The Constitutional Origins of the American Civil War

In an incisive analysis of over two dozen clauses as well as several "unwritten" rules and practices, *The Constitutional Origins of the American Civil War* shows how the Constitution aggravated the sectional conflict over slavery to the point of civil war. Going beyond the fugitive slave clause, the three-fifths clause, and the international slave trade clause, Michael F. Conlin demonstrates that many more constitutional provisions and practices played a crucial role in the bloody conflict that claimed the lives of over 750,000 Americans. He also reveals that ordinary Americans in the mid-nineteenth century had a surprisingly sophisticated knowledge of the provisions and the methods of interpretation of the Constitution. Lastly, Conlin reminds us that many of the debates that divide Americans today were present in the 1850s: minority rights versus majority rule, original intent versus a living Constitution, state's rights versus federal supremacy, judicial activism versus legislative prerogative, secession versus union, and counter-majoritarianism versus democracy.

Michael F. Conlin is Professor of History at Eastern Washington University and author of *One Nation Divided by Slavery: Remembering the American Revolution while Marching toward the Civil War* (2015).

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CAMBRIDGE
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University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108495271
DOI: 10.1017/9781108575522

First published 2019

Printed in the United Kingdom by TJ International Ltd. Padstow Cornwall

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data
NAMES: Conlin, Michael F., 1968- author.
TITLE: The constitutional origins of the American civil war / Michael F. Conlin, Eastern Washington University.
DESCRIPTION: Cambridge, United Kingdom ; New York, NY, USA : Cambridge University Press, 2019. | SERIES: Cambridge historical studies in American law and society | Includes bibliographical references and index.
IDENTIFIERS: LCCN 2018048994 | ISBN 9781108495271 (hardback : alk. paper) | ISBN 9781108459969 (pbk. : alk. paper)
SUBJECTS: LCSH: Constitutional history–United States–19th century. | United States–History–Civil War, 1861-1865–Causes.
CLASSIFICATION: LCC KF4541 .C556 2019 | DDC 973.7/11–dc23
LC record available at https://lccn.loc.gov/2018048994

ISBN 978-1-108-49527-1 Hardback

To my father Michael F. Conlin Sr. who taught me the value of hard work and to my mother Carrie Conlin Royalty who taught me to love learning.

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A Constitutional Conflict

It may seem like a gross oversimplification, a provocative throwaway line, or even an absurd exaggeration to say that the Constitution caused the Civil War, but it is true nonetheless. If the Constitution did not cause the Civil War by itself, that four-thousand-word document certainly played a key role – perhaps the starring role – in aggravating the sectional conflict over slavery that resulted in the Civil War. There is an irony in this. The Founders had tried mightily to compromise on the issue of slavery during that fateful summer in Philadelphia in 1787. Indeed, most of them thought that they had put servile labor on a glide path to extinction by giving Congress the power to cut off the supply of new slaves from Africa and the Caribbean as early as 1808. They were mistaken. Even though Congress did ban American participation in the Atlantic slave trade in that year and a dozen years later made slave trading a variety of piracy, American slavery did not wither on the vine. Instead, under the protection of the Founders' Constitution, slavery blossomed. The number of chattels in the United States expanded from some seven hundred thousand in 1790 to nearly four million in 1860 – almost a six-fold increase. While enslaved people declined as a proportion of the American population from one-fifth in 1790 to one-eighth in 1860, they increased in importance to the Southern economy and to the American economy as a whole. To take just one telling statistic: slaves accounted for nearly one-fifth of the total wealth of the United States in 1860, more than railroads and manufacturing combined. In that year – on the eve of the Civil War – there were nearly six million slaves in the New World and two-thirds of

them toiled in the United States. In short, despite the Founders' best intentions, slavery prospered under the Constitution.[1]

That a short document drafted in secret in the late eighteenth century by a coterie of self-interested elite white males led millions of Americans to take up arms eight decades later to end or perpetuate the enslavement of black people may seem far-fetched but consider the rhetoric and terms of the sectional debate over slavery. To a great extent, the sectional conflict over slavery was not ordinary political back-and-forth, it was a constitutional contest. In a telling address to his constituents about the secession crisis, Senator Robert M. T. Hunter of Virginia reduced the sectional troubles to their first principles: the South was fighting for the "cause of the Constitution" and the North was fighting against it. Allen C. Fuller, an Illinois lawyer, agreed with the Virginia planter that nothing less than the Constitution was at stake, but he reversed the roles of the sections. Fuller argued the contest was between those who would destroy the great American charter of liberty and those who would protect it.[2]

Indeed, Southerners and Northerners alike framed the sectional contest over slavery and the Civil War itself in the language of constitutional rights (and wrongs). White Southerners wanted to protect their "constitutional right" to own slaves, to take their chattels anywhere in the United States, and to have their fugitive slaves returned. These were what a US Army officer from Virginia – one Robert E. Lee – called "the rights guaranteed by the Constitution." Accordingly, they objected to what a Maryland journalist, lawyer, and author called the "unconstitutionality" of the North's efforts to restrict servile labor to the South and the North's failure to return fugitive slaves. Conservative Northerners agreed the sectional conflict was about whether or not Southerners would enjoy what Indiana famer Henry B. Pickett dubbed "their Constitutional Rights." At the same time, these Northerners believed that the South was also violating the Constitution. In fact, most Northerners regarded the sectional conflict and the Civil War itself as a matter of the rule of law – as a test of the Constitution. Even that conservative Hoosier Democrat protested Southern violations of his "rights as guaranteed by that instrument." Moses G. Atwood, a downstate Illinois businessman,

[1] James L. Huston, *Calculating the Value of the Union: Slavery, Property Rights, and the Economic Origins of the Civil War* (Chapel Hill: University of North Carolina Press, 2003), 27.

[2] Robert M. T. Hunter to the Citizens of Essex County, Virginia, Nov. 24, 1860, Robert M. T. Hunter Papers, UVA; Allen C. Fuller to Richard Yates, Dec. 30, 1860, Richard Yates Papers, ALPLM.

denounced the Southern rebellion as a blow against "citizen suffrage, the *right* of the majority to rule, and freedom of expression." Atwood spoke for the many Northerners, Republicans and Democrats alike, who believed that the Confederates had rebelled not just against the Constitution but also against democracy itself.[3]

We can see the primacy of the Constitution in the sectional struggle quite clearly by looking at the rhetoric of antebellum Northerners and Southerners. The Constitution did not just color the controversy; it directed the debate. Southerners and Northerners from across the entire spectrum of opinion viewed the sectional conflict over servile labor through the lens of the Constitution. From "no union with slaveholders" abolitionists to "positive good" defenders of slavery, they believed that nothing less than their constitutional rights was at stake in the political and moral battle over slavery. Thus one Virginia planter protested when "the constitutional rights of the Southern slaveholder" were violated and another worried about "the Constitutional guarantees of the South." Likewise, William Lloyd Garrison's *Liberator* complained that a slaveholding clique was trying to subvert "all the constitutional rights of Northern citizens" and a fair-minded Massachusetts free-soil merchant allowed that both the North and the South had violated "guarantees of the Constitution" regarding slavery.[4]

The constitutional conflict over slavery went far beyond semantics. The structure of the Constitution shaped the contours of the national debate over the problem of servile labor and suggested a solution. Thus, the Constitution channeled what the free-soil *St. Louis Missouri Democrat* provocatively proclaimed the "national nigger question" to focus on seemingly peripheral geographical regions – the District of Columbia and the western territories – and a few thousand marginal enslaved people – domestic fugitives and international captives – rather than the heart of the matter, i.e., the millions of creole slaves in the Southern states. The Constitution also offered the possibility of resolving the dispute:

[3] *Louisville Democrat*, Nov. 17, 1860; Robert E. Lee to Annette Carter, Jan. 15, 1861, Mary Custis Lee Papers, VHS; Severn T. Wallis to Reverdy Johnson, Jan. 3, 1861, Reverdy Johnson Collection, MdHS; Henry B. Pickett to John G. Davis, Dec. 26, 1860, John Givan Davis Papers, WHS; Moses G. Atwood to Moody Kent, Feb. 10, 1861, Moses G. Atwood Letter, ALPLM.

[4] J. R. Jackson to George M. Dallas, Feb. 22, 1848, George Mifflin Dallas Papers, HSP; James McDowell III to James D. Davidson, Jan. 12, 1860, James D. Davidson Papers, McCormick Collection, WHS; *Liberator*, July 4, 1856; Eliab P. Mackintire to William Salter, March 16, 1850, Eliab Parker Mackintire Letters, NYPL.

amendments, anti- or proslavery depending on the proclivities of the advocate. In 1832, Thomas H. Gallaudet, the great educator of the deaf, believed that the only way to end slavery and remain on "Constitutional grounds" was to pass an abolition amendment. While Gallaudet's concern was somewhat unusual in the 1830s, it became increasingly common by the 1850s. Nearly twenty years after Gallaudet's trenchant observation, William B. Napton, a Missouri slaveholder, lawyer, and judge, argued that the only way to allay sectional wrangling was to pass an amendment that put servile labor beyond the reach of the federal government.[5]

Antebellum Americans did not dispute slavery with abstract allusions to the Constitution. Instead they cited the Constitution clause by clause, article and section. In fact, the sectional controversy over slavery turned on the wording of a surprisingly large number of clauses – nearly thirty – of the Constitution. They constitute a third of the eighty-four clauses in the document. In addition to the parts of the document that obviously dealt with servile labor – the three-fifths clause, the international slave trade clause, and the fugitive slave clause – mid-nineteenth-century Americans sparred over a long list of constitutional provisions that at first blush seemed to have little or even nothing to do with slavery, including the domestic violence clause, the federal district clause, the guarantee clause, the military installations clause, the militia clause, and the privileges and immunities clause to name just a few.

Take the privileges and immunities clause (Article IV, Section 2) for example. This constitutional provision prohibits a state from discriminating against Americans from other states. It allows visitors to a state to have the same privileges and immunities as that state's own citizens. For this reason, it is sometimes called the "comity clause" as it was intended to force the states to treat each other's citizens with mutual respect. Adversaries in the sectional conflict used the comity clause to attack each other. In a biting editorial in the *Voice of the Fugitive*, newspaper editor *cum* fugitive slave Henry Bibb charged that South Carolina routinely violated the privileges and immunities clause by imprisoning free black sailors, who had committed no crime but to walk the streets of Charleston. Using the language of the comity clause, Nicholas F. Bocock, a Virginia lawyer and scion of a planter, complained that the Compromise

[5] *St. Louis Missouri Democrat*, April 23, 1857; Thomas H. Gallaudet to Joshua N. Danforth, Feb. 14, 1832, Joshua N. Danforth Papers, UMich; William B. Napton, Aug. 1850, Diary Typescripts, pp. 50–51, William Barclay Napton Papers, MoHS.

of 1850 failed to guarantee the "rights, privileges, and immunities of the [Southern] people" to take their chattels to any part of the Mexican Cession. The Virginia Democrat argued that the potential exclusion of slavery from that western territory by popular sovereignty – i.e., having the residents of the territory vote on it – was unconstitutional on its face. To be sure, not all Americans quoted the privileges and immunities clause as well as Bibb and Bocock. A. Van Fossen, an Indiana flour miller, argued that the Constitution permitted a Kentucky slavemaster "to take his niggers any where he pleases [including the free state of Indiana], & that he should be protected in his property as any other man is in his property but no more" just as a Hoosier could take his horse to Kentucky and have his property rights protected.[6]

In addition to citing specific clauses of the Constitution, antebellum Americans also adduced the words and actions of that document's drafters in their constitutional conflict over slavery. While even the most ardent abolitionist had to admit that James Madison, the "Father of the Constitution," was a lifelong slaveholder, even the most fanatical fire-eater and the doughtiest doughface conceded that Alexander Hamilton, John Jay, and Benjamin Franklin were abolitionists and that Madison expressed doubts about the propriety of servile labor. So, when the *Freedom's Champion* and the *Louisville Courier* observed that the Founding Fathers had opposed slavery and Indiana merchant James M. Lucas noted that Madison had hoped to emancipate his slaves, the *Charleston Mercury* conceded those points as "very true and very trite." At the same time, all but a coterie of radical abolitionists believed that the Founders had placed slavery in the states out of the federal government's reach. They regarded slavery as one of the quintessential state's rights. The power to regulate servile labor, both free-soilers and slave expansionists believed, had been "reserved" by the Tenth Amendment to the states. When the *National Era* proclaimed in 1847 that slavery was "a State institution, dependent upon State Laws" and completely beyond the power of Congress that free-soil newspaper merely summarized the national consensus on this point of constitutional interpretation.[7]

[6] *Voice of the Fugitive*, Jan. 15, 1851; Nicholas F. Bocock to Thomas S. Bocock, June 17, 1850, Thomas S. Bocock Papers, UVA; A. Van Fossen to John G. Davis, Feb. 12, 1861, John G. Davis Papers, InHS.

[7] *Atchison (Kans.) Freedom's Champion*, July 20, 1859; *Louisville Courier*, Aug. 6, 1849; James M. Lucas to John G. Davis, Nov. 21, 1859, John Givan Davis Papers; *Charleston Mercury*, May 4, 1853; *National Era*, Mar. 18, 1847.

Due to the key role played by the Constitution in the sectional struggle, mid-nineteenth-century theories of constitutional interpretation loomed large as well in the constitutional conflict. Of course, one person's commonsense approach was another's "unhappy constitutional bias" or "false system of Hermeneutics." While some antebellum Americans called for a straightforward interpretation of the Constitution's text as written others demanded that the Founders' original intent be the guiding principle for constitutional construction. In short, antebellum Americans – ranging from Maine ministers to South Carolina planters – did not want the Constitution to be "contaminated" by the wrong jurisprudence.[8]

Moreover, the constitutional dimension of the sectional conflict can be seen in how everyday Americans – many with only vague political affiliations and a few openly disdainful of politicians and politics – participated fully in what a group of concerned Georgia businessmen called the "difficult constitutional question" of slavery and union. Underlying the fact that ordinary Americans joined this constitutional debate, a Nashville banker sent a constitutional solution to the secession crisis to President-Elect Abraham Lincoln with the disclaimer that he was "no politician." It was not just a phenomenon peculiar to the Secession Winter of 1860–1861. Like countless antebellum Americans, a Pennsylvania abolitionist had "examined the Constitution of the United States, for [him]self" in 1845 and determined that it was "not a proslavery document." He was ordinary in every way except that he was an opponent of slavery and his views are extant (in a letter to the editor of the *National Anti-Slavery Standard*) for historians to read. The American notion that everyone could read and interpret the Constitution for themselves can also be seen by looking at the examples in the paragraphs above: several businessmen, lawyers, ministers, newspaper editors, and planters with a banker, a flour miller, a journalist, a judge, a mathematician, a merchant, a teacher, a US Army officer, and a yeoman farmer to boot. These everyday Americans and millions of others made their own judgments of the Constitution's relevance to the sectional struggle over servile labor.[9]

[8] Benjamin Tappan, Silas McKeen, and S. L. Pomroy to Thomas C. Stuart, Aug. 20, 1839, Benjamin Tappan Letters, NYHS; Ellis Lewis to George M. Dallas, Oct. 7, 1847, George Mifflin Dallas Papers, HSP; William Porcher Miles, *Oration Delivered before the Fourth of July Association* (Charleston: James S Burges, 1849), 14; South Carolina planter's Fourth of July toast quoted in *Charleston Mercury*, July 15, 1853.

[9] R. L. M. Whorter, James R. Sanders, et al. to George M. Dallas, Nov. 12, 1850, George Mifflin Dallas Papers, HSP; Orville Ewing to Abraham Lincoln, Jan. 24, 1861, Letters to Lincoln 1848–1861, ALPLM; Pennsylvania abolitionist quoted in *National Anti-Slavery Standard*, Oct. 23, 1845.

To see the primacy of the Constitution in causing the Civil War, consider how the sectional conflict over servile labor played out. When Northern abolitionists and Southern slaveholders quarreled over slavery, they framed their arguments in constitutional rhetoric: the former claimed that the Constitution did not permit slavery because the word "slave" did not mar its text, while the latter claimed that they had property rights in people vested by the Constitution. When they debated whether or not the nation's capital should have slaves or slave sales they were contending over territory the Constitution vouchsafed to Congress. When they rescued fugitive slaves or rendered them to their states of origin, they were clashing over a constitutional obligation. When they smuggled international slaves into the nation or tried to free them, they were sparring over a loophole the Constitution allowed Congress to close in 1808. When they objected to or gloried in the fact that the Constitution gave states with chattels extra representation in the House of Representatives and the Electoral College, they confronted the fact that the Founders gave slaveholders additional political power by constitutional fiat. When they pondered whether or not a state that had voluntarily joined the Union by ratifying the Constitution or applying to Congress for admission could leave, they confronted the possibility that states had the constitutional right to secede. When they considered whether or not the federal government could prevent secession by military force, they contemplated yet another constitutional dispute.

The most important issue in the sectional battle was not slavery in the South per se, it was the expansion of slavery into the western territories. The fate of servile labor in the tobacco and hemp fields of Virginia, the rice paddies of South Carolina, the cotton plantations of Mississippi and Alabama, and the sugar estates in Louisiana hinged on its expansion into Kansas, Nebraska, Utah, New Mexico, and California. No antebellum American thought that slavery would be a thriving enterprise in the plains of Kansas and Nebraska or the deserts of Utah and New Mexico. What mattered was having those states send pro-slavery senators to the Capitol to counterbalance the North's anti-slavery senators in Congress. So long as the South could keep the North from having a majority in the Senate, it could prevent the Northern majority in the House of Representatives from sending anti-slavery legislation to the president. The westward expansion of slavery was only important insofar as the Constitution made it so. Thus, it was the constitutional provision that gave states equal representation in the Senate that made the western expansion of slavery into the territories, rather than slavery in the Southern states, the crucial issue of the presidential election of 1860. Indeed, this had been the flashpoint of the sectional

conflict since 1819 when Missouri applied to enter the Union as a slave state. Beyond the equality of the states in the Senate there was another way the Constitution implicated the westward expansion of slavery: the territory clause. Article IV Section 3 empowered Congress to "dispose of and make all needful rules and regulations respecting the territory" of the United States. But the Tenth Amendment reserved to the states the powers not explicitly or implicitly given to the federal government. So the most divisive issue in the sectional conflict was the result of a constitutional double or even triple bind: the equality of the states in the Senate, the territory clause, and the Tenth Amendment. This constitutional issue or rather these constitutional issues divided the Democratic Party into Northern and Southern factions and gave birth to the Republican Party that ultimately prevailed in 1860. Of course, it was the election of Abraham Lincoln – under the provisions of Article I – who was pledged to contain slavery in the South, which prompted seven Southern states to secede.

The government established by the Constitution's "formula" was supposed to relieve the sectional tension over slavery, but instead it exacerbated the conflict. Not only did the three-fifths clause fail to close the gap between the Northern majority and the Southern minority in the House of Representatives, it also permitted the "sectional majority" to elect an antislavery president in 1860. After losing parity in the Senate in 1850, Southerners watched what they regarded as a Northern abolitionist cabal take "possession of the [federal] Government" in 1860. With a chief executive pledged to place slavery on the road to "ultimate extinction" and majorities in both houses of Congress, many Southerners believed that antislavery Northerners would employ a radical or even revolutionary interpretation of the Constitution to perform a sort of reverse alchemy, transmuting the federal government from a bastion of mutual defense into an engine of oppression. In the face of such a threat, many Southerners believed their only recourse was the constitutional right of secession. Even the location and timing of the Civil War's first battle – the Confederate bombardment of Fort Sumter – was dictated by the Constitution's military installations clause (Article I, Section 8) and the inauguration of the president on March 4 (the Twelfth Amendment). It was no accident that the Civil War began at a federal fort shortly after the inauguration of Abraham Lincoln: it was a constitutional consequence.[10]

[10] *National Era*, Jan. 21, 1847; John C. Rutherfoord, Dec. 11, 1859, Diary, pp. 18, 26, John C. Rutherfoord Papers, VHS.

In short, the origins of the Civil War can be found in the text, structure, and interpretation of the Constitution. It was a constitutional conflict.

By 1860–1861, antebellum Americans' conflicting interpretations of the Constitution made a political compromise on the issue of slavery impossible. When John H. Claiborne, a Virginia doctor, protested that the South had never violated the "old Constitution," he was correct. Of course, the very same boast could be made by Northern opponents of slavery. Historian George Bancroft, a conservative Democrat who was gradually turned into an antislavery Unionist by events, rejoiced that the Civil War permitted the North to "make good" on the antislavery promise of the Constitution. In the end, Frederick Douglass's *North Star* had identified the crux of the dispute a decade earlier. The Constitution, the *Star* editorialized, contained two hostile elements – "Liberty and Slavery."[11] The North and the South would resolve this constitutional conundrum by force of arms, culminating in the return of the antislavery Constitution from exile with the ratification of the Thirteenth Amendment in 1865. The Constitution's role in precipitating the Civil War should remind Americans that the seemingly abstract or even academic matter of constitutional interpretation has important consequences far beyond the courtroom, the law school seminar, and the undergraduate lecture hall.

It would be unfair to say that historians and law professors have ignored the relationship between slavery and the Constitution. Modern scholars have produced studies on the role of slavery in the Constitutional Convention,[12] how the proslavery provisions of the Constitution worked to protect and even to expand slavery in the early American republic,[13]

[11] John Herbert Claiborne to Joel K. Thomas, Dec. 25, 1860, Joel K. Thomas Papers, VHS; George Bancroft to Henry Hart Milman, Aug. 15, 1861, George Bancroft Papers, NYPL; *North Star*, April 5, 1850.

[12] Staughton Lynd, *Class Conflict, Slavery, and the United States Constitution* (Indianapolis: Bobbs-Merrill Co., 1967); Lawrence Goldstone, *Dark Bargain: Slavery, Profits, and the Struggle for the Constitution* (New York: Walker & Co., 2005); David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (New York: Hill and Wang, 2009).

[13] Paul Finkleman, *Slavery and the: Race and Liberty in the Age of Jefferson,* 2d ed. (Armonk, NY: M. E. Sharpe, 2001); Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery* (New York: Oxford University Press, 2001); Matthew Mason, *Slavery and Politics in the Early Republic* (Chapel Hill: University of North Carolina Press, 2006); John Craig Hammond, *Slavery, Freedom, and Expansion in the Early American West* (Charlottesville: University of Virginia Press, 2007); Gary J. Kornblith, *Slavery and Sectional Strife in the Early American Republic, 1776–1821* (Lanham, Md.: Rowman & Littlefield, 2010); George

and how abolitionists read the Constitution as an antislavery document.[14] In contrast to the numerous studies on how the Constitution shaped the slavery debate during the period immediately following the Constitutional Convention, there have been few studies on the period preceding the Civil War. Historians have paid some attention to the role of fugitive slaves in aggravating the sectional conflict.[15] One historian has briefly covered the importance of parity in the Senate in keeping the sectional peace in the antebellum era.[16] Another has argued that abolitionists' efforts to use the commerce clause to regulate or end the domestic slave trade helped to spark the Civil War. One has briefly argued that the war was "the result of the constitutional crisis caused by the Constitution's proslavery provisions," but he spent the bulk of his journal article discussing the Convention rather than antebellum America.[17]

In contrast to the paucity of studies on how the Constitution directed the sectional conflict, several leading scholars have demonstrated how ordinary Americans played an important role in interpreting and even implementing the Constitution despite the efforts of judges, statesmen, and eminent lawyers to maintain a jurisprudential monopoly on the American frame of government. This scholarly approach has come to be called "popular constitutionalism." In the course of "two centuries of civic experience," legal scholar Bruce Ackerman argued, American citizens have developed a "rough and ready grasp" of the Constitution's working principles and "animating ideals" through their participation in elections. Building on this foundation, historian Michael Kammen went considerably further. Kammen contended that "the perception and misperceptions, uses and abuses,

Van Cleve, *A Slaveholders' Union: Slavery, Politics, and the Constitution in the Early American Republic* (Chicago: University of Chicago Press, 2010).

[14] William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760–1848* (Ithaca, NY: Cornell University Press, 1977).

[15] Albert J. Von Frank, *The Trials of Anthony Burns: Freedom and Slavery in Emerson's Boston* (Cambridge, MA: Harvard University Press, 1998); Nat Brandt and Yanna Kroyt Brandt, *In the Shadow of the Civil War: Passmore Williamson and the Rescue of Jane Johnson* (Columbia, SC: University of South Carolina Press, 2007); Steven Lubet, *Fugitive Justice: Runaways, Rescuers, and Slavery on Trial* (Cambridge, MA: Harvard University Press, 2010); Robert H. Baker, *Prigg v. Pennsylvania: Slavery, the Supreme Court, and the Ambivalent Constitution* (Lawrence: University Press of Kansas, 2012).

[16] Leonard L. Richards, *The Slave Power: The Free North and Southern Domination, 1780–1860* (Baton Rouge: Louisiana State University Press, 2000).

[17] David L. Lightner, *Slavery and the Commerce Power: How the Struggle against the Interstate Slave Trade Led to the Civil War* (New Haven: Yale University Press, 2006); Paul Finkelman, "How the Proslavery Constitution Led to the Civil War," *Rutgers Law Journal* 43 (Fall/Winter 2013): 407.

and knowledge and ignorance of ordinary Americans" of the Constitution played an important role in the functioning of the American government and in American society writ large. Taking these insights considerably further still, law professor Larry Kramer identified the American people themselves as the driving force behind constitutional government in the United States from the late eighteenth to the mid-twentieth century. This uniquely American phenomenon of "popular constitutionalism," he maintained, assigned to "ordinary citizens a central and pivotal role in implementing their Constitution."[18]

This book builds on the "popular constitutionalism" approach of these scholars, but extends the analysis in two important ways. First, it applies popular constitutionalism to the antebellum period and the issue of Civil War causation. When scholars have noted that antebellum Americans' understanding of the Constitution shaped the sectional conflict, they have done so in passing, almost as a throwaway line rather than making it the focus of their work. Kramer's study focused on the founding era and the early republic. He stated that "popular constitutionalism remained ascendant in the antebellum era," but only briefly studied one aspect of it in the period before the Civil War – the Dred Scott case. Kammen's study devotes the second half of one chapter and the first half of the next to the antebellum period, but focuses on civic commemoration of the Constitution rather than the sectional conflict.[19] Although the text, the interpretation of the text, and the practice of the various interpretations of the Constitution loomed large during the political contest between the North and the South over slavery in the three decades preceding the Civil War, modern scholars have not yet given us a proper treatment of the constitutional origins of the Civil War. Second, this book presents a social history or a "grass-roots story" of American constitutionalism in the antebellum era. Although a few scholars have made efforts to present a history of the Constitution in American political life "from the bottom up" only Pauline Maier has well and truly done so in her magnificent study of the ratification debates in the late 1780s. Even the pioneering scholars who established the insightful scholarly framework of "popular constitutionalism" relied heavily on published sources – legal cases, treatises, polemics, and books – written by

[18] Bruce Ackerman, "Constitutional Politics/Constitutional Law," *Yale Law Journal* 99 (Dec. 1989): 454; Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Alfred A. Knopf, 1986), xi; Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), 8.

[19] Kramer, *The People Themselves*, 209; Kammen, *A Machine That Would Go*, 75–105.

elites – jurists, statesmen, and prominent lawyers – most of whom had formal constitutional training.[20] In this book, I perform both tasks, extending the "popular constitutionalism" approach to everyday Americans and applying it to Civil War causation.

My variant of popular constitutionalism parts company with Kramer's and Kammen's in one important respect. Their definition of "ordinary" does not apply to social class or level of education. Instead, Kramer took ordinary to apply to voters and especially to politicians rather than to "a trained elite of judges and lawyers whose professional task" was to study and implement the Constitution. In much the same way, Kammen took "ordinary" to apply to "nonprofessionals," i.e., Americans who were "not lawyers, not judges, nor professors of law." As the "overwhelming majority" of antebellum lawyers read law in the offices of practicing attorneys – as Abraham Lincoln and Stephen A. Douglas did – I argue that most lawyers in the mid-nineteenth century were not "professionals" in the sense that Kramer and Kammen used the term. Indeed, even the lawyers trained at one of the few law schools – there were fifteen nationwide in 1850 and just twenty-one in 1860 – generally had no other university training and completed their course of legal study in only one year. To give a telling example: in 1851 Benjamin R. Curtis became the first Supreme Court justice to have a proper law degree from a law school. His predecessors had either read law like Lincoln and Douglas or had entered law school but not taken a degree.[21] Using a slightly more expansive definition of "ordinary" than Kramer and Kammen do, this book examines how Americans from all walks of life read, understood, and interpreted the Constitution in the three decades or so preceding the Civil War. In particular, this study looks at how ordinary Americans – including lawyers – framed the political and moral dispute over slavery in constitutional terms and demonstrates how the structure, the text, and the understanding of the Constitution aggravated the sectional conflict, causing the Civil War.

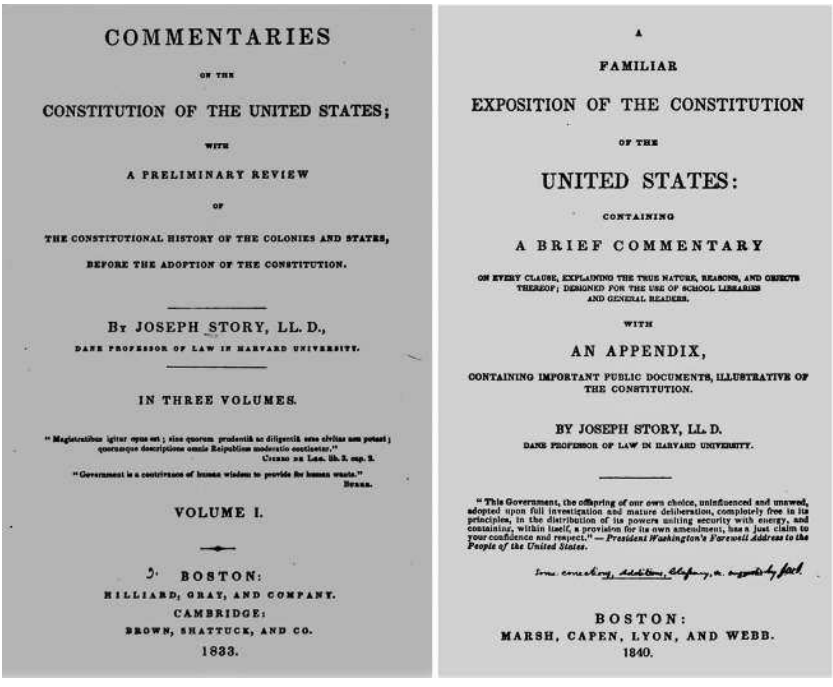
This approach requires a focus on ordinary Americans rather than elites. It brings the perspectives of everyday Americans – bankers and

[20] Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (New York: Simon and Schuster, 2010), xiii; Kramer, *The People Themselves*.

[21] Kramer, *The People Themselves*, 7; Kammen, *A Machine That Would Go*, xi; Lawrence M. Friedman, *A History of American Law* (New York: Simon and Schuster, 1973), 278, 525–528; Brian R. Dirck, *Lincoln the Lawyer* (Urbana: University of Illinois Press, 2008), 14–22; Martin H. Quitt, *Stephen A. Douglas and Antebellum Democracy* (New York: Cambridge University Press, 2012), 39–41; Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*, 3rd ed. (New York: Oxford University Press, 1992), 61.

blacksmiths, bookbinders and booksellers, cattle traders and clerks, dentists and doctors, farmers and Forty-niners, geologists and grocers, homemakers and homesteaders, lawyers and lime dealers, merchants and mechanics, miners and ministers, millworkers and mill owners, planters and politicians, printers and professors, shopkeepers and surgeons, teachers and teamsters, and slaves and yeoman farmers – to the limelight. The example of Emily Ross and Mary Clark demonstrates my variety of popular constitutionalism. These two women were sisters who had grown up in the slave state of Kentucky in a yeoman farmer's family. Emily married a master carpenter named Wesley Ross from Indiana, while Mary married a yeoman farmer named James Clark from Kentucky, who owned several slaves. In a series of letters (of which only one side has survived the vagaries of time and war), the sisters debated the constitutional contours of the sectional conflict. Both of them read the document on their own and both had little, if any, schooling let alone formal training in constitutional interpretation. The Kentuckian, a self-described "constitutional Democrat," disclaimed any pretension of being a "constitutional crittic [*sic*]," saying that such a vocation was the proper domain of "statesmen and politicians" rather than homemakers. Nonetheless, she answered her sister's antislavery construction of the Constitution with her own proslavery one. Clark said that black equality was "repugnant" to American society and the happiness of white Americans. Clark called for slaves to "ever remain where our [founding] fathers place[d] them" in the Constitution, i.e., in servitude. She argued that the document did not permit the people of Indiana to meddle with Kentucky's slaves any more than the people of Kentucky could interfere with Indiana's property. In short, Clark argued that slavery was a "State['s] Right" beyond the reach of the other states and the federal government. "You might as well say we [Kentuckians] had no right to our home or lands as to say that we have no right to our slaves," she wrote, "and [those] who would steal our slaves upon the same principle would steal our homes or would take our lands." Clark blamed the Civil War on abolitionists who had broken with the Founders' Constitution by attacking slavery in the states and believed that the only hope for the preservation of the Union was a return to the Founders' Constitution.[22] Clark and her sister illustrate the extent to which ordinary Americans read and interpreted the Constitution for themselves.

[22] Mary Elizabeth Kephart Clark to Emily Kephart Kidwell Ross, Sept. 16, [1862?], Kephart and Kidwell Family Papers, InHS.



COMMENTARIES
ON THE
CONSTITUTION OF THE UNITED STATES;
WITH
A PRELIMINARY REVIEW
OF
THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES,
BEFORE THE ADOPTION OF THE CONSTITUTION.
By JOSEPH STORY, LL. D.,
DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY.
IN THREE VOLUMES.
VOLUME I.
BOSTON:
HILLIARD, GRAY, AND COMPANY.
CAMBRIDGE:
BROWN, SHATTUCK, AND CO.
1833.

A
FAMILIAR
EXPOSITION OF THE CONSTITUTION
OF THE
UNITED STATES:
CONTAINING
A BRIEF COMMENTARY
ON EVERY CLAUSE, EXPLAINING THE TRUE NATURE, REASONS, AND OBJECTS THEREOF; DESIGNED FOR THE USE OF SCHOOL LIBRARIES AND GENERAL READERS.
WITH
AN APPENDIX,
CONTAINING IMPORTANT PUBLIC DOCUMENTS, ILLUSTRATIVE OF THE CONSTITUTION.
BY JOSEPH STORY, LL. D.
DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY.
"This Government, the offspring of our own choice, uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers uniting security with energy, and containing, within itself, a provision for its own amendment, has a just claim to your confidence and respect." — *President Washington's Farewell Address to the People of the United States.*
BOSTON:
MARSH, CAPEN, LYON, AND WEBB.
1840.

FIGURE 0.1. Through his erudite *Commentaries on the Constitution* and his popular *Familiar Exposition of the Constitution* as well as several textbooks aimed at grammar school children, Associate Justice Joseph Story did more than any other scholar or jurist to shape the antebellum American understanding of the Constitution. (Joseph Story, *Commentaries on the Constitution of the United States* [Boston: Hilliard, Gray, and Company, 1833] title page, and *A Familiar Exposition of the Constitution of the United States* [Boston: Marsh, Capen, Lyon, and Webb, 1840], title page.)

As this book tells the story of how everyday Americans like Mary Clark and Emily Ross read, understood, interpreted, and remembered the Constitution, it relies heavily on personal manuscripts (letters and diaries) and newspapers – the two essential types of primary sources for non-elite opinion in the antebellum era. Unless mentioned in the notes, all emphasis was in the original sources. I have converted the underlines into italics, preserving the emphasis that antebellum Americans used in personal letters and diary entries. (Of course, I retained the original italics in books, pamphlets, newspapers, and magazines.) In the interest of clarity, I have made a few silent changes to the manuscript primary sources: adding or deleting commas, periods, question marks, semicolons, and

colons; capitalizing the beginnings of sentences; and substituting commas or periods for dashes. In the interest of readability, I have changed the initial letter of a quoted passage in all sources from lowercase to capital when I used it at the beginning of a sentence and vice versa regardless of where it appeared in the source quoted. I have tried to use "[*sic*]" only when necessity demands it. Lastly, I have cited the person's first name even if they signed their letters with their initials.[23]

One difficulty in studying ordinary Americans is determining their biographical details. Whenever possible I have used the manuscript census, archival finding aids, internal evidence from the manuscripts, city directories, genealogical materials, local histories, and other sources to determine the occupations, political orientations, and legal training (if any) of the everyday Americans like Mary Clark and Emily Ross that I have found commenting on how the sectional struggle over slavery was a constitutional conflict. For a complete list of the manuscript sources of the 227 ordinary and 40 elite antebellum Americans cited in this book, please see Appendices A and B. They are nearly evenly divided between the sections: 135 of them are Northerners and 132 of them are Southerners.

Of course, this book does not entirely avoid elite Americans. In fact, it should not inasmuch as some prominent historians, jurists, law professors, and politicians shaped the general understanding of the Constitution in the 1830s, 1840s, and 1850s. For the purposes of this book, elites are defined as law professors, judges, and politicians holding statewide or national office, such as state governors, US senators, and cabinet members. Joseph Story was just such a person. He was an Associate Justice of the United States Supreme Court and Dane Professor at Harvard Law School. Despite his conservative preference that ordinary Americans defer to elites, he wrote several popularizations of the Constitution – *Commentaries on the Constitution of the United States* (1833), *The Constitutional Class Book* (1834), and *A Familiar Exposition of the Constitution of the United States* (1842) – that went into multiple editions over several decades, exerting far more influence than any of his decisions on the highest court in the land or any of his lectures at the nation's leading law school. Indeed, publishers were keen to get their hands on Story's material because it was money in the bank. Story's

[23] Stephen Berry, ed., *Princes of Cotton: Four Diaries of Young Men in the South, 1848–1860* (Athens: University of Georgia Press, 2007), 25; Elizabeth Fox-Genovese and Eugene D. Genovese, *The Mind of the Master Class: History and Faith in the Southern Slaveholders' Worldview* (New York: Cambridge University Press, 2005), ix.

popularizations were widely read, not just by lawyers, jurists, and the like, but also by ordinary Americans, such as the US Navy midshipman who in 1839 used Story's *Commentaries* to defend himself against a second court martial on the grounds of double jeopardy. This book then is a peoples' history of the antebellum Constitution, slavery, and the sectional conflict.[24]

It would be a terrible irony for a book that tells the story of how ordinary Americans interpreted the Constitution to be written exclusively for specialists in constitutional law and antebellum history. While hoping to make a mark in academic circles, this book is aimed at the educated general reader with an interest in the Civil War and the Constitution. Accordingly, I explain technical terms in a list of terms and in the text itself.

Lastly, this book departs from conventional historical practice in two ways. First it explores many interrelated themes rather than telling a story in a linear narrative. Thus, the book's organization is thematic rather than chronological. This approach is applied even in individual paragraphs. Although some historians have defined the practice of academic history as *change over time*, some historical periods or least some aspects of those periods are marked by continuity rather than change: they are static rather than dynamic. I argue that the social history of the Constitution's impact on the sectional struggle over slavery is just that sort of historical phenomenon. Second, this book is unconventional in that it does not have historical figures – people if you like – in the leading role. Instead, the Constitution drives the narrative such as it is.

Chapter 1 examines how ordinary antebellum Americans cherished the Constitution for enshrining their "free institutions" of freedom of speech, press, and religion as well as representative democracy and local self-government. Indeed, Americans boasted that the Constitution had given them a form of government that was superior to any other in the world. At the same time that they gloried in the Constitution, mid-nineteenth-century Americans were divided by the Constitution. Slavery, more than any other issue, drove the division. Except for a tiny group of radicals,

[24] R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985), 301; Gerald T. Dunne, *Justice Joseph Story and the Rise of the Supreme Court* (New York: Simon & Schuster, 1970), 352; H. Jefferson Powell, "Joseph Story's Commentaries on the Constitution: A Belated Review," *Yale Law Journal* 94 (April 1985): 1285–1286; James Burns to Joseph Story, June 27, 1839 and Simon Greenleaf to Joseph Story, March 2, 1839, Joseph Story Papers, UMich.

antislavery Northerners believed the Constitution was either antislavery or at least neutral towards slave labor. Northern conservatives and some moderate Southerners held that the Constitution countenanced slavery and they accepted this as the price for a constitutional union of free states and slave states. Most white Southerners believed that the Constitution was avowedly proslavery. This three-way debate carried over to the lives and intentions of the Founders and the proper way to interpret their Constitution.

Chapter 2 focuses on the international slave trade clause and the fugitive slave clause. The Constitution permitted Americans to ply that "infamous traffic" for two decades, but the Founders hoped that American slavery would end after the slave trade ceased to supply new chattels. Instead, the American slave population expanded. Even though Congress made slave trading a form of piracy a few years later, a few Americans smuggled foreign-born slaves into the United States, while others transported African slaves to Cuba and Brazil. In the 1850s, a small band of fire-eaters tried to overturn the federal ban on the slave trade. In a couple of notorious cases, Southern juries refused to convict slave traders despite overwhelming evidence of their guilt. At the same time that these slave traders brought the slave trade clause to the fore, enslaved persons did the same for the fugitive slave clause, making it the most contentious of the Constitution's compromises over slavery. While all Southerners and many Northerners agreed that the return of fugitive slaves was a constitutional duty, some abolitionists shirked this obligation and a tiny minority actively flouted the law. Northern juries declined to convict slave rescuers. The actions of the slave rescuers and the slave traders called into question the commitment of the North and the South to the rule of constitutional law.

Chapter 3 looks at how the Southern minority used the three-fifths clause, the Electoral College, and parity in the Senate to protect itself from "tyranny" of the Northern majority. Even with the three-fifths clause, the South could not overcome the North's increasing population advantage. Nonetheless, the three-fifths clause's "slave bonus" did limit the South's losses in the House. While the South only briefly had a majority of seats in the Senate, its determination to have the number of slave states equal the number of free states ensured that the North would not have a majority. Both parity in the Senate and the three-fifths clause inflated the South's representation in the Electoral College. Of these two pro-slavery constitutional provisions, parity in the Senate provided greater protection to the South. Northerners understood only too well the political benefits the three-fifths clause and parity in the Senate conferred upon the South. Anti-

slavery advocates bristled at this, while conservatives believed it was the result of the Founders' grand plan. Both Northerners and Southerners realized that the three-fifths clause and parity in the Senate added to the difficulty of securing congressional approval of an anti-slavery amendment. In 1850, the South lost parity in the Senate, never to regain it. By 1860, the South was six senators behind the North.

Chapter 4 details how antebellum Americans followed the spirit as well as the letter of the Constitution. Conservative Northerners embodied the "spirit of 1787," aiding the Southern minority on matters relating to slavery when the explicit provisions of the Constitution were not sufficient. These conservative Northerners did their constitutional duty by providing sectional balance to proslavery presidential tickets, thereby giving the appearance that the South did not dominate the executive branch. In Congress, conservative Northerners also voted with Southerners on sectional bills, blocking antislavery measures and passing proslavery ones. The most important of these bills formed the grand sectional compromises: the Missouri Compromise, the Compromise of 1833, and the Compromise of 1850. These compromises gained the aura of de facto constitutional amendments. Unfortunately, these grand sectional compromises did not solve the constitutional problems raised by slavery; they only delayed the final reckoning. On the federal bench, Northern conservatives cast votes for and occasionally wrote proslavery decisions, including most notoriously *Dred Scott v. Sandford* (1857). Thus, all three branches of the government established by the Constitution were affected by the sectional struggle over slavery.

Chapter 5 demonstrates that the constitutional crisis over slavery reached the point of no return by 1860. Having no prospect of gaining majorities in Congress in the 1850s, the Southern minority came to believe that the presidency offered the main protection for their right to hold people as chattels. Thus, white Southerners were alarmed at the prospect of the election of Abraham Lincoln in 1860. They feared that his victory augured the beginning of a "dynasty" of antislavery presidents, who would slowly but surely abolish slavery by legislation, judicial challenge, constitutional amendment, or executive fiat. In response to the unprecedented event of the inauguration of an avowedly antislavery president, seven Southern states seceded. Citing compact theory, some Southerners claimed that secession was a constitutional right. In contrast, most Northerners rejected secession not just as unconstitutional but as an existential threat to the Constitution itself. These Northerners believed that the Constitution was a charter that had established a permanent

government. In the final analysis, the Constitution itself was of little help. It permitted ambiguous readings of the matters in dispute. If the constitutionality of secession was uncertain, then so was federal coercion of the seceded states. If the states could not secede, but the federal government could not compel them to return to the Union, then the only solution was compromise. As the previous grand compromises had not solved the constitutional disputes surrounding slavery, there was widespread agreement that a proper amendment was necessary. Unfortunately, the Constitution made passing an amendment exceedingly difficult in normal times and nearly impossible during a crisis.

The Epilogue shows the conclusion of the constitutional conflict over slavery. As the North was poised to exert control over all three branches of the federal government, Southerners called for additional safeguards in the form of constitutional amendments. Americans from all walks of life participated in the constitutional conflict over slavery. They read the Constitution. They made their own interpretations of its provisions. And they acted on their constitutional beliefs by supporting secession, compromise, or coercion. Once the constitutional conflict over slavery became a shooting war, they volunteered by the tens of thousands to take up arms and fight for their understanding of the Constitution. In the end, the Civil War afforded the North the opportunity to realize the Constitution's antislavery potential. In short order, Congress passed and the states ratified the Thirteenth Amendment (1865), which abolished slavery, and the Fourteenth and Fifteenth Amendments (1868 and 1870), which compelled the states to recognize the rights of their African-American citizens. After the Civil War, the Founders' Constitution was no more. In its place is the living Constitution that Americans have been expanding upon and improving ever since.

Acknowledgments

Writing a book is a lonely experience. Much of the time is spent sitting quietly in front of a computer screen. This truism is especially acute for historians inasmuch as before we take the seat before the computer, we have spent hundreds of equally lonesome hours in the archives, collecting, transcribing, and organizing the raw material of our book. Moreover, the historical profession does not encourage collaboration in the way that most other academic disciplines do. Despite the solitary nature of historical research and writing, I have benefitted from the encouragement, support, and assistance of many people.

Over the last seventeen years, I have spent twenty months in almost as many archives. As historians are only as good as the archivists and librarians who assist them (and the collections they administer), it is only fair that I give proper recognition to the archivists and librarians who assisted me. As my project focused on recovering the viewpoints of everyday Americans (rather than elites), it was particularly challenging to find relevant manuscript sources and thus my gratitude to those tireless professionals is correspondingly great. I would like to collectively thank the staffs of the Abraham Lincoln Presidential Library and Museum, the Filson Historical Society, the Historical Society of Pennsylvania, the Indiana Historical Society, the New-York Historical Society, the Manuscripts and Archives Division at the New York Public Library, the Maryland Historical Society, the Massachusetts Historical Society, the Missouri Historical Society, the Newspapers and Periodicals Room at the Library of Congress, the Rubenstein Rare Book and Manuscript Library at Duke University, the Small Special Collections Library at the University of Virginia, the South Caroliniana Library at the University of South

Carolina, the Southern Historical Collection at the University of North Carolina, the Virginia Historical Society, the William L. Clements Library at the University of Michigan, and the Wisconsin Historical Society at the University of Wisconsin. I regret that I cannot properly thank all of the librarians and archivists who have aided me. At the risk of omitting a few, I would like to single out several for commendation: Pat Anderson, Sarah Bouchey, Laura Brown, Taryn Cooksey, James Cornelius, Brian Cuthrell, Barbara DeWolf, Sam Fore, Henry Fulmer, Elaine Grublin, Tammy Kiter, Debbie Hamm, Shirley Harmon, Nelson D. Lankford, Clayton Lewis, Brenna McHenry, Becky Rice, Marc Thomas, Michael Veach, and Mark Wetherington.

As finding economical lodging within walking distance of the archives was my greatest challenge other than finding relevant documents from ordinary Americans, I thank various people who solved that problem for me: Jennifer Hannah of the Filson Historical Society for finding me lodging in the dorms of Spalding University; Brian Cuthrell of the South Caroliniana Library for putting me into contact with Tom Lekan, who generously allowed me to house-sit; James Green of the Library Company of Philadelphia for providing me with a room in the Mary Cassatt House; and Bruce Hall for kindly allowing me to house-sit his row-house in Fell's Point.

As researchers need good cheer as well as a place to stay, I would like to tip my hat to the Massachusetts Historical Society for inviting me to its Strawberry Festival and to the Clements Library for taking the time to have tea every day. Anne and James Cornelius, Tracy and Tyler Batten, Tina Cavaluzzi and Scott Heyward, and Jim and Tracey Sopp provided both hospitality and housing to such an extent as to completely cure my homesickness.

As researchers also need financial support, I would like to thank the institutions that assisted me in my travels and research. Eastern Washington University provided two summer faculty research grants, which afforded me the resources and time to conduct archival research. In addition, the Filson Historical Society's C. Ballard Breaux Visiting Fellowship, the Gilder Lehrman Institute of American History's Fellowship in American Civilization, the Maryland Historical Society's Lord Baltimore Research Fellowship, the North Caroliniana Society's Archie K. Davis Fellowship, and the Virginia Historical Society's Andrew W. Mellon Research Fellowship helped to defray the expense of traveling two and often three time zones and residing some place for a month or so to ransack various archives.

I would like to thank my friends and mentors at the University of Illinois for cultivating my interests in the Constitution, slavery, the Atlantic slave trade, the popular culture of the antebellum era, and intellectual history writ large. I owe my initial interest in the Constitution to Jim Sopp, my dorm-mate at Miami University, my roommate at the University of Illinois, and my friend, I hope, forever. I learned much about the Constitution and legal history as well as proper scholarly work ethic from my mentor Winton Solberg. In the course of my work as his Research Assistant, Daniel Littlefield introduced me to American slavery, the Atlantic slave trade to early national South Carolina (which was permitted by the international slave trade clause), and to my future wife, Stephanie Randall, who checked the *Charleston Daily Courier* (in microfilm) out to me four or five days a week for an entire school year. . My PhD advisor Robert Johannsen taught me to aspire to write with flair and to delve into antebellum popular culture. As a PhD student, my interest in the participation of ordinary Americans in intellectual or even scholarly debates culminated in the publication of a journal article that showed that tens of thousands of everyday Americans read about French physicist Jean-Bernard Léon Foucault's mechanical demonstration of the earth's diurnal rotation with his eponymous pendulum in 1851, hundreds (if not thousands) attended public performances of this experiment conducted by scientists, and dozens attempted to repeat the experiment themselves, arguing with scientists and other elites about whether or not the experiment really did prove that the earth turns. (It does.)[1] Of course, not all of the would-be experimenters got it right – in particular they did not account for the disturbing effects of air resistance on the pendulum's oscillation – but these Americans demonstrated their intellectual curiosity, their attention to current events, and their belief in a sort of egalitarianism in the arts, letters, and sciences. Lastly, my work with John Hoffmann in the Illinois Historical Survey assisting genealogists gave me the skills to identify the occupations, residences, political affiliations, and education of the two hundred and fifty Americans, ranging from cartmen and mechanics to Supreme Court justices and law professors, who made their own constitutional interpretations (and are listed in Appendices A and B). Thus, I was well positioned by my previous training and experiences to

[1] Michael F. Conlin, "The Popular and Scientific Reception of the Foucault Pendulum in the United States," *Isis: An International Review Devoted to the History of Science and Its Cultural Influences* 90 (June 1999): 180–204.

find, appreciate, and analyze the popular constitutionalism that is one of the main themes of this book.

Many people at Eastern Washington University and beyond have assisted me. President Mary Cullinan, Provost Scott Gordon, current College of Social Sciences Dean Jonathan Anderson, and former College of Social Sciences Dean Vickie Shields provided encouragement every step of the way. All six hundred or so EWU faculty made my job as president of the United Faculty of Eastern so easy that I could write a book in my spare time. EWU students Joel Martin, Nicole Montgomery, and Paul Warden transcribed photocopies of some archival manuscripts; Nick Weitzel transcribed many newspapers; and Ian Pettus provided crucial assistance in digitizing the illustrations. Although all of my colleagues in the History Department were supportive in one way or another, several deserve honorable mention for outstanding support. The members of the Works in Progress Symposium offered crucial early feedback from a non-specialized audience. Dick Donley, my predecessor as Civil War historian at Eastern Washington University and fellow "Little Giant," read the entire manuscript with a friendly but critical eye. In his characteristic way, Robert Dean carefully read the manuscript, encouraging me to enliven my prose, develop my scholarly argument, and raise my authorial voice. More than anyone else, I thank David May, Robert Owens, and Liping Zhu. David saved me from many errors – logical, grammatical, and constitutional. He has forgotten more about the Constitution than I will ever know. Liping suggested the topic, modeled the approach of combining political and social history in his own work, and provided unstinting encouragement. Not only did Robert read the entire manuscript, he also kindly served as my research assistant on the many occasions when his Revolutionary/Early Republic sources were exhausted at an archive, but the Antebellum/Civil War sources stretched on and on. It is rare indeed to have a research assistant whose book is on sale in the gift shop of the library in which you are working but that was my happy situation on several occasions when Robert read archival manuscripts and took notes for me. Moreover, I would like to thank the anonymous referees who offered extensive criticisms and suggestions, which sharpened my argument. Finally, I would like to thank Christopher Tomlins, the editor of Cambridge's Historical Studies in American Law and Society, who in addition to offering historical criticisms and suggestions also guided me through the publishing process. These generous scholars have saved me from egregious errors, dull digressions, and excessive examples (but not annoying alliteration). In short, they saved me from myself. Of course, I am responsible for what remains.

The talented staff at Cambridge University Press have assisted me every step of the way from accepting my prospectus to producing a beautiful scholarly monograph. They put the lie to the notion that a large scholarly press cannot provide personal attention to its authors and contributors. In particular, I want to thank Acquisitions Editor Debbie Gershenowitz and Editorial Assistants Kristina Deusch and Rachel Blaifeder for their tireless help, unstinting good cheer, and problem-solving attitude in shepherding this project. I could not have done it without them.

Lastly, I want to thank my family. For the contributions of my father Michael F. Conlin Sr. and my mother Carrie Conlin Royalty please see the dedication. My brother John Conlin, my sister-in-law Robin Conlin, my aunt Mary Ann St. Clair, my uncle Randy St. Clair, and my mother-in-law Betty Randall have encouraged me throughout the process in ways that are more meaningful and helpful than they probably realize. In addition to reading the entire manuscript and offering her own editorial commentary honed by her experiences as managing editor of the *Gonzaga Law Review*, Stephanie, my dear wife, also cheerfully endured my absence of twenty months spread throughout seventeen years in the archives, the last third compounded by the glorious arrival of our sons Devin Seamus and Eamon Patrick. She also allowed me to supplement the various research grants I was awarded with the Conlin family's own research grants on several occasions. Stephanie, Devin, and Eamon have given me much pleasant time away from the computer, showing me that there is much, much more to life than writing a book or toiling away in the archives – such as hiking on a lovely Pacific Northwest trail, listening to a beautiful piano recital, or watching a well-placed penalty kick.

Abbreviations

ALPLM	**Abraham Lincoln Presidential Library and Museum**, Springfield, Ill.
APS	**American Philosophical Society**, Philadelphia, Pa.
DukeU	Rubenstein Library, **Duke University**, Durham, NC
FHS	**Filson Historical Society**, Louisville, Ky.
HSP	**Historical Society of Pennsylvania**, Philadelphia, Pa.
InHS	**Indiana Historical Society**, Indianapolis, Ind.
MaHS	**Massachusetts Historical Society**, Boston, Mass.
MdHS	**Maryland Historical Society**, Baltimore, Md.
MoHS	**Missouri Historical Society**, St. Louis, Mo.
NYHS	**New York Historical Society**, New York City, NY
NYPL	Manuscripts and Archives Division, Astor, Lennox and Tilden Foundations, **New York Public Library**, New York City, NY
UMich	Clements Library, **University of Michigan**, Ann Arbor, Mich.
UNC	Southern Historical Collection, Wilson Library, **University of North Carolina**, Chapel Hill, NC
USC	South Caroliniana Library, **University of South Carolina**, Columbia, SC
UVA	Small Special Collections Library, **University of Virginia**, Charlottesville, Va.
VHS	**Virginia Historical Society**, Richmond, Va.
WHS	**Wisconsin Historical Society**, University of Wisconsin, Madison, Wis.

Terms

Amendment Clause: Article V of the Constitution outlines the two-step process of amendment. Before a proposed amendment can become a binding part of the Constitution it must first be endorsed by two-thirds supermajorities in each of house of Congress and then ratified by three-quarters of the states. An alternate method for sending a proposed amendment to the states for ratification is for the states to amend the Constitution without Congress by establishing a Convention – called an "Article V Convention" by modern scholars – by a two-thirds supermajority vote of the state legislatures. Thus far, no effort to convene an Article V Convention has succeeded. Article V's requirement of two separate supermajorities makes the United States Constitution among the most difficult – if not the most difficult – to amend of the world's constitutions.

Appointments Clause: Article II, Section 2 of the Constitution empowers the president to nominate, and, with the "Advice and Consent of the Senate," to appoint principal federal officers, including ambassadors and Supreme Court justices. Southern slaveholders feared that an

antislavery president might use the appointments clause to appoint abolitionists to federal offices and thereby use federal power to undermine slavery.

Broad Construction: The idea that the powers delegated to the federal government by the Constitution should be broadly or expansively interpreted to accomplish the general ends of government.

Colonizationists: Opponents of slavery who wanted former slaves and free black persons to be deported (with state, federal, or private assistance) to Africa or the Caribbean. Colonizationists accepted the racist premise that black and white Americans could not live harmoniously together in the United States on a basis of equality.

Comity Clause: See the **Privileges and Immunities Clause**.

Compact Theory: The idea that the Constitution is a contract between the states, and thus the states, not the federal judiciary, should determine whether or not the federal government overstepped the powers delegated to it by the Constitution.

Compromise of 1833: The grand sectional compromise that resolved the Nullification Crisis of 1832–1833. The Compromise of 1833 had two components: a piece of legislation passed by Congress that explicitly empowered President Andrew Jackson to use the militia to enforce the tariff in South Carolina and the Tariff of 1833, which gradually lowered the duties of the federal tariff over a ten-year period.

Compromise of 1850: The compromise that resolved the Crisis of 1850. It included a resolution of the Texas-New Mexico boundary, the Fugitive Slave Act of 1850, the end of the slave trade in Washington DC, and allowing the settlers of the western territories decide for themselves (popular sovereignty) whether or not to have slavery.

Conscience Whigs: Antislavery Whigs.

Construction: The act of interpreting the Constitution or a piece of legislation.

Cotton Whigs: Northern conservatives who supported slavery largely because they represented parts of the North with deep economic ties to the South, especially the parts of New England and the mid-Atlantic that had many cotton mills.

Crisis of 1850: The sectional crisis that was resolved by the Compromise of 1850. It involved the Texas-New Mexico boundary, slavery in Washington DC, fugitive slaves, and the westward expansion of slavery into the newly acquired territories from Mexico.

Domestic Institution: A widely used euphemism for slavery.

Domestic Violence Clause: Article IV, Section 4 of the Constitution requires the federal government, on the application of a state's legislature or governor, to protect it from "domestic violence" by free or enslaved insurgents. It was generally regarded by antebellum Americans as an assurance of federal assistance in suppressing slave revolts.

Doughfaces: An epithet for Northern conservatives, usually Democrats, who supported the South in sectional disputes, especially those over slavery but also the federal tariff and Indian removal. Doughfaces were called "Northern men with Southern principles" by their supporters. They played a crucial role in the South's ability to overcome its minority status in the House of Representatives and its parity in the Senate to pass proslavery legislation or to block antislavery legislation.

Due Process Clause: The provision of the Fifth Amendment of the Constitution protects Americans from being "deprived of life, liberty, or property without due process of law." Before the Civil War, most Americans believed that property held in humans was protected by this constitutional provision.

Excepting Clause: Article II, Section 2 of the Constitution permits the president to directly appoint "inferior Officers." Southern slaveholders feared that an anti-slavery president might use the excepting clause to appoint abolitionists to federal offices and thereby use federal power to undermine slavery.

Faithful Execution Clause: Article II, Section 3 of the Constitution charges the president with "tak[ing] Care that the Laws be faithfully executed." In fact, this is the primary responsibility of the president and it is the reason that this branch of the federal government is called the "Executive branch." It is sometimes called the "take care clause."

Federal District Clause: Article I, Section 8 of the Constitution gives Congress the "exclusive" power to pass legislation for a territory to house "the Seat of the Government of the United States." It made Washington DC one of the few places where Congress was empowered to end slavery, channeling the sectional conflict over slavery to the nation's capital.

Fire-Eater: Radical Southerners who called for **Nullification**, **Secession**, and the establishment of an independent Southern confederacy. They were also called "hotspurs."

First-Wave Abolitionist: Abolitionists who used petitions, lobbying, and other nonconfrontational methods to oppose and end slavery. They drew heavily on the Quakers and tended to be composed of elites. They were largely responsible for the abolition of slavery in the Northern states.

Flight-from-Justice Clause: See **Interstate Rendition Clause**.

Free-Soiler: A person who opposed the westward expansion of slavery.

Free Soiler: A member of the **Free Soil Party**.

Free Soil Party: An antislavery political party that ran on the platform of "no new slave states." Its goal was not to end slavery in the Southern states, but rather to prevent the westward expansion of slavery into the territories. The Free Soil Party ran presidential candidates in 1848 and 1852 and then was subsumed into the Republican Party in 1856.

Fugitive Slave Clause: Article IV, Section 2 of the Constitution requires states to return fugitive slaves to their states of origin. It was designed to ensure comity between the states and was a logical extension of the **Flight-from-Justice Clause**.

Garrisonian: A variety of **Second-Wave Abolitionist** who followed the precepts of William Lloyd Garrison, including nonviolence, nonparticipation in the political system, and Northern secession from the Union.

Guarantee Clause: Article IV, Section 4 of the Constitution requires the federal government to ensure that every state has "a Republican Form of Government," i.e., to prevent the establishment of a monarchy and to protect them from foreign invasion. Some abolitionists believed that slavery was not a republican form of government and they reasoned that the Guarantee Clause permitted the federal government to abolish slavery in the states.

Higher-Law Abolitionists: Opponents of slavery who believed that that the Bible forbade the return of fugitive slaves to their masters and pledged to follow the higher law – God's law – rather than the Constitution's fugitive slave clause.

Hotspur: See **Fire-Eater**.

Incorporation: See **Selective Incorporation**.

International Slave Trade Clause: Article I, Section 9 of the Constitution empowered Congress to prohibit the international slave trade after a period of twenty years and to tax slave imports. Under

its auspices, Congress passed and President Thomas Jefferson signed into law the Act Prohibiting the Importation of Slaves (1807), which went into effect on January 1, 1808. The slave trade clause was clear evidence that Congress could regulate and even abolish at least some aspects of slavery.

Interstate Rendition Clause: Article IV, Section 2 of the Constitution requires the states to extradite criminals to their states of origin. It was designed to ensure comity between the states and to prevent criminals from evading justice. Its general principles applied to fugitive slaves as well.

Judicial Power Clause: Article III, Section 2 of the Constitution empowers the federal judiciary to consider "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority." This is sometimes called the "federal question" jurisdiction of the courts. This broad remit enables the federal judiciary to weigh in on most constitutional matters, including the expansion of slavery into the western territories. It has been used to support the federal judiciary's power of **Judicial Review**.

Judicial Review: The power the US Supreme Court gave itself in *Marbury v. Madison* (1803) to review the constitutionality of actions taken by the president and federal laws passed by Congress. Although the Constitution does not explicitly grant this power to the federal judiciary it was commonly believed to be a logical extension of the **Judicial Power Clause.** Judicial review also was implied by the **Judicial Vesting Clause**. Of course, advocates of the **Compact Theory** believed it was the states not the federal judiciary that should determine the constitutionality of federal laws and presidential actions.

Judicial Vesting Clause: Article 3, Section 1 of the Constitution explicitly confers the "judicial Power of the United States" to the federal judiciary. Together with the **Judicial Power Clause**, the judicial vesting clause provides the constitutional justification for **Judicial Review.**

Jurisprudence: The acts of studying and interpreting the Constitution.

Kansas-Nebraska Act: An 1854 statute passed by Congress and signed into law by President Franklin Pierce which repealed the **Missouri Compromise**'s prohibition of slavery north of 36°30' in the Louisiana Purchase.

Liberty Man/Woman: A member of the **Liberty Party**.

Liberty Party: The first antislavery political party. Because of the refusal of the Whigs and Democrats to have anything to do with political abolitionism, moderate abolitionists formed a third party and ran a presidential ticket in 1840 and 1844, attracting a tiny fraction of the popular vote. It was loosely organized around general antislavery positions. In 1848 it merged with even more moderate opponents of slavery to form the **Free Soil Party**.

Living Constitution: The idea that the Constitution grows with the United States so that judges should use contemporary values and look to pragmatic results when interpreting various constitutional clauses. It is a variety of **Broad Construction**.

Loose Construction: A pejorative term for **Broad Construction**.

Meetings of Congress Clause: Article I, Section 4 of the Constitution stipulates that Congress meets on "the first Monday in December" – the only date it mandated on the federal calendar – but it did not set the date for congressional elections. Congress decided to hold its elections at the same time as the presidential election (the Tuesday after the first Monday in November) so there was a

thirteen-month lag between the election of a new Congress and its assumption of power.

Middle Passage: The trip a slave took from Africa to the New World. It was called the Middle Passage because it was the stage in between the slave's journey from capture in the African interior to the coast of Africa (or the banks of a major river) and their journey from the slave trader's ship to an American plantation.

Military Installations Clause: Article I, Section 8 of the Constitution gives Congress the exclusive power to pass legislation for federal installations in the states, including "Forts, Magazines, Arsenals, [and] dock-Yards." Slaveholders feared that antislavery majorities in Congress might try to undermine slavery inside the states themselves by passing legislation that would make these military installations havens for fugitive slaves.

Militia Clause: Article I, Section 8 of the Constitution empowers Congress to call for the militia "to execute the Laws of the Union, suppress Insurrections, and repel Invasions." In 1792, Congress passed the Militia Act which authorized the president to muster the militia when an invasion seemed imminent or an insurrection refused to stand down.

Missouri Compromise: The grand sectional compromise that resolved the issue of the westward expansion of slavery into the Louisiana Purchase and codified the practice of admitting free and slave states in pairs to maintain **Parity in the Senate**. The Missouri Compromise was comprised of three bills, all passed by Congress in 1820: one that admitted Missouri as a slave state, another that admitted Maine as a free state, and the last that divided the remainder of the Louisiana Purchase, along 36°30', into free and slave territory. President James Monroe signed these bills into law. The

Missouri Compromise was the first grand compromise and it assumed the aura of a de facto constitutional amendment.

Moderate Abolitionists: A variety of **Second-Wave Abolitionist** who advocated using the political system, the mainline Protestant churches, and the federal and state governments to end slavery. In 1840, moderate abolitionists split with the **Garrisonians**, disagreeing on the means to achieve the end of abolition.

Nullification: The idea that states could use their **Reserved Rights** to invalidate or suspend a federal law that the state determined to be unconstitutional. Nullification was a corollary of **Compact Theory**. The issue was first broached by the Virginia and Kentucky Resolutions of 1798 and 1799. In 1832, South Carolina nullified the federal tariffs of 1828 and 1832, precipitating a national crisis, which was only resolved by the **Compromise of 1833**.

Original Intent: The idea that when jurists interpret the Constitution they should try to determine what the authors of the text were trying to achieve and privilege that understanding over the text of the Constitution. Although it is often classified as a variety of strict construction, strictly speaking original intent jurisprudence is not an application of strict construction as it posits that the authors of texts sometimes do not write clearly. Unfortunately, many statutes as well as the Constitution were products of compromise where the authors had several different and sometimes mutually exclusive intents so that in practice original intent is difficult and sometimes impossible. Despite its name, the jurisprudence of original intent is not to be confused with **Originalism**.

Originalism: The idea that the Constitution's meaning is fixed at the time of its ratification in 1788. Originalism is the antithesis of the **Living Constitution**. It is a variety of **Strict Construction** inasmuch as both theories of constitutional interpretation take the text of the Constitution as their starting point. Despite its name, it is different from **Original Intent**.

Parity in the Senate: The effort by several generations of American statesmen to ensure that the number of slave states equaled the number of free states to ensure that the South was not reduced to minority status in the Senate. Parity in the Senate allowed the South to effectively check the Northern majority in the House of Representatives, preventing the North from using its legislative might to pass antislavery legislation or even an abolition amendment. Parity in the Senate began with the admission of Ohio (1803) and Louisiana (1812), was codified by the **Missouri Compromise** of 1820, and ended with the **Compromise of 1850**'s admission of California as a single free state.

Peculiar Institution: A widely used euphemism for slavery.

Presidential Oath of Office Clause: Article II, Section 1 of the Constitution enjoins the president to "preserve, protect, and defend the Constitution." The Constitution thus established the president, who, of course was commander-in-chief of the armed forces as the ultimate guarantor of the federal system in the event of a *coup d'état*, rebellion, or invasion that prevented Congress from declaring war.

Presidential Vote Clause: Article II, Section 1 of the Constitution gives Congress the discretion to set the date of presidential elections and the inauguration of the president. Congress chose the Tuesday after the first Monday in November for

presidential elections and March 4 for the inauguration of the new president. Thus, the Constitution established a system that allowed a four-month lag between the election of a new chief executive and his assumption of power.

Privileges and Immunities Clause: Article IV, Section 2 of the Constitution prohibits the states from discriminating against Americans from other states. It allows visitors to a state to have the same privileges and immunities as that state's own citizens. It is sometimes called the "comity clause."

Property Clause: See the **Territory Clause**.

Ratification Clause: Article VII of the Constitution determined that ratification by conventions of nine of the thirteen states was "sufficient for the Establishment" of the Constitution. Even though the Preamble states that "We the People" established the Constitution, the Ratification Clause relies on a three-quarters supermajority of the states to establish the Constitution.

Religious Test Clause: Article VI of the Constitution prohibits the use of any "religious Test" as a "Qualification to any Office" in the federal government. As most of the states imposed religious tests of some kind or another, this provision of the Constitution was leagues ahead of state practice.

Reserved Rights: The idea in **Compact Theory** that the **Tenth Amendment** reserved to the states all of the sovereign powers or "rights" they had not explicitly or implicitly delegated to the federal government via the Constitution. Although the Tenth Amendment reserved "powers" to the states, Americans commonly called these powers "rights." In the antebellum era, most Americans believed that one of the reserved powers or rights of the states was the regulation of domestic institutions, i.e.,

slavery. Some Southerners and even a few Northerners believed that **Nullification** of federal law and **Secession** from the Union were also among the reserved powers or rights of the states.

Rules and Expulsion Clause: Article I, Section 5 of the Constitution allows both the House of Representatives and the Senate to "determine the Rules of its Proceedings." The Framers left the development the day-to-day procedures for both houses of Congress to the congressmen and senators themselves. Many congressional policies are merely rules that could be changed by the respective house of Congress by simple majorities.

Secession: The act of a state formally leaving the Union. Secession is an implied constitutional right under the compact theory of the Constitution.

Second-Wave Abolitionists: Abolitionists who broke with the **First-Wave Abolitionists** over the means to the end of abolition. Second-wave abolitionists were part of a broad reform movement inspired by the Second Great Awakening. They used evangelical techniques in their denunciations of slaveholders as sinners and slavery as a sin.

Selective Incorporation: The mid-twentieth-century process by which the US Supreme Court, using the Fourteenth Amendment's equal protection clause and due process clause, incorporated the Bill of Rights, i.e., made the protections of the Bill of Rights apply to the states as well as the federal government. Incorporation is selective because the Supreme Court has incorporated the Bill of Rights clause by clause in separate decisions rather than issuing a blanket incorporation.

Slave Power: The antislavery conspiracy theory that slaveholders plotted, with the assistance of Doughface Democrats and Cotton Whigs, to not just protect slavery in the Southern states, but to impose slavery on the Northern states.

Southern Institution: A widely used euphemism for slavery.

Speaker of the House Clause: Article I, Section 2 of the Constitution simply states that the House of Representatives shall "chuse [*sic*]" its Speaker rather than having the president appoint one for it. Customarily, the election of a Speaker is the first order of business for the lower house of Congress. There is no requirement that a majority vote is necessary to elect a Speaker but that has been the general practice. Due to sectional tensions that prevented any candidate from receiving a majority vote, the House accepted a Speaker in 1856 that received only a plurality vote.

State Treaties Clause: Article 1, Section 10 of the Constitution prohibits the states from entering "into any Treaty, Alliance, or Confederation" as the power to conduct foreign policy was reserved exclusively to the federal government. Many Northerners believed that this constitutional provision prevented the South from forming the Confederacy.

Strict Construction: The idea that the powers the states and the people have delegated to the federal government by the Constitution should be strictly or narrowly interpreted to accomplish only those limited ends explicitly stated in the Constitution.

Supremacy Clause: Article VI of the Constitution states that federal law is the "supreme Law of the Land" so that if state law conflicts with federal law then federal law prevails.

Take Care Clause: See **Faithful Execution Clause.**

Taxing and Spending Clause: Article I Section 8 of the Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises."

Tenth Amendment: The Tenth Amendment of the Constitution reserves to the states those powers not explicitly or implicitly delegated to the federal government. These reserved powers were called **Reserved Rights**. In the antebellum era,

the Tenth Amendment was widely believed to have underlined the fact that the states still retained significant powers, including the regulation of domestic institutions, i.e., slavery. Some Southerners and even a few Northerners believed that **Nullification** of federal law and **Secession** from the Union were also among the reserved powers or rights of the states.

Territory Clause: Article IV, Section 3 of the Constitution empowers Congress to "dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States." Abolitionists and free-soilers believed that the territory clause permitted Congress to exclude slavery from the western territories; most Southerners believed that such an action would violate individual slaveholders' Fifth Amendment property rights and the individual states' **Reserved Rights** in the Tenth Amendment.

Textualism: The idea that when jurists interpret the Constitution they should use the ordinary meaning of the words of its text rather than the authors' intent. It is a variety of **Strict Construction**.

• **Three-Fifths Clause:** Article I, Section 2 of the Constitution counted enslaved people as three-fifths of free people for purposes of the apportionment of seats in the House of Representatives. It thus increased the political power of the South in the House, though it only did so modestly. The three-fifths clause also inflated the South's power on the Electoral College as each state's vote for president was the sum of its senators and representatives.

• **Treason Clause:** Article III, Section 3 of the Constitution defines the crime of treason as "consisting only in levying War" against the United States or "giving Aid and Comfort" to the "Enemies"

of the United States. In addition to this narrow definition the Constitution requires that a treason conviction must have the two witnesses to the "same Overt act." The Founders put such strict limits on a treason conviction because they were keen to ensure that the federal government did not abuse the crime of treason to persecute their political opponents rather than proper traitors. In this they were successful: to date fewer than thirty people have been convicted of treason.

- **Treaty Clause:** Article II, Section 2 of the Constitution requires that a two-thirds supermajority of the Senate was necessary to ratify a treaty negotiated by the executive branch. It is a classic example of separation of powers as it checks the president's power to conduct diplomacy. There was no parallel role for the House of Representatives in the treaty-making process. As the states not the people of the states were represented in the Senate before the ratification of the Seventeenth Amendment (1913), the treaty clause gave the states the means to check the power of the president.