Race, Slavery, and Federal Law, 1789-1804: The Creation of Proslavery Constitutional Law Before Marbury

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ARTICLE

RACE, SLAVERY, AND FEDERAL LAW, 1789–1804: THE CREATION OF PROSLAVERY CONSTITUTIONAL LAW BEFORE MARBURY

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This article suggests three things about our early constitutional history—the period before the Court decided *Marbury v. Madison.* While most legal scholars think of constitutional law as being about the Supreme Court, this article shows that most constitutional law in this period was a result of actions by Congress and the executive, as those two branches of the government implemented the new constitution. This article demonstrates that, in this period, Congress and the executive branch implemented and interpreted the Constitution in a way that protected slavery and undermined the liberty of free blacks.

First, we see that constitutional law in this early period was not court-centered. This was true after *Marbury* as well as before. In the 1790s, Congress and the executive branch made constitutional law as they interpreted, constructed, and implemented the Constitution. It is perhaps too much to expect this will be taught in Constitutional law courses, which are almost always court-centered. But to the extent law schools train judges, legislators, and policy makers, it would be valuable to teach future lawyers that the Constitution is not just a document for judges.

Second, this article shows that slavery was a controversial constitutional issue from the very beginning of the nation. In a nation that struggles over monuments to the Confederate States of America—a putative nation

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dedicated to slavery and white supremacy\textsuperscript{2}—to the proposition that all men are \textit{not} created equal\textsuperscript{3}—it is worth recalling how slavery also shaped the early development of our Constitutional law. In this period, Congress passed the first fugitive slave law,\textsuperscript{4} refused to consider legislation to prevent the kidnapping of free blacks,\textsuperscript{5} prohibited free blacks or slaves from carrying the mail from place-to-place,\textsuperscript{6} denied immigrant blacks the right to become naturalized citizens,\textsuperscript{7} and prohibited free blacks from serving in the military.\textsuperscript{8}

I have not covered all the issues surrounding slavery and the Constitution in this period. Among those not covered are the extensive debates and legislation over the regulation of the African slave trade in the period before \textit{Marbury}.\textsuperscript{9} Nor have I discussed how slavery was also central to debates over foreign policy, including the Jay Treaty with Great Britain and policy on Haiti.\textsuperscript{10} I also do not consider the extensive debates in Congress over taxation and slavery that focused in part on the constitutional meaning of direct taxes.\textsuperscript{11} A full discussion of these issues would require a book, not a law review article.

Finally, this article raises important issues about modern constitutional interpretation and what is generally called “intentionalism.” Slavery was at the heart of many debates in the Constitutional Convention,\textsuperscript{12} as well as the

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\textsuperscript{3} \textit{See}, e.g., Alexander H. Stephens, \textit{The Corner Stone Speech} (Mar. 21, 1861), in Henry Cleveland, Alexander H. Stephens, \textit{In Public and Private: With Letters and Speeches, Before, During, and Since the War} 717, 721 (1886) (“Our new government is founded . . . its foundations are laid, its corner-stone rests upon the great truth, that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition. This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth.”). At the time, Stephens was the Vice President of the Confederate States.
\textsuperscript{4} Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (1793) (repealed 1864).
\textsuperscript{5} \textit{See infra} text accompanying notes 96–142.
\textsuperscript{6} Act of May 3, 1802, ch. 48, 2 Stat. 189, 191. (repassed in 1810) (altering and establishing certain post roads and improving mail security); Act of Apr. 30, 1810, ch. 37, 2 Stat. 592 (regulating post office establishment). \textit{See infra} text accompanying notes 69–87.
\textsuperscript{7} “\textit{An Act to Establish an Uniform Rule of Naturalization}” (Naturalization Act of 1790), Act of March 6, 1790, ch. 3, § 1, 1 Stat. 103; “\textit{An act to establish an uniform rule of Naturalization; and to repeal the act heretofore passed on that subject}” (Naturalization Act of 1795), Act of January 29, 1795, ch. 20, § 1, 1 Stat. 414.
\textsuperscript{8} Militia Act of May 8, 1792, ch. 33, 1 Stat. 271 (1792) (amended 1862). \textit{See infra} text accompanying notes 63–68.
\textsuperscript{11} \textit{See generally Robin L. Einhorn, American Taxation, American Slavery} (2006).
\textsuperscript{12} Finkelman, \textit{Slavery and the Founders, supra note 10, at 3–36.}
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constitutional debates before Marbury. Protecting slavery was also a central aspect of the drafting and adoption of the U.S. Constitution. In many ways, the abolitionist William Lloyd Garrison was correct when he labeled the Constitution “a covenant with death, an Agreement in hell.” The early Congress, filled with founders, including James Madison, chose over and over again to protect slavery and to reject any discussion of freedom or emancipation. Representative William L. Smith of South Carolina argued the House could not even debate these issues. And, he carried the House on this point. Whether we like it or not, protection of slavery and a rejection of liberty was the intention of a significant number of the Framers in 1787, and they successfully carried this argument into the government in the 1790s and beyond. The founding generation created a slaveholder’s republic, and it is a legacy that has bedeviled the United States for more than two centuries. This legacy is surely a caution on how we view their “intentions” and whether we should venerate them.

I. THE FAILURE TO “SECURE THE BLESSING OF LIBERTY”

The Constitution’s Preamble proudly proclaimed it was “ordain[ed] and establish[ed]” to “secure the Blessings of Liberty” to the American people. But, in the area of race and slavery from 1789 until 1803, Congress passed numerous laws that undermined liberty and strengthened slavery and racism. These laws reflected some of the dictates of the Constitution but also went beyond them. Thus, in the period before Marbury, Congress not only grappled with the place of slavery and race under the new Constitution but also enhanced and expanded the proslavery aspects of the Constitution.

Before turning to the legislation on race and slavery in this period, a quick look at how the Constitution dealt with slavery and race is in order. Although the Constitution of 1787 does not use the words slave or slavery, the institution profoundly shaped the document and is embedded in it in a variety of ways. In the end, the Convention avoided using the term “slave” because it was expedient to do so. Northern delegates wanted to avoid antagonizing their own constituents, who might support a stronger Union but were hostile to slavery; southerners were ready to acquiesce on this point

15. During the Convention, the framers used the terms “slave” and “negro” interchangeably, but in the end, they used euphemisms at the request of some New England delegates who feared that such explicit terminology would undermine ratification in their states. Connecticut’s Roger Sherman, who voted with the Deep South to allow the trade, objected, not only to the singling out of specific states, but also to the term “slave.” He declared that he “liked a description better than the terms proposed,” which had been declined by the old Congresses and were not pleasing to some people. George Clymer of Pennsylvania “concurred with Mr. Sherman” on this issue. 2 Max Farrand, The Records of the Federal Convention of 1787, at 415 (rev. ed. 1966) [hereinafter Records].
because the description was clear and unmistakable.\textsuperscript{16} But, despite the circumlocution, the Constitution directly sanctioned slavery in six provisions:

- Art. I, Sec. 2, Cl. 3. The “three-fifths clause” provided for counting three-fifths of all slaves for purposes of representation in Congress. This clause also provided that, if any “direct tax” was levied on the states, it could be imposed only proportionately, according to population, and that only three-fifths of all slaves would be counted in assessing what each state’s contribution would be.

- Art. I, Sec. 9, Cl. 1. The “slave trade clause” prohibited Congress from banning the “Migration or Importation of such Persons as any of the States now existing shall think proper to admit” before the year 1808. Awkwardly phrased and designed to confuse readers, this clause prevented Congress from ending the African slave trade before 1808 but did not require Congress to ban the trade after that date. The clause was a significant exception to the general power granted to Congress to regulate all international commerce. However, while preventing Congress from banning the trade before 1808, there was no bar to regulating it.

- Art. I, Sec. 9, Cl. 4. The “capitation tax clause” insured that any “capitation” or other “direct tax” had to take into account the three-fifths clause. It ensured that if a head tax were ever levied, slaves would be taxed at three-fifths the rate of free people. The “direct tax” portion of this clause was redundant, because that was provided for in the three-fifths clause.

- Art. II, Sec. 1, Cl. 2, provided for the indirect election of the president through the electoral college, which was based on congressional representation. This provision incorporated the three-fifths clause into the electoral college and gave whites in slave states a disproportionate influence in the election of the president.\textsuperscript{17} At the Convention, James Madison made it clear that this was necessary because otherwise the South “could have no influence in the election on the score of the Negroes.”\textsuperscript{18} This clause had a major impact on the politics of slavery and American history. Thomas Jefferson’s victory in the election of 1800 would be possible only because of the electoral votes the southern states gained on account of their slaves. Thus, Jefferson, who spent most of his career quietly...

\textsuperscript{16} When he returned from the Philadelphia Convention, James Iredell explained to the North Carolina ratifying convention that, “the word ‘slave’ is not mentioned” because “[t]he northern delegates, owing to their particular scruples on the subject of slavery, did not choose the word ‘slave’ to be mentioned.” 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 176 (Jonathan Elliot ed., Burt Franklin 1987) (1888).


\textsuperscript{18} 2 RECORDS, supra note 15, at 57.
and privately protecting slavery while publicly trying to avoid any conflict over slavery, was elevated to the presidency in part because of slavery. In the context of this law review symposium, Marbury would never have happened had it not been for the proslavery electoral college.

- Art. IV, Sec. 2, Cl. 3. The “fugitive slave clause” prohibited the states from emancipating fugitive slaves and required that runaways be returned to their owners “on demand.” The clause did not say how it should be implemented, or indeed, if it required (or even allowed) Congressional implementation.

- Art. V. The amendment provisions prohibited any amendment of the slave importation or capitation clauses before 1808.

Taken together, these six provisions gave the South a strong claim to “special treatment” for its peculiar institution. The three-fifths clause also gave the South extra political muscle—in the House of Representatives and in the Electoral College—to support that claim.

Numerous other clauses of the Constitution supplemented the six clauses that directly protected slavery. Some provisions that indirectly guarded slavery, such as the prohibition on taxing exports, were included primarily to protect the interests of slaveholders. Others, such as the guarantee of federal support to “suppress Insurrections” were written with slavery in mind, although delegates also supported them for reasons having nothing to do with slavery. The most prominent indirect protections of slavery were:

- Art. I, Sec. 8, Cl. 15, empowered Congress to call “forth the Militia” to “suppress Insurrections,” which included slave rebellions. This clause would be implemented to help suppress Gabriel’s rebellion, the Nat Turner Rebellion, and John Brown’s attempt to make war on slavery in Virginia.

- Art. I, Sec. 9, Cl. 5, prohibited federal taxes on exports and thus prevented an indirect tax on slavery by taxing the products of slave labor, such as tobacco, rice, and, by the late 1790s, cotton.

- Art. I, Sec. 10, Cl. 2, prohibited the states from taxing exports or imports, thus preventing an indirect tax on the products of slave labor by a nonslaveholding state. This was especially important to the slave states because almost all slave states produced export products: tobacco, rice, and eventually cotton, which were often shipped out of Northern ports.

- Art. IV, Sec. 3, Cl. 1, allowed for the admission of new states. The delegates to the Convention anticipated the admission of new slave states to the Union.


• Art. IV, Sec. 4, through this provision, known as the “guarantee clause,” the United States government promised to protect states from “domestic Violence,” including slave rebellions.
• Art. V required a three-fourths majority of the states to ratify any amendment to the Constitution. This Article ensured that the slaveholding states would have a perpetual veto over any constitutional changes. The power of this provision in protecting slavery was profound. It effectively prevented any normal constitutional end to slavery. Had all fifteen slave states that existed in 1860 remained in the Union, they would, to this day, in the twenty-first century, be able to prevent an amendment on any subject. In a fifty-state union, it takes only thirteen states to block an amendment.

Other clauses provided opportunities for Congress to regulate, or not regulate, race and slavery. These included, but were not limited to, the power of Congress to regulate interstate and foreign commerce and commerce with Indian Tribes (one of the few explicit references to race in the Constitution), define piracy and “Offenses against the Law of Nation,” raise an army and regulate, train, and arm the state militias, provide for the naturalization of aliens, regulate the national capital and other federal property, regulate the Post Office, grant patents and copyrights, and admit new states and regulate western territories and acquire more. Starting in 1789, Congress began to legislate about slavery and race in all these areas. As such, Congress was able to shape the Constitution as it affected black and white Americans.

II. THE TERRITORIES AND SLAVERY

Even before the Constitution was written, the nation faced the question of whether to allow slaves in the western territories. In 1787, the Congress, under the Articles of Confederation, passed the Northwest Ordinance, which famously banned slavery north and west of the Ohio River, declaring:

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted: Provided, always, That any person escaping into the same, from whom labor

21. Id. art. I, § 8, cl. 3.
22. Id. art. I, § 8, cl. 10.
23. Id. art. I, § 8, cl. 12–16.
24. Id. art. I, § 8, cl. 4.
25. Id. art. I, § 8, cl. 17.
27. Id. art. I, § 8, cl. 8.
28. Id. art. IV, § 3, cl. 1–2.
29. An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, 1 Stat. 51 (July 13, 1787) [hereinafter Northwest Ordinance].
or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.30

The Northwest Ordinance never worked as its authors probably expected, and as late as the 1840s there were still people held in slavery in Illinois.31 But from the perspective of public policy and as an assertion of the power of Congress, it was a powerful statement.

With the ratification of the Constitution it was unclear if this statute was still viable because it required various actions of Congress, such as the appointment of the territorial governor,32 which were inappropriate under the new form of government. Selling land in the Northwest was imperative to the success of the nation under the Constitution, and the Northwest Ordinance was popular with prospective settlers.33 Thus, early in its first session, Congress amended the Northwest Ordinance, which effectively constituted a repassage of the law.34 Thus, Congress’s first action on slavery was a positive reaffirmation of the power of Congress to regulate—and even ban—slavery in the western territories.

A year after this, Congress formally accepted the cession of North Carolina’s claims to western lands, which would eventually constitute the state of Tennessee.35 The act promised that the inhabitants of this territory would have “all the privileges, benefits and advantages set forth in the ordinance of the late Congress, for the government of the western territory of the United States,” which was an explicit reference to the Northwest Ordinance.36 However, the statute explicitly rejected the antislavery provision of the Northwest Ordinance: “Provided always, [t]hat no regulations made or to be made by Congress, shall tend to emancipate slaves.”37 Here, Congress explicitly allowed slavery in a new territory. This was not required by the Constitution. Congress might have banned slavery in the Southwest, as it did in the Northwest, but it did not.

30. Id. art. VI.
32. Northwest Ordinance, supra note 29, para. 3.
33. See CAMPBELL GIbson & KAY JUNG, HISTORICAL CENSUS STATISTICS ON POPULATION TOTALS BY RACE, 1790 TO 1990, AND BY HISPANIC ORIGIN, 1970–1990, FOR THE UNITED STATES, REGIONS, DIVISIONS, AND STATES, tbl.50 (U.S. Census Bureau, Working Paper No. 56, 2002), http://mapmaker.rutgers.edu/REFERENCE/Hist_Pop_stats.pdf (Ohio had virtually no settlers in 1790; by 1800 there were over 40,000 and by 1810 the new state of Ohio had over 230,000 settlers, which illustrates just how anxious Americans were to move into the Northwest, and the effectiveness and popularity of the Northwest Ordinance).
34. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (an act to provide for the government of the territory Northwest of the river Ohio).
35. Act of Apr. 2, 1790, ch. 6, § 4, 1 Stat. 106, 108 (an act to accept a cession of the claims of North Carolina to a certain district of Western territory).
36. Id.
37. Id. (emphasis in original).
Over the next fourteen years, Congress would admit new free states (Vermont, 1791 and Ohio, 1803) and slave states (Kentucky, 1791 and Tennessee, 1796) without any controversy or meaningful debate. Meanwhile, in 1799, New York would pass a gradual abolition law, setting the stage for a slave state to become a free state.\textsuperscript{38} New Jersey would do the same in 1804.\textsuperscript{39} Neither of these state acts raised constitutional questions, since all political leaders and constitutional commentators agreed that the states were free to regulate slavery within their borders. Thus, the constitutional lesson from the years before Marbury was that Congress had full authority to regulate slavery in the west, and admit or not admit states with or without slavery. Congress would continue to use this power until 1857, when Chief Justice Taney would hold in Dred Scott v. Sandford that Congress lacked the power to limit the importation of slaves into the federal territories.\textsuperscript{40}

In 1819, the issue of slavery in the territories arose in the debate over the admission of Missouri into the Union. In 1820, Congress thought it settled the issue in the Missouri Compromise.\textsuperscript{41} But, like a vampire that refuses to die, the issue came back during the debate over Texas’ annexation and then after the Mexican War. The Compromise of 1850—what ought to be called the “Appeasement of 1850”\textsuperscript{43}—was a failed attempt to solve the problem of what to do with slavery in the western territories acquired in the Mexican War. In 1854, the Kansas-Nebraska Act removed almost all barriers to slavery in the west, effectively repealing much of the

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\item \textsuperscript{38} Act of Mar. 29, 1799, ch. 62, 1799 N.Y. Laws 388 (an act for the gradual abolition of slavery).
\item \textsuperscript{39} Act of Dec. 3, 1804, ch. 103, 1804 N.J. Laws 251 (an act for the gradual abolition of slavery).
\item \textsuperscript{40} Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
\item \textsuperscript{41} Act of Apr. 7, 1820, ch. 19, 3 Stat. 544 (an act for the admission of the state of Maine into the Union); Act of Mar. 6, 1820, ch. 22, 3 Stat. 545 (an act to authorize the people of the Missouri territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states, and to prohibit slavery in certain territories).
\item The Compromise of 1850 was actually a series of given laws passed separately. They are: “An Act: Proposing to the State of Texas the establishment of her northern and western boundaries, the relinquishment by the said State of all territory claimed by her exterior to said boundaries, and of all her claims upon the United States, and to establish a territorial government for New Mexico,” Act of Sept. 9, 1850, Chapter 49, 31 Congress, Session 1, 9 Stat. 446; “An Act: For the admission of the State of California into the Union,” Act of Sept. 9, 1850, 31 Congress, Session 1, Chap. 50, 9 Stat. 452; “An Act: To establish a territorial government for Utah,” Act of Sept. 9, 1850, Chapter 51, 31 Congress, Session 9 Stat. 453; 9 Stat. 453; “An Act: To amend, and supplementary to, the act entitled “An Act respecting fugitives from justice, and persons escaping from the service of their masters,” approved February twelfth, one thousand seven hundred and ninety-three,” Act of Sept. 9, 1850, Chap. 31, 31 Cong. Session 1; 9 Stat. 453; “An Act: To suppress the slave trade in the District of Columbia, Act of Sept. 20, 1850, Chap. 63, 31 Cong., Session 1; 9 Stat. 467. They are discussed in Paul Finkelman, Millard Fillmore 101–125 (2011).
\item \textsuperscript{43} See Paul Finkelman, The Appeasement of 1850, in Congress and the Crisis of the 1850’s, at 36–79 (Paul Finkelman & Donald R. Kennon eds., 2012) [hereinafter Finkelman, Appeasement].
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settlement created in the Missouri Compromise. This led to the emergence of the Republican Party, which was dedicated to “Free Soil, Free Labor, Free Speech and Free Men,” and for a ban on slavery in all the territories. In the Compromise of 1850 and the Kansas-Nebraska Act, Congress continued to exercise the constitutional power that had emerged before Marbury to regulate slavery in the territories. But, in Dred Scott, Chief Justice Taney found the ban on slavery in the territories in the Missouri Compromise (and by extension similar bans in other laws) to be unconstitutional. His sweeping attempt to decide all constitutional issues over slavery in favor of the South backfired, and helped catapult Lincoln to the White House. In Dred Scott, Chief Justice Taney overturned important constitutional policy that predated Marbury. Significantly, this was the first time since Marbury that the Court had overturned a federal statute.

III. CREATING A WHITE SOCIETY

During the Revolution, blacks engaged in political activity, served with the minutemen in New England, and fought for liberty from Great Britain, serving in state militias and the Continental line. During this period they voted and petitioned legislatures. The Constitution of 1787 did not contain the word race, and free blacks voted in at least six states during the ratification process. The Constitution of 1787 did not define national citizenship at the time, and federal citizenship (except for naturalized citizens) was acquired through state citizenship. Article I of the Constitution, for example, provided that the right to vote for members of Congress would be based on the right to vote for members of the state legislature. The provision for the election of the president required that the person be “a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution.” There was no definition of “natural born Citizen,” but quickly it came to mean those who were born in the United States. Anyone born outside the United States was not a citizen at birth, but had to be naturalized or made a citizen through some legislative act. In other

44. Id.
45. Id.
47. Finkelman, Appeasement, supra note 43, at 55.
49. Paul Finkelman, Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North, 17 Rutgers L.J. 415, 477 (1986) In 1787, there were no racial restrictions on voting in New Hampshire, Massachusetts, New York, Pennsylvania, New Jersey, and North Carolina. There is scattered evidence of blacks voting in Maryland and Connecticut as well. Id.
51. Id. art. II, § 1, cl. 5.
52. The Naturalization Act of 1790 provided that the children of U.S. citizens born outside the United States, “shall be considered as natural born Citizens” as long as their fathers had previously lived in the United States. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 104 (presuming that without such a law they were not considered U.S. citizens at birth because of their
words, the child of a U.S. citizen born outside the United States was not a “natural born citizen,” but needed an act of Congress to gain citizenship. The statutes clearly limited the right of naturalization to “any alien, being a free white person,” but this was not required by the Constitution. This simply underscores the way Congress used its Constitutional powers—in the case the power “to establish an uniform Rule of Naturalization”—to indirectly support slavery by creating a racial requirement for naturalization. None of these issues directly affected the status of free blacks already in the nation or those born there in the future. Free blacks were considered full citizens in some states, citizens with limited rights in others, and clearly second-class residents in other places.

Despite the lack of any constitutional requirement or guidance, almost immediately Congress began to use race as a category for benefits and obligations in American society. Here, Congress defined constitutional norms by using race to limit constitutional rights. While some northern states let blacks vote and even hold office, at the national level Congress quickly used its constitutional powers to create a class of non-citizens with diminished rights for free African Americans. Nothing in the Constitution required such a policy, but nothing prevented it either.

In its second session, Congress exercised its constitutional power to “establish an uniform Rule of Naturalization.” Before this, naturalization was entirely in the hands of the states, which could make people state citizens, either through birth in an American state or through state naturalization. Through that state citizenship they became U.S. citizens. The 1790 law changed this, but the law also introduced a racial categorization, allowing “any alien, being a free white person” to become a citizen.

53. This language is in all the naturalization acts passed before 1870, when the language is changed to allow people of African ancestry to be naturalized. Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256.
55. Id.
gress repeated this language in the second Naturalization Act of 1795 and in a similar act in 1802.

During the debate over the 1795 Naturalization Act, which continued the requirement that new citizens be white, there was a brief debate over slavery. A Republican Congressman from Virginia, William Branch Giles, offered an amendment to prohibit people who had titles of nobility from becoming naturalized citizens. His goal was to attack New England Federalists, whom he erroneously believed favored such titles. In response, Samuel Dexter, a Federalist from Massachusetts, proposed that no slave-owning aliens could become naturalized citizens, and once naturalized, these new citizens would be permanently barred from owning slaves. Dexter’s motion was easily defeated, but it illustrates that slavery and race were on the table in the early years of constitutional interpretation and implementation.

The racial limitation on naturalization would remain the law until after the Civil War, when Congress allowed people of African ancestry to become naturalized citizens. In 1790, there were very few African immigrants coming into the country, and the slave trade was dormant. Thus, there could have been no fear of a flood of non-white citizens. But, under the Constitution, Congress had plenary power to regulate naturalization, and, as the very first sentence of the act made clear, ensure that the United States would become a white person’s country. This whites-only provision of the Naturalization Act was not needed and was not a response to any actual threat. Rather, it was a statement of policy on race that set a pattern until the Civil War.

Two years later Congress passed the Militia Act. Like the Naturalization Act, Congress made race part of the very first sentence of the law, requiring “[t]hat each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years” would be “enrolled in the militia.” The law did not specifically prohibit blacks from serving, but it was applied that way. There was nothing in the Constitution that required this ban on black military service, and many in Congress, as well as the presi-

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60. Party names in this period are tricky. The party of Thomas Jefferson and James Madison was, at this time, called the Republican Party or the “Democratic Republicans.” In the 1820s this Party would be called the Democratic Party, and is the great grandparent of the modern Democratic Party. From the 1790s until the Civil War it was also the party that most supported slavery.
61. Robinson, supra note 9, at 253–254.
62. Id.
64. Militia Act of 1792, ch. 33, § 1, 1 Stat. 271, 271.
65. Id.
dent who signed the bill, were well aware of the gallant service of black soldiers during the Revolution. For example, at the battle of Yorktown in 1781, General Washington had personally chosen the First Rhode Island to lead an attack on a key British position, known as Redoubt 10, while French troops were assigned to attack Redoubt 9. About half the soldiers in the First Rhode Island were black, and most of them had been slaves when the Revolution began. Alexander Hamilton commanded the attacking black troops in a magnificent victory that set the stage for the surrender of Cornwallis and American Independence.

By the end of the Revolution, “there were so many black soldiers” under Washington’s command “that their presence had ceased to be remarkable to contemporary observers.” But the memory of this service was forgotten when Congress passed, and Washington signed, the Militia Act of 1792. Although a few blacks would serve in the War of 1812, there would be no formal enlistment of blacks until August 1862, following the passage of the Militia Act of that year, which did not have the word “white” in the law and specifically provided for the enlistment of blacks.

Congress also used its constitutional power to regulate the Post Office to develop a racial policy. In this period, Congress often used non-government contractors to move mail from one part of the country to another. In the 1790s, entrepreneurs who had contracts to move mail in the South (mail contractors as they were called) often used slaves to drive their wagons and deliver the mail to post offices. Postmaster General George Habersham, a Federalist from Georgia who served in the Washington and Adams administrations, noted that slaves had been successfully used as mail coach drivers throughout the South. But in 1802, the Jefferson administration, which was deeply paranoid about free blacks and the slave rebellion in Haiti, opposed this practice. On March 23, Postmaster General Gideon Granger urged Congress to prohibit blacks from being employed to drive wagons or carriages that carried the mail.

In his official report to Senator James Jackson, the chair of the committee that oversaw the Post Office, Granger claimed that the potential for
robery necessitated this change.\textsuperscript{73} He worried that if mail wagons were robbed, the slave drivers could not testify against the criminals if they were white. He told the Senate: “The law ought, in my opinion, to prohibit contractors from entrusting the mail to negroes, or people of color” because in many states they were “not allowed as witnesses excepted against persons of color.”\textsuperscript{74} Thus, “[p]eople disposed to rob the mail” would not be deterred “by fear of conviction.”\textsuperscript{75} Since robbing a mail carrier was a federal crime, and could be prosecuted in federal court, there would have been an alternative solution—allowing black testimony, even from slaves, in such cases. But that obvious solution was not likely to gain support from Jackson or any other southerner in Congress.

The fear of robbery and the problem of black testimony may in fact have been a pretext for Granger. Thus, the Postmaster General ended his report by noting: “There are also political considerations which, as this time, will evince the propriety of such restriction.”\textsuperscript{76} In a private note addressed to James Jackson in his capacity as a “Senator from Georgia,” and not as the chair of the committee on the Post Office, Granger spelled out these “considerations.”\textsuperscript{77} He asserted that the “objection” to “employing negroes, or people of color, in transporting the public mails” was “of a nature too delicate to engraft into a report which may become public.”\textsuperscript{78} Thus, he sent this private letter.

In this letter, Granger argued that after the rebellion in Haiti “we cannot be too cautious in attempting to prevent similar evils.”\textsuperscript{79} He warned that if slaves were allowed to travel from place to place delivering mail, it would “increase their knowledge of natural rights of men and things” while the travelling “affords them an opportunity of associating, acquiring, and communicating sentiments, and of establishing a chain or line of intelligence” that could lead to slave rebellions.\textsuperscript{80} As post riders, Granger feared blacks would acquire knowledge of geography useful for a rebellion while at the same time learning that “a man’s rights do not depend on his color.”\textsuperscript{81} Finally, the Postmaster General noted that as post riders “[t]heir travelling creates no suspicion; excites no alarm,” and thus “[o]ne able man among them, perceiving the value of this machine, might lay a plan which would be communicated by your post riders from town to town, and produce a general and united operation against you.”\textsuperscript{82} The Postmaster General admit-
ted that the “hazard may be small,” but he urged legislation to “prevent the evil” by banning blacks from working for the Post Office.83 As the leading historian of the U.S. Post Office has observed, “[f]ear of a slave rebellion, of course, can hardly explain the exclusion of blacks from the postal system in the nonslaveholding states.”84 But, the desire of the Jeffersonians to secure white supremacy in their slaveholder’s republic was enough to push for a full ban on black post riders.

It is somewhat ironic that these fears were articulated by a Postmaster General from Connecticut, where slavery was on its last legs due to the state’s nearly twenty-year old, gradual abolition act,85 under which no new slaves had been brought into the state and the children of all slave women were born free. Thus, the Postmaster General, who was from effectively the free state of Connecticut, told the senator of Georgia, who fiercely protected slavery in his political career, how to protect slavery in the South. But Granger clearly reflected the fears and anxieties of his own boss, President Jefferson. Whatever the motivation, Granger’s letter to Senator Jackson worked. Two months later, a new law provided that “no other than a free white person shall be employed in carrying the mail of the United States, on any of the post roads, either as a post-rider or driver of a carriage carrying the mail.”86 The law provided a fifty dollar fine for any contractor who used blacks, slave or free, to deliver mail.87 Some mail contractors would later be fined for using slaves as drivers, while at least one employed a ten-year-old white boy (for very little money) to sit with a slave wagon driver, to effectively evade the law.88

The 1802 law shows that before Marbury the executive and legislative branches were interpreting and implementing the Constitution to both protect slavery and oppress the nation’s growing free black population.89 Constitutional law at the ground level had by this time emerged as the law for white people.

83. Granger, Further Provision for Transporting the Mail, supra note 72, at 27.
84. JOHN, supra note 70, at 141.
85. Gibson & Jung, supra note 33, at tbl.21 (Connecticut passed its gradual abolition act in 1784. The 1790 census found 2764 slaves in the state, but there were only 951 in 1800 and by 1810 there would be only 310).
86. Act of May 3, 1802, ch. 48, § 4, 2 Stat. 189, 191 (repassed in 1810) (an act further to alter and establish certain post roads; and for the more secure carriage of the mail of the United States); Act of Apr. 30, 1810, ch. 37, § 4, 2 Stat. 592, 594 (an act regulating the post-office establishment).
88. JOHN, supra note 70, at 141.
89. While not huge in absolute numbers, the free black population in the nation was growing more rapidly than at other times before the Civil War because of a combination of Virginia’s (temporary) liberalization of private manumission and the dismantling of slavery in the North. The population statistics, showing the growth of the free black population in the Virginia and the rest of the nation are conveniently found in CAMPBELL GIBSON & KAY JUNG, supra note 33.
IV. INTERSTATE COMITY, FUGITIVE SLAVES, AND FREE BLACKS: RACE EMERGES AS THE “THIRD RAIL” OF CONSTITUTIONAL POLITICS

Article IV, Section 2 of the Constitution set out provisions to promote interstate comity and facilitate smooth relations between the states. The first paragraph of this section obligated the states to give equal “privileges and immunities” to citizens of other states. The second clause obligated the states to cooperate in the extradition of fugitives from justice. The third clause prohibited states from legally emancipating fugitive slaves from other states and instead required that such fugitives be returned to their owners. Significantly, none of these three provisions contained any language suggesting that the federal government had a role to play in their enforcement. This lack of explicit federal power contrasts with all the other sections and clauses of Article IV, which give explicit enforcement power to Congress or the national government. Thus, Sections 1 and 3 of Article IV provide for explicit Congressional action, while Section 4 obligates the “United States” to act to guarantee the states have a “Republican Form of Government” and to protect them from “domestic Violence.” Nevertheless, despite the lack of any authorization of congressional power, in 1793 Congress passed an extradition act that applied to both fugitives from justice and fugitive slaves. This was an example of Congress interpreting the Constitution expansively to protect slavery and in the process to undermine the liberty of free blacks.

A full analysis of this law is beyond the scope of this article. But it is important to see that the 1793 law offered virtually no due process protections for alleged fugitive slaves, allowing the removal of an alleged fugitive after a summary process, where the evidence was based entirely on what the slaveholder or the slaveholder’s agent presented to a magistrate or judge. In such a hearing, alleged slaves were often not represented by counsel. Under this law someone could be condemned to a lifetime of bondage without a trial of any kind. Significantly, anyone interfering with the return of an

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90. U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).
91. Id. art. IV, § 2, cl. 2 (“A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.”).
92. Id. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).
94. Id.
96. See Finkelman, Slavery and the Founders, supra note 10, at 102–132 (for a history of the origin and passage of this law).
alleged fugitive could be fined five hundred dollars (an enormous sum at the time) and be subject to six months in prison. For northern free blacks, this law seemed to legalize kidnapping. Arguably, this law violated the protections in the Bill of Rights, which guaranteed a jury trial to anyone in federal court, and that the legal process of determining the status of a person as a slave or free person required protections found in the Fifth and Sixth Amendments. In this sense, the return of a fugitive slave was not like the extradition of a fugitive from justice, because someone charged with a crime in another state would be given a jury trial in that state. But, an alleged fugitive slave would be simply sent to the person claiming the slave. Under this law, which was arguably not even authorized by the Constitution, a free black in the North could be deprived of “liberty” without due process of law, as required by the Fifth Amendment.

The 1793 law emerged out of a dispute between Pennsylvania and Virginia over the extradition of three white men accused of kidnapping a free black in Pennsylvania. When Virginia officials refused to extradite the kidnappers, the governor of Pennsylvania, Thomas Mifflin, wrote directly to President Washington for help. The correspondence eventually went to Congress, which responded with the extradition law of 1793. While Congress thought it fixed the problems set out in the correspondence between Pennsylvania and Virginia, the law was inadequate for the task. After the law was passed, Virginia still ignored Pennsylvania’s extradition requisition and the three men who were wanted for kidnapping a free black resident of Pennsylvania would never be returned for prosecution. Thus, the northern states were unable to protect their free citizens from being kidnapped and could not obtain the extradition of anyone who did kidnap free blacks. However, slaveowners could now call on state and federal judges and magistrates to help them recover fugitive slaves.

In the 1790s, two debates in Congress over the protection of free blacks in the new nation illustrate how race affected the shaping of the

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98. See Finkelman, Slavery and the Founders, supra note 10, at 102–132 (discussing a detailed history of this controversy and the adoption of the 1793 law); see also Paul Finkelman, The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793, 56 J. So. Hist. 397 (1990).


100. Fugitive Slave Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.


102. See Paul Finkelman, The Protection of Black Rights in Seward’s New York, 34 Civ. War Hist. 211 (1998) (starting in the 1830s and continuing until the Civil War, northern governors would refuse to extradite free blacks accused of helping slaves escape to the North); Paul Finkelman, States’ Rights North and South in Antebellum America, in An Uncertain Tradition: Constitutionalism and the History of the South 125 (Kermit L. Hall & James W. Ely, Jr., eds., 1989); Kentucky v. Dennison, 65 U.S. 66 (1861) (just before the Civil War, the Supreme Court reluctantly confirmed the right of state governors to refuse to extradite fugitives from justice).
Constitution. The history shows that the early Congress used its powers only to support slavery and deny protection for free blacks. Put another way, the Congress only wanted to “establish Justice . . . and secure the Blessings of Liberty,” \(^{103}\) to protect the liberty of whites to own blacks but not to protect the liberty of free blacks.

The first debate involved a request from Delaware to help that state prevent the kidnapping of its free black residents and the kidnapping (or stealing) of slaves who were then sold out of state. This debate might be seen as the first step on the road to Congress’s endless nineteenth century debates over slavery and race. The debate was caused by an innocuous request from a slave state (Delaware) to prevent the kidnapping of free blacks and also to prevent people from stealing slaves and selling them outside of the state. There was something in it for northerners (protection of freedom) and for southerners (protection of slave property). In the abstract, the most committed slaveowners could not endorse kidnapping free blacks, even if they did not think any slaves ought to be manumitted. Similarly, even the most committed opponents of slavery—and there were few around at the time since the only anti-slavery organizations in the country were state societies focused on ending slavery at the state level—would not have objected to prosecuting people who stole slaves to resell them, especially since some of these stolen slaves were being exported to the West Indies.

Federalists should have supported Delaware because legislation on this subject would have strengthened the national government, while Jeffersonians might have acquiesced on the grounds that the plea for help came from a state and legislation would have improved interstate harmony. But, despite the mild goals of the proposal, slaveowners and even some northerners responded in ways that suggested the impossibility of ever having a serious and calm discussion of slavery and race with southern politicians.

Delaware was a slave state and would remain one until after the Civil War. But, it had a rapidly growing free black population and a declining slave population. In 1790, there were about 8900 slaves in the state and 3900 free blacks, and by 1800 (four years after this debate) the state would have 6200 slaves and 8300 free blacks.\(^{104}\) The state liberally allowed private manumission and had strict rules to prevent selling slaves to other states. In 1793, Delaware passed new legislation to prevent the kidnapping of free blacks and the illegal sale of slaves from the state.\(^{105}\) But, enforcement was difficult. Delaware was sandwiched between two slave states—New Jersey (which would not begin to end slavery until 1804) and Maryland—and located close to Virginia. With an enormous coastline and an equally long border with Maryland, it was easy for kidnappers to take

\(^{103}\) U.S. Const. pmbl.

\(^{104}\) Gibson & Jung, supra note 33, at tbl.22.

\(^{105}\) Act of June 14, 1793, ch. 22, 1793 Del. Laws 1093 (an act to punish the practice of kidnapping free negroes, and free mulattoes, and for other purposes).
blacks (free or slave) out of the state. Thus, the state turned to Congress for help.

In April 1796, Congressman Albert Gallatin of Pennsylvania, at the behest of the Delaware legislature, asked Congress to pass legislation to prevent “the future kidnapping of negroes and mulattoes.” Gallatin acted because Representative John Patten from Delaware was ill. He proposed: “That the Committee of Commerce and Manufactures be instructed to inquire into the propriety of making effectual provision for preventing the kidnapping of negroes and mulattoes, and of carrying them from their respective States contrary to the laws of the said States.” Congress agreed and sent the resolution to the appropriate committee.

In December, Representative John Swanwick of Pennsylvania reported a bill back from the committee. The debate revealed a Congress reluctant to use its constitutional powers to protect free blacks. The Federalist representative from Connecticut, Joshua Coit, who would normally have supported enhanced national power on an issue of trade, commerce, tariffs, or banking, suddenly doubted that Congress should readily expand its constitutional powers. He suddenly wanted to defer to the states on this issue, noting that “[i]t appeared to him that the laws in the several States were fully adequate to the subject.” While he admitted that kidnapping free blacks was an “evil,” he feared federal legislation would be “a greater evil.” This was perhaps a legacy from Connecticut’s alliance with the Deep South on the African slave trade vote at the Constitutional Convention. Indeed, on the first important vote over the slave trade, the Connecticut delegation had provided the winning margin for South Carolina’s demand that the slave trade be protected from congressional interference for twenty years. Coit concluded that the committee report “was a very lame one.”

Edward Livingston, a Jeffersonian Republican from New York also expressed doubts about congressional power. Like Coit, he agreed kidnapping was evil but wondered how Congress could remedy it. This was consistent with the Jeffersonian hostility to a stronger national government as well as the proclivity of northern Jeffersonians to support the South on issues involving slavery.

The hostility from southerners was more direct and intense. William Vans Murray, a Federalist from Maryland, mocked the whole idea, claiming

106. 5 ANNALS OF CONG. 1025 (1796).
107. Id.
108. 6 ANNALS OF CONG. 1730 (1796).
110. 6 ANNALS OF CONG. 1731 (1796).
112. Id.
he did “not rightly understand the meaning of the word” kidnapping and asked if it was “the intention of the Committee to have reference to the taking of free negroes and selling them as slaves, or the taking slaves to make them free.” Murray, who had studied law in London, obviously knew what kidnapping was, but he apparently saw nothing evil about snatching free blacks, or at least it was not important enough for Congress to worry about it. Murray’s position is almost a precursor of the notion articulated six decades later by Chief Justice Roger B. Taney (who was also from Maryland) that blacks, even when free, were “so far inferior, that they had no rights which the white man was bound to respect.” William L. Smith of South Carolina wanted to “get rid of the business altogether.” He considered it an “entering-wedge” for a full debate on slavery, was “alarmed” by the discussion, and “did not think [the] Constitution allowed [the] House to act in it.” Nathaniel Macon of North Carolina agreed with this position, asserting the “impropriety of the measure.”

A few northerners defended the proposal. Isaac Smith pointed out that the kidnappings involved federal issues because blacks from Delaware were being taken to the West Indies and that it “was impossible that the existing laws of the States should prevent this fraudulent practice.” Smith, who was from New Jersey where slavery was still completely legal, had no doubt a law preventing such practices would “in no way” be contrary to the Constitution and believed “it could give no offense or cause of alarm to any gentleman.”

Samuel Sitgreaves of Pennsylvania defended the proposal, and denounced Murray for “satirizing” a serious issue. He argued that it was “honorable” for the legislature to pass a bill “to prevent free men from being kidnapped.” He noted that if there was a problem with people kidnapping slaves to free them, “he was willing to join” the southerners “to correct it.” This was a response to southerners, like Murray, who believed that northerners were stealing slaves—“kidnapping” them—in order to free them.

Representative Murray responded to Sitgreaves by reiterating this point. He asserted that the real problem was “the false philosophy and misplaced philanthropy of the advocates of emancipation” who were trying to free slaves. Significantly, Murray, like the other southerners, refused to

114. Murray, supra note 111.
117. *Id.* at 1731–1732.
118. *Id.* at 1732.
119. *Id.*
120. *Id.*
121. *Id.*
even consider the possibility that free blacks actually were being kidnapped. This differed considerably from northerners like Sitgreaves who were willing to deal with that problem as well.

Significantly, those representatives sympathetic to the Delaware petition were effectively arguing for a redesign of the Fugitive Slave Law to protect free blacks from kidnapping while at the same time protecting the rights of masters to recover their fugitives. There was certainly constitutional space for a revised law that would have protected free blacks from kidnapping and criminalizing the interstate or international transportation of stolen slaves or kidnapped free people. If southerners had been interested in compromise along these grounds they might have actually gained a law that would have helped recover fugitive slaves while also protecting free blacks from kidnapping.

But many southerners wanted no part of any compromise. South Carolina’s William Smith reiterated that the whole discussion was dangerous and unconstitutional, and that one of the Northern delegates “had gone too far to make use of the word *emancipation*.”123 (It is worth noting that Representative Murray had used that word in his speech, but this did not apparently bother Smith, since Murray, like Smith, opposed protecting free blacks). Representative Smith insisted that “the General Government” should not “intermeddle with the States’ policy; it might cause very considerable contests and injury. He hoped it would drop altogether.”124

In the end, the House sent the bill back to committee, where it would eventually die.125 Congress passed no law to prevent kidnapping of free blacks. Almost all of the southerners and many northerners did not see a constitutional (or political) role for the federal government in helping to prevent the interstate or international transportation of kidnapped free blacks. On the other hand, the Fugitive Slave Law, which provided a federal role in the return of slaves who sought their own freedom, remained on the books.

Various members of Congress tried to increase penalties under that law for people who helped fugitives.126 Indeed, on the same day the House tabled the bill to prevent kidnapping, William Van Murray proposed a fine of five hundred dollars for anyone who hired a fugitive slave.127 This bill was tabled but later sent to a committee for further consideration.128 But unlike the bill to protect free blacks, no one doubted the constitutionality of a law to protect slave property. In the debate over Delaware’s request for help to protect its black residents from kidnapping, the responses of Repre-

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123. *Id.*

124. *Id.* at 1735.


sentatives Murray, Macon, and William Smith illustrated the extent to which the slaveholders of the nation insisted on shaping the Constitution to protect their interests and only their interests.

About a month after Congress debated the Delaware proposal, Representative Swanwick presented the House with a petition from four free, black residents of Philadelphia, where Swanwick lived. The petition and the debate that followed, which took up nine pages of the Annals of Congress, underscores the growing hostility to black rights in this period.

The four blacks, originally from North Carolina, petitioned Congress to protect their freedom. Their Quaker masters in North Carolina had manumitted them, and a state court had confirmed their freedom. But some people in North Carolina questioned the legality of the manumissions since the state allowed former slaves to remain in the state only if their manumissions were for “meritorious service” (or if there was a special act of the legislature approving the manumission). A North Carolina law of 1741 required that any slave manumitted by an owner leave the state within six months, unless liberated for “meritorious service.” This statute remained in force after the Revolution with some modest changes. A 1788 law reminded North Carolinians that private manumission required proof of meritorious service, and declared that any blacks still in the state who had been manumitted for other reasons could be apprehended by the sheriff or by private parties, who would then be compensated when the now re-enslaved blacks were auctioned off.

In 1796, the North Carolina legislature reaffirmed the validity of the 1741 law asserting:

That no slave shall be set free in any case, or under any pretence whatever, except for meritorious services, to be adjudged of and allowed by the county court, and licence first had and obtained therefor; and that such liberation when entered of record,

129. Id. at 2015–2017.
132. Act of 1788, ch. 20, 1788 N.C. Laws 450 (amending an act to prevent domestic insurrections). A 1795 law authorized the arrest of free blacks who “conduct themselves so as to become dangerous to the peace and good order of the State and county.” Such free blacks could be required to give security for future good behavior or sold into slavery. Act of 1795, ch. 16, § 4, 1795 N.C. Laws 79, 80. From the petition to Congress, it is not clear if the petitioners were also fearful of this law.
shall vest in the said slave, so as aforesaid liberated, all the right
and privilege of a free born negro, anything in the said act to the
contrary notwithstanding.\textsuperscript{133}

Since the petitioners no longer lived in North Carolina it is not clear if
this law even applied to them, and if it did, whether it overrode the grant of
freedom previously affirmed by local courts.

The petitioners detailed these facts, noting that while in North Carolina
some people had tried to re-enslave them, that some of them had been
jailed, and that they had been forced to leave North Carolina, and eventually
they all moved to Pennsylvania. All of them claimed their experience in
North Carolina deserved congressional protection because they asserted
they had in fact been legally manumitted. Although Pennsylvania was a free
state, they feared being captured under the Fugitive Slave Law of 1793 and
the being returned to North Carolina. They left the state, first going to Vir-
ginia and then moving to Pennsylvania, which was rapidly ending slav-
ery.\textsuperscript{134} In 1780, Pennsylvania passed the nation’s first law to end slavery,
and by 1790 there were only 3700 slaves in the state and over 6500 free
blacks. By 1800, there would be about 1700 slaves in the state but more
than 14,500 free blacks, as the state became a haven for manumitted slaves
from other states.\textsuperscript{135}

The debate in the House over this petition revealed, once again, the
conflict over the meaning of the Constitution and congressional power with
regard to slavery, race, and state powers. Southerners were almost apoplectic
over the petition. Thomas Blount, who was from North Carolina, in-
sisted the Congress should never receive the petition and asserted the
petitioners were actually still slaves and should be returned under the Fugi-
tive Slave Law of 1793. John Heath of Virginia was equally “convinced”
the petitioners “were slaves.”\textsuperscript{136} Heath argued that “[i]t appeared to him to
be more within the jurisdiction of the Legislature of that State; indeed, the
United States had nothing to do with it.”\textsuperscript{137} James Madison agreed “it did
not come within the purview of the Legislative body” and thought it was a
judicial matter for the state of North Carolina.\textsuperscript{138}

\textsuperscript{133.} Act of 1796, ch. 5, § 1, 1796 N.C. Laws 88, 88 (an act to amend, strengthen and confirm
the several acts of assembly of this state, against the emancipation of slaves).

\textsuperscript{134.} ROBINSON, supra note 9, at 288.

\textsuperscript{135.} GIBSON & JUNG, supra note 33, at tbl.53. See generally ARTHUR ZILVERSMIT, THE FIRST
EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH (1967) (on the end of the slavery in
Pennsylvania); PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY
46–69 (1981); GARY NASH & JEAN SODERLUND, FREEDOM BY DEGREES: EMANCIPATION IN PENN-
SYLVANIA AND ITS AFTERMATH (1991); PAUL FINKELMAN, HUMAN LIBERTY, PROPERTY IN HUMAN BE-

\textsuperscript{136.} 6 ANNALS OF CONG. 2020 (1797).

\textsuperscript{137.} Id.

\textsuperscript{138.} Id.
tution,” who was also the owner of more than one hundred slaves, had no interest in seeing Congress consider any freedom claims. He was smart enough to avoid a debate over the merits of slavery but fell back on the limits of federalism and the power of the states to determine the status of people in their own jurisdiction. But, Madison’s position missed the point. If the petitioners were actually free, then it would be wrong to have them transported to North Carolina, where they still might be enslaved or kidnapped. Because they were in Pennsylvania, it would have been reasonable for the Pennsylvania courts to determine if they should be sent back to North Carolina if someone claimed them. Madison was certainly creative enough to see a solution through a modification of the Fugitive Slave Law that would have provided reasonable due process for blacks who alleged freedom. But Madison and the other southerners would have none of this.

A number of northerners thought that the petition should be sent to a committee because it raised serious issues about freedom and “[a] claim to the humanity of the House” to protect free people from kidnapping. But, the southerners were inflexible, arguing that this was an issue “on which the House has no power to legislate.” In the end, the House refused to even accept the petition, much less consider the problem it raised. Any discussion of the rights of free blacks or their protection was toxic—the eighteenth century equivalent of the third rail of constitutional politics. The adamantly proslavery William Smith of South Carolina vigorously asserted that he did “not think [the members of the House] were sent there to take up the subject of emancipation.” In the end, his colleagues agreed.

This debate once again underscored how the Constitution was being shaped. The slave states could demand and get protection for their property. That was within the scope of congressional power, even where, as in the Fugitive Slave Clause, the structure of the Constitution seemed to preclude such power. In reality, as this debate showed, the southerners were arguing that they could impose obligations on Congress and the northern states, but Congress could not intervene on “[a] claim to the humanity of the House.”

139. See Ralph Ketcham, James Madison: A Biography (1970) (noting that Madison’s slaveholding “grew rapidly; [and] by 1782 there were at least 118 [slaves]”). In 1801, Madison paid taxes on 108 adult slaves, but this figure would not have included children or adults considered too old to work. James Madison’s Montpelier, Slavery Interpretation Manual 59 (2017).
140. 6 Annals of Cong. 2021 (1797).
141. Id.
142. Id. at 2023.
143. Id. at 2021.
V. Slavery in the New National Capital: A Slaveholder’s City for a Slaveholder’s Republic

The decision to move the national capital from Philadelphia to Washington, DC in 1800 led to *Marbury*. The case, as we all know, was about the appointment of a justice of the peace in Washington County, in the new District of Columbia, under the Organic Act for the District of Columbia, formally titled “An Act Concerning the District of Columbia.” Congress passed this law under its powers “To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States.” There were no constitutional issues with this law, since Congress clearly had plenary power to enact it.

The new capital consisted of two counties—Washington and Alexandria—that had been ceded to the nation by Maryland and Virginia. Washington was on the Maryland side of the Potomac River and constitutes the present national capital. Alexandria was on the Virginia side of the river and is today the city of Alexandria, Virginia. (In 1846 Congress would return this part of the District of Columbia to Virginia.) Because of *Marbury* we remember the Organic Act for the clause dealing with justices of the peace, but the law also had important implications for slavery in the new national capital. In the debates of the 1790s, southerners like William Smith of South Carolina had argued that slavery was entirely a state matter and that Congress should not even discuss the subject—except of course to discuss how to recover runaway slaves. But, if Congress was precluded from considering slavery, what would happen to slaveowners in the national capital?

Both Virginia and Maryland were slave states, and there were already slaves being held in what had become the new capital. Congress cleverly avoided a debate over the issue without even mentioning slavery. Section one of the Organic Act provided that:

the laws of the state of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia, which was ceded by the said state to the United States, and by them accepted for the permanent seat of government; and that the laws of the state of Maryland, as they now exist, shall be and continue

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146. U.S. Const. art. I, § 8, cl. 17.
147. Act of July 9, 1846, ch. 35, 9 Stat. 35 (an act to retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia).
in force in that part of the said district, which was ceded by that state to the United States, and by them accepted as aforesaid. 148

Under this provision the District adopted all of the laws of slavery for Maryland (in Washington County) and Virginia (in Alexandria County). Once established, Congress and the district government would adopt other laws to regulate slavery, 149 while federal courts, including the US Supreme Court, would interpret these laws. 150 In cases coming out of the District, the US Supreme Court would always interpret the laws of Maryland and Virginia to protect slaveowners. This often meant ignoring Maryland or Virginia precedent, practice, or even the exact wording of state statutes. 151

Thus, quietly, indeed silently, and with no debate or constitutional questions raised, slavery crept into the national capital, and the United States officially became a slaveholder’s republic. It would remain that way until 1862, when Congress would exercise its plenary powers to govern the District of Columbia by abolishing slavery there. 152

VI. THE CONSTITUTION AND SLAVERY IN THE EARLY PERIOD

As I noted at the beginning of this article, my goal here has been to demonstrate the three things about our early constitutional history. First, it was not court centered. In the 1790s, Congress and the executive branch made constitutional law as they interpreted, constructed, and implemented the Constitution. Second, this article shows that slavery was a controversial constitutional issue from the very beginning of the nation. In our own times, this matters. We live with the legacy of slavery and racism. Civil rights and equality are at the center of our national debates. Racism profoundly affects our economy, educational systems, access to health care, and criminal justice system. It also affects our foreign policy. To deny this is to ignore the reality of American society. I would argue that to understand and solve

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150. Sylvia v. Coryell, 23 F. Cas. 591 (C.C.D.C. 1801) (No. 13, 713) (this is the first case to deal with slavery. The court refused to rigorously enforce a Virginia law which prohibited the import of slaves into the state. Had the Court enforced the law, the slave, Sylvia, would have gained her freedom).
these issues requires Americans to deeply interrogate their own history. This includes the Founding period.

Thus, this article raises important issues about modern constitutional interpretation, and what is generally called “intentionalism.” Slavery was at the heart of many constitutional debates before Marbury. Protecting slavery was also a central aspect of the drafting and adoption of the US Constitution. Those scholars and judges who profess to support “original intent”—however they define it—must come to terms with a Constitution and early constitutional law that was designed and implemented to protect slavery and support a nation for white people only. They need only look at the laws passed in the 1790s and the debates in the Constitutional Convention and in Congress to realize that the modern United States cannot emulate or be proud of the original intent of many of the framers and the Founders, especially on issues of slavery, race, and equality. The early Congress, filled with founders, including James Madison, chose over and over again to protect slavery and to reject any discussion of freedom or emancipation. Representative Smith of South Carolina argued the House could not even debate these issues. And, he carried the House on this point. Whether we like it or not, protection of slavery and a rejection of liberty was the intention of many Framers in 1787, and they successfully carried this argument into the government in the 1790s and beyond. The Founding generation created a slaveholder’s republic, and it is a legacy that has bedeviled the United States for more than two centuries. This legacy is surely a caution on how we view their “intentions” and whether we should venerate them.