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SLAVERY AND THE HISTORY OF CONGRESS'S ENUMERATED POWERS

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INTRODUCTION

In his first inaugural address, President Abraham Lincoln declared, "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so."[1] Like virtually all Americans before the Civil War, Lincoln believed in what historians call the "national consensus" on slavery.[2] According to this consensus, Congress's enumerated powers were not broad enough to justify any regulation of slavery within the states.[3] Legal scholars who support the modern reach of federal powers have thus conventionally argued that the Constitution is a living document that changes over time outside the formal amendment process. Bruce Ackerman, for example, contends that the constitutional moment of the New Deal effectively amended the Constitution by expanding the reach of implied powers.[4]

A growing number of revisionist scholars, however, argue that the modern reach of federal powers can be justified without

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1. Abraham Lincoln, *First Inaugural Address* (March 4, 1861), [https://perma.cc/LBV7-NTSZ].

2. *See* Louisa M. A. Heiny, *Radical Abolitionist Influence on Federalism and the Fourteenth Amendment*, 49 AM. J. LEGAL HIST. 180, 184-86; *Id.* at 190-91 (explaining that it was unclear whether Lincoln could end slavery in the states and that Lincoln had no intention of changing the "current constitutional structure").

3. *See, e.g.*, SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING 162 (2018); DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 16 (Ward M. McAfee ed. 2002).

4. *See generally* 1 BRUCE ACKERMAN: WE THE PEOPLE: FOUNDATIONS 41 (1991).

resorting to a living Constitution. Scholars like Richard Primus and David Schwartz look to the history of the founding, early congressional debates, and Marshall Court decisions to argue that no subject is off-limits from federal regulation.[5] Moreover, progressive originalists like Jack Balkin contend that the historical purpose underlying Congress's enumerated powers is to empower the federal government to regulate any subject that the states cannot.[6] Many of the most influential scholars in the field thus contend that constitutional history supports virtually unlimited federal power.

This Article argues that the revisionist account of federal powers is inconsistent with the constitutional history of slavery. In sum, the national consensus—the idea that Congress had no power to regulate slavery within the states—was a litmus test for constitutional meaning prior to the Civil War. The Founders, early Congress, and federal courts all rejected any interpretation of federal powers that could have justified the regulation of slavery within the states.[7] In particular, the Commerce Clause, which is the basis for most federal regulation today, did not empower Congress to regulate intrastate economic activity.[8] This was not because, as is sometimes argued,[9] the economy was less interconnected in the early republic. Instead, Congress and the courts rejected the modern approach to the commerce power precisely because southern plantations produced cash crops for

5. *See generally* DAVID S. SCHWARTZ, THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF MCCULLOCH V. MARYLAND 1-4 (2019) [hereinafter SCHWARTZ, THE SPIRIT OF THE CONSTITUTION]; David S. Schwartz, *An Error and an Evil: The Strange History of Implied Commerce Powers*, 68 AM. U. L. REV. 927, 930 (2018) [hereinafter Schwartz, *An Error and an Evil*]; Richard Primus, *"The Essential Characteristic": Enumerated Powers and the Bank of the United States*, 117 MICH. L. REV. 415, 417 (2018) [hereinafter Primus, *The Essential Characteristic*]; Richard Primus, *The* Gibbons *Fallacy*, 19 U. PA. J. CONST. L. 567, 568-69 (2017); Richard Primus, *Why Enumeration Matters*, 115 MICH. L. REV. 1, 3-4 (2016); Richard Primus, *The Limits of Enumeration*, 124 YALE L. J. 576, 578-79 (2014); Richard Primus, *Reframing Article I, Section 8*, 89 FORDHAM L. REV. 2003, 2003-04 (2021).

6. *See* JACK BALKIN, LIVING ORIGINALISM 140, 155 (2011); Jack Balkin, *Commerce*, 109 MICH. L. REV. 1, 6 (2010).

7. *See infra* text accompanying notes 78-89.

8. *See infra* Part III. The National Consensus in the Courts.

9. *See* United States v. Lopez, 514 U.S. 549, 624 (1995) (Breyer, J., dissenting) (asserting that the New Deal approach to the Commerce Clause merely "appl[ied] preexisting law to changing economic circumstances").

interstate and internal trade.[10] In fact, constitutional objections to federal power blocked federal initiatives that would be at the core of the commerce power today, such as the construction of interstate roads and canals.[11] In the constitutional debates over these projects, slavery always lurked in the background.

Although legal scholars often distinguish historical practices from constitutional meaning,[12] no such legal sleight of hand can save the revisionist accounts of federal powers. The revisionist scholars present their theories as being consistent with the principles of the original Constitution, early congressional practice, or landmark Marshall Court decisions. In doing so, they ignore or minimize slavery's pervasive influence on the original Constitution. Especially at this time of racial reckoning, legal scholarship should present an accurate account of how slavery shaped constitutional history.

In fact, slavery's ubiquitous influence on the Constitution of 1787 demonstrates why history should not be dispositive in matters of constitutional interpretation.[13] However, as Justice Amy Coney Barrett's confirmation hearings vividly demonstrate, the revisionist account threatens to provide moral cover for those who pretend that originalism is a neutral and bipartisan theory.[14] Legal scholars thus should stop advancing implausible historical arguments in a vain attempt to convince conservative justices to abandon federalism. Instead, any convincing defense of federal power requires scholarship that justifies a living Constitution and convinces the legal community (and public at large) to reverse the rising influence of originalism. By arguing that slavery was

10. *See infra* Part II. The National Consensus in Antebellum Politics.

11. *See infra* text accompanying notes 114-16.

12. William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 811 (2019) (arguing that constitutional scholars "properly ignor[e] certain facts" about history when constructing legal doctrine).

13. This Article is not a comprehensive attack on originalism. The many flaws of originalism have been detailed elsewhere. *See, e.g.*, ERIC J. SEGALL, ORIGINALISM AS FAITH (2018). In fact, originalism may be a defensible approach to the Reconstruction Amendments, which were created with the purpose of eliminating slavery.

14. *Amy Coney Barrett Senate Confirmation Hearing Day 2 Transcript*, REV (Oct. 13, 2020), [https://perma.cc/6V5R-ZKL9]. Justice Barrett defended her commitment to originalism by saying that it "is not necessarily a conservative idea." In fact, she explained, "there is a school of . . . progressive originalism" that has gained increasing influence in the academy.

central to the structure of the Constitution of 1787, this Article attempts to accomplish the latter.

This Article is divided into five Parts. Part I examines how the national consensus on slavery shaped federal powers at the Founding. Part II explores how slavery influenced Congress's understanding of its powers prior to the Civil War. Part III argues that the national consensus profoundly shaped the Marshall and Taney Courts' jurisprudence on federal powers. Part IV summarizes the revisionist history of federal powers and argues that it is inconsistent with the constitutional history of slavery. Part V discusses why this debate is important and explores how the constitutional history of slavery should shape constitutional interpretation today.

I. THE NATIONAL CONSENSUS AT THE FOUNDING

At the Constitutional Convention, James Madison recognized that "the great division of interests in the United States . . . did not lie between the large & small States: it lay between the Northern & Southern."[15] Although slavery was a national institution at the time of the Founding, the Revolutionary War put it on the path to gradual extinction in the North.[16] Many Americans recognized the hypocrisy of fighting a war for liberty while denying it to those held in bondage.[17] Pennsylvania, Connecticut, and Rhode Island therefore all passed gradual abolition legislation during the 1780s, and Massachusetts abolished slavery by judicial decree in 1783.[18]

In the South, however, slavery was too deeply rooted to be dislodged by abstract principles of liberty.[19] While enslaved

15. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 486 (Max Farrand ed., Yale Univ. Press 1911).

16. MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 261 (2016).

17. *Id.* at 259-60.

18. *Id.* at 260; RICHARD BEEMAN, PLAIN HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 311 (2009). Pennsylvania's law, for example, only freed people who were born after its enactment when they reached the age of twenty-eight. Slaves were therefore expected to pay for their own freedom through decades of forced labor.

19. Virginia, Maryland, and Delaware each debated gradual emancipation proposals and passed legislation that authorized masters to manumit their slaves without legislative approval. Virginia even freed slaves who had served in the war for their masters, declaring

people were less than three percent of the population of the North, they represented approximately forty percent of the population and one-third of the wealth of the southern states.[20] Not only was the southern economy dependent on slave labor, but southerners also could not imagine an interracial society without the institution.[21] Thomas Jefferson expressed a common sentiment when he said that, if the races lived together without slavery, "[d]eep rooted prejudices" would cause "the extermination of the one or the other . . . ."[22]

The delegates to the Convention therefore understood that the national government would have no power to interfere with slavery in the states.[23] Several delegates from the Deep South emphatically declared that their states would never join a union that threatened the future of slavery. For example, when the Committee of Detail wrote the first draft of the Constitution, Charles Cotesworth Pickney of South Carolina warned that, if the committee failed "to insert some security to the Southern States agst. an emancipation of slaves" he would "be bound by his duty to his State" to oppose it.[24] Northern delegates were unwilling to see if the South was bluffing. Oliver Ellsworth of Connecticut asserted that the "morality or wisdom of slavery" was a matter only for "the States themselves,"[25] and Elbridge Gerry of Massachusetts told the Convention that it "had nothing to do with the conduct of the States as to Slaves . . . ."[26] From the very

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that men who "contributed towards the establishment of American liberty and independence should enjoy the blessings of freedom as a reward for their toils and labours . . . ." KLARMAN, *supra* note 16, at 261(quoting BEEMAN, *supra* note 18, at x).

20. KLARMAN, *supra* note 16, at 266-67.

21. *See* FEHRENBACHER, *supra* note 3, at 15.

22. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 147 (Philadelphia, Prichard & Hall, 1787). Patrick Henry likewise said: "As much as I deplore slavery, I see that prudence forbids its abolition" because it was not "practicable, by any human means, to liberate them without producing the most dreadful and ruinous consequences[.]" 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 590-91 (Philadelphia, Jonathan Elliot ed., J.B. Lippincott Co., 1891).

23. WILENTZ, *supra* note 3, at 2; KLARMAN, *supra* note 16, at 294.

24. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 95 (Max Farrand ed., Yale Univ. Press 1911). Thomas Lynch declared that "[i]f it is debated, whether their slaves are their property, there is an end of the confederation." 6 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 1080 (Worthington Chauncey Ford ed., 1906).

25. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 364.

26. *Id.* at 372.

beginning, the Framers understood that the state governments would have complete independence on matters relating to slavery within the states.[27]

Although the Framers shared a basic assumption that the new federal government would have no power over slavery, the Convention was nearly undone over conflicts regarding the international slave trade and the manner in which slaves would be counted for representation in Congress.[28] As Madison would later tell Jefferson, South Carolina and Georgia "were inflexible on the point of the slaves."[29] The Deep South was especially committed to preserving the international slave trade. John Rutledge of South Carolina declared: "If the convention thinks that [North Carolina, South Carolina, and] Georgia will ever agree to the plan, unless their right to import slaves be untouched, the expectation is vain. The people of those States will never be such fools as to give up so important an interest."[30] Because the delegates from these states believed that their way of life depended on continued access to slave labor, they threatened to abandon the Union if the Convention did not meet their demands.[31]

Bowing to Southern pressure, Northern representatives struck a deal. They agreed to prohibit Congress from interfering with the international slave trade for twenty years.[32] In exchange, the South agreed to grant Congress the power to regulate commerce—a power they feared Congress could use to protect manufacturing and East Coast shipping interests at the expense of southern cash crops.[33] Although many delegates found the slave trade immoral, most seem to have agreed with Oliver Ellsworth of Connecticut,[34] who feared that, without compromise, the states might "fly into a variety of shapes & directions, and most

27. WILENTZ, *supra* note 3, at 31.

28. KLARMAN, *supra* note 16, at 257-64, 283-86 (discussion of the southern states asserting that they would not ratify a constitution without protections for slavery).

29. Madison to Jefferson, Oct. 24, 1787, *in* 5 THE WRITINGS OF JAMES MADISON 32 (Gaillard Hunt ed., N.Y.: Putnam, 1904).

30. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 373.

31. BEEMAN, *supra* note 18, at 315.

32. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 415.

33. KLARMAN, *supra* note 16, at 287-89.

34. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 369-75.

probably into several confederations[,] and not without bloodshed."[35] When pushed on slavery, most delegates compromised and voted in their self-interest rather than in the interests of liberty.[36]

The Framers also sought to protect slavery within the states with at least two fundamental features.[37] The first was the infamous Three-Fifths Clause, which allocated representation in the federal government by counting enslaved people as three-fifths of a person.[38] If slaves had been counted equally, the North and South would have had roughly the same population at the time of the Founding.[39] The Three-Fifths Compromise ensured that, although the North would initially have a majority in the House, the South would not be a helpless minority.[40] In fact, when Gouverneur Morris attacked the Three-Fifths Clause because it would empower the South to control federal policy, Pierce Butler responded that "[t]he security the Southn. States want is that their negroes may not be taken from them which some gentlemen within or without doors, have a very good mind to do."[41] Southerners fought for the Three-Fifths Clause in large part because it gave them the power to protect slavery from federal overreach.[42]

The second major structural protection for slavery was the enumeration of Congress's powers. Enumeration ensured that the federal government had no power to interfere with slavery in the

35. *Id.* at 375.

36. For more detail on these constitutional compromises on slavery, see KLARMAN, *supra* note 16, at 270-76, 287, 304; BEEMAN, *supra* note 18, at 207-18, 316, 326-33; FEHRENBACHER, *supra* note 3, at 24-28, 32-35, 41; PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 12-18, 25-35 (2d. ed. M.E. Sharpe Inc., 2001); WILLIAM M. WIECEK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA 64-73 (Cornell Univ. Press, 1977).

37. Many other provisions protected slavery. Examples include the Fugitive Slave Clause, the Slave Trade Clause, and the duty to suppress insurrections. PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT 13-18 (Harv. Univ. Press 2018); DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION 6-9 (Hill & Wang 2009).

38. U.S. CONST. art. 1, § 2, cl. 3.

39. KLARMAN, *supra* note 16, at 266.

40. WILENTZ, *supra* note 3, at 68-69.

41. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 15, at 603-05.

42. Of course, the Three-Fifths Clause also gave the South a larger vote in the Electoral College. KLARMAN, *supra* note 16, at 301.

states. When the Virginia delegation first introduced Resolution VI of the Virginia Plan, Pierce Butler (of South Carolina) feared that "we were running into an extreme in taking away the powers of the States," and he asked Edmund Randolph to explain "the extent of his meaning."[43] Edmund Randolph, who had introduced the resolution, "disclaimed any intention to give indefinite powers to the national Legislature," and insisted that "he was entirely opposed to such an inroad on the State jurisdictions . . . ."[44] Moreover, Luther Martin of Maryland (a small slaveholding state) invoked slavery to explain why the national government could not be trusted with such a power.[45] Historian Michael Klarman captures the scholarly consensus when he says that, "[i]t is likely that every delegate in Philadelphia believed that regulating a domestic institution such as slavery would exceed the delegated powers of Congress."[46]

The debates over Ratification confirm that the Founders thought Congress lacked the power to regulate slavery within the states. Federalist James Iredell, who would later serve as a Supreme Court Justice, rhetorically asked the North Carolina ratifying convention: "Is there any thing in this Constitution which says that Congress shall have it in their power to abolish the slavery of those slaves who are now in the country?"[47] In South Carolina, Charles Cotesworth Pinckney declared that the South had "a security that the general government can never emancipate them, for no such authority is granted, and it is admitted on all hands, that the general government has no powers but what are expressly granted by the constitution."[48] Madison told the Virginia Ratifying Convention that "[n]o power is given to the General Government to interpose with respect to the

43. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 15, at 53.

44. *Id.*

45. WALDSTREICHER, *supra* note 37, at 79.

46. KLARMAN, *supra* note 16, at 294; *see also* FINKELMAN, *supra* note 37, at 19 ("Virtually everyone in 1787—and thereafter until the Civil War—fully understood that Congress could not interfere with the 'domestic institutions' of the states . . . .").

47. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 102 (Philadelphia, Jonathan Elliot ed., J.B. Lippincott Co., 1891).

48. THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 124 (1788) (John Kaminski ed., 2021) [hereinafter THE DOCUMENTARY HISTORY].

property in slaves now held by the States."[49] In fact, Anti-Federalist Luther Martin of Maryland, an antislavery southerner, condemned the Constitution on the grounds that the federal government lacked the power "to make such regulations as should be thought most advantageous for the *gradual abolition of slavery*, and the *emancipation* of the *slaves* which are already in the States."[50]

Southern Anti-Federalists generally responded by arguing that Congress could indirectly undermine or weaken slavery rather than by saying that the Constitution empowered the federal government to emancipate directly. At the Virginia Ratifying Convention, for example, George Mason and Patrick Henry criticized the Constitution for failing to include any explicit protection for slavery.[51] Mason warned the Virginia ratifying convention that, without such a protection, Congress could find a way to undermine slavery, such as a tax on slaves so high "as it will amount to manumission."[52] Patrick Henry similarly worried that Congress could use its powers to weaken slavery and thus slowly eradicate it.[53] No prominent politician at the time of the founding, however, seriously suggested that the Constitution granted Congress the power to abolish slavery within the states.[54] Given the Deep South's intense commitment to the institution, Anti-Federalists certainly would have so argued if they could make even a plausible case for a federal power of emancipation.[55]

When Anti-Federalists complained that the Constitution made them complicit in slavery, Federalists generally responded by saying that slavery was an issue wholly reserved to the states.[56] For example, Pennsylvania Federalist Tench Coxe stressed that,

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49. *Id.* at 1339. Madison later said that the Congress could not emancipate slaves within the states because "[t]here is no power to warrant it, in that paper. If there be, I know it not." *Id.* at 1503.

50. WILENTZ, *supra* note 3, at 142 (quoting THE DOCUMENTARY HISTORY, *supra* note 48, at 196).

51. *Id.* at 143.

52. *Id.* at 144 (quoting THE DOCUMENTARY HISTORY, *supra* note 48, at 1338).

53. *Id.* at 149.

54. *Id.* at 158 (quoting THE DOCUMENTARY HISTORY, *supra* note 48, at 1483).

55. *See* KLARMAN, *supra* note 16, at 302-03; DAVID L. LIGHTNER, SLAVERY AND THE COMMERCE POWER: HOW THE STRUGGLE AGAINST THE INTERSTATE SLAVE TRADE LED TO THE CIVIL WAR (2006).

56. WILENTZ, *supra* note 3, at 121.

because state laws regarding slavery "can *in no wise* be controuled or restrained by the fœderal legislature," each state had the power not only to preserve slavery, but also to abolish it.[57]

In fact, Federalists who touted the antislavery potential of the Constitution did not suggest any federal power to regulate slavery. Instead, they argued that the Constitution put slavery on the path to extinction by abolishing the international slave trade and empowering Congress to halt slavery's expansion into the federal territories.[58] They largely agreed with Oliver Ellsworth of Connecticut, who justified the Constitution's accommodation of slavery by arguing that, "as population increases; poor laborers will be so plenty as to render slaves useless[,]" so that "[s]lavery in time will not be a speck in our country."[59]

Although the founding generation agreed that Congress had no power to regulate slavery within the states, the Constitution does not explicitly protect slavery. In fact, the Constitution does not use the term "slave" at all. Even the Fugitive Slave Clause euphemistically refers to "Person[s] held to Service or Labour," and the Three-Fifths Clause counts "free Persons" and "three fifths of all other Persons."[60] Historians have conventionally said that the northern delegates wished to hide their complicity with such an obviously unjust institution.[61] In a compelling new book, however, historian Sean Wilentz argues that there was a much deeper meaning.[62] He convincingly argues that, "the convention took care to ensure that while the Constitution would accept slavery where it already existed, it would not validate slavery in national law[.]"[63] Wilentz concludes that the Constitution thus gave the states complete sovereignty over slavery—the federal

57. *Id.* at 130 (quoting THE DOCUMENTARY HISTORY, *supra* note 48, at 836). New England Federalist William Heath similarly responded to antislavery criticism by stating that "[e]ach State is sovereign and independent to a certain degree, and they have a right, and will regulate their own internal affairs." *Id.* at 121 (quoting THE DOCUMENTARY HISTORY, *supra* note 48, at 1371).

58. *Id.* at 132-33 (quoting THE DOCUMENTARY HISTORY, *supra* note 48, at 463).

59. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 24, at 371.

60. U.S. CONST. art. IV, § 2, cl. 3; U.S. CONST. art. I, § 2, cl. 3.

61. WILENTZ, *supra* note 3, at 7-9.

62. *Id.* at vii.

63. *Id.* at xiii.

government had no power to require it in the North or abolish it in the South.[64]

In sum, the history of the Founding demonstrates that the national consensus on slavery was a critical feature of the Constitution. The records of the Convention make it painfully obvious that South Carolina and Georgia insisted on some assurance that the federal government could never abolish slavery within the states.[65] Northerners, however, were unwilling to protect slavery explicitly, because they hoped that abolition of the international slave trade, the power to ban slavery in the territories, and continued white immigration would soon spell the end of the institution.[66] The Convention's tacit compromise was thus to empower Congress to ban the slave trade (in 1808) and control the territories but give Congress no power to regulate the domestic institutions of existing states. The Framers wrote this compromise into the text through the enumeration of Congress's powers.

II. THE NATIONAL CONSENSUS IN ANTEBELLUM POLITICS

The national consensus on slavery exerted a powerful influence on antebellum politics. Because approximately one-third of the southern population was held in bondage, economic prosperity was heavily dependent on slave labor.[67] Moreover, because whites were paranoid about the possibility of slave insurrections, they viewed any threat to slavery as a threat to their personal safety.[68] White southerners thus thought their economy,

64. *Id.* at 6. Wilentz thus emphasizes the antislavery potential of the Constitution. Although the Constitution did not empower Congress to abolish it directly within the existing states, Congress had the power to ban it in the territories and prohibit the international slave trade. He thus argues that the Constitution did not use the word "slave" because many Founders hoped slavery would quickly wither away.

65. *Id.* at 69.

66. WILENTZ, *supra* note 3, at xiii.

67. *Id.* at 12.

68. *Id.* at 13-15. Even though most white southerners did not own slaves, the potential to become a slave owner was also an important part of white southern cultural identity. *See* JESSE T. CARPENTER, THE SOUTH AS A CONSCIOUS MINORITY 1789-1861: A STUDY IN POLITICAL THOUGHT 12-13 (1963).

personal safety, and very way of life depended on the continuation of the institution.

White southerners, however, did not trust the federal government to protect slavery. In fact, southern distrust of the federal government increased over time as the population in the North progressively exceeded that of the South.[69] At the time of the Founding, the southern population was roughly equal to that of the North, and, although the Three-Fifths Clause decreased southern representation, the South had 46% of the seats in the House.[70] Southern power in the federal government, however, consistently decreased over time. By 1860, when Lincoln was elected president, the southern states held only 35% of the seats in the House.[71] Although it sounds ironic today, white southerners saw themselves as a minority group that was under constant threat from a northern majority.[72]

Southern leaders thus looked to the Constitution for protection. John C. Calhoun, the architect of nullification and a leading voice in southern constitutionalism, warned that legislation like the Missouri Compromise could never protect southern interests.[73] By contrast, he declared, "the Constitution . . . is a firm and stable ground, on which we can better stand in opposition to fanaticism, than on the shifting sands of compromise. Let us be done with compromises. Let us go back and stand upon the Constitution!"[74] When sectional tensions reached new heights in 1850 over the status of slavery in the federal territories, then Representative Robert Toombs of Georgia declared that the North had "brought us to the point where we are to test the sufficiency of written constitutions to protect the rights of a minority against a majority of the people."[75] Toombs warned that the South would "stand by the Constitution and laws" for protection, and he implicitly threatened secession if federal power

69. CARPENTER, *supra* note 68, at 12-13.

70. *Id.* at 22.

71. *Id.*

72. Another key factor was rising antislavery sentiment in the North, especially in the 1830s. *Id.*

73. *See* CONG. GLOBE, 29th Cong., 2d Sess. 453-54 (1847).

74. *Id.* (statement of Sen. John C. Calhoun).

75. CONG. GLOBE, app. 31st Cong., 1st Sess. 198 (1850) (statement of Rep. Robert Toombs).

restricted slavery.[76] In the words of Jefferson Davis, who would later become the president of the Confederacy: "Our safety consists in a rigid adherence to the terms and principles of the federal compact. If . . . we depart from it, we, the minority, will have abandoned our only reliable means of safety."[77] In sum, the national consensus was a central principle of antebellum politics, and political elites knew that any deviation from it would threaten the stability of the Union.

The national consensus on slavery, moreover, was not an isolated exception to otherwise broad federal power. Instead, all federal powers were interpreted narrowly to preserve state sovereignty over local economic and social issues, the most important of which was slavery.[78] In fact, southerners saw threats to slavery from federal legislation that had nothing to do with the institution, including the bank of the United States, internal improvements, and tariffs.[79] Rather than insist on expansive federal power, advocates of this federal legislation tried to reassure southerners that federal power could never threaten slavery or state sovereignty more generally.[80]

Congress explicitly disclaimed any power to regulate slavery within the states as early as 1790.[81] The issue first arose when a group of Quakers petitioned Congress to tax the international slave trade, prohibit slaves from entering the federal territories, and otherwise attack slavery "to the full extent of [its] power . . . ."[82] Southern representatives generally agreed with South Carolina Representative William Loughton Smith, who responded by asserting that the southern states "never would have adopted" the Constitution if they thought it empowered the

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76. *Id.* at 201 (statement of Rep. Robert Toombs).

77. *Id.* at 1614 (statement of Sen. Jefferson Davis); *see also* CARPENTER, *supra* note 68, at 141-44, 146 (arguing that most southerners relied on the Constitution to protect southern rights in this era).

78. *See, e.g.*, Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 RUTGERS L. J. 405, 421, 429-30 (2012) (concluding that the South "insisted on limitations on the national government precisely because . . . . [n]o other institution was so vulnerable to hostile legislation at the national level").

79. *See id.* at 425.

80. *See, e.g.*, *id.* at 421, 423.

81. CARPENTER, *supra* note 68, at 142.

82. *See e.g.*, 1 ANNALS OF CONG. 1224-26 (1790) (Joseph Gales ed., 1834); LIGHTNER, *supra* note 55, at 38.

federal government to interfere with slavery.[83] Representative Thomas Tudor Tucker went so far as to declare that the petition's "unconstitutional request" to interfere with slavery "would never be submitted to by the Southern States without a civil war."[84] Although some spoke out in defense of the right to petition and to end the slave trade in 1808, no one in Congress advocated for a federal power to regulate slavery.[85] The House ultimately voted to refer the matter to a committee, which issued a report stating: "Congress ha[s] no authority to interfere in the internal regulations of particular States" regarding slavery.[86]

The leading politicians of the North readily admitted that federal power was too limited to pose a threat to slavery within the states. Daniel Webster, New England's leading champion of federal power, said that "Congress has no authority to interfere in the emancipation of slaves. This was so resolved by the House in 1790 . . . and I do not know of a different opinion since."[87] Moreover, in his first inaugural address, President Lincoln likewise declared:

> The maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions [i.e., slavery] according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend.[88]

In fact, no mainstream politician prior to the Civil War publicly argued that Congress had the power to regulate or abolish slavery within the states.[89]

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83. 1 ANNALS OF CONG. *supra* note 82, at 1243-44.

84. *Id.* at 1240. Many other southern representatives made similar statements. *See, e.g.*, Richard S. Newman, *Prelude to the Gag Rule: Southern Reaction to Antislavery Petitions in the First Federal Congress*, 16 J. EARLY REPUBLIC 571, 582-86 (1996).

85. *See* Newman, *supra* note 84, at 588-90. For more on slavery's influence on the rights of speech and petition, see MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 121-22 (Duke Univ. Press ed., 2000).

86. 2 ANNALS OF CONG. 1465 (1790). Similar resolutions were passed in the House in 1836 and the Senate in 1838. *See* CARPENTER, *supra* note 68, at 142-43.

87. Newman, *supra* note 84, at 573 (quoting Webster).

88. James D. Richardson, *A Compilation of the Messages and Papers of the Presidents: Abraham Lincoln*, PROJECT GUTENBERG (May 28, 2004), [https://perma.cc/C8UQ-KZ68].

89. *See, e.g.*, SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 36.

Although historians recognize that the country's intense commitment to federalism was largely driven by a perceived need to protect slavery, congressmen often avoided making the connection explicitly.[90] This is because northern and southern statesmen alike understood that public debate over slavery was extraordinarily divisive. After the first major debate over slavery's expansion in 1820, for example, Thomas Jefferson wrote, "this momentous question, like a fire bell in the night, awakened and filled me with terror. I considered it at once as the knell of the Union."[91] When debates over slavery's expansion again threatened to tear the country apart in 1850, Stephen Douglas, the leader of the Democratic Party in the North, pushed through the Compromise of 1850 and "resolved never to make another speech upon the slavery question in the halls of Congress."[92] Although politicians often avoided the subject of slavery, historian David Currie explains that "the slavery question often lurked behind Southern insistence on strict interpretation of federal powers . . . ."[93]

Slavery impacted every major debate over the reach of federal power, including the First Congress's debate over Congress's power to incorporate a national bank. Because the text of the Constitution does not explicitly empower Congress to incorporate a bank, the debate focused on the scope of implied powers.[94] Madison emerged as the leading opponent of the bank.[95] In sum, he contended that the bank was unconstitutional because Congress's implied powers included only those necessary to effectuate the powers enumerated in Article I.[96] He warned that "[i]f implications, thus remote and thus multiplied,

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90. *See also id.* at 35.

91. Letter from Thomas Jefferson to John Holmes, LIBR. CONG. (April 22, 1820), [https://perma.cc/W8E6-S7TK]. Jefferson lamented that agitation over slavery would destroy the Union and make the Revolution a "useless sacrifice." *Id.* His "only consolidation" was that he would "not . . . weep over it." *Id.*

92. CONG. GLOBE, app. 32d Cong., 1st Sess., app., 65 (Dec. 23, 1850) (statement of Sen. Stephen Douglas).

93. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861, at xii (2005); *see also* SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 35.

94. *See id.* at 202.

95. *Id.* at 203.

96. *See id.* at 208-09.

can be linked together, a chain may be formed that will reach every object of legislation . . . ."[97] Although he did not say so explicitly, antebellum readers would have understood this as a warning that the bank bill would set a precedent for federal power that could threaten slavery.[98] In fact, in an obvious reference to slavery, one representative noticed that "the opinions respecting the constitution seem to be divided by a geographical line."[99]

As some revisionist scholars have stressed,[100] many representatives responded to Madison by arguing that Congress was not limited to its enumerated powers or that Congress could legislate for the "general welfare."[101] These men, however, did not argue that Congress had unlimited regulatory power. Instead, according to historian Jonathan Gienapp, American elites often did not view the Constitution "strictly, or even primarily, as a text" until approximately 1796.[102] Many elites thus saw the Constitution as an abstract set of principles, much like the unwritten British constitution.[103] Under this approach, the text was merely illustrative of a system that balanced competing powers and interests rather than strictly enforceable like a statute.[104] Congress thus could legislate according to the spirit, as opposed to the letter, of the powers enumerated in Article I.[105]

The debates show that representatives on both sides of the debate agreed that the spirit of the Constitution limited federal power so as to preserve state sovereignty over domestic institutions like slavery.[106] William Loughton Smith, a proponent of the bank, asserted that no one would ever accept the idea that

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97. 2 ANNALS OF CONG. *supra* note 86, at 1899.

98. *See* JOHNATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 207 (2018).

99. *Id.* at 212.

100. *See* Primus, *The Essential Characteristic*, *supra* note 5, at 460-61. Primus's arguments are addressed below. *See* discussion *infra* Part V.

101. *See* GIENAPP, *supra* note 98, at 203, 218.

102. *See id.* at 10.

103. *See id.* at 23. Other scholars agree with Gienapp's assessment. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 11-12 (2004); *see also* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 3-4 (1990).

104. *See* GIENAPP, *supra* note 98, at 62-63.

105. *Id.* at 92.

106. *See id.* at 203, 217, 222.

"whatever the legislature thought expedient was therefore constitutional."[107] Fisher Ames similarly said that he "did not contend for an arbitrary and unlimited discretion in the government to do every thing" and that implied powers must be "guided and limited."[108] Even Hamilton, the foremost champion of the bank, acknowledged that some subjects were beyond the power of Congress and reserved to the states.[109] Although the bank's supporters had a difficult time articulating the line between legitimate and illegitimate implied powers,[110] it would be a mistake to assume that there was no such line. The larger historical context suggests that the bank's supporters were attempting to assure men like Madison that the bank bill was no threat to the national consensus on slavery.

Although the bank's supporters won the battle over the bank, they lost the debate over the meaning of the Constitution. In fact, Gienapp concludes that, as early as 1796, Madison's textualist approach to enumerated powers dominated elite thinking.[111] Elites thus embraced the idea that Congress was limited to its enumerated powers (as supplemented by implied powers), which could be best understood by excavating original meaning.[112] Because the national consensus on slavery pervaded the original meaning of federal powers, this approach to constitutional meaning dictated that federal powers were narrow in scope.

The debates over internal improvements further reveal slavery's ubiquitous influence on federal powers. Today, no one doubts that Congress can build and regulate interstate transportation under the Spending and Commerce Clauses.[113] In fact, the modern Court identifies interstate transportation as a core Commerce Clause concern.[114] Before the Civil War, however, the states and private companies built most roads and canals

107. *Id.* at 222.
108. *Id.* at 203, 217.
109. GIENAPP, *supra* note 98, at 202, 244.
110. *Id.* at 222.
111. *See id.* at 10, 203.
112. *Id.* at 330, 332.
113. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 558 (1995).
114. *Id.*

because many political actors thought Congress lacked the constitutional authority to build internal improvements.[115]

Using veiled references to slavery, presidents from Jefferson to Polk cited constitutional concerns when vetoing internal improvement bills. In 1824, for example, Thomas Jefferson said that he "most dreaded" a federal power over internal improvements, because it would imply that Congress could "make the text say whatever will relieve them from the bridle of the States."[116] Moreover, in his last act as President, Madison vetoed a bill to fund improvements (the Bonus Bill of 1817) and warned that "the permanent success of the Constitution depends on a definite partition of powers between the General and the State Governments . . . ."[117] As late as 1846, President James K. Polk warned that "[a] construction of the Constitution so broad as that by which the power in question [over internal improvements] is defended tends imperceptibly to a consolidation of power in a Government intended by its framers to be thus limited in its authority."[118] For southerners like Jefferson, Madison, and Polk, consolidation was dangerous not only because it threatened the republic, but also because it threatened state sovereignty over slavery.[119]

In telling moments, frustrated southern representatives occasionally tied the constitutional debates over internal improvements to slavery explicitly.[120] Representative John Randolph of Virginia, for example, warned that, if Congress had

115. *See* JOHN LAURITZ LARSON, INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN THE EARLY UNITED STATES 49, 79 (2001).

116. Letter from Thomas Jefferson to Richard Rush (Oct. 13, 1824), *in* 12 THE WORKS OF THOMAS JEFFERSON 380-81 (Paul Leicester Ford ed., 1905).

117. James D. Richardson, *A Compilation of the Messages and Papers of the Presidents: James Madison*, PROJECT GUTENBURG (Jan. 31, 2004), [https://perma.cc/M278-7WSL].

118. James D. Richardson, *A Compilation of the Messages and Papers of the Presidents: James Knox Polk*, PROJECT GUTENBURG (May 28, 2004), [https://perma.cc/W2WB-6XLG]. Polk argued that, while longstanding practice allowed the federal government to build lighthouses and piers near the ocean to facilitate navigation, Congress could not "advance a step beyond this point . . . to make improvements in the interior" of the country. *Id.*

119. Many congressional representatives made the same arguments in debates over internal improvements. *See* LARSON, *supra* note 115, at 67.

120. *See* LIGHTNER, *supra* note 55, at 57; *see also* 41 ANNALS OF CONG. 1299 (1824).

the implied power to build roads and canals, it could also "emancipate every slave in the United States."[121] Nathaniel Macon, a representative from North Carolina and former Speaker of the House, similarly said, "if Congress can make banks, roads and canals under the constitution; they can free any slave in the United States . . . ."[122] He thus warned that a broad interpretation of federal power over internal improvements threatened to "destroy our beloved mother N[orth] Carolina and all the South country."[123]

Other examples of slavery's influence on constitutional politics abound. During the nullification crisis of 1832, John C. Calhoun argued that Congress lacked the power to impose a tariff that had a disproportionate effect on the slave states' cash crop economy.[124] Although President Jackson rejected the theory of nullification, he devoted his second inaugural address to reassuring the country that he defended state sovereignty over local matters. Jackson stated that "the destruction of our State governments or the annihilation of their control over the local concerns of the people [i.e., slavery] would lead directly to revolution and anarchy, and finally to despotism and military domination."[125] In one of the most famous speeches in the history of the Senate, Webster similarly argued that southern fear of federal encroachment on slavery was "wholly unfounded and unjust" because such an encroachment would "evade the constitutional compact and [] extend the power of the government over the internal laws and domestic condition of the states."[126]

Southern paranoia around federal power occasionally even pushed Congress to limit federal protections for slavery. For example, after Shadrach Minkins escaped from federal custody as

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121. 41 ANNALS OF CONG., *supra* note 120, at 1308.

122. EDWIN MOOD WILSON, THE CONGRESSIONAL CAREER OF NATHANIEL MACON 71-72 (1900).

123. *Id.* at 46-47.

124. *See* 1 WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY: 1776-1854, at 255, 257 (1990); *The Tariff of Abominations: The Effects*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, [https://perma.cc/MMX5-P3LA] (last visited Oct. 13, 2021).

125. STATES' RIGHTS AND AMERICAN FEDERALISM: A DOCUMENTARY HISTORY 108 (Frederick D. Drake & Lynn R. Nelson eds., 1999).

126. SPEECHES OF HAYNE AND WEBSTER IN THE UNITED STATES SENATE, ON THE RESOLUTION OF MR. FOOT, JANUARY, 1830, at 44 (Redding & Co., 1852).

a fugitive slave in 1851, President Millard Fillmore sought authorization to call on the federal military and state militia to enforce the Fugitive Slave Act.[127] A strange combination of votes from northern Whigs and southern Democrats, however, led Congress to deny the President's request.[128] According to Jefferson Davis:

> [W]hen any State in this Union shall choose to set aside the law, it is within her sovereignty, and beyond our power. . . . [I]t would be a total subversion of the principles of our Government if the strong arm of the United States is to be brought to crush the known will of the people of any State in this Union.[129]

The *Charleston Mercury* similarly warned, "the Boston riot is to be used, as all Northern outrages are, as the occasion and pretext for arming the General Government and especially the Executive, with increased means of assailing the South."[130] In fact, Senator Robert Rhett of South Carolina even went so far as to declare that the proslavery Fugitive Slave Law of 1850 was an unconstitutional consolidation of power in the federal government.[131]

Although some scholars argue that the Slave Trade Clause implies a broad Commerce Power, or at least some power to regulate slavery,[132] such arguments rely on a modern reading of the text rather than constitutional history. The Slave Trade Clause of the Constitution prohibited Congress from banning the international slave trade prior to 1808.[133] When northern representatives introduced the first bill to end the trade in January

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127. *Presidential Speeches: Millard Fillmore Presidency, February 19*, *1851: Message Regarding Disturbance in Boston*, MILLER CTR., [https://perma.cc/J6EK-KJXS] (last visited Oct. 15, 2021); *See* Brendan Wolfe, *Minkins, Shadrach (d. 1875)*, ENCYCLOPEDIA VA., [https://perma.cc/K492-SR2E] (Feb. 12, 2021).

128. *See* CONG. GLOBE, 31st Cong., 2d Sess. 828 (1851); CONG. GLOBE, 31st Cong., 2d Sess. app. 292.326 (1851).

129. CONG. GLOBE, 31st Cong., 2d Sess. 599 (1851).

130. *The President's Message*, CHARLESTON MERCURY, Feb. 25, 1851. *Cf. The Picayune and Consolidation*, NEW ORLEANS DELTA, *quoted in* DAILY PICAYUNE, Feb. 27, 1851 (arguing that supporters of the president's proclamation "intended to prepare the public mind for the idea of an absolute consolidated National Government, built upon the ruins of State Governments").

131. CONG. GLOBE, 31st Cong., 2d Sess. app. 317–18 (1851).

132. *See* Schwartz, *An Error and an Evil*, *supra* note 5, at 955.

133. U.S. CONST. art. I, § 9, cl. 1.

of 1807, they "altogether denied" that the Commerce Clause could apply to slavery.[134] Instead, they relied on Congress's power to "define and punish offenses against the law of nations."[135] Using the Commerce power, they asserted, would be "at war with our fundamental institutions" presumably because it would imply that Congress could regulate the interstate slave trade and perhaps even slavery within the states.[136]

The Slave Trade and Commerce Clauses arose again during the Missouri Crisis. James Tallmadge, Jr., of New York, provoked the crisis in 1819 by proposing that Missouri's admission to the Union be made conditional on its abolition of slavery.[137] The proposal's supporters primarily argued that Congress's power to regulate the territories and admit new states authorized Congress to impose conditions on Missouri's admission.[138] Some northerners, however, also relied on the Slave Trade and Commerce Clauses.[139] Because the Slave Trade Clause was merely a prohibition on ending the trade for a period of years, they argued, some other provision of the Constitution must have granted Congress the power to enact a ban.[140] The most natural source of such power was the Commerce Clause, which confers power over both international and interstate commerce.[141]

Southerners like Madison, however, replied that the Slave Trade Clause implied only that Congress could ban the international slave trade.[142] If the Framers or Ratifiers had thought that Congress had a similar power over the domestic slave trade, Madison contended, the South surely would have objected.[143] Southerners further demanded that Congress allow

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134. 16 ANNALS OF CONG. 271 (1807).

135. *Id.*

136. LIGHTNER, *supra* note 55, at 45-46. They further stated that it was "abhorrent to humanity" to call people articles of commerce. *Id.*

137. *See* JOHN R. VAN ATTA, WOLF BY THE EARS: THE MISSOURI CRISIS: 1819-1821, at 1 (2015).

138. *See* LIGHTNER, *supra* note 55, at 49.

139. *See id.* at 49-52.

140. *See id.* at 51.

141. *See id.* at 51-52.

142. *See From James Madison to Robert Walsh Jr., 27 November 1819, Founders Online*, NAT'L ARCHIVES, [https://perma.cc/8YHJ-4WLR] (last visited Oct. 15, 2021).

143. *Id.*

slavery to expand on terms equal to those of free labor.[144] The Missouri Compromise, which allowed slavery in Missouri but banned it north of the new state's southern border, did not resolve the constitutional debate.[145] The nation thus could not even agree on whether Congress could ban slavery in the territories or regulate the interstate sale of slaves. In this context, it was a basic assumption that Congress had no power to regulate slavery directly within the southern states.

Although not as common or well known, some northerners also sought to limit federal power to preserve a state's right to abolish slavery. In his famous senatorial campaign against Stephen Douglas in 1858 and his successful run for the presidency in 1860, Lincoln repeatedly warned that a southern-dominated federal government could force slavery into the North.[146] Most dramatically, after the Wisconsin Supreme Court declared the federal Fugitive Slave Act unconstitutional in 1854, it declared that state sovereignty trumped the power of the United States Supreme Court to exercise appellate jurisdiction.[147] In a concurring opinion, Judge Smith of the Wisconsin Supreme Court explained that state sovereignty was paramount and warned that, if the state lacked the power to reject the federal Fugitive Slave Act, "[t]he slave code of every state in the union [would be] engrafted upon the laws of every free state . . . ."[148] The Wisconsin legislature adopted the same states' rights stance, Ohio nearly followed suit, and northern militia came close to confronting federal marshals over a state's right to exclude slavery.[149]

In sum, slavery's influence on antebellum federal powers is difficult to overstate. On issues ranging from mundane details like funding for the Cumberland Road to high-profile legislation

144. *See* VAN ATTA, *supra* note 137, at 14, 75.

145. *See* LIGHTNER, *supra* note 55, at 57.

146. *See* DAVID M. POTTER, THE IMPENDING CRISIS 1848-1861, at 333 (1976); FEHRENBACHER, *supra* note 3, at 451.

147. *See In re* Booth, 3 Wis. 1, 9 (1854).

148. *Id.* at 122.

149. For more on the Wisconsin decision and its context, see Jeffrey M. Schmitt, *Rethinking* Ableman v. Booth *and States' Rights in Wisconsin*, 93 VA. L. REV. 1315 (2007).

like the Fugitive Slave Act of 1850,[150] slavery pushed the country towards a narrow understanding of federal powers. It is no accident that, aside from *Marbury v. Madison*,[151] the Supreme Court did not strike down a single federal statute until the *Dred Scott* decision.[152]

III. THE NATIONAL CONSENSUS IN THE COURTS

Slavery also deeply influenced the Court's jurisprudence on federal powers. Although the Court, like Congress, often did not mention slavery explicitly, its influence is unmistakable. The national consensus on slavery pushed the Court to adopt both a narrow interpretation of federal authority and a broad understanding of the states' police powers.

Although legal scholars have conventionally read Chief Justice Marshall's opinion in *McCulloch v. Maryland* as an endorsement of expansive federal powers,[153] his opinion actually reinforces the national consensus on slavery. In *McCulloch*, Justice Marshall provided the definitive interpretation of the Necessary and Proper Clause while upholding the constitutionality of the bank of the United States.[154] Although the power to create a bank is not enumerated in Article I, the Court held that it was implied from the powers to tax, spend, regulate commerce, and support the armies and navies.[155] In an oft-quoted passage, Justice Marshall said: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution,

150. In the debates over the Fugitive Slave Act, Maryland Senator Thomas G. Pratt moved to have the federal government indemnify slaveholders when the government failed to return fugitives. In response, Jefferson Davis, the future president of the Confederacy, asked: "If we admit that the Federal Government has power to assume control over slave property . . . where shall we find an end to the action which anti-slavery feeling will suggest?" *See* Jeffrey M. Schmitt, *Courts, Backlash, and Social Change: Learning from the History of* Prigg v. Pennsylvania, 123 PENN STATE L. REV. 103, 129-130 (2018).

151. 5 U.S. (1 Cranch) 137, 147-48 (1803).

152. Scott v. Sanford, 60 U.S. (1 How.) 414, 416 (1857).

153. *See* SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 16-23 (collecting sources).

154. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 324 (1819).

155. *Id.* at 407.

are constitutional."[156] He further explained that legislation is "necessary" when it is "convenient, or useful" in the pursuit of enumerated powers.[157]

Chief Justice Marshall, however, was careful to stress that implied powers were limited in scope. He asserted that the federal "government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted."[158] For Justice Marshall, this meant "that the powers of the [federal] government are limited, and that its limits are not to be transcended."[159] He further stated that, "[i]n America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other."[160] In other words, Justice Marshall said that there are topics reserved to the states and thus prohibited from the federal government. Although Justice Marshall does not spell out the precise limits on federal power, he clearly contemplates that federal legislation could be related to an enumerated power and yet still be inconsistent with "the letter and spirit of the constitution . . . ."[161] As David Schwartz concludes in his recent book on *McCulloch*, the language of the decision is "deeply ambiguous" because it uses vague and indeterminate language when describing both the scope and limitations of implied powers.[162]

Looking beyond the language of the opinion, however, the historical context strongly implies that the Court in *McCulloch* did not have an expansive view of federal powers. The outcome of the decision was never in question, as Congress had already extensively debated the issue and the bank had become central to

156. *Id.* at 421.
157. *Id.* at 413.
158. *Id.* at 405.
159. *McCulloch*, 17 U.S. at 421.
160. *Id.* at 410.
161. *Id.* at 421.
162. *See* SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 5.

the nation's economic well-being.[163] Yet, the Court decided the case as the Missouri Crisis raged in Congress, and it had obvious implications for slavery.[164] For a Chief Justice who is famous for his political acumen when ruling in cases like *Marbury*,[165] it would have been an especially inopportune moment to declare that Congress had virtually unlimited federal powers.

In fact, Justice Marshall himself did not view *McCulloch* as a precedent for expansive federal powers.[166] Soon after the Court announced its decision, the *Richmond Enquirer* published a series of essays arguing that *McCulloch*'s reasoning threatened to consolidate power in the federal government.[167] In a remarkable turn of events, Justice Marshall anonymously published a series of responses in the *Philadelphia Union*[168] and *Alexandria Gazette*.[169] In the words of legal historian Gerald Gunther:

> [T]he thrust of Marshall's response was to deny that charge of consolidation, to insist, with more emphasis than in *McCulloch* itself, that those principles did not give Congress carte blanche, that they did preserve a true federal system in which the central government was limited in its powers—and that the limits were capable of judicial enforcement.[170]

For example, in his *Friend of the Constitution* essay of July 5, Marshall says, "[i]n no single instance does the court admit the unlimited power of congress to adopt any means whatever, and thus to pass the limits prescribed by the constitution."[171]

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163. *See* GERALD GUNTHER, JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 5 (1969) ("To conclude that the Bank was constitutional was to beat a moribund horse.").

164. *Id.* at 8.

165. *See* SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 53.

166. *McCulloch*, 17 U.S. at 353.

167. *See* GUNTHER, *supra* note 163, at 55 ("If the Congress of the United States should think proper to legislate to the full extent, upon the principles now adjudicated by the supreme court, it is difficult to say how small would be the remnant of power left in the hands of the state authorities."). Although the authors used pseudonyms, the essays were probably written by William Brockenbrough and Spencer Roane, both of whom were prominent judges on the Virginia Court of Appeals and well-known for their Jeffersonian principles. *Id.* at 1.

168. *See* Gerald Gunther, *John Marshall, "A Friend of the Constitution": In Defense and Elaboration of* McCulloch v. Maryland, 21 STAN. L. REV. 449, 449-50 (1969).

169. *Id.*

170. *See* Gunther, *supra* note 168, at 19.

171. *Id.* at 186-87. He further writes that "not a syllable uttered by the court[] applies to an enlargement of the powers of congress. The reasoning of the judges is opposed to that

Moreover, the Marshall Court adopted a narrow reading of Congress's implied powers in subsequent cases, rarely cited *McCulloch*, and never cited its discussion of implied powers when deciding other federalism issues.[172] If the conventional view of *McCulloch* as a precedent for expansive federal powers is correct, the Court and Justice Marshall seem to have been completely unaware.

Slavery's influence on federal powers is perhaps most evident in the Court's Commerce Clause jurisprudence. The institution of slavery was deeply embedded within interstate and international commerce. Slaves primarily produced cash crops like tobacco, rice, and cotton that were bound for interstate and international markets.[173] Enslaved people were also important articles of interstate commerce themselves, because masters in the Upper South sold millions of slaves to fuel development in the Deep South, where brutal conditions produced high mortality rates.[174] The interstate slave trade was thus key to slavery's expansion and an important feature of the southern economy.[175] Revisionists who support the modern reach of the Commerce Clause thus cannot simply rely on changing economic circumstances.[176] Because slave labor was local economic activity that substantially effected interstate (and international) commerce, modern doctrine would unquestionably empower Congress to regulate or abolish slavery.

The antebellum Supreme Court, however, never suggested that Congress could use the Commerce Clause to regulate any aspect of slavery. Because Congress did not attempt to regulate the interstate slave trade, the Court never had occasion to rule on that issue. However, this lack of federal regulation was no accident. In *Slavery and the Commerce Power*, historian David Lightner concludes, "during both the drawing up of the Constitution and the battle over ratification, it never entered the

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restricted construction which would embarrass congress . . . but makes no allusion to a construction enlarging the grant beyond the meaning of its ends." *Id.* at 182.

172. SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 59.

173. LIGHTNER, *supra* note 55, at 32.

174. *Id.*

175. *Id.* at 5.

176. *See* Balkin, *Commerce*, *supra* note 6, at 21.

minds of most southerners that the Constitution gave Congress the authority to outlaw the interstate slave trade."[177] Lightner continues to explain that, although a faction of the abolitionist movement thought Congress could regulate the interstate slave trade, this position lacked any serious support in national politics or the judiciary.[178]

Although the Court never staked out a position on the interstate slave trade, it broadly interpreted state power over slavery and clearly stated (albeit in dicta) that the commerce power could not reach slavery within the states.[179] Before examining the Court's decisions, however, it is important to understand the context in which they arose. Each of the cases discussed below implicate the State's power to regulate the interstate movement of people—passengers, immigrants, and slaves. The Court, however, never ruled on the most contentious such state law.

South Carolina's Negro Seaman's Act required all black sailors who left their ships in a South Carolina port to be jailed until the vessel left harbor.[180] After Denmark Vesey's attempted slave insurrection in 1822, South Carolinians became paranoid that outsiders, and especially free blacks, would incite revolt by spreading dangerous ideas of freedom and equality.[181] Many other states followed suit with similar legislation targeting free blacks and antislavery speech.[182] White southerners believed such legislation was essential to slavery's survival and thus the preservation of southern society.[183]

In *Elkison v. Deliesseline*, Justice William Johnson challenged southern control over slavery by ruling that the Negro Seaman's Act was unconstitutional.[184] While riding circuit, Justice Johnson held that the law was unconstitutional because Congress's power to regulate interstate commerce was exclusive

177. LIGHTNER, *supra* note 55, at 33.

178. *See id.* at 59.

179. *See id.* at 65, 68-69.

180. *See id.* at 66.

181. *See* MICHAEL A. SCHOEPPNER, MORAL CONTAGION: BLACK ATLANTIC SAILORS, CITIZENSHIP, AND DIPLOMACY IN ANTEBELLUM AMERICA 3 (2019).

182. *Id.* at 4.

183. *Id.*

184. 8 F. Cas. 493, 498 (C.C.D. S.C. 1823) (No. 4,366).

in nature.[185] Southerners, however, rejected the decision as an attack on slavery, and South Carolina brazenly continued to enforce the law.[186] In a private letter, Chief Justice John Marshall criticized Johnson's decision and worried that Southerners would "break" the Constitution before they would "submit" to Johnson's ruling,[187] and the Supreme Court never intervened.

Justice Marshall issued his landmark decision in *Gibbons v. Ogden* just one year after Johnson's controversial decision in *Elkison*.[188] *Gibbons* arose from a challenge to an exclusive New York license to navigate certain waters that connected the state to New Jersey.[189] In his argument for Gibbons, Daniel Webster argued that the New York licensing law was invalid because, as Justice Johnson had held while riding circuit, the Commerce Clause granted Congress an exclusive power over interstate commerce.[190] However, despite Webster's deserved reputation as a nationalist, he interpreted the scope of the commerce power quite narrowly. He acknowledged that a broad view of the commerce power was possible by saying "[a]lmost all of the business and intercourse of life may be connected, incidentally, more or less, with *commercial regulations*."[191] However, he rejected the argument that Congress could regulate local matters merely because they were "connected" to interstate commerce. Instead, he argued, the Commerce Clause should be interpreted in light of its underlying purpose. This purpose, he said, was simply the elimination of "embarrassing and destructive" trade barriers between the states that had existed under the Articles of Confederation.[192] Interpreting commerce in light of this purpose, he argued, meant that federal power was limited to the regulation of trade and navigation.[193]

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185. *Id.* at 495.

186. SCHOEPPNER, *supra* note 181, at 47.

187. LIGHTNER, *supra* note 55, at 66-67.

188. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 186 (1824).

189. *Id.* at 1-2.

190. *Id.* at 186.

191. *Id.* at 9-10.

192. *Id.* at 11.

193. In his article, *The* Gibbons *Fallacy*, Richard Primus contends that Webster urged the Court to hold that Congress had the exclusive power to regulate all "domestic commerce as one integrated system . . . ." Primus, *The* Gibbons *Fallacy, supra* note 5, at 583-84. When combined with federal exclusivity, Primus says, such a broad reading of the commerce power

Webster warned that a more expansive interpretation of commerce would be dangerous to federalism and state sovereignty. He argued that a broad view of commerce as extending to all economic activity would:

> [A]cknowledge[] the right of Congress, over a vast scope of internal legislation, which no one has heretofore supposed to be within its powers. But this is not all; for it is admitted, that when Congress and the States have power to legislate over the same subject, the power of Congress, when exercised, controls or extinguishes the State power; and, therefore, the consequence would seem to follow, from the argument, that all State legislation, over such subjects as have been mentioned, is, at all times, liable to the superior power of Congress; *a consequence, which no one would admit for a moment*. The truth was, he thought, that all these things were, in their general character, rather regulations of police than of commerce, in the constitutional understanding of that term.[194]

In this quote, Webster is saying that the mere possibility of federal regulation over local activities was "a consequence which no one would admit for a moment" because the Supremacy Clause would allow Congress to overrule the states.[195] Of course, federal supremacy over local conditions would also violate the national consensus on slavery—something that Webster clearly invoked when he warned that, if Congress and the states had a concurrent power over commerce, federal law could overrule state commercial legislation, including New York's ban on slavery.[196] He thus urged the Court to view commercial legislation narrowly, so that the federal government had no power

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would have invalidated most state economic legislation. *Id.* at 584. Webster, however, said nothing of the sort. The "God-like Daniel" and "Expounder of the Constitution" would never have made such an impractical argument, and its strains credulity to suggest otherwise. *See* ROBERT V. REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME 9, 162, 613 (1997) (using Webster's nicknames). Instead, as explained above, Webster understood that federal exclusivity would require a narrow reading of the Commerce Clause. *See Gibbons*, 22 U.S. (9 Wheat) at 14 ("[T]he words must have a reasonable construction, and the power should be considered as exclusively vested in Congress, so far, and so far only, as the nature of the power requires.").

194. *Gibbons*, 22 U.S. (9 Wheat) at 19 (emphasis added).

195. *Id.* at 19.

196. *Id.* at 20-21.

to interfere with state legislation enacted under the police power.[197]

In *Gibbons*, Justice Marshall found a way to adopt the basic thrust of Webster's argument while still preserving the national consensus on slavery.[198] With Justice Johnson's recent decision on the Negro Seaman's Act likely on his mind,[199] Marshall did not adopt Webster's argument that the federal commerce power was exclusive. Instead, he held that New York's exclusive license was invalid because it conflicted with a federal steamboat license.[200] The federal license was valid, Justice Marshall held, because the Commerce Clause empowered Congress to "prescrib[e] rules for carrying on" the "commercial intercourse between nations, and parts of nations . . . ."[201]

Although Justice Marshall held that commerce included navigation, he followed Webster by saying that the Commerce Clause did not extend to that "which is completely internal" to a state.[202] This was true, he said, because "[t]he enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State."[203] In other words, because the Commerce Clause grants Congress power only over commerce "among" the states, the text implies that Congress has no power over intrastate commerce.[204] But Marshall did not leave this point up to implication. He further says that the:

> [G]enius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the

197. *Id.* at 19-20.

198. *Id.* at 239-40.

199. *See* SCHOEPPNER, *supra* note 181, at 6-7 (asserting that *Gibbons* and other Commerce Clause cases "were adjudicated with an eye towards the effects on the Seamen Acts").

200. *Gibbons*, 22 U.S. (9 Wheat.) at 24, 27.

201. *Id.* at 189-90.

202. *Id.* at 193-95.

203. *Id.* at 195.

204. *Id.* Presumably, Justice Marshall must have thought that using the Necessary and Property Clause to reach internal commerce would similarly violate the text of the Commerce Clause. *See Gibbons*, 22 U.S. (9 Wheat.) at 195.

> States generally; *but not to those which are completely within a particular State . . . .*[205]

Marshall continues to say that "[s]uch a power [over intrastate conduct] would be inconvenient, and is certainly unnecessary."[206] Because Marshall elsewhere uses the word "convenient" when interpreting the Necessary and Proper Clause,[207] his statement strongly implies that Congress cannot use that Clause to expand the commerce power to reach intrastate commerce. If any doubt remained, he further stated: "completely internal commerce of a State, then, may be considered as reserved for the State itself."[208] As Webster forcefully argued, state power is not "reserved" when the federal government can overrule state legislation.[209] *Gibbons* is thus best understood as holding that Congress's commerce power, even when supplemented by the Necessary and Proper Clause, did not apply to intrastate commerce.[210]

Justice Marshall's cautious approach to federal powers should come as no surprise. Marshall was a wealthy Virginian

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205. *Gibbons*, 22 U.S. (9 Wheat.) at 195 (emphasis added).

206. *Id.* at 194.

207. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 409 (1819).

208. *Gibbons*, 22 U.S. (9 Wheat.) at 195.

209. *See id.* at 31, 34-35.

210. In *The* Gibbons *Fallacy*, Primus asserts that Marshall's opinion is relatively consistent with modern doctrine on the scope of federal power. *See* Primus, *The* Gibbons *Fallacy*, *supra* note 5, at 591. According to Primus, although the Commerce Clause does not directly extend to intrastate commerce, *Gibbons* holds that the Necessary and Proper Clause allows Congress to reach local commerce as an implied power. *Id.* at 574-75. According to Primus, this distinction was important to Marshall because he believed that the Commerce Clause made federal power over interstate commerce exclusive, whereas the Necessary and Proper Clause was not. As a result, the states had concurrent power over local commerce but no power to interfere with interstate trade. *Id.* at 591. Although Primus presents a creative argument, it is not historically accurate. Marshall did not invent an ingenious argument for federal exclusivity over trade and concurrent authority over local economic activities, as Primus contends. *See id.* at 590-92. Instead, Marshall found a way to adopt the basic thrust of Webster's argument while still preserving the national consensus on slavery. See *id.* at 584-85, 613. As explained above, Justice Johnson had declared that South Carolina's Negro Seaman Act was unconstitutional because Congress had the exclusive power to regulate interstate and international commerce. *See supra* notes 185-88 and accompanying text. Marshall thought Johnson's decision was unwise because he knew that the South would never tolerate any interference with state authority over slavery, and many Southerners thought restrictions on free blacks were necessary to maintain control over the enslaved. *See supra* notes 185-88 and accompanying text. Although Marshall said that Webster's argument for exclusivity had "great force" he was probably unwilling to adopt it because of the national consensus on slavery. *See Gibbons*, 22 U.S. (9 Wheat.) at 209.

who bought and sold hundreds of enslaved people throughout his lifetime.[211] According to historian Paul Finkelman, "in slavery cases, Marshall's opinions were cautious, narrow, legalistic, and hostile to freedom."[212] Moreover, in his biography of Justice Marshall, Kent Newmyer similarly states that Marshall's approach to "federalism deferred to the states on the question of slavery."[213] Justice Marshall probably had no inclination to challenge state sovereignty over slavery through an expansive interpretation of implied federal powers. When Marshall said that federal legislation must be consistent with the "spirit of the constitution,"[214] he may very well have had state sovereignty over slavery on his mind.

The Taney Court's Commerce Clause jurisprudence similarly supported the national consensus on slavery. In *Mayor of New York v. Miln*, the Court broadly interpreted the state's police power to include the power to regulate the entry of immigrants because doing so was necessary to guard against the introduction of "moral pestilence" as well as physical disease.[215] The reference to "moral pestilence" was not lost on the southern states, which had used similar language to justify racial "quarantine" laws like the Negro Seamen Acts and prohibitions on abolitionist literature.[216] In fact, New York warned the Court that any ruling against its immigration law would call into question "a class of laws peculiar to the southern states, prohibiting traffic with slaves, and prohibiting masters of vessels from bringing people of colour in their vessels."[217] Slavery thus pushed the Court in *Miln* to interpret state police powers broadly and to reject federal exclusivity over the entry of immigrants.[218]

The Taney Court returned to the issue of slavery and the Commerce Clause in *Groves v. Slaughter*.[219] The case arose

211. FINKELMAN, *supra* note 37, at 31.

212. *See id.* at 28.

213. R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 434 (La. St. Univ. Press 2001).

214. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420-21 (1819).

215. 36 U.S. 102, 142-43 (1837).

216. *See* SCHOEPPNER, *supra* note 181, at 106-07.

217. *Miln*, 36 U.S. at 109.

218. *See id.* at 111-12.

219. 40 U.S. 449, 464 (1841).

when Moses Groves purchased slaves from Robert Slaughter and used a promissory note as partial payment.[220] Groves, however, claimed that the note was invalid because Mississippi's constitution stated, "[t]he introduction of slaves into this state, as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833."[221] Despite the plain meaning of the text, the Court held that the Mississippi Constitution was not self-executing and thus, required legislation to go into effect.[222] The Court thus bent over backwards to avoid ruling on slavery.[223]

Justice John McLean of Ohio, however, wrote separately to address the parties' argument that federal power over interstate commerce was exclusive.[224] McLean was easily the most antislavery justice on the Court, and he would later dissent in the Court's two most consequential proslavery opinions: *Prigg v. Pennsylvania*[225] and *Dred Scott v. Sanford*.[226] Justice McLean declared that "[t]he power over slavery belongs to the states respectively. It is local in its character, and in its effects[.]"[227] A state therefore could ban the sale of slaves into its territory because "the transfer or sale of slaves cannot be separated from this power" over slavery.[228] Although a state could not ban the importation of cotton or fabrics from other states, McLean said, the sale of slaves was different because "the Constitution acts upon slaves as persons, and not as property."[229] Moving beyond doctrine, he went so far as to declare that a state's power to ban

220. *Id.* at 455.
221. *Id.* at 451-52.
222. *Id.* at 500-01.
223. *Id.*
224. *Groves*, 40 U.S. at 503-04.
225. 41 U.S. 539, 658 (1842) (McLean, J., dissenting).
226. 60 U.S. 393, 545 (1857) (McLean, J., dissenting). Antislavery leader Salmon P. Chase said Justice McLean was "a good man and an honest man, [whose] sympathies [were] with the enslaved." Salmon P. Chase, Letter to Charles Sumner (April 24, 1847), *in* 2 THE SALMON CHASE PAPERS 149 (John Niven, ed. 1994). Chase would later serve as the Governor of Ohio, U.S. Senator, Secretary of the Treasury under Lincoln, and Chief Justice of the Supreme Court. For more on McLean, see generally FRANCIS P. WEISENBURGER, THE LIFE OF JOHN MCLEAN: A POLITICIAN ON THE UNITED STATES SUPREME COURT (1937).
227. *Groves*, 40 U.S. at 508.
228. *Id.*
229. *Id.* at 507.

slavery was "higher and deeper than the Constitution."[230] McLean's opinion shows why the federal consensus was nearly universally accepted—it not only protected slavery in the South, but it also preserved freedom in the North.

Chief Justice Roger B. Taney felt compelled to respond.[231] Like Justice McLean, he said that the power to regulate slavery "is exclusively with the several states[.]"[232] Taney elaborated that the states had the exclusive power "to determine their condition and treatment within their respective territories: and the action of the several states upon this subject cannot be controlled by Congress, either by virtue of its power to regulate commerce, or by virtue of any power conferred by the Constitution of the United States."[233] Taney did not justify his conclusion by saying that there was a slavery exception to the Commerce Clause. Instead, he said that Congress's commerce power was so narrow that "the regulations of Congress, already made, appear to cover the whole, or very nearly the whole ground[.]"[234]

This Article's discussion of slavery's impact on the Court's Commerce Clause jurisprudence is one, admittedly incomplete, example of slavery's influence on the Constitution. However, this example shows that the Court was unwilling to interpret federal power in a way that could challenge the national consensus on slavery.

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230. *Id.* at 508.

231. *See id.*

232. *Grover*, 40 U.S. at 508.

233. *Id.*

234. *Id.* at 509. Justice Baldwin also wrote separately, though he concluded that, if the Mississippi ban on importing slaves were self-enforcing, it would violate the dormant Commerce Clause. *See id.* at 515-17. He narrowly defined "'[c]ommerce among the states,' as . . . 'trade,' 'traffic,' 'intercourse,' and dealing in articles of commerce between states, by its citizens or others, and carried on in more than one state." *Id.* at 511. He distinguished this from the police power of the states, which, he said, "relates only to the internal concerns of one state, and commerce, within it . . . ." *Grover*, 40 U.S. at 511. He further explained that slavery within the states was "a matter of internal police, over which the states have reserved the entire control; they, and they alone, can declare what is property capable of ownership . . . ." *Id.* at 515. Justice Baldwin thus concluded that, although the Commerce Clause extended to the interstate traffic in slaves, it could not reach intrastate economic activity. *See id.* at 515-17.

IV. THE REVISIONIST HISTORY OF FEDERAL POWERS

The revisionist history of federal powers is a story of constitutional redemption. According to this story, the Framers created a national government that was capable of solving every problem that required a national solution. The Marshall Court then broadly interpreted federal power in canonical cases like *McCulloch* and *Gibbons*. The proslavery Taney Court, however, retreated from the true meaning of the Constitution by artificially limiting federal power to protect state sovereignty over slavery. The Court later continued to limit federal power to facilitate the retreat from Reconstruction and establishment of Jim Crow. When the Court dramatically expanded federal power in the New Deal era, it was returning to the principles of the original Constitution and the logical implications of the Marshall Court's great decisions. Although the revisionists tell a nice story, it is a work of historical fiction.

A. The Enumeration Principle

A growing number of revisionist scholars argue that the enumeration of Congress's powers in Article I should not be seen as a limitation on the scope of federal authority.[235] These revisionists acknowledge that Article I and the Tenth Amendment limit Congress to its enumerated powers.[236] They argue, however, that Congress's enumerated powers are broad enough to leave nothing beyond the reach of the federal government.[237]

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235. *See generally* SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 5-6; Schwartz, *An Error and an Evil*, *supra* note 5, at 932; Primus, *The Essential Characteristic*, *supra* note 5, at 415-16; Primus, *The* Gibbons *Fallacy*, *supra* note 5, at 567; Primus, *Why Enumeration Matters*, *supra* note 5, at 1-4; Primus, *The Limits of Enumeration*, *supra* note 5, at 576; Primus, *Reframing Article I, Section 8*, *supra* note 5, at 2003-05.

236. *See generally* SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 26, 29; Schwartz, *An Error and an Evil*, *supra* note 5, at 938; Primus, *The Essential Characteristic*, *supra* note 5, at 496; Primus, *The* Gibbons *Fallacy*, *supra* note 5, at 571; Primus, *Why Enumeration Matters*, *supra* note 5, at 6-7, 24; Primus, *The Limits of Enumeration*, *supra* note 5, at 581-82, 629-30; Primus, *Reframing Article I, Section 8*, *supra* note 5, at 2007, 2010.

237. *See generally* SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 5-6; Schwartz, *An Error and an Evil*, *supra* note 5, at 932; Primus, *The Essential Characteristic*, *supra* note 5, at 415-16; Primus, *The* Gibbons *Fallacy*, *supra* note 5, at 567;

In doing so, they challenge the conventional wisdom and reasoning of several modern Supreme Court decisions that limit the scope of the federal Commerce Power.[238] In *NFIB v. Sebelius*, for example, Chief Justice Roberts contends that "[t]he enumeration of powers is also a limitation of powers, because '[t]he enumeration presupposes something not enumerated.'"[239] I will refer to this idea as the "enumeration principle." Legal scholars have advanced at least three different lines of reasoning to argue that history does not support the enumeration principle. None of these arguments, however, withstands scrutiny.

1. The Unimportance of Enumeration

Richard Primus, who has written several articles on the enumeration principle,[240] contends that we can be faithful to the Founders' design while still rejecting the enumeration principle because the Founders cared far more about process limits—such as elections and separation of powers—than doctrinal limitations on federal power like enumeration.[241] He further asserts that the public rejected enumeration as an adequate safeguard for individual rights when it demanded a bill of rights that would impose external constraints on federal power.[242] Because the Founders' real concern was in limiting federal power and preserving individual rights, he argues, we can abandon the enumeration principle in favor of more important process limits and external constraints.[243]

As demonstrated above, however, white southerners saw enumeration as a critical component of the Constitution's

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Primus, *Why Enumeration Matters*, *supra* note 5, at 2-4; Primus, *The Limits of Enumeration*, *supra* note 5, at 576; Primus, *Reframing Article I, Section 8*, *supra* note 5, at 2004-05.

238. *See* United States v. Lopez, 514 U.S. 549, 566 (1995); *see also* NFIB v. Sebelius, 567 U.S. 519, 532-37 (2012).

239. *NFIB*, 567 U.S. at 534 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824)).

240. *See e.g.*, Primus, *The Essential Characteristic*, *supra* note 5; Primus, *The* Gibbons *Fallacy*, *supra* note 5; Primus, *Why Enumeration Matters*, *supra* note 5; Primus, *The Limits of Enumeration*, *supra* note 5; Primus, *Reframing Article I, Section 8*, *supra* note 5.

241. Primus, *The Limits of Enumeration*, *supra* note 5, at 615-17. Primus calls this the "*internal-limits canon*."

242. *See id.* at 617-18.

243. *See id.* at 623-25.

protections for slavery, and complete state sovereignty over slavery—i.e., the national consensus—was perhaps the most fundamental principle of the antebellum constitutional order.[244] It may be true that some delegates to the Constitutional Convention thought that the Three-Fifths Clause and Slave Trade Clause were more significant,[245] but the historical record shows that most Founders were adamant about limiting the scope of federal power.[246]

Moreover, public concern over the adequacy of enumeration does not suggest that it was rejected or that it was so unimportant that it can be ignored. Instead, history shows only that the Framers sought overlapping devices to protect liberty, including the separation of powers, enumeration, and the Bill of Rights. The fact that the people did not trust any single method to protect liberty does not mean that we can ignore any of them today.[247]

2. Rejection of Textualism

Scholars also object to the enumeration principle by pointing out that some Founders and members of the early Congress did not see the text as an enforceable document.[248] Early uncertainty about the nature of the Constitution, however, provides little reason to reject the enumeration principle today. Although the contested nature of constitutional meaning in the eighteenth century is fascinating from the standpoint of history, the fact

244. *See supra* notes 74-86 and accompanying text.

245. In *Reframing Article I, Section 8*, Primus specifically addresses slavery's impact on the constitutional convention. Primus, *Reframing Article I, Section 8*, *supra* note 5, at 2021-24. Following his earlier work, Primus argues that enumeration was not important to southern delegates because they counted on structural provisions like the Three-Fifths Clause to protect slavery. *See id.* However, Primus's argument does not seriously engage with the national consensus on slavery after the Founding.

246. *See supra* note 106 and accompanying text.

247. A hypothetical may help to illustrate the point. Suppose that the Constitution had originally granted a police power to Congress along with a bill of rights. Suppose further that the people ratified the Constitution only on the understanding that subsequent amendments would limit Congress to a list of enumerated powers. Under this hypothetical, would it make sense to say that the courts could ignore the bill of rights in the original constitution? Although such an argument would be highly problematic, it is like Primus's argument in every way that matters.

248. *See* Primus, *The Essential Characteristic*, *supra* note 5, at 462-69; SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 25.

remains that the textualist approach to constitutional interpretation, i.e., reading the text like an enforceable statute, won out in Congress and the Courts by the turn of the nineteenth century.[249] More fundamentally, as explained above, even the representatives who viewed the Constitution as an abstract framework did not think that it was infinitely malleable.[250] Although many representatives in the 1790s believed that the Constitution merely created a framework for government, complete state sovereignty over local economic activities was a central component of that framework. There is simply no historical evidence that any prominent public figure thought the federal government had the power—enumerated or not—to regulate slavery within the states.[251] In other words, although some representatives briefly rejected the enumeration principle in the 1790s, none seem to have rejected the national consensus on slavery or the fact that federal power was inherently limited.[252]

3. Slavery as an Exception to Inherently Broad Federal Powers

In *The Spirit of the Constitution*, David Schwartz attempts to reconcile the conventional reading of *McCulloch* with the constitutional history of slavery.[253] According to Schwartz, the Marshall Court "retreated from the more expansive ideas of implied powers expressed in *McCulloch*" to keep the Court out of

249. GIENAPP, *supra* note 98, at 203.

250. *See supra* text accompanying notes 73-84. For example, Fisher Ames, a proponent of the Bank and unenumerated powers, said that "he 'did not contend for an arbitrary and unlimited discretion in the government to do everything. . . .'" *See* GIENAPP, *supra* note 98, at 203.

251. Although some representatives argued that Congress had the power to "legislate in the general interest" during the bank debate. *Id.* at 210. The national consensus on slavery implies that this "general interest" was distinct from local activities. In fact, many of the bank's defenders argued that Congress's implied powers should be limited to national objects that the states could not regulate. *Id.* at 218. Moreover, it is probably no coincidence that southerners generally favored a narrower and textualist approach to federal powers during the debate. *Id.* at 212.

252. *See id.* at 222 (Ames), 227-28 (Madison), 244 (Hamilton).

253. Although Schwartz acknowledges that McCulloch is "deeply ambiguous," he somehow concludes that "the logic of implied powers spelled out in *McCulloch* could, when applied to the Commerce Clause, justify all present-day federal regulation of the economy." SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 4-5, 23.

the growing controversy over slavery.[254] The Taney Court, he further asserts, then sought to "protect the constitutional position of slavery" by "in essence, not overruling but actually reversing the direction of *McCulloch*."[255] The Court's doctrine of "reserved state powers," he further contends, emerged to accommodate state control over slavery and Jim Crow.[256] Schwartz thus argues that the enumeration principle—the idea that there must be something Congress cannot regulate—is an artificial constraint that should be rejected as a relic of constitutional evil.[257] In other words, he concludes that, because slavery was an external constraint on otherwise broad federal power, the Thirteenth Amendment requires us to reject slavery's influence on the Constitution and return to a broad understanding of federal powers.[258]

Schwartz, however, gets it exactly backwards. Slavery did not operate as an external constraint on otherwise broad federal power. Instead, slavery was a powerful motivation for the antebellum consensus that all federal powers were inherently limited in scope. The abolition of slavery thus did not open the way to a *return* to strong federal powers, because federal powers were never understood to be expansive in the first place.[259] Although abolition should have reduced the motivation to limit federal powers in the future, it did not change the historical fact that federal powers had always been limited in scope. Any expansion of federal power thus must arise from the new powers granted in the Reconstruction Amendments or an evolving (i.e., non-originalist) understanding of federal powers under the

254. *Id.* at 5, 87-88.

255. *Id.* at 87-88.

256. Schwartz, *An Error and an Evil*, *supra* note 5, at 933.

257. *Id.* at 934. Schwartz derisively calls the enumeration principle the "'mustbesomething' rule." *Id.* at 939.

258. *See* SCHWARTZ, THE SPIRIT OF THE CONSTITUTION, *supra* note 5, at 98 ("[S]ome of the justices seemed to view slavery as legally unique—as though there were a slavery exception to the Commerce Clause . . . .").

259. In fact, Schwartz acknowledges that Marshall's decision in *McCulloch* was ambiguous and could be read to endorse a more limited approach to federal powers. *Id.* at 5. After discussing the case, however, the remainder of the book appears to assume that the nationalist reading of the decision is correct. If the narrower reading of the case is correct, as this Article argues, then the Court did not "retreat" from anything. Instead, subsequent Marshall and Taney Court decisions were perfectly consistent with both the founding and *McCulloch*.

original Constitution. Pretending otherwise is an attempt to write the history of slavery out of the Constitution.

B. Living Originalism: Text and Principle

Focusing on the history of the Founding, progressive originalists like Jack Balkin similarly argue that constitutional history supports a virtually unbounded approach to federal powers.[260] In his book, *Living Originalism*, and a series of related articles, Balkin advances a method of constitutional interpretation he calls "*text and principle.*"[261] As he explains, "[t]he basic idea is that interpreters must be faithful to the original meaning of the constitutional text and to the principles that underlie the text."[262] In referring to the "original meaning of the constitutional text," Balkin means the semantic or linguistic meaning of the words in context.[263] After finding this original linguistic meaning, he argues, courts should construct doctrine that advances the text's underlying principles.[264] These principles, he asserts, should be defined broadly to create a framework that can change and adapt over time.[265] Under his approach, therefore, the Framers' expectations of how the text would apply to concrete issues are not binding today.[266]

Balkin contends that the principle underlying Congress's enumerated powers, including the Commerce Clause, is "to give Congress power to legislate in all cases where states are separately incompetent or where the interests of the nation might be undermined by unilateral or conflicting state action."[267] He draws this principle from Resolution VI of the Virginia Plan,

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260. *See* BALKIN, LIVING ORIGINALISM, *supra* note 6, at 138-40, 143, 146, 298; *see* Balkin, *Commerce*, *supra* note 6, at 3, 6, 12, 16-18; *see* Jack Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 551, 567-75 (2009); *see* Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292, 297-98 (2007).

261. BALKIN, LIVING ORIGINALISM, *supra* note 6, at 3.

262. Balkin, *Framework Originalism and the Living Constitution*, *supra* note 260, at 551-52.

263. *Id.* at 551-52.

264. *Id.* at 553-54.

265. *Id.* at 553-59.

266. *See* Balkin, *Commerce*, supra note 6, at 4-5.

267. BALKIN, LIVING ORIGINALISM, *supra* note 6, at 140; Balkin, *Commerce*, *supra* note 6, at 6.

which Edmund Randolph introduced at the Constitutional Convention.[268] According to Balkin, the Committee of Detail drafted Congress's enumerated powers to effectuate this principle, and Federalists like James Wilson used it to explain the nature of federal power during the Ratification debates.[269]

The Founders, however, rejected Resolution VI precisely because it violated state sovereignty and the national consensus on slavery.[270] As delegates like Pierce Butler of South Carolina immediately recognized, Congress could have used Resolution VI to justify the abolition of slavery by asserting that abolition was in the national interest.[271] In fact, it was commonly argued that the threat of slave insurrections posed a threat to national security, especially during times of war with foreign powers.[272] As historians recognize, the Convention did not accept the substance of Resolution VI; instead, the delegates voted to approve it only as a placeholder so that the Convention could move forward.[273] The Framers did not even mention Resolution VI when debating the scope of the powers drafted by the Committee of Detail, and there is no record of its mention during the debates over Ratification.[274] The enumerated powers were not meant to reflect Resolution VI because the Framers understood that, to preserve state sovereignty (over slavery), Congress's powers must be limited in scope.

Although it may be difficult to admit, the national consensus on slavery was part of the principle underlying Congress's enumerated powers. As detailed above, the Founders agreed that

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268. Balkin, *Commerce*, *supra* note 6, at 8-9.

269. *Id.* at 8-10.

270. Kurt T. Lash, *"Resolution VI": The Virginia Plan and Authority to Resolve Collective Action Problems Under Article I, Section 8*, 87 NOTRE DAME L. REV. 2123, 2134-35, 2137-39 (2012).

271. As explained above, when Resolution VI was first introduced, Pierce Butler (of South Carolina) feared that "we were running into an extreme in taking away the powers of the States . . . ." I RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 15, at 53. Later in the debates, Butler explained that "[t]he security the Southn. States want is that their negroes may not be taken from them which some gentlemen within or without doors, have a very good mind to do." *Id.* at 605.

272. Schwartz, *An Error and An Evil*, *supra* note 5, at 995-96.

273. Lash, *supra* note 270, at 2134; JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION, 177-78 (1996).

274. Lash, *supra* note 270, at 2138-39.

Congress had no power to interfere with slavery in the states. This was true in the North as well in the South, during the Convention and Ratification, and even among the most antislavery of the Founders.[275] The principle underlying federal powers thus could better be stated as follows:

> Congress has the power to legislate in all cases where states are separately incompetent or where the interests of the nation might be undermined by unilateral or conflicting state action (i.e., Resolution VI); provided, however, that the states have complete and exclusive autonomy over intrastate activities, regardless of their effects on interstate commerce (i.e., the national consensus on slavery).

Of course, this principle is a relatively accurate statement of the Court's Commerce Clause jurisprudence prior to the New Deal. It is also similar to the principle that Daniel Webster—the nationalist "Expounder of the Constitution"—identified as a lawyer in *Gibbons*.[276] Although post-ratification history is certainly not dispositive, this consistency is no coincidence. As Balkin himself admits, post-ratification history is circumstantial evidence of both text and principle.[277] His failure to engage seriously with the history of slavery in his work on living originalism is thus particularly striking.

Balkin might object that the "principle" underlying the Commerce Clause should be defined at a higher level of generality than the national consensus on slavery. His theory "views the Constitution as an initial framework for governance that sets politics in motion and must be filled out over time through constitutional construction. The goal is to get politics started and keep it going (and stable) so that it can solve future problems of governance."[278] The national consensus on slavery, however, is just this type of framework principle. Rather than straitjacket constitutional meaning for all issues, it would simply

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275. As explained above, opponents of slavery hoped that ending the international slave trade and empowering Congress to ban slavery's expansion into the territories would destroy the institution.

276. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 11 (1824). For more on Webster, *see* REMINI, *supra* note 193, at 28-29, 162.

277. Balkin, *Framework Originalism and the Living Constitution*, *supra* note 260, at 551-52.

278. *Id.* at 550.

dictate the division of authority between the state and federal governments. The Framers also saw it as a necessary condition of ratification and peace within the Union.

Although the division of power dictated by the national consensus may not fit Balkin's policy preferences, produce normatively desirable results, or match modern doctrine, it is hard to explain why it is wrong under his theory of constitutional interpretation. Balkin's text and principle method purports to look for the actual historical principles that guided the Founders.[279] Of course, the Founders also wanted to produce an effective and just government. If these are seen as the underlying principles, however, his method would better be called "text and free-floating concepts of justice." However, this would eliminate any recognizable form of originalism from his theory of *Living Originalism*.

Balkin takes other theories of originalism to task for their inability to explain constitutional progress on issues like segregation, women's rights, and federal power.[280] He also argues that Bruce Ackerman's theory of constitutional change is unnecessary because the New Deal's expansion of federal power is perfectly consistent with the "Constitution's original meaning, its text, or its underlying principles."[281] His theory, however, explains the reality of expansive federal power only by ignoring the most obvious candidate for the actual principle underlying the Commerce Clause and by fabricating an expansive alternative that has little basis in history. Of course, using the national consensus on slavery as a fundamental principle to interpret the Constitution today would strike most people as illegitimate. It is slavery's very illegitimacy, however, that demonstrates why constitutional doctrine should not be bound by the principles (or intent) of the people who wrote and ratified the Constitution of 1787.

279. *Id.* at 551-53.
280. *See* Balkin, *Commerce*, *supra* note 6, at 2.
281. *Id.* at 4.

V. SLAVERY, ORIGINALISM, AND THE LIVING CONSTITUTION

The scope of federal powers is one of the most significant issues in constitutional law. In *NFIB*, the Supreme Court came within one vote of striking down the Affordable Care Act ("ACA"), perhaps the most significant federal legislation of the twenty-first century.[282] In fact, by making Medicaid expansion voluntary with each state, the Court invalidated a central provision of the ACA and effectively prevented millions of Americans from getting health insurance.[283] The Justices who voted against the ACA did so to protect "the independent power of the States" in our federal system.[284] The Obama Administration's expansive view of federal power, Chief Justice Roberts warned, "would . . . permit[] Congress to reach beyond the natural extent of its authority, 'everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.'"[285] The Roberts Court could use the same reasoning to strike down any new legislation that expands the role of the federal government or its oversight of state programs. Just as the Hughes Court gutted the New Deal before 1936,[286] the Roberts Court could impede urgently needed federal action on issues ranging from climate change to pandemic relief.

The revisionist attempt to forestall this result is understandable. History is influential to the Roberts Court, and this is particularly true with respect to its federalism jurisprudence.[287] However, it is extremely unlikely that the revisionist history of scholars like Balkin, Primus, or Schwartz will convince the Justices to change course. Groundbreaking work on the history of the Second Amendment, affirmative action, and state action doctrine, to name just a few examples,

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282. NFIB v. Sebelius, 567 U.S. 519, 524 (2012).

283. *Id.* at 588, 599.

284. *Id.* at 536.

285. *Id.* at 554 (quoting THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961)).

286. Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 201-02 (1994).

287. *See, e.g.*, *NFIB*, 567 U.S. at 533-34; Bond v. United States, 572 U.S. 844, 854 (2014).

have had little influence on the Court, notwithstanding the fact that it is painstakingly researched and historically accurate.[288] There is little reason to think that a highly contested revisionist history of federal powers will fare any better. In fact, even the Court's self-identified originalist justices often ignore history when it does not favor their preferred results.[289]

Moreover, at this moment of racial reckoning, with widespread protests against systemic racism and a national debate over teaching critical race theory, legal scholarship should not ignore the constitutional history of slavery. The revisionist history sees slavery as a temporary aberration that can be easily excised from the Constitution, leaving a coherent and workable framework for modern life. However, the hard truth is that it is impossible to understand the Constitution of 1787 without appreciating the pervasive influence of slavery. Because of the South's insistence on complete state autonomy over slavery—the foundation of its social and economic system—federal powers were extraordinarily narrow in scope. Pretending otherwise threatens to obscure the country's history of racial injustice and treat it as a phenomenon of the past. The struggle for racial justice, however, requires a clear-eyed view of the past of white supremacy and its continuing effects.[290] Without such an honest assessment, the continuing structures of systemic racism can never be eliminated.[291]

Recognizing slavery's influence on the Constitution is not only necessary to address the legacy of racial injustice, but it also presents a powerful argument against any theory of constitutional interpretation that makes historical purpose, principles, beliefs, or practices dispositive of constitutional meaning.[292] Any such

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288. *See, e.g.*, Chris Schmitt, *Originalism and Congressional Power to Enforce the Fourteenth Amendment*, 75 WASH. & LEE L. REV. ONLINE 33, 51-52 (2018); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 798 (1985).

289. *See* SEGALL, *supra* note 13, at 3, 6-7, 169.

290. *See, e.g.*, Charles W. McKinney, Jr., *Beyond Dreams and Mountains: Martin King's Challenge to the Arc of History*, 49 U. MEMPHIS L. REV. 263, 282-83 (2018).

291. Derrick Bell, Brown v. Board of Education*: Reliving and Learning from Our Racial History*, 66 U. PITT. L. REV. 21, 31 (2004) ("The historic serves as a guide to understanding the present.").

292. This does not describe all originalist methods of interpretation. An originalist who believes in the distinction between interpretation and construction may not view historic

theory must view modern constitutional doctrine, which allows Congress to regulate local economic matters because they effect interstate commerce, as illegitimate. Countless federal laws that enjoy overwhelming public support, ranging from civil rights protections to criminal laws against child pornography, are thus unconstitutional from the standpoint of originalism. Admittedly, most originalists argue that the courts should uphold non-originalist precedent under certain circumstances.[293] The fact remains, however, that most federal legislation would be constitutionally suspect, and the Court may strike down any new legislation that would expand federal power. An originalist Court thus could strike down new legislation on critical issues requiring a national solution, such as medical care or climate change, to preserve a system that the Founders designed to protect state autonomy over slavery. Stated simply, understanding the constitutional history of slavery demonstrates why no one should accept a strong version of originalism today.

Once originalism is rejected, it is far easier to articulate a principled justification for a broad view of federal powers. As a matter of text and logic, Primus's critique of the enumeration principle is correct. Rejection of the enumeration principle, however, requires a dynamic approach to constitutional meaning. While Primus's theory may be faithful to the values of liberty and limited government, it is not faithful to the historical understanding of the Constitution. He undermines his larger argument by saying otherwise.

Similarly, there is much to recommend in Balkin's work on text and principle. It works well for individual rights protections that are stated at a high level of generality and that reflect fundamental shared values, especially those in the Reconstruction Amendments. As Balkin explains, our conception of how these fundamental values apply to concrete issues changes over time. For example, although the framers of the Fourteenth Amendment

purpose or practices as dispositive. *See, e.g.*, LAWRENCE SOLUM & ROBERT BENNETT, CONSTITUTIONAL ORIGINALISM: A DEBATE 3 (2011). Of course, this critique also would not apply to an originalist approach to the Reconstruction Amendments.

293. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 385 (2007). However, the fact remains all such federal legislation would be constitutionally illegitimate from an originalist standpoint.

thought that segregation was consistent with equal treatment,[294] this original expected application is not binding today. As the Court held in *Brown v. Board of Education*, we now know that segregation is incompatible with the principle of equality.[295]

However, Balkin is wrong to extend the text and principle approach to the federal powers contained in the Constitution of 1787. This is because, rather than reflecting a fundamental shared value like equality, the structure of federal powers reflected a compromise that gave the states complete sovereignty to abolish or protect slavery. In other words, the Founders sought to preserve a state's power to structure its social and political institutions to enforce white supremacy. A dynamic, "living" approach to constitutional interpretation thus is the only legitimate approach to federal powers.

CONCLUSION

Abolitionist William Lloyd Garrison famously condemned the Constitution as a "covenant with death" and an "agreement with Hell."[296] As Garrison recognized more than 150 years ago, slavery exerted a profound influence on the structure of the Constitution and its subsequent interpretation. In fact, from the founding period until the Civil War, there was a national consensus that the federal government had no power to interfere with slavery in the states. Because slavery was a central component of the country's economic and social order, the national consensus dictated that Congress's powers were far more limited in the past than they are today. In particular, American elites agreed that Congress had no power to regulate local activities merely because they had an effect on interstate commerce. If Congress could regulate working conditions, wages, or production, it could abolish slavery as well. Any theory of constitutional interpretation that looks to original intent, underlying principles, or early constitutional history therefore must account for the national consensus on slavery.

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294. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 5-6 (2006).

295. 347 U.S. 483, 495 (1954).

296. *See* FINKELMAN, *supra* note 37, at 11.

There is an obvious injustice to using the national consensus on slavery to interpret the Constitution. After all, slavery was profoundly unjust, and the country fought its bloodiest war to see it formally eliminated in the Thirteenth Amendment.[297] Whitewashing constitutional history, however, is not the answer. Instead, legal scholars should plainly acknowledge that the Constitution's basic meaning has changed over time. The living Constitution should be celebrated and defended, not obscured by a revisionist history that minimizes the Constitution's complicity with slavery.

297. *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, [https://perma.cc/LXD6-MWFB] (last visited Oct. 13, 2021).