madison is the first President who has ventured to give an alarming and dangerous construction to the powers of the constitution." Madison, the constitutional framer, was the chief violator of the Constitution, at least in the eyes of many New Englanders.

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[87] Giulian C. Verplank, *An oration delivered July 4th, 1809, in the North Dutch Church, before the Washington Benevolent Society of the City of New-York* (New York, 1809).
[88] A Massachusetts Farmer [John Lowell], *Mr. Madison's War: A dispassionate inquiry into the reasons alleged by Mr. Madison for declaring an offensive and ruinous war against Great Britain* (Hanover, N.H. 1812).
[89] *The Republican crisis; or, An exposition of the political Jesuitism of James Madison, President of the United States of America* (Alexandria, D.C. 1812).
[90] A Massachusetts Farmer [John Lowell], *Perpetual War, the Policy of Mr. Madison* (London, 1813).

To condemn the policies and practices of the Madison administration, Federalists did not need internal stories of authorial intentions at a sacred Founding. The Constitution itself readily sufficed. At a Philadelphia chapter meeting of the Washington Association in the spring of 1813, for instance, the day's orator explained: "When the National Government, in direct violation of the salutary provisions and opening declaration of the constitution, neglects or overlooks the interest of any class of our citizens — when it evidently seeks to augment the power of one section of our country, and to diminish the influence and impede the progressive improvement of another — the constitution is trampled under foot."[91] This open-ended understanding of unconstitutionally could never be precisely committed to text, but it drew meaning from the very first words that an aggrieved reader would see upon glancing at the Constitution. When war broke out, Republicans had no use for such a Founding either. They lambasted ongoing "constitutional" resistance in Massachusetts to providing military manpower as "pretended grievances to restrict the construction of the constitution to the bare letter, in opposition to their own avowed principles and the plainest common sense," in the words of Alexander Hill Everett.[92] Wartime, with its attendant demands for constitutional elasticity, was no time for revisiting restrictive Convention debates.

Fueled by a capacious sense of unconstitutionality, the resistance indicated by Massachusetts culminated in the Hartford Convention. In December of 1814, delegates from Massachusetts, Connecticut, Rhode Island, New Hampshire and Vermont gathered to contemplate their constitutional future. Though accused of fomenting secession, the Federalists in attendance demanded textual, systemic revision, but not disunion. Indeed, the resulting convention report spoke directly to those who would advocate secession, the leaders of whom had been excluded from the assembly. "It is a truth, not to be concealed, that a sentiment prevails to no inconsiderable extent, that administration have given such constructions to that instrument, and practised so many abuses under color of its authority, that the time for a change is at hand. Those who so believe, regard the evils which surround them as intrinsic and incurable defects in the Constitution. They yield to a persuasion, that no change, at any time, or on any occasion, can aggravate the misery of their country. This opinion may ultimately prove to be correct."[93] While constitutional veneration was at low ebb in New England, the Hartford gathering and the constituencies it represented were inclined to press for renovation rather than abandonment. Although recalling that the Constitution, "under the auspices of a wise and virtuous administration, proved itself competent to all the objects of national prosperity," the convention insisted that the moment and terms of the Constitution's creation were obsolete. "To enumerate all the improvements of which that instrument is susceptible, and to propose such amendments as might render it in all respects perfect, would be a task which this convention has not thought proper to assume," and the body only "confined their attention to such as experience has demonstrated to be essential." The report's ensuing pages named and justified a series of amendments. Its authors showed no deference to the constitutional past or indication that earlier settlements should bind the future. If the country has remained in a long Founding moment to this point, the Convention argued that the process was far from complete.

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[91] A Member, *An oration delivered before the Washington association, at a stated meeting, March 16th, 1813* (Philadelphia, 1813).

[92] Alexander Hill Everett, *Remarks on the Governor's Speech* (Boston, 1814).

[93] *The Proceedings of a Convention of Delegates, from the States of Massachusetts, Connecticut and Rhode Island ... Convened at Hartford, Dec. 15, 1814* (Boston, 1815), 4.

Foremost among the amendments was the erasure of the three-fifths clause: the federalists demanded the eradication of political representation of enslaved people in the federal government, which the New Englanders had increasingly viewed as a founding error. "It has proved unjust and unequal in its operation. Had this effect been foreseen, the privilege would probably not have been demanded, certainly not conceded. Its tendency in future will be adverse to that harmony and mutual confidence, which are more conducive to the happiness and prosperity of every confederated state than a mere preponderance of power, the prolific source of jealousies, and controversy can be to any one of them." The proposed amendments reflected the specific experience of the years since ratification and the general destruction of an initial "balance of power among the original parties." Thus the revised Constitution should prohibit any trade embargo longer than two months, confine the presidency to a single term in which each successive officeholder must come from a different state than the immediate predecessor, and require a two-thirds congressional majority to halt foreign trade, wage offensive war or admit a new state. These amendments reflected a sense that the framers and ratifiers had failed to adequately foresee future possibilities under the Constitution. Hardened by the loss of power and wiser through observation of the rapid development of party politics and sectional advantages, the Hartford amenders intended to exert better control. The restriction on admitting new states exemplified this perspective: it warned that "southern states will first avail themselves of their new confederates to govern the east, and finally the western states, multiplied in number and augmented in population, will control the interests of the whole."[94] The report did not predict that the Missouri crisis would erupt a scant five years later over slavery and control in western territory outside the original United States. But it reflected a clear sense that the Constitution was inadequate to regulate coming conflicts over the national map and sectional interests without precipitating crisis. Because the Constitution was a framework for effective, principled government, it could and should be restructured.

Constitutional disenchantment had sprung up among free New Englanders since the late 1790s. Its roots lay in slavery and sectional power. The Hartford Convention's proposed amendments gave formal voice to the sense that the Constitution contained a fundamental defect that was continuously destroying the republican, representative character of the government. The political dominance of Virginia, the election of Jefferson and congressional pluralities through slave census power, and the creation of new slave states with increasing enslaved populations produced mounting dread and, with it, a chorus of constitutional criticism. As Boreas wrote in the polemic *Slave Representation*, "the article authorising the Southern negroes to be represented in Congress is the rotten part of the Constitution and must be amputated."[95]

Unburdened by any sense of binding historical promises, many New Englanders in this period saw constitutional revision and legislative action as possible and practicable. Thomas Branagan's 1805 publication, *Serious Remonstrances*, set the tone after South Carolina re-opened the African slave trade. Each state had independently banned introducing more captives directly from Africa in advance of the constitutional bar against federal legislation prohibiting the foreign slave trade before 1808, and the reversal sent a shock. But halting the trade sooner or later was not enough, Branagan urged – both because the enslaved population had become too larger and the South would ignore future bans out of financial and political avarice. Only "amending the federal constitution" to terminate the three-fifths clause would prevent rule by a

[94] *The Proceedings of a Convention of Delegates, from the States of Massachusetts, Connecticut and Rhode Island ... Convened at Hartford, Dec. 15, 1814*, 16.
[95] Boreas, *Slave Representation* (n.p., 1812).

slaveholding aristocracy.[96] In an era of ongoing amendment, he remarked, "What a pity it is, that the friends of our constitution, in all their amendments never attempt to remedy this growing evil this accumulating gangrene, which is devouring the vitals of the body politic." Branagan had still greater ambitions of national refashioning. He wanted to make a black state in the west. While recognizing "negro citizens" as part of the body politic, explicit exclusionary racism coursed through this object: Southern dominance commingled with Haiti-inspired fears of an uprising of enslaved and free black Americans and sexual-racial anxieties about the biological fate of white Americans. This plan further revealed a constitutional consciousness: in arguing that citizens should petition Congress to set aside distant land for "a separate state of their own," Branagan assumed this was a policy choice that Congress could undertake, not a matter constrained constitutional or historical obligations.

Of the conclusions drawn by Federalists exiled from power, one constitutional lesson was an increasingly dim view of the choices made in the Convention. To the extent that they crafted a story of the Founding, it was one of fateful miscalculation and original sectional exploitation. In 1812, Boreas elaborated:

> Ever since the meeting of the Convention at Philadelphia, in the summer of 1787, to form the Constitution, there has been a constant determination in the Slave country to gain, and preserve, an undue ascendency in both branches of the National Legislature, and in the number of Presidential Electors. This determination was fully and most successfully operative in that Convention, by procuring the insertion of the Article just mentioned, authorising *three fifths of the Slaves, and all of the free blacks*, to be represented in the Lower House of Congress. This one article, which crept almost unobserved into the Constitution, has secured to the SLAVE COUNTRY, *in the House of Representatives*, every advantage which it wished…. In the Convention, which formed the Constitution, the Northern Delegates agreed to the article authorizing the Black Representation, as a sort of just compensation for a supposed advantage enjoyed by the North in the *Senate*, on account of the number of its *Small States*. Delaware and Rhode Island were both Northern States; and, though small, were entitled to their full quota of Senators. The same mistaken apprehension has been entertained by many, even well informed men till the present hour; and the injustice and disgrace of the Black Representation have on that account been more peaceably submitted to Little did those gentlemen imagine, that, at the very time of making the Constitution, the Slave Country had its full proportion of *Senators*; and, that from that period to the present, with the exception of the first four years, it was to have a greater number of Senators than it was entitled to on the principles of equal representation.[97]

For the northern criers of constitutional inadequacy, the failure of the framers to foresee the impending dangers was understandable; but it left the Constitution unequipped to organize the United States that had come to exist only fifteen years after ratification. In keeping with a conception of constitutionality that could invoke principles rather than text or ascribed history, the South's aggregation of power through more slaves and more slave states appeared to be undermined the Constitution itself. "The spirit of the constitution then has been broken in three ways," announced Sidney Edwards Morse writing as "Massachusetts" in 1813. From an initial

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[96] Thomas Branagan, *Serious Remonstrances: Addressed to the Citizens of the Northern States, and Their Representatives* (Philadelphia, 1805).
[97] Boreas, *Slave Representation* (n.p., 1812).

balance that had informed the Constitutional architecture, the introduction of more slave states and absence of direct taxation meant that the "privileges granted as an equivalent for slave representation, no longer existing, the representation of the slaves is now contrary to the spirit of the constitution."[98] In other words, the three-fifths clause was a means to a constitutional end of producing sectional balance; and once that clause promoted the opposing effect, it ceased to be truly constitutional. Most terrifying for the North, Morse argued, was that this violation went to the "radical principle" of the Constitution – apportionment – and thus to the capacity to formally amend its text. "The most important power which the people of the United States ever delegated was the power of altering the Constitution," and slave representation threatened to steal it away. This was a constitutionalism focused upon the mechanics, nature and levels of constitutional change not one that prioritized respect for past constitutional craftsmanship. Original bargains and original text were of secondary importance to tending to the relationship between constitutional principles and present interests. While New Englanders and northern Federalists held a range of views on the wisdom of the Constitution, the core concerns expressed by Morse, Boreas and Branagan pervaded popular politics and constitutional understanding. In the winter of 1814, when military defeat, economic catastrophe and national political crisis seemed more likely than not in the eyes of many northerners, the Hartford Convention's vision for constitutional refashioning was mainstream in its corner of the Union.

The Constitution endured, while the Federalists did not. War with Britain ended mere weeks after the Harford Convention. Peace brought mortification and virtual dissolution of the party rather than the awaited collapse of the Madison administration. In the wake of this perceived victory, a political project of national reconciliation invited a synthesis of Republican and Federalist interests and constitutional interpretations. During the final years of his administration, Madison sanctioned the national bank and protective tariff for manufacturing enterprises – measures that Republicans had earlier deemed unconstitutional; and although his veto of internal improvements legislation stunned many, he publicly and privately expected and encouraged a constitutional amendment to sanction such exercises of federal power. The most successful political publication of the day, Matthew Carey's *The Olive Branch, or, Faults on both Sides, Federal and Democratic: a Serious Appeal on the Necessity of Mutual Forgiveness and Harmony*, made this movement explicit. The printer, who had been aligned with Republicans, cited errors and lack of vision of both parties going back to the creation of the Constitution. "In the convention that formed the federal constitution, the democratic party sowed the seeds of a premature dissolution of that instrument and of the American confederacy…. Its endeavours produced a constitution, which, however admirably calculated for a period of peace, has been found incompetent in war to call forth, at once and decisively, the energies of the nation, and the administration of which has been repeatedly bearded, baffled, and thwarted by the state governments. Had the real federalists in the convention succeeded, and made the general government somewhat more energetic – endowed it with a small degree more of power – it might endure for centuries."[99] But left to their own devices, Carey continued, the first Federalists posed a danger, too. "Had they possessed a complete ascendency in the convention, it is probable they would have fallen into the opposite extreme to that which decided the tenor of

[98] Massachusetts [Sidney E. Morse], *The New States, Or, A Comparison of the Wealth, Strength, and Population of the Northern and Southern States, as Also of Their Respective Powers in Congress: With a View to Expose the Injustice of Erecting New States at the South* (Boston, 1813).
[99] Mathew Carey, *The Olive Branch, or, Faults on both Sides, Federal and Democratic: a Serious Appeal on the Necessity of Mutual Forgiveness and Harmony* (Philadelphia, 1815).

the constitution…. A small but very active division were monarchists and utterly disbelieved in the efficacy or security of the republican form of government especially in a territory so extensive as that of the United States and embracing so numerous a population as were to be taken into the calculation at no distant period." Of course not all believed in reconciliation. A writer in Boston, where Federalists still held local power, warned, "in 1787, while the Convention for forming a constitution for the United States were sitting at Philadelphia, reports were in circulation that the Convention intended framing a monarchy… These facts show that at a former period, the advocates of monarchy in this country were numerous and bold. And can we believe that the royal race has become extinct? We cannot." As Carey's critiques indicate, as well as the suspicions of skeptics attest, the Founding was still not sanctified in 1815. And as the internal improvement amendment seemed imminent, the Constitution did not yet appear untouchable. Post-war constitutionalism remained active, not reverent and deferential. People were not in search of historical strictures.

Policy, Principles and Illusions: Slavery's Constitutional Politics Before the Founding

The United States harbored an evolving politics of slavery between ratification and the collapse of the Federalist Party. Configurations of interest and ideology unfolded without the concepts and rhetoric of a constitutionalism centered on the past. In 1789, the first Congress enacted the Northwest Ordinance, reaffirming the 1787 prohibition on slavery in territory ceded by several original states. In the 1790s, before the coalescence of an expressly proslavery South, lawmakers discussed matters of slavery openly – but only on a limited set of subjects that did not address the fate of slavery within the United States. In the early 1800s, the Federalist reaction to Republican power introduced a more forceful and explicit antislavery political agenda. The complaints of New Englanders culminating in the Hartford Convention's proposals to end slave representation and curb the growth of "slave country" made the sectional and constitutional dimensions clear: indeed, the linkages between political power, constitutional structure and slavery would not be stated so bluntly again for several decades. Meanwhile, enslaved people escaping northward or crossing over to Britain during the war, as well as growing currents of transatlantic abolitionism, frayed the white South's sense of security within the Union.[100] In response, southern voices began to articulate the permeance of slavery as an indisputable fact and to cautiously espouse racial enslavement as meritorious.[101] During these early national developments, the country did not experience a constitutional politics of slavery in the way that antebellum America would come to know as natural and fundamental. Slavery presented policy questions within the framework of the Constitution, and they were debated as such. Narratives of constitutional history and expansive promises or expectations did not structure debates. Without a constitutionalism of the Founding, Americans could not fight through ascribed original visions that ventured beyond the text to mandate, proscribe or justify federal action. Instead, they argued over interests and principles in spaces delimited by constitutional text. During the early national period, the constitutionalism mediating how American located meaning and authority channeled political conflict around slavery toward policymaking as an overt exercise of legislative authority rather than as simply following the commands of the fathers. Guided by this constitutionalism, Congress discussed and legislated on a range of slavery-related matters, passing a series of laws

[100] Alan Taylor, *The Internal Enemy: Slavery and War in Virginia, 1772-1832* (New York, 2013); Alan Taylor, *The Civil War of 1812: American Citizens, British Subjects, Irish Rebels, & Indian Allies* (New York, 2010); Edward Rugemer, *Slave Law and the Politics of Resistance in the Early Atlantic World* (Cambridge, Mass: 2018).
[101] Matthew Mason, *Slavery and Politics in the Early American Republic* (Chapel Hill, 2006).

against the foreign slave trade while letting slaveholders force the institution into new lands of occupation.[102]

Early national constitutionalism enabled a gauzy vision for antislavery Americans, one marked by faith, hope and critique. If the Constitution had an equalitarian, republican spirit; if it respected the rights of man; if it could be improved over time; if its text should match the principles that people believed underlay it, then the Constitution was no obstacle to progress. At a gathering of the New York Society for Promoting the Manumission of Slaves, in April of 1797, the United Presbyterian minister Samuel Miller concluded his address with a demonstration of this aspirational thinking. "The time, I trust, is not far distant ,when there shall be no slavery to lament, no oppression to oppose in the United States, when the emancipating spirit of our Constitution shall go forth in the greatness of her strength, breaking in pieces every chain, and trampling down every unjust effort of power, when she shall proclaim even to the stranger and the sojourner the moment he sets his foot upon American earth, that the ground on which he treads is sacred to Liberty."[103] The antislavery public was not oblivious to certain proslavery provisions in the Constitution; but given its perceived "emancipatory spirit" and identity as a framework rather than an encompassing historical settlement, it did not yet loom as a major barrier. Only three years after ratification, Maryland antislavery petitioners observed "with pain [] that the constitution of the national government prohibits all interference, for a limited time, in the policy of any of the existing States respecting the migration or importation of such persons as they shall think proper to admit," a provision they registered as "a temporary sanction to the partial infraction of the rights of man recognised by the laws of some of the States ,and so far a defect in the noble structure of our liberties." But as a policy matter, however, they pointed out that the federal government could halt US citizens from supplying slave ships and could otherwise regulate the trade touching American shores. Congress did so in 1794, criminalizing the building or outfitting of slaving ships in US ports and banning the use of ports by vessels embarking on a slaving journey. With the trade seen as a legitimate subject of federal regulatory action short of outright prohibition, Congress subsequently barred Americans from investing in the slaving ventures in 1800 (when South Carolina and Georgia reopened the slave trade in their jurisdictions), criminalized serving aboard any slaving ship and awarded informants and the crews of capturing vessels the value of condemned smuggling ships. These laws came from public petitioning and legislative majorities not unsympathetic to modest, ocean-oriented antislavery aims. In this moment, all legislative encounters with slavery did not belong to a single, sectional divide and implicate the validity of an original constitutional program guaranteeing slaveholders' interests in perpetuity. For the white northerners enacting gradual emancipation laws and erasing their own history with slavery, it was possible to cherish the illusion that the Constitution and the road to abolition were eminently compatible.

This indeterminate constitutionalism dovetailed with the gradualist aims of antislavery societies, their focus on the foreign slave trade rather than domestic expansion and their unexamined expectation for an antislavery future that ignored the burgeoning footprint of slavery in distant locales. Writing in 1806, in a country inhabited by more enslaved people across a wider domain, Quaker abolitionist John Parrish saw a failure to realize constitutional principles. But the illusion remained intact based on his sense of the Constitution. "I am no politician, but it

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[102] John Craig Hammond, *Slavery, Freedom, and Expansion in the Early American West* (Charlottesville, 2007).
[103] Samuel Miller, *A Discourse, Delivered April 12, 1797: At the Request of and Before the New-York Society for Promoting the Manumission of Slaves, and Protecting Such of Them as Have Been Or May be Liberated* (New York, 1797).

is clear that the fundamentals of all good governments, being equal liberty and impartial justice, the constitution and laws ought to be expressed in such unequivocal terms as not to be misunderstood, or admit of a double meaning," Parrish remarked in a pamphlet to his countrymen. "The preamble to the constitution is plain," he stated.[104] Slavery, rather than promoting a more perfect union, justice, domestic tranquility, the general welfare and liberty for posterity, produced the very destruction of these preeminent constitutional goals. Parrish conceived of the Constitution as "fundamental law, the principles of which, ought to pervade the whole system of legal operation," and the "leading features of this Constitution are well expressed in the Declaration of Congress." Enslaving fellow men, he continued, introduced a terrible and unsustainable contradiction. "A house divided against itself cannot stand; neither can a government or constitution," he argued. Parrish did not present an argument against a proslavery Founding or seek to restore an antislavery Founding. The moment presented neither a betrayal nor reflection of original intentions: rather, there was work to do. The publication sought to stir lawmakers, slaveholders and voters to bring the United States in line with a constitution that had a textual face but also existed in spirit.

With a narrow gaze, it could seem that this work was being done. When the federal ban on the foreign slave trade came into effect in 1808, northern officials, antislavery associations and free black citizens celebrated with parades and speeches anticipating the demise of slavery. Since the state debates over ratification, many wishful Americans had cultivated a convenient slippage between the end of the slave trade and the end of slavery. But affairs looked very different from elsewhere in the Union. Slaveholders from the original states were moving westward with men, women and children as property, and slave traders were increasingly active in making an expansive market for enslaved people. In the same year of the transatlantic ban, petitioners and officials on the interior found that settlers were seeking to instate slavery as far north as the Indiana Territory, which they deemed "contrary both to the spirit and letter of the [Northwest] ordinance, and that, therefore, it is unconstitutional."[105] In 1808, much harder policy struggles lay in the future on the western horizon.

Slavery in Congress Before the Founding

When questions of slavery policy arose in Congress – introduced by northern antislavery constituencies, slaveholding settlers and the interests of a South that did not speak with a unified voice – interlocutors did not present their positions as ordained by constitutional history. They felt no obligation to do so, lacked techniques to make such claims, and to advance such narratives would not have carried extraordinary authority. The absence of a constrictive constitutionalism of the Founding effected the tenor and outcome of lawmaking. Without a South that had rehearsed a Founding to protect slavery in all its facets and sites over time, disorganized, disaggregated deliberations over policy followed. Lawmakers openly argued over the purposes, scope and effects of legislation while engaging in constitutional construction to define their arena for action. The early national proceedings of Congress show a politics of slavery in which a significant space existed between what was seen as constitutionally required and what was constitutionally permissible. Debates were marked by overt choice within a constitutional framework requiring interpretation. With the rise of the Founding, this politics of choosing

[104] John Parrish, *Remarks on the Slavery of the Black People; addressed to the Citizens of the United States, Particularly those who are in Legislative or Executive Stations in the General or State Governments; and also to such Individuals as Hold them in Bondage* (Philadelphia, 1806).
[105] "Report of General W. Johnston," in Jacob Piatt Dunn, ed., Slavery and Petition Papers (Indianapolis, 1894), 81.

would dissipate; proslavery and anti-abolitionist forces would insist that choices had already been made.

The first significant debate over slavery in the First Congress demonstrated how members assumed and considered the limits of their own constitutional authority to touch the subject. On February 11 and 12, 1790, the House of Representatives listened to members read a prolix antislavery address from the Quaker annual meeting and a memorial from the Pennsylvania Society for the Abolition of Slavery. The appeals' religious and philosophical language and their allusiveness about policy left members uncertain as to whether the missives called for federal action to abolish slavery, to end the foreign slave trade or for other measures short of abolishing that trade. As Massachusetts' Theodore Sedgwick explained the potential impropriety of the Quaker address: "If I understood it right on its first reading, though to be sure I did not comprehend perfectly all that the petition contained, it prays that we should take measures for the abolition of the slave trade. This is desiring an unconstitutional act, because the Constitution secures that trade to the States, independent of Congressional restrictions for a term of twenty-one years." A number of southern members insisted the petitions sought the exercise of this authority in flat contradiction of constitutional rules. Abram Baldwin of Georgia, formerly a framer in the Federal Convention, enjoined that, "Gentlemen have said that this petition does not pray for an abolition of the slave trade. I think, sir, it prays for nothing else." The Pennsylvania memorial bore the signature of the celebrity constitutional framer Benjamin Franklin, leading Thomas Tucker of South Carolina to sneer that "He was surprised to see another memorial on the same subject, and that signed by a man who ought to have known the Constitution better."[106] In other words, the famous old framer did not understand the plain text of the Constitution, which Tucker read as buying the South eighteen more years of legislative inaction.

Distinguishing the categories of relief at issue and deciding whether to vote the petitions to a committee took time. And it elicited criticism both of the merits of debating the matter and of the Constitution itself. As Thomas Scott of Pennsylvania lamented, it was a tragedy that "the framers of the Constitution did not go further and enable us to interdict the traffic entirely, for I look upon the slave trade to be of the most abominable things on earth." Perceiving the prayed for relief as unclear and fantastical, some southern representatives objected that further discussion was bad for business and safety. Michael Stone of Maryland complained of the effects such a discussion validating the notion of emancipation would have on the wealth of slaveholders: "it would sink it in value very considerably." Likewise, Georgia's James Jackson argued that potentially taking congressional action would signify a "disposition towards a total emancipation and they would hold their property in jeopardy." Abraham Baldwin referred to the Convention not to invoke a binding meaning or to declare a superior understanding but to recall, in warning, "the pain and difficulty which the subject caused in that body." South Carolina's William Smith thought the appropriate act of legislative discretion would be to shut down debate, warning it might "induce the slave to turn his hand against his master." The debate drifted into an airing of grievances, with Smith complaining that in New York and Philadelphia, where the First Congress met, "gentlemen" could not avoid "persons trying to seduce his servants to leave him." Such sectional jibes and signaling of congressional incapacity to act against slavery provoked a bold counterclaim of power by arch-Federalist Elbridge Gerry. He estimated that the enslaved population of the South had a market value of ten million dollars and opined that "Congress have a right, if they see proper, to make a proposal to the Southern States to purchase the whole of them, and their resources in the Western Territory might furnish them

[106] *Annals of the Congress of the United States*, 1st Cong. 2nd sess., 1183, 1188, 1201, 1198.

with the means." Gerry did not recommend this policy but named it as a demonstration of constitutional authority – "to show that Congress certainly has a right to intermeddle in the business."[107] This was a claim decidedly founded on text, principle and ongoing constructive license, not on historical understanding.

A series of members sought to steer the reactive floor debate back the preliminary question of whether to give the memorials to a committee to study and recommend constitutionally permissible action. To clarify the question presented and thus Congress' authority, former framer Roger Sherman of Connecticut explained that the petitioners had already sought legislation action in New York, where the foreign slave trade was illegal, against its unlawful and covert conduct via its ports, but that the legislature had declined because "they supposed that power was exclusively vested in the General Government under the Constitution." Accordingly, the petitions should be committed "to ascertain what are the powers of the General Government." Upper South members did not express the same fears as Deep South representatives. John Page of Virginia professed to "feel no uneasiness or alarm on account of the present measure because he should rely upon the virtue of Congress that they would not exercise any unconstitutional authority." He saw a zone of permissible legislative action and presumed that Congress must be trusted to interpret the Constitution. Now a Virginia representative, James Madison observed how disorganized the debate had become, and decisively intervened. He did not invoke the Founding but directed members to the constitutional text. Clearly, Madison argued, "Congress is restricted by the Constitution from taking measures to abolish the slave trade yet there are a variety of ways by which it could countenance the abolition, and regulations might be made in relation to the introduction of them into the new States to be formed out of the Western Territory."[108] This Madison of 1790 identified open-ended domains of federal regulatory power over slavery. Congress could act against the slave trade without banning it; and it could restrict the westward expansion of slavery, as it had already done with Northwest Ordinance. The Constitution did not decide and specify all that Congress might do.

Then New Jersey's Elias Boudinot convincingly explained why it was good constitutional policy to undertake serious study of the memorials for possible legislative action.

> Is it not prudent now, while the design of the framers of the Constitution is well known, and while the best information can be obtained, for Congress to declare their sense of it on points which the gentlemen say involve their great and essential interests, especially when the gentleman from Pennsylvania gives so different a construction to it from what the gentleman from the Southward think right? Is it not advantageous to the Southern States to have an explicit declaration calming their fears and unnecessary jealousies on this subject? Can there be any foundation for alarm when Congress expressly declare that they have no power of interference prior to the year 1808?[109]

An elder Revolutionary statesman with antislavery sentiments, Boudinot's view prevailed, as did his form of constitutionalism. His rhetorical questions were an argument for Congress to take responsibility for working out what was constitutional on the most divisive of subjects. It was an explicit statement of their ongoing participation in a founding moment that stretched past ratification, one in which Congress necessarily had a central role. The ambiguous antislavery

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[107] *Annals of the Congress of the United States*, 1st Cong. 2nd sess., 1199, 1185, 1187, 1201, 1204.
[108] *Annals of the Congress of the United States*, 1st Cong. 2nd sess., 1189, 1203.
[109] *Annals of the Congress of the United States*, 1st Cong. 2nd sess., 1467.

materials were committed. In the ensuing years prior to the Missouri Crisis, Congress would continue to receive, report on and legislate in view of antislavery petitions. Southern antipathy would not cease, but members would express objections in terms of their view of dangerous policy and their interpretation of the Constitution.

The early national Congress often confronted subjects that might ask them to consider the identity of slavery under the Constitution. For the most part, they demurred. When debating policy and writing bills, members did not seek to define the constitutional property-ness or personhood of enslaved people. Members, uninterested in this question, did not see it as a grave problem that the constitutional framers had settled. This was a marked a contrast to the world of constitutional discourse that would emerge following the Missouri Crisis. Whether the Constitution recognized enslaved people as property – and thus whether the federal government did the same – was a perpetually divisive theme in the antebellum politics of slavery. The southern view in the decades before the Civil War was an absolute affirmative, holding aloft the provisions in the Constitution addressing "other persons," the general protection of property in the Constitution and, invariably, Founding narratives of intentional recognition by the framers. Many northerners rejected this understanding, emphasizing that the Constitution and government only respected what state law made property – that the Constitution itself treated enslaved people only as persons and not property. While the distinction may seem vanishingly slight, it mattered it broad debates over whether the country had a proslavery Constitution and government and particular controversies over slaveholder compensation for enslaved persons who died in the course of military events.

An earlier world of constitutionalism could be observed in 1794 when the House worked on a bill to regulate alien naturalization. To the provision requiring renunciation of any title of nobility, Massachusetts' Samuel Dexter sought to add that "in case such alien shall at the time his application hold any person in slavery, he shall, in the same manner, renounce all right and claim to hold such person in slavery."[110] Irritated sectional insults followed, along with the suggestion that the provision might unconstitutionally regulate the foreign slave trade prior to 1808. Angry discussion spanned two days. This would seem to have been a ripe moment for southern representatives to assert the involatile status of enslaved people as property. But they did not. Nor did lawmakers take the opportunity to contest the question when slaveholders brought claims for federal assistance in certain cases where enslaved persons had been taken or killed. In 1810, for instance, a House committed reported in favor of petitioner Alexander Scott on a claim arising from "Indian Depredations." Three South Carolina men, including Scott's relative, had entered the Mississippi Territory in 1794 with "twenty-one negro slaves"; then "a party of Cherokee Indians" killed the white families and departed with the enslaved people. Because of federal treaty provisions, the heirs had no legal recourse. The sympathetic committee explained: "If there existed any tribunal of justice before whom the case could be brought, the right of the petitioners to the said negro slaves and their increase would doubtless be established. But there is no court within the United States having cognizance of an action for the recovery of property held within the Indian boundary." Accordingly, the legislators deemed the government obliged to help or pay. Believing that the "slaves would be delivered to the agent of the United States for Indian Affairs among the Cherokee Indians upon conditions more favorable to the United States than a full remuneration of their value to the petitioners," the committee recommended that the President direct the relevant Indian Affairs agent to treat for "the delivery

[110] *Abridgement of the Debates of Congress, From 1789 to 1856* (vol. 1, New York: 1857), 559.

to the rightful owners of the slaves and their increase."[111] This report prompted no recorded debate. Despite the several ways in which it pressed the federal government into the service of slaveholders to secure people as property outside of a specific provision of the Constitution, the Constitution itself was never mentioned. This silence, an exercise of legislative discretion, expressed a constitutional consciousness that would soon pass.

The most confounding subject, fraught with implications for the status of slavery, arrived in 1806 with consideration of how to prohibit the foreign slave trade. As a preliminary matter, in the very act of banning the importation of enslaved people from abroad, Congress would be deploying its power to regulate commerce. This basis implied, though not necessarily established, that Congress considered enslaved people as property. As a leading proponent of the ban, Barnabas Bidwell of Massachusetts, justified prospective legislation in February of 1806: "Slaves are therefore articles of merchandise and, as such, their importation may be prohibited." Bidwell sought to encourage Congress to take preemptive action so that the ban would become operative on the first possible day in 1808. Doing so, he argued, was "consistent[] with both the spirit and the letter of the Constitution."[112] This step, in and of itself, did not provoke deliberations on the constitutional identity of slavery. With prior restrictions on the American involvement with transatlantic slave trade, Congress had already legislated under the Commerce Clause; and for lawmakers not yet invested in the question and not committed to teasing out original understandings of slavery, it did not matter.

But the fate of Africans unlawfully brought to American shores posed a second, much more divisive issue for Congress, one with immediate human consequence. When captured slaving ships entered American ports carrying people whom could not introduced legally as slaves, what became of them? Could they go free or return to Africa? Or would the United States find a way to enslave them nonetheless? The practical question presented a collision between the logic of the slave trade ban and the vicious logics of southern racial governance, hostile to free black populations. Congress would have to choose.

Lawmakers adopted the property concept of "forfeiture" – but to whom would people be forfeited and then to what end? Could Congress legislate freedom or slavery? As things stood, southern states that had already banned the trade in their ports profited from the forfeiture and sale of African captives at auction. The initial version of the bill provided that "if any negro mulatto or person of color the importation or bringing of whom is by this act prohibited shall after the 31st day of December aforesaid be found within the United States or the territories thereof every such negro mulatto or person of color shall be forfeited." Such a provision, in conjunction with other parts of the bill, would mean that the United States would similarly become a slave dealer. As Bidwell noted, "the description of persons referred to will be transferred from their individual owners to the United States as property and be, by them, sold as slaves and be held afterwards in slavery."[113]

James Sloan of New Jersey moved to transform the forfeiture provision with the additional phase: "and such person or slave shall be entitled to his freedom." When North Carolina's Willis Alston questioned Congress' power to enact freedom and Georgia's Peter Early called the coexistence of forfeiture and freedom a "palpable absurdity," Sloan opened the question of constitutional means. As the "universal wish" of Congress was to put a "stop to this inhuman traffic," the representative sought "information, (he would not say that he was perfectly

[111] *Annals of the Congress of the United States*, 11th Cong. 2nd sess., 1538-39.
[112] *Annals of the Congress of the United States*, 9th Cong. 1st sess., 437.
[113] *Annals of the Congress of the United States*, 9th Cong. 2nd sess., 167, 171.

able to explain the Constitution on this point,) whether it was not in the power of the House as completely to prohibit this trade as the Parliament of Great Britain? If he was rightly informed, as soon as a slave put his foot into that country, he became free." The Democratic-Republican Sloan was a farmer, not a lawyer. But he was well aware of the judicial decision in the 1772 Somerset Case, which Americans took to mean that any slave reaching England went free. He hoped Congress could make this rule the law of land, "If this was among the Constitutional powers of the Government." As the debate continued, the Constitution proved to present no meaningful obstacle or to have much bearing beyond situating the matter as a "commercial" question. Among supporters, the property concept was the essential predicate to producing freedom. As Bidwell argued, "What is this forfeiture but a cessation of the interest of the former owner in the thing forfeited, and its transfer to the United States? And, cannot the United States, instead of selling, manumit them? … The United States will not take the property themselves or pass it over to any other person." Under the constitutionalism of the day, this was a matter for legislative judgment. A few members sought to strike the forfeiture position. James Fisk of Vermont, arguing by analogy, explained that "It was never thought that people or property shipwrecked belonged to the finder. Just so with slaves when brought here." He and William Findley thought that the unlawful captives should be bound out as apprentices. This effort went nowhere. Speaker of the House Nathaniel Macon reminded, "If this is not a commercial question, I would thank the gentleman to show what part of the Constitution gives us any right to legislate on this subject." Orchard Cook of Massachusetts agreed: "Unless the slaves are forfeited, we can have no jurisdiction over them," he reasoned, and "binding them out without their consent" would be a new mode of legislation.[114]

Yet the stakes of forfeiture hinged on whether that was an intermediate step to freedom or slavery. Opponents to manumission did not manage a coherent constitutional argument about state rights or state property laws. Instead, southern objections dwelt on the consequences of captive Africans going free in a land ruled by their enemies, anxious slaveholders. Macon threatened with bloody simplicity that "if you give these people their freedom and turn them loose, they must perish." When it became clear that the provision for manumission would fail, the forfeiture provision stood in a different light. It left the United States as the beneficiary of illegal traffic in persons. As forfeiture advocate Georgian Peter Early insisted, "How are we to enforce a single penalty of this law without consenting to become dealers in slaves?" Moreover, the bill raised the further scenario of a captured slaving ship reaching the shores of a free state, where federal law would seem to require a slave auction in a jurisdiction where state laws allowed no such thing. Given this state of affairs, Bidwell changed his approach. Now he sought to strip the forfeiture provision from the bill. Bidwell urged that "The Constitution and laws have always left the disposition of slaves to the States and hitherto have never recognised the principle of slavery." The forfeiture provision would do just that, and thus it would be better for the captives to be "left to the States to dispose of according to the State laws."[115] While steping toward the question of slavery's constitutional identity, the remark sounded neither in history nor in textual construction. It belonged to a constitutionalism attuned to law's spirit.

With the bill read a third time and accelerating towards passage, a group of the most antislavery members of the House made a plea for recommitment and reconsideration. "They were ready to acquiesce in the principle of a forfeiture of the person inasmuch as it had been sanctioned by the vote of a large majority, and as it appeared to be so strenuously insisted on by

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[114] *Annals of the Congress of the United States*, 9th Cong. 2nd sess., 168, 169, 170, 225,
[115] *Annals of the Congress of the United States*, 9th Cong. 2nd sess., 173, 177, 221.

the representatives of the Southern country," the group explained. But they beseeched members to allow Congress to find a way to "prevent their conversion into slaves and so as to save the United States from the humiliation and disgrace of sanctioning a principle at which the strongest feelings of humanity as well as the plainest dictates of reason revolted." The House did agree to vote to recommit. The resulting bill, which became law, modified the forfeiture provision to correspond to Bidwell's despairing second-best preference. Captives' fates would depend on the laws of individual states where they arrived: in the South, they would be sold. In making their plea, the dozen vocal advocates, mostly Federalists, had punctuated their request with a sentimental reference to the creation of the Constitution. They hoped, "that a spirit of harmony and accommodation, of which so illustrious an example had been set by the framers of the Constitution, would induce the friends of the bill to allow its modification in such a way as to reconcile its provisions to the sentiments entertained in the Eastern section of the Union."[116] With this expression, they did indeed conjure a Founding moment that could set an example for their present one. But it is more revealing to see what it was not said. There was no invocation of what the framers intended about this question or any narrative construction about what they would have thought. There was no presumption that the dilemma had a discrete and definitive answer to be adduced from the Convention or ratification. That past moment did not bind the present on the identity of slavery under the Constitution.

The first acrimonious slavery debate in Congress, the petition debate of 1790, found James Madison assuring Congress that they might take further measures to restrict slavery in the West. During the prior year, the federal government had sanctioned the Northwest Ordinance: thus Congress had effectively exercised power to prohibit slavery in national territory prior to statehood. In 1798, Congress reopened the subject. As it arranged to set the limits of Georgia and create a government for the Mississippi Territory, George Thatcher advocated for a parallel restriction of slavery in the Deep South federal domain. Presuming the constitutional authority to do so, the Massachusetts representative moved to strike out the exception providing that "a Government similar in all respects to that established in the Northwestern Territory shall be established in the Mississippi Territory except that slavery shall not be forbidden."[117] Southern members immediately objected, of course. But they did not make claims of constitutional incapacity. Nor did they argue for the existence of original understandings that should preclude such legislative action.

South Carolina's Robert Harper reacted first, denying "his friend's motion would be a proper mode of supporting the rights of man." Upon hearing this invocation of human rights by the slaveholder, Joseph Varnum immediately scoffed that he "did not know that the gentleman from South Carolina wished to promote the rights of man." While stating that general emancipation within the original states might be unsafe, Varnum "hoped therefore Congress would have so much respect for the rights of humanity as not to legalize the existence of slavery any farther than it at present exists." The unfolding debate was brief and dwelt on questions of interest. Pennsylvania's Thomas Hartley, a reliable antislavery voice, explained that he had intended to bring the same amendment proposed by Thatcher. But on investigation, he had "found so many difficulties in the way" because of the numerous enslaved people already in the territory. If the legislation were to affect all those individuals, it would be "a serious attack on property" and the "amendment, if carried, would be attended with bad effects." While this concern with property may have reflected a measure of doubt about constitutional authority as to

[116] *Annals of the Congress of the United States*, 9th Cong. 2nd sess., 270, 271.
[117] *Annals of the Congress of the United States*, 5th Cong. 2nd sess., 1306.

those enslaved people already present, it was southerners' assertion of the dangers of revolt and chaos stemmed from a prospective policy that deterred Hartley. Albert Gallatin, another Pennsylvania representative, was skeptical of this analysis. Disclaiming any interest in allowing a "commotion or insurgency in any State where there is a great number of slaves," the congressman argued that he could "not see how any such effect could be produced by the present motion." South Carolina's John Rutledge, Jr. had claimed that the restriction would stir violence in his home state, but Gallatin reject this fear as nonsensical: "it did not appear to him how a regulation with respect to another Territory can affect the tranquility or property of any other State." Then Gallatin considered whether there were any other grounds to oppose restriction. Congress' constitutional authority, he noted, was unquestionable:

> "Ought it to be rejected on the ground of jurisdiction? Certainly not. The United States intend to exercise jurisdiction over that Territory, and was there any more reason for excepting this jurisdiction than any other? If we establish this Government we expect it to be permanent; and if we believe it is not conducive to the happiness of any people, but the contrary, to legalize when we are about to form a Constitution for a Territory, its establishment ought to be prevented. But if this amendment is rejected, we establish slavery for the country not only during its temporary Government, but for all the time it is a State… Having determined slavery was bad policy for the Northwestern Territory he saw no reason for a contrary determination with respect to this Territory."

This message reflected no weight of historical constitutionalism, an absence only recognizable in retrospect. It demonstrated a politics of slavery operating within a constitutional framework in which lawmakers did not deny that they were exercising authority and making policy. The reply of Virginia's John Nicholas confirmed this register: he "believed it not only to be the interest of the Southern States, but of the United States that this motion should be rejected. They were to legislate for the whole of the Union, and ought to consult the happiness of the whole…. [It would] be doing service… to the whole Union to open this Western country, and by that means spread the blacks over a large space, so that in time it might be safe to carry into effect the plan which certain philanthropists have so much at heart."[118] This diffusionist apologia did not argue from a specific textual basis of the Constitution, but it resonated with the constitutional principle of governing for the country's general welfare, as the Virginian conceived of that object.

George Thatcher accepted this same ground as the basis of his motion as he took up Nicholas' argument. But he came to the opposite legislative judgment: "the true interest and happiness of the United States would be promoted" by restricting slavery in Mississippi. As he delivered closing remarks and saw colleagues shrink from his proposal, Thatcher directed their attention back to the creation of the United States – but not for a prescriptive rule of action or parameters of compromise. "We are [] about to establish a government for a new country. Ours originated from, and was founded on the rights of man, upon which ground we mean to protect it, and could there be any propriety in emanating a government from ours, in which slavery is not only tolerated, but sanctioned by law? Certainly not."[119] A decade after ratification, Thatcher communicated, the responsibility of the day was to govern in keeping with fundamental principles that could be identified without even naming the Constitution.

The debate over restriction lasted for only part of a day. Ultimately, it turned on the prevailing acceptance among members that the Northwest and the Southwest were different in

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[118] *Annals of the Congress of the United States*, 5th Cong. 2nd sess., 1306, 1309, 1310.
[119] *Annals of the Congress of the United States*, 5th Cong. 2nd sess., 1310-11.

population and interests and thus required different regimes of racial governance. This was not a constitutional rule but an exercise of legislative discretion. The lawmakers of the Fifth Congress chose not to restrict slavery, and they did not cloak their decision as something other than that.

In its brief span, the Mississippi question of 1798 illuminated the constitutional politics of slavery and the contours of constitutionalism in its moment. From a certain vantage, the passing debate showed the lay of the constitutional landscape two decades before the crisis over Missouri statehood in 1819 on a meaningfully similar matter. The underlying questions presented by the Mississippi and Missouri territories can be distinguished in a number of ways: restricting slavery in a territory versus conditioning the statehood of an existing territory on restricting slavery; the status of Missouri as land outside of the cessions of original states; and the intermediate geographical location of Missouri. The most persuasive reason for why the Mississippi question did not explode into a version the Missouri question lay in the perceived differences between the Northwest and Southwest circa 1798 – that in most congressional eyes, Mississippi naturally belonged to the South and to slavery and that it therefore lay outside the interests of northern states. But that was not the only reason, and the meaningfulness of that perceived difference hinged on Congress considering itself constitutionally capable of legislating on such a basis. The Mississippi question belonged to a different moment in the political and constitutional imagination of its participants. Beginning with the Missouri Crisis, discussions of restricting slavery could never again be confined to an explicit debate about national interests and the policy preferences of lawmakers. The constitutional authority of Congress to make any restriction became a subject not only of constitutional dispute but of historical constitutional contestation. With the rise of the Founding, the constitutionalism of legislative discretion on slavery yielded to a constitutionalism of deference to ascribed original meanings. People would continue to argue over restriction to the edge of civil war; but they would do so with constitutional language and concepts that lacked presence and meaning in early national politics.

CHAPTER TWO

THE MISSOURI CRISIS OF AUTHORITY

Introduction

In the summer of 1820, an editor for the New York *Commercial Advertiser* trained his gaze southward. At ease with sectional generalization, the writer pronounced it "well known that most of the schoolmasters, teachers and professors in the academies and colleges at the South, have heretofore been from the northern and eastern states… But it seems, that since the agitation of the Missouri question, an attempt is to be made to reject teachers and professors from the free states, lest they should corrupt the minds and principles of the Southern youth!" Visualizing the South through the papers and reportage reaching his desk, the writer saw a rising demand for sectional educational purity. South Carolinian advocates expressed particular concern with the prospect of "doctrines… connected with the Missouri question" potentially compromising impressionable scions. At this moment, tensions between free states and slave states, between a broadly geographical North and South, had never been higher. The pending question of whether the Missouri territory, formed from a chunk of the 1803 Louisiana Purchase and now populated by American settlers, would enter the Union as a state permitting enslavement had erupted in the national capitol in early 1819. Free state Republicans and vestigial Federalists in Congress had had abruptly risen against extension. The issue concentrated minds across the country for the next two years. People squinted into the distance: from their relative northerly or southerly positions, Americans stared across a legal, economic, social, and ideological line that had gradually grown more distinct in the preceding decades and now snapped into focus; they peered west, to envision future parts of the United States over which they assumed the right to possess and govern. The *Advertiser*, using sectional invective that was fast becoming second nature, seized upon the implications of an educational policy designed to shut out free state understandings. "This project is surely a fine beginning; and we may next expect to hear that the Declaration of Independence, the Constitution of the United States, have been ordered to be burnt by the common hangman, lest, from the flexible minds of their youth, they may be induced to believe that the illustrious framers of those instruments were in earnest."[120]

This article was a drop in the ocean of ink spilled over Missouri, a passing anecdote to make northern readers feel a twinge of anger and wave of scorn at the failings of countrymen. But it also captured an important shift underway in the tectonics of American constitutional life. Dimly visible in the writer's jibe was the popular emergence of a venerated Constitution whose meaning derived from its framers, as understood by the present crafters and consumers of that history. The New York editor claimed the Constitution for the North, equating its true meaning with one aligning with the values and national future that many free state citizens articulated during the Missouri crisis; and, critically, this view proceeded through a conviction that the framers intended the Constitution as such. In other words, the writer lay claim to the Founding itself. And by implication, those southerners seeking to exclude unwelcome doctrines connected to Missouri were doing the same, though imputing an opposing universe of authorial meaning. The fruits of this project were perceptible a decade later during the Nullification crisis as cadres

[120] New York *Commercial Advertiser*, Aug. 16, 1820, pg. 2. On divisions over slavery prior to the realization of the Missouri Crisis, see Matthew Mason, *Slavery and Politics in the Early American Republic* (Chapel Hill, 2006); on prior geographical tensions, see Francois Furstenberg, "The Significance of the Trans-Appalachian Frontier in Atlantic History," *American Historical Review* 113:3 (June 2008).

of South Carolina College students marched on a Unionist printshop carrying flaming effigies, their constitutional mobbing undertaken in favor of slave state power.[121]

Before the United States began to grapple anew with the place of slavery under the Constitution in 1819, southern and northern schools alike could hardly teach constitutional history. There were no books with which to do it – no treatises, no primers, no historical surveys, no classbooks. As a genre, American constitutional history itself was unwritten and unformed. Alexander Hill Everett, commenting in the mid-1820s, observed the nascent quality of constitutional literature. While "libraries have been written and published upon the construction of the constitution in the shape of speeches and newspaper essays," they lack "permanent value," representing mere partial and partisan opinion. The prominent diplomat acknowledged only *The Federalist* and John Adam's *Defense of the Constitutions*, both penned before ratification. During the Missouri Crisis, when Timothy Pitkin took up the work of writing arguably the first substantial civil and political history rather than military chronicle of the Founding era (1763-1797), subjects "daily becoming more and more objects of peculiar interest and inquiry," he confronted an empty field and a slim archive. "[W]e regret that the materials for a more particular account of the proceedings of the august assemblies which formed [the Confederation and Constitution] not more ample," he told readers, but "proceedings, in both instances, it is well known, were directed to be kept secret, and the debates on the various topics presented for deliberation, and which alone would develope the true history of their transactions, have never been made public." A Federalist congressman from Connecticut between 1805 and 1819, Pitkin visited libraries, read memoirs and used his connections to review the correspondence of still-living men including Rufus King and John Jay.[122]

More broadly, the authority of constitutional history itself, particularly the deliberations of the Convention and the expectations of the framers, was shallow and limited in the popular mind. In public constitutional understanding and interpretive practice, the Founding occupied an uncertain, peripheral place without a clear identity as an authoritative, authorial moment. Larry Kramer has described an "original sense of a constitution as popular law for the people themselves to interpret and enforce" during the early national period. This account does not fully convey the multiple ways that people thought about constitutional meaning – it omits early congressional negotiations of subjective Convention intent, common law reasoning around precedents, and Federalist lamentations over Republican officeholders supplanting their "true" constitutionalism. But it nevertheless suggests the terrain of a constitutional culture that happily accepted the written Constitution and its prescribed framework for government, elections and rights, but that did not yet figure its veneration around particular wise and visionary authorship or attempt to resolve national conflict on the basis of what authors did or did not mean. Invoking the Constitution connoted shared and contested understandings of text that did not refer to the Convention, framers and ratification debates for validation and authority.[123]

Little more than a decade later, all this had changed. By the close of the Nullification crisis in 1834, the second protracted and absorbing sectional conflict in half a generation,

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[121] *Richmond Palladium*, February 23, 1833.

[122] Alexander Hill Everett, *America: Or, A General Survey of the Political Situation of the Several Powers of the Western Continent, with Conjectures on Their Future Prospects ...* (Philadelphia, 1827), 71; Timothy Pitkin, *A Political and Civil History of the United States of America: From the Year 1763 to the Close of the Administration of President Washington, in March, 1797: Including a Summary View of the Political and Civil State of the North American Colonies, Prior to that Period* (2 vols. New Haven, 1828); Thomas Clap Pitkin, *Memoir of Timothy Pitkin* (Cambridge, 1881).

[123] Larry Kramer, *The People Themselves* (New York, 2004), 149.

constitutional history had arrived. Books on the meaning of the Constitution poured forth from authors and printers concerned with the country's constitutional knowledge and faith. As Francis Fellowes' *The Youth's Manual of the Constitution of the United States* declared in 1835, "The Constitution of the United States is the Palladium of these rights and liberties," upon urging the question of how "shall [a young American] know when danger is approaching this sacred Palladium if he knows not what it is?" The author explained that the "historical" arrangement of his schoolbook "is indispensably necessary for understanding the Constitution in its true spirit. Without knowing what precedes, we cannot comprehend what follows." Texts encoded a recognition and reverence for the Founding's authority over the present. The basis of constitutional truth and the vernacular through which to express it belonged firmly to the past. American constitutional history – the origins stories of the country's written ur-text – emerged from a transformation in constitutional culture and practice between the Missouri and Nullification Crises. As the authority of the Founding rose and the ascribed intentions of framers gained power, a textual world came into being to sustain the United States' incipient and makeshift historical constitutionalism. Founding-era sources entered into print again and authors took up the work of scripting and transcribing narratives of that moment. The writing of constitutional history flowed from the larger shift in the how Americans understood the nature of constitutional meaning. In the throes of conflicts over slavery and section, publics demanded the Constitution yield determinate, favorable answers – sanction and prohibitions that the bare text of the document could not provide. Constitutional history, conceived of as original intentions and understandings accessible through memory, research and narration, opened up the Constitution: it became a historical world of meaning to be imagined and claimed. Once Americans invested in the authority of the past, the Founding became the terrain upon which many resorted to litigate constitutional disputes over contemporary policymaking and morality. As constitutionalism itself evolved, the coalescing authority of the national past made for complex interactions between those making claims upon the Founding and the rapidly dwindling living framers who harbored memories, interests and opinions. Only with the silence of their generational extinction was the Founding complete and able to sail free from the anchors of its historical participants.[124]

This chapter commences an analysis of the arc of transformative constitutionalism that seized public life with the dispute over Missouri statehood. That arc closed with the reverberations of the Nullification Crisis, the setting of the next chapter, when the authority of constitutional history was confirmed and newly committed to text. As subjects of political history, these conflicts are well-trod historical ground, reliably figuring into master narratives of US history and the march to civil war. To summarize, conflict over the terms of Missouri joining the Union revealed an intensified sectional divide. Northern congressmen unexpectedly refused admission in 1819 unless slavery was prohibited. Debates consumed Washington and echoed across the country, until Congress brokered an ostensible compromise. By 1821, Maine had become a new free state, Missouri entered the Union as a slave state with a constitution barring free blacks' ingress, and Congress barred new slave states in the west above a certain latitude. Less than a decade later, the Nullification Crisis between 1828 and 1833 exposed the radical trajectory and lengths to which southern states might go: aggravated by protective tariffs on domestic manufactures and driven by more speculative fears about the fragility of slavery and encroaching federal power on the institution, South Carolina promulgated the doctrine of nullification of federal law within its jurisdiction. As in the Missouri Crisis, debates consumed

[124] Francis Fellowes, *Youth's Manual of the Constitution of the United States: Adapted to Classes in Schools, and to General Use* (Hartford, 1835).

Washington and spilled across the country. While slave states generally shared fierce antipathy for the tariff, they declined to support South Carolina's performance of formal nullification in 1832. Congress reduced rates, and South Carolina nominally nullified the enforcement act for actuating Andrew Jackson threats of military action. Each event has received scholarly treatments centering around leading politicians, debates in Congress, presidential policy, and careful chronologies. Historians have duly explained the claims of congressional power or federal incapacity to restrict slavery in new states or legislate against the perceived interests of southern slaveholders. Yet these accounts have not looked down at the constitutional tectonics shifting under foot. The impact of the events on constitutional culture, particularly when viewed as connected parts rather than in isolation, are unmapped territory. In this chapter, I revisit the conflict over Missouri statehood to identify the production of a new popular constitutional discourse around the Founding as well as the powerful form of constitutional authority that came with it. In the next chapter, I then trace how the Nullification crisis carried forward this emergent species of discourse and authority to render the very identity and future of the United States into a historical question. Together, these events comprised an extended, transformative moment in public constitutionalism, wrenching the country from early national practices into a new mode that dominated antebellum America and has endured well beyond the nineteenth century.[125]

The crises were a crucible: they inflicted a sustained constitutional experience – an encounter with the Constitution that compelled Americans to read, speak, entertain and absorb new concepts about the *source* of its meaning and authority. The legal scholar Bruce Ackerman has advanced a paradigm of "constitutional moments" to describe significant changes in constitutional meaning, with or without textual amendment. But the meaning of clauses and the framework of government are not the only components of constitutional understanding. Epistemic foundations – the sites from which people assume meaning and knowledge arises – are another, and they too can shift. As historians have opened up the category of law to include plural, public, informal realms beyond black letter texts, it becomes possible to dig beneath changing interpretations for another species of constitutional moment: a deep movement in people's relationship to the Constitution and its sources of authority and meaning. Daniel Hulsebosch has shown that a "republic of law" in the form of portable ideas and institutions spread across the Early Republic, organizing an orderly empire without central administrative control. These legal forces informed common Americans' sense of citizenship, he suggests because "There were several attempts to divide territories from the Union, but before 1861 these attempts fail." Yet this substantial, long-threatened exception points to sub-structural limits on the ordinary operation of formal law in speaking to this question of lived nationality. Public convictions about the basis of constitutional authority lay under that regular law, constitutional and common, where they might disturb jurisprudence and the Union itself. Just as legal discourse around property and labor shaped what people believed was socially true and politically possible in the Early Republic, public constitutional discourse erected an ideological world of the Founding that mediated what the Constitution was or seemed to be. The Missouri Crisis initiated a rare category of constitutional moment that transformed how the public thought and argued

[125] On the Missouri and Nullification Crises, see Robert Pierce Forbes, *The Missouri Compromise and Its Aftermath: Slavery and the Meaning of America* (2007); Sean Wilentz, "Jeffersonian Democracy and the Origins of Political Antislavery in the United States: The Missouri Crisis Revisited," *Journal of the Historical Society*, Vol. 4 Issue 3, (2204), pp 375–401; Richard Brown, "Missouri Crisis, Slavery, and the Politics of Jacksonianism," *South Atlantic Quarterly* (Winter, 1966); William W. Freehling, *Prelude to Civil War: The Nullification Crisis in South Carolina 1816-1836* (1965); Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis* (1987).

about constitutional meaning – a transformation radiating out from the traumatic nexus of slavery and section.[126]

The bitter impasse over Missouri statehood inspired a search for higher, stronger authority as free and slave states interlocutors justified their spatial-temporal visions of the future United States. Through constitutional history, people sought to govern not only distant lands and communities but to control the chronologically remote contours of those places. The constitutional Founding became a lens with which many Americans during the Missouri debates saw authorizations for the free or slave societies they found familiar, natural and desirable. A *Middlesex Gazette* writer in New England, for example, proclaimed that old assurances of diminishing slavery by framer James Wilson, unearthed from the proceedings of the Pennsylvania ratification convention in 1788, established "positive proof that the framers of the Constitution intended and understood that Congress should have power to prohibit Slavery in all the New States," concluding that the "framers of the Constitution of the United States fully believed that they had laid the foundation for the entire extinction of Slavery in this nation." Meanwhile, "A SOUTHRON" wrote to the *Richmond Enquirer* appalled by such claims. His objections rested on a quite different Convention that lived vividly in his mind. "Had the framers of the constitution ever, contemplated the exaction from new states of other terms than those of the federal compact, their political foresight would not have permitted them to have been silent on so interesting a subject." In hoping that the "spirit of conciliation and compromise which animated our fathers" would prevail, A SOUTHRON expected northern acquiescence to the extension of slavery as a constitutional right. The Missouri conflict began and ended with congressional action. In between, however, once home communities learned that the House had voted to require restriction of slavery, the question belonged to the public as well as to lawmakers. These Connecticut and Virginia citizens, along with so many others, invoked the framers and invested them with authority in this parlous moment. Innovations in constitutional discourse initiated in Congress were seized upon, elaborated and echoed back to the Capitol and to other communities in press, speech and action. A Founding vernacular spread widely and took root.[127]

The public, out-of-doors debates conducted through new idioms of original constitutional meaning were a far cry from prior congressional negotiations of Convention intent. As Jonathan Gienapp and Jack Rakove have shown, several controversies such as the presidential removal power and Jay's treaty had prompted awkward considerations of the role of framers' recent memories during the 1790s. The Missouri Crisis arose in a dramatically different political time and space – when the country's constitutional formation was suddenly remote in its context, concerns and actors from much of the body politic. On the triumphant side of a second war with Britain, white Americans at the eve of the Crisis gazed westward with newly unfettered ambition. The Constitution itself was secure and proven, an object for veneration as the

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[126] See Bruce Akerman, *We the People, Volume 1, Foundations* (Cambridge, Mass., 1991) and *We the People, Volume 2, Transformations* (Cambridge, Mass., 1998); Daniel Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill, 2005), 294, 302; Christopher Tomlins, *Law, Labor, and Ideology in the Early American* Republic (New York, 1993); on recognizing legal ordering beyond formal statutes and adjudication, see Hendrik Hartog, "Pigs and Positivism," *Wisconsin Law Review* 899 (1985); Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill, 2009); on constitutionalism outside of courts, see Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York, 2004).

[127] "Proof Against Slavery," *Middlesex Gazette*, February 24, 1820, pg 2; *Richmond Enquirer*, January 22, 1820, pg 3.

guarantor of prosperity, safety and liberty. Framers and Founders were rapidly disappearing from public life; their absence, underscored by a stream of obituaries and commemorations across the country, left a younger generation to make a new politics dislocated from the conflicts, commitments, personalities and party affiliations that had animated early national politics. On the ground, meanwhile, settlers with enslaved people pushed further into the southwest and middle portions of the Louisiana Purchase. The question of extending slavery into western expanses, territory that had never belonged to any American state, sprang from this conjuncture; it ushered the transformation of the Founding from a familiar past into the annals of history and the heights of constitutional authority. Unlike those early interpretative queries conducted in Congress, the Missouri question opened the Founding to passionate claims of historical truth by the people themselves: about a Convention in which they did not participate but could imagine, about an era that only a few might remember and then only in a particular light, about an admired past moment and figures that they further venerated, intuitively, in order to imbue them with the very authority that Missouri litigants sought to draw on to justify their claims. Emotional renderings of the past, populated by noble or jealous framers whose expectations and desires inhered in the Constitution, were new in public constitutional life.[128]

A Double Crisis

The movement to restrict slavery from Missouri did not begin with a claim upon the Founding. In February of 1819, New York Representative James Tallmadge proposed amending the pending Missouri statehood bill to prohibit the "introduction of slavery or involuntary servitude… except for the punishment of crimes" and to provide for the eventual emancipation of enslaved children born into the future state. It was a policy proposal, not a constitutional contention at this juncture. Tallmadge assumed the power of Congress to impose such conditions. His amendment parroted the familiar language of the Northwest Ordinance, passed by the Continental Congress and affirmed by the first U.S. Congress in 1789, barring slavery in the expanse west of the Appalachian Mountains and north of the Ohio River. In this moment, restriction was launched in the House of Representations without any lingering glance at constitutional history. For northern Republicans such as Tallmadge and fellow New York representative John Taylor, the amendment was a matter of interest and politics, a measure consistent with preserving white opportunity and containing the immorality of slavery. This posture did not last, however. Once voiced, the Missouri restriction posed a crisis of constitutional authority.[129]

The proposal and discordant reactions in Congress took representatives and senators by surprise. While most northern lawmakers readily supported the measure, southerners' immediate shock gave way to a mad rush to turn back the prospective closing of the frontiers of slavery. A scramble for authority unfolded. Southern lawmakers promptly condemned the policy, but that

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[128] Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (Cambridge, Mass., 1997); Jonathan Gienapp, "Making Constitutional Meaning: The Removal Debate and the Birth of Constitutional Essentialism," *Journal of the Early Republic* 35 (2015); George Dangerfield, *The Awakening of American Nationalism: 1815–1828* (New York, 1965); David Waldstreicher, *In the Midst of Perpetual Fetes: The Making of American Nationalism 1776-1820* (Chapel Hill, 1997); Caitlin Fitz, *Our Sister Republics: The United States in an Age of American Revolutions* (New York, 2016). On the general transition underway, see Andrew Burstein, *America's Jubilee: How in 1826 a Generation Remembered Fifty Years of Independence* (New York, 2001); John Craig Hammond, *Slavery, Freedom, and Expansion in the Early American West* (Charlottesville, 2007); Adam Rothman, *Slave Country: American Expansion and the Origins of the Deep South* (Cambridge, 2005).

[129] *Annals of Congress*, House of Representatives, 15th Congress, 2nd Session, 1170.

was insufficient: within days, they denied that Congress had the authority to limit slavery under the Constitution. In these early speeches, it was clear that the South did not have a rhetorical and conceptual arsenal at the ready for making such constitutional claims – and nor did the free state voices have a well-developed historical response. Soon John Scott, Missouri's territorial delegate in the House, stood and read excerpts of *The Federalist*, "written by late President Madison, contemporaneously with the Constitution of the United States, and from a very celebrated work," showing the limited scope of Congress' responsibility to ensure a republican form of government. Tallmadge expressed wonder at the accusations of unconstitutionality and southern claims of congressional incapacity. He responded: "Sir, we have been told that this is a new principle for which we contend, never before adopted, or thought of. So far from this being correct, it is due to the memory of our ancestors to say, it is an old principle, adopted by them, as the policy of our country. Whenever the United States have had the right and the power, they have heretofore prevented the extension of slavery." Both the surprise that greeted the amendment in Congress and the conflicting sectional assumptions that lawmakers revealed were telling about the underpinnings of the constitutional conflict that Missouri would elicit. By 1819, the elected representatives of a visible North and South had come to inhabit different understandings of the country's historical arc. As New Jersey representative Ephraim Bateman wrote to his constituents on March 4, 1819, "Believing myself that slavery is morally wrong, and that no just and lawful means ought to be omitted to lessen its evils, & check it prevalence; under the impression also, that a spirit of gradual emancipation had gone forth, I was much surprised to witness so much acute sensibility on the subject." Americans' inconsistent perceptions of that trajectory not only stretched into the future, but, when provoked to look back in time, they saw different originating positions.[130]

As tensions escalated that February, proponents of restriction sought to crack open the Founding and inspect the terms of the three-fifths clause. Tallmadge deemed the federal ratio, structuring apportionment and federal direct taxation, "a benefit to the southern states which had borne part in the revolution," the extension of which to new territory "would be… a violation of its original intention." At once, a few anti-restriction advocates gestured towards the Founding. North Carolina Representative Felix Walker urged "vigilance to the great principles of the constitution, and particularly to that friendly compromise entered into by the worthy framers of that instrument," and Delaware Representative Louis McLane argued that the motives "which reconciled and harmonized the jarring and discordant elements of our system originally, and which enabled the framers of our happy Constitution to compromise the different interests which then prevailed upon this and other subjects, if properly cherished by us, will enable us to achieve similar objects." But in the days after the amendment's introduction, they were grasping for an unassembled instrument. They did not know how to elaborate a prescriptive vision and to bind the fate of Missouri with constitutional history. In contrast to the long speeches dwelling on original constitutional meaning that would occupy the Sixteenth Congress in less than a year, southern lawmakers could do little more than assert unconstitutionality, and northern congressmen primarily responded by pointing to the Northwest Ordinance as proof of power.[131]

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[130] *Niles' Weekly Register*, Supplement to Vol. XVI, Missouri Question, 165-68 (1819). Ephraim Batemen letter, March 4, 1819, in Noble Cunningham, Jr. ed., *Circular letters of Congressmen to their constituents, 1789-1829*, Vol. 3 (Chapel Hill, 1978), 1074.

[131] *Abridgment of the Debates of Congress, from 1789 to 1856*: Dec. 1, 1817-March 3, 1821, 356; "The Arkansaw Bill," *Niles' Weekly Register*, Supplement to Vol. XVI, 168 (1819); *Annals of Congress*, House of Representatives, 15th Congress, 2nd Session, 1235.

The waning weeks of the Fifteenth Congress in 1819 gave lawmakers only a few days to debate the amendment. When a bipartisan bloc of free state representatives attached it to the Missouri bill and the Senate refused to reconcile its version, which was silent on slavery, statehood failed for the time being. The question carried over to the next Congress – and to the people out of doors. The press linked communities to their representatives in Washington, passing back and forth constitutional truths. A correspondent for the *New Hampshire Sentinel*, for example, reported that the state's congressional delegation was united in opposition to allowing slavery into Missouri. The paper assured readers that the territory and the South had no constitutional basis to object. "The framers of that instrument… performed an irksome duty, which existing imperious circumstances demanded, when they provided that Slavery might exist until the year 1808. But they then stipulated that Congress should have the power to check the further inroads of a system at war with the very principles they had long been struggling to maintain, and in direct violation of all they held most dear." In the spring of 1819, a mystified contributor to the *Kentucky Reporter* asked: "how can Congress require a prohibition of slavery in the state of Missouri, without a manifest violation of the compact by which we are bound to grant such state all the rights and advantages which accord with the principles of the federal constitution?" The author professed to have not yet seen the full debates on this question, and so his expectations of a constitutional right to hold slaves expressed assumptions about meaning that he had previously taken for granted. A web of newspapers created a kind of discursive inter-visibility in which communities could monitor the constitutional rhetoric of their sectional adversaries. Editors subscribed to the productions of opposing and distant presses and reprinted and commented on their contents. Thomas Richie of the important *Richmond Enquirer* explained his relentless coverage of the Missouri debates and their popular reception by way of his position as a node of cross and intersectional discourse. "No one who has not an opportunity of seeing as many newspapers as daily pass before us, can have any adequate idea of the space which it occupies in the eyes of our countrymen…. The whole country appears agitated by this question; and well it may be, for a vital blow is aimed the constitution of the United States." When publics responded en masse to the Missouri conflict, they did so in an environment that communicated their constitutional claims far and wide.[132]

Rallying History

Meetings and local proceedings rippled across the country. Especially in the free states, bodies formed to adduce and rehearse historical constitutional narratives. They sought to turn back claims of constitutional incapacity to restrict slavery raised by the South. In upstate New York, for instance, the Grand Jury of Columbia County placed itself among the "the numerous and highly respectable meetings which have been held in various parts of the Union" deliberating on the relationship between the Missouri question, the Founding and responsibilities of the present generation. Affirming the "noble principles of the fathers of our country," jurors "lamented that the fair fabric which was reared by the wisdom of our forefathers, is polluted by the foul stain of *slavery.*" This stance was far from a critical or hopeless one, however. The Grand Jury "would not blast the memories of those deceased patriots, nor cause to wither the laurels of the surviving few, who framed the Constitution by the breath of censure, for not abolishing slavery by that charter." Rather, the jury identified an abiding hostility to slavery's "continuance and extension" in the framers' words, deeds and expectations. Thus the work of the

[132] *New Hampshire Sentinel*, January 1, 1820, pg. 3; *Daily National Intelligencer*, May 5, 1819; *Richmond Enquirer*, January 22, 1820, pg. 3.

moment consisted in carrying out their intentions and exercising the fullness of congressional authority to enact with respect to slaveholding the principle, "thus far shalt thou go and no farther."[133]

Like-minded delegates from twenty-four towns in Cheshire County, New Hampshire convened at their courthouse to encourage congressional restriction of slavery westward. Seventy-year old Keene attorney Noah Cooke addressed the crowd. In exercising congressional power, he explained "it is doubtless proper, as is so often maintained in this discussion, that it should be guided by the spirit of the constitution, and the design of its framers." A revolutionary war chaplain and colonel, Cooke invested the authority that attached to his personage in making claims upon Founding intent. "But what clause of this instrument sanctions the extension of slavery? Are not the principles of freedom and benevolence exhibited in all its provisions? Who can doubt the design of its framers? With what reluctance they approach the subject, and with what caution they avoid the mention of slavery! Their wish to arrest the progress of the evil, is apparent." These complex historical questions were rhetorical in this time and place. For Cooke's northern community, an antislavery desire inhered in the Constitution, embedded by its framers, providing authority for restriction and others measures that entered into northern constitutional consciousness in this moment. When the New Hampshire town delegates unanimously approved resolutions in keeping with Cooke's speech, they were sharing a historical narrative, agreeing on its veracity, and giving it power. Observing the flurry of associational activity and cacophony of moral-constitutional discourse across New England, a contributor to the *Boston Patriot* complained that "*body meetings* are held, to act in a summary manner, under the influence of speeches, solely calculated to inflame the audience against this species of commerce."[134]

The presence of the aged Cooke at the head of proceedings was no accident or eccentric local custom. Rallies and gatherings sought to place a figure from the Founding in the chair to align their actions with the country's ascribed original purposes. Elder statesmen signaled that restriction was no radical change but rather was in keeping with Founding values. At the State House in Trenton, New Jersey, hundreds of men assembled to urge that "the prohibition of slavery in the new States coming into the union is not forbidden by any article of the Constitution of the United States, but is in full accordance with the principles of the Constitution." Among the elite figures guiding proceedings was 79-year-old Elias Boudinot, who had presided over the Continental Congress and then served in the First Congress under the Constitution. In Philadelphia, a large public meeting convened to express similar constitutional sentiments about Missouri in November of 1819. Attorney Horace Binney triumphantly established that restriction "was the endowed intention of its authors and that they'd never believe the power of authorizing crime essential to perfect freedom." The "framers of the Federal Constitution," the Philadelphia crowd avowed, "shun[ed] that hateful word *slave*" and empowered Congress to exclude slaves from national territory. The gathering made clear the authority they vested in the intentions that they attributed to the Founding. "What is to be inferred from the phraseology of this instrument with respect to the limitation of slavery is likewise deducible from the character, sentiments and purposes of the majority of its authors." But if Binney spoke with great persuasion, his old law teacher communicated greater authority. In the chair of the meeting sat 70-year-old constitutional framer Jared Ingersoll, close to death – an approaching inevitability of which the audience was surely aware. His presence afforded the

[133] *The Bee* (Hudson, New York), December 21, 1819, Page 3;
[134] *New-Hampshire Sentinel*, (Keene, New Hampshire), 12-25-1819; *Southern Recorder*, Apr. 4, 1820, 3

proceeding with a rare linkage to the source from which they sought to draw meaning. His message was unshrinking: the framers "could never have intended, nor consented to render the federal system, into which they were to enter, accessory to the propagation and confirmation throughout new and boundless domains, of an order of things which they abhorred as among the severest scourges of the earth, and boldest outrages upon the majesty of Heaven." Who could doubt such authority?[135]

As the Sixteenth Congress convened in Washington, an exceptionally large Missouri meeting gathered at the City Hotel in New York in December 1819. Reportedly at least 2,000 people attended to affirm Congress' power to restrict slavery. Chaired by the elderly Revolutionary War officer Matthew Clarkson, the meeting expressly addressed the American public beyond its walls and state boundaries: if the Constitution indeed barred interference with slavery in West, they promised: "we should submit in silence, but with sorrow; and have only to regret that the great and good men who framed the constitution had, in this particular, lost not only their moral sentiments, but their political forecast, and withheld from the charter of our union, a principle vitally essential to justice and its own perpetuity." But his was a counterfactual posed with the security of believing in wise, antislavery framers, of knowing that "They were not thus blind." Constitutional obedience, veneration and the authority of the framers advanced together. Declaring that the Convention knew slavery "could not be eradicated at once, but it could be circumscribed and restricted; and time would pave the way for the introduction of more powerful and controlling laws," the mass gathering affirmed that the constitutional provision enabling restriction of "Migration or Importation of such Persons" after 1808 meant what they believed the framers intended – that Congress could ban the movement of slaves between states. While the chair served primarily to project respectability and authority, Clarkson issued a letter that circulated through papers that more directly invoked the authority of the past. He declared that advocates of restriction "are those who have not forgotten the creed of their forefathers, when they promulgated the Declaration of Independence, and believe that the further extension of slavery, by the instrumentality of the federal government, would be an indelible stigma on its character." As the letter circulated widely, it spread the word of an antislavery constitutional Founding. And it drew a line among the living between the faithful and the wayward progeny of the Revolutionary generation.[136]

In the absence of symbolic survivors from the Founding, restriction meetings labored to bring to life the prescriptive visions of the framers. In Boston, people heard James Austin probe the past to locate the right of Congress to prohibit slavery. Chairman William Eustice reported the historical narrative that emerged from this search for Founding authority. It chronicled the framers' design to stop the increase of slavery and the "unanimity with which Congress adopted the ordinance of 1787" to ban slavery in the Northwest Territory – concluding that "a policy so wise and humane will not now be departed from." The meeting's deliberations were not without tension. Alden Bradford stood and, though disclaiming anything but loathing for slavery, urged caution because he thought Congress lacked "a clear, explicit right" to legislate. District Attorney George Blake quickly rose to this challenge by "demonstrate[ing] very clearly that the constitutional power was possessed by Congress, and ought to be exercised, for the honor and

[135] "Slavery," *The National Recorder*, Nov. 6, 1819; "Meeting on the Subject of Slavery," *The National Era*, Nov. 27, 1819.
[136] "THE MISSOURI QUESTION MEETING TO OPPOSE SLAVERY ADDRESS TO THE AMERICAN PEOPLE," *The New York Evening Post*, December, 1819; Laurence B. Goodrich, *Ralph Earl, Recorder for an Era* (Albany, 1967), 50.

safety of the nation." To ward off any remaining constitutional doubt in the crowd, Daniel Webster then deployed his oratorical fire and, according to one witness, "further illustrated by an historical view of the admission of the several states into the Union since the adoptions of the constitution" that restricting slavery honored the framework and intentions of the Constitution.[137]

These mass meetings, populated with political, cultural and legal authorities, were convincing constitutional experiences. Whatever an individual might have thought if left to his or her own devices, the power of these meetings made for unitary professions of constitutional opinions and understandings of the constitutional past. At the Rhode Island statehouse, Governor William Jones chaired a large meeting that resolved, "while we sincerely adhere to the terms and conditions upon which the Constitution was formed, we deprecate with the most ardent solicitude any further extension of the evils of Slavery, within the limits of the United States." In Wilmington, Delaware, a crowd unanimously passed resolutions affirming the constitutionality of restriction after listening to Chief Justice James Booth, Sr. and congressman Caesar Rodney speak on the question. Communicating through ample legal talent in the community, a cohort of Boston petitioners averred in 1819, that "the introduction of Slavery into the New States," imperiled "the future welfare" of their country. They warned their congressmen that Missouri posed no "local question" but implicated national interests and the objects "for which the Constitution itself was formed." The petitioners' memorial offered constructions of the clauses empowering Congress to restrict slavery, relying on past government practices extending to the Founding. Distinguishing Alabama's recent statehood on the basis of its cession from slaveholding Georgia, these northern citizens registered Missouri as a new question and the western territory as fully belonging to the nation – with their national government constituted to halt the spread of human enslavement. In these acts of public constitutionalism, popular voices converged with political and legal elites who shaped how people expressed their constitutional understandings. With Congress and other citizens as intended audiences, this eruption of popular constitutional practice saw public opinion marshalled against other public opinion with history adopted as fundamental authority.[138]

Claiming Missouri Across Time and Space

Through their demands to bar slavery from the West, northern citizens gave voice to a profound spatial and temporal investment in the nation. The institutional reproduction of slavery led them to embrace their fears, to publicly intervene and to imagine a Constitution framed to empower them – through Congress – to make real their demands on a democratic basis. In the context of Missouri, seen not as part of the slave South but as a place for free white settlement, northerners assumed they did not live in a confederacy where the question must be settled on the de facto basis of slaveholders moving in with property in persons. As the editor of the *Rural Magazine and Literary Evening Fireside* contended, Missouri was "important to the last degree to the farmers of America" because the "great national question" now facing the people was whether the West would "in future ages, be dotted over with pleasant villages and comfortable farm houses, and cultivated by the industrious owners of the soil" or host exhausted wastes and "miserable slaves." Magazine correspondent SANDIFORD delivered a dire warning that the statehood bill threatened to pervert the country's government from "its original design." Grasping at a nascent language of human rights, the writer imputed a comprehensive antislavery vision back to 1787. "The august founders of our republic have not once named it in the constitution, as if they were unwilling that so foul a name should stain the purity of our

[137] *Daily National Intelligencer*, December 10, 1819.
[138] "Slavery," *Providence Patriot*, December 22, 1819; "The Slave Question," *The Philanthropist*, February 5, 1820.

escutcheon, as if it were a crime against humanity too execrable to be uttered," he explained, assuring readers that the framers had provided for prohibition of the domestic slave trade. Leading restriction advocate John Taylor bluntly articulated the overlapping horizons of space and time that informed northern public investment in the Missouri question. "The present generation is not alone, nor even principally interested in this question before us. If the age of states were limited to the period of human life, this subject would be comparatively of little importance," he explained. But holding convictions about how racial slavery degraded free white labor where it existed and stole their national political power, Taylor and other free state citizens whose antislavery sentiments did not impel action for equality felt an urgent responsibility to take action in this context. Theirs was an obligatory national project, one they firmly associated with the Founding when southerners denied the constitutionality of restriction.[139]

Contentions that free states had no investment in Missouri and that their government lacked constitutional power to limit slavery seemed incomprehensible to residents increasingly dedicated to national narratives that dictated otherwise. In Maine, for instance, A PLAIN DEALER took umbrage at a letter in the Portsmouth Oracle claiming that "Northern and Eastern States have no interest in the question" and no constitutional right to oppose slavery in Missouri. This was fallacious, he argued. Of unstated age, the writer implied a memory stretching back to the Founding, claiming that it was "well known by those who were old enough at the time the Constitution was adopted" that framers had carefully designed a specific compromise on slavery and slave representation, one sustained by a "spirit of conciliation and compromise [that] was assiduously cultivated and industriously extended among the people of the Thirteen United States." This was not a call for further compromise but an argument to abide by the narrow specifications that the framers intended. "It should never be forgotten that we agreed to the slave representation, as a compromise; and that it is peculiar to the very nature of a compromise, not to be extended to new parties," the writer insisted. SANDIFORD heaped scorn on the "pretence… that such restriction would be *unconstitutional, oppressive, and inexpedient*." According to a reader of the *Baltimore Patriot & Mercantile Advertiser*, it was indeed a simple matter of history that the proslavery visions of the constitution were "contrary to the known views of its framers, the great principles of freedom and the rights of humanity of which it boasts its establishment." With the clarity of constitutional faith translated into historical knowledge, the aggrieved letter-writer offered a "concise sketch of this important enquiry, not in the chop-logic of special pleading or the tinsel frippery and oratorical jingling of words, to the utter confusion of the senses as well as the sense." Similarly, A PENNSYLVANIAN, writing to the *Philadelphia Register*, marveled that even some free state members could believe that restricting slavery lay beyond Congress' powers. "How this opinion can exist it is difficult to perceive; in none of the published debates are any strong reasons offered for it." The citizen seemed to have recently reviewed the available sources illustrating constitutional authorship. Or at least, he had read or heard others making this claim.[140]

Meanwhile, Missourians gathered with fury. Grand juries met, issued condemnations of restriction and urged public action. The challenge to southern settlers' ability to plant institutions of racial ownership and domination brought forth alternative spatial and temporal assumptions. Proslavery voices could also articulate their claims of unconstitutional congressional usurpation

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[139] "Extension of Slavery," *The Rural Magazine and Literary Evening Fireside*, January 1, 1820; *Niles' Weekly Register*, March 4, 1820, 18.

[140] *Portsmouth Oracle*, February 4, 1820, pg. 2; *Baltimore Patriot & Mercantile Advertiser*, February 22, 1820; *The Philadelphia Register*, May 15, 1819.

with expansive terms linking Founding to future. Anti-restriction citizens around the Missouri town of Boon's Lick rallied behind the declaration by Henry Carroll that Missourians' "ambition is, that they and their offspring through the long track of time, may be sheltered under the constitution of the United States, and buoyed up on that latest triumphant ark of freedom, that remote generations may realize the sublime conceptions which the destines of this nation develop in their onward march." When this body demanded the Constitution be "administered in its own undefiled spirit, pure and healthy in all its parts," they conceived of an original meaning that would sustain slavery by and for generations, in Missouri and wherever else their progeny settled in the West. At an overflowing courthouse meeting in St. Louis, soon-to-be governor Alexander M'Nair chaired a rally where speakers gave the community the constitutional sanction they sought. At the court, future Missouri senator Thomas Hart Benton declared: "The right of prescribing degrading conditions on the admission of a new state is not granted by the constitution; and cannot be implied without imputing insanity and wretched contradiction to the framers of that instrument." The event functioned as constitutional history lesson, political rally and public promise. Delegates from the Baptist churches of Missouri deliberated for two days in September 1819 and published their conclusions. The religious organization had no trouble venerating the "constitution of the United States, as the result of the *united* experience of statesmen and patriots of the revolution, and as the sacred palladium of our religious as well as civil liberty." While expressing no open moral sanction for slavery, the group found that constitutional history effectively required its extension. The United States' "solemn covenant" made way for slavery, they contended, because "the necessity of these provisions grew out of the political situation of the states forming the constitutions, as explained in the words of our beloved Washington, in his letter to the president of the congress." It was not for godly men and women to argue with such authority.[141]

Legible dissent appeared in papers and in person against the proslavery constitutional consensus in Missouri. But aspirational free staters like one hundred citizens who met in St. Louis to oppose "further introduction of slaves" were a numerical and discursive minority. In a community committed to extending slavery, the restrictionist vision of an antislavery Founding could seem doubtful even to those who professed to oppose slavery's advance. One slaveholder from Missouri, HOWARD, vowed to "resist to the last extremity the exercise of a pretention on the part of Congress," but proposed that the country might "extinguish slavery, in all her dominions, on just and equitable terms" with compensation from public land proceeds and ratification by state conventions. Such equivocation would not do for residents rushing to adopt the constitutional clarity of a proslavery Founding. When Missouri elected a convention to frame its constitution, proslavery voices crowed that "not a single *confessed* restrictionist" was elected. Beforehand, such advocates had urged citizens to be vigilant for any candidates who might still compromise on white residents' birthright to hold slaves. Offering himself as a candidate, a Mr. Hunt had written that "However much I may deplore the existence of slavery, it having existed by law from the first settlement of the country, and the public lands having been sold at an enhanced price under a fair presumption of its continuing to exist, are among the reasons why I am opposed at this time to every-thing like an interference on the part of the constitution against it." This was not good enough for "A Citizen of St Louis," who objected that Hunt effectively held "identical doctrine of their enemies." Similarly, "A Farmer of St. Charles County" drew the

[141] "Howard County Meeting," *St. Louis Enquirer*, July 28, 1819; "St. Louis County Meeting," *St. Louis Enquirer*, May 19, 1819; "Missouri Question," *Niles' Weekly Register*, November 27, 1819; "Missouri--Slave Question," *Niles' Weekly Register*, October 2, 1819; "Presentment E. Bates," *St. Louis Enquirer*, Wednesday, August 4, 1819.

intense public ire of fellow residents when he endorsed restriction. MISSOURIAN asked in response, "Is the constitution indeed a mere thing of wax, to be molded and changed, as a majority of 'two' votes in one branch of the legislature shall will it?" He matched the farmer's claims of constitutionality and expediency with higher-pitched claims upon Founding promises. Speaking for the state at large, the editorialist asserted that Missourians "venerate the principles of the revolution, and hold sacred the names of the dauntless defenders of the rights of man, to whom (under God) we owe our national existence.… They plant their standard on the very basis of the federal constitution, and it will be defended not only by themselves, but by their fellow citizens of every state in the union, in which the ancient spirit of the people is not dead." In this impassioned telling, the extension of slavery was an implicit act of constitutional defense. As the author experienced the Missouri Crisis, he exhibited an understanding of public constitutional power at odds with people's capacity to interpret the document. Popular constitutionalism was the maintenance of an original order framed by a prior generation. By coming to embrace the Constitution as a vessel of historical meanings and promises beyond the text, people underwent a constitutional experience that enabled them to locate, create and rehearse authoritative answers to the most combative issues. By believing that binding constitutional history barred restriction, publics absolved themselves and the country from any obligation to consider the morality and expediency of perpetuating enslavement: through constitutional fictions, slavery's expansion was confined to a municipal and ultimately a personal decision.[142]

Southerners and southern states vociferously supported the outrage of proslavery Missourians. After statehood initially failed, the Missouri writer Gracchus appealed to "our brethren of the south," for aid "to preserve inviolate the great charter of the union." The conflict excited the Georgia editors of the *Augusta Examiner* to declare themselves "advocates for Southern rights, as defined in the constitution of the United States, and clearly avowed by the framers of that instrument-untrammeled by those conditions and restrictions, which were avowed on the floor of Congress." In Louisiana, Governor Thomas Robinson expressed the common southern counterview in his 1821 inaugural address: "the newly invented sympathy for a certain description of our population was not then discovered at the time of our introduction into the union." Through its official bodies, Virginia expounded a Founding that cast antislavery efforts as a mockery of constitutional history. "It never can be believed that an association of free and independent states, formed for the purpose of general defence, of establishing justice, and of securing the blessing of liberty to themselves and their posterity, ever contemplated the acquisition of territory for the purpose of establishing and perpetuating for others and their posterity that colonial bondage which they themselves had so lately revolted," it instructed other states. In Virginia's constitutional historical imagination circa 1820, the so-called bondage of colonies was tantamount to the restriction of human bondage in the Missouri territory.[143]

Hallowed Fathers and their Archival Silences

As the country debated the future of slavery and elevated the authors of the Constitution to new heights, public voices articulated a new sense of being watched by the fathers of the

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[142] "Restriction of Slavery," *The National Recorder*, May 13, 1820; "Plan for Abolishing Slavery," *The National Recorder*, Dec. 15, 1819; *St. Louis Enquirer*, May 10, 1820; *St. Louis Enquirer*, April 15, 1820; *St. Louis Enquirer*, April 21, 1820.

[143] *St. Louis Enquirer* (St. Louis, Missouri), Wednesday, May 19, 1819; *St. Louis Enquirer* (St. Louis, Missouri), Wednesday, April 21, 1819; *INDEPENDENT CHRONICLE AND BOSTON PATRIOT*, (Boston, Massachusetts), 04-24-1822**;** *The National Register*, Washington July 1, 1820.

Union. Imagining this sensation of surveillance amounted to an act of anxious veneration. In Alton, Illinois, for instance, attorney James Whitney used his 1819 Independence Day oration to reckon with fears prompted by the Crisis over the permanency of the Union. He expressed constitutional faith in his fathers' labors, attesting that "we cannot but admire the consummate wisdom and ability that planned and formed it." Naming and venerating framers, Whitney described them looking down and guiding the present. "Among the band of sages and patriots of that time, and of the first rank, we find the names of a Washington and a Franklin standing pre-eminent. They were great, and they were good; but, after accomplishing the measure of their days, they slept, and went the way of their fathers…. Lo! How majestically they lean from the canopy of yonder heavens, and in strains mellifluous, they call you to the source of immortal beatitude." This invisible monitoring and judgment captured the ascending mode of public constitutional observance. Seemingly celebratory in this instance, it could swiftly lend itself to accusations of deviation and failure with respect to Founding visions. Some distressed writers saw enslaved people bearing witness to constitutional betrayal and judging the country's intergenerational hypocrisy. In the slavery-skeptical *Missouri Gazette*, a poet slipped into the imagined perspective of an enslaved man to castigate the scions of the Founding generation for disregarding their inherited commitments. "Your fathers have stated, have clearly made known, That *all men* are equal, and ought to be free; But you their most vile and degenerate sons, Would *millions enslave*, and make *justice* your plea*!!*" Speaking to the Jefferson Branch of the Manumission Society of Tennessee in the aftermath of Missouri statehood, John Swain adopted a similar ventriloquism. He conjured the scene of his enslaved brethren crying: "thou, whose constitutions and declaration of rights, secure the freedom and equality of thy sons and daughters -why this paradox, - why are we, the coloured part of thy population, thus tortured and degraded under the iron yoke of bondage?" Swain concluded that the Constitution gave no warrant for ongoing slavery. In these exercises, consciousness of the Founding was acute – not as a diffuse history but as a pointed obligation that many free white Americans failed to carry out.[144]

This mood of declension figured prominently in invocations of Founding authority elicited by the Missouri conflict. Indeed, it was critical to the collective, cross-sectional development of that authority. To advance the project of inventing a justificatory past, Americans elevated and clarified history into instructive virtues and lessons. In a series of commentaries in the *American Watchman*, "Justitia" taught that "toleration of this evil crept into the Constitution; and that it was a blot, a stain, a kind of interpolation placed there by the hand of the southern planter, and yielded to by the friends of universal freedom, under the impression that the articles quoted from the Constitution secured to Congress the power of controuling the evil and confining it to the old states." Present resistance and duty to the intentions of the Founding were united; both demanded supporting restriction against new, radical southern claims of powerlessness. In potentially taking actions contrary to posited Founding meanings that should control the Missouri struggle, declension narratives rendered the present generation as wandering, wasting and in sore need of constitutional instruction. "Washington and his example of virtue and patriotism were bestowed upon us for our imitation and gratitude, and permanent advantage," proclaimed AN ANOTHER AMERICAN in a letter to *Poulson's American Daily Advertiser*. But the Missouri question had exposed "degeneracy" that should cause any American "who venerates the memories of the founders of this republic" to "hang his head" with shame. In casting the national fathers as antislavery agents, the writer framed

[144] *Edwardsville Spectator*, July 24, 1819; "SOLILOQUY OF SAMBO, A NEGRO SLAVE," *Genius of Universal Emancipation*, July 1821; "An Address…," *Genius of Universal Emancipation*, Oct. 1823.

opponents of restriction as opponents of those who defined the very meaning and purpose of the country. Who are the "zealots" whose meddling propensities led them to consider slavery as "a sin" - "a blot" - "a sham," the writer asked before wielding the answer: "Amongst them, will be found the names of Washington, of Franklin, of Henry, of Jefferson, of Adams, of Madison, of Tucker." As this writer added another voice to the rising chorus of veneration for the Founding, ANOTHER AMERICAN ceded authority over meaning to the ascribed understandings of these figures and their contemporaries.[145]

By making the national framers and fathers hallowed in this moment, they became repositories of constitutional power. Americans conceded the right of the deceased lights of the Founding – as exhumed, reanimated and remembered by the living – to mediate and structure present-day constitutional substance. Advocates of restriction developed narratives of Founding necessity to accept slavery in the Union on the most limited terms, bounded both in space and time. "Urgent, yet sad was the necessity which compelled our fathers to provide for the preservation of the existing political rights and the indulgence of an existing sin in some states, when our Constitution was framed," explained the *Hamden Federalist*. If that necessity required dooming "thousands and thousands to brutal bondage, whose natural rights, whose feelings and whose innocent enjoyments were then and still are unquestionably as sacred as were those of George Washington, president of that venerable convention," it argued, the necessity did not extend to new states, and the framers' Constitution empowered Congress to hold the line against any further extension. In a report introduced at the 1819 American Convention for Promoting the Abolition of Slavery, the Delaware antislavery society itemized the acts that evinced a Founding commitment to eventual abolition. and avowed that "Many of those illustrious characters who framed our constitution, it is fair to presume, would have preferred the evils under which our country then struggled to the adoption of a constitution which might entail bondage upon so many millions and spread it over a country of such wide extent as would most certainly become the property of the United States and be incorporated into the Union."

The authority attached to the identity of framers could serve an antislavery purpose; but treating framers as venerated sources of constitutional instruction could readily advance other ends. After all, it was southern congressmen who first made the Missouri question one of constitutional history rather than democratic policy. As the editor of the *Savannah Daily Republican* wrote of restrictionists and antislavery men, "however carefully veiled under the mask of patriotism," their efforts are "but little better than treason; and we hold it to be the duty of all good citizens to 'frown indignantly' upon them, so long as they reverence the warning voice of the departed Washington." Southern opponents of restriction perceived another form of necessity at work in the place of slavery at the Founding from which they sought an authority to bind northern citizens and lawmakers. Rather than accept a Convention that made the minimal necessary and temporary concessions to slavery for the sake of Union, southerners began to imagine that proslavery framers had fully secured the institution on the terms that the present South demanded; for otherwise, they reasoned, their forbearers would never have consented to the Union. As the *Charleston Southern Patriot* declared, the "parties of the Federal compact would never have come into such an association, but on the implied assurance and understanding between them, that the feelings, interest, and opinions of each of the states, but especially a large minority of them, would be respected." This was a powerful and portable version of Founding

[145] "Slavery versus the Constitution," *Poulson's American Daily Advertiser*, January 26, 1820; *American Watchman*, May 15, 1819, pg. 3.

necessity, one that would prove contagious as publics, politicians and jurists negotiated the place of slavery under the Constitution.[146]

To better invoke the framers, people sought authoritative sources. They combined historical imaginations, assumptions and an ad hoc American constitutional archive. The quest for authority in the Missouri Crisis led Americans to increasingly see their Constitution as a work of inspired authorship in which generative hands and minds moved to the fore of public constitutional culture. Moved by a spirit of reverence for the framers as individuals, a Mr. Russell wrote in to *The Boston Sentinel* urging the paper to publish his full list of the framers because "the names of those statesman and legislators who formed inside the existing *Constitution of the United State*s, ought to stand recorded on the indestructible annals of our country." The meagerness of materials from the Founding available as the crisis enveloped national politics cannot be understated. As debates commenced, people had virtually no window into the federal Convention. The closed-door secrecy of the Federal Convention did not merely cloak the delegates' conversations from contemporary criticism; during the Missouri crisis, that silence rendered the Convention a shrouded source of power – especially wide open to interpretation. Indirect glances could be had only with great effort. *The Federalist* circulated, though it had hardly attained its future stature and currency. Ratification proceedings were often hidden away in newspapers, irregular legal publications and out-of-print pamphlets. One delegate, Luther Martin, had immediately broken Convention secrecy to issue an explanatory report against the pending Constitution, but this partial report had fallen into obscurity by 1819. The bare proceedings of the Convention – who proposed what language, when and what became of it – had lain locked away under the purview of the Department of State since Washington deposited the records in 1796. Only in 1818 did Congress resolve to view and publish them, a work of transcription and organization that occasioned behind the scenes consultation with surviving framers and documents. In 1819, the *Journal, Acts and Proceedings of the Convention, . . . which formed the Constitution of the United States* finally emerged from a Boston press and began to trickle out to interested readers. "The debates which took place in the convention have never been given to the world. They sat with closed doors; and it is only within a few months that their Journal has been published," wrote "a Pennsylvanian" in 1820. Arriving at this moment, the *Journal* could only begin to be assimilated narratives about slavery and the Constitution. Indeed, it was only after the events of the Missouri crisis that a more elaborate resource with contemporary provenance saw publication, stimulated by America's resort to constitutional history. In the spring of 1821, news emerged that a volume called the "*Secret Debates of the Federal Convention"* would enter into print. As one paper explained, "A work is proposed to be published by Messrs. Webster and Skinner, of Albany, from manuscript notes of the late chief justice Yates of New York… and must cast the broadest light on the intentions of the framers of our federal constitution." The volume of Robert Yates' notes would work its way into the sinews of constitutional arguments in time for the Nullification Crisis; but during the Missouri debates, the Convention afforded vast room for imagination with few documentary anchors; in the conflict over slavery, people created a methodology without the sources upon which it ostensibly depended. Veneration of constitutional history far outpaced historical knowledge. Perhaps, in fact, the rise of this particular methodology and this species of veneration

[146] *Savannah Daily Republican*, Nov. 6, 1820; *The National Recorder*, Nov. 13, 1819; *Mobile Gazette & General Advertiser*, Dec. 8, 1820.

depended upon the absence of sources that could impose too restrictive and conclusive a set of answers to the Missouri question.[147]

Antagonists complained about each other's interpretative practices and grasped for documentary support in their contest for winning constitutional authority. "The slave-holders, in their attempts to get rid of the powers granted to Congress in the Constitution," wrote the *New York Daily Advertiser*, "have resorted to a species of construction, which we believe was never adopted until the purpose of the occasion called it forth." The target of critique was not the overarching reliance on original intent but the alleged substitution of false history – in this instance, southerners' contention that the framers had intended not to enable restriction of enslaved people's "migration," but only the movement of "poor and vicious foreigners." Proudly turning to Founding evidence, the writer announced that "we have lately been furnished, by a gentleman of this city, with a publication, which contains valuable evidence directly in point." The document, Luther Martin's 1788 report on the convention, was not yet an artifact that the paper could trust readers would recognize. The *Advertiser* explained that "the year after the Convention met and formed the constitution, Luther Martin, Esq. … published a pamphlet, containing information which, as a member of the Convention, he delivered to the legislature of the state which he had represented. This publication, it will be recollected, was as nearly contemporaneous with the convention and the constitution as the nature of things would admit, and therefore is entitled to the utmost respect, as far as it regards the facts and statements which it contains." The treasured source was, to be sure, just raw material for interpretation and consumption. Virginia congressman Alexander Smyth, for instance, drew from Luther Martin's report in early 1820 to depict a body of framers who provided for the future security of slavery writ national. "[I]t was intended by the convention and by the people, that that [slave] property should be secure," and that the "whole nation sanctioned the right of slavery, by adopting the constitution," he urged. Mississippi Representative Christopher Rankin likewise turned to the "brilliancy" of Martin's Report, along with *Federalist* No. 42, and "Add[ed] to this [the] authority" of the Massachusetts ratification debates to prove that the Convention understood Congress lacked power to restrict the "migration" of enslaved people within the territorial United States.[148]

As legislators of the Sixteenth Congress grappled with the authority of constitutional history and plunged deeper into the work of instrumental knowledge production, Illinois Representative Daniel Cook gave thanks for the expanding documentary record. Per the recent Congressional resolution distributing the text to congressmen, Cook declared that "we are fortunately provided with the Journal of that convention who bequeathed to this nation I (trust) the eternal charter of our liberties, the federal constitution" and directed colleagues "to such part of its history" that would shed "light upon the subject" of restriction. In arguing for the power of Congress to prohibit the internal migration of slaves to Missouri, Cook located the framers as conduits of constitutional authority whether in or out of the Convention: their support for the

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[147] *Journal, Acts and Proceedings of the Convention: Assembled at Philadelphia, Monday, May 14, and Dissolved Monday, September 17, 1787, which Formed the Constitution of the United States* (Boston, 1819); *Secret proceedings and debates of the convention assembled at Philadelphia, in the year 1787: for the purpose of forming the Constitution of the United States of America* (Albany, 1821); Max Farrand, ed., *The Records of the Federal Convention of 1787*, (New Haven, 1911). Vol. 1; James H. Hutson, "Robert Yates's Notes On the Constitutional Convention of 1787: Citizen Genet's Edition," *Quarterly Journal of the Library of Congress* 35 (1978).

[148] *New York Daily Advertiser*, February 12, 1820; *Speech of Mr. Smyth, on the restriction of slavery in Missouri. Delivered in the House of Representatives of the United States, January 28, 1820* (Washington DC, 1820), 18; *Annals of Congress*, House of Representatives, 16th Congress, 1st Session, 1336.

Northwest Ordinance during the concurrent Continental Congress and subsequent First Congress, he argued, spoke to original intentions in the Convention. To objections by Kentucky Representative Hardin against the precedential authority of historical conduct, at least in this instance, Cook was outraged: "What! not a precedent made by some of the very framers of that constitution!" This tension over what Founding words and deeds counted as precedents mattered. Historical claims that attained that status were more than metaphorical precedents: they carried constitutional authority to legitimate or undermine political action.[149]

Encounters with Founding sources in this moment were experienced as new and revelatory by those mining for assurance and justification. In the New York legislature during February of 1820, the Committee of the Whole deliberated on the expansion of enslavement westward. As lawmakers rallied themselves in opposition, they turned to the federal and ratification conventions to imbue their efforts with what they identified as the "higher authorities" of original constitutional understanding. Speaker John C. Spencer unearthed framer James Wilson's language from the "the debates in the PA convention, which will be found in 4th Hall's American law journal," holding it aloft as conclusion of the right and duty of restriction. That the legislator had to search out and cite the source, tucked away in a legal periodical, in this manner suggests it prior obscurity. "Authority more decisive can hardly be expected, especially when it is recollected that it is a contemporaneous exposition of the intentions of the framers of the constitution, being made in the year 1787 by one of the most distinguished in the land of illustrious statesmen," he explained, explicitly investing Wilson's statements with true, binding constitutional force. With language suggesting the possession of a valuable asset, Spencer also declared that "we have the testimony of the venerable patriot John Jay, in a letter lately made public, which is equally explicit." And for a final framer, he turned to Rufus King, "that exalted statesman whom we have lately with unexampled unanimity elected to the senate of the United States." King still served in Congress. He occupied the thick of political fights over Missouri and thus belonged to the present moment; but he also could serve as a conduit for original meaning for those inclined to see him speaking as a framer rather than as a politician. The epoch-crossing King, Spencer argued, had "not only given evidence the most clear and decisive… but has presented a mass of invaluable facts, which show there could have been no other intention in the minds of the framers of the constitution, that that which has been ascribed to them." The words of the Constitution alone were not enough in the Missouri debates; each side needed authority beyond legislative will, morality and arguments of good or bad policy. When the New York state assembly speaker insisted that "we have it from men who were actors in the scene and who were intimately acquainted with the men and the events of the day," and the body proceeded to act with enlarged faith in the constitutional cause of restriction, the authority of the Founding burgeoned. Beyond the restriction campaign and beyond the Missouri question itself, the sway of history advanced, colonizing American constitutional consciousness.[150]

The Problems of Living Founders

The Crisis arose at a transitional moment in the sources of constitutional authority, when aged founders still participated in public life. Texts left by deceased framers formed one basis of argumentation, but so did living memory. People reckoned not only with historical language but also with new words by men belonging to the contested present day and the venerated past. In

[149] *Speech of Mr. Cook, of Illinois, on the restriction of slavery in Missouri, Delivered in the House of Representatives of the United States, February 4, 1820* (Washington DC, 1820).
[150] *The New York Evening Post*, January 19, 1820.

Congress, two framers remained, each on opposite sides of the question. South Carolinian Charles Pinckney invoked his own authority as a constitutional author. He placed himself above all other figures in the House for "above all, being the only member of the general convention which formed the constitution of the United States, now on this floor, and on whose acts rests the great question in controversy." This status was not incidental to his arguments. Again and again, he turned to remembrance. When he rejoined against objections to Missouri's proposed constitution, he vowed, "I say that at the time I drew that constitution, I perfectly knew that there did not then exist such a thing in the Union as a black or colored citizen." Pinckney proffered his special status to undermine the Northwest Ordinance as a constitutional precedent. He described the former congress that passed it as "a body literally in the very agonies of political death" for which it was not "lawful or constitutional" or "even decent… to have passed an ordinance of such importance." If its few remaining members had been credible, influential and talented, he suggested, they would have in Philadelphia with him. "I do not know or recollect the names of the members who voted for it, but it is to be fairly presumed they could hot have been among the men who possessed the greatest confidence of the union, or, at that very time they would have been members of the convention sitting at Philadelphia," he scoffed. Here the performance of forgetting the names of Continental Congress delegates was itself evidence that they did not belong to the authoritative pantheon worth recalling. This was a challenge that had to be met. Pennsylvania congressman Jonathan Sergeant cast the Ordinance as "part of the groundwork of the constitution itself; one of the preliminary measures upon which it was founded." An implicit rather than overt challenge to the narrative that Pinckney offered, Sergeant stated that "it cannot be doubted, that its adoption had a great influence in bringing about the good understanding that finally prevailed in the Convention." In contrast to Pinckney's memories and subjective sense, he offered historical analysis and supposition. "If the convention had meant to repeal the Ordinance, they would have done so," he insisted. The enactment "was directly in their view" and concerned subjects "carefully treated by that body" – slavery, territory and federal power. "And yet, immediately after, when the same men who had framed the constitution, and knew its intention, where many of them members of congress, the supplement to the ordinance was adopted," noted Sergeant. The silences and inaction of the framers became proof against Pinckney's testimony.[151]

In the Senate, New Yorker Rufus King explored the authority he could command as the tectonics of constitutionalism shifted beneath him, as he participated in remaking the constitutional authority of Founders such as himself. Once a framer, then an inveterate Federalist and now a restriction advocate, he explained the Convention's compromise on slavery and slave representation was understood to be a "settlement between the original thirteen states." Circa the Founding moment, it reflected conditions and obligations "peculiar to the time and to the parties and [] not applicable to the new states which congress may now be willing to admit into the union." Other voices raised such arguments. But only King could provide the authority of framer authenticity at a conjuncture that found all parties looking backward in time to constitutional genesis. To combat his claims, southern congressmen did not resist the authority of the Founding but questioned the reliability of King's narration. Acknowledging that King "had taken an active part in forming this very Constitution," Senator William Smith demanded that he "give a history to that effect, if such a thing was contemplated or spoken of in the Convention. No, sir, such a proposition would have dissolved your Convention, and have left your Government where it was. Then does he expect to set up his opinion as Constitutional law?" Another figure from the

[151] *Niles' Weekly Register*, July 15, 1820, 349, 355; *Abridgment of the Debates of Congress, from 1789 to 1856*, Vol. 7, Sixteenth Congress, Second Session (New York, 1858), 109; *Niles' Weekly Register*, July 22, 1820, 369.

Founding, John Adams, would privately assure King that "As far as my Memory serves me, the facts you have stated, are perfectly correct—I believe there was not another Member in Congress; Capable of developing their History in detail, with such precision." Though not a framer or much for constitutional speechifying, one of the most aged members in Congress, Thomas Forrest, could also speak broadly for an antislavery Founding. The Pennsylvanian had fought under Washington as a captain in the revolutionary war, and in 1820 he deployed the moral authority that accrued from his age and experience. On the floor of the House, he recollected the wisdom of national fathers whom he had once known – nostalgia that served as the prelude for his strike against the extension of slavery. "I have occasion to rejoice; yes, rejoice overmuch, that they were not, like me, permitted to live to see posterity outgrow the remembrance of the patriotic virtues of their fathers, by an act for the extension of slavery." He informed the present generation that "if the extension of slavery grows out of the question before the committee, I shall think the small share I have had in the revolution, was the blackest part of my life." In a political culture committed to enshrining the Revolution and now investing so much authority in the Founding, these were the harshest possible words from the vanishing generation. Forrest suggested the national fathers would disown the posterity whom their Constitution had sought to serve.[152]

Other aged figures lurked in retirement. At a moment when Americans rushed to elevate the Founding and establish favorable, anticipated original meanings, figures such as Thomas Jefferson, James Madison and John Jay possessed a measure of constitutional authority beyond that of the present generation who inherited the text. During the Missouri Crisis, Founding era figures became acutely aware of their dwindling numbers. Pinckney remarked on his status to a correspondent that "Of the Members who signed the declaration of Independence, I found only 4 are alive—But what is still more extraordinary, there are only six who signed the constitution so long afterwards & of these three are from the 'unhealthy' South Carolina." The remainders of the Founding generation recognized a growing authority that came with their rare position.[153]

Though not strictly a constitutional framer, Thomas Jefferson became an oracle of high constitutional authority for many. During the Crisis, he maintained a guarded correspondence from Monticello as disciples sought his direction and sanction. Behind his famous remark that Missouri signified a "fire bell in the night" was this popular appetite for his understanding. Congressman Hugh Nelson, after quoting from correspondence on the House floor, confessed to Jefferson that "I cou'd not forego the temptation of availing myself of the Influence of your name." A few months later, congressman John Holmes sought permission to publish Jefferson's analysis of the Missouri conflict in view of the powerful "influence of your name, opinion & reasons." The Crisis brought home the question of intergenerational authority that Jefferson had mused upon decades early. If he once entertained notions that every generation might reconstitute themselves, now Jefferson disclosed a conservative lamentation that "the preceding generation sacrificed themselves to establish their posterity in independent self-government, which their successors seem disposed to throw away for an abstract proposition." In their uneasy warnings, some of those proximate to the Founding implicitly embraced the higher authority that Missouri litigants were investing in their more youthful days. "The fathers of our Republick, as I had ever supposed, arranged, wisely and safely, all the fearful questions that belong to those

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[152] *Niles' Register*, July 20, 1819, pg 349; *Niles' Weekly Register*, December 4, 1819, 219; February 13, 1821, *Annals of Congress*, Senate, Sixteenth Congress, 1st session, 377-78; John Adams to Rufus King, December 7, 1819, Rufus King Papers; *Niles' Weekly Register*, August 19, 1820, 440.

[153] Charles Pinckney to Thomas Jefferson, September 6, 1820, Papers of Thomas Jefferson.

discussions," wrote Richard Rush, regretting that "we, of this generation, have chosen to open them anew." A distinct relationship of Founders and followers, albeit one noticed through dereliction, appeared in such sentiments, just as national discourse was doing the same. With a quite different view on the merits of this abstraction, John Adams commented that "Strange doctrines have been broached in Congress during the discussion of the Missouri question," and he wondered if the "principles of the revolution are already out of fashion, and to be discarded." Founding era statesmen and first Chief Justice of the Supreme Court, John Jay wrote a widely circulated letter in 1819 reporting to reflect his original understanding of slavery under the Constitution. "To me the constitutional authority of the Congress to prohibit the migration and importation of slaves into any of the States, does not appear questionable," he stated. This living voice from the Founding provided precisely the kind of historical testimony through which northerners found confirmation of their convictions. In welcoming, repeating and elevating this exposition by a contemporary of the Convention – but not a contemporaneous exposition – they made the man himself authoritative. Yet the Founders themselves, such as remained, could only offer an additional layer of ambiguity and conflicting authority overlaying public ascriptions of original meaning. They shared different perspectives and fostered opposing public memory on the constitutional dimensions of the Missouri question as they looked to their past to judge the present dispute.[154]

But the intervention of icons from the Founding was deeply unsettling for people opposed to their current opinions. A Massachusetts reader, noticing the Jay letter in a newspaper, objected that thirty years prior, the ex-chief justice's opinion "would have commanded the respect of any statesman." But the writer drew a harsh line between the Founding era figure of national history and the authorial voice taking a stand on the Missouri question through recollections of the past. He complained, "the opinion of an old gentleman, fottering under the accumulated weight of infirmity and age, are not to be received at their ancient & sterling value." After limning the wise framers whom he believed in – for he could not dispute the authority of constitutional history itself – the writer deemed Jay's views "little less than a pointed insult on their understandings." This letter exemplified slippages between logic and history, between his own subjective understandings and those prevailing at the Founding. Writer "J." invoked the understandings of wise minds in the Convention while speaking through them. Meanwhile, the specter of a Founding figure uttering unwelcome words was brushed off as belonging to the "market-place and bar-room debate" over Missouri that the writers' sound historical reasonings purported to correct. J. cast himself as defending "the certainty as well as sanctity of our written constitutional law," against the confounding "intervention of the popular voice," that might arise whenever one "particular section of the Union fancies that its provisions may not precisely accord with its imagined or real interest." But in adducing his historical narrative, the disgruntled citizen was not removed from the moment and movement that he disdained. What he took to be true and rooted in the authority of the past was popular intervention in itself. The afterlife of words from the Founding continued to rankle the author. A month after complaining of Jay's letter, J. warned that introducing "verbal evidence of the constitutional power of Congress, is certainly not less alarming than novel." This time, the danger lay in the use of James Wilson's statements in the ratification debates that gave such support to restrictionists. "Against this

[154] Thomas Jefferson to John Holmes, April 22, 1820; John Holmes to Thomas Jefferson, June 19, 1820; Hugh Nelson to Thomas Jefferson, February 29, 1820; Thomas Jefferson to Richard Rush, December 27, 1820; Richard Rush to Thomas Jefferson, March 14, 1821; William Jay, ed., *The Life of John Jay: With Selections from His Correspondence and Miscellaneous Papers, Volume 1* (New York, 1833).

dangerous and novel precedent of Judge Wilson, we enter our unqualified protest. Adopt it, and our constitution is a sea without shore and without bottom." The appearance of individual statements of intention threatened to discredit the aggregate understanding of the Convention that the writer believed himself to know so well. With the future of slavery, union and constitutionalism all bound up together, J.'s complaint rested less on the practice of locating Founding intentions than on his present beliefs about history and encountering contradiction with the body of intentions that he was convinced must have existed.

> Did the Convention intend to clothe Congress with power to say to a new state? – you may freely receive and protect the personal property of the North!-The personal property of the South is a different affair! … And did the conventions of the slave states imagine, when they assented to the constitution, that those states had thus quit-claimed all the benefits flowing from our wide and fertile domains? I beg pardon of the Honorable Mr. Jay and Judge Wilson, - I cannot believe it."

As J. revealed, beliefs about the Founding mirroring present desires formed the basis upon which people came to rest their own constitutional understanding.[155]

Writing and Reading the Constitutional History of Slavery

Among the spate of critical literature that appeared during the Missouri crisis, the most prominent pamphlet circulating, *Free Remarks on the Spirit of the Federal Constitution*, made archetypical use of Jay's understanding. His antislavery missive formed part of a historical constitutional mosaic by Robert Walsh Jr., the most comprehensive effort to depict a Founding that would sanction restricting any further expansion of American slaveholding. Pushing the boundaries of a limited archival universe, the editor and attorney wrote to James Madison for new old information on "what is called *the Missouri-slave-question*" in 1819. Questing after the original understanding of the migration and importation clause and whether the three-fifths clause was understood to apply to new states, he professed to "attach most weight" to Madison's judgment because "no one can know as well as you do, what were the views & intention of the framers of the Constitution in regard to the extension or rather the restriction of negro-slavery." In answering, Madison noted that he consulted both his memory and "Manuscript," the convention notes that would only see publication in another 17 years. The former president took Walsh's request as an opportunity to at least privately fix constitutional meaning in accord with his then-understanding of the Convention's original understanding. While some in the Convention had "scruples against admitting the term 'slaves' into the Instrument," Madison assured Walsh of the "intention of the framers of the Constitution" to enable only the exclusion of enslaved people from abroad. Denying that restricting slavery could be a needful regulation of federal territory, rejecting any constitutional distinction between new and old states, and casting doubt on the constitutionality of the Northwest Ordinance, Madison's letter certainly did not provide the information that Walsh wished to learn. After *Free Remarks* appeared, Madison wrote to President James Monroe that, "I have been truly astonished at some of the doctrines & declarations to which the Missouri question has led." In particular, he thought it "impossible that the memory of any one who was a Member of the General Convention could favor an opinion that the terms did not then *exclusively* refer to migration & importation *into the U. S.*" At the

[155] *Hampden Patriot* (Springfield, Massachusetts), February 2, 1820, pg. 3; *Hampden Patriot*, March 1, 1820, pg. 3.

very moment in which the public authority of the Convention ascended, the framer witnessed a dramatic erosion of control over the meaning of the Constitution's language.[156]

Readers received Walsh's volume as a work of *constitutional history*, either illuminating or dangerous. Transforming popular constitutional subjectivity was visible in the response to the text. Printers Davis & Forth in Washington advertised the work; the post dispatched it through the Union; and papers reprinted long excerpts. Reviewing *Free Remarks* in *The Port-folio*, James Elihu Hall concurred with its narrative and epistemic premise. "[W]e must all regard the conduct of the framers of the constitution as the highest possible authority" for interpreting the Constitution, the editor asserted, as the framers "certainly understood its spirits and knew its bounds." What did this historical conduct and understanding instruct? While permitting existing slave states to continue acquiring enslaved people until 1808, "the sages of the convention" intended that Congress could prevent "at once the extension of slavery beyond the limits of the old states… and ultimately, [] suppress[] altogether the diabolical trade in human flesh, whether *internal* or external." In the crucible of the Missouri crisis, readers such as Hall found that *Free Remarks* taught both a particular constitutional meaning and a way to think about the source of that meaning. In his *Register*, publisher Hezekiah Niles approvingly declared that it "proves the original design" to limit slavery to states then existing by showing the "history of the feelings and proceedings" of Convention, ratification conventions and early congresses on the future of slavery. The *Illinois Gazette* praised the volume for showing "it to be the intention of the constitution to tolerate slavery no farther than in the original thirteen states." For the *Baltimore Patriot & Mercantile Advertiser*, Washington correspondent A. B. wrote that he had "begun to read Walsh's Pamphlet, and was forcibly struck with his discussion of the section of the Constitution, relative to the 'migration and importation of Slaves;' … [and] was astonished at this new doctrine." While this particular reader presumed that "No person doubts the power of Congress… to prescribe that slaves shall not be admitted into the territory," he believed that "If the Constitution had meant what Mr. Walsh has assumed as the construction of the section, the framers would have been explicit." As this reader's experience suggests, texts like Walsh's *Free Remarks* challenged Americans to envision and articulate the Founding that they found plausible and true. The popular invocation of authorial understandings for which the constitutional text was only a starting point spread as readers demanded the Constitution give definite and favorable answers in their political war over slavery.[157]

Opponents of restricting slavery perceived pernicious falsehood and great risk in the constitutional ground Walsh's pamphlet claimed. The *Mobile Gazette & General Advertiser*, circulating passages from Charleston's *Southern Patriot*, complained that the Walsh's account of the Union was untenable, that the "parties of Federal compact would never have come into such an association, but on the implied assurance and understanding between them, that the feelings, interest, and opinions of each of the states, but especially a large minority of them, would be respected by the others." Like Hall in *The Portfolio*, the southern editors wished Congress to be

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[156] *Free remarks on the spirit of the federal Constitution, the practice of the federal government, and the obligations of the Union, respecting the exclusion of slavery from the territories and new states* (Philadelphia, 1819); Robert Walsh, Jr. to James Madison, Nov. 11, 1819, James Madison Papers; James Madison to Robert Walsh, Nov. 27, 1819; *Madison Writings* 9:1—13; James Madison to James Monroe, February 10, 1820.

[157] *Daily National Intelligencer*, January 12, 1820; "Review," *The Port Folio*, 9:1 (1820); *Niles' Weekly Register*, January 8, 1820, 307; *Illinois Gazette*, February 3, 1820; *Baltimore Patriot & Mercantile Advertiser*, January 18, 1820. Like other advocacy for restriction focused on policy and political economy, Daniel Raymond expressly deferred to the explanations given by Rufus King that circulated widely in pamphlets and newspapers. Daniel Raymond, *The Missouri Question* (Baltimore, 1819), 37-39.

"guided by the large prospective views of the men who built up the proud fabric of this constitution" – but Walsh's history stood in stark opposition to their Founding expectations. His account was received by southerners as an attack on basic constitutional history and settled constitutional right– it undid the Founding in their eyes. "Any-thing more sir?" responded the *Richmond Enquirer,* "Will you not stretch your arm also into the old states? Abolish their slave representation; abolish slavery?" In Georgia's *Southern Recorder*, ATTICUS issued an open letter to "Robert Walsh, Jun'r, Esq." The writer took his sectional opponent very seriously: while other restrictionist efforts were "feeble and harmless squibs," Walsh's work used the "most seductive arts" to offer "a nucleus around which the whole corruption of the government is to settle, and when it has there sufficiently rankled, it is to ulcertate every extremity of our political system." It was the art of false constitutional history wielded against slavery and the illegitimate authority that such material promised that provoked ATTICUS. The southerner implicitly asked his sectional allies to trust their own sense of history: "Do you believe the framers of the Federal Constitution conveyed to Congress through that justly admired instrument, any latent of secret powers to effect what is either not expressed or openly withheld?" One such ally in Walsh's hometown of Philadelphia, political economist Tench Coxe, responded to the moment by striving to retroactively exile black Americans from the Founding. Once a Revolutionary generation political leader who professed antislavery sentiments, the aged Coxe of the Missouri Crisis was a more fearful, less hopeful man who jettisoned antislavery talk. He read Walsh's work, saw the antislavery advocacy in Republican papers like William Duane's *Aurora*, felt the rising tide of historical constitutional consciousness, and began to construct a justificatory history of exclusion. "My materials have been historical, constitutional & statutory; and I have satisfied myself, that as the black & colored people were not, in 1774. 1776. 1781. (the Confederation) 1787 the date of the constitution, parties to our social compacts (provincial or state)," Coxe wrote, summarizing his lengthy newspaper letters supporting perpetual racial subjugation. Another sectional ally, Portuguese émigré Jose Correa de Serra, branded *Free Remarks* as a "joint production of some of the Leading federalists of New York and New England" that Walsh had "polished and varnished." In the pamphlet, the southern sympathizer perceived the laying of a constitutional foundation to eventually "attempt to stripe you of your property of slaves." Such accusations were inevitable in the constitutional culture ushered in by the ongoing debates over slavery's future. As the authority of the Founding waxed during the Missouri crisis, conflicting representations of historical truth led antagonists to mistrust the sincerity and motives behind opposing historical narratives.[158]

Yet the recruitment of historical authority to formulate binding constitutional meaning, both for and against the extension of slavery, generally was made in earnest. The Missouri conflict prompted minds to craft stories of constitutional meaning that elaborated on preexisting assumptions, that sprang first into being as constitutional convictions and then became fully-formed historical claims upon further consideration. Like congressmen, editors and interested Americans, Walsh discovered that the past provided fertile ground for the policy he advocated. In *Free Remarks*, in Coxes' letters and in commentary across the country, people hardly experienced a gap between what they wished for the future United States and what they believed

[158] *Mobile Gazette & General Advertiser*, December 08, 1820; *Savannah Daily Republican*, Dec. 21, 1820; *Southern Recorder*, Jul. 18, 1820; Jose Correa de Serra to Thomas Mann Jefferson, January 7, 1820; Tench Coxe to James Madison, December 28, 1820; 106-10; Gary Nash, "Race and Citizenship in the Early Republic," in Richard Newman and James Mueller, eds., *Antislavery and Abolition in Philadelphia: Emancipation and the Long Struggle for Racial Justice in the City of Brotherly Love* (Baton Rouge, 2011).

the Founding originally authorized and required. Available documentary sources in 1820 scarcely required otherwise, granting a generative space for imagination and vehement argument. That Walsh selected, omitted, and glossed did not mean that he doubted the historical veracity of his vision of the Founding: these embedded choices and assumptions flowed from the subjective process of drawing forth narratives of meaning beyond the face of the Constitution to govern the future of American slavery. Walsh's understanding that the "spirit and drift of the constitution" granted the government "no power to permit slavery in a territory of the Union," and instead demanded action to prevent it looked to the Founding for authorization. But it was Walsh who chose to look there, chose what to look at, and finally chose how to construct his mosaic of meaning. These choices did not unfold in insolation. The Missouri Crisis, as questions of the political good shifted to the constitutionally allowable, impelled this quest for authority. In the methodology of *Free Remarks* and responses to its content, participants in the debates over Missouri conveyed the changing terrain of constitutional authority beneath them.

Legislating as the Fathers Intended

The impasse over Missouri statehood ended when enough northern congressmen, buffeted by political pressures, convinced themselves that admitting Missouri with slavery actuated a Founding constitutional value of compromise for union's sake. Facing an outcry over his vote, New Jersey congressman Bernard Smith narrated to constituents the drama of his consultation of authorities. "I perused *Washington*'s Farewell Address; I read it with attention," he explained, focusing particularly on language counseling against geographical discrimination and in favor of fraternal affection among citizens. "About this time," Smith continued, "I saw an extract of a letter from the venerable Jefferson to a member of Congress, in which he says, 'the Missouri question is the most portentous one which ever yet threatened our Union.'" Smith's account of his meditative encounter with these warnings from Founding figures represented the congressmen as a humble follower of higher wisdom. It suggested the act of reading his bible or receiving a divine message on anxious matters of constitutional faith. Smith rested his vote on their paternal authority and example. "As the sentiments of Washington and Jefferson made a deep impression on my mind, at an early period of my life; they could not be viewed with indifference by me, at a time when I was about to vote on the most important question that has been discussed in Congress since the adoption of the constitution." Hoping voters would find that his justificatory narrative justified his vote, he articulated the most authoritative reasons available to him. Massachusetts congressman Mark Langdon Hill expanded upon similar themes in a circular to constituents. Citing "a spirit of compromise and conciliation" at the Federal Convention, "as is evident from the records of those transactions as well as Washington's letter to Congress," he contended that a partial, prospective restriction obeyed the Constitution they had inherited and preserved the flourishing Union that had developed under its inscribed wisdom. In his next missive in May, he proudly shared a congratulatory letter that he received from James Madison hoping that "the conciliatory spirit which produced the constitution remains in the mass of people, and the several parts of the union understand the deep stake every part has in its preservation." Hill would only represent Massachusetts for the single term allowing him to vote for the compromise. He returned to Washington for the next session of congress representing his district in the new state of Maine, which Congress had accepted into the Union along with Missouri.[159]

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[159] *Daily National Intelligencer*, September 14, 1820; Mark Langdon Hill letter, March 31, 1820; Mark Langdon Hill letter, May 15, 1820 in Noble Cunningham, Jr. ed., *Circular letters of Congressmen to their constituents, 1789-*

Another Massachusetts-turned-Maine congressman, John Holmes, explained to his constituents that the real Missouri question was "Not whether [slavery] ought to be abolished-but what are our Constitutional means, to remove this evil without inflicting a greater?" The means were minimal by dint of the Constitution. Replacing the moral question with the legal one, Holmes rested his stance on Founding authority. "The Constitution of the United States was a compromise of conflicting rights and interests" that "recognized the right of any State to its slaves." He looked back to find a binding understanding that would foreclose his own agency in the matter. Fellow Massachusetts representative Jonathan Mason wrote to David Sears that he held the unpopular opinion in his district that the Constitution did not permit restriction but preserved "the right of a citizen to travel with his slave from one portion of the country to another," free from congressional interference. He professed to have "made it my duty to read every paper, pamphlet & essay written on the subject, & to attend to every speech which has been delivered thereon; but it has been my misfortune that those efforts, made with a desire to meet the wishes of my friends and constituents, have resulted in confirming my first impressions." That Mason experienced such confirmation was to be expected. With opposing historical narratives supporting opposing textual interpretations, engaged citizens who already had an opinion were not often swayed. Constitutional narratives persuaded and mobilized those already sympathetic to halting the national spread of slavery, or those who believed that extending slavery was perfectly compatible with western expansion. Narratives of the Founding fended off unwelcome interpretations or took the fight to opponents, pressuring them to articulate their own narratives. On each side of the dispute over restriction, people could believe their own alignments of history and conviction while finding other accounts spurious.[160]

In the aftermath of the crisis, Charles Pinckney wrote to a friend that much praise and credit belonged to these free state representatives "who joined us in… preserving the noble fabric of our Union and government." Newspapers excerpted and circulated these words from the lingering framer ad slaveholder. "This is the view of the conduct of those men which is entertained, we dare say without exception, by the surviving framers of the Constitution of the United States," commented one writer, a view that conspicuously omitted Rufus King. "We hope never to see the day when the opinions of such men are not respected," the paper concluded, presenting the framers as a homogenous authority for the cause of unionism. This view implicitly looked forward a day when the inconvenient reality of living framers would cease, where their dead hands could be invoked without intrusion by surviving voices. In similar fashion, a Missouri writer concluded that "slavery cannot be touched with any sort of moderation, and, in future, we hope Congress will imitate the conduct of the framers of our national Constitution, and pass over the subject in silence." This prescription for political quiescence surrounding slavery planted itself on the ground of proper constitutionalism. The Missouri Crisis, as a constitutional experience, exposed an institutional fragility that suggested to many the importance of clasping tightly to their national fathers' creation and course of conduct. For instance, Tennessee Representative John Rhea, relieved that the Missouri "question is put to rest" on terms leaving the west open to slavery, closed his 1820 circular with an impassioned paean to the handiwork that held the country together. "The constitution of the United States, which is the bond of Union, and the foundation of national sovereignty and independence, is to

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1829, Vol. 3 (Chapel Hill, 1978), 1102-03, 23. Matthew Mason, "The Maine and Missouri Crisis: Competing Priorities and Northern Slavery Politics in the Early Republic," *Journal of the Early Republic* 33 (2003): 675-700.

[160] *American Advocate, and Kennebec Advertiser*, April 29, 1820; William C. Richards, *Greatness in Good: A Memoir of George N. Briggs* (Boston, 1866); *Daily National Intelligencer*, April 1, 1820

be maintained against violation and innovation; it is the production of wise patriotism, directed by omniscient wisdom…. Let us, therefore, preserve it inviolate; by doing so we will strengthen the bonds of our Union, and be invincible." For the Tennessean and many southerners at this juncture, they had played the part of good sons to national fathers, obeying their "omniscient wisdom" and warding away "innovation" by wayward brothers.[161]

But after a struggle in which Americans rhetorically and conceptually committed themselves to defending original constitutional meanings, notions of compromise and preservation were themselves quite vexing for numerous southerners and northerners alike. As a writer in the *Boston Recorder* observed of the resolution, "Those who are in favor of it, certainly give up all constitutional scruples; because it is equally constitutional to restrict in Missouri, as it would be in Arkansaw," while for the free states, "Every new precedent strengthens the friends of slavery, and weakens its enemies." In the *Louisville Public Advertiser*, a writer griped that the "compromise ought not to have been made, because it was a concession on the part of the south and the west in favor of ambitious states determined to rule the nation at the hazard of dissolving the union." In his 1820 manifesto for an incapacitated federal government, *Construction Construed and Constitutions Vindicated*, John Taylor of Caroline deemed the resolution "void" and a "fraud" because the "subject of internal slavery was definitively disposed of by the federal compact." When Missouri joined the Union with a constitution that barred free blacks from entering the new state, many in the North saw Congress acquiescing to the violation of the privileges and immunities that the framers intended to guarantee to all citizens. A Charleston, South Carolina editor mocked this quite earnest objection as a pretension to "know[] the intentions of the framers of our glorious Constitution, better than they did themselves." The view that freemen of African descent came under the protection of the Privileges and Immunities clause "puts a construction on the term citizens never intended by the framers of the Constitution." White citizens may have broadly appreciated the bare fact that the Missouri debates had ended, but compromise seemed to connote some betrayal of the Founding. An angry Connecticut resident wrote to the *Darien Gazette,* that the bargain "palm[s] slavery upon us to an extent greater than was contemplated by the framers of our excellent Constitution." A writer in the *Columbus Gazette* responded to pro-compromise warnings against geographical division by tendentiously identifying a sectional divide in adherence to the Founding. In the North, "the constitution and laws of the land, are to be literally understood, agreeable to the plain and obvious meaning and intent of the founders of our republic, and the framers of the constitution," the letter contended, while in the South, the Constitution is "to be warped, twisted, curtailed or extended to mean anything or nothing." After months of heated constitutional rhetoric, Americans could understand their sectional perspective and true constitutionalism as virtually coextensive on the subject of slavery.[162]

As people litigated Missouri through the Constitution, the question was never confined to that jurisdiction or to territory generally. Scorning the history and constructions offered by restrictionists, one congressman predicted that future "encroachments could be made upon slave property," and determined "the Missouri question to involve property in slaves throughout the

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[161] *Pittsfield Sun,* April 4,1821; *St. Louis Enquirer*, April 15, 1820; John Rhea letter, March 5, 1821, in Noble Cunningham, Jr. ed., *Circular letters of Congressmen to their constituents, 1789-1829*, Vol. 3 (Chapel Hill, 1978), 1143-7.

[162] "Restriction of Slavery," *Boston Recorder*, Feb. 5, 1820; *Louisville Public Advertiser*, Oct. 14, 1820; John Taylor, *Construction Construed and Constitutions Vindicated* (Richmond, 1820); *Charleston City Gazette and Commercial Daily Advertiser*, August 20, 1821; *Hampden Federalist & Public Journal*, September 20, 1820; *Salem Gazette*, January 2, 1821.

United States sovereignty, and the constitution itself." His dread was not entirely unfounded, even if their political possibility remained dim. In 1822, antislavery papers circulated a plan for abolition originating in the *Genius of Universal Emancipation* that had been gradually building in the author's mind. Affirming that "America is my country, and the United States is my home," the writer reflected the antislavery nationalism fertilized by the Missouri crisis, where citizens assumed governing responsibility for remote lands. The proposal included abolishing slavery in all federal territories and Washington D.C., outlawing the interstate slave trade, imposing harsh penalties on the kidnapping of free blacks across state lines, and seeking an amendment ending slave representation. "It cannot be doubted that the national Legislature possesses full power and authority to make the regulations here alluded to," he assured readers, as "the act passed during the session of 1819-20, generally termed the compromise… settled the question." The silver lining of the Missouri defeat that caught the eye of this writer was the constitutional power to regulate slavery. In this immediate post-Missouri moment, Americans contemplating the national politics of slavery found that the Constitution loomed much larger in their hopes and fears, that policy debates now meant constitutional politics.[163]

The Crisis, the Courts and Constitutional History

The formation of constitutional narratives around slavery, section and union did not recede or lie dormant with the end of the Missouri Crisis. In communities, at celebrations, in public addresses, in courtrooms and print culture, the past came alive. The framers, the Convention and the Constitution continued to perform the work of justification – moral, political and legal. Their authority was affirmed, their shadow grew. In 1822, for instance, with the Crisis fresh on the minds of citizens and judges alike, Massachusetts Chief Justice Isaac Parker reviewed the constitutionality of the 1793 Fugitive Slave Act after Virginian Camillus Griffith attempted to capture New Bedford resident John Randolph and return him to slavery. Parker, exposed to both a local northern and distant southern gaze, turned to Founding history, drawing on the historical logics and vernacular that the Missouri Crisis had propagated. The jurist relied upon the Convention to authorize and buttress a ruling permitting the slave-catcher to drag Randolph away from his five-year residence.

> We must reflect, however, that the constitution was made with some states in which it would not occur to the mind to inquire whether slaves were property. It was a very serious question when they came to make the constitution what should be done with their slaves… That instrument was a compromise. It was a compact by which all are bound. We are to consider then what was the intention of the constitution. The words of it were used out of delicacy so as not to offend some in the convention whose feelings were abhorrent to slavery but we there entered into an agreement that slaves as property.[164]

This judicial opinion was of the moment. The pronounced deference to constitutional intention in the context of slavery; the respect for attributed understandings that derived less from old text than present conviction; and the deployment of a closed narrative arc around the work of the Convention on slavery all marked the transformation of American constitutional

[163] *St. Louis Enquirer*, April 29, 1820; *Abolition Intelligencer and Missionary Magazine* (August, 1822).
[164] *Commonwealth v. Griffith*, 2 Pick. 11 (1823), in *Reports of Cases Argued and Determined in the Supreme Judicial Court of Massachusetts* (Boston, 1866), 2:11–20; Kathryn Grover, *The Fugitive's Gibraltar: Escaping Slaves and Abolitionism in New Bedford* (Amherst, 2001).

consciousness. Parker was sure to spare the Constitution and Convention of any of moral blame for either the day's ruling or the existence of legal bondage. Slavery "would still have continued if no constitution had been made," he concluded. The judge cited no sources for his history, but he described the vision of the Founding that lay in his imagination. It was one that many Americans could share. The court leaned upon the public authority gathering around the Founding, validating and enhancing that power with its decision. It made history into law.

Parker's legitimation of fugitive slave rendition through a binding historical mythos capped a rapid introduction of Founding authority in American jurisprudence. A year and a half prior to the Missouri Crisis, the Supreme Court of Pennsylvania heard a case in which a Virginian sought to claim an enslaved woman's child who was born on Pennsylvania soil. To the outrage of southern slaveholders, the Court found the Constitution's fugitive slave provision forbidding the discharge of a "person held to service or labour in one state under the laws thereof escaping into another" did not extend to the child because there was no escape. To authorize this controversial decision – controversial because slaveholders had already developed an expectation of entitlement on this question of first impression – Chief Justice William Tilghman introduced the Convention. He reasoned that "we must presume that [southern] representatives in the General Convention of 1787 regarded this important object with vigilant attention. Neither can it be supposed that Pennsylvania and the eastern states were inattentive to what had always been deemed by them a matter of importance, so that it is a case in which there are peculiar reasons for adhering to the words of the constitution." These presumptions and suppositions were just that, and they were used to underscore what Tilghman regarded as a plain, literal construction of constitutional text. As such, Tilghman's statement did not stray far from practices of common law statutory interpretation and remained distant from inventing an inner story of the Convention that would carrying meanings beyond the face of framers' language. But these conjectures were seeds that could readily grow into believed-in historical facts and narratives that would do more than buttress a plain textual meaning. Fellow judge Jasper Yeates concurred that the Convention "had the whole subject of slavery before them, and we well know the prejudices and jealousies of the southern parts of the union as to their property in slaves…. but the business was accomplished by acts of concession and mutual condescension." Yeates' brief historical claim was similarly limited to declaring that the Constitution meant what it said, enhanced with an admiring reference to the framers' settlement by compromise. Already in this passing remark, however, a slippage appeared between the increasingly jealous southern slaveholders in Yeates' present and the framers from slave states in the Convention whose debates and deliberations remained largely unknown.[165]

With the Missouri crisis raging in 1819, Tilghman once again turned to history in another slavery case, *Wright v. Deacon*. Now conjecture gave way to assertion of historical fact and attestation of popular understanding. It "is well known that our southern brethren would not have consented to become parties to a constitution under which the United States have enjoyed so much prosperity unless their property in slaves had been secured," wrote Tilghman, as he required state officials to carry out the cursory process of the federal Fugitive Slave Act of 1793 and send a man to slavery. The opinion was an act of public communication and persuasion, a legal object distinct from the ruling itself, that sought to reconcile audiences to the dismal outcome. In keeping with the Missouri moment, Tilghman manufactured historical authority, albeit still brief, declarative and unelaborated, in service of his exceptionally unwelcome ruling at an instant when constitutional obligations respecting slavery were in wide dispute. The

[165] *Commonwealth ex rel. Johnson, A Negro v. Holloway*, 3 Sergeant and Rawle 3 (1817).

Pennsylvania legislature responded by enacting the first anti-kidnapping statute barring state officials from aiding enforcement. Meanwhile, the ongoing debates over Missouri, the Constitution and the future of slavery further disseminated a constitutionalism of obedience to a revered Founding and, for many established citizens, the emulative virtue of preserving the Union of their fathers. By 1823, a local trial judge like Moses Levy, President of the local District Court for Philadelphia knew how to summon the authority of the Founding and the culture of constitutional veneration in support of his "painful but imperious duty" – the return of George to enslavement by Virginian John Winder. The case was a straightforward application of the Fugitive Slave Act of 1793 under the precedent of *Wright*, but Levy had both public opposition and personal regret to assuage. "Let it be recollected that this constitution gave us the rank and high standing among nations which we now enjoy. It never could have been adopted, it never could have been ratified by a majority of the States, if the clause alluded to or some equivalent provision had not been introduced into it," he opined. After giving a brief history of slavery in the United States culminating in the Convention, Levy concluded that "I shall not therefore do what lays in me, to sever, or endanger the Union by speculative questions, but act in conformity that Constitution which is the ark of our safety, the foundation of our glory; that has furnished the great model for newly emancipated nations to fashion their charters of freedom by, and which it is our first duty to preserve entire." Levy had absorbed the new vernacular constitutionalism around slavery, defined by veneration and deference to ascribed historical meaning, and he spoke it fluently from the bench. Soon thereafter, lawmakers would pass another anti-kidnapping law in 1826, one that would eventually come before the Supreme Court and elicit more elaborate invocations of the Founding in *Prigg v. Pennsylvania* (1842).[166]

These decisions delivered around the Missouri Crisis disclose a shift in courts' engagement with history and public sentiment on cases involving slavery – where white Americans saw relationships between slavery and the Constitution play out in visceral and contentious terms. The shift was inextricable from the newly emergent public contestation over slavery and the unstable, discordant claims that Americans made upon the Constitution. Prior legal cases involving the Fugitive Slave Clause and Fugitive Slave Act of 1793 had not ventured into historical territory, the will of the Convention and the contingency of the Union on observing framers' imputed bargains. Nor did those arising as late as 1818 do so in other jurisdictions. In part, the cases anticipated and in part they followed the transformative constitutionalism of the Crisis by drawing on the Convention to assert authority over terrible legal subjects. At its formative moment around the Missouri crisis, slavery's constitutionalism was a matter of public practice, but it also slipped into the jurisprudential realm as judges negotiated the most fraught domains of constitutional meaning before a broad, divided public. In courtrooms, as well as in congress and in popular constitutional discourse implicating slavery during and after the Missouri crisis, the Founding attained new justificatory heights. With the rise of the Founding, the Constitution itself expanded. It did so not through amendment or judicial construction but by annexing the opaque well of history. The text remained the same while historical narratives constructed around claims of authorial understanding enlarged its

[166] *Wright v. Deacon*, 5 Sergeant and Rawle 62 (1819); *The American Farmer*, October 8, 1824, 230-1; *Philadelphia in 1824; or, a brief account of the various institutions and public objects in this metropolis, being a complete guide for strangers* (Philadelphia, 1824), 134; William R. Leslie, "The Pennsylvania Fugitive Slave Act of 1826," The Journal of Southern History 4 (November, 1952): 429-445; Eric Plaag, "'Let the Constitution Perish:' Prigg v. Pennsylvania, Joseph Story, and the Flawed Doctrine of Historical Necessity," *Slavery and Abolition*, 25 (2004), 76-101.

scope of rule. Constitutional silence gave way to reconstructed voices of national fathers. Through the authority of the Founding, the idioms of original intentions, and the materials of the past, Americans could force their aging Constitution to govern their most intractable dilemmas.[167]

[167] This analysis complements the depiction of the crisis and its resolution in Padraig Riley, *Slavery and the Democratic Conscience: Political Life in Jeffersonian America*, (Philadelphia, 2016), 249-252, with respect to the terms on which democratic culture came to accommodate slaveholder power and white supremacy.

CHAPTER THREE

INVENTING THE FOUNDING: CONSTITUTIONAL TRANSFORMATION DURING NULLIFICATION

Introduction

Whitemarsh Benjamin Seabrook issued a stern warning to his fellow South Carolina slaveholders in September of 1825. From his seat in the state legislature and his plantation manor, the erstwhile attorney had compiled a list of national political dangers descending upon southern enslavers. As he read aloud this anxious essay to the Agricultural Society of St. John's Colleton, swiftly published as *A Concise View of the Critical Situation, and Future Prospects of the Slave-holding States: In Relation to Their Coloured Population*, his political community heard sectional dread sound in the key of "infringement of the constitutional rights." Seabrook observed that party differences had given way to unceasing "sectional jealousies… so long as the Southern States shall cling to the charter of their rights, so long as they shall refuse to sacrifice their constitutional immunities." Antislavery discourse and action, he declared, proceeded unabated despite appeals to the wise admonitions of "the Father of his country." Public constitutionalism was assuming a particular language of fear – of unworthy sons forgetting or perverting the Constitution of their fathers – and Seabrook spoke it fluently.[168]

Training his sights upon new antislavery possibilities in the aftermath of the Missouri crisis, the Princeton-educated planter seized upon Ohio's 1823 resolution proposing gradual national emancipation and exile of enslaved black Americans, a scheme that elicited supportive calls from several state governments for an enabling constitutional amendment. Seabrook conceded an abstract right to suggest textual changes, but he declared that "certainly it was never contemplated that a State should possess the right of attempting to alter the conditions of our society, or fundamentally to change the form of our government." For the slaveholder, original constitutional commitments and the ascribed contemplations of national fathers imposed substantive limits on revisiting slavery that no living majority could transgress. Emancipation would still be "unconstitutional[,] [e]ven should the assent of two-thirds of both houses of Congress, the legislatures of three-fourths of the States, and the signature of the President be obtained." Seabrook steered his audience through a host of new constitutional fears over federal involvement with subjects implicating slavery: that federal courts and treaties claimed to prohibit South Carolina from imprisoning free black sailors in their ports; the prospect of federal support for the African Colonization Society; and the specter of enslaved people revolting with congressional encouragement, just as "the injudicious speeches on the Missouri question" animate[d] Vesey in his hellish effort." Even the cultural bled into the constitutional as he fretted over lessons northerners learned in their newspapers and books. Whether publications sought "to sketch the characters of the Signers of the Declaration of Independence or to instruct the youthful mind," they waged a war "Against the constitutional privileges of the slave-holder." Such texts, Seabrook feared, prepared the rising generation to upend a Constitution that he knew in his bones had been designed to secure slavery and southern political power.[169]

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[168] Whitemarsh B. Seabrook, *A Concise View of the Critical Situation, and Future Prospects of the Slave-holding States: In Relation to Their Coloured Population* (Charleston, 1825); 1830; Census Place: St Johns Colleton, Charleston, South Carolina; Series: M19; Roll: 170; Page: 151; Family History Library Film: 0022504; *History of the State Agricultural Society of South Carolina from 1839 to 1845…* (Columbia, 1916), 219.

[169] Salmon P. Chase, ed., *The Statutes of Ohio and of the Northwestern Territory, Adopted Or Enacted from 1788 to 1833 Inclusive, Volume 2* (Cincinnati, 1834), 1454; Herman V. Ames, "The Proposed Amendments to the

A sense of original constitutional rights pitted against new wrongs structured *A Concise View*'s warning to the South. It assumed a proslavery Founding. At the adoption of the Constitution, Seabrook instructed, every state had been a slave state. "It is now, for the first time asserted, that in framing the Constitution of the United States, the representation of three-fifths of our slaves was a 'great concession,'" he argued, claiming that "reference to the Journals of the old Congress" must show this "assertion has no foundation in truth" and "No compromise was ever made." Through the narrative form of constitutional history and an archival presence open to appropriation, the speaker, audience and readers could experience as a shared fact the tenets of their faith in past actions. Seabrook closed this effort to galvanize southern minds for "self-defense" by invoking the Constitution – "Esto Perpetua!" he announced. But from the forgoing account, it was clear that what commanded his veneration and obedience by 1825 was something other than a discrete text. A strange temporal object, his Constitution was a bundle of meanings at once fixed in the past and mirroring present commitments, the preservation of slavery above all else. In *A Concise View*, the rising fears, priorities and centrality of historical constitutional legitimacy among South Carolina slaveholders flashed into view. The doctrines of nullification did not yet appear; but in a few years' time, Whitemarsh Seabrook would enthusiastically support the cause, first as a state senator and then as Lieutenant Governor. In doing so, he believed that he was ensuring the perpetuity of both the Constitution and slavery.[170]

The struggle over restricting slavery in Missouri opened the tap of Founding authority. By the end of the decade, the Nullification Crisis ensured that Americans absorbed this new public constitutionalism into their very sense of nationality. From an idiom and instrument of meaning, the construct of Founding intentions became the basis upon which Americans understood the identity of the United States. Between 1828 and 1833, South Carolina rallied white southerners to believe in a state right to halt the federal protective tariff on manufactures inside its borders and, more importantly, any law deemed threatening to the political economy of plantation slavery. While historians have studied the politics, personalities, ideologies and interests involved, they have not considered the pivotal force of nullification in remaking the contours of American constitutionalism. It posed the future of the country as a question of constitutional history. Nullifiers, wary southerners and aghast northerners sought to fix precisely what had happened at the moment of constitutional origin – a question understood to determine where sovereignty resided and dictate the limits of present and future political possibilities. Establishing the history of the Founding meant defining the Union across time. From debating the constitutionality of the tariff, to describing whether separate states or one people formed the Constitution, to arguing over what these differences signified, the Crisis compelled people to ask what the past was and what it allowed of the present. If debates over slavery in Missouri inaugurated a new popular discourse of framer intention, the nullification experience fulfilled a constitutional moment that transformed how people understood the nature of the Constitution itself. Through the Crisis, Americans invented the Founding.[171]

Constitution of the United States During the First Century of Its History" in *Annual Report of the American Historical Association for the Year 1896,* Vol. II (Washington, 1897), 206.

[170] Seabrook, *A Concise View of the Critical Situation*.

[171] On the nexus of nullification and slavery, see, William W. Freehling, *Prelude to Civil War: The Nullification Crisis in South Carolina 1816-1836* (1965); Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis* (1987); Lacy K. Ford, *The Origins of Southern Radicalism: The South Carolina Upcountry, 1800-1860* (New York, 1988); Manisha Sinha, *The Counterrevolution of Slavery: Politics and Ideology in Antebellum South Carolina* (Chapel Hill, 2000); Stephanie McCurry, *Master of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country* (New

The publics who contested nullification fought to declare a particular history as true and conclusive. A correct reading of Federal Convention sources, South Carolina's nullification convention reported, "removes every shadow of doubt with regard to the true meaning and intent of the framers of the Constitution in relation to the protection of manufactures"; and as for nullification itself, the "history of the Constitution, as traced through the Journals of the Convention which framed that instrument, places the right contended for, upon the same sure foundation." Beyond the tariff, the claim that nullification lived within their inherited Constitution astonished Americans accustomed to a sturdy federal government. That claim posited a Founding alien to many, one demanding rebuttal and correction. As attendees of a public dinner in Ohio toasted in 1833, "The framers of the Constitution. Statesmen and Patriots, they could not have intended to sanction the absurdity of giving to Congress the power to make laws and to the people of a single State, a power to nullify them." Massachusetts Senator Daniel Webster seized this moment to become "the Defender of the Constitution" with a speech articulating a Founding in which the whole people of the United States ratified the document and their nationhood. This popular constitutional history became instant doctrine for many in the free states. "The people were the framers of the Constitution, and not the States," succinctly declared the *Albany Daily Advertiser*. Such public incantations reclaimed the Founding and reasserted a shared constitutional truth. As the South Carolina unionist James Petigru declared, "The theory of nullification falsifies the history of the country." The Crisis drew out popular representations of the past. It was not enough for the advocates or opponents to affirm the merit of their theories. Associations, governments, and individuals articulated the Founding that appeared true, and they made deference to that history the only legitimate source of meaning to resolve the disorienting constitutional cacophony. As a committee of New York legislators urged, Americans had to proceed with "sincere adherence" and "honest and inflexible observance" of constitutional architecture, "in the sense designed by the Convention, and as understood by the people in the adoption of the Constitution." Through town meetings, assemblies, petitions, newspapers, and speeches where people rehearsed a justificatory history, the authority of the Founding waxed.[172]

A Historical Theory Rises

Like the sudden arrival of the Missouri Crisis, nullification took the Union by surprise. As the theory went, South Carolina could interpose its reserved authority as party to a compact in which all states retained indivisible sovereignty. From inside a maelstrom of his own making, Vice President John Calhoun, who resigned and entered the Senate to defend nullification, elaborated a system for turning theory into practice: he proposed that a concurrent majority of a state's electors could enjoin the internal operation of a federal law unless or until three-fourths of the United States upheld it – effectively a constitutional amendment carried out to sanction a single law. As they campaigned, nullifiers claimed that the Founding sanctioned precisely such

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York, 1995); Major L. Wilson, *Space, Time, and Freedom: The Quest for Nationality and the Irrepressible Conflict, 1815–1861* (Westport, 1974). On the nature of union as a question during the early republic, see Kenneth M. Stampp, "The Concept of a Perpetual Union," *Journal of American History* (June, 1978); Elizabeth Varon, *Disunion!: The Coming of the American Civil War, 1789-1859* (Chapel Hill, 2008); Paul Nagle, *One Nation Indivisible: The Union in American Thought, 1776-1861* (New York, 1964).

[172] *Journal of the Convention of the People of South Carolina: Assembled at Columbia on the 19th November, 1832, and Again, on the 11th March, 1833* (Columbia, 1833), 35; *The Globe*, March 27, 1833; *Daily National Journal*, September 5, 1831. James Petigru Carson, ed., *Life, letters and speeches of James Louis Petigru, the Union man of South Carolina* (Washington DC, 1920), 92; "Resolves of the New York Legislature," in *State papers on nullification* (Boston, 1834).

interposition. In the state legislature, Whitemarsh Seabrook insisted that, "This is the compact which Rutledge, and Butler, and the Pinckneys subscribed in behalf of the then free, sovereign and independent state of South Carolina." At Charleston's Carolina Coffee-House, seven hundred nullifying faithful agreed that no one else had a greater "attachment" to the Constitution "in its original purity." The campaigning slaveholders cultivated support by refusing the mantle of constitutional innovation.[173]

This unfamiliar constitutional vision startled the country. For most northerners, the tariff was a matter of plain politics and policymaking, not a cause for cries of unconstitutionality. It was hard enough to believe that the South would earnestly raise constitutional objections to the tariff. That South Carolina would attempt to nullify was still harder to accept, and that they would claim constitutional history for support seemed most far-fetched of all. As the majority report of the House Committee on Manufactures expressed in 1831, "Our government has adopted, and endeavored to sustain by repeated legislative enactments, a policy which has had the sanction of Washington, Jefferson, Madison, and Monroe." At a Union and Concession Meeting in New York, Peter Jay articulated the disorientation felt by many: "For a long time I did not believe them: for I could not suppose that sensible men would resort to a measure which would be more disastrous to them than to us. But alas! Facts compel me to believe that they are in earnest." The value of Union and the work of their fathers – including his own, John Jay – seemed too great and constitutional obligations too clear to make sense of South Carolina's militancy. Southerners often shared this bafflement. When revolutionary soldier Christopher Houston of North Carolina learned of nullification movements, he wrote to his son that "for any of the original states to lose their sense so far is unaccountable… The times are really extraordinary." For the octogenarian, a complacent slaveholder for whom it seemed obvious that "the Union is our strength," the South Carolina campaign denied his own memory of the Founding. Nullification may have seemed to spring from nowhere. But the drastic constitutional project reflected issues of slavery and sectional power that smoldered throughout the 1820s.[174]

After the Missouri Crisis, the basic interpretative practices of public constitutionalism were in flux. The ascribed will of the framers occupied a new conceptual space and discursive prominence. Tensions over congressional and judicial powers under the Constitution surfaced as the nationalist afterglow of the War of 1812 faded. The power of congress to enact internal improvements, the infrastructure for a growing country, had entered a zone of doubt in 1817 following the James Madison's unexpected veto of a bill directing revenue towards federal works. So too did the United States Bank and the final appellate authority of the Supreme Court come into question. A community of politicians, jurists, and slaveholders in Virginia persistently advanced these ideas, attacking legislation and judicial decisions that seemed to encroach upon their vision of an autonomous State whose interests should never yield to national authority. As Virginia judge Spencer Roane complained in 1819, "the great fault of the present times is in considering the constitution as perfect" and stretching it "as a nose of wax." The "Old Republicans" to which Roane belonged did not praise the Constitution for enabling federal power but rather for limiting it.[175]

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[173] *The Debates in the South Carolina Legislature in December, 1830…* (Columbia, 1831); *Proceedings and the Resolutions and Address Adopted by the State Rights' Party in Charleston* (Charleston, 1830).

[174] Christopher Houston to Placebo Houston, Sept 4, 1832 (Houston Papers, Rubenstein Library, Duke); House Report on Manufactures, *Register of Debates in Congress*, 21st Congress, 2nd session, Appendix, (1831), lxii; "Speech of Mr. Jay," *The Banner of the Constitution*, June 27, 1830.

[175] Spencer Roane, *Exposition of the Federal Constitution: Contained in the Report of the Committee of the Virginia House of Delegates…* (Richmond, 1819), 73; John Lauritz Larson, *Internal Improvement: National Public Works*

Their approach to the Constitution – often identified under the moniker of "strict construction" and undertaken in service of "state rights" – gained increasing traction during the 1820s. "[T]hough it has been nearly forty years in operation," the New England-based *United States Law Journal* observed of the Constitution in 1826, "New questions and theories of interpretation are everyday brought forth, and some schools, of recent origin, would fain persuade us that the true key to that instrument has been rusting in darkness until discovered and brought to light by themselves." This was not quite the case. Anti-national jurisprudence built upon interpretive themes in post-Revolutionary legal writing by figures such as Virginian St. George Tucker at Virginia's William & Mary College; but it mobilized general concepts in new contexts and with ambitious new claims – not only against Marshall Court rulings but also broader federal policymaking and perceived threats to slave state power. Bestowing the unwelcome mantle of constitutional innovation on the self-proclaimed preservationists, the *Law Journal* complained that the Virginia school "have not only erected themselves into guardians of the constitution, but claim an exclusive patent for construing that instrument, derived from the Virginia resolutions of '98 and the address of 1800." These documents, produced by James Madison and Thomas Jefferson during a rancorous campaign against the Federalist Alien and Sedition Acts, acted as a historical bridge for this movement. They mediated constitutional meaning while maintaining connection to the authority of the Founding. Contested in their own time, the Kentucky and Virginia Resolutions of 1798-99 and the Virginia Report of 1800 prescribed strictly construing the Constitution in favor of state sovereignty and stood for the ambiguous proposition that states could judge the constitutionality of federal laws. With these texts, southern jurists and politicians could find the Founding voices of Madison and Jefferson issuing constitutional commentary a decade removed from ratification – a temporal gulf that for many antebellum observers seemed to diminish as time passed.[176]

Mined and refined from this expanded Founding, the doctrines of states' rights and strict construction of enumerated grants of power held a singular, early attraction for slave states desirous of insulating their regimes. Early in the 1820s, future advocates of nullification could still be found among vocal proponents for exercising federal power for "general welfare" purposes such as building national internal improvement. John Calhoun, challenged in 1824 for this support, defended federal infrastructure financing by invoking the improvement programs sustained by framers and first administrators of the national government. When in doubt, he explained, the Constitution must be construed "in reference to the true meaning and intent of the framers of the instrument; and consequently that the construction must, in each part, be more or less rigid, as may be necessary to effect the intention." Arch-nullifiers South Carolinians George McDuffie and Robert Hayne made their political careers by similarly articulating a full-throated embrace of federal power. But the southern fixation on a government and nationhood that might threaten instead of serve southern power exerted pressure on these lingering views from a time of more national enthusiasms. As North Carolina senator Nathaniel Macon often told southerners in the 1820s, "examine again the Constitution, with the sole view to decide, whether if Congress

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and the. Promise of Popular Government in the Early United States (Chapel Hill, 2001); Norman K. Risjord, *The Old Republicans: Southern Conservatism in the Age of Jefferson* (New York, 1965); Brian Schoen, "Calculating the Price of Union: Republican Economic Nationalism and the Origins of Southern Sectionalism, 1790-1828," *Journal of the Early Republic*, 23:2 (Summer 2003), 173-206. On the Old Republicans carrying forward anti-Federalist ideas, see Cornell, *The Other Founders*.

[176] "Constitutional Interpretation," *United States Law Journal* (April 1826); Mason, *Slavery and Politics in the Early American Republic*, 162-3; See St. George Tucker, *Blackstone's Commentaries* (Philadelphia, 1803) William G. Shade, *Democratizing the Old Dominion: Virginia and the Second Party System, 1824-1861* (Charlottesville, 1996).

can establish a bank or make roads and canals, whether Congress cannot also free every slave in the several states, there is no clause in the constitution forbidding it." A former revolutionary soldier and Anti-Federalist, Macon made explicit the connection that informed growing wariness among slaveholders towards a government that most Americans took as constitutionally sound. This alarm migrated from the periphery towards centers of southern power during the 1820s. Assumptions about the nature of union were shifting. Nullification, however, was not merely a demand for strict construction. It was a state self-help remedy claimed as constitutional right. The former required motivated readings of constitutional text to limit federal power; nullification involved much greater imaginative world-building, moving between historical narratives of the Convention and ratification to extrapolate a system with hardly a toehold in the text.[177]

As northerners and southerners contemplated federal power and the Constitution during the 1820s, the roots of their conflict lay unmistakably in slavery as an institution. It was an organizing force, informing economic interest, political power, identity and morality. As nullification advocate Chancellor William Harper stated in 1830, "Ever since the fatal Missouri question, which like a fire bell in the night startled the last days of Jefferson… no one can be so dull as not to have observed that every question of leading importance in our federal councils has been connected more or less with this great distinction." If there was not a single galvanizing conflict over slavery in the years after Missouri statehood, linked sectional and constitutional differences, made so visible during the Crisis, lingered in different configurations. Through these tensions, the authority of the Founding continued to develop as a resource and reference.[178]

No sooner had Missouri entered the Union then South Carolina enacted a "Negro Seamen Act" in 1822 amid the bloody preemption of a suspected slave rebellion. Under the law, South Carolina imprisoned free black sailors, regardless of nationality, entering its ports and sold them into slavery if captains failed to pay jail fees. On its face, even without consideration of free blacks' privileges and immunities, the law invaded federal powers over commerce and foreign relations, as Attorney General William Wirt would conclude. In a challenge that immediately arose, South Carolina judges upheld it as a valid exercise of police power: they believed Benjamin Hunt's argument that racial control was a right that South Carolina "could not and has not surrendered to the Federal Government." The attorney pitched this claim on grounds of constitutional history.

> "By adverting to the history of the Colonies, from their first Congress in 1774, to the Declaration of Independence in 1776, and pursuing the path that led to the Confederation, and finally to the present Constitution, we shall perceive that the States always considered themselves as distinct bodies corporate, or states; and that the present system of government is but a very intimate confederation or federal republic."

This narrative of constitutional genesis and resistance to federal authority, here expressed in terms of an inalienable principle of self-defense against the dangers of black people, anticipated the substance and method of nullification. Only by framing Founding history to make ratification

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[177] John Calhoun to Robert Garnett, July 3, 1824, *Annual Report of the American Historical Association for the year 1899*, Vol. 2 (Washington, 1900), 219; Letter from Nathaniel Macon to Bartlett Yancey Washington, Dec. 8 1825, in Edwin Mood Wilson, ed. *The Congressional Career of Nathaniel Macon* (Chapel Hill, 1900), 76. Donald Ratcliffe, "The Nullification Crisis, Southern Discontents, and the American Political Process," *American Nineteenth-Century History* 1 (2000), 1-30.

[178] William Harper, *The Remedy by State Interposition, Or Nullification…* (Charleston, 1832), 15.

the compacting of sovereigns could South Carolina claim power over every person seen as black.[179]

Supreme Court Justice William Johnson, a South Carolina native, heard the appeal for this case, *Elkison v. Deliesseline*, while riding circuit. Though a Jefferson appointee and no sure friend to the nationalist jurisprudence of the Marshall Court, Johnson saw something different and dangerous in his state's arguments. They did not attempt to prove that the seaman law respected federal commerce power but instead claimed a superseding right of state necessity. One attorney even asserted in court that "if a dissolution of the union must be the alternative, he was ready to meet it." Johnson declared the "unquestionable" supremacy of the federal commerce power with a flourish of veneration. "In the constitution of the United States, the most wonderful instrument ever drawn by the hand of man, there is a comprehension and precision that is unparalleled, and I can truly say that after spending my life in studying it, I still daily find in it some new excellence," he concluded. Despite this display of judicial passion and interpretive certainty, South Carolina ignored him, a de facto nullification that other southern states copied into their statute books. A *New York Telescope* writer, observing these practices in 1826, yearned for those states to be "compelled at last to obey this section of the Constitution [guaranteeing privileges and immunities], although for thirty-nine years they have set it at defiance." That unenforced federal judicial authority could yield to state power was a lesson particularly well taken by white Georgians who would move from enacting black seamen laws to asserting jurisdiction over Cherokee peoples despite contrary Supreme Court precedent in 1832. At the height of the Nullification crisis in 1833, David Lee Child could observe acidly that state interposition as nothing new for free blacks: "Every slave State has nullified from ten to twenty years the only article of the constitution which protects our free fellow citizens among them while at the same time they come and claim to the last pound of flesh the execution of the provision of the constitution which secures to them their property in slaves among us." Seven years after *Elkison* brought this routine state nullification into the open, Justice William Johnson would receive an invitation to one of the mass dinners through which nullifiers rallied residents. The justice asked whether he would be able to explain that protecting domestic industry "was an avowed leading and necessary object of the constitution" and nullification a "wicked delusion." Receiving no reply, Johnson wrote that "I would as soon be privy to intoxicating a Jury, that sat upon a case of life and death" as join the fetes that intoxicated men "by wine and declamation." From the Negro Seamen Act through nullification, the justice heard his state refashioning the Founding to sanction grandiose claims to power.[180]

As fraught gaps opened in public constitutional narratives during the decade, a reverent textual ossification settled into place around the Constitution itself. Contestation over slavery

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[179] *The argument of Benj. Faneuil Hunt, in the case of… ex parte Henry Elkison, claiming to be a subject of His Britannic Majesty, vs. Francis G. Deliesseline, sheriff of Charleston District* (Charleston, 1823); *Elkinson v. Deliesseline*, 8 F. Cas. 493 (D.S.C. 1823); Michael A. Schoeppner, "Peculiar Quarantines: The Seamen Acts and Regulatory Authority in the Antebellum South," *Law & History Review* 31:3 (2013)

[180] "Judicial Opinion – Judge Johnson on the S. Carolina Law," *Niles' Weekly Register*, September 6, 1825, 12-16; *Augusta Chronicle And Georgia Advertiser*, Sept. 22, 1830, 2; *Baltimore Patriot & Mercantile Advertiser*, October 27, 1830; "Free Negroes in the Southern Prisons," *New York Telescope*, October 14, 1826; *Acts of the General Assembly of the State of Georgia… 1822* (Milledgeville, 1822), 231; David Lee Child, *The Despotism of Freedom; Or the Tyranny and Cruelty of American Republican Slave-masters, Shown to be the Worst in the World* (Boston, 1833), 59; Donald Morgan, *Justice William Johnson, the First Dissenter: The Career and Constitutional Philosophy of a Jeffersonian Judge* (Columbia, SC, 1954); Timothy Huebner, "Divided Loyalties: Justice William Johnson and the Rise of Disunion in South Carolina, 1822-1834," *Journal of Supreme Court History* 20:1 (December 1995), 19-23.

revealed the political dangers of allowing the present generation to disturb the fathers' Constitution. When states raised the possibility of altering text to expressly sanction southern racial exclusion laws or national spending on gradual emancipation – meanings that proponents presented as realizing original Founding intentions – it represented a symbolic constitutional brinkmanship. Such suggestions demonstrated that if living Americans could rewrite the Constitution, nothing was stable. In 1828, Georgia warned against ever altering the constitutional stature of slavery. "Non-interference on this subject was the sine qua non on the part of the slave-holding States, in forming the Union, and entering into the Federal Compact," it resolved, vowing that it "never can, and never will" compromise. This Founding performed the work of guaranteeing slavery without requiring new text. Slave states cultivated a constitutional history that insulated slavery from debate, legislation and amendment, a vision that could turn even incidental tax burdens into a violation of the system established by their ancestors. Their overarching commitment to slavery redefined constitutional history and the nature of union.[181]

In discussions of a proposed amendment unrelated to slavery, the sweeping new immutability of the original Constitution became clear. Americans debated amending the mode of electing the President in the wake of John Quincy Adams' 1824 much-criticized selection in the House under the Twelfth Amendment. The effort sputtered out when anxious congressmen stepped back from the edge of constitutional change. The sanctity of the Constitution was sufficient reason for inaction. As Pennsylvanian Charles Miner explained, "It is a species of political vanity which leads us to think ourselves wiser in our day and generation than our fathers and to be unwilling to be guided by their counsels." Presidential election procedures had already been revised in 1804, the final amendment until 1865. The early national window of an amendable text had snapped shut, yielding a Constitution beyond the reach of the people.[182]

Nullification itself seemed to take the transgressive step of putting living South Carolinians on par with the Founding generation by reworking the Constitution. As an 1832 unionist meeting urged, "Under the Federal Constitution we have enjoyed all, which the patriots of the American Revolution desired to see," while nullification renders it a "dead letter" with "no settled meaning." During the Crisis, John Quincy Adams, then a congressman, suggested that nullification itself was akin to amendment. The doctrine would reopen the Founding, unleashing unanticipated consequences. If the South determined that protecting domestic industry violated the Constitution, he mused, then the protection afforded from slave insurrection might fall, followed by the Three-Fifths Clause. This drew immediate rebuke from southern unionists for "rous[ing] up those prejudices and passions," but the specter of constitutional instability hung in the air. States wanted nothing to do with either a constitutional convention or amendment to settle the tariff question. Mississippi, for instance, resolved that such a proposition "tread[] upon holy ground" and it would do nothing that might "endanger the existence, or mar the symmetry and beauty of this most perfect monument." The notion of carrying out constitutional change inspired an ode to the Founding by Mississippi officials, as if to banish it from legitimate discourse. Lawmakers recalled why the present generation dared not try to improve on the past:

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[181] Gordon Reed, ed., *Pennsylvania Archives* Vol. 5, Papers of the Governors, 1817-1832 (Harrisburg, 1900), 507; *Niles' Weekly Register*, December 25, 1824, 263-64; *A Compilation of the Laws of the State of Georgia, Passed by the Legislature Since the Year 1819 to the Year 1829, Inclusive* (Milledgeville, 1831), 38.

[182] *Speech of Mr. Miner of Pennsylvania: In Defence of the Constitution, Delivered in the House of Representatives, March 28, 1826* (Washington, 1826), 14; Andrew Burstein, *America's Jubilee: How in 1826 a Generation Remembered Fifty Years of Independence* (New York, 2001). Don E. Fehrenbacher, *Constitutions and Constitutionalism in the Slaveholding South* (Athens, 1989).

> the great, the good, the pure and gifted statesmen by whom it was framed, the all-embracing spirit of conciliation and patriotism in which it originated, and by which it was perfected – the signal and glorious triumphs which under it have attended the eagle of our star spangled banner on the land and on the deep – the high and wide-spread national character which it has enabled us to attain – the unexampled rapidity of our march under its fortunate auspices to national glory power prosperity and happiness – the marked and all-pervading influence which it has exerted in liberalizing the forms of government throughout the civilized world… the paternal voice of Him who was first in war, first in peace, and still is first in the hearts of his countrymen, employed its latest accents in inculcating a deep and solemn veneration for this Constitution and the Union.

As this long yet abbreviated passage attests, the harrowing prospect of constitutional change could not be undertaken directly and consciously. In concert with this willful self-incapacitation, the stakes of constitutional history rose to fill the void where interest and authority unite.[183]

On the cusp of the Nullification Crisis in 1828, a writer in the *Southern Review* exemplified how a constructed Founding would perform that work. Although the framers had authored a clear text, the article contended, intergenerational reading had occluded what had once been understood. The solution lay in more language from the past. "We have the testimony of the framers of the Constitution; the declarations of those most prominent in its establishment; the journal of the body by whom it was created, disclosing their express objects, shewing not only the history and origin of those powers which it was deemed expedient to grant, but also the claims of jurisdiction which were intentionally omitted." These archival resources became the raw material for authoring Founding narratives. What framers did not say could mean as much as what they did. With slavery in mind, the writer knew that "none of the many able men from the South, who were in the Convention" had permitted a general welfare clause that would ever endanger "not only the prosperity, but even the peace and safety of their constituents." Present judgment became ascribed original meaning. So the Founding grew.[184]

As the country quivered with sectional consciousness before South Carolina broached nullification, ill will centered upon the tariff. Planters came to regard duties on foreign goods as a tax in the form of higher prices – and from which they claimed to receive no benefit because they relied upon enslaved people to produce export commodities. The policy was hardly new. By its second act, the First Congress set a tariff for "encouragement and protection of manufactures." In the surge of nationalism after the second war with Britain, Congress passed a protective tariff without controversy in 1816 to fend off merchandise dumping. When lawmakers expanded duties in 1824 and then 1828, however, they acted in a different political world where sectional antagonism and constitutional conflict ran beneath the surface of one-party national politics.[185]

Debates spilled into public meetings and civic events where communities articulated their political commitments. In Mecklenburg County, Virginia, for example, citizens gathered in 1827 to complain to Congress. They opposed protective duties not only as a matter of policy but as a

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[183] *Proceedings of the Convention of the Union and State Rights Party of South Carolina* (n.p. 1832); "JOHN QUINCY ADAMS—NULLIFICATION," *Genius of Universal Emancipation*, Feb. 1833. *Annals of Congress*, House of Representatives, 22nd Congress, 2nd Session (1833), 1617; "Resolves of the Legislature of Mississippi," in *State papers on nullification*.

[184] "On the Constitution of the United States," *Southern Review* (May 1828), 274.

[185] Duty Acts, Act of July 4, 1789, chap. 2.

violation of the "objects of the framers of the Federal Constitution." These white propertied men reached for the authority of constitutional history to resist what they deemed a taking of property. "Not content with the safeguards in the Constitution, as originally recommended by the convention, our ancestors thought it of sufficient importance to justify the adoption of a special amendment especially establishing the sanctity of the right, and declaring that private property should not be taken, even for public use, without just compensation to its owner." This narrative of textual origins, stretched to cover unequal burdens of tariffs, imbued the anti-tariff action with the imprimatur of Founding devotion. The Virginians avowed that they "must be degenerate, indeed, utterly unworthy the blessings of freedom, utterly unworthy the glorious Government erected to perpetuate the liberties of America," were they to abandon their rights and ruin the "hopes of their descendants." Put this way, idle acceptance of federal law was not an option.[186]

Energized by such discursive and organizational activity, southern governments issued resolutions reaching for a binding past to delegitimize the tariff. Georgia uttered a constitutional narrative fast gaining credence amongst partisans. The state, where nullification would find the most adherents outside of South Carolina, declared that the "convention which formed and adopted the Constitution was composed of members elected and delegated by, and deriving immediate power and authority" from state legislatures; that the states "treated with each other as sovereign and independent Governments" in the Constitutional Convention; that this Founding process necessarily meant states could remonstrate, and even "refuse obedience to any measure of the General Government manifestly against, and in violation of, the Constitution"; and that laws designed for "sectional advantages or local interests" defy "the letter and spirit of the Constitution." Here lay the groundwork for nullification. These stacked claims, at once historical and theoretical, delivered an origin story primed to fit the moment. It was a Founding that validated state grievances and empowered the state to do something about it.[187]

Northern citizens read these developments and responded in kind, affirming the tariff and a Founding that supported it. At an 1827 mass meeting in Pleasant Valley, New York led by James Tallmadge, who had proposed banning slavery in Missouri eight years earlier, people shifted the tariff from good policy to the fulfillment of original visions. "The Constitution certainly furnishes no such restriction or limitation of powers," they announced, "But a reference to the exposition of the Constitution given by its framers in their early and continued practice will most effectually put at rest all doubts." Citing the work of the Convention and early administrations, the meeting understood protecting industry to involve a power and purpose fully authorized by present interest and past authorities. The threat of southern resistance to a policy both important and constitutionally unimpeachable suggested, in turn, that southerners did not merely differ in interests but disputed basic constitutional truths. The following year, on July 26, 1828, thousands gathered at the Valley Forge Encampment Ground in Pennsylvania. Three thousand people dined at this "Harvest Home" ceremony, a customarily delayed independence celebration. Veneration of the past was paired with bitter politics. Pennsylvanians observed stirrings of the nullification movement from afar – marching citizens, burning effigies, threatening resolutions – and condemned the "traitorous proceedings of the rebellious spirits of

[186] "Against the Increase of Duties on Imports," *American State Papers: Finance* (Washington DC, 1859), 5:799, 690.
[187] *Journal of the House of Representatives of the United States*, 20th Congress, 2d Session (Washington DC, 1828), 158.

the South." Competing narratives of the Founding were emerging to frame the conflict in historical terms. Beyond the tariff, the nature of the union was under contestation.[188]

The Crisis and the Crisis

Nullification arose as a campaign of persuasion. Before South Carolina voters could populate a convention to pass an ordinance to nullify the tariff, they had to believe it was possible. They needed to see this path as legitimate and know that low country and upcountry slaveholders would walk it together. Planter, lawyer and enslaver Robert James Turnbull penned one of the earliest declarations of intent for nullification in 1827. *The Crisis*, dedicated "To THE PEOPLE of The 'Plantation States,'" contemplated a sectional and constitutional emergency. From his expansive plantation, he warned that "we shall be for them hewers of wood and drawers of water, and we may discover that under the phraseology of the term general welfare in the Constitution, Congress may be propelled by the public opinion of the North, to regulate our domestic policy." Domestic policy meant nothing less than governance of the hewers, drawers, pickers and harvesters whom Turnbull and his local readership enslaved. *The Crisis* attested to the new authority of constitutional history as well as the circulation of Convention sources. "It is from the history of the proceedings of the Convention which formed the Constitution that we are to expound the meaning of particular clauses." Turnbull instructed. "Fortunately for us, such sources of safe interpretation are within our reach." The volume mined Yates' *Secret Debates*, the Journal of the Convention and Luther Martin's report, along with *The Federalist* and state ratification proceedings to sustain its vision of a Founding creating only the most limited of governments. Regretting that the records "preserved by Chief Justice Yates do not extend to… when the enumerated powers were under discussion," he filled the gap with a narrative of original intentions to constrain Congress. Turnbull promised to show that the narrowest view of federal power was the understanding of "those who framed the Constitution and of those who accepted it," and that such was "the true and unequivocal intent of that instrument in 1787."[189]

The legacy of the Missouri Crisis shaped Turnbull's constitutional consciousness beyond its investiture of the Founding moment with elevated authority. In 1822, Charleston authorities detected and preempted what appeared to be an imminent uprising of enslaved people led by Demark Vesey. On the court that condemned dozens of alleged co-conspirators to death sat Turnbull. South Carolina ascribed causality to antislavery discourse and the Missouri debates. "Materials were abundantly furnished in the seditious pamphlets brought into this state, by equally culpable incendiaries; while the speeches of opportunists in congress to the admission of Missouri, gave a serious and imposing effect to his machinations," stated the official report. This connection was not entirely speculation. Apparently, the speeches of framer and Senator Rufus King had been received as a measure of encouragement. One enslaved man, Jack Purcell, recounted during interrogation that Vesey "brought me a speech which he told me had been delivered in Congress by a *Mr. King* on the subject of slavery; he told me this Mr. King was the black man's friend; that he, Mr. King, had declared he would continue to speak, write, and

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[188] "In Favor of Increase of Duties on Imports," *American State Papers: Finance*, 5:804, 699; *Harvest Home Meeting of Chester and Montgomery Counties: At the Valley Forge Encampment Ground, July 26, 1828, with Remarks and Explanations* (Philadelphia, 1828).

[189] Brutus, *The Crisis: Or, Essays on the Usurpations of the Federal Government* (Charleston, 1827), 12, 19, 46.

publish pamphlets against slavery the longest day he lived, until the Southern states consented to emancipate their slaves."[190]

Turnbull remembered all this. When he seethed that "many weak white men amongst us… regard Congress as omnipotent… it would indeed be strange if the untutored slave were to think otherwise," the Vesey uprising was not far from mind. The construction of roads by the federal government; passage of protective tariffs on manufactures; possible government support of the American Colonization Society; and prospect of "Negro Societies, crowding the lobbies of the House, soliciting and provoking the discussion of subjects, which, to us, in these States, will be productive of evils, which language is inadequate to describe" seemed all of a piece. They were unsanctioned by the Founding, developments their slaveholding forefathers must never have consented to allow. The titular *Crisis* was not tariffs or abstract federal power, but the total threat to slavery and southern power. At its crescendo, Turnbull warned "The crisis approaches, when Congress is to be called upon to discuss a subject upon which no vote can be taken, which will not amount to an expression of its opinion on the subject of domestic slavery." South Carolina's felt need to perform constitutional power called for more than speeches and memorials. Turnbull contended "our slaves do regard Congress as uncontroulable in its authority over the States and the only way to remove these false impressions… is to give some STRIKING demonstration to them that Congress can no more interfere with this subject than Ohio and New Jersey can make laws for us." Here lay the clarion call for nullification. Enslaved people's constitutional views imperiled planter power, and nullification would show that federal law could never save them.[191]

Antislavery men in the South keenly observed the anxiety and bombast of southern leaders. A writer in Guilford Country, North Carolina drafted a mock-Declaration of Independence in the fall of 1827 that anticipated the South Carolinian course. "We hold these truths to be self-evident: - That all Negroes are created for slaves, and doomed by their Creator," he wrote. "We have repeatedly told them, with clenched fists, frothing mouths, and frowning brows, that when we exhaust our arguments, we will STAND BY OUR ARMS; that before we will suffer an infringement of our rights, we will overturn the Constitution, Law and everything else we hold dear," the grim satire proclaimed. Abolitionists readily saw past the tariff as the true explanation for nullification. Before a packed, somber crowd Boston Concert Hall in 1832, Simeon Jocelyn "demonstrated the utter futility of thinking that concessions on the part of the free States would relive the South, or that stability could be given to the Union while slavery was permitted to exist," reported the *Liberator*. The *Genius of Universal Emancipation* agreed that "the tariff has been made the scape-goat" but slavery posed "the grand spring and origin of the Southern doctrines of Nullification." It expected the South to continue holding the Union hostage to sustain slaveholder rule. In 1833, even President Andrew Jackson, a South Carolina native, had similar inklings. He confided that "the tariff was only a pretext, and disunion and southern confederacy the real object. The next pretext will be the negro, or slavery question."[192]

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[190] *Niles' Weekly Register*, September 7, 1822, 11; *Negro Plot: An Account of the Late Intended Insurrection among a Portion of the Blacks of the City of Charleston, South Carolina* (Boston, 1822), 46; Yates Snowden and Harry Gardner Cutler, eds., *History of South Carolina*, Vol. 1 (Chicago, 1920), 556; Michael P. Johnson, "Denmark Vesey and His Co-Conspirators," *William and Mary Quarterly* 58:4 (Oct., 2001), pp. 915-976.

[191] Brutus, *The Crisis*, 24, 130-31.

[192] "THE ELEMENTARY PRINCIPLES OF THE COMBINATION, DECLARATION OF INDEPENDENCE, DISSIDIUM," *Genius of Universal Emancipation*, Oct. 27, 1827; "NULLIFICATION!," *The Liberator*, Dec. 22, 1832; "Nullification and Slavery," *Genius of Universal Emancipation*, May 1833.

The tariff, then, became a real and proxy struggle. In the heat of nullification debates, some southern congressmen acknowledged the larger battle for slavery under the Constitution. Alabama Senator Gabriel Moore announced that, "we insist that it never was intended by the framers of the constitution to tax the slave labor of the south for the purpose of protecting the free labor of the north." Mississippi Senator George Poindexter raised a scenario in which "there can be one opinion… among reasonable men" that nullification was justified: what if a free state majority deemed it necessary and proper to pass a general manumission statute upon finding slavery violated the Constitution's guarantee of republican governments, he asked, claiming that already "powers much more inconsistent with the letter of the constitution have been usurped and exercised." The senators, representing Deep South states that joined the Union three decades after ratification, believed in a Founding that would never have impaired their interests during the early 1830s cotton boom. Protective duties were both a target of southern rage and a vessel for slaveholders' concerns. British tourist Edward Abdy observed in 1833 that "nullification arose from a deeper feeling than any the protecting policy" and expressed "the haughtiness of slave-holding and the jealousy of northern interference." Without immersion in the preceding decade of constitutional conflict, Abdy could quickly grasp this underlying sectional thread.[193]

The Nullification Experience

The significance of nullification for the transformation of American constitutional culture lies in the experience it inflicted on Americans at large. South Carolina's course steered the country into discussions and gatherings in which, over and over again, people had to listen, read and speak about the Founding, inventing and making it real in the process. This inundation cemented the authority of constitutional history on fundamental questions of nationhood. People looked to that moment to ascertain the legitimacy of nullification and the kind of union to which they belonged. Those who believed themselves part of an indivisible nation of citizens governed by a federal government, those who thought their states delegated sovereign authority for limited purposes, and those who imagined their states remained fully sovereign parties to a compact by which states could judge violations and halt performance – all produced or received their own Founding story. The struggle for narrative control of the United States' constitutional origins was thus a struggle to govern present and future: the construction of Founding authority necessarily removed that authority from generations who had and would come after.

The nullification movement proceeded as a whirlwind of discourse, picking up energy and careening about South Carolina. As one resident summarized the scene, political luminaries "were riding post throughout the State, collecting the citizens into large assemblies at barbeques and vociferating Nullification as a peaceable and constitutional remedy against the tariff and internal improvement systems, imposed on the South for taking from the planter." Beyond South Carolina's borders, the North and fellow slave states mobilized to defend their understanding of the country's constitutional system. In Washington, orators squared off in the hope of delivering a monumental speech that would gain ground and win fame back home. The organizational and oratorical activity surrounding nullification overwhelmed the political senses. But in their

[193] Brutus, *The Crisis*, 137-38; *Annals of Congress*, Senate, 22nd Congress, 2nd Session (1833), 489, 640; Edward Abdy, *Journal of a Residence and Tour in the United States of North America: From April, 1833, to October, 1834*, *Volume 1* (London, 1835).

frequency and redundancy, the meetings, speaking and pamphleting revealed a people working themselves into fervent, divided constitutional beliefs that all rested on the Founding.[194]

When South Carolina leaders escalated from sending angry memorials to threatening nullification, they immediately sought the authority of the past. As Thomas Cooper, president of South Carolina College, wrote to the *New York Inquirer*, "We have waited now nearly seven years in South Carolina to see what effect our memorials, remonstrances and appeals would have on our oppressors. For my own part, I think with Mr. Jefferson – Disunion is a bad thing, but consolidation is worse." This invocation of Jefferson typified the effort of nullifiers to draw close to figures of authority. At Fourth of July dinners across South Carolina in 1832, nullifiers placed themselves in the mainstream of constitutional tradition. "Thomas Jefferson: The great apostle of liberty, the author of nullification; although dead, his principles still live in South Carolina," toasted the Anderson district. At St. Peter's Parish, the Calhoun Hussers celebrated "Washington – His virtues should be a beacon to all successors in office" – and "Nullification – the rightful offspring of Monticello's sage" without felt tension. Fealty to the past and ambiguity of constitutional substance inhered in this moment, succinctly expressed when an officer cheered South Carolina to "continue to support the principles on which our Government was founded."[195]

Southerners beyond South Carolina echoed these sentiments and performed the same backward glance for authority. At a States' Rights festival in Athens, Georgia, two hundred people cheered "the Memory of Jefferson – fearless asserter of the doctrine of Nullification" and "George Washington – a name hallowed to every honest American; but lately used for the worst of purposes." This claim on the Founding came in August 1833, after Congress had reduced the tariff and South Carolina had symbolically nullified a bill to enforce the prior tariff. Attendees could believe that nullification "has returned to the bosom of the Constitution, there to remain until a new exigency" would draw it forth. In North Carolina, nullification sympathizers hoped their leaders would follow the Constitution according "to the true intent and meaning of its framers, and our Government will be safe." Supporters of nullification in Virginia toasted the Constitution as "Once the bulwark of our liberties – expiring now, beneath the wounds inflicted by a reckless majority." These messages carried specific meanings in which orator and audience testified to the Founding's "true intent" and differentiated it from present perversion.[196]

Northerners who witnessed the nullification whirlwind marveled at the constitutional convictions that had taken hold of people. The "multitudes <u>believe</u> & affirm all that their leaders say, & are blindly led to their destruction," northeastern minister Samuel Cram Jackson recorded in his diary while visiting South Carolina in 1832. He had just attended a nullification gathering where an estimated two thousand people cheered George McDuffie's "revolutionary" vision. A Boston man travelling south for health reasons in 1831 observed the excitement that nullification lit in some slaveholders' hearts while sharing a stage coach with "three nullifiers" who surprised him by evidencing less violence and more rationality "than I had imagined persons of that party could." In his travel diary, the Bostonian recounted listening to their animated, hours-long constitutional discussions of "very objectionable" doctrines parroting "Mr. Calhoun." The traveler noted his own dismay at the thought that "the purest government that the world ever saw should be overthrown and trampled in the dust." Tellingly, however, what provoked more

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[194] *Alabama State Intelligencer*, March 2, 1833; James B. Stewart, "A Great Talking and Eating Machine: Patriarchy, Mobilization, and the Dynamics of Nullification in South Carolina," *Civil War History* 27 (Sept. 1981), 198-220.
[195] *Daily National Journal*, September 2, 1830; *United States Telegraph*, July 22, 1833; *The Globe*, March 27, 1833.
[196] *Columbia Telescope*, August 27, 1833; *United States Telegraph*, July 19, 1833.

passion than nullification was doubting slavery. When a fellow northerner later asked one interlocutor "if he did not imagine that the South would be in a better condition without their slaves," the man inveighed against northern interference with southern rights.[197]

Nullifiers could believe in the legitimacy of their cause most fervently by lauding a lost original constitution of their fathers. They labored to locate their stance at the foot of the framers and place their opponents as wayward violators. Thus as the country celebrated independence in 1830, Edward Pinckney toasted "Our Federal Union as laid in original compact, but not Mr. Webster's Union." In few words, he positioned the South Carolinian cause as faithful to an authentic union. As instigators of what they cast as constitutional restoration, the nullification movement felt obliged to present claims to power within the emergent frame of American constitutionalism, to ground nullification as consistent with history. According to the pseudonymous Hermann, a subordinated federal government would uphold the framers' original design, "a beautiful fabrick reared by the joint labour of the most able and skillful master workmen the world has produced." Advocates professing to defend the "abstract" right without fail predicated their claims upon Founding narratives. Jurist William Harper put the matter plainly, that "authority with most men weighs more than argument, and our authorities are of the highest." He proceeded to claim Madison and Jefferson as the authors of nullification.[198]

Yet the constitutional past, while malleable and gap-strewn, was not neutral and formless on the question. Nor were people's experiences as citizens. When George McDuffie advocated nullification in Congress, a commentator wrote that the "Senatorial Nullifier maintained that the right to nullify was a constitutional right" with a theory "more absurd than that of his friend Gen. Hayne." The intellectual and verbal labors of the movement to secure Founding authority often met such derision. "Mr. Calhoun's speculations are altogether too refined and too metaphysical for our taste," wrote Americus in the *Daily National Journal*. The critique captured an essential limit on its appeal. The elaborate scheme to put the doctrine into operation deviated from most citizens' sense of constitutional reality. Even assuming that the Founding created "a compact among the several States," Americus wrote, "it does appear to us a most extraordinary leap for Mr. C to deduce… the inference that 'the several States or parties have a right to judge its infractions.'" In *Strictures on Nullification*, Alexander Everett took up the argument that no commonly held Founding stories could actually justify it. "[T]he controversy respecting the origin of the Constitution, which has been often agitated in connexion with this question, is in a great measure foreign to it," because whether "of the *people* of the States, or of the *people* of the United States," the country created a legitimate government. Only by regarding the Union as a mere "confederacy of independent States," could nullification become tenable – and that proposition ran against the constitutional history that most white Americans cherished.[199]

Northern defenders of the tariff against nullification rehearsed historical truths, putting into constitutional narrative what they had long taken for granted. In Brunswick, Maine, for example, citizens passed resolutions comprising a saga of the Founding. Consistent with stories of woe under the Articles of Confederation, the townspeople determined that "the great evil of the confederation, which it was the primary object of our civil fathers to remedy, by the

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[197] Samuel Cram Jackson Diary (UN-C, SHC); Anonymous, New England Man's Travel Diary, 1831 (UNC-C, SHC).

[198] *Daily National Intelligencer*, August 10, 1830; Hermann, *Letters which Have Appeared in the Banner of the Constitution* (Philadelphia, 1831); Harper, *The Remedy by State Interposition, Or Nullification*, 16. Thomas Blackwood, *Nullification Considered and Defended on the Principles of Abstract Right* (Charleston, 1833).

[199] *Baltimore Patriot & Mercantile Advertiser*, June 4, 1831; *Daily National Journal*, August 18, 1831; Alexander Everett, *Strictures on Nullification* (Boston, 1832), 28.

Constitution of the United States, was the intervention of corporate bodies between the Federal Government and the people." The framers had fixed this flaw, precipitating the prosperity that followed. In short, "the Constitution accomplished its object by establishing a government of the People emanating from them, and by them alone repealable." At an anti-nullification gathering in Ohio, guests toasted "The memory of Washington and Jefferson. While we enjoy the fruits of their labors, let us reverence their example." These same names rang out at Low Country dinners, but the constitutional content they signified could hardly diverge more. Urban masses and elites flocked to a March dinner in New York City to celebrate Daniel Webster's defense of the Constitution from nullification. According to reports, the honoree delivered an emotional hour and half discourse "upon the benefits of the Constitution; upon the perils from which it sprang; upon the gifted men – the Hamiltons, the Jays, the Madisons – who were its framers; upon the duties which it enjoins" and the "fallacies" that would destroy it. Tariff supporters cast their antagonists as opposing the actual conduct of the framers. At another city gathering, advocates affirmed protecting industry as "one of the main objects which the people of the United States had in view in forming and adopting the federal constitution," recounting that men "recently from the convention" implemented "their own instrument" by enacting a tariff in 1789. Preferred policy became original constitutional vision in these moments. The Friends of American Industry, convening at the Philadelphia Musical Fund Hall in 1831, resolved that to deny the government's "authority, by its charter," to protect manufactures "is to suppose that its illustrious framers were insensitive to the first and greatest interests of their common country." Publisher Matthew Carey led the meeting and pitted his press against the outpouring of pro-nullification materials. He warned in 1832 that nullifiers printed 10,000 pamphlets per month, and their "efforts are already powerfully felt" in neighboring states. To communicate his fears, Carey published an *Epitaph for the Constitution*. "Here Lie… The Shattered Remains of the noblest fabric of Government, ever devised by man," warned the face of a tombstone.[200]

South Carolina's campaign pushed subtle structures of Founding authority into the stream of American consciousness. The specter of nullification pervaded spaces and forums typically removed from national political conflict. At the anniversary dinner of a Pennsylvania typographical society in 1833, nullification weighed on the minds of the printing community whose papers transmitted the enfolding events. Attendees toasted the Union "from the foundry of 87'-it has stood too long to be easily distributed by short-sighted and unskillful hands." With professional puns, they grappled with the disorienting experience. Similarly, farming journals, which generally avoided overtly political matters, tried to make light of the situation: in November 1831, the *New England Farmer* punned on the double agricultural and political meanings of "radical," reporting: "Carolina Potatoes – We see nothing in the way of a general cultivation of this valuable root in this region; and should be glad of the introduction of many southern *radical* notions; always excepting nullification." Extracts of an "epic poem" titled "Nullification" in the literary *New England Magazine* observed that "Constitutions have of late/ Both of the nation and the state/ Seen fit to number with the Dead/ And rule despotic in their Stead." Crafting a constitutional gallows humor, the author adopted the persona of a South Carolinian who would not cease until "All Creation is nullified," boasting of the Constitution "we to bits had boldly Battered/ Into the winds its fragments scattered." Constitutional reckoning

[200] *Eastern Argus*, January 4, 1833; *Baltimore Patriot & Mercantile Advertiser*, March 28, 1831; *Atkinson's Saturday Evening Post*, October 1, 1831; Mathew Carey, *The Dissolution of the Union: A Sober Address to All Those who Have Any Interest in the Welfare, the Power, the Glory, Or the Happiness of the United States* (Philadelphia, 1832).

entered into unexpected areas of cultural life, including the *Philadelphia Album and Ladies' Literary Portfolio*. Along with jokes of marrying Nullifiers being "for Union," female readers encountered reports of grave speeches and saw the Founding deployed against the South Carolina campaign. "The memory of George Washington… No Nullification shall obliterate our devotion to his principles," invoked one such article. At the heart of these critiques was devotion to a Constitution for which the venerated past provided the measure of unconstitutionality.[201]

While the Founding narrative espoused by nullifiers could never resonate in the North, much of the South found it alluring but inadequate. The constitutional history embraced by Nullifiers seemed true up to a point and yet did not establish nullification. "The Federal Constitution is a compact, by which the thirteen sovereign States that adopted it, renounced a certain portion of their powers; and also delegated a certain portion, to be jointly held," explained the *Augusta Constitutionalist*. This synopsis of the Founding was not inconsistent with tales from South Carolina. But the same mode of strict construction that found the tariff unconstitutional could find fault with nullification when contemplating the authorial work of the Convention. If the framers had provided for state interposition, the paper queried, "why did not those framers plainly say so?" For once, inference predicated on silence did not limit the federal government. The South Carolina Union Party Convention in 1832 explained that the state had no pro-tariff party and endorsed resistance "by all constitutional means." But nullification did not qualify, and the party pledged to preserve the Constitution from false history. If nullification belonged to the Founding, "it would have would have silenced the anti-federal opposition" and the framers' writings would show it, argued unionist Daniel Huger in the South Carolina legislature. History controlled meaning, he told fellow slaveholders, and "our wishes cannot give construction to the constitution." The protective tariff seemed to "violate the true meaning and intent of the Constitution," as South Carolina's Ordinance declared in 1832; but the remedy of stopping it, or any law, on a state's own authority seemed far outside the intention of the states when they entered the constitutional compact, even per the South's preferred origin story.[202]

Even for those sympathetic to constitutional indictments of the tariff, nullification seemed a hazardous fantasy. At a public dinner in Tuscawilla, Florida, for instance, guests deemed the tariff "more grievous to the South than Egyptian Bondage," but they demanded preservation of the Constitution in the face of nullification, "a doctrine fraught with the greatest dangers to their Union." A writer in Gwinnett County, Georgia, likened nullification to biblical temptation and generational fall. His chronicle recounted that "although our first parents were in possession of the richest gifts of Heaven, this old nullifier began to preach nullification to them, knowing that if he could get them to nullify the law, it would break the happy union with their Creator." Among the enticements offered by the political seducer to overturn constitutional union were "great feasts" and promises of power to "be like Gods." In this scheme, nullification defiled creation. Southerners assimilated these lessons, ordering their constitutional convictions. As one soldier in Fort Mitchell, Alabama wrote to a friend from Virginia, "I claim like yourself to be friendly to what are properly termed states rights but I say damn the villainous doctrine of nullification." The limits of southern support confounded true believers in South Carolina.

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[201] *Hazard's Register of Pennsylvania*, January 19, 1833; *The New England Farmer, and Horticultural Register*, November 2, 1831; "An Extract from 'NULLIFICATION,' an Epic Poem," *New England Magazine* (June 1833); *Philadelphia Album and Ladies' Literary Portfolio*, December 29, 1832.

[202] *Daily National Intelligencer*, September 17, 1832; *Carolina Observer*, September 25, 1832; *Journal of the Convention of the People of South Carolina: Assembled at Columbia on the 19th November, 1832, and Again, on the 11th March, 1833* (Columbia, 1833), 48; *The Debates in the South Carolina Legislature in December, 1830*

Writing to a female acquaintance, one militiaman professed "surprise[] that the other southern states should be inactive in the present crisis" because the tariff question has "become a question of liberty and slavery." The mobilization of South Carolina's militia and the vow of enforcement in Andrew Jackson's December 10, 1832 Proclamation made this danger easy to foresee.[203]

The proclamation entered into virtually every political newspaper. It voiced the experience of constitutional veneration as the Founding ascended.

> "We have hitherto relied on it as the perpetual bond of our Union. We have received it as the work of the assembled wisdom of the nation. We have trusted to it as to the sheet anchor of our safety in the stormy times of conflict with a foreign or domestic foe. We have looked to it with sacred awe as the palladium of our liberties and with all the solemnities of religion have pledged to each other our lives and fortunes here and our hopes of happiness hereafter in its defence and support."

If nullification were legitimate, Jackson asserted, then this constitutional faith was mistaken. But its very tenets assured nullification was false. The "sages whose memory will always be reverenced" did not err in crafting the Constitution, and nor did the people err in loving it. The Proclamation told a Founding story and vowed to enforce it. Read by Americans everywhere, it declared that the "allegiance of states' citizens was transferred in the first instance to the Government of the United States; they became American citizens." Here, through the authorial hand of Secretary of State Edward Livingstone, Jackson endorsed an account of the Founding that sounded like northern constitutional nationalism, not southern compact stories. Regardless, those who read the proclamation with approval or disbelief accepted the authority of the Founding to judge the question. This clarity and uniformity inside the nullification tempest was momentous. Constitutional conflict had trained people to think and argue in historical terms.[204]

Even as nullifiers failed to win converts to the immediate cause, the South cultivated an historical imaginary: their Founding categorically could not encroach upon southern interests as identified in the present. When nullification advocate Robert Hayne asked a rally in 1830 – can it "be believed, that the wise & patriotic men who represented the South in the Convention which framed the Constitution, would have consented in our behalf, to sign a bond by which it was to be submitted to a majority of the people, or what is more, a majority of their Representatives in Congress assembled, whether our institutions should be preserved'" – it was a rhetorical question for most southerners. If they would not accept the constitutionality of nullification, they would accept a Founding that forbade perceived incursions on slaveholder power that nullification stood against. Writing to a friend in Charleston, planter John Riley agreed that South Carolina could exercise "the reserved rights of the States" to "resist the oppression," but he confessed to "hope some fair and honorable compromise (not a mock compromise) may restore the Constitution to its pristine purity." Whether Riley might be deemed a full-fledged nullifier, the enslaver embraced the notion of a pure, historical Constitution in need of restoration, one that forbid the tariff and enabled state resistance. Southern politicians and planters, in making the tariff a question of the Founding, in turn made the Founding the authoritative site from which power to enact such unwelcome measures was necessarily denied. As the Alabama legislature reported in 1833, "it cannot be supposed that those who consented to [the Constitution] intended,

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[203] *Floridian & Advocate*, August 17, 1831; "Effects of Nullification," *Aurora*, September 10, 1834; Letter to Edward Lucas, Dec. 19, 1833 (Edward and William Lucas papers Rubenstein Library, Duke); Letter to Margaret Cole Smith, Jan. 7, 1833 (Brumby and Smith Family Papers, UN-C, SHC).

[204] S. Doc. No. 30, 22nd Cong., 2nd Sess. (1832), 82; Ellis, *The Union at Risk*, 86.

by implication and construction, to confer on the General Government powers destructive of their happiness and best interests." When the slaveholding planters who made this declaration looked at the Constitution, they saw bold absences of federal power and assumed a prescriptive history for them. They believed that "contemporaneous history informs us that, in the Convention," the protective tariffs were "refused." This assertion of evidence, unseen and contestable, produced a compliant Convention that could yield authority for the negation of its work. The legislature's resolution that the tariff violates "the spirit, true intent, and meaning of the constitution" was a historical claim upon a Founding liberated from negotiating the history of the Founding.[205]

Fixing Slavery, Memory and Authority

As the larger struggle over constitutional identity subsumed tariff policy, nullification drove Americans to see constitutional union in terms of slavery and section. A furious Ohioan wrote of watching a wagon carrying enslaved people pass and feeling constitutionally proscribed from raising a hand to help: "our hands were tied by a law of this FREE country, which gives to these SOUL drivers the privilege of taking their PROPERTY wherever they can find it." South Carolina's campaign put the situation in a different light. Antislavery Americans saw that a measure to protect the governing power of slaveholders would expose southern vulnerability if practiced by free states. His state legislature, the furious witness asserted, should "pass a law prohibiting the transportation of any human beings whatever… out of this state against their will, the constitution and laws of the U. States to the contrary notwithstanding. In so doing we shall but follow the example of our slave-holding brethren at the South in asserting the Sovereignty and maintain the RIGHT of our state." This constitutional fantasy, whether in earnest or not, denounced South Carolina for violating the Constitution that antislavery folks dutifully followed. Yet the destabilizing experience of nullification hardly suggested a way forward for free people who hated slavery. Indeed, the Union-shaking moment revealed the limits of constitutional possibility. At an 1833 meeting in New York, the antislavery jurist Chancellor Christopher Walworth cautioned: "we have no right to interfere" with southern slaveholding under the Constitution. "Let us not talk any more of nullification; the doctrine of immediate emancipation is a direct and palpable nullification of that constitution which we have sworn to support," he concluded. On the bench, Walworth took a concerted stand against the rendition of enslaved people by finding a narrow scope to the terms secured by slaveholders in the Federal Convention. Yet that Founding, as publicly recalled, recited and revered with intensity in this moment, imposed firmer boundaries upon more radical measures. As new calls for immediate emancipation sounded in the antislavery community, nullification raised a perimeter around the Founding and what people believed it authorized.[206]

In ways not visible on its face, nullification and its resolution by compromise were a profound setback to the antislavery cause. By illustrating the possibility of disunion and concentrating minds on the Founding, it instilled a pronounced will to respect the compromises of the Constitution, however imagined. For example, Judge Solomon Strong, speaking before the Worcester Agricultural Society in 1833, praised the freedom of the New England farmer and

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[205] *Proceedings of the State Rights Celebration, at Charleston, S.C., July 1st, 1830* (Charleston, 1830), 12; John Riley to William Royall Jr, Oct. 13, 1832 (William Royall folder, UN-C, SHC); "Resolves of the Legislature of Alabama," in *State papers on nullification*, 219-20.

[206] "Anti Slavite," *Observer and Telegraph*, April 12, 1832; *Federal Union*, October 23, 1833; Charles Edwards, *Pleasantries about Courts and Lawyers of the State of New York* (New York, 1867), 407

then stopped short: "It seems to me that we are not authorized to touch the question of private property in slaves. We have entered into the most solemn compact, the Constitution of the United States, that we will not interfere between the master and his slave, or do any-thing to impair his right of property therein." An antislavery fringe coalesced during this moment around abolitionist publisher William Garrison, as well, and their nascent disunion rhetoric made them a loathed minority within an unpopular community. The powerful Founding narratives that emerged from nullification pressed abolition to the very margins of constitutional possibilities.[207]

Watching nullification unfold from France via letters and papers, the revolutionary elder Marquis de Lafayette wrote to William Rives with a newfound despair. The optimist for America, who had taken a triumphal tour in 1825, considered disunion for the first time. He hoped that should it occur, "it ought, at least, in charity, not to take place before the period (not now remote) when every one of those who have fought and bled in the cause shall have joined their contemporaries." As Lafayette regarded his own impending mortality, he could see a world emptied of the Founding generation. Americans were indeed a people removed from their moment of constitutional origin – with one profound exception – in facing the Crisis.[208]

This generational solitude weighed on public constitutional life. The power that accrued to the Founding depended on the moment's temporal distance from disputants who, by imagination and inadvertence, refashioned their predecessors' authorial acts. This distance grew ineluctably greater between the Missouri Crisis and nullification. By 1830, Charles Pinckney, Rufus King, John Jay and most other Founding figures who had engaged in the Missouri debates had passed on. The most dramatic event signifying the loneliness of the living generation and their remove from the Founding came on July 4, 1826, when, former Presidents Thomas Jefferson and John Adams both died. Political and cultural leaders diligently worked to fit this event into the narrative needs of the 1820s, where national anxieties and ambitions coexisted uneasily. The double death elicited reflection on the rushing current of American history beyond the careers of the two former presidents. Eulogies took the opportunity to restate and refine the story of the United States, focusing on the Constitution. In Newburyport, Caleb Cushing recalled how at the Founding, "the influence of Washington, of Adams, and of a great majority of other tried patriots, and especially the victorious essays of Hamilton, Madison and Jay, rallied the suffrages of the country around the palladium of our liberties." In Albany, William Duer hoped that if the United States were threatened "by local jealousies and geographical distinctions, let us revert to the national principles and catholic feelings of the two great chieftains of the North and South," while in Bridgewater, the Reverend John Shaw wrote history anew, rendering them as enemies of "sectional jealousies." The minister addressed the audience by addressing the deceased: "No venerable Fathers! your American children can never be so ungrateful as to trifle with the rights secured by your prompt resistance your manly firmness by your toils and sacrifices." This instructional mode was typical: death liberated their authority to infuse new civic lessons. The Founders would live again as malleable sources of guidance and symbols of obligation.[209]

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[207] *The New England Farmer, and Horticultural Register*, January 15, 1834; Donald Ratcliffe, "The Decline of Antislavery Politics, 1815-1840," in John Craig Hammond and Matthew Mason, eds., *Contesting Slavery: The Politics of Bondage and Slavery in the New American Nation* (Charlottesville, 2011), 267-290.

[208] *Richmond Enquirer*, December 4, 1832.

[209] *A Selection of Eulogies Pronounced in the Several States, in Honor of Those Illustrious Patriots and Statesmen, John Adams and Thomas Jefferson* (Hartford, 1826), 41, 170; William Duer, *An Eulogy on John Adams, and Thomas Jefferson: Pronounced by Request of the Common Council of Albany, at the Public Commemoration of Their Deaths, Held in that City, on Monday the 31st of July, 1826* (Albany, 1826).

By the time South Carolinians threatened nullification, Americans were nearly untethered from living ties to the Founding. Old soldiers and politicians were relics, treated with talismanic power. At an 1830 mass meeting in South Carolina, dueling authorities from the Founding era emerged to invest in or withhold authority from nullification. Thomas Taylor, a 90-year-old officer, "in a voice issuing as it were from the sepulcher," warned "against calling a Convention, and re-enacting the bloody scenes, in which, in other days, he has borne a distinguished part." Later, Samuel Hammond, a revolutionary veteran fifteen years Taylor's junior, announced his support for a nullification convention. During the midst of the Crisis, the last signer of the Declaration of Independence, Charles Carroll, died in 1832. Paying homage to this state resident, Maryland Governor George Howard acknowledged Carroll had witnessed a wondrous national rise; but, he continued, Carroll "had likewise lived to see our glorious union lose that reverence in what, until recently, it was universally beheld, and the stability of our institutions threatened by that spirit of anarchy and disunion, which the warning voice of the father of his country calls upon us "indignantly to frown upon," and to proclaim that the "Union cannot IN ANY EVENT, be abandoned." No death of a Founding figure could be wasted during the crisis.[210]

James Madison remained. This was a fateful biological and political conjuncture. Among the Convention delegates who might have lived, Madison was the most potent figure for the Nullification Crisis. He was central to the history that mattered. As a leading framer; as an ally of Jefferson; and as the author of the Virginia Resolutions of 1798 and Report of 1800, documents crucial to nullifiers' efforts to read their doctrines into the Constitution, he contained unrivaled authority. As nullifiers claimed the Founding and the Virginia and Kentucky Resolutions (Jefferson authored the latter), Madison objected. His correspondence and consciousness were convulsed by nullification and his own authority over time. Since leaving the presidency, Madison had become increasingly silent: when he finally emerged via published opinions to affirm the constitutionality of the tariff and then condemn nullification, most people did not see a practicing politician but a near miraculous intervention of higher authority. When his letters appeared, Americans registered a clarifying power that transcended the morass of arguments over nullification – "his words will discourse wisdom to posterity with an authority which will not be resisted," wrote one observer.[211]

Madison's lengthy censure, rapidly reprinted, quoted and cited across the country, complicated everything. Constitutional nationalists discovered an ally. They made Madison's final public texts the authenticating source in their account of the Founding, even if they differed on the precise relationship between individuals, states and Union. The *North American Review*, a leading voice of northern sentiment, readily assimilated the authority of Madison as past framer and present redeemer of original meaning. It happily opined, "we are sustained by the concurrence of the illustrious Madison, perhaps on the whole the highest living authority on a question of constitutional law." His letter against nullification, the writer enthused, embodied the original Madison who crafted and campaigned for a national Union. It captured the "true constitutional faith: the quintessence in a few pages of the Federalist; and the true exposition, by their author, of the often misrepresented Virginia Report and Resolutions." But Thomas Richie's *Richmond Enquirer*, torchbearer for Old Republican constitutionalism, express concern. "Mr. Madison has not done himself full justice… that so great has been the horror he has conceived of the doctrine of nullification … that he has not as maturely deliberated" in representing the

[210] *Richmond Enquirer*, October, 1, 1830; *Maryland Gazette*, January 10, 1833.
[211] *Daily National Journal*, October 12, 1830; Drew McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (New York, 1989).

Supreme Court as the final arbiter of constitutional disputes. POWHATAN wrote to the paper in 1830 to object that Madison had gone as far as Jefferson in supporting nullification in 1799: "I have now the proceedings on those resolutions before me, as well as the debate," he claimed, and could see the historical acts with own eyes. If the pro-nullification POWHATAN responded to Madison's interjection by trying to salvage a purer Madison, the nullification advocate Mutius used Yates' *Secret Debates* to him of being a Federalist seeking consolidation. A contributor to the *Lynchburg Virginian* came to Madison's defense, arguing that the old framer was under attack "because he has the hardihood to differ in opinion from the nullifiers and seceders, who have taken to themselves the title of 'exclusive republicans.'"[212]

This intertemporal intervention was exceptionally unwelcome within the nullification movement. The Virginia and Kentucky resolutions had posited that states could declare federal laws to be unconstitutional – as Virginia and Kentucky did with respect to the Alien and Sedition Acts. In connection with the general victory of Republicanism over Federalism, many took these documents as a coda on the Founding, works that translated and clarified original meaning rather than alter it. The nullification movement, however, read them as empowering direct state action. Even among those favorably disposed towards states' rights, many deemed this unconstitutional, an argument advanced in pamphlets such as *Virginia Doctrines, Not Nullification*. Perplexed by the drift in constitutional memory, former Attorney General William Wirt recalled to his friend, Judge Dabney Carr, "Did we not hold it Mr. Madison's and Mr. Jefferson's resolutions were not for secession, they were appeals to the other States and looked no further than to the repeal of the laws or the engrafting an explanatory amendment on the constitution?" With the singular authorial experience to judge present actions by the history in which he participated, however, Madison was a singular problem. He spoke for his prior writings, making them not fixed texts open to interpretation but living works mediated by dynamic testimony. The Massachusetts legislature illustrated how this authority could undermine the interpretive work that South Carolina dedicated to carrying nullification, via the Resolutions, into the Constitution. It reported that the Resolutions were definitively explained "by the distinguished Statesman who drafted one set of them, and was at the time the confidential friend and political associate of the author of the other," thereby "remov[ing] the only shadow of practical authority and precedent" for nullification. Southern unionists embraced Madison with even greater relief. Judge John Richardson, for instance, announced "to those who, on former occasions, so liberally quoted Mr. Madison as authority" that they must now heed the framer himself. Unionists in Wilkes County, Georgia circulated Madison's latter-day texts and instructed, "Let the people be not deluded, by being told that [nullification represents] the Republican doctrines taught by Jefferson in '98 and '99. Mr. Madison… tells us what those doctrines are in terms too plain to admit of a doubt."[213]

South Carolina representative Warren Davis confronted this Madisonian dilemma in justifying to constituents continued resistance to the tariff after Madison's first letter emerged. "Notwithstanding my profound respect for the great ability and talents of that distinguished gentleman, truth requires me to say, that my opinions are unchanged," Davis wrote. But this stance, as he soon made clear, could not openly depend on choosing his own judgment over the

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[212] *North American Review* (Oct., 1830), 537-546; (July, 1833), 241; *Republican Star and General Advertiser*, November 16, 1830; *Richmond Enquirer*, March 16, 1830; *Lynchburg Virginian*, August 1, 1833.

[213] Agricola, *Virginia Doctrines, Not Nullification* (Richmond, 1832); John Kennedy, *Memoirs of the Life of William Wirt: Attorney General of the United States*, Vol. 2 (Philadelphia, 1850); "Resolves of the Legislature of Massachusetts," in *State papers on nullification*, 125; *The Debates in the South Carolina Legislature in December, 1830; Proceedings of a Union Meeting, in Wilkes County, Georgia* (Augusta, 1834).

authority of Madison. Davis professed that he would have "long since abandoned" his views of the tariff, "if I were not convinced that they are sustained by authority, equal to that by which they have been assailed – by the authority of that illustrious statesman himself!" Thus rather than advance his own "crude notions, he would fight the current Madison with the true Madison of the past. At ponderous length compelled by his fraught endeavor, Davis described his defense,

> as appealing from the opinions and judgment of Mr. Madison, in 1828 to those of Mr. Madison, in 1788, and 1798; as appealing from his letters in the Intelligencer, to his letters in the Federalist; from the shades of Montpelier to the halls of the Convention; as appealing from the opinions of Mr. Madison, after many years of retirement from public life, to Mr. Madison in his noon of manhood and pride of genius, when all his energies and faculties were concentrated and employed in illustrating the Federal Constitution, and winning for it the reluctant assent of a free people, jealous of power, who, beyond all question, would never have adopted it, with a knowledge of the constructive powers now so gratuitously bestowed.

Davis labored with the published sources on the Convention to give a Founding-era Madisonian vision that would cast doubt on the tariff that he unequivocally supported in 1828. To such efforts, unionist Willie McWillie pointedly expressed "astonish[ment] to hear people claim Madison is in dotage and cannot explain own acts." For nullifiers such as Davis, Madison would have been much more useful in a silent grave.[214]

Ultimately, Madison was far too alive. Had he not survived, the nullification movement could have more readily recruited his authority. Statements such as Andrew Butler's assertion that he was guilty only of "the treason and rebellion of Thomas Jefferson and James Madison" would have passed without authoritative contravention. Thomas Jefferson, however, was conveniently dead. Unable to speak, his writings and intentions became the locus of efforts to legitimate nullification. A self-professed Virginian Republican of the "Old School," after hearing advocacy of nullification, expressed shock that anyone could believe that such a right was constitutional. He wondered "What would Thomas Jefferson say of this doctrine," believing that Jefferson "branded the mere suspected meditation of such measures as Treason." The question of what Jefferson would, and did, say took on outsized importance. After Madison intervened, a South Carolina unionist warned him that nullifiers now sought "to justify this act… by enlisting on its side the authority of the Virginia & Kentucky Resolutions of .98 & .99, and by the deservedly high authority also of Mr. Jefferson, and until recently by that of your own name."[215]

With this turn of events, Madison assumed the role of defending a unionist Jefferson. Memory, faith and present politics informed his stance. With an ever more painful hand, he wrote letters interpreting and glossing Jefferson's language in the Kentucky Resolution. "It cannot be supposed for a moment that Mr. Jefferson would not revolt at the doctrine of South Carolina," he insisted, which proposed to "overrule the will of a great majority of the whole." When a draft of the Kentucky Resolutions in Jefferson's handwriting emerged that seemed to endorse nullification, another round of reckoning and rationalization followed. The *Macon Telegraph* in April 1832 complained that "advocates of this heresy claim Mr. Jefferson as the author of the doctrine," but nullification goes directly against "the whole tenor of his public life."

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[214] "Extract from an Address of the Hon. WARREN R. DAVIS, of South Carolina, to his constituents," *The Banner of the Constitution*, Dec. 26, 1829; *The Debates in the South Carolina Legislature in December, 1830*.

[215] *The Debates in the South Carolina Legislature in December, 1830*; *Daily National Intelligencer*, March 19, 1830; John Townsend to James Madison, October 3, 1831.

How to explain the new revelation? It was "written by him in private for the use of others," the paper reasoned. The *Richmond Enquirer* sought to preserve its hero from the taint of nullification. In December 1832, Thomas Richie still held that "Mr. Jefferson does not maintain it in one solitary line of his most intimate correspondence with his friends." The New York legislature also refused to accept Jefferson as a proto-nullifier, arguing that the "writings of that great man are replete with the evidences of his avowed opinions inconsistent" with nullification. In those opinions, the northern lawmakers assumed, lay the power of legitimation. Madison's friend Nicolas Trist searched for archival redemption. Visiting Jefferson's papers, he described his quest "for materials to put the measures of '98-'99 in their true light, and thus to vindicate his memory." The gravity of nullification and Americans' increasing commitment to original understandings made this no personal campaign. People cared deeply about what Madison and Jefferson once believed because those meanings carried governing authority. They seemed to promise answers to conflict that living Americans could not resolve themselves.[216]

The epoch-crossing existence of Madison during nullification reveals much about the hardening shape of public constitutionalism. In the new era to which he bore witness, narratives of the Founding regulated constitutional authority itself. Madison saw his history ascend in public consciousness, and he heard deceased contemporaries become justificatory material. Antebellum Americans were never interested in rote instructions or curiosities. People wanted usable pasts, history through which to rule. Unfavorable stories could not be believed. On spurning nullification, Madison became dead to its advocates, and he resisted their efforts to sever his living self from former ones. Once gone, he would become like Jefferson: a name, texts, mythos and authority for future conflict. He would become constitutional history for a people eager to use him.

The Birth of American Constitutional History

American constitutional history was born and raised by fights over slavery and section. During the fraught debates of the Missouri and Nullification Crises, Americans imbued the framers with significance and invested the Founding with authority. This stature propelled the production and dissemination of original constitutional sources, materials from which to spin historical narratives and the rehearsal of constitutional just-so stories. Michael Warner has suggested that an impersonal written constitutional text – without signatory authors, infinitely capable of reproduction and circulation – defined the reception of the Constitution in the Early Republic. But Americans needed authorities beyond themselves to wage intractable battles over slavery. They needed the Constitution to become more than its plain text and afford sanction or restrictions beyond the literal, limited framework for government offered by words alone. They needed constitutional histories to explain, instruct, and forbid – constitutional histories to believe in. So they made them. Americans re-embodied their text with semi-fictive Founding stories, opening new realms of meaning and bringing to bear authority beyond the living demos.[217]

Most telling of constitutional history's ascendancy in the wake of nullification was its appearance as a genre. The power of the Founding in public constitutional faith, political conflict

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[216] James Madison, On Nullification, December 1834, Madison Papers; *Macon Telegraph*, April, 28, 1832; *Richmond Enquirer*, December 4, 1832; "Report of the Joint Committee of the Senate and Assembly…," in *Documents of the Senate of the State of New York, Fifty-sixth session*, 34:12 (Albany, 1833); Nicholas Trist to James Madison, August 20, 1834.

[217] Michael Warner, *The Letters of the Republic*: *Publication and the Public Sphere in Eighteenth-Century America* (Cambridge, 1990).

and nationality stability made compiling, curating, editing, narrating and teaching that history a matter of grave import. The transformation of American constitutional culture would be printed, circulated and taught. With a new public constitutionalism came a new popular literature.

The movement to script constitutional history into authoritative secondary texts began after the Missouri Crisis and flourished during the nullification era. Observing the first sectional rupture, Justice Joseph Story decided upon the necessity of public constitutional training. Writing to Edward Everett, he fretted that "I verily believe that if the East does not send forth its talents to sustain the Constitution and its legitimate powers in Congress, the Constitution will be frittered away until it becomes the mere ghost of the confederation." Nullification impelled Story to act upon this anxiety with furious productivity. He published *Commentaries on the Constitution of the United States, with a Preliminary Review of the Constitutional History of the Colonies and States before the adoption of the Constitution of the United States* in 1833; a year later, he released *The Constitutional Class Book* for a wider audience "to awaken in the bosoms of American youth… a more deep and firm love of the National Constitution." These texts asked readers to visualize the woes that preceded its authorship, wonder at the difficulties faced by the Convention, marvel at the framers' handiwork and only then embark on studying constitutional law informed by the aspirations that attached at inception. Story had words for nullification: "If this be the true interpretation of the instrument," he remarked, "it has wholly failed to express the intentions of its framers, and brings back… the evils of the old confederation."[218]

During this moment, other jurists, scholars and writers took up the challenge of instilling public constitutionalism. Philadelphia attorney Thomas Sergeant published *Constitutional Law*, the first synoptic text for lawyers, in 1822, inviting them to learn the system's "origins and uniform harmony." In 1830, nullification induced advertisements for "an improved edition of Sergeant's valuable treatise on Constitutional Law… [with] particular interest now excited upon that subject." Following Sergeant, William Rawle, published the 1825 constitutional textbook, *A View of the Constitution of the United States of America*. With its promise that the "history of man does not present a more illustrious monument of human invention," the book reflected a changing landscape in which construction involved claiming the venerated past. The national fathers, in Rawle's telling, were men whose thinking could be resurrected and followed. "The framers of the Constitution would naturally examine the state of things existing at the time," and students of the Constitution must consider the text not strictly but historically.[219]

The work presented a novel contribution to American literature. It spread through institutions from common academies to West Point. At Bowdoin College during the Nullification Crisis, students performed thirty recitations of Rawle's text. A reviewer in the *United States Literary Gazette* looked forward to it replacing *The Federalist*, which "has hereto been used as a manual on the constitution" but was "*prospectively* written." Constitutional history had gained authority, yet historical sources and events required mediation. The Constitution was too powerful, the past too murky, and both too contested for Americans to be stranded with only the constitutional text, a smattering of old sources and their own individual interpretive capacities. Rawle's work illuminated how the "framers of the constitution were wise men, endued with

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[218] W. W. Story, ed., *Life and Letters of Joseph Story, Vol. I* (Boston, 1851), 367; Joseph Story, *Commentaries on the Constitution of the United States* (Boston, 1833); Joseph Story, *The Constitutional Class Book* (Boston, 1834).
[219] Thomas Sergeant, *Constitutional Law: Being a Collection of Points Arising Upon the Constitution and Jurisprudence of the United States, which Have Been Settled, by Judicial Decision and Practice* (Philadelphia, 1822); *United States Intelligencer and Review*, (Jan., 1830); William Rawle, *A View on the Constitution of the United States* (Philadelphia, 1825).

foresight almost prophetical." It gave a safe account of constitutional meaning; and "certainly there is no subject, on which we want *safe* works more," the review exclaimed, taking direct note of the "politicians of the Virginia school" who appeared to present a new danger.[220]

The nullification years elicited a cascade of works inventing constitutional history and inculcating faith. Justice Story's work belonged to a new movement to teach the Constitution, which, in this moment, came to mean constitutional history. Propagating this knowledge seemed newly indispensable to maintaining the Union. As Hartford schoolteacher Francis Fellowes declared in *The Youth's Manual of the Constitution of the United States*, "Every American citizen is as it were stationed upon a watch-tower whence he ought to behold the rulers of the country administering the government under the Constitution, and to descry every deviation from its rules. How will he be able to discharge the duties of such a trust, if he knows not WHAT THE CONSTITUION IS?" The idea of nullification so horrified the aged jurist Nathan Dane that he returned with an 1829 appendix to his ubiquitous *General Abridgement and Digest of American Law* that dove into the thicket of its doctrines to heap scorn upon the "dinner parties in S. Carolina." Dane narrated a history of colonial, confederative and national government that culminated in a Founding that established a single, irreducible nationality. William Duer, a judge turned president of Columbia University, dedicated his 1833 *Outlines of the Constitutional Jurisprudence of the United States* to Madison for warding off the "heresies" of nullification. Duer observed "the increasing interest… in discussions relative to the origin, structure and principles of our political system" and hoped his work would reach common schools. In the same year, Nathaniel Chipman of Middlebury College published a textbook on American constitutionalism, *Principles of Government A Treatise on Free Institutions, Including the Constitution of the United States.* Chipman explained that even if over time, "the meaning of words or terms is changed, the meaning of the constitution" remains fixed, making it "necessary to seek and learn the meaning intended by the framers." For example, it was "clearly intended by the framers" and "so understood by the parties ratifying" that the Constitution would create "not a federal but a national union." It is telling that no portion of this focus on framers and intention appeared in Chipman's 1793 *Sketches of the Principles of Government*. Constitutional culture had changed, propelling these concepts to the fore in the intervening span.[221]

If the immediate risk of nullification subsided in 1834, its lessons remained. Jurist Peter du Ponceau published *A Brief View of the Constitution of the United States* so that the "rising generation" could admire the genesis of the Constitution and "avoid the errors which experience has shown us to be the most dangerous to the permanency of our Union." Students learned that "it was no doubt the view of the framers" to make a national government. With nullification bombast still ringing in his ears, du Ponceau claimed to say "nothing on the questions which have been lately stirred," such as whether a state can "declare an act of congress null and void…. lest the shade of Washington should frown upon me." With this allusion to Washington's Farewell Address and the image of a national father watching from above, du Ponceau embraced the authority and judgment of the Founding. But he could not resist speaking further to the

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[220] *The United States Literary Gazette*, 2:9, August 1, 1825, 321-27; *General Catalogue of Bowdoin College and the Medical School of Maine, 1794-1894* (Brunswick, 1894), lxvi; Elizabeth Kelley Bauer, *Commentaries on the Constitution, 1790-1860* (New York, 1952).

[221] Francis Fellowes, *Youth's Manual of the Constitution of the United States* (Hartford, 1835).William A. Duer, *Outlines of the Constitutional Jurisprudence of the United States* (New York, 1833); Nathan Dane, *A General Abridgment and Digest of American Law: With Occasional Notes and Comments, Volume 9* (Boston, 1829); Nathaniel Chipman, *Sketches of the Principles of Government* (Rutland, 1793); Nathaniel Chipman, *Principles of Government: A Treatise on Free Institutions, Including the Constitution of the United States* (Burlington, 1833).

entwined sectional and constitutional conflicts that had unfolded. "What has been done by a single state, when nothing more than a doubtful local interest was in question, shows what might be done by a combination of states if more serious disturbances should take place," he warned.[222]

The bundle of fears communicated by du Ponceau lurked behind authors' desire to commit to text an account of the Constitution, to impart stability though historical narrative. In 1834, a young Edward Mansfield, recently settled in Cincinnati, published *The Political Grammar of the United States: Or, A Complete View of the Theory and Practice of the General and State Governments, with the Relations Between Them* to affirm that the Union was no mere nullifiers' league. This constitutional truth, he argued, was shown "1st, in the intention of those who framed the Constitution; and 2dly, from the powers vested in the framers of it." The author apologized for adding another constitutional instructor, explaining that he started writing in 1833 before three new texts appeared. The attorney, the highly educated scion of a US Surveyor General, recognized that he belonged to a pivotal constitutional moment. Mansfield consciously rooted his work in the crisis of the times. Much later in life, he recalled in the 1870s: "The attempt at nullification and the argument of Webster kindled thousands of minds into the ardor of patriotism and the study of constitutional law. I was one of them, and my little work, the Political Grammar published in 1834, was one of the consequences." William Sullivan's 1830 *Political Class Book,* future Delaware Senator James Bayard's 1833 *A Brief Exposition of the Constitution of the United States*, R. Moulton's 1834 *The Constitutional Guide*, and Andrew Young's *Introduction to the Science of Government* emerged in this moment. Nullification produced an abundant harvest of constitutional literature. These works were the mature fruits of a decade of conflict over slavery and section that made the Founding into the center of contestation.[223]

Amid the new constitutional literature, publishers released the archive from which people could sculpt narratives of the past. In 1830, Jonathan Eliot printed a landmark compendium of Founding documents to "disclose the opinions of many of the most distinguished revolutionary patriots and statesmen in relation to the powers intended to be granted." *The Book of the Constitution* introduced its document collection in 1833 with a history lesson for the nullification era. "A government more energetic and able, by the powers vested in it, to maintain its authority, without being entirely at the mercy of the separate states, was sought to be formed by the convention which formed the present constitution of the United States," editor Edwin Williams wrote. In 1832, South Carolina unionist E. S. Davis published a constitutional compendium with the preface that "[i]t is absurd to talk of a written constitution while your representative substitutes his own construction" and "idle to talk of the usurpations of Congress whilst the States are claiming rights altogether incompatible with… this Union." This moving force behind this grassroots effort also managed to spur the federal government into action. As nullification raged into early 1833, the U.S. government began to publish the *Documentary History of the United States*. Secretary of State Edward Livingston, on signing the contract, delivered a message of purpose:

> Fifty years have not yet elapsed since the formation of our National Government, and already the great principles on which it was founded are forgotten, or

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[222] Peter du Ponceau, *A Brief View of the Constitution of the United States* (Philadelphia, 1834).

[223] James Bayard, *A Brief Exposition of the Constitution of the United States* (Philadelphia, 1833); William Sullivan, *The Political Class Book* (Boston, 1830); R. K. Moulton, *The Constitutional Guide*… (New York, 1834); Edward Mansfield, *Personal Memories, Social, Political, and Literary: With Sketches of Many Noted People, 1803-1843* (Cincinnati, 1879); Edward Mansfield, *The Political Grammar of the United States: Or, A Complete View of the Theory and Practice of the General and State Governments, with the Relations Between Them* (New York, 1834). Andrew W. Young, *Introduction to the Science of Government*… (Warsaw, NY 1835).

> misrepresented, or unknown. Facts are distorted to suit party purposes, and an honest, intelligent people are deceived, because the means of correcting error are not within their reach. But place in their hands the documentary evidence of what we were in our colonial state; of the union by which we achieved our independence; of the defect of that system; of the means by which the admirable structure of our constitution was raised. Let them read, not in the distorted, turgid language of party writers of the present day, but in the lucid arguments of the sages who deliberated on the formation, the adoption, and the first movements of the Government; let them draw from that source, fact, and truth, and sound argument, and they can never be made the instruments of political parties, or designing demagogues.

His message was clear, instructive and instrumental. History had power. In could discipline living generations of Americans, now and in the future. By learning their correct shared past, by listening, believing and obeying its meaning, the true constitutional union would endure.[224]

This first boom in constitutional literature represented predominantly northern efforts to disseminate a shared constitutionalism rooted in an authoritative Founding that would bind the Union together. But a small nullification-era pamphlet written by Maria Pinckney, *A Political Catechism; by a lady for her God-Daughter*, exemplified the extent to which American constitutional culture shifted to find meaning through historical narratives that vested authority in framers and constitutional history. Daughter of the deceased Convention delegate Charles Pinckney, Maria Pinckney's tract rehearsed justifications for nullification on the bedrock of original meaning. While assuming a humble guise of republican motherhood and authorship for children, the work aimed for an audience and legitimation beyond any single family circle. It expressed the narrative core of nullification's Founding: "What is the nature of the Federal Constitution? It is a compact based upon cautious and jealous specifications. The distinguished body of men who framed it, guarded and defined every power that was to be exercised through the agency of the General Government – and every other power not enumerated in the compact, was to be reserved and executed by the States." In this account, the framers made precisely the Founding needed to render nullification a constitutional act. Pinckney, like the leading nullifiers, sought to claim the Founding. She wished to distinguish the present state of constitutional practice – "the new version of the Constitution by Messrs. Webster & Co." – from original meaning. This view of past and present absolved nullifiers of accusations of revolution and betrayal. "The same motives which led to the formation of the Union, a conviction of its utility, are as strong now that its beneficial effects have been experienced, as when they were only anticipated," she wrote, assuring that her state remained ardently attached to the "Union as it was formed- an Union of Free, Sovereign and Independent States – an Union, affording equal protection and mutual benefit to all." Nullification, then, was an act of reactive constitutional

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[224] Jonathan Eliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787: Together with the Journal of the Federal Convention, Luther Martin's Letter, Yates's Minutes, Congressional Opinions, Virginia and Kentucky Resolutions of '98-'99, and Other Illustrations of the Constitution* (Washington DC, 1830); Edwin Williams, *The Book of the Constitution…* (New York, 1833); William L. Smith and E.S. Davis, *A Comparative View of the Constitutions of the Several States with each other, and with that of the United States* (Washington, 1832); *Report made to the Hon. John Forsyth, secretary of State of the United States: on the subject of the Documentary history of the United States* (Washington, 1834).

redemption. To seize original meaning, however, advocates had to first invent the Founding it sought to redeem, to author a history that would justify action.[225]

Conclusion

This sudden bevy of texts marked the culmination of a transformative moment in constitutionalism. Looking forward, Americans would face a political world in which dire subjects were governed by Founding narratives. When the *New York Advertiser* had observed the southern impulse to expel free state constitutionalism via excluding northern school teachers during the Missouri Crisis, it was a sign of things to come: in subsequent years, the sectional concern with constitutional learning enlarged from teachers to texts. As the *Southern Literary Messenger* would warn, Story's *Commentaries* "stood a fair chance of being made a text-book in our law schools – the great hot house of American politicians" – and thus tainting minds with its false history. Struggles over slavery and section altered public understanding of the sources of constitutional meaning and authority. In registering this development, it is important to distinguish change in perceived constitutional meanings from change in public practices for perceiving such meaning. As people disputed issues in the former domain, it was this latter, deeper tectonic plate of constitutionalism that shifted between the outbreak of the Missouri Crisis and the end of the nullification experience. Beyond the interpretation of clauses or the acceptance of interpretive claims, Americans reanimated their constitutional text. They made it into something pervaded by authors' intentions and understandings that could limit and expand what its words alone might mean to a reader unschooled in the Founding and unmindful of the Founders. This transformation created an obligatory weapon. In the immediate years and decades to come, claims of original meaning would serve as indispensable instruments for waging constitutional conflict. In the hands of proslavery publics, committed Unionists, abolitionist petitioners, black litigants and antislavery lawyers, the Founding would perform the heavy work of precedents and legal authority. As contestation over constitutional slavery buffeted lives and agitated the country, constitutional history – as variously imagined, asserted and believed – would shape the strategies and experiences of antebellum Americans.[226]

[225] *Georgia Journal*, Feb. 10, 1831, pg. 1; Maria Pinckney, *The Quintessence of Long Speeches, Arranged as a Political Catechism* (Charleston, 1830).
[226] New York *Commercial Advertiser*, Aug. 16, 1820; *Southern Literary Messenger* (Dec., 1841), 866.

CHAPTER FOUR

BECOMING SENTINELS: LESSONS OF CONSTITUTIONALISM IN ANTEBELLUM AMERICA

Slavery's Popular Constitutionalism

In the last days of antebellum America, Henry Leaver took careful notes as he attended regular classes on the U.S. Constitution at Trinity College. The Connecticut student dutifully recorded his sense of Professor Samuel Eliot's 1859 lectures, documenting constitutional educational practices at the moment before wartime ruptures and amendatory transformations. Like most college students enrolled in classes on constitutional basics, Leaver would not pursue law as a profession. He joined the U.S. Treasury Department, performing work for the Union not inconsistent with the constitutional nationalism that he learned in Elliot's class. A writer, historian and Harvard College graduate, Samuel Eliot was not a trained lawyer or admitted to the bar. But he knew well the reigning idiom and ideas of public constitutionalism, and he described a great, historical foundation upon which every American stood. "We must go back & understand what the framers of the Constitution had in their minds," he instructed. On the question of congressional power over federal territory where the political battle over slavery's future lay, Lever recorded "no provision of the Const. discussed so much especially in recent times since the agitations of slavery." Eliot combined the interpretive methodology of authorial intent with an unspoken presumption of antislavery framers. "The framers of the Const. knowing that these state claims were about to be rendered… would have added the little word now at least if they had intended the clause to apply only to territory at the moment," he lectured. Yet Eliot had a more imperative lesson to impart on constitutional sanctity:

> Men must understand that there is a vast difference between politics and principles of the Const. They are different things & must be kept separate. Party measures depend upon political considerations. As for instance views of the power of Congress as to slavery in the Territories. Men may differ here but as to the cardinal point of the Const. They should meet on common ground. When we take measures, we must come to the Const. Policy continually varies. The Const never. From it we cannot form theories to meet the politics of the day, for it is immutable.

As transcribed by Leaver, this message glowed with unvarnished veneration and affirmative deference. It was urged upon a student body among whom differences in antislavery sentiment surely existed. Eliot intended to teach the virtue of forbearance and a constitutionalism that would enable concession to unwanted policy. Perhaps his injunction felt persuasive at Trinity in 1859. But if students tried to follow it, the lesson twisted into a question. What was mere policy and what was immutable constitutional rock? Who could judge and how? If the course gave no answer, it nonetheless inculcated a protective love for an unchanging Constitution. With striking clarity, the lecture disclosed a constitutional consciousness conditioned by the antebellum experience of recursive crisis over slavery and section. Eliot's words, mediated by Leaver, evinced a struggle to separate politics from fundamental law for his students, to extricate the unchanging fathers' Constitution from the morass of claims and counter-claims. Yet the delineation of a space for policy bounded by constitutional architecture resisted such line-drawing. In the very example chosen, congressional regulation over slavery in western territories, the exercise of such power was variously understood as a matter of proper congressional regulation or as an unconstitutional transgression against original understandings. Eliot's struggle spoke to a basic tension that energized antebellum constitutionalism. The

collective investment in a revered constitutional history reflected the urgent need to produce authority that would give fixed, final answers – constitutional answers. To behold that Founding authority was to experience a constitutional sublime.[227]

A backwards facing veneration was the heart of antebellum constitutionalism. In passing encounters and extended engagements with constitutional meaning, Americans absorbed a posture of reverence for the Constitution of their fathers – an object of power and a body of meaning far greater than the words of its text. For free white citizens, their fathers' Constitution was a precious patrimony, a prescription for the future, and a bundle of historical understandings and intentions that the country's founders had cemented into national bedrock. Individuals' immigration and family history notwithstanding, most white Americans related to the antebellum Constitution with awe: their constitution was sublime. As a description of experience, ideas and action, this constitutionalism suggests how they thought and spoke, how they ascertained meaning and how they observed its commands as they understood them. Constitutionalism was a matter of culture and consciousness, and innumerable materials and spaces of public life fostered this historically-inflected reverence. It was a matter of urgent public education. Standing before students at the University of the City of New York in 1845, congressman Daniel Dewey Barnard put the terms and structure of this constitutionalism plainly. To the educated rising generation, he could earnestly insist upon no alternative to veneration, no other possible relationship to their fathers' Constitution than grateful deference: "if there be… any one who looks for any state of things in which personal protection, personal freedom, equal privileges, observance of the laws, justice, the preservation of the Constitution, and of the Union, and the great interests of national peace, and national honor shall be better provided for than they may be under our Constitutional Forms, taking them in their grand outline and main features as our fathers framed them, when administered in purity and according to their true intent and spirit; if any one expects this and expects to see anything of the sort accomplished by radical changes by any changes affecting materially the great compromises of the Federal Constitution, I profess before high heaven that I believe it is all - all a miserable delusion."[228] This was the sweeping antebellum call to limit constitutional thinking, a nonpartisan demand to revere and obey not judges but the Founding. Under this rubric, to imagine an order different from the Constitution as written, understood and agreed upon by national fathers was dangerous folly.[229]

This educational mainstream was wide and fast, sweeping free white Americans along a forceful current of admiration for the document, its framers and the Founding. Popular constitutionalism was an exercise in historical reverence. Most people did not gain expertise with technical jurisprudence. Ignorance about the patchwork field of antebellum constitutional law readily coexisted, however, with strong constitutional opinions on salient particulars and principles; and it no less strongly interlaced with assumptions about where meaning and authority lay. Particularly during this period, constitutional faith and conviction vastly outstripped textual knowledge and jurisprudential learning. Instead, Americans acquired discourses of historical authority and, with them, fault lines of difference.

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[227] Henry K. Leaver, Lecture notes, "Constitution of the U.S.," Prof. Samuel Eliot, Trinity College, Hartford, Ct., New Hampshire Historical Society. See also, Samuel Eliot, *Manual of United States History: From 1492 to 1850* (Boston, 1861).

[228] Daniel D. Barnard, *A Plea for Social and Popular Repose; being an address delivered before the Philomathean and Eucleian Societies of the University of the City of New York, July 1, 1845* (New York, 1845).

[229] Mark Graber, *A New Introduction to American Constitutionalism* (New York, 2013); Don E. Fehrenbacher, *Constitutions and Constitutionalism in the Slaveholding South* (Athens, 1989); Alison LaCroix, "The Interbellum Constitution: Federalism in the Long Founding Moment," 67 *Stanford Law Review* 397 (2015).

In this chapter, the venerative core of antebellum popular constitutionalism comes into focus. It surveys the contours of a distinct constitutional culture that Americans produced and reproduced between the Missouri Crisis and Civil War. Only well after ratification, after Anti-Federalists accepted the Constitution, after Washington's posthumous "apotheosis," after Jeffersonians controlled national office, after the United States affirmed its national self through war with Britain, after intensified sectional divisions emerged, and after the constitutional fathers began to rapidly disappear, did public constitutional veneration transform from budding vernacular to flowering historical narratives of national meaning. Only then did the Founding move to the center of that meaning; and only then did the mood and interpretive practices of popular constitutionalism fix upon the authority of a revered past populated by illustrious national framers. A new constitutional culture swept over the land in this time and context.

The ways in which antebellum Americans learned to think and argue about constitutional meaning cannot be understood separately from national conflict over slavery. Contestation was constitutive of deepening veneration, directly and indirectly. The gravity of conflicts over rights and sectional power, electric with moral tension, stimulated constitutional faith. As the prior chapters showed, crises over the expansion of slavery and slave state power transformed American constitutionalism between 1819 and 1834. With the Founding moment receding into memory and myth, people responded to national disharmony by investing in visions of a wise, authoritative original constitutional moment, even as those attributed visions clashed. Citizens shared a language of paternal authority in service of divergent understandings of the national future of slavery. Through such discordant veneration, Americans described constitutional fabric as they saw it, binding distant countrymen as national progenitors had woven it. Attributed historical promises and intentions structured how people conceived of their rights and others' wrongs. As a pervasive practice, venerative deference toward the Founding did not derive mechanically and exclusively from slavery – though the crises catalyzed discursive development and crystalized Founding authority in defining the United States. More broadly, this constitutional orientation flowed from the felt imperative to stabilize and secure the Union. But it was again slavery, articulated through political power and sectional conflicts, that posed the most abiding hazard. This dangerous quality applied not only during moments of dire contestation but also in times in between, when the conflict proceeded at a lower pitch and the potential for eruption lingered on the horizon. Americans, consciously or not, developed their constitutionalism to fit this long shadow.

As a politico-legal culture defined by Founding reverence and searing disagreement over its meaning, antebellum public constitutionalism was slavery's constitutionalism. That is, it was a culture and consciousness shaped by and directed towards mediation of the place of slavery in the United States. It reframed moral and policy questions as historico-legal ones, limiting what people viewed as possible and pushing clashes to textual seams where government might be activated for or against slavery.[230] Slavery's constitutionalism was popular constitutionalism. The people themselves announced meanings about slavery, race and rights under the law of the land. Yet their claims were remarkably constrained to the point of self-negation: they conformed

[230] Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery* (New York, 2001). This approach is informed by recent work revisiting American economic history to locate the pervasive presence of slavery, yielding the concept "Slavery's Capitalism." While the legal history of slavery is an enduring subject of scholarship, no comparable effort has been made to consider how slavery shaped the broad contours of constitutionalism beyond cases and ruling. This chapter and dissertation seek to do so.

to strictures frankly disavowing the authority of the democratic present to defy the imputed constitutional past.

Scholarly attention on popular constitutionalism during the early republic has primarily focused on hostility to judicial supremacy: indeed, popular constitutionalism has been defined as the practice where "the people" or their elected representatives decided constitutional meaning rather than recognizing the interpretations of judges as final. But this approach, focused narrowly upon an ostensibly undemocratic judiciary and sustained by a too-generous reading of Jacksonian commitments, neglects two tenets of antebellum constitutional life: the profound authority of the past and the singularly divisive power of slavery. Thus Larry Kramer's paradigmatic work on this subject provides an account of how different departments of government assumed responsibility for constitutional interpretation, but it cannot suffice to illustrate how popular constitutionalism operated in antebellum America. Together, people deferred to a venerated past and made competing claims upon its authority. The public was divided against itself – not judicial elites. Indeed, in many cases, views on judicial supremacy turned conspicuously upon how cases reflected on slavery. By looking away from the judiciary in this chapter, a view of the everyday presence and contours of popular constitutionalism emerges showing how the public learned to heed authority rooted in the past.[231]

As an object of study, slavery's constitutionalism yields a new vantage upon the terrain of constitutional politics in antebellum America. Studying the pervasive culture of public veneration and deference opens a sightline beyond and beneath the familiar structure of party affiliations and specific constitutional positions associated with Whigs and Democrats. The politics of slavery defied a regularizing party embrace. Other disputes – a national bank, protective tariffs, internal improvements, executive prerogatives, hard money and public lands – existed in a lower register, managed through cross-sectional organization. Democrats and Whigs arrayed themselves around constitutional differences of opinion on these issues, building platforms and rallying around distinctions of ideology and interest. As former Illinois congressmen John Reynolds recalled in 1855, the "fundamental principles of the parties seem to be founded principally on the different constructions given to the constitution of the United States. One party, the Democrats, give the constitution a limited and rigid construction while the other party the Whigs give that instrument a more liberal and extended interpretation." By helping to organize coalitions, issues located political conflicts away from slavery and section. Reynolds, a proslavery Democrat, continued, "The parties and the members of the parties are as honest and patriotic on one side as they are on the other, both anxious to advance the best interests of the country." Opposition over slavery permitted no such sympathetic view of foes; nor did it allow room for legitimate interpretive disagreement on constitutional meaning. A particular constitutional culture developed in the presence of this open fault that continually

[231] Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York, 2004). Sean Beienburg and Paul Frymer, "The People Against Themselves: Rethinking Popular Constitutionalism," *Law & Social Inquiry* 41.1 (2016): 242-266. Signal examples of stances on judicial supremacy shifting to accommodate commitments on slavery and sectional power include the arguments surrounding the South Carolina's nullification efforts, a broad northern rejection of the validity of the Supreme Court's ruling in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), and the response to Wisconsin's noncompliance with the Fugitive Slave Act of 1850, culminating in *Ableman v. Booth*, 62 U.S. 506 (1859). Recently, more open-ended studies of popular constitutional engagement during the twentieth century have appeared. See Christopher W. Schmidt, *The Sit-Ins: Protest and Legal Change in the Civil Rights Era* (Chicago, 2018).

threatened to destabilize the young United States.[232] Recognizing this mode of popular constitutional engagement draws attention to the standard by which people made judgments: the question arises of *how* unconstitutionality was understood. As this chapter shows, Americans learned to measure subjects of the gravest political and moral consequence by their "fathers' constitution," duly venerated and subjectively understood.

To see the supple shape of the dominant constitutional culture that grew under the shadow of slavery, this chapter explores the constitutional education of antebellum Americans. It analyzes the materials and forums through which people reproduced belief and knowledge. It identifies a pervasive inculcation of reverent deference to the Founding. Although historians of the Early Republic have illuminated the construction of American nationalism, changes in elite constitutional thought and the development of antebellum schools, the domain of popular constitutional learning remains remarkably understudied. In pursuing this research, several revisions arise to Michael Kammen's pathbreaking study of constitutional culture, *A Machine that Would Go of Itself*, which has largely remained the last word on this subject for decades. In a work focused primarily on the twentieth century, Kammen suggests that antebellum constitutional veneration was quite limited while constitutional ignorance was quite high, noting for instance the absence of an annual Constitution holiday and few accessible constitutional textbooks. This assessment stems from several problems: undercounting the range of constitutional texts; taking at face value authors' professions of public ignorance; conceiving of constitutional knowledge only as objective comprehension of the text; and failing to see how constitutional veneration was not an event but rather an everyday orientation that permeated civic life – including Independence Day celebrations. As a result, Kammen's important scholarship does not register the terrible political work performed by widespread constitutional faith in buttressing a slaveholding Union or in shaping how people understood the perceived transgressions of sectional antagonists. Its lessons and vernacular comprised a vital force, informed how people initiated, understood and responded to growing tensions over slavery. Touring illustrative forums of constitutional education, this chapter focuses on a realm of public study, examining the scholastic spaces and textual sources that taught constitutional veneration. Like rooms of a sprawling house, linked by doors, hallways and stairs, these forums connected. Sometimes muffled, sometimes amplified, voices carried, where they could be heard or misheard by others. Such materials and forums hosted the cultivation of American constitutional culture: one energized by slavery that induced people to look ineluctably back upon the Founding for sanction. In the process, through the force of opinions and actions they fostered, they shaped antebellum law, politics and society around its most traumatic subject.[233]

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[232] John Reynolds, *My Own Times: Embracing Also the History of My Life ...* (Illinois, 1855), 451; Gerald Leonard, *The Invention of Party Politics: Federalism, Popular Sovereignty, and Constitutional Development in Jacksonian Illinois* (Chapel Hill, 2002); Daniel Ratcliffe, "The Decline of Antislavery Politics," in John Craig Hammond and Matthew Mason, ed., *Contesting Slavery*: *The Politics of Bondage and Freedom in the New American Nation* (Charlottesville, 2011), 276-9; Leonard Richards, *The Slave Power: The Free North and Southern Domination, 1780-1860* (Baton Rouge, 2000).

[233] Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York, 1986). This chapter also takes issue with the account of constitutional literature in Peter Knupfer's *The Union As It Is*, one of the few other works addressing constitutional learning. Where Knupfer sees antebellum Americans inculcated with the virtue of compromise, this chapter finds a much stronger directive to preserve, defend and abide by the Constitution in both the texts he examines and in many others, particularly because upholding the compromises of the Founders contemplated quite different practices than undertaking new compromises. Peter Knupfer, *The Union As It Is: Constitutional Unionism and Sectional Compromise* (Chapel Hill, 1991); One recent, partial exception is Al Brophy, *University, Court, and Slave: Proslavery Thought in Southern Colleges and Courts and the Coming of Civil*

Constitutional Texts for the Rising Generation

Antebellum Americans learned to love the Constitution from youth. As they read and listened, white citizens coming of age developed constitutional consciousness through expanding common school networks and hearthside home study, private academies and multiplying colleges. Formal and informal educational regimes fostered feelings at once proud, possessive and deferential towards the governing constitutional sun under which they were born. Citizen-students soaked up forms of knowledge about the Constitution from a cascade of history and civics texts crafted for the classroom and household. Print culture instructed pupils to treasure the Constitution as a personal inheritance to defend to the death while internalizing subordination to the superior wisdom of its human origins. Supporting the Constitution "by his talents, by his best services, and with his life, if required, is the firm and irrevocable determination of every true patriot; but the 'support' presupposes a *knowledge* of that valued instrument," stipulated the editor of an 1846 instructional volume who warned readers that "we are not permitted to treat with irreverence the political doctrines and maxims of the fathers of the republic." Teachers, in print and person, made clear the proper relationship between present and past, between the rising generation and the national fathers. Good American children followed their understanding.[234]

The materials of constitutional schooling came from professional authors, illustrious jurists and local teachers. Where nary a constitutional instructor had existed when the Missouri statehood debates began in 1819, the genre was fully formed by the denouement of Nullification in 1834. With the rise of the Founding in vernacular and authority between those crises, a thriving print culture emerged to propagate America's transformed constitutionalism. Some texts exclusively concerned the Constitution, and others pursued larger historical narratives. Yet most works furnished several important commonalities. Maintaining a reverential treatment of the near past, they located a founding moment populated by wise fathers who had brought the Union to life and charged it with defining purposes. Materials emphasized the obligation of citizens to know the Constitution through this past. Students learned to approach the Constitution as complete and final, to live within, not change their forbearers' well-designed framework. Rules, rights and powers, especially those touching slavery, were not subject to revisit and revision. To inculcate students with these values, texts deployed an immensely powerful appeal: that prosperity, economic growth, peace, liberty, democratic government, social order, and national power stemmed from the Constitution of their fathers – and that deviation and innovation would bring ruin. Such was Daniel Barnard's message to the students of the University of the City of New York, a constitutional lesson they had likely already encountered in one guise or another. In short, didactic literature attributed to the Founding all that people valued in the present.

Justice Joseph Story instilled this lesson in his popular work, *The Constitutional Class Book* (1834), published while dividing time between the Supreme Court and fledgling Harvard Law School. Dedicated to the "schoolmasters" who promote "pure patriotism" and would deploy his text, it laced basic jurisprudence with constitutional prayers of gratitude and submission. By the "profound wisdom of the framers of the Constitution," Story taught, "the country has risen

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War (New York, 2016); See also Elizabeth Kelley Bauer, *Commentaries on the Constitution 1790-1860* (New York, 1952).

[234] A Citizen (William Hickey), *The Constitution of the United States of America; The Proximate Causes of Its Adoption and Ratification: The Declaration of Independence: The Prominent Political Acts of George Washington: and Other Interesting Matter: with an Alphabetical Analysis of the Constitution* (Washington, 1846); Nancy Beadie, *Education and the Creation of Capital in the Early American Republic* (New York 2010); Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780-1860* (New York, 1983).

from poverty to opulence, from a state of narrow and scanty resources to an ample national revenue, from a feeble and disheartening intercourse and competition with foreign nations in agriculture commerce manufactures and population to a proud and conscious independence in arts, in numbers, in skill, and in civil polity." In a simplified successor for a still younger set, *A Familiar Exposition of the Constitution* (1840), Story kneeled beside his youngest readers to model gratitude. "To those great men who thus framed the Constitution and secured the adoption of it we owe a debt of gratitude which can scarcely be repaid," he explained, promising "we shall have reason to admire their wisdom and forecast." These happy expositions confined slavery to a settled subject. In Story's telling, his cherished northern framers had "sacrificed their own opinions and feelings" to accommodate "so delicate to Southern interests." To now demand abolition or more southern power lay beyond the competence of living generations. These common conceptions and assumptions appeared throughout the period's constitutional discourse. In popular educational texts, authors gathered them together as lessons for American youth.[235]

Among free white Americans, educational life in the Early Republic was fractured by geography and stratified by class. But in countless schoolrooms and homeplaces, constitutional class books met an impressionable nation of readers, facilitated by the authority of teachers, parents or narrators. Middling writers and publishers joined legal luminaries like Story to spread a constitutional culture that made historical veneration and deference its core. Across the antebellum era, works like *The Principles of the Government of the United States* (1823), *The Constitutional Guide* (1834), *The Scholar's Manual containing the Declaration of Independence and Constitution of the United States with questions for the use of schools* (1837), *The Government Instructor* (1846), *A Brief Exposition of the Constitution of the United States: for Common Schools* (1850), and *The Young Citizen's Catechism* (1861) explicated structures, duties and veneration. As author Elisha Howe stated, the Constitution was "what every American should know and understand," and dozens of titles emerged to bring the Constitution and its history to the people. Such texts were not the most renown works of this growing genre – they did not sell the most copies or come from the pen of the most prominent authors. They represented a diffuse cultural project to inculcate a shared devotion to the fathers' Constitution.[236]

Constitutional education incorporated an abiding fear of its own inadequacy. People fretted as titles mounted, creating a discursive realm both dominated by the Founding and worried over its neglect. "No one can doubt the great dearth of such books, and the consequent ignorance of the masses," the *Plough, the Loom and Anvil* commented in 1856 on yet another textbook release. "We may prate about the purity of the ballot box and the guarantees of the constitution," wrote the *Southern Literary Messenger*, but "[w]hat purity can we expert in the stream if the fountain be defiled?" The journal demanded root and branch recommitment to

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[235] Joseph Story, *The Constitutional Class Book* (Boston, 1834); Joseph Story, *A Familiar Exposition of the Constitution of the United States* (Boston, 1840).

[236] Pardon Davis, *The Principles of the Government of the United States, Adapted to the Use of Schools* (Philadelphia, 1823); R. K. Moulton, *The Constitutional Guide: Comprising the Constitution of the United States; with Notes and Commentaries from the Writings of Justice Story, Chancellor Kent, James Madison, and Other Distinguished American Citizens* (New York, 1834); J.B. Shurtleff, *The Governmental Instructor: Or, A Brief and Comprehensive View of the Government of the United States, and of the State Governments, in Easy Lessons, Designed for the Use of Schools* (New York, 1846) A Teacher, *The Scholar's Manual containing the Declaration of Independence and Constitution of the United States with questions for the use of schools* (New York, 1837), John S. Hart, *A Brief Exposition of the Constitution of the United States: for Common Schools* (Philadelphia, 1850) Elisha Moore, *The Young Citizen's Catechism…* (New York, 1861).

constitutional education, to "take the embryo voter and prepare him for the solemn duty which is to devolve upon him." Writers reflected the contours of their own constitutional devotion in their professions of paucity. Amid bitter conflicts over slavery, it was possible for white scribes and students to imagine that quiescence might follow from every American properly heeding the wisdom of the fathers. Author Joseph Burleigh gave fears a statistical toehold, suggesting "not one woman in ten thousand or one voter out of every hundred read the Constitution," causing "its illustrious authors" to mourn from beyond the grave. In a similar numerical vein, William Hickey consulted the federal census and speculated in the mid-1840s that with "one copy furnished by the Government to every hundred men, a large portion of the other ninety-nine would probably by their own means obtain it." Former U.S. senator John Holmes of Maine spent his waning years writing an instructional work, *The Statesman* (1840) to spread understanding of constitutional authority; a key vote for admitting Missouri two decades earlier, he fretted that "every one of ordinary understanding should be made acquainted with the general principles… to perform his duties as a citizen." Shaken by the Nullification Crisis, educational reformer Thomas Grimké complained at an 1834 Cincinnati school association convention that bookshelves contain merely "some 12 mo. History of the United States, and some such work as Pitkin's civil and political History of the Union, Rawle on the Constitution, the Federalist, or Story on the Constitution." Grimké's diagnosis of meagerness was a symptom of his own constitutional reverence. In his critique, the staunch South Carolina unionist appropriated the Founding as both analogy and object: "if the people have not yet demanded a new constitution in education, it is because they are not yet aware of the deficiencies in their old articles of confederacy in the educational department." Back home in South Carolina, Grimké worked to organize a popular lyceum that would deliver "Constitutional Law" to the people, offering the "best text books, such as the Federalist and the writings of Jefferson and Madison on the subject." For those who believed in the Founding, there could never be enough constitutional learning. In North and South, dread lingered, impervious to practices.[237]

Empathetic writers catered to this frightened market. Their appeals described not textual reality but the landscape of their shared fears, which recurred with every episode of sectional acrimony. Feeding anxiety that for "a vast number of children, our Common Schools afford the only opportunity" to learn their Constitution, a chance too often squandered with "silly stories," the rudimentary *Governmental Instructor* (1846) sold through large printings with express promises to entice students to seek greater knowledge. In his *Elementary Catechism on the Constitution of the United States* (1828), Arthur Stansbury, who became the *National Intelligencer*'s congressional reporter, confirmed fears of "how small a portion of the citizens of this Republic have even a tolerable acquaintance with their own Constitution." The trained minister counseled secular devotion, asking readers "to love, cherish and obey the Constitution."

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[237] *The Plough, the Loom and the Anvil*, Vol. IIX, 442; *Southern Literary Messenger* (December 1848), 761. Joseph Burleigh, *The American Manual; Containing a Brief Outline of the Origin and Progress of Political Power, and the Laws of Nations; a Commentary on the Constitution of the United States of North America, and a Lucid Exposition of the Duties and Responsibilities of Voters, Jurors and Civil Magistrates; with Questions, Definitions and Marginal Exercises, Etc* (Philadelphia, 1848); A Citizen (William Hickey), *The Constitution of the United States of America; The Proximate Causes of Its Adoption and Ratification: The Declaration of Independence: The Prominent Political Acts of George Washington: and Other Interesting Matter: with an Alphabetical Analysis of the Constitution* (Washington, 1846); John Holmes, *The Statesman, Or, Principles of Legislation and Law* (Augusta, 1840); Thomas Grimké, *Oration on American Education, Delivered Before the Western Literary Institute and College of Professional Teachers* (Cincinnati, 1835). Angela Ray, *The Lyceum and Public Culture in the Nineteenth Century United States* (East Lansing, 2005).

His work reduced constitutional questions to a matter of black and white, right and wrong. "Q. Who is to determine whether any law is contrary to the Constitution or no, the people themselves? A. No: but certain persons whom they have appointed… called Judges of the Supreme Court." Any complexities that may have existed about popular interpretative authority, either en masse or through political departments, dissolved under the felt clarity of such statements. If the popular constitutional vision of the *Elementary Catechism* embraced judicial supremacy, it commanded a yet greater deference that swept up all living Americas, from classrooms to Congress and Court. Drawing students close at the text's end, Stansbury articulated the inner structure of antebellum constitutionalism. He beseeched:

> remember that this precious Constitution, thus wise, thus just, is your birth right. It has been earned for you by your fathers, who counselled much, labored long and shed their dearest blood to win it for their children. To them it was the fruit of toil and danger, to you it is a gift. Do not slight it on that account, but prize it as you ought. It is yours, no human power can deprive you of it, but your own folly and wickedness… And though the glory of giving to their country such a Constitution as this, is what none but they have been so blessed as to enjoy, yet you succeed to a task but one degree removed from it, that of preserving what they have committed to your virtue, unsullied and unimpaired.

So the book concluded: with the Founding invoked and its grip upon the present affirmed. Whatever readers took away about the architecture of constitutional powers, many surely closed the cover convinced of the profound stakes of maintaining them.[238]

Angst over proper intergenerational transmission, so palpable in Stansbury's work, did not relent with time over the antebellum era. As Furman Sheppard avowed in *The Constitutional Textbook* (1855), it "is almost impossible to exaggerate the importance of a thorough study of the Constitution of the United States by the pupils in our schools." But Sheppard, a fixture of the Pennsylvania bar later remembered for conducting mass prosecutions during 1876 centennial celebrations, sounded the familiar alarm of neglect– "as teachers are aware, for want of a plain practical and thorough work" – even in the 1850s. The constitutional instructors that students used, "however meritorious," suffered from excessive "simplicity and brevity" or from "disquisitions and generalities" inappropriate for rote school room "recitation," while others harbored "partisan or sectional views." Sheppard's work, perhaps, would teach the Constitution just right – at least in the eyes of the anti-abolition, Princeton-educated constitutional unionist. If this complaint was part puffery for a crowded market, it rested upon an unabated unease shared by the author and potential buyers of his work, which ran through multiple editions. Even as the Civil War raged, a Bloomsburg, Pennsylvania bookshop advertised that fifty new copies of Sheppard's book, "recommended by the best Judges and Lawyers of the country" had arrived, sent for "because they have been so frequently inquired after." At the confluence of ideological and institutional nation-building, conducted through both constitutionalism, writers and

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[238] J.B. Shurtleff, *The Governmental Instructor: Or, A Brief and Comprehensive View of the Government of the United States, and of the State Governments, in Easy Lessons, Designed for the Use of Schools* (New York, 1846); Arthur Stansbury, *Elementary Catechism on the Constitution of the United States* (Boston, 1828), "Arthur Stansbury," *National Shorthand Reporters' Association, Proceedings of the Annual Meeting*… (New York, 1906), 60-2.

consumers mobilized education to produce a venerative consciousness in a world of intractable discord – and thus to fasten the country with cords woven from the past.[239]

If education broadly aimed at improving youth, teachers and authors betrayed a unique concern with the delivery of constitutional understanding: it posed a distinctly precious, perishable form of knowledge. A leading constitutional instructor during the two decades before the Civil War illustrated by vivid, dire metaphor the necessity of holding fast to Founding choices. "Equaly as rational would it be for navigators to disregard the position of the heavenly bodies, destroy their charts and compasses, and attempt to steer their frail barks amid storms and darkness across the pathless ocean, as for the people of this country to destroy the chart of their liberties by permitting the violation of their Constitution and by ceasing to imitate the virtues of their ancestors," it admonished. As *A Book of the United States* (1843) insisted, "There are certain historical facts in relation to the Convention which framed the Constitution… which should be treasured up in the recollection of every free born American." This knowledge was not a set of substantive meanings but a narrative arc in which wise framers wrought the Union from a morass of disorder and struggle. The volume taught readers to see the Constitution both as a precise text – "A committee consisting of Mr. Johnson, Mr. Hamilton, G. Morriss, Mr. Madison, and Mr. King was then selected to revise the style and arrange the articles" – and as a world of meaning inhering in the expectations of the "eminent scholars and statesmen" at the Convention. A competing volume, *First Lessons in Civil Government* (1843), which would reach nineteen editions by 1850, expressed its high civic identity as a conduit of constitutional meaning from national fathers to American "children of ordinary intelligence" from ten years and up. The excellence of the Constitution, wrote Andrew W. Young, "has been satisfactorily proved by the experience of more than half a century," but whether its fruits "shall be enjoyed by our posterity will depend essentially upon what shall be done to qualify the rising generation of American youth for the duties and responsibilities of freemen." Once a newspaper publisher in Warsaw, New York, Young found his calling in mass civics instruction, producing thousands of textbooks such as *Introduction to the Science of Government* for his home state, Ohio and others. The coupling of past greatness and present obligation in his work and that of contemporaries formed the common rallying cry for public constitutional education.[240]

The project of instilling the subordinate relationship between young Americans and the ascendant Founding proceeded through ad hoc channels and public power. Teachers, schools and associations introduced the works of enterprising local writers, regional authors like Young or national figures like Joseph Story. In the upstate New York town of Mexico, a school improvement society formed in 1837. The imperative that youth "should understand the constitution of the United States" figured into its community appeal. Noticing local resident Luther Pratt's just-published *An Exposition of the Constitution of the United States for the use of Schools* – an especially obscure class book – boosters sought to place it "not only into our

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[239] Furman Sheppard, *The Constitutional Textbook: A Practical and Familiar Exposition of the Constitution of the United States…* (Philadelphia, 1855); *Railway World*, Nov. 11, 1893, 1060; *The University Magazine* VII:1 (Aug., 1892), 82-83; *The Star of the North*, September 23, 1863, pg 3.

[240] *A Book of the United States: Exhibiting Its Geography, Divisions, Constitution, and Government* (1843); Andrew Young, *First Lessons in Civil Government…* (New York, 1850); Andrew Young, *Introduction to the Science of Government* (Warsaw, NY, 1835); Andrew Young, *The citizens' manual of government and law: comprising the elementary principles of civil government; a practical view of the state governments, and of the government of the United States* (New York, 1858); William Richard Cutter, *Genealogical and Family History of Western New York: A Record of the Achievements of Her People in the Making of a Commonwealth and the Building of a Nation, Volume 2* (New York, 1912), 867.

common schools, but into our family libraries" and "made the study of the old and the young." This impulse for constitutional dissemination harmonized with that year's *Report of the Regents of the University [of the State of New York] on the Education of Common School Teachers*. It prescribed: "Every citizen, in order to exercise discreetly and intelligently the right of suffrage, upon which questions of constitutional power are frequently dependent, must understand the provisions of the constitution of the United States and the constitution of his own state; and there cannot perhaps be a better mode of attaining the object than to require each pupil to make a brief analysis of both." Education policy declared political competence a function of constitutional knowledge. To implement this commitment, schools and students ordered works from the ever-expanding selection of texts that mediated the Constitution for the people – or booksellers came to them. At the 1845 New York State Convention of County and Town Superintendents in Syracuse, for instance, author A. L. Smith presented his volume on the U.S. Constitution to the officials in attendance. Public authorities also concerned themselves with the knowledge of older citizens whom the state could reach to dispense tutelage. Chicago mayor John Wentworth had the constitutional education of city firemen in mind when he delivered his 1857 inaugural address. He urged the common council to put a small library in each station with "a few standard books" on the Constitution and American history to impart a "healthy influence upon our firemen." The mayor understood these subjects were of a piece. Contact with the Founding as law and narrative would discipline the unruly, voting men who filled Chicago's fire companies.[241]

In language, assumption and practice, the enfranchised white male figured as the focus of educational attention. This gendered front was not unbroken, however. As female school attendance expanded, so did contact with venerative didactic materials. While teaching at Joseph Hoxie's Academy in New York, Caroline Thayer compiled *First Lessons in the History of the United States*, used by female and male classes at a number of area schools. Published in 1823, its constitutional lessons reflected the transition from pre-Missouri Crisis constitutionalism to the world of an elevated, ossified Founding. While reminding students of their responsibility "to transmit entire to their descendants the glorious legacy of freedom," she instructed that "one of its chief excellencies is, that it contains a provision for future amendments, as the exigencies of the states shall require." Such praise for the possibility of amendment virtually vanished from the scene of constitutional education by the end of the decade. Likewise, Thayer assured students that slavery "is gradually decreasing, provision having been made in the Constitution to prevent the importation of slaves after the year 1807." This view, increasingly contradicted by reality, was also a disappearing one, as textbooks, even if expressing regret for the existence of slavery, made the compromises of the Founding the final word on the matter. Within a few years, Thayer moved to the Mississippi cotton frontier and spent the rest of her life teaching planters' white daughters at academies and Mississippi College.[242]

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[241] "Movements in Oswego Co.," *Common School Assistant* (July, 1837), 52-3; "Report of the Regents of the University on the Education of Common School Teachers," Document 70, in *Documents of the Senate of the State of New York, Fifty-Eighth Session, 1835*, Vol. 2 (Albany, 1835); *District School Journal of the State of New York*, 6:3 (June, 1845), 55; John Wentworth, *Congressional Reminiscences: Adams, Benton, Clay, Calhoun, and Webster* (Chicago, 1882), 77.

[242] Caroline Matilda Thayer, *First Lessons in the History of the United States: Compiled for the Use of the Junior Classes in Joseph Hoxie's Academy* (New York, 1823); Haskell Monroe, Jr. and James McIntosh, eds., *The Papers of Jefferson Davis* (vol. 1, Baton Rouge, 1971), 305-6. Margaret A. Nash, "Rethinking Republican Motherhood: Benjamin Rush and the Young Ladies' Academy of Philadelphia," *Journal of the Early Republic* 17 (Summer

Female students' access to a venerative constitutional education was not merely incidental. In *The American Manual*, Joseph Burleigh announced that "the entire school, both male and female, should early be made acquainted with the most perfect charter of human government that was ever framed by mortal men." Indeed, in a gendered capacity, females were prominent in Burleigh's vision for constitutional learning to solve the country's civic woes. He urged that "woman be properly educated and enlisted in the cause of common school education." As "natural trainers of the young," the argument went, they had to power to dissipate the "portentous cloud of ignorance and delusion" looming over the United States on matters of constitutional truth. In 1858, Andrew Young similarly "commended to females" his latest publication, *The Citizens' Manual of Government*. The volume included a usable constitutional history for pressing times, giving "the principal causes and the successive steps which led to its formation, with sketches of the debates of the convention of framers, presenting the various and conflicting views entertained in that body on some of the more important provisions especially those known as the great compromises of the constitution." In the fraught republic, with audible female antislavery voices, the lesson of obedience to ascribed original settlements was imparted without respect to gender. When Frederick Marryat toured female seminaries in Albany and Troy, New York, he witnessed this education in action. After spectating at an examination, he wrote, "the American constitution was the next subject on which they were examined; by their replies this appeared to be to them more abstruse than algebra." Beneath the condescension, this critique was not dissimilar from general lamentations of deficient constitutional education.[243]

Perhaps the most popular antebellum constitutional instructor was also the most effusive for the Founding and cautious about slavery. Between 1844 and 1854, seventeen editions of Burleigh's *The American Manual* spread unfettered veneration. From the Baltimore attorney and founder of the city's Newton University, students learned that the "American Constitution far surpasses the seven ancient wonders of the world in the magnificence of its architecture and in its claims to the applause mankind." Time had proven the "transcendent merits" of the framers' governmental art. Americans must keep this "work of patriots of a past age" as "the fireside companion of every family through-out the land." In short, Burleigh painted the constitutional sublime. The departed men of the Founding still governed the present through handiwork that was historical artifact and object of awe. In unison, students using the textbook recited a poetical thank you to the framers "for securing Unnumber'd blessings to our favor'd land," concluding the Constitution "is a proper monument beside/ For all its authors mighty pure and sage/ Who are indeed their grateful country's pride/ The crowning glory of a trying age." In keeping with its triumphal view of the Founding, ratification became a process of wise deliberation and perfection that emabraced the Anti-Federalists. "Happily for this country, for the fame of its framers, and for all succeeding ages, there existed a powerful, an enlightened and even a patriotic band opposed to the adoption of the Constitution," because they elicited a better public

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1997), 171-91; Kelley, *Learning to Stand and Speak*, 25-26; Lucia McMahon, *Mere Equals: The Paradox of Educated Women in the Early American Republic* (Ithaca, NY, 2012).

[243] Burleigh, *The American Manual*; Frederick Marryat, *A Diary in America: With Remarks on Its Institutions* (Paris, 1839); Sarah Hyde, *Schooling in the Antebellum South: The Rise of Public and Private Education in Louisiana, Mississippi, and Alabama* (Baton Rouge, 2016); on reading, see James Machor, *Reading Fiction in Antebellum America: Informed Response and Reception Histories, 1820–1865* (Baltimore, 2011); Ronald J. Zboray, *A Fictive People: Antebellum Economic Development and the American Reading Public* (New York, 1993); Ronald J. Zboray and Mary Saracino Zboray, "Home Libraries and the Institutionalization of Everyday Practice in Antebellum New England," *American Studies, Special Issue on Culture and Libraries,* 42 (3 (Fall 2001), 63-86.

understanding. Educators across Pennsylvania, Maryland and Virginia endorsed this work. It delivered maximum reverence with minimum controversy.[244]

With its Upper South provenance, *The American Manual* applied its own authorial gag about slavery to the extent possible. Virginia reviewers signed off that the *Manual*'s "political sentiments are unexceptionable and the moral tone of the highest order." Yet the subject remained just beyond the page. Students received the Founding just-so story that "our ancestors had many difficulties to contend with -sectional jealousies and prejudices then existed as they now do- but they went to their duties with pure hearts and enlightened and liberal views." As a plea for passive emulation, the present generation was instructed to admire national fathers for putting other interests before black freedom and moral qualms. Burleigh implicitly sought sectional appeasement, as his depiction of the framers' promise of free speech showed. Those enraged by abolitionist mailings would find that the Constitution protected only expression not injurious to "property or reputation" or the "public peace"; meanwhile, those outraged by rules preempting antislavery memorials would welcome the view that only "despotic governments under a pretense of guarding against insurrections" denied the right to petition. The *American Manual* expertly pressed the weight of history upon young minds. Binding meanings could not be separated from the constant presence of authors and ancestors, ensuring settlements beyond the text itself. "[D]aily and domestic intercourse with that hallowed instrument and the pure spirit of its authors must promote harmony and union and inspire every one with patriotism and an ardent desire faithfully and efficiently to perform his duty," it pronounced, deliberately entangling description and prescription respecting conduct and effect. Inside classrooms and from within the textbook's pages, this connection may have seemed unimpeachable. But students who imbibed these lessons in the 1840s and 1850s would find they frayed apart when exposed to antebellum sectional politics. Pennsylvania, Maryland and Virginia students' notions of constitutional duty led in disharmonious directions, away from peace and Union.[245]

Before a generation became soldiers, antebellum civic education trained American youth to be vigilant constitutional defenders. In practice, students prepared to maintain whatever they believed the Constitution promised them or whatever they imagined their fathers had meant. That patrimony could include a perpetual Union, and it could embrace the perpetual right of enslaving people across America. "Every American citizen is a sentinel stationed on the outposts," declared Francis Fellowes' *The Youth's Manual of the Constitution of the United States* (1835). The young head of the Hartford Grammar School was just beginning a legal career that would take him to the Supreme Court bar. But a confessed sense of civic duty after the Nullification crisis impelled Fellowes to publish a textbook bridging his educational and legal worlds. Fellowes reasoned that the Constitution's very excellence had lulled Americans into neglecting it. "We are so accustomed to the daily blessings which flow from the Constitution that we are unmindful of their source" and rarely contemplate "this source may ever fail," he warned. Fellowes sought to teach "the political maxims and sentiments of our fathers," history that was "indispensably necessary for understanding the Constitution in its true spirit." Carried by accelerating cultural momentum to locate meaning in ascribed original intentions, Fellowes wrote four chapters taking readers through the long Founding moment. Only by learning the

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[244] Joseph Burleigh, *The American Manual*; *Southern Literary Messenger* (December 1848), 762; Charles Burleigh, *The Genealogy of the Burley, Or Burleigh Family of America* (Portland, 1880), 109. On early national discourse about the Constitution as beautiful artifice, see Eric Slauter, *The State as a Work of Art: The Cultural Origins of the Constitution* (Chicago, 2009).

[245] Joseph Burleigh, *The American Manual.*

"evils" of pre-Constitution life could Americans recognize what the framers had intended and accomplished. The instrumentality of the lesson lay bare. Fellowes insisted that youth must not only fix the "in their memories, but understand it, learn to admire it as replete with wisdom, and to regard it as the preserver of the rights of the people, and the great fountain under divine providence of our national prosperity." Civics texts like those of Fellowes and Burleigh trained constitutional "sentinels." The nation's future turned on what forms their vigilance took.[246]

Young white Americans left their common schools, academies and courses of home study carrying a powerful form of constitutional knowledge tantamount to faith. They learned to think and speak as citizens who deferred to the authority of the dead, to believe in government by history, to test constitutionality by what they though national fathers intended. They joined the structure of antebellum public constitutionalism itself. Recurrent concern over inadequate education about the Constitution spoke to enduring political conflict, unresolved disagreements over jurisdictional power and sectional fears over national stability; but whatever substantive constitutional ignorance prevailed, rising generations learned a Founding faith that closed their minds to the power of Americans to reconstitute their society and limited political possibilities to what constitutional narratives could bear. This epistemic lesson comprised a form of foundational knowledge, one of method and substance, for channeling constitutional meaning.

Vernacular Constitutionalism for the American Elite

After imbibing an elementary constitutional education from primers, textbooks and instructors, thousands of Americans annually entered the expanding ranks of collegiate institutions. There, in classes on government and law, people likely to accrue political, legal and economic power studied the Constitution with greater depth. Yet to a remarkable extent, the shape of antebellum constitutionalism remained constant. Sons deferred to fathers; and questions of meaning on controversial matters looked backwards to fashion narratives of framers' expectations and understandings. Leading jurists, attorneys and scholars took up the challenge of instilling public constitutionalism and shaping these higher classes. Columbia University president William Duer, formerly a New York judge, published *Outlines of the Constitutional Jurisprudence of the United States* (1833), hoping it possessed "a sufficiently popular character," and released a full treatment of his annual course on the Constitution in 1843. Philadelphia Law Academy provost Peter du Ponceau published *A Brief View of the Constitution of the United States* (1834) with similar intentions. Situating this volume among "several elementary works on the constitution" recently noticed, the *American Jurist* echoed its hopes for "thorough diffusion of correct constitutional knowledge… and brighter days for the republic." Most significantly, Joseph Story stepped into the role of schoolbook author. Concurrently with his landmark, *Commentaries on the Constitution of the United States* in 1833, Story whittled down its three volumes into a 700-odd page work for "Colleges and High-schools" to teach "every student… the principles of constitutional law, which were maintained by the founders of the constitution." If nuance slipped away in each successive reduction down to his *Familiar Exposition of the*

[246] Francis Fellowes, *Youth's Manual of the Constitution of the United States* (Hartford, 1835). "Obituary Sketch of Francis Fellowes," *Connecticut Reports*, Vol. LVI. (1889), 600-3. Constitutional educational literature is addressed in Peter Knupfer, *The Union As It Is: Constitutional Unionism and Sectional Compromise* (Chapel Hill, 1991), wherein Knupfer sees as promoting acts of compromise in emulation of the "fathers." However, the directive to preserve, defend and abide by the Constitution is a much stronger message in these texts – and one which stands in significant tension with undertaking new compromises.

Constitution, they retained an unyielding posture of reverence for the Founding. Popular constitutional education developed through judges acting beyond the courtroom.[247]

Young antebellum men gained precepts and a constitutional language that they held in common across political and geographical distances. While harboring differences on the powers of federal and state governments, the students who filled colleges and secondary academies assimilated the power and stakes of the Founding. In William Rawle's widely read *A View of the Constitution of the United States of America* (1825), constitutional veneration was haunted by the specter of disunion. The Philadelphia professor considered secession as a theoretical possibility but a practical catastrophe – a veritable crime against history. Appointed as a district attorney by George Washington, Rawle idealized constitutional union and sought to make students do the same. For young white men reading of a nightmarish America where the Constitution had fallen – "our country would be weakened by internal war, foreign enemies would be encouraged to invade" – the lesson was clear: only under the original Constitution could America prosper. "[W]e feel the deepest impression of a sacred obligation to preserve the union of our country; we feel our glory, our safety, and our happiness, involved in it; we unite the interests of those who coldly calculate advantages with those who glow with what is little short of filial affection; and we must resist the attempt of its own citizens to destroy it with the same feelings that we should avert the dagger of the parricide," he concluded. The metaphor of parricide, with its grave and classical weight, showed the framework of slavery's constitution. If pupils learned their lesson, they would look upon the luminous Constitution with awe, dreading violation by the unfaithful.[248]

Vigilant complacency was a virtue in constitutional curricula. William Sullivan's *Political Class Book* (1830) instructed a generation of New Englanders to give thanks for meaning that had come to rest. The "framers of this system are entitled to the gratitude of their countrymen, and the people who adopted their work well deserve to be honored by their fortunate descendants," the prominent attorney explained. While the *American Monthly Review* applauded the work's commercial success and civic contribution, abolitionist lawyer William Goodell had a less sanguine response. Sullivan had recently advocated outlawing antislavery pamphlets. Appalled to see this figure as a "guardian of republican education," Goodell excoriated Sullivan for representing government as a "machine for *regulating the rights of the people*" without recognition of those rights' independent existence. In instructing students to love law blindly, however, *The Political Class Book* was ordinary in its time. It taught youth to naturalize and appreciate the existing order as secured by their fathers' Constitution.[249]

Yet as constitutional education insisted upon reverent deference to settled meanings, it often could not avoid producing new ambiguities. In future Delaware Senator James Bayard's *A*

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[247] William A. Duer, *Outlines of the Constitutional Jurisprudence of the United States* (New York, 1832); Peter du Ponceau *A Brief View of the Constitution of the United States* (Philadelphia, 1834). Story, *Commentaries on the Constitution of the United States*; Kanisorn Wongsrichanalai, "'What Is a Person Worth at Such a Time': New England College Students, Sectionalism, and Secession," *Children and Youth during the Civil War Era*, ed. James Marten, (New York, 2012).

[248] Rawle, *A View on the Constitution of the United States* (Philadelphia, 1825). An 1837 eulogy for Rawle before the Historical Society of Pennsylvania, of which he had been the founding president, noted the text when through several editions and had been incorporated into curricula.

[249] William Sullivan, *The Political Class Book: Intended to Instruct the Higher Classes in Schools in the Origin, Nature, and Use of Political Power* (Boston, 1830); "Sullivan's Political Class Book," *American Monthly Review* (January, 1832), 58-9; William Goodell, "Anti-Republican Education," *Quarterly Anti-Slavery Magazine* (January, 1836), 186-7.

Brief Exposition of the Constitution of the United States (1833), which sold several thousand copies during the mid-1830s, students encountered unintended room for motivated historical reasoning. In coming decades, Bayard would make law serve slaveholders in Congress and the courtroom, where he obtained damages against an Underground Railroad agent. His textbook sounded familiar tones of historical reverence for "our immediate ancestors." Commending the "wise provision not adding any sanction to domestic slavery but leaving it to be settled by each State," Bayard concluded that "southern States would probably not have consented to the Union" otherwise. Here readers learned historical logic vital to slavery's constitutionalism, the *no Union but for* appeal. Resting national existence on an ascribed original understanding, it could fit new problems, from slave rendition to new territory. In the coming decades, it would spread through court cases and congressional speeches, against which antislavery constitutionalists would press their own less effective variant on a behalf an imagined historic North than would not have consented to a proslavery Constitution. Endorsing neither very liberal nor rigid construction, the *Exposition* pleasantly advised "fair and reasonable construction," a premise of that, for Bayard readily incorporated the notions of reasonable slaveholding framers. When conflicts over slavery arose, Bayard would find his clear answers. Students of his text might see different ones.[250]

Rather than pit legal elites against common people over the authority to interpret fundamental law, the deepest contours of public constitutional instruction insisted upon the higher authority of the Founding itself. Teacher and student, judge and citizen, all made acknowledgements of their subordinate place relative to the framers and their commandments. This premise was a potent form of constitutional knowledge capable of cutting through the tissue of debates and decisions in moments of fierce controversy. This higher authority could remain dormant during routine politics and mostly out of sight during the normal course of constitutional discussion and litigation. But generations of young antebellum men who became politicians, judges and voters learned to believe in and invoke the ascribed intentions of the national fathers when intractable conflict seemed to beckon for their authority.

Southern Anxieties

A sectional difference marked constitutional training. Sharp doctrinal divergences over state powers could certainly be read and heard between North and South, but the difference was no less a matter of reflective worry about northern influence. The South had far fewer schools per capita and was slower to build them. Children from wealthy southern families often went north for education, and northern-trained teachers came South. Almost all texts came from northern authors and northern publishing houses. Most stoked a constitutional veneration that was ambiguous and evasive as to slavery. But some southerners believed they infringed on their political sensitivities and constitutional convictions. As the *Richmond Enquirer* warned readers, for example, a local bookshop was found to carry *The Constitutional Text-Book*, a title that might "mislead casual observers," because it was effectively a compendium of speeches by Daniel Webster, "no authority on constitutional law in Virginia." Yet the reach of constitutional instruction was national as a matter of texts. According to the 1848 library catalogue of the University of Alabama, students used a collection that included Jonathan Elliot's multi-volume *Debates, Resolutions and Proceedings in Convention on the Adoption of the Federal Constitution*; *American's Guide, comprising the Declaration Independence, the Constitution of*

[250] James Bayard, *A Brief Exposition of the Constitution of the United States* (Philadelphia, 1833); William Sullivan, *The Political Class Book: Intended to Instruct the Higher Classes in Schools in the Origin, Nature, and Use of Political Power* (Boston, 1830).

the States &c.; Bayard's *Brief Exposition of the Constitution*; Hickey's *The Constitution of the United States, the proximate causes of its Adoption and Ratification*…; Robert Yates' *Notes on the debates of the Convention*; *The Federalist*; Rawle's *View of the Constitution*; Story's *Commentaries on the Constitution*; James Madison's Notes; Kent's *Commentaries on American Law*; Duer's *Outlines of the Constitutional Jurisprudence*; and Sergeant's *Constitutional Law*.[251]

Perceived dependency stoked fears of constitutional miseducation in certain southern corners. Ever more reactive to depictions of the American past at odds with proslavery ideation, the policemen of southern education detected lurking antislavery sentiments. Because of the commitment to insulation of slavery in sovereign states and the facilitating ideology of the Democratic Party, a nationalist view of the Constitution found less favor among southern politicians and people for a time. In northern-produced texts, southerners saw this nationalist vision – with all its antislavery potential – presented as original, settled meaning. Virginia professor Beverley Tucker lamented that when a southern "boy advances towards manhood and begins to study the political institutions of his country" his books "establish a reading of the constitution highly favourable to [northern] purposes and… injurious to ours." Tucker painted conspiratorial images of "book makers of the north [] busy in preparing works for propagating through the minds of the rising generation and, especially through the legal profession, principles of constitutional law suited to the views of centralism." While this assertion of intentionality was overdrawn, Tucker's accusation of propagated consciousness tells of the power residing in public constitutionalism.[252]

Yet the South had important allies in the publishing industry. For reasons of interest and ideology, some schoolbooks pitted the Founding against the antislavery movement in charging students with preserving their fathers' union. Emma Willard's popular *History of the United States* infused her anti-agitation politics into the lesson that, the Constitution, "after seventy years of trial, is regarded by the friends of the rights of man in both hemispheres as the palladium of civil liberty." Abolitionist activities registered as constitutional subversion while ensuring sectional peace was an unqualified good in her volume, periodically updated through the antebellum era. Precisely because of its ascribed compromises over slavery, the "convention was an example to future times of the triumph of strong patriotism, honest zeal for the public welfare over party feeling, and sectional prejudice," she urged. But the text could deliver no test to distinguish compromising interest and surrendering principle. Students were left to judge what their fathers would do. In a similar vein, *Harper's School History* (1856) led classes across world history, culminating in a final chapter on the Constitution. Published amid unrelenting sectional discord, it sought to show students a true nature of union that would be palatable in southern schools. Author Jacob Abbott explained, "Young persons sometimes imagine that the general government is, in some sense, a government above the state governments, and that it exercises a sort of superintendence over them, but this is not so in any sense whatever." To disabuse them of this notion, the text offered a reverential presentation of dual federalism, the institutional vision of a simple order where the federal government "is supreme in respect to the business intrusted to it and so are the state governments supreme in respect to the business intrusted to them."[253]

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[251] *Richmond enquirer*, March 17, 1854, pg 1; *Catalogue of the Library of the University of Alabama: With an Index of Subjects* (Tuscaloosa, 1848).

[252] Nathaniel Beverly Tucker, *A Series of Lectures on the Science of Government: Intended to Prepare the Student for the Study of the Constitution of the United States* (Philadelphia, 1845).

[253] Emma Willard, *History of the United States, or Republic of America* (New York, 1852); see Emma Willard, *A Peaceful and Permanent Settlement of the Slavery Question* (Washington, 1862); *Harper's School History* (New York, 1856)

The prominent Harper & Brothers publishing house behind Abbott's volume cultivated an exceptionally deferential relationship with southern book markets. After the New York company issued an English travel narrative in 1835 containing sentiments against slavery that irritated a southern editor, it wrote an apology professing that, "we had no suspicion of it whatever." As proof of their good faith, the company noted that it had considered Edward Abdy's travel narrative as "likely to be profitable, but we were told that Mr. Abdy was an abolitionist; and we would have nothing to do with him." Soon thereafter, Harper found itself apologizing again for having issued a novel that scorned slavery. Harper & Brothers assured the South: "By this time, it must be pretty generally understood in your section, as well as elsewhere, that we uniformly decline publishing works calculated to interfere, in any way, with Southern Rights and Southern Institutions. Our interests, not less than our opinions, would dictate this course, if there were no other less selfish considerations." Before the outbreak of the Civil War, *Harper's Magazine* orchestrated an exclusive release of Stephen Douglas' divisive, historical essay on popular sovereignty, "The Dividing Line between Federal and Local Authority." Denounced as a proslavery press as secession neared, Fletcher Harper would rationalize to a nephew, "I grew up under the Union and the Constitution. I am for the Union, and whoever is against the Union, I am against him with all I have in the world. I don't believe what the abolitionists print weekly in their organ, that the Union or the Constitution is a covenant with hell." This complacent constitutionalism informed how the company taught the Founding.[254]

When Harper published a biography of Founder John Jay in its District School Library series, the work claimed him for the cause of anti-abolition. The volume urged that Jay

> did not deny the abstract right of holding slaves, or stigmatize those who did, as offenders against the code of morals and religion; for he made use of the services of slaves, both received by inheritance, and obtained by purchase. With a sound view of the provision of the Constitution, and of the rights of the States, his efforts at emancipation were limited to the State in which he lived… were those of a sound statesman and enlightened politician, not those of a fanatic and disorganizer.

His son, antislavery attorney William Jay, responded with fury. He argued the facts of his father's life: that John Jay had advocated compulsory gradual emancipation; had never inherited any enslaved people; had purchased people to eventually manumit them; had never sold a slave; and had led the Manumission Society that petitioned the Continental Congress for national antislavery measures. This dispute over the intentions of his actual father was a personal matter; but it was also a microcosm of the political struggle over representing national fathers and original visions. For the son, the South and the nation, the stakes of contested history arose from a constitutional culture that vested authority in words and deeds from the Founding.[255]

Even when the South produced its own instructional materials, the underlying structure was much the same. In a work hoping to entreat northern as well as southern readers late in the antebellum day, Virginia attorney William Archer Cocke published a celebratory *Constitutional History of the United States* (1858). The volume found it "a source of brilliant delight… to trace

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[254] "THE HARPER'S SCHOOL LIBRARY," *The Philanthropist*, Mar 10, 1841 (reprinting from *The New York American*); Robert W. Johannsen, "Stephen A. Douglas, 'Harper's Magazine,' and Popular Sovereignty," *Mississippi Valley Historical Review*, Vol. 45, No. 4 (Mar., 1959), pp. 606-631; Joseph Harper, *The House of Harper: A Century of Publishing in Franklin Square* (New York, 1912), 177-78.

[255] "THE HARPER'S SCHOOL LIBRARY," *The Philanthropist*, Mar 10, 1841 (reprinting from *The New York American*).

the difficulties that oppressed the framers of our Constitution, mingled with the successful manner in which they were overcome and the promulgation of those pure principles whose splendor has only been surpassed by their practical force and utility." A southern partisan who would spend the war practicing law in Florida and become the state's post-Reconstruction attorney general, Cocke described an alternate reality in which "a common political and national destiny have nearly reduced all difference except a few local institutions which adds beauty and variety." For Cocke, this that meant slavery.[256] In South Carolina, Bartholomew Rivers Carroll published a *Catechism of United States History* offering fervent constitutional lessons in its Founding narrative and authorial vision. On its cover stood an archway of stones, each labeled with the name of a state, accompanied by the motto "Protect the parts, and Preserve the Whole." Carroll's final lines spoke directly to obligations of the living to revere the national fathers and uphold their labors.

> It was not every-day men that made this government what it is; but such as, feeling the hard necessity of the task, brought to their aid minds which felt no interest but that of the Republic. A few such spirits are met with in an age. Like stars scattered over the darkness of Heaven, they diffuse their cheering light. Let us ever watch them in their elevation and gather from their course their brighter virtues. And if to their immortal spirits it be permitted to look down from that Heaven, of which they dreamed may it be to shed upon our path the same light of purity and of peace which they enjoy.

Carroll expressly disclaimed any "sectional favor" for his text, which went through twenty editions by 1859. But even as the work diffused a constitutionalism of historical deference, it seemed to bless distinctly sectional visions. In 1860, William Gilmore Simms' revised *History of South Carolina* showed the understanding of the past that southerners entertained under such constitutionalism. The text taught South Carolina students that their state "has kept faith with her sister sovereigns, and has maintained a proverbially jealous watch over the common constitution of the country, which the wisdom of her great revolutionary sires contributed to devise as embodying the best securities equally of state and people." This observance expressly included Nullification, which Simms still justified with the authority of Madison.[257]

While southern educational institutions expanded, alarm grew too. In 1859, U.S. Senator Albert Gallatin Brown, speaking before Madison College in his home state of Mississippi, deemed it "idle to talk of Southern education, so long as we borrow or hire our teachers from the North," and nor can we "have proper school books until we educate our own teachers" to write them. Given "how impure the fountain at the North has become," he said of flow of educational literature, the South must teach its own. "I am only trying to protect the minds of Southern youth from the contaminating influences of Northern teaching," he urged. Georgia politician William Stiles fervently agreed. At the 1858 commencement of Cherokee Baptist College in Georgia, he delivered an address on *Southern Education for Southern Youth*. Yale-educated Stiles described what he adjudged the ensuing ruination of a Southern youth, sent north and immersed in hostile texts and abolitionist teachers. "Is he, in short, prepared for the performance of that plainest and most obvious duty of every private, no less than public, citizen, obedience to the constitution of his country? For this even is he wholly unfitted, at the South, on account of his belief in the

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[256] William Archer Cocke, *Constitutional History of the United States* (Philadelphia, 1858).

[257] Bartholomew Rivers Carroll, *Catechism of United States History* (Charleston, 1859); William Gilmore Simms, *The History of South Carolina from Its First European Discovery to Its Erection Into a Republic: With a Supplementary Book, Bringing the Narrative Down to the Present Time* (New York, 1860).

existence and supremacy of a 'higher law.'" Thus from Stiles' perspective, anti-constitutionalism was inculcated in the North because vigilant protection of slavery was a prime constitutional duty. In the early months after the Confederate States of American formed, when slaveholders looked with confidence to the future, they had room to contemplate a new world of "Southern School Books" that would cement their regime. As "Josephus" in Knob Creek, North Carolina set forth, "the stability of government depends, to a great extent, on the character of her literature," a fact "plainly demonstrated" by the war. "Therefore," he argued, "it is important that the South prepare her own school books." Long pining for educational independence on matters of history and government, the writer announced: "That time has now arrived."[258]

Studying to Save the Union

The Constitution pervaded the tiers of late antebellum instructional life as affective national bond, edifice of authority and historical monument. Lessons reflected the growing centrality of the sacral fathers' Constitution in crises over slavery and hopes for national tranquility. As schoolbook author George Williams reflected in 1861, "the study of the Constitution has been gaining ground as a necessary part of the education of the young." Pennsylvania publisher Mordecai M'Kinney entreated citizens to connect sectional disturbances to their own constitutional education when he asked them to buy his *United States Constitutional Manual* (1844) on the premise that "only a proper understanding of our civil institutions [] can induce strong and settled attachment to their principles and impart ability for their maintenance." To students and "readers in general" across the middle states, M'Kinney urged reflection upon the "late events in our country." And he urged simple faith in the Constitution as the rock of the Union. Succinct questions and answers let readers gain purchase on the Constitution, training them to walk with certitude, ready to defend their understanding. "Of what authority is the constitution of the United States?" "It is the supreme law of the land," the *Manual* answered. Contestation and complexity remained hidden, and people could project their understandings into the gaps. They could flexibly rehearse an article of constitutional faith: that their fathers' Constitution was born of sacred compromises and wise statesmanship. "Is the federal constitution to be regarded as the result of concession and compromise? Yes. It was the act of the people of the original States voluntarily uniting through mutual concession and compromise," especially on "the existence of slavery in some of the States." Yet here was no obvious prescription for further compromise. The Constitution contained the last word. As Texas and further territorial additions loomed, the text could confirm readers' historical instincts. "Has Congress a right to impose a restriction prohibiting the introduction of slavery into a State as a condition of its admission into the Union?" The *Manual* responded unequivocally: "Yes." These lessons were framed as facts, not interpretations. They admitted no room for dispute.[259]

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[258]Albert Gallatin Brown, *An Address on Southern Education Delivered July 18, 1859: Before the Faculty, Trustees, Students, and Patrons of Madison College, Sharon, Mississippi* (Washington, 1859); William H. Stiles, *Southern education for southern youth: an address before the Alpha Pi Delta Society of the Cherokee Baptist College, delivered at the commencement on the 14th July, 1858* (Savannah, 1858); Bruce Elman, "'An Educated and Intelligent People Cannot be Enslaved": The Struggle for Common Schools in Antebellum Spartanburg South Carolina," *History of Education Quarterly* Vol. 44, No. 2 (Summer, 2004), pp. 250-270. *Spirit of the Age*, August 07, 1861, p. 1. Michael Bernath, *Confederate Minds: The Struggle for Intellectual Independence in the Civil War South* (Chapel Hill, 2005).

[259] George S. Williams, *The Constitution of the United States: For the Use of Schools and Academies* (Cambridge, 1861); Mordecai M'Kinney, *United States Constitutional Manual* (Philadelphia, 1844).

In a similar vein, Daniel Parker's *The Constitutional Instructor* (1848) taught that the prosperity and liberty secured by the Founding were "without precedent in the annals of mankind"; but shadowing this veneration was a sense of its sectional fragility that weighed on the Vermont author. Citing "Texas, Oregon and slavery," he counseled urgent constitutional training in "every primary school" for "every school boy." In Parker's analogical telling, constitutional learning was as essential to citizens as a mechanic's apprenticeship, a farmer's knowledge of soil, a merchant's ability to value goods, a lawyer's legal expertise or a physician's anatomical studies. A former minister, Parker urged citizens to vote following the framers. Those national fathers "understood the language in which [the Constitution] was expressed and what the Convention intended by it," Parker wrote, and so any "true exposition of the Constitution must therefore always agree with their understanding of the matter." As he proudly noted, "the Madison Papers… has been my constant guide." *The Constitutional Instructor* encoded deference to the Founding as a formal "rule it is important to remember." Temporal submission became easier when Parker assured New England students that the framers "were extremely anxious" their government "should not show any favor" to slavery and doubted they had meant for federal slave rendition. Here was an understanding that students could take to the ballot box.[260]

As southern states threatened secession in 1860, the United States added several new works of public constitutional instruction to the collection that the country had amassed. Most prominently, Nathaniel Towle's *A History and Analysis of the Constitution of the United States* epitomized the ascendance of historical authority. Relying primarily upon Madison's notes from the Convention, the federal civil servant sought to explicate the history of each clause as it was produced in Philadelphia. This would "make the objects and intentions of its framers clear and intelligible" and, of course, the "framers of the Constitution were certainly the most competent to explain its intended import." This novel approach to foregrounding historical understandings garnered warm praise from the professional voice of the *Legal Intelligencer*. "No student of the Constitution of his country who has once learned its value as a book of reference will ever consent to be without a copy," according to *The New Englander*. Towle's methods of public constitutionalism were of the moment. Ezra Chase contributed the popular *Teachings of Patriots and Statesmen*. The Pennsylvania Democrat promised binding historical balm for a divided country. What "the voters of this country desire in reference to the question of slavery is to know from an authentic source what the framers of the Constitution meant to do with it." With such knowledge, "they will steadily pursue the path marked out by their fathers." Chase's premise encapsulated assumptions from decades of constitutional learning. Americans at the close of the antebellum era enthroned framers' ascribed visions to govern a disorganizing nation.[261]

Committed constitutional educators rushed their works to press to staunch national entropy at the very moment that southern conventions purported to dissolve their constitutional

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[260] Daniel Parker, *The Constitutional Instructor, for the Use of Schools* (Boston, 1848); Abby Hemmenway, ed., *The Vermont Historical Gazetteer, Vol. II* (Burlington, 1871), 362.

[261] *The New Englander,* Vol. 18 (November 1860), 1092; *Legal Intelligencer*, Oct. 26 1860, 342; Nathaniel C. Towle, *A History and Analysis of the Constitution of the United States* (Boston, 1860). *Obituary Record of the Graduates of Bowdoin College and the Medical School…* (Brunswick, ME, 1899), 392; Ezra Chase, *Teachings of Patriots and Statesmen: Or, The "founders of the Republic" on Slavery* (Philadelphia, 1860); on Chase as a copperhead district attorney, see Mark Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York, 1991). See also Henry Flanders, *An Exposition of the Constitution of the United States* (Philadelphia, 1860); *Henry Flanders, Teacher and Friend: Proceedings in Memoriam Held by Friends, Faculty and Students at the Law School, University of Pennsylvania, Philadelphia, April 21, 1911* (Philadelphia, 1911).

bonds. Secession across the Deep South had already commenced when George Williams' textbook, *The Constitution of the United States* (1861) went to print. It delivered a final education articulation of the framers' Constitution "as it is" before the Civil War. This last antebellum production taught veneration for an authoritative Founding that secured perpetual union but never emancipation. "How was the institution of slavery regarded by the framers of the Constitution? As an institution… existing by force of State laws and no power was given to the government of the United States to interpose," Williams taught. This lesson reflected his avowed effort to inculcate "correct views respecting the organic law with which personal opinions should be made to harmonize." In other words, Williams demanded popular constitutional deference. Yale University President Theodore D. Woolsey concurred. "Each generation in our history needs to be taught *what the Constitution is*, and what the framers of it *understood it to* be at its formation," he wrote in July 1861. Woolsey blamed sectional education for disunion, legitimating constitutional secession below the Mason-Dixon line. "It has been extensively the doctrine which the young men of the South have learned at college, and into which unfledged politicians have been initiated as the means of unsettling the country, should a necessity for such a step ever arrive." From the University of Michigan, Thomas Cooley likewise reflected that for the past thirty years, southern leaders had "set deliberately at work to educate the people in erroneous principles of national law." In southern citizens' slaveholding, constitutionalists like Chase, Williams and Woolsey saw legal activity with which they could readily live. In southern citizens' secession to promote slaveholding, they perceived a monstrous incursion on the framework in which they had invested their moral lives.[262]

The Documents Themselves and the Archival Dilemma

When Americans grasped the documentary materials of the Constitution and constitutional history, they had no license to interpret them as they saw fit. Like the textbooks that modeled proper constitutionalism, compendiums imposed a posture of historical veneration by their contents and curation. Publishers bundled copies of the Constitution with the Declaration of Independence, and Washington's Farewell Address. For example, *The Hand-book of the Nation*, advertising its precise and authentic reproduction of the Convention's work, argued that these accuracies "alone enable the citizen or the legislator to understand the true meaning and intentions of its framers, since the change of no more than a comma might easily remove the strongest barrier between Power and Right, or bridge the Hellespont by which its framers so wisely separated between State and Federal sovereignty." Such documents could support strict textual reading practices, while their presence reflected enthusiasm for accessing Founding authority. The Constitution-bearing *Union Text Book* (1854), offered for "high classes of educational institutions and for home reading," made explicit its criteria for speeches to accompany Founding documents. The editor searched for words that would best "impress the young with a love of Country, a veneration for the Constitution, a respect for the Memory of the great and good men who founded our republic." Other works such as *Political Landmarks*, *The American Statesmen*, *The Political Textbook* and *Parties and their Principles* similarly combined documentary resources, long narratives of national political history and excerpts of significant speeches suffused with constitutional claims, all with the stated intent of producing an informed citizenry. Boston publisher Nahon Capon promised that his *The Republic of the United States of*

[262] George S. Williams, *The Constitution of the United States: For the Use of Schools and Academies* (Cambridge, 1861); "The Southern Apology for Secession," *The New Englander*, Vol. 19 (July, 1861), 732; Thomas Colley, *Address by Hon. Thomas M. Cooley and Poem by D. Bethune Duffield, Esq.* (Ann Arbor, 1863).

America would lead citizens "to contemplate the institutions of their country as sacred trusts to be honored by duty and protected by patriotism." Anxious Americans could also purchase Jehiel Brooks' *A Compilation of the Laws of the United States, and of the States, in relation to fugitives from labor* (1860), which reduced the Constitution to its utterances on slavery. Blaming personal liberty laws in the Northern states, Brooks wondered: "Who… does not pray that the storm may only sweep away the pestiferous malaria of demagoguism, and render the moral atmosphere once more fit for the breath of patriots?" But this desire for restoring a sublime bygone day could not, in application, mean the same thing for all prospective readers.[263]

National elected officials shared the impulse for preserving the Union through constitutional instruction. Congress purchased and disseminated great batches of compendiums to libraries and localities across the country in the late 1840s and early 1850s. After the first edition in 1846, William Hickey's *The Constitution of the United States of America* rapidly went through extensive printings in 1847, 1851, 1852 and 1854, as anger and fear stalked the country. Each edition proudly displayed new congressional purchase resolutions. Vice President George Dallas, an archetypal doughface, provided an epigraph that made the Founding and national identity inseparable: the Constitution "is meant for the homebred, unsophisticated understandings of our fellow citizen… Yield away the Constitution and the Union and where are we? Frittered into fragments and not able to claim one portion of the past as peculiarly our own." In Dallas's telling, "the past" was a veritable possession of living Americans, irreplaceable and susceptible to destruction. Editor Hickey similarly blended the humble and the hallowed. The Constitution, he effused, "the fireside companion of the American citizen" was the unimpaired monument of the "fathers of the republic." Page after page spoke a vernacular of dire veneration. The Constitution "is the Bond, and the only Bond, of the Union of these States; it is all that gives us a National character," blurbed Daniel Webster, while his reputation suffered for supporting the Fugitive Slave Act. Chief Justice Roger Taney ordered twenty-four copies to "always be within the reach" of the justices and bar, while Pennsylvania Chief Justice Gibson called for placing the book "in the hands of the masses" and adopting it as "a text-book in the common schools."[264]

Materials from the constitutional Founding functioned as relic, cipher and divining tool in antebellum America. This contingent archive translated the past, assuming sentimental and legal significance. In the Founding moment, it depended upon individual choices to jot down procedure, dialogue and impressions, reflecting the commissions and omissions of recorders and commentators. Later, as such materials attained increasing authority over the antebellum era, the public archive depended upon choices of collection, selection and publication. Particularly before 1840, Americans faced a paucity of Founding materials, which they supplemented by lore and logic. Between 1819 and the early 1830s, Americans gradually gained access to some documentary glimpses of the Founding through publication of the brief Convention journal, reproduction of partial notes taken by two antifederalists who departed the Convention early and several state ratification debates. Once Jonathan Eliot released a package of these materials by 1830, advertised to reveal the intentions of the framers, the publication quickly threaded through debates and court decisions. This response showed both a desire for documentary authority and

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[263] John Henry, *The Hand-Book of the Nation* (New York, 1852); see also *The constitution of the United States: with the acts of Congress, relating to slavery, embracing, the Constitution, the Fugitive slave act of 1793, the Missouri compromise act of 1820, the Fugitive slave law of 1850, and the Nebraska and Kansas bill; carefully compiled* (Rochester, 1854).

[264] William Hickey, *The Constitution of the United States of America*… (Philadelphia, 1852).

the investment of authority in such documents from a revered past. Lawmakers expanded the garden of venerative constitutionalism by publishing the *American Archives* series beginning in the 1830s. The project would deliver "the lucid arguments of the sages who deliberated on the formation, the adoption, and the first movements of the Government." Publishers Peter Force and Matthew St. Clair knew their role. In their first *Archives* release, they echoed that "every American citizen shall be impressed with the conviction that as he is individually interested, in the blessings which freedom confers, so there is imposed upon him the personal duty and sacred trust of vigilantly watching and manfully sustaining that liberty which has been transmitted to him" – liberty which could only be defined through the words and deeds of their fathers.[265]

The United States attained a new grasp on Founding material after the government-commissioned publication of James Madison's curated Convention notes in 1840. The last framer had died in 1836, which allowed the proceedings he had transcribed and embargoed, to descend to the public. In the intervening decades, Madison had sculpted their contents as passing political time pressed him to elaborate original arguments and understandings. President Andrew Jackson endorsed legislation for the manuscripts to be purchased, printed and "disseminated at the public charge, to confer the most important of all benefits on the present and succeeding generations, accurate knowledge of the principles of their Government." Politicians and public bowed to the documents' allure, and their purchase became an act of veneration. Speaking to Congress in favor of the project, Virginian William Rives acknowledged Madison as "the founder and author of that glorious Constitution" and hoped that people would "canonize the work of his hands, and surround, with a new veneration, that precious relic of the wisdom of our departed patriots and sages." Even John Quincy Adams agreed. With "that band of benefactors of the human race, the founders of the Constitution" now vanished, it ever more became "our duty to transmit the inheritance unimpaired to our children of the rising age," the old congressman affirmed.[266]

Americans had already come to invoke the deliberations inside Philadelphia's Independence Hall before gaining access to a reasonable portrait of proceedings. Such opacity had provided a generative shroud of ambiguity. Dramatic expansion of the Founding cannon implicated America's longstanding constitutional narratives. Speaking at the University of North Carolina, Senator Bedford Brown declared it "must, to a great extent, clear up what was before doubtful: remove what was before considered uncertain: and reveal, more distinctly, the true principles and character of our Government." In the *Holly Springs Gazette*, a Mississippi writer mused that the publication "has placed it in our power, to read the debates and views of these great men upon every important question of government and legislation," to read their worries

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[265] Jonathan Eliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787: Together with the Journal of the Federal Convention, Luther Martin's Letter, Yates's Minutes, Congressional Opinions, Virginia and Kentucky Resolutions of '98-'99, and Other Illustrations of the Constitution* (Washington, 1830); *Report made to the Hon. John Forsyth, secretary of State of the United States: on the subject of the Documentary history of the United States* (Washington, 1834); *American Archives, Vol. I* (Washington, 1837); On Eliot's political biases and editorial decisions, see H. Jefferson Powell, "The Principles of '98: An Essay in Historical Retrieval." *Virginia Law Review* 80 (1994): 689-743; Carolyn Sung, "Peter Force: Washington Printer and Creator of the American Archives." (Ph.D. diss., George Washington University, 1985). Interpretative possibilities were stimulated by and stemmed from the experience of living with a fixed, written Constitution. Michael Warner, "Textuality and Legitimacy in the Printed Constitution," *Proceedings of the American Antiquarian Society* 97:1 (1987), 59–84.

[266] Mary Sarah Bilder, *Madison's Hand: Revising the Constitutional Convention* (Cambridge, Mass., 2015). "Death of James Madison," *Register of Debates in Congress,* June 30, 1836 (vol. 12, Washington, DC. 1836), 1912; *Niles' Register*, July 9, 1836, p. 318; *Richmond Enquirer*, November 6, 1848, 4.

for the future, and "look to the subsequent history of the country for the proof of their sagacity." The southerner seemed at once amazed and sure of what he would find. A fellow Mississippian writing in the *Creole* affirmed that Madison's notes belonged in the "possession of every voter in the country." At the Charlottesville Lyceum, law professor George Tucker rejoiced that Madison's notes "will enable the world to estimate the ability of those several members whose joint work has long been the theme of national praise." The *Democratic Review* channeled popular yearning for historical validation. "How often… have not the intentions of its framers been misrepresented or misunderstood?" The time of "full revelation" had come "for fully unbosoming the secret proceedings of that time to the respectful veneration of the country." The journal offered readers a special deal in 1842 bundling an annual subscription with the three-volume Madison Papers. After spending decades fervently imagining the deliberations of national fathers, Americans assumed Madison would confirm their understandings. After waging sectional conflicts through Founding history, people's inured constitutional faith admitted no doubt. The Papers quickly entered the circulatory system of constitutional discourse, appearing in newspapers and debates on issues ranging from slavery to a national bank. If most consumers of this history found confirmation rather than revelation, that reflected willful reading by Americans firmly committed to pre-existing truths. For motivated publics, a deeper archive did not offer clarity but more materials for construction and conflict. Publication furthered the re-embodiment of the Constitution. Even before people could digest the Papers' substance, a chart travelled through the papers that tallied the purported 1,782 Convention speeches and listed framers in descending order according to their active voice. In the post-Madison Papers moment, Americans could easily pit framer against framer, authority and counter-authority.[267]

Embedded Lessons in the Print Cultural Stream

Constitutional textbooks, manuals and compendiums existed inside a wider expanse of didactic publications. Venerative constitutionalism came to Americans embedded in the vernacular history of the period. As the public crafted national narratives and rehearsed the origins of the United States, they learned to place the fathers' Constitution at the center of those stories. Over the early national period, this pronounced bond between national history and the Constitution was gradually forged. Before a "cult of the Constitution" coalesced in the early republic, Americans made George Washington the object of their adoration. As the first legitimating institution of nationhood, a "living monument," this preeminent father coexisted with the Constitution during the first decade of post-ratification life. Washington transferred symbolic, centripetal energy inhering in his self to the young document. While living, President Washington counseled constitutional attachment and rejection of geographic divisions in circulars and addresses. Posthumously, his words became anthemic refrains, particularly his Farewell Address. As Americans absorbed the lessons of his constructed and curated image, they

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[267] *Holly Springs gazette*, December 08, 1843, pg. 1; *Mississippi Creole*, January 29, 1842, pg. 2; "Prof. Tucker's Discourse," *Southern Literary Messenger, IV* (February, 1838), 83; Bedford Brown, *An address delivered before the two literary societies, of the University of North Carolina: in Gerard Hall: on the day preceding the annual commencement, in June 1839* (Raleigh, 1839); "Madison, and the Madison Papers," *The United States Magazine and Democratic Review, Volume 5* (March, 1839), 246. Instances of other constitutional engagement may be found in Charlottesville Lyceum Minute Book, 1845-1856 (UVA Special Collections). David Houpt, "Securing a Legacy: The Publication of James Madison's Notes from the Constitutional Convention," *Virginia Magazine of History and Biography*, 118:1 (2010), pp. 4-39; Holly Schulman, "Dolley Madison and the Publication of the Papers of James Madison, 1836–1837," *Virginia Magazine of History and Biography* 118, no. 1 (2010): 41–70. *Columbia Democrat*, September 03, 1842, p. 4l; *Richmond enquirer*, August 17, 1841; *Illinois free trader*, August 21, 1840, p. 2.

also learned constitutional reverence and duty. Mason Weems' *The Life of Washington* became the most prolific messenger, selling through several hundred thousand copies. The authorial apostle soared to the conclusion that Washington, "leaves us at his death this blessed advice" that "'the constitution, which at any time exists, until changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all.'" Weems amplified this theme of duty to a resounding finale. "As good children, give her all your support. Respect her authority!--comply with her laws!--acquiesce in her measures!" he urged. Writing amid the explosive foreign affairs of the first decade of the nineteenth century, Weems instructed readers that only by maintaining the Constitution could post-Washington America ensure "the blessings of liberty to our children and children's children." Though the context of this crisis passed, these words remained in over fifty succeeding editions. The crisis changed to internal schisms over slavery, the Constitution itself became a world of historical meanings, and the resonance of Weems' injunction grew.[268]

Following the United States' sense of triumph after the War of 1812, the Constitution began to appear in texts more often as a blessed object. *The History of North America* (1815) appended the "constitution of our country, the sacred palladium of our liberties," because it "should be in every family." Albert Picket's class book *The Juvenile Mentor* (1818) represented as a natural maturation the enlargement of veneration from Washington to Constitution. Imagining an "infant in a cradle," Picket thought his first words should be "Washington," and then his first study must be the Constitution and Declaration of Independence. In 1820, as the Missouri Crisis peaked, a new edition included the full Constitution and a section advocating constitutional education. Another attempt to secure America's future by teaching youth to respect for the past came in *The History of the American Revolution, in Scripture Style* (1823), which attached a copy of the Constitution and converted the Revolution into mock-biblical narrative. Thus, when the United States was formed, "the Provinces in the land of Columbia were called by a new name, and they became one people, and the great Sanhedrim ruled over them." Making clear the object of inspiring "the rising generation," the publisher suggested the work counted among "the most useful Books which preceptors could recommend to their pupils, because they will thereby be enabled to learn what their forefathers did for them." Initial editions published in the late 1790s and early 1800s did not include the Constitution or this injunction for generational fealty; but as the distinction between Revolution and nationality under the Constitution diminished, the framers' text became an implicit denouement. In the act of transposing recent history into language suggestive of the ancient and epochal, the publication accomplished both mystification and mythification of the Founding. Such nation-building "civic texts," in Francois Furstenberg's felicitous expression, were also constitutional texts, elevating the founding generation as makers of fundamental law.[269]

Even if focused on battles and military glory, revolutionary histories during the antebellum era reached out to embrace the Constitution. Sarah Alcock's *A Brief History of the*

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[268] Mason L. Weems, *The Life of Washington: with curious anecdotes, equally honourable to himself and exemplary to his young countrymen* (Philadelphia, 1800); on the fables of Parson Weems, Scott Casper, *American Lives*: *Biography and Culture in Nineteenth-Century America* (Chapel Hill, 1999), 72; *In the Name of the Father*; David Hackett Fischer, *Liberty and Freedom: A Visual History of America's Founding Ideas* (New York, 2005), 179.
[269] W. D. Cooper, *The History of North America*… (Albany, 1815), iv; Albert Picket, *The Juvenile Mentor: Or American School Class-book No. 3* (New York, 1818); Richard Snowden, *The History of the American Revolution, in Scripture Style* (Frederick, Md. 1823); H. G. Good, "Albert Picket, Educational Journalist and Organizer," *Peabody Journal of Education,* Vol. 19, No. 6 (May, 1942), pp. 318-322. Analysis of the creation and meaning of such "civic texts" is explored in François Furstenberg, *In the Name of the Father*: *Washington's Legacy, Slavery, and the Making of a Nation* (New York, 2006).

Revolution (1843) included the document "with a brief view of the grand Procession of Philadelphia, when ten out of the then thirteen States of North America, signed the most sublime system of a Republican form of Government that the sun ever shone upon since the creation of the world." Attorney Levi Judson, recalling his personal acquaintance with Founders, published a "portable and cheap volume" of revolutionary biographies along with the Constitution in 1839. Tinged with the nostalgia of living after the Founding generation – "like leaves in autumn, they have descended to the earth" – the publication named typical instructional objects of "obey the precepts" and "imitate the examples." Robert Sears' widely-circulated *Pictorial History of the American Revolution* printed the Constitution and demanded youth show gratitude by staying "alive to every encroachment." Readers could not miss the imperative for obedience and emulation. As Jesse Olney's *History of the United States* (1836) declared, the Constitution "display[ed] the wisdom and integrity of a body of men whose example is worthy of universal imitation." Present glories derived from paternal gifts, faults from current deviance. These texts encouraged young readers not to compromise but rather to stand upon ground and principles that their elders had secured. Yet the nature of particular glories and faults remained a matter of subjective understanding and contestation among the present generation.[270]

Temporal distinctions bent as the constitutional Founding ascended. Readers received one long Founding moment with the Constitution as Telos, as revolutionary time grew to encompass it. Benson Lossing's popular *Biographical Sketches of the Signers of the Declaration of Independence*. This text explained to readers that adopting "the Federal Constitution and the organization of the present government of the United States under it formed the climax the crowning act of the drama of which the Declaration of Independence was the opening scene." Diplomat Alexander H. Everett's 1828 volume *America: or, A general Survey of the Political Powers of the Western Continent*, claimed that of the events of Revolution, "the last in order, viz. the successful formation of the federal constitution, is the one to which we may, perhaps, with justice, attribute the greatest importance, as it was the indispensable condition, without which we should have lost the benefit of all the others." In the glowing portrait of the leading framers that followed, the federalists and anti-federalists of the Founding moment shared more than they differed – with all interested in constitutional liberty. Slippages occurred around the gravitational pull of a Constitution that was becoming ever more a product of men and an expansive authority in public life. Biographies burnished and blurred national fathers. *The Lives of George Washington and Thomas Jefferson* (1833) concluded "that the mind of Washington was the fountain whence flowed the wisdom and beauty of the federal Constitution, and that Constitution became the fountain of Mr. Jefferson's political principles" – though Washington had little authorial role and Jefferson did not participate. In Harvard historian Jared Sparks' *Life of George Washington,* the national father "watched [the Constitution's] fate with anxious solicitude and was animated with joy at the favor it gradually gained with the public and its ultimate triumph." Chief Justice John Marshall's five-volume biography of Washington, subsequently abridged to

[270] Levi Judson, *A Biography of the Signers of the Declaration of Independence: And of Washington and Patrick Henry, With an Appendix, Containing the Constitution of the United States and Other Documents* (Philadelphia, 1839); Stephen Simpson, *The Lives of George Washington and Thomas Jefferson* (Philadelphia, 1833); Robert Sears, *The Pictorial History of the American Revolution: With a Sketch of the Early History of the Country. The Constitution of the United States, and a Chronological Index* (New York, 1845); Jesse Olney, *History of the United States* (New Haven, 1836).

two books and then a single school text, predictably made the wise framing and fortunate ratification of the Constitution central to his telling of the United States' national birth.[271]

Historian Richard Hildreth confronted the tendency to render the Founding era as an island in time, ensconced in clouds of valorization. His multivolume *History of the United States of America*, when moving from the Founding into the Federalist period, commented acerbically on typical representations. "To pass from these mythical and heroic times to those which form the subject of the present volumes is like suddenly dropping from the golden to the brazen and iron ages of the poets," he wrote, noting that people are "stripped, in the popular mind, of that super-human magnanimity and disinterestedness so commonly ascribed to all the men of the Revolution." Hildreth's unvarnished approach drew criticism. But the author could deploy veneration as needed. In a pamphlet attack on nativism, he invoked the "authors of our American independence" as "the first practical statesmen, who recognized, by their public political acts, the brotherhood of the family of man." With deliberate conflation of independence and Constitution, and the accusation of nativist designs to "undo this great work of our fathers," Hildreth used the tools that moved American sentiment.[272] His historical work was the exception that proved the rule of reverence, a rule that he too followed when seeking to persuade in the public sphere.

Young Americans, well before they might encounter a civics text, were awash in literature that encouraged a venerative consensus around their national fathers' constitution-making. Under the moniker of Peter Parley, an empire of didactic material flowed from the hand of New England author Samuel Goodrich. *The Tales of Peter Parley about America* invited children to "cherish, then, the memory of those gallant men, who gave their life-blood, fresh and free, to purchase peace and liberty," and if not yet tired, to "read a little about the American government." For a slightly older audience, *Peter Parley's Book of the United States* told of "wise" men forming a "glorious" Constitution. Without their work, students learned, "you would not be secure of a home; your father's house might be taken from him by violence; you could not at evening sit down by the pleasant fireside, and feel secure and happy under the protection of your parents." *Peter Parley's First Book of History* likewise inculcated the Founding's munificence: "wise and good men… devised an excellent government, which went into operation in the year 1789," after which "[a]ll things now began to go on well… and peace and plenty were spread over the land." It was these Peter Parley texts that Beverly Tucker singled out as spreading doctrines across the South that threatened slave state power.[273]

Even if American students never used a constitutional instructor, their standard American history textbooks imparted the core features of antebellum constitutionalism. The voluminous *Illustrated School History of the United States and the Adjacent Parts of America* (1857) insisted that the Constitution "should be familiar to every student of his country's history." Indeed, the common schoolbook by George Quackenbos designated the whole span from 1789 to the present as the "Constitutional Period," and reflected gladly on the Founding moment when "Madison,

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[271] Sarah Alcock, *A Brief History of the Revolution, with a Sketch of the Life of Captain John Hewson* (Philadelphia, 1843); Benson J. Lossing, *Biographical Sketches of the Signers of the Declaration of Independence; the Declaration Historically Considered; and a Sketch of the Leading Events Connected with the Adoption of the Articles of Confederation and of the Federal Constitution* (New York, 1843). On Lossing, see Harold Mahon, *Benson J. Lossing and Historical Writing in the United States: 1830-1890* (Westport, 1996).

[272] Richard Hildreth, *History of the United States of America* (3 vols. New York, 1856); Hildreth, *Native-Americanism Detected and Exposed* (Boston, 1845).

[273] Lewis Munn, ed., *The American Orator* (Boston, 1853); Samuel Goodrich, *Peter Parley's Book of the United States* (Boston, 1837); Samuel Goodrich, *Peter Parley's First Book of History* (Boston, 1837). Tucker, *A Series of Lectures on the Science of Government* (Philadelphia, 1845).

Jay and Hamilton" overcame opposition for "the greatest good of the greatest number." Somberly, the *School History of the United States* (1838) told students that "soon the last one of the actors in our Revolution will have gone down to the grave of his fathers," and now the "*written page*" must suffice to teach every "son or daughter of the American republic" in whose hands the national fathers' achievement would be "PRESERVED or LOST." The volume explained that God had inspired the Convention delegates. But events since 1830, it sternly intoned, revealed that Americans neglected the "warning voice of the Father of his country." The work closed with a list of the "responsibilities of the young" that consisted of perpetuating their national, constitutional patrimony. John Frost's *History of the United States: For the Use of Common Schools* (1855) narrated a Federal Convention "composed of some of the most illustrious men whose names adorn our national history" – incorrectly rattling off the names of "Adams, Jefferson, Madison, Patrick Henry, Franklin, Hamilton, Jay, Randolph, the Lees" as delegates. Students could study the Constitution for themselves in the appendix. Without delving into details, these works inculcated students with the overriding principle to revere the Constitution as a text made by the greatest of men to create the greatest government.[274]

Charles Goodrich counseled students to practice the same genuflection in *A History of the United States of America* that his brother Samuel instilled in younger readers. They learned of their privilege to be born "under a constitution as wise as it was singular, and whose excellency and competency the experience of more than thirty years has confirmed." With unrivalled "means of national prosperity," America's future looked bright. Shadowing this account, however, lay the notion that to fail in the face of such gifts would be wholly the fault of the living generation. Lecturing at the Lowell Institute in the early 1850s, Goodrich made clear the terms of Founding he obeyed on the subject shaking the country. While professing to despise slavery as an "evil," he explained that the framers had "permitted it to exist by and under the local law" as a compromise. As such, only "the guidance of God" could alter its presence: "Its remedy, so far as you and your system of government are or may be concerned, may be stated in few and simple terms: that remedy is, let it alone leave it where the constitution of your country has left it." Goodrich's schoolbook was widely used, its teaching on the moral-constitutional obligations of the present to the past rehearsed in classrooms. The principal of a female seminary elaborated its venerative lessons with *Questions and Supplement to Goodrich's History of the United States*. "What people first deliberately formed and adopted a constitution of government for themselves? In what, were our forefathers tried and proved and refined? From whom does our history deserve attention? In whom, does it probably excite admiring gratitude? Upon whom, has our history the highest claims? When should the children of our country begin to learn our history? As soon as they can be interested with its most affecting stories." History was immanent; it made claims upon the living. Educators agreed: the past governed.[275]

As antebellum American began to rupture, the Founding became a multivolume epic in George Ticknor Curtis' *History of the Origin, Formation, and Adoption of the Constitution of the United States* (1854). The Massachusetts Cotton Whig turned into prose what many already had

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[274] B. R. Hall and A. R. Baker, *School History of the United States: Containing Maps, a Chronological Chart, and an Outline of Topics for a More Extensive Course of Study* (Boston, 1838); George Quackenbos, *Illustrated School History of the United States and the Adjacent Parts of America* (New York, 1857); John Frost, *History of the United States: For the Use of Common Schools* (Philadelphia, 1857); Charles Goodrich, *A History of the United States of America* (Hartford, 1847);

[275] Charles Goodrich, *The Science of Government as Exhibited in the Institutions of the United States of America* (Boston, 1853); Joseph Emerson, *Questions and Supplement to Goodrich's History of the United States* (Boston, 1850).

learned to feel. Curtis cast the Founding as salvation and obligation. The Constitution had "saved" liberty for "posterity and it left it to depend on their fidelity to the Union." Curtis, trained at Harvard Law School, knew well the technical face of law; but he had learned the power of public constitutionalism to move people in political life. The axiom that the Constitution bound Americans into one political and legal community came together in Curtis's grand narrative with the venerative tenet of constitutionally-inspired prosperity. Curtis invited readers to behold "that among the causes of this unequalled growth stands, prominent and decisive far over all other human agencies, the great code of civil government which the fathers of our republic wrought." Locating American wealth and power as the work of the framers instilled conservative obedience. Hagiographic prose extended readers' childhood lessons, extolling the "high sense of justice," "power of concession," "magnanimity and patriotism," and "moral sanity of the intellect which is farthest removed from fanaticism" that inhered in the framers. For Curtis, any criticism for accommodating slavery "reduced therefore to the single question whether the people of the United States should have foregone the blessings of a free republican government because they were obliged by circumstances to limit the application of the maxims of liberty on which it rests." Curtis practiced what he taught: He executed the Fugitive Slave Law by day as a U.S. Commissioner, including returning escaped slave Thomas Sims to bondage in 1851, and he served as co-counsel for Dred Scott at the Supreme Court to defend against what he believed was the original settlement about slavery. Abolitionists scorned Curtis as a tool of the Slave Power; other antislavery citizens rejected his views on fugitive slaves but shared his larger venerative vision. More Americans simply registered in his account the Founding that they had long learned to revere.[276]

As a cultural system, antebellum historical education demanded that the rising generation sustain their fathers' constitutional order, however configured. This intergenerational project raised up role models, most prominently Senator Daniel Webster, "Defender of the Constitution" as his supporters called him. *The Youth's Cabinet* invited children to share the moment Webster met the Constitution.

> The first time that Mr. Webster's eyes fell upon the Constitution of the United States, of which he is now universally acknowledged to be the chief expounder and defender, it was printed upon a cotton pocket handkerchief, according to a fashion of the time, which he chanced to stumble upon in a country store, and for which he paid out of his own pocket, all the money he had- twenty five cents and the evening of the day on which he thus obtained a copy was wholly devoted to its close and attentive perusal while seated before a blazing fire, and by the side of his father and mother."

In its purity and domesticity, this scene imparted an ideal of constitutional learning. Editor Henry Binney Wallace, encountering a passage by Webster in a volume of American prose that reached the "sublime," hoped that "young men of America would inhale the almost supra-mortal spirit which it breathes." "[T]his side of idolatry," the Senator had mused, "I believe that no human working on such a subject, no human ability exerted for such an end, has ever produced so much happiness, or holds out now to so many millions of people the prospect, through such a succession of ages and ages, of so much happiness, as the Constitution of the United States." These words captured the sensation of constitutional veneration internalized by many Americans.

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[276] George Ticknor Curtis, *History of the Origin, Formation, and Adoption of the Constitution of the United States* (New York, 1854).

It was their expression of gratitude and obligation of preservation, at once self-effacing and self-ennobling, that citizens learned to feel about their constitutional order.[277]

Such instructive modeling, lessons and vernacular made inroads on youthful consciousness. In an 1850 memoir, Charles Lanman recalled skipping school to attend July 4 festivities; facing punishment, he stood in his "boyish estimation as 'defender of the constitution'" and delivered his "maiden speech." Behind this mirthful account was a learned comfort with patriotic rights-claiming that students acquired from civic texts. As Edward Mansfield travelled between Connecticut and Ohio on the passing of his own father in the early 1830s, he encountered Webster's just-delivered speech against Nullification in the *National Intelligencer*. The Litchfield Law School graduate recalled that it seemed "to embody all that grand idea of the American Republic, with its glory and strength surviving, as I believed, and do believe it will do until the sunset of history; giving to the nations light, freedom and righteousness." Webster's words imbued him with a new and substantive constitutional faith. "My ideas of Constitutional Powers were derived from him," remembered Mansfield, who would soon teach such subjects.[278]

On Webster's death in 1853, Harvard Law School students who had grown up with his example purchased a large portrait to rest alongside Supreme Court justices Joseph Story and John Marshall. Professor Joel Parker closed his oratory for the occasion with prescriptive reverence: "so long as the Constitution shall exist, and so long as any record of its history shall remain, wise men will do honor to the wisdom and firmness of those who framed and adopted it and to the signal ability of its expounder, its commentator, and its defender." Linked in a chain of constitutional observance, the living could demonstrate their wisdom by following the past. A few years earlier, Henry David Thoreau had also testified to Webster's constitutional fealty, but he turned the species of valorization practiced by Lanman, Mansfield, and the Harvard alumni on its head. The author, dismayed by Webster's accommodation of slavery, entered a dissenting plea against veneration in *Civil Disobedience*: Webster "well deserves to be called, as he has been called, the Defender of the Constitution. He is not a leader but a follower. His leaders are the men of 87." Watching public constitutionalism sustain slavery, Thoreau saw Webster as a model of shameful submission. While appreciating Webster's oratorical power, Swedish traveler Fredrika Bremer came to a subtler conclusion upon observing him defend a perpetual union with slavery. Webster is "like a great national watchman who keeps watch that the Constitution does not take fire in any of her old corners…. He is a pacificator but not a regenerator," she saw.[279]

From Washington biographies to Curtis' tomes, an extended field of didactic literature helped to make American households the site of patriotic constitutional training. Texts like *The Youth Companion* were consumed beyond formal school walls. For families living in rural fringes, classbooks, histories and readers brought home a venerative education. Publishers sold their instructors and compendiums as constitutional references for the small family bookshelf. As *The Patriot's Manual* (1828) emphasized, "every householder ought to have" the Constitution. Home libraries gathered pieces of venerative cultural production. Beyond lessons conducted

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[277] "Daniel Webster's Childhood, Francis Woodworth," *The Youth's Cabinet: A Book of Gems for the Mind and the Heart, Vol. 1* (New York, 1852), 128; Horace Binney Wallace, "The Prose Writers of America," in *Literary Criticisms and Other Papers* (Philadelphia, 1856); *Knickerbocker, Or New-York Monthly Magazine*, Vol. 30 (1847), 444-5.

[278] Charles Lanman, *Haw-ho-noo, or, Records of a tourist* (Philadelphia, 1850); Edward D. Mansfield, *Personal Memories, Social, Political, and Literary: With Sketches of Many Noted People, 1803-1843* (Cincinnati, 1879).

[279] Joel Parker, *Daniel Webster as a Jurist* (Cambridge, 1853); Henry David Thoreau, *A Yankee in Canada: With Anti-slavery and Reform Papers* (Boston, 1866), 149; Fredrika Bremer, *Homes of the New World*, Vol. 1

within the household through these textual works, décor and possessions echoed the Founding in both North and South. Writing to his former Virginia congregation, the Reverend Paxton depicted how domestic spaces communicated lessons. He listed the household objects that must be eradicated to keep symbols of liberty and rights discourse away from slaves: besides "tear[ing] from your law books, geographies, gazetteers, and other volumes, the declaration of independence, the bill of rights, the state constitution and other matters that relate to personal rights," you must not "omit to destroy those beautiful prints" of the founders on mantles and walls. As the proprietor of New York shop selling busts told the African-American educator William Wilson in 1853, "'Washington he sell, Franklin he sell.'" In the background of daily life, these objects mirrored occupants' national and constitutional conceptions.[280]

The normative household and the structure of public constitutionalism aligned in antebellum culture. Writers wedded constitutional values to family ones. Children could learn in the *American Penny Magazine* that "[a]ll our country is our home," and Americans "should love every part of the United States, because it all belongs to our nation, as our house belongs to one family." It was a tidy national household that this voice of northern domestic order sought to project, one governed by "rules… agreed on by our fathers when they were at work laying the foundation." "[C]alled the Constitution," these great decrees ensured that people could travel freely and live "in the large new rooms in the west wing… if we will only mind the rules they have there." Conveying notions about territory and rights, this lesson would have uncertain application for youth soon contemplating slavery and who controlled the western rooms. A stern warning against "selfish and ignorant children" who failed to know their history and thus "knock down a wall or post, to make a change to suit themselves" did not clarify matters, only serving notice that bad apples might live within the national home. Children's book author William Swan, in his *First Lessons in the History of the United States*, also pursued this filial analogy. "In families and schools, certain rules are established for their government, and when these are complied with everything goes on pleasantly. So it is with states and nations," explained. This was not merely an injunction for obedience to elected leaders but an account of the Founding. "Happily, we had wise and good men at this time," he continued, and they "drew up a plan of government which is called the Constitution of the United States." In his *An American Home* lecture, the Reverend Albert Barnes conveyed how proper households comprised a national family. The "father is allowed to pursue his own plan for the good of his family," whom "are acquainted with the constitution of their country-they know their rights as citizens." Conceiving of a filial United States allowed veneration to recruit patriarchal norms like those espoused by Barnes. The national fathers were *fathers*. "Let us read the history of other countries to learn how much better our fathers understood building a nation," urged the *Magazine*, and "we will try to keep every good thing in its place just where the good old men put it and never let any body take away a good stone from the foundation or shake a sound timber from the walls." National parenting made vigorous obedience to the constitutional fathers its primary lesson.[281]

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[280] Jesse Hopkins, ed*., The Patriot's Manual: Comprising Various Standard and Miscellaneous Subjects, Interesting to Every American Citizen, Proper Also for Seminaries of Learning* (Utica, 1828); J. D. Paxton, *Letters on slavery; addressed to the Cumberland congregation, Virginia* (Lexington, 1833). See Michael Kammen, *A Season of Youth: The American Revolution and the Historical Imagination* (New York, 1978) (chapter 3 on Revolutionary Iconography in National Tradition). William J. Wilson to Frederick Douglass, *The Black Abolitionist Papers, vol. 4*, ed. C. Peter Ripley, 141 (*Frederick Douglass' Paper*, March 11, 1853).

[281] "Juvenile Department," *American Penny Magazine and Family Newspaper*, Vol. 2, (1846), 366-7; Albert Barnes, "An American Home," *American Penny Magazine and Family Newspaper*, Vol. 1, (1844), 299-300; William Draper Swan, *First Lessons in the History of the United States: Compiled for the Use of Common Schools* (Boston, 1856).

Slavery's Constitutionalism Among the Lawyers

Antebellum attorneys shared the vernacular constitutionalism that infused national political life. They were not removed from the conflicts that sculpted the public culture of venerative deference, and their legal education assimilated popular modes of making passionate claims upon the Founding. But the antebellum bar and bench were not ordinary participants in constitutional culture. As producers of instructional material and speechifying politicians, they absorbed and amplified constitutionalism in texts and public forums. The Early Republic relied on a burgeoning community of legal professionals to lead its political affairs, integrate its economy and litigate its disputes. Law schools, from small proprietor offices to larger university-affiliated organizations, became a growing presence on the educational landscape. These sites of expertise, though influential beyond their numbers, taught a fraction of attorneys through the Civil War. Most lawyers-to-be passed through an apprenticeship of "reading law" under an established member of the bar. Scholarship on antebellum legal education has predominantly focused on institution-building and the development of private law subjects. Yet to important effect, venerative constitutionalism was embedded in instruction for aspiring attorneys.[282]

For the generations of lawyers who manned the political decks of their states and sections and who waged the constitutional politics of slavery in courtrooms, fluency with public constitutionalism was a tool of the trade. To capture audiences or represent communities on the most fraught subjects, the ability to move from formal knowledge to passionate vernacular was invaluable. Attorneys campaigned with popular constitutionalism and committed it to text in instructors. Legal education could not be insulated from the lessons of historical reverence. General curricula focused on black letter learning and tedious copying of rule, case and doctrine; but popular constitutionalism entered lectures and texts. If attorneys addressing private law or the more technical aspects of constitutional practice stood apart from the people in such moments, they were right back among them when matters implicated slavery and sectional politics.[283]

The *New York Legal Observer* traced explicit bonds between lawyers and public constitutionalism. A contributor in 1847 extolled how the profession exerted "a very salutary influence upon the affairs and institutions of our republic." Lawyers, the writer suggested, occupied a special role in conserving constitutional union. With their "conservative stare decisis habits," "love of order" and commitment to "standing firmly by the constitution," they possess "proper appreciation of all the wise prudence which our fathers inculcated and for the maintenance of affairs in the just equipoise in which they endeavored to place them." In other words, it was the work of attorneys to guard constitutional boundaries and ensure a law-abiding culture to subvert "disorganizing tendencies." That culture undergirded a stable Union. The *Observer* took it as a sign of lawyers' positive influence that the "republican fathers… are appealed to on all sides as having been right" in their designs. Disobedience and excess democracy were the shared foe of American lawyers, whose professional duty required they be "always found on the side of the constitution." Hundreds of miles from the legal networks of New York, the Ohio-based *Western Law Journal* concurred. Lawyers learn the "sentiments of

[282] Justin Simard, "The Birth of a Legal Economy: Lawyers and the Development of American Commerce," 65 *Buffalo Law Review* 1059 (2016); Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776-1876* (Cambridge, MA 1976); Daniel Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill, 2005).

[283] Edwin Surrency, "Law Schools," *The New Encyclopedia of Southern Culture: Volume 10: Law and Politics* (Chapel Hill, 2008), 47-50.

rational patriotism," it editorialized in 1849. The bar's constitutional knowledge "unite[d] the sentiments of a numerous and powerful body of men in every part of the United States" – an influence that "perhaps contributes more to the stability of the Union than a standing army," the profession-building publication suggested. In these accounts, the legal profession fashioned itself as a leader of popular deference to the fathers' Constitution. They evidenced a concern with historical supremacy more than judicial supremacy, a precept most Americans could share.[284]

The *United States Monthly Law Magazine* illustrated how lawyers reproduced conservative constitutionalism. Stepping into the roiling wake of the Fugitive Slave Act of 1850, editor John Livingston praised the inaugural address of New Jersey Governor George Fort for exhibiting "sentiments of a true statesman" in seeking popular compliance with the Act. Fort advocated the constitutional adoration that he doubtlessly felt, assuring New Jersey that the compromise "originated in the purest devotion to the spirit and provisions of our fundamental law" and "an exalted love of country, worthy of the fathers of the republic." Invoking an unqualified duty to support the Constitution, Fort asked for happy acquiescence "to preserve it as an invaluable legacy bequeathed to us by our fathers, and to transmit it unimpaired to future generations." In the patriotic arithmetic endorsed by the *Magazine*, obeying the Fugitive Slave Law carried out the high duty of constitutional maintenance; the latter required the former. Livingston's publication aspired to connect a national legal community, and it espoused lawyerly values meant to transcend section. Lawyers learned to wield expertise and vernacular constitutionalism to justify the existing order. Prominent Virginia jurist Conway Robinson reached out to northern and southern audiences in 1840 with the essay "Slavery and the Constitution," published first in the Boston-based *American Jurist and Law Magazine*, and then in the *Southern Literary Messenger* and as a standalone text. Official reporter, state law codifier, and historian, Robinson mined Founding-era ratification debates for proslavery "understanding" to promulgate an expectation that slavery questions could be easily answered through a turn to history. Meaning, authority and empowering assurance lay in quotations like Edmund Randolph's statement to the Virginia Convention that "the Southern States, even South Carolina herself, conceived this property to be secure by these words. I believe whatever we may think here that there was not a member of the Virginia delegation who had the smallest suspicion of the abolition of slavery." Free state readers should defer to this history, Robinson argued, and slaveholders should be comforted that northern judges largely did just that, assiduously enforcing slavery under the Constitution. For the bar, historical veneration was an intuitive bulwark of law and order, a means to preserve the prosperous Union without directly addressing slavery.[285]

Of course this vision of the profession neglects those who defended fugitive by pushing the bounds of constituted authority. And it should not obscure that attachment to the Founding in theory allowed attorneys to militate on all sides of the most hotly political constitutional questions. Nonetheless, the *Observer* and other legal periodicals indeed captured a general truth: most lawyers stuck to existing patterns and norms. Law and history, as conceived, commanded respect. They venerated the Constitution – "in the history of politics, a miracle" according to the legal writers of the *American Jurist and Law Magazine*; and they revered the framers, who "had the address and the wisdom, which enabled them to create out of the elements, for America, what

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[284] "The Legal Profession," *New York Legal Observer*, Vol. V (May 1847), 161-5; "The Profession of the Law," *The Western Law Journal*, 2:3 (December 1849), 97-101. See also, Timothy Walker, *Introductory Lecture on the Dignity of the Law as a Profession* (Cincinnati, 1837).

[285] *United States Monthly Law Magazine* (July-August, 1851, 203) M. H. Hoeflich, *Legal Publishing in Antebellum America* (New York, 2010); "Robinson," *The Cyclopædia of American Biography, Volume 5* (New York, 1915)

the silent growth of ages had given birth to for England." When Columbia College law professor Timothy Dwight spoke to a new class in 1858, he extolled the "cautious and conservative character" of legal reasoning by "patriot lawyers." Dwight presented the careful drafting of a more perfect Constitution as exemplary of this ethos. Professor Theophilus Parsons, in an 1859 commemoration of the late Rufus Choate, conveyed this same spirit to Harvard Law School students: "A lawyer… is in an important sense a member of the judicial department of the State. Let him, then, be true to the Constitution and the law which he has sworn to support and to that system of rules which is the best result that the best efforts of the best intellects, continued through centuries, have been able to devise for the protection of all the interests of humanity." As Parsons attested, the legal community placed itself in communion with the past: deference to the Constitution meant deference to history. Existing parameters of lawyers' constitutionalism readily embraced veneration, particularly in arguments over governance and slavery under law.[286]

William Wetmore Story described a moment when those reverent feelings seized the student body during his days at Harvard in the late 1830s. Following the final constitutional law lecture, his father, Justice Joseph Story "slid into a glowing discourse upon the principles and objects of the Constitution, the views of the great men of the Revolution by whom it was drawn, the position of our country, the dangers to which it was exposed, and the duty of every citizen to see that the republic sustained no detriment." Speaking off the cuff to a transfixed audience, the elder Story segued into discussing the national fathers' hopes for America and closed with an exhortation to actualize them. Students left with an ardent fusion of constitutional law and aspiration. In the mid-1840s, Rutherford Hayes found this historical reverence remained integral to the curriculum. Writing to his uncle in Vermont, the future president reported fascination with Story's lectures because they "give many items of valuable information in relation to the history of the Constitution, its framers, their views and intentions, and its practical workings, which are not to be found in print." Here constitutional law acquired a narrative form and mythos beyond the corners of the document. Meaning was given room to stretch and grow, entering into a realm of unprinted stories populated by original desires. Slavery stimulated veneration and its negative corollary, fear of great constitutional loss, when Story's ire fell upon abolitionists impeding the rendition of fugitive slaves. Hayes recorded a fervent lecture warning that such failures of obedience would render "the Constitution worse than a dead letter, an apple of discord in our midst, a fruitful source of reproach, bitterness, and hatred, and in the end, discord and civil war." A man of genteel antislavery sentiments, Story taught disdain for the "madmen" whom he saw as "ready to bid farewell to that Constitution under which we have lived and prospered for more than half a century, and which I trust may be transmitted unimpaired from generation to generation for many centuries to come." Venerative ideation arose from the perceived risk of national collapse. It held the constitutional line against moral doubt.[287]

From his concurrent academic and judicial posts to his works for lay and expert readers, Joseph Story's influence became canonical, making and reflecting constitutional culture. His *Commentaries on the Constitution* taught the nation's attorneys how to discuss the Constitution with reference to the presumed purposes and logic of its authors. These practices, in the context

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[286] The Madison Papers, 26 *Am. Jurist & L. Mag.* 393; Timothy W. Dwight, *An Introductory Lecture Delivered Before the Law Class of Columbia College, New York: On Monday, November 1, 1858* (New York, 1858), 17; Theophilus Parsons, *Address Commemorative of Rufus Choate* (Boston, 1859).

[287] William Wetmore Story, ed., *Life and Letters of Joseph Story, Vol. II* (Boston, 1851), 488-9; Charles R. Williams, ed., *Diary and Letters of Rutherford Birchard Hayes, Vol. I* (Columbus, 1922).

of the Constitution, became an act of reverent historical imagination. James Kent's classic doctrinal *Commentaries on American Law*, a cornerstone of legal education, expressly affirmed the general outlook of the "learned commentator" on the Founding. American constitutional life, in Story's view, required the bar to be embedded in society. His *Discourse on the Past History, Present State, and Future Prospects of the Law* instructed that the profession must provide "sentinels upon the outposts of the constitution, and no nobler end can be proposed for their ambition or patriotism than to stand as faithful guardians of the constitution." This obligation to make good on Founding promises was a justificatory through-line. Writing as James Madison's passing removed the last framer in 1836, Story insisted that the present would choose "whether the national constitution shall descend to our children in its masculine majesty" or "perish before the grave has closed upon the last of its illustrious founders." His lesson carried a warning that went beyond proper construction to national destiny. On inauguration as Dane Professor of Law, he promised to labor to "fix in the minds of American youth a more devout enthusiasm for the constitution" as illuminated "by the lights of those great minds, which fostered into being and nourished its infancy." The Founding must be Americans' constitutional sun. Training lawyers in the classroom and print, the jurist sought to construct public constitutionalism.[288]

After graduating from Story's Harvard Law School, Timothy Walker migrated to Ohio in the early 1830s. Bringing a professionalizing legal culture with him, he helped to found the Cincinnati Law School, set up the *Western Law Journal* and authored the popular textbook, *Introduction to American Law*. Eastern authorities granted this volume their seal of approval. Professors Simon Greenleaf and Story assured buyers that it contained "sound and discriminating learning." The *North American Review* called it an excellent first book for the "young jurisprudent of our country." It conveyed properly venerative constitutionalism. Walker effused over students' inherited government – "we enjoy that golden mean so long looked for, but never before discovered…. the wondrous fable of Minerva's birth here finds almost an actual parallel." In simply describing the workings of a bicameral Congress, Walker waxed that "[i]n no other part of this wonderful instrument, do we find such convincing proof of the profound wisdom of its framers" for balancing the federal system. In the Necessary and Proper Clause, he related that "the framers of the federal constitution, than whom a wiser body of men was never convened," resolved "anticipated" doubts over implied powers by conferring them. The framers' wisdom inevitably confirmed his views. Walker invited law students to join the community of men who practiced a personal and professional life of constitutional reverence. Assuming a paternal tone, he wrote, "When you come to examine with more leisure and attention, as you assuredly will, the department of constitutional law, I am persuaded you will do so with a growing sentiment of inexpressible admiration at the almost unerring wisdom and sagacity, which framed a system at once so complicated and so complete, without the aid of pre-existing models." Such lessons merged popular constitutional values and professional practice. Veneration of the framers, the authority vested in their intentions, the process of reading the document, and Walker's normative nationalism comingled. Each quality reinforced a bundle that was handed to students. The Constitution and the Founding contributed to and defined the other's authority.[289]

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[288] Story, *Commentaries on the Constitution*; Story, *The Miscellaneous Writings*; James Kent, *Commentaries on American Law* (New York, 1836); see also James Kent, *A Lecture, Introductory to a Course of Law Lectures in Columbia College, Delivered February 2, 1824* (New York, 1824)

[289] Timothy Walker, *Introduction to American Law* (Philadelphia, 1837); *The North American Review* Vol. 45, No. 97 (Oct., 1837), pp. 485-488; Walter Theodore Hitchcock, *Timothy Walker: Antebellum Lawyer* (New York, 1990); Paul Holsinger, "Timothy Walker: Blackstone for the New Republic," *Ohio History*, 84:3 (Summer 1975).

Introduction to American Law pondered the United States' capacity to alter its constitutional self. Walker suggested that "one of the transcendent beauties of the work they have left us, [is] that it admits of reform, without revolution." Most antebellum books of constitutional instruction relegated amendment to an afterthought or silence. Often texts drew no temporal or narrative separation between the original text and Bill of Rights. The eleventh and twelfth amendments were walled off as matters of clarification that belonged to a closed Founding moment. Walker's framers had "wisely made provision" for national constitutional upkeep so that the "stately machine continues to move on, though its parts be undergoing repairs." This reconciliation of historical veneration with amendment assumed the most limited scope, as a pathway not for transformation but for preservation. Walker suggested that amendments might clarify several matters on which there was "no room for doubt" – "the nature of our union" and "extent of incidental powers." The professor urged that the "deeply agitating questions of state rights, secession, nullification, and the like, ought to be put forever at rest." For Walker, this meant affirming the Constitution as he understood its authors to have intended it. Slavery lay beyond alteration. The primacy of Walker's love of union, order, and prosperity counseled against disruptive abolition, and so his Founding proscribed it: "One thing is certain, that the federal government cannot interfere with it, in the states where it exists, without violating a compact of peculiar sacredness, without which the Union could not have been formed, and cannot now be preserved; but all else is doubtful." Tellingly, Walker made no call for a clarifying amendment about remaining questions over territory and representation. "Can the Union survive the strife which threatens to be carried on with increasing violence, between the advocates and opponents of slavery? This is a fearful question, which time only can answer," the textbook stating, peering out fearfully from the safe harbor of constitutional observance.[290]

The legal academy's constitutional veneration, itself mirroring the vernacular of public constitutionalism, appeared in aids to the laymen. Individuals without academic or professional training could hope to navigate the American legal system with guides like *The Citizen's Law Book: Containing the Constitution of the United States*. The book offered what its attorney author deemed a practical statement of constitutional meanings. For example, following a rote synopsis of defects under the Articles of Confederation, readers learned "The object of this more perfect union was, in the language of the preamble, first to establish justice; that is, to provide for delivering up fugitives from justice to secure the privileges of the citizens of one state to those of another and an impartial administration of the laws to all." Whether delivering up enslaved fugitives from service was also justice went unstated. *Well's Every Man His Own Lawyer and United States Form Book* offered another source. Promising "the professional man, the farmer, the mechanic, and the business man a comprehensive and reliable" source of legal information, the volume necessarily featured the U.S. Constitution. People bought John Bouvier's popular *Law Dictionary* and learned that the Constitution, "framed by a convention of the representatives of the people," was the "fundamental law of the United States." The dictionary provided simple definitions for hundreds of legal terms; for the Constitution, however, it delivered a "short analysis of this instrument, so replete with salutary provisions for insuring liberty and private rights and public peace and prosperity." Attorney Silas Jones aimed his *An Introduction to Legal Science* (1842) for "every citizen" interested in a "general and business education." Its account of the Founding sounded with reverence. Out of the "failure" of the Articles of Confederation, a new national vision arose. "Upon this grand conception, the convention framed the Constitution of the United States, an instrument of which it is not eulogy to say it has not its parallel in the

[290] Timothy Walker, *Introduction to American Law* (Philadelphia, 1837);

history of deliberative sagacity and comprehension," Jones explained. When consulting these works of legal education, people outside the profession found that a common vernacular constitutionalism echoed between people and practitioners.[291]

A distinct constitutional education developed in the South, conducted under the shared national banner of veneration for the Founding. While the constitutionalism espoused by Story, Walker and like-minded teachers convincingly braided law and nationalism for many, it provoked decidedly more ambivalent reactions among southerners concerned with legal education. The *Southern Literary Messenger* warned against using Story's *Commentaries* in schools. Editors were glad to see local voices "correcting the evil tendency, and [] maintaining the orthodoxy of the States' right." Jurists, professors and politicians guiding southern legal education taught reverence for the Founding while developing their own constitutional truths. Lucian Minor's reminiscences following the death of University of Virginia law professor John Davis in 1847 suggested their content. Davis had used as "a chief text-book" in his constitutional law courses "the celebrated Madison's Report," an 1800 exegesis on state sovereignty drawn by James Madison during political battles. When South Carolinian nullifiers later deployed the work, Madison toiled to distinguish its meaning. But Professor Davis, it was fondly recalled, "embraced, earnestly and unchangingly, the strictest interpretation of the United States Constitution, inculcated by that state-paper; and dissented from some relaxations of its doctrine (as he and many others considered them) which the illustrious author countenanced in his latter years." That is, the professor adhered to what he regarded as the original Madison (circa 1800).[292]

Historically reverent constitutionalism was deeply embedded in the South's legal culture. Southern lawyers had led discursive innovations during the Missouri and Nullification Crises, and rising attorneys routinely practiced claiming the Founding. Georgia Superior Court Judge William Law, speaking at the newly-founded Georgia Historical Society in 1840, modeled how to marvel at the "undying immortality" of the national fathers who "erected a government very far surpassing any model which the world had known in practical operation." He recited political accomplishments that inhered within the Constitution, deemed it "the ark of our political safety," and prayed for "each succeeding generation to preserve and perpetuate to posterity the blessings of this fair fabric of government." These were essential idioms and tropes of antebellum constitutional discourse, and Law, partners with U.S. Senator John Berrien in a prosperous Savannah firm, was the consummate southern legal elite. In 1860, he enthusiastically endorsed secession; then, refusing to take the Ironclad Oath in 1866 to regain admission to courtroom practice, Law relied on the Constitution's prohibition on ex post facto laws and taking property without due process to successfully challenge the statute. He also relied upon the oral arguments of former Confederate governor Joseph Brown and the sympathetic perspective of Georgian federal judge, John Erskine. From his perspective, the arc of Law's career was a straight line of conservative devotion to the Constitution of his fathers. Law, Brown, Erskine and countless

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[291] *The Citizen's Law Book: Containing the Constitution of the United States* (New York, 1844); *Well's Every Man His Own Lawyer and United States Form Book* (New York, 1858); John Bouvier, *A Law Dictionary: Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* (New York, 1839, 1856 ed.); Silas Jones, *An Introduction to Legal Science* (New York, 1842); *Hunt's Merchants' Magazine*, Volume 6, 294.

[292] *Southern Literary Messenger* (December, 1841), 866. *Lucian Minor, Discourse on the Life and Character of the Late John A. G. Davis, Professor of Law in the University of Virginia* (Richmond, 1847), 16.

southern attorneys trained to obey and apply an original Constitution as they imagined its meaning through gauzy layers of historical reverence.[293]

Virginia was the epicenter of southern constitutional education during the antebellum period. Henry St. George Tucker, perhaps the Story of the South, ran the Winchester Law School, presided over the Virginia Court of Appeals and held a law professorship at the University of Virginia. From an extended clan of Virginia jurists, lawmakers and professors, Tucker was "well known in this section of the country as a profound venerator of our constitution, devotedly attached to the institutions of his country and to the Union" according to a travelling "New Englander" who met him during a stage coach journey. He used Story's *Commentaries* as textbook and foil. Tucker's published *Lectures on Constitutional Law* (1843) explained that the northern work afforded a southern student "abundant materials for the formation of his own opinion and for enabling him to decide satisfactorily whether the author's inferences from the facts which he himself has stated be warranted by them or not." The lectures invited students to scorn Story's account of a Founding that created one national people: "Can we suppress our wonder at the distinct avowal of such an opinion by such a man?" But the *Commentaries*, Tucker explained, "represent[] in a general sense the opinions of a large body of statesmen and jurists in different parts of the Union, avowed and acted upon in former times, and recently revived under circumstances which have given them increased importance, if not a perilous influence." Northern constitutionalism became a danger to train and teach against. The leading object was to inoculate elite young southerners. Tucker provided an alternative constitutionalism that located an original meaning guaranteeing state and southern power.[294]

Virginia politician Abel Upshur joined the project of "correcting" constitutional instruction in 1840, publishing a long, trenchant rejoinder to Story's *Commentaries*. in 1840 southern voice to the. Tucker promoted the work, *A Brief Enquiry Into the True Nature and Character of Our Federal Government*, as perfectly suited for southern education. Upshur, an attorney who would serve as secretary of the navy and secretary of state under John Tyler, complained that *Commentaries* had been "recommended in the strongest terms to public favor" without any challenge, and he wished to deny its characterization of the federal government and Union. He promised conclusions "drawn from the authentic information of history." Yet Upshur's embrace of the past was vexed; his convictions overstepped the archive. "The Constitution is much better understood at this day," he suggested. "This is not true of the great principles of civil and political liberty which lie at the foundation of that instrument, but it is emphatically true of some of its provisions, which were considered at the time as comparatively unimportant, or so plain as not to be misunderstood, but which have been shown by subsequent events to be pregnant with the greatest difficulties," he instructed. Keeping within venerative channels, he finessed this distinction between fundamental principles and textual possibilities. The framers had not erred, Upshur taught, but subsequent generations had failed to adhere to their original proslavery understandings and limited purposes for national government. In this respect, ascribed Founding visions should trump even constitutional text.[295]

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[293] *Southern Ladies' Book a Magazine of Literature, Science and Arts*, Vol. 2, Iss. 4, (Oct 1840); *ex parte William Law*, 35 Geo. 285 (1866); Isaac Avery, T*he History of the State of Georgia from 1850 to 1881: Embracing the Three Important Epochs: the Decade Before the War of 1861-5; the War; the Period of Reconstruction* (New York, 1881), 361. Carolyn Swiggart, Shades of Gray: *The Clay and McAllister Families of Bryan County, Georgia During the Plantation Years (ca. 1760-1888)*, (Darien, CT, 1999), 176.

[294] Henry St. George Tucker, *Lectures on Constitutional Law* (Richmond, 1843).

[295] Abel Upshur, *A Brief Enquiry Into the True Nature and Character of Our Federal Government* (Petersburg, 1840).

Upshur ostensibly advocated for strict construction. The constitutional watchword of southern Democrats, this interpretive approach meant not simply to read the text narrowly, but to construe it against federal power based upon premises about what transpired at the Founding. Yet Upshur's *Enquiry* could not maintain his positions with respect to either strict construction or the role of historical wisdom. The former approach would not justify the proslavery national government that he believed the Constitution enabled, whether in fugitive slave rendition or acquisition of territory. "I certainly do not mean to say that in construing the Constitution we should at all times confine ourselves to its strict letter," Upshur openly admitted, because "powers are granted by that instrument which are not included within its express terms literally taken but which are nevertheless within their obvious meaning." What then did he teach as the proper avenue to constitutional meaning? "*The strict construction for which I contend applies to the intention of the framers of the Constitution, and this may or may not require a strict construction of their words*." This verbal pirouette revealed much. Recurring to the authority of the Founding, Upshur merged historical veneration with tropes of strict construction to present a constitutionalism at once subjectively inflexible and yet capable of accommodating proslavery constitutional certitudes. These qualities made the synthesis ideal for southern legal education.

Law professor Nathaniel Beverly Tucker staked out a no less ambitious claim on the past. An early apostle of southern radicalism, he taught students at the College of William and Mary that during the Founding, among "a vast majority of the men of that day, there was a paramount desire to guard the sovereignty of the states, and by no means to arm the hands of federal functionaries with any pretext" for interference. In his account, these forbearers assumed that state pride would preserve the constitutional order. Thus it became a duty to "our children, as well as to our ancestors, to cherish the memory of their virtues and… to habituate ourselves not only to regard [Virginia] as one of the bright stars of our federal constellation but as, in and of herself, A SUN." Tucker equated proper historical constitutionalism with veneration of an individual state. He described a Founding that relished deep state allegiance rather than feared it. "Trust me, gentlemen," he concluded, it is by this "alone that the union itself can be preserved." Beverley Tucker spread this message widely, embedded in literature and public address. Tucker depicted the process of constitutional learning in his novel *The Partisan Leader: A Tale of the Future* (1836), set in a war-torn America in which Virginian rebels sought to join a Southern Confederacy promulgated the hopes and fears of an early fire-eater. The law professor portrayed the liberation of a young Virginian, Douglass, from false constitutionalism. In dialogue with an older southern rebel, the man posited that he could not utter sympathies for the southern cause due to their unlawfulness and his allegiance to the Constitution. Mr. Trevor responded, "what if your views of the constitution had shown you that the acts of the Government were violations of the constitution… Would you support the constitution by taking part with those who trampled it under foot, against those who upheld it as long as there was hope?" Douglas replied that he would have denied his own judgment, thinking it absurd to go "against the opinions of the legislature, executive, and judiciary." Tucker's Mr. Trevor punctured Douglass' faith. Upon discovering the error of practicing constitutionalism under a Constitution already desecrated, "Douglas colored high, and, after a long pause, said: 'I see that I have been swinging in a gilded cage, and mistook its motions for those of my own will…. Thank God! I am free!'" With Douglass as a proxy for the books' prospective audience, Tucker guided southern readers toward original constitutional meaning set apart from whatever northern elites said. In 1838, he lectured the Lynchburg Young Men's Lyceum that "the sole and avowed motive to the adoption of the federal constitution" was "to place the external relations of all the states on the same footing and

to unite the powers of all for the common defence." By this measure, Tucker instructed attendees to regard any action beyond such original purposes as offending "the spirit even when they do not transcend the letter of that instrument" for violating the rule of the past.[296]

When law students and lawyers studied slavery as constitutional law, it came wrapped in legitimating narratives of the Founding. This was the case in Story's *Commentaries*, as it discussed original compromises, fugitives and jurisdictional limits; and it was the case in reports as judicial opinions accrued the vernacular constitutionalism that legal professionals introduced over the period. In the emerging treatise culture, normative works on slavery taught through the instrument of the Founding. George McDowell Stroud, a long-serving justice on the District Court of Philadelphia, published an institutional image of slavery in *A Sketch of the Laws Relating to Slavery in the Several States of the United States of America* (1856), twenty-nine years after issuing an initial edition in 1827. He reflected on what he understood as the better days of the Founding, when he believed slavery had lacked advocates. Reshaping the past for himself and his audience, Stroud made much of claims that Washington had manumitted people through his will, that Jefferson had proposed a Virginia constitution that would free enslaved people born after 1800, and that Madison "was unwilling that the word slave should have a place in the Federal Constitution." But a conceptual tide had turned in 1830: sons had let down the national fathers. Stroud lamented that now Americans are "presented with elaborate [proslavery] essays… from the pens of some of the most gifted and eminent scholars of the South." From this morose vantage, Stroud's text instilled reverence for a lost Founding and deference to its antislavery authority. As a self-professed venerator of the Constitution, Stroud found it important "to state distinctly" his respect for state sovereignty and to promise readers that he was "not now, nor ever has been, a member of any Abolition or Anti-slavery Society." These affirmations of constitutional obedience established the ground on which his conviction that "free states have the constitutional right and power to prevent the extension of the institution into territories" might stand. With his compilation of precedents and Founding history, the jurist imagined that he could contribute to making slavery a disgrace, as he believed it had been during his fathers' generation, and help to confine it to the South, where his fathers' Constitution had left it.[297]

A proslavery mirror to Stroud's work arrived in *An Inquiry into Law of Slavery in the United States* (1858) by Georgia lawyer and slaveholder Thomas R. R. Cobb. A treatise with an appended "historical sketch of slavery," the work presented a hybrid of legal and proslavery thought that justified bondage as a constitutional imperative. Cobb mirrored, reproduced and taught veneration for a Founding supportive of slaveholding ambitions. He averred that the framers had guaranteed the full weight of the federal government and state compliance in the rendition of any slaves who sought freedom. "It cannot be believed that the wise framers of our Constitution whose foresight and providence amounted almost to prophetic ken have left so fruitful a source of disturbance so dangerous a rock of offence without some principles to govern us and some power to enforce," he posited. Weaving together Madison's convention notes and state ratification debates, Cobb identified proslavery national fathers, "enlightened framers" for

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[296] Nathaniel Beverly Tucker, *A Series of Lectures on the Science of Government: Intended to Prepare the Student for the Study of the Constitution of the United States* (Philadelphia, 1845); Nathaniel Beverly Tucker, *A Discourse on the Genius of the Federative System of the United States* (Richmond, 1838).

[297] Jacob Wheeler, *Practical Treatise on the Law of Slavery* (New York, 1837); George McDowell Stroud, *A Sketch of the Laws Relating to Slavery in the Several States of the United States of America* (Philadelphia 1827); Stroud, *A Sketch of the Laws Relating to Slavery in the Several States of the United States of America* (Philadelphia, 1856); John Hill Martin, *Martin's Bench and Bar of Philadelphia: Together with Other Lists of Person* (Philadelphia, 1883).

whom he counseled admiration. Their attributed wisdom operated to guarantee slavery: to have not provided fully for the rights of slaveholders, Cobb urged, "would show an inexperience and folly in the venerable framers of the Constitution from which of all public bodies that ever assembled they were perhaps most exempt." After publishing the text, Cobb co-founded and led the Lumpkin School of Law in Georgia. The lawyer brought constitutional education to southern students until his fire-eating dreams came true: in 1861, he became the primary drafter of the Confederate Constitution. Both Stroud's *Sketch* and Cobb's *Inquiry* encouraged a constitutionalism that looked reverently upon the past. Conflict over slavery induced this backwards gaze, eliciting a venerative consensus that covered and enabled bitter disagreement.[298]

This consensus in legal education produced lawyers equipped to claim the Founding *for* their causes by claiming the Founding *as* their cause. It was a consensus both linguistic and conceptual. Even Supreme Court Justice Henry Baldwin, known for refusing to conform to either the constitutional nationalism of Story and Marshall or the strict construction of the Virginia school, made veneration the keystone of his constitutionalism. Wading into legal education in 1837 with *A General View of the Origin and Nature of the Constitution and Government of the United States*, Baldwin expressed his method for reading the instrument "intended by its framers to endure for ages to come." Whether contemplating the Constitution with patriotic exuberance, historical analysis or disinterested judgment, he testified that all must admit its glory. Beholding the "convention in which the people did assemble, how they acted, what they did, the work which came finished and perfect from their hands, and the scenes of action," Baldwin found an irresistible "moral grandeur and sublimity." This awe shaped his approach to interpretation and construction. The Constitution, Baldwin explained, is a "law of supreme obligation, made for the purposes it declares, [] by enlightened patriots; men, whose intentions required no concealment, employing words which most directly and aptly expressed the idea *they* intended to convey, as well as *the people* who adopted it; must be understood to have employed words, *in their natural sense, and to have intended what they said*." From this venerative premise, Baldwin determined to read the Constitution according to what he believed the framers plainly and simply intended by their words. This quest for original meaning rested on explicit reverence for the Founding.[299]

In the realm of legal education, the space outside reverent historical constitutionalism was lonely. Examining a would-be legal educator from the periphery of antebellum constitutional culture shows further the shape of its normative core. That fringe belonged to pioneering political economist Daniel Raymond, who published a remarkable work in 1840 that revealed a conflicted stand against the hardening boundaries of American constitutionalism. *The Elements of Constitutional Law and of Political Economy* took up the question of how to think about the Constitution. Unsuspecting readers who encountered it at a bookshop or library may have been startled by what they found. Once a lawyer trained at Tapping Reeve's Litchfield Law School, Raymond sounded a familiar refrain when proclaiming that the "convention was a body of as wise men as ever were assembled"; but his affirmative declaration that the Founding generation was "not authorized to give an authoritative construction to the instrument" placed him at stark odds with convention. Among the book's propositions "opposed to the commonly received opinion" were contentions that "congress exercises no power whatever by virtue of any grant" and a scornful dismissal of the Tenth Amendment as "a manifest solecism without sense

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[298] Thomas R. R. Cobb, *An Inquiry into Law of Slavery in the United States* (Philadelphia, 1858).

[299] Henry Baldwin, *A General View of the Origin and Nature of the Constitution and Government of the United States Deduced from the Political History and Condition of the Colonies* and States from 1774 Until 1788… (Philadelphia, 1837).

or meaning." He praised James Madison not for far-seeing wisdom but for manipulation – "confounding the adversaries of the new constitution and thereby preventing them from prejudicing the people," which necessarily required going "much beyond the truth." The work resisted the strictures of temporal deference. Raymond's view that an American coming of age "is not bound to adopt it in the same sense or to give it the same construction his father gave it" disclaimed the posture sons were taught to assume toward the Founding. Seeking an energetic, democratic political economy, he pushed aside the mediating structure of historical veneration.[300]

Extraordinarily, Raymond took liberties with the framers' text. His volume included a modified Constitution corresponding to his conception of how power was allocated. As he described the plan, text establishing government structure was "printed in common type," while text limiting its power appeared in larger type, with parts concerning state government power "also printed in larger type and enclosed in brackets," and text "merely declaratory of the powers" of Congress "printed in italics." It was a living document that Raymond elaborated. "Some eminent jurists say that, as the constitution of the United States is but one instrument; but one right, uniform construction can be given to it while it lasts," he noted. Raymond rejected this view as injurious fallacy. Instead, he argued that the constitution was crafted "for the use and the benefit of the people of the Union, and it was designed to promote their happiness not merely of one generation but of each and every successive generation…. and it must be admitted that each generation is the best judge of its own interests." Yet in the very moment of announcing freedom from the Founding, Raymond evinced the difficulty of extricating argumentation from the vernacular of original purposes and design. Admitting doubt about the possibility of reeducation, Raymond supposed that "not one in an hundred of the people ever read the constitution, and not one in a thousand of those who do read it will take the trouble, if they are even capable, of understanding or forming an opinion about it." *The Elements of Constitutional Law and of Political Economy* represented the limits of developing an anti-historical, non-deferential popular constitutionalism. Raymond wanted Americans to control their own constitutional destiny, to see that the text was theirs to construe and change. His true foe was not judicial mandarins but public acceptance of Founding authority. His call to independent popular constitutional judgment came in an esoteric publication; meanwhile, public speakers populated stumps "illustrat[ing] our splendid system of government by a sublime figure of rhetoric," and textbooks instilled historical reverence. Most Americans learned to look intently upon past for fixed constitutional meaning. In doing so, they were encouraged by lawyers who gladly embraced the authority of the past.

Conclusion: Slavery and Popular Constitutional Culture

Routine educational life, away from immediate struggles over slavery, discloses the contours of antebellum America's dominant constitutional culture across time and space. Yet the destabilizing presence of sectional conflict and mass enslavement was the prime moving force behind a firmament of reverent deference for the Founding. Free white citizens constructed, inculcated and assimilated this form of devout constitutional knowledge to sustain the United States and shape its foundation, while often working at cross-purposes for the visions of Union they held. In national curricula, the new American constitutionalism assumed a general expression and statement of principles. As this cultural body grew in the shadow of contestation over slavery, section and state power, it stood a degree removed from specific public battles.

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[300] Daniel Raymond, *The Elements of Constitutional Law and of Political Economy* (Baltimore, 1840) This was the substantially revised fourth edition of his important text on national wealth. Donald Frey, "The Puritan Roots of Daniel Raymond's Economics," *History of Political Economy 32.3* (2000) 607-629.

Popular embrace of the authority of the Founding, the ascribed visions of the framers, and the commanding glory of the Constitution developed as a reservoir of power during everyday instruction – power to be invoked in particular ways as political eruptions required.

Outside the common schools, college halls and law offices where antebellum Americans trained as constitutional sentinels, they stepped into a wider world of constitutional engagement. Beyond the realm of classbooks and classrooms, people encountered an entangled, immersive popular education on slavery and the Constitution. Overt conflicts made explicit the generative relationship between the politics of slavery and historical logic of American constitutionalism. Congress was the foremost engine of constitutional discourse claiming the Founding. During clashes over slavery, oratorical production in Washington D.C. became what Theodore Dwight described as a near-mechanical process: "speeches are made in Congress, written out, amended and published by thousands to influence some county state or number of states." During the seething, protracted 1850 session that teetered on the edge of secession, attorney Hiram Ketchum witnessed this procedure unfold. "Speech after speech was made by northern men against southern men, and by southern men against northern men," he recounted, and they "were printed, sent home and read, and they influenced the South against the North and the North against the South, for month after month, far more than the people were influenced during the discussions of the convention that framed the Constitution." Nearly the whole free literate republic could encounter Daniel Webster's Seventh of March speech making enforcing slavery a grand duty: "Never did there devolve on any generation of men higher trusts than now devolve upon us, for the preservation of this Constitution and the harmony and peace of all who are destined to live under it." Readers could reckon with John Calhoun's dying insistence that the U.S. had fallen "from a federal republic, as it originally came from the hands of its framers, into a great national consolidated democracy." With speeches and circulars, elected officials confronted questions over slavery by reproducing venerative constitutionalism. Vast partisan print networks spun this discourse out to the people. Constituents of Missouri Representative James Bowlin, for instance, read his warning that "severance of this great Confederacy, bound together by a Constitution, the work of our patriot fathers, by so many glorious reminiscences of the past, by so many bright and brilliant hopes of the future, has always been, in my judgment, the refined essence of unadulterated political folly," and his slaveholding community "must protect our rights within the pale of the Constitution."[301] Editors, correspondents and readers chimed in to ratify or dispute points of history and meaning, as the newspapers during the Missouri and Nullification Crises demonstrated. In his 1855 memoir, a congressman recalled that the two leading Washington D.C. papers "reached the most remote corners of the Union." Through the national press and local printers, communities followed the narratives of constitutional history with which their government waged politics. In antebellum America, most days brought news of the Founding.

If the civic texts and history books studied by Americans inculcated the tenets of constitutional faith from youth, political life welded those lessons to pressing conflicts. In this wider world, as people learned the revere and defer to the Founding by reading about struggles over the future of American slavery, they also seamlessly argued, attended and acted upon their constitutional convictions. They entered a realm filled with speechifying, mass meetings, civic festivals, mobbing, petitioning campaigns, barbeques and electioneering. Constitutional learning became constitutional participation as people moved from reading papers to writing, rallying,

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[301] *Letter of John Fine* (1840); *Circular letter to the electors of the First congressional district of Iowa* (1856); *Circular of Mr. James B. Bowlin to his constituents, the voters of the First Congressional District of Missouri* (Washington DC, 1850).

fighting and, in the case free white men, voting. As the flashpoints of sectional discord unfolded, the lessons of antebellum constitutionalism structured how the people understood and contested the flow of events. The venerative census created room for ferocious conflict on constitutional meaning itself, and it shaped the pathways down which disputes travelled.

This chapter has argued that Americans developed a constitutional culture of historical reverence at the confluence of nation-building education and national danger implicating slavery and sectional power. It has depicted an alternative way of seeing the dominant mode of popular constitutionalism. Looking not to party platforms and anti-judicial sentiment but the civic texts, history books and constitutional study of generations of white Americans, it has traced a cultural structure that impelled Americans to broadly celebrate rule by constitutional history – as they variously imagined its prescriptions and prohibitions. Through a common vernacular of deference to the fathers' Constitution, this cultural formation provided a near-hegemonic language with which to claim and deny meaning. As rising generations venerated the Constitution crafted by national fathers; as they attributed current prosperities and future destinies to its ascribed wisdom; and as they vowed to preserve original Founding visions that they knew must be true, antebellum Americans practiced the rites and rituals of slavery's constitutionalism.

CHAPTER FIVE

FIGHTING THE FOUNDING: BLACK CONSTITUTIONALISM AND THE ABOLITIONIST MOVEMENT

What Did Frederick Douglass See?

On the second evening of the 1843 National Convention of Colored Citizens in Buffalo, New York, twenty-five-year-old Frederick Douglass took a stand. Assembled free people of color and those whose bodies remained subject to claims of legal ownership were prepared to pass a resolution affirming their rights as Americans citizens – guaranteed under the U.S. Constitution. Douglass, who belonged to latter group, did not believe a word of it. With flaming language, he announced "that the constitution of this country was a slaveholding instrument, and as such denied all rights to the colored man." This anti-constitutional stance did not meet with favor on the convention floor. Many delegates had exercised the precarious right of interstate travel to attend, coming from Maine, Massachusetts, Connecticut, New York, Ohio, Illinois, and even Virginia, North Carolina and Georgia. Indeed, some participants disapproved of the resolution affirming their rights on opposite grounds: "that its sentiments were self-evident—that nothing could be plainer, than that native free born men must be citizens, and that the converse of this was palbably absurd," and accordingly the assembly should not dignify doubt. In 1843, this Constitution-scorching Frederick Douglass was less than five years removed from a life of enslavement and a perilous flight to the North. With clarity, he saw a national government that sustained slavery while boasting of liberty; what seemed delusive was the constitutional embrace performed by his fellow delegates. This Douglass was not yet the elder statesmen of black America, the man whose fame, writings and daguerreotypes spread across the country, the living symbol who conversed with Lincoln.[302]

He could not become that Douglass without changing his public mind. To renounce the Constitution itself in antebellum America was to consign oneself to exile from a consensus on constitutional veneration that undergirded political life. It meant choosing alienation, both discursive and practical, from allies and remaining at constant war with the cultural fabric that one brushed against daily. Douglass was not alone in this caustic stand, but it was a profoundly lonely one. In slavery, he commenced his constitutional education by learning the practical jurisdictional lines of bondage, freedom and fugitivity framed by the federal Constitution, all the while witnessing the patriotic rhetoric of white civic life in the antebellum Border South. Once making his escape and joining his spouse in New York, Douglass received a rare constitutional education among the William Garrison school of immediate abolitionists with whom he initially associated. He emerged as a powerful antislavery voice in their company – a community who vowed "no union with slaveholders" and notoriously condemned the Constitution as an "agreement with hell." This perspective resonated with the phenom, who found "their views supported by the united and entire history of every department of the government," as he later reflected. Douglass carried this knowledge of a malevolent Constitution to Buffalo in 1843 and onward through the rest of the decade. As the hour drew near for his return to the United States from touring England in May 1847, he could say with confidence to a crowd at the London Tavern that "the constitution consecrates every rood of earth in that land over which the star-spangled banner waves as slave-hunting ground." In 1849, when Liberty Party organizer Gerrit

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[302] *Minutes of the National Convention of Colored Citizens; Held at Buffalo; on the 15th, 16th, 17th, 18th, and 19th of August, 1843; for the purpose of considering their moral and political condition as American citizens*. (New York, 1843).

Smith proposed an antislavery textual reading of the Constitution, Douglass still appeared unwavering in his public commitment to a clear-eyed condemnation of American constitutionalism. "To think of good government in a Union with slaveholders, and under a Constitution framed by slaveholders, the practical operation of which for sixty years has been to strengthen, sustain and spread slavery, does seem to us delusive," Douglas responded in *The North Star*, demanding that people start "afresh under a new and higher light than our piratical fathers saw."[303]

The constitutional education of Frederick Douglass did not cease during his time with the Garrison community. He lived, traveled, argued, read and listened among a mass of white Americans for whom the Constitution was bedrock and its history a beacon. From their complacency, he learned about futility and possibility in American constitutionalism. Burning the document in word and deed incinerated popular legitimacy and authority in a society that revered their fathers' Constitution, and it perhaps abandoned enslaved brethren in the process. Redeeming and reimagining the Constitution without taking the transgressive leap of denunciation presented a pathway that might conduct Americans in an emancipatory direction. A shift was imminent, if not already underway, when Douglass considered the arguments of Gerrit Smith. In the spring of 1851, Douglass published a notice in *The North Star*: "Change of Opinion Announced." His editorial voice informed readers that "we had arrived at the firm conviction that the Constitution, construed in the light of well-established rules of legal interpretation, might be made consistent in its details with the noble purposes avowed in its preamble." As a public intellectual and editor, Douglass returned from anti-constitutional exile. A new 1855 memoir explained that he had discovered that "the constitution of our country is our warrant for the abolition of slavery in every state in the American Union," and "could not well have been designed at the same time to maintain and perpetuate a system of rapine and murder like slavery" because it lacked any express authorization of bondage. Because the textual corpus of Constitution contained this potentiality for extirpating national slavery, disunion must be opposed and redemption sought. He presented this constitutional persuasion, which enlarged a rift in abolitionist circles, as a learning process. By 1860, he would characterize his former opinions as those of a child, taken on trust, but "Subsequent experience and reading [] led me to examine for myself."[304] Fundamentally, this public conversion reflected the practical challenge of fighting against the edifice of constitutional veneration in the service of slavery. By entering the unfriendly terrain of constitutionalism, Douglass could keep hold of the document with a reverent grasp while pruning and discarding its framers' supposed understandings. Having learned the pervasive power of veneration for the Founding, Douglass hoped to redirect it towards emancipation by cutting away the overgrowth of debates over historical intent and practice. As Douglass explained while discussing the clause on fugitives from service, "that Mr. Madison can be cited on both sides of this question is another evidence of the folly and absurdity of making the secret intentions of the framers the criterion by which the Constitution is to be construed." This was the active negotiation of the power and structure of dominant

[303] *The North Star*, March 30, 1849.
[304] *The North Star,* May 15, 1851; Frederick Douglass, *My Bondage, My Freedom* (New York, 1855); *Farewell Speech of Mr. Frederick Douglass Previously to Embarking on Board The Cambria Upon His Return to America, Delivered at the Valedictory Soiree Given to Him at the London Tavern on March 30, 1847* (London, 1847).

constitutionalism. Douglass reckoned with the hegemonic presence of historical veneration, and then he crafted his own antislavery lessons.[305]

The arc of Frederick Douglass' constitutional knowledge is a testament to the gravitational force of popular constitutionalism in antebellum America. It is an ambiguous story, neither triumph nor tragedy. Rather, it reveals the disciplining of a searching mind – one that sought efficacious resistance against slavery and saw vanishingly thin room for action beyond the borders of a Constitution beloved and obeyed by most citizens. His embrace demonstrated the capacity of public constitutional culture to bend even the imagination of antislavery radicals and constitutional dissenters. There remains an essential opacity as to whether Douglass fully believed in textual constitutional redemption or only believed that it was a strategic necessity. In an important sense, however, the difference did not matter: the power of venerative culture constrained Douglass, pressuring his internal perspective to change or else requiring adaptation of his public self for the sake of practically militating against slavery. Out of doors, he traded his lonesome, searing truth of 1843 for the pursuit of a shared constitutional fiction.

This chapter listens to the perspectives of people who looked at the Constitution from outside the venerative consensus that most Americans inhabited. It analyzes how people – free black Americans, fugitives, enslaved people and abolitionist communities – wrestled with the hegemonic culture of veneration for the Constitution and Founding. The strenuous path of negotiation that Douglass walked was not necessarily the same one chosen by fellow black Americans, both those living in northern fugitivity or as free people of color. Many maintained some measure of the perspective that Douglass originally espoused. Others claimed constitutional rights in the fashion that Douglass had mocked in 1843. And as the antebellum era dragged on with the Slave Power making policy and perpetuating bondage, some once inclined to hope for constitutional reform and redemption abandoned that approach. Logic and bitter experience seemed to dictate that disunionism and anti-constitutionalism provided the one narrow pathway towards dealing a blow to national slavery. Inside white abolitionist and antislavery communities, the force of constitutionalism was a wedge that separated radicals from relative respectability in the North. Among the former, some spurned the Founding and embraced disunionism, while others tried to circumnavigate the authority of history, interpreting it out of existence or rewriting the past. For the enslaved, meanwhile, the jurisdictional boundaries of relative freedom comprised the practical constitutional knowledge that mattered most.

Constitutional Learning while Black

America taught free blacks to be constitutional skeptics. Seeking a better future among believers in the past, free people of color generally developed a relationship to veneration can be understood as a function of strategy and experience. The black press made visible this negotiation of the dominant constitutional culture. In the late 1820s, *Freedom's Journal*, the first newspaper published by black Americans, advertised itself as an instructor on matters political and constitutional. In its prospectus, editor John Russwurm stated its object of diffusing knowledge "among our people" and promised that "we shall ever regard the constitution of the United States as our polar star." While adhering to this stance, a prudent one for the newspaper's daring enterprise, it instructed that the Constitution should mean something for free blacks. When the Ohio legislature enacted a law requiring African-Americans to give individual bonds

[305] Frederick Douglass*, The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery*? *A Speech Delivered in Glasgow, March 26,* 1860*, in Reply to an Attack Made Upon His View by Mr. George Thompson* (Halifax, 1860).

or face exile, the paper commented that the act's "cruel authors never could have seen the Declaration of Independence nor the Constitution of the United States or they would have perceived it equally illegal" as if they had imposed such demands on white people. In the *Journal'*s pages, readers could find David Walker address the General Colored Association in Boston calling for aid to black Americans throughout the whole country – "with the restriction, however, of not infringing upon… the U.S. Constitution." During this moment, Walker was honing how to negotiate America's growing obsession with their fathers and Founding. His famous 1829 Appeal would demand that the country compare its "Declaration of Independence, with your cruelties and murders inflicted by your cruel and unmerciful fathers and yourselves on our fathers and on us--men who have never given your fathers or you the least provocation!!!!!!" With his freighted language of fathers and rights, Walker cast the Founding itself as an empty promise. It was a harbinger of voices to come that would denounce hypocrisy while claiming rights. As text and message, the *Appeal* traced subversive and covert routes southward, along with other antislavery literature. The productions and understandings of free black communities in the North passed into hands of free and enslaved African-Americans whom legal restrictions on mobility and communication placed at tremendous remove – even if not to the "incendiary" extent that planter politicians sometimes claimed.[306]

Black writers and readers learned to scrutinize constitutional veneration. The text and constitutional faith of white countrymen, in the lessons worked out in newsprint, became an instrument of critique and leverage. Between the late 1830s and early 1840s, the New York-based *Colored American* afforded space for readers to consider and debate questions of constitutional meaning and strategy. In 1841, for instance, two readers exchanged views over the soundness of trying laws against free blacks in the Supreme Court and developing a National Convention to address the issue. Primarily run by black leader Charles Ray, the paper republished salient constitutional discourse, propagating at least a moderately emancipatory constitutional vision. On August 26, 1837, the *Colored American's* front page featured both a letter from Sarah and Angelina Grimké affirming the constitutional power of Congress to ban the slave trade in the Capitol and a reprinting of Vice President Richard Johnson's 1820 speech declaring that the Constitution conferred such power on Congress. When the Massachusetts legislature protested that a congressional gag on antislavery petitions was "at variance with the spirit and intent of the Constitution of the United States," an editorialist wrote an impassioned concurrence, condemning southern officials as "proud lordlings [who], when called on to act out the principles of the Constitution, and heed the voiced that created them, throw themselves upon their dignity, and cry out, dissolve the Union!!" Other short-lived African-American papers such as Martin Delany's *Mystery* (Pittsburgh) and David Jenkins' *Palladium of Liberty* (Columbus) in early 40s and then Henry Garnet's *National Watchmen* rose and fell, offering spaces for sharing constitutional understanding and critique while they lasted. For instance, when the Supreme Court decision in *Prigg v. Pennsylvania* (1842) struck down the legal process that the state had provided alleged fugitives, Stephen Myer's *Northern Star and Freeman's Advocate* in Albany reported the news, lamenting that constitutional rights including trial by jury are "now denounced as unconstitutional by the federal court of this session."[307]

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[306] *Freedom's Journal*, April 25, 1828, 37; "BARBARISM IN AMERICA. The Rights of All," *Freedom's Journal*, August 07, 1829, 28; "ADDRESS, Delivered before the General Colored Association at Boston, by David Walker," *Freedom's Journal*, December 20, 1828.

[307] *The Colored American*, July 17, 1841; *The Colored American*, August 26, 1837, 1; Massachusetts and the Constitution, *The Colored American*, April 1, 1837. Stephen A. Myer, *Southern Consistency, Northern Star and*

In conjunction with these critiques of white betrayal of the Constitution or Founding, some African-Americans sought to reclaim a patriotic and empowered identity within the United States' national origin story. Philadelphian Robert Purvis, responding to new racial exclusions formalized in his state constitution, issued a collective "Appeal of forty thousand citizens, threatened with disfranchisement, to the people of Pennsylvania" laden with historical claims. "We are citizens," he declared, and the Founding proved it: "On the adoption of the present Constitution of the United States no change was made as to the rights of citizenship. This is explicitly proved by the Journal of Congress."[308] At times, claiming the Constitution could offer the legitimation drawing upon white Americans' venerative notions. For instance, the first African-American lawyer, Bostonian Macon B. Allen, was harassed upon his refusal to sign a pledge of support for the U.S. government's war upon Mexico, a campaign that would foreseeably secure more territory for slavery. In response Allen cited his sworn oath to uphold the Constitution taken upon entering the bar.[309] Former newspaper editor and abolitionist organizer William Nell authored the successful volume *The Colored Patriots of the Revolution* to kindle public recognition of black contributions to the Revolutionary history. Nell adapted the discourse and framework of paternal veneration for rising generation of black Americans, asking them to "emulate the noble deeds and sentiments of their ancestors and feel that the dark skin can never be a badge of disgrace while it has been ennobled by such examples." The work showed free black citizens petitioning and claiming rights of a Constitution in which "not a sentence or a syllable can be found recognising any distinctions among the citizens of the States." This vision would culminate in the Civil War, when recollections of early military service could be replaced with direct action. In this moment, T. Morris Chester urged black Americans to "Take down from your walls the pictures of WASHINGTON" and replace it with "the immortal TOUSSIANT"; to "Remove from the eyes of the rising generation the portraits of CLAY, WEBSTER and SEWARD" and put up "the great WARD, the unrivalled DOUGLASS, and the wise ROBERTS, all of whom were born in the South." He reflected an appetite to transcend the Founding and its devotees, to instead celebrate an ongoing black founding with its own narratives and pantheon of heroes.[310]

From Rochester, New York, Frederick Douglass edited a series of important newspapers that provided informational sinews for the antislavery cause. As they followed political events, organizational developments and daily injustices, the papers provided a forum in which to teach critical yet venerative constitutionalism. For instance, in the eponymous *Frederick Douglass' Paper*, "An Old Practitioner" wrote in with a constitutional analysis of slavery that claimed the document for abolitionism. Counseling readers that the institution had no sanction, he suggested that black people's "personal public enemies of Liberty will not publish the sacred documents named at the head of this article, because such publication would ruin their slavery interests."

Freeman's Advocate (Albany, NY) March 10 1842. On free blacks' educational efforts, see Hilary J. Moss, *Schooling Citizens: The Struggle for African American Education in Antebellum America* (Chicago, 2009); Carter G. Woodson, *The Education of the Negro Prior to 1861: A History of the Education of the Colored People of the United States from the Beginning of Slavery to the Civil War* (Washington DC, 1919); William H. Pease and Jane H. Pease. "Walker's Appeal Comes to Charleston: Notes and a Document," *Journal of Negro History* LIX (1974), 287–292.

[308] Robert Purvis, *Appeal of forty thousand citizens, threatened with disfranchisement, to the people of Pennsylvania* (Philadelphia, 1838).

[309] *The Liberator*, June 5, 1856

[310] Nell, *The Colored Patriots of the Revolution*; *Negro self-respect and pride of race: Speech of T. Morris Chester, Esq., of Liberia, delivered at the twenty-ninth anniversary of the Philadelphia ... 1862* (Philadelphia, 1862).

The paper asked "Is the United States Constitution for or against Slavery?" in the summer of 1851, describing a liberatory document to its readers over a series of articles. One writer for the *North Star*, a predecessor Douglass paper, delivered a penetrating assessment of the distinctly unreflective reverence with which the country regarded the framers and Founding. Americans love to claim is it "the peculiar characteristic of this adventurous age that it cares not for precedent… and will not submit to be terrified into the belief if any dogma, because it has received the sanction of high and venerated authority," the editorialist observed. Then the writer pivoted to the disjunctive practice of American constitutionalism. "Is it not an every-day observation, that if such or such a course were adopted, it would require that the Constitution should be altered?" The stigma of change, the writer noted "is supposed to be an unanswerable argument, and all powerful to silence opposition." Here, the writer marveled at the strangeness of public constitutional practice, the proud and popular consent to the Founding's dead hand: "But what is this immaculate Constitution? What pure and holy thing is this, that must not be touched by the sacrilegious hands of the present generation? It is nothing more nor less nor else than a few maxims, written on parchment, by men who lived nearly a hundred years ago." This was a perspective far removed the instructive texts that populated the mainstream of American constitutional education. The editorial concluded that "to assert that what [framers] said, and thought, and did, was perfect, incapable of improvement of correction! What is that but the most abject and unreasoning servility?" These were heavy words, carefully chosen, invoking the gravest of metaphors. In a time of vast slavery, blind veneration constituted bondage.[311]

For free people of color in the North, the Constitution could exist apart from the Founding. From outside the venerative consensus that conflated the two, or that subordinated the words of the former to ascribed visions from the latter, black writers worked with text and principles rather than original unwritten bargains. In the *Anglo-African Magazine*, an ambitious journal of black literature culture and politics published on the eve of the Civil War, pseudonymous writer Y Alida Allen argued in 1860 that "human rights" were summed up and incorporated by the words of the framers: "the Constitution of the United States has told us in a few terse terms what the human rights of the people of this Union were meant to be." The written, unqualified promise of privileges and immunities, Allen stated, recognized the right to freely think and act with the mental and physical powers bestowed by the Creator. Here was active rights-claiming in contravention of dominant constitutional culture, in which meaning flowed from intergenerational textual interpretation rather than from ascriptions of historical intent; from faith in principles rather than faith in national fathers.[312] From this perspective, Allen need not elaborate on the Founding to conclude that "only on one side of Mason & Dixon's line" does society even "pretend to uphold human rights." From this perspective, the popular and judicial approach to a Founding that allowed for ascriptions of original intentions and understandings to supersede the meaning of words was a pronounced danger: it allowed the crafting of invidious histories and imposition of racial exclusions where the Constitution itself was arguably silent. Thus it was the constitutional education of his white countrymen that worried polymath Dr. James McCune Smith, writing after the *Dred Scott* decision purported to deny black citizenship. "Young America," he remarked in the *Anglo-American Magazine*, was taught "the dates instead of the principles of the Revolution." Unlike the dominant cultural

[311] An Old Practitioner, "Some Legal Bearings of the United States Constitution and Our Organic Laws," *Frederick Douglass' Paper*, July 27, 1855; "Is the United States Constitution for or against Slavery?" *Frederick Douglass' Paper*, July 24, 1851.
[312] "Temperance and Human Rights," *The Anglo-African Magazine* (March 1860), 76.

anxiety about constitutional education, which revolved around fears of failing to preserve the patrimony of the fathers, McCune feared the inculcation of a hollow constitutionalism devoid of principles of freedom, liberty and equality that the language of Constitution required. "A School History, sound on the principles of liberty which lay at the root, and culminated in the result of the American Revolution, would be entirely too Anti-slavery to command the market." In this regard, McCune identified the political and financial influence of the Slave Power at work on constitutional consciousness over time: "the South not only buys our goods, but saps the principles of our youth, and gains command of the next generation." He hoped that antislavery lawyer William Goodell would find the time to author and publish a "Constitution of the United States with questions and answers for the use of schools." McCune assured readers that the language of the Constitution at its time of adoption – "a barrier against new and forced or false interpretations" – admitted no basis for racial exclusion. For this reason, he concluded, "we blacks may smile at the Dred Scott decision, and the various rulings of the minions of slaveholders" while striving to "put in practice the glorious principles" of the Constitution itself. The true document, as a textual storehouse of principles, remained in exile while Americans worshipped a false Founding.[313]

Free blacks lived, labored and travelled under legal deprivations and hostility. Leaders of free black communities made an especial point of holding "colored conventions" to develop strategies and solidarity. Building upon local organizing and interstate networks, they campaigned against slavery while seeking to secure rights in their home jurisdictions. From this vulnerable position, many free blacks learned to approach constitutional veneration as a point of leverage. At annual conventions, they banded together to articulate rights claims, which many speakers tethered to the Founding. At the First Annual Convention of the People of Colour in 1831, held in Philadelphia's Lombard Street Wesleyan Church, the executive committee urged "that the Declaration of Independence and Constitution of the United States, be read in our Conventions; believing, that the truths contained in the former are incontrovertible, and that the latter guarantees in letter and spirit to every freeman born in this country, all the rights and immunities of citizenship." Or at the 1840 New York convention in Albany, the keynote address claimed equality for all Americans on the basis of "the history of the country, the nature of its institutions, the spirit of its Constitution, and the designs and purposes of its great originators." As Martha Jones has recently demonstrated, claims to equal citizenship were a mainstay of black constitutional discourse despite repeated refusals across various states and the federal government during the antebellum period. Drawing connections to the Founding was a means of strengthening such claims – establishing an original history of belonging.[314]

Over time, these mass gatherings, attended by fugitive slaves and abolitionist allies, reflected wider collective tensions over what constitutional lessons should prevail and the binds of law itself. A view of American law simply as vessel of the dominant will of white Americans informed the stance articulated by Frederick Douglass, Alexander Grummell, John Lyle, and

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[313] James McCune Smith, "Citizenship," *Anglo-American Magazine* (1859); Irvine G. Penn, *The Afro-American Press and Its Editors* (1891).

[314] *Minutes and Proceedings of the First Annual Convention of the People of Colour, held by adjournments in the city of Philadelphia, from the sixth to the eleventh of June, inclusive, 1831* (Philadelphia, 1831); Howard Bell, *A Survey of the Negro Convention Movement -1830-1861* (unpublished Ph.D. Thesis, Northwestern University), 1953; Derrick R. Spires, "Imagining a State of Fellow Citizens: Early African American Politics of Publicity in Black State Conventions," *Early African American Print Culture in Theory and Practice*, eds. Lara L. Cohen and Jordan A. Stein, (Philadelphia, 2012); Erica L. Ball, *To Live an Antislavery Life: Personal Politics and the Antebellum Black Middle Class* (Athens, 2012).

Thos. Van Rensselaer at the 1847 National Convention in Troy. "Slavery exists because it is popular. It will cease when it is made unpopular," they urged, arguing that this principle underlay John C. Calhoun's constitutional demand that "the North to put down" agitation.[315] Such sentiments resonated with increasing disdain for respecting law independent of its content. In 1839, for instance, a free black woman living in Connecticut wrote to a Hartford newspaper entreating women to sign and circulate antislavery petitions. Naming burdens and abuses routinely experienced by enslaved females, the letter writer communicated her contempt for the majesty of the law: "I see all this, and know that our GREAT and WISE men in the nation's BLACK LAW FACTORY have decided that *you have no right to ask for mercy on* in their behalf."[316] On one hand, she observed constitutional violations; on the other, law itself seemed a creature of bad men. Reverend John W. Lewis, a Baptist preacher, agreed with such an approach to positive enactments. "If then my fellow-men authorize government to exercise arbitrary will over me it is a usurped and wicked dominion that is no law, not being found in justice, and impartial justice demands the trampling such enactments under foot," he wrote.[317] From outside the venerative consensus, there was no difference between the Constitution and a South Carolina patrol statue insofar as they both worked to persecute and enslave. Writing to Samuel May, Jr., William Wells Brown expressed this ethos in historical terms: "It was a majority which passed the Stamp Act, and the Tea Tax."[318] At the National Convention in Buffalo, however, Henry Highland Garnet took the most radical position, not merely denigrating the authority of law but advocating just revolutionary violence by the enslaved. Recounting the Founding, he asked rhetorically, "When the power of government returned to their hands, did they emancipate their slaves? No, rather they added new links to our chains." Garnett's recruited the indelible proposition of "LIBERTY, OR DEATH!" and vowed that one day Denmark Vesey would go on the same monument as Washington.[319] This particular appropriation of Revolutionary history – a mortal claim against made in defiance on constitutional law; a total repudiation of veneration – grew in appeal. As black clergyman William Newman wrote to Frederick Douglass as the passage of the Fugitive Slave Bill loomed, "I am proud to say that Patrick Henry's motto is mine – 'Give me Liberty or give me Death.'"[320]

Many free African-Americans grew increasingly fatalistic with time. Writing in 1848, Joseph Holly reflected on a Founding that seemed to have little to redeem it. "In the formation of a constitution for the government of the confederacy, the North did not only mortgage every particle of its soil as a hunting ground for the bloodhounds of slavery, biped and quadruped… they did not only pledge every strong arm at the North to go to the South in case the slaves, goaded by oppression, should imitate the 'virtues of their forefathers' … but in the spirit of compromise and barter, stipulated that the slaveholder should have additional power in

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[315] *Proceedings of the National Convention of Colored People and Their Friends, Held in Troy, NY... 1847* (Troy, 1847)
[316] *Charter Oak (Hartford, Conn),* November 1839.
[317] John W. Lewis*, The Life, Labors and Travels of Elder Charles Bowles by Eld. John W. Lewis together with an Essay on the Character and Condition of the African Race by the Same* (Watertown, 1852).
[318] William Well Brown to Samuel May Jr., 9 August 1847, *The Black Abolitionist Papers, vol. 4*, ed. C. Peter Ripley.
[319] Minutes of the *National Convention of Colored Citizens, held at Buffalo… August 1843 for the Purpose of Considering their Moral and Political Condition as American Citizens* (New York, 1843*)*.
[320] William P. Newman to Frederick Douglass, 1 October 1850, , *The Black Abolitionist Papers, vol. 4*, ed. C. Peter Ripley.

proportion as he became the great plunderer of human rights."[321] In levying this critique, Holly conceded that the framers had "incorporated some guarantees for freedom"; but these were only honored in the North. Thus, rather than an object worthy of veneration, the fathers' Constitution was "proof at the futility of any attempt at compromise between liberty and slavery, right and wrong." The Founding marked an incurable moment, a kind of original sin, Augustus Washington of Hartford came to believe. Writing to the *African Repository* on the day before Independence Day celebrations in 1851, he explained his new sympathy for the Liberian colonization project in the wake of Fugitive Slave Law. Knowing this view coming from someone whom his fellow free black citizens "regarded as intelligent and sound in faith," he took pains to explain that "Ever since the adoption of the Constitution, the government and the people of this country, as a body, have pursued but one policy toward our race."[322] As a determined emigrationist in 1852, Martin Delany mocked hopes for constitutional redemption and the notion "that the Constitution makes no distinction, but includes in its provisions, all the people alike. This is not true, and certainly is blind absurdity in us at least."[323] This fatalism broadly peaked before the ascent of the Republican Party. In late August of 1854, the National Emigration Convention met in Cleveland, Ohio. The fate of black people in the United States was sealed, they resolved, because "whether Democrat, Whig, or Free Democracy—all have thrown themselves upon the declaration: To sustain the Constitution as our forefathers understood it, and the Union as they formed it; all of which plainly and boldly imply, unrestricted liberty to the whites, and the right to hold the blacks in slavery and degradation." Observing that American political roads led back to continued slavery, the Convention identified the cause as stemming in no small part from their limited range of travel within the confines of a historically-venerative constitutional culture. It made the country unredeemable. In giving up on the United States, the Convention recognized that the practical meaning of the Constitution lay in peoples' beliefs and that its power lay in the shared reverence with which Americans held it.[324]

Vigilance committees put practical constitutional knowledge to work. As William Still recalled of his time with the interracial network around Pennsylvania, "duties devolving on the Vigilance Committee when hearing of slaves brought into the State by their owners, was immediately to inform such persons that as they were not fugitives, but were brought into the State by their masters, they were entitled to their freedom without another moment's service, and that they could have the assistance of the Committee and the advice of counsel without charge, by simply availing themselves of these proffered favors."[325] Experience taught African-Americans organized in such associations to use the law as one avenue of action but to not put much stock in white American's willingness to follow their own unjust rules. As the New York Committee of Vigilance remarked, laws protecting people of color "are continually violated, not only by men in private life, but even by our judges."[326] Telling its own origin story in its 1837 First Annual Report, the New York association explained: "That colored people were often

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[321] Essay by Joseph Holly, 17 April 1848, *The Black Abolitionist Papers, vol. 4*, ed. C. Peter Ripley.
[322] *African Repository*, XXVII, (July 3, 1851), 259-265.
[323] Martin Delaney, *The Condition, Elevation, Emigration, and Destiny of the Colored People of the United States, politically considered* (Philadelphia, 1852)
[324] *Proceedings of the National Emigration Convention of Colored People, Held at Cleveland, Ohio, Thursday, Friday and Saturday, the 24th, 25th and 26th of August 1854* (Pittsburgh, 1854)
[325] William Still, *The underground rail road. A record of facts, authentic narratives, letters, &c., narrating the hardships, hair-breadth escapes, and death struggles of the slaves in their effort* (Philadelphia, 1872).
[326] *New York Committee of Vigilance for the Year 1837, First Annual Report of the Committee of Vigilance for the Protection of the People of Color* (New York, 1837)

kidnapped from the free states was generally known – but we have found the practice so extensive that no colored man is safe, be his age or condition what it may – by sea and land, in slave states, or in those where colored men are considered free… they are exposed to the horrors of slavery." Constitutional knowledge mattered, but it came without faith. Local black activists like Louis Napoleon of New York, as Sarah Gronningsater has shown, deployed their practical understanding of slavery, jurisdiction and law under the Constitution to intervene in multiple instances to force cases into courts.[327] Distant from most fugitivity and kidnapping, the Colored Vigilant Committee of Detroit, Michigan primarily performed institution-building, such as developing a day school, reading room, debating society, and "Library of Historical works." When Nelson Hackett, a fugitive from Arkansas arrested and detained in Canada arose in 1842, however, the organization sprang into action, contacting lawyers, officials and residents across the border. The group gathered knowledge of constitutional limits and foreign precedents – that in the absence of an extradition treaty, Hackett should be free on British soil – but on the ground events did not measure up to law on the books. "General information of the case was circulated among our people, recommending to keep a vigilant eye upon the course pursued by British law, in the case of a slave claimed on British soil, under the charge of felony," the committee recounted.[328] But Hackett was secreted back into America, jailed in Detroit and swiftly taken south. The lesson was to trust the law less whenever slaveholders could exert a degree of pressure.

For many white Americans, the Constitution of their fathers stood above laws enacted in the present day. Among black Americans and especially black activists, however, this distinction broke down. They saw the former constrain the minds of possible allies, as when Charles Remond recalled asking John Quincy Adams for help with the imprisonment of George Latimer as a fugitive in Boston: Adams responded, in the words of Remond, that his "opinion should be forthcoming, *subject to the provisions of the American Constitution.*"[329] From beyond the spell of veneration, both objects were accretions of opinion and power that enabled enslavement and exclusion. To be known and used when practicable, but neither deserving of veneration or deference in and of themselves.

What is the Constitution to the Enslaved?

Enslaved people experienced a very different practical education on the American constitutional order. By conversation and observation, those trapped in bondage pieced together knowledge of jurisdictions, relative freedom and spaces in between. Brought to the Unites States as a small child from Africa and enslaved, James Bradley – his original name lost along the way – worked tirelessly for years accruing funds to purchase himself. He succinctly recalled in 1834: "As soon as I was free, I started for a free State."[330] From the vantage of his enslavement, the jurisdiction beyond slavery– meaningful by the laws that it did not have – was the applied face of the Constitution, known indirectly through rapt attention to the power of state boundaries and separate legal orders.

Slaves were not walled off from the discourses of law and constitutionalism. Travelling journalist James Redpath recorded an enslaved man in Virginia deem antislavery people, "'on de

[327] Sarah L. H. Gronningsater, "'On Behalf of His Race and the Lemmon Slaves': Louis Napoleon, Northern Black Legal Culture, and the Politics of Sectional Crisis," *Journal of the Civil War Era* 7:2 (June 2017), 206-41.
[328] "Annual Report of the Colored Vigilant Committee of Detroit, delivered at Detroit City Hall, ... 10, 1843," in Ripley et al., eds., *Black Abolitionist Papers*, 3:397-402.
[329] "Speech by Charles Lenox Remond, Marlboro Chapel, Boston, MA 29 May 1844," in *The Black Abolitionist Papers, vol. 3*, ed. C. Peter Ripley (Chapel Hill, 1991), 442–45
[330] Lydia Maria Child, ed., *The Oasis* (Boston, 1834), 109.

light side.'" Registering a proslavery Constitution that weighed against his people, the man explained, "'de Constitution is in de oder scale agin us.'" Once a literate and propertied black New Yorker, Solomon Northrup found himself kidnapped, transported and enslaved in Louisiana. In his 1853 memoir, he illustrated how constitutionality established terms for disputes over slavery. In a confrontation between planter Edwin Epps and Samuel Bass, a Yankee employee who helped Northrup, Epps uttered, "I expect you'd be one of them cursed fanatics that know more than the constitution and go about peddling clocks and coaxing niggers to run away." Bass avowed that "Slavery was an iniquity and ought to be abolished. I would say there was no reason nor justice in the law or the constitution that allows one man to hold another man in bondage." The exchange placed the contested content and the established authority of Constitution on plain display. The plantation could hear Epps claim that "fanatics" deigned to know better than the Constitution, a transgressive act in itself, and Bass avow that the Constitution does not justify slavery. These discursive moments stuck. Writing years after the fact, former slave Charles Ball recalled the rights-infused invective of a local slaveholder who argued with the man who purchased Ball; the figure cursed that "a freeman of South Carolina was not to be imposed upon; that by the constitution of the state, his rights were sacred, and he was not to be deprived of his liberty, at the arbitrary will of a man just from amongst the Yankees." During his involuntary journey southward in early national America, Ball similarly took note of patriotic celebrations, hearing "toasts in honour of liberty and independence."[331]

As several scholars have shown, the workings of local justice, property-holding by enslaved people, trials for crime and the strong discursive presence of legal culture meaningfully exposed slaves to legal procedures. Freedom suits became imaginable for those slaves whose travels, personal histories or contacts happened to allow the information and opportunity. Although masters and officials sought to control such knowledge, enslavers could rely on the idiom and logic of law in framing the position of slaves. An account given by ex-slave Jourden Banks demonstrated how notions of legality informed slave governance. When introducing a new overseer, the man holding Banks declared that "'We white people have laws which we must obey, or suffer the consequences. And these are my rules by which you must abide, or else you must and shall be punished, and that severely.'" But slaves assembled an understanding of legality beyond masters' authority, one that traced the differences among states, between North and South, and between Canada and the United States. Away from surveilled labor, slaves could communicate understandings of the architecture sustaining their bondage and transmit antislavery critiques. Inside their quarters, some displayed abolitionist literature that they had managed to acquire and to pass along smuggled information. As Daniel Payne, a free black teacher in Charleston, South Carolina, remarked of knowledge of the antislavery movement in the early 1830s, "It was only by whispers that we learned that there was a glimmer of a day of freedom to come to the enslaved." Ex-slave Harriet Jacobs recalled that slaveholders tried to suppress knowledge about the North "[B]ut, notwithstanding this, intelligent slaves are aware that they have many friends in the Free States," and "[e]ven the most ignorant have some confused notions about it." Because of her literacy, many enslaved persons inquired with Jacobs if she "had seen any thing in the newspapers about white folks over in the big north, who were trying to get their freedom for them." One belief she observed among slaves was that "abolitionists have already made them free, and that it is established by law, but that their

[331] James Redpath, *The Roving Editor: Or, Talks with Slaves in the Southern States* (1859); Solomon Northup, *Twelve Years a Slave: Narrative of Solomon Northup* (New York, 1855); Charles Ball, *The Life of a Negro Slave* (Norwich, 1846); James Anderson, *The Education of Black in the South, 1860–1935* (Durham, 1988).

masters prevent the law from going into effect." The association between law, freedom and geography, even when misinformed, could hardly have been tighter.[332]

As Jacobs' experience illustrated, literacy was an instrument for gaining constitutional knowledge both jurisdictional and political. In his early adulthood in Charleston, South Carolina, Payne, the future head of Wilberforce University, ran one of five small private schools for fellow free people of color in the city. By the time the state legislature outlawed such establishments in 1835, his pupils had increased from a handful to sixty people. In 1829, a slaveholder, seeking to hire Payne to assist him in the West Indies, uttered the searing line: "Do you know what makes the difference between the master and the slave? *Nothing but superior knowledge."* This view, spoken here as an inducement for Payne to see the world, animated the enactments against slave literacy. It persuaded Payne to stay and contribute to the invisible spread of literacy and knowledge that passed from teachers to students who might taught others. Such knowledge aided in navigating and illuminating the dangerous spaces. Upon managing to acquire and study an atlas, Payne recalled, "I introduced geography and map-drawing into my school." The legislation ending Payne's southern career embodied arbitrary oppression, as Payne expressed in verse as he prepared to go North. "When Carolina's laws shall shut the doors/ Of this fine room, where science holds his reign,/ The humble tutor, hated Daniel Payne," he reflected, seeing law as a petty, man-made thing that contained the prejudices of the empowered. This perspective of American law as a matter of immediate human agency – an active choice and responsibility of the living – extended to the Constitution itself. Writing in 1850 while touring Yale, Payne inveighed, "Go tell thy statesmen to wipe from their Constitution and statutes those laws which persecute the hapless sons of Ham, and thou shalt be just what a Christian State ought to be. Farewell!" Slaveholders' effort to govern the flow of information to enslaved people fixed on preventing the spread of this tool, but literacy was perhaps more widespread than once believed. Between pit schools in the woods, instruction conducted through religious communities and the ad hoc opportunistic learning of individuals, some measure of literacy penetrated enslaved society in urban spaces, the Upper South and even Deep South plantations. With it came a means to know something of the constitutional order that upheld their enslavement, circumstances perhaps corroborated by the rapid display of legal and constitutional consciousness of freedpeople.[333]

Men and women fleeing slavery carried mental maps marked by constitutional meaning. These images were not merely ideas of state lines. They contained the substance of constitutional law and constitutionalism in action: boundaries of North and South, how authorities enforced slavery and with what popular intensity and where white Americans would or would not follow the commands of their fathers' Constitution as commonly understood. John Jackson, for

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[332] Jourden Banks, *A Narrative of Events of the Life of J. H. Banks, an Escaped Slave, from the Cotton State, Alabama, in America* (Liverpool, 1861); Harriet Jacobs, *Incidents in the Life of a Slave Girl* (Boston, 1861); Laura Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill, 2009); Dylan Penningroth, *The Claims of Kinfolk: African American Property and Community in the Nineteenth Century South* (Chapel Hill, 2003); Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* (Chapel Hill, 1996); Stephanie M. H. Camp, *Closer to Freedom: Enslaved Women and Everyday Resistance in the Plantation South* (Chapel Hill, 2004); Lea Vandevelde, *Redemption Songs: Suing for Freedom before Dred Scott* (New York, 2014).

[333] Daniel Payne*, Recollections of Seventy Years* (Nashville, 1888); Grey Gundaker, "*Hidden Education among African Americans during Slavery," Teachers College Record 109:7* (July 2007): 1591-1621*;* Janet Cornelius, "We Slipped and Learned to Read': Slaves' Accounts of the Literacy Process, 1830— 1865," *Phylon* 44 (1983): 171—186; See chapter one, "Acquiring Literacy in Slave Communities," in Heather Andrea Williams, *Self-Taught: African American Education in Slavery and Freedom* (Chapel Hill, 2005) 7-28.

example, stowed away to Boston in 1846. Then, he recounted, "that most atrocious of all laws, the 'Fugitive Slave Law,' was passed, and I was compelled to flee" to Canada. Jackson saw his only sure escape lay beyond the Constitution itself. Ex-slave Jacob Cummings' pathway from Tennessee relied on a keen sense of legality and political geography. "I paid a man to write me a free paper and concealed myself in the Sequatcha valley from pursuers… kept on till I was on the north side of the Cumberland Mountains and walked on toward McMinville," he recounted soon after completing his journey northward. When detained by two men, he had paid them "to go back seven miles to the old lawyer to find out that I had my free papers" and escaped again in the meantime. While working for some abolitionists in Ohio, Cummings found himself captured once again and invoked the aid of law. Abolitionists and lawyers stopped his transport to Kentucky, and a judge announced that "'I believe you're a slave but I have no right to hold you.'" In Cumming's journey, the play of federal and state law was enemy and ally, a constitutional order to be navigated cautiously. The journey also demonstrated the connection between literacy, law, and capacity to navigate maps marked with constitutional meaning. The enslaved James Fisher anticipated this connection and devoted himself to learning how to read and write with specific goal of being able to forge credible passes – which he did. The Constitution informed enslaved people's aspirations in immediate and practical ways. As a youth in Western Virginia, Henry Parker watched his enslaver sell away his brothers and then claim that Parker would soon forget their existence. In that moment, wrote Parker a few years after his 1859 escape at age twenty-four, "I resolved that, should I live to become a man, I would take my mother and sisters and find a home where we would be free; and knowing that if I should stop in the United States, and Cooper should hear of us, and claim what the law called his, we would be compelled to return, I resolved to find us a home in Canada." In this vow, Parker visualized the overlapping spatial and legal dimensions of finding freedom.[334]

In a letter to his former owner after escaping to Canada, one man in St. Catherine's demonstrated the profound sensitivity to legal difference and life beyond the Constitution that enslavement had imparted. Crossing the border in 1840, the blunt missive professed: "Since I have been in the Queen's dominions, I have been well contented, Yes well contended for sure, man is as God intended he should be. That is, all men are born free & equal. This is a wholesome law, not like the Southern laws which puts man made in the image of God, on level with brutes."[335] Boston abolitionist Benjamin Drew travelled through Canada in the mid-1850s, collecting testimony from black men and women who had fled slavery, disenfranchisement and constitutional coercion in the United States. Many explained their escape as a protracted, fraught process that did not end upon entering the North. With the 1850 enactment of intensified slave rendition, the risk of kidnapping and re-enslavement grew too great to bear. An anonymous ex-slave in St. Catherine told Drew that after fleeing the South, she and her free husband "were comfortably settled in the States and were broken up by the fugitive slave law, compelled to leave our home and friends, and to go at later than middle life into a foreign country." Maryland ex-slave Nancy Howard had likewise fled north within the prior year from Lynn, Massachusetts for "fear of being carried back, owing to the fugitive slave law." Alexander Hemsley, who had

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[334] John Andrew Jackson, *The Experience of a Slave in South Carolina* (London, 1862); "Jacob Cummings Reaches Cabin Creek, Randolph County (Interview with Rev. Jacob Cummings, an Escaped Slave Living in Columbus, Ohio)," in *The Underground Railroad in Indiana,* 1st ed., Vol. 1, ed. Wilbur H. Siebert (n.d.), 230-35. Wilbur H. Siebert Collection, Ohio Historical Society, Mic 192, Rolls 2, 3, 4, Box 42, Folder 1, No. 63; *Autobiography of Henry Parker* (n.p., n.d.); John Blassingame, *Slave Testimony: Two Centuries of Letters, Speeches, Interviews, and Autobiographies* (Baton Rouge, 1977), 229-234.

[335] Robert S. Starobin, ed., *Blacks in Bondage*: *Letters of American Slaves* (New York, 1974).

managed to secure freedom in a New Jersey court with the legal aid of Theodore Frelinghuysen, had nevertheless travelled from jail to Canada, wary of the vulnerability imposed by the nexus of federalism, kidnapping and the gap between formal freedom in one state and legal enforcement in another. Only on reaching "English territory," Hemsley recalled, did he enjoy the "comfort in the law that my shackles were struck off and that a man was a man by law." In the United States, Aby Jones had also been "nominally free and had free papers" but "did not consider myself free in the eye of the law." After settling into Canada, he told Drew that he was "only sorry to say that I did not come years before I did." As a free black man, John Moore had abandoned Pennsylvania because the threat of violence stymied his entrepreneurial ventures. For him Canada represented lawfulness in practice. "The law here is stronger than the mob," Moore found. Among these free black formerly enslaved expatriates, the opposite of a venerative consensus prevailed: the Constitution had been just a thing.[336]

A sense of a layered, constructed legal order pervaded ex-slaves' recollections, particularly from those who had crossed a line from slavery to something short of freedom. Accounts consistently registered myriad offenses they had suffered – sanctioned restrictions on movement, physical safety, labor, speech, assembly, reading, trading, and marriage; and they recalled the capacities and impunities afforded whites. Henry "Box" Brown, who initially gained fame for shipping himself north in 1849, pronounced that "I was a slave because my countrymen had made it lawful." While manmade laws designed to close "every avenue of hope," Brown recognized a divine rule beyond the constitutional authority, where even "senates' laws cannot control." Writing from England in 1852, escaped slave James Watkins branded the Fugitive Slave Law that had led him to flee the United States as "a palpable violation of the 5th article of the constitution" and "equally a violation of the constitution of each free state, which guarantees personal liberty to all, unless deprived of it by 'due course of law.'" Watkins' enthusiastic embrace of British domains signified a deliberate rejection and reversal of the progressive march of liberty claimed by the United States. He lambasted legislators for enacting law to strengthen slavery "when their duty seemed to be, to abolish all those acts that were already on the statute books, which licensed slavery, in a nation which had for a fundamental principle, that "all men are equal.'" His accusation echoed the disjunction between words and deeds that he had long observed. In younger days, Watkins had witnessed a neighboring plantation owner whip his mother with impunity during an interrogation about the whereabouts of absent slaves; nothing could be done, he remembered, because "the evidence of colored people being of no value according to the laws of our country which declare 'all men equal.'" Ellen and William Craft, spousal escapees from Georgia, reflected on their decision to remain in Boston rather than continue to Canada in 1848. They found it "true that the constitution of the Republic has always guaranteed the slaveholders the right to come into any of the so-called free States, and take their fugitives back to southern Egypt"; but they credited the work of abolitionists for making "public opinion in Massachusetts… so much opposed to slavery and to kidnapping, that it was almost impossible for any one to take a fugitive slave." Then came the Fugitive Slave Law in 1850, followed by man hunters, threats of federal rendition and a joint passage to England.[337]

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[336] Benjamin Drew, *A North-Side View of Slavery* (Boston, 1856).

[337] Jeannine Marie DeLombard, "Slave Narratives and U.S. Legal History," in John Ernst, ed., *The Oxford Handbook of African American Slave Narrative* (New York, 2014); Henry Brown, *Narrative of the life of Henry Box Brown* (Manchester, 1851); James Watkins, *Struggles for Freedom; or The Life of James Watkins* (Manchester, 1861); Ellen and William Craft, *Running a Thousand Miles for Freedom* (London, 1861).

Memoirs of escaped slaves observed painful ironies of public constitutionalism, reflecting education gained beyond the constitutional "borders of belonging," the cultural and legal boundaries separating the "rising generation" of constitutional heirs from constitutional "other persons." With the authority of personal experience under slavery and the constitutional defiance of escape, ex-slave narratives produced a challenging education for white readers. Fleeing from Georgia, William Grimes became a barber for Litchfield law school students. His 1825 narrative concluded with harrowing words: "If it were not for the stripes on my back, which were made while I was a slave, I would in my will leave my skin as a legacy to the government, desiring that it might be taken off and made into parchment, and then bind the constitution of glorious, happy and free America. Let the skin of an American slave bind the charter of American liberty!" Joining the physicality of his marked body to the Constitution, Grimes had heard Americans venerate their Founding document quite enough. Ex-slave preacher Israel Campbell, who managed to reach Canada from the Deep South, pointed out the chasm between Americans boasts of liberty and equality, "and yet in their constitution and laws deny the very truth," forging a "glorious Union [] cemented together by the groans and tears of the slave." In the whole system of cruelties against enslaved blacks, ex-slave Henry Bibb perceived "the regulation and law of American Slavery, as sanctioned by the Government of the United States, and without which it could not exist." Soon after writing these words in 1850, Bibb also felt compelled to relocate to Canada with Mary Miles, his free black wife and fellow abolitionist. "I only judge by their actions," he explained, eight years after escaping the South, and he saw that "Slaveholders are put into the highest offices in the gift of the people in both Church and State, thereby making slaveholding popular and reputable." This was American constitutionalism, observed from below.[338]

"The United States is the most hypocritical, guileful, and arrogant nation on the face of the earth," wrote Thomas Smallwood in 1851. Manumitted in 1831 at age thirty, Smallwood had become a journalist and conductor of fugitive slaves before settling north of the US border. In the wake of the Fugitive Slave Law, he bitterly mocked the "the wise men, the sorcerers, the magicians, and astrologers of the United States [] assembled at Washington" who opened "a way through Mason's and Dixon's sea, that they might recapture those that had crossed" and "attempted to expel from their hall a servant of God, the Hon. Mr. Seward, for telling them that there was a higher power than their constitution." Smallwood had already given up on the United States and long urged blacks to "come to Canada, and you will get freedom, yea British freedom!" He expressed fury at the counsel fugitives had received to remain. While abolitionists had a lost cause and "vain hope; of seeing a day when the colored race in the United States would be admitted to equal rights with whites," Smallwood concluded that "national prejudice" was elemental to Americans' constitutional order. As text and culture, American constitutionalism seemed irredeemable. "It is a part of the principles ingrafted in their national compact, and have been carried out to the present time, without abatement, that the African race should never ascend to an equality with the whites." For Smallwood, fugitive slave legislation expressed America's Founding. William Wells Brown advanced this bitter constitutional education from the margins. A prominent antislavery agent and escaped steamboat hand, Brown drew the image of "the American slave trader march[ing] by the capitol with his coffle gang the

[338] Barbara Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (New York, 2010); William L. Andrews and Regina E. Mason, eds, *Life of William Grimes, the Runaway Slave* (New York, 2008); Israel Campbell, *Bond and Free: Or, Yearnings for Freedom, from My Green Brier House* (Philadelphia, 1861); Henry Bibb, *Narrative of the Life and Adventures of Henry Bibb, an American Slave* (New York, 1849).

stars and stripes waving over their heads and the constitution of the United States in his pocket." Lecturing in Salem, Massachusetts at a meeting of the Female Anti-Slavery Society, Brown described a hard jurisdictional reality. "Wherever the United States constitution has jurisdiction and the American flag is seen flying, they point out the slave as a chattel, a thing a piece of property." Brown wrote in a text recounting his travels in Europe that England was the "land of the free, and the home of the brave." Indeed, while travelling in England, he sent a letter to his former owner explaining that "The United States has disenfranchised me, and declared that I am not a citizen, but a chattel: her Constitution dooms me to be your slave."[339] Brown's experience of freedom hinged on knowledge of the legal limits placed on enslavers. "My old master may make his appearance here, with the Constitution of the United States in his pocket… but all will avail him nothing." Confronting the historical veneration practiced everywhere in America, he declared: "It is not enough that they should laud to the skies a constitution containing boasting declarations in favour of freedom. It is not enough that they should extol the genius of Washington, the patriotism of Henry, or the enthusiasm of Otis. The time has come when nations are judged by the acts of the present instead of the past." Brown demanded a new public relationship to constitutional meaning and history. The living generation must take responsibility; people must cease to let gauzy historical reverence obscure their own choice in determining law and power in the present.[340]

The formerly enslaved did not fully write with one voice on how to regard the Constitution. Some adopted an approach akin to that of Frederick Douglass, jettisoning categorical antipathy to pair criticism with redemptive veneration as an antislavery force. Ex-slave Lewis Clarke, who led a mobile life among abolitionist communities in the United States and Canada, shared "a fugitive's thoughts under this government." He accused complicit Americans of "making slaves of millions of those persons here in our country that have a right to be protected according to the Constitution of the United States." Having steadily navigated legal violence to aid his brother and other fleeing slaves, Clarke insisted it was all citizens' duty to "pry into the proceedings of the government, and see that they administer it according to the Constitution of the United States." He pressed a redemptive constitutional duty to impel practical political action. Like Brown, Clarke wished the living to feel a duty that would displace past practices, but he located it within rather without the Constitution: "Can the people get rid of national responsibility? I answer in the negative." Former slave Moses Roper passed through the ownership of well over a dozen men across the South before escaping from Florida to New York and then Great Britain in 1835. Through his oft-coerced travels, Roper listened to the discourses of southern whites and hoped that "God shall wipe off this deep stain from her constitution, and may America soon be indeed the land of the free." The difference between North and South was one of institutions and required a constitutional resolution. Rather than attack the country's founding document directly, Roper cast slavery as a foreign blemish upon a legal landscape of freedom.

The esteemed orator and activist Samuel Ringgold Ward, born enslaved but raised free in New York City, worried over the constitutional education of white Americans. Two weeks after Daniel Webster's "Seventh of March" speech in 1850 defending the Fugitive Slave Act and a Constitution committed to slavery, Ward took the stand at Faneuil Hall in Boston. "Sir, what must be the moral influence of this speech of Mr. Webster on the minds of young men, lawyers

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[339] *Liberator*, Dec. 14, 1849

[340] Thomas Smallwood, *A Narrative of Thomas Smallwood, (colored man)* (Toronto, 1851); William Wells Brown, *Narrative of William W. Brown, an American slave* (London, 1849).

and others, here in the North? They turn their eyes towards Daniel Webster as towards a superior mind, and a legal and constitutional oracle."[341] Ward knew the mediating authority that Webster had long cultivating between the reverence deference that Americans learned to feel towards the Constitution of their fathers and the meanings that he ascribed to it. From without the venerative consensus, a man who could so effectively recruit popular constitutionalism to sustain a Union with slavery held particular dangers. In 1855, Ward reflected on his efforts so that black Americans could "share the benefits secured by the constitution." Ward had made the pragmatic choice to pursue reform through third-party political action. In his telling, many northerners had seen that the existing political parties "departed from the constitution." Writing at the cusp of the rise of the Republican Party in 1855, he explained that "Whigs denied the faith of their revolutionary fathers," and "Democrats, claiming Jefferson as their father… hated nothing so intensely as Jefferson's writings against slavery--and that very Declaration of Independence." Ward observed an interpretative slippage between present proslavery desires and true construction. The South, he explained, had demanded that the "constitution must be understood as they understood it; and therefore slaves escaping must be given up." Slavery was always an active choice, Ward wrote, one that could not be ducked by pointing either to the colonial or revolutionary past. "If they retained slavery after" independence, he posed, "was it not because they chose to do so?" He dispatched the well-practiced excuse that national fathers "found it impossible to agree upon a constitution without agreeing either to let slavery alone, or to secure it!"; and he rejected the South's claim to "immunity from rebuke, on the ground that slavery is constitutional." Ward responded, "If so, who made it so?" The nation could unmake it, he implied. For black Americans seeking redemption within or without the country's founding document, constitutional history obscured present agency.[342]

Ultimately, fugitive slaves and enslaved people more broadly were central actors on the most contested terrain of public constitutional life. Runaways made cases, provoked laws and fomented sectional conflict. Their threat produced a security state among whites in the South. Their encouragement by abolitionists fueled efforts at national postal censorship. Their presence sparked legislation providing for a federal enforcement apparatus and penalties for assistance. Their escapes precipitated the violence of capture and summary proceedings. From the Philadelphia Convention through the Civil War, slaves made slavery a governing problem. They taught themselves a constitutional vision not muddled by veneration and bound by deference but informed by interstate boundaries and federalized power. In resistance both actuated and potential, enslaved people triggered popular constitutional engagement in the United States that crossed over from print culture and classrooms to civic and governmental life. Americans everywhere learned constitutional meaning through the acrimonious events and organizational activity occasioned by slavery and slaves.

Reading, Redeeming and Burning the Constitution

Southern voices declared a proslavery Founding loudly and expansively in the decades after the Nullification Crisis. Politicians, newspapers and lawyers praised Washington, Madison

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[341] Speech by Samuel Ringgold Ward, Faneuil Hall, 25 March 1850 in *The Black Abolitionist Papers, vol. 4*, ed. C. Peter Ripley (Chapel Hill, 1991).

[342] Lewis Clarke, *Narrative of the Sufferings of Lewis Clarke, During a Captivity of More than Twenty-Five Years, Among the Algerines of Kentucky* (Boston, 1845); *A Narrative of the adventures and escape of Moses Roper from American Slavery* (London, 1837); Samuel Ringgold Ward, *Autobiography of a Fugitive Negro: His Anti-Slavery Labours in the United States, Canada, & England* (London, 1855).

and southern framers as slaveholders, pointed to northern profits from the slave trade and argued for original promises to make the whole territory of the United States open to slavery under the protection but not the interference of the federal government. A radical wing of the antislavery movement did not dispute many of the historical claims such proslavery voices expressed. Affiliates of the immediate emancipationists William Lloyd Garrison and Wendell Phillips condemned political participation in the United States for its immoral entanglement with slavery. For this vocal fraction, the Constitution lay at the center of national sin, and the Founding represented a millstone around the country's neck. As more information about the internal deliberations of the 1787 Convention emerged during the 1840s, Phillips seized on the opportunity to teach Americans that the framers "grant[ed] to the slaveholder distinct privileges and protection for his slave property" and to "prove also that the Nation at large were fully aware of this bargain at the time and entered into it willingly and with open eyes." *The Constitution A Pro-Slavery Compact; or, Selections from the Madison Papers* revealed the constructed legal and cultural authority of the Founding as a proslavery vise. The Constitution, Phillips averred, was no "ball of clay to be moulded into any shape that party contrivance or caprice may choose it to assume… It means precisely what those who framed and adopted it meant - NOTHING MORE NOTHING LESS - as a matter of bargain and compromise…. No just or honest use of it can be made in opposition to the plain intention of its framers except to declare the contract at an end and to refuse to serve under it." This resounding statement of the relationship between present and past over interpretive control of constitutional meaning was no less than a recitation of the central cultural rule of antebellum constitutionalism. From Phillips, however, the rule was ripped from its typical venerative context. The Constitution of their fathers was a prison from which American must break out. The text was an empirical gospel of disunion. As William Wells Brown toured New York speaking in favor of this "remedy" in 1846, he wrote to Sydney Gay of leaving "a number of copies" in towns that seemed potentially receptive. In their fixation on the Constitution – Garrison gained notoriety for publicly incinerating a copy of what he deemed "a Covenent with Hell" – these abolitionists were reckoning with the public culture of deference to the Founding. The Garrisonian vision perceived that only by destroying that reverence slavery be dismantled. Their attacks did not attest to the weakness of constitutional veneration but rather signaled its strength. In the process, however, their discourse affirmed the very authority of the Founding as the font of constitutional meaning.[343]

This approach to American constitutionalism was in full display in a grove when radical abolitionists decided to observe July Fourth, after a fashion, in Massachusetts. Gathering in a grove in Abington, abolitionists took turns castigating the Founding. Parker Pillsbury declared that "Washington himself was a failure, and so were Jefferson and Adams, and all the lesser men of their day." Free soil politicians like Charles Sumner and Samuel Chase, who paired Founding veneration with antislavery politics, came under attack for lauding the Union and Constitution. Chaired by William Lloyd Garrison, the counter-celebration addressed constitutional meaning at length. "No man, sir, can say the Constitution is an anti-slavery document without falsifying the history of the country and the history of that document," explained Wendell Phillips. He anticipated disunion because national "agitation grows out of the thing itself-the opposing principles of liberty and slavery being united in one government and one Constitution." Analogizing Founding protections for slavery to placing gunpowder under the capital, he argued that the framers "who put a fugitive slave clause in the Constitution, provided for the dissolution

[343] Wendell Phillips, *The Constitution A Pro-Slavery Compact; or, Selections from the Madison Papers* (Boston, 1845).

of the government under that Constitution." This community of constitutional dissenters specifically reversed the relational structure of deference that defined hegemonic popular constitutionalism; yet it condemned rising generations for sinking lower. All agreed "we ought to be better than our fathers; yet in 1783, the public sentiment on the subject of human freedom was better than it is now." On this Fourth, as their countrymen elsewhere feted history and a Union newly preserved by accommodating slavery in the Compromise of 1850, the present seemed even worse than the past.[344]

In a world that inculcated constitutional reverence, dissenting education happened outside schools, inside homes and at public meetings. Jane Elizabeth Jones' *The Young Abolitionists; or Conversations on Slavery*, was designed for just such an end, modeling domestic counter-study. Overhearing discussion of the Constitution and slavery, young Charlie engaged his mother in a long dialogue. "Since 1789, the slave catcher has felt that he had a legal right to hunt out his fugitives and drag them back from any part of the Union where they had taken shelter, and the people do not question his right to do it," Mrs. Selden explained. Implicitly disposing of wishful constitutional constructions based on the absence of the term "slave," she continued that it "matters very little, however, about the way it reads; the people have always understood it to be in favor of slavery." A moment of terrible revelation ensued about the Father of the Country: "'A slaveholder!' cried the astonished boy. '*George Washington a slaveholder!*'" While Charlie expressed relief that his father resists laws denying "equal liberty to all," Jones served a warning to parental readers, relating an anecdote of an appalled daughter whose father bowed to the Slave Power in congress. Anybody who upheld slavery, whether national fathers or one's own father, deserved condemnation. Antislavery domestic literature afforded little deference to law, constitutional or otherwise. *A Child's Anti-Slavery Book* taught that "every negro child that is born is as free before God as the white child, having precisely the same right to life, liberty, and the pursuit of happiness, as the white child," denying the authority of "wicked law" to impair the right. *The Child's Book on Slavery* encouraged an understanding of law as power and choice, stripped of gauzy majesty. "And the lawmakers meet in assembly or legislature, every year, and if the people wanted the slave laws done away, they could send men there who would repeal them. But they do not do this; so the slave laws express just the mind and wishes of the most, or of a great many, of the white people in the Slave States." This brutal assessment made respecting legal authority no freestanding virtue. To have the opportunity to repulse slavery and do nothing, young readers learned, was tantamount to sustaining it. This literature was the domestic, didactic counterpart to radical abolitionism, preparing minds for "no union with slaveholders."[345]

As the criticism of antislavery constitutionalists like Chase at the Abingdon gathering suggests, the question of what to do about the Constitution was a central point of difference within the broader antislavery ranks, opening a rift during the 1830s that closed only with war and emancipation. Many antislavery-minded Americans were convinced that elections offered the only practical avenue towards ending slavery; and they were unwilling to abandon the Constitution and Union. As one antislavery citizen publicly reasoned in print, "Had the Fathers of this Republic designed to form a government for Slavery, would they have set up over the very threshold of the superstructure they were rearing — such a flaming sword as the

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[344] "Fourth of July at Abington," *The Liberator*, July 11, 1851, 110.

[345] Jane Elizabeth Jones *The Young Abolitionists; or Conversations on Slavery* (Boston, 1848); *A Child's Anti-Slavery Book: Containing a Few Words About American Slave Children and Stories of Slave-Life* (New York, 1860); *The Child's Book on Slavery; Or, Slavery Made Plain* (1857); Chris Dixon, *Perfecting the Family: Antislavery Marriages in Nineteenth-century America* (Amherst, 1997).

Declaration of Independence?" The leading voice was Ohio attorney Samuel P. Chase. His lawyering efforts in fugitive slave cases and campaigns for the Liberty Party spread visions of redeeming an antislavery Founding through political action.

Antislavery Americans rehearsed a negotiation of the structure of antebellum constitutionalism that placed them inside its framework of reverence and deference. At the 1845 Southern and Western Liberty Convention organized by Chase in Cincinnati, Ohio, thousands of citizens honed their understanding of antislavery commitments at the Founding. Raised on veneration for their fathers' Constitution, history was their tool, the key to unlocking the true promise of the document. As a popular politician and lawyer, Chase knew well the constitutional vernacular that stirred hearts and persuaded minds seeking to oppose slavery while holding fast to the Founding. "We are citizens of the United States, having our homes in the West and the Southwest, some in the Slave States, and some in the Free, bound to our country by the most endearing ties and the most solemn obligations, filled with the most ardent desires for her prosperity and glory, and resolved, so far as in uses, to carry forward and perfect the great work of individual, social, and civil elevation which our fathers nobly began." In the Liberty Convention's perception of the work those revered fathers had commenced lay the crux of their constitutional understanding, which in turn underpinned and delimited the work of this extended antislavery community. Invoking the 1787 Northwest Ordinance banning slavery across a huge swath of territory on the cusp of the constitutional creation, Chase told the audience that their fathers had "expected, however, and they had reason to expect, that slavery would be excluded from all places of national jurisdiction." With a constructive premise that the fathers were antislavery men, he avowed that Constitution "is to be examined with reference to the public acts which preceded it, and the prevalent popular sentiment." Such an examination was made much easier with faith in an emancipatory Founding. While admitting that certain constitutional clauses referenced slavery, Chase reaffirmed for listeners that "neither the framers of the Constitution, nor the people who adopted it, intended to violate the pledges given in the covenant of 1774, in the declaration of 1776, in the ordinance of 1787; that they did not purpose to confer on Congress or the General Government any power to establish, or continue, or sanction slavery anywhere." In short, attendees learned there should never have been new slave states: Americans could and should constitutionally exclude slavery from every territory and Washington, D.C. Amid an impressionistic flurry of substantiating citations, Convention participants told and retold a constitutional history that resonated – that made their liminal position seem righteous and true. Sincere constitutional veneration served the Convention community's cause – while limiting its immediate aims. Undertaken with the immediate goal of rousing the antislavery Liberty Party, the regional rally inspired another one in Boston a few months later, the Great Convention of the Friends of Freedom in the Eastern and Middle States, and then the North-Western Liberty Convention in Chicago followed the next summer. Thousands assembled and formally resolved that the Constitution was an antislavery document. The Eastern and Middle States Convention formulated an address to the American people claiming the legitimating mantle of the past: "Historical testimonies are worthless, if they do not authorize the conclusion, that our fathers believed, that theirs was the last generation, which should see an American slave."[346]

This constitutionalism did not dissent from the hegemonic venerative consensus and the authority of the Founding; it did not call for rejecting constitutional meaning that transgressed

[346] *The Address of the Southern and Western Liberty Convention, Held at Cincinnati ... 1845, to the People of the United States* (Cincinnati, 1845); *Proceedings of the Great Convention of the Friends of Freedom in the Eastern and Middle States: held in Boston, Oct. 1, 2, & 3, 1845* (Boston, 1845); Brooks, *Liberty Power*, 100-3.

morality, nor for undertaking radical readings regardless of the understandings and desires of the framers. It did not provide for the end of slavery. Rather, it accepted all those conventions and limits in order to redeem the Constitution – with the limits that their sense of history permitted. In their story telling, they developed alternative constitutional stories for Americans who grew disenchanted from prevailing narratives and legitimating political work they performed. When southern constitutional discourse and elected officials used the Founding to justify the Fugitive Slave Act of 1850, the incapacity of Congress to regulate slavery in western territories and the constitutionality of a federal slave code in the territories, among other acts of proslavery governance passed or proposed, the venerative Founding narratives of the Liberty Party – and then the Republican Party – justified another course.

Antislavery constitutionalists generally sought to present the Founding in service of their cause, but its most ambitious practitioners saw inquiries into framers' intent as a dangerous quagmire. Its evidentiary basis contained too much proslavery material, and its soft ground bore the imprint of the weight of established opinion, which favored conservative positions on maintaining implicit compromises and imputed understandings. In its boldest form, then, antislavery constitutionalists sought to take up ground between Chase and Garrison: they would spurn the Founding but the revere the Constitution as a text. Interlocutors like William Goodell, Alvan Stewart, Gerrit Smith and Lysander Spooner held out the appealing image of a pure antislavery Constitution. As Goodell announced in *Views on American Constitutional Law*, "the Constitution of the United States was ordained to establish JUSTICE and SECURE the blessings of LIBERTY to ourselves and our POSTERITY," while "the slave codes and enactments of the slave States establish injustice and render the liberties of ourselves and our posterity insecure." These abolitionists pressed Americans to read the "plain direct and express words" of the Constitution, the words ratified by a past generation people, and to see in them the creation of a federal power that must combat and contain rather sanction slavery.[347] When Antislavery champion Frederick Douglass became a redemptive textual constitutionalist in the late antebellum era, his constitutional conversion reverberated through the divided elements of the antislavery community. In joining the lawyerly ranks of Goodell and Spooner, he brought a powerful language of constitutional aspiration that provided an alternative channel for veneration without deference to supposed understandings of slaveholding fathers.

The prospect of such conversion was critical to the antislavery project. Given the authority vested in the Founding, persuading Americans to understand meaning in new ways could enable people to cross the gulf from moral condemnation of slavery to political action. Lewis Tappan, an important antislavery organizer and funder, recounted an inspiring exchange he had with "a distinguished civilian" in New York. After subscribing to Benjamin Lundy's newspaper, the *Genius of Universal Emancipation*, the unnamed man had been "induced to examine the bearing the Constitution had on Slavery." Tappan happily reported that this figure now believed that "a slave should not be given up who has fled from the South to the North," that "the Constitution does not recognize slavery, [and] that the framers of that Instrument had in view the final destruction of our greatest national sin." Antislavery writer Mary Andrews Denison's *Old Hepsy*, modelled the process of constitutional conversion. The book imagined a cross-sectional constitutional dialogue between white men. Addressing southerner Marshall, the Quaker northerner Harry coaxed, "I ask you to take the Constitution, analyze it, and then see if you do not say that *the Constitution condemns slavery* from the, first page to the last." While Marshall objected that abolitionists "pour contempt upon our Constitution, because they say it

[347] William Goodell, *Views of American Constitutional Law in its Bearing upon American Slavery* (Utica, 1845).

upholds slavery," Harry countered that "they *prove* that the spirit of the Constitution *condemns* slavery." He assumed a patient, didactic posture: "When you return home, my friend, get your National Constitution. Mark its preamble: 'We, *the people* of the United States;' not 'We, the *white* people,'" he urged, before giving a condensed antislavery reading of the Constitution. Denison's narration attested to Americans' divergent constitutional faiths. In *Old Hepsy*, the representation of antislavery constitutional learning was a proxy for the books' prospective audiences: Harry was a guide for both his interlocutor and for uncertain readers.[348] Radical abolitionists in the vein of Garrison expressed skepticism or outright contempt for conversion, as they tried to organize against constitutionalism. "If our Liberty Party brethren can revolutionize public sentiment-save the Union-and abolish slavery-by their new interpretation of the constitution, the revolution will be effected and we shall be satisfied with the result," wrote the Ohio-based *Anti-Slavery Bugle*, "But [] these means look to us inadequate and hopeless."[349]

Through speeches, journals, pamphlets, and courtroom arguments, radical antislavery legal voices strove to teach an understanding of the Constitution that could escape from the constraints of what Convention members once thought and said. In a typical publication, *Constitutional Argument Against Slavery*, Gerrit Smith contended that "the framers of the Constitution were the agents of its adopters." Whether individual members of the Convention thought they hidden protections for slavery in the Constitution did not matter. Given "the strong anti-slavery sentiment, which then existed in almost every part of our country," Smith found it impossible, "that the Constitution would have been adopted" had it clearly announced that agenda. New York Supreme Court Reporter Joel Tiffany contributed *A Treatise on the Unconstitutionality of Slavery* (1850), "written to rebut the historical presumption that the founders of our National Government would desire or even consent legally to recognize sanction or in any manner guaranty human slavery" and to prove "it impossible for them to do so even if they desired to." The book drew upon convention sources, "the history of the times," the presumption of antislavery framers to find that slaves were citizens, protected by the letter of the Constitution, properly understood, and the power of the federal government. Even assuming arguendo that the Constitution framers had "wicked intentions," Goodell pressed in his *Views on American Constitutional Law*, the country ought not be "bound by their secret and unrighteous purposes rather than by the righteous words they were obliged to employ in order to make their document acceptable to the People." But at least for strategic reasons, Goodell did not fully cast aside the framers. To turn the idealized Founding against slavery's accommodators, he suggested that "if there are any who impeach the characters of the framers of the Constitution before the world, they are the" villains who would argue that the national fathers undertook crafty compromises in a secret convention.[350]

Radical antislavery constitutionalists worked to save the Founding from itself by spreading an aspirational mode of reading. They did not condemn the framers but sought to reshape public and legal interpretation of the language they had wrote and the people ratified. Ultimately, the most transgressive among them sought to direct veneration and deference toward a thin text of imagined meanings, unmoored from the past, rather than a document wedded to popular historical understandings. The Constitution's "words alone" did not sanction slavery,

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[348] "American Antislavery Convention," *The Abolitionist* 1:11 (Nov. 1833), 182; Mary Andrews Denison, *Old Hepsy* (New York, 1858).
[349] Frederick Douglass, *My Bondage, My Freedom* (New York, 1855); *The Anti-Slavery Bugle*, July 5, 1851.
[350] Gerrit Smith, *Constitutional Argument Against Slavery* (Utica, 1844); Joel Tiffany, *A Treatise on the Unconstitutionality of Slavery* (1850); William Goodell, *Views on American Constitutional Law* (Utica, 1845).

argued Lysander Spooner. Such interpreters saw the common project of finding original understanding as a nefarious effort to bring slavery into the Constitution, to "go out of the instrument and grope among the records of oppression lawlessness and crime" in order to introduce a "thing which the constitution dare not name." In his most prominent publication, *The Unconstitutionality of Slavery*, Spooner acidly indicted the practice of resorting to framers' unwritten wishes. Finding support of slavery in a Constitution that expressly seeks justice and liberty "artfully substitutes the supposed intentions of those who drafted the constitution for the intentions of the constitution itself," he wrote. Public constitutionalism's obsession with intent "personifies the constitution as a crafty individual capable of both open and secret intentions, capable of legally participating in and giving effect to all the subtleties and double dealings of knavish men, and as actually intending to secure slavery while openly professing to secure and establish liberty and justice," Spooner professed. But this distinction between men and text, between aims of national fathers and the aims of a document, defied the culture of veneration that had become commonsense and commonplace through rehearsal.[351]

Alvan Stewart introduced this anti-historical constitutionalism into the Supreme Court of New Jersey in 1845. Seeking to challenge the legal existence of slavery and lifelong racial apprenticeships in the state, which lingered on through a nearly illusory gradual emancipation statute, he devoted one leg of his argument to a radical redemption of the Constitution through reading. Stewart was clear about his epistemic target: "Many persons run to the Madison Papers published in the last few years to ascertain the meaning of the framers of the Constitution who met in Philadelphia in 1787 as a mere committee of the nation… I deny in any event the right to resort to this mode of interpretation to contradict the noble and glorious text of that document." The whole discursive project of Founding history seemed to him a vast trick. Finding constitutional sanction for slavery amounted, in hos telling to "wait[ing] till the framers and adopters are dead and then to come out and say ah the people have adopted this Constitution for what it purported on its face but we the sons and grandsons of the Southern framers have a cabalistic key left by our grandfathers in the South by which, when the word justice appears, our grandfathers meant slavery or injustice, when we used the word persons, we meant slaves sometimes and sometimes free persons. Steward urged to Court to simply read the Constitution, to bask in its preamble and to see the in consistency of its principles with slavery. If any historical understanding should matter, he declared, it should be that of the adopters, not the framers. They knew the Constitution only by reading its text as he now read it. "If told that the text meant what is now claimed its framed intended, he alleged, the American people "would have resolved to have let the common hangman hang this Constitution on the gallows with caricatures of the leaders in the convention of 1787 and closed the scene by burning it up and have adjourned." Stewart earned a dissenting vote in his favor from Justice Hornblower – likely not on the grounds of his reading of the Federal Constitution. But his claim against the culture and practice of teasing out proslavery original understandings led the court to reject his argument with passion. "To give such a construction to the constitution now would be considered a wanton stretch of judicial power and a fraud upon those who framed, as well as on those who adopted that instrument," one justice announced, repeating the familiar strains celebrating a wise,

[351] George Mellen, *An Argument on the Unconstitutionality of Slavery, embracing an Abstract of the Proceedings of the National and State Conventions on this Subject* (Boston, 1841); Lysander Spooner, *The Unconstitutionality of Slavery* (Boston, 1845).

authoritative settlement. The Constitution "was a result of compromise," where "[e]very-thing which could reasonably give offence or create parties, was carefully excluded."[352]

Abolitionists aligned with Garrison decried this project of redemptive constitutionalism as dangerous fantasy – judicial failures the New Jersey case seemed conclusive. In an unsparing review of Spooner's book, Wendell Phillips offered that "if merely believing the Constitution to be Anti-Slavery would really make it so we would be the last to stir the question." But all that constitutionalism accomplished, he argued, was "persuading men that it does not need amendment," while its proslavery effects continue unabated. In other words, inculcating veneration was the problem. "National evils are only cured by holding men's eyes open and forcing them to gaze on the hideous reality," he urged, stating the premise of his Founding-focused anti-constitutionalism. A Harvard Law School graduate and student of the plain-talking school of public oratory, Phillips knew the difference between technical construction and the historical practices of popular constitutionalism. In American life, he advised, the Constitution "is not so much a statute as a great national event, and is to be interpreted not by technical rules, but by liberal reference to the history of the times, the circumstances which produced it, the great parties and interests represented in it, and the national objects it has in view." As Phillips observed, the Constitution in antebellum life was not text but rather a field of belief: the past as recalled by the present ruled no less than words alone, and this cultural system was effectively constitutional law in action. It was through this shared mode of constitutional reading and faith that radical abolitionists saw slavery embedded at the heart of the Founding and, accordingly, a fundamental obstacle to material change. "The only way their sons can free themselves is to disown their fathers act the Constitution itself," Phillips insisted, and the "path to such release is over the Constitution, trampling it under foot not under it trying to evade its fair meaning." That view spoke to the perceived limits of popular interpretive control over the Constitution. The cultural power of the Founding defined reality. While antislavery constitutionalists sought to skirt the framers with a focus on language, anti-constitutional abolitionists saw no alternative but to produce new framers and new text. In these different impulses, both communities plotted courses to navigate a world that privileged the Founding while upholding slavery.[353]

Women's Constitutional Work

Denied the choice to exert or withhold electoral political power, antebellum women in radical and reformist circles like authors Jane Elizabeth Jones and Mary Andrews Denison engaged in constitutionalism. Participants developed a constitutional consciousness as dissenters or redeemers that would reverberate nationally in antislavery petitioning campaigns and demands for their democratic inclusion. At the long-running Female Anti-slavery Society of Philadelphia, for instance, African-American leader James Forten, Jr. shared his perspective on constitutionalism circa April of 1836. Coming at the height of that efforts to gag antislavery petitions to Congress, Forten pointed at the halls of Washington and announced "There, behold the Constitution of the United States – our national compact, the great organ of national sentiment, perjured, immolated upon the alter of expediency there." He brought with him a

[352] Alvan Stewart, *Legal Argument Before the Supreme Court of the State of New Jersey at this May 1845, at Trenton, for the Deliverance of Four Thousand Persons from Bondage* (New York, 1845); Luther Rawson Marsh, ed., *Writings and Speeches of Alvan Stewart on Slavery* (New York, 1860); *State v. Post,* 20 N. J. L. 368 (1845); Daniel Ernst, "Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845," *Law and History Review*, Vol. 4, No. 2 (Autumn, 1986), pp. 337-365.

[353] Wendell Phillips, *Review of Lysander Spooner's Essay on the Unconstitutionality of Slavery* (Boston, 1847).

report from South Carolina's Joint Committee on Federal Relations resolving that the very existence of abolition societies "are a direct violation of the obligations of the compact of Union." Against such accusations, Forten assured his audience that they were acting in keeping with "a Rush, a Franklin, a Jay," that they were following the path of the Founding's antislavery guides. This speech arrived at a particular time and place. As a well-to-do freeman speaking to predominantly white women, speaking before Pennsylvania further disenfranchised its black citizens and the Slave Power obtained the West, Forten readily proclaimed "I love America."[354]

For regulars at the Female Anti-slavery Society of Philadelphia, this account built on the incipient version of an antislavery Founding that Edwin Pitt Atlee delivered in January 1834. Speaking to and for the audience, Atlee instructed that, "we maintain that Congress has a right, and is solemnly bound, to suppress the domestic slave trade between the several States, and to abolish slavery in those portions of our territory which the Constitution has placed under its exclusive jurisdiction." Assured that the "assert[ion] that slaves are declared to be property by the Constitution of the United States" derived from mere construction, the Philadelphia women learned that the Constitution intentionally contained a route for "the people of the free States, to remove slavery by moral and political action." Through this avenue, notions of moral reformation associated with emergent middle-class female identity received the constitutional object of exercising speech rights and preparing white Americans to accept emancipation. Although female enfranchisement and legal equality remained a fraught topic among the antislavery community, women belonged to its debates over constitutional meaning. In a lecture before the Rochester Ladies' Anti-Slavery Society, Frederick Douglass pressed the case for his politics of constitutional redemption in among its most enduring articulations. Lamenting that some abolitionists' efforts to prove the "Constitution is and was intended to be a slave holding instrument" simply "pil[es] up between the slave and his freedom the huge work of the abolition of the Government," Douglass insisted the Constitution should be read against slavery.[355]

Women at these meetings organized themselves both logistically and ideologically, a process that worked in part through constitutional discourse. At the first national political gathering of women, the 1837 Anti-Slavery Convention of American Women, the assembly released a lengthy "appeal to women of the nominally free states" that deemed the jury-free punishment of slaves a "direct violation of the Constitution of the United States." The gathered attendees urged female education on slavery, writing that "[w]e wish that every Northern woman could read 'Stroud's Sketch of the Slave Laws.'" As many women became practiced in their critiques of slavery, they gained fluency with public constitutional vernacular. At the 1853 Women's Rights Convention in Cleveland, Mrs. Sandford of New London declared, "If the present Congressmen do not use the power delegated to them by the Constitution, to enact laws for the general welfare, we wish to elect such Congressmen as will so use it." This was a conjoined argument against slavery and for women's suffrage. "Heretofore Congress has been magnetized into ultra pro-slavery measures, and hugging its power like a giant, with a Weight upon its neck, when it might rise and wrestle with that giant" to destroy slavery, she continued. Turning to the Founding, Sanford claimed it for her double cause. "Whatever there is worthy in

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[354] *Speech by James Forten Jr. Delivered before the Philadelphia Female Anti-slavery Society, 14 April 1836* (Philadelphia, 1836).

[355] Edwin Atlee, *An Address delivered before the Female Anti-Slavery Society of Philadelphia* (Philadelphia, 1834); Frederick Douglass, *The Nature, Character, and History of the Anti-slavery Movement* (Glasgow, 1855); Lori Ginzberg, *Untidy Origins: A Story of Women's Rights in Antebellum New* York (Chapel Hill, 2005); Mary Saracino Zboray and Ronald J. Zboray, *Voices without Votes: Women and Politics in Antebellum New England* (Durham, NH, 2010).

our own Constitution is owing to the indirect influence of two women: the mother of Washington and the wife of John Adams," she told a crowd of hundreds.[356]

When women began inundating Congress with petitions on slavery in the 1830s, they integrated constitutional knowledge and collective action. The Boston Female Anti-Slavery Society urged all Massachusetts women in 1836 that "as wives and mothers, as sisters and daughters, we are deeply responsible for the influence we have on the human race" and "Bound to the constant exercise of the only right we ourselves enjoy… the right of petition." Constitutional understanding structured the object of the project they proposed. "We are bound to try how much it can accomplish in the District of Columbia… for Congress possesses power 'to exercise exclusive legislation over the District of Columbia in all cases whatsoever'; by a provision of the Constitution." The ensuing memorials that women authored and signed deployed arguments about constitutional meaning and federal power. In 1836, women in Rehoboth, Massachusetts requested that Congress "abolish slavery" in Washington, D.C., "a part of the country over which Congress possesses exclusive jurisdiction, in all cases whatsoever." In Indiana County, Pennsylvania, woman wrote to Congress in 1838 declaring that it "has the constitutional power to abolish slavery and the slave trade in … District of Columbia"; "the constitutional power to abolish them in the several Territories"; and "the constitutional power to prohibit the slave trade between the several states" – and they beseeched legislators to "exercise that power." Women of Jaffrey, New Hampshire wrote out by hand a direct demand for Congress in 1840 "so to exercise the Constitutional power vested in you 'to regulate Commerce among the several states' as entirely to prohibit the Domestic Slave Trade" and "not to admit any new state to the Union whose constitution tolerates domestic slavery." These claims are typical samples from a vast sea. Their words, and many like them, were articulated over and over again, endorsed by hundreds of thousands of signatures over a period of years. Often women shared petition space with men, and on occasion, disenfranchisement meant that men were counted under "voters" rather than "inhabitants."[357] The rolls and sheaves of paper that made the rounds through towns and ended up stacked in Washington, D.C. passed through many hands and minds. While petition language originally derived from male and female antislavery leaders, it took on new life as women met, canvased and conversed. Participatory constitutional engagement reached deep into communities, as women placed themselves behind the understandings represented by their petitions. Antislavery constitutionalism and dissent opened a realm of action – for advancing interpretations or rejecting authority in public and en masse. This is not to overstate the efficacy and political power in antislavery women's constitutional engagement. But it framed the capacity to aggregate the force of opinions out of doors in an idiom that possessed cultural power.

John Brown's Constitutional Body

In early 1858, Frederick Douglass sought to dissuade John Brown from his vision. As he firmed up his designs for taking the armory at Harper's Ferry and establishing a militarized maroon community in the Virginia mountains, the martyr-and-villain-to-be had travelled to see his old friend in Rochester. When they had first met in the late 1840s, Brown's powerful

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[356] Angelina Grimké, *An Appeal to the Women of the Nominally Free States, Issued by an Anti-Slavery Convention of American Women, Held by Adjournments from the 9th to the 12th May, 1837* (New York, 1837); *Proceedings of the National Women's Rights Convention, held at Cleveland, Ohio, on Wednesday, Thursday and Friday, October 5th, 6th, and 7th, 1853* (Cleveland, 1854).

[357] *Address of the Boston Female Anti-Slavery Society* (1836); [National Archives petition collection].

skepticism of moral persuasion ever subverting slavery had unsettled Douglass, contributing groundwork for his turn way from Garrisonian anti-constitionalism and disunionism. A decade later, Douglass rejected the Brown plan not because of any commitment to patient, non-violence but because the realities of power and politics in the United States seemed inescapable and lethal: he foresaw fatal bloodshed for Brown, his company and any enslaved people who joined him, as white Americans would see it as "attack upon the federal government, and would array the whole country against us."[358] It was during this early winter moment with Douglass that Brown drew up a document titled, "Provisional Constitution and Ordinances for the People of the United States." Brown's planning involved constitutional framing. On May 8, 1858, the militants and a number of allied formally gathered in Chatham, Canada to ratify this constitution, the proceedings of which they recorded in a "Journal of the Provisional Constitutional Convention." In the aftermath of the brief battle at Harper's Ferry, authorities discovered "many copies [] found on the persons of the slain," and Colonel Robert E. Lee reported that "there were a large number prepared for issue by the insurgents."[359]

The Preamble stated:

> Whereas slavery, throughout its entire existence in the United States, is none other than the most barbarous, unprovoked and unjustifiable war of one portion of its citizens against another portion, the only conditions of which are perpetual imprisonment and hopeless servitude, or absolute extermination, in utter disregard and violation of those eternal and self-evident truths set forth in our Declaration of Independence. Therefore, we, citizens of the United States, and the oppressed people who, by a recent decision of the Supreme' Court, are declared to have no rights which the white man is bound to respect, together with all other people degraded by the laws thereof, do, for the time being, ordain and establish for ourselves the following Provisional Constitution and Ordinances, the better to protect our persons, property, lives, and liberties, and to govern our actions.[360]

The provisional constitution loomed large in the ensuing interrogation, trial and demonization of John Brown. For his prosecutors, it was proof of profound treason. They read it as deigning to supersede the Constitution of the fathers. In antebellum American, what could be more treacherous in southern eyes than combining a slave uprising with a new Founding? Ohio Proslavery Democrat Clement Vallandigham, arriving to make pollical hay, asked Brown: "Did you get up this document that is called a Constitution? – implying that an affirmation was a confession to treason. Brown duly responded: "I did. They are a constitution and ordinances of my own contriving and getting up." Pressed further by James Mason, Brown insisted, "I wish you would give that paper close attention."

What Brown wished people to recognize is that he was no anti-constitutionalist. He did not spurn the Founding. In the face of the *Dred Scott* decision, his Preamble claimed citizenship for all people in America and claimed the fullest meaning of the Declaration. In a key section, the text itself professed: "These articles not for the overthrow of government. The foregoing

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[358] Frederick Douglass, *Life and Times of Frederick Douglass* (Hartford, 1881), 323; Benjamin Quarles, ed., *Blacks on John Brown* (Urbana, IL: 1972).

[359] Franklin Sanborn, *The Life and Letters of John Brown: Liberator of Kansas, and Martyr of Virginia* (1885); *Report [of] the Select Committee of the Senate Appointed to Inquire Into the Late Invasion and Seizure of the Public Property at Harper's Ferry* (Washington, 1860).

[360] *Provisional Constitution and Ordinances for the people of the United States* (1858).

articles shall not be construed so as in any way to encourage the overthrow of any State government, or of the general government of the United States, and look to no dissolution of the Union, but simply to amendment and repeal. And our flag shall be the same that our fathers fought under in the Revolution." Osborne Perry Anderson, who accompanied Brown and eluded capture, mocked the southern perception that their constitution signified governmental overthrow: "Destitute of political or social power as respects," he wrote, "What use could such men make of a Constitution?[361]

Among the meanings of the John Brown project – a raid that included a constitutional literature – is as a negotiation of the structure of antebellum constitutionalism. His movement combined the ethos of both constitutional redemption and revolution: it honored the Founding while embracing radical change. Henry Thoreau observed this abiding constitutionalism, remarking "he is an old-fashioned man in his respect for the Constitution and his faith in the permanence of this Union. Slavery he deems to be wholly opposed to these." The turn to violence sought to shatter a stasis that conflated government and perpetual slavery. The project contemplated an armed interracial society, governing themselves under a constitution that honored the Constitution, waging war on slavery, not on government. In the felt need to have a constitution, in its patterning after the Constitution, in its conversation with the Founding, in the performance of enactment via convention, and in the express disclaiming of any intention to overthrow government, the Brown project revealed the cultural authority of constitutionalism. In Puritan fashion, like a city on the hill, the John Brown constitutional project sought to provide an example for others to see and know what purity was possible. In an age of constitutional faith, this act of devotion took the form of authoring and diffusing a constitutional model.

Conclusion

In 1881, Frederick Douglass visited Harpers Ferry, West Virginia. At Storrs College, an institution established for African-Americans in 1865 near the site of the Brown's mission, he paid tribute to his friend. In his address at the college, Douglass recalled the meaning of the Brown raid: "that a man might do something very audacious and desperate for money, power or fame, was to the general apprehension quite possible; but, in face of plainly-written law, in face of constitutional guarantees protecting each State against domestic violence, in face of a nation of forty million of people, that nineteen men could invade a great State to liberate a despised and hated race, was to the average intellect and conscience, too monstrous for belief.[362] By this time, Douglass was an elder statesman, and American constitutionalism had been buffeted by war, Reconstruction and now the agonies of "Redemption." Yet in this moment, Douglass easily sailed back in time to the world of antebellum constitutionalism – when the combined weight of the Constitution and the understandings of "forty million" people had seemed like an unassailable wall against emancipation.

When Frederick Douglass had advised against the Brown mission, he thought of inevitable fatalities – but he also thought of the Constitution in American minds. He knew that white Americans who ruled his country had grown up learning to believe in the Constitution of their fathers, that they had trained to be its reverent sentinels. Douglass did not believe that a direct assault on the Constitution could bring liberation. As the United States sustained bondage, it was bound by chords of historical memory. For Douglass, there appeared to be more play in

[361] Osborne Perry Anderson, *A Voice from Harper's Ferry: A Narrative of Events at Harper's Ferry* (Boston 1861).
[362] Frederick Douglass, *John Brown: An Address at The Fourteenth Anniversary Of Storer College, Harpers Ferry, West Virginia May 30, 1881* (Dover, NH, 1881).

what comprised constitutional truth than in the peoples' constitutional faith itself. With this knowledge of the strength and flexibility of popular constitutionalism, he made his own fabric. In 1851, Douglass was scheduled to deliver an Independence Day address in Rochester, New York's Corinthian Hall. Severe illness intervened, and he could not contribute to the multi-vocal constitutional veneration that rang out that day. One year later, he made good on the promise: he asked *What to the Slave is the Fourth of July?* From describing atrocities of enslavement, Douglass abruptly turned to constitutional meaning: "it is answered in reply to all this, that precisely what I have now denounced is, in fact, guaranteed and sanctioned by the Constitution of the United States; that the right to hold and to hunt slaves is a part of that Constitution framed by the illustrious Fathers of this Republic." In this fragile political moment, when constitutionalism and justice could seem at fundamental odds, Douglass offered his audience a pathway to keep their fathers' Constitution and to celebrate national independence without accepting slavery. "I differ from those who charge this baseness on the framers of the Constitution of the United States," he declared, concluding that "there is neither warrant, license, nor sanction of the hateful thing; but, interpreted as it ought to be interpreted, the Constitution is a GLORIOUS LIBERTY DOCUMENT."[363] From enslavement to anti-constitutional dissenter to constitutional redeemer, Douglass had experienced the weight of slavery's constitutionalism. And he had studied its venerative core. Once Douglass had felt its effects while the legal property of other men; then he had loathed the Constitution of which enslavers boasted; now, from some nexus of feeling and insight, he accepted American constitutionalism far enough to attempt to turn it against itself.

[363] *Oration, Delivered in Corinthian Hall, Rochester, by Frederick Douglas, July 5th, 1852* (Rochester, 1852).

CHAPTER SIX

SLAVERY IN THE COURT OF HISTORY

An immense crowd converged upon Philadelphia's Independence Hall in late November of 1851. People spilled through the corridors and packed into the chambers of the Old State House. Men and women commingled where the Federal Constitution had been drafted and the Declaration of Independence adopted. Law enforcement officers stood in full dress as people milled about the grounds. The Independence Chamber itself, populated by commemorative statutes and a growing portraiture collection, had recently been restored and opened to the public.[364] But that room held little allure for the masses who visited on November 24th and during the following week. It was not a grand civic ceremony or a patriotic holiday that drew people to the edifice that loomed so large in national memory. They came because a man, Castner Hanway, stood trial inside for treason. They attended to hear a dozen lawyers line up to sway a jury on whether that high constitutional crime lay in the white civilian's refusal of a federal obligation to attack a house sheltering fugitives from slavery.

Violence had descended on the hamlet of Christiana, Pennsylvania earlier that September when a Deputy U.S. Marshal, Maryland slaveowner Edward Gorsuch and other government-sanctioned slavecatchers laid siege to the home of William Parker. They planned to seize four people who had fled Gorsuch's possession. Recently, as emboldened hunters stalked the region after the Fugitive Slave Law of 1850, black residents in the area had formed a mutual protection society. "I vowed to let no slaveholder take back a fugitive, if I could but get my eye on him," recalled Parker, himself a longstanding fugitive. A few years prior, he had emerged from an antislavery meeting led by Fredrick Douglass electrified by the eloquent embodiment of his own "ideas of freedom, and his own hearty censure of the man-stealer."[365] From their vulnerable position beyond political belonging and legal security, the free and fugitive black families of Christiana could not indulge in the luxury of American constitutionalism's venerative consensus. Deference meant slavery. When the gun-wielding Gorsuch gang charged into Parker's house under color of federal law, the community refused to yield to the authority of the Constitution framed in Philadelphia. Edward Gorsuch was shot down during the ensuing chaos, an act taken in self-preservation and received as constitutional defiance. A federal grand jury convened in Independence Hall and indicted thirty-eight people for treason – by action or inaction. Taking aim at those who would "represent the Constitution of the land as a compact of iniquity, which it were meritorious to violate or subvert," District Judge John Kane issued instructions that made such speech tantamount to war against the United States. Passerby Hanway had spurned authorities' demands for assistance as he came upon the scene. The farmer, a witness testified, uttered the constitutionally unsound words that "negroes had rights and could defend themselves." For refusing the aid of his body or property, prosecutors chose Hanway as an example for constitutional discipline. By the text of the Constitution itself, treason against the United States consisted "only in levying war against them, or in adhering to their enemies, giving them aid and comfort." But what the assertion of antislavery state power lacked in legal merit, it sought to develop through claims upon the Founding.

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[364] Frank Etting, *An Historical Account of the Old State House of Pennsylvania Now Known as the Hall of Independence* (Philadelphia, 1874), 164-65.
[365] William Parker, "The Freedman's Story - Parts I and II," *Atlantic Monthly*, Vol. XVII, February/March 1866.

As proceedings unfolded inside the hallowed Hall, the trial of Hanway revealed itself as a makeshift but powerful public ceremony. Before an audience that extended beyond the jury to include a restive crowd, anxious national government and angry sections of the country, the court and litigants mounted a bitter exercise in invoking historical memory and performing patriotism. The national Founding was not confined to background scenery: it provided the substance of arguments and the weapon of choice that legal professionals grasped to make their case. The Hanway trial arrived in Independence Hall because the federal government had rented its space for the growing docket of the Eastern District of Pennsylvania. U.S. District Judge John Kane seized this architectural opportunity to charge the grand jury who would indict alleged violators of the 1850 Fugitive Slave Act that the Constitution, "which was made within these very walls, will never be repudiated here." When U.S. District Attorney John Ashmead opened the case, he reached for the same lever of authority. "This venerated hall from which the Declaration of American Independence was first proclaimed to an admiring world, never can be the scene of the violation of the Constitution, the noblest product of that Independence," the representative of the government declared, insisting upon the safety offered by "the intelligence, patriotism and honesty of American juries." If the charge of treason seemed a stretch for Hanway's disobedience, the eminence of the walls and a will to patriotic service might provide enough legal elasticity to secure a conviction, and with it the Union. Maryland Attorney General Robert Brent joined the prosecutorial onslaught to represent Maryland's injured slaveholders and ensure that an adamant proslavery voice resounded. He fulminated that the defense "scoffed at" the doctrine of constitutional submission "which the Father of our Country left us as a sacred legacy to posterity, [] here in the very building where the 'Declaration of Independence' first went forth to cheer and enlighten mankind." The duty fell to jurors, he insisted, to uphold the "solemn bond and covenant which your great forefathers entered into, and which binds you in common honesty as religiously as if you had with your own hands and seals accepted it; because you are the descendants of those forefathers, and you are enjoying the blessings which that contract has procured for you."[366] With great political pressure and little precedent for the prosecution, these legal professionals sought to transmute constitutional faith into a duty to convict.

As the patriotic mind of the jury assumed such importance, the government and defense sparred over the constitutional conscience of American citizens before the trial commenced. Prosecutors proposed interrogating potential jurors over their sensibilities with respect to the new Fugitive Slave Act. It "would annihilate the Constitution of the United States at once, and hazard everything in allowing that juror to go into the jury box and say — I believe the law to be an outrage upon humanity," argued James Ludlow, an elite Philadelphia lawyer. The avid participant in Union preservation meetings feared a jury whose sense of morality and law might undermine rather than sustain slavery: "It is essential to the rights of the United States that every juror who goes into that box should believe the law to be constitutional," he vowed, because otherwise "any juror may take his seat and be guilty of the same traitorous intention in heart as is charged in the overt act upon the prisoners." The court largely concurred with this logic. Meanwhile, the defense fretted over jurors who would enthusiastic elide constitutional faith with

[366] James J. Robbins, *Report of the Trial of Castner Hanway for Treason, in the Resistance of the Execution of the Fugitive Slave Law of September, 1850* (Philadelphia, 1852).

upholding the Union and convicting Hanway.[367] Ultimately, of the 83 men who appeared for jury duty, Hanway's attorney accepted 59 men and then the U.S. Attorney struck 51 of them.[368]

Before the ears and eyes of a divided and extended public, prosecutors spun stories of the Founding. They told of promises made, faith plighted and the absolute necessity of fugitive slave rendition, without which, per Ashmead, "the Constitution of the United States never could have been adopted; the existing National Union never could have been formed, and the powerful, prosperous, and glorious Republic of the United States, never could have existed among the nations of the earth." In this volley of historical discourse, U.S. Senator James Cooper, a Pennsylvanian with Maryland roots, chimed in for the prosecution that the "framers did not intend that the duties which it enjoined, should be stintedly and hesitatingly performed; but that acting in good faith, the parties to it should cordially fulfill all its requirements."[369] No mere festive ritual, the legal event around Hanway enlisted veneration of the Constitution, its authors and the Union they wrought to actuate harsh governance for a slaveholding republic. As the U.S. Attorney pleaded for a conviction, the final words of his address hung in the air like the finale of a Fourth of July oration. The United States requires that slavery "be vindicated and maintained, and that the promises of the Constitution shall be kept… in the spirit and in the truth, with which that instrument came to us from the great Fathers of the Revolution."[370] The unimpeded rendition of fugitive slaves, the dutiful cooperation of citizens, the prosecution of those purportedly conspiring to resist – all counted as the original intended meaning of the U.S. Constitution; all constituted law as ordained and enjoined by the imperatives of national history.

In Philadelphia, the built environment, symbols and even sounds of the Founding were undeniably *present* in the national enforcement of slavery. When black abolitionist William Henry Johnson returned to Philadelphia after the Civil War and marched by Independence Hall with the Unconditional Club as "the grand old Liberty bell pealed out eleven strokes," memories of the first proceedings under the 1850 Act flooded back. Johnson recalled "scenes so terrible and impressive, which I witnessed and was a party to, through three long eventful days, Monday, Tuesday and Wednesday, during the progress of a mockery trial of the alleged fugitive Daniel Webster…. held in the United States Court room, located in Independence Hall under the sound of the Liberty bell."[371] The Old State House and the city hosted a series of proceedings, which more often than not sent people to slavery or allowed slaveholders to accept payment for manumitting captives. The landscape surrounding the hall hosted mass protests and civic violence as police and government-hired brawlers guarded against black vigilance committee action. At the Hanway trial, Supreme Court Justice Robert Grier, sitting with the ardent Judge

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[367] *Addresses delivered at the meeting of the Philadelphia Bar, Held September 22nd, 1886, upon the occasion of the death of Hon. James R. Ludlow*. (Philadelphia, 1886).
[368] *Report of Attorney General Brent, to His Excellency, Gov. Lowe, in relation to the Christiana treason trials, in the Circuit Court of the United States, held at Philadelphia* (Annapolis, 1852), 4-5, 10.
[369] Robbins, *Report of the Trial of Castner Hanway for Treason*.
[370] A Member of the Philadelphia bar, *A History of the Trial of Castner Hanway and Others, for Treason, at Philadelphia in November, 1851: With an Introduction Upon the History of the Slave Question* (Philadelphia, 1852).
[371] William Henry Johnson, *Autobiography of Dr. William Henry Johnson* (Albany, 1900). Robbins, *Report of the Trial of Castner Hanway for Treason*, 11. The Webster proceeding arose eight years after the Hanway trial, at which a new commissioner J. Cooke Longstreth discharged the man after his lawyers sewed enough public sympathy and doubt about his identity. Johnson's recollections may refer to an earlier proceeding in which a different fugitive was returned to slavery, and several of Johnson's vigilance committee friends received long terms in the State Penitentiary for trying to free rescue the prisoner. *The arrest, trial, and release of Daniel Webster, a fugitive slave : correspondence of the Anti-slavery standard* (Philadelphia, 1859); Samuel May, *The Fugitive Slave Law and Its Victims* (New York, 1861), 116-18.

Kane, instructed the jury "when the object of an insurrection is of a local or private nature, not having a direct tendency to destroy all property and all government, by numbers and armed force, it will not amount to treason." This statement of law deflated the constitutional passions that prosecutors had stoked in painting Hanway as encouraging the overthrow of constituted authorities. A verdict of not guilty followed. After the trial concluded, its lessons remained contested. A Philadelphia press disseminated *A History of the Trial of Castner Hanway and Others, for Treason*.[372] Authored by a conservative attorney, it featured an historical essay on the Founding "to show the views entertained upon the subject by the great statesmen who framed the Constitution and watched over its first developments." As the long pamphlet insisted, questions of whether constitutional justice was done and how the public should judge participants were measured through ascriptions of original meaning. Across antebellum America, most proceeding involving the seizure of alleged fugitive slaves took place in less commanding structures than Independence Hall – in old courtrooms in Boston and New York, newer establishments of legal authority in Ohio towns, and outposts of law in Indiana, Illinois and elsewhere. But if they lacked the immediate power conferred by the physical site of the Founding, they drew mightily upon the intangible authority of the Founding that lived in many Americans' minds.[373]

This chapter examines how the cultural power of the Founding became legal authority in antebellum courts confronting the place of slavery in the constitutional firmament. In cases sparked by enslaved peoples' struggles to escape bondage and stay free, legal practitioners mobilized constitutional origin stories as authoritative precedent. As preceding chapters have illustrated, the Founding ascended in American constitutional life during the early republic. It gained a currency and power that proved irresistible during judicial contestation of the constitutional terms and territory of American slavery. In tracing the rise of the Founding in antebellum courtrooms, the chapter suggests not only a causal connection between slavery and the development of a distinctive American constitutionalism that seeks binding meanings in an original moment. More particularly, it shows a linkage between that nexus of slavery and constitutionalism and the legal practices undertaken in oral arguments and the four corners of published judicial opinions. The emergence of this cultural constitutional structure, at the confluence of history and law, has eluded direct study by scholars across disciplines. As cases of rendition and resistance like Christiana illustrate, legal professionals pressed popular reverence for the Founding and its history into service in order to manage the most explosive domain of national constitutional life. The bar used its legitimating power to advance interpretations, persuade juries, and win spectators' favor. Judges wielded the Founding as a resource for justifying rulings and conducting didactic and diplomatic roles beyond adjudication: through the authority of history, the judiciary sought to instill public obedience, divert moral objections to slavery and negotiate the sectional politics that inhered in each contested rendition. As courts both assimilated the Founding and crafted lessons for public consumption, antebellum America experienced the interpenetration of vernacular constitutionalism and formal jurisprudence. The moral and political gravity of slavery bent and bowed the United States' constitutional practices in its high juridical halls as well as in popular understanding.

Attorneys and judges asked the Founding to perform the work of law – making present choices appear as constitutionally required. This was not a single, steady task but a shifting obligation. Different types of litigation – fugitive slave cases, prosecutions for aiding enslaved

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[372] A Member of the Philadelphia bar, *A History of the Trial of Castner Hanway and Others, for Treason, at Philadelphia in November, 1851: With an Introduction Upon the History of the Slave Question* (Philadelphia, 1852)
[373] Charlene Mires, *Independence Hall in American Memory* (Philadelphia, 2002).

people and trials of kidnappers for violating state procedural protections – evoked their own tellings of historical compromises and original understandings. The overarching question of the identity of slavery under Constitution fragmented into a multiplicity of inquiries. Did the Constitution recognize enslaved people as property or only as persons with a legal status determined by local jurisdictions? Was rendition of fugitive slaves left to state governments? What process for adjudicating rendition was due? What could the federal government demand of citizens in aiding slavery? To what extent could states proscribe cooperation? Did the Constitution mandate interstate comity and thus free state recognition of other states' slave and criminal codes? Was the Fugitive Slave Law of 1793 or 1850 constitutional? Was there a general constitutional promise to protect and preserve slavery in what America would become?

The legitimating labor of constitutional history came in phases. This chapter traces the spreading authority of the Founding in the judiciary during the late 1820s until the early 1840s. Over this period, the Founding grew. As articulated inside courts, its narrative swelled both in detail and in scope – developing over time from a vague authorizing principle of upholding an original principle of sectional compromise to upholding specific ascribed proslavery promises. Legal contests over slavery reflected both the increasing intensity of the constitutional politics of slavery and the increasing availability of Founding materials and the intensifying vernacular of anxious constitution veneration over the antebellum era: relatively thin representations of the Founding offered during the 1820s developed into thicker, elaborated imaginings in the 1850s exemplified by the warring depictions in *Dred Scott* of African American status at the Founding. The evolution of constitutional origin stories around slavery was punctuated by contingent events. New precedents such as *Prigg v. Pennsylvania* (1842) and, as will be seen in the following chapter, statutes such as the 1850 Fugitive Slave Act imposed new demands for a justificatory past. Such regime changes pressured the historical narratives accreting in opinions and extralegal literature to adapt and expand, while also opening opportunities for objections on historical grounds. The introduction of important archival materials, especially the posthumous publication of James Madison's notes from the constitutional convention in 1840, transformed the extent to which legal actors could craft constitutional narratives and counter-narratives. The justificatory work of the Founding was responsive to the political geography of courts: cases argued in Boston or New York City, in Ohio's antislavery Western Reserve or enslaver-friendly Cincinnati, in Quaker Pennsylvania or rural Indiana saw lawyers and judges recruit the Founding with rhetorical postures addressing the constituencies in which the constitutional issues were borne out on the ground. Yet across the various changes, locales and issues, legal professionals beat out a familiar rhythm in speeches and opinions– to obey a glorious Constitution of the fathers, as the fathers intended. In their appropriation and reproduction of Founding authority, they reinforced a categorical method for understanding the law of the land.

The Spread of Authority

In the era of the Missouri Crisis, courts began to gradually assimilate the authorizing presence of Founding narratives. The stories that judges gestured towards in *Wright v. Deacon* (1819) and *Commonwealth v. Griffith* (1823), as discussed previously, found judges reaching for the same vernacular constitutionalism that arose in the public sphere to impose original settlements on conflicts over fugitives and state power. These initial cases suggested that as courts confronted the constitutional politics of slavery, the discourses of popular historical authority and formal legal justification would move together. The idioms and information of public constitutional history comprised a kind of legal technology that judges and lawyers would

call it into service to negotiate conflicts over slavery. Just as legal reporters and treatises moved across the country, so too did the precedential dimensions of the Founding spread.[374]

The Indiana case of William Sewall demonstrated the frontiers of this knowledge at the moment before Nullification and emergence of immediate abolitionism into public notoriety. In 1829, slaveholder William Sewall left Virginia to resettle in Illinois. This was not an act of moral conversation. Taking with him the Richardsons, a family whom he enslaved, Sewall encountered winter storms and high waters in Indiana that induced the party to stop for several weeks. In the meantime, Nellie Richardson, a young woman, took matters into her own hands. Nellie "Walked to Indianapolis, and found the laws in favor of her obtaining her freedom," Sewall recorded in his diary, furious at her "violence and impertinence." The man rushed to consult with Governor James Ray and retained counsel who assured him that his constitutional property rights in persons would be maintained, particularly if he were to rebrand himself as a slave state citizen sojourning to settle in another slave state. In court proceedings that pitted Nellie's petition against Sewall's invocation of the Fugitive Slave Clause, his attorney invoked the Founding to overcome inconvenient facts – that Sewall had stayed voluntarily in the free state of Indiana and quit Virginia to relocate to a free state. Under common law precedents developed from the 1772 British *Somerset* decision, these facts arguably made the Richardsons free in Indiana. To prevent such an outcome, John Farnham, of the Farnham and Thornton law partnership, contended:

> It is a matter of historical notoriety, that the Federal Constitution would never have received the ascent of the slave-holding states, without a provision obligatory on all the other states, securing the rights of slaveholders. The decided majority of the original thirteen states were, at the adoption of the Constitution, directly interested in this protective principle. Hence the Constitutional provision for a summary remedy in all cases of escape from said states.

This historically enterprising lawyer demanded deference to a sufficiently proslavery Founding. Farnham argued that past understandings and intentions beyond the text required a liberal construction of the term "escape" in the Fugitive Slave Clause. By this view, Nellie's extended stay in a free state at the volition of Sewall did not make her claim to freedom any less of a constitutional escape. "Instead of casting about for legal excuses to deprive a slaveholder of his property," the proper mode of adjudication "looked the spirit and meaning, the intention and object of the Federal Constitution," he insisted.[375] At trial, however, Farnham encountered a jurist who envisioned a different Founding. Judge B. F. Morris conceded that "At the establishment of our national government, slavery existed in a number of the states, and any portion of them it was found to be so interwoven with the habits and feelings of the people, that as a necessary compromise of conflicting principles and interest, its existence was tolerated to secure the adoption of the Federal Constitution."[376] But that acceptance was bounded, and those bounds were to be strictly construed in keeping with a Founding that recognized the "principle of perfect equality in the natural right of all men to the enjoyment of life and Liberty in the pursuit of happiness" within the fabric of the national Constitution. From this premise, Morris opined that a "Clause of the Constitution of the United States which tolerates the existence of slavery in any portion of our country forms an exception" the country's originating principles. The character of the particular Founding that Farnham and Morris conjured would decide the case.

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[374] *Wright v. Deacon,* 5 Serg. & Rawle 62 Pa. (1819) *Commonwealth v. Griffith*, 2 Pick. 11 (1823).
[375] *Indiana Journal* (Indianapolis, Indiana), Wednesday, January 27, 1830.
[376] For the Indiana Journal, *Indiana Journal* (Indianapolis, Indiana), Wednesday, December 30, 1829.

The judge ruled in favor of Nellie and her family. Outraged when Morris, "notwithstanding all the laws, pronounced all my slaves free," Sewall raced to U.S. District Judge Benjamin Parkes, who issued a warrant allowing him to seize the Richardsons. Evidently, Parke accepted the constitutional narrative that Farnham offered.[377]

Nellie's action presented a novel case for Indiana. If prevailing common law principles favored freedom, popular constitutional views among the mix of ex-southerners and eastern migrants inhabiting Indiana were murkier.[378] No shortage of anger greeted the ruling by Morris, who proceeded to circulate his unreported opinion through the *Indiana Journal* – because "the public have a right to know the principles and reasons upon which it is predicated, and if… the reasoning false and conclusion erroneous, any individual has a right to demonstrate that such is its character." In Nellie's case, legal professionals pondered the reach of the Constitution before the national upsurge in immediate abolitionism. With no controlling statutory regime, no conflict between federal and state authorities, and an intense regional gaze but little national attention in 1829, the case posed an open moment for constitutional expression.[379] Indeed, the case did not inherently raise a constitutional question over slavery. It was a choice by attorneys and judge to move beyond Indiana common law to invoke the Founding and consider what the framers meant. To support and legitimate their positions, they intuitively drew upon the growing public idiom of imagined constitutional history. They appeared wholly uninformed by specific historical sources but versed in a shared vernacular, which they put to use in developing incompatible depictions of a proslavery or antislavery Founding in the protections afforded the institution as the United States expanded into a continental empire.

After apprehending the Richardsons in 1830, Sewall swiftly went south to Missouri and left Nellie in St. Louis with the slave trading merchants McGill and Ingram. But again she took matters into her own hands, managing to file one of the freedom suits that arose in the American confluence.[380] In March 1831, a St. Louis judge determined that "Nelly Richards be permitted to sue as a poor person to establish her right to freedom." The court ordered Sewall to appear in July to answer her suit for false imprisonment, assault and battery. Sewall seems not have shown, and Nellie likely went free.[381] As for the Indiana legal professionals, feelings could not have been too hard after Sewall left with the Richardsons. A year after the case, in 1831, Judge Benjamin Parke served as the first president of the Indiana Historical Society, with B. F. Morris as recording secretary and lawyers, H. P. Thornton and John Farnham as co-founders. Ironically, the first address delivered to the society was titled "The Uses of History," by Indiana College president Andrew Wylie.[382]

When the Nullification Crisis arrived after the Sewall case, it ushered in a commitment to constitutional stability through constitutional history. As politicians and authors sought to script a binding past to sustain the Union, courts became forums in which to impose that stabilizing

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[377] John Goodell, ed., *Diary of William Sewall, 1797-1846, formerly of Augusta, Maine, Maryland, Virginia and pioneer in Illinois* (Beardstown, IL 1830), 126-9, 132.
[378] Nicole Etcheson, *The Emerging Midwest: Upland Southerners and the Political Culture of the Old Northwest, 1787-1861* (Bloomington, 1996).
[379] The editors of the leading national legal periodical, upon reading accounts in the Indiana press, discussed the case at some length in 1830. "Rights of Slave Holders," *American Jurist and Law Magazine* 3:6 (April, 1830), 404-07.
[380] Anne Twitty, *Before Dred Scott: Slavery and Legal Culture in the American Confluence, 1787-1857* (New York, 2016).
[381] Richards, Nelly, a woman of color v. Sewel, William, July 1831, Case No. 2, Circuit Court Case Files, Office of the Circuit Clerk, City of St. Louis, Missouri.
[382] Gen. John Coburn, "What the Indiana Historical Society Has Done," *The Indianan* Vol. 4:5 (1899), 298.

history as law. Constitutional questions of race and slavery opened the courthouse door for historical narratives to enter carrying urgent instructions for the present. The Crisis developed at a conjuncture with other forces that heightened this urgency. In 1831, Nat Turner's bloody strike against slavery in Virginia crystallized fears across the South and the desire to exert tight control over law, politics and persons. At the same time, a vocal minority of abolitionists joined with free black activists in promoting immediate emancipation. Its most visible leader, William Garrison, began publishing *The Liberator* in 1831 and soon articulated a transgressive condemnation of the fathers' Constitution, one that would escalate over the years. "There is much declamation about the sacredness of the compact which was formed between the free and slave states, on the adoption of the Constitution," he wrote in 1832, but the framers "were men, like ourselves—as fallible, as sinful, as weak, as ourselves" – and they sacrificed "the bodies and souls of millions of our race, for the sake of achieving a political object."[383] Although marginal, such views informed the sense of constitutional risk that judges and attorneys sought to guard against. In the courtroom, proslavery, antislavery and conservative unionist legal professionals clung tightly to the Founding in the following decades. They sought its authority as their own. As cases unfolded under the specter of sectional conflict in the antebellum era, constitutional nostalgia became a powerful mode of legal argumentation. The quest for original meaning owed little allegiance to a past independent of present desires. As would occur time and again in antebellum litigation, the historical record was soft while public opinions were hard. The mode itself tended towards reinforcing the views already harbored by its practitioners.

A month after the South Carolina Convention repealed its Nullification Ordinance in March of 1833, the U.S. Circuit Court for Pennsylvania confronted a case of antislavery action. For Supreme Court Justice Henry Baldwin and District Judge Joseph Hopkinson, who presided over the trial, the time was ripe to firm hard civic lessons on historical constitutional meaning. "Vigilance" and "punishing all infraction" were the order of the day, according to Baldwin. In 1832, the enslaved Jack had fled Caleb Johnson of Princeton, New Jersey and found agricultural work in Pennsylvania. In October, Johnson crossed the Delaware with several men and seized the man. Before they could carry him back in their wagon, local residents including Jack's employers and Justice of the Peace Isaac Tompkins intervened with force. Jack escaped while an injured Johnson and his men were arrested for kidnapping. The erstwhile slaveholder came to federal court seeking damages and penalties under the Fugitive Slave Act of 1793.[384]

The nullification moment weighed upon the Pennsylvania court. "The political aspect of public affairs cannot be overlooked," Baldwin stated. Even though "the country has happily passed through some exciting and painful scenes threatening its peace," he warned, "No one can tell what danger may be impending over us or how imminent it may be."[385] The constitutional disorder posed by the slaveholding nullifiers and the aid given to Jack's will to freedom seemed linked, or the court was willing to make the connection. Drawing from the pioneering claims of Justice Tilghman during the Missouri Crisis era, the court instructed the jury that the Constitution "would never have been formed or assented to by the southern states without some provision for securing their property in slaves," a truth borne out by the fact that "slaves are not only property as chattels, but political property, which confers the highest and most sacred political rights of the states." Beyond pressing for a verdict in favor of the plaintiff, the justice

[383] On the Constitution and the Union," *The Liberator*, December 29, 1832.
[384] James Gigantino II, *The Ragged Road to Abolition: Slavery and Freedom in New Jersey, 1775-1861* (Philadelphia, 2016).
[385] *Johnson v. Tompkins*, 13 F.Cas. 840, Baldw. 571, No. 7416 (C.C.E.D.Pa.,1833)

sought renewed constitutional faith in original bargains struck by the framers and the architecture they designed. Slavery, the court instructed, was an inseverable part of one excellent whole. Baldwin coaxed the jury to "see that in protecting the rights of a master in the property of a slave, the constitution guarantees" the "rights of the states," the formative "concession to the Southern states" enabling equal representation in the Senate and the three-fifths clause, and the "sacred" right of property itself. That slavery was built into the fundament of the Union, he concluded, was a truth never to be questioned – only implemented: "you see that the foundations of the government are laid and rest on the rights of property in slaves the whole structure must fall by disturbing the *corner stones* of federal numbers." Decades before Alexander Stephens would designate slavery the cornerstone of the Confederate Constitution, a Supreme Court justice elaborated a historical vision of an original commitment to slavery in perpetuity. His words fell on willing ears: without regarding themselves as proslavery actors, jurors duly carried out the commands of their fathers' Constitution. The arguments of William Rawle and John Sergeant were thoroughly unavailing. The jury rendered a verdict against several of the men, awarded $4,000 in damages, and requested that Baldwin furnish his charge for publication and public edification.[386]

Not all courts in Pennsylvania were so enthusiastic to curtail antislavery hopes, but they dutifully performed the work of upholding legal slavery. Judges relied upon the legitimating force of the Founding to this end as well as to resist the pull of antislavery lawyers' attempts to recruit that history in defense of alleged fugitives. As a fifteen-year-old in 1832, Charles Brown fled laborious enslavement in William Drury's Hagerstown, Maryland store. In western Pennsylvania, he found sanctuary and work until his capture and adjudication in early 1835. Pittsburgh Recorder Ephraim Pentland, the judge for the town, presided over a trial of Brown's identity and freedom.[387] The national enforcement of slavery and long-running conflict between Pennsylvania and its southern neighbors over returning alleged fugitives had finally caught up with the official. "During my eleven years of official duty, as Recorder of the city of Pittsburgh," Pentland reflected, "this is the first instance in which I have officially been called on to remand a human being into bondage, and I trust in God it will be the last." A Pennsylvania statute governing the rendition of enslaved people complicated the affairs of slaveholders who, under the federal Fugitive Slave Act of 1793, could "seize or arrest" enslaved persons, take them before a judicial officer and readily secure a certificate of removal. To the increasing ire of Maryland slaveholders, the statute stipulated that claimants' oaths were insufficient proof of enslaved identity such that slaveholders must present impartial witnesses to establish the alleged fugitive.[388] Wealthy Drury went through these steps to reclaim Brown, though his attorneys protested and demanded summary "constitutional" removal. White men from the young man's past made unwelcome appearances on the witness stand, while various African-American acquaintances tried to save him with contrary testimony.

While the frightened Charles sat in court, Pentland could not hide his shock at the terrible work his hand was doing – "[a]s my pen glided along the paper," he wrote in a dissociative public reflection. To return Brown to slavery, he took refuge in the Constitution. Instructing himself as much as his audience, Pentland repeatedly invoked his fealty to his fathers'

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[386] *Johnson v. Tomkins*, 13 F. Cas. 840 (C.C.E.D. Pa. 1833); "Important Law Case," *Niles' Register*, June 1, 1833, 229-30; "Kidnapping by Law," *The Liberator* (Boston, Massachusetts), Saturday, July 20, 1833.
[387] Sarah Hutchins Killikelly, *The History of Pittsburgh: Its Rise and Progress* (Pittsburgh, 1906), 508
[388] William R. Leslie, "The Pennsylvania Fugitive Slave Act of 1826," *Journal of Southern History*, 18: 4 (Nov. 1952), 429-445.

Constitution. "Whilst, as a man, all my prejudices are strong against the curse of slavery, and all its concomitant evils, I am bound by my oath of office to support the constitution of the United States," he declared; and again, "whatever may be our own notions and feelings on this subject; however our feelings as men, and members of a community in which we are not cursed with the foul blot of slavery; we must not, in our official capacity, when called on to act in cases like the present, forget that, according to the constitution and laws of the United States, slaves are personal property." The Pittsburgh Recorder acted out the moral work of constitutional deference. It was not mere law but the inherited Constitution of the Union that commanded his complicity.[389]

Through claims upon the Founding, Drury's lawyers helped usher Pentland to a plane where official constitutional obedience was the only ethical act. "The framers of the constitution could not have used stronger language than they have done on this subject," assured George Dallas, who urged removal proceedings because "this species of property were intended by congress, under the constitution of the U. S., to be of the most summary kind." Another Drury attorney, Mr. Kingston, dismissed the framers' textual reticence regarding slavery. "Slaves" may not appear in the Constitution, "yet they are in it, in different terms." It may not have "suit[ed] the genius of the times, perhaps, in a nation which had just thrown off the yoke of slavery herself," he conceded, but the framers provided for slavery and not black freedom. The slaveholder's representatives argued that even the courtroom testimony of Brown's witnesses was of dubious constitutionality because "free negroes, or mulattoes, are not citizens of the U. S. within the meaning of the constitution." Wilson McCandless and Thomas Hamilton, rising members of the Pittsburgh legal establishment, tried their best to respond in kind on Brown's behalf.[390] Asking for the most exacting standard of proof and strictest construction of laws respecting human liberty, they avowed that "'the principles of the revolution embued our fathers with a hatred against tyranny and oppression, of every sort and degree — and they had no sooner thrown off their own shackles, than they felt it their bounden duty, having accomplished their own emancipation, to strike the fetters from the slave — conscious that the language of the immortal Declaration of Independence, 'that all men are born free and equal,' should not, as regarded the patriots of Pennsylvania, be a libel on their revolutionary principles, and upon their moral integrity, as well as a stain upon the Declaration of Independence itself.'" These general sentiments and claims upon Pennsylvania fathers could not erase the constitutional text and history that, for Pentland, committed him to the maintenance of slavery against Brown's fugitivity. Nor could broad nostalgic strokes defeat the identifying information adduced at trial. Immersed in the Union-venerating legal culture of the bar, McCandless and Hamilton did not challenge the constitutionality of rendition itself. And nobody challenged the Constitution.

Ruling a Racial Founding in Connecticut

North from the free state borderland with the South, white Americans created courtroom opportunities to mobilize the Founding against black freedom. In Connecticut, the first fugitive slave case under the Federal Constitution arose in 1837. But conservative citizens around the village of Canterbury staged a proxy in the immediate wake of the Nullification Crisis and appearance of radical abolitionists in their vicinity. Local racial animus and a wave of national hostility towards antislavery activism spurred community leaders and their judiciary to practice

[389] *Report of the case of Charles Brown, a fugitive slave, owing labour and service to Wm. C. Drury, of Washington County, Maryland: decided by the recorder of Pittsburgh, February 7th, 1835* (Pittsburgh, 1835)
[390] "Anniversary of the 'Alumni,'" *Hazard's Register of Pennsylvania* (August, 1835), 75-77

the reasoning and perform the passion of the Founding. When the cannon boomed from the lawn of Canterbury Town Clerk Andrew T. Judson in May 1833, spectating citizens let loose a cheer for the imminent legal demise of a local schoolhouse that they had blasted as a dire racial nuisance. Word had just reached the townspeople that the Connecticut General Assembly had criminalized the operation of any academy serving African Americans from out of state without municipal permission. This new law promised to solve the menace to their affluent community perceived in the presence of Prudence Crandall's "High School for Young Colored Ladies and Misses." What began in 1831 as the Canterbury Female Boarding School to serve the daughters of well-to-do residents had descended into racial panic and institutional crisis by late 1832. Once Sarah Harris, an aspiring teacher and young African American county public school graduate, had enrolled in the boarding school, white parents withdrew their children. The 30-year-old Quaker Crandall, facing this de facto segregation campaign, remade her teetering venture into an institution for daughters of free black families. When students arrived from across the Northeast, white residents greeted them with adversarial civil process and violence. After issuing warning, harassing the school with "rough music," refusing goods and services, vandalizing the schoolhouse, and sending memorials seeking a statute enabling prosecution, townspeople were happy to cart a cannon six miles into Canterbury and score their victory with gunpowder. But it would take multiple trips into the court and a final touch of extralegal coercion to shutter the schoolhouse doors in 1834.[391]

Crandall opened her establishment on volatile ground – though virtually nowhere in the United States offered safe harbor for an African American women's academy. The ostensible reasons for suppressing the school – to preserve the neighborhood racial order and the reputation of nearby Yale College – echoed a nationwide conservative politics of preserving the Union through upholding slavery and racial exclusion. In this moment, a local bout of white supremacy and class elitism assumed a national meaning and profile. As a British tourist remarked with only a measure of exaggeration, Crandall was "a name that had been heard in every hamlet and house throughout the Union" because of the symbolic layers of her case. Residents could see their effort to police the social fabric of Canterbury as entwined with the fabric of the Union, connected through long threads of race and constitutional politics. These politics not only informed the stakes of the controversy; they also prepared people for a particular mode of judicial contestation. As civil authorities prosecuted Crandall through multiple trials, the advocates, judges and community seized upon the anti-school law to examine the question of whether black Americans held constitutional citizenship. In turn, as the lawyers grappled with this constitutional inquiry, they chose to litigate the relationship through history: they grasped for a Founding in which national fathers had already settled such a question.

In August of 1833, the State opened its prosecution in Windham Superior Court for Crandall's ongoing operations. After the jury deadlocked, the State tried again in October before Judge David Daggett of the Supreme Court of Errors and secured a conviction. As prosecuting attorney, Andrew Judson relished the opportunity to bring home his version of justice after shepherding the anti-school bill into law while representing Canterbury in the General Assembly. Before the bill passed, a joint committee of the Assembly had assured citizens that having already "restored to the blessings of freedom" to the formerly-enslaved African Americans of Connecticut, "*Our* obligations as a *State*, acting in its sovereign capacity are limited to the people

[391] "High School for Young Colored Ladies and Misses," *The Liberator* (March 2, 1833); *Fruits of Colonization!* (Boston: 1833), 8; Edward S. Abdy, *Journal of a Residence and Tour in the United States*, Vol. 1 (London, 1835).

of our *own territory*."[392] At trial, Judson similarly absolved jurors from responsibility for racial exclusion through constitutional history that enabled jurors to take pride in forbearers while opposing black freedom. "It was the policy of our fathers to rid the State of the evils of slavery," Judson explained; but it was a simple historical fact, he continued, that the U.S. Constitution "does recognise slavery, and leaves it with every state to continue, regulate, or abolish it, at their pleasure." To take new measures having the effect of interfering with slavery across the Union would violate the fathers' settlement. As Judson mediated original constitutional expectations, he argued that racial slavery "must be left, where the framers of the Constitution left it, with each State, or force must be the resort" – and that Connecticut's policy against fostering racial inclusion implemented this constitutional rule. From a sweeping premise that lay outside of the text, Judson could pit the framers against the increasingly visible abolitionists with whom Crandall began associating. "There are indeed a few individuals in New England, who would prefer to see the constitution torn into a thousand atoms, rather than live under it, so long as it tolerates slavery," Judson spoke, and he wondered rhetorically "If the time has indeed arrived, when the citizens of New England are to go deliberately at the work of dissolving the Union of the States, and a Jury of the County of Windham is to begin that work." With these remarks, the State's attorney suggested that in adjudicating the fate of Crandall, jurors faced a choice to either follow the framers or align with philanthropists of disunion. The people at the center of this case and on the margins of Canterbury were free African American female students, not enslaved men and women. And the litigation brought up questions of black citizenship and attendant privileges and immunities, not the institution of slavery. Yet if the controversy did not immediately involve American slavery, it was quite enmeshed in its politics and in the construction of a historical constitutionalism of racial exclusion.

Superior Court jurors appeared to deny the national citizenship of black Americans with their verdict. Although they could decide both facts and law, Justice Daggett issued an emphatic charge that left no doubt where his views lay. "At the adoption of the Constitution of the United States, every State was a slave State," he asserted, and "slaves were not considered citizens by the framers of the constitution."[393] Daggett presented these historical assertions as the key to the Constitution. Embracing government by reconstructing the Founding, he instructed that "to decide who are now citizens of the United States, we must go back to our revolution." Peering into the Revolutionary era with dictionaries, commentaries and his mind's eye, the judge assembled a statement of law that made whiteness a prerequisite. Justice Daggett and Andrew Judson shared this vision. As political leaders and legal authorities, both men advanced political projects of constitutional exile for black Americans. During the fall of 1831 in New Haven, where he had recently held mayoral office, Daggett campaigned to subdue a proposed trade school for young African-Americans. Approximately "700 freemen" including the mayor, common council and aldermen adopted the resolution he advocated at a city meeting: that slavery

> depends on the municipal laws of the state which allows it, and over which neither any other state nor the Congress of the United States has any control, that the propagation of sentiments favorable to the immediate emancipation of slaves, in disregard of the civil institutions of the states in which they belong, and as auxiliary

[392] "Report," in *Andrew T. Judson's Remarks to the Jury, on the Trial of the Case State v. P. Crandall, Superior Court, Oct. Term, 1833, Windham County, Ct.* (Hartford, 1833), 30-32.
[393] "Charge," in *Andrew T. Judson's Remarks to the Jury, on the Trial of the Case State v. P. Crandall, Superior Court, Oct. Term, 1833, Windham County, Ct.* (Hartford, 1833), 25-30.

> thereto the contemporaneous founding of Colleges for educating colored people, is an unwarranted and dangerous interference with the internal concerns of others States, and ought to be discouraged.[394]

Like the opponents of Crandall's school, the judge drew a connection between free black opportunity, abolitionism and sectional politics. And like the advocates of the anti-school law in 1833, he placed the moral, legal and political irresponsibility of Connecticut for racial exclusion on the governing grounds of constitutional history. The moving spirit behind the legal attack on Crandall's school, Judson, was a true believer in original constitutional exile for black Americans, one that matched the physical exile the American Colonization Society scheme that he and Daggett supported. Connecticut abolitionist Samuel May, who helped organize the defense for Crandall, recalled Judson's heated accusation following a Canterbury town meeting. "You are violating the Constitution of our Republic, which settled forever the status of the black men in this land. They belong to Africa. Let them be sent back there or kept as they are here," the official inveighed.[395] Only a year after Crandall and her pupils were forced to abandon the school, Daggett convened a large gathering at the Connecticut State House to perform conservative panic over antislavery mailings in 1835. Retired from the judiciary, he remained the long-serving Kent Professor of Law at Yale College and contributed his authority to the mass adoption of a resolution, "That the Constitution of the United States, in which the different and delicate interests of the sovereign States composing this confederacy, were compromised and *settled*, has resulted in unparalleled political prosperity and happiness; that this Constitution, as the basis of our national compact, was formed in a patriotic spirit of mutual concession, and that any citizen who attempts to undermine its foundations, is an enemy to the best interests of his country."[396] This emphasis (in the original) on a historical settlement upon which order and prosperity depends threaded through the Crandall case and the broader commitments of these lawyers and representatives. Veneration and racial exclusion braided together in the legal and political constitutionalism of these leaders of men and officers of the Court.

Crandall appealed her conviction for harboring and boarding "foreign persons of color" in July 1834 before four members of the Supreme Court of Errors, where Daggett presided again as Chief Justice. With the silent sponsorship of Arthur Tappan, Samuel May secured elite counsel who brought political respectability and legal expertise.[397] Calvin Goddard, the mayor of Norwich and once a Federalist mainstay, and Trinity College law professor William W. Ellsworth, who had just retired from Congress and would become the twenty-ninth governor of Connecticut, took her case. Inside the courtroom, they faced Judson and a new State attorney, Chauncey Cleveland, a Canterbury native who would succeed Ellsworth as the thirtieth

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[394] "Negro College," *The Connecticut Courant* (Hartford, Connecticut), September 20, 1831, 1.
[395] Samuel May, *Some Recollections of Our Antislavery Conflict* (Boston, 1869), 48; Samuel May, *The Right of Colored People to Education, Vindicated. Letters to Andrew T. Judson, Esq., and Others in Canterbury, Remonstrating with Them on Their Unjust and Unjustifiable Procedure Relative to Miss Crandall and Her School for Colored Females* (Brooklyn, Conn., 1833).
[396] "Meeting of the Citizens," *Richmond Enquirer* (Richmond, Virginia), Sept. 22, 1835, 1; "Sketch of the Life and Character of Hon. David Daggett," in Thomas Day, ed., *Reports of Cases Argued and Determined in the Supreme Court of Errors of the State of Connecticut Vol. XX* (New York, 1856), vii-xvi; "Hon. Andrew T. Judson, of Connecticut," *United States Monthly Law Magazine and Examiner* (July, 1852), 11-15.
[397] *Proceedings of the American Anti-slavery Society: At Its Third Decade, Held in the City of Philadelphia, Dec. 3d and 4th, 1864* (New York, 1864), 46. *Crandall v. State,* 10 Conn. 339 (1836).

governor.[398] These lawyers marked the Founding as their battleground; they gave it form through stories, claims and affirmations of its authority. The future of young black women who endured Canterbury's abuse, the career of Prudence Crandall and the constitutional place of African Americans seemed to hang in the balance of Founding narratives and counter-narratives.

Although the State prosecuted Crandall for how she made her living and used her real estate, the case did not dwell on professional and property rights. It fixated on race in historical perspective. The answer to whether Connecticut could bar free African-American from coming into the State and attending school, the lawyers agreed, hinged on the understandings of dead men. "There might be some little difficulty in the question, if the words of the Constitution are taken literally, but looking at its spirit, and the intention of the makers, there is none whatever," urged Cleveland, telling the "four Judges who are white men" that to violate the racial line made by "those who have gone before us" would "destroy a nation of free white Americans." Later in his political career, Cleveland would develop public antislavery positions.[399] But as he represented Connecticut in 1834, he argued that text must yield to imputed understandings of racial citizenship: in short, "The framers of the Constitution made a distinction in color." Judson labored to draw out this original commitment to discrimination. "What was the intention of those who framed the constitution? Did they mean to place persons of color on the footing of equality with themselves and did they mean to make them citizens?" he queried. With the first-person appeal of the storyteller, Judson implored, "Go back with me to the when the constitution was made." He wanted the Court to recollect a time when "it was not immoral to hold slaves" and leading men "bought and sold negroes without scruple." He invited listeners to imagine and defer to racism woven into Founding fabric. This cultivation of proslavery public memory had constitutional implications. Deeming white belief in black rights an "impulse [] of modern date," the enterprising advocate for white supremacy sought to deploy the country's foremost founder in his dual role as nation-maker and slave-holder. "The immortal Washington who presided at the Convention," recalled Judson, "held more than one hundred slaves as his property on that day, and he was not thus inconsistent." The national father's slaveholding became an instruction of constitutional meaning. Judson also excavated near-contemporaneous legislative action. Much like the relationship drawn between the fugitive slave law of 1793 and a proslavery Constitution, Judson held up the 1790 U.S. naturalization law allowing only "free white" aliens to become citizens as illustrative of an original understanding that only white people could be U.S. citizens. "The first Congress after the constitution was adopted was composed of many of those distinguished patriots who framed the constitution and from that circumstance would be supposed to know what its spirit," he asserted. That spirit was white supremacy.[400]

Crandall's lawyers could argue against the State's historical narrative, but they could hardly defy the authority of the Founding as its cultural power transformed into legal power. The persuasive allure of an original settlement, eliminating responsibility for constitutional interpretation itself, was too strong. "Such were not the ideas of our fathers," responded Ellsworth, "when the colored soldier stood in the ranks of that army which achieved for us our liberty; nor when their names were enrolled on the pension list as many of them were – the

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[398] Frederick C. Norton, *The Governors of Connecticut: Biographies of the Chief Executives of the Commonwealth that Gave to the World the First Written Constitution Known to History* (New Haven, 1906), 183-86, 189.
[399] Henry Wilson, *History of the Rise and Fall of the Slave Power Vol. II* (Boston, 1872), 215.
[400] A Member of the Boston Bar, *Report of the Arguments of Counsel, in the Case of Prudence Crandall, Plff., in Error, vs. State of Connecticut before the Supreme Court of Errors at their Session at Brooklyn, July Term, 1834* (Brooklyn, CT: Advertiser Press, 1833).

testimonial that *they* had a country and had bled for." The advocate, as many in the room likely knew, was the son of constitutional framer Oliver Ellsworth. While it would have been undignified to invoke his own parentage, co-counsel Goddard took the opportunity during his historical analysis to reference the actions of "another patriot of the revolution, the father of my honorable associate" attesting to a general recognition of black citizens during the Articles of Confederation period. The younger Ellsworth resisted the State's effort to temporally sever Connecticut from any moral connection to slavery. Taking the United States as a whole, he recounted that Americans "forced the ancestors of our colored population from Africa; they have since kept their descendants in bonds and darkness, and now talk of right, founded in the color and degradation of the negro, as a justification for continued wrong." This past encompassed the present. For these actions, "we owe a debt to the colored population of this country which we can never pay, - no, *never*, *never* unless we can call back oceans of tears, and all the groans and agonies of the middle passage, and the thousands and millions of human beings, whom we have sent and are sending ignorant debased and undone to eternity." The obtrusive "we" pointed directly at the court and State. Crandall's school, in ways that seemed inexorable to both defenders and opponents, implicated slavery. As Ellsworth put it, the law "rivets the chains of grinding bondage and makes our State an ally in the unholy cause of slavery itself," an injustice "more awful and foreboding nullification ten times told."[401]

In his closing argument, Goddard strove to countermand the historical claims espoused by Judson and Cleveland. He felt compelled to enter the epistemic ground marked by the State's lawyers and imbued with authority and centrality by constitutional culture. "I cheerfully adopt the rules laid down by the counsel," he announced, that "the intention of the enacting power *at the time* is to be sought, for the condition of the country and parties then is to be considered." To do otherwise would have tacitly validated the prosecution's accusation that a new "spirit of fanaticism" animated Crandall's constitutional claims. Before delving into a Founding that sustained black freedom, however, the counsel noticed the temporality of their own moment in court. According to Goddard, never had a court decided "whether the free native inhabitants of the United States were citizens" despite the fact that "numerous occasions have arisen in which those privileges have been exercised." That the question of black citizenship entered the Connecticut judiciary in the early 1830s spoke to the changed circumstances of new white anxieties and exclusionary policies rather than unprecedented claims by African Americans.[402]

The national fathers were better. "Unless I am deceived, language is held now, and principles advanced, which the patriots of the revolution and the framers of our Constitution would never have ventured to adopt or countenance," Goddard avowed. This generational distinction lay at the core of his primary argument that no racial distinction inhered in the U.S. Constitution. "So impressed were they respecting the colored population, and so much had they talked, and so much did they feel on the subject of civil liberty for which they were struggling, that the term *slave* is not used in the constitution of the United States," he told the Court. According to the septuagenarian lawyer, the Revolution had transformed British subjects into American citizens en masse – all persons without regard for color. Crandall's attorney sought to prove an inclusive Founding. He acknowledged that opposing counsel had "referred to the opinions entertained by our fathers," but he came prepared with his own sources and own sense of history. Goddard's argument toured through the proceedings of Congress under the Articles of Confederation for debates, addresses and enactments that drew no distinction by race. The voice

[401] A Member of the Boston Bar, *Report of the Arguments of Counsel.*
[402] Ibid.

of Alexander Hamilton, Justice Chase and others sounded in the Connecticut courtroom through this exercise in historical reconstruction. In producing this argument, Goddard drew from the recent outpouring of American historical writing, citing *Political and Civil History of the United States from 1763 to the Close of Washington's Administration* (1828) by Connecticut author Timothy Pitkin. He read aloud a handwritten letter from William Jay, "a son of one of the most distinguished citizens of the United States and one of the purest patriots," for the invaluable statement: "It cannot with any decency be questioned, that up to the moment when the federal constitution went into operation, a free negro of one State, was entitled by the national compact to all the rights and immunities of a free citizen in every State of the Union." Jay had also sent May a packet of documentary excerpts in which framer Rufus King affirmed the historical citizenship of free men of color under the Federal Constitution.[403] The personal connection to the Founding of this testimony, Crandall's defense must have hoped, outweighed its defects of temporal remoteness and political interest. Goddard invoked the military service of black Americans and participation in public life at the Founding. While serving in civil government, he had examined Revolutionary soldiers' applications for federal pensions and recalled finding "within the little circle of my residence nineteen colored persons whose claims I believe were well founded and successful." This legislative precedent, marrying venerated history and government action, opened the story of African American soldier Primus Babcock – which was also a George Washington story. The veteran, Goddard related, had "proudly presented to me an honorable discharge from service during the war, dated at the close of it, wholly in the hand writing of George WASHINGTON." When this document was sent to the Capital, Babcock insisted upon its return and "seemed inclined to spurn the pension" rather than lose the relic. Given not only his service, but the imprimatur of Washington and Babcock's appreciation of patriotic artifact over personal gain, Goddard concluded, "Was not Primus a citizen? 'an illustrious citizen?'" This kind of history was the law through which the case was fought. As the cultural authority of the Founding permeated courtrooms in deeply political conflicts over race, slavery and state power, constitutional history was what people could make it.

The prosecution of Crandall displayed the rise of constitutional nostalgia in the antebellum American courtroom. Among the elite bar of the northeastern state, the performance of devotion to the Founding emerged as an essential mode of constitutional engagement. That Crandall's legal representatives adopted a defense rooted in narratives of a bygone moment attested to both the waxing power of constitutional history and the constitutionalization of conflicts over race and slavery. They approached the case as one of rights and status under the federal Constitution because that was where people carried the country's intractable political and legal disputes in search of resolution. Out of necessity, they spoke through the venerated past, because that was where people sought constitutional answers beyond present day opinions. When fraught constitutional questions of race and slavery occupied courts, the nostalgic mode offered an avenue to historical legitimacy and settlement. But particular references to historical records and anecdotes like those tendered by Crandall's lawyers could only go so far in controlling outcomes. Constitutional nostalgia, albeit tethered to history, was firmly embedded in commonsense historical notions, knowledge gleaned from everyday culture and projections of the present into the past. Inside courtrooms, it drew strength from popular, public history to which its vernacular and tropes belonged. Constitutional nostalgia contained a normative dimension that demanded deference or restoration. As intergenerational public memory departed from actual events, it existed at a distance from empirical study of the Founding.

[403] "Are Free Colored Men Citizens" *Liberator*, October 26, 1833.

For this reason, Judson could close his case for prosecution with a powerful invocation of constitutional nostalgia rooted in his audience's racial imaginary. He spoke in a moment and community in which many could not believe in black citizenship. This socio-legal intuition gained expression in the communal harassment of students, in the mordant condemnation of the school in public presses, in the stagecoach taken by Edward Abdy where "All parties were agreed in condemning poor Miss Crandall."[404] Judson's final argument "founded in patriotism and love of country" resonated with these popular expressions. The question facing the court placed nothing less than the future of the Constitution and Republic on a line between white and black: "Are we now called upon to adopt such construction of the constitution as shall surrender the country purchased by the blood of our fathers up to another race of men?" To answer his query sounding in nostalgia and preservation, Judson needed to cite no sources and adduce no evidence. He asked listeners to come together in articulating a history they simply knew to be true. The court and "every American citizen" must "say America is ours – it belongs to a race of white men, the descendants of those who first redeemed the wilderness," Judson declared. Their fathers "handed down to this generation" American citizenship, identity and prosperity. "Let not the determination of this case aid those who are plotting the destruction of our constitution," he implored. Judges felt the pressure that constitutional cases of race and slavery brought inside their courthouse walls. Judson, who Andrew Jackson would make a federal judge in two years' time, made this political seepage visible. "It rests with the Court to say whether the country shall be preserved or lost," he concluded. White supremacy, expressed through the idiom and ideas of a venerated original moment, took the form of a powerful legal argument.

As the State and defense presented vying historical impressions, the question of whose narrative would prevail occasioned much trepidation. Given the importance and popular excitement that had grown around Crandall's case, it threatened to become a national legal landmark. The editors of the *American Jurist and Law Magazine* anticipated an appeal going to the United States Supreme Court. But the Connecticut court found a procedural escape from responsibility for ruling, and another two decades would pass before the national judiciary would formally exile black Americans from constitutional citizenship.[405] Apparently, the charging Information omitted to explicitly allege that the school lacked the license of the civil authority of Canterbury. While the conviction was reversed, the court did not condone the school. Instead, it let extralegal violence take its course. The campaign of arson, well-poisoning, non-intercourse and physical menacing finally took its toll on Crandall and the students who garrisoned themselves in the school. The academy closed with no alternative location.

The quiescence sought by racial conservatives and Union conservators remained a work in progress in Connecticut and across the country. The constitutional history deployed in Crandall's case was essential to that project. In 1837, for instance, Connecticut's Supreme Court of Errors heard the freedom suit of Nancy Jackson, a woman enslaved by James Bulloch in Georgia and taken to Connecticut in 1835. Though traveling intermittently to and from the South, Jackson had resided in Connecticut for two full years serving Bulloch's family. The case presented neither the lingering vestige of bondage nor even a sojourn through the jurisdiction; rather it posed the introduction of southern slavery on an individual basis. Abolitionist minister Edward Tyler reached out to James Mars, a formerly enslaved local resident, to communicate with Nancy and arrange her liberation from the prominent Bulloch family. Knowing the storm

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[404] Edward Abdy, *Journal of a Residence and Tour in the United States of North America: From April, 1833, to October, 1834, Volume* 1 (London, 1835), 220; A Member of the Boston Bar, *Report of the Arguments of Counsel.*
[405] Miss Crandall's Case, *American Jurist and Law Magazine*, Volume 11, 244-

that would engulf the suit, the first of its kind in Connecticut, Mars nonetheless agreed to serve as Nancy's next friend, signed the habeas corpus petition and consulted with William Ellsworth, who served as counsel. "I had a fair opportunity to see how strong a hold slavery had on the feelings of the people in Hartford," Mars recalled of the ten days between filing the petition and the hearing before the Supreme Court. "I was frowned upon; I was blamed; I was told that I had done wrong; the house where I lived would be pulled down; I should be mobbed; and all kinds of scarecrows were talked about, and this by men of wealth and standing."[406]

If the facts of the case presented the court with an opportunity to express a full-throated defense of northern liberties, it was one that Connecticut's justices declined. Nancy prevailed in a 3-2 decision and did not take the "two large pills of opium" that she clutched in the courtroom. But before concluding "that we know of no law of this state under which this woman can be holden in slavery," the court distanced the case from any alarming antislavery implications. To extinguish sectional fire and any broader emancipatory meaning, Justice Thomas Williams gave assurances that Jackson's suit "comes divested of that importance which arises from a supposed conmexion with a great constitutional question upon a subject highly interesting and of such a nature as not even to be named in the instrument which binds together these United States." Echoing the present, now the framers' omission was taken not to signify antislavery sentiment but rather their desire to avoid controversy. Williams, who had heard Crandall's appeal three years prior, found the freedom suit an opportunity to issue historical dicta in the spirit of Daggett and Judson. He denied that African Americans were parties to the "social compact" and delivered soothing words of constitutional nostalgia that promised white supremacy: "When the preamble to the constitution of the United States speaks of 'WE THE PEOPLE…' it cannot be seriously contended, that it included that class of people called slaves; and the term 'people' in the bill of rights must have been used in a similar sense." Turning finally to Connecticut's laws, the court observed that lawmakers after the Revolution provided for the end of slavery in Connecticut – "yet with the wisdom and cautious policy that distinguished the men of the revolution, they did not assume the high ground that slavery is always a sin and that it must be immediately abolished." This was none too subtle a lesson. Though unnecessary to the decision, these statements seemed essential to legitimating a narrow victory for Nancy. Constitutional nostalgia served this palliative judicial purpose. After the case, Mars noticed a rapid "change in the feelings of the people" and "could pass along the streets in quiet." Because of the tenor of the resolution and authority of the court, Mars' transgression seemed to diminish. Despite the wishes of Williams to minimize the decision, however, Tyler placed it among recent litigation in Massachusetts and elsewhere disproving the common complaint that "the country can receive no benefit from agitating the subject of slavery at the North."[407]

Paired with institutional power and popular sentiment, the constitutional history deployed in *ex parte Crandall* and *Jackson v. Bulloch* aided in maintaining a conservative racial regime. But African-Americans and the antislavery community did not relinquish all claim to the United States' constitutional past – not when its cultural might resounded. Just as Crandall's lawyers made use of the Founding, narrating its meaning to arguably reach a practical legal draw with the prosecution, so too did African-American residents use to continue challenging their internal

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[406] James Mars, *Life of James Mars, a Slave Born and Sold in Connecticut* (Hartford, 1868), 34-38; Henry Burnham and Abby Maria Hemenway, *Brattleboro*, *Windham County, Vermont: Early History, with Biographical Sketches of Some of Its Citizens* (Brattleboro, 1880), 104-5. "Slave Case in Connecticut," *Emancipator* (New York, New York), Thursday, June 29, 1837.

[407] *Nancy Jackson v. Bulloch*, 12 Conn. 38 (1837).

constitutional exile. For example, when nine African-Americans residents of New London, Connecticut formally protested their ongoing taxation without representation to the legislature, they deployed constitutionalism as a lever to pry open a space for electoral inclusion. Their 1841 memorial to the General Assembly seeking "the guarantee of the privileges which are based on those rights, and which we, as citizens, wish to enjoy," venerated a justificatory Founding. "Many of our Ancestors took an active part in the Revolutionary War, fought, bled, and died, sealing with their blood, in common with other heroes, that sacred compact which is now held up as a model for older nations to imitate, and will stand as a chart for those which are yet to come into existence."[408] With this history, they claimed citizenship regardless of popular opinion and judicial dicta. By refusing to heed the historical pronouncements of courts and legal elites, African-Americans kept this narrative alive before Reconstruction.[409]

Conflict Mediation through the Founding in Massachusetts

In the mid-1830s, the politics of slavery occupied the streets and halls of Boston. The urban heart of immediate abolitionism carried its own majoritarian backlash. The "public mind" during the summer and fall of 1835, as Mayor Theodore Lyman wrote, had achieved a "very heated, irritable state," with the city periodically "menaced with a riot."[410] Antislavery mailing and petition campaigns elicited threats from southern governments and local residents. Cotton Whigs, the mercantile elite tied to the South by commercial interest and social identity, and the laboring class of the port city often united in opposing abolitionist activity. Through public influence and outright violence, they sought to make the organizational work – speaking, meeting, printing – of the antislavery community untenable. In early October, several thousand men converged on the Boston Female Antislavery Society, harassed the women as they quit their meeting, vandalized the *Liberator* and assaulted William Garrison.[411] Public men legitimated this collective anti-antislavery labor with the discourse of constitutional fealty. At a late August Faneuil Hall gathering that energized the subsequent riot, the aged Harrison Gray Otis brandished the movement's transgressions upon the Founding. The Brahmin figure described how antislavery tracts apply "all the epithets of vituperation which our language affords… to the slaveholders or their principles, to the principles of Washington and Jefferson and Madison and the Rutledges and Pinkneys and the thousands of other great and estimable persons who have held or yet hold slaves." He used his advanced years to tender a dying wish. "I witnessed the adoption of the constitution and through a long series of years have been accustomed to rely upon an adherence to it as the foundation of all my hopes for posterity," Otis recalled, and he prayed that abolitionism, "the most portentous danger that has yet arisen," be suppressed or that he perish before the Union fell.[412] Preserving the fathers' Constitution, in this view, meant suppressing speech that enjoyed no constitutional protection. This popular constitutional militancy transpired outside courts, but it echoed inside.

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[408] "To the Honorable the General Assembly of the State of Connecticut, New London, May 3, 1841 – 9 signatures"
[409] "Franchise Petition from New London, 184," Rejected Bills, State Archives Record Group No. 2, Box 2 Connecticut State Archives; "No Taxation with Representation" in Theresa Vara-Dannen, *African American Connecticut Explored; The African-American Experience in Nineteenth-Century Connecticut: Benevolence and Bitterness* (Lanham, 2014).
[410] Theodore Lyman III, ed., *Papers Relating to the Garrison Mob* (Cambridge, 1870)
[411] *The Boston Mob of "gentlemen of Property and Standing": Proceedings of the Anti-slavery Meeting Held in Stacy Hall, Boston, on the Twentieth Anniversary of the Mob of October 21, 1835* (Boston, 1855).
[412] "Speech of Harrison Gray Otis," *Nile's Register*, September 5, 1835, 10-12.

Public fervor for deference to a proslavery constitutional order had only relented by degrees in July of 1836, when Eliza Small and Polly Ann Yates found themselves sitting inside a Boston courthouse, relieved and anxious. Though carrying papers attesting to free status during passage from Baltimore, the young African American women had been imprisoned aboard their ship by captain Henry Eldridge at the request of the agent of John Morris, their purported owner. Before the vessel could head back south, black Bostonian Samuel Adams and attorney Samuel Sewall secured a writ of habeas corpus. By its authority, civil authorities removed Small and Yates from floating captivity in Boston Harbor.[413] In a room "completely crowded by colored people" and Boston Female Antislavery Society members, Chief Justice Lemuel Shaw listened to counsel debate how law might dictate the women's fate.[414] When Sewall argued that case did not fall within the meaning of the Fugitive Slave Law of 1793, the predominately female crowd applauded roundly. Attorney A. H. Fiske delved into the framers' promise of fugitive slave rendition and the application of the law.[415] This would not be a day for elaborate constitutional adjudication, however. Shaw commenced to discharge the women because Captain Eldridge, as neither alleged owner nor agent, had no right to hold Small and Yates, regardless of their status. Before the ruling was finished and thus before Morris' agent could seize them under the Fugitive Slave Law, the attending African-American woman rushed both young women out to a waiting carriage bound for Canada. Represented as a black, female and lawless mob, this rescue was condemned by a Boston public that justified the lawless routine harassment of abolitionists.[416] The *Columbian Centinel* denounced the event an unforgivable "barefaced insult to the laws of Massachusetts and the Constitution of the United States," and other Boston papers complained of the treatment of a slaveholder for merely "claiming his rights in a manner pointed out by the Constitution and laws of his country."[417] Aggrieved slaveholders sent Sewall threatening missives, and a southern Navy officer showed up in his office cracking a whip.[418]

Only weeks after Small and Yates fled the courthouse, another African-American girl, Med, sat in their place. While the Baltimore women had arrived carrying contested free papers, Med came to Massachusetts as the young enslaved servant of Mary Aves Slater, a Louisiana resident visiting her father, Thomas Aves. The tensions expressed in the riotous incidents of the preceding year entered the court when the habeas proceedings came before Chief Justice Shaw and Justices Putnam, Wilde, Morrison.[419] Med's path to the Supreme Judicial Council travelled through the constitutional knowledge and convictions of the Boston Female Antislavery Society.[420] As the group recorded in 1836, the women held "the impression that the laws of Massachusetts would shelter the slave brought within their local limits by his master" but discovered that "the popular voice" and "the Boston bar" disagreed. They read this dim constitutional view in the accessible legal literature of the day, but refused to accept it: "In

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[413] Samuel E. Sewall to Comfort H. Winslow, July 31, 1836 in Nina Moore Tiffany, S*amuel Sewall: A Memoir* (Boston, 1898), 62-63; "Supreme Judicial Court," *Boston Investigator* (Boston, Massachusetts), Friday, August 05, 1836.
[414] *Portsmouth Journal of Literature & Politics* (Portsmouth, New Hampshire), August 6, 1836, 2.
[415] *Annual Report of the Boston Female Anti-Slavery Society, with a Concise Statement of Events, Previous and Subsequent to the Annual Meeting of 1835* (Boston, 1836); Leonard W. Levy, "The 'Abolition Riot': Boston's First Slave Rescue," *The New England Quarterly*. 25:1 (1852): 85–92.
[416] "Outrageous Violation of Justice," *The New-London Gazette* (New London, Connecticut), August 17, 1836, 2.
[417] "Supreme Judicial Court," *Boston Investigator*, Friday, August 05, 1836.
[418] *Columbian Centinel* (Boston), August 9, 1836.
[419] "The Slave Case in Massachusetts" *Richmond Enquirer*, September 9, 1836, 4
[420] Debra Gold Hansen, *Strained Sisterhood: Gender and Class in the Boston Female Anti-Slavery Society* (Amherst, 1993).

Hilliard's 'Elements of Law, a summary of American Civil Jurisprudence for the use of Students men of business and general readers,' we found it laid down that a slave bought in one state acquires No RIGHTs as a freeman by being brought into another."[421] Learning that the Aves family held an enslaved girl who would soon return south, society members instigated a legal process on the basis of constitutional hope and faith. Members visited the Aves residence to confirm the status of Med and secured willing attorneys, Ellis Loring, Rufus Choate and Samuel Sewall, to petition the Supreme Judicial Court.[422] Loring was a committed advocate for the Garrisonian antislavery project. An early convert to the cause, he aided New England fugitives in a professional and extralegal capacity throughout the antebellum era. Choate was a more conservative figure. Renown as a premier orator, the politician would urge constitutional unionism to his dying day in 1859. In 1836, the claim for Med's liberty fit within his constitutional understanding and political judgement. To maintain their hold on Med, Mary Slater and Thomas Aves secured the services of a leading commercial lawyer Charles P. Curtis and his promising new partner Benjamin Curtis. A few years removed from Harvard Law School, the younger Curtis was at the start of a long legal career inflected by conservative unionist politics in which he would join and quit the U.S. Supreme Court before defending impeached President Andrew Johnson in the U.S. Senate. Before the court and spectators in Boston, Curtis asserted claims upon the Founding to maintain Med's enslavement that, if not his mostly deeply held constitutional truths, were resonant with his anti-sectional politics.

By longstanding judicial construction of the Massachusetts Bill of Rights (1783) and common law principles adopted from *Somerset's Case* (1772), enslaved people became free upon entering the state – if the U.S. Constitution did not mandate otherwise. Med was no fugitive. She came to Massachusetts through the voluntary actions of her Louisiana owner, and thus even Benjamin Robbins Curtis did not controvert that the letter of the Fugitive Slave Clause did not govern her status. This position left Curtis to advocate for a form of constitutional obligation that transcended text. In the Constitution and its history, he claimed to find "a guide, and a safe guide, in the question." When the State made their "solemn compact" and provided for the rendition of fugitive slaves, he asserted, they laid down a public policy that slaveholders' rights in human property should be protected. Curtis argued that commitments made at the original constitutional moment compelled Massachusetts to practice a special proslavery comity, respecting the laws and institutions of Louisiana. "We are bound up with her by the constitution into a Union upon the preservation of which no man doubts that our own peace and welfare depend," he argued.[423] The Founding as a source of meaning swallowed the text in Curtis' arguments. To preemptively rebut an objection that "non-slaveholding States came… unwillingly" to accept limited protection for southern slavery at the Founding, Curtis urged that his accommodating slavery "was on the whole consistent with their policy" because otherwise "it is clear [southern states] would never have come into [the Union] at all." The "clear" historical fact that Curtis conjured – that Massachusetts' decision to ratify the Constitution amounted to a broad principle of protecting slaveowner's property rights within the Union – made Founding visions authoritative while opening the genre to expansive counterfactual speculation. Curtis anticipated that Med's attorneys would respond with the obvious point that Massachusetts'

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[421] *Annual Report of the Boston Female Anti-Slavery Society, with a Concise Statement of Events, Previous and Subsequent to the Annual Meeting of 1835* (Boston, 1836).
[422] Nina Moore Tiffany, *Samuel Sewall: A Memoir* (Boston, 1898).
[423] *Case of the Slave Child, Med. Report of the Arguments of Counsel and of the Opinion of the Court, in the Case of the Commonwealth vs. Aves. Tried and determined in the Supreme Judicial Court of Massachusetts.* (Boston, 1836).

assent to the Fugitive Slave Clause should act as a limitation against cases beyond its scope. Not at all, Curtis argued, because it "provides for that class of cases which was most important" and "deeply felt by the southern States during the existence of the confederation." Fugitive cases required the aid of government power, but the framers assumed that what he anachronistically referred to as the "non-slaveholding States" would enforce slaveholders' rights. Curtis claimed to find proof of this Founding vision in the subsequent actions of state legislatures. "Very soon after the adoption of the constitution, four non-slaveholding States passed laws securing to citizens of slave States, who came within their territories as travelers and brought their slaves with them, a right to remove those slaves from the State and return them to their domicile."

This conjectural yarn of original understanding could be easily unspooled still further. The existence of these statutes readily supported the contrary conclusion that the legal effect Curtis advocated required a positive enactment, which Massachusetts never made. The elite attorney offered yet one more narrative layer to defend the original constitutional understanding he had fashioned for the Court: those laws came as exceptions in the context of states banning the introduction of enslaved people for permanent settlement. But with its more rapid juridical annulment of slavery, Massachusetts never enacted the half-measures and gradual emancipation regimes that Pennsylvania, New York, Rhode Island and New Jersey had variously adopted. Again, the grasp for an original meaning that would ensure Med's enslavement proved elusive empirically. Yet if unsuccessful as an act of recovery, Curtis' persistent claims on the Founding advanced a way of arguing about constitutionality in the courtroom that vested authority in historical narrative. His argumentation, delivered as formal legal analysis, echoed the vernacular constitutionalism around slavery that people read, spoke and heard in public forums across America. In the Founding narrative that Curtis built through assumptions, logic, bits of historical information and belief, the Constitution's meaning appeared muddier, more debatable and more expansive than the words of the instrument would suggest. However hazy, it was unmistakably a historical image that flickered in the courtroom discourse.

Layer upon layer of historical speculative did nothing to dampen a professed faith in the wisdom and capacity of the Constitution to determine the limits of the present generation's political and legal engagement with slavery. In making the case for an unwritten constitutional directive, the advocate approached the court with the express purpose "to prove that slavery is not immoral." Absolute deference to the Constitution precluded the possibility, even when its meaning was built of historical figments. As Curtis explained the direct equivalence between what is constitutional and what is right, "the standard of morality by which courts of justice are to be guided, is that which the law prescribes." In his telling, Samuel Slater's right to own Med and Mary Slater's right to possess her while sojourning in Massachusetts were a constitutional certitude, once inappropriate moralizing was retired from the courtroom. But that deference rested upon an ascribed understanding of how the Constitution was designed to operate, not on the words of the thing. Co-counsel Charles Curtis reiterated this claim in explicitly historical terms. Massachusetts may have once abolished slavery, he contended, "yet a change has since been made by the adoption of the constitution of the United States, and it is not for us now to denounce as legally immoral, a practice which is permitted and sanctioned by the supreme law of the land." Framing and ratification transformed the immorality of slavery itself, so that "it is not so now." The elder Curtis was blunt. Alloying constitutional supremacy and an open-ended approach to the original meaning of the "compromise" embodied by the Constitution, the attorney declared a proslavery Founding governed the Union across time.[424]

[424] Ibid.

Med's attorneys indeed pounced on the historical ground that Curtis tread first. They attacked his narrative to take control of history's power, not to banish it from the court. With the posture of faithful constitutionalists, they delivered an argument for Med's liberty that doubled as a defense of the Founding from fictions worked by the Aves' representatives. Loring's depiction of slavery in the making of the Constitution flipped the relative power of slaveholders. They were beggars, not choosers, for a measure of constitutional security for holding people in bondage across state lines, and they got no more than the text precisely promised. From this vantage, the question of comity became a rhetorical one. "Now how did it happen, I ask, that the Southern framers of the constitution, after this experience, left a doubtful point, like the present, to be settled by uncertain considerations of comity, while they guarded with such jealous care an apparently far stronger case of right?" It was absurd to think that the framers established terms by "mutual concessions, after long dispute and difficulty" and then expected non-slaveholding states to enforce slavery beyond them. Loring's courtroom performance offered a public tutorial in how to marvel and frown at the abuse of constitutional history. "We are not to be told that some of our principles were yielded up by compromise, and the rest are to be sacrificed to comity," he averred, aspiring to speak for Massachusetts. In Curtis' arguments, Loring perceived the latest iteration of a movement to establish an expansive, proslavery Founding beyond Med's case. Raising memories of constitutional arguments from the "time of the Missouri question," Loring recalled southerners' assertion that "having admitted the principle of slavery in the constitution, we could not object to its extension into new states," a view he claimed that Massachusetts rejected decisively. In the ongoing opposition to antislavery speech and publications, he observed the recent demand that "recognition of slavery in the national compact renders it unlawful for individuals, in the free states, to discuss its evils or their remedy."[425]

Massachusetts' deliberations on constitutional ratification, as they existed in public memory, served as contemporaneous understanding to turn back such ascriptions of a proslavery Founding. Given that "one of the most serious arguments urged against it was that some of its provisions recognized slavery," Loring depicted a scene of "Massachusetts fathers" being told that a slaveholder could travel with people as property "where and how he pleases" under unwritten obligations. He concluded: "Our Massachusetts fathers were a sturdy, business-like set of men — and a pretension like this, if gravely put forward, would have proved a great, if not insurmountable objection to the new constitution." Though less bombastic than its kin, this contention belonged to the family of counterfactual arguments that balanced the very existence of the Union on the basis a particular original meaning. Stories of the Founding operated to support strict adherence to the text for the antislavery lawyer: though he criticized Curtis' efforts to use "parol" evidence to defeat original meaning, he then relied on the same narratives of the constitutional past. But his account, the argument insisted, represented the faithful one.[426]

To establish the truth and superior plausibility of their constitutional history, Rufus Choate brought scholarship and public history into the court. With the literary and archival resources generated by Massachusetts' celebration of its own past, he expounded confidently on colonial and revolutionary era adoption of British common law working the liberation of slaves entering the jurisdiction. He assured the court that "historians of Massachusetts, and Dr. Belknap, in his letter to Judge Tucker, prove that slavery had been nearly or altogether abolished before the revolution." Under the Articles period, he continued, "free States" had even barred

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[425] "Mr. Loring's Argument," *The Emancipator* (New York, New York), Thursday, October 20, 1836.

[426] *Case of the Slave Child, Med. Report of the Arguments of Counsel and of the Opinion of the Court, in the Case of the Commonwealth vs. Aves. Tried and determined in the Supreme Judicial Court of Massachusetts.* (Boston, 1836).

slaveholders from chasing escaping enslaved people through their jurisdictions. The adjudicatory authority of historical knowledge took form as Choate cited the Massachusetts Historical Collections and Bradford's History of Massachusetts. "The state of feeling, — in the Convention which formed the Federal Constitution, and in the Conventions of the free States which adopted it,— touching the question of slavery, is [a] matter of history," he instructed. This conclusion represented a declaratory statement of a bygone public understanding. Choate contended that "every historian" and "every well-informed man in the community" knows that "slavery was held unjust and criminal" at that time. Obligatory proslavery comity could not have grown silently in the conventions from such roots. "To assert that the new relations and closer union created by the Federal Constitution required a comity to the local law of slave States…. requires evidence," Choate concluded, and "there is no evidence of an intention to do any thing." This constitutional analysis enlisted the empirical research and popular convictions of the present. In the hands an advocate such as Choate, the authority of the past was conducted through these perceptible public channels of credibility and authenticity.

Both court and crowd experienced the development of slavery's constitutionalism during Med's proceeding. The proceedings amassed and articulated a body of authority and its manner of legal application. "The constitution of the U. S. undertakes to settle, as between the States, the questions growing out of slavery." The particular statement, though it came from Loring, uttered a premise with which all the attorneys and Justice Shaw could agree. It communicated the place of the Constitution in the national politics of slavery, more profoundly for its seeming simplicity and obviousness. The world into which the document was the entry ordered everything and contained answers to all questions that might arise. On matters of slavery, the Constitution could not be uncertain, unsettled and unknowable – because such matters could not be left to the present generation. The document alone could not do the omniscient work demanded of it: the text did not speak for itself with a vast yet determinate scope. Paired with the discourse of the Founding, however, the original Constitution could become expansive as needed; and all the while, it could appear to retain its authoritative purity, untrammeled by new meanings and amendments invented by antebellum Americans. The ascribed exhaustiveness of the fathers' Constitution worked in tandem with the historical argumentation practiced in and out of court. As the narratives in Med's case illustrate, a venerative historical method enabled the production of desired meanings, and the need for authoritative meanings impelled the method.

These dynamics became constitutional law in the enslaved girl's presence. As Justice Shaw recognized her liberty on August 27, 1836, he encoded the practices of slavery's constitutionalism into his formal decision. The personal rupture in Med's life – now rescued from slavery, cut off from family and subject to guardianship – was a constitutional event for the legal professionals who argued over slavery as a political abstraction and for the public that listened. Over the course of his unanimous opinion, Shaw assimilated the authority of history to justify his ruling. "It is not easy, without more time for historical research than I now have, to show the course of slavery in Massachusetts," he remarked, but he determined that slavery had been long abolished and much-loathed at the Founding. Shaw succinctly repeated the popular story and "well known circumstances" of slavery at the moment of constitutional genesis. Some "states permitted slavery and the slave trade, and considered them highly essential to their interests, and that some other states had abolished slavery within their own limits, and from the principles deduced and policy avowed by them, might be presumed to desire to extend such abolition further," he narrated. Shaw had absorbed the popular conceptual frame of the slave South versus the free North bargaining in Philadelphia. Validating these sections as historical

parties to the Constitution, he opined that it was "manifestly the intent and the object of one party to this compact to enlarge extend and secure as far as possible the rights and powers of the owners of slaves… and of the other party to limit and restrain them." From declaring historical identities and purposes as true, he next determined constitutional effect. The fugitive slave clause that resulted from the section against section negotiation was agreed upon, Shaw explained; "and as it was well considered, as it was intended to secure future peace and harmony, and to fix as precisely as language could" settle the jurisdictional terms of slavery. Finding an obligation of comity would "depart[] from the purpose and spirit of that compact." In ways subtle but meaningful, veneration and deference entered into legal writing. While the outcome in Med's case may seem to have followed from the simple application of plain language, Shaw's opinion revealed a need for more persuasive authority. Beyond precedents and textual analysis, the court claimed the support of the Founding and drew from its power.[427]

Generally, northern observers perceived Med's liberation as consistent with the forms and narratives of the Constitution. The sparing of an enslaved child carried on to Massachusetts' vaunted free soil, what they considered "the first decision in any of the free states upon that precise point," offered a more sympathetic case than abolitionists' ostensible interference with slavery elsewhere, and it was reported that Daniel Webster would argue on Med's behalf if Aves and Slater were to appeal.[428] Some northern voices condemned the impediment to travelling slaveholders, accepting Shaw's reasoning but concluding that "the remedy lies not with the court, but with the Legislature," as the *New York Express* wrote.[429] But others channeled southern anger over perceived constitutional betrayal. The *New York Enquirer* anticipated Med's case reaching the Supreme Court to see "whether a man's property is not protected by the constitution of the United States," contending that if Louisiana seized the pocketbook of a Yankee merchant, the "judicial reasoning in justification of the outrage in the latter case may be quite as convincing and abundantly more plausible than that of Judge Shaw."[430] Fury greeted the decision in the South, where many citizens by 1836 believed in a Constitution containing original promises to fully protect slavery. The proslavery *United States Telegraph* declared, "The *principles* of this decision are new to us – new to the country."[431] Newspaper readers in Mississippi encountering the "disgusting facts" of Med's freedom were told the case represented efforts "to sever the union of the States by setting aside the guaranty of property which was sacredly conceded to the South by the Federal compact;" and thus the time had arrived "to learn what remedy our citizens have."[432] Back in New Orleans, Samuel Slater circulated a seething open letter that excoriated the "disunionist" abolitionists, claiming that they carried out a judicial theft of Med in the face of the "respectable people" of Boston. The decision presented "the strongest and boldest step yet taken against the rights of the South," according to the *Georgia Sentinel*, and "as if to add the grossest insult to the deepest injury, we are told that this decision is no interference with the rights of the slaveholder, but that, rather, the carrying of a slave into a State which does not tolerate slavery, is an interference with the laws of that State!"[433] In these expressions of outrage, proslavery voices expressed an extra measure of anger for the historical analysis accompanying the decision. The reassuring constitutional past that Shaw offered to

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[427] *Commonwealth v. Aves*, 35 Mass. 193 (1836)
[428] "Important Decision," *Essex Gazette* (Haverhill, Massachusetts), September 3, 1836
[429] "Slave Case Boston Transcript," *The Liberator*, November 05, 1836
[430] *Cheraw gazette*, October 11, 1836, 3.
[431] "The Slave Case," *United States' Telegraph* (Washington, DC), October 4, 1836.
[432] *Southern telegraph*, March 07, 1837, 2.
[433] "The Slave Case Robt. Y. Hayne," *United States' Telegraph*, October 7, 1836.

legitimate his ruling for Med met a southern horizon of plausibility. Among those Americans living beyond it, his claims upon the Founding seemed to falsify the past and do violence unto their fathers' proslavery Constitution. Popular constitutional history was an irresistible instrument for judges like Shaw. But the authority it offered was limited by the public resonance of their narratives; where oppositional histories prevailed, the court's historical constitutional discourse became a source of grave offense.

Searching for an Alternative Founding in Ohio

Ohio could not be Massachusetts during the 1830s. The state shared several hundred miles of border waters with Virginia and Kentucky. Fugitives from slavery, harrowing renditions and clashing political cultures were a geographic inevitability as antislavery communities grew in parts of the state. Between a redemptive constitutionalism developed by figures such as Samuel Chase and the aggressive claims of southern neighbors, Ohio courts hosted dramatically conflicting visions of the Founding. For their part, judges grasped the narratives that would sustain constitutional union, which was history they could believe in.

In June of 1836, Matilda disembarked covertly from the *Gazelle*, a steamer docked in Cincinnati, halting her involuntary journey to Missouri. She went underground. For six months, Virginia slaveholder Larkin Lawrence could not find the woman, whom he was transporting with five other enslaved people. In March of 1837, however, his agent arrested Matilda at the home of James Birney, the abolitionist thorn in the side of the most southern of northern American cities. Both went to court. Matilda came before a magistrate for removal and then a state court judge to escaping the fugitive slave law. Months later, the State of Ohio prosecuted Birney for harboring Matilda. In both proceedings, Cincinnati courts would hear a developing discourse of constitutional history meant to shrink the legal shadow of slavery in the Union. The cases would prompt commercial lawyer Salmon Chase, a new convert to the antislavery cause, to argue for an antislavery Founding at the nation's turbulent center of mobbing against free blacks and abolitionists.[434]

Matilda escaped into a southwestern city that looked with friendship at slave country across the Ohio River. In the mid-1830s, Cincinnati relied upon southern trade, hosted southern travelers, and held the line against the antislavery movement. This last task was carried out with reverent constitutionalism and mob violence. At a mass anti-abolition meeting in late January, for instance, the Cincinnati mayor, judiciary, bar and other public men assembled to guide public opinion with the legitimating instrument of the Founding.[435] Former Ohio Supreme Court judge John C. Wright, editor of the *Cincinnati Gazette* and co-founder of the Cincinnati Law School, delivered the preamble and resolutions condemning interference with American slavery.[436] Narrating the achievements of "our fathers," he instructed the crowd that: "after a full and thorough discussion, the compact of union was consummated, leaving to the slave states, the full discretion of settling the momentous question of slavery in their own way, and… the implied guarantee was thus promulgated, that slave property should be held sacred by the Constitution and protected by the laws." The sacred bargain and understanding extended beyond the particulars of any strict construction of clauses. As the body branded abolitionists "enemies… to the peace" and vowed to "sustain the original compact, which made us a *united people*,"

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[434] J. T. Trowbridge, *The Ferry-boy and the Financier* (Boston, 1864)
[435] "Great Anti-Abolition Meeting in Cincinnati," *United States' Telegraph* (Washington, DC), February 05, 1836.
[436] Wilson, James Grant; Fiske, John, eds., "Wright, John C.," *Appletons' Cyclopædia of American Biography* (New York, 1900).

boisterous cheers ratified these views. Judges, elites and people embraced a shared constitutionalism to ensure the white man's republic promised by their fathers. In attendance was the unwelcome presence of James Birney, a recent addition to the city, who spoke up vainly in defense of abolitionism. Once a slaveholder, lawyer and politician in Kentucky and Alabama, Birney had gradually, then suddenly, turned against slavery: in late 1835, he moved to Ohio and set up the *Philanthropist* to disseminate antislavery principles, much to the fury of many white residents, officials, and neighboring southerners. White rioting laid waste to the free black community of Cincinnati multiple times in 1836; along with terrible fatalities, injuries, and destruction inside African-American neighborhoods, Birney's press was twice destroyed.[437]

The discovery of Matilda arrived in an exhausted and bloodied municipality, one that had earned its reputation as the riot capital of the Union. After the Larkin family hauled her before a justice of the peace for summary removal in March, Judge Estes of the Court of Common Pleas granted a writ of habeas corpus that permitted her counsel a day to cobble together a defense. In his first case on behalf of a fugitive, Chase commenced an argument against the federal fugitive slave law itself. Larkin's attorney, Robert T. Lytle, interjected that the court should not "at this late day, permit any discussion as to the constitutionality of the act."[438] Such constitutional talk should not find a public forum, he hoped. A U.S. congressman from 1833 to 1835, Lyle had led the January anti-abolition meeting and remained an advocate for the cause of proslavery silence.

A skeptical court let Chase continue. His argument bundled historical veneration and textual analysis. The fourth Article of the Constitution sets forth relationships among the states and between the federal government and each state. Chase observed that only some sections explicitly conferred a federal power of action – and the fugitive slave clause did not. For instance, Section 1, guaranteeing that each state would afford full faith and credit to the laws of other states, stipulated that "Congress may by general Laws prescribe the Manner" in which such recognition would occur. Section 2, however, provided simply that fugitives from justice in one state "shall on Demand of the executive Authority of the State from which he fled, be delivered up"; and, for escaping enslaved people escaping across state lines, it provided that such persons not "be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due." The absence of a grant of federal power, claimed Chase, illustrated the framers' intention to not enable any such law as the Fugitive Slave Act of 1793. "The framers of the constitution were men of large experience, comprehensive knowledge, sound judgment, and great ability. Among them were Hamilton, and Madison, and Washington. Such men, in framing such an instrument would avoid all needless repetition," he argued, segueing between textual analysis and veneration.[439] The framers were particularly wise and careful, in this telling, and so the difference between sections should carry particular weight. Importantly, Chase's analysis did not rest on plain language alone. The "framers" were not abstract, anonymous writers. He invited the court and public to make the Founding part of their constitutional understanding: "can it be that the framers of the constitution intended to confer on congress power to enact such a law as this? To suppose it, would be to rob their names of that reverence with which they have ever been pronounced." If national fathers adopted the Constitution understanding that it authorized federal laws for fugitives from slavery, then "the great principles which had hallowed their recent struggle, were strangely forgotten." The power

[437] *Narrative of the Late Riotous Proceedings Against the Liberty of the Press* (Cincinnati: 1836).
[438] *Speech of Salmon P. Chase, in the case of the colored woman, Matilda, who was brought before the Court of Common Pleas of Hamilton County, Ohio, by writ of habeas corpus; March 11, 1837* (Cincinnati, 1837).
[439] Ibid.

and plausibility of Chase's textual reading rested on the ascribed visions of the Founding and the authority that historical memory carried. After Chase had his say, Judge Estes wrote no opinion and declared that he could not consider the constitutionality of the Fugitive Slave Act an open question. With that, Matilda's brief span of underground freedom ended. Justice of the Peace Doty announced that although he was "a man bound to bear on the side of Liberty," his duty required him declare her the slave of Larkin Lawrence.[440]

Though shocking to the Cincinnati court and novel to Chase as well, the new antislavery lawyer's argument for Matilda against the constitutionality of the fugitive slave act drew from the thinking of New Jersey Chief Justice Joseph Hornblower in an unpublished decision from the prior year, communicated by oral reports, letters and the antislavery press.[441] Learning of the opinion as Med's case arose soon after, William Garrison hoped that the argument would find favor among the lawyers and judges involved in *Commonwealth v. Aves.* Hornblower, like Chase, looked at constitutional text, imagined the framers and saw a Founding that never empowered Congress to legislate on fugitives. As the judge suggested, "the framers of the constitution had no idea that the simple statement of these several international stipulations [on fugitives], would confer on Congress any legislative powers concerning them" and only in certain other sections granted "the power of legislation."[442] This was dicta, however, not a ruling against the federal Fugitive Slave Act. The sheriff who arrested and imprisoned Alex Helmsley as a fugitive slave had acted under a New Jersey statute, which Hornblower struck down as inconsistent with the state constitution.[443] A sense of the Founding informed his jurisprudence and the arc of his political life. After retiring from the bench, the stalwart of elite New Jersey society actively reconciled constitutional observance and anti-slavery politics as a Whig and then a Republican. He corresponded with Chase about the 1836 case in the early 1850s and with Supreme Court Justice John McLean in 1856 about the Republic's fall from its Founding.[444] At the very end of his life, presiding over New Jersey's electoral college in 1860, Hornblower's constitutional faith remained: he declared that the principles of Lincoln and the Republicans like Chase were those of "Washington and the early Fathers of the Republic."[445]

In denying Matilda's enslavement in 1837, Chase drew upon another stream of historical veneration and legal authority connected to the national Founding, one particular to the region. "As citizens of Ohio," he recalled, "we are accustomed to hear eulogies upon the ordinance of 1787… and certainly that ordinance merits all the encomiums which have been passed upon it." Enacted at the end of the Confederation Congress, this framework for government barred slavery in the territory northwest of the Ohio River and professed to comprise a compact, "unalterable" except by common consent, between the original states and the people of the territory. According to Chase, the Constitution made no change to the force of the Ordinance crafted by a body known for "genuine sagacity, for singular moderation, for solid wisdom, manly spirit, sublime sentiments, and simplicity of language"; as such, Matilda had the right to trial by jury and due process as guaranteed to everyone under its terms. Although this argument proved unavailing for the enslaved woman, respect for the Ordinance may have gain some traction when Chase

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[440] *Southern telegraph*, April 25, 1837, 2.
[441] William Garrison to Isaac Knap, August 23, 1836, Letters of William Garrison, Boston Public Library.
[442] *Opinion of Chief Justice Hornblower on the fugitive slave law* (n.p., n.d.).
[443] "Important Decision," *Vermont telegraph*, August 25, 1836, 3.
[444] Letter from Judge McLean to Judge Hornblower, *Boston Daily Atlas* (Boston, Massachusetts), Monday, June 16, 1856.
[445] "Life and Character of Hon. Joseph Hornblower," *Proceedings of the New Jersey Historical Society, Vol. X. 1865-66* (Newark, 1867), 41.

defended Birney against prosecution for harboring Matilda.[446] Vernation of the Ordinance was an annual affair in Ohio, honored in celebrations from its southern to northern reaches. In 1835, for instance, Cincinnati residents massed at the First Presbyterian Church to cheer that it "gave Ohio an entire exemption, for which she can never be sufficiently thankful – of which she can never be too proud – from *the curse of slavery*." As they ritually praised its authors and effects, Ohioans typically represented the Ordinance as part the formative gifts of the "great fathers of our country" and constitutive of the fortune and liberty that followed.[447]

At trial in Cincinnati, a jury convicted Birney, with the encouragement of a county court judge, under an 1804 statute criminalizing the harboring of a slave. On appeal at the state supreme court, justices heard the argument that such a crime was "impossible" in Ohio – that it presupposed the existence of a status incompatible with the fundamental compact. History lessons and an antislavery Founding entered the court through this door. To grasp the provisions of the Ordinance, Chase explained, "it is proper to refer to the history of the country at the time when they were incorporated first into the fundamental compact of the territory." Between the Revolution and Constitution, slaves could become free when they crossed over into free states. Chase quoted "Mr. Madison," speaking during the Virginia ratification debates, for this historical proposition: "'if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws." Chase narrated his understanding of the Founding understanding responsive to this state of affairs. Anxious slaveholders had secured the principle that emancipation would not follow interstate escape. But the resulting clause "was cautiously framed" to deny recognition of slavery. Nothing in the Constitution, Chase urged, required the passage of state laws to further protect the "right of property in human beings," and the Ordinance precluded authority to make such a law in Ohio.[448] Cornered by these arguments and rulings that might spark public outrage one way or another, the court found a way out. Birney's indictment had failed to aver that he actually knew Matilda was enslaved. Yet the statute did not expressly require this scienter. Judge Wood reasoned that because the indictment concerned conduct that "involves no moral wrong, nay, an act that in many cases would be highly praiseworthy," scienter must be charged and proven.[449] As the court threw out Birney's conviction, the sanctity of the Ordinance remained intact, abstract and untested.

As state judicial officers during the 1830s held hearings pursuant to both the Fugitive Slave Act of 1793 and the growing number of state regulations on the rendition process, their legal proceedings were sites of persistent conflict along fault lines seen in constitutional terms. At trials and appeals, legal professionals and public audiences experienced conflict between seemingly summary federal process for removal and more elaborate state regimes; between inconsistent expectations about the scope of constitutional guarantees; and between warring assumptions about slaveholder rights and state rights rooted in convictions of historical legitimacy. Enslaved men and women escaped, southern agents stalked the land, bodily seizures led to removal proceedings as well as indictments for kidnapping state residents or for helping enslaved people. The system cultivated constitutional conflict and harvested hostility among citizens. As escaped slaves suffered capture and adjudications, courtrooms hosted scenes not of consensus but outrage.

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[446] On the ordinance, including its symbolic power subsequent to statehood, see Peter Onuf, *Statehood and Union: A History of the Northwest Ordinance* (Bloomington: Indiana, 1987).
[447] *Celebration of the 57th Anniversary of the Settlement of Ohio, April, 8th, 1844* (Cincinnati, 1844).
[448] *Birney v. State of Ohio*, 8 Ohio 230-39 (1837).
[449] *New-York Spectator* (New York, New York), Monday, April 17, 1837.

In Ohio, with its divided population and seemingly endless border with Virginia and Kentucky, this legal culture became a fact of life. No pause in escapes, removals and kidnappings followed the Matilda and Birney trials; instead, they seemed to increase in visibility, frequency and gravity.[450] In the northern Ohio town of Marion, for example, a riot broke out inside the courtroom and spilled through the streets in August of 1839. A band of western Virginia men had come to town, obtained a warrant, and seized well-liked resident "Black Bill" as the escaped slave Mitchell. They proceeded according to law thus far. Escalating pressure from Kentucky over the cross-border incidents had induced Ohio earlier that year to enact a new process for regulating the capture and adjudication of alleged fugitives: the act, which prohibited jury trials and established penalties, announced the general assembly's determination that "the constitution can only be sustained as it was framed, by a spirit of just compromise."[451] Despite the protests of black Ohioans and white abolitionists, upholding a perceived Founding commitment to treat slavery respectfully was the governing ethos.

At the hearing before the court of common pleas that followed Bill's arrest, Judge Ozias Bowen duly recited the historical bonds that structured this moment. "It was intended by those who represented the slaveholding states, at the formation of the Constitution, that property in this description should be secure under its provisions. It was approved in that form by the people. Those for whose benefit it was most particularly designed have continued to rely on its efficacy as a national compact to secure them fully in their rights," he intoned.[452] Dutiful recognition of constitutional obligation, the court hoped, would authorize what came next: the three-judge panel of Bowen, George Gray and Thomas J. Anderson ruled that Virginian Adnah Van Bibber could not take the man. This claimant established that his cousin John Lewis had owned Mitchell, but Van Bibber was not his authorized agent. When these words were spoken, their attorney shouted, "I now give notice that we shall claim the defendant under the law of Congress," and the Virginians seized ahold of Bill. Brandishing guns and blades, they fought through the throngs and barricaded themselves in the office of a justice of the peace. The attending public took up arms and attacked, ignoring authorities' cries for order. As a local paper reported, "Our citizens, and friends from the country, stood out in defense of their trampled and insulted laws, which were set at defiance."[453] Chased on foot, Bill reached Canada by way of Oberlin, while the Virginia men were arrested, convicted and released. The events gained widespread notoriety and was relitigated in the press as Marion fractured. The son of Judge Anderson recalled "relations, political, social and religious, were strained: men long friends hardly spoke to each other, and this estrangement continued for years." In January of 1840, handbills went up all over the village for a county anti-abolition meeting. Affirming the sanctity of the Union, it asked all those desiring to protect the "the safety of our sacred institutions and the protection of our fellow citizens in their persons and property" to gather at the Marion courthouse to suppress antislavery activity. Three days later, a different group of citizens circulated another set of handbills titled "Freedom of Speech" that quoted the language First Amendment and called another courthouse meeting to peaceably discuss the "commotion." In the preceding weeks, the Marion Lyceum had presented a microcosm of the tensions. "Ought slavery to be immediately abolished in the United

[450] Stanley Harrold, *Border War: Fighting over Slavery before the Civil War* (Chapel Hill, 2010), 79-89.
[451] "An act relating to fugitives from labor or service from other states," *Statutes of the State of Ohio, of a General Nature, in Force, December 7, 1840: Also, the Statutes of a General Nature, Passed by the General Assembly at Their Thirty-ninth Session, Commencing December 7, 1840* (Columbus, 1841), 595-600.
[452] "Marion Abolition Riot," *The Ohio Statesman*, November 27, 1839.
[453] Nevin O. Winter, *A History of Northwest Ohio* (Chicago, 1917), 275-76.

States?" had been selected as the topic of the evening on January 14, 1840. A faction of attendees denied the right to discuss it, and the question was put off to another meeting. Only after much hissing, hooting and yelling, and the arrival of civil authorities, was the "sacred constitutional right" vindicated. Circumstances surrounding Bill's case and their larger meaning lingered as an open wound.[454] It posed a searing constitutional experience. Notions of the Founding threaded in and out of court. People carried the justificatory presence of constitutional history through the arc of events: in the Ohio slave law, the Virginians' legal expectations, Judge Bowen's public reasoning, the vigilante action, the competing discourses of the meetings, and the understanding of the stakes involved in the case and aftermath. Marion practiced slavery's constitutionalism, its troubles and embitterment indicia of faith. A constitutionalism born of slavery invited conflict to occur on fundamental ground, where the strictures of the past, the true meaning of the Constitution and the fate of the Union perpetually hung in the balance.

Slavery's Constitutionalism in the Supreme Court: the *Prigg* Turn

The constitutional litigation over slavery welling up in state courts during the 1830s was antebellum federalism in action. Nellie Richardson, Charles Brown, Nancy Jackson, Med, Eliza Small and Polly Ann Yates, Matilda and Bill came before state courts of general jurisdiction. Their experiences and the public controversies that surrounded each of their cases were part and parcel of the coexistence of federal legislation with state law and the Constitution with internal state police powers. As enabled by congressional grants of jurisdiction under the Constitution, the federal judiciary was not equipped to administer the day-to-day relationship between slavery and law, even just constitutional law. Cases involving fugitives from slavery implicated state regulations of process and generally occurred before state judges, and the everyday property, contract and criminal law of slavery unfolded in southern state forums. As the judicial, legislative and law enforcement authorities of individual states implemented Founding bargains over slavery and the 1793 Fugitive Slave Act, the organized disorder of federalism distributed constitutional conflict among the states, away from U.S. courts and federal responsibility. At least as a conceptual formulation, a "federal consensus" on the constitutional division of authority over slavery between state and national governments prevailed through the 1840s according to the classic argument of William Wiecek. People broadly agreed that "only the states could abolish or in any way regulate slavery within their jurisdictions," while the federal government lacked all power over it in states, he found.[455] Americans of the time indeed broadly espoused this view. Yet that consensus still left much topical and interpretive room for dispute.[456] It was pulled upon at both ends by slaveholder demands and antislavery voices, undercut by subjective, conflicting understandings of what the Constitution required or allowed, and escaping slaves repeatedly disturbed its abstract clarity. Again and again, the project of federal silence broke down – in Congress and but also in federal courts. Slavery cases passed through federal courthouse doors and into the dockets of district, circuit and Supreme courts. Most often they came as slave trade prosecutions and piracy cases; sometimes they arrived as exceptional appeals that demanded articulation of the relationship between slavery and

[454] James H. Anderson, ed., *Life and letters of Judge Thomas J. Anderson and wife: Including a Few Letters from Children and Others; most Written During the Civil War; A History* (n.p. 1904); "TRIUMPTH OF TRUTH IN MARION," *Philanthropist* (Cincinnati), Mar. 10, 1840.
[455] William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Ithaca, 1977).
[456] Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery* (New York, 2001).

constitutional union. Come the early 1840s, slavery breached the high court as litigants demanded answers to questions, contingent and structural, that the federal government could not avoid addressing.[457]

By the close of the 1830s, the Supreme Court had avoided the full glare of the public on the constitutional politics of slavery. Its docket of cases involving the institution did not align with the fugitive and racial controversies that stirred passions and evoked slavery's constitutionalism. That remove was breached in 1841, first obliquely and then profoundly. Slavery ascended unexpectedly through the federal courts with the 1841 *La Amistad* case. In a series of statutes and treaties dating to 1808, the United States had banned the introduction of enslaved people from abroad, designated trafficking as piracy, and participated in outlawing the international slave trade. Arrests, libels and prosecutions pursuant to this body of law brought slavery before federal district judges at some remove from the constitutional politics of domestic slavery. Cases occupied a strange corner of federal law and policy, where the U.S. at least nominally pursued an antislavery policy, even though practical enforcement withered. In 1839, Mende Africans held illegally in captivity at sea by Spanish nationals seized the slaving ship near Cuba. When *La Amistad* entered waters off New York, U.S. officers boarded and took custody of the beleaguered passengers. In their claims to freedom through violence and law in a country divided over slavery, the fate of the Mende survivors became a human and legal drama in the eyes a rapt public. The U.S. government supported Spanish claims for the return of the vessel and people, as southern politicians pressed the issue. Antislavery organizers secured representation and collected funds for the detained Africans, a cause célèbre. The Norfolk County Anti-slavery Society, for instance, resolved in January of 1841 that "the example of our revolutionary fathers in preferring death to slavery… demand the immediate liberation of the unfortunate Amistad captives," a view held well beyond their abolitionist membership. The case was not obviously a constitutional one. Yet the very act of the federal government supporting Spanish claims rendered it such, for it would arguably mean sustaining slavery beyond the terms of the Constitution and affirming human property under law. Although the case revolved around international law and the applicability of treaties, both sides felt compelled to incorporate the Founding into their arguments. Alongside technical interpretations, the question of whether the national fathers sanctioned slavery hung in the air, promising to condone or condemn the Van Buren Administration's desire to turn over the Africans as slaves. Its relevance and persuasive power derived from the cultural authority vested in the Founding.[458]

In federal court in New Haven on January 10, 1840, Roger Sherman Baldwin asserted that the Constitution did not authorize the U.S. government to recognize slavery "except where it exists in our country" and only to the extent of providing for the return of fugitives from slave states. In effect, he contended, the U.S. was now seeking to enslave free Africans who had arrived in the U.S subject to no lawful claim of ownership. Baldwin framed this objection as a historical and rhetorical question: "Would the people of this country at the adoption of the Constitution have assented a proposition like this?" Would the same people who vowed that "men are born free and equal and are endowed with the inalienable rights of life and liberty… have granted by the Constitution such Powers as these?" His legal argument sounded as an interrogation of how the Founding generation would regard this moment in American public and legal life. Emerging from formal legal analysis, Baldwin's closing line to the court enjoined, "your honor will rejoice in the opportunity of applying to the case of these unfortunate Africans,

[457] *Groves v. Slaughter*, 40 U.S. 449 (1841).
[458] Marcus Rediker, *The Amistad Rebellion: An Atlantic Odyssey of Slavery and Freedom* (New York, 2012).

those principles of right and Justice which were proclaimed by our fathers as the Oasis of our institutions."[459] In other words, the court could live up to the Founding as Baldwin limned it. In the U.S. Circuit Court, young abolitionist attorney Seth Staples advanced the similar point that the Constitution had settled the scope of slavery under federal law, allowing nothing more than American interstate fugitive rendition: only this "was what the convention agreed to – what every citizen, however painful, is bound barely to execute; *but not an iota further*."[460] At the Supreme Court, the captive people's lawyers would extend this claim upon the Founding. Baldwin asked the justices to "remember" that constitutional government was "based on the principles promulgated in the Declaration of Independence." Making people slaves through honoring a foreign law was "inconsistent with the fundamental principles of our government and the purposes for which it was established" and did not follow from the compact made between states respecting slavery under law. Drawing upon the freshly published Madison Papers, he contended that "the convention which formed the federal constitution," though recognizing that slavery existed in some states, "were careful to exclude from that instrument every expression that might be construed into an admission that there could be property in men."[461] From that source, he described how his grandfather Roger Sherman and James Madison had prompted the alteration of reported language to maintain this essential remove. Joining the captives' defense before the Supreme Court, John Quincy Adams echoed these views – that the only law governing the Africans at sea was natural law "on which our fathers placed our own national existence," and that the Constitution recognized slaves "only as persons enjoying rights and held to the performance of duties."[462] Whatever internal doubts Adams or these attorneys may have felt, they were people of their time and skilled advocates who spoke the constitutional language of historical legitimacy and authority.

U.S. Attorney General Henry Gilpin and Ralph Ingersoll, the lawyer for the Spanish government, invoked an alternative Founding. Through the same basic facts, Gilpin responded to the constitutional vision described by the captives' representatives with a different avowed historical truth: the country has always recognized human property. The Constitution left "to the states the regulation of their internal property of which slaves were at the time it was formed a well known portion," and "guarantied and protected the rights of the states to increase this property up to the year 1808 by importation from abroad."[463] This did not represent a limitation but a sanction of slaveholding writ large. Ralph Ingersoll went further. The Connecticut politician declared that the Constitution was based upon the relation of master and servant and recognized throughout the document. Slaveholders and slaveholding were at the foundation of the Union, in his telling, and must be respected and followed as such. "Who aided in forming this government? Slaveholders. Who led your revolutionary armies? A slaveholder. Who framed the Declaration of Independence? A slaveholder. Who was the man called by Eminence the father of the Constitution? A slaveholder." This argument for deep constitutional support of slavery through the national fathers continued at length. He mocked claims that the absence of the word "slave" from the 1795 Pinckney's Treaty stipulating not to detain property from Spanish vessels meant anything at all. "Who signed that treaty? Washington – a slaveholder. Did he not suppose

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[459] "Mr. Baldwin's Plea," *Emancipator* (New York, New York), January 30, 1840.
[460] *The African Captives. Trial of the Prisoners of the Amistad on the Writ of Habeas Corpus, Before the Circuit Court of the United States, for the District of Connecticut, at Hartford* (New York, 1839).
[461] *United States v. Schooner Amistad*, 40 U.S. 518 (1841).
[462] *Argument of John Quincy Adams Before the Supreme Court of U. S. in the Case of the United States Vs: Cinque and Others, Africans, Captured in the Schooner Amistad, by Leuit. Gedney* (New York, 1841).
[463] *United States v. Schooner Amistad*, 40 U.S. 518 (1841).

that the word property meant slave property?" Ingersoll remarked.[464] The slaveholding fathers lived the principle that people could be property; thus turning over the Mende captives to the Spanish would implement their understanding. The federal courts ruled for the Mende. By the decision of Justice Story in 1841, all aboard the ship went free. The adjudication was not strictly a constitutional one. Yet by virtue of this fact, *La Amistad* revealed the intuitive grasp for the authority of constitutional history that courtroom advocates undertook to settle questions involving slavery, even where its connection might be remote.

The *Amistad* brought liberation for the Africans who survived their ordeal and re-crossed the Atlantic to Mendiland. In the United States, it proved a catalyzing event for antislavery organizers. Meanwhile, the Supreme Court's docket contained other matters that more directly implicated the relationship between slavery and the Constitution. One day after announcing its *Amistad* ruling, the Court decided another slavery case, *Groves v. Slaughter,* less noticed but laden with potential constitutional import. A never-enforced provision of the state constitution of Mississippi had prohibited bringing enslaved people into the state for sale, through which a belly-up debtor sought to avoid payment for the enslaved people he had once purchased. Ensuing litigation sponsored by notorious slave traders raised dreaded questions of whether federal power to regulate interstate commerce included the interstate slave trade – which in turn would bring constitutional recognition of people as property. A fractured court reduced to seven justices produced four opinions, skirting clear holdings on volatile issues while sniping with dicta.[465]

As it bared its own divisions, the Court watched another slavery case rise, one that loomed larger than those addressed that term. After years of friction over the return of fugitives from slavery, Maryland and Pennsylvania had produced a test case to clarify the constitutional obligation of states. A cross-border kidnapping pitted slaveholders' claimed right to seize human property anywhere in the Union against free states' capacity to regulate how inhabitants were taken and adjudged as enslaved. It was not a matter that the Court could avoid, and nor did many justices want to. As the *Cincinnati Gazette* remarked of the case in 1839, "The slavery folks want a made case, for settling all the laws, in the Supreme Court of the United States. Yes – Taney, Barbour, Wayne, M'Kinley, and Catron! Very convenient time to settle slavery questions."[466] The case was not heard until after Virginian Peter Daniel replaced the deceased Phillip Barbour following the 1841 term. For numerous enslaved people, the American public, the course of slavery under law and American constitutional development, the resulting case of *Prigg v. Pennsylvania* (1842) structured experiences and conflicts to come.[467] The decision brought an end to state-by-state procedural protections for alleged fugitives from slavery, opening the field to the eventual direct exercise of federal power over the capture and return of people fleeing slavery. For the ascent of the Founding in formal constitutional practice, it also marked a watershed moment. In arguing and deciding the case, lawyers and judges resorted to constitutional history with unprecedented faith, commitment, research and imagination. The Supreme Court justices who opined in *Prigg* tapped the burgeoning power of the Founding and the arrival of new historical resources to authorize their constitutional edicts. They wrote history as law.

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[464] "Case--Circuit Court Lewis Tappan," *Emancipator* (New York, New York), May 1, 1840.
[465] *Groves v. Slaughter*, 40 U.S. 15 Pet. 449 449 (1841).
[466] "Slavery Matters" (From the Cincinnati Gazette), *Emancipator* (New York, New York), July 25, 1839.
[467] *Prigg v. Pennsylvania*, 41 U.S. 16 Pet. 539 539 (1842); Paul Finkelman, "Story Telling on the Supreme Court: Prigg v Pennsylvania and Justice Joseph Story's Judicial Nationalism," *Supreme Court Review* ,Vol. 1994 (1994), pp. 247-294.

In *Prigg*, the Supreme Court took it upon itself to govern slavery. States had asked, and the justices would oblige. Exercising what institutional and popular authority it possessed along with the cultural power of the Founding it could recruit, the Court would seek to impose a national legal order that practical federalism had made elusive during the 1830s. In 1837, a team of Maryland men had snatched Margaret Morgan and her family, including her Pennsylvania-born child and free husband Jerry, without sanction from a state legal officer. She had resided for half a decade in Pennsylvania with the permission of an owner who purportedly believed that he had freed her whole family years prior; but his heir and her husband saw potential wealth living across the state line in York County. After the slavecatching party dragged the family to Maryland, a Pennsylvania jury indicted the men for kidnapping and the governor requested Maryland produce Nathan Bemis, Jacob Forwood, Edward Prigg and Stephen Lewis for trial. Tense back and forth negotiations ensued typical of interstate extradition demands involving slavery, which usually featured southern calls for northern ship captains and sailors to be sent down to meet their fate for aiding escaping slaves. A special committee of the Maryland legislature concluded that the men had committed no offense, and that to send the men would "admit the power of the non-slaveholding states to nullify that Article of the Federal Constitution which recognises the relation of master and slave, and guarantees the right of property in persons held to service."[468] But instead of the impasse that generally followed demands from non-neighboring states, southern-sympathizing Democrat David Porter replaced the antislavery Anti-Mason Joseph Ritner as Pennsylvania governor, a deputation visited from Maryland and the state governments cleared a path to the Supreme Court to resolve what they could not. As the *Emancipator* fretted from New York, "We have tried very hard to keep the public apprised of the fact that there is a controversy now pending between Maryland and Pennsylvania, involving precisely the same principles with the controversy between Maine and Georgia, and that between New York and Virginia; with the difference that in this case it is the Free State that makes the demand."[469] This case moved quickly under a special act of the assembly. A Pennsylvania jury convicted the well-to-do gang of kidnapping the Morgan family in violation of an 1826 state statute governing the removal process. In the state supreme court, the verdict was immediately sustained without argument beyond a few remarks. For the defendants, John Nelson of Baltimore announced that the litigation involved a matter "of the deepest concern to all the slave states" and "that this case would settle and put to rest, the conflicting questions of state and national jurisdiction, over the subject of fugitive slaves." Pennsylvania attorney general Ovid. F. Johnson agreed. He instructed that the matter was "designed to settle the agitating and delicate questions referred to, by the decision of the highest tribunal in the Union, and that he would throw no obstruction in the way of doing so."[470] The tolling desire for constitutional settlement from statehouses on the border of slavery was heard in Washington D.C. But to perform such a settlement, to make a constitutional ruling that might resound convincingly across jurisdictions, the Court could not rely simply upon its placement as the "highest tribunal."

Prigg arrived at a confluence of forces. By the early 1840s, slavery cases exposing dissonant understandings of constitutional promises were pushing at judiciaries, kindling interstate conflict as northern states enacted procedures for rendition that contravened

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[468] "Journal of Proceedings of the House of Delegates of the State of Maryland," *Maryland Gazette* (Annapolis, Maryland), January 11, 1838.
[469] "Maryland," The *Emancipator*, January 28, 1841.
[470] "By Last Night's Western Mail - Correspondence of the Inquirer & Courier," *Pennsylvania Inquirer and Daily Courier* (Philadelphia, Pennsylvania), May 29, 1840.

slaveholders' increasing uncompromising claims of constitutional right. At the same, the possibilities and power of historical argumentation were expanding. Madison's Notes from the Constitution Convention finally received publication in 1840. Legal professionals who grasped for the past could now take hold of a seemingly objective, complete account of the secret center of the Founding, and ratification debates were republished and circulated widely. A reviewer in a leading legal periodical found himself so moved by the appearance of Madison's Notes as to exclaim in January of 1842, just before oral arguments in *Prigg* opened, that the "constitution of the United States is in the history of politics, a miracle. Nothing of the kind had ever been produced, which, in view of its importance, or its success, could be placed in comparison with it."[471] The emergence at that moment of a historical record appeared as a corollary man-made miracle. "Mr. Madison seems all along to have had a prophetic insight into the relative importance of this portion of our revolutionary history," having "foreseen that the time would come" when the public inquire of the Constitution rather than military developments. A more ambivalent exclamation that no less affirmed the power of the documentary record came in the *Philanthropist* and the *Emancipator,* which in 1841 republished and annotated the "full report of proceedings" connected with slavery. "The world owes a great debt of gratitude to Mr. Madison for his faithful report," the papers announced, "But what heart does not revolt at some of the revelations he makes!" The writer confronted the overwhelming reality that "We have been taught to venerate the character of the framers of the Federal Constitution," but terrible bargains and inhumane views now disclosed required modulating "our respect." Yet redeeming value could – and must – be found: the editor hoped to "imprint[] deeply on every mind" how "Mr. Madison of Virginia… thought it WRONG TO ADMIT IN THE CONSTITUTION THE IDEA THAT THERE COULD BE PROPERTY IN MEN." Regardless of section, politics and sentiment, history mattered in confronting the constitutional place of slavery.[472]

The conjuncture could be seen in the pages of the *American Jurist and Law Magazine*. In 1840, as the *Prigg* case advanced in Pennsylvania, legal writers telegraphed the mounting conservative desire for order and the ascending method of historical legitimation that would cohere in the case. They observed an "increased and increasing interest… in every part of our country" on the rights of slaveholders under the Constitution, devoting to the subject an enormous article spanning two issues. The editors betrayed their appetite for quiescence, praising those judges who "uphold the constitution and laws of the union" by summarily returning enslaved people to the South as agreed to at "the time of the convention."[473] The avid attention to constitutional litigation over slavery inspired the editors' increasing passion for the Founding as the rock of constitutional meaning. Long quotations from Madison, Henry, Iredell, Randolph and others in ratification proceedings followed, as the magazine demonstrated the widening possibilities for constitutional storytelling. With this material, the essay instructed the legal community that "the people of the slaveholding states were apprehensive that a non-slave holding state might pass laws" affecting their absolute property rights. This, more or less, was the answer that the South would desire from *Prigg*: that beneath the silence of the Constitution's Fugitive Slave Clause, the framers had implanted an understanding that denied states could

[471] Art. IV – The Madison Papers, *The American Jurist and Law Magazine*, Volume 26 (1842), 393; "The Madison Papers." (July, 1842), 333-34; "American Law Periodicals," *Albany Law Journal*, Vol. II (December 10, 1870), 446.
[472] "Importation of Slaves—Original Compromise between North and South," *Emancipator* (New York, New York), March 4, 1841.
[473] "Art. II - Rights of the Slave-Holding States and of the Owners of Slave Property under the Constitution of the United States," *The American Jurist: And Law Magazine, Volume 23* (1840).

impinge upon American slaveholders' ability to summarily reclaim the allegedly enslaved – and that such an unwritten understanding should be binding circa 1840 and forever. In their omen of an article, the legal writers concluded with a prescription for federal judicial power. In fugitive slave cases, they reasoned with clarified historical conviction, "judicial power should be exercised not by a state court but… by a court of the United States," and Congress should legislate accordingly. A future of orderly constitutional adjudication of fugitives from slavery seemed to proceed from a proper grasp of the settlements of the past.

Into this fraught moment and into the Supreme Court stepped advocates from Maryland and Pennsylvania in February 1842. They spoke before justices who harkened predominately from the South. The Morgan family had been ripped apart by this time. The Marylanders sold Margaret and her children to a trader. Her free husband Jerry, although released, died under duress on a desperate expedition to obtain help from authorities. Their case carried on as a vehicle for the country's constitutional politics. All who entered the courtroom in early February recognized the high stakes. "Indeed, it would perhaps be not too much to say, that the case was one of vital interest to the peace and perpetuity of the Union itself," Johnathan Meredith of Baltimore spoke, as he blamed state laws for producing "exasperation of public sentiment… that seemed every day to assume a more malignant and threatening aspect."[474] Pennsylvania attorney Thomas C. Hambly agreed. No constitutional question "has arisen of more commanding import, of wider scope in its influence, or on which hung mightier results for good or ill to this nation," he declared, as the case confronted a subject "now heaving the political tides of the country, which has caused enthusiasm to throw her lighted torch into the temples of religion, and the halls of science and learning, whilst the forum of justice, and the village bar-room have equally resounded with the discussion." They felt an exceptional public gaze. It was popular and political attention from which the Court did not shy away. Justice Story delivered the prefatory remark that few cases had ever "involve[d] more delicate and important considerations, and few upon which the public at large may be presumed to feel a more profound and pervading interest." He promised to set out the basis of his decision-making for the people to see.[475]

The immanent publicity and gravity of *Prigg* made the Founding essential for advocates and Court alike. Vernacular constitutionalism offered authority, legitimation and communicative power. Deference to a venerated Founding entered the Court and jurisprudence because legal professionals embraced these qualities. To a remarkable extent, the arguments and opinions were built from narratives of original creation, contemporaneous understanding and prospective intentions. The case reduced to the question of the true meaning of the Fugitive Slave Clause, and became an effort in motivated, dueling historical reconstruction. With the same available information, the attorneys and justices – who authored seven opinions among the nine of them – took turns relating the past with different original meanings.

The arc of the southern lawyers' Founding saga unfolded in parts. It endeavored to establish the central place of slavery, the problem of enslaved fugitivity, and the expansive constitutional protection settled by the framers. According to Maryland attorney Meredith, "at the close of the Revolution, the system had so intertwined itself with the vital interests of private

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[474] *Report of the Case of Edward Prigg Against the Commonwealth of Pennsylvania, Argued and Adjudged in the Supreme Court of the United States, at January Term, 1842: In which it was Decided that All the Laws of the Several States Relative to Fugitive Slaves are Unconstitutional and Void, and that Congress Have the Exclusive Power of Legislation on the Subject of Fugitive Slaves Escaping Into Other States* (Philadelphia, 1842).
[475] Patricia Reid, "Margaret Morgan's Story: A Threshold between Slavery and Freedom, 1820–1842." *Slavery and Abolition* 33, no. 3 (2012): 359–80.

property, and with the maintenance of the public safety, as to render every project, even of gradual abolition, unsafe and impracticable."[476] Before the Convention, then, slavery was already an undoubted, perpetual commitment within the South. And yet the Articles of Confederation left owners exposed to the self-liberation of enslaved people across sectional lines. In presenting this state of affairs, Meredith cited Justice Story's own *Commentaries*, its now-commonplace history resurfacing as authority. The court also heard from select primary sources: Madison in Virginia and Iredell in North Carolina explained how slaves would continue to be emancipated in the northern states if the Constitution were not adopted. But with ratification, the framers' work transformed the legality of slavery from mere interstate comity to an unending federal responsibility to ensure owners can always claim alleged runaways. Meredith offered what he contended was the "well-known history" of a grand Founding bargain struck between sections. "On the one hand, the south agreed to confer upon Congress the power to prohibit the importation of slaves after the year 1808. On the other, the north agreed to recognise and protect the existing institutions of the south." The scope of this promise yawned nearly without limit. The Fugitive Slave Clause, in his account, embodied this totalizing national vow. Proof came in general reference to "history of the times" and careful quotation of Governor Randolph's assurance in the Virginia Convention as he urged ratification – that "Were it right to mention what passed in convention on the occasion, I might tell you that the southern states, even South Carolina herself—conceived this property to be secured by these words." Meredith represented this understanding as both widely accepted and literal in breadth – that the purpose and promise to make ownership secure controlled the meaning of the constitutional text. "Such, undoubtedly, was the confidence of the whole south, in the intention of the framers of the Constitution." And from this ascribed intention, Meredith was close enough to leap to the desired conclusion that the framers therefore "meant to commit all legislative power" to Congress. In his account, the Constitution allowed slaveholders to seize those whom they believe were their slaves wherever found. But to the extent that the process was regulated, it must be a federal matter because "the apprehension must have forced itself upon every southern mind in the convention, that if the provision were left to be carried out by state legislation, it must prove but a precarious and inadequate protection." Finally, there was the 1793 Fugitive Slave Law, legislation that began because Virginia refused to turn over kidnapping fugitives from *justice* "on demand" of Pennsylvania and was revised to include a process for the removal of claimed fugitives from slavery. According to Prigg's attorney, this Fugitive Slave Act represented "a contemporaneous exposition of the constitutional provision" because it arrived four years after the adoption of the Constitution through the agency of a Congress populated by "many of the leading and most distinguished men of the convention." Under a Constitution written to ensure that slaveholders experience the "least possible inconvenience, expense, and delay," the Pennsylvania law affording some measure of process must fall, and all like it. Precedent and doctrinal analysis assumed a minimal role in *Prigg*. When the Baltimore lawyer cited and quoted from previous fugitive slave cases, he did so for their historical claims; that is, these precedents operated as conduits of narrative, gaining perceived authority and factuality through time and repetition. In his opinion, Justice Story would effectively treat them as such, too. Meredith's historical narrative made the political landscape eerily familiar to those in attendance. His Founding depicted slavery as a foundational commitment, fugitive slaves a defining schism, interstate trust low and the influence of a federal "Slave Power" high.

[476] *Report of the Case of Edward Prigg Against the Commonwealth of Pennsylvania.*

From York County, Thomas Hambly travelled to Washington D.C. to defend the Pennsylvania law and with it his beloved Constitution. The local district attorney brought to the high court a fluent command of popular constitutional poetics, vernacular absorbed at the confluence of national civic, political and legal life. He addressed the Court with rhetoric that merged veneration and fear for an original Constitution at once great and fragile. "Any irreverential touch given to this ark of public safety should be rebuked, and every violence chastened; its sanctity should be no less than that of the domestic altar; its guardians should be Argus-eyed; and as the price of its purchase was blood, its privileges and immunities should be maintained, even if this price must be paid again," Hambly declared, his language only a few degrees more effusive than that of other counsel and several jurists.[477] From this posture of fealty and vigilant loyalty, he contested the historical basis of the Meredith's arguments. In the Founding narrative that Hambly unfolded, regulations such as the 1826 statute in question stayed true to the original vision of the framers. He observed that both state governments and Congress had enacted laws on the rendition of fugitives from slavery soon after the formation of the Constitution, "when the debates… were still fresh in the memory of the whole country": thus Meredith's contention would mean that "the public men of the day" had enacted laws "where not only no legislation was necessary but not at all allowable," a proposition "too monstrous to indulge a moment." This argument might have been expressed in other ways, but he spoke so as to position the claims opposing counsel against an extended community of national fathers.[478]

Hambly had to fend off, on one side, the argument that the Constitution entitled slaveholders to simply seize people, and, on the other, that only Congress could govern the subject. Against the former view, he explained that "no one, either in the debates upon the formation of the Constitution, or at its adoption by the States, ever asserted that to be the meaning of this clause." The district attorney came prepared with documentary sources. He recited statements by southern framers referencing the security afforded by the Fugitive Slave Clause, where none seemed to speak of an interstate right of "self-help" outside an implicit legal process. Such a meaning would violate "the very spirit of the instrument," converting free states into a hunting ground for enslaved people and free black residents alike. Hambly sought to repel the argument for exclusive federal control with even more elaborate historical means. "I will now show, by inference, from the Madison Papers and Debates in Convention, that this matter was expected to be left to State legislation, and that the South was not united itself upon the subject." Only then, in 1842, could an attorney advance the kind of argument that Hambly proceeded to deliver. He explained the sequence by which various framers offered, amended and voted on the language that became the Fugitive Slave Clause, which he concluded exhibited an assumption that state courts would determine whether a "claimed" person was lawfully held to service. As he spoke in the slaveholding city of Washington D.C. to a bench dominated by slaveholders, Hambly did not argue for an antislavery Founding. His venerative invocations and historical reconstructions hewed to more conventional northern expectations of constitutional meaning. Denying that Pennsylvania had any desire to harbor slaves, he readily conceded that enslaved people were not "the people" protected by the Constitution; but to enslave a free man, by accident or intention as the Marylanders' position might enable, would make the Constitution "a waxen tablet, a writing in the sand; and instead of being, as is supposed, the freest country on

[477] *Argument of Mr. Hambly, of York, Pa. in the case of Edward Progg, plaintiff in error, vs. the Commonwealth of Pennsylvania, defendant in error, in the Supreme Court of the United States, Washington, D.C.* (Baltimore, 1842).
[478] Ibid.

earth, this is the vilest despotism which can be imagined."[479] Hambly denied the framers could have provided for such a meaning. Through these arguments, mainstream currents of historical reverence and constitutional vigilance became legal claims in the nation's highest court.

When Ovid Johnson approached the bar after Hambly, he welcomed the *Prigg* conjuncture. The young Pennsylvania attorney general announced that the "times call for a full and frank exposition of this subject; and he rejoiced that it had been presented at this juncture, before this tribunal, and in the friendly spirit that actuated the parties."[480] For this officer, the moment was ripe to redeem constitutional history, to articulate the true path laid out at the moment of constitutional genesis. Johnson lamented that Americans currently "too often" had come to see the state and federal governments at odds; he "thought, with the fathers of the republic, that both were essential to each other; both formed one consistent, harmonious, beautiful system of government." The notion that the framers implicitly committed the federal government to enforcing fugitive slave law across the land seemed irreconcilable with their known words, ideas and understandings. Citing "the letters of the Federalist, Nos. 41, 42, and 43; but especially 42," Johnson mocked the idea, implicit in Marylanders' argument, that such a tremendous federal power lurked within the clause, undiscovered "by the keen eyes of Hamilton, Madison, or Jay." The *Federalist* was circulated prior to ratification, "read by almost every one," and understood as explicating original, contemporaneous meaning, he announced, to bolster the authority of this point. To make his primary historical argument, Johnson thus advanced fictive secondary ones about Founding Era reading practices. Just as his Hambly had done, Johnson deliberately made his approach a historical and personal one, presenting his opponent as seeking to pass off a constitutional meaning that "these great men never dreamed of." What constitutional protection for slavery did they dream of, then? Only a prohibition on state emancipation of fugitives, he continued, citing pages in Elliot's compilation; "had the southern states demanded more than this simple guarantee… it might have jeoparded the formation of the Union itself." What began as inferences drawn from documentary sources ended in the counterfactual of constitutional failure. The surest, strongest basis for an ascribed original constitutional meaning was its necessity to the Founding, that without it the invaluable inheritance of the United States would not exist.

The effort by Prigg's representatives to cast the Fugitive Slave Law as contemporaneous construction from the Founding provoked Johnson to undertake the opposite project. While professing not to "speak irreverently of the Congress of 1793," he remarked that the "science of legislative log-rolling, which has been deemed of quite modern origin" was at work. Rather than actualizing an original constitutional intention, the law represented regular politics, plain and simple: "the northern states were constrained to agree to the provision relative to fugitive slaves, for the purpose of procuring the passage of a law providing for the case of fugitives from justice." The thrust of this tale of legislative history was not to attack concurrent congressional power per se but to bring the law down to the post-Founding realm, where it could not possibly illustrate the framers' binding promise for exclusive federal regulation of fugitive slave rendition. All this argumentation, assuming the primacy of a single moment of authorial intent, further ratified the authority of ascribed original understanding in settling the matter.

Ovid Johnson knew how he must close his argument before the Supreme Court. The *Prigg* moment called for the purest, most forceful invocation of reverent, deferential constitutionalism that his pen and voice could deliver. The final passages of the Pennsylvania

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[479] Ibid.

[480] *Report of the Case of Edward Prigg Against the Commonwealth of Pennsylvania.*

Attorney General's argument laid bare the kind of authority at work in constitutional litigation on slavery. He averred that "events of every day, and every year, invest the Constitution with additional claims to our veneration," with advantages that "seem to multiply with our necessities, and to spring out of them." Such language brought the discourse and posture of public constitutionalism into the Court. The lawyer observed as a natural matter of fact the rising tide of constitutional reverence and the sense that the Constitution contained answers to the most fraught questions of the day. Virtually nothing in the words that Johnson chose for his final effort at persuasion registered in the practice or idioms of legal construction. They soared, acclaimed and plead – calling forth the judicial power to produce a settlement, not through its own judgment and authority, but by following the Founding.

> The framers of our glorious Constitution, appear to have been little less than inspired. They not only guarded the liberties of their own age, but they looked into futurity, and provided for the liberties of ages to follow them—constitutional indemnities which must then have been established, or never established at all. The day to intrench political freedom within a written Constitution, was the day when the fresh recollection of the revolutionary contest not only taught its value, but the duty of placing it beyond the reach of invasion; and our fathers, conscious of this truth, performed the duty devolved on them, in a manner worthy of its inestimable importance. The most skeptical must trace the finger of God in this work; and acknowledge that he has sanctified it in the councils of his Providence. It is adapted to our condition in every stage of our national advancement. From the Atlantic to the Pacific Oceans, and from the lakes to the borders of Mexico, it has stretched forth its cherishing arm over our people, and diffused its blessings on all alike…. Changed as is our condition, modified as may seem our government in various matters of policy; the Constitution of our fathers is still solid and entire, the Constitution of their descendants.

Moved by the pressures of *Prigg*, the attorney general ushered slavery's constitutionalism into the Supreme Court. Its essential themes were palpable in his oration. The almost divine wisdom of the framers and fathers, the recognition of deliberate visions for the future, the elevation of the Founding moment and its discontinuity in time, the infinite suitability and perfection for all succeeding generations of the "Constitution of our fathers" were all present in room. The only thing to do, Johnson continued, was to preserve it. Neither strict construction nor latitudinarian construction would suffice. The only safe path through the antagonism between North and South required "undeviating adherence to the spirit and letter of the national Constitution." This approach to meaning seemed to renounce construction itself in favor of historical truth. Here, following the framers and their spirit of "concession" meant affirming his state's power to regulate the rendition of fugitives from slavery. He made no mention t that Prigg's attorneys had rendered an account in which that power was conceded by the North in the spirit of compromise. "The long and impatient struggle on this question, I trust is nearly over," Johnson concluded, because the Court would affirm what history instructs. Johnson rested believing that he had proven that the Founding was on his side.

The members of the Court, inundated by historical claims, could pick and choose the constitutional narratives that confirmed what they believed must be so. But the nine justices did not share the same story. Seven opinions emerged. At the time, it was clear that the Pennsylvania law and other personal liberty statues affording process were struck down, while slaveholders'

self-help right to seize the enslaved across the Union without a breach of peace was upheld. It seemed that the Court also found the federal government had exclusive power to regulate fugitive slave rendition – but that state governments could decline to participate in the enforcement of federal slave law.[481] Among the converging and diverging views, the legitimating power of the Founding coursed through the judicial writings unleashed on the country.

Justice Story wrote the "Opinion of the Court," guiding how people understood the state of constitutional law in the wake of the case. Through *Prigg*, Story expanded on his *Commentaries*' origin story of the Fugitive Slave Clause, an account written years before Madison's Notes allowed verification or closer inspection. In the form of a judicial opinion, it now became true as a matter of law. "Historically, it is well known that the object of this clause was to secure to the citizens of the slave-holding States the complete right and title of ownership in their slaves, as property, in every State in the Union into which they might escape from the State where they were held in servitude," Story explained.[482] But the recent Madisonian reveal did not enhance the keystone-of the-Constitution narrative that he had espoused. Popular knowledge and conviction would suffice in Story's retelling. In his Founding, the Clause's promise "was so vital to the preservation of their domestic interests and institutions that it cannot be doubted that it constituted a fundamental article without the adoption of which the Union could not have been formed." This instruction of an undoubtable causal relationship between the existence of the Fugitive Slave Clause and the Union implied an imperative for the most diligent observance of its obligations. In *Prigg*, however, the commitment contained within the Clause grew from its prior formulation by Story. Now the framers had intended to prevent states "from intermeddling with, or obstructing, or abolishing the rights" of slaveholders. This articulation of the Founding vision, with its inclusion of local interference as an ill to be remedied, recast state legislation as unconstitutional. If protecting slavery was so crucial, then surely the framers intended to make it a federal matter. As Story insisted of their thinking, "It is scarcely conceivable that the slaveholding States would have been satisfied with leaving to the legislation of the non-slaveholding States a power of regulation, in the absence of that of Congress, which would or might practically amount to a power to destroy the rights of the owner." Thus the Founding demanded uniform federal action. This was a promise only redeemed by *Prigg*. It had taken half a century to recognize and the participation of a Massachusetts justice devoted to constitutional nationalism while sitting on a southern Supreme Court.[483]

For all the ambiguities among the opinions produced by the justices, they exhibited a common epistemic commitment to the Founding in discussing the constitutional place of slavery and obligations upon the present. As Justice James Wayne observed of his judicial brethren, "All of them concur also in the declaration that the provision in the Constitution was a compromise between the slaveholding and the non-slaveholding States to secure to the former fugitive slaves as property." Of the Fugitive Slave Clause at the heart of the case, Justice Smith Thompson wrote that "We know historically that this provision was the result of a compromise between the slaveholding and non-slaveholding States; and it is the indispensable duty of all to carry it faithfully into execution according to its real object and intention." But the scope and particulars of that intention, as a historical matter, remained an engine of disagreement. Thus Chief Justice Roger Taney concurred with Story that all laws inhibiting slaveholders must fall, but he thought it a constitutional "duty" for states to legislate in their favor and ensure the cooperation of its

[481] Paul Finkelman, "Sorting Out Prigg v. Pennsylvania," *Rutgers Law Journal* 24:3 (1993), 632-33.
[482] *Prigg v. Pennsylvania*, 41 U.S. 16 Pet. 539 539 (1842).
[483] Robert Baker, "A Better Story in Prigg v. Pennsylvania?," 39 *Journal of Supreme Court History* 169 (2014).

officials. Were it otherwise, the onetime Baltimore lawyer wrote, the process of fugitive rendition under the 1973 Act would grind to a halt by the virtue of the few and distant federal judges available to issue certificates of ownership. But Taney did not rely on this instrumental reasoning: he invoked a version of the Founding that encompassed the First Congress. The lawmakers "of that day must have counted upon [states'] cordial cooperation… And it will be remembered that, when this law was passed, the Government of the United States was administered by the men who had but recently taken a leading part in the formation of the Constitution." The historical claims in Story's opinion unburdening state governments from participation never "entered into their minds," Taney objected. This dispute over policy and federal power assumed the identity of a clash over past mental facts.

Among the Court's opinions, only John McLean offered what could be recognized as a dissent. He accepted the exclusive power of Congress to regulate the rendition of fugitives from slavery; leaving the matter to state enforcement "would show an inexperience and folly in the venerable framers of the Constitution from which, of all public bodies that ever assembled, they were perhaps most exempt," he wrote, historical veneration part of his logic. But the Ohio justice insisted that states could pass laws like the Pennsylvania statute at issue to protect their free black citizens. His framers did not intend for slaveholders to roam freely seizing alleged slaves and sweeping up free people of color. The other justices paid no mind to the prospect, trusting the summary federal process implicitly or indifferently. McLean, whom the Free Soil Party would attempt unsuccessfully to draft as a presidential candidate, inhabited an only slightly more gentle version of Story's Founding, one that did not embody the "peculiar views of any great section of the Union." In McLean's account, deep divisions over slavery could only have been bridged "by an exercise of exalted patriotism," which "Fortunately for the country… was not wanting in the convention and in the States." Claiming that the slaveholders' experience with fugitives "produced great excitement, and would have led to results destructive of the Union," the "constitutional guarantee was essential" in forming the United States. With this view of the historical centrality of the Clause to the Union, the justice's own antislavery principles could remain a matter of private concern. Deference to an ascribed vision of the national fathers dissolved tensions between moral impulses and public duties. Beyond the unsettled domain of the "law" at this juncture, the strictures of the Founding settled the question for him.[484]

Justice James Wayne concurred with the decision recognizing the federal government's original and exclusive constitutional responsibility to legislate on fugitives from slavery. But the vision of the past upon which he predicated that result was another story. The Georgian looked back upon the Founding to perceive a total southern triumph inside a body divided by slavery above all else. Slave states received "a full and perfect security for their slaves as property when they fled into any of the States of the Union; the fact is not more plainly stated by me than it was put in the convention." In his telling, the South secured all it desired: federal representation of enslaved people; an open slave trade for years and the certain return of fugitives. They were "equally insisted upon by the representatives from the slaveholding States; and, without all of them being provided for, it was well understood that the convention would have been dissolved without a Constitution's being formed. I mention the facts as they were; they cannot be denied." Wayne, who held title to dozens of enslaved people, brought an aggressively proslavery iteration of vernacular constitutionalism to the Court. The justice publicly venerated the slaveholding national fathers and happily deferred to the vision he believed they had embedded in the United

[484] Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven, 1975); Francis P. Weisenberger, *The Life of John McLean: A Politician On the United States Supreme Court* (Columbus, 1937).

States' fundamental law. "I am satisfied with what was done, and revere the men, and their motives for insisting, politically, upon what was done," he stated frankly.

When Wayne explained why the Constitution gave the federal government exclusive control over ensuring the return of fugitives, his proslavery vision of the Founding emerged with startling clarity. It must be "remembered," he opined, that the Fugitive Slave Clause "was not intended only to secure the property of individuals, but that, through their rights, the institutions of the States should be preserved so long as any one of the States chose to continue slavery as a part of its policy." The framers of the Constitution cherished by the southern justice had held as a "great object" the preservation of the system of slavery itself in the United States, "protected in all of the States as well from any interference with it by the United States as by the States." For this faith in an active constitutional commitment to coddle the institution, Justice Wayne believed history sustained him. He pointed to lessons learned under the Articles of Confederation and an ascribed understanding shared during the Federal Convention and ratification debates. He quoted slaveholding national fathers Iredell in North Carolina and Charles Cotesworth Pinckney in South Carolina speaking of the security for slaveholders newly afford by the Constitution.[485] All sides to the question had considered these same words. None stated that the federal government would take exclusive charge of fugitive slave rendition or discussed the mechanisms by which such security might occur. For Wayne, however, the framers whom he believed in could have meant only one thing: exclusive and obligatory federal enforcement "removes those causes which have contributed more than any other to disturb that harmony which is essential to the continuance of the Union. The framers of the Constitution knew it to be so, and inserted the provision in it." As a bearer of southern slaveholders' constitutional faith, Wayne uttered its assumptions from the bench. Wielding the legitimating authority of the framers enabled him to slip easily from the confines of states' rights and strict construction principles. For there was no firmer ground than the Founding on which to plant arguments about slavery under law.

Along with new constitutional rules, *Prigg* delivered other lessons. It showed that when slavery came before the Court, the justices could sound very much like the people themselves. As they praised national fathers and staked out their historical truth, the Court's institutional power interlaced with the idioms and passions of public constitutional discourse. The justices demonstrated broad unity in revering the Founding and in claiming to defer to original meaning. Yet in the hazy space of historical reconstruction, where faith, belief and motivated reasoning swirled, that commonality determined decisions less than any justice would vow. It did, nonetheless, impose very real limits on the available range of constitutional interpretations. When the nominally antislavery Justice McLean embraced the popular historical premise in which fugitive slave rendition was a vital interest upon which the Constitution and Union depended, he foreclosed a textual reading of the Fugitive Slave Clause or an interpretation based on principles of freedom. And when he further agreed that the framers provided for federal authority over rendition because states could not be trusted, McLean forwent the possibility of a practical reckoning with ambiguity, uncertainty and present-day choice in assessing the constitutional place of slavery in the United States' federal system. The dominant role of history in *Prigg* attracted notice. As the political antislavery movement organized during the 1840s, the

[485] ["In some of the northern States, they have emancipated all of their slaves; if any one of our slaves go there and remain there a certain time, they would, by the present laws, be entitled to their freedom, so that their masters could not get them again; this would be extremely prejudicial to the inhabitants of the southern States; and, to prevent it, this clause is inserted in the Constitution." And "we have obtained a right to recover our slaves in whatever part of America they may take refuge; which is a right we had not before."]

case inspired some lawyers to pursue an ahistorical, textual approach to the Constitution. At the 1845 Convention of the Friends of Freedom in the Eastern and Middle States in Boston, a resolution was presented "That in the case of Prigg vs. Pennsylvania, the Supreme Court of the United States, by expressly quoting and relying upon history, instead of the words of the constitution, to prove that the clause in regard to fugitives from service or labor, was intended to refer to slaves, impliedly acknowledged, and plainly evinced their consciousness of the fact, that the words alone of the clause would not authorize or justify such a construction." But these resolutions were not approved – they were "too novel and startling… to be adopted on so limited a consideration" according to one commentator.[486] Belief in a Constitution known through history ran deep; for many Americans, it remained entirely possible to have faith in an antislavery Founding that promised much less to slaveholders than the present generation claimed.

The Opinion of the Court in *Prigg* was supposed to tamp down the state-by-state fugitive slave conflicts that had roiled the country during the 1830s. The decision curtailed the discretion of states legislatures and courts to enact statutes or issues decisions inviting contestation outside a summary national rendition process. Constitutional history was an essential instrument to this end. By the authority of the Founding, seized and channeled by the Court, long-exercised state legislative and judicial power disappeared in a cloud of imputed original meaning. This shift did not go unappreciated or unchallenged. In its wake, politicians, legal writers, courtroom advocates and vocal citizens debated its implications and criticized its validity from a variety of perspectives. Southerners welcomed that *Prigg* "asserted in high and becoming terms, the rights of the slaveholder under the Federal Constitution," as Charles Faulkner contended in the Virginia House of Delegates, but regretted that it "gave utterance to an opinion" that state authorities could refuse to aid in the capture of alleged fugitives from slavery.[487] This state non-participation principle remained uncertain, as did the question of whether the Supreme Court had determined that the Constitution truly recognized the chattel principle of people as property. Arguing soon after the decision that alleged fugitives contesting their status had a right to trial, William Seward urged the Supreme Court to reconsider its decision: that "after a lapse of fifty years and after acquiescence during that period by nearly all the states in this system of legislation," the restriction of state legislative power in *Prigg* was an "error."[488] One observer of an Indiana proceeding arising from the rendition of fugitives commented that in "Prigg vs. Pennsylvania, the ablest lawyers differ as to what the court decided, and it seems that the judges themselves in private conversation with Henry Clay and others have avowed that their decision was directly contrary to what it reads in the report."[489] Among northern states, where the specter of slaveholders self-helping themselves to inhabitants appalled moral and legal sensibilities, people began pressing governments to forbid active complicity. No community had greater cause for outrage and terror than free African Americans and long-time fugitives who saw constitutional decimation of the very possibility of legal protections against their own enslavement. As an editorialist considering the "Duty of Colored Americans" wrote in the *Emancipator and Free American* in March 1842, the *Prigg* "decision is so unexpected, so unreasonable, so

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[486] *Convention of the Friends of Freedom in the Eastern and Middle States* (Boston: 1845). *Proceedings of the great convention of the friends of freedom in the eastern and middle states, held in Boston, Oct. 1, 2, & 3, 1845.*
[487] *Richmond enquirer*, December 22, 1848, 2.
[488] *In the Supreme Court of the United States: John Van Zandt, Ad Sectum Wharton Jone : Argument for the Defendant* (Albany, 1847).
[489] *The South Bend Fugitive Case: Involving the Right to a Writ of Habeas Corpus* (New York, 1851).

irreconcilable with the great principles of law, affecting the rights of personal security, that it would be presumptuous to determine, at the moment, how far it will subject the free people of color to the liability of being enslaved by kidnappers."[490] Antislavery activist Samuel Ringgold Ward, who had "recently learned from mother "that my being born free – legally - is not susceptible of proof," dispatched a letter to Gerrit Smith that after *Prigg*, "I can see no kind of legal protection for any colored man's liberty." The Supreme Court's ruling, he contended, was "contrary to the Constitution" and "tending to dissolution."[491]

In these immediate reactions to *Prigg* lay the seeds of a new era of plural claims upon the Founding. Free people of color and antislavery communities were among the first to object to *Prigg*, but others would join in the act of doubting judicial pronouncements of commingled history and law. The Supreme Court declared an authoritative history in *Prigg*. For purposes of governing slavery, it had rendered itself as a court of history: by words and deeds, the justices ventured beyond their special competency as jurists to fully claim a new expertise as arbiters of historical constitutional truth. In doing so, they entered a terrain where people – bearing their own notions of the past – could more readily object.

[490] "Duty of Colored Americans," *Emancipator and Free American* (New York, New York), March 31, 1842.
[491] Samuel Ringgold Ward to Gerrit Smith, 18 April 1842, in *The Black Abolitionist Papers, vol. 3*, ed. C. Peter Ripley (Chapel Hill, 1991).

CHAPTER SEVEN

FOUNDING RULES: THE LIMITS OF JUDICIAL AND HISTORICAL AUTHORITY

Viewing constitutional litigation over slavery across the landscape and political arc of the antebellum United States reveals a two-fold transformation. History, or at least ideas about history, became law. And as lawyers and judges converted narratives of the Founding into arguments, reasoning and decisions, a methodological devotion to original visions became entrenched in formal constitutionalism. Surviving transcriptions and opinions attest to a swelling need to ground claims upon what people imagined was intended, foreseen and forbade. The legitimating power of the Founding shaped the very role of judiciaries. Indeed, courts' capacity to adjudicate slavery's constitutional identity rested on marshaling the authority of the past. When courts overstepped what people believed true history would sustain and when popular historical consciousness diverged into warring camps during the 1850s, this reliance was laid bare. Then the legitimacy and finality of rulings quavered. This chapter exposes these dynamics.

In the 1820s and early 1830s, as the prior chapter demonstrated, the judicial narrative of the Founding was a bare-bones affair that underpinned a directive to maintain a limited compromise over fugitive slaves authored by southern and northern fathers: in this iteration, the paternal "compromise" was held aloft as both a historical fact and guiding principle that would justify results that might disappoint slaveholders or antislavery northerners when enslaved lives were in jeopardy. Embedded in the backlash to antislavery politics during the 1830s, the judicial narrative grew more elaborate and incorporated broader visions of racial exclusion, while the terms and scope of the ascribed compromise became ever more favorable to slavery. In response, antislavery Americans developed alternative narratives of the Founding, telling modern declension stories and urging constitutional redemption through an original antislavery Founding. Initially a peripheral position articulated by Samuel Chase, events caught up with such claims. Courts leaned ever more heavily for support on the Founding, turning the fathers' "compromise" into a prescriptive historical device through which legal professionals authorized a federal government committing to sustaining slavery everywhere. Over the 1850s, this narrative became increasingly contested, and the stories of the Founding embraced by publics, lawyers and even judges fractured. Redeeming an antislavery Founding gained support in and out of courts at the very moment that judges, southerners and conservative unionists wielded the authority of a proslavery Founding to the fullest possible extent. This chapter traces the developing work of the Founding in the aftermath of *Prigg*, now firmly embedded in constitutional practice. It observes the offensive and defensive courtroom performances predicated upon thick constructions of historical visions, culminating in the simultaneous apotheosis and trial of Founding authority in *Dred Scott*. Honed as a legal weapon, the Founding structured slavery's judicial encounters, which in turn structured American constitutionalism at its most fraught moments.

After the *Prigg* Turn

The constitutional edicts of *Prigg* remade the terrain upon which legal clashes over slavery took place. The jurisprudential aftermath of the Morgan family's destruction did not bring about the quiescence sought by the government sponsors and judicial arbiters of the case; instead, new areas of disorder opened. With a firm sense of constitutional right, slaveholders and their agents exercised their Court and Founding sanctioned option of carrying away alleged

fugitives by their own hands. With a dawning sense of the nationality of slavery and their own institutional involvement, northern publics pressured governments to disentangle themselves: during the seven years after *Prigg*, half a dozen states enacted statutes that deprived slaveholders of the use of jails and coercive services of state officers.[492] These personal liberty laws, the resistance offered by free black and antislavery communities and the stigma that developed around those aiding slaveholders indicated that southerners must rely on federal power. But extant federal law enforcement institutions were few and far between. As a Maine writer commented after a southerner failed to secure a fugitive, the enslaver had lost his man "because Virginia has been these 50 years hampering and tearing away all those energetic Central Powers with which the framers of the Constitution intended that the general government should be armed."[493] To make a federal government incapable of threatening slavery and southern state power, the legislative and constitutional agenda led by southern Democrats had produced a federal state ill-equipped to immediately take up the work policing slavery in the North. Meanwhile, the overt, historical commitment to slavery articulated by the justices, as well as the approval they cast upon the federal Fugitive Slave Act, did not go uncontested in subsequent cases. As constitutional litigation proceeded across the post-*Prigg* landscape, the Founding was fixed as the central as a site of authority and contestation. As attorneys, judges and commentators sought to legitimate an original settlement as their binding inheritance, Americans saw the salience and authority of constitutional history affirmed in their continued struggle for and against slavery.

Before 1842 was out, these post-*Prigg* tensions surfaced in Massachusetts. Rebecca and George Latimer slipped away from Norfolk, Virginia concealed in the fore-peak of a ship.[494] Enslaved by different Virginia families, the married couple eventually reached Boston in early October. After a scant two weeks of relative freedom, George was recognized, arrested and then jailed on orders of Justice Story from his seat on the First Circuit Court. Summary removal awaited the return of purported owner James Gray with proof of ownership. At a covert hearing near the jail to avoid rescue efforts, Massachusetts Chief Justice Lemuel Shaw deferred to federal authority and declined to act on the writs sued out by Samuel Sewall.[495] Rebecca remained in hiding with the black Bostonian community during George's imprisonment. As Massachusetts legal officers enabled George's rendition, the path to contesting the process commenced outside the courts. By mid-November, the Suffolk County sheriff yielded to a cresting wave of pressure and the constitutional understanding of voluntary state cooperation that had arisen during the preceding weeks: he ordered Latimer's release. With a black vigilance network and antislavery community at the ready, Gray manumitted Latimer for $400. In the post-*Prigg* world, judicial process and public constitutional action tangled immediately. Order appeared remote, disputed discretion resilient, and Founding claims still abounded.

As authorities whisked Latimer to jail, antislavery organizers advertised a mass meeting that filled Faneuil Hall with sympathetic citizens and raucous local opponents. Speakers parsed the limits of Massachusetts's constitutional obligations, as identified by courts, southerners and their own sense of history. Edmund Quincy asked, "Fellow citizens, of which of our rights may

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[492] *Acts of the General Assembly of Virginia, 1849-1850* (Richmond, 1850), 248-50; Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North* (Baltimore, 1974).
[493] *Daily National Intelligencer* (Washington, DC), December 22, 1842 (from Portland *Advertiser*).
[494] John W. Hutchinson, *Story of the Hutchinsons, Volume II* (Boston, 1896), 350-51; "The Two Autobiographical Fragments of George W. Latimer," *Journal of Afro-American Historical and Genealogical Society*, No 1, (Summer 1980).
[495] *Richmond enquirer,* November 8, 1842, 2.

we not next be deprived, by those judge-made laws, called precedents?"[496] Samuel Sewall excoriated *Prigg* at length. Running through the exhortations was a bitter motif of state complicity beyond constitutional requirements in the landscape newly mapped by the Supreme Court. They pressed upon the audience their ongoing responsibility for the conduct of their own institutions. Imprisonment of Latimer with "no warrant, no legal process, no evidence" as Sewall recounted, was an abuse of public jails; his detention "by your servants, to allow time for the production or the manufacture" of some proof of ownership, as Quincy suggested, was an injustice that every Massachusetts citizen should prevent from recurring. Wendell Phillips went further. "This old Hall cannot rock as it used to with the spirit of Liberty," he declared, because it "is chained down by the iron links of the United States Constitution." An enormous uproar followed, which hardly relented as he inveighed against placing "a piece of parchment" above natural law, justice and the Bible. Such transgressive, anti-constitutional language sparked the ire of anti-abolition men in attendance, as did the presence of black speakers. Repeated efforts by Charles Lenox Remond and Frederick Douglass to deliver speeches were shouted down with racist vitriol. Among the "large number of ladies" in attendance who applauded and waved, several African American women had their bonnet and garments torn from their person.[497]

This public assembly was a call for popular action to transform public policy. Other meetings followed performing popular, historical constitutionalism. At Lynn's Lyceum Hall, for instance, a unanimous crowd affirmed an antislavery Founding that denied sanction to Latimer's treatment. They resolved that

> the Constitution of the United States is the act of the people of the United States, and their intention at the time is to be looked to for the object aimed at; and when we find their express declaration that it was to secure the blessings of liberty to themselves and their posterity, it is impossible to believe that they intended to make the law of slavery ride over the habeas corpus, where to authorize a private individual to seize and imprison who he pleases, without warrant of law.[498]

In response to the arrest of Latimer, people took ownership of the legal process unfolding in their jurisdiction. Through a vehement conversation steeped in constitutionalism, one that grappled with the authority of the Founding, a growing body of Massachusetts residents pressed to limit slavery's infiltration into their immediate legal and political world. During the fraught weeks of Latimer's imprisonment, African American citizens of Boston met in significant numbers at the Belknap Street Baptist Church, where the black New England Freedom Association organized rhetorical and extralegal resistance. Black Bostonians had attempted to rescue Latimer soon after his arrest, and their potential action informed Gray's decision to trade manumission for $400 when civil authorities decided to no longer imprison him. At their meetings, they condemned the outrage of Latimer's arrest "on the very spot and soil that drunk the blood of our fathers, who revered their Liberties more than life, and pledged their sacred honor to defend her cause" and detention "without legal process, or the least reverence of the liberty for which their venerable sires pledged and lost their lives." Against the oppressions of their present, leaders such as William Cooper Nell, author of *The Colored Patriots of the*

[496] "The Faneuil Hall Meeting," October 30, 1842, *The Liberator*, November 11, 1842.
[497] *The New York Herald*, November 2, 1842, 2.
[498] "Great Meeting at Lyceum Hall, in Lynn," *Liberator*, Nov. 11, 1842.

American Revolution, and Henry Weeden deployed public memory and veneration for a revolutionary generation to which African Americans could claim full belonging.[499]

Spurred by public assemblies and town-by-town engagement, a vast petition campaign aimed at the Massachusetts statehouse unfolded under the banner of Latimer's name.[500] Over sixty thousand signatures, with George Latimer's mark among them, urged the state to enact legislation barring officials and jails from aiding slave-hunters and to pursue a corrective constitutional amendment "forever separating the people of Massachusetts from all connexion with slavery."[501] A joint special committee led by Charles Francis Adams took up these demands with an earnestness that traced a point of inflection in the constitutional politics of slavery. In their public report, the committee dwelt upon the *Prigg* decision as marking a new era. When proslavery constitutionalism remained a matter of contested public opinion, they suggested that Massachusetts could feel hopeful that better ideas would prevail; but when "tribunals of justice" accepted in *Prigg* the "the same dangerous notions" in circulation, a "change in the character of the public feeling" necessarily followed. The demands presented by the sea of signatories gave lawmakers an opportunity to set forth an alternative devotion to original constitutional meaning, one that contemplated different results across the plane of slavery's constitutional politics. The committee condemned *Prigg* as a stark violation of the spirit of the instrument and high purposes of its authors. In their telling, the Constitution was adopted "to secure the blessings of liberty to the generations now in being in America," and that "design should, then, be eternally kept in view, when construing each of its separate provisions." As such, whenever a constitutional provision runs against the framers' promise of liberty, Adams insisted that it should be cabined to the precise meaning intended. In practice, this version of constitutional construction as historical deference aspired to cut the fugitive slave clause down to an imputed original size: "Was it the intention of the framers of the Constitution, that one little clause, admitted by way of compromise with the upholders of slavery, should be made omnipotent against freedom? Surely not." While thus objecting to the course of Story's reasoning, which left Latimer and free blacks vulnerable to kidnapping, lawmakers could comply with the decision and stay within the bounds of internal state policy by stripping away institutional support for enforcing the fugitive slave law. Their recommended personal liberty bill passed at the end of the legislative term in 1843.[502]

But formal constitutional change was another matter. "Slavery, which crept in at the shadow of the edifice when it was building, under implied promise to remain but for a time, has now grown so large that it occupies all the space, and cannot be put out of the door without hazard to the whole erection," they explained mournfully. Adams' committee articulated their current political world as an unintended deviation from the Founding, and they confessed uncertainty on how a separation from slavery could be undertaken without destroying the instrument itself. Yet Massachusetts could seek one amendment, they proposed, that would not interfere with southern slavery but sustain original constitutional values that slipped away with each national election. It was "slave representation" that was carrying out "by slow but sure degrees, the overthrow of all the noble principles that were embodied in the federal

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[499] "Great Mass Meeting of Colored Citizens of Boston J. T. Hilton, President, V. W. Barker and B. F. Roberts, Secretaries," *The Liberator* (Boston, Massachusetts), December 23, 1842; James Oliver Horton and Lois E. Horton, *Black Bostonians: Family Life and Community Struggle in the Antebellum* North (New York, 1999); Benjamin Quarles, *Black Abolitionists* (New York, 1969).

[500] Sinha, *The Slave's Cause: A History of Abolition*, 362.

[501] "Legislative Report on the Petition of George Latimer and Others," *The Liberator* (Boston, Massachusetts), March 3, 1843.

[502] Ibid.; Bruce Laurie, *Beyond Garrison: Antislavery and Social Reform* (New York, 2005).

Constitution." The bargain in practice in the 1840s was not the bargain intended, the committee argued. The resulting proposal to abolish the three-fifths clause, so that the enslaved population of the South did not bolster the political power of slaveholding politicians, was a pointed, impracticable gesture – a non-starter by virtue of the very force it aimed to topple. It made no claim for the power of abolition but imagined restoring slavery to a weaker place in the national political life, one in keeping with an imagined Founding vision.

The court of public opinion, as it were, and the judiciary were entwined. Through the public press, Gray's attorney, Elbridge Gerry Austin, defended his client as a model American citizen, "proceeding strictly according to law." This grandson of framer Elbridge Gerry also felt the need to defend his own professional advocacy for a cause more widely reviled than anticipated: "[C]itizens of the South, whenever they seek to enforce their rights, are entitled to the services of those persons, who, by education, are qualified to advise them how to observe the provisions of the Constitution and laws of their country."[503] Abolitionists rallied support beyond their unusual numbers. The *Latimer Journal and North Star*, circulating through the towns of Massachusetts, pooled together radical antislavery discourse and popular memory of the Founding and Massachusetts fathers.[504] The conservative *Monthly Law Journal* complained that this single-minded paper presented "the most extraordinary confounding of all moral and legal distinctions… that we have ever seen in any publication whatsoever."[505] This lawyerly polemic borrowed the famed words and trope of "WASHINGTON speaking of the constitution" to brand the antislavery movement as the faction that the national father warned against. Public disputes over the Latimer proceedings encompassed a wider debate in the north over obligations respecting slavery. As the *Latimer Journal* argued, the events surrounding his capture and detention revealed to northeastern residents that "our institutions are not what we thought them."[506] On reading an account in the *New England Puritan* that the Constitution and Union never could have been adopted without recognizing slavery and guaranteeing the return of fugitives by public law, "An Old Man" in Vermont objected that he did not believe "foul clause" had actually been necessary. But if it were, "then I say, Perish the Constitution and Perish the union" the writer urged in the *Vermont Freeman*, evincing both the spreading appeal of radical rhetoric and doubt for the historical claims upon which proslavery policy and jurisprudence found legitimation.[507]

The Latimer case was a mirror. A divided public saw their preferred constitutional narratives reflected back in the arc of the events. When the New York *Union* decided that the eventual release of Latimer represented the most open violation of the Constitution heretofore, a *Boston Atlas* writer felt compelled to respond with a two-fold defense in historical terms. On behalf of Massachusetts, the paper asserted that "we" as "the successors" have always adhered to the Constitution that "our fathers who achieved the revolution had engaged, as the best one they could make, under the then existing circumstances"; but the South, on the other side of a Founding bargain for the "very reluctantly admitted" Fugitive Slave Clause, had consistently stymied direct taxation as well as deprived free colored citizens of their promised privileges and immunities. "The South must come into court with clean hands" before it can legitimately

[503] *Richmond enquirer*, November 29, 1842, 2.
[504] Minardi, *Making Slavery History*.
[505] "The Latimer Case," *The Monthly Law Journal, Vol. V*, 488.
[506] *Vermont freeman*, December 10, 1842, 2.
[507] Ibid.

complain, the paper wrote.[508] A reader of the *Boston Courier* wrote to insist that the Latimer case could do for Massachusetts what the "Somerset case did for England." The letter writer hoped for a collective declaration through public opinion and legal authority overturning the constitutional sanction for slavery articulated by the national judiciary. *Prigg* declares "slavery is the law of the Union," the reader warned, and if it stands, "to speak of the free states is sheer irony." This popular constitutional appeal contravened high judicial authority, but it imagined consistency with the Founding. Escaping proslavery history through textual literalism, the citizen argued that reading into the Constitution a promise to return fugitives from slavery would mean the framers, "through shame or fear, they hypocritically framed a technical fiction," protecting slavery without expressly saying so. The constitutional authors that America so revered could never have meant to make the country a "'slaveholder's hunting ground' *with human beings as their "constitutional game.*" In this citizen's efforts to foster antislavery legal opinion in the space opened by the Latimer outrage, the Supreme Court was less daunting an obstacle than people's faith in the Founding. The former could be contradicted, while the latter required creative evasions and willful imaginings.[509]

When a fugitive slave case arose three years later in Massachusetts, expectations for state aid would rest on the side of the antislavery community. In 1846, an enslaved man, George, reached Boston Harbor from New Orleans aboard the brig Ottoman. Massachusetts Supreme Court Judge Hubbard granted a writ of habeas corpus for the stowaway once his presence was known, and Captain James Hannum was arrested after forcing George onto a steamer heading back to Louisiana. In the outrage that followed, the situation was regarded with much less ambiguity than the Latimer case. Subject to withering scorn as a veritable pirate, the merchant whose boat carried the man vainly invoked the Constitution: "I consider the free states have no right to succor the runaway slave, unless you trample the Constitution of the United States under your feet, and make it a dead letter." In public presses, some suggested that he was the only shipper in all of Boston who would have so helped the enslaver's cause. Hannum, while ultimately released, wrote from jail that he was "branded as a kidnapper at the North" and sent bitter letters to New Orleans complaining of a North from which all justice had fled. As condemnation fell upon those who voluntarily enabled slavery, citizens rallied for political action within the bounds the Constitution. John Quincy Adams, chairing a public meeting in Faneuil Hall, stated the central issue as whether Massachusetts could protect persons under its laws and within its jurisdiction. In his late seventies, the congressman recounted seeing framer Elbridge Gerry lead a similar meeting when Britain had seized a man from an American frigate. At the hall, emergent leaders of antislavery electoral politics grasped the Constitution while urging vigilance, voting and legislation. Charles Sumner condemned Hamman as "a volunteer against law and against humanity" because "no regulation in the Constitution" required the actions he took. Massachusetts politico Stephen C. Phillips argued that "we… fail to maintain the Constitution and laws" by allowing people of color, allegedly slaves, to be taken without process. Garrisonian abolitionist Wendell Phillips, an odd man out in this swelling assembly, also spoke. He deemed it "idle to say now that this thing and that thing is unconstitutional" and had to pause his denunciation of the Constitution amid a cacophony of "shouts and hisses." The antislavery crowd made clear that even as their opinions crystalized against fugitive slave

[508] "The Latimer Case," *The Daily Atlas* (Boston), December 9, 1842.
[509] "PERSONS HELD TO SERVICE, FUGITIVE SLAVES, &c.," *Boston Courier*, February 9, 1843.

rendition and slaveholders' territorial expansion, anti-constitutional ideas travelled where they would not follow.[510]

In Virginia, Gray's inability to bring Latimer effortlessly back south provoked an acute sense of constitutional violation. Citizens assembled at a December meeting in the Norfolk courthouse. Together, they saw events through a lens shaped by subjective constitutional knowledge and belief. In words drafted by a subcommittee of John Tazewell, John Chandler, John Leigh, John Millson and Tazewell Taylor, and ratified by the body, they agreed that Gray's experience "arose not from any defect in the Constitution of the U. States, but a want of fidelity to the high and solemn behest of that instrument in a considerable portion of Boston, and the inadequacy" of the current Fugitive Slave Law. A decline in understanding and obedience to original meaning was to blame. Right after the Founding, "such was the reverence entertained for the Federal Constitution by the people of all the States," and "such was the universally recognized right of the owner of slaves to recover them wherever found," that a slaveholder would have easily reclaimed a man in Latimer's position. Manumission was declension from the Founding. The Norfolk gathering rehearsed their constitutional claims. Citing "the case of prig," they demanded robust federal action and circulated their assumptions and demands.[511]

Upon Gray's return to Norfolk without Latimer, Virginia newspapers circulated their understanding of events under the telling headline, "Abolitionism triumphant-the Constitution and the rights of the southern states trampled in the dust, in the city of Boston!" In Gray, the paper identified a sympathetic figure who could have been any reader, a man entitled by "the authority of the Constitution" to carry back Latimer. The $400 arrangement seemed forced and fraudulent. In the coerced decision of the sheriff – who was "well-disposed at first to support the Constitution, and do his duty fearlessly" – to unlock the cell, Virginians perceived a portentous power that was antislavery and thus anti-Constitution. In Latimer's freedom, they took away the lesson that the "the guarantees of our glorious Constitution, under which this Union has heretofore so happily flourished, can be nullified by the laws of Massachusetts, or the insurrectionary proceedings of her citizens, with impunity." And in Massachusetts' turn against cooperation, southerners thought the state failed to perform its duties and, in so doing, dissolved the constitutional bonds of Union. It was a gulf in perspective that would soon grow much wider as the sheriff's act transformed into official policy under the ensuing personal liberty laws.

At the behest of Virginia's governor, a special committee of lawmakers formed in Richmond to address the fury of their constituents over the Latimer case. Majority and minority reports issued in full agreement on the sins of northern constitutionalism. In Massachusetts' sympathy for Latimer, in wheeling the huge petition into the statehouse, and in the popular desire to stymie fugitive slave rendition, the majority warned of the approaching specter of a "dead constitution." While praising the judiciary's "reverence for the constitution" during the episode, they advised that northerners' evasion of the fullness of their implied duties under the Founding bargain would render the instrument "an obsolete act of noble founders." In similar terms, the minority report found Latimer had shown "that this great Union, once cherished by all, is now lightly esteemed by many; that the American constitution, once so sacredly regarded, is losing its

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[510] "Case of Capt. Hannum Jno. H. Pearson," *The Liberator*, October 23, 1846; *Address of the Committee Appointed by a Public Meeting, Held at Faneuil Hall, September 24, 1846, for the Purpose of Considering the Recent Case of Kidnapping from Our Soil, and of Taking Measures to Prevent the Recurrence of Similar Outrages: With an Appendix; Fifteenth Annual Report, presented to the Massachusetts Anti-Slavery Society, by its Board of Managers, January 27, 1847* (Boston, 1847), 67.

[511] *Richmond enquirer*, January 12, 1843, 4; *Proceedings of the Citizens of the Borough of Norfolk, on the Boston Outrage, in the case of the runaway slave George Latimer* (Norfolk, 1843).

hold upon the public mind in the north… that rights are but little respected in some parts of the Union, which are sacredly guaranteed by our federal constitution." The difference in opinion came in the recommended solution. Most of the committee wanted the federal government to enact a more stringent fugitive slave law, while the minority demanded better enforcement of the original law but advised against opening a debate over slavery in Congress.[512]

These Virginia lawmakers, like the community of white slaveholders they represented, embraced constitutional nostalgia and the authority of the Founding in response to the Latimer case. In resorting to a constitutionalism of historical promises and contemporary failures, they extended a conceptual terrain shared by the North yet riddled with different landmarks and divergent meanings. The case of Latimer and the judicial action at its center propelled this process. In a flash of human and legal conflict, it made doctrines real, narratives come into focus and constitutional understandings snap into place. The case was structured by courts and officials applying law and exercising discretion; but public constitutionalism around the Latimer case swamped the judiciary, overwhelming legal officers' efforts at maintaining an image of regular order. The constitutional lessons drawn from the case, while responding to immediate judicial acts and the *Prigg* ruling, located authority in the Founding itself.

Redemption Denied in Ohio

In Ohio, the redemptive constitutionalism that Samuel Chase initiated in the Matilda case grew in historical research and popular support. It took aim at *Prigg* and what advocates regarded as the unjust treatment of the Founding by the Supreme Court. In attempting to aid fugitives and those who ran afoul of the Fugitive Slave Act, this iteration of reverent constitutionalism was unsuccessful in the courtroom. As it failed to win over judges, however, it fostered popular notions of constitutional history and meaning at odds with the official, Court-declared version.

Samuel Watson stepped onto the Cincinnati public landing from the Ohio Belle in January 1845, hours after the steamboat moored. When Henry Hoppess later noticed the black man standing ashore, the white man locked Watson in the watch house overnight and then took him before a magistrate for removal as a fugitive slave. As Hoppess would assert, he was transporting the enslaved man from Arkansas as the agent of a Virginian who now owned Watson. Evidently, Hoppess feared Ohio law and its recent drift towards territorial liberation: he had sought unsuccessfully to avoid making any landing and registered Watson's steps onto Ohio ground as a clear risk to continued enslavement. In February, the case came by way of a writ of habeas corpus before Ohio supreme court judge Nathaniel Read. Antislavery lawyers Samuel Chase, William Johnston and William Birney sought pathways to free Watson. In interpreting his footsteps onto Ohio soil and describing the constitutional limits of American slavery, their claims sprang from a venerated Founding and the authority inhering in its ascribed original visions. Courtesy of Chase, the *Western Law Journal* summarized their efforts.[513] As the right to reclaim fugitives under the Ordinance of 1787 expressly applied only to the "original states," Watson's journey from Arkansas rendered him no slave at all; and Hoppess' voluntary actions bringing the man to Ohio doubly insulated him from any constitutional removal. Against the precedent of *Prigg* and the constitutionality of the Fugitive Slave Act, they urged the case was "founded on mistaken assumptions of historical facts" and "not to be considered as authority in this case." All

[512] *Journal of the House of Delegates of the Commonwealth of Virginia, Session 1842-43*, Appendix Doc. 47 (Richmond, 1843); *Richmond enquirer,* March 9, 1843, 3.
[513] "The State v. Hoppess," *Western Law Journal*, Mar. 1845.

these contentions drew suasive energy from a historical constitutional commitment against slavery, and the *Journal* noted their citation to the *Madison Papers*. Watson's attorneys "insisted that at the time of the adoption of the Constitution of the United States, the most distinguished men, and the people generally, were averse to slavery, and looked for its speedy extermination; that the settled policy and understanding of the nation was that slavery should be restricted within its existing limits; and, within a convenient time, finally abolished by legislative authority." They invoked the 1774 covenant against slave trading, the Declaration of Independence, the incipient abolition acts of several states, and Northwest Ordinance. These developments, the lawyers contended, "prove the existence of this settled policy and understanding," they confirm the application of the constitutional prohibition on deprivation of liberty without due process, and they mandate that slavery can never be introduced in Ohio – as recognition of Watson as a slave threatened to do.[514]

Together, these were powerful arguments for a growing fraction of Ohioans who saw their state as firmly free soil. And it would be wrong to say that the arguments for Watson fell on closed judicial ears. In the fullness of his own veneration, Judge Read professed that the embodiment of the very principles named by Watson's attorneys "constitutes the base, frame, work and spirit of our system of government, and he who attempts to reconcile it with slavery assumes a hopeless and impossible task." Slavery in the southern states was a Founding exception, a suspension of their operation as a "matter of compromise as to an existing and admitted evil necessary to the formation of the Union." The judge desired not to judge. He sought to erase himself from the interpretive and decision-making process, to neither see himself nor be seen as choosing the fate of Watson. He approached the case on the same terrain of history that Watson's lawyers claimed. As Read professed, he understood the "policy, general principles, and intentions of those who gave organization and life to our government, in reference to negro slavery and the negro, as fixing the great outline to govern the doctrines of construction and presumption." In the Founding, Read beheld a guiding, abiding settlement of the issue he confronted. The wisest course for the present generation and implicitly for himself, he reasoned aloud, was to "respect and observe, in the highest good faith, that compromise of a great difficulty which the wisdom and patriotism of the fathers of the country adjusted and settled, lest we may put to hazard the rich good we enjoy." Where all this vernacular constitutionalism left Watson was thus far unclear as Read recited his opinion. But whichever way Read chose to decide, the authority of the Founding was crackling in the air, ready to discharge Watson or legitimate his enslavement.

Samuel Watson did not go free. Hoppess got his man and continued on to Virginia. Yet a few months later in May of 1845, Chase entered the black Union Baptist Church and received a silver pitcher inscribed: "A TESTIMONIAL OF GRATITUDE TO SALMON P. CHASE FROM THE COLORED PEOPLE OF CINCINNATI FOR HIS *Various public services in behalf of the oppressed*, and particularly for his ELOQUENT ADVOCACY OF THE RIGHTS OF MAN, in the case of SAMUEL WATSON, who was claimed as a fugitive slave Feb. 12, 1845."[515] Despite the terrible loss of Watson, this was not a trophy of defeat or a symbol of futility. When Judge Read uttered his decision after the multiday trial, all awaited the fate of

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[514] Ibid.

[515] *Address (by A. J. G.) and Reply (by S. P. Chase) on the presentation of a testimonial to S. P. Chase by the colored people of Cincinnati; with some account of the case of J. Watson* (Cincinnati, 1845); Scott L. Gampfer , "A Testimonial of Gratitude in Silver at the Cincinnati Museum Center: Salmon Chase and the Defense of Samuel Watson," *Ohio Valley History*, 13:4 (Winter 2013), 71-76.

Watson; but the black community also listened for the constitutional landscape that the court would describe. After Read ruled for Hoppess and a removal certificate issued, the enslaved man cried to William Birney, "have you done everything – can nothing more be done?"; and hearing his fate sealed by constitutional authority, Watson blessed his attorney and promised remembrance in the life ahead.[516] Amid these searing words, the antislavery audience also heard a precious statement. "At one time I was of the opinion he had the right of passage through a free State with his slave," Read spoke, "But upon more careful examination, I am satisfied the master must lose his slave if he brings him into a free State, unless the slave voluntarily returns to a state of slavery because the master loses power over him." For reasons Read would locate in the ascribed intentions of the constitutional framers, Watson's trip to Ohio was a necessary exception to this rule of freedom.

The constitutional terrain of slavery in Ohio shifted during the early 1840s. What many people believed history meant and the original Constitution allowed was evolving: despite hard-bitten racism and economic ties to the South, increasing numbers believed Ohio had no enduring obligation to let slave traders, emigrating planters and slaveholding travelers pass through the bottom fringes of the state. Read found himself at the judicial center of this process of changing constitutional understanding. The judge was hardly an antislavery icon. His political and professional career travelled the main routes to power through white Democratic politics and commercial clients with southern interests. His younger brother Amasa, after reading law in his office, was prospering in Louisiana as an attorney, professor and state legislator.[517] He opined in Hoppess that "ours is a government of white men," "formed by white men and for white men." This was his sense of original racial meaning, stitching into his country's Founding. And as the black community would recall in their ceremony for Chase, "It is somewhat remarkable that Judge Read was the opposing counsel" in the Matilda case and Birney prosecution in 1837, when the opposite doctrine prevailed as to Matilda's presence in Ohio. Thus in Hoppess, Judge Read was not seeking to consciously remake constitutional law in accord with his values and ideals. By the migration of his views, he embodied popular constitutional convictions on the bench, announcing a newly clarified historic truth that he shared with the public.[518]

In the years before the Read's decision, Ohio engaged in a dialogic, protracted and violent negotiation of constitutional free soil as a matter of law and public understanding of Founding meaning. In 1841, as a judge on the Court of Common Pleas, Read began to hint at shifting views when a Kentucky man claimed Mary Towns, a decade-long Cincinnati resident, as his slave. Read ordered her release based on deficient pleadings but intimated that entry into Ohio in the company of an owner, or with permission, dissolved the legal bonds of slavery.[519] At virtually the same moment in the Ohio supreme court, Chief Justice Ebenezer Lane spoke from the bench that an enslaved person becomes "free when brought to this State by his master, since the Constitution and the act of Congress, under which alone the state of slavery subsists in Ohio,

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[516] *Green-Mountain freeman*, February 28, 1845.
[517] "American Obituary for 1849," *The American Almanac and Repository of Useful Knowledge for 1850* (Boston, 1850), 334.
[518] *Address (by A. J. G.) and Reply (by S. P. Chase) on the presentation of a testimonial to S. P. Chase by the colored people of Cincinnati; with some account of the case of J. Watson* (Cincinnati, 1845).
[519] *Cincinnati Gazette*, May 12, 1841; "Law Case," *Cincinnati Daily Gazette*, May 21, 1841; John Niven, *Samuel P. Chase: A Biography* (New York, 1995), 62-63; Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill, 1981), 164-67.

applies *to fugitives only*."[520] Learning of a slaveholder carrying a number of people across their state to Missouri, seventeen Ohioans intervened and announced them free by law. The enslaved people fled. But a jury convicted all seventeen of rioting under instructions that, as defendant Abraham Brooke wrote, converted Ohio into "a thoroughfare for the slave-driver through our state, in defiance of an ordinance of 1787, prohibiting forever involuntary servitude, except as punishment for a crime."[521] On appeal, the court overturned the convictions in *State v. Farr*. The oral decision left Ohioans and their neighbors to argue whether Lane's statement of territorial redemption represented ill-considered dicta or a binding part of the decision.[522]

Knowledge of these unreported cases circulated widely. They sparked "unceasing comment" in Ohio and beyond.[523] In Covington, Kentucky, for instance, a handbill appeared in response that seethed, "in vain did our fathers struggle for independence, and security, if our chartered rights are to be frittered away by quibbles of law."[524] Southerners watching the legal developments in Ohio entertained narratives of historical loss and betrayal. Constriction of movement with enslaved people felt like a deprivation of constitutional rights, "chartered" and bequeathed by their fathers at the Founding. And given such perceived constitutional encroachments understood in such elevated terms, they felt entitled to ask if the "harmony of union" could endure much longer. As new judicial innovations seeming to defy established constitutional right, the cases received blame for hard times by the mercantile and laboring classes in Ohio river towns who relied on southern money. In the understanding of the community, they comprised a target of the anti-back mobs that summer.[525] That August in Cincinnati, white men waged popular constitutional violence in service of preserving their white man's republic – injuring, exiling, imprisoning and otherwise persecuting black people throughout the city, as well as destroying the presses of Gameil Bailey's *Philanthropist*.

The Ohio Antislavery Society also reflected on these legal developments at their early June meeting in Mount Pleasant. They expressed appreciation for the utterances from the Hamilton Country Court of Common Pleas that "re-affirmed in the face of a prejudiced community… that liberty is the fundamental law"; and they resolved that the just-issued *State v. Farr* ruling, "that slaves introduced into this state by consent of their masters, thereby become free, is a glorious vindication of the constitution." This gathering, riven by disagreement over constitutional versus anti-constitutional abolitionism, was no hotbed of veneration. Yet a framework of redemptive constitutionalism surfaced in their discussions as they saw the developments aligning practice with true, historical meaning. Such views hardly blinded the interracial society from the operation of law close to the ground: "All along our southern border, the inferior class of magistrates, with comparatively few exceptions, is disgracefully subservient to [the slaveholder's] interests, and the constabulary force for the most part is at his disposal."[526] A fugitive slave case during the following year would embody all these qualities: despite pleas for delay, a local magistrate, paid in advance by the purported owner, quickly signed off on a

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[520] "THE MATTER SETTLED," Philanthropist, Aug 4, 1841, 6, 8l; "The Slave Decision" (From the Cincinnati Gazette), *Indiana Journal*, May 29, 1841; "Law Cases," *Niles' National Register*, May 29, 1841, 206.
[521] Philanthropist, Dec 16, 1840, 5, 35.
[522] "The Slave Decision" (From the Cincinnati Gazette), *Indiana Journal*, May 29, 184.1
[523] "THE DECISION OF THE SUPREME COURT," Jun. 30, 1841, 6, 3.
[524] "DECISION OF THE SUPREME COURT," *Philanthropist*, Jun. 16, 184, 6.
[525] "A Mob in Cincinnati," *Philanthropist*, June 30, 1841; "Riots and Mobs, Confusion and Bloodshed," *Philanthropist*, Sept. 8, 1841.
[526] "THE SIXTH ANNIVERSARY OF THE OHIO STATE ANTI-SLAVERY SOCIETY," *Philanthropist*, Jun. 23, 1841, 6.

certificate for removal while police quelled protest and resistance.[527] They could not expect to enjoy the full protection of the law, and so they were appalled but not surprised when the anti-black rioting broke.[528]

Evan as this violence unfolded, residents debated the strictures of history that they believed bound their present moment. In the *Cincinnati Gazette*, one writer claimed that the Constitution intended to negate the antislavery meaning of the Ordinance of 1787. A reader, J., responded that the Ordinance still stood, as did its original meaning allowing fugitive slave rendition only from the "original states." The inflamed letter-writer produced exhibits of antislavery attitudes at the Founding. Drawing from his library of pamphlets, books and papers, he showed the participation of national fathers in the formation of abolition societies and quoted framers and ratifiers including Jay, Martin, Baldwin, Iredell, Wilson, Martin, Randolph, Johnson, Dawes and Heath and Jefferson. These extracts were the glowing materials from which his constitutionalism was made. "The facts pertaining to the history of the times when the ordinance and the Constitution of the United States were both brought into being, and the language of them both, have satisfied my mind that no slave is reclaimable in Ohio unless he has escaped from one of the (13) original States," concluded the writer.[529] While the tide of racial violence of Cincinnati continued to wash in and out of the city, legal change tethered to shifting constitutional visions occurred in the legislature as well the courts. After *Prigg* illuminated the alluring path of state disentanglement, officials pushed through the statehouse a bill that enacted anti-kidnapping provisions and repealed a state fugitive slave law designed to appease the South.[530] Thus as Henry Hoppess sought to ensure the enslavement of Samuel Watson, he could rely only on the Federal Constitution and the Fugitive Slave Act of 1793.

When the Hoppess case opened in February of 1845, Judge Read found that antislavery constitutional narratives had grown more learned since the Matilda, Birney or Towns cases of past years. Between fending off *Prigg* and recruiting Madison's notes, Chase and the other lawyers for Watson had thickened their arguments with documentary authority to show open antislavery historical pathways.[531] Read closed down many. He rejected constitutional challenges to the rendition of purported fugitive slaves from states outside the original thirteen and to the Fugitive Slave Act. According to the judge, the framers contemplated national fugitive slave rendition under congressional legislation – otherwise "the compromise might be totally evaded, or its entire spirit violated" and "bring us to the weakness of the old Confederation and defeat the chief object of our present Constitution." The framers, as Read imagined them, were extraordinary problem-solvers of the Union's gravest problem. In their design for a more perfect Union that settled matters on slavery, the judge found embedded instructions for him to follow. As he wrote of national fugitive slave legislation that ensured the harmony of the Union, federal powers "should be construed to remedy the evil and advance the intention of the framers of the

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[527] *Philanthropist*, August 20, 1842.

[528] Henry Louis Taylor, "John Mercer Langston and the Cincinnati Riot of 1841," in *Race and the city: work, community, and protest in Cincinnati, 1820-1970* (Urbana, 1993); Stephen Middleton, *The Black Laws: Race and the Legal Process in Early Ohio* (Athens, OH, 2005); Nikki Marie Taylor, *Frontiers of Freedom: Cincinnati's Black community, 1802-1868* (Athens, OH 2004).

[529] "ORDINANCE OF '87," *Philanthropist*, Aug 11, 1841, 6, 9.

[530] "Act to repeal the act entitled, 'an act relating to fugitives from labor and service from other states,'" 41 *Laws of Ohio* 13 (1843).

[531] Letter from Chase to Charles D. Cleveland, Feb. 3, 1845, Box 13, Chase Papers, Historical Society of Pennsylvania.

Constitution." In this constitutional logic lay Read's path to adjudication. He could fold the practicalities of the case under the rule of wise framers.

If the riverine boundary of Ohio could grant freedom to the enslaved who reached it in the company of their owners, it would make the Ohio River into "the river of strife, the war river, the river of blood," he warned, envisioning abolitionist plots bringing boats to shore. History spared Read the burden of sanctioning this specter. "But such is not the law - these difficulties were foreseen and guarded against by the foresight and wisdom of Virginia," Read nearly exulted. The judge discovered that the land cession by Virginia creating the Ohio territory during the Founding. In his telling, the Old Dominion had stipulated the river would become a "common highway" subject to concurrent jurisdiction, thereby precluding the liberating effects of Ohio's jurisdiction both on the Ohio and its banks – because the shore comprised a necessary "incident" to navigation. While the antislavery scope of the Ordinance of 1787 waned in this crucial moment, the controlling authority of earlier cession of Virginia in 1780 waxed. Read dredged up and shaped this bit of the past, like clay from the riverbed, to fit the case. But he did so believing that he was faithfully following Founding wisdom. This was instrumental reasoning, but it was also earnest, devout constitutional practice. Judge Read closed his courtroom remarks with a constitutional lesson that applied no less to his audience than himself. "As good citizens it is the duty of all to endeavor to preserve harmony, by observing strictly the rights of others, and by adhering faithfully to the spirit and principles of that great compromise of a most difficult and vexed question," because "We shall never be able to adjust it more favorably." It was a prescription of veneration and deference underwritten by fear and fatalism. He spoke as judge and citizen, addressing the litigants and Ohio as both teacher and student of Founding meaning. In the very moment that Read marked out the free constitutional soil of Ohio while letting slavery enclose around Samuel Watson once again, he sought to turn minds towards the Founding, where he located instructions and authority for his ruling. This was constitutionalism that the judiciary and a broad American public could share.[532]

The fatalistic constitutionalism espoused by Read could not satisfy the whole public. The black Ohioans who gathered months later in the Union Church affirmed more restive narratives of historical promise through which they claimed rights and condemned racial oppression. Local leader A. J. Gordon recalled the enslaved persons who, setting foot in Ohio, "sought through the instrumentality of the Ordinance of 1787, enacted by the wisdom and patriotism of the Fathers of the American Revolution" to assert their rights to freedom. Gordon contrasted the "Patriots of the Revolution" who intended to limit "the growth of the Slave Power" with the "pro-slavery forgetfulness [of] their degenerate sons." When he praised Chase for laboring to "vindicate the memory of the departed patriots" and bring about the "extinction, in a legal and constitutional manner, of the foul system," Gordon expressed a demand for radical constitutional change with the idiom of historical reverence. Chase tendered his gratitude for the pitcher that Gordon presented. Then he elaborated what the tenets of this vision of historical redemption might entail: "nowhere unless within the limits of the original States can a single person be enslaved except in violation of the Constitution"; the Constitution expressed "the anti-slavery sentiment of an anti-slavery people," creating a government to implement "the theory of the Declaration"; and the antislavery policy of the framers, "clearly indicated by the Ordinance of 1787," contemplated only new free states. "We make no war on the Constitution" but rather seek to vindicate its Founding meaning and "original limits" on slavery, Chase declared. This approach made possible a rhetorical coexistence with the country's dominant constitutional veneration while

[532] *New York daily tribune*, February 20, 1845.

spurning the complacency of Judge Read and more aggressive proslavery claims by judicial authorities. History was at once the instrument, the floor and the ceiling of this antislavery constitutional imaginary. As the attorney concluded, his passion palpable, "We act in the spirit of our Fathers and are guided by their example. We act as we believe they would act were they living and not dead." For black Ohioans like Gordon, who lived under the state's black laws and had experienced years of anti-black riots conducted with impunity, the veracity of this history was secondary to its usability. The Anglo-American Chase could speak easily of the "fathers," while black Americans' use of the vernacular was an argument they found worth making.

Once Chase finished his reply, everyone stood together to perform *America* with "great taste and feeling." As sung by the black Ohioans, the opening verse espousing national freedom and patrimonial attachment – "My country, 'tis of thee, Sweet land of liberty… Land where my fathers died, Land of the pilgrims' pride" – contained a pointed claim of historical belonging. In this context, the group likely elected not to adopt the abolitionist lyrics published in 1843. "My country, 'tis of thee, Stronghold of slavery," it opened, castigating the racial limits of freedom in a country "Where all men are born free, if white's their skin."[533] Out in public spaces, facing the white world and in the courtrooms where individual battles were fought, the community's campaign against legal inequality and slavery sounded in a very different register. History had power in antebellum America. Claiming the Founding, as the Hoppess case seemed to demonstrate, might help win some bittersweet measure of constitutional redemption.

The principle in Hoppess was fragile, however. Ohio could claim to follow the Founding; it could describe a constitutional fabric by which slavery perished upon its territory, as the authors of the Ordinance intended, except in the case of fugitives. But other states, publics and judges could develop a conflicting legal regime, visualize a different constitutional order and let them crash into one another – what observers and historians would call a breakdown in comity. This was particularly the case once *Prigg* encouraged slaveholders to peaceably reclaim fugitives without resort to legal process. Such a clash was underway in the spring of 1846, as Ohio attorney William Johnston travelled down to the circuit court of Franklin County, Kentucky. After helping argue the case against Hoppess during the preceding year, the advocate spoke before the southern bench on behalf of Ohio Governor Mordecai Bartley. Per a writ from the Kentucky governor, this court entertained arguments on whether Ohioans A.C. Forbes and Jacob Armitage should be delivered up to Bartley as fugitives from justice for kidnapping Ohio resident Jerry Phinney. Approximately seventeen years prior, Phinney had been the slave of a Mrs. Brown (for the remainder of her life), who rented the youth to an Allgaier. This man took him to Cincinnati for at least six months, until directed to return to Kentucky. Only weeks after Phinney thus reentered the slave state in Allgaier's custody, he secured permission to retrieve his clothes from the Ohio city. For the next sixteen years, Phinney made a life in Ohio and was never seen by any interested Kentuckians or their slave-catching agents. Then Forbes and Armitage took him by force across state lines and back into slavery. Under Ohio law – especially after Hoppess – the long, sanctioned stay in Cincinnati and the licensed return made Jerry was a free man. Johnston argued that "the constitution never intended" to allow states to turn such kidnapping into fugitive slave rendition. The removal process under the Fugitive Slave Act, he contended, was "a fair exponent of that instrument" since it was "passed in aid of the constitution by a Congress composed to a great extent of the same men who but five years before had framed the constitution." And if the Constitution originally permitted slave-owners to seize fugitives in

[533] *Antislavery Melodies: for The Friends of Freedom. Prepared for the Hingham Antislavery Society. Words by A. G. Duncan*. (Hingham, Mass., 1843), 28–29.

other states without process, slave-catching agents such Forbes and Armitage were "not known to the constitution nor to the ordinance of 1787." But Kentucky law encouraged slave-catchers and allowed re-enslavement of "voluntary" returnees or those who had merely "sojourned" in free states by permission, categories that the present case stretched to new temporal lengths. As Johnston and Judge Mason Brown discussed the case, their imagination of the Founding shaped their reasoning. The slaveholding judge saw the risk to human property that he believed the framers intended to prevent. "When we recollect the spirit of compromise and concession under which the Constitution was adopted, and the deep interest which many of the States felt in the question of fugitive slaves, it can scarcely be seriously contended, that the parties to that instrument ever intended that the right of service should under such circumstances be lost to the owner, and his power of reclamation cease," he wrote. The judge refused to order the delivery of Forbes and Armitage. Johnston returned to Ohio, where, if the men followed, they would transform from lawful slave-catchers to fugitives wanted for kidnapping.[534]

This kind of action seemed inevitable under *Prigg*. With it came warring understandings of who was enslaved, who was free, and who had authority to make such determinations. Enslavers would exercise their constitutional right to self-help themselves to purported fugitives, and they would spirit away people who might be free under state law – and thus, arguably, under the Constitution as well. The long shadow of *Prigg* left Ohioans alarmed and confused, judges included. The state's capacity to prevent kidnapping seemed entirely in jeopardy. In an unreported 1846 case, Ohio supreme court judge Matthew Birchard took the position that under *Prigg*, southerners could indeed come into the state and self-help themselves to alleged fugitives. As he understood the precedent, Ohio's anti-kidnapping statute could offer no protection. Thus in *Richardson v. Beebe*, it was unlawful for Sheriff Huron Beebe to have taken custody of William Richardson for carrying off Alfred Berry, a black resident of Cuyahoga County without any process of law. From the decision, it appeared that the enslaved status of Berry had gone unproven and the ownership or official agency of Richardson was likewise not established; Birchard effectively assumed these elements to be true because he saw no procedural point at which Ohio could demand proof and thus encroach upon slaveholders' constitutional rights. This aggressive reading of *Prigg* provoked the outrage of "Liber," a self-professed willing observer of Founding compromises. In the *Cleveland Herald*, he readily conceded, "It is undoubtedly true that, by the adoption of the Federal Constitution, the free States bound themselves not to interfere with the right of the master to the service of his slave, and not to prevent the recapture of fugitives from labor when pursued by their masters into the free States." But the legal order that the Ohio court gleaned from *Prigg*, he averred, was not the Constitution of his fathers. While the letter-writer denied that *Prigg* actually sanctioned Birchard's position, he protested the decision as a violation of constitutional history and public memory: "it certainly was not the intention of the framers of that instrument to protect the negro-stealer in arresting and dragging back into bondage," alleged slaves or free black people, and "Such an imputation would be a libel upon the great and good men by whom that Constitution was framed." In this immediate case and in the broader tilt of constitutional law during the 1840s, Ohioans saw the Slave Power perverting the Founding.[535]

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[534] The State of Ohio v. Forbes and Armitage, *Western Law Journal*, Vol 3 (Cincinnati, 1846). 371; *The State of Ohio vs. Forbes and Armitage: arrested upon the requisition of the government of Ohio, on charge of kidnapping Jerry Phinney, and tried before the Franklin Circuit Court of Kentucky, April 10, 1846* (n.p., 1846).
[535] *Cleveland Herald*, July 22, 1846

The belief that states formed under the aegis of the Ordinance of 1787 need only to return fugitive slaves from the "original states" did not die when Judge Nathaniel Read dismissed the idea in *Hoppess*. It was an article of popular constitutional faith for some antislavery Ohioans. A few months later, Justice John McLean had occasion to address this public history while riding circuit in Indiana during the May 1845 term.[536] Sam, Maria and Lydia Burk had fled from Missouri to Illinois in 1837, escaping an expected break-up of their family by Singleton Vaughn, who held them in slavery. The Missourian eventually learned their whereabouts in 1844 and went in pursuit. After his gang laid siege to their cabin, he agreed to take the family to court under pressure from a growing crowd hostile to his ambitions. Amid a chaotic moment at a fork in the road, the wagon carrying the Burks bolted north, never to be seen by the southerner again.[537] Accordingly, Vaughn began to sue for the $500 penalty under the Fugitive Slave Act for those who obstruct a seizure, and Owen Williams was first in line. As McLean explained to the jury, "Every one of the one hundred and fifty persons who were present at the forks of the road, and who encouraged the rescue, is responsible to the plaintiff."

The trial hinged on the status of the Burks. Attorneys Quarles, Stevens & Bradley argued for Williams that under the terms of the Northwest Ordinance, the family were not slaves subject to rendition – that the compact had dedicated the territory of Illinois to freedom except in the case of fugitives from the original thirteen states. McLean considered this a question of first impression for a U.S. circuit court and one that required an unequivocal negative. While not treating the entire Ordinance as a dead letter, the Ohioan determined that "every part of the ordinance which conflicts with the constitution of the Union… was consequently annulled" when Illinois entered the Union. Williams' lawyers had described an antislavery Founding. McLean felt compelled to respond in kind with venerative history to justify his ruling for the supremacy of a Constitution that facilitated slavery. In McLean's narrative, slavery was the key to forming the Republic: "The fruits of the Revolution trembled in the balance" when slavery was "discussed in the convention; and they were settled only by a spirit of compromise and of mutual concession." Living under the framers' bargain was a virtuous act, all the more so because it required the same forbearance practiced by "a considerable proportion of those who formed" the Constitution and deemed it not "a perfect instrument, perhaps, in every respect" but "the best" that could be made. The trial provided a venue for constitutional instruction, both for the jury and the wider legal public who would see the language that McLean publicized. The judge delivered a constitutional ode:

> It has saved us from anarchy and ruin. It has given us a national character, and a proud standing among the great nations of the earth. Under its protection, our commerce has flourished among the several states, and been extended to every sea. It laid the foundation of the prosperity and glory of our country. Whatever defects there may be in the instrument, no one can fail to see that its beneficial results exceed the power of human computation.[538]

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[536] *Vaughn v. Williams*, 3 McLean, 530; 3 West. Law J. 65; 8 Law Rep. 375; 1 Circuit Court, D. Indiana (1845).
[537] Julia Conklin, "The Underground Railroad in Indiana," *Indiana Quarterly Magazine of History*, Vol. 6, No. 2 (June, 1910), 63-74; Augustus Finch Shirts, *A History of the Formation, Settlement, and Development of Hamilton County, Indiana, From the Year 1818 to the Close of the Civil War* (Noblesville, Ind., 1901), 247-26.
[538] The subsequent several trials and proceedings of *Driskell v. Parish* under McLean and U.S. District Judge Humphrey Leavitt developed the legal elements and the politics of harboring and obstructing. See *Cincinnati Examiner*, August 28, 1847; *Cincinnati Examiner*., December 11, 1847, 3; *Driskell v. Parish*, 10 Law Rep. 395 Circuit Court D. Ohio Nov. Term 1847.

This statement to the jury was hardly formal constitutional law. Its musings were irrelevant to the statutes and precedents governing the case. Indeed, if McLean had not resolved to settle the meaning of the Ordinance for fugitive slaves and rejoin the historical claims of Williams' lawyers, the case would have produced the same outcome without creating an enduring public record of constitutional veneration. A prior owner had kept Sam and Maria in Illinois for over six months, which rendered them free at law before their purchase by Vaughn. On that basis, the jury returned a verdict for Williams after a few minutes. Yet McLean found it essential to bring vernacular constitutionalism into his courtroom. The Supreme Court justice, in the western reaches of the country, determined to foster proper constitutionalism, to declare a particular history as true and binding, and to legitimate his judicial labors through the power of public constitutional culture. If the historical narratives existed at a remove from the technical doctrine of the decision, the court nonetheless made them an integral part of the case.

When the Illinois supreme court expressly followed the precedent of *Vaughn v. Williams* on territorial liberation two years later, it also retraced McLean's reliance upon Founding authority. Confronting a highly contested freedom suit against a wealthy landowner, justices William Wilson and Samuel Treat reflected on the status of slavery at "the period of the adoption of the Constitution of the United States" and admired the foresight of the framers: "it did not escape the prescience of the Convention that this subject would be likely to give rise to irritation and angry excitement between the citizens of proximate free and slave States," and they had intended "to promote harmony." Jane Bryant, and her four children sought liberation from Kentucky planter Robert Matson, who had kept them working inside the free state for two years. They were not fugitives. Nor were they still "in transit," as future president Abraham Lincoln argued for Matson, like the enslaved people Matson had seasonally cycled through his Illinois farm. State and federal law made the merits of the case clear enough, and the Bryant family gained legal freedom. But additional authority was at work. The court invoked the Founding to justify both the instant and the general place of slavery in the American constitutional order. The justices narrated that "it was only by [the framers'] devotion to the cause in which they were engaged and the exercise of a generous and magnanimous spirit of concession and compromise that they were able to overcome the difficulties by which they were surrounded." It was only by this singular, irreproachable process that a settlement binding on all Americans was reached. While slavery remained part of the Union, the court remarked, "it is the duty of every good citizen to conform to the Constitution." As Williams, Treat, McLean and other judges realized, delivering opinions and wielding the past were all part of the work of adjudicating slavery under the Constitution. When such cases arose, whether ruling for or against freedom, their role seemed to require both a grasp of legal precedent and public history.[539]

The redemptive constitutional history that grew in Ohio ran aground at the Supreme Court in late 1847. In a Fugitive Slave Act prosecution arising on the state's southern borderlands, the Court examined a case study in the persistence of disorder. Hours before dawn on a fall morning in 1842, Ohio abolitionist John Van Zandt conveyed nine enslaved people north from the Kentucky border in his covered wagon. Accosted, apprehended and dragged south with most of the fugitive passengers, the farmer was then hauled into court by slaveholder Wharton Jones. The border state neighbor sought statutory damages for "harboring" pursuant to the Fugitive Slave Act of 1793. In testimony adduced at trial, a witness reported hearing Van

[539] "Decision in a Slave Case," *Weekly Miners' Express*, December 29, 1847, 2; Hiram Willene Hendrick and George Hendrick Rutherford, eds., *On the Illinois frontier: Dr. Hiram Rutherford, 1840-1848* (Carbondale, 1981); Charles R. McKirdy, *Lincoln Apostate: The Matson Slave Trial* (Jackson, MS, 2011).

Zandt declare that "the colored persons were free by the constitution." The moonlit encounter on a wagon road moved into the courtroom as a straightforward suit of the kind designed to deter would-be friends of fugitives. As a practical matter, the Van Zandt case was a tragedy.[540] Eight of nine escapees remained in bondage and the first direct challenge to the Fugitive Slave Act failed, initially in the U.S. Circuit Court for Ohio in 1843 and then in the Supreme Court in 1847. Reduced to indigence by the verdict and compelled to send his children away, Van Zandt died in 1847, going "to another bar where aid to the weak and suffering will not be imputed as a crime" as Samuel Chase wrote at the time.[541]

The pro-slavery Founding described by *Prigg* and diffused through public discourse shook those who reconciled antislavery convictions with their constitutional veneration. Thus in *Van Zandt*, antislavery attorneys undertook a direct assault on the constitutionality of the Fugitive Slave Act of 1793 for violating the original meaning of the Constitution, motioning for a judgment of non-suit. Arguably, in the long chain of prior fugitive slave litigation, including cases prior to the rise of the Founding in public life, the Act itself had only been sustained collaterally. Among the "large assemblage of citizens" who heard this challenge unfold each day of the U.S. Circuit Court trial sat a young Cincinnati law clerk, James Taylor Wicks. The main question at issue, he entered into his diary, was: "What is the real nature and effect of the relation between master and slave under the Constitution of U. S.?" The unfolding arguments impelled Wicks to consider that the framers never meant to recognize property in man. Admitted to the bar during the same year as the case, Wicks evidenced a keen interest in the formal legal proceedings; but when the jury returned a $1,200 verdict against Van Zandt, he reflected that "My sympathies had become gradually enlisted in behalf of the poor fellow, whose whole conduct had grown out of opinions and feelings, with which every freeman must sympathise." While transcripts do not survive, the defense, according to an unfriendly newspaper reporter, employed "the help of declamation, and the stereotyped arguments of the slaveholder" that "proved nothing more about the constitutionality of slavery, than has been proved hitherto on the floor of Congress, by declaimers of the same style."[542] These political proclamations, it may be surmised, condemned abolitionism for violating the Constitution of the fathers and endangering the Union they authored. Wicks, too, scorned defense attorney Charles Fox's "puerile and illogical tirades" and the slightly more passable "bluster" of co-counsel William Wright Southgate, but he deemed Salmon Chase's multi-day argument the "finest forensic display that I have witnessed in Cincinnati." Chase, the courtroom diarist wrote, "was evidently at home with his subject, having studied it closely, I understand, this five years, and his present effort promises to be a chef d'o[e]uvre."[543] This expert appeal elicited careful judicial management from Supreme Court Justice John McLean, who presided over the trial. He instructed the jury that: "From our earliest history it appears that slavery existed in all the colonies and at the adoption of the federal constitution it was tolerated in most of the states." While acknowledging the "view of Mr. Madison, who thought it wrong to admit in the constitution the idea that there could be property in men," McLean warned that this history could not perform the task that the defense

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[540] *Jones v. VanZandt*, 2 McLean 611 (1843) (Case no. 7502), in The Federal Cases comprising Cases Argued and Determined in the Circuit and District Courts of the United States, Book 13 (West, 1895), 1049; *Jones v. VanZandt*, 2 McLean 596 (1843) (Case No. 7,501).

[541] "Diary and Correspondence of Salmon P. Chase," *Annual Report of the American Historical Association for the Year 1902*, *Vol. 2* (Washington, 1903), 115.

[542] "An Important Slave Case," *The Liberator*, August 25, 1843.

[543] James Wickes Taylor, *"A Choice Nook of Memor": The Diary of a Cincinnati Law Clerk, 1842-1844*, ed. James Taylor Dunn (Columbus, 1950).

asked. A judge of passive antislavery sentiments and political aspirations, his denial of the motion sought to inoculate the jury against claims upon the Founding that Chase proceeded to introduce. As McLean would remark in refusing a new trial, "We cannot theorize upon the principles of our government or of slavery. The law is our only guide." The law itself, however, represented the judicial mobilization of history. As a trial reporter observed, the Constitution "was construed… not so much in accordance with its letter, as its supposed design."[544]

As Van Zandt's body yielded to the final throes of "pulmonary disease" in 1847, his case came before the Supreme Court. Having assimilated the archive of the Founding, Chase arrived with carefully crafted, elaborately cited claims. He declared, "above all, I have consulted the constitution of the Union and the history of its formation and adoption." The Madison papers, state ratification debates, the published writings of national fathers punctuated his materials and wove through his argument, leavened with the language of deference to the Founding. William Seward, a former New York Governor and future U.S. senator, joined Chase at the Court to plead for constitutional restoration from a false Founding. "Volumes have been written to prove that slavery, the relations of master and slave, and of owner and slave, existed in the country when the Constitution was adopted," Seward noticed, and those who maintain the Constitution guarantees perpetual toleration of Slavery "fortify themselves with arguments derived from the condition of the country and the spirit of the times when the Constitution was established." For Seward and Chase, this chorus of proslavery discourse signified a collective effort to defeat the framers' true intent. The nine justices and crowd of spectators who sat in the North Wing of the Capitol heard Van Zandt's lawyers strive to transport them to an antislavery Founding. The legal professionals offered a constitutional history to strike down the Fugitive Slave Act of 1793.[545] To realize this unfamiliar vision, Chase pronounced it "necessary to advert to the circumstances of the country and the state of public opinion at the time of the adoption of the Constitution." The antislavery lawyer articulated the open-ended epistemic framework of original Founding meaning. It was not a break with recent practice, as this mode for determining meaning had already seeped into the mainspring of the most contentious domain of constitution jurisprudence. It was an approach that had largely served the interests of slaveholders and Union conservators, a way of ascribing meaning that would continue to resound through American constitutional life in and out of courts. It was a framework that made the past into a constitutional arsenal. It made lawyers and judges into partisan popular historians.[546]

The legal arguments for Van Zandt doubled as public history lectures. To study the moment of the Founding, Chase urged, was to realize that there could be no "room for doubt that it was the general expectation at that time that slavery… would disappear from the legislation and the polity of every state at no very distant period." Proof came in the form of expressions from vaunted names that carried authority. "Evidences…abound in the writings of Washington, of Jefferson, of Martin and other distinguished men of that era, and I am not aware of any single

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[544] *Jones v. VanZandt*, 2 McLean 611 (1843) (Case no. 7502), in *The Federal Cases comprising Cases Argued and Determined in the Circuit and District Courts of the United States, Book 13* (West, 1895), 1049; *Jones v. VanZandt*, 2 McLean 596 (1843) (Case No. 7,501); "An Important Slave Case," *Liberator* (Boston, Massachusetts), August 25, 1843.

[545] *Reclamation of Fugitives from Service: An Argument for the Defendant, Submitted to the Supreme Court of the United States, at the December Term, 1846, in the Case of Wharton Jones Vs. John Vanzandt* (Cincinnati, 1847); William H. Seward, *In the Supreme Court of the United States: John Van Zandt, Ad Sectum Wharton Jones : Argument for the Defendant* (Albany, 1847); *Diary and Correspondence of Salmon P. Chase*, 115.

[546] *Reclamation of Fugitives from Service;* Seward, *In the Supreme Court of the United States*; *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

instance of the utterance of a different expectation in any quarter." Chase cited the Founding era South: "the powerful public sentiment in favor of emancipation in Maryland, Virginia and North Carolina," held especially "by nearly all the most illustrious public men of the time." This method of constitutional knowing allowed Chase to render a historical verdict. "Such was the state of opinion at the time the constitution was framed," he declared. And it provided the ground from which to move from general understanding to particular intention, to find that "the pages of Mr. Madison's report of the Debates in the Constitutional Convention are full of proofs of its influence upon the proceedings of that body" and "the clearest evidence of deliberate purpose to exclude all recognition of the rightfulness of slaveholding and all national sanction to the practice."[547] The attorney deployed these sources and references as the highest legal authorities, controlling precedents from parties and a moment more supreme than the Court.

While an experienced legal technician, Chase fashioned the identity of a constitutional historian, offering a kind of scholarly testimony embedded within his argument. His claim to discover no "historical warrant" for the purported necessity of the fugitive slave clause in the formation of the Constitution went beyond legal interpretation. It presented an assertion of historical causation that challenged the Court's performed fealty to the clause beyond its words. The provision was an afterthought, Chase contended, not a keystone of the Constitution: "It was not even suggested until late in the session of the Convention when a clause to the effect that fugitive slaves and servants should be delivered up like criminals was proposed" by South Carolina; "met with no favor and was withdrawn"; later revived without contestation; and eventually modified "to exclude from the Constitution the idea of a sanction to slave holding and to make the provision express the precise sense of the convention as to the matter of escaping servants." This Convention history estranged the Fugitive Slave Law from the Founding by destabilizing the familiar meaning of the Fugitive Slave Clause. Attacking the constitutionality of the law, particularly in its post-*Prigg* stature, Chase asserted, "It would rather seem if it was the intention of the framers of the constitution that… they meant to dispense with legislation by Congress and the states altogether," an intention confirmed by their decision not to expressly confer any power of enforcement.[548] In other words, the Constitution forbade states from emancipating fugitives, but slaveholders were otherwise on their own, subject to state laws governing process and the peace.

William Seward would soon become notorious for proclaiming in the U.S. Senate that a higher law than the Constitution governed the western territories, lands not yet shrouded by any legal sanction for slavery. In the Van Zandt's case, however, his focus lay squarely upon illustrating the historical thinness of the protection promised by the Constitution. Like Chase, he labored to establish an antislavery Founding that would collapse the fugitive law from below. Seward trained his energies on the Northwest Ordinance enacted by the Continental Congress in 1787, which barred the introduction of slavery into territory ceded to the national government. The Ordinance, in Seward's view operated as both a landmark of antislavery commitment and a governing force across the land. Expressed in the language that vested authority in the Founding moment, it was "a valuable contemporaneous exposition of the temper and sentiments of the American People on the subject of slavery" and an unalterable "solemn compact" between the original states and "the new States the future States the future generations northwest of the Ohio." If the compact had been vitiated, it could still stand as a testament to Founding intent.

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[547] *Reclamation of Fugitives from Service*.
[548] Ibid.

To deploy the authority of Founding but escape its temporal logics, Seward attempted an acrobatic feat of historical imagination. He denied that "implicit veneration [is] due to what is called [the] contemporaneous construction" represented by 1793 Fugitive Slave Law. In Seward's telling, the statute was no organic implementation of the Constitution but a criminal extradition law perverted by slaveholders.[549] The act arose from an interstate dispute over Virginia's obligation to send white kidnappers to face trial for abducting a free black man into slavery, not from a case demonstrating that the Constitution was ineffectual without legislation. Slaveholding interests managed to tack on provisions never contemplated at the Founding moment. "The framers of the Constitution knew that there could not be such proceedings unless there were a Court, a claimant, a defender, a plea, proof, judgment and execution, and that all these would be essential in the administration of justice and would be found perfect in the administration of justice in every state which should come into the confederacy," contended Seward. The simplicity of the Fugitive Slave Clause was intentional and gave no sanction to the subsequent act. This effort to pry the Fugitive Slave Law away from the Founding reified a fundamental divide between the authoritative original moment and whatever politics unfolded thereafter. The authority of the former could be wielded to undermine even the most proximate subsequent legislation. Seward knew not to concede the historical high ground. Indeed, his argument concluded in a crescendo of historical faith and veneration. "Our Senses tell us, our Happiness assures us, our Pride proclaims, the Graves and Glory of our Ancestors every day and every hour remind us, that we are a FREE People, and that the Constitution is a Legacy of Liberty, and so far as Liberty and Slavery depend on that Great Charter, all men are Free and Equal." These words mapped the flow of constitutional power vested in the Founding by antebellum political and legal culture. Seward channeled vernacular constitutionalism towards antislavery aims. The defense of Van Zandt was an argument to redeem a Founding in exile.

From the vantage point of 1847, these notions seemed unfathomable to many Americans accustomed to the intense sectional animus and southern attention to slave fugitivity. Indeed, Chase acknowledged, "It is thought by some that a leading object in the formation of the Federal Constitution was to secure to the citizens of the slaveholding states their rights of property in slaves." The doctrine of a proslavery Founding, of bargains that recognized property in man and promised to protect it as such, he vowed, was "not the Constitution" but "a pernicious parasite [] planted by the side of the constitutional oak by other hands than those of the Founders of the Republic." This tension between the parasitic doctrine and the genuine article went to the heart of proper constitutional observance: those judges, politicians and people who advanced such a doctrine betrayed the national fathers and dishonored their bequest. Chase represented the popular historical memory of a proslavery Founding as a latter-day fiction: "On the contrary does not that history prove that it was the clear understanding of all parties concerned in the establishment of the National Government that the practice of slaveholding was inconsistent with the principles on which that government was to be founded." While slavery "might be tolerated or legalized in certain states," the Founding generation concurred "that it should receive no national sanction whatever." The defense of Van Zandt was thus an argument for the resurrection of original understandings. As Seward implored, slavery must not receive "sanction and countenance denied to it by a Convention of the American States more than half a century ago"; he enjoined the justices to follow the "spirit which prevailed in that august assembly," and return

[549] William H. Seward, *In the Supreme Court of the United States: John Van Zandt, Ad Sectum Wharton Jones : Argument for the Defendant* (Albany, 1847)

slavery to the place the national fathers left it. It was the Van Zandt lawyers' burden to prove that this unfamiliar vision of the Founding was a matter of historical truth.

All this antislavery argumentation failed, of course. Constrained by politics, precedent and their own historical truth, a unanimous bench rebuffed the attorneys' combined pleas in the key of historical redemption. The justices denied Chase's call for the "honorable court to restore the true construction of the charter of our union by stamping with its decisive disapprobation every attempt to introduce into it what its framers studiously excluded." They spurned Seward's plea "to restore to that revered instrument its simplicity, its truthfulness, its harmony with the Declaration of Independence, its studied denial of a Right of Property in Man, and its jealous regard for the Security of the People." For the Court, there was no antislavery Founding to redeem. The bench had cultivated its own narratives and woven them into law, crafting representations of original understanding that sanctioned the existing slaveholders' order. Each justice agreed that the framers of the Constitution, "flung its shield… over such property as is in controversy in the present case, and the right to pursue and reclaim it within the limits of another state." As history, the Founding itself offered plenty for the Court to use. Citing the Madison Papers, Justice Woodbury assured people that the Fugitive Slave Clause "was undoubtedly introduced into the Constitution, as one of its compromises, for the safety of that portion of the Union which did permit such property," and that the 1793 Fugitive Slave Act "passed only four years after the Constitution was adopted, was therefore designed merely to render effective the guarantee of the Constitution itself." The Act thus virtually belonged to the Founding. In a terse line, Woodbury articulated precisely how the Court understood its duty to serve the present through fidelity to the past, as they imagined it. "While the compromises of the Constitution exist, it is impossible to do justice to their requirements, or fulfill the duty incumbent on us towards all the members of the Union, under its provisions, without sustaining such enactments as those of the statute of 1793." It was a revelatory statement that slipped from the pen of the justice. Not plain text but the "compromises of the Constitution" were the lodestar of slavery jurisprudence. The precise application and duties entailed by those compromises were a living thing under this view, a set of original directives set in motion at the Founding. What precisely those "compromises" were amounted to a historical question answered through narratives constructed from felt necessities in the Court's present.[550]

In his closing remarks, Chase warned of a "growing disaffection to the Constitution" in light of its "supposed" support for slavery, and he urged the justices to "rescue the Constitution from the undeserved opprobrium." This admonition was not entirely groundless. Constitutional veneration remained hegemonic among white Americans, but as the Court made slavery an ever greater Founding commitment, dissenters mobilized. As New Hampshire Rev. Jesse C. Webster wrote to Joshua Leavitt in March of 1847, "Notwithstanding the late infamous decision of the Supreme Court in the Van Zandt case, we enjoyed the great satisfaction in our village, this afternoon, of administering to the necessities of two fugitives from the dark prison-house of slavery.… What therefore, shall we care for the decision of the Slaveholding Courts so long as we have the approval of a good conscience and our Master who is in heaven?"[551]

Such constitutional disobedience was confined to an archipelago of houses, churches, communities and other islands in a sea of deference. Conscious contempt for the Constitution itself was a perspective obtained by fugitives from slavery, free blacks who stared legal violence

[550] *Jones v. Van Zandt*, 46 U.S. 215 (1847)
[551] J. C. Webster, *The Emancipator*, April 7, 1847; Rufus Blanchard, *History of Du Page County, Illinois* (Chicago, 1882), 85.

in the face, and white abolitionists willing to uproot inculcated reverence. Perhaps the Reverend Webster and associates did not go so far, fixing their disdain primarily upon the courts. Yet if the Founding was an instrument through which judges and a broader public legitimated expanding protections for slavery, it might also provide a means through which to resist slavery's nationalization. Though hardly a warrant for action, the accrued authority of the Founding rendered it a source of power independent from courts, a means through which to question proslavery rulings. In organizing an antislavery political program, the Liberty Party formally condemned *Prigg* and the version of constitutional history that undergirded Van Zandt.[552] As a party leader and founder of the successor Free Soil Party, Chase wrote of his courtroom arguments "that the discussion will not be without a salutary effect upon the professional mind of the country, and if so, even though my poor old client be sacrificed, the great cause of humanity will be a gainer by it." The judiciary exercised a constitutive but not unlimited power over public historical truth. It made history and law, at least within the parameters of popular plausibility. Witnessing this influence upon American legal consciousness caused Chase to lament that "the detestable doctrine of property in man is spreading having received the Countenance of the Supreme Court."[553] But the judicial power to wield and dictate history encountered limits. Beyond them, the popular authority of the Founding and the juridical authority of courts could split apart. After the Republican Party emerged from the fusion of the Free Soil Party and the ashes of the Whigs, it would soon confront the most aggressive judicial assertion of a proslavery Founding – and contest it through claims upon an alternative constitutional history.

In *Prigg*'s Original Promised Land

In the southern Pennsylvania regions from whence the *Prigg* arose, the judicial project of imposing a historically-ordained constitutional order produced different configurations of violence and litigation – but not the quiescence that jurists desired. A legal regime that operated through ruthless southern self-help backed by prosecution under federal law of those aiding fugitives was an engine of systematic discontent. By 1848, the conservative voice of the *Pennsylvania Law Journal* decried this state of affairs, remarking that the South "entered our Union under a constitutional provision that their peculiar species of property should be recognized and protected," and while "we receive the benefits of the Union, it is a duty of high moral obligation to execute the provisions of the constitution in good."[554] Lawyers, judges and juries often practiced this constitutional unionism, but it was not enough to coerce tranquility when enslaved people sought freedom and antislavery communities helped them.

In September 1845, Virginian Garrett Van Metre and a gang of slave-catchers rode into Indiana County, Pennsylvania, raided a cabin on the expansive farm of Dr. Robert Mitchell and carried off several people. But Jared Harris, once enslaved by Van Metre, eluded capture. Earlier that year, some of these same men had failed to remove a young fugitive, Anthony Hollingsworth, after a local antislavery judge ordered his discharge while a local assembly foiled their kidnapping scheme. The furious Virginians had come unprepared to offer legal proof, as the judge demanded, that slavery formally existed under Virginia law – this was not how they understood their constitutional rights to operate. Mitchell, a former state legislator and the

[552] Corey M. Brooks, *Liberty Power: Antislavery Third Parties and the Transformation of American Politics* (Chicago, 2016); Thomas Hudson McKee, *The National Conventions and Platforms of All Political Parties 1789-1905* (Baltimore, 1901).
[553] "Diary and Correspondence of Salmon P. Chase."
[554] "The Powers of the National and State Governments," *Pennsylvania Law Journal* vol. 7 (April, 1848), 253.

resident physician in his rural country, had played a visible part in this public event, speaking to the crowd and arranging the proceeding. He made no secret of his animosity towards slavery among a people where that was a respectable opinion. Some knew him to belong to the Underground Railroad and a vigilance committee.[555] In November 1847, Garrett Van Metre saw Mitchell again, this time inside the federal court at Pittsburgh. Pursuant to the 1793 Fugitive Slave Act, the Virginian sought the $500 penalty for harboring and concealing a fugitive.[556]

Riding circuit in the Western District of Pennsylvania, Justice Robert Grier, with District Judge Thomas Irwin, oversaw the four-day proceeding. The court demanded a stark separation between law and morality from the jury. Warning against considerations of "liberty and human rights" that have "no place on the bench or in the jury box," Grier offered something else in exchange: duty and history. The justice charged that "the people of these United States, as one people united under a common government, have bound themselves by the great charter of their Union to deliver up slaves escaping from one state to another," and reiterated the popular constitutional fact that the South would not have joined the Union without securing slavery. By invoking the all-encompassing Founding bargain, the court provided the moral choice of their national fathers as a substitute. It was the same ameliorating historical substance that northern judges often partook in the course of justifying decisions that served slavery.[557]

The question of Mitchell's liability was not an easy one. One jury locked, and it took three trials to produce the verdict for Van Metre that Justice Grier desired. Like in *Van Zandt*, which the Supreme Court had just affirmed, the facts of the case presented the issue of what constituted harboring and concealing. In the company of fellow fugitives from slavery, Jared Harris had reached Mitchell's home in a weary state in the spring of 1845. Mitchell gave them supplies and offered a vacant cabin on his property; but he made no effort to hide the presence of the fugitives, whom both he and his neighbors hired for various jobs. Knowing these facts fell short of the active concealment in *Van Zandt*, Grier reframed the standard. "Inquire whether shelter and entertainment were afforded to the fugitives for the purpose and with the effect of encouraging them in the desertion of their master and furthering their escape and to impede or frustrate their arrest," he charged the heavily Democratic jury. As the *Pittsburgh Gazette* reported, "The charge of Judge Grier was so pointedly against the defendant that no hopes were entertained of a verdict in his favor."[558] On this count, they found against Mitchell, who would eventually pay several times more than the penalty in legal fees and court costs. When news of the verdict reached Washington, the *Daily National Intelligencer* observed that the "decision in this case goes somewhat further than the famous Van Zandt case of Ohio." A protest meeting gathered in Pittsburgh with designs to fund an appeal to the Supreme Court.[559] This aggressive application of the Fugitive Slave Law was another shifting piece of the legal landscape in the wake of *Prigg*. As northern states enacted laws withdrawing state aid to slave-catchers, the federal statute loomed larger. Indeed, months before the trial, Pennsylvania swiftly enacted a personal liberty law that prohibited official assistance with detaining alleged slaves and provided penalties for kidnapping.[560] In the hands of Grier and the jury, the Fugitive Slave Act grew as a

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[555] Court reporter John William Wallace, Jr. incorporated similar information. *Van Metre v. Mitchell*, 2 Wall. Jr., 311;17 Pa. Law J. 115; 4 Pa. Law J. 111. Circuit Court, W. D. Pennsylvania. Oct. 1853.
[556] J. T. Stewart, ed., *Indiana County, Pennsylvania: Her People, Past and Present... Volume 1* (Chicago, 1913).
[557] "Van Metre v. Mitchell," *Pennsylvania Law Journal, Vol. VII* (1848).
[558] "Judicial Decision in Pennsylvania," *Daily National Intelligencer*, November 30, 1847; "The Slave Case," *North American and United States Gazette*, November 27, 1847.
[559] Weston Arthur Goodspeed, *Standard History of Pittsburgh, Pennsylvania* (Chicago, 1898).
[560] Morris, *Free Men All*, 118.

financial deterrent against those considering helping possible fugitives from slavery. The authority of the Founding, which the Court had used to write *Prigg*, was further deployed to legitimate greater federal coercion. As Grier's instructions demonstrated, the imputed original bargain between sections would authorize and encapsulate whatever was necessary.

In the Carlisle, Pennsylvania post office on June 2, 1847, word reached John McClintock that he should hasten to the courthouse. The Dickson College professor entered the hall to find a black man, woman and child in the custody of the town sheriff, who had jailed the family at the behest of slave-catchers. McClintock arrived just in time to hear Judge Samuel Hepburn instruct the lawman to release the three alleged slaves and bid the southern men to carry them away under removal certificates issued by a local justice of the peace. McClintock intervened. The judge and lawyers claimed to be unaware of the personal liberty law passed a few months earlier that forbid the involvement of state officers in such removals and proceedings. McClintock came back with a copy of the text and, according to his diary entry, then "stood on the porch talking with several young lawyers, who exhibited the most miserable ignorance of the Constitution of the United States."[561] According to his friend George Crooks, McClintock was steeped in constitutional knowledge: "Few Americans were better versed than he in the Constitution of the United States and its history. He could cite its provisions with a readiness which often silenced an over-confident debater." While the professor listened to the constitutional notions of these attorneys practicing in a town hardly north of the Mason Dixon line, the wheel of rendition continued to turn. Out stepped the family, still in custody, where local black residents awaited. Many rushed forward and whisked the woman and child away, as fighting, shouting and confusion broke out. Days after this courthouse melee, as rumors spread blaming McClintock for inciting the event, the antislavery man insisted to his brother in law, "All that I did was to try to do my duty to the laws of the land." Plural constitutional consciousness had moved from ideas to action. Soon, local officials secured indictments against McClintock and twenty-nine others.

At the August trial before Hepburn in Cumberland County court, prosecuting attorney J. Ellis Bonham made the case a matter of national survival. Reminding the jury of their obligations to their "southern brethren," he warned that "If you decide that these outrages can be committed with impunity, the foundations of the Government will be broken, this union of States will be rent in twain… a servile war will light up the land."[562] The state attorney argued that enslaved people were drawing dangerous legal lessons. Because of the Carlisle rescue, "slaves now think that they can get protection and aid from the whites, and their conduct has become marked by insubordination and violence." The presence of slavery elevated the social and political stakes from local peace to the vitality of the federal constitutional order. It made public conceptions of the constitutional past salient as an instrument through which to both press for convictions and impress upon people the strictures of proper citizenship in a slaveholders' republic. Judge Hepburn declared that citizens' constitutional rights and duties concerning slavery must "be known and respected," and demanded a punitive constitutional lesson to show that a "slave owner has rights guaranteed to him, by the very bond which confederated the states." He enlisted the Founding. Hepburn readily narrated the constitutional history of American slavery that he had absorbed as a legal professional, political actor and border citizen. The Cumberland County court administered a history of the Founding in which a central fault of the Articles of Confederation was the failure to protect slavery. The Fugitive Slave Clause brought forth the Union by making slavery national. Glancing back at colonial days, he explained that the "history

[561] George R. Crooks, ed., *Life and Letters of the Rev. John M'Clintock* (New York, 1876).
[562] Ibid.

of this country shows, that at an early period slavery was recognized in all the provinces, and a conventional arrangement existed," where slaveholders could seize fugitives "wherever found."[563] The Cumberland County judge made slavery the central story of the Founding; the weakness and woes of the Confederation period were the lack of aid "furnished to the master in many of the provinces to reclaim his fugitive, and in others he met with open resistance." The South demanded and received security at the Convention, Hepburn insisted, citing Justice Story's *Commentaries* for his historical propositions. The constitutional narrative authored and encoded by Story, mixing judicial authority with the cultural power of constitutional birth, grew ever more settled, even as the uses to which it was put expanded over time. The jury convicted thirteen of the black men on trial but found McClintock and the others not guilty. The was not enough for Hepburn, who complained that he would have set the verdict aside if the trial had been civil rather than criminal. Given multi-year sentences in the Eastern Petitionary, they were discharged after approximately nine months by a Pennsylvania supreme court shocked to learn of the severe punishment.[564]

Presiding over the trial arising from disorder on his courthouse steps did not make for a disinterested judge – but it did stimulate constitutional passions. Hepburn became excised over tensions between the 1847 statute, the meaning of *Prigg* and the framers' vision for fugitive rendition as he imagined it. By command of the Constitution and force of the Founding, the judge demanded that people see some people as property. "As so long as slaves are regarded as property under the Constitution and laws of the United States, we too, are so bound to regard them."[565] This lecture spoke not to the legal elements of the crime charged, but rather to the field of authority that embraced cases involving slavery under the Constitution.

This field encompassed dissimilar legal matters united by the same constitutional politics and historical authority. Not long afterwards in Harrisonburg, Pennsylvania, for example, Virginia planter William Taylor and his slave-catching gang sought to seize a group of fugitives on the courthouse steps after their scheme to claim the alleged slaves as horse thieves failed. A brawl ensued as free people of color and antislavery white men came to their defense. At the prosecution of Taylor for riot and assault, Dauphin County Judge John Pearson placed the case within that field of authority. The elements of the charged crime paled in comparison to the larger stakes, he implied to the jury: "Whatever maybe our own individual opinions concerning the institution of slavery, the history of the times when the Constitution was adopted clearly shows that without this or some similar provision the union of these states would never have taken place, and the history of the present times is pregnant with evidence that without its faithful fulfillment on the part of the non-slaveholding states, it cannot be continued. The perpetuity of the union with all its attendant blessings, imperiously demands of every branch of the state government, executive legislative and judicial, an honest faithful and strict compliance with this Duty."[566] The jury returned a verdict of not guilty.

Riding circuit in the state, Justice Grier would soon situate another case, dissimilar in law, in that same field of authority. Robert Cole, a black Pennsylvanian, sought to conduct north a group of fugitives who feared sale and dispersion following the recent demise of their

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[563] "Commonwealth v. John Clellans, Quarter Sessions of Cumberland County, August 1847," *Pennsylvania Law Journal*, Vol. 7 (1848), 35.
[564] "Clellans v. Commonwealth," *Pennsylvania State Reports, Vol* 8 (Philadelphia, 1848), 223.
[565] Commonwealth v. John Clellans, Quarter Sessions of Cumberland County, August 1847, *Pennsylvania Law Journal*, Vol. 7 (1848).
[566] "Commonwealth v. William Taylor, Quarter Sessions of Dauphin County," *American Law Journal Vol. 3* (Philadelphia, 1851), 258.

Maryland enslaver. A farmer, Kauffman, gave some kind of aid along the way, and the purported owner brought suit for their market value as slaves in 1847. The trial court instructed that Kauffman's action did not amount to harboring. On appeal, the Pennsylvania Supreme Court duly professed that the state "reverently acknowledges and clings" to the Constitution, "a compromise of conflicting interests, on many subjects, and none more emphatically so then on the subject of slavery." But respecting the terms of that compromise and under the authority of *Prigg*, the court disclaimed jurisdiction over the case. In federal court, however, the case came before a judge enraged by the recent Christiana riot and the death of enslaver Edward Gorsuch. "A worthy citizen of Maryland in attempting to recapture a fugitive was basely murdered by a mob of negroes on the southern borders of our state," declared Grier to the jury, attributing it to the "seditious and treasonable doctrines" of fanatics who "should migrate to Canada or some country whose institutions they prefer."[567] The emphasis in Grier's instructions to the jury was on dire constitutional fidelity. He demanded the jury defer to their fathers: "it is well known that the Southern states would not have become parties to this Union but for the solemn compact of the other states to protect their rights in this species of property. This constitution and these laws enforcing it are binding on the conscience of every good citizen and honest man so long as he continues to be a citizen." The standard for harboring and the unavailability of Cole's testimony at this juncture were secondary, as the statutory and legal order bent to accommodate the imperative of constitutional order. After multiple proceedings that stretched for years, a jury delivered.

By the late 1840s, the conservative constitutional project of quiescence ventured in *Prigg* lay in ruins. The case-by-case unrest in Pennsylvania revealed an internal borderlands that lingered in a state of indefinite disorder. If there was an equilibrium that prevailed in the years after *Prigg*, it was one that contained episodic violence and outrage, where every case hinged on the play of forces on the ground outside of the law itself. Fugitive slave controversies merged with other sectional divisions in this moment. The proposal in Congress of the Wilmot Proviso (1846), which would prohibit slavery in territory obtained through the Mexican-American war, saw antislavery politics infiltrate mainstream political agendas, from which the party system had long excluded it. Intersectional dissension among Democrats followed, while antislavery Whigs began taking more aggressive stances – such as proposing the abolition of slavery in Washington D.C. – and the Free Soil Party emerged in 1848. A multifaceted sectional crisis set in by 1850 as southern radicals plotted secession and fanned fury at northerners' ostensible "breaches of the Constitution."[568] In contributing to this situation, the *American Law Journal* concluded, *Prigg* had been a colossal error – not for enabling outrages by slaveholders but for endangering the Union with bad law, politics and history.[569] Among the many proven evils of Story's decision, it asserted in April 1850, were:

> It has embarrassed the owners of slaves in recovering their property in the free States. It has encouraged the abolitionists in their efforts to increase those embarrassments. It has offended the dignity and trampled upon the sovereign powers of every State in the confederacy. It has impaired public confidence in the tribunal…. And finally it has endangered the peace and happiness of that great Union of independent States which is the Home of Freedom on this Continent and the Beacon Light for all the other Nations of the Earth.

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[567] *Oliver v. Kauffman*, 18 F. Cas. 657, 660 [C.C.E.D. Pa. 1850]
[568] *Condensed Proceedings of the Southern Convention* (Jackson, 1850).
[569] "The Slavery Question," *American Law Journal* (April 1850).

The constitutional unionists in Congress agreed with this assessment. As they sought to legislate quiescence into being, the prevailing disorder only seemed to expand. In the southern district of Iowa that June, for instance, a jury encountered the "first suit of the kind ever brought west of our mighty river," heard local lawyers declaim that the "Constitution has recognized the institution of Slavery," and duly held men liable for aiding fugitives from Missouri.[570]

The Fugitive Slave Law of 1850

When the ten-month long session of Congress closed on September 30, 1850, one hundred guns boomed across the Capitol. A secession crisis had been adverted and the restriction of slavery in the Southwest foiled. Piece by piece, Congress had performed the work of constitutional unionism, admitted California as free state while enacting a new federal legal regime against fugitives from slavery. As the Whig congressman George Washington Julian of Indiana recalled, then came "great Union saving meetings throughout the country which denounced abolitionism in the severest term and endorsed the action of Congress."[571] Navigating the map drawn by *Prigg*, lawmakers produced a Fugitive Slave Act of 1850 that made the federal government into a police force against fugitives from slavery. Along with mandating punishments for those caught aiding enslaved people, it made federal marshals into slave-hunters and required "good citizens" to help carry out this work upon request; and it mandated that federal commissioners, non-Article III administrators, send accused slaves to the South upon a minimal presentation of testimonial evidence that the accused, even if claiming to be a free person of color, could not contradict. For doing so, commissioners received ten dollars, double the amount they would get for ruling for the accused.

Conservative unionists sought to quell any doubt about the law. Letters circulated from Justice Grier and eminent Boston attorney Benjamin Curtis, appointed to the Court the following year, affirming the constitutionality of the Fugitive Slave Law, its deprivation of due process notwithstanding.[572] When the *Western Law Journal* deemed the law "so extraordinary in its character, and of such general interest to the people of the north-western states" that it immediately published an unofficial copy, an irate reader responded in the following issue that "I do not see why a law should be styled extraordinary in its character, which contains nothing new in principle, and which, as a remedial measure, was imperiously demanded to maintain and carry out a requisition of the constitution."[573] Federal judges crafted emphatic jury instructions to eradicate doubt in citizens' minds. Necessarily, they relied upon the authorizing power of a Founding that gained new layers to suit the moment. Associate Justice Samuel Nelson prepared his most elaborate account of a proslavery Founding to administer while riding circuit. Gone was any original moment when national fathers contemplated the eventual demise of slavery. At the adoption of the Constitution, Nelson asserted, "slavery existed, I believe, to an extent, more or less, in each of the states."[574] Accordingly, "All the original states therefore were interested" in ensuring the return of fugitives. Rather than hope for future without slavery, he continued, the framers knew that it would grow: they "anticipated that in the progress of time, slavery, while it

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[570] *Fugitive Slave Case: District Court of the United States for the Southern Division of Iowa, Burlington, June Term, 1850. Ruel Daggs, Vs. Elihu Frazier, Et Als., Trespass on the Case* (Burlington, IA, 1850).
[571] George Washington Julian, *Political Recollections, 1840 to 1872* (Chicago, 1884).
[572] B. R. Curtis, "The Constitutionality of the Fugitive Slave Law," *New Hampshire Statesman*, November 29, 1850.
[573] 8 W. L.J. 49, 145 (1850-1851).
[574] "Fugitive Slave Law. U.S. Circuit Court," *New-York Legal Observer, Volume* 9 (June, 1851).

would increase in the South, would diminish and finally become extinguished in the North." And they knew that without strict enforcement of a federal regime "such a state of things would have led inevitably to the bitterest animosities especially between border states and have been the source of perpetual strife." In effect, Nelson told jurors that the framers had dreaded the very day in which they now lived and had wisely provided constitutional power to prevent it – if the subsequent generations would make good on their true vision. The justice of course insisted that the Founding had hinged on the Fugitive Slave Clause, a proposition that had become a necessary article of faith that "No one conversant with the history of the convention… can doubt for a moment." That Nelson also introduced the politics of the moment – his "deep conviction and belief" that the Union depended upon people in the free states showing "that this constitutional obligation will be hereafter executed in the faith and spirit with which it was entered" – seemed to pose no tension between law and politics. Putting that faith in practice, after all, is what the national fathers wanted. Carrying out the Fugitive Slave Law was carrying out the duty of preservation at the center of antebellum constitutionalism – for which "unborn millions [] will be indebted to them under the favor of heaven for the rich heritage they enjoy."

When the new Fugitive Slave Act arrived, many Americans outside the free black and antislavery community approached it with acceptance. Then it went into action, and doubts rapidly grew into disbelief. In New Hampshire, for instance, a regular meeting of the Loudon Debating Society decided "unanimously in the negative" against resisting the 1850 Fugitive Slave Law right after its passage; then they changed their minds, "on merits of argument" after a few months of experience.[575] Besides offering direct federal support to the ostensibly municipal institution of slavery, people found unconstitutionality lurking in the Act. The lack of a jury trial for alleged slaves placed free people of color in new jeopardy and seemed to violate the letter and history of the Constitution, while the federal commandeering of free state bodies as police was without precedent in the U.S.[576] At a November indignation meeting in Canfield, Ohio led by future senator Benjamin Wade, the crowd unanimously resolved that the law "bring[s] back the dark ages of despotism and absolute rule against which the Constitution of the United States meant effectually to guard by its explicit and solemn guarantee of these inestimable rights." In northern parts of the Union, the legitimacy of the law shrank in popular historical perspective. On the same day in Massachusetts, Charles Sumner, soon to be elected to the Senate as a Free Soil Democrat, could declare that his opposition invokes the true "spirit of its founders" and seeks "the conservation of the principles of our fathers."[577] When Illinois attorney Orville H. Browning spoke with Kentucky Congressman George Caldwell in late November, expressing what he thought was a moderate northern view that the deprivation of process should be amended, the southern man replied heatedly, "'we will dissolve the Union before we will submit to it.'"[578] The swift rendition of the first accused slave under the Act, James Hamlet of New York, proved shocking for the African American community and a broader public. As if embodying the narrative of generational decline from the Founding, observers noted that the federal marshal "we regret to say, is the GRANDSON OF COLONEL BENJAMIN TALLMADGE OF THE REVOLUTIONARY ARMY AND ONCE AN AID OF GENERAL

[575] Loudon Debating Society records, New Hampshire Historical Society.
[576] *Boston Daily Atlas*, November 23, 1850.
[577] "Mr. Sumner's Speech, at Faneuil Hall, Nov. 6, 1850" *Emancipator & Republican*, November 14, 1850.
[578] *The Diary of Orville Hickman Browning, Vol. 1* (Springfield, IL, 1925)

WASHINGTON."[579] Ransomed through charity and manumitted in Baltimore, Hamlet returned to a crowd of thousands that denounced the Act as unconstitutional.

While erected atop the constitutional ground cleared by *Prigg*, the Act sought to suppress litigation over fugitives in state and federal courts. By shunting people into the commissioner system and providing a summary process, the new regime was supposed to impose quiet order. In a narrow sense, it was successful. Courtroom contestation, constitutional and otherwise, involving accused slaves diminished. Hundreds of alleged slaves were carried south. Hundreds more fled beyond the borders of the United States in the shadow of the law. In place of the *Prigg*-era litigation, however, arose cases like the treason trial of Castner Hanway in Independence Hall, who had refused to participate in policing slavery. The constitutionality and enforcement of the Fugitive Slave Act was challenged in the streets; and in the prosecutions that followed, new courtroom scenes swept vernacular constitutionalism into the courts.

In the period before the 1850 legislation, the practical operation of state and federal courts had enabled fugitives from slavery to create delay, occasionally secure discharges and sometimes enable prosecutions aimed at their violent pursuers. Significantly, courtroom proceedings were also forums in which antislavery constitutionalists could elaborate and publicize attacks upon the extant legal regime, evangelizing for an antislavery Founding. Yet these constitutional challenges, virtually never successful, did not convince most free state residents that the 1793 Fugitive Slave Law was invalid as a matter of history. A white northern public broadly saw the existing rendition process, which often frustrated southern slaveholders, as constitutionally legitimate.

The 1850 law turned this configuration on its head. The new system foreclosed opportunities not only for fugitives but also for constitutional challenges – only partially displacing the latter into prosecutions after people defied the law to undertake rescue efforts. Popular constitutional understanding of the statutory regime was an essential part of this inversion: northerners increasingly perceived the system as a violation of their fathers' Constitution, illegitimate in the light of the Founding. As Thomas Albot of the Cumberland, Maine bar announced in 1852, "The Constitution was not an accomplice" in renditions under the law; "if this Act of Congress be suffered to stand, then there is a beginning of the end of American Law, and the vigor and virtue of the American Constitution."[580] Thus at the moment that public constitutional understanding veered away from the one embodied in the federal fugitive rendition law, eroding its tacit support, the new federal commissioner system ensured that constitutional challenges would routinely stay outside of regular courts or embedded in collateral proceedings. Federal commissioners, judges and attorneys duly recruited the authority of constitutional history to defend the new system, instructing Americans that the regime was the same as the original one. But their labors of legitimation were met with growing resistance as a wider public claimed that the Founding instructed otherwise. And because of the institutional structure occasioned by the Fugitive Slave Act, the full force of the judiciary did not immediately affirm and buttress the law in the public mind – the Supreme Court would only uphold the law in 1859. This dynamic gives coherence to constitutional conflicts over the 1850s that seem chaotic. The surge in rescue efforts after 1850, the growing popular sympathy for such cases, jury nullification in prosecutions, the resignation of federal marshals on constitutional grounds, the

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[579] *The Fugitive Slave Bill [of Aug. 1850]; Its History and Unconstitutionality; with an Account of the Seizure and Enslavement of J. Hamlet, and His Subsequent Restoration to Liberty* (New York, 1850).

[580] Thomas Talbot, *The constitutional provision respecting fugitives from service or labor: and the act of Congress, of September 18, 1850* (Boston, 1852).

passage of new personal liberty laws contradicting the Act and the eventual defiance by state courts of federal authority can all be understood as part of a whole in which constitutional legitimacy became plural and slipped from the exclusive grasp of the government. Over the 1850s, the authority of the Founding was ascendant. But the traditional bond between its legitimizing force and the proslavery work of the government began to loosen.

The sequence of famous fugitives in Boston after 1850 – Shadrach Minkins, Thomas Sims, and Anthony Burns demonstrated the progression of the new regime. Federal marshals in Boston seized Minkins, who had escaped from Virginia, in early 1851. As they would have done under the previous legal regime, antislavery attorneys petitioned for a writ of habeas corpus from a state court. Judge Lemuel Shaw summarily denied it: the case was a federal matter. Black Bostonians anticipated this outcome. As the proceeding before Commissioner George Curtis ended, a group of Vigilance Committee members came to the rescue of Minkins. They wrested him from the marshals and secreted him out of the city. A storm of acrimony and indictments followed. The federal government prosecuted several identified participated, includes lawyers for Shadrach. But it was hardly the show of force that southerners or conservative unionists like Daniel Webster desired. The prosecutions failed to establish a premeditated conspiracy and did not secure any convictions, arguably due to jury nullification. District Attorney George Lunt sought implicate those who attended meetings against the Fugitive Slave Law. In response, attorney Richard Dana Jr. denied such a stature, that it was no "part of the organic law, sunk down deep into national compact and never to be repealed."[581]

District Judge Peleg Sprague assured the Boston jury that the Fugitive Slave Act was just like the "statute of 1793 passed by the fathers of the Constitution with the approbation of Washington and sustained by the people for more than half a century."[582] His closing instructions vowed that a better government was not possible. Whoever looks at the constitutional republic, he announced, "its history and its hopes, its past performance and future promise, and then desire its destruction, in the vain and desperate hope of establishing a better in its stead, they must be inaccessible to reason or remonstrance, and of that unfortunate class, in whose minds judgment is dethroned, and monomania holds usurped dominion." These remarks were expressed not in terms of conventional law but rather in passion for order and complacent veneration. As the indicted began to go free, Sprague penned a constitutional defense of the Fugitive Slave Act midway through 1851. Asking Americans to deny their own reading of the text, he set forth his inquiry as one of original meaning. "If in sixty years language has been deflected, or acquired new shades of meaning, still our inquiry is, what was the sense in which it was originally used." The search for original textual meaning was a means to commune with the Founding. Sprague extolled the implications of the overlapping membership of those in the Convention and those in Congress who enacted the first Fugitive Slave Law in 1793, an analytical move familiar from the previous decades. So too was the assertion that "it was not until years afterwards, and when a new generation had arisen, that its constitutionality was questioned." Sprague's innovation was to conflate the new law with the old, to argue the current process was the one intended by those national fathers whose "spirit of Liberty was never higher or more Vigilant in any people." It was a delicate rhetorical operation. The judge sought to use the authority of a binding past while shifting people's understanding of its meaning in ways that undercut its mythos. "Those who,

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[581] *Report of the proceedings at the examination of Charles G. Davis, Esq., on a charge of aiding and abetting in the rescue of a fugitive slave: held in Boston, in February, 1851* (Boston, 1851).

[582] *Decisions of Hon. Peleg Sprague, in Admirality and Maritime Causes, in the District Court of the United States for the District of Massachusetts, Volume 1* (Boston, 1861)

impressed only with the feelings of the present time, find it difficult to believe that our fathers in the north could have intended to render persons of color liable to be carried out of the state as slaves without trial by jury," he instructed, must "go back to the when the Constitution was established and to see the actual condition of things at that time." The ensuing illustration of a process-less world in which masters seized slaves carefully avoided questions involving either the role of the federal government or the adjudication of whether a person was indeed enslaved.[583]

While the Minkins prosecutions were still unfolding in April of 1851, federal marshals captured Thomas Sims, a Bostonian who fled enslavement in Georgia. Antislavery lawyers tried to stage a scene of legal redemption. They sought a writ of habeas from Judge Shaw and challenged the constitutionality of the Fugitive Slave Law before commissioner George Curtis, who lacked the authority and will to declare the law invalid. In denying his state court had any basis to issue a writ of habeas, Shaw followed Sprague in delivering a long opinion reciting how important fugitive rendition was to the Founding and recounting the constitutionality of the 1793 Fugitive Slave Act. Then in another long note included with the official report, Shaw was moved to again wax at length about Founding wisdom and the settlement that framers reached. By trading text for history and treating the past moment as an encompassing prescription, the objectionable details of the new law receded from the picture:

> The constitution therefore is not responsible for the origin or continuance of slavery. The provision it contains was the best adjustment which could be made of conflicting rights and claims, and was absolutely necessary to effect what may now be considered as the general pacification by which harmony and peace should take the place of violence and war. These were the circumstances, and this the spirit, in which the constitution was made; the regulation of slavery, so far as to prohibit states by law from harboring fugitive slaves, was an essential element in its formation; and the union intended to be established by it was essentially necessary to the peace, happiness and highest prosperity of all the states.[584]

Appearing before Curtis, Congressman Robert Rantoul Jr. defended Sims by invoking the "the original understanding of the framers of the Constitution" on jury trials and governmental structure. He called upon the authority of "one of the great sages of the Revolution, Thomas Jefferson" in insisting that the lack of enumerated power to create a federal slave-catching police meant it was not intended and not permissible. To find constitutional sanction for the Fugitive Slave Act, he argued, was to render the framers' handiwork as "diffused and intangible as the pretended unwritten Constitution of Great Britain." Curtis dismissed such concerns. As he summarily authorized the removal of Thomas Sims, he noted his own confidence that constitutional history justified his act. "I cannot bring my mind to the conclusion that it was intended by the Constitution to leave the sole application of these means, thus industriously

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[583] "The Rescue Case," *Daily National Intelligencer*, June 12, 1851; *United States Monthly Law Magazine*, (April 1851), 482; George Frisbie Hoar, *Autobiography of Seventy Years, Volume 1* (New York, 1903); *United States vs Charles G. Davis. Report of the proceedings at the examination of Charles G. Davis, Esq., on a charge of aiding and abetting in the rescue of a fugitive slave. Held in Boston, in February, 1851* (Boston, 1851); Gary L. Collison, *Shadrach Minkins: From Fugitive Slave to Citizen* (Cambridge, Mass., 1997).

[584] *Sim's Case*, 7 Cushing (Mass.) 285 (1851).

added to the prohibition, to the very authority against whom the prohibition itself is directed."[585] As a student of Story and his own sectional age, Curtis believed in framers who intended to address national problems with national solutions. His sense of the past was familiar where it mattered.

Instead of judicial proceedings, the public saw a unit of U.S. Marines take Sims through the city and board a federal ship for Georgia. President Millard Fillmore and Daniel Webster sought to make an example for the South; but as a writer in the *Mississippi Free Trader* remarked in response, "the Fugitive Slave bill is a sheer humbug because it finds no sanction in the public voice of the northern states; because it requires the force to compel obedience."[586] The demonstration of coercive authority, he implied, lacked a deeper authority rooted in the constitutional consciousness of free state residents. Slaveholders regarded Sims' fate as a test case of constitutional fidelity. Such was the case even of Sims' enslaver, James Potter. An acquaintance reported that the planter did not care "much about the man, but was determined to try the question and see whether a slave could be carried back."[587]

The federal troops that transported Sims back to slavery were a skeleton crew compared to the undeclared martial law imposed in Boston when U.S. forces carried away Anthony Burns in 1854. The fugitive from Virginia was seized on the city street on May 24 and marched aboard a ship by June 2. In between, a failed effort to free Burns, the death of a deputy marshal, and the arrival of hundreds of troops who occupied the streets and harbor shocked the city. At Faneuil Hall two days after Burns' arrest, an enlarged antislavery community worked themselves into action.[588] Judge George Russell, a former Roxbury mayor who presided over the meeting, showed fluency with ascendant constitutionalism and the authority it conferred. "We have made compromises until we find that compromise is concession and concession is degradation," he exclaimed, moving acquiescence from the domain of faithful constitutionalism to a form of declension. In the hands of the Slave Power, he continued, "It seems that the Constitution has nothing for us to do but to help catch fugitive slaves." Acidly addressed to "Fellow subjects of Virginia," Theodore Parker set out a stark difference between an original set of constitutional purposes and present practice: "Once the Constitution was formed to 'establish justice, promote tranquility, and secure the blessings of liberty to ourselves and our posterity." *Now* the Constitution is *not* to secure liberty; it is to *extend slavery* into Nebraska; and, when slavery is established there, in order to show what it is, there comes a sheriff from Alexandria to kidnap a man in the city of Boston…." Amid cries of "shame" and vows to assemble the next day, the hall learned that black activists were seeking to free Burns at that moment. The meeting dissolved and a melee ensued at the courthouse. Then President Franklin Pierce called in the troops.

Commissioner Edward Loring swiftly granted the removal of Burns, repeating Judge Shaw's historical invocations from *Sim's Case*. Meanwhile, Bostonians and antislavery supporters from outlying towns found the city had become what felt like a police state. Days after the failed rescue attempt, for instance, the Worcester Freedom Club had their banner confiscated by authorities while proceeding near the court. Along with endorsing freedom, its

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[585] *Trial of T. Sims on an issue of personal liberty on the claim of J. Potter of Georgia against him as an alleged fugitive from service. Arguments of R. Rantoul Jr. and C. G. Loring with the decision of G. T. Curtis. Boston, April 7-11th, 1851. Phonographic report by Dr. J. W. Stone* (Boston, 1851).

[586] "The Fugitive Sims," *Mississippi Free Trader and Natchez Gazette*, April 26, 1851.

[587] "A Slaveholder at the North," *Daily Morning News* (Savannah, Georgia), April 24, 1851

[588] *Boston slave riot, and trial of Anthony Burns: Containing the report of the Faneuil Hall meeting, the murder of Batchelder, Theodore Parker's Lesson for the day, speeches of counsel on both sides, corrected by themselves, a verbatim report of Judge Loring's decision, and detailed account of the embarkation* (Boston, 1854).

instruction read: "True to the Union and Constitution."[589] Thousands of Bostonians watched Burns depart from behind military cordons, seeing in the man's rendition their own occupation by the Slave Power. The legal aftermath was telling of the government's loosening control over the power of antebellum constitutionalism. When Judge E. R. Hoar instructed the Boston Municipal Court on rioting charges a month after Burns' rendition, he tried to ask them to pay no heed to their constitutional doubts. It was clear, however, that he was trying to convince himself of the same. Hoar told the jury that "if it were proper for me to do so," he would give his private view that "the authorities upon which that decision rests have failed to satisfy my understanding" and that the law "evince a more deliberate and settled disregard of all the principles of constitutional liberty than any other enactment which has ever come under my notice."[590] But although the day might arrive when the law "will be held not to be constitutional," this was no matter for the moment. Instead, he affirmed that it "could never have been the intention of the framers of our Government" to permit the law in Boston to differ based on the opinions, and citizens must accept the consequences of their legal violations until the law changes. Hoar's confessional instruction did not merely depict the common dilemma between law and morality. It expressed an internal struggle of constitutional pluralism: two normative orders vied and coexisted; and remarkably, both relied upon the authority of the framers for support.

After Loring executed the new Fugitive Slave Law in the summary fashion its authors intended, he was the most loathed man in Boston. People came to believe that he chose to sustain the Slave Power when he ought to have followed the Founding. As James Freeman Clarke stated in July, Loring "had an opportunity of setting the man free on grounds which every Boston lawyer would have admitted to be sufficient," but he opted to return him to slavery "upon grounds in which half his legal friends will not sustain him."[591] The Burns case brought out a growing popular resistance to the manner in which constitutional history in the hands of jurists seemed to flex and shift to justify the latest demands of the Slave Power. Clarke, who firmly believed in an antislavery Founding, captured this sense with a counterfactual: "uttering this threat; if the whole North was determined to resist the law, and the South did not care whether it was enforced or not, how long would it have taken Mr. Ben. R. Curtis and Mr. Edward G. Loring to have shown the *unconstitutionality* of the law?" Under the Fugitive Slave Act, the structure of antebellum constitutionalism, with its command for venerative deference, could be more readily seen as an instrument of rule. Two days after the Burns rendition, John Weiss asked "Can we not see the settled purpose of slavery to make its life perpetual, and that for this chiefly it values the Union and the Constitution and the deferential North?"[592] The questions posed by Freeman and Weiss signified a growing fissure between what many understood as original constitutional purposes and present law. This movement was not experienced as a difference in interpretation on an ambiguous issue but rather a question of following versus disregarding the strictures of true history. As for Loring, a campaign to remove him from office began soon after his decision. By 1857, through the actions of the legislature and governor, it was successful. In Massachusetts and much of the broader North, executing the Fugitive Law Act of 1850 was no longer the same thing as performing a constitutional duty or preserving the fathers' Constitution.

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[589] Ibid.
[590] Ebenezer Hoar, *Charge to the Grand Jury, at the July Term of the Municipal Court, in Boston, 1854* (Boston, 1854).
[591] James Freeman Clarke, *The Rendition of Anthony Burns. Its Causes and Consequences. A Discourse on Christian Politics, Etc*. (Boston, 1854).
[592] John Wiess, *Reform and Repeal, a sermon preached on Fast day April 6 1854, and Legal anarchy, a sermon preached June 4 1854, after the rendition of Anthony Burns* (Boston, 1854)

Founding versus Founding in Ohio

In Ohio, the first fugitive slave case under the new regime came in the summer of 1853. After several years of safety, Washington McQuerry, a fugitive from Kentucky, was taken into custody by a deputy marshal. African American leader Peter Humphries Clark reached Associate Justice John McLean at his home in the early morning hours and sought a writ of habeas corpus. On receiving the application, McLean decided to articulate a justification of the law in hopes of dampening dispute over its constitutionality. Arguments opened on a process typically confined to summary action in commissioners' offices, and they dwelt almost exclusively on the constitutionality of the Act. The courtroom overflowed with local black residents and white spectators, while women filled the jury box and police surrounded the building. "I am aware that the word slave is not in the constitution, but the subject was debated in the convention, and it caused a deep excitement in the public mind. The constitutional provision in this regard was the result of a compromise," spoke McLean. Along with this historical trope, one made authoritative through repetition, he assured his courtroom that a jury trial would be superfluous. He fondly recollected an anecdote of law triumphing over opinion: "In an instance that I call to mind, a decided anti-slavery man was upon a jury in a case involving the liberty of escaped slaves. But he considered the solemnity of his oath to support the law and the constitution, and he agreed with his brethren to give a verdict of damages." At the tense border between slave and free states, McLean pressed his audience with Founding authority to find federal enforcement of slave rendition a necessary constitutional remedy. "If this be not so, the constitution is not what its framers supposed it to be…. a fundamental law of the Union," McLean opined. To believe otherwise, he suggested, required ignoring their cherished constitutional genesis and impugning the wisdom of its actors. It "fixes an act of consummate folly on the framers of the constitution," which the "men of that day" would never have done, "know[ing] that without some effective provision on this subject, the superstructure which they were about to rear would soon be overthrown." As McLean recreated the Founding with his imagination and pen, he modeled how the Founding would extend as far as people would believe it to justify enforcing slavery.[593]

Limits began to surface. The local U.S. Commissioner, Samuel Carpenter, formally resigned his post in less than a year. In a long legal and historical analysis published in the *Cincinnati Gazette*, he concluded that he could not exercise the judicial power unlawfully delegated to him. In this decision, he professed to be upholding his sworn oath to the Constitution – and he said he would have resigned sooner had a fugitive, Lewis, not escaped before requiring his action. In the meantime, his hope "that the important questions of constitutional law, which were presented by the counsel in the case would be settled by higher authority" had not been realized.[594] Personal objections to the law became public policy when Ohio enacted a new personal liberty statute in 1857 that potentially criminalized the actions of federal marshals taken in the course of seizing alleged fugitives or opposing those giving aid.

That year, a Clark County justice of the peace ordered the sheriff to jail ten deputy and assistant U.S. marshals. This band of men, acting under federal authority, had been seeking to arrest four Ohio residents for aiding an escaping slave. U.S. District Judge Leavitt discharged them all, condemning the episode as a "rebellion" under the "specious pretences of law."[595]

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[593] *Monthly Law Reporter* (1854), 294; *Miller v. McQuerry*, 5 McLean, 469 (D. Ohio, 1853).
[594] "The Judicial Powers of Commissioners Unconstitutional," *New York Daily Times*, July 4, 1854 (From the *Cincinnati Gazette*).
[595] "Ex parte Spifford," The *American Law Register*, Volume 5 (Philadelphia, 1857), 675.

Ohio's leading proslavery advocate, Clement Vallandigham, spoke for the detainees in court as he campaigned for Congress. Recalling many decades of peace, prosperity and fugitive slave rendition, he excoriated the new generation of "Men, wise above what is written – wiser than the fathers…[who] have discovered that the Constitution is all wrong." The "murder of Gorsuch" and "attempted rescue of Sims and of Burns all occurred before the age of Personal Liberty Bills and statutes of treason," he asserted. Now the State of Ohio itself had betrayed their fathers' Constitution, he declaimed, speaking for southern Ohio Democrats and the South more broadly.[596]

This so-called "Ohio Rebellion" in 1857 was a prelude to the "Oberlin-Wellington Rescue Case" of 1858-1859, in which the power of antebellum constitutionalism decoupled from the government and order that it had developed to sustain. As it wended through Ohio courtrooms, judges and legal professionals would try mightily to discipline citizens, sway outcomes and justify outcomes with the authority of the Founding. But it was an increasingly untamed cultural power, one that lent itself to multiple conflicting meanings. Courts could only exert so much control over the constitutional lessons people drew from the litigation they hosted. While providing the forum and exercising the direct power of the state, judges' decisions had to compete with alternative narratives offered by parties in and out of court.

When U.S. Marshall Jacob Lowe seized John Price, a fugitive slave taking refuge in Oberlin, in September of 1858, he treaded on unfriendly territory. He brought two armed associated and the authority conferred by Fugitive Slave Law to the antislavery town and county; but fearing the inadequacy of these weapons, he swiftly sought to steal away Price to the more slave-law abiding city of Columbus, from which he could then take him to a Kentucky slaveholder. Lowe made it as far as a railroad depot in Wellington, about ten miles south of Oberlin. But a swarm of black and white area residents forced the release of Price. When this mob action subsided, judicial process sprang into motion.[597] Federal officials secured indictments against thirty-seven participants, who refused to post bail. A trial opened with Americans far beyond north-central Ohio paying rapt attention. Conscious of this vast audience, the Oberlin community, defendants and their lawyers performed antislavery constitutionalism. They sought to draw close the legitimating power of the Founding and separate the Fugitive Slave Law from the authority of past. Before the trial got under way in earnest, community supporters held a "felons' feast" in early January, 1859 for their indicted fellows. Speaking at the dinner, John Langston, a prominent black leader and president of the Ohio Anti-Slavery Society, framed the moment succinctly. "[W]hat is the work of the American citizen of to-day to accomplish? It is this. He is to reinstate the Declaration of Independence and to reinstate the Constitution of the United States. American Slavery has stricken down the first; the Fugitive Slave Law the latter." Civil disobedience and active resistance were no violation of the United States' fundamental law in this view; rather they were conduct to preserve it.[598]

Once proceedings commenced, lawyers defending Price's rescuers – "rescuing" was the charged offense – translated precisely Langston's conception into legal argumentation. Attorney Albert Riddle posed questions that paralleled Langston's distinction: "Are we at that point that

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[596] *The Record of Hon. C.L. Vallandigham on Abolition, the Union, and the Civil War* (Columbus, 1863).
[597] J. Brent Morris, *Oberlin, Hotbed of Abolitionism: College, Community, and the Fight for Freedom and Equality in Antebellum America* (Chapel Hill, 2014); Stanley Campbell, *The Slave Catchers: Enforcement of the Fugitive Slave Law, 1850-1860* (Chapel Hill, 1970); Stanley Harrold, *Border War: Fighting over Slavery before the Civil War* (Chapel Hill, 2010).
[598] Jacob R. Shipherd, comp., *History of the Oberlin-Wellington Rescue* (Boston, 1859); William and Aimee Lee Cheek, *John Mercer Langston and the Fight for Black Freedom, 1829-65* (Urbana, 1996).

no man can be a good citizen or a patriot unless he believes not only in the Union, Star Spangled Banner, the American Eagle, and Bunker Hill, as we all now here do, but our faith must reach every Act of Congress and every ruling of the Federal Court?" Riddle's associate Rufus Spaulding also claimed the mantle of true meaning. To the judge, jury and wider world of observers, Spaulding presented himself – and by extension the mob who rescued Price – as defenders of the Constitution. "I would that I had power to bring to the vindication of the true History of the Constitution of the United States, more ability than I possess. I would rescue it from the infamy cast upon it by the prosecution in this case," he professed. Spaulding drew a declension narrative of the kind that Americans had learned to fear from childhood. "The Convention that framed the Constitution would not allow the word slave to be placed anywhere in that instrument for any consideration," Spaulding argued, "[a]nd now we bring our school children into court that they may hear District Attorneys of the United States read indictments against free citizens of the State for aiding the escape of slaves." The constitutional veneration embraced by antebellum Americans perpetually teetered on a ledge over ruination through unconstitutionality. In the Fugitive Slave Law, many northerners wondered if their nation was plunging over the edge, even as southerners regarded the failure of northern citizens to eagerly "deliver up" escaped slaves as a grievous constitutional breach.

The court became a forum through which to promote the antislavery mob's constitutional understanding. To a packed audience, the defense read aloud condemnations of the Fugitive Slave Act by meetings of "respectable" citizens soon after the law's passage. Confronting past precedent, Spaulding deliberately pit the constitutional framers against those who would uphold the law, including justices of the Supreme Court. He suggested that Court had "declared that these men were all ignoramuses because they gave power to the State Courts to interfere to a certain extent in carrying out the provisions of the Act." Spaulding implied that judicial re-writing of paternal intentions towards slavery destabilized the whole constitutional edifice by impeaching the Founding. He contended that "if George Washington and John Adams and a score of such men might be mistaken as to the authority of State officers, might they not just as easily be mistaken upon any other equally debatable point." This antislavery legal voice asked the courtroom to look out from the Convention to the historical people themselves, the collective body of fathers who ratified the Constitution. Stipulating "we must take it as they adopted it and ask how they understood it," Spaulding urged that it could not be that Americans "were deceived and defrauded by the ingenious men who were sent to draft the Constitution…. [that they] adopted an instrument supposing it to be an instrument of freedom which really consigned them and their posterity to slavery." This was the central antislavery constitutional lesson within the paradigm of veneration that had accreted over the antebellum period. It announced a binding, better history through which to restore the Constitution. Accordingly, Spaulding denied the "fugitive servant" clause had been originally "looked upon as one of the compromises between the North and the South… and never was so regarded anywhere else until a very modern date." In the formal space of a courtroom, ostensibly limiting permissible discourse to legal reasoning and argument, and potentially validating discourse that transpired inside, Spaulding claimed the Founding. In his telling, the framers and the ratifiers belonged to the mob he represented. If this demonstration of courtroom popular constitutionalism denied the finality of the Supreme Court rulings, it nevertheless sought authority and legitimacy by developing a constitutional history that people could believe in.[599]

[599] *History of the Oberlin-Wellington Rescue.*

For the prosecution, former U.S. Representative George Bliss made his own appeal to the present generation's duty to the past. After weaving a Convention story in which the framers had agreed on the necessity of federal fugitive slave rendition, he asked Ohio residents to feel the constitutional ties of union that their state fathers had woven. "In 1802, the people of Ohio deliberated upon taking upon themselves the Constitution with all its provisions and clauses… thereby binding themselves to support and abide by all the provisions of that Constitution. How then can they stand up to day and repudiate and impugn this same Constitution?" he queried. Presiding federal judge Hiram Willson, who had apprenticed in Francis Scott Key's office, also directed the all-Democrat jury towards a present duty of maintaining the framer's original vision. Willson, indicted in New York on kidnapping charges in 1841 for aiding the capture of two escaped slaves, now instructed the jury that the Constitution "implies a guaranty on the part of the national government to provide the mode and secure the means to make the right available." Yet this mission of maintenance, fundamentally a temporal one, had its own relational claim to past and future. It indicated that enforcing slavery kept the United States' house in order.[600]

The Oberlin-Wellington case initially visited the Ohio Supreme Court when imprisoned defendants Charles Langston and Simeon Bushnell unsuccessfully sought a writ of habeas corpus. With the didactic platform afforded by another courtroom, the defense spent a full afternoon tracing the formation of the Constitution. The antislavery legal strategy rested on leading the court away from rote adherence to legislation bearing the imprint of the Slave Power controlling the Capital. But if the judges could not be persuaded, the defense wanted as large an audience as possible to learn the proper articulation of what antislavery constitutionalists knew to be true. Thus Spaulding declared that he "planted himself… on the Constitution of the United States" and "bid defiance to any constructionists," asking that the Court and Americans follow their fathers. The fugitive clause "would never have been adopted in that convention if it had not been the general belief South as well as North that slavery was a temporary evil," and "people would not have ratified the Constitution containing that clause if leading men had not insisted upon it that no difficulty grew out of the clause in question because slavery was necessarily a temporary institution." This lesson reversed the very premise of judges and proslavery constitutionalists who assumed that the clause was the keystone of sectional compromise at the Founding and an expansive promise to protect slave-owners' property in people. As they disputed the point, however, the authority vested in the purposes and understandings of that moment were confirmed again and again.

On May 12, 1859, a jury returned a guilty verdict for African-American defendant Charles Langston. The white defendant, Bushnell, had already been sentenced. Afforded a moment to speak, Langston denied there was anything he could utter to halt the churning wheels of "governmental machinery… constituted to oppress and outrage colored men." But Langston, whose white father had fought in the War of Independence, did not relinquish the court's attention. Deploying the force of his heritage, Langston reflected: "I had been taught by my Revolutionary father… that the fundamental doctrine of this government was that all men have a right to life and liberty." Raising the image of Philadelphia's constitutional convention hall, Langston proposed "Let me stand in that Hall and tell a United States Marshal that my father was a Revolutionary soldier, that he served under Lafayette, and fought through the whole war, and that lie always told me, that he fought for my freedom as much as for his own, and he would sneer at me and clutch me with his bloody fingers and say he had a right to make me a slave."

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[600] *City of Cleveland and Cuyahoga County: taken from Cleave's Biographical Cyclopaedie of the state of Ohio* (Philadelphia, 1875).

Langston had seized the didactic moment offered by his own prosecution. A venerated Founding became an instrument with which he indicted the degraded present.

While Langston returned in jail, the full bench of the Ohio Supreme Court met in a special session at the end of May, 1859, to consider petitions by Bushnell and Langston. The State of Ohio, with Salmon Chase now governor, sent Attorney General Christopher Wolcott to argue in support. Recent Supreme Court jurisprudence, expressed in the Wisconsin fugitive slave case *Ableman v. Booth*, strongly rejected the kind of state judicial resistance that antislavery lawyers demanded. The proceedings reopened the question of which understanding of Fugitive Slave Law constitutionality would prevail – the popular vision promoted by antislavery constitutionalists or the other popular vision taken for granted by constitutional unionists and southern unionists. Wolcott took his turn at capturing the past purposes of the framers that would delimit or at least constitutionally delegitimize the federal slave-catching power in the minds of listeners and readers beyond the bench. "All the world now knows, and I have already shown, with what painful and anxious care the framers of the Convention – slaveholders and all – Madison and Mason and even Randolph the special and ablest advocate of the slave holding interest – excluded from the Constitution the idea that there could be property in man," he urged. Wolcott spoke exhaustively of the Founding, filling page after page of transcription. He delivered a history in which the fugitive clause was "in no sense one of the compromises of the Constitution," a myth "never hinted at till long after all those compromises had been definitely settled and not indeed until after all the provisions deemed essential to be incorporated in the Constitution had been agreed on and referred to a committee to report back in due form." A telling moment arose when Chief Justice Joseph Swan interjected to note "one statement" from the Convention that Wolcott had missed. So much popular and legal authority did Founding narratives carry in performances of constitutional persuasion that Swan felt compelled to point out that "Mr. Pinckney of South Carolina said he would not vote for any Constitution unless it protected property his slaves." But having mined the Convention records, Wolcott could respond that no one supported Pinckney. The attorney concluded that "this solitary remark of a solitary man upon a solitary occasion certainly furnishes no justification" for making the clause into a fundamental promise to protect slave property upon which the Union's formation depended. Extolling a popular constitutionalism of deference to an antislavery Founding, Wolcott sought to tar upholders of the Fugitive Slave Law with the brush of destructive, irreverent change.[601]

Antebellum public constitutionalism, as it crystalized around slavery contestation, was laden with hardly-veiled emotion. Indeed, intensity of feeling was an integral to its inculcation and performance. People referenced Founding materials with passion, and interlocutors revealed their devotion in chosen moments. Attorney General Wolcott, a government lawyer speaking in his official capacity, brought these cultural dynamics into the courtroom because they were inseparable from slavery's constitutionalism in all its sites of practice, from the most casual to the most formal. Like Spaulding before him, Wolcott's argumentation culminated in an ardent plea for the Constitution itself. "GO BACK, I SAY, TO THE TEXT OF THE CONSTITUTION, PLANT YOURSELVES ON ITS PRIMAL GRANITE, AND FOLLOW THE RULE WHICH YOU SHALL FIND SO PLAINLY AND INDELIBLY GRAVEN THERE," he thundered, concluding that "THE CAUSE OF CONSTITUTIONAL GOVERNMENT IS HERE AND NOW ON TRIAL. GOD SEND IT A SAFE DELIVERANCE."

By a vote of 3-2, the Ohio Supreme Court refused relief. The Price rescuers remained imprisoned and their lawyers failed to produce a counter-precedent against the Fugitive Slave

[601] *Ex parte Bushnell*, 9 Ohio State Reports 77 (1859).

Law. Chief Justice Swan disappointed many fellow Republicans with his majority opinion. He refused the invitation to lead a constitutional insurgency from the bench, resolving that "the work of revolution should not be begun by the conservators of the public peace." Yet this confession of institutional incompetence for reclaiming an antislavery Founding hardly held a monopoly on the constitutional lessons produced. In dissent, Justice Brinkerhoff endorsed a first-principles fundamentalism. "The federal legislature has usurped a power not granted by the Constitution, and a federal judiciary has, through the medium of reasonings lame, halting, contradictory, and of far-fetched implications, derived from unwarranted assumptions and false history sanctioned the usurpation," he wrote. Explaining that constitutional text instructs and "history confirms" that "the framers" never intended to grant a federal power of enforcement, Brinkerhoff found the Fugitive Slave Law's violation of the "most sacred and fundamental guaranties of the Constitution" required putting deference to Founding visions before respecting precedents.

At the end of the day, as the judges retired, correspondents wrote their reports, and the audience dispersed, the constitutional lessons were equivocal and multivocal. As Americans viewed the case through divergent lenses, the only clear victor was constitutional veneration itself. In Omaha, Nebraska, the town newspaper related happily that the "Court has now decided, in a case made up by Republicans for political effect, that it is the duty and pleasure of Ohio to remain in the Union, to respect the Constitution of the United States and to yield obedience to the laws." In a note titled "Schoolmaster on the Constitution," the *Banner of Liberty* in Middletown, New York mocked the pretentions of antislavery constitutionalism. It related: "The Oberlin rescue cases have led some abolition pedagogue to study the foundation of the Union and the Charter of our liberties; and lo! he has discovered that the clause which provides for the rendition of fugitives from labor is not good grammar…. We can tell him how it is to be parsed by those who forcibly resist its provisions – *by fine and imprisonment.*" In Ohio, however, constitutional convictions had grown stronger. Officials arrested Marshall Lowe and his associates for kidnapping. Ohio only released them in June, when federal authorities agreed to drop the indictments against the Price rescuers. They had remained in prison for eighty-four days.[602]

Beyond the courtroom but in conspicuous dialogic with its historical claims, mass meetings convened where speakers re-adjudicated the case. At one early May gathering in Jefferson, longtime antislavery politician Joshua Giddings presented the constitution of a rekindled *Sons of Liberty* organization. Appropriating this Revolutionary name, he instructed the audience that in such dire times, "we should look to precedents, to the action of our Revolutionary ancestors, men immortalized in history, their conduct will furnish safe rules for us to follow under like circumstances." Giddings, analogizing the Fugitive Slave Law to the Stamp Act – only "a thousand times more revolting" – declared that as "our fathers would not submit," the present generation must not either. Two weeks later, throngs of people turned out for a massive Cleveland rally on May 24, 1859. Governor Chase travelled down from Columbus to speak. With the presidential election on his horizon, he urged the assembled to apply the "great remedy" of "the people themselves at the ballot box" to reinstate their national forbearers' true Constitution. Paralleling the Oberlin courtroom arguments, this rhetoric was reverential and restorative. Voters, Chase demanded, must elect a man to "administer the Constitution of our fathers, the securer of liberty and not the prop of slavery." The fathers themselves, and their Constitution, went unquestioned. William Dennison Jr., who would replace Chase as governor at

[602] "The Oberlin Rescuers Released," *Mississippian*, July 26, 1859; "Nullification in Ohio," *Omaha Nebraskian*, June 11, 1859; "Schoolmaster on the Constitution," *Banner of Liberty,* June 15, 1859, 1; *Berkshire County Eagle*, July 15, 1859.

the end of the year, sent his like-minded support. We must "prove ourselves worthy descendants of the heroic founders of the Republic, who declared one of the great purposes of the Federal Constitution to be the securing to themselves and their posterity the blessings of liberty," he urged.[603] The Oberlin case, through dialectical courtroom sequences and echoes in public arenas, rehearsed Founding narratives that structured late antebellum constitutional consciousness.

Law versus Founding in Wisconsin

During the 1850s, fugitive slave rendition often proceeded swiftly and mechanically. U.S. marshals and their deputized assistants would capture and return people to slavery with only the passing involvement of a waiting federal commissioner. But disruptions like the Oberlin Rescue prosecution in Ohio and the Sims and Burns cases in Massachusetts loomed large in memory, imagination and constitutional consciousness. Across the late antebellum landscape, a series of episodes taught southerners to deny the constitutional fidelity of the free states and instructed northerners to distinguish Slave Power laws from their true Constitution. These conceptions of meaning rested upon a foundation of faith in the Founding that magnified and confirmed these perceived transgressions. The rescue of the enslaved man "Jerry" in Syracuse, New York and the prosecutions that followed in its wake; the imprisonment of abolitionist Passamore Williamson for aiding fugitive Jane Johnson; and in the infanticide and attempted suicide of fugitive Margret Garner in Ohio as U.S. marshals closed around her – all imparted constitutional lessons of doubt. The Fugitive Slave Act, implicating northern citizens more closely in the enforcement of slavery and embodied by such events, brought the narratives of pain and authority that congealed in legal cases home for many free state citizens. Popular doubt and contestation fixed much less on merits of the Founding but rather what its true self would authorize.

As enforcing the Fugitive Slave Act and preserving the fathers' Constitution ceased to mean the same thing for antislavery northerners, resistance on the ground demonstrably increased. In their matrix of motives and rationales, communities had come to belief themselves to be constitutional redeemers. But even if judges like Brinkerhoff in Ohio were tempted during the Oberlin proceedings to spurn the Fugitive Slave Law, courts broadly refused to adopt the insurgent antislavery constitutionalism. Through introduced in oral arguments and briefs, its counter-narrative of the Founding remained a popular constitutional conviction. Accumulated court precedent backed by its own claims upon the Founding was the immediate barrier. More fundamentally, however, judicial resistance implicated other parts of the Constitution. To defy federal authority meant tugging at the larger constitutional fabric of the United States: thus to redeem the Founding with respect to the Fugitive Slave Law would tear down the edifice – exactly what antebellum legal professionals were trained never to do. In Judge Hoar's personal castigation of the law and wistful yearning for the day when it "will be held not to be constitutional," this configuration of principles was hardly sublimated.[604] There was a monumental exception, however. In one episode during the mid-1850s, as Congress repealed the Missouri Compromise and the Slave Power seemed to own the federal government, state judges in Wisconsin assumed the role of constitutional redeemer.

In the spring of 1854, in the far northern locale of Milwaukee, Joshua Glover's two years of relative freedom ended. The former Missouri slave was located by his enslaver and thrown

[603] On the extralegal public trial of slavery, see Jeannine Marie DeLombard, *Slavery on Trial*: *Law*, *Abolitionism, and Print Culture* (Chapel Hill, 2007).
[604] Ebenezer Hoar, *Charge to the Grand Jury, at the July Term of the Municipal Court, in Boston, 1854* (Boston, 1854).

into jail for imminent removal as the mechanisms of the Fugitive Slave Law went into motion. In Glover's imprisonment, the abstraction of the nationalization of slavery became more real for Wisconsin residents. Actions both legal and popular began immediately. While Glover remained imprisoned in the custody of U.S. Marshalls, local publisher Sherman Booth rallied a crowd and speechified against the constitutionality of the Fugitive Slave Act. Word reached them that the federal district judge would ignore the writ of habeas corpus that lawyers were securing for Glover from a local judge. This news prompted a rush for the jailhouse door, which yielded to their axes. Glover made it to Canada, leaving behind a world of constitutional conflict.[605]

Arrested by U.S. marshals, Booth became the center of a clash between the state and federal jurisdiction and between two versions of the Founding. With popular acclaim, the Wisconsin supreme court adopted insurgent antislavery constitutionalism.[606] It struck down the Fugitive Slave Law of 1850, deploying the force of the Founding against the Law rather than to prop it up. Redeeming the original Constitution as they imagined it, however, required the judges to break the constitutional constraint of federal judicial supremacy. While in custody on May 27, Booth petitioned supreme court justice Abram Smith to order his discharge on grounds of the law's unconstitutionality. Smith granted the petition himself. Then, after hearing the U.S. marshal's appeal in June, the full court struck down the Fugitive Slave Law for conferring judicial powers on commissioners and depriving the accused of a jury trial "given him by the Constitution." Smith, in verbal and written opinions, justified this ruling on the highest positive authority. "One great aim of the founders of our government, among others, was to secure beyond contingency personal liberty and to protect and preserve, as far as practicable, the independence and sovereignty of the respective States," he announced.[607] Invoking an undifferentiated mass of Founding archives, Smith insisted that a "mere glance at the history of the times, at the debates in the national convention that framed, and of the respective State conventions which adopted, the Constitution will suffice to convince us that the respective States were regarded as the essential if not the sole of the personal rights and liberties." With this historical analysis, Smith laid the groundwork for claiming that the Constitution divided sovereignty such that the Supreme Court was not the final, authoritative arbiter of law within a given state – that constitutional supremacy did not entail judicial supremacy. Indeed, Smith claimed that "Such was the theory of the framers," and that the arrangement was a leading "mark of the wisdom and foresight of those who framed this complex and novel system." In 1854, this view ran contrary to the prevailing operation of federalism and constitutional law in the United States, as the court well knew. If Smith claimed the authority of the Founding for adopting it, then he likewise rested on Founding authority to undertake the reexamination: "as admonished by the Father of our country, familiar with the difficulties and obstacles, which interposed to the formation of our national government, to recur frequently to elementary principles, it may not be improper, in recurrence to those fundamental principles of our government, to refer to what would seem an obvious and primary principle by which the federal compact is to be interpreted, and for this purpose to look to the origin as well as the consummation of the system of government established, thereby." In other words, Smith claimed that the national fathers wanted him to consult the Founding and ensure the republic did not stray.

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[605] "Examination of S. M. Booth, for 'Aiding and Abetting' in the Rescue of Joshua Glover, a Fugitive Slave," *Milwaukee Daily Sentinel*, March 24, 1854.
[606] "Convention at Young's Hall," *Milwaukee Daily Sentinel*, April 14, 1854; "The Glorious Rescue," *Liberator*, May 12, 1854.
[607] *In re Booth*, 3 Wis. 157 (1854); "Opinion of the Hon. A. D. Smith," *Milwaukee Daily Sentinel*, June 8, 1854.

Pitting court against Court, the *Booth* decision did not directly present a popular constitutionalism in which the people dethroned judicial rule. Yet the court's action arrived on a wave of popular demand inside its jurisdiction. The locus of that constitutional demand, however, was not in the structure of federalism but in the national rule of slavery and constitutionality of the Fugitive Slave Act. To strike at these objects, the Wisconsin judges had to first manipulate constitutional architecture – or, as Smith put it, recur to "the origin as well as the consummation" of the Constitution. Once the court turned to the Fugitive Slave Act, it carried out the constitutional redemption that animated its project. As Smith narrated the authorship of the Fugitive Slave Clause during formation of the Constitution, he told a story not of grand bargains but minimal textual commitments. Federal aid for rendition was nowhere in their minds. "The slave States did not ask this at the time of the framing and adoption of the Constitution. All they asked of the free States was expressed by Messrs. Pinkney and Butler" that free states not emancipate fugitives. After the Confederation period, only that term was seen as a "clear gain" by the South. By 1854, Smith could draw upon a body of evidence to support his contention that the long-running judicial declarations of the Founding importance of the Clause were an illusion. "There is not a scintilla of evidence that this clause, or its subject matter, was a consideration in settling what were called the compromises between the North and South," he opined, citing to Madison, Randolph, Iredell and other sources. Reversing the familiar counterfactual of the contingency of the Union, he deployed one his own:

> Had the Northern States imagined, that by assenting to this clause of the Constitution, they were thereby conferring upon the federal government the power to enter their territory in pursuit of a runaway negro, and to employ the whole military and naval force of the Union for that purpose, to subject their houses to search, and to override their own laws and municipal regulations, and that they were parting with all power to regulate the mode of procedure by which that clause was to be carried into effect; does any sane man believe that they would ever have assented to it? – or, if the Southern States had imagined such a construction would be put upon it, that they would ever have proposed it?[608]

Instead of the scenario of enslaved people escaping across state lines, the existing proslavery leviathan became the version of the Union for which the Founding gave no sanction.
In Wisconsin, Booth and the court emerged as public heroes. Press, speeches and elections celebrated them. While the whole South, all constitutional unionists and those troubled by the institutional implications decried the court's action as outright nullification or worse, the case was a rallying point for northern antislavery communities seeking constitutional redemption. Indeed, the only member of the state supreme court to dissent in the *Booth* case lost his seat in the next election for that reason.[609] The judicial stand taken against the Fugitive Slave Law and the possibilities of further constitutional resistance energized a people demoralized by a reigning constitutional regime in tension with their own constitutionalism, a regime that seem to exploit and contradict what they believed to be true. In 1858, the Supreme Court overturned the Wisconsin decision in no uncertain terms, and American state courts recognized federal judicial supremacy in the years before the Civil War. Yet the *Booth* decision can be seen a monument to the legal power of public constitutional history in that moment. The state supreme court expressed an unyielding conviction that the authority of the Founding was great enough to

[608] *In re Booth*, 3 Wis. 157 (1854)
[609] *Milwaukee Daily Sentinel*, July 31, 1854; *Milwaukee Daily Sentinel*, February 06, 1855.

sustain among the most radical of judicial acts – rewriting the constitutional system in which it exists. The Wisconsin judges may not have believed in the federalism they prescribed in the course of the decision, but they were certain that they were redeeming the original Constitution and that the Founding justified their action.[610]

Dred Scott: Apotheosis

The judicial apotheosis of the Founding in antebellum America came with the nadir of constitutional adjudication against black Americans. In 1857, the Supreme Court in *Dred Scott v. Sandford* ruled that African Americans, slave or free, lived perpetually beyond the pale of the Constitution: they could not sue in federal court, and slavery was beyond the control of Congress even in federal territory. With fractious, dueling histories offered by various justices, *Dred Scott* represented the culmination of the Founding's legal labor. The Court leveraged Founding authority to impose a historically-ordained quiescence where present-day policymaking could not. As Justice Wayne asserted, the case "involved constitutional principles of the highest importance about which there had become such a difference of opinion, [such] that the peace and harmony of the country required the settlement of them by judicial decision." Striking down the Missouri Compromise and declaring the national fathers as slavery's truest friends were acts of radical originalism, whether historically accurate or fanciful. The court could not do it alone: they invoked the Founding again and again, pushing it to perform the work of public legitimation on an unprecedented scale. To achieve this manifest proslavery Founding, familiar in the South but much less so elsewhere, Chief Justice Taney told the country to shift their public memory. "It is difficult at this day to realize the state of public opinion in relation to that unfortunate race which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence and when the Constitution of the United States was framed and adopted."[611] According to Taney, the real story of intergenerational declension since the Founding was the relative fall of racial prejudice. The national fathers had taken racial exclusion for granted, he recalled. When the "great men -- high in literary acquirements, high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting" wrote of freedom and equality, "they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery." Their Constitution had no place for African-Americans as citizens, only as property or subjects.

The arguments and opinions in *Dred Scott* were tendentious research papers in the meaning of the American past. They only became recognizable as constitutional argumentation because decades of legal practice had incorporated the idioms, sources, and authority of makeshift Founding history. Yet the opinions went further: the incorporated authority took possession of the whole, merging so thoroughly as to make them a new kind of constitutional artifact. In *Dred Scott*, the synthesis of popular constitutional passions and jurisprudential form, born through conflicts over slavery, achieved full articulation. Legal readers then and since have struggled to locate doctrinal lines, to identify holdings, dicta and reasoning, and to analyze the decisions in conventional fashion. In part, this reflects from a misapprehension of the kind of constitutional law at work. Popular history was the tissue with which the Court worked. The arguments and opinions reveal a tense contest to tell a prevailing Founding story and seize control of the structure of antebellum constitutionalism to legitimate rulings.

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[610] *Ableman v. Booth*, 62 U.S. 506 (1859).
[611] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

Antebellum constitutionalism had come to require, and thus to invent, original understandings and settlements conflicts of slavery. The attorneys arguing the *Dred Scott* case had to give historical accounts. The Constitution, as a body of meaning beyond its text, could not withhold an answer when asked. Arguing on behalf of Scott, Montgomery Blair portrayed a Founding populated by national fathers committed to the end of slavery. Constitutional text provided only one element for this construction. The history of Congress under the Articles of Confederation, the history of the Northwest Ordinance, the Federal Convention, the *Federalist*, Madison's ruminations, and plenty of faith in the fathers provided the crucial material for the Maryland attorney's appeal. "That such men, animated by such sentiments, should form a constitution which imposed slavery on the Territories of the Union, or, which is the same thing, did not admit of the exercise of power to prohibit its introduction, is not to be supposed; especially as the controlling spirits of both bodies—the Congress of '87 and the convention then sitting and framing the Constitution—were the same men," he urged. To think otherwise was to participate in betraying of the Founding. Thus Blair contended that the reactionary movement to make slavery national through the case belonged to the same effort to reopen the slave trade and to enslave "the poor of our race, as proposed in Mr. Fitzhugh's work on Southern society," a project that would prove "that the era of the founders has passed."[612]

Constitutional historian George Ticknor Curtis appeared to argue specifically about the original power of Congress over federal territories. In effect, as the leading author on the Founding, he provided expert historical testimony on what he announced was "eminently a historical question" – because "when you have once ascertained the historical facts out of which the particular provision arose, and have placed those facts in their true historical relations, you have gone far towards deciding the whole controversy."[613] Curtis came with a dossier of archival materials, such as proof of Richard Lee transmitting the Northwest Ordinance from Congress to George Washington at the Convention. He erected a narrative history of the critical constitutional phrase, that the "Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory" of the United States. "We have arrived, then, at the summer of 1787 with these facts," Curtis proclaimed. Beneath the phrase, he told listeners, lay a rare achievement "of the pen by which a man of great experience and legislative tact, sitting as if in the centre of men's minds, and combining their thoughts and purposes into a single sentence, engraves the needed provision upon the record by a single stroke, and leaves it to do its office through all coming time." The current generation lived in that time. To now tell stories in which the framers never meant to allow plenary federal authority over new territories was to deny their authorial triumph. Curtis' analysis of the application of this constitutional text self-consciously ceased by 1804 – "for at this point of time we leave the actual presence of its framers and their contemporary generation." The Founding was sealed shut at that juncture. While Reverdy Johnson's arguments are not available outside their presence in the majority decisions, George Curtis later recalled: "It was the forcible presentation of the southern view of our Constitution, in respect to the relation to slavery to the territories and of the territories to the nation, that contributed more than anything else to bring about the decision that was made in this case….

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[612] "Brief for Plaintiff," in *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional law, Volume 3* (Washington DC, 1978).
[613] "Oral Argument (by Mr. Curtis for Plaintiff)," *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional law, Volume 3* (Washington DC, 1978).

Those who were opposed to him (and I happened to be one of them) felt the force of his arguments and foresaw what their effect would be on a majority of the Court."[614]

Taney wrote the opinion of the Court to author the Founding. From the position of Chief Justice, straining with all the authority he could muster, he sought to script a proslavery origin story for the Constitution and stamp into law a version of the Founding whose power would flow to uphold a slaveholding Union. The heart of this project lay in toppling an aspirational vision of the Founding, of ensuring that the language of equality in the Declaration of Independence meant not what it said. In effect, Taney needed to override inconvenient text, to imprison the Preambles in a proslavery past. The assorted rulings contained within the opinion for the court, whether holding or dicta, depended on this first-order work. This is why Taney insisted multiple times that: "it is too clear for dispute that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration, for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted, and instead of the sympathy of mankind to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation." Taney made the mind of slaveholding Founders his lodestar. Their wishes and ascribed logic controlled. The "great men of the slaveholding States, who took so large a share in framing the Constitution of the United States and exercised so much influence in procuring its adoption," would never have built a Union that gave citizenship rights to people of color. The notion of African Americans engaging in interstate travel, exercising free speech, holding political meeting and bearing arms were named as the parade of horribles; implicitly, Taney rebuked white men in free states for now betraying the Founding to the extent that they permitted such activity.

A Supreme Court dominated by southern and Democratic justices, seeming to embody the Slave Power's disproportionate political might, joined in the project of authoring the past to decide the present. Justice Campbell worked through the words of framers and founders. He boasted of the archival conjuncture at which he sat. "The publication of the journals of the Federal Convention in 1819, of the debates reported by Mr. Madison in 1840, and the mass of private correspondence of the early statesmen before and since, enable us to approach the discussion of the aims of those who made the Constitution with some insight and confidence," Campbell wrote, recruiting their authority as his own.[615] Justice Catron concurred that everything in the Constitution possessed a "history that must be understood before the brief and sententious language employed can be comprehended in the relations its authors intended." In a project devoted to authoring the Founding, the text itself could not trusted – only the minds of national fathers as the southern justices reconstructed them. Justice Daniel invoked latter day criticism by Madison during the Missouri Crisis and mocked the notion of a Founding that permit the government to treat enslaved people in any way other than as ordinary property: "Can there be imputed to the sages and patriots by whom the Constitution was framed, or can there be detected in the text of that Constitution, or in any rational construction or implication deducible therefrom, a contradiction so palpable as would exist between a pledge to the slaveholder of an equality with his fellow citizens, and of the formal and solemn assurance for the security and enjoyment of his property, and a warrant given, as it were *uno flatu,* to another to rob him of that property, or to subject him to proscription and disfranchisement for possessing or for endeavoring to retain it?" Justice Wayne knew that that striking down the Missouri Compromise

[614] Bernard Christian Steiner, *Life of Reverdy Johnson* (Baltimore, 1914), 38.
[615] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

and exiling black Americans in far-reaching ways tested the boundaries of the Court's power. Knowing that many would curse this judicial act, he claimed that the court had done its duty as an independent department, "as the framers of the Constitution meant the judiciary to be, and as the States of the Union and the people of those States intended it should be, when they ratified the Constitution of the United States." In carrying out the work of the *Dred Scott* decision, legitimation weighed on the Court's mind.

The two dissenting justices saw the techniques and tropes of antebellum constitutionalism that they had long performed turned against them. In their years on the bench and in practice, John McLean and Benjamin Curtis had addressed major cases involving the constitutional politics of slavery. They had claimed the Founding many times before, reverently deferring to what they assumed were the sacred compromises that formed the Union and would ensure its safe passage across generations. At the time, they imagined that they held fast to historical truth, to a particular set of substantive commitments entered into the Constitution at its genesis. With *Dred Scott*, the jurists discovered that when the Court belonged to the South, the constitutional history they believed into turned soft; truth and fact became contestable, and the structure of antebellum constitutionalism provided little limitation in itself. McLean defended the Founding that he cherished: "I prefer the lights of Madison, Hamilton, and Jay as a means of construing the Constitution in all its bearings, rather than to look behind that period into a traffic which is now declared to be piracy… Our independence was a great epoch in the history of freedom, and while I admit the Government was not made especially for the colored race, yet many of them were citizens of the New England States, and exercised, the rights of suffrage when the Constitution was adopted, and it was not doubted by any intelligent person that its tendencies would greatly ameliorate their condition." But in dissent, the justice's admiring professions sounded like a eulogy. The work of analytical history that Curtis offered up as a dissenting opinion combined his own investigations with the research tendered by Blair and his brother. The former scholar wrote with didactic anger against the claims of the majority: "It has been often asserted that the Constitution was made exclusively by and for the white race. It has already been shown that, in five of the thirteen original States, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established. If so, it is not true, in point of fact, that the Constitution was made exclusively by the white race." This opinion illustrated that the central point of dispute was hardly a matter legal analysis; rather it a failure of historical practice at the vital heart of American history, the past that each generation was trained to guard and transmit in its purity. Soon after filing his dissent, Curtis resigned from a Court in which he no longer belonged.

Taney authored a Founding that many Americans could not believe in. When Abraham Lincoln went on the campaign trail, he mocked the court's "assum[ption] as a fact that the public estimate of the black man is more favorable now than it was in the days of the Revolution," conjecturing that if the "framers could rise from their graves they could not at all recognize" the documents they authored.[616] In his "Historical and Legal Examination" of the case, the disgruntled Democrat and doubting slaveholder Thomas Hart Benton shared this outlook, accusing the Court of "inserting new clauses in [the Constitution] which could not have been put

[616] *Speeches and debates 1856-1858, comprising political speeches, legal arguments and notes, and the first three joint debates with Douglas, and the opening of the fourth* (New York, 1907).

in it at the time that instrument was made nor at any time since nor now."[617] Similarly, attorneys Horace Gray and John Lowell, both future Republican federal judges, issued an expansive *Legal Review of the Case of Dred Scott* that echoed and enlarged upon the historical claims by the dissenters – showing, for instance, that "since the time of the adoption of the federal Constitution, free negroes have not only been recognized as citizens but allowed to exercise one of the highest privileges of citizenship, that of voting."[618] In New York, a special Joint Committee of the New York legislature understood the decision as doubly illegitimate. Not only were its historical claims and assertions that people of color, even those whose "grandfather served with honor, or died in battle under our Washington," were not citizens utterly "hostile to the spirit of our institutions"; but the very conduct of the Court also violated the Founding vision for the Court, "established by our forefathers to secure a fair and enlightened exposition of the Constitution."[619] The solace that the committee took lay in a newly blunt reckoning with the relationship of law and politics in the judiciary that would strike down long-enacted laws and instate legal sectional regimes. *Dred Scott* "will be overruled as soon as the Free States have their just representation on the bench," the lawmakers reported. In the *New York Herald*, one commentator described the justices as "men who alter our Constitution for us" from "what its framers never thought of putting into it – what no man discerned in it till a very few years since it was seen, with the aid of optics, sharpened by the eager desire to preserve the political ascendency of the slave States."[620] A livid Wisconsin writer declaimed, "We are so firm in the belief that the founders of this government had a higher and a nobler object in view, when they gave expression to the great truths which underlie the Declaration of Independence, and the Constitution of the United States, than to confer and guarantee the right of the property in man, that we will not willingly stigmatize the memory of the honored dead by attributing to them so unjust an intention."[621] In response to the decision, the New Hampshire legislature formed a special committee that reported "we are compelled to believe from the misstatements and perversions of historical facts in the opinion delivered by the court that the decision was the result of pro-slavery sympathies and an improper desire to favor and strengthen the slaveholding interest."[622] The public expressions of outraged historical sensibilities went on and on.

Many southern voices and diehard constitutional unionist inevitably celebrated the decision. As proslavery publisher John H. Van Evrie wrote, the decision "must be accepted and sustained by the northern masses," who must "abandon the false mental habits imposed on them by them" and embrace "the fixed and immutable truths of the Dred Scott decision," in order to "save for their offspring the glorious institutions won by the blood and sacrifices of their fathers."[623] But unlike after the Fugitive Slave Law of 1850s, there would be no wave of mass Union saving meetings to rally support for the decision. Endangering people of color was one

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[617] Thomas H. Benton, *Historical and legal examination of that part of the decision of the Supreme Court of the United States in the Dred Scott Case, which declares the unconstitutionality of the Missouri Compromise Act, and the self extension of the constitution to territories, carrying slavery along with it* (New York, 1858).
[618] Horace Gray and John Lowell, *A Legal Review of the Case of Dred Scott* (Boston, 1851).
[619] "Report of Joint Committee of Senate and Assembly relative to a certain decision of the Supreme Court of the United States in the case of Dred Scott, Senate Doc. No. 201," *Documents of the Assembly of the State of New York, Volume 3* (Albany, 1857).
[620] "The Dred Scott Decision—The New York Herald Versus the New York Tribune," *New York Herald*, April 14, 1857.
[621] "Manly Protest," *Milwaukee Daily Sentinel*, April 1, 1857.
[622] "New Hampshire Legislature," *New Hampshire Statesman*, June 20, 1857.
[623] *Opinion of the Chief Justice with an Introduction by DR. J. H. VAN EVRIE…* (New York, 1859)

thing; ill-treating the Founding and encouraging slavery's extension was another. The *New York Evening Post*, in an editorial that circulated in South Carolina, explained the mistake of those who thought the Dred Scott decision would bring an end to national conflict. According the writer, the "five slaveholding judges on the bench" had lost legitimacy, their minds "tainted, beyond recovery" by sectional political prejudice. Popular understanding of constitutional history and faith in the Founding, so often an asset to slaveholding interests, could sap institutional authority, just as it could confer it. The *Post* signified this enervation: "The Constitution which they now profess to administer, is not the Constitution under which this country has lived for seventy years; it is not the Constitution which Washington, Franklin and Jefferson, and the able jurists who filled the seat of justice in the calmer days of our republic, recognized; this is not the Constitution to which we have long looked up with reverence and admiration; it is a new Constitution, of which we have never heard till it was invented by Mr. Calhoun."[624] Stripped of the authority of the Founding, the Court stood naked of the cultural support structure that clothed its slavery jurisprudence.

After *Dred Scott*, new controversies broke over the horizon. The *Lemmon* case in New York threatened to declare free states open to travelling slaveholders bringing enslaved people within their borders. As the *New York Times* fretted, only "one more decision is needed to make slavery the actual law of the whole Republic and render its prohibition in any of the states null and void; - and this we shall probably have when the Lemmon case reaches the same tribunal."[625] In the *Amy* case involving federal punishment of an enslaved person for interfering with the mails, Justice Taney would have opportunity to further script a Founding in which enslaved people had the exclusive identity of personal property. And the *Nuckolls* case from Nebraska Territory, where Eliza fled her enslaver inside a jurisdiction with no municipal slave law, threatened to elaborate the implications of *Dred Scott* – unambiguously imposing judicial protection for slavery in all federal territories.[626] After decades of contestation, the Supreme Court sought to fix the constitutional identity of slavery, staking it in place with the authority of history. Inherent in popular fears of "another Dred Scott" was the disorienting sense that the Court could freely rewrite the American Founding to suit southern visions and proslavery narratives.[627] The *Boston Journal* lamented that "the past is unsettled" after *Dred Scott*, as the "decision is in direct opposition to the intention of the framers of the Constitution." A public trained to revere the Founding discovered that the ground of sacred national history was malleable clay in the hands of the Court. The realization prised apart institutional and historical authority. When free white Americans imagined the source of constitutional authority in the late 1850s, they did not picture the Supreme Court, an unassuming hall in the Capitol that most had never seen depicted. Instead they pictured what schoolbooks, prints and papers had long illustrated, what antebellum constitutionalism had fixated upon: the interior of Independence Hall, with the framers in place at Washington standing before them, Constitution in hand. As they experienced the proslavery judicial mobilization of history, as they mounted their own historical defenses in court and out of doors, they confirmed that the Founding was a weapon, not a treaty.

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[624] "The New Federal Constitution," *Charleston Mercury*, March 16, 1857.
[625] "Opinions of the Press upon the Slavery Decision of the Supreme Court," *Bangor Daily Whig & Courier*, March 12, 1857.
[626] *Report of the Lemmon slave case: containing points and arguments of counsel on both sides, and opinions of all the judges* (New York, 1860); *Lemmon v. People*, 20 N.Y. 562 (1860; "U.S. v. Amy," 4 *Quarterly Law Journal* 163 (Va. Cir. Ct. 1859); "The Western Democracy," *Chicago Daily Tribune*, November 15, 1860
[627] "Chicago Fugitive Case," *Cleveland Morning Leader*, November 24, 1860; Julian, *Political Recollections.*

CHAPTER EIGHT

DEGENERATE SONS: SLAVERY'S CONSTITUTIONALISM AND THE SECTIONAL CRISIS

The Paradox of Constitutional Restoration

For three weeks in February of 1861, the doors of Willard's Hall in Washington D.C closed each day behind a conclave of antebellum political luminaries. Inside the unofficial edifice, delegates from over twenty states held secret debates on amending the Constitution. This so-called Peace Convention counted former President John Tyler, William Rives, David Wilmot and Salmon Chase among its approximately 130 members over the weeks that it convened at the prominent hotel. According to the invitation that Virginia circulated among state governments calling forth such delegates, the conference represented "a final effort to restore the Union and the Constitution in the spirit in which they were established by the fathers of the Republic." No reporters or stenographers gained entry. No daily summaries of deliberations were shared with the public. The conduct of the Federal Convention in 1787 was on the delegates' minds with respect to this policy and many other subjects. As James Seddon of Virginia urged, "it certainly is the course of wisdom that we should follow the illustrious example of the framers of the present Constitution and sit with closed doors." Steeped in decades of sectional and constitutional conflict, the delegates arrived with different agendas and oppositional views of what it meant to "restore" the Union to its original spirit. But they understood the conference asked them to consider whether, how and on what basis to alter the Constitution of their fathers.[628]

As the Capitol awaited the March 4 inauguration of Abraham Lincoln, the integrity of the Union seemed to be wrapped up in questions of constitutional continuity and change. Six Deep South states had purported to leave the Union in the two months preceding the conference. Organized under a provisional Confederate Constitution that emulated the United States Constitution, they were busy courting a much-divided Upper South to join them in forming a nation-state for slavery.[629] As talk of further secession and federal coercion grew, so too did claims upon the Constitution – as though proper instructions, justifications, solutions and even proper amendments could be coaxed from the history of its creation. During this uncertain span of national rupture, efforts to stave off further disunion revolved around fixing the constitutional place of slavery. The public political imagination in the waning days of antebellum America conceived of a settlement within the Constitution as the only possible means of resisting the crisis and wherever it might lead. New legislation, promises by incoming Republicans not to interfere with southern slavery, practical political calculations foreclosing national abolition, and existing constitutional understandings all appeared inadequate to stem the secessionist momentum of a South confronting its loss of control over the federal government. Even among the many Republicans who opposed further compromise or any constitutional change that gave an inch to slavery, there was a desire to achieve constitutional clarity. In the preceding years of

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[628] Lucius Eugene Chittenden, *A Report of the Debates and Proceedings in the Secret Sessions of the Conference Convention, for Proposing Amendments to the Constitution of the United States: Held at Washington, D.C., in February, A.D. 1861* (Washington DC, 1864), 12; Daniel W. Crofts, *Reluctant Confederates: Upper South Unionists in the Secession Crisis* (Chapel Hill, 1989)

[629] William Freehling, *The Road to Disunion: Secessionists Triumphant, 1854-1861* (New York, 2007); Charles Dew, *Apostles of Disunion: Southern Secession Commissioners and the Causes of the Civil War* (Charlottesville, 2001).

intense sectional strife, every facet of constitutional conflict of over slavery had been subject to competing of true meaning. As Lincoln, with strategic charity, remarked in Steubenville, Ohio on his way to Washington in February 1861,"I believe the devotion to the Constitution is equally great on both sides of the river. It is only the different understanding of that instrument that causes difficulty."[630]

The convention in the Willard Hotel belonged to a moment in which Unionists in the broadest sense searched for a constitutional remedy. In and out of Congress, Americans considered amending the Constitution with a seriousness lacking since at least the 1810s, if not the drafting of the Bill of Rights in the First Congress. During the months between Lincoln's election and inauguration, officials contemplated undertaking a second founding on the subject of slavery, one that would impose explicit constitutional settlements where combatants has previously relied upon claims of original meaning. In each house of Congress, special committees formed to deliberate on possible alterations of the sacred text. Proposals ranged widely while southern senators and representatives still shared the halls of the Capitol with Republicans elated at having finally toppled the slave power Democracy.[631]

The Peace Convention was an exemplar of this moment of constitutional searching Convened as an assembly with the sole purpose of seeking amendatory language for the country to adopt, it compelled delegates to reflect on making a new founding. Yet they could hardly confront it as such. Their pursuit was carried out with the halting vocabulary and staged from the limited vantage of a constitutional culture profoundly uncomfortable with constitutional change. Proslavery southerners and antislavery Republicans spoke alike of restoring the fathers' Constitution, but they disagreed on whether this required substantially changing the existing text, clarifying original intent by amendment, or doing nothing to the instrument but adhering to it scrupulously – a restoration through action. In effect, they faced off over whose Founding story would prevail. Or put differently, they reflected a desire to keep the Founding while potentially changing text itself.

Throughout the Convention, delegates hewed to a paradigm of Founding deference even in the course of proposing constitutional change. Deep into the debates in Willard's Hall, Massachusetts Lieutenant Governor John Goodrich struck upon this frustrating, illusive framework that governed their ongoing negotiations. As observer and participant, he traced with clarity the hard cultural walls of constitutionalism that enclosed him, his fellow delegates and the American public. "(Mr. Rives) from Virginia demands a 'restoration of the Constitution to the landmarks of our fathers,' and his colleague (Mr. Seddon) urges a return to the 'policy of our fathers in 1787.' This assumes that we have departed from the principles and landmarks of our fathers, and from the policy of 1787. The call of the Convention assumes this; the platform of the Republican party assumes it," remarked Goodrich. And he agreed that "it is true." Taking one step towards specificity, the former congressman further observed that the Virginia General Assembly's organizing resolutions professed that such a return to the Founding would "afford to the people of the slaveholding States adequate guarantees for the security of their rights." With this premise, Goodrich likewise concurred. "I agree that it will; and I am ready, and Massachusetts is ready… to give the guarantees demanded in exactly this way." Yet all this

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[630] Henry Jarvis Raymond, *The Life and Public Services of Abraham Lincoln ...: Together with His State Papers, Including His Speeches, Addresses, Messages, Letters, and Proclamations, and the Closing Scenes Connected with His Life and Death* (New York, 1865), 136.

[631] Daniel Crofts, *Lincoln and the Politics of Slavery: The Other Thirteenth Amendment and the Struggle to Save the Union* (Chapel Hill, 2016).

surface agreement, articulated in terms of following the Founding, skimmed across a chasm in understandings of how to bridge past and present. "Stated in these general terms, there is a perfect agreement between us. But we find a wide difference when we go one step farther and learn precisely what Virginia claims would be a restoration of the Constitution to the principles of the fathers and a return to the policy of 1787," Goodrich declared. As a measure consistent with "the spirit of compact of the fathers," for example, Seddon had demanded "a guarantee of actual power in the Constitution and in the working of the Government to the slaveholding and minority section is indispensable." One such guarantee would nationalize and constitutionalize the principle of a government by and for white people down to the most local office, a vision that many in the South had come to believe inhered in the Founding. "The elective franchise and the right to hold office, whether federal, State, territorial, or municipal, shall not be exercised by persons who are in whole or in part of the African race," Seddon proposed. This was new text that corresponded to ascribed original values.[632]

The antislavery Goodrich was not a detached and ironic observer in this debate. Nor did he hold himself apart from the standard of the Founding, for which the Massachusetts delegate offered a definition of its scope and authority. "By the spirit of the compact of our fathers, is meant the Constitution as they understood it, and as the people of that day understood it. And this is what is meant by the 'landmarks of the fathers.' All admit that the Federal Government should be administered now as it was administered by its framers." The authorial minds behind the Constitution remained the compass by which to judge constitutional amendments undertaken for the restoration of original visions. This constitutionalism channeled the Peace Convention right back to the abiding, ever-renewing question that lay beneath its epistemic consensus. As Goodrich asked: "Then what is the Constitution as understood by those who framed it? What does it mean when interpreted by the light of the policy of 1787, and what is the spirit of the compact which they made? This is the question we are called to consider. In my remarks, I do not mean to wander from it."[633]

His answer did not. In the long argument that followed, he drew on Founding era documents and secondary sources to relate a joint history of the formation of the Constitution and Northwest Ordinance. In his telling, a sectional deal had been struck in the Federal Convention and the Continental Congress: the "original" – and only the original – slave states received the fugitive slave clause under the new Constitution, and all new states to be formed under the control of congress would never host slavery. "This manifestly was the meaning of the fathers when the ordinance and Constitution were framed and ratified." With this story of constitutional meaning established, Goodrich could return to the general ground that he shared with hostile colleagues. "Southern gentlemen in this Convention propose to be governed by the principles of the founders of the Government, and by the Constitution or compact of union as those founders understood it…. Let me assure gentlemen from the slave States that if they are really in earnest in offering these terms of adjustment, this unhappy controversy can be settled in less than an hour's time." This work of adjustment, conducted in the illuminating and authoritative light of history, was indeed simple: to prevent the further extension of slavery. As Goodrich concluded, "I propose to begin the work of 'restoring the policy of 1787' by applying the ordinance of 1787 to every foot of organized and unorganized territory, wherever situated, which now belongs to the United States, precisely as the fathers applied it to every foot of such territory at the time the Constitution was made; and I ask, in all earnestness and seriousness,

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[632] Chittenden, *A Report of the Debates and Proceedings in the Secret Sessions of the Conference Convention.*
[633] Chittenden, *A Report of the Debates and Proceedings in the Secret Sessions of the Conference Convention.*

what any member of the Convention can have to say against this who sincerely desires to 'restore the Union and Constitution in the spirit in which they were established by the fathers of the Republic.'" This return, or restoration or adjustment was the Republican doctrine of no new slave states. It had become one of the antislavery understandings of the Founding. In the Convention, Goodrich described with exceptional lucidity the chasm that lay beneath the delegates' shared constitutionalism of the Founding. But as his subsequent argument demonstrated with no less force, seeing the chasm in understandings did not release him from the Founding's conceptual and rhetorical boundaries. Its ingrained presence and instrumental power were too great. To the last, antebellum constitutional consciousness structured how Americans grappled with the slavery and secession.[634]

As this chapter shows, the struggle to bridge the constitutional past and present during the secession crisis bore the imprint of two generations of fighting about slavery through the Founding. For thirty years, creation stories of the Constitution had served as an indispensable weapon in the arena of popular politics and legislative action. In the hands of adversarial politicians and publics, the Founding's authority, narrative forms and command of popular faith had provided a sword and shield in successive conflicts over governing slavery across different jurisdictions. Contestation over slavery was inherently spatial – a matter of controlling people in places near and far. Proslavery or antislavery Americans variously turned to the Founding to extract rules for an expanding Union where the constitutional text was silent, inconvenient or unbelievable. Looking backward and forward in time at the end of January 1861, Senator Lazarus Powell of Kentucky attested balefully to a process of weaponization that had long worked in slaveholders' favor: the "Constitution, as interpreted by the Republican party, instead of being a shield for our defense, is used as an instrument for the destruction of our rights of property in the common territory of the Union. For the first forty years of our Government, the rights of our people were everywhere maintained under the Constitution; indeed, in those earlier and better days of the Republic, so light were the exactions the Government made on the people, and so ample the protection it afforded to persons and property everywhere, that we scarcely knew we had a Government, save from the benefits we enjoyed."[635]

From controlling speech and mail touching slavery; to congressional power to regulate slavery in the District of Columbia; to the annexation of Texas and war with Mexico; to the restriction of slavery in western territory; to federal powers in aid of fugitive rendition; and to the constitutional status of enslaved people as property in federal spaces and transit, Americans had shaped a constitutional history that, in turn, shaped how they fought. In these serial conflicts, the Founding that people constructed and believed in produced specific, contested lessons for Americans to obey. Political bodies made this history to govern themselves, their sectional antagonists and African-Americans living in bondage or relative freedom. This Founding imaginary still held sway in 1861 as the South reconstituted itself as the Confederate States of America. The Peace Conference delegates' self-abnegating approach to amending the Constitution before the Civil War – what would have amounted to a proslavery second founding – revealed that they clung to claims upon the Founding. Not only the points of conflict they perceived as crucial but their framework for advocating or resisting amendments reflected the constitutional stories they told and the past they assumed. This chapter begins in 1861 with political adversaries grappling not only with one another but also with the confines of their constitutional culture. As they contemplated a proslavery re-founding, they still carried an

[634] Chittenden, *A Report of the Debates and Proceedings in the Secret Sessions of the Conference Convention.*
[635] Cong. Globe Appendix, 36th Cong., 2nd Sess. (1861), 91.

arsenal of historical claims. Then it travels through the preceding three decades to illustrate how fighting through the Founding had structured the rush of conflict over slavery that produced war between the Union and a new nation-state explicitly founded on slavery.

The Unchangeable Constitution

The Peace Convention, imbued with personal prestige and relative insulation from the vituperative performances in Congress, was a project of the slaveholding border states. From the beginning, its organizing voices sought to make the Union perpetually safe for slavery in the eyes of southern states. In response, many delegates came not to alter the Constitution but to defend it "as it is," though advocates of new text sought to style their appeals as serving this preservationist cause.[636] The New York attorney James Smith expressed his skepticism of change in terms of veneration. "When we are asked to alter a Constitution that was made by Washington and Madison under which the country has grown to wealth and happiness," he mused, "we certainly ought to approach the subject with the utmost deliberation." From Pennsylvania, Thomas White urged that that the best response to the question of what to do was nothing. "My answer is live along as we have done before," he vowed. "Our Constitution is good enough for a people who are wise enough to live under it." The debates elicited frequent attacks upon northern states for constitutional negligence or malfeasance. After one instance John A. King rejoined, "I revere the Constitution of my country. I was educated to love it, and my own father helped to make it." The scion of framer Rufus King invoked his antebellum cultural training and his personal, paternal connection to the Founding as he defended "the Constitution as it now stands." Roger S. Baldwin of Connecticut, grandson of framer Roger Sherman, objected to the Peace Convention's very form on grounds of deference to the Founding. "This was not one of the modes contemplated or provided by the framers of that sacred instrument." The framers and ratifiers, he argued, "did not intend that amendments should be proposed under, or the existence of the Constitution endangered by, any extraneous pressure whatever." John Guthrie of North Carolina disputed the point, brandishing his own sense of the Founding. "I have made the Constitution my study for many years, and I have looked at the causes which give it strength and the causes which give it weakness," he stated. "I believe that our fathers organized this Government in great wisdom" and with "the affections of the people," he argued, and the Peace Convention thus must rekindle popular affection through amendments restoring the balance intended by the framers. William Rives of Virginia argued that the arc of the Founding legitimated their assembly. Explaining how the Annapolis Convention had convened prior to the Federal Convention, he asserted that the "first Convention was just as unconstitutional as this. The two cases were perfectly alike" but with the current "crisis [] infinitely more important."[637]

Advocates for constitutional change felt the anchor of a sacral Founding and Constitution tethered to an authoritative past. The merchant magnate William Dodge disclaimed expertise with the finer points of legal debates but spoke as a beneficiary of prosperity produced by the Constitution. "I venerate it and its authors as highly as any man here," he contended, "But I do not venerate it so highly as to induce me to witness the destruction of the Government rather than see the Constitution amended or improved." When Theodore Frelinghuysen of New Jersey expressed support for "constitutional guarantees" respecting slavery, he felt compelled to defend

[636] Robert G. Gunderson, "The Washington Peace Conference of 1861: Selection of Delegates," *Journal of Southern History*, Vol. 24, No. 3 (Aug. 1958), pp. 347-359; Kenneth M. Stampp, "Letters from the Washington Peace Conference of 1861," *Journal of Southern History*, Vol. 9, No. 3 (Aug., 1943), pp. 394-403.
[637] Chittenden, *A Report of the Debates and Proceedings in the Secret Sessions of the Conference Convention.*

the decision to touch the Constitution "that Washington signed" due to the changed circumstances that "when he did so, we had a population of but three millions, and now we have a population of upward of thirty millions." Former New Hampshire congressman Amos Tuck exhibited the tension between reverence for the Founding and the horizons of constitutional change. One of the earliest organizers of the Republican Party, Tuck professed total veneration: "we do not doubt that the theory of our Government is the best which is possible for this nation, that the Union of the States is of vital importance, and that the Constitution which expresses the combined wisdom of the illustrious founders of the Government is still the palladium of our liberties, adequate to every emergency and justly entitled to the support of every good citizen." From this posture, the scope of constitutional change had an inherently self-limiting quality. If circumstances caused people to "believe they ought to have their rights more exactly defined or more fully explained in the Constitution, it is their duty in accordance with its provisions to seek a remedy by way of amendment to that instrument and it is the duty of all the States to concur in such amendments as may be found necessary to insure equal and exact justice to all." Constitutional amendment entailed definition and explanation, not creation or destruction. Greene Bronson, corporate counsel for the City of New York, more comfortably joined his reverent constitutionalism to a degree of textual change. But it was still an act of historical caution. "I venerate our Constitution," he declared. "Nothing short of Almighty Wisdom could have framed a better. But was it given to human wisdom, to Washington and Madison, to foresee all the events of the future? The Constitution has held us together for three fourths of a century; that is a wonder in itself; but its makers did not foresee this day a day when Freedom itself was in danger of perishing." The unionist Bronson expressed dread at the prospect of a general convention and the wholesale constitutional change it might wreak; he saw the delegates' efforts at constitutional adjustments to represent the best means to preserve the constitutional order intended by the national fathers. Nearly all members felt the presence of the constitutional past in their convention – though hardly as equals to it. When Washington's birthday approached during the debates, Kentuckian Charles Wickliffe urged the group to decide upon amendments and have "the vote taken on the twenty second day of February that we may see whether the same day that gave a Washington to our Fathers may not give Peace to their posterity."[638]

Once it convened in early February, the Peace Convention quickly began working from a slightly modified set of proposed amendments that Senator John Crittenden of Kentucky had introduced in December.[639] Voted down in Congress, that proposal belonged to the accelerating search for constitutional salvation that marked the months prior to the first Republican administration assuming power. The end result of the three weeks of deliberations did not fall far from the original material. Endorsed by a majority of delegates and strongly opposed by the remainder, the Convention produced a lengthy would-be Thirteenth Amendment designed to settle the constitutional identity of slavery across the known range of associated conflicts and crises. Behind each line of text lay decades of disputes over original meanings, federal powers and the limits of political discretion by living generations.

The proposed Amendment wove threads of old constitutional conflicts and narratives into declaratory text through which the new framers aspired to eliminate ambiguity across the range of known disputes. In brief, it set forth a series of rules designed to function as answers to dangerous questions. Slavery would be prohibited north of the 36 degrees, 30 minutes line in all

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[638] Chittenden, *A Report of the Debates and Proceedings in the Secret Sessions of the Conference Convention*

[639] Robert Gray Gunderson, "Letters from the Washington Peace Conference of 1861*," Journal of Southern History*, Vol. 17, No. 3 (Aug., 1951), pp. 382-392.

U.S. territory, effectively extending the Missouri compromise demarcation to the edge of the continent. In the territorial south, no federal action could restrict the spread of slavery; Congress could never interfere with the domestic slave trade; and it would have no discretion to reject the admission of a new state with slavery that met the requisite population threshold. Most forms of further territorial acquisition would be barred without approval by both a majority of senators from slaveholding states and a majority from free states, and territorial growth by treaty would require a two thirds majority in the Senate in addition to the sectional majorities. With territorial increase a recurrent wellspring of conflict, this scheme corresponded to ascribed original visions of sectional balance, consensual protection of southern "minority" interests and the constitutional incapacity of Congress to regulate slavery in federal spaces. The Amendment further stipulated that the Constitution could never be construed or amended to allow Congress to interfere with slavery in any state, nor do so in the District of Columbia without the consent of Maryland and D.C. slaveholders, or, in the latter case, without fully compensating non-consenting slaveholders; and nor could Congress interfere with slavery or the movement of enslaved people through D.C., areas of federal control within slave states and routes of interstate commerce not passing within free states. The interstate slave trade in the Capitol would be abolished and the prohibition on the foreign slave trade made a constitutional rule with a corresponding congressional duty to enforce it. By another provision, Justice Taney's view in *Prigg v. Pennsylvania* would replace that of Story in that state governments would be able to help but not hinder slave rendition. These changes likewise corresponded to long-running constitutional stories and counter-stories that had energized the politics of slavery for three decades. Additionally, Congress would become obliged to compensate slaveholders for escaped fugitives where an officer was obstructed by violence, intimidation or rescue. Except for this last provision, the amendment would ostensibly make the changes unamendable without the consent of all states. That is, the new rules of slavery would enter the Constitution with terms that made their alteration by state unanimity far more arduous than their adoption. But in working all these adjustments and ensuring slavery into the foreseeable future, the Constitution continued to reproduce the framers' decision to never use to the word "slave" in reference to the status of people in the United States.[640] With these proslavery measures as a cornerstone of the post-Thirteenth Amendment Constitution, it was intended by Peace Convention would-be framers that debate over slavery would cease – that there would be nothing left for citizens to petition over, voters to rally around or settlers to skirmish over respecting slavery.

In formulating this proposed Thirteenth Amendment, the Peace Convention could not help but invoke the authority of the Founding and rehearsed narratives of original intent. At one point, Roger Baldwin and Rives argued back and forth over drafting history as to which states had borne responsibility in the Federal Convention for ensuring the continuance of slavery. When Baldwin blamed Georgia and South Carolina, Rives accused New England delegates of having pursued commercial interests over morality circa 1787. Eventually, this debate found Rives, biographer of Madison, reading aloud part of a letter "discovered [] in my researches into the history of the very Constitution" that Madison had composed during the heat of the Missouri Crisis. Deemed "an authority that will command universal respect," this source purported to attest that Congress had no power over the subject of slavery in the territories, and that framer Luther Martin had assured James Monroe of this original understanding during the Crisis. Here Amaziah James, a New York jurist, interjected: "Will you leave that question just where the Constitution leaves it, upon your construction of that instrument? If so, we will agree to give you

[640] Chittenden, *A Report of the Debates and Proceedings in the Secret Sessions of the Conference Convention*, 473.

all necessary guarantees against interference." Rives' answer to this request for interstate trust was telling. "No! I will not leave it there, for it would always remain a question of construction. I prefer to put the prohibition into the Constitution." For the southern delegates, congressional incapacity was already in the Constitution, but northerners could not be trusted to always see it. Under the threat of secession, now was the time to make the Constitution say what they believed it had originally meant. Anticipating ratification by northern states in this moment, Rives continued, "I know they will not refuse to fulfil the compact of their fathers."[641]

Americans had repeatedly traded accusations of betraying the Founding during struggles over slavery in the preceding decades. Their shared premise of reverence and deference had compounded political disputes. As they spoke the same venerative language and embraced common concepts of an authoritative Founding, their constitutionalism tended to represent political opposition as profound treachery that undermined the work of the national fathers. Now facing the actual prospect of consciously undertaking constitutional change, this threat could appear as the stark culmination of decades of betrayal. At the Convention, New York attorney David Dudley Field announced his hostility to amending "a Constitution which, since its adoption by the people of this country, has answered all its needs," one in which Field professed to find no defects whatsoever. But in the proposed amendments, he saw a direct contradiction of the Founding. Southern delegates wished to introduce "guarantees for slavery which our fathers did not and would not give…. These delegates, under the presidence of Washington, aided by the counsels of Madison and Franklin, considered the very questions with which we are now dealing, and they refused to put into the Constitution which they were making, such guarantees to slavery as you now ask from their descendants." In other words, the Peace Convention was not clarifying, explaining or even extending the commitments of the Founding. It was unmaking the original vision.[642]

While the Convention met behind closed doors, the same discourse of constitutional salvation and betrayal echoed outside. At the Republican Club in New York, the attorney Francis Treadwell lectured on the Constitution in January, leading his audience to resolve "That the Constitution as it is, provides the most perfect system of government known to man; that it needs no amendment, and shall have none, at the beck and call of traitors, or their insolent mouth-pieces."[643] Lawmakers in the Capitol skirmished over alternative formulations of a Thirteenth Amendment that would fix slavery in the Constitution and avert disunion. The Crittenden proposals had been tabled at the end of December, but a myriad of other suggestions occupied both houses of Congress. Urging affirmative constitutional protection of slavery in federal territory, Sherrard Clemens of Virginia painted a scene of restoration in the venerative idiom that his generation had been trained to recite. "Let us act as men, and not as partisans; and the old Constitution, now in the very trough of the sea, with battered masts and sails in shreds, rolling at the mercy of every breaker, will again, with her dark and weather-beaten sides, loom from the deep; will again skim over the waves like the sea-bird, that scarce wets his bosom on their snowy crests, ringing with glad shouts, and the rapture of anticipated triumph," he waxed on January 22, 1861.

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[641] Chittenden, *A Report of the Debates and Proceedings in the Secret Sessions of the Conference Convention.*
[642] Chittenden, *A Report of the Debates and Proceedings in the Secret Sessions of the Conference Convention.*
[643] Frances Treadwell, *Secession an Absurdity: it is Perjury, Treason and War; to which are added, Treason defined, Declaration of Independence, and Constitution of the United States* (New York, 1861); Sherrard Clemens, *State of the Union. Speech of Hon. Sherrard Clemens, of Virginia, in the House of Representatives, January 22, 1861* (Washington, DC. 1861).

The lessons of the framers remained both central and wholly inconclusive, with all advocates finding legitimation in their example and ascribed intent. James Gilmer of North Carolina wondered: "Is it possible that the sons of American fathers cannot agree in this trifling matter? If not, then we have lost the spirit of our fathers. What did they do? When they framed the Constitution, nearly all the States owned slaves…. What, pray you, would they do if they were here in our places to-day? Why, they would settle this question immediately. They would not go to dinner before they had settled it."[644] These southern Unionist pleas gained a measure of traction. Thus when the special House Committee of Thirty-three recommended a Thirteenth Amendment that would forbid any other amendment from "having for its object any interference within the States" unless proposed by a slave state and unanimously adopted by every state, dissenting member Mason Tappan invoked national paternal condemnation. His offered the resolution, "That the provisions of the Constitution are ample for the preservation of the Union, and the protection of all the material interests of the country; that it needs to be obeyed rather than amended" because "a Union founded on the protection of slavery, as its 'chief cornerstone,' is not the Union for which our fathers fought, and is not the precious boon which they supposed they had transmitted to their posterity."[645] In Tappan's view and that of Gilmer, the Founding occupied a similar stature. Its implications for slavery and the legitimacy of a constitutional amendment could hardly have differed more.

Mason Tappan's counter-resolution responded not only to the proposed amendment but to the introductory resolution that accompanied it. The majority of the committee announced that "any reasonable, proper, and constitutional remedies, and additional and more specific and effectual guarantees of their peculiar rights and interests as recognized by the Constitution, necessary to preserve the peace of the country and the perpetuity of the Union, should be promptly and cheerfully granted." The language was telling: the resolution claimed to create nothing new but only give guarantees of rights and interests "recognized by the Constitution." This effacement of a second founding about slavery was necessary and natural for these late antebellum aspiring re-framers: for many congressmen, the structure of constitutional culture enabled them to elide responsibility for remaking the Constitution to sustain slavery across time in ways the original text did not.[646]

By the end of February, the committee's proposed amendment had failed to win support. But with inauguration days away, the search continued for some kind of constitutional settlement that might halt the secession crisis without running afoul of the Founding narratives of slavery that authorized Americans' antagonistic positions. It was not the Peace Convention's elaborate Thirteenth Amendment. The Senate voted it down between the third and fourth of March: it baldly violated constitutional convictions of Republicans. But a substitute by Ohio Republican Thomas Corwin, chair of the Committee of Thirty-three, amassed support. Its final text stipulated, "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." On February 28, the House voted in favor, just clearing the two-thirds threshold necessary for constitutional amendments. Then in the early morning of Lincoln's inauguration on March 4, when the Peace

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[644] John A. Gilmer, *State of the Union. Speech of Hon. John A. Gilmer, of North Carolina, in the House of Representatives, January 26, 1861* (Washington, DC. 1861), 7.
[645] Cong. Globe Appendix, 36th Cong., 2nd Sess., (1861), 760.
[646] Mason Tappan, *The Union as it is, and the Constitution as our fathers made it : speech of Hon. Mason W. Tappan, of N.H. : delivered in the House of Representatives, U.S., February 5, 1861* (Washington DC, 1861).

Convention proposal was defeated, the Senate also voted in favor by a sufficient majority. Accordingly, the potential Thirteenth Amendment went out to the states for ratification. Lincoln dutifully circulated the text. Only a few states – Kentucky, Ohio and Rhode Island – quickly ratified the amendment before war began in earnest; then only Maryland and Illinois purported to ratify it in the following years in keeping with the ebb of wartime fortunes and politics. The United States did not re-found itself on the unamendable basis of a nation half dedicated to slavery; but it was close – and far closer than any proposed transformation of constitutional text in the antebellum era.[647]

The Corwin Amendment did not pass Congress in a moment when lawmakers and the broader public embraced constitutional renovation. In all the debates around constitutional change during the prior months, in the failed Peace Convention project and in the arguments immediately surrounding the passage of the Corwin Amendment, this was clear: on all sides, people wished to deny they sought to break with the past. When Pennsylvania Governor Andrew Gregg Curtin entered office in January of 1861, he captured this general cast of mind. "Everything requisite to the perpetuity of the Union and its expanding power would seem to have been foreseen and provided for by the wisdom and sagacity of the framers of the Constitution. It is all we desire or hope for and all that our fellow countrymen who complain can reasonably demand," he remarked. While acknowledging that his state would carefully consider any proposed amendment dictated by necessity, Curtin evinced a deep-seated presumption in favor of the Founding. "Change is not always progress, and a people who have lived so long, and enjoyed so much prosperity, who have so many sacred memories of the past, and such rich legacies to transmit to the future, should deliberate long and seriously before they attempt to alter any of the fundamental principles of the great charter of our liberties."[648] At the same time in Kentucky, while the legislature and Governor Beriah Magoffin were inclined to endorse the terms of the proslavery Crittenden Amendment, lawmakers noted that that "they do not secure to the slave States the full measure of their constitutional equality." And in preparing to ratify the Corwin Amendment, Kentucky's Committee on Federal Affairs wrote that "it does remove one cause of apprehended danger" but "fails to secure to the slave States all the rights to which they are justly entitled."[649] The reigning paradigm of constitutional restoration could support altering or preserving the text; but it was antithetical to a forthright embrace of new authorial authority by the living generation to re-frame the Union on terms contradicting the Founding. In the Peace Convention, it was with a frightened voice, not an enthusiastic one, that Charles Allen of Massachusetts exclaimed, "We are now practically making a new Constitution" and reflected on how much longer and more carefully the framers had deliberated.[650] Under the restoration paradigm, the Corwin Amendment could obtain large majorities, in part, because it could be seen as hardly changing a thing. Overwhelmingly, Republicans agreed that Congress already had no power to command abolition in the states where it existed; and most also conceded that the Congress could not "interfere" by regulating the domestic slave trade. These were trusty

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[647] "Disturbed Condition of the Country," 36th Cong., 2nd Sess., House Rep. 31; Crofts, *Lincoln and the Politics of Slavery*; Norman W. Spaulding, "Paradoxes of Constitutional Faith: Federalism, Emancipation, and the Original Thirteenth Amendment," 3 *Critical Analysis of Law* 306 (2016).

[648] *Journal of the Senate of the Commonwealth of Pennsylvania, at the Session begun at Harrisburg, on the first day of January A.D. 1861* (Harrisburg, 1861), 95.

[649] *Journal of the Called Session of House of Representatives of the Commonwealth of Kentucky…* (Frankfurt, 1861), 391.

[650] Chittenden, *A Report of the Debates and Proceedings in the Secret Sessions of the Conference Convention.*

Founding narratives, hardened over the prior decades. The full scope of interference was a question that could be left for another day.

Thus, what the nearly-Thirteenth Amendment really seemed to accomplish was to extend a set of widely-held views of original meaning across time, to make a popular understanding of the Founding into perpetual constitutional text. This temporal dimension was critical to its passage. Slaveholders had long wielded the Constitution and the Founding during successive moment of political contestation over governing slavery. During the secession crisis, they assumed that the Constitution in northern hands could not serve that function, that it would cease to be their fathers' Constitution by construction and even amendment. As one secessionist pamphlet from South Carolina warned, "Slavery can be abolished 'Constitutionally' in TEN Years."[651] Through a count far more optimistic than antislavery advocates entertained, it argued that "the North will hold, sectionally, the requisite *constitutional number of States*, senators and representatives to enable them to propose and *adopt amendments to the Constitution* as they may please."

Despite illusions of continuity among its supporters, the Amendment's promised perpetuity was far more radical than lawmakers wished to see or admit. The act of creating a virtually unamendable portion of the Constitution on matters of slavery was something the framers had never done, even though antebellum generations would seek to ascribe such an understanding to them. Only the equal representation of states in the Senate was explicitly removed from the power of amendment. The Corwin Amendment represented the arrogation of a kind of constitution-making power greater than that exercised at the Founding: the framers had provided for amendments by future generations; the last antebellum generation sought to disable future generations not only through constitutional culture but textual command. Even if rising generations of white Americans would seek to shrug off slavery via constitutional change, even if the interracial antislavery movement transformed views throughout all but a few southern states, institutional hurdles would guarantee that it remained a millstone around the necks of enslaved people for the foreseeable future. The Amendment would install slavery as a permanent constitutional fixture in the guise of continuity and restoration. At its heart, then, this effort to amend the Constitution can be seen as a project to ensure that future generations could not contradict late antebellum Americans' narrative of original meaning. Having heard and uttered conflicting claims upon a venerated Founding across a series of crises for the duration of their political lives, the debates over amendment were an effort to share a single story. While cementing slavery in the national edifice, its antislavery and proslavery assenters found a way to write new constitutional text that could plausibly be seen as following the Founding.

A Weapon in Use

When the secession crisis erupted in the early months of 1861, Americans did not inhabit a shared constitutional world. Those who would seek to restore their fathers' Constitution through permanent protections for slavery or through realizing ascribed antislavery principles approached the moment bearing an established arsenal of claims upon the Founding. Americans had grown up in the presence of the same constitutional text and reading the same venerative literature. But they were not on the same page in understanding what the Founding had wrought. Acrimony in the present echoed in antagonisms over the past. Sectional alignments of politicians and constituents had cultivated different Foundings that produced different original meanings and, in turn, authorized different policies. This sense of constitutional divergence, of a divided

[651] John Townsend, *The Doom of Slavery in the Union: Its Safety Out of It* (Charleston, 1860).

and contested constitutional ground, was all too familiar from decades of conflict, even as it propagated new shocks across successive fights. These perceived constitutional outrages continued to arise because the specific histories that people told continued developing over the antebellum era. They were works in progress crafted in response to the unfolding constitutional politics of slavery. People suspected the sincerity of their opponents whose positions seemed to present such a clear perversion of original meaning – and because their claims often seemed to incorporate new elements to suit exigent interests.

The Founding was a weapon in popular politics: an instrument with a certain form and capabilities. In waging sectional conflict, Americans struggled to deploy the authority and legitimacy offered by constitutional history, a particular past that had become imbued with such power in order to fight over slavery. As a weapon, the Founding's qualities, materials and limitations shaped how it could be used. The stories that Americans rehearsed and believed structured how they fought. Faith in the Founding was never the origin of conflict over slavery: this constitutionalism was a mediating framework, a conductor and magnifier of struggle. Adherence to a fathers' Constitution was faith in a Constitution that guaranteed what slaveholders, conservative unionists and Republicans valued most; contestation over state power or sovereignty was often a proxy for control over the future of slavery. People did not contest this future because the Founding forced them to do so; they made and remade the constitutional past to contest slavery through its medium and might.

The thirty years prior to the Civil War were replete with episodic crises over slavery at different sites and in different postures. In the litany of clashes that, retrospectively, can be seen as leading to disunion, the Founding runs as a thread. Locating a point when disunion became "inevitable" over this span presumes an artificial separation between contingent events and underlying conditions. The influence of the Founding was felt across these causal categories. As Americans fought over slavery through the Founding, they reflected a constitutional consciousness that belonged firmly to their moment and cultural training. The contingency of their actions operated through the structure of antebellum constitutionalism. To see this work of the Founding, it is instructive to look at serial sectional flashpoints not for their particular origins, actors and resolutions, but rather for the through-line of constitutionalism setting their terms. Politicians and publics adduced specific claims upon constitutional history to govern spaces in the North, South, Capitol and West. They constructed and exalted a Founding that would eliminate any daylight between the Constitution and their most cherished interests. This vantage captures the Founding in action as a weapon of legitimation and an instrument of rule in popular politics. And it shows how Americans had accumulated warring Foundings by 1861.

The Founding of Silence

When the Nullification Crisis subsided in the mid-1830s, another sectional clash was already in motion. During the early part of the decade, the South inaugurated a struggle to control antislavery speech and organization across the United States. Through censorship of the U.S. mail, demands for the criminalization of abolitionist activity and the refusal of Congress to receive related petitions or discuss the whole subject of slavery, southern politics mobilized to extinguish antislavery discourse from the public sphere. This was not the era of the Missouri Crisis, when the majority of the northern public had opposed the extension of slavery. Nor was it the Nullification Crisis, when South Carolina had been relatively isolated at the vanguard of southern extremism. Among a northern public that had been buffeted by sectionalism and constitutional conflict, there was far more hostility than support for antislavery speech that

seemed designed to antagonize the South, disturb the Union and serve no interests they recognized. And for a white South that increasingly embraced proslavery ideology and had committed the lethal 1831 Nat Turner uprising to memory, there was no question that the antislavery movement must be subdued. As an 1835 pamphlet circulating the South declared, "we must either put down the Abolitionists, or in the end they will put us down."[652] The anti-agitation campaign took aim at an 1830s antislavery discourse that adopted a fiercer posture and agenda than its predecessor – though its ends and means were not so different as Unionists claimed. Expressing responsibility for slavery across the country, abolitionists attacked slavery with the ostensible goal of persuading slaveholders to end the evil. At the same time, they urged legislative action to limit slavery where they believed Congress had power to act, particularly the abolition of slavery in Washington D.C. As the newly-founded American Anti-Slavery Society professed in its 1833 Declaration of Sentiments, "there are, at the present time, the highest obligations resting upon the people of the free States to remove Slavery by moral and political action as prescribed in the Constitution of the United States."[653] This expansive sense of national moral responsibility was anathema to the South. The premise that, as 124 members of the clergy declared in 1833, "every man, whether he live at the North, South, East, or West, is personally responsible and has personal duties to discharge, in respect to [slavery]" inspired southerners to discover constitutional barriers.[654]

Initially, when abolitionists mailed tracts to the South and sent petitions to the Capitol, they did not invoke the constitutional authority of the Founding. They presumed the constitutionality of their speech acts as the natural exercise of their rights as free citizens; and they considered their request for congressional deliberation to fall within the realm of policymaking.[655] After all, by the text of the Constitution, Congress had the power to "exercise exclusive legislation in all cases whatsoever" in the District of Columbia. Then the campaign of suppression shifted the matter to the terrain of constitutional history. In order to legitimate a multi-pronged attack on antislavery speech, a kind of activity that would seem to enjoy express protection under the First Amendment, southerners turned to the Founding. Through it, they articulated an original constitutional moment in which the framers and ratifiers had secured the country against a future antislavery movement that had now arisen. As the citizens of Pittsylvania County, Virginia warned, "the intent and design of the constitution of the United States was to secure to the people of these states life, liberty and the pursuit of happiness; and if at any time, by the madness, wickedness, folly and fanaticism of any portion of the people of this union, it should be so perverted as to become destructive of these ends, we cannot be guilty of the folly and rashness of sacrificing to the name of union or to the lifeless remains and mangled members of a dead constitution those rights and liberties which in its full and unimpaired vigour

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[652] Dan Dowling, *The Crisis: Being, an Enquiry Into the Measures Proper to be Adopted by the Southern States, in Reference to the Proceedings of the Abolitionists* (Charleston, 1835).

[653] American Anti-Slavery Society, *Declaration of Sentiments of the American Anti-Slavery Society. Adopted at the formation of said society, in Philadelphia, on the 4th day of December, 1833* (Philadelphia, 1833)

[654] "The Opinion of One Hundred and Twenty-Four Clergymen," in Amos Phelps, *Lectures on Slavery and its Remedy* (Boston, 1834).

[655] U.S. House of Representatives. *Memorial of Citizens of the State of Pennsylvania, Praying for the Enactment of a Law, that All Colored Children Born in the Dist. Of Columbia, after a Certain Day, Shall Be Free.* (Washington DC 1828; Charles Miner, *Speech of Mr. Miner, of Pennsylvania : delivered in the House of Representatives, on Tuesday and Wednesday, January 6 and 7, 1829 : on the subject of slavery and the slave trade in the District of Columbia : with notes; Remarks upon a plan for the total abolition of slavery in the United States* (Washington DC, 1833)

it was calculated to secure."[656] For a time, this story worked. A Founding that in spirit and intent proscribed agitation was a tale by which appeasing northerners could find constitutional ground on which to stand. It rationalized legislative action, public condemnation and mob action. Antislavery minister Amos Phelps complained of this historical rule: "It is said, that we cannot constitutionally meddle with the subject – that in the Constitution we have entered into a solemn compact not to meddle with it; and therefore, that if we push our mad schemes of immediate emancipation, we do it in violation of the most sacred engagements – that we virtually trample the Constitution under our feet."[657] In response to this campaign of suppression, however, much of the antislavery community adopted the posture of defenders of the Constitution. Thus the Starksborough and Lincoln Anti-Slavery Society addressed the public in 1835, "if we may not enjoy freedom of speech and of the press — rights; which are guaranteed to us by the Constitution of the United States; — if the will of an infuriated mob is to be the grand tribunal of the day — we may as well bid adieu to American liberty!"[658] While abolitionists' underlying cause remained unpopular, they used this position to real effect in eventually bringing about the defeat of the congressional gag rules in the 1840s.

The panic over abolitionists grew with their concerted effort to place polemical publications in the hands of white southerners through the federal postal system. This project met with a violent response. In 1835, the arrival of thousands of mailings in Charleston, South Carolina provoked a demand for federal censorship and the prosecution of abolitionists for conspiring against the peace, safety and property rights of the white South. Amid the mass burning of publications in the city, a gathering in Charleston resolved, "That the post office department cannot, consistently with the constitution of the United States and the objects of such an institution, be converted into an instrument for the dissemination of incendiary publications, and that it is the duty of the federal government to provide that it shall not be so prostituted."[659] President Andrew Jackson called for legislation to ban the circulation of such dangerous materials in the South. This program of direct censorship sparked obvious constitutional doubts. Local officials had already commenced the work with tacit approval from the administration. Postmaster General Amos Kendell reasoned that "the United States have no right through their officers or departments knowingly to be instrumental in producing within the several States the very mischief which the constitution commands them to repress."[660] While Congress debated a censorship bill, the demand for penal laws came from southern governments and citizens to their northern counterparts. A gathering in Caroline Country, Virginia declared their constitutional entitlement to control distant activity. They resolved, "the circulation among the people of this state by the citizens of other states of papers or other documents calculated to excite to domestic insurrection is a direct infringement of her sovereign rights, alike admitted by the established principles of national law and the guarantees of the federal constitution, and that the authorities of this state have a perfect right to demand the delivery of such offending individuals that they

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[656] "Proceedings of the Various Counties in Virginia and Several of the Non-Slaveholding States, on the Subject of Abolition," House Doc. 12, in *Journal of the House of Delegates of Commonwealth of Virginia, Begun and Held at the Capitol, in the City of Richmond on Monday, the seventh day of December, one thousand eight hundred and thirty-five* (Richmond, 1835).
[657] Amos Phelps, *Lectures on Slavery and its Remedy* (Boston, 1834).
[658] *Address of the Starksborough and Lincoln anti-slavery society, to the public. Presented 11th month, 8th, 1834* (Middlebury, 1835).
[659] "Proceedings of the Various Counties in Virginia and Several of the Non-Slaveholding States, on the Subject of Abolition," House Doc. 12, 38.
[660] "Report of the Postmaster General," Doc. No. 2, in House Docs. 24th Cong., 2d sess. (1835), 389.

may be rendered amenable to the laws of this state."[661] These views informed the communications sent by each southern legislature to northern governments. Thus Virginia announced its "right to claim prompt and efficient legislation by her co-states to restrain as far as may be, and to punish those of their citizens, who, in defiance the obligations of social duty and those of the constitution, assail her safety and tranquility by forming associations for the abolition of slavery or printing, publishing, or circulating through the mail or otherwise, seditious and incendiary publications."[662] In the North, such resolutions were met with sympathy, if not necessarily official action. Throughout this campaign against abolitionism, southerners and appeasing Unionists developed a Founding story that would justify these new efforts to govern slavery. And abolitionists would adopt constitutional history as their mode of resistance.

The appearance of abolitionist discourse spurred southerners to furiously articulate their constitutional assumptions. Slaveholding communities expressed what they knew their fathers' Constitution accomplished, meaning that snapped into focus in this moment. According to one public meeting in Virginia, the Constitution "recognizes [enslaved people] as property and guaranties our right to the peaceable enjoyment of the proceeds of their labour." Interference with slavery in any place, another meeting resolved, was "a wanton violation of our political compact and destructive of the whole frame of our government." A Louisa County convention conveyed the far-reaching justificatory work that this account performed. The creation of the Constitution had removed all matters of slavery not only from the domain of national public policy but from moral critique. "We will not condescend to discuss the institution of domestic slavery as a question either of politics morals or religion," attendees resolved. "It is enough for us that slavery is recognized by the constitution of the United States, that by the provisions of that instrument our slaves are our property, and we demand for them as such the protection of the constituted authorities of the country. The question of right we leave to be settled by the constitution to which all the states have given their full and free consent."[663] That past moment was conclusive to preclude abolitionism in the present.

With more transparency than was typical, the future President Benjamin Harrison illustrated how constitutional desires and assumptions were transmuted into meaning through the Founding. Speaking in Vincennes, Indiana in 1835, he began by stating that "the course pursued by the emancipators is unconstitutional." To reach this conclusion, which was really his premise, the Virginia native continued: "I do not say that there are any words in the constitution which forbid such discussions as they say they are engaged in. I know that there are not. And there is even an article which secures to the citizens the right to express and publish their opinions without restriction. But in the construction of the constitution, it is always necessary to refer to the circumstances under which it was framed and to ascertain its meaning by a comparison of its provisions with each other, and with the previous situation of the several States who were parties to it."[664] The First Amendment in this analysis yielded to the authority of a Founding that implicitly made an exception for slavery.

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[661] "Proceedings of the Various Counties in Virginia and Several of the Non-Slaveholding States, on the Subject of Abolition," House Doc. 12.
[662] *Acts of the General Assembly of Virginia, Passed at the Session of 1835-1836…* (Richmond, 1836), 395.
[663] "Proceedings of the Various Counties in Virginia and Several of the Non-Slaveholding States, on the Subject of Abolition," House Doc. 12.
[664] *The Northern Man with Southern Principles, and the Southern Man with American Principles: Or a View of the Comparative Claims of … W. H. H. and M. Van Buren, Candidates for the Presidency, to the Support of Citizens of the Southern States* (Washington DC, 1840).

These assumptions received historical elaboration. William Drayton, a South Carolinian unionist who had relocated to Philadelphia during the Nullification Crisis, penned *The South Vindicated from the Treason and Fanaticism of the Northern*. Its constitutional narrative legitimated southern outrage and the call for northern counter-measures against the "mad hands [] digging under the foundation stone of our government."[665] According to Drayton, it was indisputable "that in entering into this confederacy and in adopting the Constitution of 1787" the southern states' rights "on the subject of slavery have never been surrendered, never been questioned, never been weakened, nor diminished; that they are in relation to that question what they were before they entered into the confederation." Instead, the Constitution made enslavement more secure by placing duties upon all states and prohibiting interference. As he explained the Founding choice:

> The non-slaveholding states entered into this union with their eyes open…. Everything sacred to us as patriots, Americans, and men stands pledged for our honourable adherence to the faith then plighted – the promise then solemnly and understandingly extended. Did our fathers right? No union could have been effected unless the rights of the South had been thus secured. Conscious of this, they were willing to suffer what they could not cure, and gave their sanction to the only union that could have been formed. The result has shown that they *were* right. Our people have prospered. The friends of freedom, humanity, and religion throughout the world, have reason to rejoice in the compromise then entered into, The North is not responsible morally nor politically for the existence of slavery in this country.

The lesson in Drayton's account was unmistakable. The Founding generation had chosen; it had settled slavery as a constitutional subject; it was for the living generation not only to follow but to give thanks for the choices that had been made for them. Indeed, the text lambasted antislavery Americans for presuming to know better than the national fathers, who had been slaveholders and state-makers of a Union with slavery – men with "as much philanthropy and if you will have it as much Christianity as we profess to have." As for the frequent object of abolitionist petitions, legislative termination of slavery in the Capitol, Drayton assured readers that "The framers of the constitution could never have intended to give to the government jurisdiction over this delicate subject." They must never have imagined such a notion; after all, the "South would never have sanctioned a constitution which gave to the general government any power direct or indirect to legislate on the slave question." In this analysis, constitutional history and constitutional assumption became one.

This Founding story and its corollary instructions for reverence affirmed southern desires and placed the burden on northern people to discipline their jurisdictions. The South Carolina lawyer Richard Yeadon, outraged by the antislavery mail campaign, reacted with a tendentious tract, *The amenability of Northern incendiaries as well to Southern as to Northern laws*. Pointing to the provision for the return of fugitives, he argued that "In this clause, the faith of the Union, and of each particular State, that it binds in political fellowship with its peers, is solemnly and expressly plighted to maintain and enforce the domestic policy of the South; and it is treason to the Union and to the Constitution in any State to permit any of her citizens, directly or indirectly, by word, writing or printing, to disturb this sacred guarantee of Southern rights."[666] In keeping

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[665] William Drayton, *The South Vindicated from the Treason and Fanaticism of the Northern* (Philadelphia, 1836).
[666] Richard Yeadon, *The Amenability of Northern Incendiaries as well to Southern as to Northern Laws* (Charleston, 1835).

with the subordination of the federal government, Yeadon expressed "no doubt that any Southern State has a constitutional right to make it penal in a United States Post Master, within its limits, knowingly to deliver an incendiary tract." Such an enactment was "wholesome censorship" to protect the health of a slave state. Another member of the South Carolina bar, William Rice, issued the uncompromising *Vindex on the Liability of the Abolitionists to Criminal Punishment, and on the Duty of the Non-slaveholding States to Suppress Their Efforts* (1835) at the same moment. Soon to enter the office of State Reporter, Rice assured readers that their Union was "based upon the existence of slavery" because "the Constitution expressly recognize[s] it and guarantee[s] its inviolability." Given the Constitution's promises of sanctity and security for slavery, Rice did not wish to turn away from the Union but to grasp its Founding more tightly, to adore "our WASHINGTON and PINCKNEY's… our HANCOCK and our ADAMS'… our LAURENS' and our RUTLEDGES." He explained that "we invoke them to save the Constitution and avert from our favored land the evils which surround and the dangers which threaten to destroy us." This revered, personified Founding was an instrument of discipline – it would bring the free states to heel.[667] The southern response to abolitionist discourse can be understood as sharing this aim of constitutional education. Slave states policed popular understanding of the Founding. As another anti-mailing pamphlet insisted, "We must have it clearly understood that in framing a Constitutional Union with our Northern brethren, the slave-holding States consider that they have rendered themselves no more liable to any interference with their domestic concerns than if they had remained entirely independent of the other States."[668]

Northern writers aided the effort at constitutional education.[669] The New York literary figure James Kirke Paulding, soon to become secretary of the U.S. navy, argued against abolitionist activity: "There exists no constitutional right to justify such an invasion of property and no power to enforce it," because "No historical fact is better known or more completely established than that the southern states would not have acceded to the Union under the new constitution without this security to their possessions."[670] In *Abolition a Sedition*, Calvin Colton advanced the titular proposition. Because the Constitution had guaranteed non-interference with slavery, "if the people or any association of people in one State should interfere with the domestic concerns of another they are guilty of sedition in and against the Republic." A leading political writer and propagandist for the Whigs, Colton took particular umbrage at what he believed were abolitionists' constitutional betrayal. Reviewing an antislavery report that argued "the intentions of the framers, whatever, by historical evidence, we may ascertain them to have been, cannot bind us to an interpretation of the Constitution which its own language does not render necessary and which is inconsistent with objects for which it was professedly framed."[671] This interpretative position appeared as open defiance of the Founding. The text must be known through its proslavery creation.

In the North, the story of a Founding settlement resonated among many residents. A unionist populace accepted a constitutional narrative that relieved by prohibition any responsibility for slavery and instead suggested a responsibility for quelling abolitionist. In

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[667] William Rice, *Vindex on the Liability of the Abolitionists to Criminal Punishment, and on the Duty of the Non-slaveholding States to Suppress Their Efforts* (1835).
[668] Dowling, *The Crisis*, 21.
[669] *Thoughts on American Slavery, and Its Proposed Remedies. By A Northerner* (Hartford, 1838).
[670] J. K. Paulding, *Slavery in the United States* (New York, 1836)
[671] Calvin Colton, *Abolition a Sedition. By a Northern Man.* (Philadelphia, 1839).

Massachusetts, a group organized as the Taunton Union, for the Relief and Improvement of the Colored Race expressed their "dissent from modern abolitionism and its awful consequences," citing the Constitution's "special notice by recognition and provision of the institution of Slavery as pertaining exclusively to the sovereignty of the States."[672] At a meeting in the fall of 1835, an assembly in Albany, New York illustrated the step-by-step logic and force of constructing a Founding that made quiescence the only constitutional duty of northern citizens. The abolitionist campaign, this gathering resolved, was a "violation of the agreement between the several states when the constitution was adopted." First, they announced, the Constitution "carries with it an adjustment of all questions involved in the deliberations which led to its adoption, and that the compromise of interests in which it was founded is, in our opinion, binding in honour and good faith independently of the force of agreement on all who live under its protection and participate in the benefits of which it is the source." The Founding, in other words, imposed an authoritative settlement on everything that the framers had considered – or, more accurately, what people in the 1830s believed the framers had considered. This discourse of settlement was fundamental and pervasive. The Founding, as a New Haven gathering agreed, "compromised and settled" the subject.[673]

Second, the Albany assembly resolved that "under the constitution of the United States the relation of master and slave is a matter belonging exclusively to the people of each state… and that any attempt by the government or people of any other state or by the general government to interfere with or disturb it would violate the spirit of that compromise which lies at the basis of the federal compact." These northern Unionists thus came to believe the scope of a constitutional settlement on slavery included everything about slavery, that the original Constitution was arranged so that no room was left for debate. Civilians and officials alike would transgress this constitutional edict should they seek to interfere in a jurisdiction beyond their own state. As a gathering in Hartford echoed this rule, citizens must obey "requirements both positive and negative as defined in the constitution which should be interpreted in the same spirit of compromise and conciliation in which it was framed." A Founding in which "slavery existed in nearly all the states and was sanctioned by their laws" had created precisely such a negative requirement against antislavery activity: "it is a violation of the spirit of the constitution for citizens of one state to enter into combinations to give more energy to their efforts" for abolition.[674]

In Albany, the assembly reinforced this obligation of inaction by invoking paternal veneration and encouraging social policing: "all who cherish the principles of our revolutionary fathers, and who desire to preserve the constitution by the exercise of that spirit of amity which animated its framers; that we deprecate as sincerely as any portion of our fellow citizens the conduct of individuals who are attempting to coerce our brethren." The tethering of veneration to obligatory quiescence was a common practice. In Portland, Maine, an anti-abolition meeting celebrated that the "course of prosperity for nearly half a century, unexampled in the annals of the world, has proved the wisdom and sagacity of that band of patriots who framed and recommended to the adoption of the people this great charter of our National liberties and

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[672] *Report of the Proceedings and Views of the Taunton Union for the Relief and Improvement of the Colored Race: Together with the Constitution of the Society, and a List of Officers, Chosen, May, 1835* (Taunton, 1835).
[673] "Proceedings of the Various Counties in Virginia and Several of the Non-Slaveholding States, on the Subject of Abolition," House Doc. 12.
[674] "Proceedings of the Various Counties in Virginia and Several of the Non-Slaveholding States, on the Subject of Abolition," House Doc. 12.

prosperity." Then it pivoted to the constitutional settlement of slavery. "We are bound by the compact and we are satisfied that it cannot be disturbed in this particular either by the direct action of the government and people of the United States, or by the officious intermeddling of unauthorized individuals and self-erected societies," the meeting concluded.[675] A constitutionalism of deference to ascribed understanding thus drew strength and authority from a constitutionalism of gratitude, one informed by white Americans' contemporary complacency and pleasurable narrative of historical exceptionalism.

In Congress, officials took up the project of legislating against abolitionist mailing in view of this crescendo of delimitation against the abolitionist campaign. "Already has the United States mail been subjected in violation of the constitution to the surveillance of the Postmaster General and his subordinates, and now it is proposed to make such a surveillance legal," wrote Elijah Porter Barrows.[676] Yet the censorship bill faltered as both southern and northern officials thought through the implications of enacting such a law. While the prevailing constitutional narrative enabled majorities to brand abolitionist activities as "unconstitutional," that did not ensure that direct federal censorship was a constitutional remedy. The bill failed from lack of support by ardent slaveholders and anti-abolition northern congressmen. As Daniel Webster argued, the Constitution explicitly protected the freedom of the press. And if there were a special power to prohibit only incendiary material, both the discretion and the principle involved would be subject to abuse. "Even the Constitution of the United States might be prohibited," he explained, "and Congress might under this example be called upon to pass laws to suppress the circulation of political religious or any other description of publications which produced excitement."[677]

In the Senate, a special committee delivered its conclusions on how to regulate the circulation of materials that would "excite the slaves to insurrection." Authored by John Calhoun, the report told a remarkable Founding story: it was a constitutional history that with one hand denied a federal power to impose such a censorship program while commanding the government with the other hand to heed slaveholding states' orders to prevent material identified by individual states from entering their jurisdictions. The committee's constitutional analysis turned on the "jealous spirit of liberty which characterized our ancestors at the period when the Constitution was adopted," which they determined precluded the power to decide what materials must censored. The authority of the Founding was stated at the outset: "That the true meaning of this provision may be fully comprehended as bearing on the point under consideration it will be necessary to recur briefly to the history of the adoption of the Constitution."[678] A synopsis of the circumstances of the creation of Constitution and the struggle over ratification followed. Calhoun's rendition of the origins of the First Amendment stuck to relative orthodoxy, and he noted that the freedom of the press was then "ably sustained by Mr. Madison. in his celebrated report to the Virginia Legislature in 1799 against the alien and sedition law." Then the analysis revealed the real concerns and commitments of its author two years removed from leading the South Carolina's nullification challenge to the Union. Here, as well, Calhoun sought to imprison the federal government in constitutional rules so that it might never threaten to emancipate

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[675] *The Proceedings of a Meeting Held at Portland, Me., August 15, 1835, by the Friends of the Union and the Constitution, on the Subject of Interfering at the North and East with the Relations of Master and Slave at the South* (Portland, 1835).
[676] Elijah Porter Barrows, Jr., *A View of the American Slavery Question* (New York, 1836).
[677] 11 Cong. Deb. 1722 (1836).
[678] "Report," *Public Documents printed by order of the Senate of the United States…* (vol. 2, Washington, 1836), 118.

slaves. A federal power to enact censorship, he warned, would "be virtually to clothe Congress with the power to abolish slavery by giving it the means of breaking down all the barriers which the slaveholding States have erected for the protection of their lives and property. It would give Congress, without regard to the prohibition laws of the States, the authority to open the gates to the flood of incendiary publications which are ready to break into those States, and to punish all who dare resist as criminals." The power to censor was the power to opt not to censor. But of course, the committee concluded, the Constitution conferred no such right; at the Founding, the slave states had never parted with their sovereign right to preserve their "internal peace and security" and, in this case, "the unquestionable right to pass all such laws as may be necessary to maintain the existing relation between master and slave." Finally, the committee addressed the duties of the federal government. Because of this right and the nature of the constitutional Union originated by the people of the states, in Calhoun's view, slave states could "require co-operation on the part of the General Government, and it is bound in conformity with the principle established to respect the laws of the State in their exercise and so to modify its acts as not only not to violate those of the States but as far as practicable to co-operate in their execution." In Calhoun's story of the Union, states chose what to censor and the federal government must comply. As the committee noted, this had thus far been the course of the government. And it would tacitly remain so. Southern states passed laws against the introduction of any antislavery material. And at post offices and through vigilante interrogations, they were enforced against paper and people.[679]

As Americans condemned "unconstitutional" abolitionist agitation, southern states relished the logic of an original, absolute sovereign right to preserve "internal peace and security." But that was not the only right they articulated in service of slavery. They also demanded that northern states punish or turn over those who offended southern laws that policed the institution. States indicted and demanded, through the Constitution's fugitive clause, the rendition of abolitionists and, in subsequent years, various northern residents or sailors accused of aiding slaves. In one episode in March of 1835, a grand jury empaneled in Tuscaloosa, Alabama delivered an indictment of *Emancipator* editor Robert Williams for "Feloniously, wickedly, maliciously, and seditiously" printing and distributing his antislavery paper. Without the New York man having set foot in Alabama, Governor John Gayle alleged the publication was designed to "incite the slave population [] to Insurrection and Rebellion" and demanded his extradition as under the Constitution.[680] By its terms, "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." Dissatisfied with simply the "large and numerous public meetings" and "public sentiment in the north" rallying against abolitionism and their publication campaign, Alabama demanded more – the enduring protection of constitutional guarantees. Slaveholding citizens reached out with the long arm of imagined constitutional power to govern a national community.[681]

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[679] "Cincinnatus" [William Plumer], *Freedom's Defence; or, A Candid. Examination of Mr. Calhoun's Report on the Freedom of the Press* (Worcester, 1836).
[680] *Remarks of Henry B. Stanton: In the Representatives' Hall, on the 23d and 24th of February, 1837, Before the Committee of the House of Representatives of Massachusetts, to Whom was Referred Sundry Memorials on the Subject of Slavery* (Boston, 1837).
[681] "State Rights. W. L. Marcy and His Excellency John Gayle, Governor of Alabama," *Daily National Intelligencer* (Washington, District Of Columbia), January 16, 1836.

Through claims upon the Founding, the Alabama governor slipped from the constraining dichotomy of strict versus loose constitutional construction. Gayle wrote to New York Governor William Marcy that the view that New York was not obligated to turn over Williams came from "the erroneous impression that the rules of strict construction which with great propriety apply to certain parts of the Constitution must necessarily apply to all others." The constitutional politics and pressures of slavery brought its own logic of construction by historical divination. Recalling how "When the States achieve their independence, they had no rules to regulate their intercourse," Gayle's vision of the framers beheld the body authoring the Constitution "to secure the punishment of offenders and thereby preserve the harmony of the states," and the extradition provision should be followed in this full meaning: "it should be taken in the sense in which it was used by the framers of the Constitution." This original, intended sense required "the most liberal construction for the reason that it is in favor of the rights of the states" and necessary to "the power of Self Protection," as the Alabama governor's own sense of the Founding grew to secure slavery for newly perceived threats.[682] Original meaning, as an interpretative mode spurred by the singular politics of slavery, allowed restrictive and expansive understandings in keeping with the purported visions of the framers.

New York authorities did not come to Williams' printshop, arrest him and ship him south. Governor Marcy rejected Alabama's legal and historical analysis, observing that "what it gives to the states in one respect, it takes away from them in another" by making their residents subject to whatever criminal laws other states might enact. The New York governor's response accepted the terrain of original meaning, validating its interpretative authority even if disputing Alabama's Founding narrative. Recurring to the Revolutionary past, he explained how when the British government, "their acknowledged sovereign," had asserted a similar power over American colonists, it "was regarded by them as an act of revolting tranny, and assigned in the Declaration of Independence as one of the prominent causes of that had dissolved the bands by which they were united to the British king and nation." Such circumstances, Marcy continued, rendered it "very improbable that the framers of the constitution, (almost all of whom were revolutionary patriots), intended to confer on each state the right" that Alabama now claimed.[683]

Southern states demanded that northern governments turn their professions of anti-abolition sentiment into law during the mid-1830s. Resolutions condemning antislavery agitation for violating the national compact arrived from most southern state governments in 1835 and 1836 seeking penal enactments. As South Carolina put it, the fathers gave them a "claim on the governments of the non-slave holding states, not only moral and social, but of indispensable constitutional obligation that this nuisance shall be abated."[684] The Founding loomed in the logic of this campaign of restraint. In one resolution, for instance, Georgia proclaimed that "the perpetuity of this glorious Union, which has shed such blessings on us as a people, is only to be ensured by a strict adherence to the letter of Constitution, which has guaranteed to us certain rights with which we will suffer no power on earth to interfere – that it is deeply incumbent on the people of the north to crush the traitorous designs of the abolitionists and… put an end to impertinent fanatical and disloyal interference with matters settled by the Constitution."[685] In this

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[682] *Journal of the Senate of the State of New York, at their fifty-ninth session, Begun and held at the Capitol, in the City of Albany, the fifth day of January, 1836* (Albany, 1836).
[683] *Documents of the Assembly of the State of New York, fifty-ninth session, 1836*. (vol. 1, Albany, 1836).
[684] Columbia, South Carolina," *Niles' Register*, Jan. 9, 1836, 319.
[685] *Massachusetts General Court, Joint Special Committee on Slavery, Report and Resolves on the Subject of Slavery, Sen. Doc. 56.* (Boston, 1836); *Mississippi resolutions in relation to the persons denominated "Abolitionists" ... Approved. February 27, 1836*. [n. p. 1836].

single statement, the drafters in Milledgeville combined the familiar chords of veneration and deference, a call for strict textual fealty, and the assertion of an expansive original constitutional settlement barring abolitionist activity and obliging northern state to halt it.

Massachusetts received these interstate communications and listened respectfully. While it would come to be known as a safe harbor for abolitionism, the state was hardly sympathetic to anti-slavery activities at this juncture. Between its Cotton Whigs and northern Democrats, many of its people and elected officials turned to suppress the abolitionists in their midst. Governor Edward Everett, while declining to endorse a criminal statute, seemed to contemplate some official condemnation with the Founding as the basis. In his address opening the government in January of 1836, Everett urged Massachusetts to "imitate the example of our fathers, - the Adamses, the Hancocks, and other eminent patriots of the revolution; who, although fresh from the battles of liberty… entered[ed] into a union with our brothers of the slaveholding States, on the principle of forbearance and toleration on this subject."[686] At the Founding, Everett recounted, it was the "highest public policy, by the non-slaveholding States" to join with their sister slave states and a "fact of historical notoriety" that no Union could be formed except under a Constitution that "expressly recognizes the existence of slavery; and that concedes to the States where it prevails the most important rights and privileges connected with it." With their effort to stir the South, he made clear, abolitionists waged war on the meaning of the compact upon which the Union depended.

This speech set the agenda for a special joint legislative commission chaired by Cotton Whig George Lunt to deliberate on the matter.[687] The committee did its assigned job, working up a report and resolutions condemning abolitionist agitation. It took pains to affirm slavery as a constitutional and legal institution. "It is recognized by the well understood admissions of the Constitution" and "by the laws of the land and the tribunals of justice." Invoking the ethos of an original settlement, the committee vowed that the "institution of domestic slavery is one in which, as it is settled by the constitution of these United States, we have no title to interfere especially against the consent of those whose interests may be most dearly affected."[688] And the committee assured southerners of a veneration for the fathers' constitution that admitted no sanction for the antislavery movement as a function of the Founding. Proposed resolutions averred that the legislature regarded "the constitution of these United States as the most sacred and inestimable political inheritance which could have been transmitted to us by our ancestors," and would maintain it against all hazards. The national fathers, they elaborated in their report, "settled the question of slavery as it now exists" and discussed it "at a time when no immediate danger was anticipated and when no irritated feelings had been excited," and "all their acknowledged wisdom could devise no remedy for the evil." The authority of the Founding foreclosed the issue to debate. As such, the lawmakers "distinctly disavow[ed] any right whatever in itself or in the citizens of this Commonwealth to interfere in the institution of domestic slavery in the southern states; it having existed therein before the establishment of the constitution; it having been recognized by that instrument; and it being strictly within their own keeping." To this extent, the joint committee signed on to the emergent Founding that cast

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[686] Edward Everett, *Address of His Excellency, to the Two Branches of the Legislature, on the Organization of the Government, for the Political Year Commencing January 6, 1836* (Boston, 1836).

[687] Never swerving from a proslavery unionism, Lunt would continue to condemn abolitionism in one of the very first histories of the Civil War. George Lunt, *The Origin of the Late War: Traced from the Beginning of the Constitution to the Revolt of the Southern States* (New York, 1866).

[688] *Massachusetts General Court, Joint Special Committee on Slavery, Report and Resolves on the Subject of Slavery, Sen. Doc. 56.* (Boston, 1836), 18.

abolitionist activity as unconstitutional. But just like in Congress, that judgment did not render an answer to the question of legislative remedies. The Committee declined to recommend the criminalization of the antislavery press, although that policy was not without real support by Massachusetts notables. The South's purported constitutional right to silence on the subject of slavery did not go undefended, however. The committee reported: "Besides, there is a powerful influence already at work amongst us stronger than any law the force of public sentiment directed by the best intelligence and sustained by the highest character… which looks indignantly upon every movement calculated to disturb him in the possession of his just rights or to endanger the peace and security of his domestic or social relations." In other words, the popular constitutionalism of anti-antislavery action would discipline any wayward citizens. And indeed, mobs were trying to do just that. In Boston and Mansfield, Massachusetts, Cincinnati, Ohio, Utica, New York and numerous other towns, vigilante groups sought to stamp out antislavery presses and associations.[689] To be sure, Lunt's Committee offered a resolution "disapproving of all those tumultuous and riotous proceedings everywhere which have arisen from the agitation of this question" But the line between healthy demonstrations of public opinion and popular violence was unclear, and it did not seem like one that state officials were interested in policing.

As part of creation of this report, the committee held public interviews of abolitionists inside the Massachusetts house chamber. During these proceedings, antislavery leaders unveiled their own facility with vernacular constitutionalism that countered the narratives of Everett and the Founding of settlement. Samuel May, Ellis Loring, William Goodell, Charles Follen, Samuel Sewall and even William Garrison took turns venerating an original constitution that protected their publishing activities and criticizing the failings of the present generation as Commissioner Lunt repeatedly took offense. Loring, for instance, explained that "our heroic fathers would not have listened to such a supposition" that the 'Compact,' [] binds me to hold my tongue on slavery" or that "our proceedings are contrary to the Spirit of the Constitution." For evidence of antislavery principles at the Founding, he held out Washington's recently published letters, Jefferson's antislavery writings, and the "first Anti-Slavery Society" membership of Franklin, Rush and John Jay. "These great men formed our Constitution, and must be supposed to have known something of its spirit… never found there any prohibition of writing and speaking against slavery." As the second round of interviews wrapped up, a member of the audience, Gamiel Bradford, stood and gained permission to speak. The Boston medical doctor had a Founding story to share that seemed to settle the matter. Denying that the spirit of the Constitution forbid abolitionism, he asked the committee to consider the conduct of one leading framer, "the American Socrates — Benjamin Franklin." The statesman, Bradford recounted, closed his career in the Federal Convention by urging the adoption and proper administration of the Constitution; then "he signed the Constitution— and, returning home, spent a considerable part of the remainder of his life in doing, as you will find shown in one of the pamphlets on your table, just what the abolitionists are doing now," serving as President of an Abolition Society and petitioning Congress about slavery. The only way in which the South's constitutional claims can be sustained, he concluded, is if "Doctor Franklin" did not understand the Constitution he

[689] Defensor, *The enemies of the Constitution discovered; or, An inquiry into the origin and tendency of popular violence. Containing a complete and circumstantial account of the unlawful proceedings at the City of Utica, October 21st, 1835* (New York, 1835); Isaac Stearns, *Right and wrong, in Mansfield, Mass., or, An account of the pro-slavery mob of October 10th, 1836* (Pawtucket, 1837); *Narrative of the Late Riotous Proceedings Against the Liberty of the Press, in Cincinnati* (Cincinnati, 1836).

authored or immediately disregarded it. Following these public interviews, the committee's report showed that members felt especially obligated to fend off these claims made upon the Founding by their antislavery interlocutors.[690]

Along with its oral testimony, the Massachusetts Anti-Slavery Society elaborated publicly on its Founding analysis by publishing a "full statement of the reasons which were in part offered to the committee of the legislature" against the condemnation and criminalization of abolitionist publishing.[691] A kind of popular constitutional brief, it described in blunt terms the Founding of original settlement that southern and northern voices were constructing around them. Despite no stipulation in the Constitution, the abolitionists noted, "We are told however of the Compact that was entered into by the several States when the Union was formed"; "told it was agreed that the people of the North should say nothing about the Slavery of the South"; and "therefore are accused of violating that sacred compact." They explicitly rejected the veracity and validity of this Founding. The story was an exercise in usurping constitutional power. In addition to giving an account antislavery framers and Revolutionary context, they objected to the way that Americans were creating constitutional meaning. "If it be pretended that those who formed the Constitution were induced to ratify it in consequence of some other Compact which has never been published to the world we ask for the proof of the pretended fact," their statement insisted. We ask further what binding force there could be in a secret Compact?" As the targets of constitutional story-telling wielded as a weapon, they felt first-hand the force of meaning born of contemporary belief in the past.

Ultimately, no legislative action transpired in 1836. Amid a fluid public mood provoked by the southern effort to gag congressional petitioning about slavery and Lunt's own overreaching, the momentum to adopt proslavery constitutionalism stalled. This inflection happened more swiftly in Massachusetts than in other free states, but it was generally reproduced in the North. Legislatures did not penalize abolitionist activity, and their resolutions condemning agitation and affirming a Founding of settlement tapered off. As attention pivoted from the initial storm over the abolitionist mailing campaign in 1835 to the right of citizens to petition Congress about slavery in early 1836, the breadth and plausibility of that Founding settlement wavered. As the abolitionist Henry B. Stanton told the Massachusetts' House Committee on Slavery in February 1837, the House of Representative's recent gag rule that any papers relating to slavery will be tabled without discussion were "a virtual denial to the people of the right to petition for a redress of grievances" and a violation of the "spirit of the 1st Article of the Amendments."[692] The lawmakers listened as Stanton defended the general right – and as he denied any Founding settlement about the subject of many of the petitions, federal power over slavery in the District of Columbia.

> "We are told, the *South* would never have ratified the Constitution, if they had supposed it gave Congress this power… And it is asserted, that there was a general understanding to that effect both at the North and the South. Sir, on this part of the subject, it requires all one's self-possession to keep cool, I assert that the *North* never would have ratified that Constitution if it had not fully

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[690] *An account of the interviews which took place on the fourth and eighth of March, between a committee of the Massachusetts Anti-Slavery Society, and the committee of the legislature* (Boston, 1836).
[691] *A Full Statement of the Reasons which Were in Part Offered to the Committee of the Legislature of Massachusetts* (Boston, 1836).
[692] *Remarks of Henry B. Stanton: In the Representatives' Hall, on the 23d and 24th of February, 1837, Before the Committee of the House of Representatives of Massachusetts, to Whom was Referred Sundry Memorials on the Subject of Slavery* (Boston, 1837).

> understood, that by its terms, Congress did possess this power. So far was she from supposing, at the time of adopting the Constitution, that Congress I had not this power, she most religiously believed, that that instrument inflicted a death blow upon slavery."

Stanton addressed a more welcoming committee than abolitionists had faced under Lunt only a year earlier. By April 1837, two months after he spoke, the government of Massachusetts sent a resolution to the House of Representatives condemning the gag rule tabling all communications on slavery as "at variance with the spirit and intent of the constitution of the United States" without reaching the underlying subject of such petitions.[693] The House read and then tabled it.

Stanton demonstrated an approach to slavery's constitutionalism that much of the antislavery movement would adopt over the 1830s as it grew in numbers. Many antislavery Americans would defend broad principles of free speech while developing claims of a Founding against slavery, conflict by conflict. The former cause would gain initial traction even as abolitionism remained manifestly unpopular; but in the process, as free state residents perceived an effort to control and constrict the rights of northern citizens, some might come to see a latter-day slave power at work undermining their fathers' Constitution. This was particularly the case as new territorial conflicts implicating slavery such as the annexation of Texas came into view. And thus, without ever becoming abolitionists, they could come to believe some of the precepts of an antislavery Founding.

In the spring of 1836, the House of Representatives erected its first gag rule by a substantial majority. After the session opened during the previous December, the arrival of memorials calling for Congress to abolish slavery and the slave market in the District of Columbia provoked a turbulent mélange of historical constitutional arguments. When free state representatives like William Slade, Jr. of Vermont defended the petitions, southerners sought to convert the policy question into a settled, constitutional one. Francis Pickens of South Carolina, for example, described the "extreme jealousy that existed amongst the States on this matter at the formation of the constitution" and demanded: "Is it to be supposed that Virginia, sensitive and jealous as she was at that time on the subject of slavery, would have ceded a portion of her territory and citizens if she had, for one moment, conceived that under the clause in the constitution conferring legislative powers they were to be thrown at the mercy of other interests and other sections antagonist to herself on this vital point?"[694] This was posed as an answer in the form of a historical question. A special committee headed by Henry Pinckney of South Carolina produced a report and resolutions that represented something of a compromise on the method of excluding antislavery discourse from the House. The report propounded a Founding history in which deferring to original intentions meant never disturbing slavery in the District – to do so ran against the framers' objects of avoiding interference and insecurity at the Capitol. "The security and independence of Congress, from the moment of its removal to this District to the present hour, have been as perfect as the framers of the constitution could have desired. No intimation has ever been heard that the existence of slavery in the District of Columbia has ever produced the slightest danger or inconvenience either to the interests or to the officers of the Federal Government within it."[695] But the committee's accompanying resolutions did not order silence on strictly constitutional grounds. This refusal to recognize a binding rule from the

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[693] *Niles' Weekly Register*, May 6, 1837, 150.
[694] *Speech of Mr. Pickens, of South Carolina, in the House of Representatives, January 21, 1836, on the Abolition Question* (Washington, 1836).
[695] "Report on Slavery," *Niles' Register*, June 4, 1836, 244.

Founding inflamed more conflict-inclined southern officials. As Andrew Robertson of Virginia exclaimed against Congress' professed moral obligation not to interfere: "What folly was it in our ancestors, if this be so, to spend days and months in anxious deliberation, framing written constitutions for each of the States, and for the Union, containing guarded limitations against abuses of power?"[696] Nonetheless, for the rest of the session, the House operated under a resolution dictating that "all petitions, memorials, resolutions, propositions, or papers, relating in any way, or to any extent whatsoever, to the subject of slavery, or the abolition of slavery, shall, without being either printed or referred, be laid upon the table, and that no further action whatever shall be had thereon." For the next eight years, this principle would be tested and enforced, re-adopted, extended to deny even the reception of such materials, made part of the House standing rules and then finally overturned in 1844.[697]

In the Senate, John Calhoun's effort to impose an explicit gag rule failed in the spring of 1836. Instead, the chamber insulated itself from antislavery discourse by evasion: voting not directly against consideration or reception of petitions but rather by tabling the question of whether to consider receiving them.[698] This protocol was effective at avoiding the kind of recurrent contestation over a gag that the House experienced, where John Quincy Adams and Joshua Giddings made a series of orchestrated challenges. But it was hardly satisfying for the most aggressive proslavery voices in the Senate. In 1837, Calhoun introduced a set of resolutions crafted to draw out conflict and affirm proslavery constitutional commitments.[699] Refining the general Founding story that had been designed to legitimate nullification, these resolutions homed in on slavery and the original obligations of the federal government to sustain it.

Calhoun propagated an agenda for the moment as enduring constitutional rules: That "in the adoption of the federal constitution… free, independent, and sovereign states" had entered the Union for "increased security against all dangers, *domestic*, as well as foreign; that the states had retained the "exclusive and sole right over their domestic institutions and police." Accordingly, the "intermeddling" of another state or their citizens is "not warranted by the constitution" and "subversive of the objects for which the constitution was formed." The federal government "was instituted and adopted by the several states of this Union as a common agent" to promote security and prosperity and "is bound so to exercise its powers as to give, as far as may be practicable, increased stability and security to the domestic institutions of the states that compose the Union" and thus is duty-bound to "resist all attempts, by one portion of the Union, to use it as an instrument to attack the domestic institutions of another… instead of strengthening and upholding them." Among numerous states, "domestic slavery… composes an important part of their domestic institutions, inherited from their ancestors, and existing at the adoption of the

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[696] 12 Cong. Deb. 4013 (1836).

[697] On the political history of gag rule and for context on the issues discussed here, see Robert P. Ludlum, "The Anti-slavery 'Gag-Rule': History and Argument," *Journal of Negro History* 26 (Apr. 1941), 203-43; George C. Rable, "Slavery, Politics and the South: The Gag Rule as a Case Study," *Capitol Studies* 3 (1975), 69-87; William Miller, *Arguing About Slavery: The Great Battle in the United States Congress* (New York, 1996); James M. McPherson, "The Fight Against the Gag Rule: Joshua Leavitt and Antislavery Insurgency in the Whig Party, 1839-1842," *Journal of Negro History* 48 (July 1963), 177-95; Michael Kent Curtis, *Free Speech, The People's Darling Privilege: Struggles for Freedom of Expression in American History* (Durham, 2000); Russell B. Nye, *Fettered Freedom: Civil Liberties and the Slavery Controversy, 1830-1860* (East Lansing, MI, 1849).

[698] Daniel Wirls, "'The Only Mode of Avoiding Everlasting Debate': The Overlooked Senate Gag Rule for Antislavery Petitions," *Journal of the Early Republic* 27 (Spring, 2007), 115-138.

[699] *Life of John C. Calhoun: Presenting a Condensed History of Political Events from 1811 to 1843. Together with a Selection from His Speeches, Reports, and Other Writings Subsequent to His Election as Vice-president of the United States, Including His Leading Speech on the Late War Delivered in 1811* (New York, 1843).

constitution, by which it is recognized as constituting an essential element in the distribution of its powers among the states," and that "no change" in free states can justify seeking to undermine slavery; that "all such attacks are in manifest violation of the mutual and solemn pledge, to protect and defend each other, given by the states, respectively, on entering into the constitutional compact which formed the union." Attempting to abolish slavery in the Capitol or Territories would count among such forbidden attacks. The union "rests on the equality of rights and advantages among its members," and so "to refuse to extend to the southern and western states any advantage which would tend to strengthen or render more secure, to increase their limits to population, by the annexation of new territory or states… would be contrary to the rights and advantages which the constitution was intended to secure."[700] While predictably left on the table in the Senate and resisted by southern unionists, the resolutions telegraphed the evolution of proslavery constitutional understanding. Its cluster of constitutional expectations and standards, written in terms of original meaning, became dogma for the most ardent proslavery voices in current and impending conflicts over northern constitutional observance at home, in the Capitol and in governing the West.

For an antislavery movement seeking to transform a largely indifferent and often hostile free state populace, the House gag rules presented a vital target. Antislavery Americans attacked it with plausible invocations of the Founding; and in the process, they courted slippages between general speech rights and antislavery substance. Abolitionists had protested against the diffuse social and political efforts at enforcing silence that had greeted their speech and press activities since the early 1830s. As David Childs argued in 1833, "To say that we have no right to discuss the subject of slavery, is to say, in effect, that that article of the federal constitution which provides for amending the same constitution, is inapplicable to that provision of it."[701] Amid the outburst of antipathy casting them as a dangerous nuisance, leading voices sought to claim continuity with venerable discourses from the Founding. William Ellery Channing wrote in 1835 that "In the period immediately succeeding the adoption of the Constitution, Franklin, the calm and sagacious, and Jay, the inflexibly just, were Presidents of Societies for the Abolition of Slavery," organizations "spread over a large part of the country" and attended by "some of the most honored names in our country."[702] With the assault on abolitionist speech, the esteemed minister implied, Americans were crossing the will of the fathers and creating the very intergenerational declension that they feared. "Those of us whose recollections go back to that period can bear witness to the freedom with which slavery was then discussed in conversation and by the press. The servile doctrine which some would now fasten on the Constitution would have been rejected with indignation by our fathers."

Pushing beyond these lines of continuity, some beleaguered antislavery exponents assumed the posture of defenders of the original constitution and its framers. As the author of *Remarks on the Constitution* argued in 1836, "more than at any other time, it is highly important that every American should carefully study the Constitution of the United States. Positions are taken and assumptions made at variance with its liberal spirit and the manifest intentions of the

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[700] *Journal of the Senate of the United States of America: being the Second Session of the Twenty-Fifth Congress…* (Washington, 1837) 83-84; *Speech of Henry Clay, of Kentucky, on certain resolutions offered to the Senate of the United States in December, 1837, by Mr. Calhoun, of South Carolina, involving principles of interpretation of the Constitution of the United States* (Washington DC, 1838).

[701] David L. Child, *The Despotism of Freedom, Or, The Tyranny and Cruelty of American Republican Slave-masters, Shown to be the Worst in the World: In a Speech, Delivered at the First Anniversary of the New England Anti-Slavery Society, 1833* (Boston, 1833)

[702] William E. Channing, *Slavery* (Boston, 1836), 144.

illustrious men who framed it."[703] The writer insisted that the national fathers had intended for robust antislavery action including the abolition of the domestic slave trade by congressional and state action. Retrieving these "conscientious designs of the Fathers of the Revolution and the Framers of the Constitution, it is a duty we owe to their memories and the friends of Freedom who have succeeded them to ascertain their real views upon the great subject of Human Rights," the pamphlet instructed amid a perceived crisis of forgetting. Advocates at this juncture sought to identify their cause with a progressive constitutional unionism. In an September 1835 address to the broader public, the American Antislavery Society defended itself in terms of such a project: "We have never 'calculated the value of the Union,' because we believe it to be inestimable; and that the abolition of slavery will remove the chief danger of its dissolution; and one of the many reasons why we cherish, and will endeavor to preserve the Constitution, is that it restrains Congress from making any law abridging the freedom of speech or of the press."[704] Antislavery newspapers and volumes such as *The Anti-slavery Manual: Containing a Collection of Facts and Arguments on American Slavery* handily collected such arguments, along with more ambitious constitutional claims, for agents to take to the people.[705]

These initial appeals were generally unavailing. Unwelcome abolitionist presses and meetings were broken up in many locales through violence dressed as order and patriotism, perhaps most notoriously in the 1837 killing of editor Elijah Lovejoy in Alton, Illinois. These episodes, too, were woven into an antislavery constitutional narrative that broadened the ground of their cause. Speaking in New Hampshire, Channing called Lovejoy's death "an offering in behalf of the constitutional rights of American freemen."[706] Wendell Phillips, refuting the notion that the suppressionist violence that had killed Lovejoy was akin to the revolutionary fathers' popular constitutionalism, argued that "They were the people rising to sustain the laws and constitution of the Province," while "rioters of our day go for their own wills, right or wrong."[707] In the fall of 1836, Samuel May delivered a particularly acute assessment of the precarious place of antislavery words and deeds in the popular constitutional imagination. "Wherever the Abolitionist goes to plead the cause of our enslaved countrymen, he is met with the objection, very confidently urged in bar of his proceeding, that an arrangement was made in the Constitution of this confederacy by which the people of the non-slaveholding States are bound not to attempt in any way the overthrow of Slavery."[708] May emphasized the pervasiveness of this understanding. "It is flippantly iterated by thousands who never read the Constitution of the United States. It has been passionately insisted on by some of the members of Congress, resounded furiously in the public meetings of citizens that have been held in every city and almost every considerable town at the South, echoed with equal emphasis from the pro-slavery meetings at the North and even re-echoed from the desecrated walls of Faneuil Hall." This diagnosis drew together central concerns of antebellum constitutionalism and abolitionists' own marginalized positionality. In May's eyes, deficient constitutional education was compounded by an intense constitutional faith infiltrated by proslavery narratives. Revealing his own

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[703] *Remarks on the Constitution: By a Friend of Humanity, on the Subject of Slavery* (Philadelphia, 1836).
[704] *Declaration of Sentiments and Constitution of the American Anti-Slavery Society; Together with those parts of the Constitution of the United States which are supposed to have an relation to slavery* (New York, 1835)
[705] Rev. La Roy Sunderland, *The Anti-slavery Manual: Containing a Collection of Facts and Arguments on American Slavery* (New York, 1837).
[706] Joseph C and Owen Lovejoy, eds., *Memoir of the Rev. Elijah P. Lovejoy: who was murdered in defence of the liberty of the press, at Alton, Illinois, Nov. 7, 1837* (New York, 1838).
[707] *Sixth Annual Report of the Board of Managers of the Massachusetts Anti-Slavery Society* (Boston, 1838), 49.
[708] Samuel May, "Slavery and the Constitution," *Quarterly Antislavery Magazine*, Vol. 2, Oct. 1836, 73.

constitutional belief in a better binding past, May hoped for a measure of documentary clarity. "The published Report of the proceedings of the Convention is lamentably meagre," he acknowledged, but looked "with eager expectation to the report about to be published from the manuscript of the late James Madison."

In the years after the passage of the gag rule, the antislavery movement gained a toehold for itself and its constitutional claims. As the Vermont Anti-Slavery Society declared in 1838, "The attitude which the abolitionists now occupy is not only one of opposition to slavery, but also one of defence of the great constitutional rights of petition and free discussion."[709] Of course, the organization also stated that "the allegation" that the Constitution "guaranteed the perpetual existence of slavery" lacked evidence and was "an unmerited reproach upon the memories of our revolutionary fathers." In this fashion, asserting the right to speech helped to erode the sense of a Founding settlement of silence. Charles Follen advocated this strategy at an annual meeting of the Massachusetts Anti-Slavery Society. "Let us dismiss all controversy concerning the exciting question whether or how far the Constitution sanctions slavery, but let us assert and defend the freedom of communication by speaking, writing, and printing, which is the first requisite of the freeman and the last hope of the slave," the minister urged.[710] When answering interrogatories on the abolitionist cause sent by Representative F. H. Elmore of South Carolina, James Birney affirmed that they "regard the Constitution with unabated affection" and "*are* friends of *the* Union that was intended by the Constitution; but not of a Union from which is eviscerated, to be trodden under foot, the right to Speak, –to Print, –to Petition."[711] Across the country, an organized petitioning campaign to protest the gag rules allowed the movement to both to grow in numbers and its legitimacy among a broader northern public. In Granville, Ohio, the state anti-slavery society observed in 1838 that "Petitions are multiplying and will multiply. Year after year, the tide of feeling will rise higher and higher."[712] The mounting pile of memorials and petitions that reached Congress, only to be automatically tabled or not received, attested to the measure of truth realized by this vow.

In public, antislavery advocates pressed their double constitutional case. Using a volume of lectures "compiled for the special use of anti-slavery lecturers and debators," advocates could invite listeners to "examine the celebrated Compromise about which so much is said."[713] While noting that "debates attending the fabrication of that instrument were secret and but scanty accounts of them have ever been published," the model lecture identified specific, narrow concessions coerced by the Deep South at the Founding. Then it turned to the present. Casting the gag rule as a new sectional exaction, unsanctioned by the Founding, it instructed: "now a final 'concession; is demanded by them of the suppression of constitutional freedom of speech and the press, still for the sake it is said of union; but in reality of slavery." Seen this way, opposition to the gag became adherence to an original meaning embedded in slavery-limiting norms. At least in theory, antislavery agents sought to carry this argument to southerners. In an 1843 *Address to the Non-slaveholders of the South*, a northern writer accused slaveholders of violating the constitutional rights of their fellow citizens. With their efforts at national and local

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[709] *Fourth Annual Report of the Vermont Anti-Slavery Society: with the proceedings of the annual meeting, holden on Middlebury, February 21 & 22, 1838* (Brandon, 1838).
[710] *Fourth Annual Report of the Board of Managers of the Massachusetts Anti-Slavery Society…* (Boston, 1836), 54.
[711] *Correspondence, between the Hon. F. H. Elmore, one of the South Carolina delegation in Congress, and James G. Birney, one of the secretaries of the American anti-slavery society* (New York, 1838)
[712] *Report of the Third Anniversary of the Ohio Anti-Slavery Society, Held in Granville, Licking County, Ohio, On the 30th of May, 1838* (Cincinnati, 1838)
[713] Charles Olcott, *Two Lectures on the Subjects of Slavery and Abolition* (Massillon, OH, 1838)

suppression, they had "rendered the Constitution a blurred, obliterated and tattered parchment"; and yet "whenever this same constitution can, by the grossest perversion, be made instrumental in upholding and perpetuating human bondage, then it acquires for the time a marvellous sanctity in their eyes."[714]

Meanwhile, advocates did not relent on advancing an antislavery Founding that had granted Congress powers that it ought to use against the institution. In petitions, publications, missives and debates, their anti-gag campaign consistently implicated other Founding commitments. As one pamphlet reprinted from the *New York Evening Post* recalled, Madison had "explicitly declared from his own knowledge of the views of the members of the convention that framed the constitution, as well as from the obvious import of its terms, that in the territories Congress have certainly the power to regulate the subject of slavery."[715] In an 1839 open letter to Henry Clay, the abolitionist Gerrit Smith urged deference to "the views which the framers of the Constitution took of the spirit and principles of that instrument" instead of "the definitions and interpretations of the pro-slavery generation which has succeeded them."[716] These arguments extended a narrative of generational decline respecting freedom of speech and petition to wider constitutional commitments to promote human freedom. At a meeting in Littleton, New Hampshire on Washington's birthday, an antislavery orator conjured a Founding in which there had been "an implied promise on the part of the southern states that if we would adopt a constitution tolerating slavery, they would immediately take measures which should result in the emancipation."[717] They had done just the opposite, and yet now they "come forward and say that it is a breach of faith to abolish slavery in the District of Columbia and the Territories." At one session of the Massachusetts Anti-Slavery Society, a touring slaveholder in attendance named Hogan challenged that "the principles and measures of the abolitionists [are] in violation of the constitution." After the ensuing debate, members affirmed their stance: "the doctrines and measures of the abolitionists are in perfect accordance with the constitution of the United States."[718]

Without making abolitionism popular, the anti-gag campaign constructively muddied the constitutional narratives that occupied Americans during the 1830s. As multiple claims on the Founding competed for faith, the movement passed through a moment of great vulnerability. With rising opposition to the gag, the periodic northern state government reassurances to the South that the Founding had settled everything related to slavery; that the Constitution recognized slavery; and that suppressing antislavery speech was constitutional began to waver. This shift was visible in the Rhode Island legislature in 1839. A committee assigned to consider the issue reported back that the latest House gag "is unsound in principle, a dangerous invasion of the right of the people to petition Congress, and in violation of the true intent and meaning of the Constitution of the United States." The lone dissenting member objected that Congress could certainly impose that gag and "No man who values his reputation for sagacity and common fairness will question this power under the original constitution." He could hardly believe that his fellow lawmakers were drifting from the Founding of settlement – a historical construction not yet a decade old.

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[714] *Address to the Non-slaveholders of the South: On the Social and Political Evils of Slavery* (New York, 1843).
[715] Theodore Dwight Weld, *The Power of Congress over the District of Columbia* (New York, 1838).
[716] *Letter of Gerrit Smith, to Hon. Henry Clay* (New York, 1839).
[717] William D. Wilson, *A discourse on slavery: delivered before the anti-slavery society in Littleton, N. H., February 22, 1839, being the anniversary of the birth of Washington* (Concord, NH, 1839).
[718] *Proceedings of the Massachusetts Anti-Slavery Society, at its Sixth Annual Meeting, Held in Boston, January 24, 1838* (Boston, 1838), xi.

In fighting against that ascribed original settlement through their own claims on the Founding, antislavery advocates also offered a framework for northerners to see the South as overstepping original limitations on slavery. Episodes involving the imprisonment of black sailors, the rough treatment of travelling northerners and the southern appetite for Texas began to fit into such a pattern in the early 1840s. In 1843, even before the annexation of Texas and the Mexican-American War, an antislavery report reflected that "The events of the past year have done much to open the eyes of the people of the North to the aggressions of the Slave Power upon their own rights."[719] Indeed, during the year the Massachusetts state government asked Congress for a constitutional amendment to cease counting enslaved people for political representative – to undo the three-fifths clause. This symbolic statement was a far cry from the resolutions of the Lunt Committee produced less than seven years earlier.

In 1844, the House gag fell. During the intervening years, Congress has not ceased speaking about slavery, but now the gate swung wide open. Northerners voted against its renewal regardless of party, feeling the pull of public constitutional understanding. For most, they were fulfilling Founding commitments that constituents had come to believe. Southerners attempted to justify the gag by pointing to instances in which the British Parliament had turned away petitions prior to the Revolution. Robert Winthrop of Massachusetts replied that "the framers of the Constitution would have been the last persons in the world to sanction such refusals or to consider them as in any degree furnishing precedents for us to follow."[720] It could not be believed that "the framers of the Constitution intended to give their assent to principles under which their own petitions against the stamp act were refused a reception." The conservative Whig was no friend of abolitionists, and nor were most lawmakers who voted down the gag. Nor were many of their constituents. But their newly-hardened sense of what the Constitution had originally promised would not extend to preemptive silence. A Founding had coalesced in the North that would no longer tolerate the rejection of petitions about slavery.

The defeat of the House gag rule can be understood as a political victory by the antislavery movement. But it was a fractured community that experienced this erosion of the proslavery policy. At the close of the 1830s, one faction had disclaimed any interest in policy struggles under the U.S. Constitution. While the Liberty Party began pursing antislavery party politics in the early 1840s, and the American and Foreign Anti-Slavery Society continued organizing efforts within the confines of the Constitution, immediate abolitionists embraced anti-constitutionalism. Fighting within the limited spaces allowed by the text and Founding seemed fruitless. The gag rule exemplified this point. Overturning it was scarcely a stride toward abolition, especially when the Constitution and the Union offered sturdy protections for the slavery's perpetuity. A few months after the gag fell, for instance, the respected Bostonian Francis Jackson resigned as a justice of the peace, declaring of the Constitution, "Henceforth it is dead to me, and I to it."[721] Especially after the publication of the Madison Papers gave fodder to indict the fathers' Constitution, radical abolitionists vocally claimed the Founding to condemn the Union for its proslavery heart. As Wendell Phillips wrote in his 1845 pamphlet, *Can abolitionists vote or take office under the United States Constitution?*, the "Madison Papers,

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[719] *Eleventh Annual Report, Presented to the Massachusetts Anti-Slavery Society, By its Board of Managers, January 25, 1843* (Boston, 1843), 17.
[720] Robert C. Winthrop, *Speech on the Right of Petition: delivered in the House of Representatives, January 23rd and 24th, 1844* (Washington, DC, 1844).
[721] *Thirteenth Annual Report, Presented to the Massachusetts Anti-Slavery Society, By its Board of Managers, January 22, 1845* (Boston, 1845), 38.

containing the debates of those who framed the Constitution at the time it was made, settle beyond all doubt what meaning the framers intended to convey."[722] Pretending the Constitution was other than a proslavery pact, he warned, would be met by slaveholders engaging in greater dishonest construction but in further favor of slavery. In 1846, Henry Clarke Wright offered a long brief advocating *The Dissolution of the American Union*, as his title prescribed. It elaborated "the essential nature of the Union and what were the intentions of its founders (1) from the nature of the Convention that framed it; (2) from the terms of the Constitution itself; (3) from the speeches of its framers; and (4) from the construction put upon it by the State Conventions called to ratify or reject it." All showed an irredeemable Founding.[723]

The suppressionist campaign, the antislavery counter-narrative and the collapse of the gag demonstrated the power of telling convincing constitutional stories. But the decline of the Founding of Silence did not represent the formation of consensus around slavery in the Constitution. The South retained its conception of a proslavery Founding settlement all the while, one it saw as under assault in this moment. As John Underwood seethed to Representative Howell Cobb of Georgia in February of 1844, "when our Northern brethren, forgetful of the spirit of compromise which resulted in the formation of our Constitution, and regardless of our rights as members of this Union, force issues upon us which were intended by the framers of our government to be buried and closed forever, it is time that we should hold them as we hold the rest of mankind, 'enemies in war, in peace friends.'"[724] Rather, the end of the gag rule inaugurated an era of further destabilization in constitutional politics and constitutional narratives. With western expansion on the horizon, new struggles were building over governing slavery across expansive landscapes and temporalities; and a contested, authoritative Founding would be a critical arena of their conflict.

Slavery's Constitutional Map

The United States fleshed out its continental empire with ruthless politics and military conquest during the back half of the 1840s. Between the 1845 annexation of Texas and the 1848 Treaty of Guadalupe Hidalgo ending the Mexican-American War, the national flag was planted across the Southwest and California. The annexation, a project of anglophone Texans, southern expansionists and their Democratic allies, was carried out under the presidential treaty-making power and approved by bare congressional majorities. The Republic of Texas' acceptance of the annexation they had long courted was certain to aggravate Mexico, which effectively had denied the polity's independence. President John Tyler orchestrated this moment in the waning months of his term. His successor, James Polk, consummated it and then went further, moving U.S. troops beyond the nebulous southern boundaries of Texas until Mexico initiated armed conflict. The ensuing multi-year war concluded with enormous territorial cessions to the United States. The annexation and conquest occasioned constitutional conflict and counter-invocations of authority, as expansionists and their opponents sought to delegitimize the ground upon which each party stood. But the acquisition of a vast federal domain stretching to the Pacific, much of it arguably southern in character, opened a dire front in the war over slavery's constitutional

[722] Wendell Phillips, *Can Abolitionists Vote or Take Office under the United States Constitution?* (New York, 1845).
[723] Henry C. Wright, *The Dissolution of the American Union…* (London, 1836).
[724] John W. H. Underwood to Howell Cobb, Feb. 2 1844, in "The Correspondence of Robert Toombs, Alexander H. Stephens and Howell Cobb," ed. Ulrich B. Phillips, *Annual Report of the American Historical Association for the Year 1911* (vol. 2, Washington DC, 1913), 54.

identity. The question of slavery in the territories – and the states they would become – elicited a concatenation of claims upon the Founding and a secession crisis only temporarily held at bay.[725]

The territorial question arrived after constitutional acrimony. Political and military machinations that seemed like constitutional bad faith to detractors beyond a core antislavery constituency. As early as the spring of 1837, Daniel Webster condemned the prospect of introducing the vast slaveholding domain of Texas into the fathers' carefully crafted Union. Speaking in the Grand Saloon at Niblo's Gardens in New York City, he identified "insurmountable objections" to annexation. "When the Constitution was formed it is not probable that either its framers or the people ever looked to the admission of any States into the Union except such as then already existed, and such as should be formed out of territories then already belonging to the United States."[726] And new territorial additions were a matter of careful choice to be exercised by the people of the existing United States so as not to distort their fathers' work. Their constitution had afforded "solemn guaranties" to slavery in the original states, Webster assured, "But when we come to speak of admitting new States the subject assumes an entirely different aspect." Altering the boundaries of Union was a decision to be made "looking back to the renown of our ancestors and looking forward to the interests of our posterity," which in this case should proscribe the annexation.

The campaign for annexation stalked politics in the ensuing years, emerging with force under the administration of John Tyler. The Democratic Partly largely united in support while Whigs opposed the action, though sectional differences cut across this partisan division. As Democratic Senator Levi Woodbury of Connecticut, soon to join the U.S. Supreme Court, argued in June, 1844, "The framers of the constitution were men who looked deep into the future and had no design to strip themselves of any high national powers or destinies."[727] His future colleague, Joseph Story scorned precisely this sort of analysis in the Texas debate. "It is astonishing how easily men satisfy themselves that the Constitution is exactly what they wish it to be," he wrote to Simon Greenleaf early the next year.[728] Of course, Story was quite certain that annexation and statehood via the treaty-power was a baseless fantasy. "The fact is that the framers of the Constitution never dreamed of such extravagances, and therefore they never provided in terms against them. The whole scope of the Constitution seems to be, not merely in terms, but in spirit and objects, the other way." This was not a matter of strict or loose construction but rather a distortion of original design. Both advocates and opponents claimed that the Founding supported the righteousness or wrongfulness of the annexation scheme. But the opposition leaned more strongly on the past, seeking to wield it against a majority that rested on popular will and plain constitutional text that did not clearly prohibit their course.

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[725] On the annexation of Texas and war with Mexico, see Michael A. Morrison, *Slavery and the American West: The Eclipse of Manifest Destiny and the. Coming of the Civil War* (Chapel Hill, 1997); Joel Sibley, *Storm over Texas: The Annexation Controversy and the Road to Civil War* (New York, 2005); Brian DeLay, *War of a Thousand Deserts: Indian Raids and the U. S. -Mexican War* (New Haven, 2008); Amy Greenberg, *A Wicked War: Polk, Clay, Lincoln, and the 1846 U.S. Invasion of Mexico* (New York, 2012); William Freehling, *The Road to Disunion: Volume I: Secessionists at Bay, 1776–1854* (New York, 1991); Leonard L. Richards, *The California Gold Rush and the Coming of the Civil War* (New York, 2007)

[726] Daniel Webster, "Reception at New York. A speech delivered at Niblo's Saloon, in New York, on the 15th of March, 1837," in Edwin P. Whipple, *The Speeches and Orations of Daniel Webster* (Boston, 1914).

[727] Levi Woodbury, "Re-Annexation of Texas," in *Writings of Levi Woodbury, LL.D.* (vol. 1, Boston, 1852), 357

[728] Joseph Story to Simon Greenleaf, Feb. 16, 1845 in *Life and Letters of Joseph Story*, ed. William W. Story (vol. 2, Boston, 1851), 514.

The Founding of Annexation was a simple enough device. First, it observed the constitutional provision that "New States may be admitted by the Congress into this Union." Then it turned to the drafting history of the provision. In the Convention, the language recommended by the Committee of Detail had required two-thirds majority approval by Congress and specified that new states would be formed from territory within the United States. This was subsequently abandoned, as was language requiring new states to be admitted on the same terms as original states. That abandonment was central to the Founding of Annexation's constitutional imaginary: it became an expression of limitless expansionist intent. While the framers may have sought to simplify language and ensure that lawmakers had discretion to ensure that western states did not overwhelm old states, the abandonment allowed annexation enthusiasts to claim that any domain could be voted into the Union as a state by Congress. Text, the journals of the Convention and ascribed expectations animated this claim. As Mississippi Senator John Henderson argued, "the members of that Convention were no such bunglers in conceiving a purpose, or of finding suitable language in which to express it, when conceived. But here our objectors commence with explanations. The article so reported was soon afterwards assailed successfully by Gouverneur Morris, one of the most shrewd and talented members of that peculiarly talented assembly."[729] Delegate Morris had sought to limit the creation and equality of new states; once his strong, explicit limitations were rejected, he advocated the succinct language that was adopted. Opponents of the annexation of the Republic of Texas noted this point in urging that the framers had never contemplated such a scenario and thus had not provided against it in precise terms. "Mr. Morris's motives," Henderson continued, "may be shown from the journals." After the delegate had "exhausted his efforts to tie down with cords and restrictions of colonial disqualifications the new States which were to arise in the West," the New Yorker sought sectional "counterbalance" with future northeastern territory outside the United States – Canada; and because "northern states then had a majority vote… but they had not a two-thirds vote," the bloc could admit new states from without the union in the northeast while a two-thirds majority would embarrass them in this respect." This vision of the past perfectly justified the expansionist present. In other words, the northern framer had intended to accomplish for the North at the Founding precisely what Henderson wished to accomplish for the South with Texas circa 1845. Indeed, according to Henderson's senatorial colleague from Mississippi, Robert Walker, the "same overruling Providence" that had inspired "the framers of our wonderful constitution… and is now shielding it from abolition, its most dangerous and internal foe, will open Texas as a safety valve" in which slavery would diffuse.[730] Annexation was constitutional and providential under both the fathers and the Father of the Founding.

The Admission Clause of the Constitution, after the succinct provision that Congress may admit new states, limits where and how Congress might admit new states. It stipulates that: "no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." The Founding of Annexation made the origins of this text part of a more elaborate case for incorporating the Republic of Texas. According to the expansionist reading, the framers contemplated adding states either from within the jurisdiction of the existing Union by consent of the legislatures of affected states or from without the jurisdiction of any of the States at the discretion of Congress. In the House,

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[729] Cong. Globe Appendix, 28th Cong., 2nd Sess., (1845), 407.

[730] *Letter of Mr. Walker, of Mississippi, Relative to the Annexation of Texas: in Reply to the Call of the People of Carroll County, Kentucky, to Communicate His Views on that Subject* (Washington, 1844), 15.

prominent Kentucky attorney John Wooleston Tibbatts demonstrated this position, presenting a brief on annexation as a realization of original intention. The southern Democrat invoked rules "laid down by an eminent jurist. - Justice Story, in his *Commentary on the Constitution*" that the Constitution should be approached with "constant reference" to its great objects of establishing justice, promoting the general welfare, and perpetuating liberty, and always by examining its original, contemporaneous construction by framers. The Articles of Confederation had not provided a mechanism for establishing new states. "How did the new system—the constitution as it now stands—supply the defect? The answer is obvious: by giving to Congress the general, unrestricted, unambiguous, and unlimited power to admit 'new States into the Union,'" Tibbatts argued.[731] Turning to the convention proceedings, like Henderson, the congressman narrated a drafting history in which Pinckney, Randolph, Patterson and other framers knew and intended the full, future meaning of the terms they contended over. "To show the cotemporaneous construction," Tibbatts introduced the "the 14th No. of the Federalist, a book which had always been regarded as of the highest and most unquestionable authority touching the intentions and views of the framers of the constitution." In this number, Madison wrote that the Constitution was designed to secure "the union of the thirteen primitive States, which we know to be practicable, and to add to them such other States as may arise in their own bosoms, or in their neighborhood, which we cannot doubt to be equally practicable." When read from the vantage of 1840s and through the eyes of Manifest Destiny true-believers, this language was not only justificatory but emboldening. The Republic of Texas was in their neighborhood.

Southerners eager for expansion saw in Texas an extension of their society, and Anglo-American Texans looked forward to annexation. This sense grew stronger as more and more slaveholding friends, family and neighbors moved across the border. In 1841, Henry Stuart Foote articulated this view of belonging to one historic constitutional family in his book, *Texas and the Texans*, well before Secretary of State Calhoun's 1844 treaty offer and the height of annexation fever. A rising Mississippi politician and arch-nativist, Foote wrote with passion: "The framers of the Constitution of the United States were men profoundly conversant with the history of all governments ancient and modern. They possessed likewise a knowledge both accurate and minute of all the peculiar characteristics of their own countrymen and knew exactly how far to trust to their capabilities as a people. They adapted the government which they founded with singular nicety and precision to the population over which its authority was to be exerted and by whose virtue and good sense it was at last to be made effectual."[732] All of this applied to white Texans. And it stood in contrast to all other people in Mexico. Foote continued that, "the people of the United States are emphatically a Constitution-loving, a Constitution-respecting, a Constitution-understanding people… But who would venture to assert as much in relation to the miscellaneous and unlettered rabble who constitute the people of the Mexican Republic?" In subsequent years, however, this kind of racial constitutional chauvinism would inform critiques of further expansion into the Southwest.

In the North, allies of expansionists rehearsed the Founding of Annexation. Among Northern Democrat leaders, many accepted the premise that claiming Texas would "preserve the peace and permanent independence of the Confederacy, and must result in advancing the ultimate prosperity of the whole country," as the legislature of South Carolina resolved in

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[731] *Speech of Hon. John W. Tibbatts of Kentucky on the Reannexation of Texas: Delivered in the House of Representatives, January 13, 1845* (Washington, 1845), 6.

[732] Henry S. Foote, *Texas and the Texans: or, advance of the Anglo-Americans to the South-West* (vol. 2, Philadelphia, 1841).

1844.[733] Alexander Everett authored a public letter that cast constitutional opposition as an absurdity. The diplomat cited "reports of the proceedings of the Federal Convention" and recalled revolutionary appetites for Canadian territory to substantiate a Founding for annexation. "A supposed want of constitutional power in the government is a favorite ground of opposition to almost every measure that is thought, on other accounts. to be objectionable; for the obvious reason that, if made out, it is peremptory and decisive," he noted.[734] "But I recollect no instance, in which, as it seems to me, it has been urged with less plausibility than the present one." This general observation of the delegitimizing power of constitutional claims was well put, though it was prompted by participation in the struggle for a justificatory Founding. Former President Martin Van Buren aspired to return to office in 1844, but he was not eager for annexation, probably war with Mexico and the reproduction of slave states. Yet in the vortex of expansionism, the New York Democrat could not deny Founding authorization to the project. In an 1844 letter to William Hammett that circulated publicly, he poured over the Convention proceedings. They "show that the proposition to restrict the power to admit new States to the territory within the original limits of the United States, was distinctly before the convention, once adopted by it, and finally rejected in favor of a clause making the power in this respect general," he explained.[735] There were no records of debates in the analysis of the Founding of Annexation. But the bare drafting history provided by the journal of the Convention seemed to yield answers. Assumptions about original understanding, accessed via present-day reading of textual tweaks, became confident narratives of foresight and intention.

The constitutional campaign against incorporating Texas did not relinquish historical ground. It claimed an authoritative history that proscribed the course of the majority and the President. The old northern Democrat Jabez Hammond addressed an open letter to annexation leader John Calhoun denying the Founding authorized annexation. Explaining the drafting history of the Admission Clause, he argued that "if the debates on that clause could be furnished us, it would be rendered evident that the convention adopted the section as it is because they considered that its words expressed Mr. Randolph's intention with greater brevity and equally as clear as those used in his resolution."[736] That is, far from representing a change from restricting the admission of foreign states by Congress to fully allowing it, the framers' textual adjustment reflected no change of meaning at all. As the framers expressed and organized powers that the states would delegate to the federal government, Hammond explained, they provided for the scenarios of where an existing state was "inconveniently large" and when "territory owned by the confederacy" was sufficiently occupied to become a state. Both of these possibilities were addressed in the language of the Admission Clause. Showing "that their attention was confined to the territory then held by the Union," the framers provided that a state would not be divided without its consent and that Congress could make regulations respecting the territories. Hammond marveled, "What plain common-sense man can read this section and suspect or even imagine that its authors dreamed of conferring on congress the power of annexing this nation to another?" Only by narrowly focusing on the first clause that "New States may be admitted by the Congress into this Union" in isolation, he indicated, could Americans now invent a pro-annexation Founding. In effect, Hammond was suggesting an argument about the danger of

[733] *Act of the General Assembly of the State of South-Carolina, Passed in December, 1844* (Columbia, 1845), 162.
[734] "The Texas Question. A Letter from Alexander H. Everett," *United States Magazine and Democratic Review*, vol. 15, Sept. 1844, 250.
[735] "Mr. Van Buren's Letter on Annexation," *Niles' National Register*, May 4, 1844, 154.
[736] Hamden, *Letter to the Hon. J. C. Calhoun, on the annexation of Texas* (Cooperstown, NY, 1844), 24.

faithful constitutional translation across time. The lost context of actual Founding moment concerns, the fervid imagination and intervening context of the present, and the limited textual and documentary anchors to the Founding made it possible for annexation advocates to read into the past fictive historical power and encouragement. At the same time, however, Hammond was presenting his own sense of what the framers had meant through the same methods of knowing.

Opponents elaborated an anti-Annexation Founding composed of several parts. The 1844 pamphlet *An Appeal to the People of Massachusetts, on the Texas Question* called for a state convention without regard to party focused on constitutional exposition. It asked the political leaders of the commonwealth to show "historically how far it was from the intention of the framers of the Constitution to regard slavery otherwise than as a temporary institution, a political and moral evil, and an unsuitable element of a republican government; and how little they designed to entail upon their posterity for a succession of generations." Then the statemen and people should join in sending a memorial to Congress presenting "in its full dimensions, the Constitutional argument which the case requires."[737] Among northern governments, Massachusetts especially reflected such anti-annexation sentiments and moved toward a more concerted stand against the Slave Power. In 1844, it had proposed eliminating the three-fifths clause, and it reaffirmed this position in 1845 after numerous southern states had castigated the suggestion as treasonous and Constitution-destorying. Slave representation and Texas were inextricably connected. As the government of Vermont reported in 1845: "this very compromise carries with it an irresistible argument against the measure of annexation. A slight consideration of the subject will render it apparent that the compromise securing a slave representation must have had reference to a union within the then limits of the United States because it concerned a sectional interest, the adjustment of which in the compromise must necessarily have had respect to definite territorial limits, otherwise the balance might be destroyed and the compromise practically nullified by the addition of foreign slave States…."[738] Far from the Founding allowing the annexation of Texas, the act would nullify its meaning and authority. The force of the original compromises would "be at an end."

The quest to make Texas part of the Union was understood as a project to enlarge the political power of slave states and the national space for enslavement. Its southern supporters admitted as much. While figures such as Calhoun argued for annexation as restoring an original, intended sectional balance to the Constitution, many northerners saw it in precisely opposite terms. As Representative Caleb Smith of Indiana declared, "When the balance between these two sections of the country was settled by the Constitution, each agreed to take its chance for an increase of its strength from its own resources; and if one section now finds itself growing weaker, it has no right to demand concessions from the other for the purpose of adding to its strength, much less has it the right to call in the aid of a foreign Government to increase its power and secure its ascendency."[739] Annexation went beyond the framers' original bargains and, in doing so, violated their implicit, exhaustive meaning on matters of slavery. No abolitionist, Smith placed the "extreme slavery men of the South and the extreme anti-slavery men of the North" on the same unconstitutional ground of desiring "to disturb the compromises of the Constitution." The midwestern congressman claimed to speak for the northern masses who rejected such a course, who would "religiously adhere" to the Constitution "our fathers made," but who saw annexation as an evasion or cheating of the original bargain. "Their doctrine is to let

[737] *An Appeal to the People of Massachusetts, on the Texas Question* (Boston, 1844).
[738] *Journal of the Senate of the State of Vermont. October Session, 1845* (Windsor, 1846), 28.
[739] *Speech of Mr. Caleb B. Smith, of Indiana, on the Annexation of Texas.* (Washington DC, 1845).

the Constitution stand as it is and let there be no interference with the balance it has established," Smith vowed. While the Indianan was no antislavery statesman, the Texas fight brought such figures together with more outspoken members. Ohio Representative Joshua Giddings, the leading antislavery voice in Congress, connected annexation to a Founding that had carefully delimited any federal support for slavery. "It was foreseen by the framers of the Constitution that the subject was of such a delicate character that the Federal Government could not interfere with it in any form without endangering the existence of our Union," he recollected, and it would violate this commitment and realize such a danger to bring a slaveholding Texas into the Union.[740] If Texas abolished slavery and wished to join the Union, that would be present a different constitutional scenario;, but "the continuance of slavery in Texas will endanger the freedom of Ohio," Giddings warned. This was the obverse position of the Calhoun movement that cast the failure to annex a slaveholding Texas as a danger to slavery and the Union.

This sense of southern constitutional necessity, tethered to a Founding that promised slave states power and land as the county expanded, provoked a counter-Founding specifically to dispel this expectation. "But we are told by Mr. Secretary Calhoun that the Constitution guarantees the Southern States the protection of slavery," Charles Hudson exclaimed.[741] Expansion for slavery's sake contradicted the will of the framers, as the constitutionally-informed public well-knew. Assembling familiar quotations, the Massachusetts congressmen sought to demonstrate that: "Every-one who is acquainted with the debates which took place in the Convention which framed, and those which ratified, the Constitution, knows that the statesmen of Virginia and Maryland at that time spoke of slavery as a curse… and they looked forward to the period when they should rid themselves of that burden, that stain upon their character." In developing an anti-annexation Founding, Daniel Dewey Barnard of New York focused on the territorial imagination of the framers and concerns for the viability of the national project within the limits of the country circa 1787. "It will not surely be pretended that it was the design of the framers of the Constitution to make this Government an instrument by which the people of the United States, Anglo Saxon as they are, should become the great land robbers of their time," he announced. A conservative antagonist of abolitionists, Barnard's anti-annexation origin story defined the scope of the Union that had been framed and ratified. He cited the arguments by Madison and fears of Washington over holding together the United States.

> I repeat, and insist, that the feelings and apprehensions to which I have adverted, prevailed very commonly at the time the Constitution was framed and adopted, and no disposition then existed in any quarter to make constitutional provision for extending the territorial limits of the Republic. Nothing *could* have been farther from the thoughts of the people at that period, than to clothe this Federal Government with authority to run a career of territorial acquisition and aggrandizement. All the fears and jealousies of the States, and of the people, would have been roused and fired by such a suggestion. And I do not believe there was a man in the Convention which framed the Constitution, if such a proposition had been thrown before it, who could have been found to give it the sanction of his vote; and there was not a State among the Old Thirteen, which would have adopted and ratified the Constitution, if a provision to this effect had been found in it.[742]

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[740] *Speech of Mr. J. R. Giddings, of Ohio, on the Annexation of Texas.* (Washington DC, 1844).
[741] *Speech of Mr. Charles Hudson, of Mass., on the Annexation of Texas.* (Washington DC, 1845), 14.
[742] *Speech of Mr. Barnard, of New York, on the Annexation of Texas.* (Washington DC, 1845), 9.

Through this account of the Founding, Barnard placed the annexation of Texas in a category of action that violated the conditions upon which the Union was established. That is, if the Constitution had been understood to provide for such a course, it never would have been born.

In the vehement debates over Texas, slavery, and the Constitution, George Marsh of Vermont noticed that people constantly made claims about the "compromises" and "guarantees" of the Constitution, shouting these terms interchangeably. This practice reflected the familiar pathways of discourse and their own thinking rather than any deliberate plot. But according to Marsh, the terms reflected separate categories: "The compromises are matter of history – a question of fact. The guaranties are a question of construction – matter of law."[743] To understand the former was an act of research, Marsh explained. And despite all the storytelling about the what the framers had exchanged and agreed upon at the Founding, the record on the "nature and consideration of the mutual concessions" between sections was not remotely conclusive. "The reports of the debates in the convention are very meagre, the Federalist handles the subject briefly, and indeed the principal actors in the matter appear throughout to have walked as if among eggs while passing over this difficult ground," he remarked. Marsh raised the limits of empiricism in a constitutionalism devoted to the Founding. But this was hardly a project to disclaim the authority of the framers and Founding or to deny the possible of realizing their expectations. Rather, it was done to construct and reinforce anti-annexation historical authority. Tracing what was knowable and evident, Marsh contended that "the only compromise of the Constitution" among sections was "disproportionate representation" for the South and reduced taxation for the North while slavery endured. Further, he asserted, the circumstances and terms of the Founding disproved the position of southern expansionists that that "this compromise is in its nature perpetual and sacred and… its perpetuity is secured by the Constitution" – a constructive "guaranty" without historical merit. Because at the Founding, "the wise and good of the South as well as the North regarded slavery as both an evil and a wrong, and looked forward to its entire extinction at no very distant day," and given the foreign slave trade prohibition provision and direct taxation rules, Marsh concluded that "the tacit understanding of the framers of the Constitution" was that slavery had received only a temporary protection and absolutely no basis for expansion into new territory. In this telling, the relative tax advantage of the North was originally intended to be limited in duration until the South would "begin the work of emancipation," not for the latter section to retain a "perpetual advantage" in representation. Summing up his account of the Founding, Marsh urged that "the conclusion is irresistible that both the North and the South looked forward to the year 1808 as the commencement of a new era when those glorious words of our Declaration of Independence were to be indeed something more than a hollow abstraction.

Southern opposition to annexation was rare but real. Some Whigs warned that the Founding of Annexation was a fantasy that would breakdown the protections and stability of the Constitution, which the South, as a "minority," ultimately relied upon. Virginia Senator William Rives denied the meaning of the drafting history invoked by advocates of annexation. The friend and biographer of Madison, Rives called upon his own expertise as a constitutional historian. Arguing against the claim that the Convention had expressly rejected any restriction on Congress' power to admit as states territory from without the Union, he asserted that if his southern colleague "had examined minutely, step by step, the proceedings of the Federal Convention on this subject, he would have found that there is not a particle of foundation for the idea." Rather, he averred, "there never was any vote or proceeding of the Convention fairly

[743] *Speech of Mr. George P. Marsh, of Vermont, on the Annexation of Texas.* (Washington DC, 1845).

susceptible of such an interpretation." A lengthy analysis of the meaning of the proceedings followed. Where annex-ers found deliberate sanction for unrestricted admission, Rives explained that the framers had unambiguously understood the scope of admission to apply only to the domain of the United States. Retelling the controversy about Congress' power of ratification respecting Jay's Treaty in 1794, Rives also made a structural argument about the understanding that prevailed at the Founding. "Would it not be most extraordinary, indeed, that the wise and sagacious men who framed the Constitution should have placed so strong a check on the most unimportant transactions of this Government with foreign Powers, such as the payment of a sum of money, the surrender of criminals, the fixing of some small and unimportant boundary line, by requiring the assent of two thirds of the States, and yet should have abandoned to a simple majority of the two Houses the vast, formidable, transcendent power of treating with a *foreign nation* for its incorporation into our Union?"[744] Annexing a foreign state was tantamount to amending the Constitution in the consequence of the change it effected, he noted, and the framers had clearly designed to place all such changes under the lock and key of multiple super-majorities.

The Texas question made for unusual and unstated alliances. Antislavery attorney Theodore Sedgwick articulated a similar view to Rives' in public writing on Texas. "It appears by Mr. Madison's history of the debates, that not a word is said except on the subject of the formation of western States out of our then western territory," he instructed, and "we are not at liberty to impute to the framers of the Federal Constitution any construction so wild as" that permitting the annexation scheme.[745] The consequences of doing so would be disastrous, he warned. Deference to the fathers required following a Founding that implicitly proscribed annexation. In the Senate, Rives concluded with a warning that sounded in antebellum constitutionalism's concern with intergenerational practices. In 1845, the body contained few if any people who had "the privilege of assisting at the birth of our Constitution," but if annexation were approved, "then it might yet be the melancholy office of many of us to follow that Constitution to an untimely grave."[746] Conservative southerners like Rives defended a limited proslavery Founding, one that had produced a Constitution that protected slavery but did not promise all that present slaveholders might desire. "I had carefully traced the progress of this [Admission] clause in the proceedings of the Convention with a view to answer this inquiry by their exhibition to the Senate. The lucid exposition of them by the Senators who have preceded me has relieved me from this task," spoke Georgia Whig John Berrien, a leader of the southern bar. But he was at pains to warn that annexation would recognize the Constitution as giving "to a majority of Congress, without stint or limit, the power… to change our nature" and transform the Union.[747] Annexation through treaty and a bare majority vote threatened this original Constitution by eroding collective constitutional observance. Speaking "As a Southern man, the citizen of a State, whose present safely demands that all the public and national guaranties be strictly preserved, and maintained," Tennessee congressman Spencer Jarnagin warned, "If we can break through the Constitution to extend slavery, how are we to expect that like breaches will not be made to subvert it?"[748]

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[744] *Speech of the Hon. William C. Rives, of Virginia, on the Resolution for Annexation of Texas.* (Washington DC, 1845), 6.
[745] Theodore Sedgwick, *Thoughts on the Proposed Annexation of Texas to the United States* (New York, 1844).
[746] *Speech of the Hon. William C. Rives, of Virginia, on the Resolution for Annexation of Texas.* (Washington DC, 1845).
[747] "Speech of Mr. Berrien," *Niles' National Register*, May 3, 1845, 141.
[748] *Speech of Mr. Spencer Jarnagin, of Tennessee, on the Treaty for the Annexation of Texas* (Washington DC, 184)

Such warnings went unheeded. In 1845, Texas ratified the offer for immediate annexation that Congress had passed and John Tyler had endorsed. His successor, James Polk, signed the annexation bill into law at the end of the year. Never recognized as an independent state by Mexico, Texas entered the Union early the next year with disputed borders and legitimacy. At the direction of a Polk Administration hungry for further territorial conquest, U.S. troops marched further and further south, until war broke out. President Polk extolled a duty to uphold the "incomparable system of government formed by our fathers in the midst of almost insuperable difficulties, and transmitted to us with the injunction that we should enjoy its blessings and hand it down unimpaired to those who may come after us."[749] In practice, his military campaign suggested a Founding of Conquest, a justificatory history contested even as a wartime patriotism swept the country. And in the vast domain over which it took possession by the 1848 Treaty of Guadalupe Hidalgo, it inaugurated a crisis of constitutional power over slavery and the rules set forth by the constitutional past.

The acquisition of new U.S. territory was directly linked to bringing American slavery into those lands, and both dovetailed with slaveholders sense of ownership of the country. The constitutional rationales of making Texas into a slave state – to maintain southern power promised by the fathers and to carry slavery forward as constitutional property – resonated still. In his 1846 *A Defense of Negro Slavery, as it Exists in the United States*, Matthew Estes exulted that "When Mr. Polk's term shall have expired our present constitution will have been in existence sixty years, and forty-eight years of the time, the Presidential chair will have been filled by Southern Slaveholders."[750] This confident ethos assumed the centrality and security of slavery as a constitutional institution, one that might follow the flag. In declaring that "Negroes are recognized as property by the constitution and laws of the United States," Estes reflected on a Founding that suited his present. "Upon no other terms would the South have consented to the constitution at all. There is not a single Slave State that would have consented to enter the Union upon any other terms than those of ample protection to Southern interests."

The campaign against Mexico became undeniably popular in its time, but Polk's deliberate precipitation and conduct of fighting without congressional authorization provoked objection for opponents in the North and South. In the antebellum vernacular of a generational duty to obey and pass down an untrammeled Constitution, the war appeared to ignore original constitutional intentions and structure. Amid the aggressively patriotic climate, Tennessee Whig Meredith Poindexter Gentry argued, "it is a yet higher and more sacred duty to guard and preserve with sleepless vigilance the Constitution of the Republic. I repeat that we may be loyal to our country and yet oppose its President…. who will restore to us our Constitution and liberty when they shall be wrested from us?"[751] Albert Gallatin, in his long 1847 tract *Peace with Mexico*, deemed the war an abandonment of the principles of "Your forefathers, the founders of the Republic."[752] Waging offensive war represented the failure of the living generation to preserve the work of the fathers.

The antislavery community, radical and constitutionalist, decried the war against Mexico for what it was terms both in functional and constitutional. At the 1847 annual meeting of the

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[749] *Message from the President of the United States to the Two Houses of Congress, at the Commencement of the Second Session of the Thirtieth Congress* (Washington DC, 1848), 13.
[750] Matthew Estes, *A Defence of Negro Slavery, as it Exists in the United States* (Montgomery, 1846).
[751] *Speech of Mr. M. P. Gentry, of Tenn., Upon the Resolution to Refer So Much of the President's Message as Relates to the Mexican War to the Committee on Military Affairs, Delivered in the House of Representatives of the U. States, Dec. 16, 1846* (Washington DC, 1846)
[752] Albert Gallatin, *Peace with Mexico* (New York, 1847).

Massachusetts Anti-Slavery Society, William Garrison brought forward a resolution against the "aggressive war upon Mexico… to annex it to the United States, that the accursed system of slavery may thereby be extended and perpetuated." While ever the enemy of the national compact, he condemned the military venture "commenced in violation of even the forms of constitutional law" and growing from the "unconstitutional annexation of Texas."[753] Vermont preacher John Dudley delivered a sermon, *The Mexican War and American Slavery*, that turned to the Convention as much as the Bible to condemn slavery and war in service of its expansion. "I quote here the very language which was uttered in the convention which framed and signed our Constitution," Dudley announced.[754] The reverend told a narrative in which only the delegates of South Carolina and Georgia had sought and managed to force a means for the temporary continuance of the slave trade into the Constitution. "In this provision which was designed to prohibit the slave trade after 1808, the word slave was not permitted to be used"' "Mr. Hamilton, the able reporter of the Secret Debates of that Convention" recorded that this was done to deny recognition to the institution, explained Dudley – a misattribution suggesting how constitutional faith and knowledge circulated orally via tropes and stories. In another sermon that extensively quoted framers such as George Mason and John Rutledge, Ohioan Thomas E. Thomas recounted how in admitting slavery into the Constitution, "the great and good men who formed our Federal Constitution, as well as in regard to the people generally who adopted it, that they were drawn from the path of duty by no ordinary temptations." To form a "peaceful prosperous republic," they sacrificed the rights of man "at least for a time.[755] But the present generation, Thomas concluded, had fallen much further.

The war against Mexico was an exercise of military and popular power. The Polk Administration and congressional supporters seized territory and forced terms on the United States' southern neighbor because they wanted land and could take it. Justifications of defending Texas, expanding liberty and fulfilling the Union's promised and providential continental destiny did not require parsing of convention history. Whigs in the North as well as many in the South tended to oppose the war; but it was often a reluctant, tentative, even evasive position, one not always borne out by votes. Constitutional patriotism was the language of critique. In 1847, Daniel Webster left Massachusetts and toured the South to unify his party. Inevitably, these wartime events became celebrations of reverence and deference. In Savannah, Georgia, Associate Supreme Court Justice Wayne lauded Webster for his lifework of constitutional fidelity. "[N]o man has been truer than yourself to the compromises of the Constitution," Wayne told the crowd, and this performance would surely earn Webster a place among "those master spirits who framed the Constitution of our Union" for his preservationist mission.[756] Then Webster addressed the audience, instructing that it would be "a presumptuous man indeed who would venture to think that he could suggest any new features of improvement or in any way improve" the government of the national fathers. "Our duty is to be content with the Constitution as it is, to resist all changes from whatever quarter, to preserve its original spirit and original purpose, and to commend it, as it is, to the care of those who are to come after us."

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[753] *Fifteenth Annual Report, Presented to the Massachusetts Anti-Slavery Society, By its Board of Managers, January 27, 1847*. (Boston, 1847), 93.
[754] John Dudley, *The Mexican War and American Slavery. Sermon, preached by Rev. John Dudley of Queechee, Vt., on Fast Day, 1847* (Hanover, NH, 1847).
[755] Thomas E. Thomas, *Covenant Breaking, and Its Consequences: Or the Present Posture of Our National Affairs, in Connection with the Mexican War: Embodying the Substance of Two Discourses, Preached in Hamilton, Ohio, on the 4th. and 11th. of July, 1847* (Rossville, OH, 1847).
[756] "Reception at Savannah," in *The Works of Daniel Webster* (vol. 2, Boston, 1858), 399, 401.

If the Texas Annexation brought together some conservative southerners and northerners in opposition to the campaign, one supported by both Calhounites and Democratic across the country, the war against Mexico prompted stranger bedfellows. At the end of the war, Calhoun himself introduced a resolution that "to conquer Mexico and to hold it, either as a province or to incorporate it in the Union, would be inconsistent with the avowed object for which the war has been prosecuted; a departure from the settled policy of the Government; in conflict with its character and genius; and in the end, subversive of our free and popular institutions."[757] While most expansionists southerners rallied to support the war, the most imperious spokesman for the slaveholding class exhibited a certain kind of constitutional scruples. He warned that "of the few nations, who have been so fortunate as to adopt a wise Constitution, still fewer have had the wisdom long to preserve them." What precisely was the nature of his objection, seeming to sound in the familiar tones of constitutional preservation? "Ours is the Government of the white man," he declared, seeking to enjoin the incorporation of Mexican territory where "more than half of its population are pure Indians, and by far the larger portion of the residue mixed blood." Calhoun was advancing an argument that entangled racial and constitutional preservation. In this view, the Founding itself was limited as to jurisdiction and population – that the framers' designed the Constitution for only some people and places. This was an argument that rested not on text but on racial nationalism as a binding principle across time. As the Congress and country turned fully to debating control over slavery's place in the incorporation of the Mexican cessions, many minds joined in considering constitutional, demographic and political questions together.

The policy of waging war for foreign land was ultimately a secondary subject of constitutional conflict after fighting began – and especially after the fighting ended with a redrawn national map. Objections to the usurpation of powers by Polk and arguments over the general unconstitutionality of offensive war and territorial conquest were supplanted by a sectional rupture over the place of slavery in the conquered West. Coming on the heels of the Texas annexation, the war forced critical reflection by northerners who had no particular affinity for antislavery circles. But without legislative action, it seemed that the South might reproduce itself across New Mexico and California, fashioning politics and economies in its own image. Such a Union, many believed, was neither what their fathers had created or intended. When Polk sought funds to negotiate a settlement with Mexico in the summer of 1846, a group of northern Democrats intervened. Representative David Wilmot of Pennsylvania, self-professedly "no croaker against the South," offered an amendment to the appropriations bill.[758] This Wilmot Proviso stipulated: "That, as an express and fundamental condition to the acquisition of any territory from the Republic of Mexico by the United States, by virtue of any treaty which may be negotiated between them, and to the use by the Executive of the moneys herein appropriated, neither slavery nor involuntary servitude shall ever exist in any part of said territory, except for crime, whereof the party shall first be duly convicted." It repurposed the language of the Northwest Ordinance, the words of the fathers, to insist upon no further expansion of slavery in the territorial spoils of war. The amended bill passed the House and went down by inaction in the Senate. This was only the beginning: a broader version of the proviso passed the House in the next year before Congress enacted an appropriations bill omitting it; then, in peace, America felt

[757] Richard K. Cralle, ed., *Speeches of John C. Calhoun, delivered in the House of representatives and in the Senate of the United States* (New York, 1883), 396.
[758] *Speech of Hon. D. Wilmot, of Pennsylvania, on the Oregon Question: Delivered in the House of Representatives, Saturday, February 7, 1846* (Washington DC, 1846).

the full brunt of the question, as the government swiftly turned to regulating the territory and admitting new states. The slow-moving sectional crisis accelerated in a cacophony of constitutional rights, wrongs and claimed truths.

This struggle over slavery in the West echoed the Missouri Crisis, but it was not a reprise of that event. Constitutional tectonics had shifted since that signal moment in constructing antebellum vernacular constitutionalism. In the passing decades, the Founding had coalesced. Constitutional history had been written, researched and rehearsed, and ideas about the moment of national creation had hardened. The Founding generation had long since been reduced to text and hearsay. Meanwhile, the content of proslavery and antislavery convictions and the gulf between their centers of gravity had grown. Between Founding imaginaries and visions of the future United States, Americans furiously argued in historical constitutional terms about who should occupy the remote spaces that the government had engulfed. Northerners articulated a Founding of Containment, in which the living generation could and should restrict the expansion of slavery to uphold their fathers' Constitution. Conversely, southerners increasingly asserted a Founding of National Slavery, in which the institution had been established as a cornerstone of the Constitution and was due extraordinary federal recognition and protection. These warring claims of original meaning animated intense political conflicts at the end of the 1840s, spurring a secession crisis. The Compromise of 1850 that delayed it, a set of measures passed by different, opposing majorities, did not represent the formation of constitutional consensus or a meeting of mind about historical meaning; nor did it substantially represent a shared embrace of "compromise" within a lawmaking space under the Constitution.[759] As Americans contested the future footprint of slavery, they claimed to stand by the proslavery fathers' Constitution or the slavery-confining Constitution of the fathers.

The Founding of Containment

The Founding of Containment denied that the fathers' Constitution sustained slavery over time and space. In the redeeming light of history, according to its burgeoning body of northern subscribers, the Constitution carried forward a positive, limited antislavery vision. It expressed an original understanding that Congress could restrict the further extension of slavery, an original intention to bring about the end of slavery, an original expectation that slavery would diminish not spread and an original purpose of securing liberty – all of which amounted to a veritable constitutional imperative for the living generation to let slavery progress no further.

The 1787 Ordinance prohibiting slavery in the Old Northwest, enacted by the Old Congress while the Federal Convention met and affirmed by the First Congress, figured prominently in making the case for a Founding of Containment. In a typical analysis by Ohio Representative Daniel Tilden, "The restriction of slavery to its then existing limits seemed to have been conceded as a matter of course, and as one of the necessary results of carrying out the principles upon which the Government was founded."[760] The Ordinance was fully consistent "the declarations of a long list of distinguished southern gentlemen," he argued, offering to introduce

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[759] Stephen E. Maizlish, *A Strife of Tongues: The Compromise of 1850 and the Ideological Foundations of the American Civil War* (Charlottesville, 2018). For conventional accounts of the Compromise and their meaning, see Robert V. Remini, *At the Edge of the Precipice: Henry Clay and the Compromise That Saved the Union* (New York, 2010); Peter Knufer, *The Union As It Is: Constitutional Unionism and Sectional Compromise, 1787-1861* (Chapel Hill, 2000); John C. Waugh, *On the Brink of Civil War: The Compromise of 1850 and how it Changed the Course of American History* (New York, 2003);

[760] *Speech of Hon. Daniel R. Tilden, of Ohio, on the Mexican War and Slavery: Delivered in the House of Representatives, February 4, 1847* (Washington DC, 1847), 8.

"the opinions of Washington, Jefferson, Marshall, Wythe, Pendleton, Mason, and many others; all of whom expressed opinions of slavery, which, when now uttered, are regarded by the descendants of those great men as the ravings of fanaticism." As Charles Sumner declared of the Ordinance at a political convention in Massachusetts, "The early conduct of our fathers at the formation of the Constitution should be our guide now."[761] The Ordinance demonstrated not only what was possible, as demonstrated by their policy; it was a directive, as dictated by their intentions.

Oliver C. Gardiner, formerly editor of *The Democratic Review*, tallied the overlapping groups who had agreed upon the Northwest Ordinance in the Congress of 1787, authored the Constitution and reaffirmed the Ordinance in the First Congress under the new Constitution. "We have then all, or nearly all, of the illustrious men, who were members of both bodies in various ways giving their votes for the principle of this ordinance," he remarked.[762] Of eleven members of the Old Congress who were absent from its proceedings to attend the Federal Convention, six then became members of the First Congress and each voted to reaffirm the Ordinance. In the First Congress, he counted nine representatives and eleven senators who had been framers in the Convention. None of these twenty members, he noticed, offered any objection to the enactment by the new government of the Northwestern Ordinance banning slavery. "From '74 to the organization under the Constitution, at every step through this rugged and stormy period, the action of its founders aimed ever to modify the severity, to restrict the boundary, and eventually to work out the extinction of slavery," the new free soil advocate concluded.

Following the fathers' Constitution aligned with the Wilmot Proviso and the congressional restriction of any further slave states. Under the Founding of Containment, the comfortable course of reverence and deference meant not touching slavery where it lay – but only that. As William Woodworth of New York remarked:

> I am content… to leave slavery where the Constitution has left it. The Constitution — that glorious offspring of mutual compromise — gives no power to the slave States of adding to their number; nor does it authorize the free States to interfere with slavery, so as in any manner to affect its character. In the States where it existed on the adoption of the Constitution, the institution of slavery is protected from external assault by the provisions, express or implied, of that instrument; but under it, it cannot extend itself to the acquisition of other territory; and all territory since acquired, with slavery existing therein, has been with the sufferance and by the consent of the free States.[763]

This view of the West looked back in time before returning to the present. It marked a Founding moment and then a period of acquiescence that must cease. The Missouri Compromise had been a concession by free states under particular circumstances, one limited only to the Louisiana Purchase, and not the exercise of a southern right to be repeated much less broadened.

Politicians mined drafting history to sustain their conviction that Congress' enumerated power to dispose of and make needful regulations for territory encompassed the proscribing of slavery. Senator John Dix of New York, "by exposition of the meaning of the Constitution and the intention of its framers," explained how the textual evolution of proposals to deal with

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[761] Charles Sumner, *Orations and Speeches* (vol. 2, Boston, 1850), 245.
[762] Oliver C. Gardiner, *The Great Issue: Or, The Three Presidential Candidates; Being a Brief Historical Sketch of the Free Soil Question in the United States, from the Congresses of 1774 and '87 to the Present Time* (New York, 1848).
[763] "Speech of W. W. Woodworth," Cong. Globe Appendix, 29th Cong., 2nd Sess. (1847), 438.

unappropriated land evidenced an understanding of full governmental authority – which would include restricting the spread of slavery.[764] The sparse record and nature of the claim made such efforts an exercise in proving something that the framers neither stated not contradicted in so many words. After discussing the Ordinance in 1849, Representative Timothy Jenkins of New York wondered "Would it not be strange indeed if the venerable and sagacious founders of our present form of Government did not provide in the Constitution for the government of these vast Territories preparatory to their admission into the Union as States?"[765] With praise for the foresight of the wise "assemblage," he read the insertion of the clause for regulating national territory as having intended to mark a clear resolution of the ambiguity that had prevailed under the Articles of Confederation. Their foresight did not, however, extend to territory outside the Union and the various unpredictable ways in which the government had assembled an "empire": hence the absence of a more specific provision on the subject. New Hampshire Representative James Wilson made the point with more imaginative force. Arguing that the framers had in mind "a certain, distinct, and definite tract of country to which the Constitution of the United States was to apply," he asked any congressman to "take the journal of that convention in his hand, and say whether he could believe that the men of that convention were brought together for the purpose of framing a Constitution for the United States did, in fact, form an instrument with all the properties of a monstrous gum-elastic overshoe inverted, the toe of which could be drawn on over the north pole, and the heel hitched down over some tall mountain near the Isthmus of Darien?"[766] In other words, the Founding did not intend to constitute an empire; and no prohibition on regulating slavery in newly acquired territory could be drawn from that original moment.

This perspective became a common constitutional lesson in the North. Before the real prospect of disunion arose in 1850, even Daniel Webster articulated a version of these precepts. Reflecting on the United States' post-Founding territorial acquisitions, "beyond all contemplation or expectation of the original framers of the Constitution," he counted "Five slave-holding States have been created and added to the Union, bringing ten Senators into this body" without the addition of a single free state.[767] This result was a matter of northern acquiescence, not southern right – and certainly not original design. "We have done that which, if those who framed the Constitution had foreseen, they never would have agreed to slave representation," Webster stated. The claim that slaveholders were constitutionally entitled to bring enslaved people as property with them in new federal territory was a modern invention without foundation. "The real meaning then, of Southern gentlemen, in making this complaint is, that they cannot go into the territories of the United States carrying with them their own peculiar local law, a law which creates property in persons." The framers did not imagine that they had effectively opened all future lands to slavery. In supporting this account, Webster quoted the Virginia framer George Mason's denunciation in the Convention of the effects of slavery on territory. Mason was reported to have declared that slavery put "free white labor in disrepute" where it extends. This argument represented free soil as a constitutional object. In making this claim, Webster joined a growing northern insistence that the framers had intended for free states

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[764] *Speech of Hon. John A. Dix, of New York, on the Bill to Establish a Territorial Government in Oregon: Delivered in the Senate of the United States, June 26, 1848* (Washington DC, 1848), 3.
[765] "Speech of Mr. T. Jenkins," Cong. Globe Appendix, 30th Cong., 2nd Sess. (1849), 99.
[766] *Speech of Mr. James Wilson, of N. Hampshire: On the Political Influence of Slavery, and the Expediency of Permitting Slavery in the Territories Recently Acquired from Mexico* (Washington DC, 1849), 9.
[767] *Mr. Webster's Speech at Marshfield, Mass. Delivered September 1, 1848, and his Speech on the Oregon Bill, Delivered in the United States Senate, August 12, 1848* (Boston, 1848), 21.

and free soil. The southern claim of a constitutional right to hold enslaved people as property in the new territories "amounts to a requisition for every rood of land belonging to the United States to be made the theatre of slave labor," Senator Truman Smith of Connecticut complained. The Constitution imposed no such rule but rather meant that "the slaveholders of the South can emigrate to the Territories on an exact footing of equality with the non-slaveholders of either section."[768] As one lecturer from Rising Sun, Indiana instructed in 1848, "listen to the word of Gouverneur Morris, one of the brilliant Statesmen of our Revolutionary period. In 1787, in the National Convention, when the sages were constructing our admirable Constitution, he said: 'Compare the Free regions of the Middle States, where a rich and noble cultivation marks the prosperity and happiness of the people, with the misery and poverty which overspread the barren wastes of Virginia and Maryland, and other States having Slaves.'"[769] Through such claims upon Mason and Morris, the Founding of Containment demanded adherence to an original antislavery political economy.

The Founding of Containment was an authorizing concept for intense political mobilization on a deliberately sectional basis. In a July 1848 speech to students at Columbia College on "Duties and Responsibilities of the Rising Generation," William Alexander Duer raised the alarm about an enslaved West in constitutional terms. "Should the immense domain acquired by the treaty be subdivided and erected into as many States as its dimensions, and the population which it is capable of sustaining, will admit, and these States be received as parties to the Federal compact, the machinery of the government would ere long fall to pieces from its own weight and unwieldiness; and should the 'peculiar institutions of the South' be imposed upon them, the equilibrium of the Constitution would be destroyed, its spirit violated, and its obligation impaired, if not annulled. This fearful catastrophe may not happen in my day, but you, my young friends, may live to see it. Prepare then to avert or meet it."[770] Through the Founding, the aging jurist commanded young men to uphold the fathers' Constitution. Exercising the franchise to install leaders who would preserve their rights regardless of "party discipline or partizan attachments" was the immediate method; but the professed stakes of the battle suggested it was not the only one.

An antislavery constitutionalism aimed at the West structured the emergence of the Free Soil Party during this moment, as a growing rank of northerners found the politics of slavery more pressing that cross-sectional party platforms. Speaking a mass meeting in Worcester of Whigs and Democrats turning Free Soilers, Charles Sumner claimed that the Slave Power "is unknown to the Constitution; nay it exists in defiance of that instrument, and of the recorded opinions uttered constantly by its founders" because "our Constitution was formed by lovers of Human Freedom."[771] If the proslavery claims of the Slave Power were to have put these fathers to their doctrinal tests, men such as "Washington Jefferson and Franklin" would have been excluded from office. Meanwhile, the small Liberty Party persisted in articulating an abolitionist constitutionalism that spared the beloved Constitution from any ill intentions that its authors might have harbored. As the 1848 Massachusetts Liberty Convention resolved, it was members' "first duty to emancipate that instrument, and take the ark of our political covenant out of the

[768] "Speech of Truman Smith," Cong. Globe Appendix, 31st Cong., 1st Sess. (1850), 1177.
[769] Rev. Benjamin F. Morris, *Our Country: Three Discourses, on National Subjects* (Lawrenceburgh, IN, 1848).
[770] William Duer, *The Duties and Responsibilities of the Rising Generation: An Address Delivered Before the Literary Societies of Columbia College, at Their Anniversary Meeting, July 24, 1848* (New York, 1848)
[771] *Charles Sumner: His Complete Works* (vol. 2, Boston, 1900), 230.

hands of the Philistines."[772] At the National Liberty Convention in the summer of 1848, the party specifically rejoined the proslavery Founding of National Slavery. "No such intentions, however, are expressed in that anti-slavery instrument, and it is the expressions of an instrument not the intentions of its framers which should govern the interpretation of it."[773] Most people still remained with their national party, but their representatives increasingly voted on a sectional rather than party basis on matters of slavery. With northern and southern wings pursuing antagonistic territorial programs, justified on opposing Foundings, this was an unsustainable political and constitutional mixture. The Whigs would implode first in the early 1850s; the Democrats would follow in 1860.

Into 1850, the crisis over the West dragged on with no certain path to resolution. Territorial governments could not be formed. Talk of disunion by southern politicians grew more common and more serious. Northerners had listened to the South impose what they considered a false history on the revered framers of Constitution. While discussions of a possible policy bargain were underway, they consistently refused to yield a constitutional inch to the Founding of National Slavery. Repelling that narrative in May of 1850, even the Cotton Whig Robert Winthrop of Massachusetts demonstrated an ardent refusal to "dishonor to the Fathers of the Republic and to the Framers of the Constitution" by adopting the southern view of the past and the policy imperatives at their root. "We are told that the Constitution encouraged slavery by providing for the toleration of the African slave trade for twenty years… by making it the basis of representation in this House… by providing for the suppression of insurrections… [and] by a provision for the surrender of persons held to service or labor."[774] All were false characterizations, Winthrop insisted. They presented "a libel upon the Constitution of the United States, and what is worse, sir, it is a libel upon the great and good men who framed, adopted, and ratified it." The southern articulation of a proslavery Founding was taken as a personal attack on the national fathers, a transgression no less grave than impugning the Constitution. The conservative Massachusetts Whig saw in in each element that he named a different intention and opposing meaning: with the slave trade provision, the "framers undoubtedly believed a fatal blow" had been struck; with the three-fifths clause, they had "discouraged slavery by taking away two-fifths of that representation to which the southern States would have been entitled on their black population, if that population had been a wholly free population"; the provision for suppressing insurrections addressed rebellions in the free states at least as much, as "Mr. Madison, in his account of the circumstances which led to the adoption of the Constitution" explained; and the fugitive clause "fulfils the suggestion which was made by Mr. Madison at the time the Constitution was framed and avoids the idea that there can be property in man." Efforts to conciliate the South foundered on hardened visions of constitutional right and wrong. Spoke William Richardson of Illinois in 1850, "I do not, and cannot, believe that our Constitution carries and protects slavery except in States; nor do I believe that its framers intended that it

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[772] *Massachusetts Liberty convention, and speech of Hon. John P. Hale, together with his letter accepting his nomination for the presidency* (Boston, 1848).
[773] *Proceedings of the National Liberty Convention, Held at Buffalo, N.Y., June 14th & 15th, 1848: Including the Resolutions and Addresses Adopted by that Body : and Speeches of Beriah Green and Gerrit Smith on that Occasion* (Utica, NY, 1848).
[774] Robert C. Winthrop, *Admission of California: Speech of Hon. R. C. Winthrop, of Mass., on the President's message, transmitting the constitution of California: delivered in committee of the whole in the House of Representatives of the United States, May 8, 1850* (Washington DC, 1850).

should extend this institution. I believe it was formed for far higher and nobler purposes."[775] Drawing force from the structure of antebellum constitutionalism, the Founding of Containment was an article of faith and history.

By this time, northerners had rehearsed a clear sense of their historical constitutional rights and powers. In May Representative Daniel King, for example, could succinctly survey the landmarks of a Founding of Containment. "We hear much about the compromises of the Constitution, and the intent and meaning of the Convention which framed, and of the people who adopted it. To me it appears evident that their object was 'to establish justice and secure the blessings of liberty to themselves and their posterity.'"[776] Their acts demonstrated the antislavery content of their vision. King continued: "They restricted the slave trade… excluded slavery from all territory then within their control; they did not suffer the fair parchment… to be blotted with the name of slavery; and… [hoped] that in this age, men must refer to learned books of synonyms for the definition of the word slavery, and to musty and forgotten tomes of history for an idea of its character and condition." The meaning of this historical narrative was patently obviously to its northern producers and consumers. It only became more so upon repetition. Lessons for the present seemed ever more inescapable. The 1850 volume *The Constitution Expounded, Respecting its Bearings on the Subject of Slavery* recited, elaborated on and sought to substantiate all these points at length.[777] It guided readers through the "debates which took place in the Convention" and the mental world of the Founding before the "new-fangled doctrine that Slavery is the corner stone of Liberty." The Founding of Containment that it revealed did not seek, "as has been dreamt of lately, to establish an equilibrium between two antagonist sections" but instead reflected a "settlement of a difference of opinion between the Slaveholders themselves" over when and how slavery should be abolished. In light of this history, the book located a prescriptive past. Since "on the one hand, the intent of the Constitution is clear, that it has been ordained and intended 'to secure liberty,'" and "On the other hand, Congress has the right to impose, within the attribute of its jurisdiction, conditions to the admission of new States into the Union," author Louis Bonnefoux concluded it was Congress' "*bounden duty*, under this Constitution to require that no new States shall be admitted except with a Constitution prohibiting Slavery." The Founding of Containment, taken to its logical conclusion, required that faithful Americans admit no more slave states.

The Founding of National Slavery

The crisis over the West exposed the growing gulf between the tenets of northern and southern constitutional faith beneath their shared skein of reverence. With southern political power and the extension of slavery hanging in the balance, the territorial question elicited a public articulation of a Founding of National Slavery. By its authority, southern states sought to force slavery into new domains and repel all efforts to curtail the institution in any space prior to statehood. Under this Founding, every effort at antislavery policy and abolitionist activity represented an incursion on southern constitutional rights. This claim of original meaning consolidated and extended narratives of original proslavery constitutional entitlement that

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[775] *Speech of Hon. W.A. Richardson, of Illinois, on the admission of California: Delivered in the House of Representatives, April 3, 1850* (Washington DC, 1850).
[776] *The California Question and the Ordinance of '87: Speech of Hon. D. P. King, of Massachusetts, in the House of Representatives, May 21, 1850…* (Washington DC, 1850).
[777] Louis Bonnefoux, *The Constitution Expounded, Respecting its Bearings on the Subject of Slavery* (New York, 1850).

southerners had been developing for decades. That escaping enslaved people were not summarily carried back South betrayed their fathers' original bargain, particularly in the wake of *Prigg v. Pennsylvania*. That antislavery rhetoric rang out in the hall of Congress and that northern citizens petitioned against various facets of slavery under law were unconstitutional in spirit and intent. Even as they claimed Texas, southern interests saw the prospect of free states in the Southwest as violating the explicit constitutional protection of slavery and implicit constitutional commitment to preserving southern power in the Union. The notion of a cross-sectional consensus that the National Government had nothing to do with slavery, a subject belonging only to the states, had long been an unstable conceit; its immediate plausibility at times had worked to obscure divergent assumptions about the future of slavery in the United States. Such occlusion was no longer possible.[778] With the territorial question, the entanglement of federal authority and original constitutional understanding became impossible to hide.

The Founding of National Slavery contained meanings and promises to be followed and redeemed. It was not for the present generation to bargain away proslavery rights and powers secured by their fathers. In early 1847, after the House voted for the Wilmot Proviso, John Calhoun set this agenda with resolutions and a speech demanding "Let us be done with compromises. Let us go back and stand upon the Constitution."[779] Chief among the "great truths" that he offered was that any enactment impeding the emigration of slaveholders with enslaved people as property into federal territory would "be a violation of the Constitution and the rights of the States." This claim of territorial right and the rejection of present-day compromise – not the ascribed original compromises of the fathers – was the lesson of the day in the Deep South.[780] Addressing the Calliopean and Polytechnic Societies at South Carolina's state military academy later that year, Samuel Trotti declared southern ownership of the Union accordingly. "We have an interest in all the glory it has acquired on land and sea, and we have a noble inheritance in the fame of the men who achieved our independence, and laid the foundations of the Constitution and the Union, and for each and all these reasons do we desire to see the Union perpetuated, and that the noble legacies left to us by the founders of the republic shall not be lost or destroyed by an utter disregard to the solemn injunctions of the testators, faithfully and honestly to carry out all the provisions of their last will and testament – the Constitution of the United States."[781] This was unionism and constitutionalism on the basis of power and prosperity that had been guaranteed to the South, as Trotti made clear. Sharing an apocryphal anecdote from the Federal Convention, he recalled an unnamed framer who had stipulated that he would only "go for the Constitution provided it runs by my plantation." Assuring the audience that the Constitution was "for us," the local orator agreed that he "would not give a fig for a constitution that would run in every other direction" – but such was not the Constitution their fathers made.

The Founding of National Slavery incorporated familiar bits of the constitutional past. As political voices assembled and rehearsed them, their combined narrative grew more uncompromising during the prolonged crisis. Per Mississippi, Senator Albert Brown, the

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[778] William M. Wiecek, *The Sources of Anti-Slavery Constitutionalism in America, 1760-1848* (Ithaca, 1977).
[779] Richard K. Cralle, ed., *Speeches of John C. Calhoun, delivered in the House of Representatives and in the Senate of the United States* (New York, 1883), 347.
[780] William L. Yancey, *An Address to the People of Alabama* (Montgomery, 1848).
[781] Samuel W. Trotti, *An Address Delivered Before the Calliopean and Polytechnic Societies of the State Military Academy, at the Annual Commencement, November 18th, 1847* (Charleston, 1847).

Constitution recognized slavery as "fixed, established, interwoven with the future of the country" Anyone with doubts should simply "consult[] debates in Convention," he contended.[782] Jefferson Davis described the alchemy of the Constitution upon slavery under law at the Founding. Speaking in the summer of 1848, the Mississippi Senator explained that ratification "changed the relation of the States to each other in many important particulars, and gave to property and intercourse a national character. Property in persons held to service was recognized; in various and distinct forms, it became property under the Constitution of the United States," subject only to state law. In other words, the Founding of National Slavery gave the institution a "general, instead of its previous merely local character."[783]

Original constitutional recognition of slavery was crucial in this story: for in the southern account, slaveholders were simply seeking to take their constitutionally-guaranteed property in public domains over which all citizens had common rights. Such was constitutional equality in their telling. In February of 1847, David Kaufman of Texas remarked that at "the convention which framed our Constitution, the North looked upon slaves as so entirely possessing the character of property, that they were for a long time unwilling that they should be considered in any respect in the light of persons in fixing the basis of congressional representation."[784] The notion that a Constitution created by slave states would allow, not outlaw, the confinement and destruction of slavery was absurd. The Wilmot Proviso, he concluded, "is either violative of the Constitution, or the framers of that invaluable instrument were not the sage men we have always so fondly considered them." In similar fashion, North Carolinian Abraham Venable contended in mid-1848, the government was "bound to consider as property all that was so considered at its adoption, and the Constitution guaranties the enjoyment of that property in tranquility and security to all the holders, so far as the laws of the United States are operative in the premises."[785] The congressmen denied Congress could enact the Wilmot Proviso because leaving the security of slavery to the whims of a mere majority is something Venable's framers would never have done. "No aspect of the future escaped their observation, no contingency which might arise was omitted in their provisions, and it is to this Constitution that we refer to adjust this question." In this manner, veneration for "the wise men whose profound sagacity and immaculate virtue combined with a patriotism unsurpassed in all human history" yielded constitutional meaning precisely as the southerner's imagination fused together his own interests and sense of the Founding.

The Founding of National Slavery cast a harsh retrospective light on the political course of Americans during the antebellum era. It revised how southerners should think about their post-Founding history, particularly the Missouri Crisis. According to a convention of southern members of congress in 1848, "the South had no cause to complain prior to the year 1819," after which followed unrelentingly, "a narrative of the series of acts of aggression" against slavery and southern power.[786] They declared that, "there was no diversity of opinion in the better days of the Republic prior to 1819" on the "meaning and intent" of the northern obligations to return enslaved people as well as the larger place of slavery in the Constitution.[787] Southern innocence

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[782] M. W. Clusky, ed., *Speeches, messages, and other writings of the Hon. Albert G. Brown: a senator in Congress from the state of Mississippi* (Philadelphia, 1859), 131.
[783] James A. Houston, ed., *Proceedings and Debates of the United States Senate. First Session-Thirtieth Congress*. (Washington DC, 1848), 871.
[784] "Speech of David S. Kaufman," Cong. Globe Appendix, 29th Cong., 2nd Sess. (1847), 151.
[785] Speech of Mr. A. W. Venable," Cong. Globe Appendix, 30th Cong., 1st Sess. (1848), 653.
[786] "Proceedings of a Convention of Southern Members of Congress," *Niles' National Register*, Feb. 7, 1849, 84.
[787] "Proceedings of a Convention of Southern Members of Congress," *Niles' National Register*, Feb. 7, 1849, 85.

was a common corollary to this tale. As Georgia's Joint Standing Committee on the State of the Republic reported, "Though often charged with a reckless and restless spirit which was not submissive to constitutional restraints, the South boldly meets this charge by asking when did we ever cause collision between members of this Union by any aggressive legislation, by a distrustful, a self-seeking or a domineering policy?"[788] Looking back from the vantage of 1850, even the federal ratio of slave representation demonstrated the South's "yielding and conciliatory spirit," according to the Committee, as the South had been entitled to "full representation for this species of property."

The Missouri Compromise approached something of an original sin of the sons – for conceding the principle that congress might restrict slavery – but one borne of excessive naiveté, generosity or weakness. It arose from too-compromising a spirit, which was not to be repeated. The event was a "misnamed surrender of Southern rights" without "a particle of consideration passing to the South," reported a Georgia legislative committee on the state of the Republic.[789] The fire-eating George McDuffie, in his pamphlet *The North and the South*, complained "From the Missouri Compromise to the present time, the North has been infringing upon the South, step by step, and each step a bolder one."[790] With its unconstitutional seizure of the territories, he warned, the eventual but inevitable result would be overturning the Founding: an "amendment of the Federal Constitution, and the abolition of slavery in the States." Some southerners suggested willingness to follow the Compromise westward – to treat the line through the Louisiana Purchase as extending to the Pacific. This would, of course, negate the Wilmot Proviso and open the Southwest and much of California to slavery. As Abraham Venable contended in mid-1848, "we are content to abide the Missouri compromise; not that we believe that Congress had any right to annex any such condition or to enact any such law; but the compromise having been made and acquiesced in for near thirty years, there is no purpose entertained by any southern statesman to disturb it now."[791] But making a new compromise in which the South "lost" their rightful territory would betray the Founding. Following the Missouri Compromise was an increasingly unacceptable position in the South and North, however. It was not the Founding. The former section argued that the Constitution secured slavery as property that only individual states could disestablish, while the latter believed they had every power, duty and reason to disallow the creation of new slave states.

In constructing the proslavery Founding, southerners returned to the familiar task of cutting down the Northwest Ordinance as a constitutional precedent for the federal power to restrict slavery. But the territorial question raised by the Mexican cession cast the situation in a new light: now slaveholders wanted to set up federal territorial governments in the Southwest and ensure that settlers could freely bring enslaved people into those lands, at least prior to statehood; as such, they did not want to permit residents to govern themselves and potentially bar slavery in the interim. This configuration, they claimed, was the true course prescribed at the Founding. James Woodward of South Carolina turned to Madison. In *Federalist* 38, Madison explained that the old Congress had proceeded out of necessity – a "task imposed upon them" – rather than under the authority of the Articles of Confederation in setting up temporary governments for public lands. Discussing this number, Woodward asked, "Does this look as if

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[788] *Journal of the Senate of the State of Georgia, at a Biennial Session of the General Assembly, Begun and Held in Milledgeville, the Seat of Government, in 1849 & 50* (Milledgeville, 1849), 278.
[789] *Acts of the State of Georgia, 1849-1850* (Milledgeville, 1850), 408.
[790] George McDuffie, *The North and the South, Or The Question Stated and Considered* (Columbia, 1850)
[791] "Speech of Mr. A. W. Venable," Cong. Globe Appendix, 30th Cong., 1st Sess. (1848), 652.

Mr. Madison thought there was competent authority with the inhabitants of the colonial settlements to institute temporary governments, and erect themselves into new States, against the authority of the United States?"[792] The old Congress had to usurp the power, but the Constitution "supplied the defects of the old in this respect." As such, Congress had the duty to install governments in the territory; but "the power of Congress over its territories," Woodward specified, "cannot be exerted in a manner to affect injuriously the rights of third parties; that is, the several States or people thereof." In other words, Congress could not restrict slavery, at least without the assent of the southern state representatives in Congress conceding their right. In making this case, Woodward took time to wax over the authority of Madison. "Consider, sir, the weight of Mr. Madison's authority. It is not the mere opinion of an eminent lawyer or statesman. Mr. Madison was a member of that convention; one of the very ablest, and far the most attentive and watchful. He sat from day to day, writing down everything said and done, for the information of posterity for all time to come. He speaks, therefore, as a historian, a chronicler, an eye-witness. He tells what he saw with his own eyes, heard with his own ears, and, with his own hands, helped to perform." This panegyric, by bolstering Madison's authority and authenticity, seemed to buttress the Founding that Woodward had constructed – as long as the gap between Woodward's interpretation and Madison's writing was obscured.

Nothing in the text of the Constitution expressed a limit on congressional power to condition the acquisition of land or creation of federal territories on the prohibition of slavery. The Constitution, after all, did not plainly address the preliminary subject of acquiring new territory at all. To see a Founding that proscribed the Wilmot Proviso, proslavery Americans testified to unwritten understanding and original intentions that inhered in the Constitution. As legislators in Georgia declared, the North schemed to "confine [slavery] within certain territorial limits never contemplated by the original parties to the Constitutional compact." With remarkable clarity, Joseph Segar, speaking in Virginia's House of Delegates, demonstrated how such a Founding was constructed in 1849. He explained:

> though there is no express provision of the constitution limiting the power of congress over slavery in the territories, it is forbidden by the implied prohibitions of that instrument from passing the Wilmot proviso. Again — it is equally repugnant to the compromises of the constitution touching the subject of slavery. These compromises, though not written down in full, with pen and ink, in the constitution, are legibly written in its history — and are as well understood and just as binding as if they were put down in terms the most explicit. The only question is how far these compromises extend. They reach to the protection of slaves as property, as much without as within the limits of the states. Wherever a slave is found in the common territories, the federal government, which is but the general agent or trustee of all the states, the common owners, is bound to recognize that slave as property; and if that general agent does any act to the contrary of this, it violates the true meaning and spirit of the slavery compromises of the constitution.[793]

This argument laid out the steps through which antebellum Americans made a Founding to fight antislavery policy. In the absence of constitutional text, the forbidden-ness of the proviso was

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[792] *Speech of Mr. J. A. Woodward, of S.C., on the Relations Between the United States and Their Territorial Districts: Delivered in the House of Representatives of the U.S., July 3, 1848* (Washington DC, 1848), 6.
[793] *Speech of Mr. Joseph Segar (of Elizabeth City and Warwick) on the Wilmot proviso. Delivered in the House of delegates, January 19, 1849* (Richmond, 1849).

implied. This rule arose from the "compromises of the Constitution" on slavery. These compromises transcended text, as the Constitution's words said nothing against the Proviso. This unwritten character of the full compromises – the bargains and their scope beyond words – was no obstacle to knowing constitutional meaning, however. That meaning was "legibly written in its history" and was "just as binding" as textual enumeration. Once in this land of binding history, the proslavery imagination of original meaning was free to roam and believe. Precepts of slavery as constitutional property led to further claims of a trusteeship protecting the interests of the South. And to claim otherwise was to betray the blessed Founding. In conceptualization and persuasive force, this train of argument worked through the structure of antebellum constitutionalism.

Looking west with this constitutional vision, the South professed to know what the framers wanted and virtually commanded for their present juncture. The authorial "Citizen of Virginia," in an 1850 publication titled *The Union, Past and Future: How it Works, and How to Save It*, urged the South to follow the firm lead of their slaveholding fathers.[794] Washington's virtues were "eminently characteristic of the Southerner and the slaveholder; it was the degree, only not the kind, that was miraculous. Such were the chief leaders of the Convention, the men to whose suggestion the Constitution owes its essential features – Madison and Mason, Randolph and Pinkney – all of the South." The Constitution might be a national object, the Virginian indicated, but it was a southern creation at heart. In the 1849 "Address of the Southern Delegates in Congress to their Constituents" – though not quite all southern members attended or signed on – espoused a kindred narrative of the Founding leading up to an uncompromising conclusion: "you see that the foundations of the Government are laid and rest on the right of property in slaves. The whole structure must fall by disturbing the corner stone."[795] Even short of this aggressive articulation bearing the mark of Calhoun, one that the Confederacy would embrace explicitly in a decade's time, the underlying narrative was held in common by broad swatches of the whole South. In a circular to his constituents in Missouri, Representative James B. Bowlin urged that "We must protect our rights within the pale of the Constitution even if force, which, God forbid, should ever be necessary."[796] While not a proponent of secession at this point, his opposition to the Wilmot Proviso rested upon a shared vision of the Founding. "The framers of that instrument never could have designed to leave a domestic institution peculiar to a portion of the States only, in which it had become interwoven with all forms of society, a subject for legislative of the whole," Bowlin explained, and thus "I have regarded every effort to legislate upon it… as at war with the compromises of the Constitution and against the whole spirit of that charter of rights." As southerners reflected on their slaveholding fathers in this moment, they knew slavery must have been understood as perpetual and expanding, an institution to increase with the Union. How else could the original goals of southern planter power and prosperity be sustained? At the Founding, the Virginia legislature resolved in 1850, slavery's "existence and its influence upon the future destiny of such portions of the confederacy as were likely to retain it as a permanent portion of their policy, were discussed with the fullest and most mature deliberation…. [It] became a fundamental element in the structure of the new government. Political power was claimed and accorded to our then existing and forever increasing slave

[794] Citizen of Virginia [Muscoe Russell Hunter Garnett], *The Union, Past and Future: How it Works, and how to Save it* (Washington DC, 1850).
[795] *Address of Southern Delegates in Congress, to Their Constituents* (Washington DC, 1850).
[796] *Circular of Mr. James B. Bowlin to his constituents: the voters of the First Congressional District of Missouri* (Washington DC, 1850).

population…. [Slavery] is an agent in every law and in every act of the government."[797] Southern pronouncements like this one, which invoked assorted historical proofs, wondered why their Founding of National Slavery was betrayed by the North. Some pressed deliberate malfeasance while othered named negligence. At the heart of both, though, was the passage of constitutional time and remove from the original moment. "Two generations of men have been born, and the second has well nigh passed away since the rights in question were bought and paid for," the Virginia legislature explained. Only the South, in this analysis, truly understood the past and preserved the fathers' Constitution.

Performing veneration and demanding deference to an unwritten world of original meaning guaranteeing the perpetuity of slavery and southern power was an essential weapon in the sectional crisis at the end of the 1840s. There was great cultural force when the posture of antebellum constitutionalism was paired with the particular Founding narrated by southern advocates. Edward C. Cabell of Florida could assert the foundational legitimacy of the proslavery cause when he announced that the South "stand[s] by the contract our fathers made for us," indeed that "nowhere is it held in such high reverence as among the people of the southern States" who would never "lay violent or sacrilegious hands upon it."[798] The fathers' Constitution in which he rejoiced, however, was incompatible with Founding of Containment. Mississippi's Joint Select Committee on Federal and State Relations condemned the free states for violating the "the compromises of the constitution – compromises without which it never would have received the sanction of the slaveholding States" and for spurning the appeals of their southern brethren for "devotion to that constitution framed by our fathers and cemented by their blood, as a common shield and protection for the rights of all their descendants."[799] Such violation, in turn, warranted emergency action. The legislature of Mississippi then resolved with respect to the Union that, "we desire to have it as it was formed, and not as an engine of oppression." From this stance of an original constitution posed against anything and everything else, northern professions of constitutional fealty rang hollow to southern ears. Condemning antislavery constitutionalism, James Orr of South Carolina vowed that its adherents "hypocritically profess an attachment to the Constitution, which they are really seeking to destroy."[800] In 1850 John Calhoun clung to life while devoting his waning days to a career struggle to secure perpetual slavery in or out of the Union. Virginian James Mason read his speech to the Senate in March. Wrote Calhoun, "the only reliable and certain evidence of devotion to the Constitution is to abstain, on the one hand, from violating it, and to repel on the other, all attempts to violate it."[801] And these deeds would be measured according the substance of southern understanding of original meaning. Veneration without this deference was not enough. "Nor can the Union be saved by invoking the name of the illustrious Southerner whose

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[797] *Acts of the General Assembly of Virginia, Passed at the Extra and Regular Sessions in 1849 & 1850, and in the Seventy-third and Seventy-fourth years of the Commonwealth* (Richmond, 1850), 242, 253.
[798] *Speech of Hon. E. C. Cabell, of Florida, in the House of representatives, March 5, 1850, in committee of the whole on the state of the Union, on the President's message, communicating the constitution of California* (Washington DC, 1850)
[799] *Laws of the State of Mississippi, Passed at a Regular Session of the Mississippi Legislature, held in the City of Jackson, January, February, and March, 1850* (Jackson, 1850), 524.
[800] *The slavery agitation. Speech of Hon. J. L. Orr, of South Carolina, in the House of representatives, May 8, 1850, in Committee of the whole on the state of the Union, on the President's message transmitting the constitution of California* (Washington DC, 1850).
[801] Richard K. Cralle, ed., *Speeches of John C. Calhoun, delivered in the House of Representatives and in the Senate of the United States* (New York, 1883), 560.

mortal remains repose on the western bank of the Potomac," spoke Calhoun through Mason of Washington. "He was one of us a slaveholder and a planter. We have studied his history and find nothing in it to justify submission to wrong… Nor can we find anything in his history to deter us from seceding from the Union should it fail to fulfil the objects for which it was instituted by being permanently and hopelessly converted into the means of oppressing instead of protecting us." Secession was still a minority cause in the South in 1850; but the claim to a proslavery constitutional history, to an original Union by and for slaveholders was not.

A frenetic series of gatherings in the South illustrated the consolidation and rehearsal of the Founding of National Slavery. As slaveholders saw their grasp on northern Democrats' votes in the Capitol slipping, southerners convened the Nashville Convention in June 1850. Entourages from nine slaveholding states flooded into Tennessee, along with spectators and press. A committee of leading politicians elected from among state delegates addressed the throngs and produced resolutions that circulated to citizens and officials. A constitutional discourse of historical entitlement and grievance reigned inside the convention hall. The committee opened by declaring that sixteen years had passed since "the people of the Northern States seem to have respected the rights reserved to the Southern States by the constitution," measuring time from the point of popular understanding of constitutional deviation. Because "all agitation with respect to [slavery] on the part of Congress, was equally forbidden by the constitution," all efforts to induce legislative action violated the Founding. Antislavery efforts by private citizens and state governments had become a de facto constitutional wrong. Now the Constitution itself lay in danger of "being abolished — or of becoming what the majority in Congress think proper to make it." The committee registered the subjectivity of opponents' constitutional understanding while remaining confident in the truth of their own. Attendees had no doubt that the northern people "have been false to the compact made with us in the constitution, and have allowed passion and prejudice to master reason." The Constitution itself was not questioned. The Convention recognized their fathers' work as protecting the southern states' slaveholding commitments. Their "framers of the constitution were perfectly aware that the General Government could have but little power to secure to them their fugitive slaves," and thus they not only meant to enable congressional legislation but to obligate northern state to "deliver up" enslaved people without question. A harsher fugitive slave law was no concession to the South but a matter of original right. The Convention telegraphed its constitutional vision back to the communities from which it had arisen. "Congress has no power to exclude from the territory of the United States any property lawfully held in the States of the Union, and any act which may be passed by Congress to effect this result is a plain violation of the constitution of the United States," it resolved. This message, rooted in the circulating speeches, readings, and intuitions of slaveholding communities, solidified at the meeting and was confirmed for southern people. Its emotional truth grew stronger. In popular southern consciousness, the unchanging meaning of their proslavery Constitution had developed over time, even as they asserted its timeless authority.[802]

The majority of delegates endorsed a way forward that would correspond to the policies brokered by Henry Clay later that year, but a smaller Nashville meeting of radical delegates convened that fall to foment secession. In their telling, this cause was justified by the irredeemable betrayal of the Founding of National Slavery. These delegates recognized the imperative expressed at the June convention to honor the fathers' Constitution. Fire-eaters could

[802] *Condensed Proceedings of the Southern Convention* (Jackson, 1850); Thelma Jennings, *The Nashville Convention: Southern Movement for Unity, 1848-1850* (Memphis, 1980).

bury it only if the North had already slain it. The aged Langdon Cheves (born in 1776) of South Carolina, among the earliest advocates of disunion, first celebrated the proslavery Founding of yore. "When the Constitution of the United States was adopted, and that is the era to which we are to look in seeking the true meaning of the instrument, the whole civilized world recognized and protected this property in all places and under all circumstances where other property was protected." That Constitution "was a well-balanced scheme of government, securing the rights of all parts of the Union, a Government of equal rights and equal powers." But it was no more. Rising generations in the North had "abolished the Constitution," Cheves announced in no uncertain terms. "The carcass may remain, but the spirit has left it. It is now a fetid mass generating disease and death," he lectured. Disappointed secessionists identified and amplified a conceptual path within the mainstream of southern constitutional understanding, integrating into their disunion teleology the historical veneration people had long imbibed. In this fashion, through the language of constitutional death, the medium of a mass meeting, and the dissemination that followed, secessionists continued efforts to construct a secessionist public through constitutionalism.[803]

The Nashville Convention was a meeting built upon meetings. Southerners assembled in advance to express the constitutional wrongs they had suffered against their right to enslave across the Union. White men deepened their sectional constitutional convictions through political fetes, state rights societies, county barbeques, commercial conventions and secession conclaves. In the runup to the Nashville Convention, "a meeting of the people of Essex County," Virginia gathered at the county courthouse to express their sense of fundamental rights. Scrawling out a joint letter to their governor, they composed a constitutional story:

> The Northern States have already dissolved the union so far as the stipulation for the surrender of fugitive slaves, without which it could never have been formed is concerned. They suffer organized societies within their limits to council measures for kidnapping our slaves. And for violating our peace by the circulation of incendiary publications. Not content with this, they now propose to exclude us by the Wilmot Proviso from the equal enjoyment of Territory bought with our common blood and treasure. They propose to outrage public faith and constitutional obligation by abolishing slavery in the District of Columbia, and there is every reason to believe that these are but the first steps towards the conversion of the federal government into an engine for our degradation and oppression, and by the ultimate abolition of slavery, to change the whole Southern country into another Hayti or Jamaica.[804]

This community of Virginians supported a remedial southern convention for the "maintenance of our constitutional rights." Four days later, the governor of Virginia received another petition endorsing the convention, this one from a meeting of citizens in King William County. Similarly, the gathering "recognize[d] an increasing spirit of lawless fanaticism which, disregarding the compromises of the Constitution, aims ultimately at the abolition of slavery in the states, as it is already doing in the Territories." Laden with practiced tropes and a chronology of northern violations, such documents of public participation revealed the shared lens through which these

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[803] Langdon Cheves, *Speech of Hon. Langdon Cheves, in the Southern Convention, at Nashville, Tennessee, November 14, 1850* (1850).

[804] Executive Communications – 1850 Jan. 24 Box 16, Folder 41, Library of Virginia; Ken Greenburg, *Honor and Slavery: Lies, Duels, Noses, Masks, Dressing as a Woman, Gifts, Strangers, Humanitarianism, Death, Slave Rebellions, The Proslavery Argument, Baseball, Hunting, and Gambling in the Old South* (Princeton, 1996).

communities understood the experience of their proslavery problems. They represented a groundswell of constituent blocs shouting both constitutional veneration and outrage.[805]

Scores of such gatherings convened across the South to produce and direct political power, forging a historical constitutional weapon against the North. In Jackson, Mississippi, for example, scores of citizens filled Representative Hall on May 7, 1849. They elected a committee of political elites, including Jefferson Davis and John Guion, to perform important discursive labor. First, members established their patriotic posture, avowing their appreciation for a beloved past. "We approach the subject, not in anger, but in sorrow. We venerate the Union – we venerate the memory of the illustrious men who cemented us as a family of nation – as one people. And we would hold out as an example to their sons, the recollection of the spirit of forbearance – of moderation-of compromise-of equal justice and true patriotism which governed them in their great work." Then the committee guided attendees into the constitutional past. "In the convention which formed the Constitution, the question which is now convulsing the country, was… fully discussed and understood. The pre-existing rights of the Southern States in their slave property, were acknowledged and specifically guarded by that constitution, which became at once the solemn covenant of the Union of these States, and the potent cause, under Divine Providence, of their subsequent prosperity." These claims were not novel by 1849; but in their communal affirmation, gatherings such as those in Virginia and this one in Mississippi converted claims into the hard rock of constitutional history, not mere interpretation but collectively known fact.[806] In affirming this Founding, the Central Mississippi meeting rested on the edifice of venerative constitutionalism to legitimate an uncompromising position. Together, they inhabited an unambiguous constitutional history. With the strength of concurring numbers filling a hall, they looked back with confidence. They knew that "No one, whose will and voice entered into the Declaration of Independence, or the national constitution, believed that the Africans in service, were born the equals of the Caucasian race." At a subsequent meeting in Jackson, the Southern State Convention, in October of 1849, the story was the same. "As slaves were owned in many of the States, they would not, of course, have entered into the confederacy on such terms as would weaken the right of the owner to his slave, or diminish the value," declared Judge William Sharkey of the Mississippi Supreme Court. "The right to hold slaves as property became a fixed principle, inseparable from the other provisions of the constitution," he instructed an audience primed for this statement. In the Founding of National Slavery, attendees found solace and the authoritative proslavery past that they needed to stand upon. This was the articulation of the Constitution they had learned to believe in, as ascribed meaning and reverence swirled together.[807] The Nashville Convention and cluster of public gatherings around it posed a model instance of responsive antebellum public constitutionalism through association. People joined with local, regional and national leaders to advance commitments in relation to slavery. Once assembled, the Constitution, as they grasped it, provided both the mechanism through which participants perceived offenses and the language that enabled them to collectively articulate those wrongs in a fashion admitting no legitimacy outside of their statement of meaning. Through specific claims upon the Founding, people were prepared to fight.

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[805] Executive Communications – 1850 Jan. 24 Box 16, Folder 41, Library of Virginia

[806] "Proceedings of a Meeting of Citizens of Central Mississippi in relation to the Slavery Question also the Proceedings of the State Convention on the same subject held at the City of Jackson, October 1849," in *Annual Reports of Officers, Boards and Institutions of the Commonwealth of Virginia* (Richmond, 1850), Appendix Doc. 1.

[807] Ibid.

An Uncompromised Founding

As the Founding of Containment and the Founding of National Slavery collided over slavery's territorial future, there was no common ground. The constitutional narratives and their rules for the present were absolutes: they admitted no compromise, no partial and overlapping understanding, without betraying the sacred past and a present duty to future generations of slaveholders or free citizens. Lawmakers were at an impasse as months, years and legislative sessions passed between 1846 and 1850. Efforts to broker some compromise emerged, under withering criticism from at least one and usually both sections. The concept of "compromise" in this moment was exceptionally fraught. It had become a suspect virtue. By the force of antebellum constitutionalism and the authority of prevailing conceptions of the Founding, it was the duty of the living to uphold the original compromises of the fathers – however understood. But it was not for the living to forge new *constitutional* compromises. If there was a path for compromising on policy – and in this sense emulating the ascribed statesmanship of the framers – it was a narrow one bounded by ascribed original meanings that must remain inviolate. Whatever measure might enable Congress and country to pass through this moment, it could not appear to negate the Foundings that governed the constitutional consciousness of each section.

These straights, formed of constitutional faith and knowledge, structured the task of those lawmakers seeking to resolve the crisis with a "compromise" on slavery. If lawmakers were to broker an agreement, it had to pass through this narrow space. Put differently, compromising over the future of slavery in 1850 meant finding a way not to compromise on the Constitution. This was true – transparently – of the first attempt at a sectional bargain that nearly succeeded. And it was likewise the case of the subsequent attempt that did succeed, known as the Compromise of 1850.

In the summer of 1848, the Senate debated the "Clayton compromise," a bill that sought to configure slavery and freedom in the West while skirting responsibility for doing so. If enacted, it would have barred territorial governments in New Mexico and California from acting to either establish or ban slavery; tacitly let the new Oregon territorial government maintain a de facto prohibition on slavery; and attempt to leave to the Supreme Court the question of whether slavery could exist in federal territories in the absence of Congress either legalizing or restricting it. The bill was effectively designed to take no position on slavery and rely on the Court to spare Congress from choosing a Founding to follow. Advocates promised that it left the matter of slavery to the "silent operation of the Constitution," as if the bill instituted noble deference and the fathers' Constitution would work itself out. As the sponsor John Clayton of Delaware argued, "It asks of men of all sections only to stand by the Constitution, and suffer that to settle the difference by its own tranquil operation. If the Constitution settles the question either way, let those who rail at the decision vent their indignation against their ancestors who adopted it."[808] In effect, this scheme left lawmakers and people to rest upon hope and belief that their original constitutional vision would prevail.

A far cry from the Wilmot Proviso, northerners broadly scorned the bill. It failed to exercise their claimed constitutional power of restricting the expansion of slavery. Beyond that obvious aspect, however, it dangerously ceded control over the governing constitutional narrative. In the face of the Founding of National Slavery and a Supreme Court stocked with southerners, they saw the threat of institutional and historical legitimation of slavery across the West. James Niles of Connecticut explained: "Why, sir, the Senator from Vermont [] says the Constitution excludes slavery – that no law was necessary or proper, because the Constitution is

[808] *Niles' National Register*, July 26, 1848, 54

higher authority than an act of Congress. But what says the Senator from South Carolina, Mr. Calhoun? He tells us that the Constitution admits slavery into these Territories, that it carries slavery wherever it extends. And the Senator from Delaware, Mr. Clayton, thinks, if I understand him, that the Constitution, by its silent operation, will allow of slavery in part of these Territories and exclude it from another part."[809] Based on people's conflicting constitutional truths, the territorial question only had the illusion of settlement under the bill. "The Constitution settles nothing in relation to slavery – it only extends the jurisdiction of Congress over the Territory but does not itself settle any question of private rights either of persons or property," Niles continued. As for the Supreme Court, he pointedly observed that the plan presented a "very ingenious way of dodging the question by throwing back upon the Constitution what the Constitution has referred to Congress." The evasion at the heart of the enterprise was unmistakable, while its possible impact – allowing national slavery with Court complicity – was too grave a risk.

By making some future Supreme Court ruling the site of resolution, the Clayton bill asked Senators to think about enslaved people as central constitutional actors. Some senators expressed skepticism that a test case could be undertaken in due time. Meanwhile, the territories would continue to populate with settlers and slaves, an ever-larger population who would become free if the Court were to rule that the Constitution did not protect slavery in the federal domain – a consequence the Court would seemed not likely to sanction. The ardent expansionist Sidney Breese, an Illinois Democrat, offered assurances, plotting out a territorial version of *Dred Scott*, and cases that would follow in its wake and were pending when war came. "The person claimed as a slave brings his action, and there never has been found any difficulty in obtaining the aid of counsel, even in slave States for such purpose. The master pleads to the action that true it is he holds the plaintiff in his custody, as he has a right to do, for he is his slave," Breese explained.[810] Then, presumably, the person suing for freedom would claim the Founding. "The slave replies, setting forth the fact that California, on its cession to the United States, was free; that slavery did not exist there, and that it is not recognized by the Constitution of the United States or any act of Congress; and that by virtue of that Constitution he is free."

In debating the Clayton bill, senators could not avoid witnessing the instability and unreliability of constitutional knowledge. Ohio Senator Thomas Corwin professed to "stand where our fathers stood of old, [] sustained in my position by the men who founded the first system of rational liberty on earth."[811] But he reckoned with the fact that "with but a very few exceptions, all eminent lawyers on this floor from the South have argued that you have no right to prohibit the introduction of slavery into Oregon, California and New Mexico; while on the other hand, there is not a man in the free States, learned or unlearned, clerical or lay, who has any pretensions to legal knowledge, but believes in his conscience that you have a right to prohibit slavery." Corwin thus acknowledged both the power of constitutional subjectivity and collective constitutional knowledge in structuring how the moment unfolded. As for the Supreme Court, he wondered "Can I have confidence in the Supreme Court of the United States when my confidence fails in Senators around me?" The Court, Corwin suggested, was no different from politicians and the people when it came to slavery and the Constitution.

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[809] *Speech of Hon. J.M. Niles, of Connecticut, on the Compromise Bill: Delivered in the Senate of the United States, July 25, 1848* (Washington DC, 1848).
[810] Cong. Globe, 30th Cong., 1st Sess. (1848), 992.
[811] Cong. Globe, 30th Cong., 1st Sess. (1848), 1161.

The Senate passed the Clayton bill. Then it failed, by a small margin, in the House. Though almost all southerners supported it, Georgia Representative Alexander Stephens, along with a few others, opposed the bill – reportedly because they feared the Supreme Court would not find the Constitution alone protected slavery in federal domains. As these votes show, there was an appetite for legislating to evade constitutional compromise. Eventually, Congress found a way. The failed Clayton Compromise sheds defining light on the legislation that successfully passed through the straights of the Founding of Constraint and the Founding of National Slavery. This was the actual Compromise of 1850, passed via a series of separate acts with shifting, oppositional majorities and reliance on decisive "moderates" for each raft. It was legislation pretending to "to settle and adjust amicably all questions of controversy between them arising out of the institution of Slavery" about which members could think and profess that they had avoided compromising their fathers' Constitution.[812]

The legislation established the New Mexico and Utah Territories in settling the borders of Texas and allowed each to determine whether to allow slavery. People were already held captive as slaves in each, and both would subsequently move from de facto to de jure slave polities. The Founding of National Slavery needed not be tested – only practiced. California entered the Union as a free state: testing restrictive powers to accord with the Founding of Confinement was thus avoided as the statehood convention affirmatively rejected slavery. Congress prohibited slave trading within the District of Columbia. Though loathed by the South and receiving none of their votes, this act limited to suppressing direct commerce in people under Congress' express constitutional power of "exclusive Legislation in all Cases whatsoever, over such District" avoiding implications about needful regulatory power in territories and Congress' power to actually emancipate people in the Capitol. Finally, a new Fugitive Slave Act set up a harsh and summary administrative apparatus that could obligate northern citizens to help send back alleged escapees – though it was defended robustly as akin to the 1793 act that had the sanction of national fathers.

This was the Compromise of 1850. Unlike the resolution of the Missouri Crisis, it did not reflect a conciliation of constitutional claims. In 1819, the rupture over slavery's extension had galvanized the construction of the idioms and authority of an original constitutional moment; but the Founding of National Slavery had not yet coalesced. The Missouri Compromise represented the acquisition of further territory for slavery but also a southern recognition of the congressional power of restriction; the North acquiesced to new slave states in new territory, but their power to restrict was affirmed. The Compromise of 1850, in contrast, represented no yielding of claimed constitutional entitlements and Founding absolutes. It occupied a space in the shadow of the Founding of Containment and the Founding of National Slavery, assuming a shape that reflected their commitments. As a set of proslavery policies with certain antislavery gestures and effects, the terms of this bargain hardly commanded unanimity: secessionists castigated the failure to realize national slavery. Writing to South Carolina Governor Whitemarsh Seabrook, a proponent of secession who had announced "the Crisis" to his fellow slaveholders in the mid-1820s, William Grayson warned against "the destruction of the admirable creation produced by the Convention of 1787." A former nullifer like Seabrook, Grayson asked "What more can we demand? Do we require that Congress shall interfere and enact that slavery is admissible within the Territory? Such a position, he noted "is at variance with our own position that Congress has

[812] *Speech of the Hon. Henry Clay, of Kentucky, on taking up his compromise resolutions on the subject of slavery: delivered in Senate, Feb. 5th & 6th, 1850* (New York, 1850).

no right whatever to legislate on the subject of slavery at all."[813] Nominally-antislavery northerners could come to a remarkably similar conclusion when the bargain was made. As Michigan Representative Alexander Buel argued at a Detroit public dinner in November, "Has not the North great reason for being satisfied with the compromise measures? We gained the admission of the free State of California without any division of her territory. We gained territorial governments over Utah and New Mexico without recognition of slavery. We gained the abolition of the slave traffic in the District of Columbia. And, as a compensation for all this, what did we do? We agreed to abide by the constitution, and passed a law to carry out its requirements in respect to the surrender of fugitive slaves."[814] On finishing his speech, the arrangements committee presented Buel with a parchment copy of the Constitution, inscribed that it was given as "a testimonial of regard for his consistent support in Congress of the Constitution of his Country." Of course, many northerners lamented the failure to stop the spread of slavery, a number that would burgeon thereafter. As the vegetarian minister Sylvester Graham wrote of the constitutional justifications for the legislation, the "position seems to be more legal than legitimate; that is, more in accordance with the letter than with the spirit of the Constitution."[815] And as the workings of the new Fugitive Slave Act became clear, soon it would come to be seen in much of the North as violating original meaning. But in 1850, at least for different majorities in both houses of Congress, this was legislation that moved past the Crisis with their original Constitutions and the Union intact.

The end of the impasse over the Mexican cession, the close of the longest congressional session and the signing of the bills in 1850 marked only the illusion of consensus. Warring Foundings survived in Americans minds, unimpaired and uncompromised by the legislation. Just as the terms of the ostensible compromise skirted around these edifices of constitutional culture, so too did the effort to declare the Compromise a settlement to the constitutional politics of slavery. Precisely because there was no compromise of constitutional positions, the campaign to promote the legislation could resort only to general principles of constitutional reverence and obedience. Only in this realm of abstraction using the tropes of antebellum constitutionalism, with the immediate issues involved in the crisis in abeyance, was it possible to imagine and insist upon common ground.

This mode of appeal was evident when the architect of the Compromise, Kentuckian Henry Clay, presented his framework in early 1850. With secession rhetoric in the air, he introduced his resolutions with words right from the book of antebellum constitutional devotion. "The Constitution of the United States was made not merely for the generation that then existed, but for posterity — unlimited, undefined, endless, perpetual posterity," he announced.[816] His allies pitched their support in the same register. In Congress, Thomas Ross castigated his fellow Pennsylvania representative Thaddeus Stevens for his sectional invective in 1850. If Stevens had "raised his eyes to the portrait of Washington" hanging in the hall, he would have seen the

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[813] *Letter to His Excellency Whitemarsh B. Seabrook: Governor of the State of South-Carolina, on the Dissolution of the Union* (Charleston, 1850).
[814] *Speech of Hon. Alex. W. Buel, in defence of the Constitution and the Union, delivered at a public dinner to him by his fellow-citizens, at Detroit, November 19, 1850* (Washington DC, 1851).
[815] Sylvester Graham, *Letter to the Hon. Daniel Webster, on the compromises of the Constitution* (Northampton, Mass, 1850).
[816] *Speech of the Hon. Henry Clay, of Kentucky, on taking up his compromise resolutions on the subject of slavery : delivered in Senate, Feb. 5th & 6th, 1850* (New York, 1850).

national father frowning upon his dangerous rhetoric.[817] Ross sought to cast resistance to the measures as betraying the Founding. "I envy not the man, who can thus defame the memories of Washington, and Franklin, and Madison, and of the other sages and patriots of the Revolution, by whom this Constitution was formed." Daniel Webster, in his notorious Seventh of March speech endorsing the measures, asked Americans to look away from slavery, to care less about an institution that would endure but never spread too far North, and to care far more for the Union. In the fullest tones of dominant constitutional values, he pronounced: "Never did there devolve on any generation of men higher trusts than now devolve upon us, for the preservation of this Constitution and the harmony and peace of all who are destined to live under it. Let us make our generation one of the strongest and the brightest links in that golden chain which is destined. I fully believe to grapple the people of all the States to this Constitution for ages to come."[818] The moment, in Webster's telling, was the one that they had long trained for: here and now, the living generation would perform their overriding duty of preserving the Constitution that their fathers had bequeathed.

After the Compromise passed, advocates and supported rushed to cement the Compromise with rhetoric and ceremonies celebrating the fathers' Constitution. General veneration for the Founding covered over underlying fissures. Conservative free state leaders sought to create visible, vocal forums to guide people towards what they understood as the national safe harbor of true constitutional meaning. At the Great Union Meeting in Philadelphia's Chinese Museum, a huge throng rallied in November 1850 to satisfy the South. Organizers had collected thousands of signatures endorsing compromise measures and committing to following the Constitution as it always had been. The elderly statesmen Richard Rush, scion of revolutionary figure Benjamin Rush, took the stage. A member of the original post-Founding generation, he kindled pure veneration: "From their mature wisdom ample experience and long tried devotion to their country the Federal Constitution came into being," Rush recounted, and so producing "a political fabric, one entire and complete, admirably combining the federative with the national principle, complex in its parts yet harmonious in the whole, that great work has never perhaps been equalled by human hands." At this moment, the crowd cheered emphatically. Together, they knew constitutional truth when they heard it. Rush's emotional praise drew from the well of reverent tropes in which he had long been immersed. After reaching a crescendo over George Washington's constitutional love – "he approved it, he would have fought, he would have died for it" – Rush imparted the moral of his speech: like the great Washington, Americans must take the Constitution with "its full sanction of the ancient, undoubted rights of the South, slavery and all." The audience cheered and cheered. Five days later on November 26 in Boston's Faneuil Hall, the same lesson transpired. Per the public broadside for this self-professed "Constitutional Meeting," citizens "who reverence the Constitution of the United States, who wish to discountenance a spirit of disobedience to the laws of the land, and refer all questions arising under those laws to the proper tribunals" were requested "to meet and express their sentiments." Illustrious figures stood upon the rostrum and urged happy deference to a Constitution that protected slaveholders, as the national fathers had wisely and fairly agreed. Bringing his legal eminence to bear, Benjamin Curtis spoke to the "larger class" of northern citizens who "have not thrown off their allegiance to the Constitution." Curtis, who would

[817] *Speech of Hon. Thos. Ross, of Pennsylvania, on the admission of California, delivered in the House of representatives, April 10, 1850* (Washington DC, 1850).
[818] *Speech of the Hon. Daniel Webster, on the subject of Slavery; delivered in the United States Senate, on Thursday, March 7, 1850* (Boston, 1850).

ascend to the Supreme Court within a year's time, asserted the historical necessity of fugitive slave rendition to the formation of the Constitution: "men of forecast must then have foreseen" the Fugitive Slave Law might be needed, he reckoned. In a remarkable sequence, Curtis brought the crowd into a reenactment of the Massachusetts ratification convention and staged a counterfactual debate among its members. Describing a scenario in which one would seek to defeat the Constitution because of the Fugitive Slave Clause, Curtis declaimed, "I cannot pretend, fellow citizens, to give any idea of the treatment which such an objection would have received from the great and powerful minds of that Convention. I believe they would not have left a vestige of it on earth – no, nor the material to make a ghost of, to rise from regions below, and frighten some of their descendants." As in Philadelphia, the Faneuil Hall speakers equated antislavery action with anti-constitutional action. As the event redirected attention towards Founding obligations, it insisted upon popular veneration.[819] In the South, George Washington's birthday a few months later in February 1851 provided the occasion to celebrate constitutional union and reinforce veneration. Across old party lines, politicians and people gathered in Macon, Georgia to conduct an exercise in patriotic constitutionalism. At a public dinner, participants toasted the constitutional framers and demanded that all politicians face a test of "are they faithful to the Constitution and the Union?" Warren Akin argued that "If ever there was a period in the history of the Republic, more than another, that demanded of every patriot a burial of past differences of opinion, and to unite as a band of brothers for the preservation of the Constitution of the country," now was the moment, as Americans in each section are "so open in their disregard of all the wisdom of their fathers—so undisguised in their efforts to destroy the Constitution." For this reason, participants repeatedly urged that all past party differences and associations must be set aside. Robert Toombs urged attendees, "Let us not falter in our duty.– The Constitution and Union is worth the struggle." S. W. Burney wrote that Georgia "will cling to the fabric of liberty erected by a Washington, a Madison, and their compeers, so long as the constitution remains inviolate, and the honor of her citizens if not trampled underfoot by the ultraists of the North."[820] In North and South, those seeking to reinforce the 1850 bargain turned to the structure of antebellum constitutionalism.

The Constitution did not need its own holiday or commemoration when it could permeate others. As the civic ceremonial life that unfolded in the wake of the 1850 measures, cultural, political and religious authorities demanded constitution veneration in support of quiescence on slavery questions. During Thanksgiving in 1850, the ministry and the pulpit instructed people on the proper terms of constitutional veneration and observance. On Thanksgiving Day in Washington D.C., the Reverend Clement Butler located holiness in the Founding. Worshippers heard that "He was with our Fathers in the formation of our present Constitution. If God was ever visibly in history, it was surely when our Fathers fixed upon our present form of government." Compromises on representation that enabled the Convention to proceed came "not… altogether from the wisdom of our fathers," as "the Lord of Hosts was with us," explained Butler. The sacral nature of the Founding and the government it created had consequences for the moral lives of living Americans: "patriotism and devotion to our free Constitution receive sanction and obtain sacredness from the Word of God," the Reverend assured attendees. John

[819] *Proceedings of the great Union meeting held in the large saloon of the Chinese museum: Philadelphia, on the 21st of November 1850. Under a call signed by upwards of five thousand citizens, whose names are appended to the proceedings* (Philadelphia, 1850); *Proceedings of the Constitutional Meeting at Faneuil Hall, November 26th, 1850* (Boston, 1850).

[820] *Union Celebration in Macon, Ga., on the Anniversary of Washington's Birthday, Feb. 22, 1851* (Macon, 1851)

Krebs, a prominent Presbyterian minister, delivered a discourse on "religious subjection to the government" at the Rutgers Street church in Manhattan on Thanksgiving Day in 1850; the Reverend concentrated his audience's minds on passive gratitude for the "public institutions under which we and our fathers have lived in peace… and salutary operation of those great provisions of the Constitution which under God has made this nation so great." A likeminded message came from Edward Smith at the Chelsea Presbyterian Church. This reverend recounted that "The Constitution was adopted by men who saw slavery in all its bearings, its effects, and demerits, and hence was adopted on a principle of compromise." Drawing on Madison's convention notes, he assured congregants that the Constitution was the best of all possible constitutions, as the national fathers had known.[821] In Philadelphia, the Reverend Henry Boardman also instructed Thanksgiving observers to remain on the path of constitutional veneration, temporal deference and acquiescence. The religious leader became an professorial historian, leading a journey through Founding documentary sources "to show that the convention which assembled to frame a Constitution had an herculean task to perform; and that without the special illumination of Divine Providence, they must have essayed in vain to frame an instrument which should unite in its support the suffrages of a majority of the States." It was a blessed time, this narrative instructed, one that lay beyond doubt for the present generation. After sixty years, "it is not with us an open question whether that immortal instrument was framed with all the wisdom which has been claimed for it," Boardman announced, urging those who would "estimate its value" to simply "LOOK AROUND!" Constitutional obedience and the framers' federalism provided a moral cordon from responsibility for slavery.[822]

The Fourth of July arrived in 1851 amid an uncertain political climate of hope and dread. Unionism had repelled secessionists. The bare illusion of consensus was slipping, however. Political and constitutional conflict over slavery increased, as enforcement of the fugitive slave law created brutal scenes in the North. With the Fourth impending, arrangement committees and honored speakers saw emotions running high in communities, and unionists sought to ward off the teachings of both southern secessionists and northern opponents of the fugitive slave law. The ceremony in New Haven, Connecticut illustrated the desperate campaign to make constitutionalism discipline the public and hold together the Union. Hiram Ketchum occupied the public square. The city's Independence Day organizers had asked the esteemed attorney "to make a salutary and enduring impression in regard to our great duties to the Union, the Constitution, and the Laws." He fulfilled his promise, making explicit the authority and reverence with which Americans must receive the Constitution. "My friends, the people of these United States have entered into a compact, the whole bargain was made together, and its obligation is of the most binding character. It has done more to advance the happiness of man than any other that was ever made. It has done more for the comfort and elevation of the people than any form of government that ever existed before." This holiday would not be one for recalling battles but for imparting patriotic constitutionalism. The Declaration and British defeat had been "but the beginning of the contest," Ketchum explained, as "the great question arose how shall we preserve the liberty which has been acquired." Through this door, the speaker led his audience back to the Convention where Washington, "the ablest man of any age or country,"

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[821] Clement Butler, *Our Union-God's Gift* (1850); John Krebs, *The American Citizen. A Discourse [on Deut. Iv. 7, 8] on the Nature and Extent of Our Religious Subjection to the Government Under which We Live* (New York, 1851).

[822] Henry Boardman, *The American Union: A Discourse Delivered on Thursday, December 12, 1850, the Day of the Annual Thanksgiving in Pennsylvania…* (Philadelphia, 1851).

along with "Hamilton, and Madison, and Sherman of this State, and Ellsworth, and a host of other worthies," "labored with untiring zeal." Underlying this journey lay the premise that their wishes and knowledge should control the present. "It is important we should fully understand the character of the Convention, in order to appreciate the Constitution which was the work of their hands," Ketchum instructed. Back and forth, the speech travelled between the 1780s and 1851, punctuated by boisterous cheers and yells from the crowd. Peals of laughter rewarded the attorney's facetious embodiment of an antislavery fair-weather constitutionalist. He reminded the audience that at the Founding, slaves had absconded from here "to Hartford, or to Middletown, or to New London" and nobody "dispute[d] the right of their masters at any time to go and bring them back." The lesson was to follow the Founding in values and law, tolerating slavery and obeying its commitments. The world of prosperity and liberty attributed to constitutional union, Ketchum scornfully warned, "is to be undone because there are men so much wiser than Washington, and Franklin, and Hamilton, and Madison, and Roger Sherman, and Oliver Ellsworth." Asked if they believed it, a chorus of negatives arose. Asked if Americans could "do anything better than to sustain in all its provisions the Constitution," another roar of noes came in response. Shouting their constitutional deference to the Founding with slavery, this was how many patriotic citizens celebrated Independence Day.[823] Numerous ceremonies like this one punctuated the Fourth in towns and cities across the country. They strove to focus people on a Founding that would produce quiescence.

Below the Mason-Dixon line, a similar vernacular veneration radiated from stages and podiums. At an 1851 Fourth of July festival in Danville, Kentucky, Professor William Scott of Centre College guided a large audience to the Philadelphia convention hall, where the national fathers "again assembled to form a more perfect union, and devise such a system as would not only form but preserve that more perfect union." The fathers had done just that, he lectured. "Sixty years has that Constitution, and the Union it formed and cemented, stood, producing results such as were never seen before…. Liberty, prosperity, security, boundless growth, glorious prospects." A lawyer turned Presbyterian minister and scholar, Scott took on the southern "gentry" who would dare threaten secession, as a number of southern fire-eaters continued to do after the passage of the 1850 measures. Speaking specifically of the Constitution, he declaimed that "priceless heritage is not ours nor theirs, but is given us in trust for the orphan world and for coming generations, and we must not gamble upon orphans' trust funds, nor rattle the dice upon our fathers' gravestones, nor allow it to be done." Much admired in his own southern community, the Princeton Theological Seminary trained Scott averred, "it to be my firm conviction, that the true heart of this great people, requires the perpetuity of this Union and this Constitution." This was description and instruction. On the day of national celebration, he vouched for most Americans' loyalty to Founding promises and located his listeners in this national community.[824] As Scott spoke in Kentucky, Joshua Wright stood before a crowd at the Methodist Church of Wilmington, North Carolina. The local notable and lawyer led a celebration that rested on constitutional devotion and constitutional peril. To an assembly of presumptive slaveholders and white citizens on the side of bondage, Wright hailed slavery and the Constitution in the same breath. Maintaining bondage – "the inheritance of which you were born,

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[823] Hiram Ketchum, *An Oration Delivered on the Public Square at New Haven: At the Request of Its Citizens, July 4, 1851* (New Haven, 1851)

[824] William Scott, *An address delivered at a barbacue, given by the citizens of Boyle County, Ky. at Danville, July 4th, 1851* (Philadelphia, 1851); Joseph M. Wilson, *The Presbyterian Historical Almanac, and Annual Remembrancer of the Church, Volume* 5 (Philadelphia, 1863), 204-5.

and by the subversion of which you must perish" – and the Founding's original meaning were one and the same. "All that we ask is that the integrity of the national compact may be preserved inviolate," he urged. "Reanimate the dead body of the Constitution with the spirit that was breathed into it by those who first spoke it into life, and our chafed spirits will be soothed — the unclenched hand of fellowship extended again in amity, and our hearts hallowed to the love of the Union — that Union, which in solemn covenant guaranteed the protection of our interests." When Wright lauded the "the Constitution of my country as it came from the hands of our fathers, a magnificent creation, complete in every form and lineament of liberty," he confirmed that profound constitutional veneration and unstinting defense of slavery went hand in hand. In holding aloft a general proslavery Founding, this, too, was a rally for constitutional faith in a world where divergent sections inhabited opposing Foundings.[825] **This was how the South celebrated the Constitution and the Union.**

At first glance, such patriotic holidays showed a country on the same page. Venerative constitutionalism stirred the hearts of many Americans on the Fourth. Orators affirmed attachment to the Constitution of their fathers. People revered the Founding and accepted the authority of their organic law. Beneath this quickened devotion, however, remained substantial differences in the constitutional visions that communities inhabited. What government actions the Constitution allowed, disallowed or mandated regarding slavery remained a matter of bitter dispute. The Founding of Containment and the Founding of National Slavery endured. No rallies for constitutional faith could bridge the gulf between them; no general invocations of veneration and deference could produce a common constitutional order. Indeed, those imperatives applied to those divergent Foundings was more accelerant than anodyne in the wake of 1850, escalating and legitimating extant conflicts over slavery. The country swiftly returned to a seething sectionalism by the early 1850s. In the conflicts to come, several of which flowed directly from the evasions and bargains of 1850, America's warring Foundings would jut further into political life and shred any illusion of a shared understanding of the fathers' Constitution. New struggles over the Kansas-Nebraska Act repealing the Missouri Compromise, the constitutionality of the new Fugitive Slave Act, the validity of *Dred Scott*, the practice of popular sovereignty, the demand for a territorial slave code and the rise of the Republican Party would take place on the established rock of opposing narratives of binding, original meaning. These hardened fixtures of constitutional faith, knowledge and desire would gain new narrative mass and deeper historical claims over the 1850s as the crisis over slavery roiled. The force of antebellum constitutional culture and potent narratives of original meaning structured how Americans arrived at southern secession and war.

Between 1847 and 1854, Congress bought a cumulative 40,000 copies of William Hickey's *Constitution of the United States*, a handbook of knowledge about the constitution and laws of the country. It distributed them to constituents far and wide across a divided country. They entered into homes and libraries, and circulated within communities – to be carefully read or simply revered. The volume opened with Hickey effusing, "The Constitution, as the fireside companion of the American citizen, preserves in full freshness and vigor… the intelligence and fidelity of those fathers of the republic who secured by this noble charter, the fruits and the blessings of independence."[826] Hickey's work included a narrative of the constitutional

[825] Joshua G. Wright, *An Oration Delivered in the Methodist Episcopal Church, Wilmington, N. C.* (Wilmington, 1851).
[826] William Hickey, ed., *The Constitution of the United States of America: With an Alphabetical Analysis, the Declaration of Independence, the Articles of Confederation, the Prominent Political Acts of George Washington,*

Founding, documentary sources of its creation and George Washington's Farewell Address; and it came with instructions on how Americans should approach its titular object. The editor reminded readers young and old that, "we are not permitted to treat with irreverence the political doctrines and maxims of the fathers of the republic." Page after page spoke a vernacular of dire veneration, counseling obedience to the handiwork of national fathers. Vice President George Dallas, a proslavery Pennsylvanian, provided an epigraph that made the Founding and national identity inseparable: "Yield away the Constitution and the Union and where are we? Frittered into fragments and not able to claim one portion of the past as [] our own." The constitutional "past" was a veritable possession of living Americans, an irreplaceable and fragile inheritance.

One copy took an inverse route, from private purchase to government hands. In mid-1851, 250 school children filed into the East Room of the White House. Thirteen-year old John Edwards stepped forward and offered an "elegantly bound" edition of Hickey's Constitution to President Millard Fillmore. The youth dutifully intoned that it was through the "incomparable instrument which we believe it is your highest aim to uphold… that the Union may be preserved undivided, even to the latest generation." Fillmore duly professed his constitutional fidelity and pleasure at seeing the "interest felt by the rising generation in the perpetuity" in their fathers' Constitution and Union.[827] It was a singular phenomenon that Congress distributed great batches of this work across the land. The antebellum federal government was notorious for refusing to spend for the general welfare, in part to foreclose constitutional power to ever reach the subject of slavery. Public education was certainly no priority. As a Tennessee editor commented, "Congress was never designed by the framers of the constitution to be the purveyor of books for the people."[828] But the Constitution itself was an exception to this ascribed original intent. In a body fractured along sectional lines, where lawmakers came armed to fight over the territorial future of slavery, members readily voted to bring the Constitution to the people. This was a Congress that could agree on virtually nothing, that only faced down the 1850 secession crisis with piece-by-piece legislation enacted by different hostile majorities during the longest session on record. The purchases spanned precisely the years between the clash over the Wilmot Proviso and the repeal of the Missouri Crisis that opened Kansas to a bloody contest for slavery. Why did Congress spread the book to every district in the country during the years of mounting crisis? Lawmakers repeatedly distributed the Constitution not despite but because of the looming presence of slavery. Bitterly divided members could believe that the Constitution was on their side; that they stood in defense of its true meaning; and that popular contact with Hickey's curated work would inspire renewed fealty. Sending out the volume, with its instructions for reverent deference to the "fathers of the republic," was both an act of constitutional faith and an act to govern slavery.

The moment at which the purchasing practice ended is also telling. It arrived when the failure of Compromise of 1850 became undeniable – as the Whig Party collapsed on sectional grounds and a new front over slave territory was opened. While the particulars of the decision are obscure, the cessation signifies how a shared constitutional understanding appeared impossibly out of reach. It represented an abandonment of the fantasy that collective constitutional education and faith could bind the Union. Most Americans believed mightily in the Constitution of their fathers; but in the constitutionalism of their sectional antagonists, they saw

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Electoral Votes for All the Presidents and Vice-presidents, the High Authorities and Civil Officers of Government… (Philadelphia, 1852).

[827] *The Republic*, July 3, 1851, 3.

[828] *Nashville Union and American*, July 9, 1854, 2.

bad faith and false history that could not remedied by paeans to the framers, fathers, Constitution and Union. Specific Foundings mattered.

Founding Parties, Founding Sections

In December of 1850, antislavery Congressman Joshua Giddings of Ohio surveyed the results of the sectional bargain that his colleagues had made together – though most had voted against one or another enactment. As to the 'Union of our fathers,' I venerate it… But it is now nearly half a century since that Union ceased to exist." Yet amid the grim moment, Giddings made a prediction. "We shall soon have but two political parties. One will contend for the emancipation of the free States and this Government from the control of the slave power; to restore vitality to the Constitution; to give that instrument effect to maintain the rights of all the States under it; to secure all men under our exclusive jurisdiction in the enjoyment of life, liberty, and happiness."[829] Quoting antislavery remarks from the various national fathers, Giddings foretold that "With these framers of the Constitution, the party of freedom will stand." Uttered during the pitched effort to rally Americans regardless of party behind the 1850 bargain, this political forecast seemed farfetched to practical observers and participants at the time. In fact, Giddings was referring to the Free Soil Party, the small group that seemed to pose little threat to the either the Democrats or Whigs. Yet taken more broadly, the statement was doubly prophetic. Not only did Giddings effectively predict the ascent of the Republican Party four years later and, to a lesser extent, the fracture of the Democratic Party at the end of the decade; his declaration also linked the core platform of parties to the warring Foundings claimed by their leaders and constituents. That is, in his invocation of the framers and ascription of an antislavery original meaning, the speech showed that the organizing principle of the future party would be the Founding of Containment. The other party, of course, would be the Slave Power.[830]

This came to pass in a matter of years. Opposing Foundings comprised the creed, program and rationale of the Republican Party and then the Democratic South. In October 1854, the still-obscure Abraham Lincoln delivered a speech in Peoria, Illinois in response to Democratic Senator Stephen Douglas and the Kansas-Nebraska Act that he had pushed through Congress. Championing the paradigm of "popular sovereignty" – letting the white settlers of territories decided whether to allow slavery – the Act opened northern territory from the Louisiana Purchase to slavery that had been closed by the Missouri Compromise. Lincoln declared, "Senator Douglas has sought to bring to his aid the opinions and examples of our Revolutionary fathers. I am glad he has done this. I love the sentiments of those old-time men and shall be most happy to abide by their opinions."[831] On the question of slavery spreading into national territory, he continued, "we will let the fathers themselves answer it." In what would become a powerful theme that would parallel his own political ascent, Lincoln proceeded to relate the Founding of Containment. He would refine and extend this narrative, along with other antislavery politicians, incorporating the practically-marginalized Declaration of Independence

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[829] Joshua R. Giddings, *Speeches in Congress* (Boston, 1853), 443.

[830] On the history of the Republican Party, party reorganizations and sectional positions during the 1850s see, Heather Cox Richardson, *To Make Men Free: A History of the Republican Party* (New York, 2014); William Gienapp, *The Origins of the Republican Party, 1852-1856* (New York, 1987); Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (New York, 1970); Michael F. Holt, *The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War* (New York, 1999); Elizabeth Varon, *Disunion!: The Coming of the American Civil War* (Chapel Hill, 2008); Robert E. Bonner, *Mastering America: Southern Slaveholders and the Crisis of American Nationhood* (New York, 2009).

[831] Arthur B. Lapsley, ed., *The Writings of Abraham Lincoln* (vol. 2, New York, 1905), 210.

into Republican constitutionalism. When Lincoln challenged Douglas for the Senate in 1858, his campaign addresses revolved around carrying out the wishes of the fathers on slavery: "And when I say that I desire to see the further spread of it arrested, I only say l desire to see that done which the fathers have first done. When I say I desire to see it placed where the public mind will rest in the belief that it is in the course of ultimate extinction, I only say I desire see it placed where they placed it."[832] By 1860, he campaigned for the presidency on the basis of redeeming the Founding. Steeped in its idioms and posture, Lincoln legitimated and authorized both his candidacy and the Republican Party through it. In his celebrated New York speech at the Cooper Institute, appropriately titled "The Testimony of the Framers of the Constitution" in print, he demonstrated easy command of the structure of antebellum constitutionalism, validating convictions, repelling attacks and denigrating *Dred Scott* through the high authority of the past.[833] Again he used Douglas as a foil, who had remarked on slavery under the Constitution a few months earlier that "Our fathers, when they framers the Government under which we live, understood this question just as well, and even better than we do now." Readily accepting this premise to contrast "Republicans and that wing of the Democracy headed by Senator Douglas," Lincoln devoted the speech to establishing original understanding of the "'thirty-nine' who signed the original instrument" – although it was "altogether true to say they fairly represented the opinion and sentiment of the whole nation at that time." In the ensuing analysis of votes, quotes and other records from the Founding, Lincoln illustrated a fathers' Constitution that provided for restricting slavery in the Federal Territories.

According to Douglas, popular sovereignty was just what the fathers wanted. By this argument, it replaced the unconstitutional Missouri Compromise, made by hands other than the fathers, and restored "self-government" as the fathers had intended. The concept was an elaboration of the evasion adopted in 1850 respecting slavery in the territories: across different locations including the more northerly territory of Kansas, it was designed to again avoid federal constitutional choice and thus constitutional conflict and compromise over the national identity of slavery. When Charles Sumner lambasted Douglas for spreading slavery through this mechanism, the Illinois Senator and absentee Mississippi slaveholder exclaimed: "What you call the slave power is simply observance of the Constitution of the country as our fathers made it. Let us have that fair issue between the parties, and let us discuss that, instead of dealing in denunciation against one another here."[834] Tearing down the Missouri Compromise suited advocates of the Founding of National Slavery. As Louisiana Senator Judah Benjamin explained, by "retracing the steps of Federal legislation, so far as it interfered with this subject, from the year 1820 to the present hour, [the Kansas-Nebraska Act] proposes to go back to the traditions of the fathers."[835] But once the Compromise was repealed and original constitutional meaning governed, Southern Democrats insisted this meant the whole of federal territories was open to slaveholders travelling and settling with their constitutionally-recognized property in people.

As Lincoln wielded the Founding to great effect in assembling the Republican electorate, he was hardly alone. His words and ideas belonged to a discursive movement. The eminent Harvard Law Professor Joel Parker, speaking as a longstanding Whig, "a Massachusetts Whig, a Conservative Whig, a National Whig, perhaps as sound an expositor of Whig principles as if I

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[832] *Political Debates between Abraham Lincoln and Stephen A. Douglas…* (Cleveland, 1902), 158.
[833] *The testimony of the framers of the constitution : speech of Hon. Abraham Lincoln at the Cooper Institute, New York, Feb. 27th, 1860* (Press & Tribune, 1860)
[834] Cong. Globe Appendix, 34th Cong., 1st Sess. (1856), 546.
[835] Cong. Globe Appendix, 33rd Cong., 1st Sess. (1854), 767.

were a member of the Whig State Central Committee itself," explained why he was supporting the new party in 1856.[836] The Republican cause, he argued, was the cause of the national fathers. Undertaking a long discussion of the "history of the debates upon the Constitution," Parker professed to "show that the Republican party is not a fanatical party, and that their platform is not a sectional platform." The name of the party itself, as the primary campaign literature for the 1856 presidential election made clear, was a deliberate claim act of historical allegiance: Rather than a new party, pamphlets asserted, "The reformed party is what the original was, the party of the CONSTITUTION and of the NATION."[837] When the national party was organized at a mass convention in Pittsburgh, its address to Americans was a litany of claims to the Founding. It vowed to "obey in all things the requirements of the constitution" and "cherish a profound reverence for the wise and patriotic men by whom it was framed." Veneration and deference were their leading constitutional values; through them, Republicans would redeem the government from the Slave Power's "promotion and extension of the interests of slavery in direct hostility to the letter and spirit of the constitution." At the 1860 National Republican Convention in Chicago, David Wilmot chaired the gathering and declared in no uncertain terms the constitutional agenda of the party. "It is our mission to restore this government to its original policy, and place it again in that rank upon which our fathers organized and brought it into existence. It is our purpose and our policy to resist these new Constitutional dogmas that slavery exists by virtue of the Constitution wherever the banner of this Union floats… It is our purpose to restore the Constitution to its original meaning, to give to it its true interpretation, to read that instrument as our fathers read it."[838] A decade after the failure of the Wilmot Proviso, the agenda of the Republican Party was the Founding of Containment. The Chicago Platform adopted by the Convention embodied this vision of preserving and restoring an original Constitution that incorporated the ascribed principles of the Declaration of Independence and had no place for the "new dogma that the Constitution, of its own force, carries slavery into any or all of the territories." This program was mobilizing. It offered northerners a path to put venerative constitutionalism and convictions about original meaning against the expansion of slavery into electoral action. As the members of the Republican central committee of Ingham County, Michigan remarked after it was declared, they were especially pleased by the "firmness with which it adheres to the principles of the Constitution, as set forth by the founders of our government."[839]

Republicans and Democrats each claimed exclusive fealty to the fathers' Constitution on the fate of slavery. This framework of constitutionalism around the explosive subject intensified the conflict for the white men who had been trained to revere the Founding. As the 1850s drew to a close, southerners had come to demand a territorial slave code, threatened secession for the ascribed constitutional breaches of the North, spoke of reopening the foreign slave trade and extolled slavery as a constitutional good. Representative Henry Dawes of Massachusetts replied: "Change your own opinions, and spit upon those of your fathers, if it seem well so to do; but you have no right to demand any such change in us. You may pluck the beards of your fathers; we

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[836] Joel Parker, *The True Issue, and the Duty of the Whigs: An Address Before the Citizens of Cambridge, October 1, 1856* (Cambridge, 1856).
[837] Benjamin F. Hall, *The Republican Party and Its Presidential Candidates; Comprising an Accurate ... History of the Republican Party in the United States, from Its Origin in 1796 to Its Dissolution in 1832; of the Whig and Democratic Parties During the Interregnum; and of Its Reformation in 1856 ... With Biographical Sketches and Portraits of Fremont and Dayton* (New York, 1850).
[838] *Proceedings of the Republican Nation Convention, held at Chicago, May 16, 17 & 18, 1860* (Albany, 1860).
[839] *Address of the Republican central committee of Ingham County* (Lansing, MI, 1860).

will bow before ours. You may worship new gods; we will venerate the old ones."[840] After Alabaman fire-eater William Yancey argued that the northern framers had relished the slave trade and wished to continue it, the antislavery speaker Ebenezer Griffin responded in a public address two weeks later that Yancey needed a better constitutional education. The southerner should consult Madison's records, he condescended. "They were published by order of Congress in three volumes, called 'The Madison Papers.' I presume that Mr. Yancey has never read them, for no gentleman who ever had, would have made the charge which he did in Corinthian Hall."[841] At this point, the Democratic Party was coming apart as the long-dominant South pressed for a proslavery policy agenda on the basis of a Founding of National Slavery that even many "doughface" allies resisted. For Republicans, this made it easier to insist upon their own constitutional identity and lineage. The Democratic Party faced by Republicans in 1860, according to Henry Waldron of Michigan, was "not [] the organization of the past"; now it has become "arrayed against the policy and teachings of the Republicans of the Revolution, as well as of the Republicans of to-day."[842]

As the Democratic Party faced the emergent Republicans, its sectional identity crystalizing, the organization sought to maintain its rule by appealing to the fears and convictions that laced through antebellum constitutionalism. The party warned at its national convention in 1856 of their opponents' "unholy crusade against the Constitution… in the fond hope that they may involve in one common ruin all the glorious recollections of the past and all our proud anticipations of the future. In nominating arch-doughface James Buchanan, Democrats extolled his constitutional fidelity. Samuel Black, in reference to Buchanan's bachelorhood, concluded that "as soon as James Buchanan was old enough to marry, he became wedded to the Constitution of his country, and the laws of Pennsylvania do not allow a man to have more than one wife" – a finale greeted with cheers and cannon.[843]

Northern party leaders, facing the defections, claimed to be the party of the Founding. The 1856 Democratic state convention in Syracuse, New York affirmed that anyone "who truly reveres the constitution, and meditates no assault, now or hereafter, on its beneficent adjustments and wise compromises" must vote with the party.[844] In 1860, the organization of Massachusetts Democrats would make the claim bluntly, and with a measure of desperation, "to be the Party of History… founded on the Constitution, worked out for us through dangers and trials by our fathers and to be transmitted as the noblest gift of human origin to man."[845] But the content of original compromises proved ever more inconclusive for the issues of the present. The familiar claim that the fathers' Constitution left slavery to the states – "that in no part of the Federal compact is the wisdom of our fathers more conspicuous, than in leaving the whole question of slavery to the States in their separate capacities," as Pennsylvania Democrats resolved – was far

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[840] *The new dogma of the South—"Slavery a blessing" Speech of Hon. Henry L. Dawes, of Mass. Delivered in the House of Representatives, April 12, 1860* (Washington DC, 1860).
[841] *Speech of the Hon. Ebenezer Griffin, delivered at the City Hall, Oct. 30, 1860, in reply to the address of Hon. Wm. L. Yancey, delivered at Corinthian Hall, Oct. 17, 1860* (Rochester, NY, 1860).
[842] *Modern democracy against the Union, the Constitution, the policy of our fathers, and the rights of free labor : speech of Hon. Henry Waldron, of Michigan : delivered in the House of Representatives, April 26, 1860* (Washington DC, 1860).
[843] *Official Proceedings of the National Democratic Convention, held in Cincinnati. June 2-6, 1856* (Cincinnati, 1856).
[844] *Proceedings and Address, of the Democratic State Convention, held at Syracuse, January Tenth and Eleventh, 1856* (Albany, 1856).
[845] *Proceedings of the Massachusetts national Democratic convention: and of the mass meeting for the ratification of the nominations of Breckinridge & lane, held at the Tremont Temple, Boston, Sept. 12, 1860* (Boston, 1860).

too ambiguous.[846] Thus Democrats focused on alienating Republicans from the Founding. The Syracuse convention branded "the Anti-Slavery Republican Party" as "Men who, had they stood by when Washington and his compatriots finished their labors, and given utterance to their present views, would have denounced the constitution as a 'covenant of blood!'" Democratic campaign propaganda blared "THE MASS OF LINCOLN'S SUPPORTERS HOSTILE TO THE CONSTITUTION." Voters in the 1860 election, another tract warned, would decide whether "the Constitution and the Union our fathers made shall stand or fall."[847]

All Democrats claimed a proslavery Founding, but southern Democrats claimed more over the 1850s. Their Founding of National Slavery left slavery to the states in the only loosest sense. Their Constitution was not neutral on slavery. Rather, as William Stiles told the Georgia Democratic state convention on July 4, 1856, "The Constitution finds Slavery among us and simply acknowledges and protects it. No power was given to Congress to abolish, limit, or restrain, or impair the institution, but on the contrary every clause in the Constitution on the subject does, in fact, or was intended either to increase it, to strengthen it, or to protect it."[848] Original constitutional recognition had become original constitutional support. The potent theme of intergenerational constitution decline marked the Southern Democrats' program, but the fall from the Founding was the rise of an antislavery North, forgetful of their duties. Pointing to the decisive moment of the Missouri Crisis, when "prominent actors of the revolution had just descended to their graves," Stiles condemned a prior generation of southerners who "yielded to the solicitations of their Northern brethren" and allowed the unconstitutional restriction of slavery. "The men of that day were not true to themselves, they were not true to us…. They should have planted themselves immovably upon the Constitution." If antebellum constitutionalism meant never compromising the work of the fathers, and the Founding had secured national slavery, then the slaveholding leaders of the 1850s vowed to uphold the vision that they now ascribed to that original moment. In this narrative of the Founding, there was no expectation for the end of slavery but for its perpetuity. For instance, the framers provided "for the increase of slavery by prohibiting the suppression of the slave trade for twenty years after its adoption… in order that the proportional number and value of the slaves, in different parts of the slave holding country might be equalized." The historical nature of the three-fifths clause was also reconceived in this account. Since all the states at the Founding were slave states except for Massachusetts, as southern Democrats repeated, it was not a bargain between free and slave states but rather a method to ensure that the South received equal power – a commitment that inhered in the Constitution across time. As John McRae of Mississippi argued, "I never understood that as being a compromise between the North and South on the subject of slavery. I understood it to be a provision of the Constitution inserted to do what was just to the South giving her her proper weight of representation in the Congress of the United States. The Constitution, as I have said, was made altogether by slaveholders and was adopted by slave-holding States."[849]

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[846] *Proceedings of the Pennsylvania Democratic state convention: held at Harrisburg, March 4th, 1856* (Philadelphia, 1856).

[847] *Abraham Lincoln's record on the slavery question. His doctrines condemned by Henry Clay. The mass of Lincoln's supporters hostile to the Constitution. Lincoln's course in Congress on the Mexican war. The Homestead bill, -- "Land for the landless," Lincoln, Douglas, and Hamlin* (Baltimore, 1860).

[848] *William H. Stiles, An address, delivered before the Georgia Democratic State Convention, held at Milledgeville, July 4th, 1856* (Atlanta, 1856).

[849] *Speech of Hon. John J. McRae, of Mississippi, on the Organization of the House: Delivered in the House of Representatives, December 13 and 14, 1859* (Washington DC, 1859).

Building on the narrative genesis undertaken during the long debates over the Mexican cession, Southern Democrats rewrote historical tropes while retaining the structure of veneration and deference. Federal action in support of slavery and southern power, from a territorial slave code to annexing Cuba, because fulfillment of original purposes and expectations. Thus, for example, given that the Federal Territories belonged in common to the United States; and given that "it is the privilege of the citizens of all the States to go into the Territories with every kind or description of property recognised by the Constitution," southern senators demanded that Congress or Territorial governments fulfill their "constitutional duty… to enact such laws as may be found necessary for the adequate and sufficient protection" of enslaved people as property.[850] Virginia Representative Roger Pryor insisted that "It was an implied compromise of the Constitution that the South should be guaranteed the rights which she enjoyed at the time of joining the Confederacy," rights which included power and domains that would grow with the Union.[851] Speaking to his constituency in Huntsville, Alabama, C. C. Clay described the special place of slavery at the Founding. "Of all property none was so carefully guarded as that of slaves. It alone, of all property, was given representation, both, in Congress and in the President: thereby pledging both President and Congress to guard and protect." Through this lens, the territorial question virtually answered itself. The framers, he continued, "refused to prevent [slavery's] expansion over the territories; thus while strong guards were thrown around private property, generally, especial and extraordinary protection was provided for property in slaves."[852] This Founding of National Slavery became their platform in 1860, when the party split between Douglas Democrats and the Southern organization led by soon-to-be-secessionists.

In the election of 1860, enfranchised Americans faced a choice among Foundings. Multiple parties offered them narratives of an original moment, each of which carried a bundle of rules, prescriptions and imperatives for the present. Voters could choose to endorse one or another historical truth. Republicans, with their Founding of Confinement and expressed desire for the eventual extinction of slavery, offered the only antislavery constitutional vision. For those who saw Republicans as betraying the Founding, however, several pathways lay open. While northern Democrats' invoked the constitutional past in support of popular sovereignty and obeying whatever the proslavery Supreme Court determined. Yet the proslavery Founding espoused by Stephen Douglas was not enough for many Southern Democrats, who articulated the Founding of National Slavery as their platform after a schism conducted through a series of failed nominating conventions. Under this maximalist proslavery view of the Constitution and the failure of the North to comply with it, Southern Democratic became increasingly vocal that secession and the creation of a fully slaveholding nation-state was necessary as well as authorized by their fathers.

This was not all. In a deeply revealing turn, still another party arose that adopted the Constitution itself as the entirety of its platform. This Constitutional Union Party joined conservative southerners with some likeminded border state and northern constituencies who did not believe in the elaborations of the Founding offered by Democrats or the antislavery narrative of the Republicans. Its advocates appealed rhetorically to emulate the national fathers by yielding principles and interests: "if our fathers could make the sacrifices necessary to secure the Union

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[850] "Resolution by Mr. Brown," 36th Cong. 1st Sess. Mis. Sen. Doc. No. 10 (1860).
[851] *Speech of Hon. Roger A. Pryor, of Virginia, on the Principles and Policy of the Black Republican Party; delivered in the House of Representatives, December 19, 1859* (Washington, 1859)
[852] *Speech of Hon. C. C. Clay Jr., on Slavery Issues, Delivered at Huntsville, Alabama, September 5th, 1859* (Huntsville, 1859).

and the Constitution, can we not make the far less sacrifices now required to preserve them?... Or are we wiser and better than our fathers, so that we will not observe and fulfil the solemn compact they made for themselves and for us?"[853] Deliberately avoiding any explicit stance on what the Constitution required on slavery, the party announced as its sole plank: "That it is both the part of patriotism and of duty to recognise no political principle other than THE CONSTITUTION OF THE COUNTRY, THE UNION OF THE STATES, AND THE ENFORCEMENT OF THE LAWS," to restore the Government "which under the example and Constitution of our fathers, has solemnly bound every citizen of the United States to maintain a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."[854] In the absence of an elaboration of what that fathers' Constitution meant, the party invited constitutional nostalgia, ambiguity and wish-fulfilment. As Presidential candidate John Bell contended, "it was not the purpose for which this great government was instituted to settle abstract questions further than they were settled by the constitution. [] In the spirit of the constitution, and in the spirit of our illustrious ancestors, at the organic period of our government, all these questions should be considered – but in no other."[855] Were the election thrown into the House, perhaps, members might find this constitutional space most inhabitable.

It is telling of the particular role that the fathers' Constitution assumed at end of the antebellum era that a party could predicate itself on simply promising true, devout, deferential constitutionalism. Yet this is what the other parties substantially vowed with less opacity and more narrative invention of original meanings about their present. In the arms race of authority, justification and legitimacy, parties claimed the Founding, jealously, exclusively and conclusively. No party campaigned against the fathers' Constitution. No party blamed the framers. And no party urged the immediate rewriting of the Constitution to transform the original understandings that they believed their father held. During the 1850s, enfranchised Americans came to mobilize against their adversaries' constitutional history; and they voted on behalf of redeeming, restoring or preserving original visions for the future of slavery that they wanted to be truth.

Changing the fathers' Constitution was a harrowing thought in the 1850s. It was the lurking specter that southerners raised about the ascension of Republican. As one contributor to *DeBow's Review* explain in an essay on "The Federal Constitution, Formerly and Now," abolition would swiftly follow when "Black Republicans shall have a President and majority in both houses of Congress of their own political faith and adopt such amendments as they desire by conventions in a majority of the States."[856] Meanwhile, Republicans almost uniformly vowed that this was a step they would never take, that they would respect the Founding of Containment and leave slavery where their fathers had left it. Amid sectional rupture, antebellum American generally disclaimed the power of amendment. They did this through their professions of veneration and deference to the Founding. They did so in how they thought about the nature of constitutional change itself. The power of living generation to amendment the Constitution was much less than the face of the text instructed. Samuel Green, a patriotic, proslavery citizen in

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[853] *The Union and the Constitution. Public Meeting in Faneuil Hall, Boston, Dec. 8, 1859. Speeches of Hon. Levi Lincoln, Hon. Edward Everett, Hon. Caleb Cushing, and letter of Ex-President Pierce* (Boston, 1859)
[854] Walter R. Houghton, *Conspectus of the History of Political Parties and the Federal Government* (Indianapolis, 1880).
[855] *The life, speeches, and public services of John Bell: together with a sketch of the life of Edward Everett, Union candidate for the offices of President and Vice-President of the United States* (New York, 1860).
[856] "Art. III – The Federal Constitution Formerly and Now," *DeBow's Review*, vol. 2(August, 1859), 150.

Andrew County, Missouri, illustrated how it became much narrower under the constraints of late antebellum constitutionalism. The power of amendment, he wrote in a tract, "was given to create, and not to destroy."[857] According to this Border State constitutionalist, Americans "possess the right" only to adopt amendments necessary "to render more perpetual and indissoluble that paternal league that should forever exist"; "to carry out the original design of its framers"; and "to unite our grand confederacy more strongly in the bonds of amity and good will." Beyond this paradigm, Green struggled to articulate how to know whether an amendment might be necessary and valid. A palpable sense of the superiority and authority of the framers, of the weight of original-ness, made for grave doubts about the worthiness of constitutional change. "The framers of our constitution, as though endowed with almost supernatural wisdom and sagacity, explored the dark and gloomy caverns of futurity" and "placed the constitution between the people and danger forever, to be called the law of the land, and only admits any amendments to be called a part of the original — (if it is a part of the original) — if it is a part of the constitution. It can only be so by being made after the model of the original — in the same spirit and meaning — thereby strengthening the bond of union between the states instead of impairing it. The thing itself must exist in an imperfect shape before an amendment can be conceived necessary." But except for constitutional dissenters – subjects of racial exclusion, ardent antislavery communities and southern reactionaries – most Americans could hardly find fault with the work of the framers. Their collective veneration and deference delimited, even foreclosed, amendment. Working through this cultural force, ascribed Founding visions of original meaning, purposes and expectations circumscribed antebellum American's constitutional imagination and sense of constitution-remaking power.

When Americans voted for the Founding of Containment in 1860 and elected Lincoln, the crisis that erupted did not immediately usher in a new constitutional culture. Into the secession winter, people carried their claims upon the Founding, their veneration for a fathers' Constitution and their resistance to constitutional change at the hands of the present generation. When delegates to the Peace Convention debated making constitutional changes at the Willard Hotel, they held these artifacts of antebellum constitutionalism. The most proslavery southern members demanded the explicit terms of the Founding of National Slavery: such would be an elaboration rather than an alteration of original meaning in their view. Proslavery Constitutional Unionists and Democrats supported textual acknowledgements of what they thought the Constitution already allowed. Meanwhile, Republicans devoted to the Founding of Containment, to what they saw as the limited identity and non-recognition of slavery in the Constitution, would not hear of these measures. They would not preserve not pervert the handiwork of the fathers. The Founding was several, containing irreconcilable yet incontrovertible rules for the future of slavery across the Union. When congress debated the Corwin Amendment, members revealed these same commitments under a different acid test of constitutional conviction. This nearly-Thirteenth Amendment garnered its substantial majorities because it sustained the Foundings that members beheld – even if it fell far short of the proslavery meanings ascribed by southerners. Its vow – that "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State" – lay just within the boundary of mainstream Republican constitutional understanding. The party had campaigned that it would never touch slavery where the institution already existed within states;

[857] Samuel B. Green, *A pamphlet on equal rights and privileges to the people of the United States by Samuel B. Green, Andrew County, November 1, 1856* (St. Joseph, MO, 1857).

such was the policy of the fathers. If they were earnest about not seeking abolition through amendment, then the Amendment would make good on that promise. In this sense, the near-Thirteenth Amendment represented the rare kind of constitutional adjustment that could pass Missourian Samuel Green's test: viewed in light of the Foundings most Americans held, it was "made after the model of the original — in the same spirit and meaning — thereby strengthening the bond of union between the states instead of impairing it." Indeed, it such a light, it was no real change at all. The Peace Convention and the Corwin Amendment confirmed that even as the Union broke apart, a Founding with slavery still governed.

This antebellum story culminated in secession, death and freedom. The South fashioned history that made disunion patriotic, enabling belief in "quit[ting] the Union, but not the Constitution" per Alexander Stephens circa 1861.[858] In their declarations and ordinances of secession, southern states narrated northern constitutional wrongs. As the pioneering state secession convention explained, "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."[859] The South decried years of northern abolitionism as a violation of the Founding of Silence and cited the many failures to abide by the Founding of National Slavery. Northerners had "utterly broken the compact which our fathers pledged their faith to maintain," Mississippi announced; its secession commissioner travelled to spread word that "Our fathers made this a government of for the white man," that "Our fathers secured to us, by our Constitutional Union, now being overturned by this Black Republican rule, protection to life, liberty and property, *all over the Union*."[860] Instead, Texas averred, the Federal Government had become a weapon against slavery in place of the originally-intended shield to protect the institution, which "her people intended should exist in all future time."[861] All the while, southern state after southern state anticipated carrying with them the original Constitution and producing a republic founded on slavery – as they believed their fathers had once done. As the South became the Confederate States of America through this reconstitution, northerners who would have never sought to interfere with southern slavery rallied to defend an indissoluble constitutional union – as they believed their fathers had founded it. As Benjamin Franklin Thomas, recently a justice on the Massachusetts Supreme Judicial Court, professed in January of 1861, "No man loves peace more than I do; but I say deliberately, war, even civil war, is better than to give up this glorious inheritance from our fathers, the noblest government on earth, without a struggle, or to leave the struggle that belongs to us, to our children." These narratives were the culmination of antebellum constitutional training. Lessons admonishing Americans to preserve their inherited Constitution, to treasure it as their birthright and to make good on the future it promised – in conjunction with the divergent content ascribed to that constitutionally-ordained future – foreclosed yet another ostensible "compromise" sustaining slavery. As delegates to the Peace Conference of 1861 realized, disunion and perhaps war would come before free states would amend the Constitution to make slavery national, and before the South would yield on what they imagined were

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[858] Alexander H. Stephens, "Speech before the Virginia Secession Convention," April 23, 1861, in Henry Cleveland, *Alexander H. Stephens, in Public and Private: With Letters and Speeches, Before, During and Since the War* (Philadelphia, 1866), 735.

[859] *Journal of the Convention of the People of South Carolina, Held in 1860-'61. Together with the Reports, Resolutions, &c*. (Charleston, 1861).

[860] *Journal of the State Convention, and Ordinances and Resolutions Adopted in January, 1861. with an Appendix* (Jackson, Miss, 1861).

[861] *Declaration of the causes which impel the state of Texas to secede from the Federal Union : also the ordinance of secession*. (Austin, Tex, 1861).

proslavery rights and power that their fathers had bequeathed them.[862] Constitutionalism facilitated the South's war for greater slavery and the Union's war for its greater self.

[862] L.E. Chittenden, *A report of the debates and proceedings in the secret sessions of the conference convention, for proposing amendments to the Constitution of the United States, held at Washington, D.C., in February, A.D. 1861* (New York, 1864).

EPILOGUE: THE FOUNDING RISES AGAIN

George Washington Paschal was far from home in 1868. A Georgian by birth and Texan by long residence, the former slaveholder now found himself in New York City. At the beginning of the decade, he had been a prominent attorney and Democratic newspaper editor in antebellum Austin. With his *Southern Intelligencer*, Paschal had advocated relentlessly for unionism before and after the war came. "Constitutional guaranties must be maintained, and the rights of the South defended," he urged across the 1850s. When the election of 1860 neared, Paschal hoped for Lincoln's defeat but warned that "if we fail, owing to our foolish divisions, it becomes every patriot, especially every Democrat, to bow to the Constitution and the laws, and to resist all encroachments legally and constitutionally *in* the Union and not *out* of it."[863] Paschal did not yield this constitutional unionism after Texas seceded; he refused to swear allegiance to the Confederate Constitution, and vigilante authorities briefly hauled him to jail.[864] For Paschal and his family, southern defeat brought a certain vindication. The "secessionists will go down to history as the mad authors of emancipation, black citizenship and universal suffrage," he remarked in 1867. Adrift in the postbellum currents, Paschal joined the Republican Party and attended the 1868 National Convention in Chicago as a state delegate.[865] As old certainties were washed away, Paschal chaired the committee on platform and resolutions at the Texas Republican Convention.[866] By his hand, it endorsed "the preservation of the Constitution, including the Thirteenth and Fourteenth Constitutional Amendments, peaceably if we can, forcibly if we must." The family then left Texas on a circuitous journey to the Capitol, where Paschal rapidly would become a leading member of the Supreme Court bar and vice president of the nascent Georgetown Law Department. In 1869, he would successfully argue the case of *Texas v. White*, in which antislavery attorney turned Chief Justice Samuel P. Chase declared the historical "perpetuity and indissolubility of the Union" since the Founding.[867]

As he passed through New York in 1868, however, this professional ascent lay in a future in flux. To reckon with his unstable times, the former proslavery man of the South had turned to writing about the constant object that had ordered his political consciousness through the years. Yet this constant was no longer the same companion, as he could plainly see. Paschal put the finishing touches on his latest work, *The Constitution of the United States, Defined and Carefully Annotated*. In an act carrying forward decades of anxious desire for greater constitutional knowledge, he created a volume to serve as an "exhaustive reference book for the lawyer, the judge, the statesman, the publicist, the editor, and the political writer" as well as "a popular text book for all our schools."[868] Finishing the book allowed Paschal to reflect on an antebellum constitutional world that he had known and to look forward at the new one that he believed a reconstructed United States was entering. From Texas slaveholder to eastern Republican, the

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[863] *Southern Intelligencer*, Oct. 10, 1860, 2; Jane Lynn Scarborough, *George W. Paschal: Texas Unionist and Scalawag Jurisprudent* (Ph.D. dissertation, Rice University, 1972)
[864] T. P. O'Connor [Elizabeth Paschal O'Connor], *I Myself* (New York, 1914).
[865] *Presidential election, 1868: proceedings of the National Union Republican Convention, held at Chicago, May 20 and 21, 1868* (Chicago, 1868), 57.
[866] Ernest W, Winkler, ed., "Platforms of political parties in Texas," *Bulletin of the University of Texas*, Sept. 20 1916, 112.
[867] *Texas v. White*, 74 U.S. 700 (1869).
[868] George W. Paschal, *The Constitution of the United States, Defined and Carefully Annotated* (Washington DC, 1868).

tectonic shifts in his own life spurred him to grapple with deep changes in the country's constitutional life.

Paschal took up his pen amid a period of enormous rupture. The Thirteenth and Fourteenth Amendments had just been adopted – the first textual changes to the fathers' Constitution in sixty years. Radical Reconstruction had commenced against an increasingly intransigent white South committed to the reinstatement of total white rule. The postbellum struggle and strains between continuity and change, between black freedom and a white man's government were in plain sight. All this followed a war of untold suffering: perhaps 750,000 soldiers had died, along with tens of thousands of civilians.[869] This mass bloodshed belonged to a recent history of constitutional failure, obsolescence and adaptation. The Civil War erupted after the de-ratification of the Constitution by the South; and it was conducted through an unprecedented exercise of war powers by the Federal Government and the Confederacy that skirted the original Constitution and realized the war-making potential of the Confederate Constitution.[870] To survey the constitutional landscape in the 1868 was thus to chart a river after an earthquake, its course uncertain and its banks unstable. Why write a constitutional textbook in this moment, fixing words on paper and in time?

Paschal's rationales sounded familiar at first blush. Like many an antebellum apostle, he emphasized the centrality and scarity of constitutional knowledge in American civic life. "All that was preserved of the debates of the wise men" who made the Constitution had become the country's national literature, he recounted, and the country's soldiers, officeholders and voters daily swore to uphold the instrument. Yet the circulation of the text was hardly enough. "There is a kind of popular fallacy that everybody understands the Constitution of his country, when, truth to confess, comparatively few have ever read it at all, and still fewer have studied it carefully." These fears echoed themes of constitutionalism from the pre-war decades, but now they seemed to have been proven true. In the very fact of the war, Paschal observed the fruits of what he deemed the worst falsehood of constitutional meaning – "the heresy of that peculiar school of 'State sovereignty' which taught that the States had, in fact, *surrendered* nothing, but had only *delegated* certain powers, in trust, to a common agent; and that any State could at any time, for any cause, or no cause, resume the delegated powers, and again peaceably take its place among the nations of the earth." But Paschal's constitutional instructor was not another antebellum ode to the Founding. Writing in 1868, his assumed task was not simply to instill obedience to the authority of the national fathers. He wrote to prepare Americans – and perhaps himself – to inhabit a new constitutional realm. It was one in which the present generation had taken control of the Constitution from the shattered grasp of the past. The days of "state sovereignty" were over, he declared, describing the centralized state that both the Confederacy and Union had

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[869] Drew Gilpin Faust, *This Republic of Suffering: Death and the American Civil War* (New York, 2008); Jim Downs, *Sick from Freedom: African-American Illness and Suffering during the Civil War and Reconstruction* (New York, 2012). J. David Hacker, "A Census-Based Count of the Civil War Dead," *Civil War History*, Volume 57, Number 4 (December 2011), 307-348; Stephanie McCurry, *Confederate Reckoning: Power and Politics in the Civil War South* (Cambridge, Mass., 2010).

[870] Aaron R. Hall, "Reframing the Fathers' Constitution: The Centralized State and Centrality of Slavery in the Confederate Constitutional Order," *Journal of Southern History*, Volume 83, Number 2 (May 2017), pp. 255-296; Mark E. Neely Jr., *Southern Rights: Political Prisoners and the Myth of Confederate Constitutionalism* (Charlottesville, 1999); Mark E. Neely Jr., *Lincoln and the Triumph of the Nation: Constitutional Conflict in the American Civil War* (Chapel Hill, 2011); Stephen C. Neff, *Justice in Blue and Gray: A Legal History of the Civil War* (Cambridge, Mass., 2010); Arthur Bestor, "The American Civil War as a Constitutional Crisis," *American Historical Review*, 69 (January 1964), 327–52; Laura F. Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights* (New York, 2015).

erected: "whether doubtful powers have been rightfully or wrongfully exercised, they have been so exercised as to become estoppels upon the whole people." There was no going back to the old ground of constitutional debate. Paschal urged a clear-sighted, informed embrace of constitutional change. The lesson to be gleaned from peering back at those debates was to distrust demagogic narrators of constitutional truth. "Such teachers are the blind leading the blind…. The Constitution has created no authoritative expounder. Every exposition has at last to come to the test of popular opinion." Constitutional study was thus essential, including for the "four millions of freemen who have been constitutionally made citizens of the United States in whose behalf the fundamental charter has been amended." At its heart, the project aspired to bridge constitutional past and future. "As the war has stricken human slavery out of the Constitution, we all in some sort stand upon a *new era* in regard to the protective principles and the guaranties of liberty which it contains. And yet it is the order of the human mind under all dispensations to consult precedents to allow them always to be persuasive and generally controlling."[871] Between the Founding and Reconstruction, the former slaveholder reflected the imperative of change and the allure of continuity. He applied the antebellum practice of ardent constitutional instruction to the postbellum Constitution's transformed temporality.

The arc of antebellum constitutionalism was visible in the sweep of Paschal's life. As a white slaveholding southerner born in 1812, his class and his generation had pressed claims about the identity of slavery under the Constitution – shaping and wielding United States constitutionalism in the process. His father, a revolutionary solider, named him George Washington for the general, framer and president under whom he had fought. As Paschal grew up in a slaveholding family in Skull Shoals, Georgia, this father would discourse for an hour at a time about the Revolutionary era figures of Franklin and Lafayette. When the son read law under Joseph Lumpkin, passed the bar and swore a constitutional oath, the father instructed him to "always remember that this [oath] is no idle form. That Constitution is the charter of our liberties; the Union its palladium."[872] Slavery and constitutionalism were mainstays in Paschal's upbringing. So was the politics of slavery. The aging father had observed the Missouri Crisis and the rise of the Founding in American constitutional culture, while the son experienced its force. Paschal recollected that "the apprehensions upon the subject of negro slavery which the Missouri restriction had left, and the incipiency of abolitionism foreshadowed, naturally inclined all ardent young men to embrace the doctrines of the Virginia and Kentucky Resolutions and the inviting school of States Rights." Yet it was when the Nullification Crisis arose, he wrote in his constitutional instructor, that his understanding solidified "after an examination of all the lights accessible to me." Chief among these authorities was "the most prominent author of these reports and resolutions, and indeed the chief architect of the Constitution itself, Mr. Madison telling us that Nullification and Secession had the same poisonous root." As a northern generational contemporary would reflect, young men constitutionally educated during that crucible "were just of the age to become the actors and leaders when secession began."[873] In a memoir, Paschal elaborated on additional counsel that he had received during that decisive time. The fast-fading father, "When his lucid intervals would return, [] would call me to his bedside, and earnestly talk

[871] Paschal, *The Constitution of the United States, Defined and Carefully Annotated* (Washington DC, 1868) (emphasis added).
[872] George W. Paschal, *Ninety-four Years: Agnes Paschal* (Washington DC, 1871).
[873] Edward D. Mansfield, *Personal memories, social, political, and literary, with sketches of many noted people, 1803-1843* (Cincinnati, 1879), 238.

to me concerning the threatening political aspect of the country, which danger, until then, I was not aware had arrested his attention. But he had carefully read the newspapers and watched the progress of nullification…. And, with his dying words, as I may say, he warned me against every insidious doctrine which looked to disunion as a remedy. I know these warnings made a serious impression upon my whole life." The southern revolutionary father, a planter and postmaster for the government, never saw the Union and slaveholding at odds; but neither did his constitutional imagination stretch to envision that the national sanctity and extension of the latter might become more fundamental than the perpetuity of the former. This patrimony helped define the way Paschal located constitutional truth in the years to come. The Founding of the United States was a family value, passed from father to son. And in turn, Paschal's son would escape across Confederate lines during the Civil War to join Union forces.[874] As a lawyer and newspaper editor, Paschal was immersed in the vernacular constitutionalism of the period. Fathers, founders and framers loomed large in arguments and editorials. Their intentions, understandings and actions were objects of inquiry and assertion. Through them, authoritative, original meanings were known. And in 1861, when secession and war disordered his power and privilege, Paschal hewed to the Founding that he been brought up to revere and obey.

This path illustrated antebellum constitutionalism in action, but it was not simply an antebellum story – as Paschal's post-secession career suggests. The conflicting Foundings that heightened conflicted between proslavery expansionists and their opponents helped carry them into war. Americans went into battle animated by proslavery constitutionalism and constitutional unionism.[875] The young Virginian tobacconist John H. Cochran, for example, wrote to his mother on the eve of Lincoln's election with unconstrained enthusiasm for disunion as a constitutional measure. He rattled off a list of well-rehearsed sectional injuries, citing *Dred Scott* for the constitutional law of national slavery and explaining that "we have been battling against abolitionism is some form or other for many years"; now he was determined to "stand upon the Virginia and Kentucky resilutions of 98 and 99."[876] Trained to claim this Founding authority, Cochran continued that, "Holding up the Constitution we have asked to have the rights it secures us given to us in the Union," and the South must yield no more – "compromise but invites aggression." In the same spirit, the Virginia college student Casper Branner hoped that politicians would produce no compromise or amendment in February of 1861. Addressing his father, he explained that "if the North made the proper promises, she would not keep them, because she has violated the constitution which she had sworn to obey."[877] The legitimating power of constitutional faith was even stronger in the North. In January 1861, F. S. Stumbaugh assured Simon Cameron that his county in Pennsylvania could provide 1,000 men with little notice "to defend the Union the Constitution & the laws, we are not very much in favor of compromises, especially any compromise which would sacrifice our principles."[878] One of these Franklin County residents would soon confirm Stumbaugh's impression. Alex Cressler, a young

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[874] *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* (ser. 2, vol. 4, Washington DC, 1899), 890.
[875] James McPherson, *What They Fought For, 1861-1865* (Baton Rouge, 1994).
[876] *John H. Cochran to His Mother, October 8, 1860*; Family Letters, 1860-1861, (MS 92-032), Civil War Collections, Special Collections, Virginia Polytechnic Institute and State University, Blacksburg, Virginia. (Source available through Valley of the Shadow digital history project, available at http://valley.lib.virginia.edu/).
[877] *Casper Branner to Father, February 9, 1861*, Casper Branner Letters, Accession #11162, Special Collections Department, University of Virginia Library, Charlottesville, Virginia.
[878] F. S. Stumbaugh to Simon Cameron, January 5, 1861, F. S. Stumbaugh to Simon Cameron, 5 January 1861, Simon Cameron Papers, Dauphin County Historical Society, Reel 6.

school teacher before enlisting, wrote some months later after fighting had commenced, "we will cheerfully sacrifice our all upon the alter of our Country and stand by the Constitution and the laws until the last drop of our hear's blood shall have oozed from bosoms, not as long as we inherit the spirit by which our fathers were actuated [can we] shrink from the task." Fulfilling antebellum narratives of intergenerational duty, marching off to preserve the Constitution appeared to offer precisely the proof that sons could be worthy descendants of their national fathers. Cressler also predicted that secessionists would flee Virginia, so that "western Virginia will extend her government over the whole dominion and abolish slavery herself."[879] While this constitutional imagination still located slavery as a state institution for abolition, it reflected the shifting expectations for national reordering that the war ought to bring.

At the outset, the national cause appeared clear enough: keeping the fathers' Constitution and Union. For many, this object seemed to be one and the same. When Lincoln was elected on a platform of the Founding of Containment, constitutional abolition was expressly and assiduously disclaimed. When the Corwin Amendment securing extant slavery from constitutional incursion nearly became the law of the land, it promised to fortify what was already Republican understanding of the limits of federal power. Soon, however, the relationship between the saving the Constitution and the Union became troubled. At each exercise of war powers, southern sympathizers and Democrats attacked the administration for violating constitutional strictures. When war powers were turned against slavery itself, the widening gulf was most apparent. As an old shopkeeper in Chambersburg, Pennsylvania confided to his diary after Lincoln delivered the Emancipation Proclamation in 1863, "Some here do not think wisely of it as many abolitionists are so wild they would change our Constitution."[880] But these reservations were vulnerable to the sense that the times had changed.[881] The ruptures of secession, hard war, mounting death and the perilous flight of enslaved people to join the Union cause encouraged Americans to think that their reconstructed Union deserved a better Constitution. In waging war for the Union against an upstart nation-state devoted to perpetual slavery, the living generation assumed responsibility for the nature of their Union. They began to recognize their own Constitution-remaking authority.

Presiding at the 1864 National Union Convention to nominate Lincoln for reelection, the "Old War Horse of Kentucky" Robert Breckinridge gave voice to this transformation in constitutionalism. As an initial matter, he told the assembled delegates that despite "all the outcry about our violations of the Constitution, this present living generation and this present Union party are more thoroughly devoted to that Constitution than any generation that has ever lived under it." Such a statement, greeted with applause, had no parallel in antebellum America. It conveyed a sentiment that had ceased to be pretense in view of the death toll and sacrifices made during the war. He continued in a vein once transgressive and speculative that was now becoming progressive and attainable: "it is a great error which is being propagated in our land, to say that our national life depends merely upon the sustaining of that Constitution. Our fathers made it, and we love it. But if it suits us to change it we can do so. And when it suits us to change it, we will change it. If it were torn into ten thousand pieces, the nation would be as much a nation as it was before the Constitution was made a nation…." Each of these lines was punctuated with cheers throughout Baltimore's Front Street Theater. What would have been

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[879] *Alex Cressler to Henry A. Bitner, July 30, 1861*, University of Virginia, Alderman Library, Special Collections MSS 11395.

[880] Jane Dice Stone, ed., "William Heyser Diary," *Papers Read Before the Kittochtinny Historical Society*, vol. 14 (Mercersburg, 1978).

[881] Chandra Manning, *What This Cruel War Was Over: Soldiers, Slavery, and the Civil War* (New York, 2007).

booed in antebellum America, was now within the bounds of constitutional imagination and political action. Robert Breckinridge was the uncle of John Breckinridge, the Southern Democrat presidential candidate in 1860. He spoke as slaveholder turned Republican Unionist and now turning emancipationist. With this identity and the peculiar authority it brought, the minister told delegates, reporters, and newspaper readers, "We ought to have it distinctly understood by friends and enemies that while we love that instrument, we will maintain it and will, with undoubted certainty, put to death friend or foe who undertakes to trample it under foot; yet, beyond a doubt, we will reserve the right to alter it to suit ourselves from time to time and from generation to generation." This was a rally not to rehearse traditional constitutional veneration but to affirm the power to re-found the Union. In the resolutions nominating Lincoln for reelection, the nation convention reconciled constitutional faith and change. The body lauded his "unswerving fidelity to the Constitution" and "approve[d] especially the Proclamation of Emancipation and the employment as Union soldiers of men heretofore held in slavery [] and that we have full confidence in his determination to carry these and all other Constitutional measures essential to the salvation of the country into full and complete effect." According to reports, this utterance received the loudest applause. The door to constitutional transformation, predicated on changing state and society, lay open.[882]

During the campaign for constitutional amendments between 1864 and 1870, living Americans did just as Robert Breckinridge described. Over this span, the Thirteenth, Fourteenth and Fifteenth Amendments were proposed, passed, ratified and adopted over violent opposition. Slavery was abolished; birthright citizenship extended; privileges and immunities of citizenship secured, due process and equal protection of the laws guaranteed; the power of federal enforcement conferred and the right to vote established regardless of race or prior enslavement. The gravity and immensity of these acts may seem to speak for themselves. Yet their radical quality, their disjunction with American constitutionalism to that point, can only be appreciated in view of the longstanding power of the Founding in antebellum America. The authority of that cultural edifice had weighed like an anchor upon popular understanding of legitimate constitutional discourse, foreclosing freedom indefinitely. Then its chain snapped. With the Reconstruction Amendments, Unionists moved beyond claiming the Founding; instead, they claimed the power to re-found the United States. They defeated southern armies and conservative appeals to do it.

This constitutional transformation depended on African-American mobilization. During this Second Founding, black politics pressed for full recognition and empowerment as constituent people of the country. Nationally and especially in the South, local organizing asserted the necessity and legitimacy of amending the Constitution. When slavery was not yet abolished, the 1864 National Colored Convention warned the nation against any belief that the institution would die of its own accord. "So thought your Revolutionary fathers when they framed the Federal Constitution; and today, the bloody fruits of their mistake are all around us. Shall we avoid or shall we repeat their stupendous error?"[883] After abolition, African-Americans relentlessly insisted that formal freedom was not enough for themselves or for the political and social health of the nation. In early 1865, the formerly enslaved woman Lucy Lee wrote to a Union officer of the imposition of new practices of servitude that rendered her daughter "a

[882] *Proceedings of the National Union Convention, held in Baltimore, Md., June 7th and 8th, 1864, Reported by D. F. Murphy* (New York, 1864).
[883] "Address of the Colored National Convention to the People of the United States," *Proceedings of the National Convention of Colored Men, held in the City of Syracuse, N.Y., October 4, 5, 6, and 7, 1864*… (Boston, 1864).

prisoner here in a free land": "We were delighted when we heard that the Constitution set us all free, but God help us, our condition is bettered little; free ourselves, but deprived of our children."[884] Without firm constitutional renovation and equal rights enforced by the ballot and the federal government, white southerners returning to power would ensure the infliction of every oppression short of slavery. As an 1865 "colored citizens" meeting in Norfolk, Virginia explained, further amendments must follow from "the necessity of the right of suffrage for our own protection" as well as the "reasons why it is expedient you should grant us that right."[885] But this extension, they emphasized, was not a privilege but a matter of "constitutional right" resting upon the principles and practices upon which the Constitution was originated. African-Americans did not spurn the Founding in this moment; instead, they demanded its narrative transformation. No longer could it be claimed that the United States was founded as a white man's country with a white man's government. As William H. Gray, an African-American leader in the 1868 Arkansas Constitutional Convention told a fellow delegate who denied black citizenship, the *Dred Scott* "decision, sir, travelled outside of the Constitution, outside of American history, outside of the precincts of the courts."[886] Connecting an original moment of free black participation with ongoing Reconstruction situated the hard work of making a Second Founding as a matter of building upon rather than attacking the first one. Speaking at an Indiana convention in 1865, John Mercer Langston argued keenly that although "It has been often asserted that the Constitution was made exclusively by and for the white race," [i]t has already been shown that in five of the thirteen original States colored persons then possessed the elective franchise and were among those by whom the Constitution was ordained and established." Indeed, he continued, black people's service in "the bloody battles of our late stupendous rebellion," were only the latest demonstration that the United States' "Constitution and the free institutions, which are its natural outgrowth, are objects of our fondest affection."[887]

Soon after the ratification of the Fifteenth Amendment in early 1870, George W. Paschal delivered a celebratory lecture at the American Union Academy. Since authoring his postbellum constitutional instructor, the ex-southerner had deliberated further on the constitutional meaning of Reconstruction. His topic for the evening was the Constitution itself, and his message was one of a world wholly remade. In short, Paschal described a Second Founding, one "so sudden that the people are hardly yet awake to the wonderful reality." Paschal noted the common understanding that the three amendments thus far accomplished had worked a tremendous reformation – "the impression is general that recent amendments have made great changes" – but he urged that "very few have stopped to think of the real revolution in our government." According to Paschal, the amendments would be the long-enduring monuments of a "heroic era." This was no occasion for revering the fathers. While denigrating the three-fifths clause in passing, Paschal announced that "I am not here to severely censure one generation or another in regard to [slavery]." The choices of the framers no longer had the salience they once did. Of their original bargains to make the Union, he said "Far be it from me to censure those who thus dealt with great facts as they were." This present-focused, self-congratulatory posture defied the structure of antebellum constitutionalism; it was a corollary to the profound break that

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[884] Dorothy Sterling, *We are Your Sisters: Black Women in the Nineteenth Century* (New York, 1997), 314.
[885] *Equal Suffrage. Address from the Colored Citizens of Norfolk, Va., to the People of the United States. Also an Account of the Agitation of the Colored People of Virginia for Equal Rights…* (New Bedford, Mass., 1865).
[886] *Debates and Proceedings of the Convention which Assembled at Little Rock, January 7th, 1868... To Form a Constitution for the State of Arkansas* (Little Rock, 1868), 95.
[887] John Mercer Langston, "Citizenship and the Ballot," *Freedom and Citizenship: Selected Lectures and Addresses* (Washington DC, 1883).

Reconstruction was effecting. And profound it was: together, he instructed, the amendments "very radically change the original theory of the government." Paschal emphasized the breadth of the amendments as a wholesale reframing of the government. The Fourteenth Amendment had "brought every State law under the immediate supervision of Federal control," he exulted: "For what law can be passed which does not in some way affect the privileges or immunities or the life liberty and property of the citizen?" To ensure that "the whole range of civil rights" and voting rights under the Fifteenth Amendment were realized, Paschal beheld the might of the federal government – "power only limited by the appropriateness of the remedies." In 1870, he looked forward to legislators "ris[ing] to the emergency" and enforcing the Second Founding.

The course of constitutional transformation between 1864 and 1870 was not plotted in advance. It was a violently dialogic process, as southerners and their northern allies – including President Andrew Johnson – contested the aims and means employed by the federal government and the efforts of black and white Republicans.[888] On the ground, this contestation often took the form of terror, persecution and murder for the sake of black subjection. The campaign for successive amendments drew from this pain. By 1869, the Fifteenth Amendment guaranteeing the right to vote was moving towards ratification, but future possibilities for disenfranchisement and dispossession haunted black politics. At the National Colored Convention that year, Pennsylvania delegate I. C. Weir observed that "the most fearful question we have now, or could ever have to contend with, was this only half subdued, and unreasonable doctrine of State Rights or State Sovereignties."[889] In place of slavery, these terms were the rallying cries of white southerners and their Democratic supporters. Through constitutional stories about still-sovereign states, they sought to limit, in theory and practice, the scope of constitutional change.

"I hates the Constitution, This great republic too, I hates the Freedmans' Buro, In uniforms of blue." So went the popular song "I'm a Good Ol' Rebel" that emerged from the occupied South in the mid-1860s.[890] Yet soon enough, this sentiment was hardly the dominant refrain among white southerners. As Reconstruction teetered and fell, the new ex-rebel yell became a cheer for the fathers' Constitution. First, the Freedman's Bureau was defunded and then shuttered by 1872. Next, the blue-uniformed Union soldiers were gradually withdrawn and then fully removed in 1877. White men largely governed the great republic again, both in the South and in the Capitol, as Confederates returned to high office.[891] And the Constitution was thus cherished again; indeed, according to the narrative crafted by former Confederates and other white southerners, they had always been faithful to their fathers' Constitution. Only a few years after surrendering, they redefined their cause from installing national, perpetual slavery into principled constitutionalism and the abstraction of state rights. On doing so, they claimed the Founding again.

Among the host of southern voices who formed this renewed constitutional chorus, Confederate Vice President Alexander Stephens exemplified the historical revision with his pioneering two-volume gloss on the Civil War, *A Constitutional View of the Late War Between the States: Its Causes, Character, Conduct and Results*, published between 1868 and 1870. "The contest was between those who held it to be strictly Federal in its character and those who

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[888] Michael Vorenburg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (New York, 2001); Michael Vorenberg, "Reconstruction as a Constitutional Crisis," in Thomas J. Brown, ed.,*Reconstructions: New Directions in the History of Postbellum America* (New York, 2006)

[889] *Proceedings of the National Convention of the Colored Men of America: Held in Washington, D. C., on January 13, 14, 15, and 16, 1869* (Washington DC, 1869), 4.

[890] "O I'm a Good Old Rebel," *Littell's Living Age*, June 29, 1867, 802.

[891] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York, 1988).

maintained that it was thoroughly National. It was a strife between the principles of Federation on the one side and Centralism or Consolidation on the other," he opined.[892] In this story, "Slavery, so-called" was the mere pretense for this conflict of principles. This was the same Alexander Stephens who, less than a decade prior, had declared slavery to be the "cornerstone" of a new nation-state and the institutional heart of the Confederate Constitution. The Georgian, who would return imminently to the House of Representatives in 1873, dedicated his work to the "memory" of all those who "sacrificed" themselves "in defence of the Sovereign Right of Local Self-government, on the part of the Peoples of the several States of the Federal Union; and in defence of those Principles upon which that Union was established, and on which alone, it, or any other Union of the States, can be maintained consistently with the preservation of Constitutional Liberty throughout the Country." This dedication told much. It reframed the Confederate cause as an honorable one, making "sacrifice" a focus of historical memory while evacuating the subject of slavery. It placed the war itself on the ground of state sovereignty and conflated that ascribed quality with constitutional liberty and the establishment of the Union. Abstract constitutional fidelity thus became another focus of historical memory. Finally, Stephens made the normative claim that only by upholding original principles of state sovereignty could constitutional liberty be preserved in the United States. Throughout Stephens' narrative and virtually all other works of constitutional history emanating from the South in the decades after Radical Reconstruction, southerners insisted on their abiding reverence for original Constitution, then and now. This Lost Cause lore permeated public memory. On Memorial Day in 1898, a Confederate veteran typically affirmed, "the *ante-bellum* South loved the organic law of its fathers."[893] As the educational activist and former Confederate constitutional framer Jabez Curry instructed at the turn of the century, "The object in quitting the Union was not to destroy but to save the principles of the Constitution."[894]

While the Reconstruction Amendment remade the Constitution between 1866 and 1870, many southerners doubted the fundamental legitimacy of the constitutional transformation that had taken place. Embracing and rehearsing this doubt sustained the legitimacy of collective resistance and vigilante white terror. The most aggressive stance was outright denial. Arraigned before a federal commissioner for violating the Enforcement Act in 1871, Linton Stephens, Alexander Stephen's brother, rejected the constitutionality of the Act. "These so called amendments are, as I shall now proceed to show, not true amendments of the Constitution, and do not form any part of that sacred instrument. They are nothing but usurpations and nullities, having no validity themselves and therefore incapable of imparting any to the Enforcement act or to any other act whatsoever."[895] Southern legal and political discourse gave cover to these views and actions. The Missouri lawyer *William O. Bateman* argued in his *Political and Constitutional Law of the United States* volume that "the xivth and xvth Amendments to the national Constitution," ran afoul of the "principles deemed sacred by the fathers of our republic."[896] In the *Southern Law Review*, attorneys reckoned constitutional change, reassuring one another that, as D. D. Shelby of Alabama wrote, "Congress did not intend to destroy the purity of our race when

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[892] Alexander H. Stephens, *A Constitutional View of the Late War Between the States: Its Causes, Character, Conduct and Results* (2 vols.; Philadelphia, 1868–1870)
[893] Salem Dutcher, "The South and the Constitution," *Confederate Veteran*, 27 (July 1919), 249–52.
[894] J. L. M. Curry, *Civil History of the Government of the Confederate States, with Some Personal Reminiscences* (Richmond, Va., 1901).
[895] J.D. Waddell, ed., *Biographical sketch of Linton Stephens, containing a selection of his letters, speeches, state papers, etc., ed.* (Atlanta, 1877).
[896] William O. Bateman, *Political and Constitutional Law of the United States* (St. Louis, 1876).

it submitted this amendment to the people, nor did the people in adopting it vote for amalgamation."[897] Bateman and others professed their dread for further constitutional change and a sixteenth amendment that would leave less room for evasion – but it never came.

As white southerners returned to power through bloody insurgency and Union forces withered away, the outright rejection of the Reconstruction Amendments ceased to be either necessary or expedient. The more subtle, supple power of historical memory, as Alexander Stephen's dedication signaled, performed the work of opposing Reconstruction instead. Through constitutionalism and construction, the scope of the Amendments were reduced and refashioned. The First Founding was restored as the only Founding and the Constitution as the fathers' Constitution, its changes not disturbing the nexus of white supremacy and state rights. The South could not do this alone, however: it was a national project.

The overthrow of Reconstruction and federal desertion of the black South is a complex political story with brutal violence at its heart. It is a story of terror and torture against black people buttressed by a parallel one of white reunion. It is also a story of constitutionalism. As white southerners seized control and white northerners ceased to support occupation and enforcement, Reconstruction gave way, achingly, to reconciliation. The sacrifice of white soldiers on all sides could be recognized and remembered.[898] Revising secession into a constitutional dispute about state rights rather than human enslavement served this shared cause of reunion. As Charles Francis Adams, Yankee scion, told an audience of South Carolinians, "Everybody in short was right, no one wrong" when it came to secession because the Constitution supported two different and legitimate original visions of sovereignty.[899] "From the moment the fathers sought to divide the indivisible, the result was written on the wall." This question of sovereignty was the true "inevitable, irrepressible conflict," he concluded. White Americans outside the South did not have to accept the historical validity of secession; they generally did not. But that mattered much less than shifting the focus of public memory away from slavery towards constitutional history and soldierly honor. The South could readily accept the "results of the war" if the outcome was not constitutional transformation but a narrative of principled disagreement and the reestablishment of white supremacist "home rule."[900] On this terrain, white Americans could more easily forget what Reconstruction was about. Standing upon it together, they could join in celebrating their enduring, inherited Constitution. Such orchestrated neglect of the recent past was critical to rewriting the meaning of the Reconstruction Amendments.

The Founding rose again. White Americans resurrected it through rituals, writings, adjudications and a plethora of cultural labor. In their constitutionalism, they exchanged a posture of active, divisive transformation for a national consensus of passive veneration. The fathers' Constitution had been amended, to be sure, but the ascribed principles and architecture of the original remained intact. The additions, made by hands other than the framers, did not carry their authority; neither the new words nor the aspirations behind them could supersede the work of the fathers. This revived Founding was the constitutional face of white reunion and reconciliation. After terrorism rolled back African-Americans' political gains and exhausted

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[897] D. D. Shelby, "The Thirteenth and Fourteenth Amendments," *Southern Law Review* (July, 1874), 352

[898] David Blight, *Race and Reunion: The Civil War in American Memory* (Cambridge, Mass, 2001).

[899] Charles Francis Adams, *The Constitutional Ethics of Secession and "War is Hell"* (Boston, 1903).

[900] On the postbellum assessment of secession on the results of the war, see Cynthia Nicoletti, *Secession on Trial: The Treason Prosecution of Jefferson Davis* (New York, 2017); Charles W. Ramsdell, "The Changing Interpretation of the Civil War," *Journal of Southern History* Vol. 3, No. 1 (Feb., 1937), 3-27.

Republicans' commitment to enforcement, the Reconstruction Amendments remained inscribed on the Constitution. Yet they were only text. As antebellum debates over slavery showed, constitutional beliefs could overcome mere words. Renewed veneration of the original Founding diminished the authority of new text that bloodshed could not erase.

In legal and popular literature, at ceremonies and memorials, white Americans reaffirmed an original Founding; in doing so, they denied a new one. A cascade of constitutional textbooks, school histories and civic literature swept across post-Reconstruction landscape numbering in the hundreds of books and countless copies. Like a magnified wave of the Nullification-era constitutional literature boom, these works emerged from a more populous, literate and commercial country. As George Paschal wrote in a second edition of his constitutional manual, "It cannot be disguised that our people are studying the Constitution and its foundations with greater accuracy and a more intelligent understanding of the true character of our complicated governments."[901] Almost uniformly, they taught only one Founding. While authors did not deny that the Constitution had been amended, they relegated that fact to the end of the story. University of Michigan Professor Burke Hinsdale's prominent textbook, *The American Government: National and State* left no doubt that there had been no Second Founding. Students learned that the "circumstances under which these amendments were incorporated into the Constitution were not favorable to a careful consideration of their real import and probable effect."[902] In a section titled "Wise Convention Contrasted with the Effects of Amendments XIII-XV," Hinsdale instructed students to denigrate them and hope for a restrictive construction. The Amendments "were adopted to prevent present evils, and how far reaching they might prove to be was not maturely considered," he explained. Implicitly, the new text did not possess authority equal to that of language from the Founding much less the authority to expansively reform the work of the framers. A notable number of women contributed conservative constitutional instruction in this moment, a form of political participation while the campaign for equal suffrage mounted. Mildred Lewis Rutherford, Historian General of the United Daughters of the Confederacy, devoted her daily labors to writing, lecturing, promoting books and organizing school curriculum all to teach "our children and children's children… the principles for which our fathers fought – states' rights and constitutional liberty."[903] Nannie McCormick Coleman, a wealthy Chicagoan from the South, focused squarely on the moment of first creation in *The Constitution and its Framers*. In keeping with her emphasis on an authoritative Founding, she cautioned that "Once the constitution becomes the subject of frequent change, public reverence for it ceases uncertainty of the interpretation that may be given the new provisions confuses and instability of government is wrought."[904] Rekindled historical veneration cast doubt on the constitution-making power of the living generation. While the Civil War had established the "inviolable integrity of the Union," Coleman warned that "The danger now is the other way. State and local sovereignty is as sacred, as important to the liberty and well-being of the people, as national sovereignty." To encounter constitutional literature as a white student in the post-Reconstruction period was to be told to revere the Founding and to disregard the constitutional ruptures of the recent past.

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[901] George W. Paschal, *The Constitution of the United States, Defined and Carefully Annotated* (Washington DC, 1876).
[902] Burke A. Hinsdale, *The American Government: National and State* (Chicago, 1891).
[903] Mildred L. Rutherford, "Address: The South in the Building of the Nation, Washington D.C. Thursday, November 14th, 1912," *Four Addresses* (Birmingham, Ala, 1916).
[904] Nannie McCormick Coleman, *The Constitution and its Framers* (Chicago, 1904).

After Reconstruction was shattered, the United States honored the centennial of the Founding. Its return to authority could be observed in the national constitutional celebration. In Philadelphia, a multi-day ceremony of parades, dinners, marches, and addresses commemorated the hundredth anniversary of the revelation of the Constitution in September 1887. President Grover Cleveland addressed the crowd, thousands of school children sang in formation, and Senior Supreme Court Justice Miller gave a long oration. An original and enduring Founding was center of the ceremony. As the poet F. Marion Crawford wrote in a poem for the occasion, "The sacred Constitution was ordained/ An age has passed and left it yet unstained."[905] In the program material that that accompanied the celebration, the folk tale of the Founding was duly related. A subsection on the "Ability and High Character of the Convention" and another with "Biographical Notices of Members" let Americans learn or refresh their memories about who precisely they should venerate.[906] Beyond the text of the Constitution itself, the Reconstruction Amendments, their authors and the failure of the fathers' Constitution were nowhere to be seen.

Justice Miller's address was largely a familiar account of constitutional creation, rendered with expected reverence. Yet the risen-again Founding related by Miller was also one to suit the times: with Reconstruction broken, the conservative jurisprudence of the Gilded Age echoed in his history and call to veneration. "History points us to no government in which the freedom of the citizen and the rights of property have been better protected, and life and liberty more firmly secured," Miller spoke.[907] In keeping with the judicial movement to stymie regulation of business activity, he ascribed to the Founding the original purpose of securing a common, uniform domain for commerce that states could not obstruct, and he lamented that governments were violating tis founding laissez-faire creed. While the Constitutional Centennial exhibited a careful silent on the subject of Amendments, Miller characterized them succinctly: "while keeping in view the principles of our complex form of State and Federal government, and seeking to disturb the distribution of powers among them as little as was consistent with the wisdom acquired by a sorrowful experience, these amendments confer additional powers on the government of the Union, and place additional restraints on those of the States. May it be long before such an awful lesson is again needed to decide upon disputed questions of constitutional law." Speaking to the crowd and opining from the bench, the justice registered a modest measure of constitutional change and, in the course of war and amendment, the settlement of an abstract dispute. The Constitution had not been reconstructed. Finally, like many an antebellum orator, Miller concluded by beseeching "the rising generation" to reject "all new theories of government" that "do not rest upon a foundation of veneration and respect for law." From the perspective of empowered officials in this time of white reconciliation and reunion, the nation needed a constitutionalism of reverence and deference.

The Constitutional Centennial was a product of vast memorial labor. Rejuvenating the Founding took planning and resources. In 1886, ex-Confederate state governors like Georgia's Henry D. McDaniel and Virginia's Fitzhugh Lee, the nephew of Robert E. Lee, joined with

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[905] F. Marion Crawford, *A National Hymn*. Constitutional Centennial Commission Papers, Box 1, Historical Society of Pennsylvania.

[906] *Centennial Celebration of the Framing of the Constitution of the United States: Official Programme of the Processions, Exercises, Entertainments and Receptions. To be Held on September 15th, 16th and 17th, 1887. At Philadelphia* (Philadelphia, 1887).

[907] Samuel F. Miller, *Memorial Oration, Delivered at the Celebration of the One Hundredth Anniversary of the Framing and Promulgation of the Constitution of the United States of America, in Independence Square, Philadelphia, September 17th, 1887*. Constitutional Centennial Commission Papers, Box 1, Historical Society of Pennsylvania.

northern counterparts among the original states to authorize preparations. "The Adoption of the Constitution of the United States of America is the most important event in the history of the American people, and that instrument is the sublimest political achievement of mankind," they resolved. Then another committee of prominent officials addressed the American people about the coming centennial. They plead for constitutional veneration and deference. In the Founding, Americans should admire the "tranquil adoption of a system of checks to the heated impulses which political strife has always aroused" and the "barrier to hasty legislation effected by an organic law unchangeable except by processes involving delay and so securing an interval in which reflection might resume its sway over passion."[908] Reconstruction and present politics went unmentioned, but the implication was clear. The Commission took as its duty the inculcation of reverence for the Constitution and dutiful observance of the law because "only by intelligent perception of its transcendent importance can be assured a continuance of the blessings which make us the admiration of the world." Centennial officials sought to ensure the event attained due grandeur and a national reach. They dispatched invitations to a hundred of business, municipal, religious and civic leaders – almost uniformly white men – across the country. These missives gave recipients a chance to reflect upon the Constitution and commit to paper their feelings. A president of a county historical society hoped that "all its features may be educational in their effect upon the present and future generation of the Republic." The Bishop of Savannah, Georgia extolled the Constitution as the "Magna Charta of American liberty, which is just as far removed from license, as law is from disorder." A physician, William Biglar, professed the critical importance of celebrating the Founding. "The celebration of the centennial of our Constitution is a duty far paramount to that of our declaration of Independence – for this was the giving to our nation a tangible government whose stability has been proven through those baptisms of blood during the century about to close;- a century that has proven to the world that our form of government possesses all the elements of permanency – and ability to advance the best interests of the race. Let us honor our Magna Charta and the memories of the prophetic framers of it…." As Biglar indicated, the Constitution that people envisioned at the Centennial was that of the "prophetic framers," not a document transformed, renewed or re-founded. The replies to Centennial invitation admitted no sense of a Constitution both young and old, one that a living generation had help craft. For these Americans and so many others, the Constitution was one hundred years old.[909]

Two years later, New York hosted its own centennial event marking the inauguration of George Washington as the first president under the Constitution. Once again, the public rehearsed that "no body of statesmen ever assembled under conditions making more serious demands upon their patriotism, temperateness, and unselfishness than those which confronted the members of the Constitutional Convention."[910] The Founding was alive and well. And the project of inculcating its authority continued. A few months later, Jabez Curry, the ex-Confederate educator, delivered the commencement address at the University of Michigan. The "centennial celebration in New York," he remarked, "need not conclude our consideration of the genesis of our Federal constitutional epoch," as "the entire year might be well consecrated to the

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[908] *Centennial Celebration of the Framing of the Constitution of the United States…* (Philadelphia, 1887).
[909] ___ to Gentlemen of the Constitutional Centennial Committee, August 29, 1887; Thomas A. Becker to the Constitutional Centennial Committee, August 6, 1887; William Bigler to the Constitutional Centennial Committee, August 12, 1887, Constitutional Centennial Commission Papers, Box 2, Historical Society of Pennsylvania.
[910] John Alden, ed., *Souvenir and Official Programme of the Centennial Celebration of George Washington's Inauguration as First President of the United States* (New York, 1889).

study."[911] In the time allotted, however, Curry spoke directly on the subject of rupture and continuity. He assured students that the fathers' Constitution remained in force. "With one exception, the Constitution has been preserved intact, or has been amended only in conformity with the ideas of the original instrument our forefathers wrought with consummate wisdom. The limited authority of the central government, the sagacious adaptedness to human progress, the wise flexibility, the prevalence of Home Rule have superseded the necessity of alteration." So wise was the Founding that the Constitution was virtually self-healing over time. That one exception was the element of the textual residual of Reconstruction least susceptible to erasure. "In the citizenship and suffrage subsequently bestowed upon the freedmen was a change of political constituency, the introduction of unanticipated elements in the body politic the only real modification of the Constitution since its adoption, the only essential departure from the recorded opinions of the Fathers. He is an idiot who is ignorant of or indifferent to the gravity and magnitude of the negro problem," Curry imparted. As students graduated and went into professions and politics, they should bear this centennial lesson in mind and remember that it is "an exalted privilege to labor for the preservation of the Constitution and the Union." A hundred years after the adoption of the Constitution and nearly two decades after the Reconstruction Amendments, teachers and students, ex-Confederates and upper Midwest youth celebrated the Founding of a white man's government.

Among the many constitutional ceremonies during this time, Confederates figured prominently. Whatever stories they still told about secession, they claimed the Founding, just as empowered white people did across the country. North Carolina, the last state to ratify the Constitution except for recalcitrant Rhode Island, held its own centennial celebration in the fall of 1889. Organizers asked Jefferson Davis to attend. Weeks away from dying in Mississippi, the ailing Davis refused the invitation but could not resist recapitulating the Founding story that he had long honed. In a letter to the committee of arrangements for public reading, Davis instructed that "heroic patriots and wise statesmen of North Carolina" never relinquished state sovereignty and reserved rights when they ratified the Constitution.[912] "If there be any… who shall ask 'how, then, should North Carolina consistently enact her ordinance of secession in 1861,'" he urged, then "He may learn that the State, having won her independence by heavy sacrifices, had never surrendered it nor ever attempted to delegate the unalienable rights of the people." Even the most traitorous, proslavery icons from the Civil War could thus honor the anniversary of the original Constitution. With every celebration, every invocation of the Founding as a current authority, every silence or diminution of Reconstruction, and every elision of constitutional transformation, public constitutionalism altered the Constitution. These acts performed the work of refashioning and reinforcing a Constitution of continuity. They sapped power from the Reconstruction Amendments and eroded the authority of their creators as constitution-makers. The resurrection of the Founding meant the demise of a Constitution that had been reborn in words vulnerable to the culture and consciousness that mediated them over time.

The rise of the Founding reverberated in law. When the Supreme Court first had occasion to initially construe the Fourteenth Amendment in 1873, it denied the text could mean what it seemed to say. Ruling in the *Slaughter-House Cases* that the Amendment's Privileges or

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[911] J. L. M. Curry, "Causes of the Power and Prosperity of the United States: An Address Delivered at the Annual Commencement of the University of Michigan, Thursday, June 27, 1889," *The Commencement Annual of the University of Michigan* (Ann Arbor, 1889).

[912] Jefferson Davis to Messrs. Wharton J Green…, Oct. 30, 1889, in Wharton J. Green, *Recollections and Reflections: An Auto of Half a Century and More* (Raleigh, NC, 1906), 224-229.

Immunities Clause did not actually protect civil rights, the Court explained: "however pervading this sentiment ["the necessity of a strong National government"], and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the State with powers for domestic and local government… was essential to the perfect working of our complex form of government."[913] Through judges would soon use the Fourteenth Amendment to sacralize and insulate property and contracts rights – values that jurists associated with the original Constitution – once Reconstruction was subdued, the meaning of "privileges and immunities" was smashed beyond repair. *Slaughter-House Cases* was a studied articulation of disbelief in constitutional change, a close kin of constitutional faith; it reasoned by conviction that surely Reconstruction had not altered the familiar creation of the framers. As the Court concluded, "whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court… has always held with a steady and an even hand the balance between State and Federal power." This statement erased constitutional rupture; it was the construction of continuity.

The rise of the Founding and erasure of Constitutional Reconstruction inflicted a terrible bite. The constitutional history that people believed, both recent and old, mattered in law and in life. In 1879, the University of Georgia's chair of history explained why he exclusively assigned the *Madison Papers* and antebellum or ex-Confederate authors. "I cannot see how the late war can be said to have affected the fundamental law, or changed the character of the government. I am quite as willing as you can be, to 'let by-gones be by-gones,' but I cannot treat historical truth as a by-gone."[914] This perspective stood in contrast to that of Richard Greener, Dean of Howard Law School and the first black graduate of Harvard College. Asked in 1883 if federal legislation barring racial discrimination in public accommodations and facilities was constitutional, he readily answered: "According to the antebellum Constitution, no. In light of the amended constitution, yes." He was asked because the Supreme Court had just struck down such laws in the *Civil Rights Cases*, enshrining the Georgian's "historical truth" and trampling Greener's.[915] In rendering its decision, the Court mused: "If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress, with equal show of authority, enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property?"[916] Public lessons, popular belief and judicial action congealed in this moment to reproduce the Founding. White Americans chose to believe their fathers' Constitution lived – and so it did.

The Court declared that the time had come for freedpeople to assume "the rank of a mere citizen and cease[] to be the special favorite of the laws." As it left black Americans exposed to every manner of "private" wrong by non-state actors, the Court exposed its constitutional consciousness without the veil of doctrine. It measured the lives of black people in the 1880s against the baseline of antebellum America, against a constitutional world before Reconstruction. According to the white Court, "There were thousands of free colored people in this country

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[913] *Slaughter-House Cases*, 83 U.S. 36 (1873).
[914] "Southern Schoolbooks," *The Anderson Intelligencer*, Feb. 20, 1879, 1.
[915] "Prof Greener's Views. Advising the Political Independence of the Negro," *The New York Globe*, Nov. 10, 1883 (excerpting the *Richmond Landmark*).
[916] *Civil Rights Cases,* 109 U.S. 3 (1883).

before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens, yet no one at that time thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement."[917] This stark declaration, made without consulting black Americans past or present, told the country that Reconstruction was meant to make all black Americans the equal of free black people in the antebellum era. Otherwise, when it came to constitutional protections, the world of the Founding endured.

By the time the blow of the *Civil Rights Cases* fell, Frederick Douglass had spent several decades of his life attuned to the contours of American constitutionalism. The freedom and fate of African-Americans, he had realized early on, were bound up in the country's public culture around the Constitution. From this perspective, he observed the particularly bitter irony in the Supreme Court's erasure of a Second Founding. Speaking in mid-1880s at a convention in St. Louis, the elder statesman recalled: "In the dark days of slavery, this court on all occasions gave the greatest importance to *intention* as a guide to interpretation…. We were over and over again referred to what the framers *meant*, and plain language was sacrificed that the so affirmed *intention* of these framers might be positively asserted." No "quibbling" or "narrow rules of legal [] construction" were permitted to come between slavery and the Constitution.[918] Now that "Liberty has supplanted slavery," however, the Court had adopted new practices when it came to black rights. In striking down the Civil Rights Act and narrowing the Amendments, Douglass lamented, "It has utterly ignored and rejected the force and application of object and intention as a rule of interpretation. It has construed the constitution in defiant disregard of what was the object and intention of the adoption of the fourteenth amendment." He concluded: "Oh, for a Supreme Court of the United States which shall be as true to the claims of humanity, as the Supreme Court formerly was to the demands of slavery!"

Douglass held out hope for a Congress and Court that would make good on the Second Founding that black Americans has sought to secure. He lived long enough to see the last significant legislative effort to enforce the Fifteenth Amendment, the Lodge Force Bill, perish in 1890. Former Confederate Postmaster General John Reagan sat in the U.S. Senate and helped usher in its demise. The long-serving senator from Texas invited his colleagues "to turn to the debates of the convention which formed that Constitution, and to its journals" to understand why states had control over their elections and voting. Reagan delivered a summation of the relationship between Reconstruction and the Founding as southerners and many Americans had come to understand it. He argued: "the idea has become so prevalent that the war has revised the Constitution and substantially obliterated the rights of the States… but the Constitution stands as it did except as to the amendments which have been engrafted upon it. Its interpretation stands to-day as it did aforetime, except as it is qualified by the amendments to it which have been adopted. None of these amendments has taken away the tenth amendment of the Constitution, adopted a year or two after the Constitution itself was adopted." For Reagan, there was only one set of fathers and one Founding. Reconstruction had tinkered, marginally and unfortunately, in his eyes and those of the white people he represented. As Reagan would conclude in the final line of his memoir a few years later, "If this great Republic could be administered on the

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[917] *Civil Rights Cases*, 109 U.S. 3 (1883)

[918] James M. Gregory, *Frederick Douglass the Orator: Containing an Account of His Life; His Eminent Public Services; His Brilliant Career as Orator; Selections from His Speeches and Writings* (Springfield, Mass., 1893), 165.

principles upon which it was founded by the fathers, it might continue to be an asylum for the most prosperous, the most enlightened, and for the freest, the happiest people on earth."[919] In making the Fifteenth Amendment a dead letter, the ex-Confederate did his part in the U.S. Senate to so administer the white man's government that he believed the fathers had founded.

George Washington Paschal embodied the arc of antebellum constitutionalism, from his paternal lessons as a youth to his Founding allegiance as the country disintegrated. He captured the moment in which Unionists turned their eyes away from the constitutional past and made a new Founding. As Reconstruction faltered, he also echoed the ways in which white Americans' political attention drifted and their constitutional imagination contracted. In 1876, George Paschal released a second edition of his constitutional instructor, which had proven no less a successful text than his professional fortunes. It struck a different tone. And more significantly, it struck a different tense. "When the first edition of this book appeared, the Constitution was undergoing a severe strain," he recalled.[920] "The reconstruction laws, which had resulted from the mad efforts at secession, had not completed the work of rehabilitating the Union; the fourteenth amendment, consequent upon the destruction of slavery, had not received the ratification of the necessary number of States; the fifteenth amendment had only been thought of by a few advanced minds; the differences between the executive and Congress threatened the peace of the country…" Looking back at his first edition, perhaps also reflecting upon his speech at the adoption of the Fifteenth Amendment, Paschal saw a markedly different world. "But the work of reconstruction has been accomplished; the new amendments have not only been adopted by recognized form, but the nation, by popular platforms, has become pledged to their support and what is better they have been construed to the general satisfaction of the country," he declared. Thus Paschal, once the paragon of a white advocate for constitutional change, declared Constitutional Reconstruction at an end. His constitutional imagination, once loosened by war, seemed to tighten. The work was complete and the constructions were satisfactory, he asserted. Yet when Paschal wrote these words in May of 1876, the South was soaked with blood, the federal military presence was skeletal, and the Supreme Court had eviscerated both the Fourteenth and Fifteenth Amendments. Just that March, the Court had decided *United States v. Cruikshank,* which overturned the convictions of white paramilitary members who had massacred hundreds of black Louisianans in the course of a state election. According to the Court, the power to enforce the Fourteenth Amendment only applied to official state actors- not these executioners. That same March also saw the Court rule in *United States v. Reese* that the Fifteenth Amendment failed to actually confer the right to vote on freedpeople: it only barred facial discrimination on grounds of race and status, thus enabling all manner of thinly-veiled voter suppression mechanism.[921] Wherever Paschal was looking and finding completion and satisfaction, it was not amongst black Americans. In the intervening time, the former Democrat and Radical Republican had joined with the Liberal Republican faction – they chased after graft in the Grant Administration and increasingly opposed spending resources on enforcing Reconstruction.[922] Stepping through this gateway led to Paschal, like other Unionists, to close the

[919] John H. Reagan, *Memoirs, with Special Reference to Secession and the Civil War*, ed. Walter F. McCaleb (New York, 1906).
[920] George W. Paschal, *The Constitution of the United States, Defined and Carefully Annotated* (Washington DC, 1876).
[921] *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Reese*, 92 U.S. 214 (1876),
[922] Scarborough, *George W. Paschal: Texas Unionist and Scalawag Jurisprudent*.

door on a Second Founding. They had not been constitutional conservatives all along. Extinguishing an active, authorial relationship with the Constitution, they became them. A final posthumous version of Paschal's constitutional instructor emerged several years later. His new remarks, written within a year of dying, were succinct. "No amendments to the Constitution have been adopted since the second edition appeared," he noticed, "And little has been done which is valuable as precedent."[923] Meanwhile, in law and life, the project of Reconstruction lay in ruins. The door to constitutional transformation was sealed shut. Now Americans again inhabited a constitutional world ruled by one original Founding.

[923] George W. Paschal, *The Constitution of the United States, Defined and Carefully Annotated* (Washington DC, 1882).

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