

# THE THIRTEENTH AMENDMENT AS A MODEL FOR REVOLUTION

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## INTRODUCTION

How do free societies accomplish revolutionary change? Although some alterations in social norms occur slowly and gradually over time, history teaches that incrementalism is not the only—or even a typical—model for fundamental change. Particularly when change is rooted in dislodging vested interests of an entrenched, empowered group, gradual change may be impossible. The privileged group may perceive even moderate change as a threat and a potential prologue to further unacceptable alterations in the balance of power. Eventually, however, such resistance causes the law to deviate from prevailing social norms so sharply that a backlash is inevitable. As when tectonic plates collide, eventually the tension reaches a tipping point and causes an earthquake: a radical shift rather than an easy and gentle adjustment.

To date, the United States has experienced only a handful of successful revolutionary movements. The first was the American Revolution itself. Although the original colonies' war of independence and the resulting creation of a democratic republic was assuredly a revolution, it was incomplete in at least one major respect: it failed to resolve the fundamental conflict between the aspiration of freedom and the reality of slavery.<sup>1</sup> Moreover, the bargains made and compromises struck at the time of the Revolution and embodied within the Constitution neither encouraged nor enabled a course of gradual abolitionism, as the Founders purportedly hoped. Instead, those compromises ensconced slavery at the expense of democracy. This inherent friction eventually reached a tipping point, which fomented the second great American revolution: the abolition of slavery.<sup>2</sup>

This Article examines the path to abolitionism in the United States as a model for circumstances that foster and enable revolutionary change in democratic societies. It concludes that when distortions in the democratic process, either explicit or implicit, systemically favor one group over another, the ability of the favored group to force (or prevent) legal change results in a divergence between the law and prevailing social norms, often at the expense of disfavored groups. That disparity cannot persist indefinitely, particularly when cultural norms continue to evolve but the law

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1. Legal historian Mark Weiner identifies political liberalism, or liberal individualism, and racial caste as two competing "visions of law and civic life" in the United States of America, both of which "define the essence of our national identity." MARK S. WEINER, *BLACK TRIALS: CITIZENSHIP FROM THE BEGINNING OF SLAVERY TO THE END OF CASTE* 17–20 (2004); *see also* ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 103–06 (1997).

2. *See generally* Herbert Aptheker, *The Abolitionist Movement*, POL. AFF. (Feb. 1976), *reprinted in* CIVIL RIGHTS SINCE 1787: A READER ON THE BLACK STRUGGLE 36, 36–40 (Jonathan Birnbaum & Clarence Taylor eds., 2000).

remains ossified. In such settings, the dominant legal regime must either change to more accurately reflect broader communal values or risk a more radical—and often increasingly violent—outcome. Just as the structural and social tensions inherent in the American preservation of slavery resulted in progressively heightened civil disruptions and ultimately the Civil War, so too do other systemic disparities between democratic norms and the dominant legal system sow the seeds of potentially radical social shifts.

The lessons of the Thirteenth Amendment are particularly important today. Many facets of American society reflect a sharp divergence between the existing legal structure, on the one hand, and egalitarian principles and supporting cultural norms on the other. The rights of gays and lesbians to marry, for example—and more broadly, their right to full and equal participation in society—is increasingly accepted across a broad spectrum of the community and yet is widely rejected by federal and state legislatures. Similar tension exists between core democratic principles and the treatment of non-citizens throughout the United States. Further, and most pervasively, the structural legal benefits granted to financial elites—whether in the form of corporate free speech rights, pervasive lobbying, or campaign contribution entitlements—are profoundly enshrined in both legislative enactments as well as in the Constitution itself (at least according to modern doctrine), and yet fundamentally conflict with broader principles of participatory democracy and the idea of actual, as opposed to merely formal, equality for rich and poor alike. The Thirteenth Amendment thus not only reflects this nation's struggle with slavery but also provides a roadmap for the resolution of contemporary and future social struggles.

Part I of this Article discusses models of social change in democratic societies and their application to the abolitionist movement in the United States. The remainder of the article expounds upon the history of abolitionism, culminating with passage of the Thirteenth Amendment, as a model for revolutionary change. Part II discusses the clash between the ideal of liberty and the reality of slavery at the founding of the American republic and argues that the governmental framework adopted at the Constitutional Convention of 1787 distorted the new democracy in favor of southern slaveholders, thereby embedding slavery and ending any realistic hope of gradual, nationwide abolitionism. Part III discusses the effects of that democratic distortion, arguing that events during the Antebellum Era both created and demonstrated the growing chasm between the laws ensconcing slavery and prevailing social norms, at least outside the southern United States. Part IV examines the emergence of abolitionism in the United States and the limitations of that movement; specifically, the distinction between opposition to slavery and support for abolitionism

during the nineteenth century. Finally, Part V reviews the competing paths to abolitionism considered during the Civil War itself and discusses why gradual emancipation, despite being clearly preferred by the federal executive, ultimately was not a viable option. The Article concludes by exploring the central lessons of the Thirteenth Amendment as applied to contemporary legal and social norms.

#### I. PLACING AMERICAN ABOLITIONISM IN A THEORETICAL FRAMEWORK

When law attempts to effect changes in behavior, gradual, incremental changes generally tend to be more effective than more sudden and radical alterations of existing norms. In Professor Dan Kahan's words, "gentle nudges" usually work better than "hard shoves."<sup>3</sup> This conclusion is supported by a variety of scholars, including Robert Ellickson, who has argued that "legal centralism"—the primacy of law in shaping human behavior—has been overstated.<sup>4</sup> Taken together, these theories suggest that the greater the disparity between the conduct demanded by law and the underlying social norm, the greater the possibility that the governed will reject or rebel against the law and, consequently, that the law will have limited effectiveness.

The road to the Thirteenth Amendment of the United States Constitution illustrates these principles, although not in the way one might expect. Although many states abolished slavery via gradual emancipation statutes, some of which phased out slavery over a period of twenty years or more,<sup>5</sup> the abolition of slavery in the South followed no such path. It could not, given the southern states' lack of desire or enthusiasm to end slavery voluntarily, and the lack of any countervailing pushes in that direction. Even in the free states, few people wanted to end slavery in the *South* during the Antebellum Era. As discussed more fully *infra*, the vast majority of those who characterized themselves as "anti-slavery" during this period cared solely about preventing the spread of slavery into the Western

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3. See generally Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607 (2000).

4. See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 137–47 (1991); Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67, 81–90 (1987). Ellickson's normative theories are based on his observations of cattle ranchers in Shasta County, California, and the conclusions that he drew regarding the relative importance of law versus informal social norms in governing their behavior, particularly with regard to the regulation of trespassing cattle. ELLICKSON, *supra*, at 15–122. See also Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 CRIM. L. & CRIMINOLOGY 325, 327 (1980) (concluding that social disapproval has a greater inhibitory effect on conduct than does knowledge of legal punishment).

5. See *infra* notes 60–69 and accompanying text.

Territories.<sup>6</sup> *Their* conversion to the cause of abolitionism—which enabled the ratification of the Thirteenth Amendment after the Civil War—is a story in and of itself.

In other contexts, Professor Kahan has argued that when the government wants to change a particularly undesirable norm of human behavior, “hard shoves” in the right direction are often counterproductive.<sup>7</sup> The theory is that if the severity of punishment for a particular type of behavior diverges too greatly from the decision-maker’s personal assessment of moral culpability for that behavior, the decision-maker (judge, jury, or prosecutor) will be less likely to enforce the law. The effect is cumulative. As more and more decision-makers fail to enforce the law, this failure to enforce becomes increasingly acceptable, creating “a self-reinforcing wave of resistance.”<sup>8</sup> Moreover, “where dissensus about a norm radically polarizes society,” a hard shove is likely to reinforce the feelings of each of the polarized groups rather than effect change in either direction.<sup>9</sup>

“Hard shoves” can occur in a democratic society when law-makers’ assessments of the relevant norm qualitatively differ from those of their constituents. The disproportionate amount of influence or “voice” that some groups may exercise in government may account, at least in part, for such a disparity. As a result of vigorous and effective advocacy, or as a consequence of their differential access to power, group members may succeed in having legislation passed that does not comport with the majority’s view of the underlying norm. In other words, because the members of the favored group are louder than everyone else, they drown out other voices and, hence, their influence tends to be exaggerated.

In a democracy, where the government is accountable to the electorate, this type of distortion is expected to be temporary, as “[f]eedback loops may help to harmonize the rules of different controllers.”<sup>10</sup> As the maker and enforcer of laws, the government is the most obvious “controller” in society, but additional informal sources of control also exist, including organizations, social forces, and the individual self.<sup>11</sup> When the laws

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6. See *infra* notes 374–81 and accompanying text.

7. Kahan, *supra* note 3, at 608. Kahan discusses his model in the context of legislative attempts to thwart behavior such as date rape, smoking, domestic violence, drugs, drunk driving, and sexual harassment. *Id.* at 623–40.

8. *Id.* at 608.

9. *Id.* at 620.

10. ELLICKSON, *supra* note 4, at 132.

11. *Id.* at 126–32. Historian Eric Foner, writing specifically about the interplay between public opinion and the political process in the context of the Civil War, observes that “[p]ublic opinion . . . is never static; the interactions of enlightened political leaders, engaged social movements, and day-to-day experiences (such as the flight of slaves to Union lines or the encounters Union soldiers had with slavery) can change the nature of public debate and, in so doing, the boundaries of what is, in fact, practical.” ERIC

enacted and enforced by the government deviate too sharply from established social norms, the constituent members of the government—politicians—may eventually get the boot. We then expect that lawmakers voted out of office will be replaced by others whose views of what the law *should* be more closely mirror the views of the majority.

When the democratic process itself becomes distorted in a way that illegitimately enhances the voice or power of a particular group, the potential for “hard shoves”—for sharp divergence between law and norms—increases exponentially. Moreover, the feedback loops described above break down when political distortion amplifies the voices of some groups and muffles that of others. The muffled group has too little impact on who gets elected and therefore too little influence over the content of laws. Similarly, the group with too much voice in the political process has an excessive amount of influence and too much control over politics and its outputs.

During the Antebellum Era, this type of distortion occurred in the United States as a result of the South’s disproportionate political power. The “constitutive rules”<sup>12</sup> adopted in 1789, particularly the Three-Fifths Clause, skewed the federal system in a manner that enabled the passage (as well as supporting judicial interpretation) of laws that were inconsistent with the social norms of the non-slave holding states. As a region, the South was over-represented in every branch of the federal government.<sup>13</sup> Although enslaved blacks indirectly enhanced the political power of slaveholders via the Three-Fifths Clause, they themselves were not represented at all, even though they outnumbered “free white” citizens by considerable percentages in some southern states. Their voices were silent in the political discourse.

The distortion of the political system wrought by the constitutive rules of 1789 was no secret and did not go unnoticed by white Americans living in the free states. Free state politicians complained loudly about over-representation of the “Slave Power” in the federal government, particularly when its influence was wielded to enable passage of federal legislation that they did not support, such as the Fugitive Slave Law of 1850 and the Kansas–Nebraska Act.<sup>14</sup> As a result, the legitimacy of such legislation was

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FONER, *THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY*, at xviii (2010).

12. ELLICKSON, *supra* note 4, at 133–34. Ellickson defines constitutive rules as those which “govern the internal structures of controllers” as, for example, the rules that “determine the structure and interrelations of the various branches of government.” *Id.* at 133.

13. *See infra* notes 156–58 and accompanying text.

14. *See* Paul Finkelman, *The Root of the Problem: How the Proslavery Constitution Shaped American Race Relations*, 4 BARRY L. REV. 1, 10 (2003) (arguing that, without the Three-Fifths Clause bolstering southern representation in the House of Representatives, it would be “difficult to imagine the passage of the draconian fugitive slave law of 1850”) [hereinafter Finkelman, *The Root of the Problem*].

called into question by those who did not support it, further justifying—in the minds of some—disobedience of the law and undermining efforts at enforcement. Ultimately, the South’s political power in the federal government enabled it to achieve many political victories designed to shield and succor the institution of slavery which, in hindsight, hastened its demise.

## II. SETTING THE STAGE: CONFRONTING (OR DODGING) THE INHERENT CONFLICT BETWEEN SLAVERY AND DEMOCRACY IN THE CONTEXT OF THE AMERICAN REVOLUTION

At the time of the Revolution, as the original thirteen colonies stretched and ultimately broke ties to Great Britain, the Founders immediately confronted the inherent conflict between the political ideology of a democratic republic and the institution of slavery. Although the American Revolution did not result in the nationwide abolition of slavery—far from it—the ideals that instigated it did inspire many states to abolish the institution (even if gradually), and caused virtually all the states to question its long-term viability in the United States. Slavery was often characterized, even by slaveholders, as a religious or moral evil for which the country would ultimately be held accountable.<sup>15</sup> However, some of the southern states, most notably South Carolina, were less willing to question the institution of slavery and defended it as the indispensable foundation of not just their own but the nation’s economy. Ultimately, the country did not embark upon a path to abolition at this crucial moment in its history but instead attempted to find and tread a middle ground between freedom and slavery, in the vain hope that freedom would naturally prevail and slavery would gradually die of its own accord throughout the nation. In doing so, the Founders struck political compromises that fundamentally altered the constitutive rules that were the framework for governing the nation, thus precluding slavery’s dissipation and ensuring its survival, at least in the short term.

### *A. The Ideal of Political Liberalism as Expressed at the Founding of the American Democratic Republic*

The ideology of political liberalism fueled the American Revolution. As John Adams observed, the real American rebellion smoldered in thought and common sentiment long before cannons roared at Concord:

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15. See *infra* notes 32–33 and accompanying text.

But what do we mean by the American Revolution? Do we mean the American war? The Revolution was effected before the war commenced. The Revolution was in the minds and hearts of the people. . . . *This radical change in the principles, opinions, sentiments, and affections of the people was the real American Revolution.*<sup>16</sup>

The egalitarianism that inspired the colonists to reject the dominion of Great Britain and demand representative government was elegantly expressed in the Declaration of Independence, the document which perhaps best defines revolutionary ideals. However, the Declaration says nothing of slavery and makes no attempt to reconcile the ideals that it articulates with the realities of human bondage. Moreover, it was written by a man who owned almost 200 slaves by the end of the Revolutionary War.<sup>17</sup> This inherent tension between American democratic ideals and the reality of slavery would forever haunt the Declaration and raise questions about its meaning and its breadth.

The Declaration provides:

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.<sup>18</sup>

Under the theory of natural law, God or the Creator bestows certain rights upon mankind. When the government infringes upon these “unalienable

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16. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 160 (1967) (quoting letter from John Adams to Hezekiah Niles, 1818); see generally GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1991).

17. See PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 134 (2d ed. 2001).

18. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added). As will be discussed throughout this Article, the egalitarianism of the Declaration of Independence—even though the document makes no reference to race—was of little benefit to those who were enslaved. Similarly, the promise of equality in the Declaration of Independence did not extend to women in the United States, of any race. See generally Sandra L. Rierson, *Race and Gender Discrimination: A Historical Case for Equal Treatment under the Fourteenth Amendment*, 1 DUKE J. GENDER LAW & POL’Y 89 (1994). The history of abolitionism and the Woman’s Movement are in many ways inextricably linked. See *id.* at 99–114. However, this Article will focus solely on the abolition of slavery. The story of the Woman’s Movement and the ways in which gender has impacted American definitions of democracy and citizenship is a fascinating one which is beyond the scope of this Article.



rights” ordained by God, then the people have the right to withdraw their consent and reject the Government—in other words, to rebel. The roots of the natural law philosophy and political liberalism touted by Jefferson and his fellow Revolutionaries can be traced to the philosophers of the Enlightenment, such as John Locke and Montesquieu.<sup>19</sup>

Jefferson and other Patriots espoused natural law ideals in numerous other writings as well. Before he penned the Declaration of Independence, Jefferson wrote that the rights of “a free people” derive “from the laws of nature, and not as the gift of their chief magistrate.”<sup>20</sup> John Dickinson, a Pennsylvania lawyer, similarly wrote that “rights essential to happiness” did not derive from Kings and Parliaments and were “not annexed to us by parchments and seals.”<sup>21</sup> Rather, they were “created in us by the decrees of Providence, which establish the laws of our nature. They are born with us; exist with us; and cannot be taken from us by any human power without taking our lives.”<sup>22</sup>

In the final version of the Declaration of Independence, Jefferson made no attempt to reconcile this natural law philosophy with the institution of slavery. In fact, the Declaration says nothing at all about slavery or the African slave trade. As originally drafted, Jefferson did include language condemning the slave *trade*:

[King George] has waged cruel war against human nature itself, violating it's [sic] most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating & carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither. . . . Determined to keep open a market where MEN should be bought & sold, he has [squashed] every legislative attempt to prohibit or to restrain this execrable commerce.<sup>23</sup>

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19. WEINER, *supra* note 1, at 18; BAILY, *supra* note 16, at 27.

20. THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774), reprinted in THOMAS JEFFERSON: WRITINGS 103, 121 (Merrill D. Peterson ed., 1984).

21. BAILY, *supra* note 16, at 187 (quoting John Dickinson, An Address to the Committee of Correspondence in Barbados (Philadelphia, 1766)). Alexander Hamilton similarly wrote that “the sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole *volume* of human nature, by the hand of the divinity itself, and can never be erased or obscured by mortal power.” *Id.* at 188 (quoting Alexander Hamilton, The Farmer Refuted (Feb. 1775), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch3s5.html>).

22. *Id.* at 187 (quoting John Dickinson, An Address to the Committee of Correspondence in Barbados (Philadelphia, 1766)).

23. THOMAS JEFFERSON, AUTOBIOGRAPHY (1821), reprinted in THOMAS JEFFERSON: WRITINGS, *supra* note 20, at 1, 22; see also DAVID BRION DAVIS, INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD 146 (2008) (discussing this language in the original draft of the Declaration); FINKELMAN, *supra* note 17, at 140–41 (same). George Mason, another Virginian, similarly

Jefferson later claimed that this language was “struck out in complaisance to South Carolina and Georgia, who had never attempted to restrain the importation of slaves, and who on the contrary still wished to continue it.”<sup>24</sup> Moreover, as the debates during the Constitutional Convention amply demonstrate, opposition to the slave *trade* did not equate to opposition to slavery. Virginians like Jefferson opposed the slave trade for many self-serving reasons in addition to humanitarian ones, not the least of which being that continued importation of slaves impaired the capital of existing slaveholders.<sup>25</sup>

Potentially dramatic increases in the number of imported slaves also increased the risk of a successful slave rebellion. Jefferson was keenly concerned about the prospect of slave insurrections and was horrified by the 1775 proclamation issued by Virginia’s Royal Governor, Lord Dunmore, inviting American slaves to earn their freedom by enlisting in the British Army to take up arms against their former masters.<sup>26</sup> The final version of the Declaration accuses King George of “excit[ing] domestic insurrections amongst us,”<sup>27</sup> a reference that historians have concluded “unmistakabl[y]” refers to the incitement of slave rebellions via Lord Dunmore’s proclamation.<sup>28</sup> Jefferson’s earlier draft of the Declaration was even more explicit:

[H]e is now exciting those very people [the imported slaves] to rise in arms among us, and to purchase that liberty of which he has deprived them, by murdering the people on whom he also obruded them: thus paying off former crimes committed against the LIBERTIES of one people, with crimes which he urges them to commit against the LIVES of another.<sup>29</sup>

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blamed “the avarice of British Merchants” for the existence of the slave trade in the United States. Notes of James Madison (Aug. 22, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 369, 370 (Max Farrand ed., 1966) (recording remarks by George Mason).

24. THOMAS JEFFERSON, AUTOBIOGRAPHY (1821), reprinted in THOMAS JEFFERSON: WRITINGS, *supra* note 20, at 1, 18. Jefferson added that “[o]ur northern brethren also I believe felt a little tender under those censures; for tho’ their people have very few slaves themselves . . . they had been pretty considerable carriers of them to others.” *Id.*

25. See *infra* notes 118–21 and accompanying text; see also FINKELMAN, *supra* note 17, at 140.

26. DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823, 9–10 (1999); see also GARRY WILLS, INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE 72–73 (1978); FINKELMAN, *supra* note 17, at 161 (discussing Jefferson’s general fears regarding slave revolts). The full text of Lord Dunmore’s proclamation may be reviewed at <http://www.pbs.org/wgbh/aia/part2/2h42t.html>.

27. THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776).

28. See, e.g., FINKELMAN, *supra* note 17, at 141; DAVIS, *supra* note 26, at 72–73.

29. THOMAS JEFFERSON, AUTOBIOGRAPHY (1821), reprinted in THOMAS JEFFERSON:

The political philosophy of the Revolution, as eloquently expressed in the Declaration of Independence, was therefore tainted by the institution of slavery at its inception. The foundational document of the new American republic did not and could not resolve the inherent conflict between democracy and natural rights, on the one hand, and the continuing institution of slavery on the other. The conflict could not and would not be ignored.

*B. Attitudes Towards Slavery During the Revolutionary Era*

Although Jefferson did not address it in the Declaration, there was widespread recognition of the inherent hypocrisy in the United States' struggle for freedom from the British while enslaving blacks. Some slaves "began speaking the language of natural rights" at this time and petitioned for their freedom, based on the same egalitarian principles articulated by the colonists in their pursuit of independence from Great Britain.<sup>30</sup> Both Patriots and Loyalists condemned the institution and decried its inconsistency with the ideals of the Revolution. These sentiments instigated the abolition of slavery, often through a gradual emancipation process, in the mid-Atlantic and New England states. It did not, however, fundamentally disturb support for slavery in the South, where a slave-driven economy lurched forward, relatively undisturbed by Revolutionary ideals.<sup>31</sup>

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WRITINGS, *supra* note 20, at 1, 22. See also Paul Finkelman, *The American Suppression of the African Slave Trade: Lessons on Legal Change, Social Policy, and Legislation*, 42 AKRON L. REV. 431, 438 (2009) (discussing this language in the Declaration).

30. DAVIS, *supra* note 23, at 146–47. For example, one slave who attempted to perpetrate a revolt in 1800 stated that he had "nothing more to offer than what General Washington would have had to offer, had he been taken by the British and put on trial. I have adventured my life in endeavoring to obtain the liberty of my countrymen [i.e., African Americans], and am a willing sacrifice in their cause." *Id.* at 149 (citation omitted); see also ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* 110–11 (1967) (discussing petitions filed by slaves in Massachusetts); *id.* at 116–17 (discussing petitions filed by slaves in New Hampshire).

31. It would be false to suggest that no one advocated the abolition of slavery in the South during the post-Revolutionary Era. However, those who did were unsuccessful in persuading their respective states to enact any plan of emancipation. For example, the venerable Whig politician Henry Clay proposed a plan of gradual emancipation in his home state of Kentucky during the state constitutional conventions of 1799 and 1849; neither proposed amendment was adopted. See FONER, *supra* note 11, at 61. The jurist St. George Tucker similarly proposed a plan of gradual emancipation in Virginia, *A Dissertation on Slavery with a Proposal for the Gradual Abolition of It*, which he presented to the Virginia General Assembly in 1796; it did not generate serious debate. See Paul Finkelman, *The Dragon St. George Could Not Slay: Tucker's Plan to End Slavery*, 47 WM. & MARY L. REV. 1213, 1216, 1240 (2006); see also ST. GEORGE TUCKER, 2 BLACKSTONE'S COMMENTARIES app. at 31–85 (1803) (setting forth the text of Tucker's Dissertation); Reuel E. Schiller, *Conflicting Obligations: Slave Law and the Late Antebellum North Carolina Supreme Court*, 78 VA. L. REV. 1207, 1245–46 (1992)

### 1. Patriot Critiques of Slavery

Many leaders of the American Revolution condemned slavery both for its immorality and sinfulness as well as for the danger it posed to the nascent democracy. However, their words were often unmatched by deeds, as many of them also owned slaves. Moreover, as discussed *infra*, when southern states demanded concessions on the subject of slavery in drafting the Constitution, opponents of slavery largely acquiesced or were outvoted.

Some of America's Founding Fathers openly predicted that, because slavery was a mortal sin being perpetrated on a nationwide scale, God would punish the country accordingly. Thomas Jefferson, infamously a slaveholder, wrote that slavery was a moral evil and predicted that God would regard it as such: "Indeed I tremble for my country when I reflect that God is just: that his justice cannot sleep for ever . . . . The Almighty has no attribute which can take side with us in such a contest [regarding the existence of slavery]."<sup>32</sup> Similarly, Luther Martin, addressing the Maryland

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(noting that North Carolina Supreme Court Justice William Gaston called for the abolition of slavery in that state "[a]s late as 1832"). Some individuals acted on their abolitionist beliefs by freeing their own slaves, although such action was often accompanied by self-imposed exile outside the South. Edward Coles, a Virginia planter and neighbor of Thomas Jefferson, freed his slaves in 1818 and settled them in Illinois, providing each family with 160 acres of land. FONER, *supra* note 11, at 7; FINKELMAN, *supra* note 17, at 194–96 (discussing Jefferson's attempts to discourage Coles from emancipating his slaves). Coles was subsequently elected governor of Illinois and successfully battled to keep slavery out of the fledgling state. FONER, *supra* note 11, at 7. Angelina and Sarah Grimke of South Carolina, members of the slaveholding aristocracy, eventually freed their own slaves; moved to Pennsylvania; and became outspoken members of the abolitionist movement. Joellen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN'S L. J. 103, 140–41 (1994); see generally GERDA LERNER, *THE GRIMKE SISTERS FROM SOUTH CAROLINA: PIONEERS FOR WOMAN'S RIGHTS AND ABOLITION* (1967).

32. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA (1787)*, reprinted in THOMAS JEFFERSON: WRITINGS, *supra* note 20, at 123, 289. During the Constitutional Convention, George Mason similarly predicted that slaves "bring the judgment of heaven on a Country. As nations can not be rewarded or punished in the next world they must be in this." Notes of James Madison (Aug. 22, 1787), 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 369, 370 (recording remarks by George Mason (VA)); see also ZILVERSMIT, *supra* note 30, at 110 (discussing similar arguments made by Patriots in Massachusetts during the Revolutionary period). Jefferson and Mason were established members of the Virginia planter class who profited immensely from slavery and—unlike some of their southern contemporaries—did little to wean themselves from it. See, e.g., FINKELMAN, *supra* note 17, at 131–32, 136 (noting that George Washington and James Madison refused to sell slaves to pay personal debts, while Jefferson did so on many occasions); see also *id.* at 152–57 (discussing Jefferson's failure to manumit the vast majority of his own slaves, even upon his death); but see William G. Merkel, *Jefferson's Failed Anti-Slavery Proviso of 1784 and the Nascence of Free Soil Constitutionalism*, 38 SETON HALL L. REV. 555, 555 (2008) (discussing Jefferson's unsuccessful proposal to ban slavery from all the Western Territories, which was later reflected in the Northwest Ordinance of 1787 but applied only to those territories north of the Ohio River). Therefore, the extent of their sincerity (or lack thereof) when condemning slavery has been the source of much historical speculation and debate. See also *infra* notes 118–121 and accompanying text.

Constitutional Convention (during which he opposed ratification of the Constitution), argued that “the continuance of the slave-trade [under the Constitution] . . . ought to be considered as justly exposing us to the displeasure and vengeance of Him, who is equally Lord of all, and who views with equal eye the poor African slave and his American master.”<sup>33</sup> Martin, who owned six slaves in 1787, was also a founding member of the Maryland Society for the Abolition of Slavery.<sup>34</sup>

Other Patriots attacked slavery for its deleterious effects on white slaveholders and on democracy itself. Benjamin Rush, a preeminent physician and Pennsylvania delegate to the Constitutional Convention, referred to slavery as “a vice which degrades human nature” and warned that “[t]he plant of liberty is of so tender a nature that it cannot thrive long in the neighborhood of slavery.”<sup>35</sup> Virginia planters like Jefferson and George Mason owned hundreds of slaves and yet damned the institution, ostensibly for similar reasons (although a strong argument can be made that, despite the breadth of their words, they desired to end the slave trade only, not slavery itself).<sup>36</sup> In the context of the debate regarding the slave trade, Mason delivered the following critique during the Constitutional Convention: “Slavery discourages arts & manufactures. The poor despise labor when performed by slaves. They prevent the immigration of Whites, who really enrich & strengthen a Country. They produce the most pernicious effect on manners. Every master of slaves is born a petty tyrant.”<sup>37</sup>

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33. Remarks of Luther Martin at the Maryland Constitutional Convention (Nov. 29, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 172, 211 (emphases omitted).

34. RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 320 (2009); *see also* PAUL S. CLARKSON & R. SAMUEL JETT, LUTHER MARTIN OF MARYLAND 164 & n.1 (1970). Beeman concludes that Martin’s “abhorrence of the institution [of slavery] was probably genuine,” even though his deeds did not always match his words in this regard. BEEMAN, *supra*, at 320. As a lawyer, Martin represented both slaves and masters in civil cases in which slaves challenged their status and argued that they should be free. CLARKSON & JETT, *supra*, at 167.

35. BAILY, *supra* note 16, at 239 (quoting Benjamin Rush, An Address to the Inhabitants of the British Settlement in America Upon Slave-Keeping (1773)). Rush was a member of the Philadelphia Abolition Society, yet he was known to have owned at least one household servant. *See* DAVID FREEMAN HAWKE, BENJAMIN RUSH: REVOLUTIONARY GADFLY 360–62 (1971). Another Revolutionary, Boston lawyer James Otis, similarly wrote that the slave trade “is the most shocking violation of the law of nature” and “has a direct tendency to diminish the idea of the inestimable value of liberty, and makes every dealer in it a tyrant.” BAILY, *supra* note 16, at 237. Otis concluded that “those who every day barter away other men’s liberty will soon care little for their own.” *Id.* (quoting James Otis, The Rights of the British Colonies Asserted and Proved (1764)).

36. *See infra* notes 118–121 and accompanying text.

37. Notes of James Madison (Aug. 22, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 369, 370 (recording remarks by George Mason (VA)). Madison wrote that Mason “held it essential in every point of view, that the Genl. Govt. should have power to prevent the increase of slavery.” *Id.* Mason ultimately argued against ratification of the Constitution, in part because it

The Patriots also recognized the inherent contradiction in demanding freedom from the oppressive rule of King George III while simultaneously perpetrating slavery. Future first lady Abigail Adams, in a letter to her husband, characterized slavery as “a most iniquitous Scheme” and lamented that the colonists were fighting for “what we are daily robbing and plundering from those who have as good a right to freedom as we have.”<sup>38</sup>

## 2. Slavery and the British

The hypocrisy inherent in demanding freedom in the name of natural law, while denying the most basic of liberties to thousands of African slaves, also did not go unnoticed by Loyalists and their British counterparts. British author and poet Samuel Johnson famously asked, “How is it that we hear the *loudest yelps* for liberty among the drivers of negroes?”<sup>39</sup> Similarly, Loyalist printer John Meins called out those who “grounded their rebellions on the ‘immutable laws of nature,’” and yet—“It cannot be! It is nevertheless very true”—owned thousands of slaves.<sup>40</sup>

Of course, the British themselves were not unstained by the sin of slavery. The colonists frequently complained that the slave trade was foisted upon them by King George without their legislative acquiescence or consent.<sup>41</sup> Moreover, the slave trade, which unquestionably generated vast amounts of wealth for the British Empire,<sup>42</sup> did not end in Great Britain until it was abolished by Parliament in 1807.<sup>43</sup> Parliament did not ban slavery in the British Colonies until 1833,<sup>44</sup> even though the institution of slavery was never legally recognized or sanctioned in England itself.<sup>45</sup>

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allowed the “diabolical” slave trade to continue for twenty years, and also (somewhat ironically) because he believed that the Constitution did not sufficiently protect the rights of existing slave owners. See Remarks of George Mason at Virginia Ratification Convention (June 17, 1788), in *THE PAPERS OF GEORGE MASON* 1086, 1086 (Robert A. Rutland, ed., 1970); see also BEEMAN, *supra* note 34, at 321–23 (discussing Mason’s views on slavery and the slave trade).

38. LYNNE WITHEY, *DEAREST FRIEND: A LIFE OF ABIGAIL ADAMS* 60 (1981) (quoting letter from Abigail Adams to John Adams (Sept. 22, 1774)); see also ZILVERSMIT, *supra* note 30, at 117–18 (discussing emerging antislavery sentiment among New England slaveholders during the Revolutionary War, some of whom emancipated their slaves).

39. See FINKELMAN, *supra* note 17, at 49 (quoting Johnson).

40. BAILYN, *supra* note 16, at 241 (quoting John Mein, *Sagittarius’s Letters and Political Speculations* (1775)).

41. See *supra* note 23 and accompanying text.

42. See William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 *CARDOZO L. REV.* 1711, 1736–38 (1996). Wiecek notes that “slavery and the slave trade played a vital role in the development of European capitalism.” *Id.* at 1738.

43. See Act for the Abolition of the Slave Trade of 1807, 47 *Geo. 3*, c. 36, §§ 1–3, available at [http://www.pdavis.nl/Legis\\_06.htm](http://www.pdavis.nl/Legis_06.htm). See generally DAVIS, *supra* note 23, at 231–37 (discussing abolition of the British slave trade).

44. See Slavery Abolition Act of 1833, 3 & 4 *Will. IV* c. 73 (Eng.). Although the Act was

The contrast between the British and American attitudes towards slavery is perhaps best exemplified by the holding in *Somerset's Case*.<sup>46</sup> When James Somerset, a slave, traveled to England from the Virginia Colony with his master, Charles Stewart, in 1769, English law was unsettled as to whether he remained a slave upon his arrival on British soil.<sup>47</sup> Somerset, a trusted manservant, escaped from bondage while he and Stewart were residing in London. Two months later he was apprehended and imprisoned on a ship, the *Ann and Mary*, bound for Jamaica, where Somerset was to be sold as a slave.<sup>48</sup> Before the ship left dock, however, a writ of habeas corpus demanding Somerset's release was obtained by a woman identifying herself as his godmother.<sup>49</sup>

Chief Justice Lord Mansfield, writing for the Court of the King's Bench, ultimately concluded that Somerset "must be discharged."<sup>50</sup> Mansfield reasoned that because England lacked "positive law" enabling Somerset's enslavement, he had to be set free: "The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force . . . [I]t's so odious, that nothing can be suffered to support it, but positive law."<sup>51</sup>

*Somerset's Case* stands in sharp contrast to *Dred Scott v. Sandford*,<sup>52</sup> in which the United States Supreme Court addressed nearly the same issue—whether a slave remained a slave when he arrived upon free soil—approximately a hundred years later. In *Dred Scott* the Court rejected the reasoning of *Somerset's Case* and reached the opposite conclusion.<sup>53</sup> In

passed in 1833, its effective date was August 1, 1834. *Id.* The Act freed nearly 800,000 colonial slaves and paid approximately £20 million pounds in compensation to former slave owners and their creditors. *Id.* Slaves under the age of six were freed immediately; older slaves were required to serve as unpaid "apprentices" for up to six years. *Id.*; see generally DAVIS, *supra* note 233, at 238–49 (assessing economic impact and humanitarian motivation of British abolitionism).

45. See WEINER, *supra* note 1, at 78.

46. *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.). For a thorough and engaging account of Somerset's case and trial, see WEINER, *supra* note 1, at 70–88. See also PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM AND COMITY 16–17, 70–125 (1981) (discussing treatment of *Somerset* in U.S. courts).

47. See Wiecek, *supra* note 42, at 1723–25 (describing early English precedent regarding African slavery as "confused and contradictory" and discussing cases); see also DAVIS, *supra* note 26, at 471–73.

48. *Somerset*, 98 Eng. Rep. at 510; see also WEINER, *supra* note 1, at 80–81.

49. WEINER, *supra* note 1, at 81.

50. *Somerset*, 98 Eng. Rep. at 510.

51. *Id.* The breadth and effect of *Somerset's Case* should not be overstated. At the time of the decision, the concept of judicial review did not exist under English law. Moreover, the decision did not even intimate that Parliament could not pass a law legitimizing slavery, if it wished to do so. See DAVIS, *supra* note 26, at 474–76.

52. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

53. See *infra* notes 316–345 and accompanying text.

short, while the revolution against Great Britain was centrally based upon the natural rights of liberty and freedom, those rights did not exist in the early republic for slaves, who actually received superior legal protection under the law of England.<sup>54</sup>

### 3. The Abolition of Slavery Outside the Southern States

The process of abolishing slavery in the United States did not begin with the Civil War and end with the ratification of the Thirteenth Amendment. Rather, the process of abolition in many states began during the Revolutionary Era but did not conclude until the mid-nineteenth century. This model of gradual abolitionism was favored by many anti-slavery advocates, including President Abraham Lincoln, even after the Civil War began.<sup>55</sup>

Those who advocated the abolition of slavery in the United States around the time of the Revolution often endorsed gradual emancipation accompanied by the deportation of emancipated slaves to Africa. Thomas Jefferson wrote,

Nothing is more certainly written in the book of fate than that these people [the slaves] are to be free. Nor is it less certain that the two races, equally free, cannot live in the same government. . . . It is still in our power to direct the process of emancipation and deportation peaceably and in such slow degree as that the evil will wear off insensibly, and [the slaves replaced] by free white laborers.<sup>56</sup>

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54. See FINKELMAN, *supra* note 17, at 144 (arguing that the “free blacks and slaves of Virginia would have been better off if the British had won the war”).

55. See *infra* notes 420–38 and accompanying text.

56. THOMAS JEFFERSON, AUTOBIOGRAPHY (1821), reprinted in THOMAS JEFFERSON: WRITINGS, *supra* note 20, at 1, 44. See also Letter from Thomas Jefferson to Edward Coles (Aug. 25, 1814), in THOMAS JEFFERSON: WRITINGS, *supra* note 20, at 1343, 1345 (espousing similar views); Letter from Thomas Jefferson to Jared Sparks (Feb. 4, 1824), in THOMAS JEFFERSON: WRITINGS, *supra* note 20, at 1484, 1484–87 (detailing plans for gradual emancipation of slaves and deportation to Mesurado). Mesurado, a cape on the coast of Liberia, was the site on which Liberia’s capital city, Monrovia, was founded by free blacks and former slaves from the United States in 1822. AYODEJI OLUKOJU, CULTURE AND CUSTOMS OF LIBERIA 10 (2006). Jefferson never relinquished his belief in the inseparability of emancipation and colonization. In fact, in 1824 Jefferson proposed that the federal government gradually eliminate the slave population by purchasing all slave children and then deporting them to Africa. FONER, *supra* note 11, at 17–18. Jefferson brushed aside anticipated humanitarian objections to this plan as “straining at a gnat.” *Id.*



Jefferson's desire to deport slaves to Africa was inspired by a deep-seated belief in the genetic inferiority of blacks and a fear of racial violence.<sup>57</sup> Moreover, as a policy matter, deportation schemes like the one Jefferson proposed in *Notes on the State of Virginia* turned out to be almost universally impractical, unsuccessful, and generally ill conceived.<sup>58</sup> However, the gradual emancipation model he purported to espouse was implemented in several states, although never in his beloved Virginia or any other southern state.<sup>59</sup>

Most of the northeastern and mid-Atlantic states began to abolish slavery within their borders during the post-Revolutionary period. Vermont, which became the fourteenth state shortly after the Constitution was ratified, incorporated a gradual abolition provision in its pre-statehood Constitutions of 1776 and 1777.<sup>60</sup> New Hampshire most likely abolished slavery via the bill of rights that was incorporated into its 1783 Constitution, although when it was interpreted as having this effect is somewhat unclear.<sup>61</sup> Slaves living in Massachusetts were freed in 1780 by virtue of that state's constitutional Declaration of Rights, a result that was later affirmed by case law.<sup>62</sup> Pennsylvania passed a gradual emancipation

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57. See, e.g., THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1787), reprinted in THOMAS JEFFERSON: WRITINGS, *supra* note 20, at 123, 266 (noting that blacks were "dull, tasteless, and anomalous" in imagination, and "much inferior" to whites in their ability to reason); see also FINKELMAN, *supra* note 17, at 132–34, 150 (discussing Jefferson's "negrophobia" and profound belief in "black biological inferiority"). Jefferson also feared that freed slaves would take revenge on their former masters for the abuses that they had suffered under slavery. See FINKELMAN, *supra* note 17, at 133.

58. See FINKELMAN, *supra* note 17, at 149–50 (discussing the scheme of emancipation and deportation detailed by Jefferson in *Notes on the State of Virginia* and the impracticality of it).

59. Jefferson had the opportunity to advocate and potentially implement a plan of gradual emancipation in Virginia when he chaired a committee to revise the Virginia code, but he did not do so. See FINKELMAN, *supra* note 17, at 144–45. Between 1790 and 1830, "dozens" of proposals for gradual, compensated emancipation of slavery were proposed in Congress, but none of them succeeded. See FONER, *supra* note 11, at 17.

60. PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM AND COMITY 42 (1981) (describing the abolition of slavery in Vermont); DAVIS, *supra* note 23, at 152; ZILVERSMIT, *supra* note 30, at 116.

61. JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 89 (2000); ZILVERSMIT, *supra* note 30, at 117; see also FINKELMAN, *supra* note 60, at 41–42. Although the 1790 census recorded 157 slaves living in New Hampshire, only 8 were reported in 1800, and zero in 1810. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, NEGRO POPULATION: 1790–1915, at 57 tbl.6 (Negro Population, Slave and Free, at each Census by Divisions and States: 1790–1860) (1918) [hereinafter, NEGRO POPULATION: 1790–1915].

62. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 43–45 (1975). See also FINKELMAN, *supra* note 60, at 41 (describing the process by which slavery was abolished in Massachusetts); ZILVERSMIT, *supra* note 30, at 112–16 (same; arguing that the drafters did not intend to abolish slavery in Massachusetts via the 1780 Constitution, although the courts later interpreted it as having that effect). The origins of slavery in Massachusetts are explored in Wiecek, *supra* note 42, at 1742–45.

statute in 1780, which effectively ended slavery in that state by the mid-1800s.<sup>63</sup> Both Connecticut and Rhode Island adopted similar statutes in 1784.<sup>64</sup>

New York and New Jersey adopted gradual emancipation statutes in 1799 and 1804, respectively.<sup>65</sup> Slavery was more firmly woven into the economic and social fabric of these two states than it was elsewhere outside the South.<sup>66</sup> As a result, slave populations in New York and New Jersey declined relatively slowly compared to the other mid-Atlantic and northeastern states.<sup>67</sup> However, New York's slave population dropped precipitously after a second emancipation statute went into effect; this law provided that, as of July 4, 1827, all slaves remaining in the state (approximately 10,000) were free.<sup>68</sup> Slavery did not officially end in New

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63. See FINKELMAN, *supra* note 60, at 44; ZILVERSMIT, *supra* note 30, at 124–37. Pennsylvania's slave population declined from 3,707 in 1790 to 64 in 1840, the last year in which slaves were reported living in Pennsylvania, according to census data. NEGRO POPULATION: 1790–1915, *supra* note 61, at 57. Pennsylvania's gradual emancipation statute began with a lengthy preamble characterizing abolition as a moral duty and “proof of our gratitude” to God for deliverance from Great Britain. An Act for the Gradual Abolition of Slavery (Pennsylvania) (March 1, 1780), *reprinted in* 1 STATUTES ON SLAVERY: THE PAMPHLET LITERATURE 21, 23 (Paul Finkelman ed., 2007). The statute uses the slavery metaphor to describe the colonists' relationship with Britain prior to the Revolution, averring that the statute was passed “in grateful commemoration of our own happy deliverance from that state of unconditional submission to which we were doomed by the tyranny of Britain.” *Id.* The origins of slavery in Pennsylvania are examined in Wiecek, *supra* note 42, at 1770–71.

64. DAVIS, *supra* note 23, at 152; *see also* FINKELMAN, *supra* note 60, at 43–44 (describing the process by which slavery was abolished in Connecticut and Rhode Island); ZILVERSMIT, *supra* note 30, at 121–23. In 1790, approximately 5400 blacks resided in Connecticut, split almost evenly between slave and free. NEGRO POPULATION: 1790–1915, *supra* note 61, at 57. Although slavery did not officially end in Connecticut until 1848, only 25 slaves were reported in the 1830 census. *Id.* Approximately 4,400 blacks resided in Rhode Island in 1790, less than 25% of whom were enslaved. *Id.* Only 17 slaves were reported living in Rhode Island in 1830. *Id.*

65. New York's gradual emancipation statute provided that any child born of a slave after July 4, 1799, “shall be free,” although such children remained indentured servants until they reached age 28 (men) or 25 (women). An Act Concerning Slaves and Servants (New York), *reprinted in* 1 STATUTES ON SLAVERY: THE PAMPHLET LITERATURE, *supra* note 63, at 67–68; *see* ZILVERSMIT, *supra* note 30, at 176–84 (discussing debate surrounding New York's gradual emancipation statute). Similarly, New Jersey's gradual abolition statute provided that any child of a slave born after July 4, 1804, would be free, although the child was required to serve until age 25 (men) or 21 (women) as an indentured servant. ZILVERSMIT, *supra* note 30, at 193; *see also id.* at 192–200 (discussing New Jersey debate regarding gradual abolition).

66. ZILVERSMIT, *supra* note 30, at 139.

67. *See* GRAHAM RUSSELL HODGES, ROOT & BRANCH: AFRICAN AMERICANS IN NEW YORK & EAST JERSEY, 1613–1863, at 162–73 (1999).

68. ZILVERSMIT, *supra* note 30, at 213. New York's emancipation law did not provide compensation to former slaveholders. *Id.* Over 10,000 slaves resided in New York in 1820; however, only 75 slaves were reported living in the state in 1830. NEGRO POPULATION: 1790–1915, *supra* note 61, at 57. The slaves remaining in the state after 1827 were the putative property of non-residents, who were allowed to bring slaves into the state until the state outlawed this practice in 1841. ZILVERSMIT, *supra* note 30, at 214 n.24.

Jersey until 1865; however, only 18 slaves were reported living in the state in the 1860 census.<sup>69</sup>

The steps taken to abolish slavery in states outside the South have sometimes been discounted as relatively painless, as slaves were not considered indispensable to these economies.<sup>70</sup> However, recent scholarship has demonstrated that, particularly in New York and New Jersey, slaves played a more vital role in the economy than previously thought. In the mid-eighteenth century, slaves performed at least a third of all physical labor in New York City, and 34% of the people living in Kings County (Brooklyn) were slaves.<sup>71</sup> Slaves worked in rural areas as well, sustaining farms on Long Island, in northern New Jersey, and in the Hudson River Valley.<sup>72</sup> Indeed, in 1770, more slaves were reported living in New York than in Georgia.<sup>73</sup> In Philadelphia, three-quarters of the servant population were enslaved during this period.<sup>74</sup> The abolition of slavery in these states—although often agonizingly slow and at times accompanied by laws stripping the newly freed slaves of their civil and political rights<sup>75</sup>—cannot be dismissed as purely symbolic.

Nonetheless, even in northern states, the Revolutionary ideals expressed in the Declaration of Independence were tainted by slavery from the earliest days of the republic. Many of the Revolutionary leaders who most eloquently attacked the slave trade and, less commonly, the institution

69. See HODGES, *supra* note 67, at 171; NEGRO POPULATION: 1790–1915, *supra* note 61, at 57. Over 7,000 slaves were reported living in New Jersey in 1820, but that number dropped to 2,254 in 1830, 674 in 1840, and 236 in 1850. NEGRO POPULATION: 1790–1915, *supra* note 61, at 57.

70. See CONG. GLOBE, 38TH CONG., 1ST SESS. 2941 (1864) (statement of Rep. Fernando Wood (Democrat/NY)) (arguing against passage of the Thirteenth Amendment in 1864, in part on grounds that doing so would deprive slaveholders of property without just compensation). Representative Wood claimed that “[i]n all the acts of emancipation heretofore passed the tacit consent of the citizens affected accompanied the passage of the statute. A species of property which has ceased to be profitable is usually surrendered without protest or opposition. Men are not disposed to cavil at the exercise of a power . . . which rids them of a relation which is onerous or inconvenient. Such was slavery in the States where it has been abolished. But where it is one of the main sources of the prosperity of the community it will be regarded very differently.” *Id.* See also Wiecek, *supra* note 42, at 1771 (observing that slavery in New Jersey was “tenacious” but “never economically important”).

71. DAVIS, *supra* note 23, at 128; see also HODGES, *supra* note 67, at 163.

72. DAVIS, *supra* note 23, at 128.

73. *Id.* at 128. By 1790, New York’s slave population had declined to 21,324 (about 6% of the total population), while Georgia’s had risen to 29,264 (approximately 35% of the total population). ELLIS, *supra* note 61, at 102 (quoting data from U.S. Bureau of Census).

74. DAVIS, *supra* note 23, at 129.

75. Compare LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860 (1961) (discussing racial discrimination in the northern states), with Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L. J. 415, 417 (1986) (arguing that “[i]n the antebellum North there was a clear trend in the direction of granting greater legal rights and protections to free blacks”).

of slavery itself, also profited from it. Even so, the rhetoric of the Revolution was not entirely empty, as most of the non-southern states did embark upon a course of abolition shortly after the end of the Revolutionary War. When the states came together in Philadelphia to form a new national government, however, the southern states made it abundantly clear that they were uninterested in dismantling slavery and, for a variety of reasons, their neighbors to the North were either unwilling or unable to compel them to do so.

### *C. The Reality of Slavery as Embedded in the Constitution*

The document that provided the foundation for government in the United States of America—the Constitution—clearly demonstrates that the promise of liberal individualism found in the Declaration of Independence was largely an illusory one for everyone except those who counted among the “men of the political community,” as Jefferson Davis later declared.<sup>76</sup> Unlike the Declaration, the Constitution could not and did not ignore the issue of slavery, even though the word appears nowhere in the document, and instead recognized and at least partially legitimized the institution in the United States.<sup>77</sup> For this reason, one prominent abolitionist ultimately denounced the Constitution as a “covenant with death, and an agreement with hell” and called for its annulment.<sup>78</sup>

The Constitution, a terse blueprint for the government of a fledgling republic, sustained and succored the institution of slavery, even as many of the states that were signatories were in the process of abolishing it. The new Constitution boosted southern representation in Congress by including “three fifths” of every enslaved person in the population figures for those

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76. CONG. GLOBE, 36TH CONG., 2D SESS. 487 (1861). In announcing Mississippi’s secession from the Union, Jefferson declared that the “Declaration of Independence is to be construed by the circumstances and purposes for which it was made. The communities were declaring their independence . . . asserting that no man was born—to use the language of Mr. Jefferson—booted and spurred to ride over the rest of mankind; that men were created equal—*meaning the men of the political community* . . . [These principles] have no reference to the slave . . .” *Id.* (emphasis added).

77. See generally DAVID WALDSTREICHER, *SLAVERY’S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* (2009); Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 427 (1999) [hereinafter, Finkelman, *Affirmative Action for the Master Class*]; FINKELMAN, *supra* note 17. Some historians have argued that the Constitution represented a general retreat from Revolutionary ideals, even for the white men who were ostensibly included within the political community. See, e.g., TERRY BOUTON, *TAMING DEMOCRACY: “THE PEOPLE,” THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION* 4 (2007).

78. WALTER M. MERRILL, *AGAINST WIND AND TIDE: A BIOGRAPHY OF WILLIAM LLOYD GARRISON* 205 (1963) (quoting a resolution presented by William Lloyd Garrison to the Massachusetts Antislavery Society in 1843); see also Finkelman, *Affirmative Action for the Master Class*, *supra* note 77, at 424–25 (discussing Garrison’s views regarding the pro-slavery nature of the United States Constitution).

states.<sup>79</sup> It preserved inviolate the southern states' right to carry on the slave trade for at least another twenty years.<sup>80</sup> It even legally and constitutionally obligated persons living in free states to return fugitive slaves to their masters.<sup>81</sup> At the same time, the Founders managed to keep the words "slave" and "slavery" out of the document.<sup>82</sup> Many of the Founders—some of whom both owned slaves and condemned slavery—publicly hoped that this inherent tension in the government they had created would resolve itself when slavery inevitably died of natural causes.<sup>83</sup> Notwithstanding this naïve (and some would say disingenuous) hope, the constitutive rules that the Framers provided for the new nation ensured that the southern states would enjoy a political hegemony that precluded rather than engendered emancipation.

### 1. The Three-Fifths Clause

More so than any other structural rule embedded within the Constitution, the infamous "Three-Fifths Clause" stacked the nation's political decks in favor of slaveholding southerners, thereby fundamentally

79. U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV, § 2.

80. U.S. CONST. art. I, § 9, cl. 1.

81. U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII.

82. Mary Frances Berry, *Slavery, the Constitution, and the Founding Fathers*, reprinted in CIVIL RIGHTS SINCE 1787: A READER ON THE BLACK STRUGGLE, *supra* note 2, at 16, 19 (noting that Frederick Douglass, a former slave and preeminent abolitionist, wrote, "Had the Constitution dropped down from the blue overhanging sky, upon a land uncursed by slavery, and without an interpreter, . . . so cunningly is it framed, that no one would have imagined that it recognized or sanctioned slavery. But having a terrestrial, and not a celestial origin, we find no difficulty in ascertaining its meaning in all the parts which we allege relate to slavery . . . and in a manner well calculated to aid and strengthen that heaven-daring crime.") (quoting Frederick Douglass, *The Constitution and Slavery*, NORTH STAR (March 16, 1849)). See also FINKELMAN, *supra* note 17, at 6 (discussing the Founders' efforts to avoid using the word "slavery" in the Constitution); Finkelman, *The Root of the Problem*, *supra* note 14, at 4–6 (same).

83. See, e.g., THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1787), reprinted in THOMAS JEFFERSON: WRITINGS, *supra* note 20, at 123, 289 ("I think a change [in attitudes about slavery] already perceptible, since the origin of the present revolution. The spirit of the master is abating, that of the slave rising from the dust, his condition mollifying . . . under the auspices of heaven, for a total emancipation . . ."). Roger Sherman, a Connecticut delegate at the Constitutional Convention, similarly observed that, at the time of the Convention, slavery was gradually being abolished, and "that the good sense of the several States would probably by degrees compleat [sic] it." Notes of James Madison (Aug. 22, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 369, 369–70 (recording remarks by Roger Sherman); see also *id.* at 371 (recording remarks by Oliver Ellsworth) (arguing that, "[a]s population increases[,] poor laborers will be so plenty as to render slaves useless[,] and therefore "[s]lavery in time will not be a speck in our Country"). James Wilson, author of the Three-Fifths Clause, also condemned the institution of slavery, arguing that, some day, "the American people 'will turn their views to the great principles of humanity,' and demand that all slaves be freed." CHARLES PAGE SMITH, JAMES WILSON: FOUNDING FATHER, 1742–1798, 274 (1956). Wilson himself owned one slave, Thomas Purcell, until he emancipated him in January 1794, four years before Wilson's death. *Id.* at 367.

altering the nature of democracy in America. It achieved this end by adding to the “whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons” when calculating the number of Representatives allotted to a given state.<sup>84</sup> This clause enhanced the political power of the slaveholder by increasing his political representation in Congress in direct proportion to the number of people that he “owned.”<sup>85</sup> The debates surrounding the adoption of this clause of the Constitution demonstrate that the issue of slavery and its place in an ostensibly democratic republic was a fundamental one that threatened the existence of the fledgling nation *ab initio*, almost a hundred years before shots were fired at Fort Sumter.<sup>86</sup>

The Three-Fifths Clause, which was contained within Article I, Section 2 of the Constitution, addressed “direct taxation” along with Congressional representation. Specifically, the clause provided that “Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers,” including all free citizens and three-fifths of all the slaves.<sup>87</sup> The stated reason for linking taxation and representation was that each state should gain representation in Congress in proportion to its value to the nation as a whole, based on some measure of the wealth that it contributed to the country (which would be subject to taxation).<sup>88</sup> In support of this notion, South Carolina delegate Pierce Butler asserted that “money is strength; and every state ought to have its weight in the national council in proportion to the quantity it possesses.”<sup>89</sup> There was considerable debate as

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84. U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV, § 2. Jefferson Davis cited the Three-Fifths Clause as further evidence that, when the Republic was founded, the Declaration’s promise of liberal egalitarianism did not embrace the slave: “When our Constitution was formed, the same idea [that slaves were not “created equal”] was rendered more palpable, for there we find provision made for that very class of persons as property; they were not put upon the footing of equality with white men—not even upon that of paupers and convicts; but, so far as representation was concerned, were discriminated against as a lower caste, only to be represented in the numerical proportion of three fifths.” CONG. GLOBE, 36TH CONG., 2D SESS. 487 (1861).

85. *See infra* notes 151–68 and accompanying text (discussing the impact of the Three-Fifths Clause on southern political power in Congress).

86. *See* FINKELMAN, *supra* note 17, at 10–21 (discussing the history of the Three-Fifths Clause). *See also* Finkelman, *Affirmative Action for the Master Class*, *supra* note 77, at 433–49 (same). Finkelman argues that slavery was a central issue at the Federal Convention in 1787 and further that the desire to protect slavery drove much of the delegates’ decision-making as to numerous Constitutional provisions. *Id.*; *but see* Howard A. Ohline, *Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States Constitution*, 28 WM. & MARY Q. 563, 567 (1971) (arguing that the issue of slavery was not central to the Three-Fifths Clause debate).

87. U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV, § 2.

88. *Cf.* FINKELMAN, *supra* note 17, at 12–13 (rejecting this explanation of the Three-Fifths Clause and arguing that the clause was initially accepted with regard to representation and not debated in the context of taxation until later in the Convention.)

89. Notes of Robert Yates (June 11, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION

to whether population was the most accurate measure of a state's wealth,<sup>90</sup> but this measure was ultimately agreed upon, despite its imperfections, allegedly due to lack of a superior alternative.<sup>91</sup>

Once population became the accepted metric for measuring both direct taxation and representation in Congress, the manner by which slaves impacted this calculation had to be addressed. Delegates from South Carolina and Georgia, states that thoroughly embraced and relied upon slave labor as an integral part of their economies, argued vociferously that the population figure upon which both Congressional representation and direct taxation was based should include 100% of the states' enslaved inhabitants.<sup>92</sup> Not surprisingly, the southern delegates did not argue that slaves should be counted on equal terms with whites on the basis of any notion of racial equality. Rather, the argument was tied to the slaves' value as a form of property that increased the wealth of the southern states. Butler argued that, because the labor of a slave in South Carolina "was as productive & valuable as that of a freeman in [Massachusetts], . . . [the slaves] were equally valuable to [the Nation] with freemen; and that

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OF 1787, *supra* note 23, at 204, 204 (recording remarks of Pierce Butler (SC)).

90. *See, e.g.*, Notes of James Madison (July 11, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 23, at 578, 583 (recording remarks of Gouverneur Morris (PA)). Morris argued that the Western states should not gain representation equal to their population because they would "ruin the Atlantic interests" and the "Busy haunts of men[,] not the remote wilderness, was the proper School of political Talents." *Id.* *See also* Notes of James Madison (July 6, 1787), *in* THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 23, at 540, 541 (recording remarks of Rufus King (MA)) (arguing that the "number of inhabitants was not the proper index of ability & wealth" and therefore that property should be included in the calculation).

91. *See, e.g.*, Notes of James Madison (July 6, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 540, 542 (recording remarks of Charles Pinckney (SC)) (arguing that "[t]he number of inhabitants appeared to [be] the only just & practicable rule" as a basis for taxation and representation, given that both land and exports/imports were impractical alternatives); Notes of James Madison (July 11, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 578, 585 (recording his own remarks) (agreeing that "numbers of inhabitants" were not an "accurate measure of wealth" but contending that it was sufficient and would become more accurate in the future); Notes of James Madison (July 11, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 578, 587–88 (recording remarks of James Wilson (PA)) (arguing in favor of population as a measure of wealth); Notes of James Madison (July 13, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 600, 605 (recording remarks of James Wilson (PA)) (noting that "if numbers [of population] be not a proper rule [for calculation of representation], why is not some better rule pointed out").

92. *See, e.g.*, Notes of James Madison (July 11, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 23, at 578, 580 (noting that South Carolina delegates Butler and Charles Cotesworth Pinckney "insisted that blacks be included in the rule of Representation, *equally* with the Whites" and therefore moved to strike the words "three fifths" on July 11, 1787); Notes of James Madison (July 12, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 23, at 591, 596 (noting motion of South Carolina delegate Charles Pinckney to make "blacks equal to the whites in the ratio of representation"). Charles Pinckney and Charles Cotesworth Pinckney were cousins who both represented South Carolina at the 1787 Constitutional Convention. BEEMAN, *supra* note 34, at 59, 187–88.

consequently an equal representation ought to be allowed for them in a Government which was instituted principally for the protection of property, and was itself to be supported by property.”<sup>93</sup> George Mason of Virginia similarly argued that, because slaves were valuable as a “peculiar species of property,” they should not be excluded altogether from the “estimat[ion] of Representation”: slaves “raised the value of land, increased the exports & imports, and of course the revenue [of the country], would supply the means of feeding & supporting an army, and might in cases of emergency become themselves soldiers.”<sup>94</sup>

Including all the southern slaves in the population figure upon which congressional representation was based was politically and, at least for some northern delegates, morally unacceptable. Although only two states had abolished slavery outright by 1787,<sup>95</sup> the slave population in the southern states dwarfed that in the Northeast. Elbridge Gerry, a Massachusetts delegate, famously and sarcastically argued that it made no sense to increase the South’s representation in Congress based on the number of its slaves while excluding the horses or oxen of the North.<sup>96</sup> Alternatively, northern delegates objected to the inclusion of slaves in the calculation of population upon which congressional representation was based on the grounds that putting the slaves on equal terms with white citizens would be degrading and unacceptable to whites. Pennsylvanian

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93. Notes of James Madison (July 11, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 23, at 578, 580–81 (recording remarks of Pierce Butler (SC)); *see also* Notes of James Madison (July 12, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 23, at 591, 596 (recording remarks of Charles Pinckney (SC)) (arguing for inclusion of all slaves in the “ratio of representation,” on grounds that “[t]he blacks are . . . as productive of pecuniary resources as [the laborers] of the Northern States. They add equally to the wealth, and considering money as the sinew of war, to the strength of the nation.”). Only South Carolina and Georgia consistently voted in favor of including all slaves in the representation calculation. *See, e.g., id.* (recording vote on Pinckney’s motion “for rating blacks as equal to whites instead of as 3/5”).

94. Notes of James Madison (July 11, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 23, at 578, 581 (recording remarks of George Mason (VA)). Unlike Butler, however, Mason supported the three-fifths compromise and did not agree that slaves should be put on an equal footing with freemen. *Id.* Not all delegates agreed that slaves were assets rather than potential liabilities. Luther Martin of Maryland argued that “slaves weakened one part of the Union which the other parts were bound to protect.” Notes of James Madison (Aug. 21, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 355, 364 (referring indirectly to slave rebellions). For this and other reasons, Martin opposed allowing the “privilege of importing [slaves].” *Id.* Moreover, when arguing in favor of abolishing the “infernal traffic” [sic] of the slave trade, Mason himself argued that slaves could become a liability in a war, if armed against their masters, and were capable of deadly insurrections. Notes of James Madison (Aug. 22, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 369, 369–70.

95. *See supra* notes 60–69 and accompanying text.

96. Notes of Robert Yates (June 11, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 204, 206 (recording remarks of Elbridge Gerry (MA)). *See also* Ohline, *supra* note 86, at 583 (noting that some northerners opposed the Three-Fifths Clause because they believed that northern property should be included in the representation calculation along with southern slaves).



Gouverneur Morris, a vocal opponent of slavery, claimed that the people of his state “would revolt at the idea of being put on a footing with slaves” in the census and “would reject any plan that was to have such an effect.”<sup>97</sup> Some northern delegates also opposed including slaves in the population base that would be used to determine congressional representation on the grounds that doing so would indirectly encourage southern states to perpetuate the slave trade, which most northerners (and some southerners) firmly opposed.<sup>98</sup>

James Wilson, a Pennsylvania delegate and future Associate Justice of the Supreme Court, proposed the Three-Fifths Clause as an apparent compromise between these competing interests.<sup>99</sup> Wilson and others recognized that the compromise suffered from logical inconsistencies. Wilson asked: “Are [slaves] admitted as Citizens? Then why are they not admitted on an equality with White Citizens? Are they admitted as property? then [sic] why is not other property admitted into the computation?”<sup>100</sup> Ultimately, however, Wilson concluded that these “difficulties” and imperfections “must be overruled by the necessity of compromise.”<sup>101</sup> The southern states, including North Carolina and

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97. Notes of James Madison (July 11, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 578, 583 (recording remarks of Gov. Morris (PA)). James Wilson similarly apprehended that “the tendency of the blending of the blacks with the whites” in the representation calculation would “give disgust to the people” of Pennsylvania. *Id.* at 587 (recording remarks of James Wilson (PA)).

98. *See, e.g., id.* at 588 (recording remarks of Gouverneur Morris (PA)) (declaring that Morris “could never agree to give such encouragement to the slave trade as would be given by allowing [the southern states] a representation for their negroes”); Notes of James Madison (Aug. 21, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 355, 364 (recording remarks of Luther Martin (MD)) (explaining how Martin saw the Three-Fifths compromise as encouraging the slave trade). *See also infra* notes 104–137 and accompanying text (discussing Congressional debates regarding the slave trade and efforts to abolish it).

99. Journal of the Federal Convention (June 11, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 192, 193. Wilson originally proposed to add the following words after “equitable ratio of representation” in the Constitutional clause regarding proportional representation: “in proportion to the whole number of white and other free Citizens and inhabitants of every age, sex and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes in each State.” *Id.* According to notes recorded by James Madison, “Mr. Wilson observed that less umbrage would perhaps be taken agst. an admission of the slaves into the Rule of representation, if it should be so expressed as to make them indirectly only an ingredient in the rule.” Notes of James Madison (July 12, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 591, 595.

100. Notes of James Madison (July 11, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 578, 587 (recording remarks of James Wilson (PA)); *see also* Notes of James Madison (August 8, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 222 (recording remarks of Gouverneur Morris (PA)) (noting the same logical inconsistencies).

101. Notes of James Madison (July 11, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 578, 587 (recording remarks of James Wilson (PA)).

Virginia, refused to support any constitution that did not include at least three-fifths of all slaves in the representation calculation.<sup>102</sup> Alexander Hamilton, who represented New York during the Constitutional Convention, later described the Three-Fifths Clause as “one result of the spirit of accommodation which governed the Convention; and without this indulgence no union could possibly have been formed.”<sup>103</sup>

## 2. The Slave Trade

The delegates engaged in similar debates regarding the future of the slave trade in the United States. In its final form, Article I, Section 9 of the Constitution provides—again, without using or mentioning the word “slave”—that “[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year [1808], but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”<sup>104</sup> Article V of the Constitution, which sets forth a procedure for its own amendment, creates an express exception for this clause, effectively prohibiting any amendment before 1808 that would affect the slave trade.<sup>105</sup> Like the Three-

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102. See, e.g., Notes of James Madison (July 12, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 591, 593 (recording remarks of William Richardson Davie (NC)). One North Carolina delegate stated that he was sure his state “would never confederate on any terms that did not rate [slaves] at least as 3/5,” and further that “[i]f the Eastern States meant therefore to exclude them altogether the business was at an end.” *Id.* Similarly, Edmund Randolph of Virginia “urged strenuously that express security ought to be provided for including slaves in the ratio of Representation.” Notes of James Madison (July 12, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 591, 594 (recording remarks of Edmund Randolph (VA)). Although Randolph “lamented that such a species of property existed,” given its existence, “the holders of it would require this security.” *Id.*

103. Remarks of Alexander Hamilton (June 20, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 332, 333.

104. U.S. CONST. art. I, § 9, cl. 1. Speaking at the Maryland Constitutional Convention, Delegate Luther Martin, Maryland’s attorney general, noted that the drafters of this article “anxiously sought to avoid the admission of expressions which might be odious in the ears of Americans [slaves or slavery], although they were willing to admit into their system those things which the expressions signified.” Remarks of Luther Martin at the Maryland Constitutional Convention (Nov. 29, 1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 172, 210. See also Finkelman, *supra* note 29, at 451–52 (discussing reasons for the lack of direct reference to slaves in the slave trade clause). Martin did not sign the final draft of the Constitution and opposed its ratification at the Maryland convention. See generally William L. Reynolds II, *Luther Martin, Maryland and the Constitution*, 47 MD. L. REV. 291, 295–305 (1987).

105. U.S. CONST. art. V (providing that “no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article”). See also Notes of James Madison (Sept. 10, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 557, 559 (recording motion of John Rutledge of South Carolina proposing that no amendment could be made affecting sections four and five of Article VII until 1808). The motion passed by a vote of 9-1, with New Hampshire dividing its vote. *Id.*

Fifths Clause, the provision of the Constitution regarding the slave trade was also the fruit of compromise between competing interests.<sup>106</sup>

As initially drafted, the Constitution said nothing about the slave trade—presumably leaving regulation of this issue to the states or to Congress—and permitted a tax on all “imports” other than slaves. Several delegates from the non-slave holding states objected to this language, arguing that the national government should have the power to ban the slave trade, and/or that slaves should be taxed like any other import.<sup>107</sup> South Carolina and Georgia delegates claimed that their constituents would never ratify any constitution that gave Congress the power to ban the slave trade, either directly or indirectly via a confiscatory tax, and threatened to disengage from the Union on this point.<sup>108</sup> In the end, the delegates voted to

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106. See Notes of James Madison (Aug. 22, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 369, 374 (recording remarks by Edmund Randolph (VA)) (noting the need for a compromise on the issue of slave importation); see also Letter from James Madison to Robert Walsh (Nov. 27, 1819), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 436, 436 (describing debate regarding this clause). During the Virginia Constitutional Convention, James Madison observed that “[g]reat as the evil [of the slave trade] is, a dismemberment of the union would be worse.” Remarks of James Madison at the Virginia Constitutional Convention (June 17, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 324, 325.

107. See, e.g., Notes of James Madison (Aug. 22, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 369, 372 (recording remarks by John Dickenson (DE)) (commenting that he considered “it as inadmissible on every principle of honor & safety that the importation of slaves should be authorized to the States by the Constitution”); Notes of James Madison (Aug. 21, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 355, 364 (recording remarks by Luther Martin (MD)) (proposing an amendment to “allow a prohibition or tax on the importation of slaves”). Connecticut delegate Roger Sherman objected to efforts to tax slaves as “import[s]” on the theory that such a tax “implied [that slaves] were *property*.” Notes of James Madison (Aug. 22, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 369, 374 (recording remarks by Roger Sherman (CT)).

108. See, e.g., Notes of James Madison (Aug. 21, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 355, 364 (recording remarks by Benjamin Rutledge (SC)) (noting that, as to the question regarding slave importation, “[t]he true question . . . is whether the southern States shall or shall not be parties to the Union”); Notes of James Madison (Aug. 21, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 355, 364 (recording remarks by Charles Pickney (SC)) (stating that “South Carolina can never receive the plan if it prohibits the slave trade”); Notes of James Madison (Aug. 22, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 369, 373 (recording remarks by Benjamin Rutledge ) (claiming that North Carolina, South Carolina, and Georgia would never agree to the Constitution “unless their right to import slaves be untouched,” as “[t]he people of those States will never be such fools as to give up so important an interest”); see also Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 131, 135 (noting that “S. Carolina & Georgia were inflexible on the point of the slaves” in debating this clause of the Constitution); Remarks of James Madison at the Virginia Constitutional Convention (June 17, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 324, 324–25 (stating that “[t]he southern states would not have entered into the union of America, without the temporary permission of [the slave] trade”). Whether these early threats to secede from the Union were credible has been the subject of scholarly debate. While many historians have taken the southern delegates’ threats to secede over the issue of the slave trade at face value, others, like Paul Finkelman, have argued that

allow limited taxation of slaves who were “imported” into the United States (up to a maximum of \$10 a person) and, more importantly, agreed that the federal government could not ban the slave trade for twenty years.<sup>109</sup> It was widely recognized that, at the end of this moratorium, Congress would have the power to abolish the slave trade.<sup>110</sup> It did so via legislation passed in 1807, with an effective date of January 1, 1808, during the presidency of Thomas Jefferson.<sup>111</sup>

Convention delegates made three main arguments in favor of giving Congress the power to ban the slave trade: (1) the trade was immoral,<sup>112</sup> (2) a Constitution that said nothing about ending the slave trade, in conjunction with the Three-Fifths Clause, encouraged slave importation by enabling southern states to boost their representation in Congress in direct proportion to the number of slaves they added to their populations;<sup>113</sup> and (3) slaves

these states probably would have joined the Union even if they had not won concessions on the issue of the slave trade. See FINKELMAN, *supra* note 17, at 31–32; Finkelman, *Affirmative Action for the Master Class*, *supra* note 77, at 464–65. Historian Joseph Ellis wryly observes that, regardless of whether these states were bluffing, “the most salient historical fact cannot be avoided: No one stepped forward to call their bluff.” ELLIS, *supra* note 61, at 105. More precisely stated, those who were willing to call the bluff (if it was indeed a bluff) were outvoted, seven to four. Notes of James Madison (Aug. 25, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 412, 415. The states voting against the slave trade clause were New Jersey, Pennsylvania, Delaware, and Virginia. *Id.*

109. The original compromise would have enabled Congress to prohibit the slave trade in 1800, not 1808. Notes of James Madison (Aug. 24, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 400, 400 (recording report from the Committee of Eleven). Charles Cotesworth Pinckney of South Carolina proposed an amendment to extend the period of noninterference with slavery from 1800 to 1808, which passed by a vote of seven to four. Notes of James Madison (Aug. 25, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 412, 415. See generally Finkelman, *supra* note 29, at 440–51 (discussing debate regarding the Slave Trade Clause at the Constitutional Convention); Finkelman, *Affirmative Action for the Master Class*, *supra* note 77, at 451–66 (same).

110. See Remarks of James Wilson at the Pennsylvania Constitutional Convention (Dec. 3, 1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 160, 161 (arguing that this Article of the Constitution would enable Congress to prohibit the slave trade as of 1808, even if an individual state wished to continue it). However, given the political power of the southern states, the demise of the trade in 1808 certainly was not a foregone conclusion. See Finkelman, *supra* note 29, at 458.

111. An Act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States, from and after [January 1, 1808], ch. 22 § 1, 2 Stat. 426 (Mar. 2, 1807), reprinted in 1 STATUTES ON SLAVERY: THE PAMPHLET LITERATURE, *supra* note 63, at 116, 116 (providing that “it shall not be lawful to import or bring into the United States or the territories thereof from any foreign kingdom, place, or country, any negro, mulatto, or person of colour, with intent to hold, sell, or dispose of such negro, mulatto, or person of colour, as a slave, or to be held to service or labour”); see also Finkelman, *supra* note 29, at 460–63 (discussing the 1807 Act and its limitations). Congress passed laws in 1794, 1800, and 1803 that attempted to limit American participation in the slave trade before banning it. See Finkelman, *supra* note 29, at 458–60 (discussing these laws and their effect on the trade). President Jefferson’s role in banning the slave trade is discussed in FINKELMAN, *supra* note 17, at 150–52.

112. See, e.g., Notes of James Madison (Aug. 8, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 215, 222 (recording remarks by Gouverneur Morris (PA)) (characterizing the trade as violating “the most sacred laws of humanity”).

113. See, e.g., Notes of James Madison (July 9, 1787), in 1 THE RECORDS OF THE FEDERAL

“weakened . . . the Union” by rendering it vulnerable to attack via slave rebellions, which non slave-holding states would be bound to repress.<sup>114</sup> Again, support for banning or limiting the slave trade, even on moral grounds, did not necessarily translate to opposition to slavery, and certainly did not equate to support for the abolition of slavery in the southern states.

Judging from the debates at the time of the Convention, there was widespread sentiment, even among many southerners, that the slave trade was immoral. Luther Martin of Maryland characterized the original constitutional language, which protected the states’ continued ability to import slaves, as “inconsistent with the principles of the revolution and dishonorable to the American character.”<sup>115</sup> Even Georgia delegate Abraham Baldwin referred to the trade as “evil” and claimed that Georgia would eventually ban the slave trade on its own, if left to its own devices, without unwanted interference from the national government.<sup>116</sup> One of the most impassioned attacks against the trade came from Virginia delegate George Mason, who owned slaves throughout his adult life and never freed them.<sup>117</sup>

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CONVENTION OF 1787, *supra* note 23, at 559, 561 (recording remarks by William Patterson (NJ)) (noting how the Three-Fifths clause encouraged the importation of slaves); Notes of James Madison (Aug. 21, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 355, 356 (recording remarks by John Dickenson (DE)) (noting the possibility that encouragement would thus be given to the slave trade); *see also* Notes of James Madison (Aug. 8, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 215, 222 (recording remarks by Gouverneur Morris (PA)) (noting great concern about the consequences of the slave trade and the Three-Fifths compromise).

114. *See, e.g.*, Notes of James Madison (Aug. 21, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 355, 364 (recording remarks by Luther Martin (MD)); *see also* Notes of James Madison (Aug. 8, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 215, 222 (recording remarks by Gouverneur Morris (PA)); Notes of James Madison (Aug. 8, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 215, 220 (recording remarks by Rufus King (MA)).

115. Notes of James Madison (Aug. 21, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 355, 364 (recording remarks by Luther Martin (MD)). *See also* Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story’s Judicial Nationalism*, 1994 SUP. CT. REV. 247, 261 (1995) (describing moral condemnation of the slave trade during state ratification debates, during which the trade was characterized as “the most barbarous violation of the sacred laws of God and humanity”) [hereinafter Finkelman, *Story Telling*].

116. Notes of James Madison (Aug. 22, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 369, 372 (recording remarks by Abraham Baldwin (GA)). Charles Pinckney of South Carolina also suggested that “[i]f the S. States were let alone they will probably of themselves stop importations.” *Id.* at 371 (notes of James Madison (VA) recording remarks by Charles Pinckney (SC) on Aug. 22, 1787).

117. *See supra* note 37 and accompanying text. In response to Mason’s critique of slavery, Oliver Ellsworth of Connecticut somewhat cynically noted that “[a]s he had never owned a slave [unlike Mason, he] could not judge . . . the effects of slavery on character.” Notes of James Madison (Aug. 22, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 369, 370–71.

As Ellsworth and others pointed out during the debates, the Virginians' opposition to the slave *trade* was consistent with their own self interest, as the Virginia slave population was self-sustaining, while that of South Carolina and Georgia was not.<sup>118</sup> According to the 1790 census, the Virginia slave population (292,627) was almost three times larger than that of any other state.<sup>119</sup> Although the Virginia planters' encouragement of slave marriages and procreation resulted in the creation and (sometimes) preservation of slave families, it also assured "significant capital gains on their investments."<sup>120</sup> George Mason eventually lobbied against ratification of the Constitution because, he argued, while it protected the slave *trade* too much, it protected slavery itself too little; he feared Congress could and would eventually emancipate Virginia's slaves.<sup>121</sup>

Even though the majority of the constitutional delegates may have characterized the slave trade as morally contemptible, they were unwilling to let such moral considerations drive a fatal wedge between themselves and their southern counterparts. Moreover, several delegates either directly or indirectly recognized that, while the southern economies benefited most directly from slavery and the trade, cheap raw materials produced by slaves in the South benefited other regions as well.<sup>122</sup> Ellsworth argued that "[t]he

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118. See DAVIS, *supra* note 23, at 134; FINKELMAN, *supra* note 17, at 27; ELLIS, *supra* note 61, at 96. See also Notes of James Madison (Aug. 22, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 369, 371 (recording remarks by Oliver Ellsworth (CT)) (noting that "slaves . . . multiply so fast in Virginia & Maryland that it is cheaper to raise than import them, whilst in the sickly rice swamps foreign supplies are necessary").

119. ELLIS, *supra* note 61, at 102 (compiling data from the U.S. Bureau of Census). The same census reported approximately 100,000 slaves living in each of the following states: North Carolina (100,572), South Carolina (107,094), and Maryland (103,036). *Id.*; see also Notes of James Madison (Aug. 22, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 369, 371 (recording remarks by Charles Pinckney (SC)) (arguing that Virginia would benefit from a ban on slave importation, as "[h]er slaves will rise in value, & she has more than she wants").

120. DAVIS, *supra* note 23, at 134.

121. See *supra* note 37; see also ELLIS, *supra* note 61, at 96 (noting Mason's desire for a constitutional provision to protect his slave property). Historian Peter Wallenstein has argued that, despite his "occasional rhetoric," George Mason cannot be characterized as "antislavery," as his opposition to the slave trade was grounded in the best interests of Virginia slaveholders, not Virginia slaves. Peter Wallenstein, *Flawed Keepers of the Flame: The Interpreters of George Mason*, 102 VA. MAG. OF HIST. & BIOGRAPHY 229, 253 (1994).

122. See Notes of James Madison (Aug. 21, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 355, 364 (recording remarks by John Rutledge (SC)) (arguing that "[i]f the Northern States consult their interest, they will not oppose the increase of Slaves which will increase the commodities of which they will become the carriers"); see also Notes of James Madison (Aug. 22, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 369, 371 (recording remarks by Charles Cotesworth Pinckney (SC)). Oliver Ellsworth of Connecticut similarly reflected that "[w]hat enriches a part enriches the whole, and the States are the best judges of their particular interest." Notes of James Madison (Aug. 21, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 355, 364 (recording remarks by Oliver Ellsworth (CT)).

morality or wisdom of slavery are considerations belonging to the States themselves,” and further that, because the “old confederation had not meddled with this point,” he did not “see any greater necessity for bringing it within the policy of the new one.”<sup>123</sup> Roger Sherman of Connecticut similarly noted that while he “disapproved of the slave trade,” the “public good” did not require that the states be deprived of the ability to import slaves. He concluded that, “as it was expedient to have as few objections as possible to the proposed scheme of Government,” it was “best to leave the matter as we find it.”<sup>124</sup>

Political objections ultimately drove the non-slave holding states to insist that some limitation be placed on the South’s continued ability to import slaves. As noted above, the Three-Fifths Clause approved earlier in the constitutional debate indirectly incentivized the southern states to import slaves, as doing so would increase their representation in Congress.<sup>125</sup> Therefore, allowing the slave trade to continue unabated would enable the southern states to cement and even further augment the political advantage they had achieved via the Three-Fifths Clause. Gouverneur Morris of Pennsylvania made this argument to the delegates of the Convention:

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.<sup>126</sup>

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123. Notes of James Madison (Aug. 21, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 355, 364 (recording remarks by Oliver Ellsworth (CT)). Elbridge Gerry of Massachusetts similarly believed that the national government “had nothing to do with the conduct of the States as to Slaves,” although he did not wish to “sanction” it. Notes of James Madison (Aug. 22, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 369, 372 (recording remarks by Elbridge Gerry (MA)).

124. Notes of James Madison (Aug. 22, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 369, 369 (recording remarks by Roger Sherman (CT)). Similarly, Hugh Williamson of North Carolina stated that he was against slavery, “both in opinion & practice,” but he “thought it more in favor of humanity, from a view of all circumstances, to let in S– C & Georgia on those terms, than to exclude them from the Union.” Notes of James Madison (Aug. 25, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 412, 415–16 (recording remarks by Hugh Williamson (NC)).

125. *See supra* notes 98 and 113 and accompanying text.

126. Notes of James Madison (Aug. 8, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION

Delegates also argued that South Carolina and Georgia should not have an unfettered ability to import an unlimited number of slaves because doing so would increase the likelihood of slave rebellions, which all the states could be called upon to suppress. Morris articulated this claim as well: “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.”<sup>127</sup> The concern that unfettered importation of African slaves would increase the danger of slave rebellions was not an idle one. The South Carolina colonial legislature had attempted to limit the slave trade on multiple occasions in the fifty-year period leading up to the Constitutional Convention, for this very reason.<sup>128</sup> After the Stono Rebellion of 1739, for example, the South Carolina Legislature attempted to effectively end the trade by imposing a tax of £100 per imported slave.<sup>129</sup>

Although one South Carolina delegate proclaimed that he would “readily exempt” the other States from any duty to protect the South as a result of a slave rebellion,<sup>130</sup> the Constitution contains no such exemption. In fact, the Constitution both empowered and required the federal government to come to the aid of the southern states in the event of a slave

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OF 1787, *supra* note 23, at 215, 222 (recording remarks by Gouverneur Morris (PA)); *see also id.* at 222–23 (noting that the southern states are encouraged to import “fresh supplies of wretched Africans” by the “assurance of having their votes in the Natl Govt increased in proportion” to the number of slaves imported); Notes of James Madison (Aug. 21, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 355, 364 (recording remarks by Luther Martin (MD)). Slavery was still legal in both Pennsylvania and New Jersey at the time of the Convention; however, both states at this point had banned the slave trade. *See supra* notes 60 and 67 and accompanying text.

127. Notes of James Madison (Aug. 8, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 215, 222 (recording remarks by Gouverneur Morris (PA)). Similarly, Rufus King of Massachusetts rhetorically asked, “Shall one part of the U. S. be bound to defend another part, and that other part be at liberty not only to increase its own danger, but to withhold the compensation for the burden?” Notes of James Madison (Aug. 8, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 215, 220 (recording remarks by Rufus King (MD)); *see also* Notes of James Madison (Aug. 8, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 215, 222 (recording remarks by Gouverneur Morris (PA)) (noting that Morris argued that, by importing slaves, the southern states were both increasing the “danger of attack” and the “difficulty of defence”); Notes of James Madison (Aug. 21, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 355, 364 (recording remarks by Luther Martin (MD)).

128. *See Finkelman, supra* note 29, at 435–36.

129. *Id.* at 435. The law cited the “very dangerous consequence to the peace and safety” of the colony posed by the “barbarous and savage disposition” of imported Africans as justification for the confiscatory tax. *Id.* (citing An Act for the Better Strengthening of this Province, ch. 669, 1740 S.C. Acts 556–57).

130. Notes of James Madison (Aug. 21, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 355, 364 (recording remarks by John Rutledge (SC)).



rebellion, both via the Domestic Insurrections Clause<sup>131</sup> and the clause that promises federal protection to the States in the event of “domestic Violence.”<sup>132</sup> Whether these clauses were written with slave rebellions explicitly in mind has been the source of historical debate.<sup>133</sup> However, nothing suggests that the delegates intended to foreclose the possibility of federal intervention in the event of a slave rebellion, which did in fact occur when Nat Turner led a slave revolt in Southampton, Virginia in 1831.<sup>134</sup>

The final language of this Constitution regarding the slave trade (without using the word “slave”) again reflects a compromise between these competing interests.<sup>135</sup> South Carolina and Georgia delegates openly predicted that the southern states would remain in the Union only if the Constitution insulated their ability to import slaves from national interference.<sup>136</sup> The majority of the other states acquiesced, but limited this protection to a period of twenty years. Moral or philosophical objections to the slave trade were largely overridden by the concern that abolishing it would imperil the body’s ability to keep all of the thirteen original states in the Union and negatively impact the economy in all regions of the country. South Carolinian John Rutledge, a future Supreme Court Justice, bluntly stated: “Religion & humanity had nothing to do with this question [of the slave trade]—Interest alone is the governing principle with Nations.”<sup>137</sup>

### 3. The Fugitive Slave Clause

The Fugitive Slave Clause—which, like the others, again does not include the word “slave”—also anticipated and reflected the inherent

131. U.S. CONST. art. I, § 8, cl. 15.

132. U.S. CONST. art. IV, § 4.

133. See FINKELMAN, *supra* note 17, at 7 (characterizing these two clauses of the Constitution as “indirect protections of slavery”); see also Finkelman, *Affirmative Action for the Master Class*, *supra* note 77, at 429–30, 466 (same). An alternative or potentially additional explanation for these clauses of the Constitution relates to Shay’s Rebellion, an uprising of cash-strapped Massachusetts farmers facing a foreclosure crisis in 1786. See BEEMAN, *supra* note 34, at 16–18, 290.

134. See Finkelman, *The Root of the Problem*, *supra* note 14, at 7 (noting that the federal government intervened to help suppress Gabriel’s Rebellion (Virginia, 1830), the Nat Turner Slave Revolt, and “John Brown’s attempts to make war on slavery in Virginia”).

135. Strong evidence suggests that the final vote on the Slave Trade Clause reflected a cynical bit of horse trading by the Deep South and New England states. Southerners agreed to vote in favor of the Commerce Clause if the New England delegates would support a ban on export taxes and protection of the slave trade. See Finkelman, *supra* note 29, at 443–45; Finkelman, *Affirmative Action for the Master Class*, *supra* note 77, at 459–63. The final vote on the clause was seven to four, with New Hampshire, Massachusetts, Connecticut, Maryland, South Carolina, North Carolina, and Georgia voting in favor of the clause. Notes of James Madison (Aug. 25, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 412, 415.

136. See *supra* note 108 and accompanying text.

137. Notes of James Madison (Aug. 21, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 355, 364 (recording remarks by John Rutledge (SC)).

difficulties presented by the existence of slavery in some but not all of the United States of America. In its entirety, the clause provides as follows: “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.”<sup>138</sup>

Unlike the other provisions of the Constitution dealing with the issue of slavery, however, this one generated little debate.

The Fugitive Slave Clause was initially proposed by South Carolina delegates Pinckney and Butler, who moved “to require fugitive slaves and servants to be delivered up like criminals,” in the context of the debate regarding the extradition clause.<sup>139</sup> James Wilson of Pennsylvania objected on the grounds that inserting such an obligation into the Constitution would oblige “the Executive of the State” to capture such fugitives, “at the public expence [sic].”<sup>140</sup> Roger Sherman of Connecticut “saw no more propriety in the public seizing and surrendering a slave or servant, than a horse.”<sup>141</sup> However, when the clause was reintroduced the next day, as its own article, it was approved unanimously without debate.<sup>142</sup>

The relative lack of debate regarding the Fugitive Slave Clause suggests that the Founders failed to anticipate the severity of conflict that would ultimately be engendered by it.<sup>143</sup> Moreover, and perhaps more

138. U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII. See FINKELMAN, *supra* note 17, at 82–84 (discussing the adoption of this clause of the Constitution); BEEMAN, *supra* note 34, at 329–30 (same).

139. Notes of James Madison (Aug. 28, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 437, 443 (recording remarks by Pierce Butler (SC) and Charles Pinckney (SC)).

140. *Id.* (recording remarks by James Wilson (PA)).

141. *Id.* (recording remarks by Roger Sherman (CT)).

142. Notes of James Madison (Aug. 29, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 447, 453–54 (recording motion proposed by Pierce Butler (SC)); Journal of the Constitutional Convention (Aug. 29, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 445, 446. As originally drafted, the clause read as follows:

If any person bound to service or labor in any of the [United] States shall escape into another State, he or she shall not be discharged from such service or labor, in consequence of any regulations subsisting in the State to which they escape, but shall be delivered up to the person justly claiming their service or labor. . . .

Notes of James Madison (Aug. 29, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 447, 453–54 (recording motion proposed by Pierce Butler (SC)). The final language was revised from the original by the Committee of Style, Report of the Committee of Style (Sept. 12, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 590, 601–02, and again by a vote of the delegates on September 15, 1787, Journal of the Constitutional Convention (Sept. 15, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 621, 621 (substituting “of any law or regulation” for “of regulations subsisting”).

143. See Finkelman, *Story Telling*, *supra* note 115, at 260 (describing the history of the clause and concluding that the lack of debate likely demonstrated that “northern delegates simply failed to appreciate the legal problems and moral dilemmas that the rendition of fugitive slaves would pose”); BEEMAN, *supra*

importantly, their relative inattention to this clause may be explained by the peripheral nature of its impact on the constitutive rules of the new republic. The Constitution, after all, was and is primarily a blueprint of constitutive rules of the United States' federal government, and therefore any such rules that advantaged one competing interest over another were bound to generate controversy. It is thus perhaps not surprising that the delegates to the Constitutional Convention did not linger over the Fugitive Slave Clause, as it had no apparent effect on the political balance of power among the various states. The same could not be said for the Three-Fifths and Slave Trade Clauses, both of which boosted the representation of slaveholders in Congress.

The Fugitive Slave Clause therefore did not generate a vociferous debate at the Constitutional Convention. That lack of debate, however, did not presage a lack of future controversy. The existence of slavery in some but not all states inexorably led to clashes between citizens of North and South, many of them violent.<sup>144</sup> Southerners complained that northern abolitionists were assisting fugitive slaves who escaped over their borders; northerners retorted that southerners were kidnapping free blacks and illegally dragging them into slavery. Although the Founders paid scant attention to this constitutional provision, it anticipated a conflict that was one of the key factors leading to the Civil War.

#### *D. Conclusion*

Many of the Founders—including some who were slaveholding southerners—openly lamented the evils of slavery and both hoped and predicted that it would die a natural death.<sup>145</sup> Republicans frequently cited this constitutional history in the years leading up to the Civil War, reminding their southern colleagues that it was “*your fathers, your immortal Washington, your Jeffersons, and Madisons, and Henrys, and Masons . . . who handed down to us the very doctrines now advocated by the Republican party*” and denounced as traitorous in the South.<sup>146</sup> However, the Constitution was not an “implicit compact” for the gradual abolition of slavery.<sup>147</sup> Had it been, it would not have empowered the

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note 34, at 332–33 (speculating that the “puzzling” and “deeply disturbing” lack of debate on the fugitive slave clause was due to delegates’ tolerance of slavery as a “necessary evil”) (citation omitted).

144. See *infra* notes 185–268 and accompanying text; see also FINKELMAN, *supra* note 17, at 83–104.

145. See *supra* note 83 and accompanying text.

146. CONG. GLOBE, 36TH CONG., 1ST SESS. 1041 (1860) (remarks of Rep. John Perry (Republican/ME)); see also *id.* at 1035 (citing Framer critiques of slavery).

147. See ELLIS, *supra* note 61, at 102. Ellis concludes that “[t]he ultimate legacy of the American Revolution on slavery was not an implicit compact that it be ended, or a gentleman’s agreement between

slaveholding states to preserve and protect the institution. In assessing the impact of the Constitution on South Carolina's ability to retain its slave population, Charles Cotesworth Pinckney was rather optimistic:

We . . . obtained a representation for our property [via the Three-Fifths Clause] . . . We have a security that the general government can never emancipate [the slaves], for no such authority is granted . . . We have obtained a right to recover our slaves in whatever part of America they may take refuge, which is a right we had not before. In short, considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could; but, on the whole, I do not think them bad.<sup>148</sup>

Pinckney's optimism was well founded. The southern states were intent on preserving their ability to perpetuate slavery in the new nation, and the newly-drafted Constitution enabled them to do so.

### III. CHANGING THE COURSE OF HISTORY: WINNING BATTLES BUT LOSING THE WAR

In the years leading up to the Civil War, the constitutive rules embedded in the Constitution as concessions to the South did not pave a path that led to the eventual but gradual abolition of slavery that the Founders claimed to welcome and anticipate. Thanks in no small part to these very rules, the South's interests were firmly overrepresented in all three branches of the federal government. As a region, the South exhibited little interest in embarking upon a course of gradual emancipation and instead used its considerable political power to shield and succor the institution of slavery. As a result, federal laws were enacted that embraced southern social norms on this issue. Slavery became ensconced rather than dissipated.

However, even as the South was winning legislative battles that repeatedly reaffirmed its ability to rely on slave labor to sustain its economy, it was gradually losing the war of public opinion in other regions of the country. In Professor Kahan's terminology, the South delivered a

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the two sections that it be tolerated, but rather a calculated obviousness that it not be talked about at all." *Id.* See also AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 352 (2005) (noting that "the Constitution's basic structure tilted the long-run game against the forces of freedom").

148. Remarks of Charles Cotesworth Pinckney (Jan. 1788), in 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, *supra* note 23, at 252, 253–55.

series of “hard shoves”<sup>149</sup> that did not sit well with citizens of the free states, and reinforced rather than weakened their opposition to slavery. Some of the South’s political victories played themselves out in a dramatic fashion that prompted outrage among a large portion of northern citizens. In the words of one well-known textile baron, “We went to bed one night old fashioned, conservative, Compromise Union Whigs & waked up stark mad Abolitionists.”<sup>150</sup> Ironically, the disproportionate political power held by the South, which allowed it to achieve these legislative victories, set the stage for Lincoln’s election, secession, and the Civil War, all of which ultimately enabled slavery’s abolition.

#### *A. The Political Power of the South*

The South’s disproportionate political power during this era—much of it stemming from the Three-Fifths Clause—enabled it to achieve legislative and judicial victories that it would not otherwise have been able to accomplish, such as the Fugitive Slave Act of 1850. However, the backlash from these laws changed public opinion in ways that ultimately enabled the success of abolitionism.

Writing his close friend (and Kentucky slaveholder) Joshua Speed in 1855, Abraham Lincoln remarked, “The slave-breeders and slave-traders, are a small, odious and detested class, among you; and yet in politics, they dictate the course of all of you, and are as completely your masters, as you are the masters of your own negroes.”<sup>151</sup> The idea of a southern “Slave Power” that dominated national politics—with the goal of not just preserving slavery in the South, but of nationalizing the institution—emerged in the 1830’s and became part of the nation’s political discourse in the years leading up to the Civil War.<sup>152</sup> Many living in the free states

149. Kahan, *supra* note 3, at 607.

150. JANE H. PEASE & WILLIAM H. PEASE, *THE FUGITIVE SLAVE LAW AND ANTHONY BURNS: A PROBLEM IN LAW ENFORCEMENT* 43 (1975) (quoting Amos Lawrence to Giles Richards, June 1, 1854). Lawrence made this statement in reaction to the arrest and forcible return to slavery of Anthony Burns. See *infra* notes 2577–62 and accompanying text. Similarly, David Davis, a political boss and future Supreme Court Justice, wrote that events such as “the outrages in Kansas” had “made abolitionists of those who never dreamed they were drifting into it.” FONER, *supra* note 11, at 88 (citation omitted).

151. Letter from Abraham Lincoln to Joshua F. Speed (Aug. 24, 1855), in 2 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 320, 322 (Roy P. Basler ed., 1953).

152. ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 87–98 (1995); see also WILLIAM E. GIENAPP, *THE ORIGINS OF THE REPUBLICAN PARTY, 1852–1856*, 76 (1987) (arguing that legislation such as the Nebraska bill pushed the Slave Power movement into national politics). For example, Congressional Representative Henry Bennett (a former Whig) remarked, in the context of debate regarding the admission of Kansas as a free state, “We have learned that the slave power aims at supremacy—*absolute supremacy in this Government*; that it is

concluded that an aristocracy of slaveholders in the South had taken control of not just southern politics, but those of the nation as a whole.<sup>153</sup> Congressman Henry Bennett of New York, arguing in favor of the admission of Kansas as a free state in 1856, claimed that “[t]here is not an aristocracy in any Government of Europe that holds the power in it that the slaveholders have held, and now hold, in this free Democratic representative Republic.”<sup>154</sup> Bennett asked his fellow Congressmen: “Are we to have a government of the people, a real representative Republican Government? or are the owners of slave property, small in number, but with the power now in their hands . . . to rule us with arbitrary and undisputed sway? Is this to be a land of freedom, or a despotism of slavery?”<sup>155</sup>

The opponents of slavery had good reason to complain about the slaveholdings states’ dominance over the national government. The slave states held a tremendous amount of power in Congress and in the nation as a whole during the mid-nineteenth century.<sup>156</sup> For two reasons, the average

ever aggressive, insolent, and exacting; that it abides by no compact, fulfills no promise, regards no obstacle, . . . but . . . seeks to secure the whole power of this Government in its grasp.” CONG. GLOBE, 34TH CONG., 1ST SESS. 698 (1856).

153. FONER, *supra* note 152, at 87–89. Senator Salmon P. Chase of Ohio remarked that “[n]o one [on the floor of the Senate] can fail to observe the immense, not to say overpowering, influence which slavery exerts over almost every act of the Government.” CONG. GLOBE, 33D CONG., 2D SESS. 877 (1855); *see also* CONG. GLOBE, 34TH CONG., 1ST SESS. app. at 699 (1856) (remarks of Rep. Henry Bennett regarding “The Slave Power”).

154. CONG. GLOBE, 34TH CONG., 1ST SESS. app. at 699 (1856). Bennett, a former Whig, eventually joined the Republican Party. *Bennett, Henry—Biographical Information*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=b000376> (last visited Mar. 12, 2011). Five years later, Representative Washburn of Wisconsin observed the following:

For sixty out of seventy-two years since the Government was formed, they [southerners] have controlled the Federal Government in all its departments—legislative, executive, and judicial. They have so long been accustomed to regard themselves as specially appointed to rule this country, that they have forgotten how to obey, claiming to be exclusively the ruling class; and, grown haughty, proud, and insolent . . . they cannot brook the idea of a man who is peculiarly the representative of the great laboring classes should be [the President].

CONG. GLOBE, 36TH CONG., 2D SESS. 513 (1861).

155. CONG. GLOBE, 34TH CONG., 1ST SESS. app. at 698 (1856). Similarly, Congressman John Perry (ME), a Republican, asked, “Under what article or section in the Constitution has an aristocracy of wealth, combined in three hundred and fifty thousand persons [the slaveholders], ‘ruled’ the teeming millions of this country . . . ? It is nowhere to be found. It has been a usurpation . . . to which the people of the free States have too long submitted.” CONG. GLOBE, 36TH CONG., 1ST SESS. 1039 (1860).

156. *See* Herbert Aptheker, *The Abolitionist Movement*, POL. AFF. (Feb. 1976), *reprinted in* CIVIL RIGHTS SINCE 1787: A READER ON THE BLACK STRUGGLE, *supra* note 2, at 36, 36–37. Marxist historian Herbert Aptheker argues that the “ruling class” of slaveowners constituted the “greatest single economic interest in the nation as a whole” during the antebellum era: “Their ownership of some 3,500,000 slaves worth perhaps three and a half billion dollars, plus their ownership of the cotton, tobacco, rice, sugar, hemp, [and] lumber-products that they produced, and of the land which that labor made fruitful, plus the buildings and tools and animals, made of that interrelated, highly class-conscious oligarchy by far the greatest single

white southern voter was represented by a significantly larger congressional delegation than the average northern voter in 1848. First, southern representation in the House of Representatives was bolstered by the Three-Fifths Clause, which allowed southern states to increase their numbers in the House of Representatives by including three-fifths of the slaves, none of whom (of course) could vote, in the total population figure upon which the number of a state's representatives was based.<sup>157</sup> Second, because the southern states were generally less populous than the northern states, the South was also disproportionately represented in the Senate, in which each state has two representatives regardless of population. These structural advantages, enshrined in the Constitution, were amply reflected in the political system. For example, between 1801 and 1842, approximately eighty percent of the Presidents Pro Tempore of the Senate (20/25) and the Speakers of the House of Representatives (11/14) were from the South.<sup>158</sup>

In the years leading up to the Civil War, Republicans were quick to point out that the South had long dominated the national government, specifically the legislature, in numbers disproportionate to its population. According to the census of 1850, as reported by Republican Representatives during House debate, the fifteen free states had over twice as many "free whites" (thirteen million) as did the fifteen slave states (six million).<sup>159</sup> However, the free and slave states were each represented by the same number of Senators (thirty each).<sup>160</sup> Moreover, even though free state representatives outnumbered slave state representatives in the House as a

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vested interest in the nation as a whole." *Id.* Eric Foner similarly notes that, when the Civil War began, the economic value of the nation's approximately four million slaves—if considered property—would have exceeded "the combined worth of all the banks, railroads, and factories in the United States." FONER, *supra* note 11, at 17. Foner concludes that, when measured by "geographical extent, population, and the institution's economic importance," the slave system of the antebellum South was "the most powerful . . . the modern world has known." *Id.*

157. U.S. CONST. art. I, § 2, cl. 3. *See also supra* notes 84–103 and accompanying text.

158. *See* Finkelman, *Story Telling*, *supra* note 115, at 250 n.17. In 1860, Republican Representative John Perry of Maine reported that the slave states dominated the committees of both the House and Senate. CONG. GLOBE, 36TH CONG., 1ST SESS. 1037 (1860). He calculated that, of the twenty-two "important committees" in the Senate, sixteen were chaired by slave state senators, while only six were chaired by senators from the free states. *Id.* Similarly, he claimed that there were twenty-five "important committees" in the House, only eight of which were chaired by free state Representatives. *Id.* He concluded that "[t]his *packing* operation on committees to favor the South was no new thing . . . ; they have *always* had it in just that kind of a way. . . . It should be borne in mind that *these committees shape the whole legislation of the country.*" *Id.*

159. CONG. GLOBE, 36TH CONG., 1ST SESS. 1036 (1860) (remarks of Rep. John Perry (Republican/ME)); *see also* CONG. GLOBE, 34TH CONG., 1ST SESS. 698 (1856) (remarks of Rep. Henry Bennett (Republican/NY)).

160. CONG. GLOBE, 34TH CONG., 1ST SESS. 698-99 (1856) (remarks of Rep. Henry Bennett (Republican/NY)). Bennett complained that "this number of slave States, extended over a large territory, with a small population, makes the disproportioned representation of the two sections in the Senate too palpably unjust. *In Senators, the slave States have, by this system, kept up a representation, in the proportion of TWO to ONE, as against the free States.*" *Id.*

result of the substantially greater “free white” population of the North, the Three-Fifths Clause continued to pad southern representation.<sup>161</sup> One Republican representative, speaking in 1856, proposed a repeal of the Three-Fifths Clause to apportion representation and direct taxes among the States “according to their respective number of free persons.”<sup>162</sup> The stated intent of this amendment was to “restore equality of representation and of political rights to all the States.”<sup>163</sup>

The South actively used its legislative dominance to influence the course of legislative debate regarding slavery.<sup>164</sup> From 1836 to 1844, the House of Representatives formally implemented a series of “gag rules” that prohibited even the consideration of any citizen petitions regarding the subject of slavery.<sup>165</sup> For example, in 1843 the House adopted a standing rule to this effect: “No petition, memorial, resolution, or other paper praying the abolition of slavery in the District of Columbia, or any State or Territory, or the slave trade between the States and the Territories of the United States, in which it now exists, shall be received by this House, or entertained in any way whatever.”<sup>166</sup> These gag rules quite obviously violated the First Amendment right to petition, and they were eventually abolished for this reason.<sup>167</sup> However, their decade-long persistence in the

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161. CONG. GLOBE, 34TH CONG., 1ST SESS. 698 (1856) (remarks of Rep. Henry Bennett (Republican/NY)) (noting that in 1854, slaves states had 90 members in the House, while the free states had 142). Bennett calculated that if the free states were represented “[u]pon the same ratio” as the slave states, they would gain 53 additional members of Congress, for a total of 195. *Id.* In 1860, Representative John Perry (Republican/ME) reported that the ratio of slave state to free state representatives was 90 to 147. CONG. GLOBE, 36TH CONG., 1ST SESS. 1036 (1860). Perry similarly concluded that “[a] ratio equal with the South would give the North one hundred and ninety-eight members.” *Id.*

162. CONG. GLOBE, 34TH CONG., 1ST SESS. app. at 702 (1856) (remarks of Rep. Henry Bennett (Republican/NY)); *see also* CONG. GLOBE, 38TH CONG., 1ST SESS. 2944 (1864) (remarks of Rep. Higby (Republican/CA)) (claiming that, under the Three-Fifths clause, the United States lacked a truly republican form of government).

163. CONG. GLOBE, 34TH CONG., 1ST SESS. app. at 702 (1856). He reasoned that, under his proposed amendment, “[t]he slave property . . . would still retain its just influence in the Government as a great property interest . . . but it would have no separate, distinct, political importance.” *Id.* Bennett’s proposed amendment was almost certainly made for rhetorical purposes, as it would have required a Constitutional Convention to implement. It did not appear to generate any serious debate.

164. Federal legislation also stripped free blacks of basic civil rights during this era. For example, the Naturalization Act of 1790 prevented blacks who immigrated to the United States from becoming citizens, and the Militia Act of 1792 excluded blacks from military service. *See FONER, supra* note 11, at 16.

165. *See WILLIAM W. FREEHLING, 1 THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776–1854*, at 308–52 (1990) (describing the history of the gag rule).

166. Standing Rules and Orders for Conducting Business in the House of Representatives of the United States (1843), *reprinted in CIVIL RIGHTS SINCE 1787: A READER ON THE BLACK STRUGGLE, supra* note 2, at 59, 59.

167. *See WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS 476–77* (1995) (discussing Adams’ role in repealing the rule). *See also* CONG. GLOBE, 36TH CONG., 1ST SESS. 1037 (1860) (remarks of Rep. John Perry (Republican/ME)) (arguing that the South



face of an express protection in the Bill of Rights further reflects the power of the slaveholding states in the federal legislature.<sup>168</sup>

The South's legislative dominance also resulted in a disproportionate share of power in presidential elections. Because the number of a state's representatives in the Electoral College is based on its combined number of Senators and congressional representatives,<sup>169</sup> the South's overrepresentation in the Senate and in the House translated into an advantage in presidential politics as well.<sup>170</sup> Even though only 30 percent of the voting population lived in slave states in 1848, those states accounted for 42 percent of the electoral votes.<sup>171</sup>

The South's disproportionate representation in the Electoral College no doubt contributed to a succession of conservatives in the Oval Office (at least on the issue of slavery) who strongly supported southern interests during the years leading up to the Civil War. When Millard Fillmore (from New York) assumed the presidency in 1850,<sup>172</sup> he was only the fourth President (after John Adams and John Quincy Adams, both from Massachusetts, and Martin Van Buren, also from New York) who was born outside the South. All other Presidents, from George Washington to Zachary Taylor, were born in either Virginia or North Carolina; the vast majority were native Virginians. In fact, of the sixteen Presidents who were elected between 1788 and 1848, all but four owned slaves.<sup>173</sup>

Even the Presidents who did not hail from the South strongly supported the region's interests, particularly on the subject of slavery. President Martin Van Buren, elected in 1837, was a New York Democrat who characterized abolitionism as one of the greatest threats to the Union in his inaugural address.<sup>174</sup> The last Whig President, Millard Fillmore, strongly

had deprived free state citizens of their rights under the First Amendment via these gag rules).

168. See Finkelman, *The Root of the Problem*, *supra* note 14, at 11 (arguing that the Three-Fifths Clause most likely enabled passage of the House gag rules).

169. U.S. CONST. art. I, § 2, cl. 2. The clause provides as follows: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." *Id.*

170. See FINKELMAN, *supra* note 17, at 22 (arguing that the Electoral College was created, at least in part, to protect the interests of southern slaveholders); see also Finkelman, *Affirmative Action for the Master Class*, *supra* note 77, at 449-51. Finkelman points out that Thomas Jefferson's election to the Presidency in 1800 was enabled by the electoral votes of southern states "gained on account of their slaves." Finkelman, *The Root of the Problem*, *supra* note 14, at 8.

171. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 54 n.17 (1988).

172. Fillmore was elected as Zachary Taylor's Vice-President in 1848. He became the President when Taylor died in 1850.

173. FONER, *supra* note 11, at 16.

174. *Id.* at 29. During his address, Van Buren characterized himself as an "inflexible and uncompromising opponent of every attempt on the part of Congress to abolish slavery in the District of

supported the Compromise of 1850, which contained the infamous Fugitive Slave Act of 1850 and repealed the Missouri Compromise.<sup>175</sup> The remaining Presidents who were elected prior to Abraham Lincoln, Franklin Pierce (New Hampshire) and James Buchanan (Pennsylvania), were northern Democrats who were lambasted by Republicans for their capitulation to southern demands on the issue of slavery.<sup>176</sup> In fact, John Quincy Adams, whose one-term presidency ended in 1829, was the last President prior to the election of Lincoln who could even arguably be characterized as anti-slavery.<sup>177</sup>

The South's hold on the Executive Branch and its overrepresentation in the Legislature also directly affected the composition of the third branch of government, particularly the Supreme Court. Supreme Court Justices who were nominated and appointed for life by southern (or southern-sympathizing) Presidents vigorously interpreted and enforced laws designed to protect slavery. For example, when *Prigg v. Pennsylvania*—the Supreme

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Columbia against the wishes of the slaveholding States,” and promised that he was determined to “resist the slightest interference with it in the States where it exists.” See Martin Van Buren, Inaugural Address (Mar. 4, 1837), available at <http://www.let.rug.nl/usa/P/mb8/speeches/vanburen.htm>. Finkelman characterizes Van Buren as a “classic ‘doughface’” for his support of proslavery positions during his Presidency. See Finkelman, *Story Telling*, *supra* note 115, at 249 n.15 (citation omitted). Although Van Buren never embraced abolitionism, his antislavery credentials improved after he left the Democratic Party and became the Free Soil nominee for President in 1848. FONER, *supra* note 11, at 54. The Free Soil Party joined together Conscience Whigs and northern Democrats who opposed the expansion of slavery into the Territories. *Id.* Van Buren's running mate was Charles Francis Adams, son of former President John Quincy Adams and grandson of President John Adams. *Id.*

175. Millard Fillmore, THE WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/millardfillmore> (last visited March 12, 2011) (noting that unlike many former Whigs, Fillmore did not join the Republicans when his party dissolved, and he opposed Abraham Lincoln throughout the Civil War). After the dissolution of the Whig Party, Fillmore joined the American Party, otherwise known as the Know-Nothings, and ran for President as a third party candidate in 1856. FONER, *supra* note 11, at 81. Fillmore's third party presidential candidacy drew many votes from conservative, former Whigs and helped to ensure victory by the Democrat James Buchanan over the Republican John C. Fremont. *Id.* at 81–82.

176. CONG. GLOBE, 36TH CONG., 1ST SESS. 1039 (1860). In describing the South's influence over Presidential politics, Representative John Perry of Maine, a Republican, asserted that “Franklin Pierce's nomination was a Southern movement, led off by Virginia; and in 1856, the South took possession of Mr. Buchanan, and have had him in keeping, soul and body, ever since.” *Id.* Similarly, New York Republican Representative Charles Van Wyck claimed that Pierce “betrayed the Democracy into the hands of the slave-trader” and that Buchanan, “outdoing Pierce, is willing to sell . . . the constitutional rights of a free people into the hands of a despotic oligarchy.” *Id.* at 1034 (emphasis omitted); see also CONG. GLOBE, 34TH CONG., 1ST SESS. app. at 700 (1856) (remarks of Rep. Henry Bennett) (claiming that Pierce had “served slavery with such a desperate, calculating zeal, as to meet the condemnation of all honest men”).

177. See CONG. GLOBE, 36TH CONG., 1ST SESS. 1036 (1860). Representative John Perry (Republican/ME) prepared a chart, which asserted that, as of 1860, the office of the President of the United States had been held by men born in the slave States for 48 years, as compared to 26 years of Presidents hailing from the free States. *Id.* Perry's chart posted similar statistics for President *pro tem* of the Senate, Speaker of the House, Secretary of State, Secretary of War, Secretary of the Navy, Attorney General, Chief Justice and the Associate Justices of the Supreme Court. *Id.*

Court case that invalidated the “personal liberty” laws of free states on federal supremacy grounds<sup>178</sup>—was decided in 1842, over 65% of all Supreme Court Justices appointed up to that date (19 of 29) were native southerners.<sup>179</sup>

The South also held a veto power over constitutional amendments. Because the Constitution can be amended only with the approval of three-fourths of the states,<sup>180</sup> no anti-slavery amendment could have been passed without the approval of the slaveholding southern states. Indeed, if the fifteen slave states that existed in 1860 had never abolished slavery and not seceded from the Union, *even today* they could block any constitutional amendment on the subject, as it takes only thirteen states to block a constitutional amendment in a nation of fifty states.<sup>181</sup> In practical terms, the secession of the southern states, thereby releasing their power to influence the federal government, may have been the single most important stepping stone in the path leading to passage of the Thirteenth Amendment. As Representative Henry Bennett sagely predicted in 1856:

But the slave States say, if we do not yield, they will secede from the Union? If, because we refuse to put absolute power in their hands, (they almost have it now,) they will separate from us, so be it. *By that act they would lose the whole of that unequal power of which we complain . . . .* They may . . . wish to try the experiment, and set up on their own account; and that would be the greatest of all calamities to slavery—one from which it could never recover.<sup>182</sup>

### *B. The Impact of the Fugitive Slave Laws*

The disproportionate political power held by the southern states played a crucial role in building the “irrepressible conflict”<sup>183</sup> between North and

178. See *infra* notes 189–207 and accompanying text.

179. See Finkelman, *Story Telling*, *supra* note 115, at 250 n.16.

180. U.S. CONST. art. V.

181. See FINKELMAN, *supra* note 17, at 1988 n.12. Speaking during the Lincoln–Douglas debates, Abraham Lincoln predicted in 1858 that “ultimate extinction” of slavery probably would not occur in “less than a hundred years at the least,” although it would eventually occur “in God’s own good time.” Abraham Lincoln, Fourth Debate with Stephen A. Douglas at Charleston, Illinois (Sept. 18, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 151, at 145, 181.

182. CONG. GLOBE, 34TH CONG., 1ST SESS. app. at 702 (1856) (emphasis added); see also AMAR, *supra* note 147, at 353–54 (concluding that “[h]ad the Slave Power simply acquiesced in the election of 1860, nothing like immediate emancipation could ever have occurred in the 1860s”) (emphasis omitted).

183. See Senator William Henry Seward, On the Irrepressible Conflict, delivered at Rochester, New York (Oct. 25, 1858), available at <http://www.nyhistory.com/central/conflict.htm> (characterizing the clash between North and South as “an irrepressible conflict between opposing and enduring forces . . . [such] that the

South. Perhaps no set of laws better illustrates the impressive political power and influence of the South, or the backlash against it, than the Fugitive Slave Laws. These laws were enormously unpopular in the free states, even among those who did not consider themselves to be abolitionists.

These laws were “hard shoves.” The Acts, which were viewed as political victories for slave owners (particularly the Fugitive Slave Act of 1850), used federal law and ultimately federal troops to protect and enforce southern “property” interests in slaves. For the most part, the Fugitive Slave Laws were perfectly consistent with the social norms of the South; however, the South was not where the laws were enforced. In the free states, slavery (by definition) was not part of either the legal or social fabric of society. Therefore, attempts to enforce the laws, particularly when enforcement required active participation by free state citizens, were often met with resistance. One year before southern guns fired on Fort Sumter, Maine Republican John Perry articulated this determination to resist on the floor of the House: “If our southern friends expect the people of the free States to turn slave hunters, and join in the chase in running down the panting fugitive, they will be disappointed. We never agreed to any such thing, and we never will do it: it is not *‘in the bond.’*”<sup>184</sup>

### 1. The Fugitive Slave Act of 1793 and Personal Liberty Laws

The fugitive slave laws derived their legitimacy from the Fugitive Slave Clause in the Constitution: “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.”<sup>185</sup> As discussed *supra*, scant debate accompanied passage of this provision of the Constitution, although the

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United States must and will, sooner or later, become either entirely a slaveholding nation, or entirely a free-labor nation”); see also DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 191–92 (2005) (discussing Seward’s speech).

184. CONG. GLOBE, 36TH CONG., 1ST SESS. 1036 (1860). New York Republican Charles Van Wyck similarly denied that his constituents had any duty to “do the menial service of hunting down your runaway slaves.” *Id.* at 1033. Van Wyck claimed that while no men in his district “would resist the execution of your [the South’s] fugitive slave law,” he did “not believe there is one who would place his hand upon the heaving breast of the fleeing fugitive who is panting for liberty as the hart panteth for the water-brooks, although there be symbols of ownership, in the brand of the master on his cheek, the rust of the iron on his limbs, and the scars of the lash on his back.” *Id.* at 1033–34.

185. U.S. CONST. art. IV, § 2.

laws that enforced the clause were among the most controversial in the early history of the Republic.<sup>186</sup>

Congress passed the first Fugitive Slave Act in 1793. The Act allowed a slave owner to reclaim an alleged fugitive by bringing her before a federal judge or a local magistrate in the non-slave state and proving the slave status of the fugitive “either by oral testimony or affidavit.”<sup>187</sup> In response, many non-slave states began to pass “personal liberty laws” designed to protect the rights of alleged slaves who were arrested and taken South under the auspices of the Act. These personal liberty laws gave various rights to alleged fugitive slaves, including the right of habeas corpus, to trial by jury, to present evidence, and the right to testify in their own defense, none of which were recognized or provided by the federal law.<sup>188</sup> Some, like the state law at issue in *Prigg v. Pennsylvania*,<sup>189</sup> imposed criminal penalties for kidnapping alleged fugitives.<sup>190</sup> As a result, at least one historian has

186. See *supra* notes 138–44 and accompanying text.

187. Act of February 12, 1793, Ch. 7, § 3, 1 Stat 302 (repealed 1864). The Act provided that: when a person held to labour in any of the United States . . . shall escape into any other of the said states or territory, the person to whom such labour or service may be due . . . is hereby empowered to seize or arrest such fugitive . . . and to take him or her before any judge of the [C]ircuit or [D]istrict [C]ourts of the United States . . . or before any magistrate of a county, city or town corporate, wherein such seizure or arrest shall be made, and upon proof . . . either by oral testimony or affidavit . . . that the person so seized [does] . . . owe service or labour to the person claiming him or her, it shall be the duty of such judge or magistrate, to give a certificate thereof to such claimant . . . which shall be sufficient warrant for removing the said fugitive from labour, to the state or territory from which he or she fled.

*Id.* at 302–05.

188. See COVER, *supra* note 62, at 162–64; see also STANLEY W. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW 1850–1860, at 10 (1970); THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780–1861, at 23–58 (1974).

189. *Prigg v. Pennsylvania*, 41 U.S. 539 (1842). For an in-depth discussion of *Prigg*, see Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 RUTGERS L. J. 605 (1993), Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and Prigg v. Pennsylvania*, 78 CORNELL L. REV. 1086, 1116–46 (1993), and Finkelman, *Story Telling*, *supra* note 115.

190. Pennsylvania enacted a statute entitled “An act to give effect to the provisions of the Constitution of the United States relative to fugitives from labour, for the protection of free people of colour, and to prevent kidnapping,” in March 1826. *Prigg*, 41 U.S. at 550. The law provided that any person who “by force and violence, take and carry away [or] by fraud or false pretence, seduce . . . any negro or mulatto from any part or parts of this commonwealth . . . with a design and intention of selling and disposing of . . . such negro or mulatto, as a slave or servant for life, or for any term whatsoever,” that person would be guilty of a felony. *Id.* at 550–51 (citing the Act). The Court held that this law was “unconstitutional and void.” *Id.* at 625–26. See also New York Kidnapping Statute § 5, *reprinted in* 1 STATUTES ON SLAVERY: THE PAMPHLET LITERATURE, *supra* note 63, at 118 (providing for a term of ten years in prison, a \$1000 fine, or both, for the crime of kidnapping and selling into slavery a “negro, mulatto, or person of color,” using language very similar to the Pennsylvania statute).

concluded that the Fugitive Slave Act of 1793 was “virtually unenforceable” outside the border states by 1830.<sup>191</sup>

In *Prigg*, the Supreme Court upheld the constitutionality of the Fugitive Slave Act of 1793 and struck down state personal liberty laws on federal supremacy grounds. The Court’s opinion, authored by Associate Justice Joseph Story, held that states had no right to interfere with federal enforcement of the Act:

The [Fugitive Slave] clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave [to reclaim his property], which no state law or regulation can in any way qualify, regulate, control, or restrain . . . .<sup>192</sup> [W]e hold the power of legislation on this subject to be *exclusive* in Congress.<sup>193</sup>

In many respects, Justice Story’s opinion was sweepingly broad. He wrote that Congress not only had the right to regulate the rendition of fugitive slaves, but that its power to do so was also exclusive, completely preempting the states’ ability to do so. As Paul Finkelman has argued, neither point was a foregone conclusion, based either on the text of the Constitution or case precedents.<sup>194</sup> A strong textual argument could have been made that the Founders intended the *states* to enforce the Fugitive Slave Clause, not Congress.<sup>195</sup> Prior to the decision in *Prigg*, at least two state supreme courts had held the Fugitive Slave Act of 1793 unconstitutional on this basis, a fact that Story chose to disregard when he wrote that the Act’s “validity has been affirmed” by all state courts addressing it.<sup>196</sup> Story further sought to buttress his decision by declaring that the Fugitive Slave Clause was “so vital” to the South that, without it, “the Union could not have been formed.”<sup>197</sup> By all objective measures,

191. Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793, 1797–98 & n.34 (1996) [hereinafter Finkelman, *Legal Ethics*]. Finkelman concludes that “[u]nless the master caught a fugitive slave near the Mason-Dixon line, the Ohio River, or in a few cities such as New York, rendition was often all but impossible.” *Id.* at 1798.

192. *Prigg*, 41 U.S. at 612.

193. *Id.* at 625 (emphasis added). The Supreme Court reaffirmed the constitutionality of the Fugitive Slave Act of 1793 in *Jones v. Van Zandt*, 46 U.S. 215, 229–30 (1847). See WEINER, *supra* note 1, at 134–53 (detailing facts of the *Van Zandt* case and trial).

194. See Finkelman, *Story Telling*, *supra* note 115, at 270–72.

195. *Id.* (discussing textual analysis in state decisions holding the Fugitive Slave Act unconstitutional).

196. *Prigg*, 41 U.S. at 621. See also Finkelman, *Story Telling*, *supra* note 115, at 268–73 (discussing relevant state precedents and Justice Story’s analysis of them in *Prigg*).

197. *Prigg*, 41 U.S. at 611. See also Finkelman, *Story Telling*, *supra* note 115, at 256–59 (discussing Justice Story’s characterization of the legislative history of the Fugitive Slave Clause in *Prigg*).

however, the Fugitive Slave Clause, unlike other Constitutional provisions regarding slavery, generated little debate and was not central to the compromises that were critical to forming the Union.<sup>198</sup>

Justice Story's pro-slavery opinion in *Prigg* is difficult to square with his reputation as an ardent opponent of slavery.<sup>199</sup> Unlike Chief Justice Roger B. Taney (the future author of *Dred Scott*) and four of Story's fellow associate justices on the *Prigg* court,<sup>200</sup> Story was not a southerner. Justice Story, who was born and bred in Massachusetts, opposed the expansion of slavery into the Territories; railed against the illegal slave trade; and once famously told a grand jury that "[t]he existence of slavery under any shape is so repugnant to the natural rights of man and the dictates of justice, that it seems difficult to find for it any adequate justification."<sup>201</sup> Many explanations for Story's decision in *Prigg* have been proffered, including his desire to preserve peace and the Union in the face of welling sectional conflict<sup>202</sup> and to create and implement a uniform federal common law.<sup>203</sup> Story himself claimed that he had no choice in deciding *Prigg* except as he did, because any alternative would have violated his duty to uphold the law.<sup>204</sup> The real reason for Story's decision will probably always be a

198. See *supra* notes 138–144 and accompanying text; see also Finkelman, *Story Telling*, *supra* note 115, at 259–63 (contrasting version of history of fugitive slave clause set forth by Justice Story in *Prigg* with contrary evidence from Madison's *Notes of the Federal Convention*).

199. See, e.g., A. Leon Higginbotham, Jr., *The Life of the Law: Values, Commitment, and Craftsmanship*, 100 HARV. L. REV. 795, 798 n.7 (1987) (characterizing Story as a "strong abolitionist" who hated slavery); Craig Joyce, *Statesman of the Old Republic*, 84 MICH. L. REV. 846, 857 (1986) (reviewing R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* (1985)) (referring to Story's "deep personal aversion to slavery"); Christopher L.M. Eisgruber, Comment, *Justice Story, Slavery and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273, 279 (1988) (characterizing Story as a "profound opponent of slavery"); but cf. Holden-Smith, *supra* note 189, at 1091 (arguing that Story's "antislavery reputation is seriously overblown").

200. *Prigg*, 41 U.S. at 626, 636; Robert G. Schwemm, *Strader v. Graham: Kentucky's Contribution to National Slavery Litigation and the Dred Scott decision*, 97 KY L.J. 353, 399–400 (2008–2009) (noting that Chief Justice Roger Taney was from Maryland, Associate Justice James Wayne was from Georgia, Associate Justice John Catron was from Tennessee, and Associate Justice John McKinley was from Alabama).

201. See Holden-Smith, *supra* note 189, at 1092–1101 (quoting 1 LIFE AND LETTERS OF JOSEPH STORY 336 (William W. Wetmore Story ed., 1851)); see also Finkelman, *Story Telling*, *supra* note 115, at 292–93. Story's Grand Jury Charge, in which he made perhaps his most well-known statements condemning slavery, was delivered in 1819 in the context of a case involving the illegal slave trade. Holden-Smith, *supra* note 189, at 1100.

202. See Holden-Smith, *supra* note 189, at 1089 (citing R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 377 (1985); Henry S. Commager, *The Nationalism of Joseph Story*, in *THE BACON LECTURES ON THE CONSTITUTION OF THE UNITED STATES 1940–1950*, at 31, 44 (1953)).

203. See Finkelman, *Story Telling*, *supra* note 115, at 285–88 (arguing that Story's decision in *Prigg* was driven by his commitment to a nationalistic interpretation of the Constitution and a desire to create a uniform federal common law).

204. 2 LIFE AND LETTERS OF JOSEPH STORY 431 (William W. Story ed., 1851) ("[I would] never

source of speculation, but its effect was more concrete. In throwing the weight of the federal government behind enforcement of the Fugitive Slave Act, Story's opinion in *Prigg* emphasized and supported the property rights of slave-holding southerners and cemented the Constitution's reputation as a pro-slavery document.

Although *Prigg v. Pennsylvania* is typically (and rightly) characterized as a pro-slavery opinion, it antagonized Americans below the Mason-Dixon line as well as above it. As a result of *Prigg*, the power of the federal government was brought to bear on behalf of a group—slaveholding southerners—who disdained federal action and intervention on virtually every other subject.<sup>205</sup> Moreover, the Court's emphasis on federal power provided somewhat of a loophole for antislavery activists. Justice Story's plurality opinion questioned the part of the Fugitive Slave Act that purported to require enforcement via the states, pointing out that the Fugitive Slave Clause of the Constitution makes no mention of state action in this regard. He concluded that “[t]he states cannot, therefore, be compelled to enforce [the Act]; and it might well be deemed an unconstitutional exercise . . . to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted [sic] to them by the Constitution.”<sup>206</sup> Responding to the decision in *Prigg*, between 1842 and 1850 nine states passed some type of new personal liberty laws that prohibited the use of state resources to recapture alleged fugitive slaves.<sup>207</sup>

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hesitate to do my duty as a Judge, under the Constitution and laws of the United States, be the consequences what they may. That Constitution I have sworn to support, and I cannot forget or repudiate my solemn obligations at pleasure.”); *see also* Holden-Smith, *supra* note 189, at 1090 & nn.26–28 (discussing other scholarship accepting and expounding upon this explanation of Story's decision in *Prigg*). As discussed *supra*, however, Story's broad interpretation of the Fugitive Slave Clause was not the only plausible reading of the Constitution (or even the most plausible), and other judges had interpreted it differently. *See supra* notes 195–98 and accompanying text.

205. South Carolina Senator John C. Calhoun (a Democrat) articulated the southern view of state sovereignty: “[Our] government is a federal, in contradistinction to a national government—a government formed by the States; ordained and established by the States, and for the States—without any participation or agency whatever, on the part of the people, regarded in the aggregate as forming a nation.” DANIEL FARBER, *LINCOLN'S CONSTITUTION* 31 (2003) (quoting John C. Calhoun, *A Discourse on the Constitution and Government of the United States*, in *UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN* (Ross M. Lence ed., 1992)).

206. *Prigg*, 41 U.S. at 615–16. In his concurring opinion, Chief Justice Taney rejected Story's reasoning in this regard, arguing that the states did have a duty to enforce the Fugitive Slave Act. *Id.* at 627 (Taney, C.J., concurring). He wrote that “it is enjoined upon [the states] as a duty to protect and support the [slave] owner when he is endeavouring to obtain possession of his property found within their respective territories. . . . [The Constitution] contains no words prohibiting the several states from passing laws to enforce this right. [The states] are in express terms forbidden to make any regulation that shall impair it. But there the prohibition stops.” *Id.*

207. *See generally* MORRIS, *supra* note 188, at 107–29; *see also* Finkelman, *Story Telling*, *supra*



These new personal liberty laws constituted a “hard shove” in their own right in the eyes of many antebellum southerners, who perceived the laws as a great affront to their sovereignty and property rights. Just as the Fugitive Slave Law deviated sharply from the legal and social norms of the North, especially when its citizens were called upon to enforce the law at the behest of southern slaveholders, the personal liberty laws likewise clashed with social norms of the South. By codifying these laws, the northern states formalized their opposition and resistance to the Fugitive Slave Laws. Rather than passively or *informally* resisting enforcement—a response that should be expected when any law deviates sharply from social norms—the personal liberty laws *formally* prohibited the state governments from using their resources to capture alleged fugitive slaves and return them to their “owners” in the slave states. Put simply, many southerners were insulted by what they perceived as northern intransigence on the issue of fugitive slaves.

South Carolina Senator John C. Calhoun characterized the personal liberty laws as “one of the most fatal blows ever received by the South and the Union,” which allegedly rendered the Fugitive Slave Clause “of non-effect, and with so much success that it may be regarded now as practically expunged from the Constitution.”<sup>208</sup> Senator James Mason of Virginia stated that “[a]lthough the loss of property is felt, the loss of honor is felt still more.”<sup>209</sup> The true impact of runaway slaves on the southern economy during this time period is nearly impossible to determine. Historian James McPherson estimates that perhaps several hundred slaves escaped to the North or Canada every year, although most of them did not come from the deep South, which lobbied most fiercely for a stronger Fugitive Slave Act.<sup>210</sup>

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note 115, at 284, 288. Massachusetts was the first state to adopt such a law. MORRIS, *supra* note 188, at 109. The law was instigated by the “Great Massachusetts Petition,” with 60,000 signatures, which requested the legislature to (1) enact a law prohibiting state officers from assisting in the arrest or detention of alleged fugitive slaves; (2) enact a law prohibiting the use of state facilities to detain alleged fugitives; and (3) propose an amendment to the federal Constitution to separate the people of Massachusetts forever from slavery. *Id.* at 112–13 (discussing Massachusetts legislation Act Further to Protect Personal Liberty, 1843 Mass. Acts 33). The demands of the Petition took the form of a bill introduced by Charles Francis Adams (son of John Quincy Adams), which was signed into law on March 24, 1843, with little debate. MORRIS, *supra* note 188, at 113–14.

208. MORRIS, *supra* note 188, at 130 (quoting 6 THE WORKS OF JOHN C. CALHOUN 292 (1870)). southern representatives cited these personal liberty laws and the North’s general hostility towards enforcement of the Fugitive Slave Act as reasons for their states’ secession from the Union. *See, e.g.*, CONG. GLOBE, 36TH CONG., 2D SESS. 486 (1861) (remarks of Sen. Daniel Clay) (announcing Alabama’s secession and his resignation from the Senate).

209. MCPHERSON, *supra* note 171, at 79; *see also* S. REP. NO. 143, at 2 (1848) (comments of Sen. Arthur P. Butler of South Carolina).

210. MCPHERSON, *supra* note 171, at 79.

But while the practical impact of these statutes may have been minimal, their social impact was not.

The personal liberty laws were intended to send a message to the slave states: free state citizens would not voluntarily hunt down alleged fugitive slaves, forcibly remove them from free state soil, and send them back into slavery. If the laws were intended to end southern demands of this nature, however, they failed miserably. The South shoved back with a new Fugitive Slave Act, which by all accounts was even harsher and more objectionable than the one that preceded it.

## 2. The Fugitive Slave Act of 1850 and the Backlash That Followed

Congress passed a new Fugitive Slave Act as part of the Compromise of 1850 (alternatively known as the Peace Measures), an omnibus agreement touted as a “final settlement” of sectional tensions and a final resolution of the issue of slavery in the Western Territories.<sup>211</sup> The Fugitive Slave Act of 1850 (“the Act”),<sup>212</sup> which was passed by a Congressional coalition of southerners and some northern Democrats, was largely a concession to southern states. The Act buttressed the rights of slaveholders by further bringing the power of the federal government to bear on the free states with regard to the issue of fugitive slaves.

The procedures created by the Act were grossly skewed in favor of the slaveholder. The Act provided for the appointment of federal commissioners who acted as judge, jury, and court of last resort in cases regarding the rendition of fugitive slaves. These commissioners were empowered to issue certificates authorizing slaveholders or “claimants” to

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211. President Millard Fillmore, speaking to Congress in December 1850, characterized the compromise as “a settlement in principle and substance—a final settlement of the dangerous and exciting subjects which they embraced.” 5 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 93 (James D. Richardson ed., 1897). Under the umbrella of the Compromise, Congress admitted California to the Union as a free state; prohibited the slave trade in the District of Columbia; paid ten million dollars to Texas to settle a border dispute with New Mexico; enacted the Fugitive Slave Act; and organized Utah and New Mexico as territories without restrictions on slavery. MCPHERSON, *supra* note 171, at 76. The legislation provided that Utah and New Mexico could later be admitted to the Union “with or without slavery, as their constitution may prescribe at the time of their admission,” but said nothing on the subject of slavery during the territorial phase. *Id.* (quoting Kansas–Nebraska Act, ch. 59, § 1, 10 Stat. 277 (1854)). For a more in-depth discussion of the Compromise of 1850, see HOLMAN HAMILTON, PROLOGUE TO CONFLICT: THE CRISIS AND COMPROMISE OF 1850 (1964); see also FREEHLING, *supra* note 165, at 487–510.

212. Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850) (amending Act of Feb. 12, 1793, ch. 7, 1 Stat. 302) (repealed 1864). The text of the Act is printed at The Avalon Project, The Avalon Project: Fugitive Slave Act 1850, available at [http://avalon.law.yale.edu/19th\\_century/fugitive.asp](http://avalon.law.yale.edu/19th_century/fugitive.asp). See also MORRIS, *supra* note 188, at 145–46; COVER, *supra* note 62, at 175; and Finkelman, *Legal Ethics*, *supra* note 191, at 1800–02 (summarizing terms of the Act).

capture alleged “fugitives from service or labor” (i.e., slaves) and take them back to the place from which they had fled so long as they received “satisfactory proof” of ownership.<sup>213</sup> Satisfactory proof consisted of a written affidavit or oral testimony from the “claimant” and specifically excluded the testimony of the fugitive slave, which could not be admitted into evidence.<sup>214</sup> The fugitive had no right to a jury trial and no right to appeal; the certificate issued by the commissioner was considered “conclusive” of the claimant’s right to remove the fugitive “to the State or Territory from which he escaped.”<sup>215</sup> If a commissioner issued a certificate affirming the claimant’s right to reclaim the fugitive slave, he earned a fee of ten dollars.<sup>216</sup> If the commissioner found the proof insufficient to issue a certificate, he was paid five dollars.<sup>217</sup> The Act contained no statute of limitations.<sup>218</sup> During the 1850s, 332 fugitives were returned to slavery under the auspices of the Act; only 11 were declared free.<sup>219</sup>

The Act specifically targeted and attempted to squelch any attempts to assist runaway slaves by sympathetic northerners. Any federal marshal who failed to “obey and execute” a warrant for a fugitive could be fined one thousand dollars.<sup>220</sup> If an alleged fugitive escaped while in the marshal’s custody (with or without the marshal’s acquiescence), the marshal was liable to the slaveholder for the value of the fugitive’s labor in the state or territory from which he had escaped.<sup>221</sup> Any person who harbored or assisted a runaway slave, or knowingly hindered the slaveholder’s efforts to capture him, could be fined one thousand dollars and imprisoned for up to six months.<sup>222</sup> Moreover, the Act *required* “all good citizens” to “aid and assist in the prompt and efficient execution of [the Act],” whenever their services were required to execute a warrant for the capture of an alleged fugitive.<sup>223</sup> The federal commissioners were specifically empowered to

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213. Fugitive Slave Act § 4, 9 Stat. at 462 Runaway slaves are consistently referred to throughout the act as “fugitives” or “fugitives from service or labor”; the word “slave” is never used. *Id.* Similarly, slaveholders are consistently referred to as “claimants.” *Id.*

214. *Id.* § 6.

215. *Id.* Northern Whigs tried to amend the law to include a right to trial by jury and/or the right of habeas corpus, but they failed to do so. See MORRIS, *supra* note 188, at 138–47.

216. Fugitive Slave Act § 8, 9 Stat. at 464.

217. *Id.* § 8.

218. *Id.*

219. CAMPBELL, *supra* note 188, at 207; see also HENRY MAYER, ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY 412 (1998) (estimating that approximately 98% of prosecutions under the Fugitive Slave Act of 1850 resulted in the fugitive being returned to slavery).

220. Fugitive Slave Act § 5, 9 Stat. at 462.

221. *Id.* § 5.

222. *Id.* § 7.

223. *Id.* § 5.

“summon and call to their aid the bystanders, or *posse comitatus*” when they considered such aid necessary to enforce the Act.<sup>224</sup>

From the perspective of citizens residing in the free states, the section of the Act that compelled their participation was particularly offensive, as it effectively impressed them into the service of the slaveholder and thereby metaphorically “enslaved” them as well. Moreover, it directly and inescapably conflicted with the laws and social norms of free state society, which did not embrace complaisance with perpetrating slavery.<sup>225</sup> Representative George W. Julian, a Free Soil member of the House of Representatives from Indiana, flatly rejected the notion that his constituents would or should assist in the capture of any fugitive slave:

If I believed the people I represent were base enough to become the miserable flunkies of a God-forsaken southern slave hunter by joining him or his constables in the blood-hound chase of a panting slave, I would scorn to hold a seat on this floor by their suffrages, and I would denounce them as fit subjects themselves for the lash of the slave-driver.<sup>226</sup>

Citizens of the free states also objected to the Act because it was devoid of any procedural protections for the person accused of being a fugitive and thus invited slaveholders to kidnap free blacks and send them into slavery. Martin R. Delany, a free black nationalist who attended Harvard Medical School and co-founded the *North Star*, an abolitionist newspaper, made this point:

By the provisions of this [Fugitive Slave] bill, the colored people of the United States are . . . made liable at any time, in any place, and under all circumstances, to be arrested—and upon the claim of any white person, without the privilege, even of making a defence, sent into endless bondage. Let no visionary nonsense about *habeas corpus*, or a *fair trial*, deceive us; there are no such rights granted in this bill, and . . . no hope under heaven for the

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224. *Id.* § 5. Under the *posse comitatus* doctrine, the government was empowered to temporarily deputize ordinary citizens and compel them to assist law enforcement officers in carrying out their duties. See generally Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth Century America*, 26 LAW & HIST. REV. 1 (2008) (discussing the *posse comitatus* doctrine in the context of the 1850 Fugitive Slave Act).

225. See Rao, *supra* note 224, at 5 (noting that “a national duty to assist in the recovery of fugitive slaves imposed the legal norms of slave society on free states”).

226. CONG. GLOBE, 31ST CONG., 1ST SESS. app. at 1301 (1850). Julian, who was a Whig prior to joining the Free Soil party, later became a Republican. He was also a Quaker. 1 SLAVERY IN THE UNITED STATES: A SOCIAL, POLITICAL, AND HISTORICAL ENCYCLOPEDIA 354 (Junius P. Rodrigues ed., 2007).

colored person who is brought before one of these officers of the law.<sup>227</sup>

Ten years later, Maine Republican Representative John Perry similarly observed that the manner in which the Fugitive Slave Act was executed was sometimes “highly exceptionable”:

Under some fraudulent, false pretense, the fugitive is often assaulted, knocked down, and dragged off like a dog, hurried away before some five-dollar commissioner, and by him summarily sent off into slavery, upon proof that would not warrant a magistrate in giving judgment for a claim of four or six pence . . . .<sup>228</sup>

For this reason, many believed that the Act was unconstitutional.<sup>229</sup>

The Supreme Court disagreed, and in 1858 it upheld the constitutionality of the Fugitive Slave Act in *Ableman v. Booth*.<sup>230</sup> The defendant in that case, Sherman M. Booth, was a free, white man who had been convicted of aiding and abetting a fugitive slave.<sup>231</sup> The Wisconsin Supreme Court, acting on a writ of habeas corpus, ordered the defendant released on the grounds that the Fugitive Slave Act violated the U.S. Constitution and was therefore void.<sup>232</sup> The Supreme Court’s relatively brief and unanimous decision, written by Chief Justice Taney, emphasized the supremacy of federal law and of the federal courts to interpret it. Justice Taney declared:

[N]o faith could be more deliberately and solemnly pledged than . . . to support the Constitution as it is, in all its provisions,

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227. Martin R. Delany, *The Condition, Elevation, Emigration, and Destiny of the Colored People of the United States Politically Considered* (1852), reprinted in *CIVIL RIGHTS SINCE 1787: A READER ON THE BLACK STRUGGLE*, *supra* note 2, at 66, 67. Representative Julian similarly observed that the Act would “expose the free colored man of the North to any southern land-pirate who may seize him as his prey.” *CONG. GLOBE*, 31ST CONG., 1ST SESS. app. 1301 (1850). Julian concluded that this law would imperil the “freedom of every colored man in the North” and turn every free white citizen into a “constable and jail-keeper for southern slaveholders.” *Id.* at 1302.

228. *CONG. GLOBE*, 36TH CONG., 1ST SESS. 1036 (1860).

229. *See, e.g.*, *CONG. GLOBE*, 36TH CONG., 2D SESS. 455 (1861) (statement of Rep. John Sherman (Republican/OH)) (arguing that “[slaveholders’] right to recapture fugitive slaves . . . is not disputed by any considerable number of persons, [however] the present law upon that subject is unjust, harsh, and unconstitutional in some of its provisions; that it may be used to kidnap free men as readily as recapture fugitives; and that its practical effect is to excite resistance”).

230. *Ableman v. Booth*, 62 U.S. 506 (1858).

231. *Id.* at 510.

232. *Id.*

until they shall be altered in the manner which the Constitution itself prescribes. . . . And no power is more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws . . . .<sup>233</sup>

Although the opinion concluded that “the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States,” it contained no substantive analysis of the Act.<sup>234</sup>

Although some abolitionists openly vowed to defy the Fugitive Slave Act of 1850 on grounds that they were bound by a “higher law,”<sup>235</sup> at least initially, such a view was well outside the mainstream of society, even in the free states. As Professor Kahan has noted, when “the law condemns the behavior only slightly more than does the typical decisionmaker, her desire to discharge her civic duties will override her reluctance to condemn, and she will enforce the law.”<sup>236</sup> This observation explains much of the initial (albeit tepid) tolerance of the Fugitive Slave Act in the free states. Although many free state citizens disapproved of the Act for the reasons identified above, they also did not desire conflict with the South. Moreover, the vast majority of free whites in the non-slaveholding states were not abolitionists and did not condone those who took affirmative steps to assist escaping slaves. Therefore, the desire to uphold the rule of law generally won out.

Many northern citizens, often leaders in the community, openly and publicly agreed to respect and obey the Fugitive Slave Act of 1850, however distasteful. In November 1850, several prominent merchants, lawyers, and politicians held a meeting at Faneuil Hall in Boston to voice their support for the rule of law.<sup>237</sup> Benjamin R. Curtis, a renowned lawyer, member of the Massachusetts House of Representatives, and future Supreme Court Justice, spoke in favor of upholding the Fugitive Slave Act, predicting that “revolution” would be the end result of “forcible resistance of law” or “refusal to execute one article in the compact which constitutes the government.”<sup>238</sup> Similar meetings were held in New York and

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233. *Id.* at 525. Prior to the Supreme Court’s decision in this case, the States’ ability to exercise *habeas corpus* jurisdiction in the manner demonstrated by the Wisconsin Supreme Court was well established. COVER, *supra* note 62, at 176; *see also* Dallin H. Oaks, *Habeas Corpus in the States—1776–1865*, 32 U. CHI. L. REV. 243, 288 (1965).

234. *Ableman*, 62 U.S. at 526.

235. *See infra* note 360–61 and accompanying text.

236. Kahan, *supra* note 3, at 608.

237. MORRIS, *supra* note 188, at 150.

238. *Id.* (quoting 1 BENJAMIN R. CURTIS, JR., A MEMOIR OF BENJAMIN ROBBINS CURTIS, 126–27 (1879)); *see also* COVER, *supra* note 62, at 176. Curtis later resigned from the Court in protest, in response to its decision in the *Dred Scott* case. *See infra* note 331 and accompanying text.

Philadelphia.<sup>239</sup> Some northern clergy spoke in favor of the law as well. The Reverend John C. Lord, a Presbyterian minister from Buffalo, New York, preached that “[t]o plead a higher law to justify disobedience to a human law, the subject matter of which is within the cognizance of the State, is to reject the authority of God himself.”<sup>240</sup> This type of open and public support for the law would have greatly increased its chances of being enforced, as people are more likely to overcome their own personal misgivings about a law and “do their duty” to enforce it when a critical mass of people are likewise doing the same.<sup>241</sup>

At a certain point, however, as the law that is being enforced diverges ever further from the predominant social norm, public attitudes reach a tipping point, and their response becomes self-reinforcing. As an increasing number of citizens reach a point at which their willingness to enforce the law is overridden by their personal aversion to it, others are emboldened to do the same.<sup>242</sup> “[B]ehavior shaped by social influence is subject to feedback effects.”<sup>243</sup> Individuals are more likely to engage in behavior that is common among a large group of their peers, which increases with the size of the group.<sup>244</sup> If the individual perceives that only a small number of peers are engaging in the behavior, she is less likely to do so herself (or stop the behavior if she has already begun it), thereby minimizing the size of the group and reducing the likelihood that others will follow suit.<sup>245</sup> Under the right circumstances, the emerging prevalence of resistance, as opposed to obedience, creates a new social norm.

This scenario played itself out in the North as the federal government threw its military weight behind enforcement of the Fugitive Slave Act of 1850 in a series of well-publicized incidents that shocked the conscience of many who were previously neutral on the subject. When Thomas Sims, a slave who had escaped from Georgia, was arrested on April 4, 1851, and tried before a federal commissioner in Boston, the courthouse was sealed

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239. MORRIS, *supra* note 188, at 149–50.

240. *Id.* at 150 (quoting John C. Lord, “The Higher Law” in its Application to the Fugitive Slave Bill: A Sermon on the Duties Men Owe to God and to Governments 27 (Buffalo 1851)).

241. Kahan, *supra* note 3, at 615. Kahan observes that even when the decisionmaker “personally regards the law as substantially too severe,” she “will be willing to enforce it because of the combined effect of her desire to discharge her duties and her amenability to the influence of her peers.” *Id.* Kahan further notes that “[i]ndividuals are also more likely to view conduct as worthy of condemnation when they know that others condemn it.” *Id.* at 614.

242. *Id.* at 615. Even when the decisionmaker believes that “conduct is worthy of condemnation” and desires to “carry out her legal duties,” Kahan argues that the “conspicuous resistance of her fellow decisionmakers will stifle [her] willingness to enforce the law.” *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 615–16.

with a heavy chain and guarded by police and soldiers.<sup>246</sup> Massachusetts state judge Lemuel Shaw refused to issue a writ of habeas corpus.<sup>247</sup> Despite the best efforts of local antislavery lawyers, the federal commissioner issued a certificate returning Sims to slavery in Savannah.<sup>248</sup> Sims was escorted from the courthouse at 4:00 AM by a contingent of 300 armed deputies and soldiers, who took him to a south-bound ship, where an additional 250 U.S. soldiers waited to ensure his departure.<sup>249</sup> Due to the resulting furor over the Sims case, particularly in response to Judge Shaw's enforcement of the Act, a constitutional convention was held in Massachusetts to entertain a proposal for an elected judiciary, which ultimately failed.<sup>250</sup>

Federal troops were again called into action when a slave owner was killed in Christiana, Pennsylvania on September 11, 1851.<sup>251</sup> Shooting broke out when the slave owner, his relatives, and three deputy marshals attempted to reclaim two fugitives from a group of over twenty armed black men.<sup>252</sup> President Fillmore sent the Marines and federal marshals to arrest those responsible.<sup>253</sup> A federal grand jury indicted thirty-six blacks and five whites for violating the Fugitive Slave Act and for treason; however, no convictions were obtained.<sup>254</sup> One of the white defendants, Caster Hanway,

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246. See COVER, *supra* note 62, at 176. An abolitionist newspaper, *The Liberator*, proclaimed, "Justice in Chains." *Id.*

247. *Id.* at 177.

248. *Id.*

249. See MCPHERSON, *supra* note 171, at 83. Sims remained a slave until he escaped during the Civil War and returned to Boston. *Id.* at 83–84 n.10; see also JAMES OLIVER HORTON & LOIS E. HORTON, *BLACK BOSTONIANS: FAMILY LIFE AND COMMUNITY STRUGGLE IN THE ANTEBELLUM NORTH* 115–16 (Holmes & Meier, rev. ed. 1999) (detailing the rescue of Shadrack from the Boston courthouse); CAMPBELL, *supra* note 188, at 117–21. In an apparent reference to this incident, Maine Republican John Perry remarked on the House floor in 1860 that the "Boston court-house has been put in chains, and the peaceable people of that State kept out of the temple of justice by Federal bayonets, and the Treasury of the United States robbed of its thousands and tens of thousands to pay the bills for returning a fugitive slave." CONG. GLOBE, 36TH CONG., 1ST SESS. 1036 (1860).

250. See COVER, *supra* note 62, at 177–78.

251. MCPHERSON, *supra* note 171, at 84.

252. *Id.*

253. *Id.* at 85.

254. *Id.*; see also JONATHAN KATZ, *RESISTANCE AT CHRISTIANA: THE FUGITIVE SLAVE REBELLION, CHRISTIANA, PENNSYLVANIA, SEPTEMBER 11, 1851* (1974). In similarly dramatic fashion, in 1858 "literally hundreds" of abolitionists from Oberlin, Ohio, forcibly removed fugitive slave John Price from the custody of his captors, who had intended to remove him from Ohio and return him to his alleged master in Kentucky. Steven Lubet, *Slavery on Trial: The Case of the Oberlin Rescue*, 54 ALA. L. REV. 785, 789–95 (2003). Price was then taken to Canada and never returned to slavery. *Id.* at 795. A federal grand jury (every member of which was a Democrat) indicted 37 of the rescuers, however, only two were convicted, and the rest of the cases were dropped. *Id.* at 795–827. A deal was struck whereby state kidnapping charges were dropped against Price's captors in exchange for the government's agreement to abandon the remaining prosecutions. *Id.* at 827.



was arrested and charged with treason for his refusal to join a *posse comitatus* seeking to arrest the alleged fugitives.<sup>255</sup> When the U.S. Marshal cited Hanway's duty to assist in the arrests under the Fugitive Slave Act, Hanway replied "that he didn't care for that Act of Congress."<sup>256</sup>

Federal troops were again sent to Boston in 1854 to escort fugitive Anthony Burns back to slavery in Virginia, in another highly publicized incident that further polarized the nation on the issue of slavery.<sup>257</sup> After Burns' arrest, a mob stormed the courthouse in a violent, yet ultimately futile, attempt to secure his release.<sup>258</sup> One U.S. Marshal was killed.<sup>259</sup> About 7,500 people subsequently gathered around the courthouse for the trial.<sup>260</sup> After Burns was convicted of being a fugitive slave, federal troops marched him to the harbor through the streets of Boston, which were draped in black.<sup>261</sup> American flags were hung upside down and a coffin labeled "Liberty" was displayed over State Street.<sup>262</sup> Several Massachusetts towns joined in these symbolic acts of protest. In Worcester, demonstrators hung Commissioner Edmund Loring in effigy, labeling him "Pontius Pilate Loring, the unjust Judge."<sup>263</sup> At an antislavery rally held in Framingham, Massachusetts, on the Fourth of July, 1854, abolitionist William Lloyd Garrison burned a copy of the Fugitive Slave Act, Commissioner Loring's decision in the Burns case, and the U.S. Constitution itself, proclaiming, "So perish all compromises with tyranny."<sup>264</sup>

The Burns affair and other infamous incidents arising from enforcement of the Fugitive Slave Act changed the minds of many free-state citizens,

255. See Rao, *supra* note 224, at 3.

256. *Id.*

257. See generally ALBERT J. VON FRANK, THE TRIALS OF ANTHONY BURNS: FREEDOM AND SLAVERY IN EMERSON'S BOSTON (1998); Thomas J. Brown, *The Fugitive Slave Act in Emerson's Boston*, 25 LAW & SOC. INQUIRY 669, 670 (2000) (Book Review) (critiquing Von Frank's analysis of Whig ideology as exemplified by the Burns case).

258. CAMPBELL, *supra* note 188, at 126.

259. *Id.* at 127.

260. HORTON & HORTON, *supra* note 249, at 118.

261. CAMPBELL, *supra* note 188, at 129.

262. *Id.* See generally HORTON & HORTON, *supra* note 249, at 116–20; see also PEASE & PEASE, *supra* note 150, at 43. Burns was harshly treated after his re-enslavement in Virginia, confined in a tiny jail cell with manacles placed on his hands and feet. Finkelman, *Legal Ethics*, *supra* note 191, at 1829–1830. Burns returned to Boston less than a year later, however, after members of the Twelfth Baptist Church raised funds to purchase his freedom. HORTON & HORTON, *supra* note 249, at 120. He later attended Oberlin Institute and Fairmont Theological Seminary in Connecticut. *Id.*

263. Finkelman, *Legal Ethics*, *supra* note 191, at 1826 (quoting NAT'L ANTI-SLAVERY STANDARD, June 17, 1854). An effigy of Commissioner Loring erected in North Bridgewater proclaimed, "Commissioner Loring: The memory of the wicked shall rot." *Id.* at 1827 (emphasis omitted) (quoting NAT'L ANTI-SLAVERY STANDARD, June 17, 1854). Abolitionists successfully petitioned the state legislature to remove Loring from office in the aftermath of the Burns affair. COVER, *supra* note 62, at 179–82.

264. MAYER, *supra* note 219, at 444–45 (citation omitted).

particularly those residing in Massachusetts, regarding their support for the Act and the institution of slavery itself.<sup>265</sup> Amos A. Lawrence, a textile baron and philanthropist from Groton, Massachusetts,<sup>266</sup> offered to finance Burns' defense "in 'any amount,'" even though he had volunteered to assist the U.S. Marshal in returning the fugitive Thomas Sims to slavery just three years earlier.<sup>267</sup> Similarly, in a letter written in the aftermath of the Burns affair, a constituent of Massachusetts Senator Charles Sumner wrote, "I have formerly been an advocate for the 'Fugitive Slave Law' but now am prepared to do anything to prevent its being ever [put] into effect."<sup>268</sup>

### 3. The Fugitive Slave Acts as "Hard Shoves"

The South's political power enabled it to push through legislation that strenuously enforced the Fugitive Slave Clause of the Constitution. Its friends on the Supreme Court interpreted those laws in ways that maximized the federal government's ability to enforce them; and the Executive Branch was ready and willing to enforce the laws, and even to dispense federal troops to do so. However, lackluster support for the fugitive slave laws in the free states ultimately led to a "wave of resistance"<sup>269</sup> to their enforcement, particularly when active participation by northern citizens was required to do so. As one Wisconsin representative observed, "If the laws are not executed, it is because the public sentiment there overrides the law; and it is in vain to pass laws, or recommend their passage, unless there is a public sentiment to sustain them."<sup>270</sup>

"[When] dissensus about a norm radically polarizes society," a "hard shove"<sup>271</sup> is likely to harden or reinforce the feelings of each of the

265. Finkelman, *Legal Ethics*, *supra* note 191, at 1817.

266. See BARBARA M. TUCKER & KENNETH H. TUCKER, JR., *INDUSTRIALIZING ANTEBELLUM AMERICA: THE RISE OF MANUFACTURING ENTREPRENEURS IN THE EARLY REPUBLIC 179–201* (2008) (discussing Lawrence's career in the textile industry and as a philanthropist, particularly in the abolition movement).

267. HORTON & HORTON, *supra* note 249, at 122–23 (quoting CHARLES FRANCIS ADAMS, 1 RICHARD HENRY DANA, 269–70 (1891)).

268. Finkelman, *Legal Ethics*, *supra* note 191, at 1817 n.143 (emphasis omitted) (quoting letter from I.R. Dillingham to Charles Sumner (June 3, 1854), in SUMNER PAPERS Box 24 (on file with the Houghton Library, Harvard University)). Senator Sumner received numerous letters from constituents attesting to the radical change in political views affected by Burns' rendition to slavery. *Id.* Sumner, a staunch anti-slavery advocate, was a founder of the Free Soil Party who later became a Republican. DAVID DONALD, *CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 139–42, 222–23* (1960).

269. See Kahan, *supra* note 3, at 608.

270. CONG. GLOBE, 36TH CONG., 2D SESS. 514 (1861) (remarks of Republican Rep. Cadwallader Washburn) (commenting on proposed resolutions that would require northern citizens to revoke personal liberty laws and southern citizens to pass laws protecting northern citizens from mob violence).

271. Kahan, *supra* note 3, at 620.

polarized groups, rather than effect change in either direction.<sup>272</sup> As Kahan notes, in these situations, “[m]embers of society who favor the targeted norm”—in this case, resistance to enforcement of the Fugitive Slave Laws in the antebellum North—“will resent the new law and will be reinforced in their disposition by the resentment of others who feel the same way.”<sup>273</sup> Those who oppose the norm—here, southern slaveholders—“will favor the law and will find confirmation of their attitudes in their peers’ positive evaluation of it.”<sup>274</sup> As a result, these laws had a distinctly polarizing effect. Northerners and others living in the free states were appalled by the use of federal power to enforce the Fugitive Slave Laws, while southerners felt betrayed by northern efforts to circumvent them. The Fugitive Slave Laws and the controversies that they spawned were but one example of a force that drove the two regions apart, with each side becoming increasingly intolerant of the other’s position.

### *C. Bleeding Kansas*

Another force that drove the two regions of the nation apart during this era was the Kansas–Nebraska Act, passed by a Democrat-dominated Congress in May 1854.<sup>275</sup> The Kansas–Nebraska Act again evidenced the South’s political power in the federal government and further polarized the nation on the issue of slavery. Although passage of the Act was a great victory from the southern perspective, the Act and the events it spawned ultimately weakened national support for the South and slavery. William Pitt Fessenden, the Whig Senator from Maine, characterized the Act as “a terrible outrage” that needed “but little to make me an out [and] out abolitionist.”<sup>276</sup>

The Act established the territories of Kansas and Nebraska and left the question of slavery to be decided by a vote of the inhabitants of those territories. To do so, the Act explicitly repealed the part of the Missouri Compromise—the ban on slavery in the Louisiana Purchase north of 36 degrees 30 minutes north latitude—that was central to the compact that allowed Missouri to be admitted to the Union as a slave state in 1820.<sup>277</sup>

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272. *Id.*

273. *Id.*

274. *Id.*

275. Kansas–Nebraska Act, ch. 59, 10 Stat. 277 (1855).

276. MCPHERSON, *supra* note 171, at 124 (citing Letter from William P. Fessenden to Ellen Fessenden (Feb. 26, 1854), *quoted in* RICHARD H. SEWELL, *BALLOTS FOR FREEDOM: ANTISLAVERY POLITICS IN THE UNITED STATES 1837–1860*, at 259 (1976)).

277. Kansas–Nebraska Act, ch. 59, 10 Stat. 277 (1855). The Compromise also provided that the northern part of Massachusetts would become Maine, which was admitted to the Union as a free state,

The Kansas–Nebraska Act effectively engendered the demise of the Whig party, which splintered along regional lines.<sup>278</sup> No northern Whigs voted in favor of the Act in either House of Congress, whereas almost three-fourths of the southern Whigs supported it.<sup>279</sup> A reporter from the *New York Tribune* wrote that passage of the Act was “the opening of a great drama that . . . inaugurates the era of a geographical division of political parties. It draws the line between North and South. It pits face to face the two opposing forces of slavery and freedom.”<sup>280</sup> It also dramatically polarized the forces both for and against the Act.

The Kansas–Nebraska Act embodied the concept of “popular sovereignty”: the people of the territory were to decide the issue of slavery by a popular vote. While the constitutive rule of popular sovereignty appeared on its face to be fair and democratic, in practice it was not. The “campaign” behind this vote came to be known as “Bleeding Kansas,” a conflict that amounted to a border war between Kansas and Missouri.<sup>281</sup> Elections were stolen, people were murdered, homes were burned, and the rule of law dissipated to nothingness in one of the most undemocratic episodes in the history of the United States.<sup>282</sup> In a reference to Missourians’ violent ouster of Mormons from the state in 1839,<sup>283</sup> Missouri

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keeping the number of slave and free states (and the number of slave and free state Senators) in equipoise at twelve each. Missouri Compromise, ch. 22, 3 Stat. 545 (1820) (amended 1821).

278. See GIENAPP, *supra* note 152, at 69–102 (discussing party decomposition largely engendered by passage of the Kansas–Nebraska Act).

279. MCPHERSON, *supra* note 171, at 125. The Act passed in the House of Representatives by a vote of 115 to 104. *Id.* Republican Representative John Perry of Maine reported that, in the Senate, nineteen southern Senators voted in favor of the Act while only two opposed it, and in the House the southerners were likewise united, with sixty-nine voting in favor and nine opposed. CONG. GLOBE, 36TH CONG., 1ST SESS. 1038 (1860).

280. GOODWIN, *supra* note 183, at 163 (quoting Pike, “A Warning,” in *New York Tribune* (April 18, 1854)).

281. See generally DAVID M. POTTER, THE IMPENDING CRISIS, 1848–1861, at 199–209 (Don E. Fehrenbacher, ed., 1976); see also GIENAPP, *supra* note 152, at 168–72.

282. CONG. GLOBE, 34TH CONG., 1ST SESS. app. at 697 (1856) (statement of Rep. Henry Bennett (Republican/NY)) (“Kansas has been made the theater of contention and violence. Printing presses have been torn down, property destroyed, houses burned, and robberies and murders committed. The Territory is in a state of civil war. Mobs of armed men, controlled only by the madness of passion, have inflicted upon peaceable citizens every kind of indignity and insult, and perpetrated every species of crime and cruelty, unchecked and unrebuked.”). Representative John Perry (Republican/ME) similarly commented on “cities sacked, peaceable citizens murdered in cool blood, public highways lined with assassins and robbers—burglaries, arson, and other crimes, committed by border-ruffian raids into Kansas.” CONG. GLOBE, 36TH CONG., 1ST SESS. 1038 (1860).

283. In 1838, Missouri governor Lilburn Boggs signed a military order announcing that “[t]he Mormons must be treated as enemies, and must be exterminated or driven from the State if necessary for the public peace—their outrages are beyond all description.” Dale A. Whitman, *Extermination Order*, in 1 ENCYCLOPEDIA OF MORMONISM 480 (Daniel H. Ludlow ed., 1992) (quoting MISSOURI EXECUTIVE ORDER NO. 44.) As a result of the order and the violence that followed, Joseph Smith agreed that the Missouri

Senator David Rice Atchison told Jefferson Davis (then Secretary of War in the Cabinet of President Franklin Pierce), “We are organizing. We will be compelled to shoot, burn [and] hang, but the thing will soon be over. We intend to ‘Mormonize’ the Abolitionists.”<sup>284</sup>

Attempts to elect a territorial legislature via the democratic process were futile. When Kansas attempted to elect such a legislature in March 1855, almost 5,000 Missouri “border ruffians,” led by Atchison, crossed into Kansas to cast votes in favor of pro-slavery candidates.<sup>285</sup> As a result, the territorial legislature was composed of thirty-six pro-slavery delegates and three antislavery delegates (Free Soilers).<sup>286</sup> Governor Andrew Reeder, a Pennsylvania Democrat who wholeheartedly supported the Kansas–Nebraska Act, was appointed by President Franklin Pierce. Reeder determined that the “border ruffian” votes had been cast illegally and ordered new elections in a third of the districts, most of which were subsequently won by Free Soil candidates.<sup>287</sup> However, when the legislature met in July 1855, it refused to seat the newly elected delegates.<sup>288</sup> President Pierce then replaced Reeder with Wilson Shannon, a more compliant Ohio Democrat.<sup>289</sup> Shannon enforced a law passed by the pro-slavery legislature that required no prior residence in Kansas to cast a vote, thereby retroactively legitimizing the 1855 election.<sup>290</sup> The battle for Kansas was not over, however, as the Free Soilers refused to recognize the legitimacy of Shannon’s government.<sup>291</sup> For years the rule of law in the Kansas territory collapsed, as battles broke out between Free Soilers and pro-slavery settlers, and each side put forth its own government and its own constitution.<sup>292</sup> Ultimately, Kansas was admitted to the United States as a free state in January 1861, just a few short months before guns roared at Fort Sumter.

While the democratic distortion that arguably enabled passage of the Kansas–Nebraska Act—the South’s padded representation, courtesy of the Three-Fifths Clause—was indirect, the distortion ultimately wrought by the Kansas–Nebraska Act was not. The election fraud that was perpetrated in Kansas, with the apparent complicity of the President, was viewed as

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Mormons (about 5,000 people) would leave the state, which confiscated their arms and their property. *Id.*

284. MCPHERSON, *supra* note 171, at 146 (quoting Letter from Atchinson to Davis (Sept. 24, 1854)).

285. MCPHERSON, *supra* note 171, at 147.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 147; *see also* CONG. GLOBE, 36TH CONG., 1ST SESS. 1038 (1860) (remarks of John Perry (ME)) (recounting history of voting fraud in Kansas); *see also id.* at 1041 (further remarks of Rep. Perry regarding Kansas).

291. POTTER, *supra* note 281, at 204; GIENAPP, *supra* note 152, at 171.

292. POTTER, *supra* note 281, at 204–09

further evidence by the free states that the goal of the southern slave power was to graft its law and social norms—specifically on the subject of slavery—on the rest of the United States, by force if necessary. To many free-state citizens, “Bleeding Kansas” demonstrated that the institution of slavery could not truly tolerate democracy, and vice-versa. Representative John Perry of Maine warned that if slavery were carried into the Territories, familiar anti-democratic effects would follow: “Free labor will be degraded; free speech suppressed; and free men, guilty of no offense against the laws, lynched, tarred and feathered, whipped, hung, and *driven out* by the . . . blood-thirsty mob.”<sup>293</sup>

#### D. *The Caning of Charles Sumner*

The battle between pro and anti-slavery forces in the Kansas Territory was mirrored by another battle of sorts on the floor of the United States Senate. Massachusetts Senator Charles Sumner, an abolitionist and founding member of the Free Soil Party, delivered a highly-anticipated speech denouncing “The Crime against Kansas” on May 19 and 20, 1856.<sup>294</sup> In it he decried the crime of the “rape of a virgin Territory, compelling it to the hateful embrace of Slavery.”<sup>295</sup> Moreover, Senator Sumner personally assailed the authors of the Kansas–Nebraska Act, Stephen Douglas of Illinois and Andrew Butler of South Carolina, for their complicity in the crime. Sumner’s speech was laced with personal attacks against the two men, in which he compared the infirm and elderly Butler to Don Quixote, with Slavery as his mistress:

The Senator from South Carolina has read many books of chivalry, and believes himself a chivalrous knight, with sentiments of honor and courage. Of course he has chosen a mistress to whom he has made his vows, and who, though ugly to others, is always lovely to him; though polluted in the sight of the world, is chaste in his sight—I mean the harlot, Slavery.<sup>296</sup>

Two days later, Senator Butler’s cousin, Congressman Preston Brooks, walked up to Sumner in the Senate chamber, where Sumner was writing at

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293. CONG. GLOBE, 36TH CONG., 1ST SESS. 1040 (1860); *see also infra* notes 365 and 377 and accompanying text.

294. CONG. GLOBE, 34TH CONG., 1ST SESS. app. at 529–36 (1856); *see also* DONALD, *supra* note 268, at 282–85 (1960) (describing Sumner’s speech).

295. CONG. GLOBE, 34TH CONG., 1ST SESS. app. at 530 (1856).

296. *Id.*; *see also* DONALD, *supra* note 268, at 285 (discussing the portion of Sumner’s speech deriding Butler).

his desk, and clubbed him over the head with a heavy cane.<sup>297</sup> Immediately before doing so, Brooks reportedly accused Sumner of libeling his relative, Butler, and the state of South Carolina, and for that reason announced that he intended to “punish” him.<sup>298</sup> Sumner was indeed physically punished, as Preston Brooks repeatedly pummeled him with his cane on the Senate floor, until the cane broke and Sumner lost consciousness.<sup>299</sup> Sumner suffered severe injuries and, as a result, did not return to the Senate floor until three years later.<sup>300</sup>

Northerners were appalled by Brooks’ brutal assault on the Massachusetts Senator.<sup>301</sup> To them, the attack constituted further evidence that slavery and democracy—particularly freedom of speech—could not peacefully coexist. A Cincinnati newspaper proclaimed that the South “cannot tolerate free speech anywhere, and would stifle it in Washington with the bludgeon and the bowie-knife, as they are now trying to stifle it in Kansas by massacre, rapine, and murder.”<sup>302</sup> Similarly, the *Boston Daily Evening Transcript* reported that citizens considered the attack a “gross outrage on an American Senator and on freedom of speech.”<sup>303</sup> Thousands rallied across the North to protest and denounce the attack.<sup>304</sup> Historian William Gienapp theorizes that the caning of Charles Sumner, perhaps more than any other single event, breathed life into the Republican Party by driving moderates and conservatives into its ranks.<sup>305</sup>

Across the Mason-Dixon Line, the reaction to Preston Brooks’ attack on Charles Sumner could not have been more different.<sup>306</sup> The *Richmond Enquirer* famously characterized the act as “good in conception, better in execution, and best of all in consequence.”<sup>307</sup> Brooks was ultimately fined \$300 as a result of the assault and, although a majority of the House

297. See GOODWIN, *supra* note 183, at 184.

298. *Id.* (quoting the *Boston Pilot*, May 31, 1856).

299. DONALD, *supra* note 268, at 295.

300. GOODWIN, *supra* note 183, at 184 (describing the caning of Sumner); DONALD, *supra* note 268, at 293–95 (same).

301. DONALD, *supra* note 268, at 300.

302. GIENAPP, *supra* note 152, at 359 (quoting the *Cincinnati Gazette*, May 24, 1856).

303. See GOODWIN, *supra* note 183, at 184 (citing the *Boston Daily Evening Transcript*); see also DONALD, *supra* note 268, at 298–301 (describing northerners’ response to the attack on Sumner).

304. See GOODWIN, *supra* note 183, at 184; DONALD, *supra* note 268, at 300–01.

305. William E. Gienapp, *The Crime against Sumner: The Caning of Charles Sumner and the Rise of the Republican Party*, 25 CIVIL WAR HISTORY 218–45 (1979); see also GIENAPP, *supra* note 152, at 359–62 (arguing that the caning of Charles Sumner, in addition to the crisis in Kansas, drove thousands of former Democrats into the Republican party by exemplifying the threat to northern whites’ civil liberties and, more generally, the United States’ republican form of government that was posed by the southern Slave Power).

306. See generally DONALD, *supra* note 268, at 304–06 (describing southern reactions to the caning of Sumner).

307. See GOODWIN, *supra* note 183, at 185 (quoting the *ENQUIRER* (Richmond), June 2, 1856).

members voted to expel him, he retained his seat because the motion failed to garner the required two-thirds majority vote.<sup>308</sup> Brooks later resigned and was promptly re-elected by his South Carolina constituents.<sup>309</sup> Meanwhile, Brooks was widely celebrated as a hero across the South.<sup>310</sup> Whig newspapers expressed only limited opposition, which typically criticized the “time, place, and manner of its execution” rather than the beating itself.<sup>311</sup> Many of Brooks’ admirers sent him new canes to replace the one that he broke over Charles Sumner’s head.<sup>312</sup>

The nation’s starkly divergent responses to the Sumner caning incident illustrated the growing chasm between North and South.<sup>313</sup> Northerners viewed the beating, delivered on the Senate floor, as evidence of the South’s brutality and lack of respect for democratic institutions. Southerners, on the other hand, considered the attack a well-deserved punishment for Sumner’s “coarse blackguardism”<sup>314</sup> and abolitionist demagoguery. In stark terms, the caning of Sumner demonstrated just how far the social norms of the North and South had diverged. As historian David Donald has observed, “When the two sections no longer spoke the same language, shared the same moral code, or obeyed the same law, when their representatives clashed in bloody conflicts in the halls of Congress, thinking men North and South began to wonder how the Union could longer endure.”<sup>315</sup>

*E. Dred Scott v. Sandford: The Supreme Court Steps into the Fray*

On March 6, 1857, just two days after the inauguration of Democratic President James Buchanan and in the midst of the Bleeding Kansas debacle, the Supreme Court attempted to resolve the question of slavery in the Territories once and for all, in perhaps its most infamous pro-slavery decision, *Dred Scott v. Sandford*.<sup>316</sup> In a sweeping decision authored by

308. DONALD, *supra* note 268, at 308. The House voted 121–95 to expel Brooks, with all but one southern congressman voting against the expulsion. *Id.*

309. *Id.* at 258.

310. DONALD, *supra* note 268, at 300.

311. *Id.* at 306.

312. *Id.* at 305. One such cane, which was donated by the businessmen of Charleston, South Carolina, was inscribed, “Hit him again.” *Id.*

313. *Id.* at 308–11.

314. GOODWIN, *supra* note 183, at 185 (quoting PETERSBURG INTELLIGENCER (Petersburg, VA)).

315. DONALD, *supra* note 268, at 311.

316. *Dred Scott v. Sandford*, 60 U.S. 393 (1856). For an excellent discussion of the *Dred Scott* opinion, see Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, 20 HAMLIN L. REV. 1 (1996); see also FONER, *supra* note 11, at 92–98 (discussing *Dred Scott* and Lincoln’s response to the decision). Although each justice wrote separately, which was extremely unusual in the Nineteenth Century,



Chief Justice Roger B. Taney, the Supreme Court declared that Congress had no power to prohibit slavery in the Territories, since doing so would unconstitutionally interfere with citizens' private property rights in slaves.<sup>317</sup> In other words, the Missouri Compromise, which had already been gutted by the Kansas–Nebraska Act, was unconstitutional and “void.”<sup>318</sup> Another justice later remarked that Taney believed the Court could “quiet all agitation on the question of slavery in the territories by affirming that Congress had no constitutional power to prohibit its introduction.”<sup>319</sup> Taney's belief was, to put it mildly, unfounded, and he failed to comprehend the social forces and cultural polarization that preceded it.

The factual context of the *Dred Scott* opinion was not unlike that present in *Somerset v. Stewart*, decided by the highest court in England almost one hundred years earlier.<sup>320</sup> Like *Somerset*, *Dred Scott* was a slave who sued his master for his freedom, claiming that he had ceased to be a slave when his master carried him to a place that did not recognize slavery.<sup>321</sup> Scott resided in the free state of Illinois for two years and in the Louisiana Territory for two years before returning to the slave state of Missouri with the man who claimed to be his master.<sup>322</sup>

However, unlike the English court, the United States Supreme Court concluded that slaves did not cease to be slaves upon arrival on free soil. Moreover, the Supreme Court boldly declared that blacks could *never* be citizens of the United States, even if they were free, and therefore *Dred Scott* was not a citizen of the United States and had no right to bring his lawsuit in federal court.<sup>323</sup> Because he had no right to sue, the courts had no jurisdiction over his case.<sup>324</sup> The Court broadly concluded that none of the guarantees present in the Constitution or the aspirations of the Declaration of Independence were intended to extend to blacks, regardless of whether

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Chief Justice Taney's opinion was labeled the “Opinion of the Court” and therefore it is generally considered to be the majority opinion.

317. *Dred Scott*, 60 U.S. at 451–52.

318. *Id.* at 452.

319. See GOODWIN, *supra* note 183, at 189 (quoting Justice Benjamin R. Curtis); see also Finkelman, *supra* note 316, at 5 (noting that “Taney tried to settle, with one sweeping decision, the volatile problem of slavery in the territories”).

320. *Somerset v. Stewart*, [1772] 98 Eng. Rep. 499 (K.B.). See *supra* notes 46–51 and accompanying text (discussing *Somerset's* case).

321. *Dred Scott*, 60 U.S. at 431.

322. *Id.* Scott's peripatetic master was a surgeon in the United States Army. *Id.*

323. *Id.* at 406–27. For a thorough critique of this aspect of the *Dred Scott* decision, see Stanton D. Krauss, *New Evidence that Dred Scott was Wrong About Whether Free Blacks Could Count for the Purposes of Federal Diversity Jurisdiction*, 37 CONN. L. REV. 25 (2004); see also FONER, *supra* note 11, at 93–94 (discussing this aspect of the opinion).

324. *Dred Scott*, 60 U.S. at 426–27.

they were enslaved. Justice Taney concluded that, because blacks were considered “beings of an inferior order, and altogether unfit to associate with the white race” when the Constitution was drafted, neither slaves nor their descendants, regardless of whether they were free, were “intended to be included in the general words used in that memorable instrument.”<sup>325</sup>

Chief Justice Taney was a lawyer/politician who grew up on a tobacco plantation in Maryland.<sup>326</sup> Taney was appointed to the Supreme Court in 1836; he was nominated by President Andrew Jackson, a fellow southerner.<sup>327</sup> Of the six justices who joined Taney in the Court’s decision, four were also sons of the South.<sup>328</sup> Although two northerners, Associate Justices Grier (Pennsylvania) and Nelson (New York), joined Taney’s decision, both were Democrats who were appointed by southern Presidents.<sup>329</sup> Only Associate Justices Benjamin R. Curtis (Massachusetts) and John Mclean (Ohio) dissented.<sup>330</sup> Justice Curtis soon thereafter resigned, largely in response to the Court’s decision in *Dred Scott*.<sup>331</sup>

Taney has been described as an “angry, uncompromising supporter of the South and slavery and an implacable foe of racial equality, the Republican Party, and the anti-slavery movement.”<sup>332</sup> The majority opinion that he authored in *Dred Scott*, as well as his concurring opinion in *Prigg v. Pennsylvania*<sup>333</sup> and his majority opinion in *Ableman v. Booth*,<sup>334</sup> support that characterization of his views on race and slavery. However, at an earlier point in his career, Justice Taney’s views on slavery were more moderate and in fact did not radically differ from those of another young lawyer/politician of the era, Abraham Lincoln. Like Lincoln, in the 1820’s Taney supported the colonization movement and, at least arguably, the

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325. *Id.* at 407.

326. Timothy S. Huebner, *Roger B. Taney and the Slavery Issue: Looking beyond — and before — Dred Scott*, 97 J. AM. HIST. 17, 18–19 (2010).

327. *Id.* at 26.

328. *Dred Scott*, 60 U.S. at 393, 454, 457, 492–93, 529 (1856). Associate Justices Wayne (GA), Catron (TN), Daniel (VA), Campbell (GA), Nelson (NY), and Grier (PA) concurred in Taney’s Opinion of the Court.

329. Associate Justice Grier (PA) was appointed by President James K. Polk, a native North Carolinian. Associate Justice Nelson (NY) was appointed by John Tyler, a Virginian. Schwemm, *supra* note 200, at 400; *Presidents: John Tyler*, WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/johntyler> (last visited April 29, 2011); *Presidents: James Polk*, WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/jamespolk> (last visited April 29, 2011).

330. *Dred Scott*, 60 U.S. at 529.

331. See FINKELMAN, *supra* note 60, at 287; FONER, *supra* note 11, at 93.

332. Finkelman, *supra* note 316, at 24.

333. *Prigg v. Pennsylvania*, 41 U.S. 539 (1842); see also *supra* note 206. (discussing Taney’s concurring opinion in *Prigg*).

334. *Ableman v. Booth*, 62 U.S. 506 (1858); see also *supra* notes 230–33 and accompanying text (discussing *Ableman v. Booth*).

gradual abolition of slavery.<sup>335</sup> Taney manumitted his own slaves.<sup>336</sup> However, Taney's *Dred Scott* opinion reflects none of his apparent earlier ambiguity as to the moral and philosophical legitimacy of the institution of slavery.

While southern reaction to the *Dred Scott* opinion was predictably and joyously positive,<sup>337</sup> the reaction among northerners, particularly members of the nascent Republican Party, decidedly was not. Republicans "bitterly denounced" the decision.<sup>338</sup> The citizenship of free blacks was affirmed in numerous Republican state party conventions and by resolutions that were passed by Republican state legislatures in New York, New Hampshire, Vermont, and Ohio.<sup>339</sup> The decision was attacked on the legal grounds that large swaths of it were dicta—i.e., that the Court had attempted to resolve issues that were not before it—particularly with regard to the constitutionality of the Missouri Compromise. One Republican Congressman argued that this "attempt to plant slavery upon free soil, and spread it over every foot of territory outside of State lines, merely because five men have undertaken to say so, in a matter not legally before them, is a most unwarrantable aggression against the people of the free States."<sup>340</sup> Another characterized the decision as "*judicial legislation* by the Federal judges *in favor of slavery*," to which the free states could not and would not submit.<sup>341</sup>

The Court's decision in *Dred Scott* struck a passionate chord in the free states for reasons similar to those underlying the pervasively negative northern reaction to the Fugitive Slave Act of 1850. In both cases, Congress and the Supreme Court acted in concert to recognize and protect the institution of slavery on free soil, seemingly a contradiction in terms. By embedding southern social norms regarding slavery in federal law and then imposing that law on the free states under the federal preemption doctrine,

335. Huebner, *supra* note 326, at 20–21.

336. *Id.* at 20. Paul Finkelman concludes that Taney manumitted his slaves "not out of any hostility to slavery, but because he apparently had no need for them," although Finkelman does concede that manumitting rather than selling the slaves tends to suggest that, at least in his youth, Taney "had some moral qualms about dealing in human beings." Finkelman, *supra* note 316, at 24.

337. GOODWIN, *supra* note 183, at 189–90 (describing southern reactions to the *Dred Scott* decision).

338. FONER, *supra* note 152, at 292.

339. *Id.* at 293. Massachusetts did not need to pass such a resolution, because its state courts had long recognized the citizenship of free blacks. FONER, *supra* note 11, at 94.

340. CONG. GLOBE, 36TH CONG., 1ST SESS. 1038 (1860) (remarks of Rep. John Perry (ME)).

341. CONG. GLOBE, 34TH CONG., 1ST SESS. app. at 701 (1856) (remarks of Rep. Henry Bennett (NY)). In commenting generally upon the judiciary's complicity with the institution of slavery, Senator Charles Sumner of Massachusetts later lamented that "[c]ourts which should have been asylums of liberty have been changed into *barracoons*, and the Supreme Court of the United States, by a final decision of surpassing infamy, became the greatest *barracoon* of all." CONG. GLOBE, 38TH CONG., 1ST SESS. 1481 (1864). A *barracoon* was a temporary holding cell for slaves. OXFORD ENGLISH DICTIONARY 967 (2d ed. 1989).

the federal government effectively denied free state citizens the right to be free—in other words, to reject slavery in their own states. As one Congressman observed, “If this [decision] is submitted to, [we need] no more legislation in Congress to *extend* slavery. It is already made the supreme law of the land. If it cannot be prohibited in the free States, they are no longer free.”<sup>342</sup>

In addition to attacking its substance, the Republicans derided the opinion as blatantly political, thereby further undermining its legitimacy. New York Republican Senator William H. Seward publicly accused Chief Justice Taney of conspiring with President Buchanan in deriving the opinion.<sup>343</sup> In fact, much evidence suggests that Buchanan was well aware of the substance of Taney’s opinion when he delivered his inaugural address, during which he pledged to “cheerfully submit” to the Court’s decision regarding the question of slavery in the Western Territories.<sup>344</sup> The *New York Tribune* concluded that the opinion was entitled to “just so much moral weight as . . . the judgment of the majority of those congregated in any Washington bar-room.”<sup>345</sup>

#### F. Conclusion

The Fugitive Slave Acts, the Kansas–Nebraska Act, the caning of Charles Sumner, and the Supreme Court’s decision in *Dred Scott* all played a role in pushing the country to the brink of the Civil War and, ultimately, the abolition of slavery. The Fugitive Slave and Kansas–Nebraska Acts, pushed through Congress thanks in no small part to the impact of the Three-Fifths Clause on southern representation, were wholeheartedly supported by both the executive and judicial branches of the federal government. These Acts were consistent with the social norms of the southern slaveholding states and thus enjoyed strong support there. However, at least on the subject of slavery, the social norms of the free states sharply diverged. When the federal government attempted to enforce these laws on free soil, a backlash eventually and inevitably followed, limiting the laws’ effectiveness and the federal government’s ability to enforce them.

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342. CONG. GLOBE, 34TH CONG., 1ST SESS. app. at 701 (1856) (remarks of Rep. Henry Bennett (NY)); see also FONER, *supra* note 152, at 97–98, 101–02; FINKELMAN, *supra* note 60, at 313–38. Abraham Lincoln echoed this theme when he warned that the people of the United States would go to sleep, “pleasantly dreaming that the people of *Missouri* are on the verge of making their State *free*,” but “*awake to the reality . . . that the Supreme Court has made Illinois a slave State.*” FONER, *supra* note 11, at 100 (citation omitted).

343. See GOODWIN, *supra* note 183, at 191. As a result, President Buchanan reportedly banned Seward from the White House. *Id.*

344. See GOODWIN, *supra* note 183, at 189 (quoting Buchanan).

345. See FINKELMAN, *supra* note 60, at 282 (citation omitted).

The backlash against these laws was fed by evidence that they were illegitimate. The free states resented the South's over-representation in the federal government, courtesy of the Constitution. Moreover, the mini-civil war known as Bleeding Kansas demonstrated that at least some slaveholders were willing to steal votes and disregard democracy entirely if necessary to carry slavery with them into the Territories of the growing nation. The *Dred Scott* opinion, which has been described as one of the Supreme Court's greatest "self-inflicted wounds,"<sup>346</sup> attempted to resolve this issue of slavery in the Territories by once again nationalizing southern social norms. Instead, however, the breadth of the opinion, its shaky legal foundation, and the circumstances under which it was derived undermined the legitimacy of the Court itself, at least in the free states.

Preston Brooks' attack on Senator Charles Sumner on the floor of the United States Senate and the radically divergent responses to it in North and South perhaps better than any other event illustrated the growing chasm between the social norms of the two regions of the country. If the Fugitive Slave Act was weakly enforced in Boston, Massachusetts, so too were laws against assault and attempted murder weakly enforced in Washington, D.C. This clash of social norms led many Americans to question the nation's continued ability to exist as a single democracy that tolerated the existence of slavery in some but not all of its states. As Abraham Lincoln famously stated in his House Divided speech, "I believe this government cannot endure, permanently half *slave* and half *free*."<sup>347</sup>

#### IV. FROM HUMBLE BEGINNINGS: THE PROSPECTS FOR EMANCIPATION DURING THE ANTEBELLUM ERA

By 1860, the divide between North and South was apparent. The federal government, which had long been dominated by slaveholders or those sympathetic to their demands, enacted and enforced laws that, at least to some degree, attempted to nationalize southern social norms on the issue of slavery. However, as any fifth-grade student of American history knows,

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346. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS* 50 (1928). Charles Evans Hughes served as the Chief Justice of the United States Supreme Court from 1930 to 1941. TIMOTHY L. HALL, *SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 247 (2001).

347. Abraham Lincoln, "A House Divided": Speech at Springfield, Illinois, Delivered to the Republican State Convention (June 16, 1858), in 2 *THE COLLECTED WORKS OF ABRAHAM LINCOLN*, *supra* note 151, at 461, 461; *see also* FONER, *supra* note 11, at 99–102 (discussing Lincoln's House Divided speech). Ralph Waldo Emerson similarly declared, "I think we must get rid of slavery, or we must get rid of freedom." DONALD, *supra* note 268, at 311 (citation omitted); *see also* GOODWIN, *supra* note 183, at 191 (discussing William Seward's speech regarding the "irrepressible conflict" between North and South).

the South seceded from the Union, not the North. To understand why the South chose this course of action, rather than the other way around, requires an explication of the distinction between opposition to slavery and abolitionism.

Although many white citizens in the free states opposed slavery in the mid-nineteenth century, few would have accepted the label of “abolitionist,” defined as one who advocated the immediate and total abolition of slavery, even in the southern states. Even fewer embraced notions of racial equality. Walt Whitman predicted that if the American people had been given a choice between “*slavery and quiet*” and “war and abolition” at the time of Fort Sumter, the former “would have triumphantly carried the day in a majority of the Northern States . . . by tremendous majorities.”<sup>348</sup> As a general rule, the social norms of the free states embraced neither slavery nor racial egalitarianism. Therefore, their desire to keep slavery out of their borders and out of the nation’s Territories did not equate to support for emancipation.

#### A. *The Moral Argument Against Slavery*

A new abolitionist movement emerged in the United States in the 1820s and 1830s. Historian James McPherson has described the participants in this movement as the “core” of free-soil sentiment: those who believed slavery was “a sinful violation of human rights that should be immediately expiated.”<sup>349</sup> Some abolitionist sentiment had always existed in the United States, even during the Colonial era and certainly during the Revolution.<sup>350</sup> However, these earlier abolitionists tended to promote gradual

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348. GOODWIN, *supra* note 183, at 502 (quoting Walt Whitman, *Origins of Attempted Secession*, in 2 THE COMPLETE PROSE WORKS OF WALT WHITMAN 155 (1902)); see also FONER, *supra* note 11, at 163 (concluding that Lincoln believed “making slavery a target of the war effort [at the beginning of the Civil War] would drive all the states of the Upper South to secede and shatter northern unanimity,” but noting presence of “antislavery rhetoric” even at that time).

349. MCPHERSON, *supra* note 171, at 54.

350. See *supra* notes 30–75 and accompanying text (describing attitudes toward slavery during the Revolutionary Era). Antislavery sentiment emerged in both Europe and the Americas during this period, as evidenced by the tenets of some religious sects and the writings of some Enlightenment philosophers, such as Charles de Montesquieu. See David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770–1823*, at 23–24, in THE ANTISLAVERY DEBATE: CAPITALISM AND ABOLITIONISM AS A PROBLEM IN HISTORICAL INTERPRETATION 19–26 (Thomas Bender ed., 1992) (discussing the origins and evolution of an international antislavery opinion). In the United States, the Quakers, or Society of Friends, were among the earliest and most influential abolitionists. *Id.* at 27–64; see also Karen Williams Biestman, *Abolitionism and Wooden Nutmegs: Repealing the Gag Rule*, 8 BLACK L. J. 408, 409 (1983) (discussing a Quaker petition for the abolition of slavery argued before the House of Representatives in 1790). However, even the Quakers widely held slaves during the early to mid-eighteenth century. Davis, *supra*, at 27 n.1.

emancipation, compensation to former slave holders, and colonization of former slaves outside the United States.<sup>351</sup> In comparison, the new generation of abolitionists distinguished themselves as “immediatist” and “interracial”; they rejected the notions of compensation and colonization and envisioned the future of the United States as a “biracial nation.”<sup>352</sup>

A key milestone in the American abolition movement occurred in 1831, when William Lloyd Garrison began publishing the *Liberator*, an anti-slavery newspaper that advocated immediate emancipation.<sup>353</sup> Shortly thereafter, in January 1832, a bi-racial group of Bostonians, including Garrison, founded the New England Anti-Slavery Society, further cementing abolitionism’s status as a movement.<sup>354</sup> Abolitionists like Garrison utilized the printing press to distribute newspapers like the *Liberator*, pamphlets and petitions, all in an effort to “challenge the conspiracy of silence that increasingly barred discussion of slavery from the national public sphere.”<sup>355</sup>

As a key leader in the abolition movement, Garrison was unequivocal in his renouncement of the United States Constitution and the Union itself, due to the nation’s tolerance of the institution of slavery:

The Constitution which subjects [slaves] to hopeless bondage is one that we cannot swear to support. Our motto is, ‘NO UNION WITH SLAVEHOLDERS,’ either religious or political. . . . We separate from them, not in anger, not in malice, not for a selfish purpose . . . [b]ut to clear our skirts of innocent blood . . . and to

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351. FONER, *supra* note 11, at 19.

352. *Id.* Foner characterizes abolitionism as “[t]he first racially integrated social movement in American history.” *Id.* at 21; *see also infra* note 354. However, there were tensions between white and black participants in the movement which eventually led to the formation of some separate, all-black abolitionist groups in the 1840s. Jane H. Pease and William H. Pease, *Black Power – The Debate in 1840*, in *AFRICAN-AMERICAN ACTIVISM BEFORE THE CIVIL WAR: THE FREEDOM STRUGGLE IN THE ANTEBELLUM NORTH* 50, 50–57 (Patrick Rael ed., 2008); *see also* Leon F. Litwack, *The Emancipation of the Negro Abolitionist*, in *AFRICAN-AMERICAN ACTIVISM BEFORE THE CIVIL WAR: THE FREEDOM STRUGGLE IN THE ANTEBELLUM NORTH* 39, 39–49 (Patrick Rael ed., 2008) (examining the tensions between white and black abolitionists that led to independent black activism during the 1840s and 1850s).

353. *See generally* MAYER, *supra* note 219, at 107–20 (discussing Garrison’s founding of *The Liberator* and related effects).

354. Of the 72 signatories to the Anti-Slavery Society’s constitution, approximately one quarter were black. HORTON & HORTON, *supra* note 249, at 91. Blacks in Boston advocated abolition years before Garrison and other whites joined the movement. *Id.* at 88–89. *See also* Herbert Aptheker, *The Abolitionist Movement*, POL. AFF. (Feb. 1976), *reprinted in* CIVIL RIGHTS SINCE 1787: A READER ON THE BLACK STRUGGLE, *supra* note 2, at 36, 36–37 (characterizing Abolitionism as a “[b]lack-white movement” in which black people were the “grand strategists, most effective tacticians, most persevering adherents and especially its pioneers”).

355. FONER, *supra* note 11, at 20.

hasten the downfall of slavery in America, and throughout the world!<sup>356</sup>

Garrison's rejection of the Constitution and political activism generally was not shared by all abolitionists. Others, chief among them Ohio Governor and future Supreme Court Justice Salmon P. Chase, argued (typically unsuccessfully) that the Constitution was not a pro-slavery document and should not be interpreted as such.<sup>357</sup> Chase and other politicians, such as Senator Charles Sumner of Massachusetts and Representative George W. Julian of Indiana, eventually formed the Radical wing of the Republican Party, dedicated to the eventual abolition of slavery and equal rights of citizenship for blacks.<sup>358</sup> However, even Chase and the other Radical Republicans did not argue, prior to the Civil War, that the Constitution gave the federal government the power to eradicate slavery in the southern states. Rather, they contended that slavery should be strictly limited to those states (with no support from the federal government), where they hoped and anticipated that it would "perish."<sup>359</sup>

The abolitionists were predictably outraged by the Fugitive Slave Act of 1850 and many of them openly vowed to defy it on grounds they were bound by a "higher law." The Reverend Samuel Willard, an anti-slavery Unitarian minister from Deerfield, Massachusetts, posed the question in this manner: "When human law comes, or appears to come, into direct and inevitable conflict with the Divine law, which is to control the conduct of good citizens? This, I think, is . . . the main issue between the opponents and the abettors, or passive instruments, of slavery."<sup>360</sup> In a highly controversial speech, William H. Seward, New York's Whig Senator, articulated this same view during the debates on the issue of slavery in the Western Territories. He proclaimed that "there is a higher law than the Constitution," God's law, under which all persons are equal.<sup>361</sup> In addition

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356. William Lloyd Garrison, *Our Pro-Slavery Constitution* (1852), reprinted in CIVIL RIGHTS SINCE 1787: A READER ON THE BLACK STRUGGLE, *supra* note 2, at 24, 27–28. See generally MAYER, *supra* note 219 (discussing William Lloyd Garrison's advocacy in the abolition movement).

357. FONER, *supra* note 11, at 43–45.

358. *Id.* at 84.

359. *Id.* at 43; see also *id.* at 84 (discussing beliefs of Radical Republicans). Massachusetts radical Lysander Spooner was one of the few individuals at the time who publicly argued, based on the language of the Declaration of Independence, that Congress had the power to abolish slavery in the South. *Id.* at 43; Helen J. Knowles, *Securing the "Blessings of Liberty" for All: Lysander Spooner's Originalism*, 5 N.Y.U. J. L. & LIBERTY 34, 39–40 (2010).

360. MORRIS, *supra* note 188, at 157 (quoting SAMUEL WILLARD, THE GRAND ISSUE: AN ETHICO-POLITICAL TRACT 3 (Boston 1851)).

361. CONG. GLOBE, 31st CONG., 1st SESS. app. at 265 (1850); see also GOODWIN, *supra* note 183, at 146–48 (discussing Seward's speech); FONER, *supra* note 11, at 87 (noting Lincoln's rejection of



to the appeal to a “higher law,” Seward, Chase and other Radical Republicans argued that—the Fugitive Slave Clause of the Constitution notwithstanding—a slave could not remain a slave when he set foot upon free soil, harkening back to English common law and the reasoning in *Somerset’s Case*.<sup>362</sup>

The abolitionists’ commitment to the principle of equality extended beyond abstract religious principles and the abolition of the legal institution of slavery. They also championed the principle of national citizenship, which was eventually enshrined in the Fourteenth Amendment, and advocated equal rights for blacks.<sup>363</sup> Their vision of an egalitarian society was truly a radical departure from the status quo in which they lived, in which even free blacks in northern states were often dispossessed of the benefits of citizenship.<sup>364</sup> As a result, abolitionists were often the targets of mob violence, particularly when they dared to publicize their views.<sup>365</sup>

During the Antebellum period, very few white Americans, even in the free states, agreed with Garrison and Seward that abolitionism was a religious or moral imperative that trumped the Constitution. As noted

the “higher law” doctrine).

362. FONER, *supra* note 11, at 44–45; *see also supra* notes 46–51 and accompanying text (discussing *Somerset’s case*). Chase became known as the “attorney general for fugitive slaves” as a result of his persistent advocacy. *Id.* at 44. Although Chase lost the vast majority of these cases, the principles that he articulated eventually impacted cases regarding the slaveholder’s “right of ‘transit,’” or the alleged right to bring and keep slaves in free states or territories. *Id.* at 44–45. Beginning with Massachusetts in 1836, northern states began to eliminate slaveholders’ legal ability to bring slaves into their borders. *Id.* at 45. Many Republicans worried, after the Supreme Court’s decision in *Dred Scott*, that the Court would use the federal preemption doctrine to invalidate these state laws in the *Lemmon* case, effectively creating a nationwide right of transit in slaves. *Id.* at 101–02. However, when the Civil War commenced and Virginia seceded from the Union, the case was rendered moot and never decided by the Court. *Id.* at 102.

363. *Id.* at 21. Foner writes that the abolitionists challenged “the racial proscription that confined free blacks to second-class status throughout the nation.” *Id.* For example, the Declaration of Sentiments of the Illinois Anti-Slavery Society called for the immediate abolition of slavery in the South and the eradication of laws in the North which prevented free blacks from achieving “equality with the whites.” *Id.* at 23. However, at least for some abolitionists, there were limits to their egalitarianism. In 1834, for example, the American Anti-Slavery Society stated that it did not advocate “social intermixing of the races” or civil rights for blacks beyond what was merited by their “intellectual and moral worth,” to which the Society was dedicated to improving. Jane H. Pease and William H. Pease, *Black Power – The Debate in 1840*, in *AFRICAN-AMERICAN ACTIVISM BEFORE THE CIVIL WAR: THE FREEDOM STRUGGLE IN THE ANTEBELLUM NORTH* 50, 50 (Patrick Rael ed., 2008) (citation omitted).

364. *See, e.g.*, FONER, *supra* note 11, at 7–8 (discussing the Black Codes of Illinois); *but see* Paul S. Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 *AKRON L. REV.* 671, 673–76 (2003) (noting that many Black Codes were repealed in the 1840s and 1850s, indicating a “fundamental sea change” in race relations, particularly in Ohio).

365. *See, e.g.*, FONER, *supra* note 11, at 21 (describing mob violence against abolitionists). Particularly during 1830s, white “mobs . . . broke up meetings of abolitionists and destroyed their printing presses.” *Id.* In one infamous incident in 1837, the abolitionist Reverend Elijah P. Lovejoy was murdered in Alton, Illinois, while defending his printing press. *Id.* at 23.

above, the notion of racial equality was also one which radically departed from prevailing norms. Even though these “radical” abolitionists were vilified in the South and repeatedly blamed for causing the Civil War,<sup>366</sup> they enjoyed precious little political power, particularly in the federal government.<sup>367</sup> While both northern abolitionists and southern fire-eaters threatened to secede, only one group had anything close to the means to carry out the threat, and it was not the abolitionists. Abolitionists were simply not in the mainstream of American society in the Antebellum Era.

### B. Political Opposition to Slavery

The majority of “antislavery” politicians and activists in the Antebellum period did not voice their opposition to the institution in moral or religious terms. In contrast to the “true” abolitionists, most of the people in this group, including Abraham Lincoln, did *not* aspire to abolish slavery in the southern states, but were firmly opposed to extending slavery into the emerging Territories of the West. This group, comprised mainly of Whigs and a few Democrats from non-slave states, generally regarded slavery as “socially repressive, economically backward, and politically harmful to the interests of the free states.”<sup>368</sup>

#### 1. Slavery as a Threat to Labor

John Locke, the Enlightenment philosopher whose work influenced Jefferson and other Revolutionaries, greatly affected American politics during the Antebellum period as well. Locke’s theory of labor and the natural right to self-ownership grounded antislavery thought during this period. Locke

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366. See, e.g., CONG. GLOBE, 38th CONG., 1ST SESS. 1483 (1864). In debating the proposed Thirteenth Amendment, Democratic Senator Lazarus Powell of Kentucky claimed that “[i]t was the eternal intermeddling with this institution that aroused the spirits of the southern men, and they in turn committed the greatest indiscretions and follies. Had there been no abolitionists North there never would have been a fire-eater South.” *Id.* Similarly, Democratic Representative Alexander Coffroth of Pennsylvania charged that “[t]he unjustifiable intermeddling with the institutions of the South fed the bad passions of men until that section of our once happy country has taken up arms to destroy the fairest fabric of human government that ever rose to animate the hopes of civilized men.” *Id.* at 2953.

367. See MCPHERSON, *supra* note 171, at 61 (noting that in the 1844 election, the abolitionists’ Presidential candidate, James G. Birney, campaigning under the banner of the Liberty Party, earned just 3% of northern votes). However, while the Liberty Party’s overall vote totals were generally unimpressive, it did enjoy pockets of support. FONER, *supra* note 11, at 41–42. In fact, some political observers blamed Birney and the Liberty Party for the defeat of Henry Clay and the Whig Party in 1844, due to the Liberty Party’s relatively strong support in New York, where Birney received about 15,000 votes. *Id.* Arguably as a result, Democrat James K. Polk carried New York and ultimately won the Presidential election. *Id.*

368. MCPHERSON, *supra* note 171, at 54.

argued that “every Man has a *Property* in his own *Person*. This no Body has any Right to but himself.”<sup>369</sup> Therefore, the “*Labour* of his Body, and the *Work* of his Hands” are rightfully his.<sup>370</sup>

In characteristically colloquial terms, Lincoln articulated a Lockean critique of slavery during the Lincoln-Douglas debates, vowing that the black man is “entitled to all the rights enumerated in the Declaration of Independence—the right of life, liberty and the pursuit of happiness.”<sup>371</sup> Like most Republicans, Lincoln considered the institution of slavery to be fundamentally inconsistent with a democratic form of government.<sup>372</sup> Lincoln argued that the “tyrannical principle” which says, “[y]ou work and toil and earn bread, and I’ll eat it,” was no different, whether coming from “the mouth of a king who seeks to bestride the people of his own nation and live by the fruit of their labor, or from one race of men as an apology for enslaving another race.”<sup>373</sup> The Republicans’ free labor ideology grounded their vehement opposition to the spread of slavery into the Western Territories.

## 2. Stopping the Spread of Slavery

Although Lincoln consistently characterized slavery as an abominable institution, he did not campaign on a promise to remove slavery from the states in which it already existed. Instead, his position was consistent with that stated in the 1860 Republican Party platform, which opposed the extension of slavery into the Western Territories but swore to maintain “inviolable . . . right of each State to order and control its own domestic institutions.”<sup>374</sup> At his first inaugural Lincoln even offered to support (and later signed) a proposed Thirteenth Amendment that would have prohibited Congress from taking any action to “abolish or interfere . . . with the domestic

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369. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (1690), reprinted in JOHN LOCKE: *TWO TREATISES OF GOVERNMENT* 305 (P. Laslett ed., 2d ed. 1967).

370. *Id.* at 305–06.

371. Abraham Lincoln, Sixth Debate with Stephen A. Douglas at Quincy, Illinois (October 13, 1858), in 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN*, *supra* note 151, at 245, 249; see also FONER, *supra* note 11, at 96–97 (discussing Lincoln’s views regarding equality, as expressed in the Declaration of Independence).

372. Harry F. Tepker, *Lincoln at 200: On Lincoln’s Statesmanship, Dred Scott and Constitutional Evil*, 61 *OKLA. L. REV.* 785, 795 (2008).

373. Abraham Lincoln, Seventh and Last Debate with Stephen A. Douglas at Alton, Illinois (October 15, 1858), in 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN*, *supra* note 151, at 283, 315; see also FONER, *supra* note 11, at 109 (discussing this language in Lincoln’s speech); *id.* at 113–17 (describing Lincoln’s free labor critique of slavery).

374. AMAR, *supra* note 147, at 353 (quoting Republican Party platform). See also FONER, *supra* note 152, at 54–58 (describing reasons for intense Republican opposition to the spread of slavery into the Territories).

institutions of any state, including slavery.”<sup>375</sup> Lincoln, like many Americans, continued to believe (or at least hoped) that slavery would die of its own accord if it could not be exported to the West or any other future territory of the United States.

The Republicans’ fervent desire to preclude the extension of slavery into the Western Territories was primarily grounded in their belief in the sanctity of labor and democratic institutions, not a moral condemnation of slavery. For example, slavery demanded the sacrifice of whites’ freedom of speech, as exemplified by the gag rules banning abolitionist petitions in Congress<sup>376</sup> and laws criminalizing abolitionist speech in the South (and mob violence against those who dared to utter such speech<sup>377</sup>). Moreover, Republicans believed that, largely as a result of slavery and the resultant degradation of labor, the South was economically backward and mired in ignorance, as opposed to the North, which was progressive and prosperous.<sup>378</sup> They wanted the Western Territories, which many believed “held the key to [the nation’s] future,” to be made in the North’s image, not the South’s.<sup>379</sup> More specifically, Republicans believed that free white laborers would never migrate to states where slavery flourished, because doing so would require them to work alongside and

375. See *infra* note 400 and accompanying text (discussing and quoting the proposed Thirteenth Amendment referred to by Lincoln in his inaugural address). See also Abraham Lincoln, Inaugural Address (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 151, at 262, 262–63; Ira Berlin, *Who Freed the Slaves?*, reprinted in CIVIL RIGHTS SINCE 1787: A READER ON THE BLACK STRUGGLE, *supra* note 2, at 90, 94; *infra* notes 399–404 and accompanying text (discussing Lincoln’s attempts to reassure the South on slavery issues). Earlier in his career, during the Lincoln–Douglas debates, Lincoln made similar assurances: “I have no purpose directly or indirectly to interfere with the institution in the States where it exists. I believe I have no right to do so. I have no inclination to do so.” Abraham Lincoln, Sixth Debate with Stephen A. Douglas at Quincy, Illinois (Oct. 13, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 151, at 245, 249.

376. See *supra* notes 165–68 and accompanying text (discussing congressional gag rules on abolitionist speech).

377. See *supra* note 365 and accompanying text (discussing mob violence against abolitionists). See also FONER, *supra* note 11, at 29 (noting that Abraham Lincoln “insisted that assaults on abolitionist meetings and presses endangered the liberty of all Americans”).

378. FONER, *supra* note 152, at 41–51; see also FONER, *supra* note 11, at 86 (noting that Lincoln, unlike many Republicans, did not make these comparisons). In 1860, responding to southern threats to dissolve the Union, one Republican Congressman predicted that the superior free labor system of the North would ultimately prevail:

No, sirs, you will long have to march to the music of the Union; that music which is everywhere uprising, from the fields where labor is repaid, and the workshops where industry is rewarded; from the machinery which, through the instrumentality of steam, is doing the bidding of man; from the gigantic steamers that plow our rivers and lakes; from the buzz of the electric telegraph; and the scream of the iron horse. We are bound together by a common language, a common religion, and a common destiny. Majorities will still control the affairs of this nation. You cannot, you dare not, resist.

CONG. GLOBE, 36TH CONG., 1ST SESS. 1034 (1860) (remarks of Rep. Charles Van Wyck (Republican/NY)).

379. FONER, *supra* note 152, at 55; GIENAPP, *supra* note 152, at 355–56.

compete with slaves, whose very existence degraded the work itself.<sup>380</sup> As the *New York Tribune* observed in 1856, although some Republicans labored “for the good of the slave,” the majority desired to “secure the new Territories for Free White Labor, with little or no regard for the interests of negroes, free or slave.”<sup>381</sup>

### 3. The Prevalence of Racial Caste Among Anti-Slavery Americans

For many Republicans during the Antebellum Era, opposition to slavery was not synonymous with dedication to, or even acceptance of, the proposition that free blacks were entitled to the same civil and political rights enjoyed by whites. Although there were exceptions, Republicans generally rejected slavery as an anti-democratic institution but did not embrace blacks as their equals. Some of them were openly racist (although Democrats tended to resort to overt race baiting more frequently than did Republicans).<sup>382</sup> Frederick Douglass once wryly observed, “Opposing slavery and hating its victims has come to be a very common form of abolitionism.”<sup>383</sup>

President Lincoln, who ultimately came to be known as the Great Emancipator, never directly espoused full political and social equality for blacks; in fact, he openly disavowed any such intention at various points in his career. During the Lincoln–Douglas debates, Lincoln promised that he did not intend “to introduce political and social equality between the white and black races,” as a “physical difference” between the two races would “probably forever forbid their living together on the footing of perfect equality.”<sup>384</sup> Reflecting his willingness to pander to the racist views of his

380. FONER, *supra* note 152, at 57–58.

381. *Id.* at 61 (quoting the *New York Tribune*, October 15, 1856). In his final debate with Stephen Douglas, Abraham Lincoln expressed this sentiment: “Now irrespective of the moral aspect of this question as to whether there is a right or wrong in enslaving a negro, I am still in favor of our new Territories being in such condition that white men may find a home . . . where they can settle upon new soil and better their condition in life.” Abraham Lincoln, Seventh and Last Debate with Stephen A. Douglas at Alton, Illinois (Oct. 15, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 151, at 283, 312; *see also* FONER, *supra* note 11, at 68; GIENAPP, *supra* note 152, at 357 (arguing that, in opposing extension of slavery into the Territories, the Republicans were more concerned about the Slave Power and its negative impact on white civil liberties than slavery and its negative impact on blacks).

382. *See* GIENAPP, *supra* note 152, at 354–55. Gienapp argues that, although Republicans were not free from racism, it was “on the fringe of the main Republican appeal” and was not a core aspect of Republican ideology. *Id.* at 354; *see also* FONER, *supra* note 11, at 107 (noting that Douglas relied on “race baiting” during the Lincoln–Douglas debates).

383. Litwack, *supra* note 352, at 46 (quoting *Frederick Douglass’ Papers*, April 5, 1865).

384. Abraham Lincoln, Sixth Debate with Stephen A. Douglas at Quincy, Illinois (Oct. 13, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 151, at 245, 249. Lincoln once characterized the notion of full social and political equality for blacks as intolerable to “the great mass of

audience, Lincoln added that, “inasmuch as . . . there must be a difference, I as well as Judge Douglas am in favor of the race to which I belong having the superior position.”<sup>385</sup> At least at one point in his political career, Lincoln was an “ardent colonizationist” who strongly supported deporting former slaves from the United States to Africa, as a means of eliminating slavery without confronting the reality of a biracial society.<sup>386</sup> Overall, the historical record on the extent to which Lincoln eventually moved beyond his belief in black inferiority, and/or the extent to which his expressed views were dictated by a desire for political advantage rather than personal belief, is decidedly mixed.<sup>387</sup>

As noted previously, however, others within the Republican Party—particularly within its Radical wing—did openly advocate civil and political equality for blacks.<sup>388</sup> As Representative Benjamin Stanton, an Ohio Republican, observed, the members of the Republican Party entertained a “great variety of sentiment in various localities” regarding the extent to

white people.” Abraham Lincoln, Speech at Peoria, Illinois (Oct. 16, 1854), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 151, at 247, 256; see also FONER, *supra* note 11, at 31 (noting that Lincoln and other Whigs tried to gain political advantage over Democrat Martin Van Buren, in the 1836 and 1840 Presidential elections, by accusing Van Buren of favoring black suffrage); *id.* at 39 (quoting letter written by Lincoln, during his 1836 campaign, stating that he favored extending the right of suffrage to “all whites . . . who pay taxes or bear arms, (by no means excluding females)”).

385. Abraham Lincoln, Sixth Debate with Stephen A. Douglas at Quincy, Illinois (Oct. 13, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 151, at 245, 249.

386. FONER, *supra* note 152, at 294; see also Ira Berlin, *Who Freed the Slaves?*, reprinted in CIVIL RIGHTS SINCE 1787: A READER ON THE BLACK STRUGGLE, *supra* note 2, at 90, 94 (discussing Lincoln’s beliefs about the colonization of former slaves to Africa); MCPHERSON, *supra* note 171, at 127–28. Lincoln once stated, “I surely will not blame [the southern states] for not doing what I should not know how to do myself. If all earthly power were given me, I should not know what to do, as to the existing institution. My first impulse would be to free all the slaves, and send them to Liberia, — to their own native land.” Abraham Lincoln, Speech at Peoria, Illinois (Oct. 16, 1854), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 151, at 247, 255. See also FONER, *supra* note 11, at 61 (discussing Lincoln’s eulogy of Henry Clay in 1852, in which Lincoln embraced Clay’s ideas regarding colonization); *infra* notes 423–28 and accompanying text (discussing debates in Congress about emancipation in 1862).

387. Many scholars contend that Lincoln never advocated full equality for blacks. See, e.g., SMITH, *supra* note 1, at 250; George M. Fredrickson, *A Man but not a Brother: Abraham Lincoln and Racial Equality*, 41 J. S. HIST. 39 (Feb. 1975). Others, such as Paul Finkelman, suggest that Lincoln “outgrew his racist views, and ultimately supported equality for blacks.” Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L. J. 415, 417–18 n.13 (1986); see also LAWANDA COX, LINCOLN AND BLACK FREEDOM: A STUDY IN PRESIDENTIAL LEADERSHIP 5 (1981); GEORGE M. FREDRICKSON, BIG ENOUGH TO BE INCONSISTENT: ABRAHAM LINCOLN CONFRONTS SLAVERY AND RACE 1–41 (2008) (surveying and discussing contrasting interpretations of Lincoln’s perspective and attitude towards race); FONER, *supra* note 11, at 256–58 (concluding that although Lincoln “never became a full-fledged racial egalitarian,” he discarded or “soften[ed]” many of his racial prejudices during the Civil War, largely due to his appreciation of the bravery and sacrifices made by black soldiers).

388. See *supra* notes 363–65 and accompanying text (discussing abolitionists’ commitment to equal rights for blacks).

which free blacks were entitled to “political and civil rights.”<sup>389</sup> Almost all of them agreed with Lincoln that all people, regardless of race, were entitled to basic human rights, or natural rights, as expressed in the Declaration of Independence.<sup>390</sup> Most of them, like Stanton, agreed that free blacks were entitled to basic civil rights, “protections of individual liberty and security of person and property.”<sup>391</sup> Only some of them embraced the idea that blacks were entitled to political rights, primary among them the right of suffrage, which was regulated by the individual states.<sup>392</sup> Virtually no one, including the most Radical Republicans, publicly embraced the concept of “social equality,” a term which was typically used almost as an epithet or shorthand for “interracial sexual relations and marriage,” both of which were prohibited by law in almost every state.<sup>393</sup>

Abraham Lincoln and the Republican Party he represented could thus not fairly be characterized as supporting “abolitionism” at the time of the 1860 Presidential election. However, Lincoln was elected by the slimmest of margins, with virtually no support from the slaveholding states, largely because he was perceived as hostile to slavery.<sup>394</sup> Lincoln earned only 40% of the popular vote in a four-man race: for every two men who voted for him, another three voted for someone else.<sup>395</sup> If the pro-slavery electorate had not split its votes among the three remaining candidates, Lincoln almost certainly would not have been elected.<sup>396</sup>

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389. CONG. GLOBE, 35TH CONG., 2D SESS. 1006 (1859); *see also* FONER, *supra* note 11, at 118.

390. FONER, *supra* note 11, at 118; *see also supra* notes 371–75 and accompanying text (discussing Lincoln’s views).

391. FONER, *supra* note 11, at 118. For example, Stanton expressed outrage over provisions in the proposed Oregon Constitution that would have categorically excluded free blacks from Oregon state courts, but at the same time characterized “negroes and mulattoes” as an “undesirable population” and a “degraded social caste.” CONG. GLOBE, 35TH CONG., 2D SESS. 1006 (1859). Stanton went on to disavow any desire to extend political rights to blacks in Oregon, as doing so “might tend to encourage negroes to come into the State.” *Id.*; *see also* CONG. GLOBE, 36TH CONG., 1ST SESS. 1910 (1860). Clearly, Stanton delineated between civil and political rights. Similarly, Illinois Senator Lyman Trumbull, who was strongly anti-slavery, denounced “negro suffrage” in no uncertain terms. FONER, *supra* note 11, at 120 (citation omitted).

392. FONER, *supra* note 11, at 118. Radical Republicans like Salmon P. Chase, Thaddeus Stevens, Joshua Giddings, George Julian, and Charles Sumner were among those who had long argued for the repeal of state laws that deprived black men of the right to vote. *Id.* at 119.

393. *Id.* at 118.

394. *See* JOHN STAUFFER, GIANTS: THE PARALLEL LIVES OF FREDERICK DOUGLASS & ABRAHAM LINCOLN 208 (2008) (noting that Lincoln did not campaign in the “cotton states” and, if he had, at least one historian has predicted that he would have been “arrested or lynched,” a result that was intimated at the time by the southern press). Lincoln’s name did not appear on the ballot in most of these states. FONER, *supra* note 11, at 144. Even in the border states, Lincoln received few votes; he won less than 3% of the popular vote in Maryland and less than 1% of the popular vote in Kentucky. AMAR, *supra* note 147, at 355.

395. AMAR, *supra* note 147, at 353.

396. *See* SMITH, *supra* note 1, at 245; *but see* FONER, *supra* note 11, at 144 (arguing that the

The results of the 1860 Presidential election and the debate that preceded it confirmed that American society was indeed polarized on the issue of slavery. The two regions of the country embraced divergent social norms on the subject, and each wanted its vision of society to prevail in America's future, symbolized by the expansion and settlement of the Western Territories. However, nineteenth century America—both North and South—was by no means a color blind society. Most white northern citizens were content to allow slavery's continued existence in the South (and some in fact may have preferred it), so long as it stayed there. They also did not, for the most part, embrace a larger vision of an egalitarian society. For this reason, the complete abolition of slavery was not a foregone conclusion, despite the explosive impact of the Civil War.

#### V. THE ROAD TO THE THIRTEENTH AMENDMENT

Members of the Republican Party—virtually all of whom would have considered themselves strongly anti-slavery—reiterated throughout the Antebellum Period that they did not intend or desire to liberate slaves in the South.<sup>397</sup> Abraham Lincoln, the party's leader in 1860 and the newly elected President of the United States, was no exception. Although Lincoln and his allies in Congress were deeply committed to preventing the spread of slavery into the Territories and into their own backyards, they had little desire (or ability) to impose the social norm of a free society on the slaveholding states. The Civil War forced a dramatic evolution in the Republicans' attitude towards emancipation, and more broadly that of the nation as a whole, at least outside the South. Shortly before the end of the Civil War the country finally ended slavery via the Thirteenth Amendment to the United States Constitution: "Neither slavery nor involuntary servitude . . . shall exist within the United States . . ."<sup>398</sup> Passage of this Amendment was the direct result of the numerous "hard shoves" that preceded it.

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Electoral College system, not third party candidates, enabled Lincoln's election due to Lincoln's sweep of the populous northern states).

397. See, e.g., CONG. GLOBE, 36TH CONG., 1ST SESS. 1042 (1861) (Rep. John Perry of Maine) (contending that "the Republican party all over the country is opposed to any and all measures which tend to disturb the domestic relations between master and slave in those States where it lawfully exists; at the same time they are in favor of all constitutional, lawful measures which will prevent its extension now and forever"); see also *id.* at 1043 (remarks of Rep. James Moorhead (Republican/PA)); CONG. GLOBE, 36TH CONG., 2D SESS. 496 (1861) (remarks of Sen. Simon Cameron (Republican/PA), a former Democrat and Lincoln's first Secretary of War) (claiming that "[n]o man ever dreamed of liberating the slaves in the southern States").

398. U.S. CONST. amend. XIII, § 1.



*A. Attempts to Preserve the Status Quo*

When Abraham Lincoln was elected to the Presidency, he immediately attempted to reassure the South and the nation as a whole that he did not intend to deviate from the Republican Party line on the issue of slavery. In his inaugural address, he promised southern slaveholders that he had “no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe that I have no lawful right to do so, and I have no inclination to do so.”<sup>399</sup> Even after southern troops fired on Fort Sumter, Congress and the President repeatedly attempted to formalize Lincoln’s pledge in the hope of ending southern hostilities and securing the loyalty of the slaveholding border states.

In February 1861, before Lincoln’s inauguration but after his election, Ohio Representative Thomas Corwin (a former Whig recently turned Republican) proposed a Thirteenth Amendment to the Constitution that, had it been ratified, would have forbade any further amendment thereof authorizing Congress to “abolish or interfere” with the “domestic institutions” of any State, including those institutions relating to “persons held to labor or service by the laws of said State.”<sup>400</sup> In his inaugural address, President Lincoln referred to the proposed amendment, stating that he considered the proposition for which it stood to be “implied constitutional law,” and therefore he had “no objection to its being made express, and irrevocable.”<sup>401</sup> Abolitionist Frederick Douglass was so disheartened and demoralized by Lincoln’s First Inaugural that, for the first

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399. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 151, at 262, 263; see Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 SUP. CT. REV. 349, 352–58 (2009) (discussing this language in Lincoln’s First Inaugural Address); see also *supra* note 375 and accompanying text (quoting Lincoln’s inaugural address); see generally FONER, *supra* note 11, at 157–61 (discussing early days of Lincoln Presidency).

400. CONG. GLOBE, 36TH CONG., 2D SESS. 1284 (1861) (Joint House Resolution No. 80). The complete text of the proposed amendment is as follows: “No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.” *Id.* During the “secession winter” of 1860 members of Congress proposed numerous compromises that, like the Corwin Amendment, were designed to appease the South. See FONER, *supra* note 11, at 147–48 (discussing such proposals). Chief among them was a plan proposed by the Unionist Senator John J. Crittenden of Kentucky, which included six amendments to the Constitution, all designed to eliminate or strictly curtail the federal government’s ability to abolish or interfere with the institution of slavery anywhere within the United States. *Id.* at 148. Senator Stephen A. Douglas of Illinois amended the bill to include provisions that would have prohibited states from allowing free blacks to vote and criminalized abolitionist speech. *Id.* Although these proposals enjoyed some support among representatives of the border South, the vast majority of Republicans rejected them. *Id.* at 149. Crittenden’s plan was ultimately rejected by the Senate, and the House of Representatives never voted on it. *Id.* at 156.

401. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 151, at 262, 270.

time, he contemplated abandoning the United States and emigrating to Haiti.<sup>402</sup>

The Corwin Amendment, as it came to be known, was approved by the House of Representatives on February 28, 1861, by a vote of 133 to 65.<sup>403</sup> On March 2, the Senate approved the amendment by a vote of 24 to 12.<sup>404</sup> Although the amendment barely obtained the required two-thirds majority vote, it almost certainly would have garnered more support but for the secession of seven southern states that presumably would have supported it. The amendment was immediately submitted to the states for ratification, but only Ohio and Maryland officially did so, in May 1861 and January 1862, respectively.<sup>405</sup> The ratification process was subsequently abandoned.

The Senate approved the Corwin Amendment during the final days of the Thirty-Sixth Congress.<sup>406</sup> Shortly thereafter, hostilities commenced in the Civil War, as Fort Sumter fell to southern forces on April 13, 1861.<sup>407</sup> However, when the Thirty-Seventh Congress convened on July 4, 1861, the position of Congress on the issue of slavery apparently had not changed. On July 22—one day after the Union’s “shocking defeat” at the Battle of Bull Run<sup>408</sup>—Unionist Representative John J. Crittenden of Kentucky proposed

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402. STAUFFER, *supra* note 394, at 215–19. After the Confederates shelled Fort Sumter, Douglass abandoned plans to emigrate and wholeheartedly supported the Union war effort. FONER, *supra* note 11, at 164–65. *See also* AMAR, *supra* note 147, at 354 (characterizing Lincoln’s endorsement of the proposed amendment as “the most antislavery moment in American history”). Lincoln’s statement, and the Republican Party Platform that echoed it, “reflected an orthodox and almost universally accepted interpretation of the U.S. Constitution” at the time it was made. Finkelman, *supra* note 399, at 353; *see also supra* note 359 and accompanying text. Even the vast majority of abolitionists did not believe that Congress had the power to abolish slavery in the South in 1860 because (1) the Constitution did not authorize it to do so; and (2) abolition of slavery without compensation to slaveholders would run afoul of the Fifth Amendment’s proscription of uncompensated “takings” by the federal government. Finkelman, *supra* note 399, at 353–54. Lincoln’s pronouncement and the Corwin Amendment prompted dismay on the part of Douglass and other abolitionists because it contemplated a (potentially permanent) alteration of the Constitution that would explicitly forbid any federal action to end or even modify the institution of slavery. If the Corwin Amendment had been ratified, it is unclear whether Congress and the states would have had the power to amend the Constitution to end slavery, as they ultimately did via the Thirteenth Amendment. *See* A. Christopher Bryant, *Stopping Time: The Pro-Slavery and “Irrevocable” Thirteenth Amendment*, 26 HARV. J. L. & PUB. POL’Y 501, 530–34 (2003) (discussing Congressional debate as to whether the Corwin Amendment would have been irrevocable).

403. CONG. GLOBE, 36TH CONG., 2D SESS. 1285 (1861). *See generally* Bryant, *supra* note 402, at 520–34 (discussing the legislative history of the Corwin Amendment).

404. CONG. GLOBE, 36TH CONG., 2D SESS. 1403 (1861).

405. FONER, *supra* note 11, at 158. Although Illinois ratified the amendment in 1862 as well, its ratification was invalid because it was done through a constitutional convention rather than a vote of the state legislature, as Congress had required. *Id.* at 158, 375 n.55.

406. CONG. GLOBE, 36TH CONG., 2D SESS. 1403 (1861).

407. *See* GOODWIN, *supra* note 183, at 334–46 (discussing events leading to the surrender of Fort Sumter).

408. FONER, *supra* note 11, at 173–74.

the Crittenden-Johnson Resolution in the House.<sup>409</sup> Two days later, Democratic Senator Andrew Johnson of Tennessee, who would later succeed Lincoln as President, proposed a nearly identical resolution in the Senate.<sup>410</sup> In this Resolution, Congress promised to “banish[ ] all feelings of mere passion or resentment” and to “recollect only its duty to the whole country,” which did not include “overthrowing or interfering with the rights or established institutions” of the rebelling southern states.<sup>411</sup> Congress further promised to “defend and maintain the supremacy of the Constitution and all laws made in pursuance thereof, and to preserve the Union,” and further “that as soon as these objects are accomplished the war ought to cease.”<sup>412</sup> The resolution received resounding, almost unanimous support, passing by a vote of 30 to 5 in the Senate<sup>413</sup> and a margin of 117 to 2 in the House.<sup>414</sup> In both the House and the Senate, the leading Radical Republicans abstained rather than vote against the measure.<sup>415</sup>

The efforts of the President and of Congress to entice the southern states back into the Union with promises of non-interference with slavery obviously failed. As the prospect of secession and civil war became a stark reality, the President and his party began to gradually move towards the abolition of slavery. With voluntary cessation of hostilities no longer a realistic possibility, most Republicans no longer felt compelled to obey their earlier promises to leave the institution of slavery alone below the Mason-Dixon line.<sup>416</sup> Nor were they constrained by the southern voting

409. CONG. GLOBE, 37TH CONG., 1ST SESS. 222 (1861).

410. *Id.* at 257.

411. *Id.*; *see also id.* at 222 (House version).

412. *Id.* at 257 (Senate version); *see also id.* at 222 (House version).

413. *Id.* at 265. The Senators voting against the resolution were Trumbull (IL), Powell (KY), Breckenridge (KY), Johnson (MO), and Polk (MO). *Id.* The Senators who opposed the measure did not do so because they wished to end slavery in the South, but rather because they believed part of the Resolution incorrectly blamed the South for starting the Civil War. *Id.*

414. *Id.* at 223. In the House, the Resolution was actually split into two parts, each of which was voted on separately. *Id.* Two Congressmen, Henry Burnett of Kentucky and John Reid of Missouri, opposed the first half of the Resolution, which blamed “disunionists of the southern States” for starting the Civil War. *Id.* Both Burnett and Reid were Democrats who eventually joined the Confederacy. *Burnett, Henry—Biographical Information*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B001120> (last visited Mar. 25, 2011); *Reid, John—Biographical Information*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=R000149> (last visited Mar. 25, 2011). The second half of the Resolution, which focused on limiting the scope of the war to preserving the Union and the Constitution, was opposed by two different Representatives—Republicans Albert Riddle of Ohio and John Potter of Wisconsin. CONG. GLOBE, 37TH CONG., 1ST SESS. 223 (1861).

415. FONER, *supra* note 11, at 174. Representative James Ashley of Ohio later characterized his abstention as “the most cowardly act of my life.” *Id.*

416. *See, e.g.*, CONG. GLOBE, 37TH CONG., 2D SESS. 82 (1862) (statements of Rep. Martin Conway (KA)) (“How can they [the Confederate states] have rights under the Constitution the

block in Congress. Moreover, the war itself caused public opinion to shift, often radically, on the subject of the abolition of slavery, emboldening politicians to do the same.<sup>417</sup> Nonetheless, Congress and the President still exhibited little interest in immediate change and instead proposed a process of gradual abolition. They did so in part to retain the loyalty of the slaveholding border states that had not seceded from the Union.<sup>418</sup> They also hoped to minimize resistance to emancipation, in line with Kahan's model advocating "gentle nudges" as opposed to "hard shoves."<sup>419</sup>

### B. Gentle Nudges in the Direction of Emancipation

When Lincoln and the Congress initially advocated ending slavery in the United States, their focus was on gradual emancipation, a model with considerable precedent in the northeastern and mid-Atlantic states.<sup>420</sup> Moreover, they supported the payment of compensation to former slaveholders.<sup>421</sup> As part of this overall scheme of gradual emancipation, Lincoln and others also sought to colonize former slaves outside the United States.<sup>422</sup>

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Government is bound to respect, while they are enjoying the rights of belligerents . . . ?"); *see also infra* note 486 and accompanying text (discussing identical argument made during debates regarding the Thirteenth Amendment).

417. *See* FONER, *supra* note 11, at 190 (quoting Secretary of the Navy Gideon Wells as stating, "The rebellion rapidly increased the anti-slavery sentiment everywhere, and politicians shaped their course accordingly"); *see also supra* notes 10–12 and accompanying text (discussing feedback loops between individual voters and elected representatives).

418. Ira Berlin, *Who Freed the Slaves?*, reprinted in CIVIL RIGHTS SINCE 1787: A READER ON THE BLACK STRUGGLE, *supra* note 2, at 90, 94. In a later report advocating gradual, compensated emancipation, the House Select Committee on Emancipation and Colonization wrote that "the border slave States hold in their hand the destinies of our country; and if they would join the great brotherhood of free labor and republican equality; . . . it is not yet too late for national salvation." HOUSE SELECT COMMITTEE ON EMANCIPATION AND COLONIZATION, REPORT ON EMANCIPATION AND COLONIZATION, H.R. REP. NO. 148, at 10 (1862) [hereinafter HOUSE REPORT ON EMANCIPATION AND COLONIZATION]; *see also* Finkelman, *supra* note 399, at 360–61 (discussing strategic importance of the border states); FONER, *supra* note 11, at 168–69 (same).

419. *See supra* notes 3–9 and accompanying text.

420. *See supra* notes 63–65 and accompanying text.

421. *See supra* note 388 and accompanying text. Earlier in his career, Congressman Lincoln drafted (but never introduced) a bill ending slavery in the District of Columbia via gradual emancipation, with compensation paid to slave owners from government funds. GOODWIN, *supra* note 183, at 128. His proposal also included a clause requiring government authorities to assist in arresting and returning fugitive slaves who escaped into the District. *Id.* at 128–29; FONER, *supra* note 11, at 57; Finkelman, *supra* note 399, at 355–57. Fifteen years later, during the Civil War, President Lincoln signed into law a bill freeing the slaves in the District of Columbia under similar terms, although emancipation was immediate, not gradual, and the law included no promises to return fugitive slaves to their former masters. GOODWIN, *supra* note 183, at 460; FONER, *supra* note 11, at 199; Finkelman, *supra* note 399, at 373–74; *see also* AMAR, *supra* note 147, at 356.

422. *See infra* notes 428–35 and accompanying text.

In an address to Congress in March 1862, Lincoln stated that, in his judgment, “gradual, and not sudden emancipation, is better for all.”<sup>423</sup> In April 1862, both the House and Senate adopted a joint resolution, proposed by President Lincoln, declaring that “the United States ought to cooperate with any State which may adopt gradual abolishment of slavery, giving to such State pecuniary aid, to be used by such State in its discretion, to compensate for the inconveniences, public and private, produced by such change of system.”<sup>424</sup> Three months later, Lincoln supported a bill, drafted by the House Select Committee on Emancipation and Colonization (the “Committee”), that proposed to issue \$180 million in bonds to compensate slave owners in Delaware, Maryland, Virginia, Kentucky, Tennessee, and Missouri in exchange for their agreement to emancipate their slaves, either immediately or via a gradual abolition process, over a period of up to twenty years.<sup>425</sup> The bill did not require gradual emancipation, but the report expressed a strong preference for it, cautioning that “sudden emancipation, without compensation, would involve too heavy a financial burden” and would “oppress the nation with a helpless population” if the former slaves were not also deported and colonized outside the United States.<sup>426</sup> Lincoln also took the unusual step of attempting to introduce a similar bill into the Senate, in the form of a “message” from the President, by which he proposed an identical scheme of compensation for emancipating slaves, either immediately or gradually.<sup>427</sup>

The House bill proposed to allocate an additional \$20 million “for the purpose of deporting, colonizing, and settling the slaves so emancipated . . . in some state, territory, or dominion beyond the limits of the United States.”<sup>428</sup> The desire to deport and colonize former slaves

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423. CONG. GLOBE, 37TH CONG., 2D SESS. 1102 (1862). *See also* AMAR, *supra* note 147, at 353 (discussing Lincoln’s support for gradual emancipation). Even earlier, in November 1861, Lincoln proposed a plan of gradual, compensated emancipation for Delaware, which Unionist Representative George P. Fisher agreed to introduce in the state legislature. FONER, *supra* note 11, at 182. However, he never did so, because it was apparent that the bill would be rejected. *Id.* at 184.

424. CONG. GLOBE, 37TH CONG., 2D SESS. 1102 (1862) (address by President Lincoln, proposing the resolution); CONG. GLOBE, 37TH CONG., 2D SESS. 1598 (1862) (announcing that the Speaker of the House had signed the joint resolution, H.R. No. 48); H.R.J. Res. 26, 38th Cong. (1862).

425. H.R. REP. NO. 37-576, at 12, 32 (1862). The \$180 million figure was calculated based on a compensation rate of \$300 per slave. *Id.* at 32.

426. HOUSE REPORT ON EMANCIPATION AND COLONIZATION, *supra* note 418, at 12. The members of the Committee were A.S. White (Republican/IN), F.P. Blair (Republican/MO), George P. Fisher (Unionist/DE), William E. Lehman (Democrat/PA), K.V. Whaley (Unionist/VA), S.L. Casey (Unionist/KY), and A.J. Clements (Unionist/TN). C.L. Leary (Unionist/MD) was also a member of the committee but did not express an opinion on the report, as he claimed not to have read it. *Id.* at 33.

427. CONG. GLOBE, 37TH CONG., 2D SESS. 3322–23 (1862).

428. H.R. REP. NO. 37-576 § 3, at 32 (1862). At the end of 1862, Lincoln supported a venture that sent freed slaves to work as timber cutters in Haiti, and it failed miserably. The colonization plan

directly arose from fear and opposition to “the intermixture of the races,” or, in more modern terms, racism.<sup>429</sup> The House Committee proposing the bill wrote that “apart from the antipathy which nature has ordained, the presence of a race among us who cannot, and ought not to, be admitted to our social and political privileges, will be a perpetual source of injury and inquietude to both [the black and white race].”<sup>430</sup> The Committee claimed that it would be “useless” to “enter upon any philosophical inquiry whether nature has or has not made the negro inferior to the Caucasian,” because “[t]he belief is indelibly fixed upon the public mind that such inequality does exist.”<sup>431</sup> It concluded that “[t]here are irreconcilable differences between the two races which separate them, as with a wall of fire.”<sup>432</sup> President Lincoln later met with a delegation of freed slaves at the White House to espouse the benefits of colonization as a means of achieving separation of the races.<sup>433</sup> The proposal went nowhere and Lincoln was roundly criticized for offering it.<sup>434</sup> Lincoln and the Congress subsequently abandoned their colonization policy, in part because black soldiers became vital to the war effort, but also because, with few exceptions, “blacks showed no interest in emigration.”<sup>435</sup>

Lincoln’s hesitation to free the slaves via anything other than a process of gradual abolition accompanied by colonization, which was shared by many in Congress, can be attributed in part to prevailing attitudes about race on the part of those in power. Their firm belief in white supremacy and its converse, black inferiority, led them to fear and dread the sudden introduction of four million former slaves into American society.<sup>436</sup>

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was called off after nearly a hundred colonists were killed by smallpox. DAVID WILLIAMS, *A PEOPLE’S HISTORY OF THE CIVIL WAR: STRUGGLES FOR THE MEANING OF FREEDOM* 353 (2005); see also FONER, *supra* note 11, at 239–40, 259–60.

429. HOUSE REPORT ON EMANCIPATION AND COLONIZATION, *supra* note 418, at 13.

430. *Id.* The Committee predicted that, “no matter how free,” the “Anglo-American” would never consent to social and political equality with “the negro.” *Id.* at 15.

431. *Id.*

432. *Id.*

433. See GOODWIN, *supra* note 183, at 469; see also STAUFFER, *supra* note 394, at 265–66; FONER, *supra* note 11, at 223–26.

434. GOODWIN, *supra* note 183, at 469–71; FONER, *supra* note 11, at 225–26.

435. FONER, *supra* note 11, at 260; see also *id.* at 258–61 (discussing the demise of the federal government’s official colonization policy).

436. According to the 1860 census, there were approximately 4 million slaves living in the United States and about 500,000 free blacks. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970*, pt. 1, at 18 (1975) (Population, by Age, Sex, Race, and Nativity: 1790 to 1970); CONG. GLOBE, 38TH CONG., 1ST SESS. 2952 (1864) (statement of Rep. Alexander Coffroth (Democrat/PA)) (warning that, if slavery were abolished by the Thirteenth Amendment, the result would be to “set free four million ignorant and debased negroes” who would “swarm the country with pestilential effect”).

However, there were more practical political reasons for preferring this course of action as well. Lincoln, by all accounts a master politician, knew the value of a “gentle nudge” versus a “hard shove.” Although he had no polling data to back him up and no access to sociological research proving the point, Lincoln doggedly adhered to the belief that a “hard shove” in the direction of emancipation would be self-defeating, particularly in the slaveholding border states. Lincoln could not afford to lose their support.<sup>437</sup> However, his efforts at gradual emancipation in the border states were almost unanimously rebuffed, eliminating this exit strategy as a realistic option.<sup>438</sup>

### *C. Hard Shoves: The Emancipation Proclamation and the Thirteenth Amendment*

Efforts to “gently nudge” slavery out of existence, even in the midst of the Civil War, ultimately failed. Although Lincoln’s personal support for the compensation of former slaveholders did not wane, he eventually gave up his plans for colonization and gradual emancipation. The border states’ refusal to accept the carrot offered in this respect ultimately proved fatal to it. Moreover, the former slaves themselves—approximately four million of them—would not have accepted it. After being completely shut out of the American polity for generations, they were empowered by service in the Union Army and had no collective interest in returning to a state of enslavement. The window for gradual emancipation, if indeed it was ever realistically open during the Civil War, had slammed shut.

#### 1. The Emancipation Proclamation and the Promise of Freedom

Approximately two years after endorsing the pro-slavery Thirteenth Amendment, and just months after touting a proposal for gradual emancipation, President Lincoln issued the Emancipation Proclamation

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437. See AMAR, *supra* note 147, at 355 (describing the strategic importance of the border states and Lincoln’s need to retain their support); FINKELMAN, *supra* note 399, at 360–61 (same). When a group of ministers told Lincoln that God would be on his side if he abolished slavery, Lincoln reportedly replied, “I hope to have God on my side, but I must have Kentucky.” FINKELMAN, *supra* note 399, at 361 (citation omitted).

438. See GOODWIN, *supra* note 183, at 459–60; FONER, *supra* note 11, at 196–98 (observing that, even though public opinion generally favored Lincoln’s proposal for gradual, compensated emancipation, the slaveholding border states overwhelmingly rejected it). The border states of West Virginia, Maryland, and Missouri abolished slavery in 1864 and 1865 by adopting revised state constitutions through the process of wartime Reconstruction. FONER, *supra* note 11, at 274–80. None of these states ultimately opted for a course of gradual, compensated emancipation. *Id.* The border states of Kentucky and Delaware did not voluntarily abolish slavery, which persisted in these states until the ratification of the Thirteenth Amendment in December 1865. *Id.* at 274.

("Proclamation") on January 1, 1863, which proclaimed that certain slaves residing in the United States "are, and henceforward shall be, free."<sup>439</sup> In the summer of 1862, just six months earlier, Lincoln had been unwilling to take this momentous step, worrying that if he did so "half the officers would fling down their arms and three more states would rise."<sup>440</sup> Although the Emancipation Proclamation was indeed a bold step towards the abolition of slavery, Lincoln did not directly extend this "hard shove" to the slaveholding border states, who were excluded from the Proclamation's reach.

The Emancipation Proclamation freed only those slaves who resided in the states, or parts of states, that were "in rebellion against the United States."<sup>441</sup> The 450,000 slaves who resided in states that had not joined the Confederacy (Delaware, Kentucky, Maryland, and Missouri) were excluded from the Proclamation's declaration of freedom, as were the 275,000 slaves in Union-occupied Tennessee and tens of thousands more in occupied portions of Virginia and Louisiana.<sup>442</sup> The obvious political benefit of excluding the loyal, slaveholding states from emancipation's reach was the continued fealty of those states; however, legal doctrine also compelled Lincoln to limit the geographic reach of his Proclamation. Because Delaware, Kentucky, Maryland, and Missouri had not joined the Confederacy, their residents were still entitled to the benefits and protections of the Constitution, including the Fifth Amendment's

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439. The Emancipation Proclamation, 12 Stat. 1268, 1269 (1863), available at [http://www.archives.gov/exhibits/featured\\_documents/emancipation\\_proclamation/transcript.html](http://www.archives.gov/exhibits/featured_documents/emancipation_proclamation/transcript.html). See GOODWIN, *supra* note 183, at 462–68, 481–83; STAUFFER, *supra* note 394, at 243–46, 267–71. Upon receiving news of Lincoln's Proclamation, Frederick Douglass stated that, henceforth, January 1 and July 4 would constitute "twin birthdays of liberty." STAUFFER, *supra* note 394, at 246.

440. WILLIAMS, *supra* note 428, at 357 (citation omitted). Lincoln claimed that had he issued the Proclamation six months before he did, "public sentiment would not have sustained it." GOODWIN, *supra* note 183, at 501–02. In fact, when Union General John C. Fremont issued another "emancipation proclamation" on August 30, 1861, declaring all slaves of disloyal citizens in the state of Missouri "free men," Lincoln publicly rescinded it. STAUFFER, *supra* note 394, at 225–27 (citation omitted); see also Finkelman, *supra* note 399, at 368–70 (discussing Fremont's proclamation and Lincoln's rescission of it); FONER, *supra* note 11, at 176–79 (same). Lincoln did the same when General David Hunter issued a similar proclamation in March 1862. FONER, *supra* note 11, at 206–07.

441. The Emancipation Proclamation, 12 Stat. 1268 (1863). The Proclamation lists the states affected as "Arkansas, Texas, Louisiana [except certain parishes], Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Virginia [except West Virginia and certain other counties and cities, including Norfolk and Portsmouth]." *Id.* at 1269. See also FONER, *supra* note 11, at 241 (providing map of all states (and portions thereof) affected by the Emancipation Proclamation).

442. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 1 (1988). West Virginia was created in 1861 when a convention of Unionists disavowed secession and elected Francis H. Pierpont as the "legitimate" governor of the State. *Id.* at 38. West Virginia was admitted to the Union as a separate state in 1863 (shortly after Lincoln issued the Emancipation Proclamation), on the condition that it abolish slavery. *Id.*



prohibition of taking property without “just compensation.”<sup>443</sup> Moreover, while Lincoln’s authority to free the slaves of the rebel states was theoretically justified under his authority as Commander in Chief, his Constitutional authority to free slaves in loyal states was much more suspect.<sup>444</sup> Lincoln had to contend with a conservative Supreme Court, presided over by Chief Justice Taney, author of the infamous *Dred Scott* decision,<sup>445</sup> and therefore reasonably had to assume that “the Court would strike down any emancipation act that was not constitutionally impregnable.”<sup>446</sup>

Lincoln’s decision to limit the reach of the Proclamation was also strategic. Taken together, Lincoln’s proposals for gradual, compensated emancipation on the one hand, and the Emancipation Proclamation on the other, can be viewed as a “carrot and stick” approach to the border states. Shortly after extending the prospect of a “gentle nudge” towards ending slavery in these states as gradually and painlessly as possible, he issued an implicit threat of immediate abolition.<sup>447</sup> Although the Emancipation Proclamation did not technically have any effect on slaves living in these states, it certainly intimated that they would soon be free, with or without the border states’ consent and cooperation.

The Emancipation Proclamation invited former slaves to join the Union Army, seeking much needed manpower for the war effort.<sup>448</sup> In this respect it succeeded, inspiring droves of former slaves and free blacks to enlist.<sup>449</sup>

443. See Finkelman, *supra* note 399, at 359.

444. *Id.* at 359–60.

445. See *supra* notes 316–345 and accompanying text (discussing the *Dred Scott* decision).

446. See Finkelman, *supra* note 399, at 360, 385–86.

447. *Id.* at 378 (noting that even before issuing the Proclamation, Lincoln warned the border states that the immediate abolition of slavery would result if they refused gradual emancipation). In a meeting with the representatives of the border states in July 1862, Lincoln “bluntly predicted” that if they did not voluntarily agree to a plan of gradual, compensated emancipation, slavery “will be gone and you will have nothing valuable in lieu of it.” *Id.* (citation omitted). See also FONER, *supra* note 11, at 212–13.

448. The Emancipation Proclamation, 12 Stat. 1268, 1269 (1863) (stating that former slaves “of suitable condition, will be received into the armed service of the United States to garrison forts, positions, stations, and other places, and to man vessels of all sorts in said service”). See also AMAR, *supra* note 147, at 356–57 (discussing Lincoln’s reasons for issuing the Emancipation Proclamation and its effect). Amar notes that, in addition to “encouraging Southern slaves to come to the aid of the Union Army,” the Proclamation was also intended to (and did) prevent an “unholy alliance” between Great Britain and the Confederacy. *Id.* Although the Proclamation was intended to have this effect, it should not be interpreted as a “desperate act to save the Union.” Finkelman, *supra* note 399, at 362. Most scholars agree that Lincoln deliberately waited for a Union military victory—which he received, in the bloody battle of Antietam—before reading the Emancipation Proclamation, because he knew that the Proclamation would be meaningless without the ability to enforce it, which would come only with military success. *Id.* at 361–63. Paul Finkelman has thus concluded that “[w]hile victory was possible [although potentially much more difficult] without emancipation, emancipation was clearly impossible without victory.” *Id.* at 363.

449. See, e.g., AMAR, *supra* note 147, at 358 (noting that in Kentucky, for example, over half of

In total, approximately 180,000 black men fought in the Union Army, over twenty percent of those who would have been eligible to serve.<sup>450</sup> In doing so these men not only strengthened the ranks of the Union Army, but also crippled the Confederacy by depleting its work force.<sup>451</sup>

Although in many ways the Emancipation Proclamation was a resounding success, it did not enjoy unanimous support, even outside the slaveholding states. Although many Americans opposed slavery at this point, for the reasons previously discussed, many others did not, even though they supported and fought for the Union in the Civil War. For these Unionists, the Emancipation Proclamation was a “hard shove” that created a predictable backlash. The Proclamation did have the desired effect of inspiring thousands of black men to join the Union Army, but it also has been credited with instigating waves of desertion among Union soldiers during the winter of 1863.<sup>452</sup> Sergeant William Pippey of Boston wrote, “I don’t believe there is *one abolitionist* in *one thousand* in the army.”<sup>453</sup> Deserting members of an Illinois regiment said they would “lie in the woods until moss grew on their backs rather than help free the slaves.”<sup>454</sup>

To fill the decimated ranks of the Union Army, Congress instituted a national draft in March 1863. Draft riots ensued, the bloodiest and most infamous of which broke out in New York City on July 13, 1863. The rioting continued for four days, resulting in at least a hundred deaths and hundreds more injured.<sup>455</sup> Blacks, who were blamed for the war and especially the draft, were “beaten, lynched, and burned out of their

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black males eligible to serve in the Union Army did so, seeking freedom for themselves and for their families); *see also* FONER, *supra* note 11, at 252–53 (noting that, by the end of the war, almost 24,000 black men from Kentucky had served in the Union Army, more than any state other than Louisiana).

450. AMAR, *supra* note 147, at 358.

451. *See* Finkelman, *supra* note 399, at 380 (quoting Lincoln, who stated that slaves “were undeniably an element of strength to those who had their service,” and further that the country had to “decide whether that element should be with or against us”).

452. WILLIAMS, *supra* note 428, at 111. According to some accounts, approximately one-half to one-third of the Army of the Potomac deserted during January and February 1863. *Id.* at 111, 361–62. New Hampshire Democratic Representative Daniel Marcy claimed that the Emancipation Proclamation caused members of the Union Army to desert and join the Confederates: “[The Emancipation Proclamation] broke the spirit of thousands of loyal men struggling to be loyal. They saw their property about to be swept away from them at a single stroke. . . . They joined the ranks of the confederates, and interposed a line of gleaming bayonets between their property and those who would take it away. . . .” CONG. GLOBE, 38TH CONG., 1ST SESS. 2951 (1864).

453. WILLIAMS, *supra* note 428, at 361.

454. *Id.* at 111 (citation omitted). Similarly, in a letter home to his parents, an Indiana private wrote that he would “quit and go South” if “old Abe arms them niggers.” *Id.* at 361. General George B. McClellan, the head of the Army of the Potomac, also opposed the Proclamation and referred to it as an “accursed doctrine.” GOODWIN, *supra* note 183, at 483–84. General Ulysses S. Grant, on the other hand, wholeheartedly supported it. FONER, *supra* note 11, at 251–52.

455. WILLIAMS, *supra* note 428, at 277; *see also* HODGES, *supra* note 67, at 263–67.

homes.”<sup>456</sup> The rioting did not end until Federal troops, returning from the battle of Gettysburg, restored order.<sup>457</sup>

Although the backlash against the Emancipation Proclamation was palpable, so too was the opposite effect. Although some soldiers rejected emancipation as a war aim, as noted above, others welcomed it. Historian Eric Foner concludes that, while “[f]ew whites had joined the army to abolish slavery,” an increasing number of them “embraced the change in the character of the war.”<sup>458</sup> Many of them modified their views about slavery, and blacks in general, as a result of their direct encounters, for the first time, with the horrors of slavery.<sup>459</sup> Blacks’ bravery and competence on the battlefield, once they were allowed to serve, and their support of Union troops in hostile territory, also modified many white soldiers’ views on slavery.<sup>460</sup> Moreover, at some level, Lincoln’s bold step in issuing the Proclamation in and of itself impacted public debate on the subject of emancipation. Although Lincoln waited to issue the Proclamation until such time as he felt public opinion would support it—hoping to avoid the calamitous rejection of a hard shove—he simultaneously influenced the nature of public discourse on slavery. Lincoln himself made this observation: “Our government rests on public opinion. Whoever can change public opinion can change the government.”<sup>461</sup> The Emancipation Proclamation demonstrated that the feedback loop between social norms and law, by its very nature, flows in both directions.<sup>462</sup>

Despite its limitations and the initial setbacks and resistance that it engendered, the Emancipation Proclamation fueled a growing national conviction that the abolition of slavery had become a foregone conclusion. Thousands of free blacks and former slaves were serving in the Union Army. For all the slaves, even those technically not covered by the Proclamation, the promise of freedom could not be revoked.<sup>463</sup> For this reason, one Republican Representative concluded that “there can be no reunion with slavery”:

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456. WILLIAMS, *supra* note 428, at 277, 360.

457. *Id.* at 277.

458. FONER, *supra* note 11, at 252.

459. *Id.* at 208–09, 252. For example, one naval officer remarked that he had considered himself a “conservative until he had seen the institution in all its horrors,” which made him an abolitionist. *Id.* at 208 (citation omitted).

460. *Id.* at 208, 251.

461. *Id.* at 90 (citation omitted). Similarly, Eric Foner writes that “popular sentiment does not exist independently of political leadership.” *Id.* at 246. Foner concludes that “Lincoln helped to create the public sentiment that made emancipation possible.” *Id.*

462. *See supra* note 11 and accompanying text.

463. Letter from Abraham Lincoln to James C. Conkling (Aug. 26, 1863), in 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 151, at 406, 409 (noting, in reference to black soldiers, “Why should they do any thing for us, if we will do nothing for them? If they stake their lives for us, they must be

[T]housands of the slaves we would be called upon to return [to their southern masters] would be soldiers in the Union Army, men who had been engaged in fighting our battles. Our faith as a people is pledged to those men for freedom. They would be the wives, sisters, mothers and daughters of soldiers . . . . The fugitives who have followed our armies from the plantations of the South have been the only loyal men and women it found in its track, and shall we be asked in the day of our triumph to punish these our friends with one hand while with the other we reward the redhanded assassins who have endeavored to strike down our liberties?<sup>464</sup>

For generations, millions of slaves had lived in the United States but were completely excluded from the benefits of citizenship. Although there were occasional rebellions during which these slaves attempted to throw off their chains, they were brutally and thoroughly repressed. The Civil War enabled them to join the polity by fighting and dying in the Union Army, and they did so by the thousands.<sup>465</sup> Once they were so empowered, they could not be returned to slavery.

## 2. Realizing the Abolition of Slavery: The Thirteenth Amendment

Although the Proclamation had great symbolic impact, Lincoln's constitutional authority to end slavery was questionable, and, in any event, the Union had little power to enforce the decree at the time it was issued.<sup>466</sup> Lincoln also worried that the Proclamation would be of little force and effect once the war had ended.<sup>467</sup> Therefore, he pushed Congress to amend the Constitution to end slavery once and for all, throughout the United States.

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prompted by the strongest motive—even the promise of freedom. And the promise being made, must be kept.”); see also FONER, *supra* note 11, at 265 (discussing Lincoln's letter to Conkling); see also *id.* at 305.

464. CONG. GLOBE, 38TH CONG., 1ST SESS. 2949 (1864) (comments of Rep. Thomas Shannon (CA)); see also Finkelman, *supra* note 399 at 364–67 (discussing the Union's evolving policies regarding fugitive slaves who escaped their masters and sought refuge with the Union Army during the Civil War).

465. See CONG. GLOBE, 38TH CONG., 1ST SESS. 2979 (1864). Representative John Farnsworth of Illinois made this point, stating, “I thank God that this nation at last has recognized the manhood of the negro. It did that when it put on him the uniform of a soldier of the Republic, and put him into the field to defend the country. His rights and his manhood were recognized, and nobly does he vindicate himself.” *Id.* See also Letter from Lincoln to James C. Conkling (Aug. 26, 1863), in 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 151, at 406, 408–09 (arguing that Lincoln's emancipation policy and the arming of “colored troops” were at least arguably helping to win the war from a military standpoint).

466. Lincoln issued the Proclamation “by virtue of the power in [him] vested as commander-in-chief of the army and navy of the United States” and justified it as a “fit and necessary war measure” for suppressing an “actual armed rebellion against the authority and Government of the United States.” The Emancipation Proclamation, 12 Stat. 1268 (1863); see *supra* notes 406–08 and accompanying text.

467. GOODWIN, *supra* note 183, at 686.

The Thirteenth Amendment that both legitimized and expanded the Emancipation Proclamation simply states: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”<sup>468</sup> When Congress first considered this “revised” version of the Thirteenth Amendment, approximately one year before the end of the War (but certainly long after any hope of a peaceful reunion with the South), it passed the Senate<sup>469</sup> but failed to garner a two-thirds majority in the House of Representatives.<sup>470</sup> The vote largely split along party lines. When the vote was retaken in the House in January 1865—four months before Lee’s surrender—it passed by a vote of 119 to 56.<sup>471</sup> The Amendment was finally ratified by the required three-quarters of the states on December 6, 1865. Kentucky did not ratify the Amendment until March 18, 1896. The last state to ratify the Thirteenth Amendment was Mississippi, on March 16, 1895.<sup>472</sup>

The Senate voted in favor of the anti-slavery Thirteenth Amendment by a margin of 38 to 6, on April 9, 1864.<sup>473</sup> The border states split their votes. Both senators from the slaveholding states of Delaware and Kentucky voted against the Amendment,<sup>474</sup> although the senators from the slaveholding states of Maryland and Missouri voted in favor (or did not cast a vote).<sup>475</sup> Only two senators from free states opposed the Thirteenth Amendment: California Democratic Senator James Alexander McDougall<sup>476</sup> and Indiana Democratic

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468. U.S. CONST. amend. XIII, § 1.

469. CONG. GLOBE, 38TH CONG., 1ST SESS. 1489–90 (1864).

470. *Id.* at 2995. Lincoln first embraced the Thirteenth Amendment in a letter accepting the 1864 Republican nomination for President, in which he characterized the Amendment as “‘a fitting, and necessary conclusion’ to the war.” FONER, *supra* note 11, at 299 (citation omitted).

471. CONG. GLOBE, 38TH CONG., 2D SESS. 531 (1865).

472. *Mississippi Finally Votes to Abolish Slavery*, THE LEGAL INTELLIGENCER, Mar. 17, 1895, at 28.

473. CONG. GLOBE, 38TH CONG., 1ST SESS. 1490 (1864).

474. *Id.* The Democratic Senators from Delaware voting in opposition to the Amendment were George Read Riddle and Willard Saulsbury, Sr. *Id.*; see also *Riddle, George Reed (1817 to 1867)*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774 TO PRESENT, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=R000239> (last visited Apr. 6, 2011); *Saulsbury, Willard, Sr. (1820 to 1892)*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774 TO PRESENT, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000074> (last visited Apr. 6, 2011). The Kentucky senators who voted against the Amendment were Garrett Davis, a Unionist, and Lazarus Whitehead Powell, a Democrat. CONG. GLOBE, 38TH CONG., 1ST SESS. 1490 (1864).

475. See *Senate Vote #134 (Apr. 8, 1864)*, GOVTRACK, [http://www.govtrack.us/congress/vote.xpd?vote=s38\\_1-134&sort=party](http://www.govtrack.us/congress/vote.xpd?vote=s38_1-134&sort=party) (select individual senators to view party affiliations) (last visited Apr. 6, 2011). Senator Reverdy Johnson of Maryland, who identified himself as a Whig, Unionist, and a Democrat at various points in his political career, voted in favor of the Thirteenth Amendment. *Id.* Maryland Senator Thomas Holliday Hicks did not cast a vote. *Id.* Both Missouri Senators, Benjamin Gratz Brown and John Brooks Henderson, were Unconditional Unionists who supported the Amendment. *Id.*

476. See generally Russell Buchanan, *James A. McDougall: A Forgotten Senator*, 15 CAL. HIST. SOC’Y Q. 199–212 (Sept. 1936); James Farr, *Not Exactly a Hero: James Alexander McDougall in the*

Senator Thomas Andrews Hendricks.<sup>477</sup> In speaking against the Amendment, Senator McDougall spoke paternalistically about the slave population, claiming that no one had been “more kind to the people of that race than have I been myself,” but concluded that “[t]hey can never commingle with us.”<sup>478</sup> The border state Senators who opposed the Amendment likewise emphasized black inferiority as a justification for maintaining the institution of slavery,<sup>479</sup> but also strongly focused on abolition’s impact on future reunification with the South. Kentucky Senator Powell argued that the South would never accept abolition of slavery—essentially that abolition would conflict so severely with the region’s social norms that the people would never yield to it.<sup>480</sup> When the Amendment was passed, Senator Saulsbury of Delaware stated, “I rise simply to say that I now bid farewell to any hope of the reconstruction of the American Union.”<sup>481</sup>

The House voted in favor of the Thirteenth Amendment on June 15, 1864, but not by the two-thirds majority required to pass the Amendment.<sup>482</sup> The vote was preceded by a long and vociferous debate. As in the Senate, one of the primary arguments in opposition to the Amendment was its presumed negative effect on efforts at reunification with the South.<sup>483</sup> Many representatives also spoke against the amendment by characterizing it as an unconstitutional taking of property without just compensation, a clear abridgement of the property rights of the slaveholder in both the South and the border states.<sup>484</sup> The more radical element of the Republican Party

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*United States Senate*, 65 CAL. HIST. 104–13 (June 1986).

477. See Ralph D. Gray, *Thomas A. Hendricks: Spokesman for the Democracy*, in GENTLEMEN FROM INDIANA: NATIONAL PARTY CANDIDATES, 1836-1940, 117–39 (1977). Senator Hendricks’s political career was unharmed by his opposition to the Thirteenth Amendment. A lifelong Democrat, he was elected governor of Indiana in 1872, and he was elected Vice President of the United States in 1884, when Grover Cleveland was elected President. *Id.* at 121. Hendricks served as Vice President for just one year; he died on November 25, 1885. *Id.* at 138.

478. CONG. GLOBE, 38TH CONG., 1ST SESS. 1490 (1864).

479. *Id.* at 1484 (statement of Sen. Lazarus Powell (KY)) (claiming that “the negro” is “an inferior man in his capacity, and no fanaticism can raise him to the level of the Caucasian race. The white man is his superior, and will be so whether you call him a slave or an equal.”).

480. *Id.* at 1483.

481. *Id.* at 1490.

482. *Id.* at 2995.

483. See, e.g., *id.* at 2940 (statement of Rep. John Pruyn (NY)) (arguing that to pass the amendment would be to “take a further step to alienate the feelings of the South, and to embarrass and impede their return to the Union”). Representative Wood added that it would also “add to the existing sectional hostilities, and if possible make the pending conflict yet more intense and deadly.” *Id.*

484. See, e.g., *id.* at 2952 (remarks of Rep. Alexander Coffroth (PA)). Coffroth rhetorically asked, “Can we abolish slavery in the loyal State of Kentucky against her will? . . . Would it be less than stealing?” *Id.*; see also *id.* at 1489 (remarks of Sen. Davis (KY)); AMAR, *supra* note 147, at 360 (discussing interplay between Fifth Amendment takings clause and Thirteenth Amendment). Even as the Thirteenth Amendment was on the verge of passage, Lincoln drafted a proposal to compensate former

responded to this argument by simply denying the existence of property rights in human beings.<sup>485</sup> Others contended that because the southern states had deliberately withdrawn from and attempted to destroy the Union, they were no longer entitled to its constitutional protections.<sup>486</sup> Other opponents of the Thirteenth Amendment argued the change that would be wrought by it was so fundamental that Congress had no power to propose it.<sup>487</sup> As Kentucky Senator Davis claimed in articulating the same argument on the floor of the Senate, “I deny that the power of amendment carries the power of revolution.”<sup>488</sup>

The Thirteenth Amendment finally passed by a two-thirds majority in the House on January 31, 1865.<sup>489</sup> The final vote was 119 to 56: a 68% margin that did not leave a great deal of room for error.<sup>490</sup> President Lincoln personally lobbied members of Congress to get the additional votes needed to send the proposed amendment to the states for ratification.<sup>491</sup> When the final vote was announced by the Speaker of the House, Republican House members and hundreds of spectators responded “with an outburst of enthusiasm” that lasted for several minutes—the men sprang to their feet, applauded and cheered, while hundreds of “ladies” in the galleries rose in their seats and waved their handkerchiefs, “adding to the general excitement and intense interest of the scene.”<sup>492</sup>

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slaveholders and to set aside 400 million dollars for that purpose. GOODWIN, *supra* note 183, at 695. He did not submit the proposal to Congress because his Cabinet dissuaded him from doing so. *Id.* at 695–96

485. *See, e.g.*, CONG. GLOBE, 38TH CONG., 1ST SESS. 1481 (1864) (remarks of Sen. Charles Sumner (MA)) (arguing that “the proposition of compensation is founded on the intolerable assumption of property in man”); *see also id.* at 2978 (remarks of Rep. John Farnsworth (IL)) (“What vested right has any man or State in property in man?”).

486. *See, e.g., id.* at 2943 (remarks of Rep. Higby (CA)) (asking, “What right, in God’s name, has the institution that has now two or three hundred thousand men arrayed in arms against the Government? . . . What rights has it which this Government is bound to respect?”); *see also id.* at 2955 (remarks of Rep. Kellogg (MI)) (asking, “[W]hat rights have rebels under a Constitution which they have set at naught?”). President Lincoln made the same argument: “The rebels could not at the same time throw off the Constitution and invoke its aid. Having made war on the Government, they were subject to the incidents and calamities of war.” Finkelman, *supra* note 399, at 380 (citation omitted).

487. CONG. GLOBE, 38TH CONG., 1ST SESS. 2939–40 (1864) (remarks of Rep. Pruyn (NY)); *see also id.* at 2952 (remarks of Rep. Alexander Coffroth (PA)).

488. *Id.* at 1489; *see also* FONER, *supra* note 11, at 313 (describing congressional debates surrounding the Thirteenth Amendment).

489. CONG. GLOBE, 38TH CONG., 2D SESS. 531 (1865).

490. *Id.*

491. GOODWIN, *supra* note 183, at 687–88. *See also* FONER, *supra* note 11, at 312–13. Lincoln intervened “more directly in the legislative process than at any other point in his presidency,” pressuring Unionists in the border states who had voted against the Amendment in June to change their votes. FONER, *supra* note 11, at 312.

492. CONG. GLOBE, 38TH CONG., 2D SESS. 531 (1865).

The Amendment passed the House due to the capture of twenty-seven additional “yes” votes. Of that number, fifteen were either Republicans or Unionists (and one Democrat) who did not cast a vote when the Amendment was first proposed in June 1864.<sup>493</sup> Twelve Congressmen, nine of whom were Democrats, changed their votes.<sup>494</sup> One Democrat who changed his vote, Representative Anson Herrick of New York, argued that his party had suffered for slavery long enough:

It has been our seeming adherence to slavery, in maintaining the principle of State rights, that has, year by year, depleted our party ranks until our once powerful organization has . . . sunk into a hopeless minority in nearly every State of the Union; and every year and every day we are growing weaker and weaker in popular favor, while our opponents are strengthening, because we will not venture to cut loose from the dead carcass of negro slavery.<sup>495</sup>

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493. Compare CONG. GLOBE, 38TH CONG., 1ST SESS. 2995 (1864) (first House vote on the Thirteenth Amendment) with CONG. GLOBE, 38TH CONG., 2D SESS. 531 (1865) (second House vote on the Thirteenth Amendment). Republican and Unionist representatives who voted in favor of the Thirteenth Amendment in January 1865 but did not cast a vote in June 1864 were William G. Brown (Unionist (WV)), Schuyler Colfax (Republican (IN)), Henry W. Davis (Unionist (MD)), Thomas Davis (Republican (NY)), Ebenezer Dumont (Republican (IN)), Josiah Grinnell (Republican (IN)), Samuel Knox (Unionist (MO)), John R. McBride (Republican (OR)), Theodore Pomeroy (Republican (NY)), William H. Randall (Unionist (KY)), Edward Rollins (Republican (NH)), William B. Washburn (Republican (MA)), George Yeaman (Unionist (KY)). Henry Gaither Worthington (Republican (NV)) was not yet in office in June 1864 and therefore did not cast a vote, but voted in the affirmative in January 1865. The only Democrat who did not cast a vote in June 1864 and subsequently voted in favor of the amendment was Homer Nelson of New York. For biographical data regarding these congressional representatives, see BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774 TO PRESENT, <http://bioguide.congress.gov> (last visited Apr. 6, 2011).

494. Compare CONG. GLOBE, 38TH CONG., 1ST SESS. 2995 (1864) (first House vote on the Thirteenth Amendment) with CONG. GLOBE, 38TH CONG., 2D SESS. 531 (1865) (second House vote on the Thirteenth Amendment). The Democrats who switched their votes from “nay” to “yea” on the Thirteenth Amendment were Augustus Baldwin (MI), Alexander Coffroth (PA), James Edward English (CT), John Ganson (NY), Anson Herrick (NY), Wells Andrews Hutchins (OH), Archibald McAllister (PA), William Radford (NY), and John B. Steele (NY). All but two of the Democrats voting in favor of the Amendment were not facing reelection in 1864. FONER, *supra* note 11, at 313. Two Unionists changed their votes to the affirmative, Austin Augustus King (MD) and James S. Rollins (MO). Compare CONG. GLOBE, 38TH CONG., 1ST SESS. 2995 (1864) (first House vote on the Thirteenth Amendment) with CONG. GLOBE, 38TH CONG., 2D SESS. 531 (1865) (second House vote on the Thirteenth Amendment). Only one Republican Congressman voted against the Thirteenth Amendment in June 1864, James Ashley (OH), and he changed his vote to a yes in January 1865. *Id.* Biographical data regarding these congressional representatives can be found on the website presenting the Biographical Directory of the United States Congress, 1774 to Present, located at <http://bioguide.congress.gov/biosearch/biosearch.asp> (last visited March 25, 2011).

495. CONG. GLOBE, 38TH CONG., 2D SESS. 526 (1865); see also CONG. GLOBE, 38TH CONG., 1ST SESS. 2955 (1864) (comments of Rep. Kellogg (MI), arguing that “[t]he men of the country . . . are everywhere in favor of this amendment of the Constitution, and intensely anxious to see it adopted by this Congress and submitted to the States for their approval”). Representative McAllister of



In voting to end slavery via the Thirteenth Amendment, Congress recognized that public sentiment had evolved sharply from where it stood during the years leading up to the Civil War, during which anyone advocating the abolition of slavery was viewed as a dangerous extremist. Less than a year after the House of Representatives approved the Amendment, on December 6, 1865, the Thirteenth Amendment was ratified by the necessary margin of two-thirds of the States, abolishing the institution of slavery throughout the United States immediately and permanently.<sup>496</sup> Any person who would have predicted this result, even ten years earlier, would have been viewed as somewhat insane.

The abolition of slavery in the United States was therefore revolutionary. However, just as the first American Revolution was incomplete due to its failure to confront slavery, so too was the fight for abolitionism. Opposition to slavery during the nineteenth century did not typically equate support for racial equality. In fact, some proponents of emancipation openly disavowed any such goal or intent.<sup>497</sup> Therefore, particularly after the southern states were readmitted to the Union through the process of Reconstruction, the scope of what would be accomplished by the Thirteenth Amendment's abolition of slavery was circumscribed. Full admission to the benefits of American citizenship for former slaves would await a third revolution: the Second Reconstruction.<sup>498</sup>

#### CONCLUSION

The story of abolitionism in the United States, particularly in the states that did not end slavery voluntarily, illustrates the potential for volatile and revolutionary change that results from distortions in or capture of the democratic process. Because the southern states were so successful in

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Pennsylvania, who also changed his vote, stated that he did so to “destroy[]” the Confederacy by eliminating slavery as its cornerstone, as he no longer considered compromise with the South to be an option. CONG. GLOBE, 38TH CONG., 2D SESS. 523 (1865).

496. See AMAR, *supra* note 147, at 358–59 (describing the ratification process); FONER, *supra* note 11, at 316 (same). The first state to ratify the Amendment was Lincoln's home state of Illinois. FONER, *supra* note 11, at 316.

497. See, e.g., CONG. GLOBE, 38TH CONG., 2D SESS. 155 (1865) (remarks of Rep. Thomas Treadwell Davis (NY)) (stating, “I am not . . . one of those who believe that the emancipation of the black race is of itself to elevate them to an equality with the white race. I believe in the distinction of races as existing in the providence of God . . . but I would make every race free and equal before the law”).

498. The Second Reconstruction is a term that was coined to describe the 1960s Civil Rights Movement, in which black Americans demanded their rights as citizens in the United States of America. See generally MANNING MARABLE, RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION AND BEYOND IN BLACK AMERICA, 1945–2006 (3d ed. 2007). The Civil Rights Movement constituted the third great revolution in American history.

warping the framework of the American Republic to insulate and nurture the institution of slavery, “gentle nudges” in the opposite direction simply did not materialize. The absence of such “nudges” precluded the success of attempts to ease slavery out of existence in these states, at least at the national level. Moreover, the South’s political dominance created “hard shoves” in the opposite direction, as the federal government utilized its power to protect slavery and to enable its export to the Territories of the expanding nation. As the laws digressed ever further from the social norms and firmly held beliefs of citizens living in the free states, they became harder to enforce. The democratic distortions that enabled such laws to be passed in the first place were well known to these citizens and further undermined the laws’ perceived legitimacy.

Against this backdrop, Abraham Lincoln was elected the sixteenth President of the United States, the first Republican ever to hold the office. Lincoln’s election signaled the end of the South’s hegemony in the federal government, which southern slaveholders feared would equate the end of their “peculiar institution,” a result that they could not tolerate. Therefore, these states seceded from the Union, a step which in hindsight turned out to be the ultimate in self-defeating “hard shoves.”

The ensuing Civil War, which caused more American deaths than all other wars combined,<sup>499</sup> was the result of the nation’s internal struggles with the institution of slavery. At least 600,000 Americans died in the Civil War.<sup>500</sup> If a similar percentage of people living in the United States died today, the death toll would reach five million.<sup>501</sup> The Civil War—the magnitude and importance of which is difficult to overestimate—ultimately enabled the complete abolition of slavery.

As social norms evolve and change over time, the law typically and eventually changes along with them. The law also influences social norms, as political leaders make value judgments as to moral issues that hopefully have a salutary impact on their constituents’ behavior. However, when democratic feedback loops break down, such that the law ensconces the norms of one overly empowered group and ignores or undervalues the voices of others, gradual change—particularly when it is resisted by the empowered group—becomes difficult if not impossible to achieve. As a result, the law becomes “stuck,” causing it to deviate ever further from prevailing social norms. Eventually, the law must lurch forward or risk becoming irrelevant. Hence lie the seeds of revolution.

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499. GOODWIN, *supra* note 183, at 346.

500. *Id.*

501. *Id.*