HOW WE KNOW THE US CONSTITUTION WAS PROSLAVERY

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ABSTRACT

This article argues that the 1787 Constitution was overwhelmingly proslavery, giving explicit recognition and multiple protections to only one form of property: slaves. It exempted only one type of international commerce from full congressional jurisdiction: the African slave trade; guaranteed that the free states could not interfere with ownership rights of only one kind of property: fugitive slaves; denied the states the power to regulate the status of only one type of person, an alleged afugitive slave who was treated as property to be summarily "delivered up on Claim" to a person claiming ownership of the alleged slave. Congressional apportionment took into account only one form of privately held property, by allocating representatives—and presidential electors—based on the number of slaves in a state. The Constitution made it impossible to end slavery by statute or amendment, because until the Civil War there were always enough slave states to prevent the ratification of any Amendment, and as long as fifteen or more slave states were in the Union, they could block any constitutional amendment, even today in a fifty-state Union.

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Was the US Constitution a proslavery "Covenant with Death," and "an Agreement in Hell," as the great abolitionist William Lloyd Garrison proclaimed (Wiecek 1977, 228; Garrison 1842, 1854/1973, 3:303; Finkelman 2014, 3-9)? Or did it lean to freedom, as Frederick Douglass asserted in 1860 after he broke with Garrison?[1] Did the framers embed slavery into our fundamental document, as one of us and other scholars have argued (Finkelman 2018a, 2014; Waldstreicher 2009; Wiecek 1977; Lynd 1967)? Or is it a document that did not recognize property in human beings, as some others have claimed (Wilentz 2018)?[2] These questions are at the heart of constitutionalism, American history, and originalism.

The Constitution was indeed proslavery, recognizing slavery throughout the document, singling it out for special protection, and giving extra political power to southern states based on the number of slaves in each state. Significantly, slavery was the *only* economic institution or form of privately held property given special protections and benefits in the Constitution. The Constitution required that the non-slave states help protect and preserve slavery. Most importantly, the Constitution's design and amendment process guaranteed that the southern states would be able to perpetually prevent the national government from interfering with slavery where it existed as long as these states remained in the Union.

For analytical purposes, it does not matter whether this design was intentional, the result of compromises at the Constitutional Convention, the unintended consequence of the desire of some framers to create a government that would support economic prosperity and protect property, or a combination of all these.

For the southern framers the design was intentional. As South Carolina's General Charles Cotesworth Pinckney told the Constitutional Convention, "[P]roperty in slaves should not be exposed to danger under a Govt. instituted for the protection of property" (Farrand 1966, 1:504). Some northerners argued the design was the result of compromises necessary to secure the new form of government. Pennsylvania's James Wilson, a future Supreme Court justice, personally opposed slavery

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1. See Douglass (1860). For the evolution of Douglass's constitutional thoughts, see Finkelman (2016); see also Guyette (2013).

2. Oakes (2021) provides an excellent analysis of Republican political arguments on how they might have used the Constitution to attack slavery through such provisions as the commerce clause, the territories clause, and the power to tax. The Republican argument was predicated on the assumption that with an antislavery Republican president, an antislavery Republican majority of both houses of Congress, and a compliant Supreme Court, the Republicans could chip away at slavery. However, as Abraham Lincoln noted in his first inaugural address, the national government had no constitutional power to end slavery in the states where it existed and was required to enforce the fugitive slave clause of the Constitution.

and "did not well see on what principle the admission of blacks in the proportion of three fifths could be explained. Are they admitted as Citizens? Then why are they not admitted on an equality with White Citizens? Are they admitted as property? then why is not other property admitted into the computation?" However, he then supported the three-fifths clause, explaining, "These were difficulties however which he thought must be overruled by the necessity of compromise" (Farrand 1966, 1:578). Finally, some northerners saw no reason to undermine support for the Constitution over slavery. Thus, Connecticut's Oliver Ellsworth objected to any limitation on the African slave trade: "let every State import what it pleases. The morality or wisdom of slavery are considerations belonging to the States themselves—What enriches a part enriches the whole. And the states are the best judges of their particular interest." He later explained that as "he had never owned a slave [he] could not judge of the effects of slavery on character" (Farrand 1966, 2:364, 371).

Whatever the cause of the proslavery outcomes—intention, compromise, or just refusal to consider the consequences—the result is the same: the Constitution protected slavery from federal interference and the actions of non-slave states. The Constitution required the non-slave states to respect the status of "slave" imposed on southern Blacks but did not require the slave states to respect the "free" status of northern Blacks.[3] Furthermore, under the Constitution the national government had absolutely no power to end slavery in the states. By creating a government of limited powers, and reserving to the states the regulation of their "domestic institutions," the national government could not interfere with slavery where it existed.[4] That could be done only through a constitutional amendment. But as long as all the slave states remained in the Union, it was simply impossible to have such an amendment ratified, even if every NORTHERN state supported the amendment. Indeed, to this day, in 2023, if the fifteen slave states that existed in 1860 still had slavery, they could block any constitutional amendment, because it would require forty-five free states to outvote those fifteen slave states. That would require a sixty-state union. This assumes that there would have been no new slave states. But, as we note later in this article, the New Mexico, Indian (later Oklahoma), and Utah

3. E.g., most slave states prohibited on pain of arrest or enslavement the migration of free Blacks from other states (Finkelman 2010, 779, 807).

4. The Lincoln administration was able to constitutionally interfere with slavery under its war powers *only* in those states and parts of states that had seceded, remained outside the jurisdiction of the United States, and were at war with the United States. Neither the Emancipation Proclamation nor any act of Congress could have constitutionally interfered with slavery in the loyal slave states or any areas of the Confederacy actually under the control of the United States when Lincoln issued the Proclamation.

territories had slavery in 1861 and would likely have come into the Union as slave states. Thus, absent secession and the Civil War, there was never a political or constitutional path for the United States to end slavery.

The central purpose of the Constitution was to create "a more perfect Union" with mechanisms and paths for the national government and the political system to solve major problems within the nation in an orderly and peaceful process under the rule of law. To the extent that a path to ending slavery was essential to a modern democratic society, the Constitution was a disastrous failure.

Abraham Lincoln's extraordinary political leadership ultimately saved the nation, which was redeemed through a trial by fire that left more than two percent of its population dead and destroyed much of the infrastructure in the South. (McPherson 1988) The US Army and Navy (which included more than 200,000 Blacks, mostly former slaves) destroyed slavery across much of the South. After the Civil War three new constitutional amendments completed the process. These amendments were possible *only* because eleven slave states voluntarily left the Union, giving up the stranglehold they otherwise had on preventing any constitutional changes that harmed slavery or protected Black rights. By walking away from the constitutional table and then making war on the United States, the slave states set the stage for the remade Constitution of 1865–1870.

I. SOUTHERN FEARS AND THE LOGIC OF PROTECTING SLAVERY IN THE US CONSTITUTION

The Constitution of 1787 reflected the importance of slavery in six of the original thirteen states, its moral incompatibility with the ethos of the Declaration of Independence, the determination of the southern founders to secure slavery *forever* under the new form of government, and the ambivalence and naiveté of many northern framers.[5]

In 1775 slavery was legal in all the thirteen soon-to-be states, but its importance varied. In the six southern states south of Pennsylvania, slavery was *the* central economic and social institution. Enslaved African Americans produced vast wealth for their owners and were a major part of the population. In 1790 South Carolina's

5. Recently Kermit Roosevelt III has argued that there was no conflict between the ideals of the Declaration of Independence and slavery. The grand language about "self-evident" truths and "all men are created equal" referred to "the state of nature"; in an actual polity, "[s]laves, because they were outsiders to colonial political communities, were also outside the argument of the Declaration" (Roosevelt 2022, 43, 45). Overall, he argues that that the legal changes wrought by Reconstruction are "not a fulfilment of the Founders' vision, but a rejection of it, a recognition of its failure" (Roosevelt 2022, 203).

population was 43 percent slave; Virginia was 42 percent; Georgia was 35 percent; Maryland was 32 percent; North Carolina was 26 percent; and Delaware was 15 percent. In 1790 about 99.4 percent of the nation's 700,000 slaves (about 18 percent of the entire American population) were in these six states, which were unalterably committed to slavery and would remain so until the Civil War.[6]

Illustrative of this commitment to perpetual slavery was the intense opposition to emancipation even in the four loyal slave states during the Civil War. In July 1862 the congressional delegations of these states adamantly rejected an offer from Congress and President Lincoln to compensate slaveowners if any of these states ended slavery (Finkelman 2009a, Gienapp 2002, 110; McPherson 1988, 503). It is simply impossible to imagine any of the antebellum slave states voluntarily moving to end bondage. The Emancipation Proclamation, the success of the United States Army, and the Thirteenth Amendment finally ended slavery.

Slavery was never very important in New England, which had very few slaveowners or slaves. Before the Revolutionary War a few merchants, especially in Rhode Island, were very minor players in the Atlantic slave trade. The Dutch communities in New York's Hudson Valley contained significant numbers of slaves into the early nineteenth century, as did farmers on Long Island (including present-day Brooklyn and Queens), and Westchester County. In New York City and Albany well-off residents used slaves as domestic servants and as laborers in their commercial enterprises (McManus 1970; White 2004). Slavery played a similar role in Philadelphia. There were some slaves in the rural Pennsylvania counties bordering Virginia, Maryland, and Delaware and many more in New Jersey. In 1790 about 6 percent of the people in both New York and New Jersey were enslaved (Gibson and Jung 2002, Table 47, Table 45). Slavery was never essential to the northern economy, although some powerful families owned slaves, some urbanites used them for household and commercial labor, some farmers had small numbers of slaves, and slaves were always valuable assets.

A debate in the Continental Congress during the Revolution, well before any state had taken steps to end slavery, illustrates the potential for slavery to undermine national harmony. In July 1775 the Congress debated how to assess the states for financial contributions to support the national government and the war. The proposed plan would base assessments on a state's population, on the theory that "population reflected wealth" (Robinson 1971, 147). But southerners objected to

6. Population figures are conveniently gathered in Gibson and Jung (2002). See Table 55 (South Carolina); Table 61 (Virginia); Table 25 (Georgia); Table 35 (Maryland); Table 48 (North Carolina); Table 22 (Delaware).

counting slaves for assessments, asserting they were property, not people. With the country hardly yet a country, South Carolina's Thomas Lynch threatened secession over slavery declaring "If it is debated whether slaves are property, there is an end of the confederation." Lynch argued, "Our slaves being our property, why should they be taxed more than the land, sheep, cattle, horses, &c.?" Unintimidated by Lynch's bluster, Benjamin Franklin replied that "slaves rather weaken than strengthen the State" and there was "some difference between them and sheep; sheep will never make any insurrections" (Ford 1904–1937, 6:1079). Franklin's spot-on comments had no effect on the outcome of the debate: taxation would be based on population and slaves would not be counted for that purpose, even though since the mid-seventeenth century the southern colonies (which were now becoming states) had always taxed owners for their slaves. Except for Franklin, no other delegates in Congress—all of whom represented states where slavery legally existed—were willing to challenge Lynch to see if he was bluffing.

By 1787 the dynamics of slavery had changed. Massachusetts and New Hampshire had ended slavery through their 1780 and 1783 constitutions. The Bay State's highest court had affirmed this in the Quock Walker cases in 1781 and 1783.[7] Pennsylvania (1780), Rhode Island (1784), and Connecticut (1784) had passed gradual abolition acts.[8] Under these laws the children of enslaved women would be born free (although subject to indentures), and thus slavery would literally die out as the existing slave population passed away. Encouraged by these laws, many masters voluntarily manumitted their slaves. For example, Rhode Island's slave population went from 948 in 1790 to 380 in 1800 and to 108 in 1810. Similarly, Pennsylvania's slave population went from 3,700 in 1790 to 795 by 1810, while its free Black population rose from 6,500 to 22,500 (Gibson and Jung 2002, Table 54, Table 53). Vermont, which would become the fourteenth state, had banned slavery in its proposed constitution. New York and New Jersey had not yet moved to dismantle slavery, but southerners assumed both states would do so.

Northern abolition was ominous for some slaveholding delegates, as they contemplated a Union that would be at least half free. As James Madison explained in the Constitutional Convention, "[T]he real difference of interests lay, not between the large and small but between the Northern and Southern States. The institution of slavery and its consequences formed the line of discrimination" (Farrand 1966, 2:9–10).

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7. *Walker v. Jennison* (1781) and *Commonwealth v. Jennison* (1783), For a full discussion of these cases see Cushing (1961).

8. On northern abolition generally, see Zilversmit (1967); Nash and Soderlund (1991); Melish (1998); Finkelman (1981, 2022).

In this context, it is hardly surprising that southern delegates were aggressive, and usually fully united, in shaping the Constitution to protect slavery. The only division among southerners was over the African slave trade. Three deep South states, along with Maryland, worked to shield the trade from Congress's power to regulate foreign commerce. Virginia and Delaware both opposed special protection for the African trade. This southern opposition to the African trade should not be confused with opposition to slavery. The African trade was truly horrifying, and most of the Virginia and Delaware delegates opposed the trade on moral grounds. But there was also an economic aspect to this opposition. Virginians had a surplus of slaves they could sell to the Carolinas and Georgia. Closing the African trade would increase the value of these slaves. Finally, some Virginia political leaders feared that bringing more slaves from Africa threatened the safety of Whites (Finkelman 2009b, 434–37).[9] Other than on this issue, the slave states were united in demanding special protections for slavery.

II. SLAVERY AND THE LANGUAGE OF THE US CONSTITUTION

The Constitution supported slavery in a variety of ways. However, the document never used the words *slave* and *slavery* or any words designating race, such as *Black*, *Negro*, or *White*. Some commentators claim that because the Constitution did not use the word *slavery*, the document did not protect or even recognize the institution. Some commentators also claim that the framers were secretly antislavery and thus did not want to appear to support slavery. Others have asserted that the framers were embarrassed by the term *slave*. Throughout the main body of the Constitution, slaves are referred to as "other persons," as "such persons," or in the singular as a "person held to Service or Labour." An equally tendentious argument is that because the Constitution refers to slaves as "person(s)," it did not recognize that enslaved people were in fact legally "property."

Throughout the Constitutional Convention delegates debated the place of "blacks," "Negroes," "slaves," and "Africans" in the constitutional scheme. Some of the debates were intense and heated. Gouverneur Morris vigorously objected to counting slaves for representation, arguing that slaves were "property" and that counting them for representation encouraged the African slave trade:

> Upon what principle is it that the slaves shall be computed in the representation? Are they men? Then make them Citizens & let them vote? Are they property?

9. White South Carolinians had expressed similar fears after the Stono Rebellion of 1739, and briefly placed a prohibitive tax on slave importation. Finkelman (2009b).

> Why then is no other property included? The Houses in this City (Philada.) are worth more than all the wretched slaves which cover the rice swamps of South Carolina. The admission of slaves into the Representation when fairly explained comes to this: that the inhabitant of Georgia and S. C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & dam(n)s them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the rights of mankind, than the Citizen of Pa or N. Jersey who views with a laudable horror, so nefarious a practice. (Farrand 1966, 2:222)

But the final document avoided these terms. The change in language was designed to make the Constitution more palatable to the North. New Jersey's William Paterson asserted that in the Articles of Confederation, Congress "had been ashamed to use the term 'Slaves' & had substituted a description" (Farrand 1966, 1:561).[10] It is not at all clear that Paterson was correct in this claim for the Confederation Congress, since at the time slavery was legal in every state. But it is critically important to understand that there is huge difference between "embarrassment" or "discomfort" over the language, which some northerners felt, and a denial of the reality that slaves were property and that the new Constitution emphatically recognized property in women and men. The strategic decision to obfuscate what the Constitutional Convention was actually doing does not mean that the delegates did not intend to protect and privilege property in human beings.

This issue is clearly seen in a debate over the African slave trade. The delegates from the Carolinas and Georgia insisted that the African trade be at least temporarily protected from Congress's power to regulate international commerce. Gouverneur Morris, furious at this immoral demand, proposed that the clause declare the "Importation of slaves into N. Carolina, S– Carolina & Georgia" shall not be prohibited. The antislavery Morris wanted to use the word *slave* to expose the hypocrisy of preventing Congress from ending the African trade. Connecticut's Roger Sherman, who voted with the deep South to protect the African slave trade, objected to the singling out of specific states and to use of the term *slaves*. He declared he "liked a description better than the terms proposed, which had been declined by the old Congs & were not pleasing to some people." Pennsylvania's George Clymer supported Sherman. The issue here was not "embarrassment" about protecting slavery but self-conscious hypocrisy and subterfuge by these

10. Ironically, although Paterson opposed the protection of the African slave trade and some other proslavery clauses, he also owned slaves. At the time, slavery was completely legal in New Jersey.

northern delegates, who did not want northern voters to understand what they had done. As James Iredell explained to the North Carolina ratifying convention: "The word *slave* is not mentioned" because "the northern delegates, owing to their particular scruples on the subject of slavery, did not choose the word *slave* to be mentioned" (Farrand 1966, 2:415; Elliot 1888/1987, 4:176).

The southern delegates did not insist on using the words *slave* and *slavery* because everyone at the convention, everyone in politics, and everyone who debated the Constitution during the ratification process understood what the words of the Constitution meant. There was no need to jeopardize ratification in the North by using explicit language, when a "description" worked just as well. Indeed, many northern anti-federalists denounced some of these proslavery provisions, especially the three-fifths clause, the slave trade provision, and the insurrection and domestic violence clauses,[11] because they understood these provisions protected slavery.

Not using the words *slave* or *slavery* helped the South on one issue. Southern federalists bragged about the fugitive slave clause, which required the northern states to return "persons owing service or labour in one State . . . escaping into another."[12] But there is no evidence that northern anti-federalists objected to this clause, suggesting the obfuscation and convoluted language of the clause, buried in Article IV of the Constitution, successfully hid its purpose. Thus, northerners simply did not appreciate its meaning or its potential for harming Blacks and their White friends and allies.

The use of "descriptions" of slave property, rather than the use of the term, has also led some commentators to argue that the Constitution does not recognize slaves as property. But, as with the non-use of the word *slave* in the Constitution, everyone at the Constitutional Convention and in the ratification debates knew the Constitution treated slaves as property, just as all the laws in all the states acknowledged that slaves were property. At the convention George Mason declared, "[T]he Southern States have this peculiar species of property, over & above the other species of property common to all the States" (Farrand 1966, 1:581). Mason did not have to say what this "species of property" was because everyone knew, just as they

11. US Constitution, Art. I, Sec. 2, Cl. 3 (three-fifths); Art. Sec. 9, Cl. 1 (slave trade); Art. I, Sec. 8, Cl. 15 (insurrections); Art. IV, Sec. 4 (domestic violence).

12. US Constitution, Art. IV, Sec. 2, Cl. 3. The full text states, "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."

knew when they used linguistic subterfuges in the Constitution that were "descriptions" of this "species of property."

It is also important to note that the Constitution did not explicitly mention *any* kind of private property. The word *property* appeared in only one place in the 1787 Constitution, where the document simply declared, "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[13] Yet, no constitutional scholars would doubt that the national government was committed to private property, and indeed, that private property was central to the American founding, as the Constitution's clauses on contracts, legal tender, and bankruptcies illustrate.[14] The debates in the Constitutional Convention illustrate this. Madison noted, "The primary objects of civil society are the security of property and public safety." South Carolina's John Rutledge, a wealthy slaveowner like Madison, asserted, "Property was certainly the principal object of Society." Rufus King, an opponent of slavery from Massachusetts, agreed that the purpose of a government was "[t]o promote the general Welfare, to protect Liberty and Property," and "that property was the primary object of Society" (Farrand 1966, 1:147, 534, 191, and 541). Everyone at the Convention knew that slaves were property. After real estate, slaves were the most valuable form of private property in the nation. The descriptions of slave property show how the Constitution and the framers recognized property in women and men.

The debates over representation also illustrate the understanding that slaves were property, which the Constitution was protecting. Northerners objected to the three-fifths clause precisely because slaves were "property." Elbridge Gerry argued that "property" should "not [be] the rule of representation." He asked, "Why then shd. the blacks, who were property in the South, be in the rule of representation more than the cattle & horses of the North" (Farrand 1966, 1:201).[15] Similarly, Paterson declared that "[h]e could regard negroes (sic) slaves in no light but as property. They are no free agents, have no personal liberty, no faculty of acquiring property, but on the contrary are themselves property, & like other property

13. US Constitution, Art. IV, Sec. 3, Cl. 2.

14. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts," US Constitution, Art. I, Sec. 10, Cl. 1.

15. In his notes Yates recorded Gerry's comments more fully. "Blacks are property, and are used to the southward as horses and cattle to the northward; and why should their representation be increased to the southward on account of the number of slaves, than horses or oxen to the north ?" (Farrand 1966, 1:205–6).

entirely at the will of the Master" (Farrand 1966, 1:561). Southerners all agreed with these northerners that slaves were property. South Carolina's Pierce Butler "contended strenuously that property was the only just measure of representation" because property "was the great object of Governt" (Farrand 1966, 1:542). Thus, counting slaves for representation made sense, not because they were "persons," but because their numbers represented property and wealth. Madison made the same point, arguing that seats in the House of Representatives should be based on the free population, but because "one of [the] primary objects" of the Senate was "the guardianship of property," seats in that body should be allocated "according to the whole number, including slaves" (Farrand 1966, 1:562).

These debates demonstrate that the framers saw slaves as property, and counting them for representation was simply a way of giving the southern states extra political power based on their slave property. This makes sense, because as the historian David Brion Davis noted, in all slave systems, from the ancient world to the vast slaveholding in the Americas,

> the very meaning of "property," is the antiquity and almost universal acceptance of the *concept* of the slave as a human being who is legally owned, used, sold, or other disposed of as if he or she were a domestic animal. This parallel persisted in the similarity in naming, branding, and even pricing slaves according to their equivalent in cows, horses, camels, pigs, and chickens. (Davis 1986, 13)

All the framers came from states where slavery existed or, in the case of Massachusetts and New Hampshire, had existed until just a few years before the Constitutional Convention. All the framers fully understood that the essence of slavery was treating people as property and enforcing that status with violence. As the sociologist Orlando Patterson correctly noted, "There is no known slaveholding society," anywhere in the world, "where the whip was not considered an indispensable instrument" (Patterson 1982, 4). The framers did not need a twentieth-century scholar to explain this to them. They knew that slaves were property—that everyone in the country knew this—and it would have been redundant and almost silly to say this in the Constitution.

Everyone at the Constitutional Convention knew that slaves, like other forms of property, were bought, sold, deeded, seized for debts, taxed by local and state governments, sold to settle unpaid taxes, and mortgaged. Everyone also knew that in some very narrow circumstances, the law treated slaves as "persons." Slaves could be prosecuted for crimes and if convicted physically punished, jailed, or executed. Significantly, however, when states executed slaves, the government usually

compensated the owners for the loss of their property. In this sense, the execution of a slave was akin to a condemnation process, in which the state took private property for public use. Slaveowners often had their slaves baptized and took them to church, in their capacity as "people," but at the same time treated them as what they *legally* were—property.[16] Thus, an owner might pay a minister to solemnize a "marriage," consistent with the owner's own religious faith or because the owner believed marriages, blessed by preachers, were good for slave morale and might lead to more children, which in turn meant more wealth for the owners. However, at the same time, owners could destroy the Christian marriage through the sale of one of the parties because slaves were always property, to be sold or disposed of in any way an owner might choose. Every southern state recognized the status of slaves, by *not* giving any legal recognition to slave marriages.[17] While federal law recognized the marriage of free people, it did not recognize the marriages of slaves.

While southern churches encouraged slave marriages, these churches fully supported the ownership of slave as property, totally under the control of those who owned them.[18] Many southern clergymen owned slaves, as did a number of churches in their corporate capacity. Twenty-first-century scholars may have trouble accepting the dual status of a person as property; however, eighteenth- and nineteenth-century White Americans fully understood this, and their Constitution recognized it.

Although Americans recognized free persons as having legal rights to protect themselves and their families from violence, American law prohibited slaves from resisting the violence of their owners and any other Whites in authority. Slaves were executed for defending themselves or their family members from violence. People could testify on their own behalf in a court and defend themselves in court. A slave could not. The sexual violation of a free woman or man was everywhere a crime; in American law it was not a crime to rape your own slave, and raping

16. For a very useful discussion of the dual nature of slaves, see Tushnet (1981).

17. Southern churches fully understood this but were troubled by the fact that when slaves were sold, their family relations would be destroyed, and this might lead them to forming new families even if they were technically still married (at least through the church) to other people. The Episcopal Church in South Carolina investigated and debated this problem, and in an official report decided that the sale of slaves should be construed as the de facto death of the partners, thus allowing both to marry new partners within the church. *Report of the Special Committee Appointed by the Protestant Episcopal Convention, at Its Session in 1858, to report on the Duty of Clergymen in the relation to the Marriage of Slaves* (1859), reprinted in Finkelman (2020, 120–26).

18. This policy was, of course, also a way for clergymen to earn extra money, by performing slave marriages.

someone else's slave was at most a trespass against the property of the owner. In neither case could slave victims testify against a White perpetrator. The Constitution enforced this regime, since if a slave ran away from violence and abuse, the Constitution required the return of the fugitive slave. Furthermore, as the Supreme Court explained in *Jones v. Zandt*, any White person might seize a suspected fugitive slave and no other White was allowed to intervene.[19]

In 1791, the Fifth Amendment enhanced the protection of slave property, guaranteeing that "[n]o person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." Because in 1791 slaves were legally property everywhere in the nation,[20] the federal government was precluded from taking them from their owners and making them free.[21]

Southern discussions of the fugitive slave clause further illustrate how the Constitution recognized slaves as property. General Charles Cotesworth Pinckney told the South Carolina legislature, "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" (Elliot 1888/1987, 4:285). Similarly, Edmund Randolph pointed to the fugitive slave clause in refuting the claims by the arch anti-federalist Patrick Henry that the Constitution threatened slavery. Dismissing Henry's fears that the Constitution would harm slavery, he rhetorically asked, "when authority is given to owners of slaves to vindicate their property, *can* it be supposed they can be *deprived* of it?" (Elliot 1888/1987, 4:286 [Pinckney], 3:598, 599 [Randolph]).

Virginians did not like the slave trade provision, but along with all other Americans, North and South, they fully understood that the clause acknowledged a right of property in slaves. The clause protected the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit," providing that "a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." People "migrate," but property is the object of "importation." There would be no taxation of immigrants, persons who "migrated," but there could be a tax on the slave property that arrived in the country through "importation."

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19. 46 U.S.S How. 15 (1847).

20. Massachusetts and New Hampshire had ended slavery through their constitutions, but the states still recognized the right of slave property in other states and through the fugitive slave clause.

21. The Fifth Amendment also provided that no person could be "deprived of life [or] liberty . . . without due process of law." But in recognizing slaves as property, the federal government did not "deprive" any person of "liberty." The federal government simply recognized that the states deprived slaves of liberty through existing statutes and state common law.

Southerners understood that the Constitution supported their *property* interest in slaves in many ways. The fugitive slave clause gave them an incredibly valuable promise that their slave property would be returned to them. Significantly, the Constitution did not make any provisions for the return of any other kind of property. Equally important is that here the Constitution declared that laws passed in one part of the country could override laws in another part of the country. Thus, while northern states might prohibit slavery and declare all people in the state free, the Constitution mandated that southern state laws overrode such northern laws. This was the only clause in the Constitution that privileged the laws of some states over those in all other states. It was also the only clause in the Constitution that interfered with the right of the states to control the status of their residents and interfered with the states' local police regulations.

Under a summary process fugitive slaves would be "delivered up on Claim of the Party to whom such Service or Labour may be due." That "claim" did not require a due process hearing or judicial superintendence, and the Supreme Court would hold that any northern law requiring a due process hearing was unconstitutional.[22] The extradition of a fugitive from justice required an indictment or a previous conviction of the fugitive and a review of the process by the governor of the state where the fugitive was found, because fugitives from justice were "people," entitled to due process and to a presumption of innocence. But the Constitution did not require any due process for the return of slaves, because slaves were "property" they had no standing in court. To recover any other kind of property, such as a lost item or a runaway horse, an out-of-state claimant would have had to apply to local law enforcement or a court to prove ownership, and the case would be completely under the authority of local or state law. The language of the fugitive slave clause implied they escaped slaves would be "delivered up" when claimed. There was no sense that the alleged fugitives might have a personal interest in their own freedom or that they might in fact be free persons who had a right to be protected from being kidnapped.

The three-fifths clause similarly gave southerners extra political power based on their slave property. All the northerners at the Constitutional Convention understood this, even if they did not like it. Similarly, the slave trade clause clearly recognized that slaves were imported as taxable objects, not as "persons." The Constitution allowed Congress to regulate or prohibit every form of international commerce *but* African slaves. In sum, the Constitution treated slaves as property,

22. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). For full discussions of that case, see Finkelman (2018a, 1994).

considered them property, and subjected them to being remanded like other property or taxed as an imported marketable form of property.

III. HOW THE US CONSTITUTION PROTECTED SLAVERY

Despite the circumlocution, the Constitution directly protected slavery in six provisions and indirectly protected it in many other places. As already noted, the three-fifths clause (Art. I, Sec. 2, Cl. 3) counted slaves in allocating representation in Congress. The extra representatives created by counting slaves proved central to southern success in Congress, enabling Missouri to enter the Union as a slave state in 1821. It also enabled Texas annexation in 1845, passage of the Fugitive Slave Law of 1850, opening up the Mexican Cession to slavery in 1850, and the Kansas-Nebraska Act in 1854, which repealed most of the Missouri Compromise and allowed slavery in almost all of the remaining western territories.

Art. I, Sec. 9, Cl. 1, popularly known as the "slave trade clause," prohibited Congress from banning the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit" before 1808. The clause was the only exception to the general power granted to Congress to regulate all international commerce; no other kind of property received an explicit exemption from congressional regulation. Furthermore, this clause did not require that Congress prohibit the trade after 1808 but only prevented Congress from prohibiting it before that time. Most convention delegates assumed the deep South would grow more rapidly than the rest of the nation, and many believed that by 1808 the newest states would have been what became Alabama and Mississippi, and not Ohio. Had that occurred, it might have been impossible to pass a law ending the trade, or such a law might have been vetoed by a president from the deep South.[23]

Under Art. I, Sec. 9, Cl. 4, any "capitation" or other "direct tax" Congress levied would tax slaves at only three-fifths the rate of free people. The "direct tax" portion of this clause reaffirmed the same provision in the three-fifths clause. This redundancy underscores the power of the slave states to protect their property interest in slaves in multiple ways.[24]

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23. In 1804 Charles Cotesworth Pinckney of South Carolina was the Federalist Party candidate for president. Had he won, he would probably have vetoed any law to end the slave trade.

24. It is important to understand that no one actually expected Congress to ever implement such a head tax. As Gouverneur Morris noted, it was "idle to suppose that the General Government can stretch its hand directly into the pockets of the people scattered over so vast a Country" (Farrand 1966, 2:220–23).

Art. II, Sec. 1, Cl. 3, allocated presidential electors based on the number of representatives each state had in Congress, plus their two senators. Congressional representation was based on the three-fifths clause, thus giving the slave states extra power in electing the president. In the Constitutional Convention James Madison asserted that "the people at large" were "the fittest" to choose the president, but he then rejected this idea because under a direct election of the president "the Southern States . . . could have no influence in the election on the score of the Negroes" (Farrand 1966, 2:57). The electoral college did exactly that, and the effects were clear. Without the electors created by counting slaves, John Adams, who never owned a slave, and not the slaveowner Thomas Jefferson, would have won the presidency in 1800 (Finkelman 2002, Wills 2003).

The fugitive slave clause, Art. IV, Sec. 2, Cl. 3, prohibited the states from emancipating fugitive slaves and required that freedom-seeking slaves be remanded to their owners "on demand." Here the Constitution *required* that the non-slave states recognize the legitimacy of slavery and obligated the free states to support it.

Article V stipulated that the clauses governing the slave trade and applying the three-fifths clause to any capitation tax were unamendable. These were the only "unamendable" provisions of the Constitution, illustrating once again the special and unique status slavery had in the structure and provisions of the Constitution.

In addition to these explicitly proslavery clauses, other provisions were written in whole, or in part, to protect slavery, though they also applied to other issues as well. Everyone at the time understood that empowering Congress to "call forth the Militia" to "suppress Insurrections," Art. I, Sec. 8, Cl. 15, included the power to put down slave rebellions.[25] Gouverneur Morris, while objecting to counting slaves for representation, rhetorically asked, "And What is the proposed compensation to the Northern States for a sacrifice of every principle of right, of every impulse of humanity. They are to bind themselves to march their militia for the defence of the S. States; for their defence agst those very slaves of whom they complain" (Farrand 1966, 2:222). In opposing ratification, three Massachusetts anti-federalists complained that the Constitution bound "the states . . . reciprocally to aid each other in defense and support of every thing to which they are entitled thereby, right or wrong." They knew that "this lust for slavery, [was] portentous of much evil in America, for the cry of innocent blood, . . . hath undoubtedly reached to the Heavens, to which that cry is always directed, and will draw down upon them vengeance

25. The abolitionist and Harvard-trained lawyer Wendell Phillips (1845, v–vi) considered this clause, and a similar one of Art. IV, Sec. 4, to be among the five key proslavery provisions of the Constitution.

adequate to the enormity of the crime."[26] Congress would authorize using state militias to enforce the 1850 Fugitive Slave Law (which passed only because the three-fifths clause had created extra slave state representatives) and in effect force northern militiamen to protect the institution of slavery. Famously, in 1854 the national government called up the Massachusetts state militia to guard the courthouse hearing the case of Anthony Burns and then ordered the same state militia to help escort Burns to the docks so that he could be placed on a coast guard ship to be returned to Virginia as a fugitive slave (Finkelman 1996).

Art. I, Sec. 9, Cl. 5, and Art. I, Sec. 10, Cl. 2, prohibiting federal and state taxes on exports, prevented an indirect tax on slavery by taxing the products of slave labor, such as tobacco, rice, and eventually cotton. Southerners demanded these clauses to protect slavery. These clauses remain legacies of the proslavery Constitution to this day.

In Art. IV, Sec. 4, the federal government promised to protect states from "domestic Violence," again including slave rebellions. The national government used this provision to send the regular army and the navy to help suppress Nat Turner's rebellion in 1831, to enforce the 1850 Fugitive Slave Law, and to send marines led by army Col. Robert E. Lee to Harpers Ferry, Virginia, to capture John Brown when local Virginia militia forces proved incapable of doing so.

Finally, Art. V's requirement of a three-fourths majority of the states to ratify any amendment to the Constitution gave the slave states a perpetual veto over any constitutional changes.

IV. THE IMPOSSIBILITY OF ENDING SLAVERY UNDER THE US CONSTITUTION

To argue that the Constitution was not proslavery, one would have to demonstrate a plausible, peaceful exit strategy for slavery. But there was none.

The amendment process protected slavery forever, making it impossible under the Constitution to end slavery as long as the slave states remained in the Union. Repeating this fact here underscores that the Constitution created a government in which the South had a permanent veto over amendments, especially those that could harm slavery or further racial equality. Recall that in 1860 there were fifteen slave states. Assuming no secession and Civil War, and thus no Thirteenth Amendment,

26. Consider Arms, Malichi Maynard, and Samuel Field, "Reasons for Dissent," 16 April 1788, in Storing (1981, 4:262–63), also available at https://press-pubs.uchicago.edu/founders/documents/a1_9_1s13.html.

it seems unlikely these states would have voluntarily ended slavery. Even if no new slave states entered the Union, the fifteen states could have blocked any emancipatory amendment. But of course, new slave states were likely. Slavery was entrenched in the Indian Territory (modern Oklahoma) in the 1840s, and the New Mexico Territory adopted a slave code in 1859 (Stegmaier 2012). There were some slaves in the Utah Territory, where the doctrine of the dominant Church of Jesus Christ of Latter-day Saints did not question the legitimacy of slavery. Slave labor could be profitably used in mining, which made it attractive to settlers in the Rocky Mountains and the desert Southwest. While a Republican president might veto bills admitting a slave state, it is unlikely that absent secession and the Civil War, Republicans would have held the presidency indefinitely (or even past the 1864 election). It would take only one two-year period of Democratic control of both houses of Congress and the White House to admit new slave states. And no constitutional process existed for forcing a state to change its domestic policies once the state was admitted.

A constitutional amendment requires a two-thirds vote of both houses of Congress before it can be sent to the states. In 1864, even with eleven slave states not represented in Congress, the House of Representatives still defeated the proposed Thirteenth Amendment because more than one-third of the House consisted of border-state and northern Democrats. It is difficult to imagine how any such amendment could ever have left Congress had all the slave states been represented. Until 1896 (with the admission of the forty-fifth state), the slave states would have held more than one-third of the Senate, having sufficient strength to block amendments.

Ratification of an amendment requires three-fourths of the states. As already noted, the fifteen slave states that existed in 1860 could to this day block any amendment in a fifty-state Union. Most people assume that without the Civil War, slavery would have ended at some point, and maybe it would have. But, when we consider that it took until 1964 to amend the Constitution to prohibit poll taxes or to have federal legislation to end segregation, and that Congress refused to pass a federal anti-lynching law until 2022, there is no reason to think that an amendment to end slavery – and abolish some $2 billion worth of property in 1860 dollars, would have been easily ratified at any time. Moreover, also as noted, without the Civil War there would likely have been more than fifteen slave states by the end of the nineteenth century.

Our point is not to offer a counterfactual history of the United States. Rather, it is to demonstrate that the 1787 Constitution prevented any national abolition of slavery without the consent of a significant number of slave states. In 1787 the framers could not have anticipated the United States' acquiring the entire Louisiana Purchase and the Mexican Cession. For them the United States ended at the Mississippi River, though they may have assumed or at least hoped for some future

acquisition of land west of the Mississippi, where slavery was already entrenched from St. Louis to the Gulf of Mexico and in lands between what is today Texas and the Pacific Ocean. Even without new territories, the founders created a nation in which about half the states would be slaveholding. Thus, in writing the Constitution, they gave the South a perpetual veto over any constitutional change regarding slavery or race. Ending slavery, making Blacks equal citizens under the law, and enfranchising them on the same basis as Whites was simply constitutionally impossible as long as the slave states remained in the Union.

The Constitution also created a government of limited powers. Virtually all constitutional law from the nation's founding to the New Deal recognized this. After the Constitutional Convention ended, South Carolina's General Charles Cotesworth Pinckney accurately bragged to his state legislature, "We have a security that the general government can never emancipate them, for no such authority is granted and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states" (Elliot 1888/1987, 4:286).[27]

No federal judge, legal scholar, or important political leader, in either 1787 or 1860, would have disagreed with Pinckney's analysis. This would have included Republican activists like Charles Sumner, William H. Seward, and Salmon P. Chase. Lincoln noted in his first inaugural address: "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so. Those who nominated and elected me did so with full knowledge that I had made this, and many similar declarations, and had never recanted them." He then quoted from the 1860 Republican platform:

> the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend. (Basler 1953, 4:262–62)

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27. Chief Justice Taney's opinion in *Strader v. Graham* supported this conclusion, rejecting a claim that enslaved persons in Kentucky had become free by virtue of temporary trips to Indiana and Ohio: "Every state has an undoubted right to determine the *status*, or domestic and social condition, of the persons domiciled within its territory. . . . There is nothing in the Constitution of the United States that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of that state, and could not be influenced by the laws of Ohio." *Strader v. Graham*, 51 U.S. (10 How.) 82, 93–94 (1851). See also Finkelman (1981, 196-204, 222-27, 271-78.

As we consider these statements, we must remember that Abraham Lincoln was the first American president who openly and without reservation hated slavery and claimed he was "naturally antislavery" and believed "if slavery is not wrong, nothing is wrong" (Lincoln to Albert G. Hodges, April 4, 1864, Basler 1953, 7:281). But as a lawyer committed to the Constitution of 1787, he respected the clauses protecting slavery. He had "no inclination" to end slavery where it existed, because he firmly believed he had no constitutional power to do so. He hated slavery, but under the Constitution he was powerless to touch it. That would change only because of secession and the Civil War (Finkelman, 2009a).

The southern founders' commitment to slavery was always clear. None of them argued against slavery at the Constitutional Convention; all voted to protect and empower the institution; and most of them, like Madison, Randolph, the two Pinckneys, and Butler personally owned at least one hundred slaves during their adult lives. With the exception of George Washington and John Dickinson of Delaware, there is no evidence that any of the southern framers were opposed to slavery, and most, like Madison, Randolph, Mason, and the Pinckneys never freed their hundreds of slaves in their lifetimes or in their wills. The northern side of the political question is more complicated. Some northern delegates, most notably Gouverneur Morris, Benjamin Franklin, and Alexander Hamilton, clearly despised slavery. But others, such as the entire Connecticut delegation, were unconcerned about slavery and thus willing to grant it special protection in the Constitution. Connecticut's Oliver Ellsworth, a future chief justice, asserted that because he "had never owned a slave," he would not debate the "morality or wisdom of slavery." But then, without even acknowledging his own hypocrisy, the very next day he endorsed the "wisdom of slavery," telling the convention delegates, "[W]hat enriches a part enriches the whole." If slavery in Georgia, South Carolina, or Virginia made the nation richer, he was willing to give the institution special constitutional protections (Farrand 1966, 2:364, 370–71). His Connecticut colleague Roger Sherman declared his personal disapproval of slavery but refused to condemn it in other states. He argued that "the public good did not require" an end to the African slave trade and "it was expedient to have as few objections as possible" to the new Constitution (Farrand 1966, 2:369). Sherman was unconcerned that people in his own state or other northerners might oppose the Constitution because of its many proslavery provisions. Rather, he was interested only in placating the South, doing so with special constitutional protections for slavery.

This history of the Constitutional Convention raises the question of how much opposition to slavery existed in the North in 1787 and as late as 1861. In the 1780s five northern states had ended or were ending slavery, and many northerners

opposed expanding slavery into some of the western territories, as the Northwest Ordinance demonstrated. Northern opposition to slavery expansion continued right up to the Civil War. Some of this opposition was always morally or ethically based; but some was economic, because White settlers did not want to compete with slave labor. Some was racist. In the lower Midwest, which was initially settled by southerners moving north, there was strong opposition to the presence of free Blacks. Ohio, Indiana, and Illinois put up barriers to the migration of free Blacks and notoriously passed laws harming Blacks. In 1849 Ohio repealed these laws, but in Indiana and Illinois these laws remained in place until the end of the Civil War.[28] Furthermore, in the 1790s and early 1800s many northerners in Congress supported proslavery and anti-Black laws that implemented the proslavery Constitution. These included the 1790 Naturalization Act, only allowing "any alien, being a free white person" to naturalize (Chin and Finkelman 2024); the 1792 Militia Act, banning Blacks from military service; the 1793 Fugitive Slave Law; and the prohibition of any Blacks, slave or free, from working for the US Postoffice (Finkelman 2018b). By the late antebellum period many northerners were much more hostile to slavery, however, and more open to Black civil rights.[29]

But in the secession crisis northerners in Congress lined up to support the Corwin Amendment—what would have been the Thirteenth Amendment had it been ratified—which would have perpetually enshrined the Constitution's protections for slavery: "No amendment shall be made to the Constitution which will authorize or give Congress 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" (Kantrowitz 2010, 1367).[30] The northerners who supported the amendment, including many Republicans, argued that it added nothing new to the Constitution, which they all conceded already protected slavery from legislative abolition; they equally understood the impossibility of an amendment to end slavery. So, they supported this proposed Thirteenth Amendment hoping it would end the crisis of the Union and placate the South. The amendment passed the House and Senate with the necessary two-thirds majority, which included Republican support, just before Lincoln took office, even though seven slave states had already seceded and had no representatives or senators to vote for it. The passage of the amendment

28. These laws, and their repeal in Ohio, are detailed in Finkelman (1986).

29. The changing nature of law in the North with regard to race is detailed in Finkelman (1986).

30. The text of the proposed Thirteenth Amendment – the Corwin Amendment – can be found online at the Gilder-Lehrman Institute of American History, https://www.gilderlehrman.org/history-resources/spotlight-primary-source/proposed-thirteenth-amendment-prevent-secession-1861.

illustrates the difficulty—indeed, the impossibility—of ending slavery through a constitutional amendment at this time. Even without fourteen southern senators and a slew of representatives, two-thirds of a mostly northern Congress was willing, through the Constitution, to explicitly protect slavery *forever*, in part because they believed the Constitution already protected it.

The language of the amendment "implied that Congress did not have the constitutional capacity to emancipate the southern slaves" (Bryant 2003, 524), which is what southerners had argued since 1787, what almost all contemporary constitutional thinkers believed, and what all members of the Supreme Court assumed. In his First Inaugural address Lincoln would reaffirm that this was his understanding of the Constitution, asserting that "such a provision to now be implied constitutional law, I have no objection to its being made express, and irrevocable." (Basler 1953, 4:270) Like many Republicans, Lincoln personally despised this aspect of the Constitution, but he also acknowledged that the Constitution protected slavery where it existed. The events surrounding the Corwin Amendment demonstrate once again that the Constitution gave no power to Congress to touch slavery where it existed and that in 1861 northerners were willing to recommit to that protection through what was theoretically an "unamendable constitutional amendment."

Some modern scholars make abstract arguments, disassociated from constitutional development and US history, that Congress might have indirectly ended slavery by using various constitutional powers. They argue, for instance, that under the commerce clause Congress could have prohibited the interstate movement of slaves or prevented the interstate sale of products produced by slave labor and thereby put enormous economic pressure on the institution of slavery. Similarly, they suggest Congress might have used its taxing power to undermine the economic viability of slavery, though it is utterly unclear how that might have worked, since at the time there were no direct taxes and the Constitution prohibited any export taxes. It is important to remember that more than a half century after the Civil War the nation required a constitutional amendment to successfully institute a federal income tax.[31] Some claim Congress could have used its power to raise armies to draft slaves and thereby emancipate them. But with at least fifteen slave states represented in Congress, it is difficult to imagine how such a law would have passed. Furthermore, given the nature of the Supreme Court, at least until World War I, it is difficult to imagine such a law passing constitutional muster. We need to remember that until World War I, the United States had never had a military draft, except during the Civil War, and even then slaves were not subject to it.

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31. US Constitution, Amendment XVI, ratified February 3, 1913.

At best, a Republican Congress working with a Republican president might have chipped away at slavery in the territories, passed a gradual abolition act for the District of Columbia, and possibly repealed the Fugitive Slave Law (though Lincoln opposed this), leaving slaveowners to recover runaways by asserting their own right of recaption, which in *Prigg v. Pennsylvania* Justice Joseph Story explained they had (Finkelman 1994). Of course, when the Democrats returned to power, all these changes could have quickly been reversed.

Claims that existing constitutional provisions might have theoretically been used to end slavery before the Thirteenth Amendment are fanciful and resemble science fiction. They are divorced from all eighteenth- and nineteenth-century constitutional law and doctrine. In 1860 no federal judges and virtually no one in Congress believed the national government had any power to touch slavery where it existed.[32] Republicans, like Chase, Sumner, Seward, and to a lesser extent Lincoln, had set out arguments for constricting slavery that were constitutionally plausible (Oakes 2021), but none of them could have touched slavery in the fifteen states where it existed, and except for the few thousand slaves in the District of Columbia and the handful in the territories, they could not have brought freedom to the nation's four million slaves when Lincoln took office. Moreover, absent secession, the Democratic majority in the Senate, joined by southern Whigs, could easily have blocked any of them.

While committed to not touching slavery where it existed, Lincoln and his party were dedicated to stopping its spread into the west. But even this goal was constitutionally problematic. In *Dred Scott*, Chief Justice Taney made it quite clear that neither Congress nor the territorial legislatures could prevent southerners from taking their constitutionally protected slave property into all federal territories. Lincoln campaigned against *Dred Scott* in his failed 1858 Senate race and in 1860 when he carried a majority or a plurality of northern voters. But denouncing a Court decision in a campaign is hardly the same thing as overturning it, especially when Lincoln's party did not control the Senate or have any supporters on the Supreme Court.

Absent secession and the Civil War, it seems likely the Supreme Court was about to hold that slaveowners had a constitutional right, under the commerce, the privileges and immunities, and the full faith and credit clauses, to take their slaves to all states in the Union and that the states could not interfere with the property rights of southerners (Finkelman 1981, 324–28). A case raising this issue, *Lemmon v. The People*,[33]

32. This is, of course, why William Lloyd Garrison argued for disunion as the only way to end slavery (Finkelman 2001).

33. 20 N.Y. 562 (1860).

had been winding its way through the New York courts since 1852. It almost certainly would have reached the Supreme Court had Virginia remained in the Union and had there been no Civil War. Justice Samuel Nelson, who was from New York, telegraphed what the Court might do with this case in his concurring opinion in *Dred Scott*. At the very end of his opinion Nelson wrote:

> A question has been alluded to, on the argument, namely: the right of the master with his slave of transit into or through a free State, on Business or commercial pursuits, or in the exercise of a Federal right, or the discharge of a Federal duty, being a citizen of the United States, which is not before us. This question depends upon different considerations and principles from the one in hand, and turns upon the rights and privileges secured to a common citizen of the republic under the Constitution of the United States. When that question arises, we shall be prepared to decide it.[34]

In his "House Divided" speech Lincoln expressed the fear that this would soon happen and "ere long" there would be "another Supreme Court decision, declaring that the Constitution of the United States does not permit a *state* to exclude slavery from its limits." He feared that

> [s]uch a decision is all that slavery now lacks of being alike lawful in all the States. . . . We shall *lie down* pleasantly dreaming that the people of *Missouri* are on the verge of making their State *free*; and we shall *awake* to the *reality*, instead, that the *Supreme* Court has made *Illinois* a *slave* State. (Basler 1953, 2:461, 467)

Lemmon would have been "such a decision," making Lincoln's fear a reality.

A remade Supreme Court could have overturned *Dred Scott*, but how would changes on the Court have occurred? When Lincoln became president, the recent death of Justice Peter V. Daniel had created a vacancy on the Court, and only one justice, John McLean, supported the power of Congress to stop the spread of slavery into the territories. McLean died shortly after Lincoln took office, giving Lincoln two seats to fill. Justice John A. Campbell of Alabama resigned from the Court just before the Civil War began. Without secession, however, Campbell would have remained on the Court, perhaps until his death in 1889. Taney died at the end of Lincoln's first term, which gave the president a third seat to fill, assuming Campbell remained on the bench. Thus, Lincoln could certainly not have remade the Court

34. *Dred Scott* at 468. See Finkelman (1981, 285–338).

during his first term. We cannot even begin to guess whether Lincoln would have had a second term without the Civil War. In 1861, when Lincoln took office, there was no reason to believe he would even be president after March 4, 1865, as no president had won a second term since Andrew Jackson in 1832. Thus, it seems likely *Dred Scott* would have remained law for some time.

As emphasized in this article, the fifteen slave states in 1860 could have blocked any amendment to end slavery. As the events of 1861–1865 demonstrated, those states were deeply and unalterably committed to slavery. Shortly before the Civil War began, Confederate vice president Alexander Stephens made clear what mattered most to the Confederacy:

> Our new government is founded upon . . . its foundations are laid, its corner-stone rests, upon the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition. This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth. (Cleveland 1886, 717–29)

It is utterly impossible to imagine that the South, which was creating the first White supremacist nation in world history—a precursor of Nazi Germany—would have ever voluntarily participated in ending slavery.

Without question the South remained unalterably committed to slavery. Eleven slave states enthusiastically seceded because the nation elected a president who considered slavery morally wrong, and believed that slavery should at some point, be put "in the course of ultimate extinction" (Basler 1953, 2:461). Indeed, South Carolina noted this statement from Lincoln's "House Divided" speech in explaining why it was leaving the Union:

> A geographical line has been drawn across the Union, and all the States north of that line have united in the election of a man to the high office of President of the United States, whose opinions and purposes are hostile to slavery. He is to be entrusted with the administration of the common Government, because he has declared that that "Government cannot endure permanently half slave, half free," and that the public mind must rest in the belief that slavery is in the course of ultimate extinction.[35]

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35. *Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union and the Ordinance of Secession*, available at the Gilden-Lehrman Institute of American History, https://www.gilderlehrman.org/collection/glc00373.

These states initiated a devastating and costly war rather than risk the possibility that slavery might be put on the road to extinction in some far distant future.

This history underscores how the Constitution effectively protected slavery in the nation, from 1787 until the Civil War. Even in the face of war and a constitutional amendment to end slavery, only two loyal slave states—Maryland and Missouri—and only on the eve of national emancipation, were willing to end slavery. Kentucky and Delaware adamantly refused to end slavery, and in fact would not ratify the Thirteenth Amendment until the 20th century (Chin and Abraham 2008, 28). Absent secession, there existed no constitutional path to emancipation and no political route to create such a path.

V. CONCLUSION

The 1787 Constitution gave explicit recognition and multiple protections to only one form of property: slaves. It exempted only one type of international commerce from congressional jurisdiction: the African slave trade. It guaranteed that the free states could not interfere with ownership rights of only one kind of property: fugitive slaves. Only in the fugitive slave clause did the US Constitution limit states from regulating the status of all people within their jurisdiction. It did so to prevent slaves from becoming free persons.[36] As with the commerce clause, which gave Congress the power to regulate all international commerce, except the slave trade, these and other clauses carved out exceptions to the powers of Congress and the states that always favored slavery. Congressional apportionment – and the allocation of votes in the electoral college – took into account only one form of privately held property: slaves. The Fifth Amendment, ratified in 1791, precluded taking private property without "just compensation" and was added to the Constitution to protect the people from arbitrary takings of their property. This would have included personal and chattel property, including slaves. It would have been technically possible to "take" and free all slaves, giving "just compensation"—assuming, of course, that such a law could be passed by Congress, signed by the president, and upheld by the Supreme Court. But such a policy would have bankrupted the nation.

The only way to end slavery in the United States was through a constitutional amendment. But that route was utterly impossible as long as fifteen or more slave states were in the Union. At the Constitutional Convention the southern framers gained what they wanted: an ironclad, perpetual protection for slavery under

36. The fugitive slave clause specifically provided that states could not pass any "Law or Regulation" affecting the status of a fugitive slave.

the national government. Their political descendants would throw that away in their ill-considered and hasty decisions to secede and then launch a military attack on the United States. We can perhaps thank Jefferson Davis, Alexander Stephens, Robert E. Lee, and the other Confederate leaders for their impulsive behavior and their foolish military policies because it was they, not Abraham Lincoln, who put slavery on the road to extinction.

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