Introduction

> [I]n a Democracy, where all Men are equal, Slavery is contrary to the Spirit of the Constitution.[1]
>
> *Montesquieu* (1748)

In early 1840, William Slade rose from his seat in the House of Representatives and began a wide-ranging speech on the right of petition, slavery, and the slave trade in the District of Columbia. Slade's speech came in the midst of an eight-year battle over the gag rule in the House of Representatives. The gag rule sought to ensure that the House did not discuss the issue of slavery by automatically laying any petitions relating to slavery "on the table" – which meant putting them on the agenda for later, but with the firm – indeed, clearly stated – intention of never getting around to them. The gag rule had been initiated in 1836 and lasted until 1844 and during that time, William Slade was a key figure in resistance to it.[2]

The crux of Slade's speech in 1840 was that Congress had the constitutional right to abolish slavery and the slave trade in the District of Columbia. In taking this position, he echoed many of his colleagues who had opposed the gag rule since its establishment in 1836. But the way in which he made this argument is worthy of note. In 1840, to establish that Congress had the power to abolish slavery in the District of Columbia, Slade examined a mass of evidence from the early Republic, including the opinions of James Madison in the *Federalist*

[1] Montesquieu's *Spirit of the Laws*, quoted as an epigram on the title page of St. George Tucker's *A Dissertation on Slavery*. St. George Tucker, *A Dissertation on Slavery: With a Proposal for the Gradual Abolition of It, in the State of Virginia* (Philadelphia: Mathew Carey, 1795).

[2] In 1837 his attempts to speak on the issue of slavery had resulted in Southern delegations walking out of the Chamber. Following his 1840 attempt to break the gag, the House of Representatives made the gag rule a standing rule of the House, and subsequently reaffirmed it each year until its defeat in 1844.

Papers, the ratification debates in Virginia, the 1789 and 1791 acts of cession that created the District of Columbia, and the practices of Congress since then. He took issue with what he labeled "*the compromise which lies at the basis of our federal compact*" – the possibility that the adoption of the Constitution contained within it an "implied faith" that Congress would not legislate upon slavery in the District of Columbia. Further evidence, including a common sense reading of the Constitution, the 1787 Northwest ordinance, Benjamin Franklin's petitioning, and once again the testimony of Madison, "the very father of the Constitution," was deployed to deny that "*this Union* was formed *to perpetuate slavery*."[3]

But then Slade changed tack. Thus far, he suggested, he had occupied a defensive ground, seeking only to show that claims that abolition in the District was unconstitutional were incorrect. He now intended to advance his argument in a positive direction. He would show:

> Whoever will look into the history of the period when the Constitution was formed, will find that it was the universal expectation – an expectation excited by the slave States themselves, especially by Virginia and Maryland – that slavery would, at no distant day, be abolished by their own legislation. Abolition, as I have already intimated, and will now show, was emphatically the spirit of those times.

Slade then produced a litany of quotations from eminent figures from the founding era to show that antislavery "pervaded the Convention that formed the Constitution," that it "was the prevalent feeling of the Revolution," that a belief that slavery was destined for a "*speedy death*" was "the *public opinion* of that day." Slade ransacked the history of the founding period to show that opinion at that time was in favor of abolition, that "*Abolition … was emphatically the spirit of those times.*" Which is to say that in 1840, Slade believed a – perhaps, the – key to showing that Congress had the power to abolish slavery in the District of Columbia was to show that the spirit of the period in which the Constitution was being drafted and ratified had been in favor of abolition.[4]

William Slade's speech was the culmination of the series of developments in the 1830s that had made argumentation about the spirit of the founding period a crucial component of debates over slavery in the District of Columbia and indeed over slavery more broadly. Over the process of that decade abolitionists,

[3] *Speech of Mr. Slade, of Vermont, on the Right of Petition: The Power of Congress to Abolish Slavery and the Slave Trade in the District of Columbia; The Implied Faith of the North and the South to Each Other in Forming the Constitution* (Washington, DC: Gales and Seaton, 1840), 7–10, 17–22. Quotes at 17, 19, 20. Original emphasis. (Here and throughout the remainder of the book, pamphlet titles in excess of 200 characters have been pared down so as to be manageable while attempting to keep title clauses intact.)

[4] *Speech of Mr. Slade, of Vermont, on the Right of Petition: The Power of Congress to Abolish Slavery and the Slave Trade in the District of Columbia; The Implied Faith of the North and the South to Each Other in Forming the Constitution*, 23, 23, 25, 23. Emphasis added in last quote.

defenders of slavery, and a vast population that located itself between those two groups faced an unrolling of a constitutional issue to which neither the constitutional text nor their then established practices of navigating the issue of slavery could provide a solution. In the process of first articulating and then addressing this issue these Americans developed an understanding of the US Constitution that transcended the debates over expressed and implied powers that had animated constitutional debate in the early Republic. By the time Slade made his speech in 1840, abolitionists were attempting to occupy ground that opponents of abolition had been variously occupying since the mid-1830s. In arguing that Americans should understand the *spirit* of the 1780s as a basis for legitimating or restricting action in terms of constitutionality, Slade was acquiescing with a mode of constitutional construction developed by anti-abolitionists over the 1830s. Slade was appropriating and mobilizing the claim that a spirit of 1787 could define what was constitutional even if he sought to reach his own conclusions as to what that spirit actually was.

This book traces those developments to show how the spirit of the 1780s came to hold constitutional authority by the 1840s. It shows how the invocation of the concept of spirit was tied to the necessity of defending the institution of slavery from an abolitionist campaign that initially relied upon textual authority in order to seek abolition in the nation's capital. In doing so, I highlight the way in which a mode of appealing to the spirit of the founding arose in a particular historical context, and through a contentious dialogue between abolitionists and defenders of slavery. Rather than being an inevitable or natural way of thinking about constitutional authority, this account suggests that recourse to a spirit of 1787–88 was prompted in the 1830s by the requirements of slavery. Facing an abolitionist challenge that pressed directly upon the Constitution's equivocations as to the personhood of slaves, defenders of slavery sought to step outside the boundaries of the constitutional text while also retaining the rhetorical and political power of a constitutional argument against abolition. By invoking a spirit of the Constitution, and more precisely, a spirit of the time of the Constitution's creation, defenders of slavery read the Constitution's three-fifths clause as the entrenchment, in 1787, of a compromise to the institution of slavery.[5] In response to the pressure from abolitionists to acknowledge the humanity of slaves and to read the constitutional text as neutral with regard to slavery, defenders of slavery instead imbued it with historical significance. They refused the abolitionist proposition that the Constitution was an abstracted text and instead rendered it a record of a specific historical moment. It was, in short, to defend slavery and ensure its continuation that actors in the 1830s embraced the concept of a "spirit" of the founding.

[5] The Fugitive Slave and the Slave Trade clauses would also be offered as similar evidence.

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SLAVERY AND THE CONSTITUTION

Recent scholarship has done much to enhance our understanding of the relationship between slavery and the Constitution. Scholars have shown how the creation and development of the US Constitution can only be fully understood against the backdrop of the "peculiar" institution.[6] Alongside these studies, other scholarly work has challenged the view of slavery as a premodern institution within the antebellum United States, such that contemporary assessments highlight the forward-looking vision of advocates of slavery.[7] Taken together, they present slavery as a robust institution in the mid-Antebellum period that shaped the politics surrounding it and which bent the Constitution to its own benefit. Comparatively, the study of the constitutional thought of abolitionists has been largely stable following the seminal work of William M. Wiecek in the 1970s.[8] Nonetheless, scholarship on the abolitionists as a body has remained constant, often joining the studies of slavery in presenting abolitionist constitutional thought within broader

[6] David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (New York: Hill and Wang, 2009); Matthew Mason, *Slavery & Politics in the Early American Republic* (Chapel Hill: The University of North Carolina Press, 2006); Martha S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (Cambridge, UK: Cambridge University Press, 2018); Don E. Fehrenbacher and Ward M. McAfee, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery* (Oxford: Oxford University Press, 2001); George William Van Cleve, *A Slaveholders' Union: Slavery, Politics, and the Constitution in the Early American Republic* (Chicago: University of Chicago Press, 2010).

[7] Edward E. Baptist, *The Half Has Never Been Told: Slavery and the Making of American Capitalism* (New York: Basic Books, 2014); Matthew Karp, *This Vast Southern Empire: Slaveholders at the Helm of American Foreign Policy* (Cambridge, MA: Harvard University Press, 2016); James Oakes, *Slavery and Freedom: An Interpretation of the Old South* (New York: Alfred A. Knopf, 1990); Seth Rockman, *Scraping By: Wage Labor, Slavery, and Survival in Early Baltimore* (Baltimore: The Johns Hopkins University Press, 2009); Sven Beckert and Seth Rockman, "Introduction: Slavery's Capitalism," in *Slavery's Capitalism: A New History of American Economic Development*, ed. Sven Beckert and Seth Rockman (Philadelphia: University of Pennsylvania Press, 2016), 1–27. For the sophistication of Southern thought in this period, see Michael O'Brien, *Conjectures of Order: Intellectual Life and the American South, 1810–1860* (Chapel Hill: The University of North Carolina Press, 2004). For a discussion of the attempts of proslavery thinkers to grapple with progress, see Eugene D. Genovese, *The Slaveholders' Dilemma: Freedom and Progress in Southern Conservative Thought, 1820–1860* (Columbia: University of South Carolina, 1992). For an account of proslavery thought as rhetoric, see Patricia Roberts-Miller, *Fanatical Schemes: Proslavery Rhetoric and the Tragedy of Consensus* (Tuscaloosa: The University of Alabama Press, 2009). For an account of proslavery thought as a mode of modern counterrevolution, see Manisha Sinha, *The Counterrevolution of Slavery: Politics and Ideology in Antebellum South Carolina* (Chapel Hill: The University of North Carolina Press, 2000).

[8] William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760–1848* (Ithaca: Cornell University Press, 1977). Two notable recent exceptions are Randy E. Barnett, "Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment," *Journal of Legal Analysis* 3, no. 1 (2011): 165–263; Helen J. Knowles, "The Constitution and Slavery: A Special Relationship," *Slavery & Abolition* 28, no. 3 (2007): 309–28.

histories.[9] The result has been a greatly enhanced understanding of the Constitution and its relationship with the politics of slavery.

However, this burgeoning literature tends to be pulled in two directions at the expense of deeper understandings of the context in which a spirit of the Constitution arose in the 1830s. Positioned between the two historical landmarks of the founding era and the Civil War, studies of slavery and the Constitution often tend toward treating mid-Antebellum constitutional debates over slavery as legacies of the founding or precursors to the Civil War, or both. With respect to the legacy of the founding, the constitutional politics of slavery is presented as an unfolding of the ideological tensions, agreements, and institutional arrangements forged in the 1770s and 1780s. Slavery is a constitutional constant and the potentiality of division over it is always present until a decisive constitutional reordering becomes possible.[10] Here, the founding often becomes a moment of "original sin," and slavery's constitutionality is the consequence of a failure of the founding generation to adequately address it.[11] In the second instance of mid-Antebellum constitutionalism as precursor to the Civil War, which is not mutually exclusive with the first approach, the 1830s debates over slavery are positioned on a path to the 1860s, as further steps toward the sectional disunion that marks the beginning of the end of formal slavery in the United States.[12] Particularly with regard to the constitutional thought of the abolitionists, this approach seeks to understand the constitutional debates of the 1830s to 1850s as developments toward the constitutional amendments that followed the Civil War. Reading back into history, such approaches look for continuity and the endurance of ideas, placing actors and concepts in a narrative

[9] For a flavor of the broader work on abolitionism, see Manisha Sinha, *The Slave's Cause: A History of Abolition* (New Haven: Yale University Press, 2016); Lawrence J. Friedman, *Gregarious Saints: Self and Community in American Abolitionism, 1830–1870* (Cambridge, UK: Cambridge University Press, 1982); Benjamin Quarles, *Black Abolitionists*, (New York: Oxford University, 1969); Richard S. Newman, *The Transformation of American Abolitionism: Fighting Slavery in the Early Republic* (Chapel Hill: The University of North Carolina Press, 2002); Robert Fanuzzi, *Abolition's Public Sphere* (Minneapolis: University of Minnesota, 2003); Benjamin Lamb-Books, *Angry Abolitionists and the Rhetoric of Slavery: Moral Emotions in Social Movements* (New York: Palgrave MacMillan, 2016); W. Caleb McDaniel, *The Problem of Democracy in the Age of Slavery: Garrisonian Abolitionists & Transatlantic Reform* (Baton Rouge: Louisiana State University Press, 2013).

[10] Van Cleve, *A Slaveholders' Union: Slavery, Politics, and the Constitution in the Early American Republic*; Padraig Riley, *Slavery and the Democratic Conscience: Political Life in Jeffersonian America* (Philadelphia: University of Pennsylvania Press, 2016); Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (New York: Routledge, 2015); For a more polemical account, see Lawrence Goldstone, *Dark Bargain: Slavery, Profits, and the Struggle for the Constitution* (New York: Walker & Company, 2005).

[11] For a critique of this approach, see Matthew Mason, "A Missed Opportunity? The Founding, Postcolonial Realities, and the Abolition of Slavery," *Slavery & Abolition* 35, no. 2 (2014): 199–213.

[12] For example William Lee Miller, *Arguing About Slavery: John Quincy Adams and the Great Battle in the United States Congress* (New York: Alfred A. Knopf, 1996).

that could only be understood after the event.[13] In a parallel manner, both approaches inhibit recognition of the agency of actors in the 1830s, in terms of developing approaches to the Constitution within their own historical moment or informed by their own pressing contemporary concerns. For instance, such approaches often treat discussion over slavery in the District of Columbia in the 1830s as one among many concerns, despite being the very issue over which Congress ground to a halt in 1836 and in response to which the gag rules were initiated. Within the broad scope of 1787–1861, the District of Columbia may be one of a series of issues, but in the 1830s it is *the* issue around which innovative constitutional thought develops and petitioning of Congress mobilizes. Treating the 1830s as only part of a broader story obscures the theoretical and historical importance of that decade.

In treating the 1830s as the culmination of the founding, the beginnings of the Civil War, or a stop on the journey between them, the discursive and dialectical developments of abolitionist and proslavery constitutionalism in that decade are marginalized. As my analysis here will show, the understanding of the Constitution offered by William Slade in 1840 emerged from a rich and swirling brew of what might be labeled mezzo-constitutional thought. I borrow and adapt the concept of "mezzo" as applied by Daniel Carpenter in his study of bureaucratic innovation in between 1862 and 1928. Carpenter uses mezzo to identify administers positioned between executive level and subordinate administers who possessed "the ability to learn and the authority to innovate."[14] Here, I use the prefix to denote actors who possess those similar traits within the field of intellectual production. Such actors – for example, newspaper editors, activists, pamphleteers, and, crucially for this study, politicians – occupy a space close enough to popular debate to respond to resonances and through reprints and quotations legitimate and organize embryonic ideas and concepts. At the same time, they are in a position to diffuse and popularize ideas offered in elite texts and debates through selective editing, translation, and the authoritative framing of reprints of debates and public events.[15] The notion of a constitutional spirit that tied

[13] See, for example, Randy Barnett's attempt to "rehabilitate [the] memory" of the abolitionists by "expos[ing] the marked continuity" between abolitionist constitutionalism and that of the authors of the Fourteenth Amendment. Barnett, "Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment," 169, 172. Identifying the origins of the Fourteenth Amendment is a characteristic of these approaches. Jacobus tenBroek, *Equal Under Law* (New York: First Collier Books, 1965). Knowles is notable for addressing abolitionist constitutionalism largely within its immediate historical context. Knowles, "The Constitution and Slavery."

[14] Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928* (Princeton: Princeton University Press, 2001), 21.

[15] On the role of newspaper editors as "nodal points" within the political system of the early nineteenth century, cf. Jeffrey L. Pasley, *"The Tyranny of Printers": Newspaper Politics in the Early American Republic* (Charlottesville: University Press of Virginia, 2002), 13.

actors back to the creation of the Constitution emerged from the interaction of disparate attitudes toward the Constitution, few of which reach the high levels of systematic constitutional thought contained within legal treatises.[16] Pamphlets, newspaper articles, debates between activists, and petitions provided spaces in which ideas could be developed, tested, and given coherence before percolating up into national debates and dispersing down into popular consciousness.

Seeing a constitutionalism centered on the historical moment of 1787–88 as emerging from a dialectical process centered on the 1830s has connotations for our understandings of constitutional development. At a first pass, the history traced here points to the contingency of constitutional development. As the structure of the book highlights (see below), the development of this constitutionalism was the result of a series of responses to the challenges and arguments being offered by actors within a political field. Black abolitionists responded to the challenges of the American Colonization Society (ACS), Southern supporters of slavery responded to the abolitionist pressures on the District of Columbia, and political abolitionists responded to the invocations of a founding spirit by the defenders of slavery. Each response was both a mobilization of political rhetoric to address a proximate goal and a further evolution of the political field itself, creating new frames of constitutional understanding and generating new challenges and options for responding to them. As a result of this complex process, it is difficult to maintain notions of constitutional development as the blossoming of seeds planted at the founding or even as the inevitable unraveling of institutions in the face of inherent tensions. The development of the constitutionalism traced here is, if not haphazard, then certainly incidental and somewhat self-generating.

This observation has implications for recent work on constitutional development and the relationship between slavery and the Constitution. Sean Wilentz's recent account of the evolution of constitutional thought regarding slavery during the Antebellum period suggests that the absence of the words

[16] In this regard, the book draws upon recent work to dedicated to tracing the ways in which constitutional development in the United States has occurred through interactions between a multiplicity of constitutional authorities, not least of which are individuals acting in "irregular" or extralegal ways. As H. Robert Baker reminds us, "the process of making constitutional law is more complicated than merely citing a line of cases." H. Robert Baker, "The Fugitive Slave Clause and the Antebellum Constitution," *Law and History Review* 30, no. 4 (2012): 1174. For other examples of approaches to constitutional law that move beyond legal opinions, see Christian G. Fritz, *American Sovereigns: The People and America's Constitutional Tradition before the Civil War* (New York: Cambridge University Press, 2008); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004); Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America*; H. Robert Baker, *Prigg v. Pennsylvania: Slavery, the Supreme Court, and the Ambivalent Constitution* (Lawrence: University of Kansas Press, 2012); Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2010).

"slavery" or "slave" in the Constitution provided a basis for the ultimate excising of slavery from the constitutional order.[17] In this telling, Abraham Lincoln's efforts at emancipation took hold of the potential of the Constitution of 1787, rendering the textual possibilities for antislavery real in the actualization of (some of) the framers' refusal to fully countenance slavery.[18] Placing much emphasis on the constitutional text, Wilentz suggests that to "dismiss the delegates' refusal to recognize the legitimacy of slavery as a linguistic technicality is to trivialize an important part of the convention's work."[19] In Wilentz's history, the Constitution always then held a kernel of antislavery, which though waylaid and shrouded by the ambiguity of the Constitution's relationship with slavery, ultimately came to fruition in the ending of slavery during the Civil War. But in light of the contingency of constitutional development over the decades of the mid-Antebellum period explored in this book, such a teleological account is hard to sustain. Where Wilentz argues that it is only "by evaluating the events of 1787 [that it is] possible to understand the struggles over the Constitution's meaning that unfolded over succeeding decades," the account offered here suggests that it is only through the struggles over the Constitution's meaning for slavery in those decades that the heightened significance of 1787 within those very debates came to be.[20]

Wilentz is not alone in viewing the textual product of 1787 as setting up a subsequent constitutional history that privileged that historical moment. Offering a very different argument in his *The Second Creation*, Jonathan Gienapp has argued that in navigating the ambiguities of the constitutional text, early American leaders came to "imagine the Constitution as *fixed* rigidly in place . . . as an authoritative text circumscribed in historical time."[21] Gienapp shows convincingly that political actors in the 1790s grappled with a project of constitutional construction that gave rise to a novel way of seeing the constitutional text. Attempting to wrest from the text answers to questions not directly engaged by it, these actors came to see themselves as recovering meanings from the Constitution as "an archival object," an "untouchable historical artifact lodged in the archives."[22] As actors in the 1790s sought to "fix" the uncertainties and gaps in the text, they moved toward a project of "excavation" in which the reconstructed judgments of the original creators of the Constitution held greater authority than any contemporary actor.[23] Merging conceptions of the "textual constitution, the archival constitution, and the contingently authored Constitution," these actors unwittingly worked

[17] Sean Wilentz, *No Property in Man: Slavery and Antislavery at the Nation's Founding* (Cambridge, MA: Harvard University Press, 2018).
[18] Wilentz, *No Property in Man*, 241–42. [19] Wilentz, *No Property in Man*, 11.
[20] Wilentz, *No Property in Man*, 20.
[21] Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (Cambridge, MA: The Belknap Press of Harvard University Press, 2018), 4.
[22] Gienapp, *The Second Creation*, 168, 189. [23] Gienapp, *The Second Creation*, 245.

to circumscribe the Constitution in time, gradually replacing "contemporary discretion" with "fixed historical meaning," and "[t]he "people's" Constitution" with the "framers' Constitution."[24]

The account of constitutional development in this book resonates in important ways with Gienapp's account. In foregrounding the contingent nature of constitutional development, contextualizing that development within a frame of actors navigating immediate political challenges, and in seeing a turn to the founding as motivated by a desire to bring stability to ambiguities contained within the Constitution, my own account and Gienapp's contain theoretical overlaps. And in seeing the legacy of those developments in contemporary constitutionalism and as a weakening of democratic modes of constitutionalism, we share, I think, political concerns. But there is also a significant departure in the conception of how 1787 came to be privileged within the American constitutional tradition. For Gienapp, it was the desire to "fix" the textual constitution that drove actors in the 1790s to turn to the project of excavation and to a privileging of the intentions of the actors of 1787. The argument in *The Second Creation* takes as its basis, and as a structuring assumption, a desire to bring fixedness to an ambiguous text. In that account, as with Wilentz, the historical turn to the framers is motivated by an attempt to bring specific meaning to the constitutional text. But I suggest that the turn to 1787–88 was not in support of the text but despite it.[25] As is discussed in the pages ahead, the congressional authority over slavery within the District of Columbia was not a question of textual ambiguity. Until the 1830s, few actors regarded that authority as in question. Indeed, during the Missouri Crisis those opposing the restriction of slavery asked why, if restrictionists really opposed slavery, they did not act against it in the District of Columbia where "the power of providing for their emancipation rests with Congress alone."[26] As I argue subsequently, the appeal to a spirit of the founding came not from a need to fix the constitutional text, but rather in an attempt to circumnavigate it. In the debates of the 1830s, it was not that the history of 1787 was holding as to the meaning of the textual constitution, it rather came to be the case that the history of 1787–88 illustrated a spirit that itself became holding *as* the Constitution.

This history also points to the centrality of slavery for constitutional development, but also for American political development more broadly. While the ideological tension between liberalism and republicanism has been presented in the past as the orientating battle within the early United States (and, indeed, in some cases across the entirety of its history), the centrality of

[24] Gienapp, *The Second Creation*, 290, 322.

[25] I use "1787–88" advisedly: the constitutional *text* arose from actions which took place in the summer 1787, but a constitutional *spirit* of that founding must stretch beyond that summer and Philadelphia and to the process of Ratification across the future States.

[26] *Annals of Congress*, *16th Congress, 1st Session* (Senate, 1819), 351.

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slavery and antislavery to the evolving understanding of the US Constitution suggests Rogers Smith is correct in calling for greater attention to the "ascriptive Americanist" tradition within the United States.[27] However, the historical story depicted in this book points to a centrality for slavery that belies its containment to particular moments or even extended periods – compromise over slavery was central to the initial formation of the US Constitution in the late eighteenth century, but its influence over American constitutionalism did not end there or even in 1865–68.[28] Slavery shaped both the text of the Constitution and the subsequent understanding of it in popular and elite political culture. The very constitutionalism that we navigate today is inflected by the historical intertwining of slavery and the Constitution that left an imprimatur on the latter, which remained long after the legal ending of slavery. This legacy is all the more striking as it implicates a facet of American political life that is often closely associated with liberalism and republicanism. The American conception of constitutional government, understood as an attempt to place constraint on democratic excess and to act as a guarantor of individual liberty through the tying of politics back to an initial moment of heightened political agreement, has its roots in the societal institution of slavery that operated to deny individual liberty and political agency to millions of black men and women. Even after the constitutional text was altered to forbid slavery, the constitutional grammar of the United States has remained modulated by its engagement with slavery.

THE RISE OF CONSTITUTIONAL SPIRIT

The argument of the book unfolds in several parts. The first part traces the various developments over the course of the 1820s and 1830s that formed the components of an emergence of a constitutional spirit of 1787–88. I begin by examining the manner in which the Missouri Crisis highlighted different concepts within competing constitutional imaginaries that would be important for the constitutional developments of the 1830s. As they debated Missouri's admission to the Union, "restrictionists" and "antirestrictionists" offered ideas about constitutional time, the role of a founding spirit in constitution construction, and the constitutional value of "compromise" that were echoed in the debates of the 1830s and then 1840s. Although they would not consolidate into the robust appeal to a constitutional spirit that developed in the mid-1830s, the Missouri debates provided a context for those later developments, signaling their centrality to constitutional thought regarding slavery and the potentiality of the latter as a site for a reconfiguration of constitutional construction.

[27] Rogers M. Smith, "Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America," *American Political Science Review* 87, no. 3 (1993): 549–66.

[28] For discussion of the role of slavery in the Constitution's formation, see Waldstreicher, *Slavery's Constitution*; Finkelman, *Slavery and the Founders*.

In the second and third chapters, attention is turned to the ways in which claims of black citizenship led to invocations of a constitutional spirit, drawn from the Declaration of Independence and utilized to enable an expansive reading of the constitutional text. Beginning in the constitutional theories being developed in free black communities in Northern cities during the 1820s, the Declaration of Independence was read into the Constitution to create a constitutional obligation of equality under law. These arguments were taken up by the broader interracial abolitionist movement of the 1830s that grew out of free black opposition to the ACS and the white supporters converted to that opposition. The third chapter explores the expansion of those ideas in the wider movement of the 1830s and the complications they created for abolitionists' understandings of their relationship with the founding fathers and the generation of the Revolution.

The fourth chapter turns to the ways in which proslavery advocates defended the institution during and after the Virginia Debates in 1831–32. Just as shifts within antislavery circles in the 1820s and 1830s altered thinking about the Constitution, so too did the reaction to Nat Turner's Rebellion have repercussions for proslavery attitudes toward the Constitution. These developments produced less apologetic and future-oriented defenses of slavery, and foregrounded an understanding of slavery as a form of property relationship supported by constitutional principles. The result was the articulation of a defense of slavery reliant upon a constitutional interpretation that was subsequently shown to be vulnerable to abolitionist challenge.

The second part of the book turns its attention to the particular case of slavery in the District of Columbia and the constitutional implications of the abolitionist and proslavery clashes over the District in the early and mid-1830s. Chapter 6 explores the ways in which slavery and the slave trade in the District of Columbia became increasingly significant to both abolitionists and the defenders of slavery in the 1830s. Home to between 4,500 and 6,200 slaves during most of this period, tens of thousands more slaves likely passed through the District during forced migrations to the South and West. As a result of the developments discussed in the previous chapters, as well as the changing international attitude toward slavery, the symbolism of slavery within the capital took on heightened significance in the 1830s, raising the political and constitutional stakes of abolition within the ten miles square. Chapter 7 details the consequences of this rising symbolism in terms of the heated congressional debates of 1836 and the pressures brought to bear on the District by the abolitionist petition campaigns. It shows how the congressional debate became an opportunity for elite articulations of a constitutional theory of "return to the founding" as a mechanism for addressing the abolitionist claims of an express textual constitutional power of abolition in the District.

Chapter 8 offers a theoretical account of the constitutional theory of "the Compact" developed in parallel to the congressional debates over the course of

the 1836 presidential election. The culmination of these trends and debates was Martin Van Buren's articulation of a constitutional theory that bound him – and the United States – back to 1787. The analysis highlights the ways in which the latter theory both departed from the theory of constitutional compact offered in 1798–99 and, at the same time, reinterpreted the notion of constitutional spirit so as to apply it to a specific historical moment.

In the final chapter, the book assesses the longer-term impact of these developments through an examination of the manner in which the abolitionists themselves adopted the theory of a constitutional spirit after the publication of Madison's *Notes*. It then traces the transformation of constitutional spirit as developed in 1836 into the notion that 1787–88 marked a constitutional "recognition" of slavery that subsequent Americans were obliged to honor. Such recognition was central to Chief Justice Taney's *Dred Scott* opinion in which Taney returned to the founding in order to resolve debates over the personhood of slaves by definitively rejecting their claims to citizenship. In conclusion, the book provides an overview of the development of constitutional spirit during the mid-Antebellum period, and considers what possibilities there might be for a constitutional politics that breaks free from the dead hand of the founding.

CONSTITUTIONAL SPIRIT IN THE NINETEENTH AND TWENTY-FIRST CENTURIES

In 2010, in the middle of his Dissent in the case of *McDonald* v. *Chicago*, Justice Stevens deviated from the immediate subject at hand (the Second Amendment's right to bear arms) to offer criticism of Justice Scalia's approach to the study of history. Justice Scalia, wrote Stevens, remained oblivious to the "malleability and elusiveness" of history and Scalia's "defense of his method" was "unsatisfying on its own terms."[29] Explaining the difficulties of historical research, Stevens offered:

> Even when historical analysis is focused on a discrete proposition, such as the original public meaning of the Second Amendment, the evidence often points in different directions. The historian must choose which pieces to credit and which to discount, and then must try to assemble them into a coherent whole.

In place of Scalia's historical approach, Stevens offered his own method, which "focused more closely on sources contemporaneous with the [Second] Amendment's drafting and ratification," and which consciously acknowledged

[29] *McDonald* v. *Chicago* (2010). *McDonald* v. *Chicago* concerned the selective incorporation of the Second Amendment's right to bear arms (i.e., whether the individual right to bear arms recognized in the earlier *District of Columbia* v. *Heller* (2008) applied to the States as well as to the federal government). Quotations in remainder of the paragraph are taken from *McDonald* v. *Chicago*.

the subjectivity of the judge's use of history and thus allied it with a "transparency" that invited critique. Responding in his Concurrence, Scalia conceded, "Historical analysis can be difficult." But he argued that despite such difficulties his "historically focused method" was "less subjective [than Stevens'] because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor." Stevens, wrote Scalia, sought not to "*replace* history with moral philosophy, but would have the courts consider *both*."

This episode, on its face, should strike the observer as extremely odd. Why would two Justices of the Supreme Court, legal practitioners at the apex of their professional field, in the middle of a landmark case, interrupt their examination of the legal precedents and points of law to engage in a squabble over historical methodology? But anyone who has paid attention to constitutional debates in the United States in recent years might regard this exchange as wholly unexceptional.[30] For as Stevens noted in his Dissent, "When answering a constitutional question to which the text provides no clear answer, there is always some amount of discretion; our constitutional system has always depended on judges' filling in the document's vast open spaces" – and, as both Stevens and Scalia concede, judges have, in turn, depended upon history to help them fill in those "vast open spaces."[31] To a significant extent, the modern Supreme Court Justice is expected to be an amateur historian, piecing together evidence to discern the underlying historical meaning of the Constitution.[32]

The judicial reliance upon history reflects a broader societal willingness to turn to history, and particularly to the history of the founding period, as a guide to resolving constitutional disputes. Appeals to the attitudes present at the Constitution's founding litter contemporary political discourse in the United States. Arguments for the constitutionality or unconstitutionality of particular policies that rest on a notion of what was intended or understood at the time of the Constitution's creation are regularly heard in the modern United States. As a society we follow our Justices in looking to historical endeavors to fill in the "vast open spaces" of our constitutional life. In such a way, we today retread the steps taken by the political moderates of the 1830s, aping their attempts to settle the controversial but unavoidable constitutional issues "to which the text provides no clear answer," by making recourse to the authority of a group of

[30] See, for instance, Saul Cornell, "Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism," *Fordham Law Review* 82 (2013): 721–55; Jonathan Gienapp, "Historicism and Holism: Failures of Originalist Translation," *Fordham Law Review* 84 (2015): 935–56.

[31] *McDonald* v. *Chicago*, 561 U.S.

[32] Whether they can do so effectively, or have taken advantage of those who can, is a point of contention. See, for example, Martin S. Flaherty, "History 'Lite' in Modern American Constitutionalism," *Columbia Law Review* 95, no. 3 (1995): 523–90.

historical actors dubbed "founders."[33] On issues as broad as freedom of religion, reproductive rights, and control of firearms, we take our unconscious lead from the debates over slavery in the 1830s and seek to tap the founding for constitutional guidance. But rarely, if at all, is the historical context that gives rise to such an approach to questions of constitutionality considered. Examining the emergence in the 1830s of the claim that the spirit of the founding provides the boundaries of legitimate politics can help us to think about what such practices entail.

In striking ways, the recourse to the founding for meaning emerged in that decade in a similar environment to the one that gave rise to originalism in the late twentieth century. In both instances, a broad societal turn to the history of the revolutionary period and questions concerning the position of the current generation in the history of the nation provided a receptive environment for a turn to the founding. Within such an environment, the emergence of issues to which the constitutional text provided no direct answer, but which progressive political forces sought to resolve constitutionally, spurred conservatives to pursue the development of a mode of constitutional interpretation that made recourse to the values of a founding generation. In the late twentieth century, the bicentennial of the Revolution drew Americans' attention to an apparently simpler time when political debates were more starkly black and white – both metaphorically and literally. A seductive alternative to the "malaise" of the 1970s and the complex constitutional debates arising around racial equality and reproductive rights for which the constitutional text apparently provided no clear answers, the founding came to loom larger in constitutional theorizing than it had in the 1950s and 1960s. One dimension of this shift was the growth and success of constitutional originalism.[34]

[33] Indeed looking back to "The Founding" for guidance as to the parameters of contemporary politics has become so accepted that a subgenre of literature has emerged which documents and analyzes the phenomena. See, for example, Andrew M. Schocket, *Fighting over the Founders: How We Remember the American Revolution* (New York: New York University Press, 2015); David Sehat, *The Jefferson Rule: How the Founding Fathers Became Infallible and Our Politics Inflexible* (New York: Simon & Schuster, 2015).

[34] In 1999, Randy Barnett declared, "Originalism is now the prevailing approach to constitutional interpretation," a declaration that seems equally plausible twenty years later. Since Attorney General Edwin Meese III's attempts to make a "jurisprudence of Original Intention," the conventional approach to questions of constitutionality in the 1980s, some form of "originalism," be it original intent, original understanding, original meaning, or more recently public meaning originalism, has been a locus of constitutional debate. For discussions of this approach as a coherent approach to constitutional interpretation, cf. Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University of Kansas Press, 1999); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997). On the changing construction of originalism, see Keith E. Whittington, "The New Originalism," *Georgetown Journal of Law & Public Policy* 22 (2004): 599–613; Martin S. Flaherty, "Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning," *Fordham Law Review* 84, no. 3 (2015): 905–14. For

The constitutional thought of the 1830s, like the 1970s and 1980s, came on the back of a bout of nostalgia for the purity of a founding moment. For the generation that followed the revolutionaries of 1776 and the founders of 1787–88, history and historical memory proved a vital tool for navigating the pressures that their political inheritance bestowed upon them.[35] As François Furstenberg has noted, a political culture that prioritized "consent" could not embrace a historical legacy without some accommodation for autonomy. The result was an embrace of civic texts, and the veneration of them which saw "Americans ... continually recur to the moment of founding, and *choose* to grant their consent, if only tacitly, to the nation."[36] Through such recurrence, and in the development of a shared public memory of that moment, the second generation of Americans forged for themselves a role as the preservers of the social and political institutions that had secured liberty. At the same time, the political elites of the early Republic were highly conscious of the history of their Revolution and founding and the uses to which such a history could be put. Facing the release of a popular energy that risked destabilizing social order, they saw, and addressed, history as a theater within which the meaning of the Revolution could be shaped and contested.[37] Elites sought to preserve and

criticisms of originalism as a historical endeavor, see the essays of the *Fordham Law Review* to which Flaherty's article serves as an introduction. Randy E. Barnett, "Originalism for Nonoriginalists," *Loyola Law Review* 45, no. 4 (1999): 611–54; Edwin III Meese, "The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention," *Public Administration Review* 45 (1985): 701–4; Edwin Meese III, "Address of the Honorable Edwin Meese III Attorney General of the United States before the D.C. Chapter of the Federalist Society Lawyers Division, November 15, 1985" (Washington, DC, 1985), www.justice.gov/sites/default/files/ag/legacy/2011/08/23/11–15-1985.pdf.

[35] I identify this generation as the second generation of Americans to emphasize their coming of age in the period after the Revolution and founding. In doing so, I depart from their usual designation as "the rising generation" within the literature of the 1820s for the purposes of clarity (there was always a "rising generation" within the literature and speeches of Antebellum America). By contrast, Joyce Appleby has identified this generation in her works as the first generation of Americans. Joyce Appleby, *Inheriting the Revolution: The First Generation of Americans* (Boston: The Belknap Press of Harvard University Press, 2000).

[36] François Furstenberg, *In the Name of the Father: Washington's Legacy, Slavery, and the Making of a Nation* (New York: Penguin Books, 2007), 22.

[37] On the uses of history and memory to shape the politics of the early Republic, see, for example, David Waldstreicher, *In the Midst of Perpetual Fetes: The Making of American Nationalism, 1776–1820* (Chapel Hill: The University of North Carolina Press, 1997); Peter C. Messer, *Stories of Independence: Identity, Ideology, and History in Eighteenth-Century America* (DeKalb: Northern Illinois University Press, 2005); Catherine L. Albanese, *Sons of the Fathers: The Civil Religion of the American Revolution* (Philadelphia: Temple University Press, 1976); Joyce Appleby, "The American Heritage: The Heirs and the Disinherited," in *A Restless Past: History and the American Public* (Lanham: Rowman & Littlefield Publishers, Inc., 2005), 71–90. On the popular pressures released by the Revolution and their threat to elites, see Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York: Hill and Wang, 2007); Terry Bouton, *Taming Democracy: "The People," the Founders, and the Troubled Ending of the American Revolution* (New York: Oxford University Press, 2007).

spread a history that enhanced their own reputations and which aggrandized the roles they had played in the founding of the nation.[38] Making use of history as a didactic tool, political and social elites offered a history of the Revolution and founding that focused on the stories of high-status individuals and which linked republican virtue to submission to established governmental institutions.[39] The history of the Constitution itself was both colored by, and served as, an important site for this project. The early history of the Constitution "place[d] particular emphasis on the role played by the educated part of society" and tempered any democratic narrative through the use of Whiggish and classical modes of historical writing.[40] Motivated by a desire to unify the nation and secure reputations, such a practice of history left to the second generation of Americans a historiographical framework of great events undertaken by a great generation.[41] But in reality, the historical legacy of the founders did not leave their hands as a sacred and untouchable inheritance

John Adams famously predicted, "The History of our Revolution will be one continued Lye from one end to the other." His concern was that it would overly focus on Washington and Franklin. John Adams, "John Adams to Benjamin Rush, April 4, 1790," in *Old Family Letters, Series A*, ed. Alexander Biddle (Philadelphia: J. B. Lippincott Company, 1892), 55.

[38] Douglass Adair, "Fame and the Founding Fathers," in *Fame and the Founding Fathers: Essays by Douglass Adair*, ed. Trevor Colbourn (New York: W. W. Norton & Company, 1974), 3–26; Michael Warner, *The Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America* (Cambridge, MA: Harvard University Press, 1990); Paul K. Longmore, *The Invention of George Washington* (Berkeley: University of California Press, 1988); David D. Van Tassel, *Recording America's Past: An Interpretation of the Development of Historical Studies in America, 1607–1884* (Chicago: The University of Chicago Press, 1960); Robert E. McGlone, "Deciphering Memory: John Adams and the Authorship of the Declaration of Independence," *Journal of American History* 85, no. 2 (1998): 411–38. On the tensions that this gave rise to, see Albanese, *Sons of the Fathers: The Civil Religion of the American Revolution*, 209; Appleby, "The American Heritage," 79; Messer, *Stories of Independence*, 159.

[39] Messer, *Stories of Independence*.

[40] Messer, *Stories of Independence*, 146; Sydney G. Fisher, "The Legendary and Myth-Making Process in Histories of the American Revolution," *Proceedings of the American Philosophical Society* 51, no. 204 (1912): 53–75; Eran Shalev, *Rome Reborn on Western Shores: Historical Imagination and the Creation of the American Republic* (Charlottesville: University of Virginia Press, 2009). On the efforts of historians of the early Republic to aggrandize the founders, see R. B. Bernstein, *The Founding Fathers Reconsidered* (Oxford: Oxford University Press, 2009), chap. 4. On the self-fashioning of the founders, see Gordon S. Wood, *Revolutionary Characters: What Made the Founders Different* (New York: The Penguin Press, 2006), 23. Young Federalists grappled with the tendency to aggrandize the individual within Whiggish histories, but even they occasionally succumbed to a history of great men. Marshall Foletta, *Coming to Terms with Democracy: Federalist Intellectuals and the Shaping of an American Culture* (Charlottesville: University Press of Virginia, 2001), 205.

[41] This historiographical legacy was passed on to the second generation in the midst of a transition to historicism and Romantic conceptions of history. Dorothy Ross defines historicism as "the doctrine that all historical phenomena can be understood historically, that all events in historical time can be explained by prior events in historical time." Dorothy Ross, "Historical Consciousness in Nineteenth-Century America," *The American Historical Review* 89, no. 4 (1984): 910; On Romantic history in the United States, see Arthur H. Shaffer, *The Politics of*

but was negotiated and reconceived through the interactions between generations.[42] Only with time and incrementally did the Revolution and the founding take on the mantle of a historical Golden Age and were its figures and exploits deemed worthy of veneration.[43]

A crucial moment within this negotiated transition from founding to second generation came in the 1820s, and particularly 1826, as something of a symbolic changing of the generational guard took place. The deaths of Thomas Jefferson and John Adams, within hours of each other and fifty years to the day after the adoption of the Declaration of Independence, impressed heightened significance on the semicentennial.[44] Following Lafayette's tour of the United States (1824–25), which had prompted American attention to the history and legacy of the founding era, the deaths in 1826 served to underline the distance between the contemporary generation and the events of the founding era and the need to come to terms with them.[45] Although the second generation's efforts to understand their political inheritance did not begin in 1826, it marked a high point within an era of pointed and self-conscious consideration of history. It was this environment in which the developments within abolitionist and proslavery thought detailed in later chapters would evolve and take root. This history made the possibility of recourse to a spirit

History: Writing the History of the American Revolution 1783–1815 (Chicago: Precedent Publishing, 1975), 177.

[42] As indeed all history continues to be. Cf. Lowenthal's discussion of the later twentieth century's boom in "heritage" which seeks to "clarif[y] pasts so as to infuse them with present purposes." David Lowenthal, *The Heritage Crusade and the Spoils of History* (Cambridge, UK: Cambridge University Press, 1998), xv. See also Daniel Levin, "Federalists in the Attic: Original Intent, the Heritage Movement, and Democratic Theory," *Law & Social Inquiry* 29, no. 1 (2004): 105–26. On the intergenerational production of a collective memory of the Revolution, see Edward Tang, "Writing the American Revolution: War Veterans in the Nineteenth-Century Cultural Memory," *Journal of American Studies* 32, no. 1 (1988): 64.

[43] Sacvan Bercovitch suggests it took a "generation or so," while Michael Kamman dates constitutional veneration to the significantly later period of the 1850s. Albanese places it within "a 'winding down' of patriotism" following the founding. Sacvan Bercovitch, *The Rites of Assent: Transformations in the Symbolic Construction of America* (New York: Routledge, 1993), 165; Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: First Vintage Books, 1987), 22, 94; Albanese, *Sons of the Fathers*, 9. By contrast, Edward Corwin believed that such veneration had been and gone by the Civil War. Edward Corwin, "The Worship of the Constitution," in *Corwin on the Constitution: Volume One, The Foundations of American Constitutional and Political Thought, the Powers of Congress, and the President's Power of Removal*, ed. Richard Loss (Ithaca: Cornell University Press, 1981), 55.

[44] For Jennifer Mercieca the event marked the second generation's arrival. Jennifer R. Mercieca, *Founding Fictions* (Tuscaloosa: The University of Alabama Press, 2010); Also, Andrew Burstein, *Sentimental Democracy: The Evolution of America's Romantic Self-Image* (New York, NY: Hill and Wang, 1999), 271–72.

[45] On Lafayette's visit, cf. Andrew Burstein, *America's Jubilee* (New York: Alfred A. Knopf, 2011), chap. 1.

of the 1780s ideologically available to the actors of the 1830s. But it also made the preservation of that spirit a normatively significant commitment.

The parallels between the 1830s and today's constitutional debates encourage us to think more critically about the alternatives to originalism offered in the current era. An appeal to an animating constitutional spirit is often a pivotal mechanism in constitutional theories that seek to break away from originalism and a commitment to interpreting the constitutional text in accordance with late eighteenth-century intentions, meanings, or expectations. Such theories often suggest that principles, rather than the text alone, allow for a constitutional interpretation that is forward-looking and broadly progressive. "Principle" is often offered in constitutional accounts as an alternative or addendum to text, often within a broader frame of "fidelity" to a constitutional settlement. While perhaps lacking the visceral and emotional attachment of "spirit," to the extent that "principle" invariably seems to come down to being some constellation of values its supporters attach to the Constitution, I suggest here its function resembles that of the idea of spirit.[46] In 1985, Justice Brennan sketched an alternative to a jurisprudence of "fidelity to … 'the intentions of the Framers.'"[47] In this alternative, Brennan argued for judges to oversee the application of the "fundamental principles" of the Constitution to contemporary situations so as to further the "ideals of human dignity" entrenched in the Constitution.[48] This "Living Constitutionalism," with its concern for the unfolding of the principles of liberty and human dignity contained within the Constitution, was exemplified in Justice Kennedy's opinion for the Court in *Obergefell* v. *Hodges* (2015), upholding a constitutional right to same-sex marriage.[49] Reviewing the changing historical understandings of marriage, Kennedy said:

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that

[46] For Justice Brennan, "principle" denotes those "certain values" declared "transcendent" by the Constitution. For Balkin, the principles "underlie the text." Liu, Karlan, and Schroeder talk of the "Framers memorialize[ing] our basic principles of government with broad language whose application to future cases and controversies would be determined … by an ongoing process of interpretation." William J. Brennan, "The Constitution of the United States: Contemporary Ratification (Presentation to Text and Teaching Symposium, Georgetown University, October 12th 1985)" (Washington, DC, 1985), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1985_1012_ConstitutionBrennan.pdf; Jack M. Balkin, *Living Originalism* (Cambridge, MA: The Belknap Press of Harvard University Press, 2011), 3; Goodwin Liu, Pamela S. Karlan, and Christopher H. Schroeder, *Keeping Faith with the Constitution* (Oxford, UK: Oxford University Press, 2010), xviii.

[47] Brennan, "The Constitution of the United States: Contemporary Ratification, (Presentation to Text and Teaching Symposium, Georgetown University, October 12th 1985)."

[48] Brennan, "The Constitution of the United States." [49] *Obergefell* v. *Hodges* (2015).

begin in pleas or protests and then are considered in the political sphere and the judicial process.[50]

Under this view of Living Constitutionalism, the Constitution evolves with society, updated to reflect new technologies or societal norms, but always in accordance to the fundamental values that had inspirited it.[51] As an approach to moving away from the rigidity of a constitutional text written in the late eighteenth century, the notion of a constitution that evolves with society has much to be said for it. However, the Living Constitution approach has been subject to the persistent critique that it gives to judges an unlimited power to idiosyncratically define those fundamental principles and apply them at will to the country at large.[52]

Recent contemporary opponents of originalism have sought to mitigate the criticisms of the Living Constitution as overly empowering the judiciary by suggesting that an approach of "text-and-principle" offers a more anchored counter to the excesses of originalism. Critics of constitutional conservatism, including the American Constitutional Society in their 2009 *Keeping Faith with the Constitution*, have looked to "constitutional fidelity" and the principles of the Constitution to argue for more expansive constitutional interpretation than that allowed by the original expected applications or strict constructions of the constitutional text.[53] These constitutional theorists seek to guard the Constitution from devolving into "whatever a sufficient number of people think it ought to mean," by paying due attention to the "fixed and enduring character of its text and principles."[54] Balkin's *Living Originalism*, which the authors of *Keeping Faith with the Constitution* draw upon, spells this idea out in terms of "*framework originalism*," which requires fidelity to the "rules, standards and principles stated by the Constitution's text," but also that Americans remain "faithful to the principles that underlie the text."[55] This approach seeks to empower not the judiciary but the people, offering space, in Balkin's words, for each "generation [to] do its part to keep the plan going and to ensure that it remains adequate to the needs and values of the American people."[56] Or as Liu, Karlan, and Schroeder put it, "the American people have

[50] *Obergefell* v. *Hodges*, 576 U.S. Quote at p. 7 Kennedy's opinion. (Page numbers refer to the slip opinion, available in pdf at www.supremecourt.gov/opinions/14pdf/14–556_3204.pdf.)

[51] Other approaches to Living Constitutionalism include common-law Living Constitutionalism (Strauss) and the Moral Reading (Dworkin). David A. Strauss, *The Living Constitution* (Oxford: Oxford University Press, 2010); Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1997). See also Bernadette Meyler, "Towards a Common Law Originalism," *Stanford Law Review* 59, no. 3 (2006): 551–600.

[52] This is the very critique that Chief Justice Roberts and Justice Scalia offered in their dissents to Kennedy's opinion in *Obergefell* v. *Hodges*. *Obergefell* v. *Hodges*, 576 U.S.

[53] Liu, Karlan, and Schroeder, *Keeping Faith with the Constitution*.

[54] Liu, Karlan, and Schroeder, *Keeping Faith with the Constitution* 31.

[55] Balkin, *Living Originalism*, 3.

[56] Balkin, *Living Originalism*, 4.

kept faith with the Constitution because its text and principles have been interpreted in ways that keep faith with the needs and understandings of the American people."[57]

As positive as this "third way" between originalism and the Living Constitution sounds, the experience of the 1830s suggests that we ought to be wary of appeals to principle or reinterpretations of the latter to meet contemporary needs and understandings. One indicator that might induce concern for the critics of originalism is the extent to which erstwhile originalists seem to be willing to embrace the concept of principle.[58] Indeed, even the authors of *Keeping Faith with the Constitution* concede, "our view of constitutional fidelity is not at odds with originalism if originalism is understood to mean a commitment to the underlying principles that the Framers' words were publicly understood to convey."[59] As the debates of the 1830s discussed in this book illustrate, there is nothing inherently progressive or constitutionally expansive in the invocation of principle or spirit. Advocates of slavery and their anti-abolitionist allies saw in the spirit or principles of the Constitution a conceptual mechanism for foreclosing the emancipatory constitutional interpretation pushed by the abolitionists. Where abolitionists understood the Constitution's grant of exclusive jurisdiction over the District of Columbia to be an opportunity, or even duty, to emancipate and acknowledge the citizenship of the District's thousands of slaves, their opponents offered the spirit of the Constitution as a justification for rejecting that opportunity and reaffirming the constitutional politics that reduced the black population held in bondage to property rather than people. In the longer term, the development of this mode of constitutional thought would provide a basis for a *Dred Scott* decision that had broader territorial reach and which sought to collapse ascribed proslavery constitutional principles with an ambiguous text. We should be wary of a belief that spirit or principle offers the prospect of an easy or automatic corrective to any perceived excesses of originalism.

But if the history studied here pours some cold water on the progressive hopes of constitutional spirit, it should also prompt us to question whether the real issue is not, in fact, the broader willingness to turn to foundings per se. Despite Anne Norton's warnings of the "temporal imperialism" of a founding generation whose "dead hand of the past . . . may weigh so heavily (or give so much assistance) to the living," the view that the origin of constitutional legitimacy lies with the initial authority of the people is shared across different

[57] Liu, Karlan, and Schroeder, *Keeping Faith with the Constitution*, 51.

[58] For example, see Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton: Princeton University Press, 2003). Although some would debate the extent to which Barnett's embrace of principle is originalist. Paul O. Carrese, "Restoring The Lost Constitution: The Presumption of Liberty," *First Things*, August 2004.

[59] Liu, Karlan, and Schroeder, *Keeping Faith with the Constitution*, 40.

shades of political belief.[60] In the case of the United States, the process of drafting and then ratifying a constitution has become the moment in which the people themselves assent to a constitutional order and grant it democratic legitimacy.[61] Located during a moment of exceptional sovereign presence, much work on the democratizing of constitutional theory is concerned primarily with recapturing or reanimating that moment in subsequent chronological time.[62] Such is the reach of this framework, that David Singh Grewal and Jedediah Purdy have persuasively argued that neither originalism nor Living Constitutionalism have escaped from its grip, with each, albeit in different ways, laboring under the inability to reanimate the initial moment of sovereign power.[63] The experiences of the 1830s urge us to think in creative ways about the possibilities for a democratic constitutional politics that is not tied back to a moment of origin.[64] Indeed, this book seeks to guide us toward such an approach by turning at the end to Thomas Jefferson and Thomas Paine and examining the loose threads of a constitutional history not taken up. In the conclusion, I pick up some of those threads in the pursuit of a constitutional politics that offers a separation of chronology and authority. In place of the

[60] Anne Norton, "Transubstantiation: The Dialectic of Constitutional Authority," *The University of Chicago Law Review* 55, no. 2 (1988): 460. For example, Whittington, *Constitutional Interpretation*; Balkin, *Living Originalism*; Jason Frank, *Constituent Moments: Enacting the People in Postrevolutionary America* (Durham: Duke University Press, 2010); Kramer, *The People Themselves*; Scalia, *A Matter of Interpretation*. Norton nonetheless notes that through such "imperialism" founders, as "figures of history and public myth . . . will become the creation of their posterity." Norton, "Transubstantiation," 460.

[61] On the ratification, cf. Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (New York: Simon & Schuster, 2011).

[62] The seminal theorization of a "returning" popular sovereign remains. Bruce Ackerman, *We The People: Foundations* (London: The Belknap Press of Harvard University Press, 1991). On attempts to "tap" the founding moment in subsequent politics, cf. Jürgen Habermas and William Regh, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?" *Political Theory* 29, no. 6 (2001): 766–81; Cf. also Frank, *Constituent Moments*. On one hand, Stephen Holmes sees constitutions through the lens of a self-binding process that "can make it easier for the living to govern themselves." On the other hand, Norton has noted the ability of the present to constrain and shape the past in a dialectical process. In a somewhat similar vein, Bonnie Honig has urged democratic theorists to embrace the "paradox of politics" in which the people can navigate and contest their own historical understanding of their constitutional origin. Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: The University of Chicago Press, 1995), 177; Norton, "Transubstantiation"; Bonnie Honig, "Between Decision and Deliberation: Political Paradox in Democratic Theory," *American Political Science Review* 101, no. 01: 1–17.

[63] David Singh Grewal and Jedediah Purdy, "The Original Theory of Constitutionalism," *Yale Law Journal* 127, no. 3 (2018): 664–705. On the historic prevalence of this viewpoint in the modern Anglo-American political thought, cf. Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge, UK: Cambridge University Press, 2016).

[64] For an effort to similarly complicate the association of founding to an originary moment in time, see Angélica Maria Bernal, *Beyond Origins: Rethinking Founding in a Time of Constitutional Democracy* (New York: Oxford University Press, 2017).

responses offered by contemporary political theory of subsequent tapping of a founding, or later contestation over the founding, Paine and Jefferson instead conceive of a popular sovereign unmoored to a particular moment in secular time.[65] In a polity in which policies regarding the regulation of weapons, the provision of healthcare, and reproductive rights are beholden to a constitution originally authored over 225 years ago and well before the creation of the technologies governed by these policies, the discussion of a constitutional politics rooted in the present seems, at the very least, a timely endeavor.[66] If we are to create a truly democratic polity, it is perhaps time for us to leave 1787–88 behind. But first I turn to the story of constitutional spirit that begins in the late 1810s.

[65] For an example of each approach, cf. Habermas and Regh, "Constitutional Democracy"; Honig, "Between Decision and Deliberation."

[66] *District of Columbia* v. *Heller* (2008); *National Federation of Independent Business* v. *Sebelius* (2012); *Roe* v. *Wade* (1973).

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