The Heritage Foundation

LECTURE
No. 1320 | FEBRUARY 23, 2021
DELIVERED SEPTEMBER 29, 2020

Slavery and the Constitution

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KEY TAKEAWAYS

The 1619 Project mistakenly claims that the Constitution creates a right to slavery.

Although the Constitution did not immediately end or explicitly condemn slavery, the Constitution creates no such constitutional right.

The Constitution's text created a path for the federal and state political processes to abolish slavery.

Introduction

The question of the hour is whether the Constitution is pro-slavery or anti-slavery. History has shown us that great leaders and reasonable men and women have changed their viewpoints on this question.

Frederick Douglass, the foremost black abolitionist in the 1840s, called the Constitution a radically and essentially pro-slavery document, but by the 1850s, Douglass changed his mind, concluding, the Constitution, when construed in light of well-established rules of legal interpretation, "is a *glorious liberty document*."

As we war over America's heart and soul, many are asking what convinced Douglass to change his viewpoint. Some declare it was what the Framers had hoped would preserve a legacy of freedom for generations to come: silence. Douglass asked, "If the

Constitution were intended to be by its framers and adopters a slave-holding instrument, then why would neither 'slavery,' 'slave-holding,' nor 'slave' be anywhere found in it?" That is not the focus of those who challenge the integrity of the Constitution.

Some who challenge the integrity of the Constitution say it is weakened by the existence of slavery in the United States at the time the Constitution was adopted. Slaveholders took part in the framing of the Constitution, and they say slaveholders, in their hearts, intended to secure certain advantages in that instrument for slavery. As Americans who believe in the motto "*E pluribus unum*," how do we move forward and bolster the present-day opportunity to live as free men?

We will learn how to answer that question today.

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The Thirteenth Amendment

What did the Constitution say about slavery before the 13th Amendment became law? Did the Constitution protect the rights of slaveholders? Did the Constitution forbid slavery? Or did the Constitution avoid taking either of those positions and leave the matter entirely to the political process?

What made those questions a contemporary subject was that, from the day that the *New York Times* published the *1619 Project* in August 2019, the opinions expressed in that work touched nerves in American historical and political scholarship, as well as in American life. The thesis of the *1619 Project* was that the true beginning of American history was not 1776, when America declared its independence from England, but was in 1619, when the first African slaves arrived in America at Jamestown. The project also claimed that whatever enduring benefits the nation has seen and has granted to the world are attributable to the nation's slave-owning past.

While the *1619 Project* was correct to condemn slavery, particularly on one of its anniversaries (slavery is a despicable institution, and no one is sorry that the Thirteenth Amendment ended it after the Civil War), the *1619 Project* is *not* a work of historical scholarship. Numerous historians have objected to the project on the grounds that it contains an erroneous view of history. A large number of Americans have objected to it on the grounds that it was leftist political agitprop.

To help frame the discussion, this section will play the devil's advocate. It will argue that the Constitution protected the right of slave-holding states to create that peculiar and evil institution through law. The subsequent sections will then detail why this point of view is erroneous.

This section will articulate two arguments. First, it will begin with making the argument in a manner that would be well-known to lawyers today, and then, second, it will make the argument in a way that would be most persuasive to people in the 18th and 19th centuries.

Argument One: Constitutional Text. Starting with today's perspective requires one to begin with the text of the Constitution. The most obvious point is that there is no Thirteenth Amendment in the original Constitution. That omission is significant. It perhaps is the dog that did not bark,[1] because the Framers knew how to ban certain practices or types of legislation that they found undesirable. Congress cannot pass bills of attainder, *ex post facto* laws, export taxes, port preferences for some cities over others, or titles of nobility.[2] States cannot pass bills of attainder or *ex post facto* laws, treaties with foreign nations, legislation coining money, laws impairing the obligation of contracts, and titles of nobility.[3] Congress knew how to go out of its way to make sure that our nation's founding document prohibited various types of legislation that it did not want to see either the federal or state governments adopt.

Beyond that, there are four clauses in the Constitution that arguably protect slave-owners' interests: (1) the Three-Fifths Clause,[4] about which I will say more later; (2) the Slave Trade Clause, which prohibited Congress from outlawing the slave trade until a date in the future;[5] (3) the Militia Clause, which allowed the President to call out the militia to deal with insurrections;[6] and (4) the Fugitive Slave Clause, which required each state to return slaves who had escaped to the state of their origin.[7]

1. Arthur Conan Doyle, *Silver Blaze*, *in* The Complete Sherlock Holmes 335 (1927).
2. U.S. Const. art. I, § 9.
3. U.S. Const. art. I, § 10.
4. U.S. Const. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.").
5. U.S. Const. art. I, § 8, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.").
6. U.S. Const. art. I, § 8, cl. 15 ("[The Congress shall have Power] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions....").
7. U.S. Const. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, 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 history behind the Constitution supports the evident conclusion of the text itself. The Declaration of Independence said that all men are created equal, but at the time, no state outlawed slavery, and the Declaration itself contained no such provision. The Articles of Confederation, which preceded the Constitution, also did not outlaw slavery. Early congressional legislation is also consistent with this conclusion. It distinguished between "citizens of the United States" and "persons of color," granting rights to the former, to citizens, that it would not necessarily grant to the latter.

Argument Two: Unenumerated Rights. Finally, we come in that regard to the Supreme Court's decision in *Dred Scott v. Sanford*.[8] In *Dred Scott*, the Supreme Court said that the Missouri Compromise could not abolish state law rights over slaves. The effect was not only to declare the Missouri Compromise unconstitutional, but also to ensure that the laws creating this institution in slave-holding states could not be undone by Congress.

The *Dred Scott* decision also created what has come to be known as the Unenumerated Rights Doctrine, a doctrine that has current contemporary force in cases such as *Roe v. Wade*[9] and *Obergefell v. Hodges*.[10] But they are not the only ones. There are a series of other cases, part of the Unenumerated Rights Doctrine, that are favored by different people in society. For example, the Constitution, as interpreted by the Supreme Court, recognizes a right of parents to non-public school their children.[11] The Constitution grants the states immunity in the courts of other states or against federal agencies.[12] The Anti-Commandeering Doctrine prohibits Congress from assigning responsibilities to state officers.[13] One of the most well-known principles of criminal justice, that a defendant's guilt must be proven beyond a reasonable doubt, is also an example of this Unenumerated Rights Doctrine.[14]

That is how we would argue it today. If you go back to how you would argue back in the 18th century, what was critical then was not whether courts could enforce constitutional rights. This was a pre-*Marbury* period,[15] and certainly a pre-Warren Court and pre-Burger Court period. What was most

8. 60 U.S. (19 How.) 393 (1857).
9. 410 U.S. 113 (1973).
10. 576 U.S. 644 (2015).
11. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).
12. Fed'l Maritime Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002).
13. Murphy v. NCAA, 138 S. Ct.1461 (2018).
14. *In re* Winship, 397 U.S. 358 (1970).
15. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

important to the Republic then was the ability to elect legislators, because the legislative process was seen as the primary threat to individual rights.

Guess what? The Three-Fifths Clause mentioned earlier enhanced the population basis that slave-holding states would have, by allowing them to count three-fifths of every slave they owned as a person towards the number of representatives that they would have in the House of Representatives and the number of presidential electors they had to choose Presidents. If you add that to the equal representation that each state had in the Senate, what you wind up with was a political process that was biased toward the Southern states, all of which had slavery at this time.

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Pre-War, Anti-Slavery Constitutionalism

This section will approach the question from a legal perspective in the way that the anti-slavery constitutional thinkers did. This is an aspect of American history that has been unfortunately downplayed, to the point that a great many people, including law students, graduate from school unaware that there even *was* a tradition of pro-Constitution, anti-slavery thought in the years leading up the Civil War.

The most famous advocate of that view was Frederick Douglass, but he was certainly not the only one. People like John Quincy Adams, Charles Sumner, and Salmon P. Chase were, to one degree or another, adherents of this pro-Constitution, anti-slavery view. Unfortunately, today's history distorts their records by over-emphasizing the Garrisonian Abolitionists, which was the group of abolitionists who thought the Constitution was an evil, pro-slavery document, and therefore that it should be abolished. Those people had very little influence on American political and legal development in the Civil War era. It is a shame that the pro-Constitution, anti-slavery thinkers like Douglass are left out in a lot of these discussions.

Two Rules of Legal Interpretation. So how would a constitutional abolitionist make the case that slavery is unconstitutional?[16] They would begin with two basic rules of legal interpretation. The first one: Only the text on the paper itself is the law when you are reading the

16. For a more thorough explanation, see Randy E. Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation*, 28 Pac. L.J. 977 (1997).

Constitution—not the subjective desires of the people who wrote the document. Only the words of the Constitution are the law and are legally binding.

The second rule: We should interpret the Constitution as pro-freedom whenever possible. This comes from an 1805 Supreme Court case called *United States v. Fisher*,[17] in which the Supreme Court said we have to interpret the Constitution as being pro-liberty unless there is a clear instruction from Congress or from the lawmakers saying otherwise. Lawyers call this a "clear statement rule," and we still use that kind of rule in interpreting the Constitution today.[18]

With those two rules of interpretation in mind, now we look at the Constitution. It starts out with those big words, "We, the People of the United States."[19] Who are those "people"? The Constitution contains no definitions section, so to understand who "the people of the United States" are, we refer back to the Declaration of Independence, which sets forth who the people of the United States are. The people of the United States are the same "one people" that dissolved their political bands with Great Britain in the Declaration.[20] The "one people" is referred to as a united body, not divided by color. There is no reference to color lines in either the Declaration or the Constitution. We have no legal reason to believe that black Americans are not part of "the people of the United States." The Constitution draws no such line.[21]

If that is the case, then why should we think that the Constitution is only intended for white Americans? We have no reason to believe that. In fact, the word "slave" and the word "slavery" do not appear anywhere in the Constitution of 1787. It is never mentioned. That is pretty remarkable. After all, if the Constitution is supposed to protect slavery, you would think it would at least mention that. What Douglass says is that reading the Constitution and saying that it is pro-slavery is like claiming to own property according to a deed, and then when you look at the deed, it contains no

17. 6 U.S. (2 Cranch) 358, 390 (1805) ("Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.").
18. *See, e.g., Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238–39 (1985); *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 206 (1991); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003).
19. U.S. Const. pmbl.
20. 1 Stat. 1 (1776).
21. *See* Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Antislavery?* (1860) vhereafter Douglas, *The Constitution*], *in* Frederick Douglass: Selected Speeches and Writings 387 (Philip Foner & Yuval Taylor, eds., 1999) [hereafter Douglas, Speeches and Writings] ("[The Constitution's] language is 'we the people'; not we the white people, not even we the citizens...but we the people...and, if Negroes are people, they are included in the benefits for which the Constitution of America was ordained and established.").

reference to the property on the piece of paper.[22] That would be a pretty weird argument to make.

In other words, the burden of proof is now on the pro-slavery side to prove that the Constitution is pro-slavery[23]—and they really cannot do it. There is no federal guarantee of slavery. There is no express limit on Congress banning or limiting it. Of course, the provision regarding the Western Territories says that Congress has power to legislate however it wants with regard to the Western Territories,[24] which, of course, was the *real* issue that sparked the Civil War.

What about the four provisions that the previous section mentioned referring to slavery circuitously? Again, none use the word "slavery." There is the Three-Fifths Clause.[25] There is what we call the "Fugitive Slave Clause."[26] There is the rule about importation and exportation of slaves.[27] Douglass's answer to that was this: The Three-Fifths Clause does not *protect* slavery. It recognizes that slavery existed at the time, but it did not guarantee it. In fact, it rewarded states that abolish slavery by giving them more representation in Congress.

The Fugitive Slave Clause does not refer to slaves. It says "persons" from whom "labor" is "due," but labor is not *due* from slaves. They are the victims of injustice, who have not been given due process of law, so labor cannot be *due* from them. Labor is due from apprentices or indentured servants. And it is true that runaway apprentices and runaway indentured servants were a serious legal problem in the Nineteenth Century. As for the Importation Clause, in fact, the Importation Clause did allow Congress to ban slavery in 1808, which it promptly did—in 1808. These provisions, although they obviously refer to slavery, do not *protect* slavery.[28]

22. *See* Frederick Douglass, *The Meaning of the Fourth of July for the Negro* (1852), *in* Foner & Taylor, *supra* note 21, at 204 ("What would be thought of an instrument drawn up, legally drawn up, for the purpose of entitling the city of Rochester to a tract of land, in which no mention of the land was made?").
23. Douglass, *The Constitution, supra* note 21, at 387 ("[Pro-slavery thinkers] reverse the common law usage, and presume the Negro a slave unless he can prove himself free. I, on the other hand, presume him free unless he is proved to be otherwise.")
24. U.S. Const. art. IV, § 3.
25. U.S. Const. art. I, § 2.
26. U.S. Const. art. IV, § 2.
27. U.S. Const. art. I, § 9.
28. These arguments are primarily found in Douglass, *The Constitution, supra* note 21. *See also* Lysander Spooner, The Unconstitutionality of Slavery (2d ed. 1860); Joel Tiffany, A Treatise on the Unconstitutionality of American Slavery (1850).

This is an important point. The anti-slavery constitutional thinkers did *not* say that the Constitution *banned* slavery.[29] Obviously it did not. Instead, they said three things.

- First, it provides no guarantee of slavery at the federal level;
- Second, it allows Congress, if it chooses to do so, to limit or even abolish slavery; and
- Third, its provisions are in the long run inconsistent with slavery, including things like due process.

If black Americans are persons, then the Constitution says they cannot be deprived of liberty without due process of law.[30] That is obviously inconsistent with slavery. What about the Bill of Attainder Clauses?[31] Slavery is a kind of bill of attainder, and yet the Constitution prohibits bills of attainder.[32] The Constitution prohibits the seizure of persons without legitimate lawful authority.[33] Obviously, slavery was inconsistent with that.

The most important provision was the Privileges and Immunities Clause, which said that people who are Americans cannot be deprived of their rights when they travel from state to state.[34] The problem with this was that black people could be citizens in some states, such as Massachusetts, and then travel to a place like South Carolina and be deprived of their liberty in violation of the federal guarantee.[35]

Those are the three principles of the anti-slavery Constitution: the Constitution does not guarantee slavery, it allows the federal government to limit or abolish it, and there are other provisions of the Constitution that, in the long-term will, prove inconsistent with slavery.

Going back to the concluding remarks in the previous section, it is not true that since the 17th and 18th Centuries were a pre-*Marbury* world, it was

29. Lysander Spooner was of the view that slavery was already unconstitutional, and at times the antislavery constitutionalists went that far, but their considered view was that slavery was *implicitly* unconstitutional. *See further* Damon Root, A Glorious Liberty: Frederick Douglass and the Fight for an Anti-Slavery Constitution 51–54, 64 (2020).

30. U.S. Const. amend. V.

31. U.S. Const., art. I, §§ 9 & 10.

32. *See* Frederick Douglass, *The Dred Scott Decision* (1857), *in* Douglass: Speeches and Writings, *supra* note 21 at 354 ("The law of slavery is a law of attainder.").

33. U.S. Const. amend. IV.

34. U.S. Const. art. IV, § 2.

35. *See* Timothy Sandefur, The Conscience of the Constitution 43–49 (2014).

uncertain whether courts could enforce individual rights. Common law courts protected "unenumerated" individual rights all the time. Under the British Constitution, the British courts protected individual rights without any written bill of rights at all. The idea that courts could protect individual rights was a well-respected and well-recognized principle at the time. That is why a lot of anti-slavery constitutional thinkers went to court to make their argument.

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The Slaveholders' View: An Anti-Slavery Constitution

This section will look at the question of a pro-slavery Constitution from the point of view of the slaveholders, which is not often a point of view considered in many of these discussions. There, we discover that they, too, did not believe in a pro-slavery Constitution. It was one of the primary arguments that slaveholders used in the secession winter of 1860 to justify the secession of the slave states—that their Northern free-state brethren had somehow reneged on the guarantees of the Constitution, which otherwise protected the slave states in their ownership of slaves.

Louisiana's Judah P. Benjamin, in his departing speech to the Senate, insisted that "under a just and fair interpretation of the Federal Constitution," it was impossible to "deny that our slaves, which directly and indirectly involve a value of more than four thousand million dollars, are property" and "entitled to protection in Territories owned by the common Government." Still, even though "the Constitution heads you off at every step in this Quixotic attempt," the North was persistent in its threat to slavery, and secession was the only cure.[36]

Similarly, Robert Barnwell Rhett was indignant, in his "Address of the People of South Carolina," at how "by gradual and steady encroachments on the part of the people of the North…the limitations in the Constitution have been swept away." While "the Southern States, from the commencement of the Government, have striven to keep…within the orbit prescribed by the Constitution," the northern states, accused Rhett, "were planning nothing short of "the overthrow of the Constitution of the United States…."[37]

36. Amendments to the Constitution, 36th Congress, 2d Sess. 217 (Dec. 31, 1860) (Statement of Judah P. Benjamin).

37. Robert Barnwell Rhett, *The Address of the People of South Carolina, Assembled in Convention, to the People of the Slaveholding States of the United States*, 30 De Bow's Rev. 352, 354 (Mar. 1861).

This sense that the Constitution was a rampart that sheltered slave owning had a long history, stretching back at least as far as the ratification process in 1788. Charles Cotesworth Pinckney assured his fellow South Carolinians that the new Constitution provided "a security that the general government can never emancipate" slaves, because "no such authority is granted." To the contrary, Pinckney explained, "we have secured an unlimited importation of negroes for twenty years. Nor is it declared that the importation shall be then stopped; it may be continued....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. In short, considering all circumstances, we have made the best terms for the security of this species of property."[38]

Nineteenth-century abolitionists, for their part, took Pinckney at his word. Frederick Douglass, in 1849, argued that, from the Three-Fifth Clause to the Insurrection Clause, "the Constitution, not only consented to form bulwarks around the system of slavery, with all its bloody enormities, to prevent the slave from escape, but has planted its uncounted feet and tremendous weight on the heaving hearts of American bondmen, to prevent them from rising to gain their freedom."[39] And several important modern historians of slavery have argued forcibly that Douglass and Pinckney were right. "Slavery would be protected by several interlocking provisions" in the Constitution, writes David Waldstreicher, so that "in growing their government, the framers and their constituents created fundamental laws that sustained human bondage."[40]

Still, there was no absolute agreement on construing the Constitution as a pro-slavery document. As Michael Conlin has shown, the Three-Fifths Clause gave slavery less heft in national affairs than it might have seemed, since Northern electors in the Electoral College enjoyed a 53 percent to 47 percent edge as early as 1796, percentages which continued to swing against the South, so that by 1860, Northern electors enjoyed a 60–40 superiority.[41] And anti-slavery northerners from Salmon Chase to Abraham Lincoln argued that the Constitution in fact gave no national sanction to slavery. Even Frederick Douglass, in 1852, swung over to the view that,

38. Charles Cotesworth Pinckney, *Speech in South Carolina House of Representatives*, *in* 3 Records of the Federal Convention of 1787, at 252, 254 (Max Farrand, Yale University Press, 1911).

39. Frederick Douglass, *The Constitution and Slavery*, *in* The Essential Douglass: Selected Writings and Speeches 37, 41 (Nicholas Buccola, ed., Hackett Publishing, 2016) [hereafter The Essential Douglas].

40. David Waldstreicher, Slavery's Constitution: From Revolution to Ratification 3 (2009).

41. Michael Conlin, The Constitutional Origins of the American Civil War 122–23 (2019).

"interpreted, as it ought to be interpreted, the Constitution is a Glorious Liberty Document."[42]

But what has been almost entirely missed in the debate over the Constitution and slavery is the degree to which Southern slave-owners themselves, *when they are only talking to themselves*, turn out to have agreed with Lincoln, Chase, and Douglass, and admit that the Constitution was a bruised reed for slavery to lean upon.

Ironically, the slave-owners' doubts actually begin with Pinckney: His attempt to convince the South Carolina ratification convention that the slavery was sheltered by the Constitution was done in the face of anti-Federalist slave-owners who doubted that it did any such thing. "Your delegates had to contend with the religious and political prejudices of the Eastern and Middle States," Pinckney pleaded, and they should realize that the deal they made was the best "it was in our power to make. We would have made better if we could."[43]

Slave-owners' constitutional peace of mind did not improve with time. In the midst of the agitation over the Compromise of 1850, "J.A.C." (which may have been John A. Cleveland, a Charleston slave-owner) took to the pages of the *Southern Quarterly Review* to warn that Southerners had made a grave mistake if they imagined that "the clause of the constitution which allows a representation for the slave population would withstand six months agitation in the Northern States." The Constitution was a "parchment idol," and "Southern people" should not be "deceived to the conclusion that the Constitution is the basis of an Union of equal States." It was, in fact, "the article of a trading partnership," a partnership which could not be relied upon to protect them.[44]

One year later, the *Review* was even more pessimistic. "No legal assurances of future security are to be found in the constitution" for slavery, it concluded.[45] *DeBow's Review* was just as pessimistic. Writing for *DeBow's* in 1855, the Louisiana planter John J. Perkins claimed that the Constitution lacked the strength to resist bending into an anti-slavery shape. "The compends and condensed commentaries upon the Constitution, prepared for schools and business men…all gloss over and misrepresent—in a manner calculated to deceive—the rights of the slaveholder under the

42. Frederick Douglass, *What to the Slave Is the Fourth of July? in* The Essential Douglass, *supra* note 39.

43. Charles Cotesworth Pinckney, *Speech in South Carolina House of Representatives*, *in* 3 Records of the Federal Convention of 1787, at 252, 253–254 (Max Farrand, Yale University Press, 1911).

44. J.A.C., *British West India Islands*, 16 Southern Q. Rev. 342, 376–77 (January 1850).

45. *Is Southern Civilization Worth Preserving?* 19 Southern Q. Rev. 189, 212 (Jan. 1851).

Constitution; while they enlarge and artfully magnify, by every possible construction, the degree of power given to the federal government over the subject."[46]

When slave-owners were candid, they could explain quite clearly why the Constitution gave them no confidence. Edmund Ruffin, Virginia's arch-secessionist, frankly admitted that "the forms or letter of the constitution may be used as to destroy" slavery. In fact, claimed Ruffin, "without the need of infringing the letter of a single article of the Constitution, the southern states, their institutions, property, and all that is dear to them... will be at the mercy of their fanatical and determined enemies....Negro slavery may be thus abolished, either directly or indirectly, gradually or immediately."[47]

Oddly, the most obvious concession of the Constitution's weakness on slavery was hidden in plain sight, in Chief Justice Roger Taney's infamous majority opinion in *Dred Scott v. Sanford* in 1857. It was precisely because the Constitution had resisted any suggestion that there could be "property in men," that Taney had to rush in, in an act of judicial re-interpretation, to deny any recognition of due process or privileges and immunities for African-Americans, free or otherwise.

The ultimate proof, however, of the slave-owners' real lack of faith in the Constitution was how, the moment they lost political control of the constitutional processes with the election of Lincoln, the slave-owners immediately tossed the Constitution aside, attempted to secede from the Union, and wrote a new Constitution which, this time, they believed would secure to them what the old one had not. It would give them a very different Constitution than the old one, looking forward (as James Stoner has written) to something more closely approximating a British parliamentary system.[48] But that is, after all, the point: The slave-owners' actions speak louder than their words, and their actions were an admission that the old Constitution was not their tool, much less their friend.

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46. John J. Perkins, *Southern Education for Southern Youth*, 19 De Bow's Rev. 462, 462 (Oct. 1855).
47. Edmund Ruffin, *Consequences of Abolition Agitation*, 22, De Bow's Rev. 583, 585–86 (June 1857).
48. James Stoner, *The Case of the Confederate Constitution*, *in* The Political Thought of the Civil War 273, 285 (A. Levine, T.W. Merrill & J.R. Stoner eds., University Press of Kansas, 2018).

Abolition and the Framers

Having arrived at the Civil War, this section will look back to 1787, first, to clarify something that comes up a lot, and that is simply this: why did the Framers not abolish slavery? The facts of the matter are pretty plain: There simply was no chance whatsoever that the Framers were going to abolish slavery in 1787. It was not because they were singularly bad people. And it was not because the Southern slaveholders somehow cowed the Northerners into submission, as if slavery's outright abolition was ever on the agenda in Philadelphia.[49]

There were at least three very good reasons why the issue was a non-starter.

- One has to do with property, which the Constitution was framed in part to protect. Even with all of the things that they did do regarding coinage and contracts, chiefly in Article I, the Framers were not going to interfere with the basic property laws of the established states, Southern states any more than Northern. That is, the Constitution would no more abrogate established southern laws regarding enslavement than it would, say, the Pennsylvania abolition law of 1780, which declared slavery an offense against nature.

- Second, in 1787, slavery was still a fully extant institution in eight of the 13 states, including New York and New Jersey. Even if anyone in the convention had attempted to do so, it would have been virtually impossible for the proposed Constitution to abolish slavery summarily or to authorize the new national government to do so, and then expect to gain ratification in any of the states outside of New England and Pennsylvania.

- Third, and perhaps most important, anti-slavery was a very new thing in the world in 1787, at least among those who were not enslaved. Before the Revolution, as John Jay, the great Federalist and early abolitionist once observed, there was hardly any opposition to slavery among whites in America, or, for that matter, in any part of the Atlantic world.[50] Even among the Quakers, among whom anti-slavery

49. The arguments in this paper, unless otherwise noted, derive from the speaker's book, Sean Wilentz, No Property in Man: Slavery and Antislavery at the Nation's Founding (2018), to which the reader is directed for additional detail and full source references.

50. 3 John Jay. *Jay to the English Anti-Slavery Society. June 1788. in* The Correspondence and Public Papers of John Jay. ed. 342 (Henry P. Johnson ed.. 1890).

> protests arose as early as 1688, it took decades before racial slavery truly became illicit, and the Quakers were, of course, a tiny minority. It was the coming of the Revolution that helped encourage the creation of an unprecedented anti-slavery sentiment outside the ranks of the enslaved, which created in the rebel colonies the very first noticeable—if somewhat dispersed and ramshackle—anti-slavery movement anywhere in the Atlantic world.[51]

Anti-slavery enjoyed some great successes before 1787 in the North, including the appearance of the first written constitution in history to abolish adult slavery (in the breakaway district of Vermont); enactment of the first gradual emancipation laws of their kind in Pennsylvania, Connecticut, and Rhode Island; and the elimination of slavery by judicial rulings in Massachusetts and New Hampshire. Yet the idea that this fairly recent movement was going to be able to abolish slavery across the nation by fiat in 1787, as some New England abolitionists seemed to desire, was, to say the least, quixotic. It ascribed to the anti-slavery movement far more power in national counsels than it possibly could have had.

Now, though, let us consider the Framers' deliberations in 1787. Everybody knows that there were many slaveholders at the Federal Convention, upward of 25 of the 55 delegates. What rarely gets talked about is that there were many avowed anti-slavery delegates at the convention as well, including the president of the Pennsylvania Abolition Society, Benjamin Franklin. These delegates knew that, while they could do nothing to abolish slavery under the new Constitution, they could prevent the pro-slavery delegates from enshrining human bondage in national law. They could also directly authorize the new government, if it so chose, to hinder slavery's expansion. A key issue for them, in this connection, was the Atlantic slave trade. Most people at the time believed, that, without at least the possibility of continuing the trade, slavery itself would be endangered. Every prominent emancipation proposal up to that point had called for ending the Atlantic slave trade as the first step.

At least some of the anti-slavery delegates came to Philadelphia prepared to try and make sure that the new government would have the power to abolish the trade. Abolitionists outside of Congress, in the Pennsylvania Abolition Society (PAS) and the New York Manumission Society, debated how best to press the convention on the matter; and the PAS sent an

51. See Christopher Leslie Brown, Moral Capital: Foundations of British Abolitionism 105–153, (2006).

anti-slave trade petition to Franklin, with a request that he present it to his fellow delegates. In part on the advice of the PAS's secretary, Tench Coxe, who considered the petition "overzealous," Franklin laid it aside, but he knew that the convention would soon enough take up the matter.[52]

Franklin, who was something of a marked man on the matter of slavery, was politic enough to keep his own counsel inside the convention on the issue; he knew very well what the anti-slavery delegates were up against. Indeed, after more than two months of debate and discussion, the lower South delegates managed to devise a draft Constitution, which would have given the new federal government no power whatsoever over the Atlantic slave trade. Led by the South Carolinians, the pro-slavery advocates called it a deal-breaker: unless the convention left the Atlantic slave trade entirely in the hands of the states, the Constitution was doomed.

Fortunately, the anti-slavery delegates, principally Gouverneur Morris of New York (although he officially represented Pennsylvania), called the pro-slavery men's bluff, tore the draft Constitution to shreds on the slavery issue, and secured to the federal government the authority not simply to regulate the Atlantic slave trade but to abolish it outright. It is true that, through some careful and crafty bargaining, the lower South delegates, led by Charles Cotesworth Pinckney, managed to get an extension forbidding Congress from acting until 1808, a move which James Madison, an opponent of the trade, immediately decried. Nevertheless, even with the delay, the outcome in Philadelphia was the first major blow against the Atlantic slave trade taken in the name of a national government anywhere in the Atlantic world. To this extent, the anti-slavery delegates succeeded beyond anything the slaveholders vowed they would permit.

None of which is to say that the Constitution was an anti-slavery document; the lower South, and even some of the Northern delegates, certainly would have bolted if it were. Quite apart from the so-called federal consensus barring national action in states where slavery existed, the pro-slavery side came away with compromises sufficient to persuade their constituents that the new federal government actually gave strong protection to slavery. The Three-Fifths Clause was a concession, although not as much of one as the most ardent pro-slavery delegates wanted. The Fugitive Slave Clause—adapted from an anti-slavery proposal regarding the Northwest Territories advanced by Rufus King in 1785, which evolved into the Northwest Ordinance of 1787—gave nominal added protection to slavery, albeit with no stipulated active role by the federal government.

52. Tench Coxe, *Coxe to James Madison, March 31, 1790*, *in* Founders Online (National Archives), https://founders.archives.gov/documents/Madison/01-13-02-0092 (last accessed January 6, 2020).

Set against these compromises, though, stood the convention's handling of the concept of property in man, the legal as well as moral essence of slavery. At the state level during the fights over northern emancipation, the pro-slavery advocates argued, above all else, that they enjoyed a vested property interest in property in slavery that no government could touch. The anti-slavery counter-argument was very simple: There could be no vested right in slavery because property in man is simply illegitimate, an offense to God and natural law.

Having lived through, and in some cases participated in, these struggles over northern emancipation, the anti-slavery northerners at the convention, joined by delegates ranging from Luther Martin of Maryland to James Madison of Virginia, were absolutely determined to keep the idea of property in man out of national law. They succeeded in doing so. Madison's notes of the convention debates show incontrovertibly that while the Constitution would tolerate slavery where it already existed, it would not recognize the institution in national law—which is say that slavery would have no presumed legitimacy in areas under national jurisdiction, including the national territories.

Based on a combination of scant ambiguous evidence and sheer projection, some historians have argued that the Framers deliberately left the word "slavery" out of the Constitution in order to assuage their guilt and fend off charges of hypocrisy from foreign critics.[53] That is why, these scholars argue, the Constitution often uses what they describe as circumlocutions such as "persons held to labor or service," shamefully to hide the fact that they had hard-wired a pro-slavery Constitution. The assertion is groundless. The evidence, albeit flawed, about what the delegates actually said, as opposed to what later historians claim and insist they were *really* saying, shows that the convention took its decision to exclude property in man not out of cunning or cowardice, but out of conviction.

This did not guarantee, by any means, that under the new Constitution slavery would be ended anytime soon. Again, it needs emphasizing that if the Constitution was not pro-slavery, neither was it anti-slavery. Without giving, as Massachusetts delegate Elbridge Gerry remarked, "any sanction" to slavery, the Framers left slavery's future up to political process.[54] For a

53. See, for example, Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, *in* Beyond Confederation: Origins of the Constitution and American National Identity 188 (Beeman, et al. eds., 1987); and David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (2010).

54. 2 James Madison, *Wednesday August 22. in Convention*, *in* The Records of the Federal Convention of 1787, at 370, 372 (Max Farrand, Yale University Press, 1966).

long time, the slaveholders and their Northern allies had enough power in the Congress to ensure that slavery would not be interfered with. (It should be noted that the Three-Fifths Clause made little or no difference to the expansion of slavery of what would be the cotton kingdom beyond the original Southern states: The issue was political, not constitutional.)

This situation began to change after the War of 1812 when it became increasingly apparent that, while the cotton revolution had given plantation slavery a new lease on life, the rapid growth of the Northern population, combined with the fitful growth of anti-slavery opinion, left slavery increasingly vulnerable in national politics. The Missouri Compromise crisis, by yielding a compromise that banned slavery in the great preponderance of the Louisiana Purchase lands, made clear that the Framers had invested the national government with formidable powers, not to abolish slavery directly but to check its growth, to hamper it, to hinder it, and to put it, as Abraham Lincoln would later remark, on "the course of ultimate extinction."

Once the anti-slavery side in the North began gaining traction in Congress, and once the territorial issue re-entered national politics, the political initiative began gradually to shift away from what became known in the 1840s as the Slave Power. As Professor Guelzo has noted, that shift seemed completed with the election of Abraham Lincoln to the presidency in 1860; the writing was on the wall, and the slaveholders' rebellion began. Yet Lincoln's Republican Party could only have existed—and the anti-slavery cause could only have attained national power—because of what the Framers did in 1787, by keeping property in man out of the Constitution.

This did not make the Constitution, it bears repeating one last time, an anti-slavery document. The anti-slavery Framers did not sit around saying, "In 1809, this man, Lincoln, is going to be born, and everything's going to work out." For all of their flawed wisdom, the Framers were not clairvoyant; and the politics of slavery and anti-slavery could have worked out very, very differently.

But they worked out the way that they did in 1865 in no small measure because of what the Framers did in 1787. To that extent, the anti-slavery elements in the Constitution, which anti-slavery constitutionalists would develop over the succeeding 70 years, were and are absolutely crucial in understanding the nation's founding.

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Lincoln and Douglas: Federalism and Founders' Intent

The great conundrum of 21st-century Americans looking back to the Founding is squaring their many statements affirming human equality and natural rights and condemning slavery while they continued the practice of slavery. Many today simply see this as rank hypocrisy and unwittingly find themselves agreeing with U.S. Supreme Court Chief Justice Roger B. Taney and Illinois Senator Stephen A. Douglas (D–IL) , who concluded that the founding generation could not have meant "all" when they wrote "all men are created equal" because they did not immediately free all American slaves. Therefore, in the words of Douglas, "This government of ours was founded, and wisely founded, upon the white basis. It was made by white men for the benefit of white men and their posterity, to be executed and managed by white men."[55] How could Abraham Lincoln not draw the same conclusion?

When Lincoln looked back to the Founders for guidance on how to deal with the growing crisis over slavery, he was not the only one who appealed to the Founding Fathers. Stephen Douglas was the leading Democrat in the 1850s, and he claimed that he knew better than Lincoln what "our Revolutionary fathers" thought about the question of slavery. Douglas cited the Founders by name: "Washington, Jefferson, Franklin, Madison, Hamilton, Jay, and the great men of that day made this government divided into free states and slave states, and left each state perfectly free to do as it pleased on the subject of slavery. Why can it not exist on the same principles on which our fathers made it?"[56] Douglas claimed his policy aligned more closely with the Founders' hopes for the new republic. In Lincoln's mind, the future of freedom and the eventual demise of slavery depended on whose interpretation of the Founders was correct.

Lincoln did not believe that the Constitution was designed to protect slavery *per se* and certainly did not agree with the 1857 *Dred Scott* opinion by Chief Justice Roger Taney. He did not think that Taney was correct in stating, "The right of property in a slave is distinctly and expressly affirmed

55. Stephen A. Douglas, *The Springfield Speeches*, *in* The Complete Lincoln–Douglas Debates of 1858, at 43, 60 (Paul M. Angle, University of Chicago Press, 1991). In his notorious majority opinion in *Dred Scott v. Sandford* (1857), Chief Justice Taney wrote 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...." *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 410 (1857).

56. Stephen A. Douglas, *The Otawa Debate*, *in* The Complete Lincoln–Douglas Debates of 1858 102, 110 (Paul M. Angle, ed.? University of Chicago Press, 1991). Douglas referred to "our Revolutionary fathers" in his 1858 Springfield Speech. *See supra* note 49.

in the Constitution."[57] Lincoln argued during his 1858 debates with Douglas "that the right of property in a slave *is not* distinctly and expressly affirmed in the Constitution, and Judge Douglas thinks it *is*."[58] Lincoln did not believe the Founders were hypocrites, generally speaking. As he put it, "We had slavery among us, we could not get our constitution unless we permitted them to remain in slavery, we could not secure the good we did secure if we grasped for more, and having by necessity submitted to that much, it does not destroy the principle that is the charter of our liberties."[59] He thought the Founders did not think they could free themselves and free their slaves at the same time.

As Professor Harvey Mansfield recently put it, "The American founding couldn't be perfect from the start. It had to progress towards its goal."[60] Put simply, the founding generation of Americans did not believe that they could both free themselves and free their slaves without hazarding the success of both their independence and their new way of governing themselves. However, once they had secured their independence, what did they do collectively with regards to the state institution of slavery? Did their federal Constitution indicate a desire to strengthen slavery's hold on the American people or did the Framers attempt to reduce their dependence upon the peculiar institution?

Lincoln answered by observing that the U.S. Constitution, unlike the Articles of Confederation, empowered Congress to ban the importation of slaves in 1808. "A Constitutional provision was necessary to prevent the people, through Congress," Lincoln noted, "from putting a stop to the traffic immediately at the close of the war. Now, if slavery had been a good thing, would the Fathers of the Republic have taken a step calculated to diminish its beneficent influences among themselves, and snatch the boon wholly from their posterity?"[61]

If the federal government did not possess the authority to abolish slavery where it already existed in the states, then the Founders attempted to begin its abolition by preventing its continued supply. It was believed at the time

57. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 451 (1857).

58. Abraham Lincoln, *The Galesburg Debate*, *in* The Complete Lincoln–Douglas Debates of 1858, at 285, 309 (Paul M. Angle, University of Chicago Press, 1991) (emphasis in original).

59. Abraham Lincoln, *Speech at Chicago, Illinois*, *in* 2 The Collected Works of Abraham Lincoln 485, 501 (Roy P. Basler, ed., Rutgers University Press, 1953) [hereafter Basler, Abraham Lincoln].

60. Harvey C. Mansfield, Jr., *The "Systemic Racism" Dodge*, Wall St. J. (Sept. 18, 2020), https://www.wsj.com/articles/the-systemic-racism-dodge-11600454532 (last accessed January 6, 2020).

61. Abraham Lincoln, *Speech at Lewistown*, *in* 2 Basler, Abraham Lincoln, *supra* note 59, at 546.

that cutting off the supply would produce its eventual demise. In addition, under the Articles of Confederation and the Constitution of 1787, Congress passed an ordinance banning slavery from the Northwest Territory, the only territory owned by the United States at that time.[62] Taken together, these were early attempts at the national level to prevent both the supply and expansion of slavery on American soil. The expectation was that slavery would eventually wither on the vine and the nation would peacefully outlive the utility of slavery. Jefferson, Madison, and others feared a race war if emancipation occurred immediately and *en masse*.[63]

Of course, these actions and expectations all occurred prior to the invention of the cotton gin in 1793, prior to the enormous profitability of plantation-grown cotton as an export, and what then became the extraordinary productivity of slave labor in harvesting that cash crop. To be sure, South Carolina and Georgia were always resistant to national control over slavery in their states, and they exercised outsized power as a minority of the American states at the Constitutional Convention.

Thus, to speak of the Founders when it came to expectations regarding slavery over the long haul is to speak in general terms and not to affirm an opinion held by every significant political player in this tragic drama. This is what produced some of the debates at the convention and the eventual compromises over slavery in the Constitution. Madison expected that these would lead to the demise of slavery over time.[64]

In his "House Divided" speech, Lincoln predicted, "Either the *opponents* of slavery will arrest the further spread of it and place it where the public mind shall rest in the belief that it is in course of ultimate extinction or its *advocates* will push it forward until it shall become alike lawful in all the states, *old* as well as *new*, *North* as well as *South*."[65] Those were the stakes in

62. Article 6 of the Northwest Ordinance reads: "There shall be neither Slavery nor involuntary Servitude in the said territory...." *An Ordinance for the Government of the Territory of the United States North West of the River Ohio*, *in* 32 Journals of the Continental Congress 334, 343, (Worthington C. Ford et al. ed. 1904–37), https://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=032/lljc032.db&recNum=352 (last accessed Dec. 1, 2020).

63. For example, see Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820), *in* Founders Online (National Archives), https://founders.archives.gov/documents/Jefferson/98-01-02-1234 (last accessed January 6, 2020). "[W]e have the wolf by the ear, and we can neither hold him, nor safely let him go. Justice is in one scale, and self-preservation in the other." *See also* Letter from Thomas Jefferson to John Adams (Jan. 22, 1821), *in* Founders Online (Nat'l Archives), https://founders.archives.gov/documents/Jefferson/98-01-02-1789 (last accessed January 6, 2020) ("[T]the real question, as seen in the states, afflicted with this unfortunate population, is, Are our slaves to be presented with freedom and a dagger?").

64. For example, on August 25 at the Constitutional Convention of 1787, Madison said, "Twenty years will produce all the mischief that can be apprehended from the liberty to import slaves. So long a term will be more dishonorable to the American character than to say nothing about it in the Constitution." That same day he would add that he "thought it wrong to admit in the Constitution the idea that there could be property in men." James Madison, *Saturday August 25. 1787 – In Convention*, in 2 The Records of the Federal Convention of 1787, at 328, 329 (Max Farrand, Yale University Press, 1911).

65. Abraham Lincoln, *"A House Divided": Speech at Springfield, Illinois*, *in in* 2 Basler, Abraham Lincoln, *supra* note 59, at 461–62 (emphasis in original).

1858, and Lincoln tried to show white Northerners that the key to preventing the spread of slavery was interpreting the Constitution as empowering Congress to ban slavery in the territories.

This was contrary to Taney's ruling in *Dred Scott*, but Lincoln believed the Constitution belonged to the American people, and if they disagreed with the Supreme Court, they could work politically to get the Court to reconsider its ruling.[66] In fact, as President, Lincoln would sign into law a ban against slavery in the District of Columbia on April 16, 1862, and two months later a ban against slavery in all the territories, even with the *Dred Scott* ruling still on the books. The Thirteenth Amendment made the constitutional conflict moot, but Lincoln and the Republicans believed an anti-slavery interpretation of the Constitution was worth the political challenge.

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Discussion

Mr. Larkin: Professor, thank you very much. I would now like the remaining members of the panel to join us. I want to ask if anyone has any comment that he would like to offer based on the remarks of the people who spoke after. That would be Timothy, Allen, and Sean. Let me go in reverse order. Sean, do you have anything that you would like to add to what Professor Morel said?

Professor Wilentz: All I can say is ditto. Lucas gave a very lucid account of how Lincoln, in particular, understood the question.

Mr. Larkin: Allen, anything you would like to add?

Professor Guelzo: I'm always impressed by the obduracy of the Southern delegates in the Constitutional Convention. When I say the Southern delegates, I am really talking about South Carolina and Georgia, their obduracy on the subject of slavery. They folded their arms and said, "We will not be part of a union that does not allow us to continue with slavery or continue to import slaves for at least some period." On that, they were prepared to

66. For his explanation of how citizens could work politically to get a Supreme Court decision overturned, see Abraham Lincoln, *Speech at Chicago, Illinois*, *in* 2 Basler, Abraham Lincoln, *supra* note 59, at 485: "If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that Dred Scott decision, I would vote that it should....Somebody has to reverse that decision, since it is made, and we mean to reverse it, and we mean to do it peaceably." *See also* Abraham Lincoln, *Speech at Springfield, Illinois*, *in* 2 Basler, Abraham Lincoln, *supra* note 59, at 401 (emphasis in original) ("But we think the Dred Scott decision is erroneous. We know the court that made it, has often over-ruled its own decisions, and we shall do what we can to have it to over-rule this. We offer no *resistance* to it.").

see things break up. There really was a serious threat that the Union might, in fact, break up. We think there is a natural progression, because we are looking at this from our perspective. We think this is natural progression, from the Continental Congress to the Articles of Confederation to the Constitution, and it was just seamless, and it was going to happen anyway.

That is not necessarily the case. There were many people who fully expected that even in the last moments of the Articles of Confederation that the entire federal Union would break up into a variety of small confederacies. If that had happened, the results probably would not in the long-term have been pretty. Those Southerners fought hard for that. In many respects, they were going to demand that as a concession. In order to get a Constitution and to keep the Union together, Northerners are going to have incentives to say, "All right, we'll make these allowances," but watch how they make those allowances.

Roger Sherman, Oliver Ellsworth, when this question is pushed on them in the debates in August of 1787, what they said is, "All right, we're not going to push on the issue about slavery or the slave trade, because slavery's going away anyhow." Sherman says, "Slavery's going to disappear in a few years." Ellsworth says, "Slavery's on its way out. In a few years, there will not be any trace whatsoever that there was such a thing as slavery in America, so let's not kick the sleeping dog. Let's move ahead, because the Constitution that we're making and the union that we're creating is going to point us towards an anti-slavery conclusion eventually."

Looking at what they had to say, you really have to put the question in terms of shall we have a union where we let the slave-owners break the whole thing to pieces, especially when the slavery issue was, as many people thought then, going to disappear anyhow. You set up the Constitution so that it accommodates that disappearance, and you sit back and you wait for it to happen, which it did not do. That was for reasons that were beyond the power of the Constitutional Convention to understand. They were not, after all, prophets with crystal balls. They could not see what was going to happen in the next 20, 30 years in the economy of the United States.

Professor Wilentz: It is true they bullied, they yelled; Pinckney and all of the rest of them, but they lost. They lost on the slave trade. They said, "This is a deal breaker. We're out of here," and then they did not leave. I think that one of the things we have to deal with is not simply the fact of anti-slavery constitutionalism at the convention, but their power. They were strong. They made the Southerners eat crow more than once.

Professor Guelzo: I think interesting to look at, too, the terms in which they demanded the continuation of the slave trade. They were willing to

talk about 20 years, because in large measure—and this is an explanation that surfaces in the ratification convention in South Carolina—what they are looking for is basically to make up the slave population they had lost to British occupation. The argument that is often—David Ramsey makes this argument—that what we are looking at, South Carolina's full of waste places, we need cheap labor in order to make them productive, so we need to replenish the supply, and when that supply is replenished, then we will be content. When that supply was replenished, they were not entirely content. You can doubt some of the sincerity there, but that is the argument that is made. What we are looking at is something provisional. What we are looking at is something temporary, because if we do not, our state economy is going to go into the tank. If it does, then that is going to create an imbalance of power in this new constitutional arrangement.

Mr. Larkin: Let me ask another audience question. I'd like panelists to discuss the significance of the ban on slavery in the Northwest Ordinance. To what extent, for example, is it Exhibit A that can be offered in defense of the argument that the Constitution did not protect slavery, because if it did, then the entire Northwest Ordinance, one of the earliest pieces of the nation's legislation, was unconstitutional from the outset? Please, what was the significance of the ban on slavery in the Northwest Ordinance?

Professor Guelzo: Certainly, Lincoln thought that was Exhibit A, because in the Cooper Institute speech in February of 1860, he makes it Exhibit A that the Northwest Ordinance, something which is in its first form adopted by the Confederation Congress and then readopted in 1787. It contains this explicit ban on slavery in the territories that were organized north of the Ohio River, and the wording of Section 6 of the Northwest Ordinance, in fact, becomes the model that is used for the wording of the Thirteenth Amendment—just picks it up and copies it completely.

People very widely understood the Northwest Ordinance that way to be an anti-slavery statement. Now bear in mind that that provision was not uniformly applied in the organization of those territories. There was a lot of unevenness. There were a number of exceptions. There were a number of lacunae in that, so that it looks more like a rumpled blanket than a simple sheet that eliminates slavery completely, and yet it was an extraordinary statement in its own right, put into national law governing the future of these territories, which had fallen into the hands of the United States administration as a result of the Treaty of Paris.

Professor Morel: I would just add that Lincoln liked that example and quoted it often precisely to show that you cannot have an anti-slavery Constitution without an anti-slavery people. For him, it showed the impulse for

freedom, which is an impulse against slavery. You cannot get rid of slavery, as they thought at the time, immediately. This was the number one way to prevent it from continuing to entrench itself on American soil: Keep it from expanding and then, as early as possible, which turned out to be January 1st, 1808 (Jefferson signed it into law the previous year), ban the importation of slaves, and the hope was that slavery would die on the vine.

Mr. Sandefur: What Douglass and Lincoln would have pointed to demonstrate that America was intended to be a place of an anti-slavery people was the Declaration of Independence. When you talk about the Northwest Ordinance, that is one of the organic laws of the United States. But another one of the organic laws of the United States is the Declaration. The issue that the anti-slavery constitution insisted upon was on the *legal* significance, not just as a rhetorical or political document, but the *legal* significance of the Constitution of the United States, which appears in the *Statutes at Large* (at volume 1, page 1) and in the U.S. Code[67] and is a *law*.[68]

The reason this comes up is before this conversation started, we were talking about this book, the Mark Graber book—*Dred Scott and the Problem of Constitutional Evil*—and this is a perfect example of what we are talking about. He says, "Whether the persons responsible for the Constitution thought Constitutional protections for property encompassed property and human beings is unclear. Both pro [sic] and anti-slavery are plausible interpretations of the Constitution."[69] Then on page 86 he says, "What Americans needed—and what Constitutional law would have no capacity to provide—was the political consensus necessary for decisive choice to be made between those two."[70] Lincoln would have said, we *have* the key to that decisive choice. It's the Declaration of Independence. *That* is the deciding factor in this argument.

This is not discussed in any detail in Graber's book. But *that* is really what this issue is about, when Lincoln says in the Gettysburg Address, "[d]edicated to the proposition that all men are created equal"—today's argument about the *1619 Project* and similar things is an argument about what proposition America *is* dedicated to. If you do not believe America is dedicated to the proposition that all men are created equal, in a legal sense as well as

67. 1 U.S.C. § xlv.

68. *See* Timothy Sandefur, *Of Course the Declaration is Law,* The Dispatch, Oct. 21, 2020, https://thedispatch.com/p/of-course-the-declaration-is-law (last accessed January 6, 2020).

69. Mark A. Graber, Dred Scott and the Problem of Constitutional Evil 66 (2006).

70. *Id.* at 86.

a political and rhetorical and spiritual sense, then what is it that you think we *are* dedicated to? That is what this discussion's really about.[71]

Professor Guelzo: I am curious in this respect that when we talk about the phrase "property in man," that, of course, is James Madison's phrase so often quoted from the records of the Constitutional Convention. It is not only Madison. [It is] Roger Sherman also. It is almost literally the same words, "We cannot be writing a Constitution that endorses the idea of property in men." The fundamental tenet of slavery itself, that human beings could be chattel property, is something that the desires of the Constitution make very clear has no place in the Constitution and no place in the organic law of the United States. That is what leads ineluctably to what you have with the Northwest Ordinance. It leads to the banning of the slave trade, because if there could be property in men, why is there this possibility of banning trade in what would otherwise have been considered property? That would have been a violation of provisions of the Constitution itself.

71. *See* Timothy Sandefur, *The 1619 Project: An Autopsy,* The Dispatch, Oct. 27, 2020, https://thedispatch.com/p/the-1619-project-an-autopsy (last accessed January 6, 2020).