Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution

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INTRODUCTION

James Madison’s defense of the Constitution’s treatment of slaves as part human and part property—less than a man by two-fifths—may surprise many readers. This is not The Federalist we’re used to seeing. Madison was responding to robust attacks on the Three-Fifths Clause that were published during debates on the ratification of the Constitution.2

2. Brutus, for example, complained that counting slaves violated the spirit of the American Revolution, as well as republican principles of representation:

If [slaves] have no share in government, why is the number of members in the assembly, to be increased on their account? . . . By this mode of apportionment, the representatives of the different parts of the union, will be extremely unequal; in some of the southern states, the slaves are nearly equal in number to the free men; and for all these slaves, they will be entitled to a proportionate share in the legislature—this will give them an unreasonable weight in the government, which can derive no additional strength, protection, nor defence from the slaves, but the contrary. Why then should they be represented?
Presenting the views of “our Southern brethren,” Madison made several arguments in response to criticisms of the Three-Fifths Clause. First, Madison described the status of slaves under the laws of the slave states:

The true state of the case is that they partake of both these qualities: being considered by our laws, in some respects, as persons, and in other respects as property.... The federal Constitution, therefore, decides with great propriety on the case of our slaves, when it views them in the mixt character of persons and of property. This is in fact their true character. It is the character bestowed on them by the laws under which they live; and it will not be denied that these are the proper criterion....

Furthermore, since the same three-fifths ratio was used in calculating taxation, Southern states would not agree to be burdened by counting slaves for tax purposes without a corresponding benefit in representation:

It is agreed on all sides that numbers are the best scale of wealth and taxation, as they are the only proper scale of representation. Would the convention have been impartial or consistent, if they had rejected the slaves from the list of inhabitants when the shares of representation were to be calculated, and inserted them on the lists when the tariff of contributions was to be adjusted? Could it be reasonably expected that the Southern States would concur in a system which considered their slaves in some degree as men when burdens were to be imposed, but refused to consider them in the same light when advantages were to be conferred?

Madison also argued that it was proper to apportion representation in part based on wealth:

After all, may not another ground be taken on which this article of the Constitution will admit of a still more ready defense? We have hitherto proceeded on the idea that representation related to persons only, and not at all to property. But is it a just idea? Government is instituted no less for protection of the property than of the persons of individuals.

Madison’s response failed to answer, however, why only slave property and not other forms of property would count toward representation. The inclusion of slave property as a basis for representation was a major flaw in republican theory and was recognized as such both during the Constitutional Convention and during ratification debates. Madison’s justifications in Federalist No. 54 have been described appropriately as “pretextual” (p. 136), since, as this Review discusses below, they had little to do with the reasons why slave property was protected under the Constitution.


3. The Federalist No. 54, at 304 (James Madison) (Clinton Rossiter ed., 1961). Madison, a landowner and slaveholder in Virginia, was one of the “Southern brethren” in whose name he purported to speak.

4. Id. at 305.

5. Id. at 305–06.

6. Id. at 307.
Federalist No. 54 shows that part of Madison's public defense of the Constitution included the defense of some of its proslavery provisions. Madison and his reading public were well aware that aspects of the Constitution protected slavery. These aspects of the Constitution were publicly debated in the press and in state ratification conventions.

Just as the Constitution's protections for slavery were debated at the time of its framing and ratification, the relationship between slavery and the Constitution remains a subject of debate. Historians continue to debate the centrality of slavery to the Constitution. The majority position among historians today appears to be that the Constitution was proslavery, in the sense that slavery and slavery protection played a central role in the formation of the Constitution. Furthermore, these historians argue that several of its provisions protected and promoted slavery. As George Van Cleve, the author of A Slaveholders' Union, concludes, the Constitution "was pro-slavery in its politics, its economics, and its law" (p. 270).

Despite this majority position among historians, the authors of constitutional law casebooks sometimes ignore or, more generally, minimize the proslavery interpretation of the Constitution. Certain casebook authors, while acknowledging the importance of slavery before and after the Constitution's ratification, adopt a more benign interpretation of the Constitution itself as "neutral" on slavery. Accordingly, a significant divergence exists between the proslavery interpretation held by many historians and the interpretation promulgated by many constitutional law casebook authors. As this Review explores, the failure of many constitutional law casebooks to engage prominently with the proslavery interpretation of the Constitution has important consequences for our understanding of the relationship between

8. See Don E. Fehrenbacher with Ward M. McAffee, The Slaveholding Republic 39 (2001) [hereinafter Fehrenbacher with McAffee, The Slaveholding Republic] ("[T]he view of the Constitution as culpably proslavery ... has gained wide acceptance in modern historical scholarship."); Matthew Mason, Book Review, 42 J. INTERDISC. HIST. 309, 309 (2011) (reviewing A Slaveholders' Union) ("Van Cleve, along with the majority of current scholars, thus places slavery at the heart of the Founding of the United States, in no instance more so than the Constitution ... ."). For contemporary scholarship interpreting the Constitution as proslavery, see Richard Beeman, Plain, Honest Men: The Making of the American Constitution 333-36 (2009); Paul Finkelman, Slavery and the Founders (2d ed. 2001); Waldstreicher, supra note 7; and James Oakes, "The Compromising Expedient": Justifying a Proslavery Constitution, 17 CARDOZO L. REV. 2023 (1996). Of course, there are other points of view, such as that expressed by Don Fehrenbacher, that the Constitution was essentially neutral on slavery: "[T]he Constitution as it came from the hands of the framers dealt only minimally and peripherally with slavery and was essentially open-ended on the subject." Fehrenbacher with McAffee, The Slaveholding Republic, supra, at 47; see also Don E. Fehrenbacher, The Dred Scott Case 26-27 (1978) [hereinafter Fehrenbacher, The Dred Scott Case] (arguing that slavery was peripheral to the Constitution).

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slavery and the Constitution and our understanding of how these origins of the Constitution may make a difference today.\textsuperscript{10}

Part I of this Review considers George Van Cleve’s \textit{A Slaveholders’ Union} and describes his contributions to our understanding of the proslavery origins of the Constitution. Part II then explores how leading constitutional law casebooks treat the proslavery origins discussed by Van Cleve. Part III discusses some of the many historical sources that could be used in casebooks to expose readers to the evidence of the proslavery Constitution. Finally, Part IV examines the significant difference that a proslavery interpretation of the Constitution makes in our understanding of how the Constitution structures race relations and racial inequality, past and present.

\section*{I. Establishing the Proslavery Constitution}

Van Cleve’s \textit{A Slaveholders’ Union} is a meticulously researched account of the proslavery Constitution’s creation. Van Cleve identifies two powerful forces that shaped the Constitution. First, slaveholders wielded considerable power to shape the law to protect their slave property.\textsuperscript{11} Second, Northern support for abolition was limited, constrained by Northern racism, property interests, and unwillingness to bear the costs of abolition.\textsuperscript{12} The importance that Van Cleve gives to both of these forces in shaping the Constitution is contrary to general understanding but consonant with the importance of slavery in early America.

Slavery was a central economic institution in the American colonies, particularly in the South (p. 22). By 1770, slaves accounted for 30 percent of Southern wealth, a proportion roughly equivalent to the value of the land in Southern colonies themselves (p. 23). By contrast, slaves accounted for less than 1 percent of wealth in the New England colonies (p. 23).

Van Cleve demonstrates that the relatively wealthy Southern slave states were able to exert considerable influence on the Articles of Confederation (p. 41). The “[s]lave states insisted that the Confederation should have no power to control slavery or slave property, even to support the war effort” (p. 45). Their insistence was effective, even dispositive, because of credible threats by Southern delegates of “an end of the confederation” in response

\textsuperscript{10} For an excellent treatment of the role of slavery in the Constitution and American law, see \textit{Slavery and the Law} (Paul Finkelman ed., 1997). In particular, see Paul Finkelman, \textit{The Centrality of Slavery in American Legal Development}, \textit{Introduction to Slavery and the Law}, \textit{supra} at 3, and Sanford Levinson, \textit{Slavery in the Canon of Constitutional Law}, \textit{in Slavery and the Law}, \textit{supra} at 89, arguing that slavery should be a major topic in constitutional law courses. This Review makes the closely related but different point that the proslavery origins of the Constitution, and their ramifications, should also be a major subject of study in constitutional law.

\textsuperscript{11} See, e.g., pp. 45, 48–49, 104–05.

\textsuperscript{12} See, e.g., p. 60.
to Northern delegates’ attempts to tax slaves or limit slave imports. Slavery thus had enormous influence on the Articles of Confederation (p. 57).

Van Cleve then describes the politics of abolition and manumission in the North and the South preceding the Constitutional Convention (pp. 62–99). Since slavery was a minor feature of the New England economy, white nonslaveholders controlled the balance of political power in many Northern states. They limited severely the scope, speed, and economic investment of the North in black freedom and equality. Van Cleve portrays the motivations of Northern white nonslaveholders as follows:

They supported abolition for various reasons, but most supported it only if they could be assured that they would bear none of its economic or social costs. Many northern white citizens, even those who opposed slavery, were either racists who were hostile to blacks or indifferent to their fate, or viewed free blacks, like the rest of the poor, as unwanted economic and social burdens. Many whites who were antislavery also believed that any responsibility that their states had toward blacks ended at the state boundaries. . . .

Northern majorities were unwilling to support either state or national government expenditures or other political trade-offs needed to limit slavery outside their borders. (p. 60)

Politically the stage was set for the proslavery compromises forged during the Constitutional Convention. The South was deeply committed to slavery for economic and cultural reasons. The North, though generally opposed to slavery, was unwilling to pay the economic and social costs of abolition outside the borders of Northern states.

In Part Two of *A Slaveholders' Union*, Van Cleve describes the sectional economic interests and politics underlying the major proslavery provisions, including the three-fifths compromise over representation in the House, the limitation on congressional commerce power to ban slave imports, and the Fugitive Slave Clause (pp. 114–72). Van Cleve argues convincingly that the Three-Fifths Clause was a compromise intended to secure additional political representation for representatives of Southern slave states, thus enabling them to better protect their slave property from possible political challenges by antislavery Northerners (pp. 127–28). Southerners had no interest in changing the status quo of the Articles of Confederation with respect to slavery (pp. 104–05). Rather than paper promises in the Constitution, “political protection directly through representation was the most important protection that could be provided by the Constitution to the Southern states or any other distinct interest” (p. 125). As Van Cleve describes the compromise, “In adopting the three-fifths clause, the delegates understood that they were agreeing to a compromise based on sectional wealth representation intended to protect slave property” (p. 124).

13. Pp. 48–49. Van Cleve also reviews abolition efforts in several Northern states and manumission efforts in Southern states. Chapter 2. He concludes that “Northern citizens demonstrated as they moved toward abolition that they were unwilling to pay any of the economic costs of black freedom in their own states, let alone elsewhere.” P. 99.
Basing representation in significant part on slave wealth, however, was in tension with theories of republicanism, as was recognized during the Constitutional Convention and ratification (pp. 123–24, 134–36). Nonetheless, delegates to the Convention chose the pragmatic over the conceptually coherent: "Convention agreement centered around a willingness to structure representation based on perceptions of political security and acceptance of wealth as a basis for representation, rather than abstract adherence to a conception of republican philosophy limiting representation to free men on an equal basis" (p. 133).

Sectional bargains between the North and the South yielded the Constitution's other slavery-protective provisions, including the slave import limitation and the Fugitive Slave Clause. Van Cleve shows that the slave import limitation was part of a bargain between delegates from New England and the Deep South. Northern delegates sought a national commerce power that could be exercised with a simple majority vote rather than a higher voting threshold, which could permit a sectional veto. Such a commerce power was of crucial importance to New England's shipping and trading economy and central to managing interstate and foreign trade. In exchange for supporting that commerce power, the South received an explicit promise in the Constitution that the power would not be exercised to limit the slave trade prior to 1808, a twenty-one-year period that guaranteed ample time for additional slave importation not just in slave states like Georgia and South Carolina but also, as delegates knew, to the expanding American West (pp. 146–50). In addition, pursuant to the increased representation guaranteed by the Three-Fifths Clause, the South retained political power to oppose any proposed limitation in the future (p. 151). As Van Cleve concludes, "In the commerce-power-slave-import bargain, New England and the Deep South each protected what they deemed their paramount economic interest in the framing of the Constitution" (p. 150).

Interestingly, in the ratifying conventions, the slave import limitation was argued in two ways, depending on the audience. In the North, the Clause was argued as a new federal power to contain the slave trade, which portended the demise of slavery. In the South, by contrast, it was argued as a semipermanent guarantee against federal intervention in the slave trade during the critical first two decades of southwestern expansion (p. 178).

Similarly, Van Cleve argues that the Fugitive Slave Clause was of considerable importance to the Constitution's enactment, though relatively uncontroversial. The lack of controversy reflected the fact that the Clause was "a consensus means of controlling fugitive slavery that served the congruent sociopolitical interests of various states" (p. 168). Northern states supported the Clause because it "prevented an influx of runaway slaves whose presence white taxpayer majorities often either objected to on racist grounds or believed would result in unwanted social costs" (p. 172). For the Southern slave states, the Clause represented a significant gain: explicit con-

15. P. 178; see also THE FEDERALIST, supra note 3, No. 42 (James Madison).
stitutional protection for their slave property, without which they might have been unwilling to enter into the compact (p. 172).

After the Constitution's enactment, "slavery expanded between 1790 and 1808 with the affirmative support or acquiescence of the federal government" (p. 188). A 1790 congressional debate over slavery, and the corresponding House report, showed that "both the Constitution's text and the sectionally balanced political structure it created effectively constrained the contest over slavery" (p. 202). Congress supported the expansion of slavery by passing the 1793 Fugitive Slave Act, which passed with "overwhelming support from all regions of the country" (p. 204). Both the North and South had interests in discouraging fugitive slaves and in establishing a clear legal mechanism for slave retrieval (pp. 204–05). In addition, Congress and President Jefferson "opened the floodgates to southwestern slavery" in legislation for the vast Louisiana Territory.16

The sectional interests in slavery's expansion westward appeared with great clarity during the debates on the Missouri Compromise in 1820. Missouri was controversial because "for the first time the national debates over slavery expansion concerned territory that large numbers of Northern free settlers and slaveholders both wanted to settle" (p. 232). Northerners wanted to restrict slavery in Missouri because slavery discouraged population by free white labor (pp. 232–33). Southerners argued that it was unfair to restrict slavery and discourage Southern emigration (p. 233). The controversy over Missouri was part of a sectional power struggle, as Northerners feared increasing Southern control of the Senate through the admission of additional slave states (pp. 238–39). The debates over Missouri revealed the North's and South's divergent and ultimately irreconcilable visions of the United States:

In one conception, the Union was a progressively improving nation seeking unified moral ends, based on a constitution founded on and subordinate to a religiously grounded (or ethically universalist) higher law. In the other, the Union was a political union of states dedicated to preserving political and moral freedom, based on a constitution founded only on popular consent and federalism principles that tolerated moral diversity even on evils such as slavery. (p. 256)

In addition, Van Cleve sheds light on the nature of Northern antislavery action: "[T]he primary purpose of antislavery action was to destroy slavery as a repressive labor status in order to foster an emerging white free-labor regime and encourage white western settlement, not to increase black civil rights" (p. 257). Van Cleve describes how antislavery rhetoric in Northern states was accompanied by simultaneous efforts to disenfranchise free blacks and to deny them resettlement (pp. 260–65). Divided in their struggle over slavery in Missouri, both the North and the South were able to agree that "full citizenship in the American republic was for whites only" (p. 265).

16. P. 222; see also pp. 211–23.
Van Cleve concludes that the Constitution was proslavery in its intent and its results. He describes the relationship between slavery and the Framers’ Constitution as follows:

[S]lavery emerged from the Convention not only intact, but with a constitutionally protected political and legal path for its growth, a path widened by critically important sectional economic-development bargains. The result was a slaveholders’ union. The Constitution’s formal and informal protections for slavery resembled a broad and well-built canal through which a growing river of slave labor could flow unimpeded. (p. 179)

Van Cleve’s A Slaveholders’ Union makes an important contribution to understanding the proslavery Constitution, from its origins to its results in the first generations of nationhood. Several features of Van Cleve’s book stand out. His exhaustive research enables him to make more detailed and persuasive arguments than some other accounts of the proslavery Constitution.

Van Cleve expertly sketches out the political and economic factors that led the Framers to create a proslavery Constitution. Chief among these factors were the different sectional economic interests of the Southern states and Northern states. Both sections were intent on protecting their current and future economic and political power. In the case of the slave states, this meant providing political and legal protections for slavery—protections that yielded the proslavery Constitution. Similarly, Van Cleve skillfully demonstrates that Northern abolitionism was grounded primarily in economic self-interest and in racism. As such, most Northerners could acquiesce in forming a political union with states committed to perpetuating the evil of black slavery. In the end, the Constitution was a political, not a moral, union, more like an economic treaty or compact than a rule of law (pp. 265–66).

II. CONSTITUTIONAL LAW TEXTS AND THE PROSLAVERY CONSTITUTION

Based on the evidence surrounding the drafting of the Constitution and developments subsequent to its adoption, Van Cleve interprets the Constitution as proslavery. He concludes that “[t]he Constitution was an obstacle to ending black slavery in America. It was proslavery in its politics, its economics, and its law” (p. 270). Other scholars, including Paul Finkelman, have reached similar conclusions about the Constitution’s inherent proslavery nature. The interpretation of the Constitution as proslavery appears to be the interpretation of a majority of historians.

17. See, e.g., FINKELMAN, supra note 8; WALDSTREICHER, supra note 7.

18. See Mason, supra note 8 (reviewing A Slaveholders’ Union and describing the majority view).
Some historians, on the other hand, have offered more benign interpretations of the Constitution.19 Some accounts downplay the significance of slavery altogether in the Constitution. Some historians emphasize the Constitution as a compromise with proslavery results. Other historians rely on the Constitution's ambiguous language, such as its references to "persons" even in its slavery-protective provisions, to argue for the Constitution's essential neutrality regarding slavery.20

Given a range of possible interpretations of the Constitution's relation to slavery, it is interesting to examine the treatment that constitutional law texts give to the Constitution. Since the Constitution is our foundational and supreme law, one would reasonably expect that constitutional law casebooks would discuss the origins of the Constitution and slavery's role in those origins. One would also expect that constitutional law casebooks would take seriously the proslavery interpretation of the Constitution, discuss that interpretation, and explore its implications for constitutional law. Yet no leading constitutional law casebook treats the proslavery origins of the Constitution with the seriousness that slavery's role deserves.

Casebooks vary widely in their willingness to acknowledge and engage with this material. Some books include little, or nothing at all, on the importance of slavery to the Constitution.21 Some books provide a short introductory paragraph or two on slavery and the Constitution but then fail to develop the implications of the issue.22 Others, while doing a better job of describing the constitutional protections for slavery and subsequent proslavery decisions of the Supreme Court, do not give the proslavery nature of the original Constitution the centrality that it deserves.23 This Review examines the treatments of the proslavery Constitution in several leading constitutional law casebooks:24 those authored by Kathleen Sullivan and Gerald

19. See Waldstreicher, supra note 7, at 161-68 (describing the range of interpretations of slavery’s role in the Constitution).

20. See, e.g., Fehrenbacher, The Dred Scott Case, supra note 8, at 26-27 (arguing that slavery was peripheral to the Constitution); Fehrenbacher with McAfee, The Slaveholding Republic, supra note 8, at 47; see also Herbert J. Storing, Slavery and the Moral Foundations of the American Republic, in Slavery and Its Consequences 45, 51 (Robert A. Goldwin & Art Kaufman eds., 1988).

21. See, e.g., Kathleen M. Sullivan & Gerald Gunther, Constitutional Law (17th ed. 2010) (failing to discuss the importance of slavery to the Constitution at all); William Cohen et al., Constitutional Law 21 (12th ed. 2005) (discussing the importance of slavery to the Constitution in one sentence).


24. My sense of the leading constitutional law casebooks comes from discussions with representatives of Aspen Law publishing and Thomson/West publishing, who generally agree on the most widely adopted casebooks. The top three appear to be those written by Sullivan and Gunther, Chemerinsky, and Stone et al.
Despite the wealth of evidence of the proslavery Constitution marshaled by Van Cleve and others, the Sullivan and Gunther book continues to ignore how slavery influenced the Constitution. Its discussion of race occurs in chapters on equal protection and the Reconstruction Amendments. The authors write, “In its historical origins, the Equal Protection Clause was directed at racial discrimination against African-Americans.” The book then describes early Supreme Court interpretations of the Fourteenth Amendment and the development of racial segregation. Describing the Reconstruction Amendments, the authors write, “[T]he post-Civil War additions ... were born of a special concern with racial discrimination ...”

The problem with these characterizations is that the authors provide absolutely no discussion of slavery or the Constitution’s role in promoting slavery. This is a stunning omission for which these authors have been criticized before. By ignoring the evidence supporting Van Cleve’s conclusion that the Constitution was “proslavery in its politics, its economics, and its law” (p. 270), the authors suggest that slavery was irrelevant with regard both to the Constitution and the Reconstruction Amendments. In addition,

25. SULLIVAN & GUNTHER, supra note 21.
26. CHEMERINSKY, supra note 23.
27. STONE ET AL., supra note 23.
28. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (5th ed. 2006). I add Brest et al. because of its unusual and extensive coverage of the Constitution and slavery, though not of the proslavery origins of the document. Two more recent books laudably provide extensive coverage of slavery and the Constitution. See RANDY E. BARNETT, CONSTITUTIONAL LAW 23-24, 172-228 (2008) (featuring a brief discussion of slavery at the Constitutional Convention and an extensive section covering Prigg, Dred Scott, and contemporaneous critical commentaries on fugitive slaves and Dred Scott); MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES, at vii, 83-99, 841-98 (2010) (giving significant attention to arguments over slavery and offering a good selection of important cases concerning slavery and its implications, including Prigg and Dred Scott). It is highly salutary to see recent constitutional law casebooks engaging seriously with slavery and its implications in constitutional law. I hope they will also engage with evidence of the proslavery origins of the Constitution.
30. SULLIVAN & GUNTHER, supra note 21, at 500.
31. Id. at 693.
32. The only mentions of slavery are a quotation from the Slaughterhouse opinion regarding “the freedom of the slave race,” a mention of “formal slavery,” and a quotation from the Civil Rights Act of 1866 describing “any previous condition of slavery.” Id. at 694 (internal quotation marks omitted). These mentions occur without any description or discussion of slavery.
33. Finkelman, supra note 29, at 268.
by omitting slavery the Sullivan and Gunther book provides no basis for understanding why the Reconstruction Amendments were necessary or what they were meant to correct. Although literally true, it is misleading to characterize the Reconstruction Amendments as responses to "racial discrimination," a description that suggests that slavery was no worse than some current concept of racial discrimination. Teachers and students using these materials could easily conclude that slavery was not so bad, and that it certainly wasn't of major significance in the Constitution or constitutional law. Both conclusions would be profoundly wrong.

Unlike the Sullivan and Gunther book, the Chemerinsky book adopts a conclusion similar to Van Cleve's—that the Constitution was proslavery, albeit in an abbreviated and conclusory fashion. Chemerinsky describes the constitutionality of slavery prior to the Thirteenth Amendment, and he lists four salient constitutional provisions that protected slavery. He also gives a brief description of the proslavery politics of the Constitution and its Framers:

Southern states simply would not have accepted a Constitution that abolished slavery. Additionally, many of the most influential drafters at the Constitutional Convention were slave owners. For example, such prominent framers as George Washington, James Madison, and John Rutledge all owned slaves. The result was a Constitution that protected the institution of slavery.

Chemerinsky continues by describing the judiciary's support for slavery, including the Supreme Court's decision in Prigg v. Pennsylvania. Finally, Chemerinsky concludes as follows:

The importance of slavery as a social and political issue during this time period cannot be overstated. Every discussion of the relationship between the federal and state governments was directly or indirectly about the slavery question. It was the central dispute of the time and affected almost all other issues.

While Chemerinsky's account of the proslavery Constitution is abbreviated, it shows that much important information can be conveyed in slightly over one page of a casebook. Space limits, therefore, are not a good excuse for not including this material.

34. Chemerinsky, supra note 23, at 749.
35. Id.
36. Id. (discussing Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842)). In Prigg v. Pennsylvania, the Supreme Court struck down a Pennsylvania statute that made the removal of a fugitive slave from the state, for purposes of reenslavement, a crime. 41 U.S. (16 Pet.) 539, 625-26 (1842). The Court interpreted the Fugitive Slave Clause as creating "a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control, or restrain." Id. at 612. The Court also upheld the Fugitive Slave Act of 1793, reasoning that Congress had an exclusive, implied power to enforce the Fugitive Slave Clause. Id. at 616-22.
37. Chemerinsky, supra note 23, at 750.
A significant problem with Chemerinsky's abbreviated treatment of the proslavery Constitution is its relatively remote placement in the book. Chemerinsky places his powerful note on pages 749–50 of his text, in a subsection under equal protection titled "Classifications Based on Race and National Origin." While his choice of placement certainly makes some sense, it belies somewhat Chemerinsky's own recognition of this material's importance. I agree that the importance of slavery "cannot be overstated," and that it was the "central dispute of the time," which "affected almost all other issues." In a casebook on the Constitution and its law, it probably doesn't make sense to bury these insights on page 749 of the text, where many students may never encounter this material. Chemerinsky's straightforward, though overly brief, treatment is a dramatic improvement over the Sullivan and Gunther book.

The Stone et al. book features more coverage of slavery and the Constitution than Chemerinsky. The book includes an entire section on slavery titled "Slavery, Jim Crow, and the Equal Protection Principle," which includes an extensive treatment of the pre–Civil War protection of slavery. The authors first quote three of the Constitution's major slavery-protective provisions. In addition, they provide an excerpt describing how Southern slave owners influenced the Constitutional Convention and its conclusion to place slavery beyond national regulation. They also describe in detail the judicial protection of slavery, including Prigg. This section also features a slave case from New Jersey, State v. Post. In notes, the authors make important points regarding slavery and the protection of slavery in the original Constitution. However, like Chemerinsky, the authors of the Stone et al. text bury these observations at pages 442 through 446 of their book.

Although the Stone et al. book provides materials on slavery and its constitutional protection, it is surprising that these materials are not discussed at all in their lengthy discussion under the heading of "The Origins of the Constitution." This section contains excerpts from Madison's memorandum describing problems with the Articles of Confederation, excerpts from Federalist Nos. 10 and 51, and explanatory notes on debates over the Constitution and various aspects of Madisonian republicanism.

38. Id. at 748.
39. Id. at 750; see also Finkelman, supra note 29, at 261 (reaching similar conclusions).
41. Id. at 442–43.
42. Id. at 443–45 (presenting excerpts from State v. Post, 20 N.J.L. 368 (N.J. 1845)). In Post, Judge Nevius decided that slavery had not been abolished in New Jersey despite a provision in the state's constitution of 1844 that declared that "all men are by nature free and independent." State v. Post, 20 N.J.L. 368, 372 (N.J. 1845) (internal quotation marks omitted).
43. Stone et al., supra note 23, at 8–29.
44. The authors describe well why the use of The Federalist Papers to understand the "Framers' intention" is problematic: "Although the papers are often consulted as a means of understanding the theory underlying the Constitution, and the 'intentions' of its drafters, it is important to keep in mind that the essays were in many respects propaganda pieces, designed to persuade the ambivalent." Id. at 14.
Ignoring the proslavery interpretation of the Constitution and their own discussion of the slavery-protective provisions of the Constitution, nowhere in this account of the Constitution’s origins do the authors mention the preservation of slavery as one of the central concerns during the debate over the Constitution. The book implicitly posits republican theory as the only driving force behind the Constitution rather than—as Van Cleve demonstrates—hard economic bargaining between the North and the South and Southern insistence on political and constitutional protection for slavery. In addition, the authors neglect to mention that the counting of slave property for purposes of representation constituted a major flaw in republican principles.

Notwithstanding these authors’ recognition of slavery as an important issue during the Constitutional Convention, they are unwilling to identify slavery protection as an origin of the Constitution. Rather than taking a position on whether the Constitution is proslavery, they ask the following question: “Do these [slavery-protective] provisions make the Constitution a pro-slavery document?” This is a crucial question to ask and for students to consider. The authors could encourage a more informed consideration of this question by presenting Van Cleve’s conclusion that the Constitution was proslavery or by including more materials on slavery’s role in the origins of the Constitution.

Another leading casebook is authored by Brest et al. This book contains the most extensive and well-integrated discussion of slavery and constitutional law and thus deserves special mention. A brief introductory note discusses, among other aspects of the Constitution, the Three-Fifths Clause, the slave import limitation, the Fugitive Slave Clause, and Northern objections to these slavery-protective provisions. The book’s section on the Taney Court contains a forty-nine-page subsection on slavery and features excerpts from Prigg and Dred Scott v. Sandford, as well as responses to Dred Scott by Frederick Douglass and during the Lincoln-Douglas debates. Additional discussions of slavery occur in other parts of the book as well.

In their textual note discussing Dred Scott, the authors engage the proslavery interpretation of the Constitution advocated by Van Cleve. They explore the possible correctness of Chief Justice Taney’s proslavery interpretation of the Framers’ intent using the writings of Paul Finkelman and Mark Graber.

45. See id. at 12–14.
46. Id. at 442.
47. BREST ET AL., supra note 28, at 23–25.
48. Chief Justice Taney, who succeeded John Marshall as chief justice of the Supreme Court in 1835, is best known for his Court’s decision in the infamous Dred Scott case. See STONE ET AL., supra note 23, at lxiv–lxxv.
49. BREST ET AL., supra note 28, at 212–60.
51. Id. at 253.
At this point, the authors could add Van Cleve as an authoritative source for a proslavery interpretation of the Constitution.

The authors, however, adopt a more neutral reading of the Constitution and avoid concluding that it was proslavery. For example, rather than crediting Justice Story's account in *Prigg* of the necessity of the Fugitive Slave Clause to the ratification of the Constitution, they suggest that its importance was more a matter of contemporary concern in 1842 than at the Constitutional Convention. Their discussion, relying on historian Don Fehrenbacher, minimizes the importance of the Clause. On the contrary, many other factors, which the authors do not discuss, suggest the Clause's importance. The authors' emphasis appears to be on subsequent proslavery interpretations of an essentially neutral Constitution, as argued by Fehrenbacher, rather than on an examination of the proslavery compromises built into the document itself. Their failure to emphasize more a proslavery interpretation of the Constitution in their casebook is surprising given the stronger acknowledgements of constitutional protections for slavery in the separate writings of several of the casebook's editors.

Considering the importance they give to slavery throughout their book, it is puzzling why they do not provide material from the original sources regarding the drafting of the proslavery provisions of the Constitution. The authors clearly believe in the importance of such evidence, since their book features extensive excerpts from debates on the Civil Rights Act of 1866 and the adoption of the Fourteenth Amendment.

This survey of several leading constitutional law casebooks shows a range of responses to the proslavery interpretation of the Constitution advocated by Van Cleve and other historians. The Sullivan and Gunther book ignores the Constitution's origins entirely and promotes student ignorance regarding the role that slavery played in the original Constitution and in the

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54. The fact that the Fugitive Slave Clause was not debated extensively and was approved unanimously suggests not that it was unimportant but rather that it was uncontroversial. There are good reasons why it might have been considered uncontroversial. First, a predecessor version of the Clause had already been enacted in the Northwest Ordinance of 1787. Second, the well-accepted preconstitutional practice under the Articles of Confederation had been to allow slave owners to recapture their fugitive slaves. In a sense, then, the Clause federalized preexisting practice. Lastly, the Clause was a positive factor in ratification of the Constitution in the Southern states. For example, both Madison and Charles Coesworth Pinckney defended the clause as an additional, new protection for slavery in ratifying conventions in Virginia and South Carolina, respectively. See infra notes 66-67 and accompanying text.


meaning of Reconstruction. It is shocking that what is apparently the leading casebook in the field blithely ignores such important material. The other books do a better job, in different ways. Chemerinsky’s account recognizes the proslavery Constitution, albeit in a conclusory fashion. Both the Stone et al. and Brest et al. books contain significant treatments of slavery and at least engage with the proslavery interpretation. Although both books take slavery seriously (Brest et al. in a more integrated fashion than Stone et al.), they present neither the proslavery interpretation as a core understanding of the original Constitution nor slavery protection and accommodation as a crucial aspect of the Constitution’s origins. Important evidence regarding the Constitution’s proslavery origins is missing from all of the books.

III. THE MISSING EVIDENCE OF THE PROSLAVERY CONSTITUTION

Part II showed how constitutional law casebooks fail to present evidence, other than the text of the Constitution itself, supporting the proslavery interpretation. This Part briefly presents some evidence supporting the proslavery interpretation. These are the kinds of sources that constitutional law casebooks use: excerpts from notes of debates at the Constitutional Convention, The Federalist Papers, and excerpts from notes of the state ratification debates. There is a wealth of available materials. Given its limited scope, this Review can only be illustrative. There is more and different evidence to be considered; this Review provides some examples and sources for further inquiry.

A. Excerpts from Madison’s Notes from the Constitutional Convention

Madison’s Notes of Debates in the Federal Convention of 1787 and Max Farrand’s Records of the Federal Convention are the best evidence of what was actually debated at the Constitutional Convention. This Review presents two important excerpts from Madison’s notes.

In the first excerpt, from June 30, 1787, Madison recognizes slavery as the principal issue dividing the Northern and Southern states. Van Cleve argues that “Madison was correct that after the Revolution, the political interests of the American regions were often principally divided by whether the states in them had major slave agricultural economies or not” (p. 3). No other issue during the Convention threatened the possibility or future stability of the incipient union as much as this division. Therefore, Madison’s recognition of slavery as the major fault line between the states is fundamental:

But [Madison] contended that the States were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from the effects of their having or not having slaves. These two causes concurred in

57. Id. at 19–26; STONE ET AL., supra note 23, at 8–29.
forming the great division of interests in the U. States. It did not lie be-
tween the large & small States: It lay between the Northern & Southern,
and if any defensive power were necessary, it ought to be mutually given to
these two interests. He was so strongly impressed with this important truth
that he had been casting about in his mind for some expedient that would
answer the purpose.58

The second excerpt, from August 21, 1787, presents an important part of
the debate on the slave trade limitation:

MR. RUTLIDGE . . . Religion & humanity had nothing to do with this ques-
tion. Interest alone is the governing principle with nations. The true
question at present is whether the South5 States shall or shall not be parties
to the Union. If the Northern States consult their interest, they will not op-
pose the increase of Slaves which will increase the commodities of which
they will become the carriers.

MR. ELSEWORTH was for leaving the clause as it stands. let every State im-
port what it pleases. The morality or wisdom of slavery are considerations
belonging to the States themselves. What enriches a part enriches the
whole, and the States are the best judges of their particular interest. The
old confederation had not meddled with this point, and he did not see any
greater necessity for bringing it within the policy of the new one:

MR. PINKNEY. South Carolina can never receive the plan if it prohibits the
slave trade. In every proposed extension of the powers of the Congress,
that State has expressly & watchfully excepted that of meddling with the
importation of negroes. If the States be all left at liberty on this subject, S.
Carolina may perhaps by degrees do of herself what is wished, as Virginia
& Maryland have already done . . .

[The next day, August 22, 1787:]

MR. SHERMAN was for leaving the clause as it stands. He disapproved of
the slave trade; yet as the States were now possessed of the right to import
slaves, as the public good did not require it to be taken from them, & as it
was expedient to have as few objections as possible to the proposed
scheme of Government, he thought it best to leave the matter as we find it.
He observed that the abolition of Slavery seemed to be going on in the U.
S. & that the good sense of the several States would probably by degrees
compleat it. He urged on the Convention the necessity of despatching its
business.59

This passage reveals some of the key compromises that were struck between
Northern and Southern delegates in agreeing to the Clause. Delegate
Rutledge, of South Carolina, describes how the increased production of
commodities resulting from additional slave importation would benefit the

58. NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES
MADISON 224–25 (Norton 1987) [hereinafter NOTES OF DEBATES]; see 1 THE RECORDS OF
THE FEDERAL CONVENTION OF 1787, at 486 (Max Farrand ed., rev. ed. 1966); see also
FINKELMAN, supra note 8, at 14 (discussing same quotation).

59. NOTES OF DEBATES, supra note 58, at 502–03 (spellings in original); see 2 RECORDS
Northern shipping industry, making it in the North’s economic interest to support Southern slavery. Northern delegates Ellsworth and Sherman, both from Connecticut, state important reasons for Northern acquiescence in a proslavery Constitution: first, that the status quo of individual state control over slavery should be preserved, and second, that economic self-interest and the desire for this Constitution made it expedient to drop objections to the slave trade. Delegate Pinckney, from South Carolina, repeats South Carolina’s position that it would not join the union if there were any interference in the slave trade, a point made by Rutledge with regard to the Southern states generally. On the next day, Delegate Sherman signals his acquiescence in the slave trade limitation clause for the sake of expediency.

B. Excerpts from The Federalist and Anti-Federalist Papers

Casebook authors who prefer to use The Federalist Papers in order to expose thinking of some of the Constitution’s Framers could use excerpts from Federalist Nos. 54, 42, and 43. Federalist No. 54, quoted above, shows that Madison felt it necessary to respond to critics of the Constitution who objected to the inclusion of slaves in apportionment.

In Federalist No. 42, Madison, in somewhat celebratory tones, argues that the slave import limitation portended the end of the slave traffic. Readers should note that the slave import limitation implicitly acknowledged congressional power, under the Commerce Clause, to limit the slave trade but not necessarily to modify the existence of slavery within states where it existed:

It were doubtless to be wished that the power of prohibiting the importation of slaves had not been postponed until the year 1808, or rather that it had been suffered to have immediate operation. But it is not difficult to account either for this restriction on the general government, or for the manner in which the whole clause is expressed. It ought to be considered as a great point gained in favor of humanity that a period of twenty years may terminate forever, within these States, a traffic which has so long and so loudly upbraided the barbarism of modern policy; that within that period it will receive a considerable discouragement from the federal government, and may be totally abolished, by a concurrence of the few States which continue the unnatural traffic in the prohibitory example which has been given by so great a majority of the Union. Happy would it be for the unfortunate Africans if an equal prospect lay before them of being redeemed from the oppressions of their European brethren!\(^{60}\)

Ironically, in the Virginia ratification convention, Madison argues the proslavery position on the Clause: that the slave trade was protected for twenty years in slave states that desired to import slaves.\(^{61}\)

In Federalist No. 43, Madison includes protection against slave revolts as part of the Constitution’s federal protections against domestic violence.

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60. THE FEDERALIST, supra note 3, No. 42, at 234 (James Madison).
61. See infra note 101 and accompanying text.
Madison takes notice of slaves, and simultaneously denies it, in his reference to the "unhappy species of population abounding in some of the States . . . [who] are sunk below the level of men":

May it not happen, in fine, that the minority of citizens may become a majority of persons, by the accession of alien residents, of a casual concourse of adventurers, or of those whom the constitution of the State has not admitted to the rights of suffrage? I take no notice of an unhappy species of population abounding in some of the States, who, during the calm of regular government, are sunk below the level of men; but who, in the tempestuous scenes of civil violence, may emerge into the human character and give a superiority of strength to any party with which they may associate themselves.62

Authors could also profitably use anti-Federalist writings to illustrate some of the public controversy sparked by the Constitution's proslavery provisions. One anonymous writer, in a letter to the Massachusetts ratifying convention, points out the incoherence in the Constitution's republican theory of representation that resulted from the Three-Fifths Clause:

Mr. Locke, in treating of political or civil societies, chap. 7, sect. 85, says, that men "being in the state of slavery, not capable of any property, cannot, in that state, be considered as any part of civil society, the chief end whereof, is the preservation of property." If slaves, then, are no part of civil society, there can be no more reason in admitting them, than there would be in admitting the beasts of the field, or trees of the forest, to be classed with free electors. What covenant are the freemen of Massachusetts about to ratify?63

The Anti-Federalist Papers also show that perceptive citizens were not fooled a bit by the Constitution's awkward, ostensibly neutral references to slavery. Brutus describes the convoluted wording of the Three-Fifths Clause as follows:

What a strange and unnecessary accumulation of words are here used to conceal from the public eye, what might have been expressed in the following concise manner. Representatives are to be proportioned among the states respectively, according to the number of freemen and slaves inhabiting them, counting five slaves for three free men.64

62. The Federalist, supra note 3, No. 43, at 245 (James Madison).
63. Anonymous Letter to Massachusetts Ratifying Convention (Jan. 19, 1788), reprinted in The American Constitution, supra note 1, at 96, 99. Brutus wrote as follows:

"In a free state," says the celebrated Montesquieu, "every man, who is supposed to be a free agent, ought to be concerned in his own government, therefore the legislature should reside in the whole body of the people, or their representatives." But it has never been alleged that those who are not free agents, can, upon any rational principle, have any thing to do in government, either by themselves or others. If they have no share in government, why is the number of members in the assembly, to be increased on their account?

The Essays of Brutus, supra note 2, at 44.
64. The Essays of Brutus, supra note 2, at 44.
C. Excerpts from State Ratification Debates

The state debates on ratification of the Constitution are another important source of evidence regarding the debate sparked by the proslavery provisions of the Constitution. In the following two excerpts from different state ratification conventions, Madison and General Charles Cotesworth Pinckney discuss the benefits of the proslavery compromises for slave owners.

The first excerpt is from the Virginia ratification debate on June 17, 1788. Readers should bear in mind that Virginia at that time had a large slave population and apparently had already banned further slave imports. In this excerpt, Madison responds to George Mason’s blistering critique of the Constitution and its alleged lack of protections for slave property. In his response, Madison discusses the slave import limitation and the Fugitive Slave Clause:

MR. MADISON. Mr. Chairman, I should conceive this clause [the slave import limitation] to be impolitic, if it were one of those things which could be excluded without encountering greater evils. The Southern States would not have entered into the Union of America without the temporary permission of that trade; and if they were excluded from the Union, the consequences might be dreadful to them and to us. We are not in a worse situation than before. That traffic is prohibited by our laws, and we may continue the prohibition. The Union in general is not in a worse situation. Under the Articles of Confederation, it might be continued forever; but, by this clause, an end may be put to it after twenty years. There is, therefore, an amelioration of our circumstances. A tax may be laid in the mean time; but it is limited; otherwise Congress might lay such a tax as would amount to a prohibition. From the mode of representation and taxation, Congress cannot lay such a tax on slaves as will amount to manumission. Another clause secures us that property which we now possess. At present, if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws; for the laws of the states are uncharitable to one another in this respect. But in this Constitution, “no person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor shall be due.” This clause was expressly inserted, to enable owners of slaves to reclaim them.

This is a better security than any that now exists. No power is given to the general government to interpose with respect to the property in slaves now held by the states. . . . Great as the evil is, a dismemberment of the Union would be worse. If those states should disunite from the other states for not

65. Accordingly, consistent with the interests of Virginia slaveowners, Madison could support a ban on slave importation since Virginia needed no more slaves and because a ban on slave imports would bolster the value of existing slaves in Virginia.
indulging them in the temporary continuance of this traffic, they might solicit and obtain aid from foreign powers.\textsuperscript{66}

The next excerpt comes from the ratification debates in South Carolina on January 17, 1788. General Charles Cotesworth Pinckney, an ardent defender of slavery at the Constitutional Convention, expresses his satisfaction with what the Constitution accomplished for slaveholders:

By this settlement we have secured an unlimited importation of negroes for twenty years. Nor is it declared that the importation shall be then stopped; it may be continued. We have a security that the general government can never emancipate them, for no such authority is granted; and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states. We have obtained a right to recover our slaves in whatever part of America they may take refuge, which is a right we had not before. In short, considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could; but, on the whole, I do not think them bad.\textsuperscript{67}

It is important to recognize that Pinckney, a key defender of slavery, approved of the Constitution and its protections for slavery. Indeed, the fact that the Constitution was ratified in the Southern slave states confirms its nature as a proslavery document. While one can only speculate, it seems reasonable to conclude that without the Constitution's manifest protections for slavery, the slave states might have either withdrawn from the Convention, as they repeatedly threatened to do, or failed to ratify the document. The Constitution contained enough built-in protections for slavery that slavery's defenders felt that the institution was safe for the foreseeable future.

Lastly, there is much language in the Supreme Court's decision in \textit{Prigg v. Pennsylvania} that confirms understanding the Constitution as a proslavery document. Several of the opinions in the case refer to the importance of the Fugitive Slave Clause in making the Constitution acceptable to the slave states.\textsuperscript{68} Justice Story, for example, wrote as follows:

Historically, it is well known, that the object of this clause was to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude. The full

\textsuperscript{66}. Speech of James Madison at the Virginia Ratifying Convention (June 17, 1788), \textit{reprinted in 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution} 453, 453–54 (Jonathan Elliot ed., 2d ed. 1836).

\textsuperscript{67}. Speech of Charles Cotesworth Pinckney at the South Carolina Ratifying Convention (Jan. 17, 1788), \textit{reprinted in 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, supra note 66}, at 277, 286. \textit{See generally Finkelman, supra note 8, at 10, 34} (providing context for General Pinckney's speech).

\textsuperscript{68}. \textit{Prigg v. Pennsylvania}, 41 U.S. (16 Pet.) 539, 611 (1842); \textit{id.} at 634 (Thompson, J., concurring in the judgment); \textit{id.} at 638–39 (Wayne, J. concurring); \textit{id.} at 660–61 (McLean, J., concurring).
recognition of this right and title was indispensable to the security of this species of property in all the slave-holding states; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non-slave-holding states, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves. . . .

The clause was, therefore, of the last importance to the safety and security of the southern states, and could not have been surrendered by them, without endangering their whole property in slaves. The clause was accordingly adopted into the Constitution by the unanimous consent of the framers of it; a proof at once of its intrinsic and practical necessity. 69

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All of these sources—Madison’s Notes, the Constitution’s text, *The Federalist Papers*, the debates during the state ratification conventions, and *Prigg v. Pennsylvania*—tell a common story about the Constitution’s proslavery compromises, the public understanding of these compromises, and the subsequent influence of these compromises on Congress and the Court. These few excerpts are evidence that the Framers, the ratifying public, and the Supreme Court understood that the Constitution protected slavery.

This Part demonstrates that authors of constitutional law casebooks can easily and briefly add evidence of the proslavery Constitution to their books if they choose to do so. The most valuable sources to include are excerpts from the notes on the Constitutional Convention and the ratification debates because they are the best evidence of the Framers’ debates about and positions regarding slavery and the Constitution. The following Part discusses the important reasons why casebook authors should add this evidence.

### IV. RACE AND CONSTITUTIONAL LAW

If constitutional law scholars take the proslavery interpretation of the Constitution seriously, then the racial implications of the Constitution should be understood as an important subject in constitutional law. Paradoxically, however, race is often considered a subject of peripheral interest to constitutional law, except in the area of equal protection. Exploring the proslavery interpretation of the Constitution makes possible the exposition of important racial themes typically not developed in constitutional law. This Review briefly describes some of these themes that belong fully to the study of constitutional law.

69. *Id.* at 611–12 (majority opinion).
A. The Constitution and Constitutional Law as Sources of Structural Racism

We accept the proposition that the Constitution sets up the structures of government: the legislative branch, the executive branch, and the judicial branch. Indeed, acceptance of this constitutional structure is so widespread that the same structure provides the organizing principle for most constitutional law casebooks. The original Constitution also structured racial hierarchy by protecting race-based slavery. As Van Cleve describes it, “[S]lavery emerged from the Convention . . . with a constitutionally protected political and legal path for its growth . . .” (p. 179). Furthermore, both the North and the South were able to agree that “full citizenship in the American republic was for whites only” (p. 265).

Historians have recognized slavery, and the Constitution’s ratification of slavery, as a deeply embedded structural component of American culture. Van Cleve describes this side of slavery as follows:

American slavery was not just a brutal, oppressive labor system. As historians have shown, it was a multidimensional institution of social control. In the mainland colonies, it served as a means of enforcing racial separation and subordination, of limiting the cost of poor relief for the unemployed and disabled, and of controlling crime. These social-control functions of slavery embedded it deeply in American culture. (p. 24; endnote omitted)

Similarly, historian David Waldstreicher writes, “[S]lavery was also a form of government over people. . . . Like the Constitution, slavery was inherently a matter of fundamental law. It defined the places of people in their society.”

The Constitution’s protections for slavery reified white supremacy and black subordination in the country’s founding document. Through its protection of slavery, the original Constitution thus perpetuated and sanctioned structural racism. Although the Thirteenth Amendment formally ended slavery, the basic structures of white supremacy have far outlived Reconstruction. Constitutional law should engage with the present effects of the Constitution’s protection of race-based slavery.

70. CHEMERINSKY, supra note 23, at 524.
71. Most constitutional law books are organized according to judicial powers, legislative powers, executive powers, and then individual rights. E.g., STONE ET AL., supra note 23.
72. WALDSTREICHER, supra note 7, at 18. Waldstreicher continues as follows:

The Constitution denied the presence of slaves in that society because it privileged politics and representation, but it defined slaves socially even as it denied them politically. Republicanism, it might be argued, was favored by many members of the Revolutionary generation precisely because . . . it upraised the political powers of a master class while retaining a place for slavery and other kinds of dependency.

Id.

73. Id.; see also p. 24.
B. The Supreme Court as a Primary Locus of Resistance to Equality

The consensus inegalitarian cultural values embedded in the proslavery Constitution may operate as a kind of "invisible hand" that continues to influence current outcomes. Over its long history, the Supreme Court has done more to impede racial equality than to promote it. For example, in the Civil Rights Cases, the Court shut down the liberatory potential of the Fourteenth Amendment, an attack from which the Amendment still has not recovered. To illustrate further, contrast the Court's approval of implied congressional power to enforce the Fugitive Slave Clause in Prigg v. Pennsylvania with the Court's prohibition of Congress's use of its explicit power under section 5 of the Fourteenth Amendment to promote equality in the Civil Rights Cases.

More recent constitutional decisions also fit the inegalitarian trajectory set by the proslavery Constitution. Despite advances during the Warren Court era, the Supreme Court has largely dismantled affirmative action, curtailed congressional action under section 5 of the Fourteenth Amendment, and required proof of intent to establish a violation of equal protection. All of these decisions can be understood as forms of resistance to racial equality and justice. In the long run of the Court's history, the equality-promoting decisions of the Warren Court are best understood as an anomaly.

time slavery was abolished, the place of blacks on society's lowest rung was so established that it has not been possible to bring about more than incremental change. Indeed, we have only been able to bring about incremental change when the reform in question served the interests of whites." (internal quotation marks omitted)). For an excellent exposition of the present relevance of the United States' history of slavery, see Derrick Bell, Learning the Three "l's" of America's Slave Heritage, in SLAVERY AND THE LAW [hereinafter Bell, Learning the Three "l's"], supra note 10, at 29.

75. 109 U.S. 3 (1883).
76. 41 U.S. (16 Pet.) 539, 615–16 (1842).
77. Civil Rights Cases, 109 U.S. at 11. This was just the point made by Justice Harlan, dissenting in the Civil Rights Cases:

With all respect for the opinion of others, I insist that the national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves.

Id. at 53 (Harlan, J., dissenting).

81. Michael Kent Curtis states as follows:

In many ways, the years from 1936 to 1969 were an anomaly. The Warren Court decisions were not different because of failure to adhere to technical legal requirements. They were different because they extended constitutional protection to blacks, to the
C. The Intentional Use of Race-Neutral Language to Produce Racially Targeted Harm

The use of race-neutral language to produce racially targeted harm is well illustrated by the Constitution itself, which nowhere mentions slavery by name but protects slavery throughout. This practice continued after Reconstruction with neutrally worded Jim Crow laws. It continued during the New Deal Era, which excluded agricultural and domestic workers from federal benefits and protections as a proxy to exclude most blacks. And it continues today with neutrally worded drug laws that, because of disparate enforcement and sentencing schemes, have produced disproportionately high rates of imprisonment and entanglement in the criminal justice system for African American and Latino males.

The use of race-neutral language to target racial minorities can be understood as an increasingly well-developed and sophisticated cultural style in the United States, a style that has been deployed since its founding document. If we recognize the full weight of this observation, we can see both the irrationality and the injustice in the Supreme Court's protection of ostensibly race-neutral laws from heightened scrutiny. People of color are often intentionally disadvantaged through race-neutral laws, but under the Supreme Court's rulings there is no meaningful challenge to such disadvantage.

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poor, to those accused of crime, and to those purveying sexually-oriented books. And they were different because the Court often actively promoted democratic decision-making.


The historical voice of judicial authority is privileged while opposition to the Court's self-aggrandizing tendencies is ignored, muted, or discredited. How and why we reached this pass is a complicated story. Some factors are internal to constitutional law—such as the historical anomaly of the Warren Court, which instilled in many liberals a naive faith in the judiciary; and the swiftness with which the Court returned to conservatism. 

Larry D. Kramer, Popular Constitutionalism, Circa 2004, 92 CALIF. L. REV. 959, 1010 (2004); see also Rebecca S. Giltner, Note, Justifying the Disparate Impact Standard Under a Theory of Equal Citizenship, 10 MICH. J. RACE & L. 427, 459 (2005) ("[T]he Court is credited with expanding minority rights and civil liberties only during the years of the Warren Court, an anomaly in the history of the Court."); Robert Justin Lipkin, What's Wrong with Judicial Supremacy? What's Right About Judicial Review?, 14 WIDENER L. REV. 1, 19-20 (2008) ("Indeed, taking a candid look at Supreme Court history will reveal that the Warren Court was an anomaly—a desirable anomaly perhaps, but an anomaly nonetheless. For over 150 years, the Court decided cases almost entirely bereft of any concern with individual rights." (footnote omitted)).

83. See MICHELLE ALEXANDER, THE NEW JIM CROW (2010).
84. See, e.g., Davis, 426 U.S. at 242-46.
import of recognizing the long-term, calculated use of race-neutral language to disadvantage minorities is to understand that today disparate impact is the most important, most probative evidence of unequal treatment under the law. The Court’s absolution of neutral wording over just results confirms this Review’s description of the Court as a primary locus of resistance to equality.

D. The Consistent Sacrifice of Black Equality Rights for the Sake of Political Union

The Framers of the Constitution protected slavery and sacrificed the rights of enslaved blacks to assuage the Southern states and forge a union between the North and the South. The Constitution sacrificed black interests in dignity and equality to forge a union among whites. This basic theme, expressed in the Constitution, has recurrent power throughout our history. After the Civil War and Reconstruction, union was reestablished among whites by sacrificing the interests of the newly freed black men and women of the South, who, essentially, were permitted to be reenslaved under the Jim Crow regime. In *Plessy v. Ferguson*, the Court endorsed that sacrifice of black equality rights. During the New Deal Era, all of the key federal statutes, including the National Labor Relations Act, the Social Security Act, and the Fair Labor Standards Act, excluded most blacks from federal benefits and protections to appease Southern racism. More recently, the theme has surfaced in the Court’s rejection of disparate impact as it affects minorities. This repeated sacrifice of black equality interests counsels for heightened vigilance any time governmental action affects minority groups disproportionately.

despite its alleged disparate impact on minority and young voters and the fact that proven voter fraud was minimal).

86. Justice Stevens wrote long ago as follows:

Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. . . . The line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as a reader of the Court’s opinion might assume.


88. See Bell, *Learning the Three “I’s”*, supra note 74, at 35 (“Tolerated in good times, despised when things go wrong; as a people [African Americans] are scapegoated and sacrificed as distraction or catalyst for compromise to facilitate resolution of political differences or relieve economic adversity.”).


91. See generally Perea, supra note 82.

Integrating an understanding of the proslavery Constitution into constitutional law provides a powerful way of understanding the early roots of present inequity and structural racism. The consensus cultural values expressed in the proslavery Constitution retain significant power. As Van Cleve writes, both North and South were able to agree that "full citizenship in the American republic was for whites only" (p. 265). To the extent that these values retain their vitality, they may help explain current inequality and indifference to this inequality.

**CONCLUSION: WHY TEACH AND STUDY THE PROSLAVERY CONSTITUTION?**

Slavery was central to the debates that produced the Constitution. The presence or absence of slavery, as recognized by Madison, was the principal cleavage between the states, requiring the "compromising expedient" of slavery protection in the original Constitution. As this Review makes clear, much historical evidence supports the proslavery interpretation of the Constitution: portions of the debates at the Constitutional Convention, commentary in *The Federalist Papers*, and evidence from the state ratification conventions. Despite this evidence of the importance of slavery in the minds of the Framers, many constitutional law casebooks ignore or minimize their treatment of the subject. It is striking that no constitutional law casebook, even those covering slavery relatively well, engages seriously with the evidence that demonstrates slavery’s central role in the origins of the Constitution.

Teaching slavery as centrally important to the origins of the Constitution and to constitutional law is to teach law in a manner that takes account of all of the evidence. If we ignore the evidence of a proslavery Constitution, we are not likely to inquire into the important present ramifications of the proslavery Constitution. Accordingly, failure to engage meaningfully with the best available evidence and historical interpretation of the Constitution yields an inadequate understanding of the Constitution, its law, and ultimately our society.

Exploring the proslavery Constitution is important because it may help explain continuing racial hierarchy and inequality. Our ability to understand adequately current racial disparities may depend on our willingness to consider that our founding document helped formally establish the hierarchy and inequality at the nation’s genesis. Despite intervening developments, the basic commitments ratified in the Constitution and the politics that generated them may still operate with life of their own, despite what we might consciously wish were true. As Mark Graber writes, "Constitutional accommodations for evil beget constitutional accommodations for evil. Past compromises generate legal and political support for subsequent constitutional decisions mandating injustice." Such further accommodations with

93. **Mark A. Graber, Dred Scott and the Problem of Constitutional Evil** 9 (2006). Paul Finkelman argues similarly:
evil are demonstrable in the abandonment of blacks post-Reconstruction and during the New Deal, among other examples.

Exploring the proslavery Constitution is also important because that interpretation better explains the subsequent national trajectory relating to slavery than an explanation that ignores the evidence that the Constitution was proslavery. Recognition of the proslavery Constitution helps explain much—the persistence and growth of slavery after enactment of the Constitution, the proslavery actions of the Congress in enacting fugitive slave legislation, and proslavery decisions of the Supreme Court, such as Prigg v. Pennsylvania and Dred Scott. Given the evidence, it makes more sense to interpret both the proslavery Constitution and subsequent proslavery events as the result of a fairly consistent national politics, rather than to inoculate the Constitution as “neutral,” and to attribute only subsequent events to a proslavery politics.

The failure to engage meaningfully the proslavery Constitution and the supporting evidence will deter professors and students from inquiring further into the possibility of its contemporary ramifications. It is obvious that many parts of the original Constitution and its subsequent interpretations by the Supreme Court have contemporary relevance. Otherwise, there would be little reason to teach decisions such as Marbury v. Madison, Gibbons v. Ogden, and McCulloch v. Maryland. It seems logically inconsistent to accept the relevance and importance of some parts of the original Constitution, but then, by omission, to ignore the possible relevance of the proslavery aspects of the Constitution and its doctrines.94 The possible effect of the Reconstruction Amendments is considered infra at notes 97–99 and accompanying text.

94. The possible effect of the Reconstruction Amendments is considered infra at notes 97–99 and accompanying text.

95. See McCleskey v. Kemp, 481 U.S. 279 (1987); Korematsu v. United States, 323 U.S. 214 (1944); cf. Levinson, supra note 10, at 93 (“[T]oo ‘[l]ittle recognition is given to the
important evidence of constitutional origins and avoiding rigorous analysis of the possible ramifications of that evidence?

There is an ethical dimension as well to considering the proslavery Constitution. The promotion of racial justice should be an important ethical norm for lawyers. The original Constitution, however, embraced racism and racial injustice by sanctioning slavery. Most professors have no difficulty condemning Dred Scott or Plessy as racist decisions of the Court. If, however, the scope of our constitutionally sanctioned racial injustice extends far earlier, far later, and far more fundamentally than these two decisions, then we bear some responsibility to discuss this possibility and to sensitize students to the present relevance of the Constitution's past. If, through the Constitution's tradition and doctrine, constitutional law continues to perpetuate racial injustice in a modern, altered form, constitutional law professors have some ethical obligation to make this known to our students.

It is also important to consider the reasons why some scholars might want to omit or de-emphasize this material. One might argue that such evidence should be omitted because it is relatively unimportant. This argument seems to be refuted by the conclusion reached by Van Cleve and a majority of historians that the Constitution was proslavery. In addition, responsible judgments about the importance or unimportance of the proslavery origins of the Constitution cannot be made without at least considering the evidence and ramifications of the proslavery Constitution.

One could also argue that even if slavery was a central issue in the original Constitution, that history has little present importance because of the abolition of slavery in the Thirteenth Amendment and the correctives provided by the other Reconstruction Amendments. While this view is plausible, the transformative potential of the Reconstruction Amendments has been curtailed severely by popular and judicial resistance to their egalitarian aims. This resistance probably stems, in part, from the unorthodox adoption of the Fourteenth Amendment, ratification of which was demanded by the Senate as a precondition for readmission of several of the former Confederate states. Accordingly, the spirit that motivated the Constitution's possibility that life under even the American Constitution may be a tragedy, presenting irresolvable conflicts between the realms of law and morality. To refuse to acknowledge the possibility is irresponsible." (quoting Sanford Levinson, Constitutional Faith 59 (1988)) (endnote omitted)).

96. Somewhat ironically given its proslavery context, the Preamble of the Constitution states that one of its purposes was to "establish Justice." U.S. Const. pmbl. A number of states have recognized the importance of racial justice and equality by incorporating antidiscrimination provisions in their ethical codes. See, e.g., Ill. Rules of Prof'l Conduct R. 8.4(j) (2010); N.J. Rules of Prof'l Conduct R. 8.4(g) (2004); see also, e.g., Fla. Bar v. Martocci, 791 So. 2d 1074 (Fla. 2001). Justice norms should be understood more broadly than mere antidiscrimination provisions in ethical codes. See, e.g., Anthony Alfieri, (Er)race-ing an Ethic of Justice, 51 Stan. L. Rev. 935 (1999).

97. See 2 Bruce Ackerman, We the People 158–62, 180–82, 198–205 (1998); Erwin Chemerinsky, Constitutional Law: Principles and Policies 14–15 (4th ed. 2011). Unlike the original Constitution, there was no popular acquiescence in the South for the propositions set forth in the Reconstruction Amendments. It is well understood that the
proslavery compromises remained strong in the South after Reconstruction. The mere enactment of the Reconstruction Amendments did not change the determination of many Southerners to maintain powerful structures of oppression for black citizens.98

An additional reason for neglecting the proslavery Constitution might be ideological resistance to acknowledging the moral flaws in the original Constitution and its drafters.99 Historian Peter Charles Hoffer has described the prevalence of “consensus history,” historiography that emphasizes national unity and consensus building.100 Accounts of constitutional origins and constitutional law that de-emphasize the moral flaws of a document that sanctioned slavery can be seen as a variety of “consensus history,” seeking to cultivate an uncontroversial aura with respect to our founding document. Unwillingness to engage the proslavery Constitution may reflect a commitment to unquestioning reverence for the Framers or the Constitution. To the extent that such reasons motivate the lack of engagement with evidence of the proslavery Constitution, I wonder about the propriety of such unquestioning reverence in the training of present and future experts in constitutional law.101 If evidence of the proslavery

Reconstruction Amendments would never have been ratified using the standard procedures for amendment in Article V. See Ackerman, supra, at 110–11.

98. For example, given the lack of enforcement of the Reconstruction Amendments, Southern blacks during the New Deal Era were skeptical of the federal government’s ability to enforce the National Recovery Act:

Negro employees in the South ... “[h]ave very grave doubts as to the ability of the Federal Government to compel compliance with the code.” They know how deliberately public policy in the South completely disregards the provisions of the Fourteenth and Fifteenth Amendments to the Federal Constitution. They feel that if the government is powerless to enforce the provisions of these measures, it will be equally as powerless to enforce the provisions of the codes.

Perea, supra note 82, at 107 (alterations in original) (quoting Ira De A. Reid, Black Wages for Black Men, 12 Opportunity: J. of Negro Life 73, 76 (1934)) (internal quotation marks omitted).

99. Justice Thurgood Marshall commented bluntly on the nature of the original Constitution:

I [do not] find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today.


101. A related objection is that to characterize the Constitution as proslavery is “too negative.” If my (and others’) interpretation of it seems negative, it is because the evidence on which my interpretation is based is somehow negative. Evidence, however, is neither negative
Constitution is hidden from view for such ideological reasons, this is both intellectually unsatisfying and perhaps dishonest.

I empathize with the potential difficulties of teaching the proslavery interpretation of the Constitution. Discussions about race and the Constitution can be challenging for everyone involved. Yet failing to engage these issues—prolonging that particular silence—only makes such discussions more difficult and such engagement more remote and unlikely.

It is hard to imagine any good pedagogical reason for constitutional law casebooks or teachers to omit evidence of the proslavery constitution. If readers of this Review have learned anything of importance about the history of the proslavery Constitution, then I have proved my point that neither the standard materials of constitutional law nor the manner of its teaching expose students to relevant evidence about the Constitution’s origins and its ramifications. The failure to present these materials and to engage fully with them perpetuates widespread ignorance about the inextricable relationship between race, slavery, and the Constitution. By failing to alleviate this ignorance, we contribute to the cultivation of new generations of colorblind warriors—new lawyers, judges, and law professors—who will assert, without knowledge or understanding, that a Constitution fully enmeshed in slavery and racial hierarchy is now magically “colorblind.”

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nor positive; it is just evidence. If a “positive” narrative about the Constitution exists that depends on ignoring evidence of its proslavery origins, this demonstrates the positive ideological tilt with which some, perhaps many, would prefer to see the Constitution. The problem with a positive ideological tilt is serious: such a view underestimates the Constitution’s promotion of racial subordination and its continuing capacity to embody meanings that promote that evil. Whatever can be deemed good about the Constitution should be tempered by the knowledge of its embrace of slavery and its continuing capacity to reproduce similar evils.