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But What About Slavery?

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The United States was not founded in 1789, and the Constitution is not our founding document. The United States was founded in 1776, and our founding document is the Declaration of Independence that Congress unanimously adopted. The Declaration officially announced the American theory of government, which can be summarized as “first come rights; and then comes government.”¹ Specifically, the Declaration affirmed the individual, natural, and inalienable rights to life, liberty, and the pursuit of happiness. It then affirmed that “to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”

To this, today’s vocal critics of the United States—both its founding and its Constitution—immediately reply, “But what about slavery?”² Unknowingly, and sometimes knowingly, these critics are accepting as accurate Chief Justice Roger Taney’s characterization of the Declaration and his interpretation of the Constitution in the notorious 1857 Supreme Court decision *Dred Scott v. Sandford*.

Dred Scott denied that black Americans could claim the constitutional protections that citizenship afforded. Writing for the majority, Taney infamously asserted that the Declaration’s ringing affirmation of equal natural rights to life, liberty, and the pursuit of happiness did not apply to *all* men at the time it was written:

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the

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Declaration of Independence, and when the Constitution of the United States was framed and adopted.³

What was this public opinion about persons of African descent? According to Taney,

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that *they had no rights which the white man was bound to respect*; and that the negro might justly and lawfully be reduced to slavery for his benefit.⁴ (Emphasis added.)

Are today's critics of the American founding right to adopt Taney's reading of the Declaration and the Constitution? I think they are decidedly wrong.

Public meaning originalism claims that the meaning of the Constitution is the meaning it had at the time of its adoption or amendment, whether in 1789, when the Constitution was ratified, or in 1868, when the 14th Amendment was passed.⁵ In this chapter, I begin by identifying the original public meaning of the Declaration of Independence. In so doing, I reframe the founding from how critics have mischaracterized it. I then turn to the original public meaning of the Constitution to consider how consistent it was with the principles the Declaration affirmed.

None of the facts on which I rely are contested by historians, but some have been downplayed or largely forgotten. Proper attention to these neglected facts will counter the negative spin that has been put on the founding and the Constitution. Despite the failure to abolish slavery in 1776, studying the original public meaning of the Declaration and its relationship to the Constitution shows that when it comes to the founding, Americans today still have much to be proud of.

Chief Justice Taney's Interpretation of the Declaration

On their face, the Declaration's words seem completely hostile to the institution of slavery. So, like today's critics of our founding, it was necessary for Taney to explain them away. In his opinion for the Court in *Dred Scott*, Taney admitted that the "general words" of the Declaration "would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood."⁶ In other words, Taney affirmed that by 1857, the public meaning of the Declaration's words was inimical to slavery.

Attributing the public meaning of the Declaration's words in 1857 to the Declaration's meaning in 1776, Taney contended, would be to misinterpret its original meaning as the founders understood it. In 1776, he wrote, "it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration." This was because "if the language, as understood in that day," had included enslaved persons, "the conduct of the distinguished *men who framed* the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted."⁷ (Emphasis added.)

In short, Taney admitted that the Declaration's words were flagrantly inconsistent with the institution of slavery. The only way to render the Declaration consistent with slavery was to appeal to its drafters' original intentions.⁸ In this way, Taney's proslavery reading of the Constitution in *Dred Scott* started with claiming a proslavery reading of the Declaration—a reading the two dissenting justices in *Dred Scott* vehemently disputed.

The issue in *Dred Scott* did not concern the citizenship of enslaved blacks. It concerned whether free blacks could ever be United States citizens. Taney's analysis of the founding was designed to support his opinion that persons of African descent, regardless of whether they were free or even whether they were deemed by a state to be a citizen, could never be a "citizen" of the United States and entitled to the fundamental privileges and immunities that such citizenship entailed:

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After such an uniform course of legislation as we have stated, by the colonies, by the States, and by Congress, running through a period of more than a century, it would seem that to call persons thus marked and stigmatized, “citizens” of the United States, “fellow-citizens,” a constituent part of the sovereignty, would be an abuse of terms.⁹

In sharp contrast, the two dissenting justices, John McLean and Benjamin Curtis, claimed that, while enslaved blacks were undeniably excluded from the polity at the founding, free blacks were considered a part of “the people” who established the Constitution. McLean wrote, “I admit the Government was not made especially for the colored race, yet many of them were citizens of the New England States, and exercised, the rights of suffrage when the Constitution was adopted.”¹⁰

Curtis added more details:

An argument from speculative premises, however well chosen, that the then state of opinion in the Commonwealth of Massachusetts was not consistent with the natural rights of people of color who were born on that soil, and that they were not, by the Constitution of 1780 of that State, admitted to the condition of citizens, would be received with surprise by the people of that State who know their own political history. It is true, beyond all controversy that persons of color, descended from African slaves, were by that Constitution made citizens of the State, and such of them as have had the necessary qualifications have held and exercised the elective franchise, as citizens, from that time to the present.¹¹

Curtis then quoted from several state constitutions. In New Hampshire, the right to vote was conferred on “every inhabitant of the State having the necessary qualifications,’ of which color or descent was not one.” New York “gave the right to vote to ‘every male inhabitant, who shall

have resided,' &c., making no discrimination between free colored persons and others." In New Jersey, the right to vote extended to "all inhabitants of this colony, of full age, who are worth £50 proclamation money, clear estate."¹²

It was true, he admitted, that sometime after the founding, some Northern states imposed racial restrictions on voting, as Taney had alleged. However, Curtis contended,

these changes can have no other effect upon the present inquiry, except to show, that before they were made, no such restrictions existed, and colored in common with white persons, were not only citizens of those States, but entitled to the elective franchise on the same qualifications as white persons, as they now are in New Hampshire and Massachusetts.¹³

Curtis then turned his attention to Taney's claim that those who drafted the Declaration would have been hypocrites had they intended its abstract principles to apply to persons of African descent:

My own opinion is, that a calm comparison of these assertions of universal abstract truths, and of their own individual opinions and acts, would not leave these men under any reproach of inconsistency; that the great truths they asserted on that solemn occasion, they were ready and anxious to make effectual, wherever a necessary regard to circumstances, which no statesman can disregard without producing more evil than good, would allow; and that it would not be just to them, nor true in itself, to allege that they intended to say that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts. But this is not the place to vindicate their memory.¹⁴

All that needed to be demonstrated for purposes of the case was that written state constitutions and political practice “show, in a manner which no argument can obscure, that, in some of the original thirteen States, free colored persons, before and at the time of the formation of the Constitution, were citizens of those States.”¹⁵

It is worth highlighting that two justices of the Supreme Court contested Taney’s historiography on the spot. Noting this avoids the charge that we are anachronistically superimposing our judgment of Taney’s erroneous interpretation of the revolutionary period onto 19th-century society by showing that in 1857, not everyone shared Taney’s understanding of the founding. Likewise, the facts McLean and Curtis related undermine the claim that we are similarly imposing a modern and color-blind interpretation of rights onto the founding itself.

McLean and Curtis’s view of the Declaration and founding has been borne out by respected historians of today. To see why, let’s begin with how the “abstract truths” in the Declaration came to be there.

Drafting the Declaration

On June 11, 1776, the Continental Congress appointed a committee to draft a declaration to effectuate Richard Henry Lee’s motion

that these United Colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British Crown: and that all political connexion between them and the state of Great Britain is, and ought to be, totally dissolved.¹⁶

This was the legal purpose of the Declaration. In addition, as John Hancock later put it, such a declaration would provide “the Ground & Foundation of a future Government.”¹⁷

The Committee of Five consisted of the senior Pennsylvanian Benjamin Franklin, Roger Sherman of Connecticut, New York's Robert Livingston, Massachusetts's stalwart champion of independence John Adams, and a rather quiet 33-year-old Virginian named Thomas Jefferson. After a series of meetings to decide on the outline of the Declaration, the committee assigned Jefferson to write the first draft.¹⁸

Jefferson did not have much time. With no executive, the war was being run entirely by congressional committees, and the business of waging war pressed heavily on its members. Over a six-month period, Jefferson served on some 34 different committees, which kept him very busy. On June 17, for example, the committee overseeing the Canadian campaign submitted two reports to Congress, both in Jefferson's own hand. Two members of the Virginia delegation had left Philadelphia, increasing the pressure on Jefferson to attend the sessions of Congress.¹⁹

So, with the press of other matters, Jefferson did not have three leisurely weeks to write. He had merely a few days. Needing to work fast, he had to borrow. Historian Pauline Maier tells us that Jefferson had two sources in front of him from which to crib. The first was a list of grievances in his draft preamble for the Virginia constitution—a list that was strikingly similar to the first group of charges against the king that ended up in the Declaration. The second was a preliminary version of the Virginia Declaration of Rights that George Mason had drafted in his room at the Raleigh Tavern in Williamsburg, the city where Virginia's provincial convention was being held concurrently.²⁰

Mason's May 27 draft proved handy indeed in composing the Declaration's famous preamble. Its first two articles present two fundamental ideas. The first idea is that *first come rights and then comes government*. Here is how Mason expressed it:

That all men are born equally free and independant, and have certain inherent natural rights, of which they cannot, by any compact, deprive or divest their posterity; among which are, the enjoyment of life and liberty, with the means of acquiring

and possessing property, and pursuing and obtaining happiness and safety.²¹

So, in Mason's draft, not only do all persons have "certain . . . natural rights" of life, liberty, and property, but these rights cannot be taken away "by any compact." These inherent individual natural rights, of which the people cannot divest their posterity, are therefore retained by them. Mason's words would become even more canonical than Jefferson's more succinct version in the Declaration of Independence, as variations were incorporated into several state constitutions. Later, James Madison proposed they be added to the preamble of the Constitution by way of an amendment. That did not happen, but Mason's description of retained rights would be echoed in the Ninth Amendment and, much later, in the privileges or immunities clause of the 14th Amendment.

Article 2 of Mason's draft then identified the persons who compose a government as the *servants* of the sovereign people, rather than their masters: "That all power is vested in, and consequently derived from the people; that magistrates are their trustees *and servants*, and at all times amenable to them."²² (Emphasis added.) As trustees and servants, those people who serve as governing magistrates are to respect the inherent natural rights retained by the people.

Jefferson then compressed all this into 55 compelling words:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

Adams later recalled that Jefferson took only a day or two to write the first draft, which was then turned over to the committee for its feedback before it was submitted to Congress. Although this draft was then heavily

edited and shortened by Congress sitting as a committee of the whole, its preamble was left pretty much as Jefferson had submitted it.

The developments that followed undercut the claim by Taney and today's critics that the Declaration of Independence did not mean what it said.

The Declaration's Antislavery Implications

Taney's history of the founding, like the history propounded by those who today criticize the Constitution, is deeply misleading. For a start, the institution of chattel slavery was as old as mankind, prevalent worldwide, and by no means limited to the enslavement of African people. In 1776, the United States was on the leading edge of the modern movement to abolish chattel slavery.

As Princeton University historian Sean Wilentz has noted in his important book *No Property in Man: Slavery and Antislavery at the Nation's Founding*, "In 1775, five days before the battles of Lexington and Concord, ten Philadelphians, seven of them Quakers, founded the first antislavery society in world history, the Society for the Relief of Free Negroes Unlawfully Held in Bondage."²³ This group was later reorganized as the Pennsylvania Society for Promoting the Abolition of Slavery.

In January 1777, just five months after the signing of the Declaration, the Vermont Republic was founded as an independent state. By declaring that "all men are born equally free and independent,"²⁴ its constitution became the first constitution in human history to abolish slavery.²⁵ But Vermont did not invent this language. It was borrowed from Mason's draft of the Virginia Declaration of Rights, quoted above. Massachusetts also included Mason's language in its constitution. In three cases decided between 1781 and 1783, four years before the United States Constitution was drafted, the Massachusetts high court relied on this language to hold chattel slavery unconstitutional in that state.

This timeline is important. In 1776, when the United States was founded, the legal institution of slavery existed in every state in the union.

But by 1787, when the Constitution was being written in Philadelphia, five of these states—Connecticut, Massachusetts, New Hampshire, Pennsylvania, and Rhode Island—had abolished or begun to abolish slavery. Then, in 1791, Vermont became the 14th state of the union, bringing the count of free states to six. In 1799, New York began the process of emancipation by enacting a gradual abolition law. Five years later, New Jersey followed with its own gradual emancipation law.

During the same summer that the Philadelphia convention was deliberating over a new constitution, in New York, the Congress formed under the Articles of Confederation enacted An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, popularly known as the Northwest Ordinance. Adopted on July 13, 1787, the ordinance stated, “There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted.” It was this language that the Republicans in Congress would later copy when drafting the 13th Amendment to abolish slavery nationwide.²⁶

Thus, slavery was banned in 1787 from a vast area of the United States, which included the future states of Illinois, Indiana, Michigan, Ohio, Wisconsin, and about a third of Minnesota. In a sign of the times, the Northwest Ordinance was approved by delegations from every state, including every delegate of every slave state.

True, the Northwest Ordinance contained its own fugitive slave clause. But its wording did not reference slavery explicitly. Instead, it referred to “any person escaping into the same, from whom labor or service is lawfully claimed *in any one of the original States*.” (Emphasis added.) This reference to “the original States” is significant, for it indicates that going forward, slavery was assumed to exist within only the original states that had not yet abolished it, as opposed to any future states.²⁷

This is a remarkable amount of progress toward implementing the political theory of the Declaration in a very short period—a mere 11 years! Yet as we all know, this progress was stopped in its tracks.

Historians generally agree that what stymied this antislavery tide was Eli Whitney's invention of the cotton gin in 1791. By mechanically separating the cotton fiber from the sticky seeds, which formerly had to be done by hand, the plantation farming of cotton using slave labor became enormously profitable. Later, the invention of the steam engine made it feasible to cheaply transport cotton north via the Mississippi and along the coast.

The Constitution was written prior to these technological developments, when slavery was widely viewed as a dying economic institution. After technology made plantation cotton farming highly lucrative, however, for the first time, a proslavery ideology arose in America that increased in its vehemence over time.

But what matters for evaluating the implications of the Declaration adopted by Congress in 1776 for the Constitution of 1787 is not what came soon after the Constitution was drafted. What matters is that the Constitution was written *before* this change occurred. It was written on the cusp of half the states in the union turning away from slavery and the Northwest Ordinance barring slavery in the territories from which six future states would be formed. It was written before an explicitly proslavery ideology arrested what seemed like rapid progress toward a national consensus that was fully consistent with the Declaration's stated principles. In short, when the Constitution was written in 1787, the United States was still on the leading edge of the movement to end the worldwide practice of chattel slavery.

To be sure, some slaveholders, especially in the Deep South, adamantly insisted on preserving slavery. And even those in the South who conceded slavery's injustice had deeply self-interested motives to kick the can of its demise down the road. Much of their wealth was bound up in their slaves. Some of them feared violent retaliation by those persons they had enslaved. But the point remains that at the moment the Constitution was drafted, these resisters were thought to be on the wrong side of history. And they were on the wrong side of history in the long run thanks, in part, to how the Constitution was worded.

Refusing to Endorse Property in Man

The text of the original Constitution reflects this remarkable progress. Nowhere in the document is slavery mentioned by name. This reflects the intellectual consensus that slavery was unjust and would inevitably be no more. Nor, contrary to Taney's claim, does the document "expressly" endorse the morality of slavery or the concept of property in man.²⁸

In *No Property in Man*, Wilentz details the lengths to which states from the Deep South went to include an expressed endorsement of slavery in the Constitution. At every turn, a coalition of antislavery Northern delegates and members of the Virginia delegation denied their efforts.

For example, the initial draft of what became the fugitive slave clause of Article IV referred to enslaved people by the same language employed by the Northwest Ordinance: persons "from whom labor or service is *lawfully* claimed" in one of the original states.²⁹ (Emphasis added.) As Wilentz notes, with this language, "the slave states' property laws would be respected without compelling the free territories to acknowledge the legitimacy of property in man."³⁰ The day after an extensive debate on the propriety of this clause, Pierce Butler of South Carolina replaced the phrase "lawfully claimed" with the phrase "shall be delivered up to the person *justly* claiming their service or labor."³¹ (Emphasis added.) Because the term "justly" would imply not merely the legality but also the justice or morality of the claim to service or labor, the antislavery coalition resisted it.

The delegate who spoke out most vociferously against slavery at the convention was Pennsylvania's Gouverneur Morris, who delivered an impassioned speech on what he called the "nefarious institution" of slavery. Morris insisted that it was "the curse of heaven on the States where it prevailed." Given that Morris was tasked with writing the actual text of the Constitution as a member of the Committee on Style, it would be surprising if the text of the Constitution expressly endorsed the concept of property in man as Taney claimed.³²

In Morris's hands, the term "justly" was deleted from the fugitive slave clause. But the Committee on Style's draft language still began "No

person *legally* held to service or labour in one state.” (Emphasis added.) This, too, proved to be unacceptable to the body of the convention when it considered the Constitution’s final wording. The language was revised to instead read “No person held to Service or Labour in one State, *under the Laws thereof.*” (Emphasis added.) In his notes, Madison explained that this change was made “in compliance with the wish of some who thought the term *legal* equivocal, and favoring the idea that slavery was legal in a moral view.”³³

In the 19th century, some abolitionists would mobilize the phrase “under the laws thereof” to argue that the Constitution adopted the view of “freedom national” and “slavery local.” This distinction was first enunciated by antislavery constitutionalist and Free-Soil Senator Salmon Chase of Ohio in an 1850 Senate speech, which was later published as a pamphlet, titled “Union and Freedom, Without Compromise.” When it came to the exercise of its national powers, Chase contended, the federal government was fully empowered to end slavery in its domain. The only protection afforded to slavery by the Constitution was that “any one of the original States”—as the Northwest Ordinance put it—could continue to maintain it solely as a matter of their positive law.³⁴

Chase had been sent to the Senate in 1850 after an election had given the Free-Soil Party the swing vote between the Whigs and the Democrats in the Ohio legislature. The Free-Soilers made a deal to give the Democrats control of the legislature in exchange for abolishing Ohio’s discriminatory black code and naming Chase a senator. (Some Ohio Whigs would never forgive Chase for making this deal; they would later undercut his candidacy for the 1860 Republican Party presidential nomination, which went to Abraham Lincoln.)

Two years later, a similar deal struck between the Free-Soilers and Massachusetts Democrats sent Charles Sumner to join Chase in the Senate. In 1852, Sumner presented this “Freedom National; Slavery Local” position at length on the floor of the Senate. Sumner’s speech received far more attention than had Chase’s. After meticulously parsing the debates in Philadelphia, Sumner concluded,

This record demonstrates that the word “person” was employed in order to show that slaves, everywhere under the Constitution, were always to be regarded as persons, and not as property, and thus to exclude from the Constitution all idea that there can be property in man. Remember well, that Mr. Sherman was opposed to the [fugitive slave] clause in its original form, “as acknowledging men to be property;” that Mr. Madison was also opposed to it, because he “thought it wrong to admit in the Constitution the idea that there could be property in man;” and that, after these objections, the clause was so amended as to exclude the idea. But Slavery cannot be national, unless this idea is distinctly and unequivocally admitted into the Constitution.³⁵

Instead, slavery was a creature entirely of local law, to be tolerated but in no way endorsed or expanded by the Constitution. This position eventually became the organizing principle of the Republican Party, which Chase helped found. (In 1856 he was elected the governor of Ohio as a Republican.)

The original Constitution also affirmed Congress’s power to abolish the slave trade with other nations, though Congress postponed any exercise of this power for 20 years. At the time, antislavery activists considered this a major blow against slavery. In 1808, President Jefferson proposed the abolition of that trade, and Congress swiftly acted to do so.

What power was Congress exercising when it abolished the slave trade? According to Edmund Randolph, the first attorney general, it was Congress’s power “to regulate commerce with foreign Nations, and among the several states, and with the Indian tribes.”³⁶ As Randolph explained to the Virginia ratification convention,

To what power in the general government is the exception made respecting the importation of negroes? Not from a general power, but from a particular power expressly enumerated. This is an exception from the power given them of regulating commerce.³⁷

Consistent with this interpretation, prior to the abolition of the international slave trade in 1808, Congress exercised its commerce power to enact the Slave Trade Act of 1794, which regulated the international slave trade by barring American flagships from importing or exporting enslaved laborers abroad.³⁸

On this reasoning, however, the commerce clause in the original Constitution also gave Congress the power to abolish the *interstate* slave trade. In his 1850 speech to the Senate, Chase made this argument regarding the commerce clause, adding, “Is it less cruel, less deserving of punishment, to tear fathers, mothers, children from their homes and each other, in Maryland and Virginia, and transport them to the markets of Louisiana or Mississippi?”³⁹

Then there is the wording of the fugitive slave clause in Article IV. Unlike the Constitution’s full faith and credit clause and the republican guarantee clause, the fugitive slave clause lacked a congressional enforcement power. As a young attorney representing fugitive slaves in the 1830s, Chase contended that Congress lacked any enumerated power to enforce what amounts to a treaty obligation of one sovereign state to another. Justice Joseph Story rejected this argument in the 1842 Supreme Court case *Prigg v. Pennsylvania*, which found that Congress could direct the federal judiciary to protect the rights of slave owners seeking to recapture escaped slaves.⁴⁰ However, he did so by interpreting the Constitution’s necessary and proper clause even more capaciously than did the New Deal and Warren Courts of the 20th century.

Furthermore, Article IV included the enumerated power of Congress to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁴¹ Congress also had an enumerated power “to exercise exclusive Legislation in all Cases whatsoever, over” the District of Columbia.⁴² These clauses seem obviously to grant Congress the same power to abolish slavery in the territories, on federal government installations, and in the District of Columbia as the seven original states that chose to abolish slavery prior to the Civil War.

The only constitutional objection to this federal power to abolish slavery in these locales was formulated in 1836 in a report by the House Select Committee upon the Subject of Slavery in the District of Columbia, chaired by Representative Henry Pinckney of South Carolina.⁴³ In its report, the committee claimed that Congress's right to legislate within the district, though exclusive, was "evidently qualified" by the due process clause of the Fifth Amendment.⁴⁴

According to this theory, the due process clause's protection of "life, liberty, and *property*" (emphasis added) limited federal power over the district by preventing it from denying slaveholders of their rightful property in their slaves. This was exactly the argument that Taney would employ some 20 years later in *Dred Scott* in extending the argument to Congress's power over the territories. But, as I have shown, Taney was making it up in *Dred Scott* when he contended that "the right of property in a slave is distinctly and expressly affirmed in the Constitution."⁴⁵

McLean also denied Taney's claim in his dissent, explaining that "we know as a historical fact, that James Madison, that great and good man, a leading member in the Federal Convention, was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man." McLean might have added that Madison was far from alone in this endeavor. Wilentz shows that, with respect to a majority of the delegates to the Constitutional Convention, McLean was right and Taney was wrong. These delegates went to great lengths to prevent the text of the Constitution from expressly contradicting the Declaration's principles.⁴⁶ That effort would later prove useful to anti-slavery constitutionalists who would assert federal power to limit the spread of slavery as well as to abolish it where the federal government had full authority.

The Republican Party platform of 1860 announced the antislavery policies that Chase had long contended were entirely constitutional. In reading these planks, notice the emphasis on the original meaning of the Constitution's text—that is, "the explicit provisions of that instrument itself, [and its] contemporaneous exposition":

2. That the maintenance of the principles promulgated in the Declaration of Independence and embodied in the Federal Constitution, “That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed,” is essential to the preservation of our Republican institutions; and that the Federal Constitution, the Rights of the States, and the Union of the States must and shall be preserved. . . .

7. That the new dogma that the Constitution, of its own force, carries slavery into any or all of the territories of the United States, is a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with contemporaneous exposition, and with legislative and judicial precedent; is revolutionary in its tendency, and subversive of the peace and harmony of the country.

8. That the normal condition of all the territory of the United States is that of freedom: That, as our Republican fathers, when they had abolished slavery in all our national territory, ordained that “no persons should be deprived of life, liberty or property without due process of law,” it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and *we deny the authority of Congress, of a territorial legislature, or of any individuals, to give legal existence to slavery in any territory of the United States.*⁴⁷ (Emphasis added.)

Republicans did not believe that the Constitution gave the federal government the power to abolish slavery in any of the six original states in which it still existed; to accomplish this they would come to support an

amendment to abolish slavery by 1865. Yet in 1860, their pledge to use federal power to resist the expansion of slavery into the territories, bar slavery on federal installations, and abolish slavery in the District of Columbia (which they achieved in 1862) was perceived by the Southern states to be so grave a threat to their system of human bondage that they seceded from the Union before the new administration could take office. That is how much power the Southerners believed the Constitution gave an antislavery national government to restrict slavery. So they got out while the getting was good.

If the original Constitution was as proslavery as the abolitionist William Lloyd Garrison and Taney had claimed, and as is widely preached today, these fears would have been entirely unwarranted. There would have been no need for the Southern states to secede. But the Southerners were right to be afraid. Immediately after taking office, the Republicans, now unopposed due to the absence of Southern representatives, moved swiftly to enact their policies using the powers granted to Congress by the original Constitution.⁴⁸

As we know, the secession of the Southern slave states led directly to a terrible war that ended slavery in the United States. All this was made possible by the language of the Constitution, which was deliberately shaped by the founding principles of the Declaration of Independence.

Original Meaning Versus Implementation

In the spring of 1851, Frederick Douglass publicly changed his stance on the Constitution, repudiating Garrison's reading that the Constitution was "a covenant with death" and "an agreement with hell" and joining the ranks of the antislavery constitutionalists. In 1860, Douglass was invited to debate the question whether the Constitution was proslavery or antislavery. In his remarks, Douglass took care to distinguish between the *Constitution* of the United States and the *government* of the United States.⁴⁹

In thinking about the original Constitution today, we would be wise to heed Douglass's framing of the issue. The question, he said,

is not whether slavery existed in the United States at the time of the adoption of the Constitution; it is not whether slaveholders took part in the framing of the Constitution; it is not whether those slaveholders, in their hearts, intended to secure certain advantages in that instrument for slavery; it is not whether the American Government has been wielded during seventy-two years in favour of the propagation and permanence of slavery; it is not whether a pro-slavery interpretation has been put upon the Constitution by the American Courts—all these points may be true or they may be false, they may be accepted or they may be rejected, without in any wise affecting the real question in debate.⁵⁰

According to Douglass, the real question is, "Does the United States Constitution guarantee to any class or description of people in that country the right to enslave, or hold as property, any other class or description of people in that country?"⁵¹ In his answer, Douglass adopted a version of the "original meaning" method of interpretation developed by abolitionist Lysander Spooner in response to activist Wendell Phillips's 1844 pamphlet *The Constitution: A Pro-Slavery Compact; or, Extracts from the Madison Papers, Etc.* As its subtitle reflects, in this tract, Phillips relied on evidence of the original *intentions* of the framers in Philadelphia.⁵²

Douglass specifically rejected the original intent approach of those he called "the Garrisonians":

It should also be borne in mind that the *intentions* of those who framed the Constitution, be they good or bad, for slavery or against slavery, are respected so far, and so far only, as we find those intentions plainly stated in the Constitution. It would be the wildest of absurdities, and lead to endless confusion

and mischiefs, if, instead of looking to the written paper itself, for its meaning, it were attempted to make us search it out, in the secret motives, and dishonest intentions, of some of the men who took part in writing it. *It was what they said that was adopted by the people, not what they were ashamed or afraid to say, and really omitted to say.*⁵³ (Emphasis added.)

Douglass was able to rely on the Declaration's principles when interpreting the text of the Constitution because a majority of the delegates who framed the Constitution went to great lengths to avoid wording that was inconsistent with those abstract principles. But what about the well-known "compromises" with the institution of slavery that did make it into the Constitution? Lest I be accused of gilding the lily, it is important to acknowledge where the founders did go wrong.

Slavery and the Founding

In this chapter, I have only scratched the surface of how the original Constitution contributed to the ultimate demise of slavery. For example, I did not discuss the important role federalism played. Before concluding, however, let me offer three important caveats.

To begin, while the Constitution's original meaning was not proslavery, neither was it *antislavery*. By this I mean the original meaning of the Constitution did not make slavery unconstitutional, as abolitionists such as William Goodell, Gerrit Smith, Spooner, and Joel Tiffany argued. Rather, as Chase contended, the Constitution gave an antislavery national government enough power to put slavery on the road to its extinction.

Second, we cannot deny that the Constitution left slavery as it found it in the original states where it still existed in 1789. Contrary to Spooner, slavery was not unconstitutional under the original Constitution. But to again paraphrase Chase, the original Constitution also gave the federal

government ample power to confine slavery within the borders of these states, prevent its further expansion, and indirectly undermine its continued existence.

Slavery grew more powerful in the antebellum period not because of its endorsement by the Constitution but because of the political forces that supported its existence and expansion and how the structure of the original Constitution allowed these forces to dominate the national government. This political domination was abetted by allowing Southern states to count each of their slaves as three-fifths of a person for purposes of representation in Congress, which also enhanced their power in the Electoral College. And it was the president, with the advice and consent of the Senate, who chose the justices of the Supreme Court. Thus, all three branches came under the sway of what antislavery activists called the “Slave Power.” This was indeed one of several structural flaws in the original Constitution.

Although the South received less federal representation than it could have achieved if slaves had been counted as full persons, the three-fifths compromise with the slave states still proved disastrous when the economics of slavery changed markedly after the invention of the cotton gin. It enabled the Slave Power to thwart any use of federal power to undermine slavery. But the three-fifths clause cannot take all the blame. It was not responsible for the Northern Democrats, and not a few Northern Whigs, who marched in political lockstep with Southern slaveholders, in some cases due to their profiting by trading the products of slave labor. These people, not the original Constitution, are to blame for failing to utilize the powers that the Constitution gave the national government to all but abolish slavery.

A final and important caveat: Opposing slavery was not the same as rejecting racism or white supremacy. For example, slavery could be opposed because it was thought to compete unfairly with free white labor. Many who opposed slavery also favored the “colonization” of freed slaves in western Africa because they believed racial integration was undesirable, impractical, or both. If the 13th Amendment was needed to

abolish slavery, the 14th and 15th Amendments were needed to combat the system of coercive white supremacy that remained embedded after slavery's demise. But neither should we forget that many opponents of slavery, like Chase, were motivated by liberal convictions regarding racial equality.

Ultimately, the founding's achievements—both the Declaration and the Constitution—proved immensely valuable in combating the moral scourge of slavery. At the 250th anniversary of the Declaration of Independence, Americans should be far more aware of both antislavery constitutionalism and how the antislavery Republican Party amended the Constitution to end slavery and then amended it again to combat white supremacy. But so too should we be far more aware of how much the founding generation opposed slavery in principle and planted the seeds of its undoing in the text of the original Constitution they drafted and ratified.

The abolition of slavery was an accomplishment of which Americans should be proud. And it was greatly aided and abetted by the Declaration of Independence. Critics of the Declaration should think twice before they adopt the views of Roger Taney as their own.

Notes

1. See Randy E. Barnett, "The Declaration of Independence and the American Theory of Government: 'First Come Rights, and Then Comes Government,'" *Harvard Journal of Law & Public Policy* 42, no. 1 (2019): 23–28, <https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2019/02/Barnett-FINAL.pdf>.

2. See, for example, Robert G. Parkinson, "You Can't Tell the Story of 1776 Without Talking About Race and Slavery," *Time*, July 4, 2021, <https://time.com/6077468/united-states-1776-racism-slavery/>. ("Slavery and arguments about race were not only at the heart of the American founding; it was what united the states in the first place.")

3. *Dred Scott v. Sandford*, 60 US 393, 407 (1857).

4. *Dred Scott*, 60 US at 407.

5. For an overview of the theory of originalism and its development since the 1980s, see Randy E. Barnett and Evan Bernick, "The Letter and the Spirit: A Unified Theory of Originalism," *The Georgetown Law Journal* 107, no. 1 (2018): 1–55, <https://www>.

law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2018/12/The-Letter-and-the-Spirit-1.pdf.

6. *Dred Scott*, 60 US at 410.
7. *Dred Scott*, 60 US at 410.
8. Ironically, when today's critics echo Taney's claim, they are adopting original intent originalism, a version of originalism that was widely criticized by non-originalists and has been abandoned by most originalists. See Barnett and Bernick, "The Letter and the Spirit," 9-10, 45-46.
9. *Dred Scott*, 60 US at 421.
10. *Dred Scott*, 60 US at 537 (McLean, J., dissenting).
11. *Dred Scott*, 60 US at 574 (Curtis, J., dissenting).
12. *Dred Scott*, 60 US at 574.
13. *Dred Scott*, 60 US at 574.
14. *Dred Scott*, 60 US at 574-75.
15. *Dred Scott*, 60 US at 575. The definition of American citizenship was left largely to individual states until the Civil Rights Act of 1866 and the passage of the 14th Amendment. See Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (W. W. Norton, 2019), 3, 63, 70.
16. Worthington Chauncey Ford, ed., *Journals of the Continental Congress, 1774-1789*, vol. 5, 1776: June 5-October 8 (Government Printing Office, 1906), 429, quoted in Pauline Maier, *American Scripture: Making the Declaration of Independence* (Alfred A. Knopf, 1997), 126.
17. John Hancock to Certain States, July 6, 1776, quoted in Maier, *American Scripture*.
18. Maier, *American Scripture*, 43, 97-99.
19. Maier, *American Scripture*, 103.
20. Maier, *American Scripture*, 125-26.
21. Virginia Declaration of Rights, *The Pennsylvania Gazette*, June 12, 1776, quoted in Maier, *American Scripture*, 126-27.
22. Virginia Declaration of Rights, in Maier, *American Scripture*, 127.
23. Sean Wilentz, *No Property in Man: Slavery and Antislavery at the Nation's Founding* (Harvard University Press, 2018), 25.
24. Vt. Const. of 1777, ch. I, art. 1.
25. Wilentz, *No Property in Man*, 30.
26. Northwest Ordinance of 1787, art. VI.
27. Northwest Ordinance of 1787, art. VI. True, in 1790, Congress enacted the Southwest Ordinance to govern the territories ceded to the United States by North Carolina, from which the states of Kentucky and Tennessee were formed in 1792 and 1796, respectively. In that law, Congress obliquely adopted the provision of the North Carolina cession act that debarred Congress from abolishing slavery in states formed from this territory. But this was the preservation of the status quo with respect to that land, not an extension of slavery into new areas. That there were many in the South who ardently wished to preserve their unjust dominion (while often conceding its

injustice) is undeniable. The issue here is whether the Declaration's original meaning was inherently antislavery, a reading the Northwest Ordinance supports.

28. *Dred Scott*, 60 US at 425 (“The only two provisions which point to them and include them, treat them as property”), 451 (“The right of property in a slave is distinctly and *expressly* affirmed in the Constitution”). (Emphasis added.)

29. Northwest Ordinance of 1787, art. VI. See also Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51–53.

30. Wilentz, *No Property in Man*, 105.

31. *Debates in the Federal Convention of 1787 by James Madison, a Member*, ed. Gordon Lloyd (Ashbrook Center, 2014), 454.

32. Wilentz, *No Property in Man*, 77.

33. Wilentz, *No Property in Man*, 110–12; and *Debates in the Federal Convention of 1787 by James Madison, a Member*, 542. The latter meaning of “legal” reflected the dominance of natural law thinking at the time. The term “law” was equivocal as it was commonly used then, as today, to refer to a statute or legislative “act,” as distinct from a morally binding law.

34. Salmon Chase, “Union and Freedom, Without Compromise,” speech, US Senate, Washington, DC, March 26, 1850.

35. Charles Sumner, *Freedom National; Slavery Sectional* (Washington, DC, 1852), 20.

36. US Const. art. I, § 8, cl. 3.

37. Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* [. . .], 2nd ed. (Washington, DC, 1863), 3:464. See Randy E. Barnett, “The Original Meaning of the Commerce Clause,” *The University of Chicago Law Review* 68, no. 1 (2001): 143, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5074&context=uclev>.

38. 1 Stat. 347.

39. Chase, “Union and Freedom, Without Compromise.” Few asserted this interpretation of the text in the 1800s, however, because of the implications of such a reading for preserving the union, which is not relevant to its original meaning.

40. See *Prigg v. Pennsylvania*, 41 US 539 (1842).

41. US Const. art. IV, § 3, cl. 2.

42. US Const. art. I, § 8, cl. 17.

43. See Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, *Journal of Legal Analysis* 3, no. 1 (2011): 165, 179–82, <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1475&context=facpub>.

44. H. L. Pinckney, *Report of the Select Committee upon the Subject of Slavery in the District of Columbia* [. . .] (Washington, DC, 1836), 10.

45. *Dred Scott*, 60 US at 451.

46. *Dred Scott*, 60 US at 537 (McLean, J., dissenting); and Wilentz, *No Property in Man*, 2. As the Constitution's wordsmith, Morris may deserve more credit for this fastidiousness than Madison.

47. University of California, Santa Barbara, American Presidency Project, “Republican Party Platform of 1860,” <https://www.presidency.ucsb.edu/node/273296>.

48. See James Oakes, *Freedom National: The Destruction of Slavery in the United States, 1861–1865* (W. W. Norton, 2014).

49. Wilentz, *No Property in Man*, 12, 274n21.

50. Frederick Douglass, “The American Constitution and the Slave: An Address Delivered in Glasgow, Scotland, on 26 March 1860,” in *The Frederick Douglass Papers, Speeches, Debates, and Interviews*, ed. John W. Blassingame, vol. 3, 1855–63 (Yale University Press, 1985), 365.

51. Douglass, “The American Constitution and the Slave,” 365.

52. See Lysander Spooner, *The Unconstitutionality of Slavery* (Boston, 1845). Spooner was responding to Wendell Phillips, ed., *The Constitution: a Pro-Slavery Compact: Or, Extracts from the Madison Papers, Etc.* (Boston, 1844). After a lengthy published reply by Phillips, Spooner added a *Part Second* to his book in which he expanded on his interpretative methodology. See Lysander Spooner, *The Unconstitutionality of Slavery*, rev. ed. (Boston, 1860), in *The Collected Works of Lysander Spooner*, ed. Charles Shively, vol. 4, *Anti-Slavery Writings* (M & S Press, 1971), 218. (“It is the *original meaning* of the constitution itself that we are now seeking for.”) (Emphasis added.)

53. Douglass, “The American Constitution and the Slave,” 366.