

## HOW SLAVERY KILLED THE CONSTITUTION OF 1787

**Books for purchase (all available in paperback – search also on [www.bookfinder.com](http://www.bookfinder.com)):**

- \* Richard Beeman, Stephen Botein, and Edward C. Carter II, eds., *Beyond Confederation: Origins of the Constitution and American National Identity* (Chapel Hill: University of North Carolina Press for Institute of Early American History and Culture, 1987). ISBN-13: 978-0807841723
- \* Mark R. Killenbeck, *McCulloch v. Maryland: Securing a Nation* (Lawrence: University Press of Kansas, 2006). ISBN-13: 978-0700614738
- \* Paul Finkelman, ed., *Dred Scott v. Sandford: A Brief History with Documents* (New York: Bedford Books/St. Martin's Press, 1997). ISBN-13: 978-0312115944

### I. Locating Slavery in the Framers's Constitution

- \*U.S. Constitution of 1787
- \*Thurgood Marshall, “Commentary: Reflections on the Bicentennial of the United States Constitution,” – available online at: <http://scholar.valpo.edu/cgi/viewcontent.cgi?article=2126&context=vulr>
- \*Gordon S. Wood, “Interest and Disinterestedness in the Making of the Constitution,” in *Beyond Confederation*, 69-112
- \*Jack N. Rakove, "The Structure of Politics at the Accession of George Washington," in *Beyond Confederation*, 261-94
- \*John M. Murrin, “A Roof Without Walls: The Dilemma of American National Identity,” in *Beyond Confederation*, 333-48
- \*Donald L. Robinson, *Slavery in the Structure of American Politics 1765-1820* (New York: Harcourt Brace Jovanovich, 1971), chapter 6: "Slavery and the Constitutional Revolution: The Debate over Federal Powers," 207-47 **[PDF]**
- \**Recommended reading*: Paul Finkelman, “Slavery and the Constitutional Convention: Making a Covenant with Death,” in *Beyond Confederation*, 188-225

### II. State Sovereignty, Slavery, and Constitutional Nationalism in the 1790s

- \*H. Jefferson Powell, "The Principles of '98: An Essay in Historical Retrieval," *Virginia Law Review* 80:3 (April 1994): 689-743. **[HeinOnline]**

- \*Hamilton, *The Federalist No. 78*: available online at:  
[http://avalon.law.yale.edu/18th\\_century/fed78.asp](http://avalon.law.yale.edu/18th_century/fed78.asp)
- \*Madison, *The Federalist No. 54*, available online at:  
[http://avalon.law.yale.edu/18th\\_century/fed54.asp](http://avalon.law.yale.edu/18th_century/fed54.asp)
- \*Brutus essays on judicial review – most easily found in William Jeffrey, Jr., “The Letters of Brutus: A Neglected Element in the Ratification Campaign of 1787-1788.” *University of Cincinnati Law Review* 40:4 (1971): 665-777 (especially Letters XI-XV, at 738-772). [HeinOnline]
- \* Thomas Jefferson, “Opinion on the Constitutionality of the Bank” (1791): available online at:  
<http://founders.archives.gov/documents/Jefferson/01-19-02-0051>
- \* Alexander Hamilton, “Opinion on the Constitutionality of the Bank” (1791): available online at:  
<http://founders.archives.gov/documents/Hamilton/01-08-02-0060-0003>
- \*Virginia Resolutions of 1798: available online at:  
<http://founders.archives.gov/documents/Madison/01-17-02-0128>
- \*Kentucky Resolutions of 1798: available online at:  
<http://founders.archives.gov/documents/Jefferson/01-30-02-0370-0003>
- \*Report of 1800: available online at:  
<http://founders.archives.gov/documents/Madison/01-17-02-0202>
- \**Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803): available online at:  
<http://www.law.cornell.edu/supremecourt/text/5/137>
- \**Cohens v. Virginia*, 19 U.S. (6 Wheaton) 264 (1821): available online at:  
<http://www.law.cornell.edu/supremecourt/text/19/264>
- \*Frederick Douglass, “The Constitution of the United States: Is It Proslavery or Antislavery?” (Glasgow, Scotland, March 26, 1860): available online at:  
<http://teachingamericanhistory.org/library/document/the-constitution-of-the-united-states-is-it-pro-slavery-or-anti-slavery/>

### **III. John Marshall, Judicial Nationalism, and the Southern Constitutional Tradition**

- \*Kathryn Turner [Preyer], "The Appointment of Chief Justice Marshall," *William and Mary Quarterly*, 3d ser., 17:2 (April 1960): 143-163. [JSTOR]
- \*R. B. Bernstein, "President John Adams and Four Chief Justices: An Essay for James F. Simon," *New York Law School Law Review* 57 (2012-2013): 441-463. [HeinOnline]
- \*William W. Freehling, "The Emergence of a Theory," chapter. 5 in his *Prelude to Civil War* (New York: Harper & Row, 1965) 134-176. [PDF]

\**McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316 (1819): available online at: <http://www.law.cornell.edu/supremecourt/text/17/316>

\*Mark R. Killenbeck, *M'Culloch v. Maryland: Securing a Nation* (Lawrence: University Press of Kansas, 2006).

\*R. Kent Newmyer, "John Marshall and the Southern Constitutional Tradition," in Kermit L. Hall and James W. Ely, Jr., eds., *An Uncertain Tradition: Constitutionalism and the History of the South* (Athens: University of Georgia Press, 1989) [PDF]

**Suggested reading:**

R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University Press, 2001), ch. 6: "Embattled Chief," 322-85. [PDF]

**[supplemental remarks regarding the transformative events 1828-1835]**

**IV. *Prigg v. Pennsylvania* and *Dred Scott v. Sandford*: Betrayal or Affirmation of the Constitution of 1787? (Or how the South captured the Court and the Constitution)**

\*Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven, CT: Yale University Press, 1975), 1-7; 238-243. [PDF]

\*John D. Gordan, III, *The Fugitive Slave Rescue Trial of Robert Morris: Benjamin Robins Curtis on the Road to Dred Scott* (Clark, NJ: Talbot Publishing/Lawbook Exchange, 2013), ch.1: "The Historical Context," 1-12 [PDF]

\*Excerpt from Albert J. Von Frank, *The Trials of Anthony Burns: Freedom and Slavery in Emerson's Boston* (Cambridge, MA: Harvard University Press, 1998), 296-301 [PDF]

\**Prigg v. Pennsylvania* 41 U.S. (16 Peters) 539 (1842): available online at: <http://www.law.cornell.edu/supremecourt/text/41/539>

\*Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic*, (Chapel Hill: University of North Carolina Press, 1985), "Yardstick Law and Fugitives From Slavery: Judge Story in the Belly of the Whale," 365-78 [PDF]

\*Fugitive Slave Act of 1850: available online at:

<http://www.usconstitution.net/fslave.html>

\*Don E. Fehrenbacher, *Sectional Crisis and Southern Constitutionalism* (Baton Rouge: Louisiana State University Press, 1995), ch. 3: "Kansas, Republicanism, and the Crisis of Union," 45-65. [PDF]

\*Excerpt from *The Trial of Theodore Parker*, by Theodore Parker – full text online at:

<http://www.gutenberg.org/files/31298/31298-h/31298-h.htm>

\*Frederick Douglass, "What to the Slave is the Fourth of July?": available online at:

<http://teachingamericanhistory.org/library/document/what-to-the-slave-is-the-fourth-of-july/>

\*Paul Finkelman, *Dred Scott v. Sandford: A Brief History with Documents* (New York: Bedford/St. Martin's Press, 1997).

\*Timothy S. Huebner, "Roger B. Taney and the Slavery Issue: Looking Beyond--and Before--*Dred Scott*," *Journal of American History* 97:1 (June 2010): 17-38. [PDF]

**Suggested reading:**

Michael Zuckert, "Legality and Legitimacy in *Dred Scott*: The Crisis of an Incomplete Constitution," *Chicago-Kent Law Review* 82:1 (2007): 291-328.

[HeinOnline]

\*Keith E. Whittington, "The Road Not Taken: *Dred Scott*, Judicial Authority, and Political Questions," *Journal of Politics* 63:2 (May 2001): 365-391. [JSTOR]

\*Lincoln, Speech at Springfield, June 26, 1857 on *Dred Scott*, available online:

<http://quod.lib.umich.edu/l/lincoln/lincoln2/1:438?rgn=div1;singlegenre=All;sort=occur;subview=detail;type=simple;view=fulltext;q1=june+26+1857>

[Supplemental remarks about the life and death of Constitutional Unionism and the battles among the lawyers in MA and Story's students at Harvard Law School]

## V. The Civil War Amendments and the Transformation of the Old Constitutional Regime

[Introductory remarks contrasting the creation of the Constitution of 1787 with the process that created the civil war amendments]

\*Lincoln, Speech in Baltimore, April 18, 1864 on positive and negative liberty – available online:

<http://quod.lib.umich.edu/l/lincoln/lincoln7/1:665?rgn=div1;singlegenre=All;sort=occur;subview=detail;type=simple;view=fulltext;q1=april+18+1864>

\*Amendments 13, 14, and 15

\*Howard Jay Graham, "Anti-Slavery Origins of the 14th Amendment," in Howard Jay Graham, *Everyman's Constitution* (Madison: State Historical

Society of Wisconsin, 1968), chapter 4 [PDF – whole book also available as Ebook at amazon.com]

\*Gerard N. Magliocca, *American Founding Son: John Bingham and the Invention of the Fourteenth Amendment*. (New York: New York University Press, 2013), ch. 7: "The Fourteenth Amendment" [PDF]

\*Author Bestor, "The American Civil War as a Constitutional Crisis," *American Historical Review* 69:2 (January 1964): 327-352. [JSTOR]

\*James McPherson, *Abraham Lincoln and the Second American Revolution* (New York: Oxford University Press, 1991), ch. VII: "Liberty and Power in the Second American Revolution," [PDF]

\*Robert Kaczorowski, "Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction," *New York University Law Review* 61:5 (November 1986): 863-940. [HeinOnline]

\*Michael Les Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction," *Journal of American History* 61:1 (June 1974): 65-90. [JSTOR]

Suggested Reading:

\*Bruce Ackerman, *We the People: Transformations* (Cambridge, MA: Belknap Press of Harvard University Press, 1998), ch. 8: "The Great Transformation" 207-252. [PDF]

\*Richard L. Aynes, "Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment," *Chicago-Kent Law Review* 70:3 (1995): 1197-1274. [HeinOnline]

\* William E. Nelson, "The Role of History in Interpreting the Fourteenth Amendment," *Loyola of Los Angeles Law Review* 25:4 (June 1992): 1177-1185. [HeinOnline]

## **VI. The Supreme Court Strikes Again: How Justices Guttled the Civil War Amendments**

\*Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (Cambridge, Eng., and New York: Cambridge University Press, 2001), "Legacies Denied: The Thirteenth Amendment in the Gilded Age," 239-50. [PDF]

\**U.S. v Cruikshank*, 92 U.S. (2 Otto) 542 (1876), available online at: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=92&invol=542>

\**Slaughterhouse Cases*, 83 U.S. (16 Wallace) 36 (1873), available online at: <http://www.law.cornell.edu/supremecourt/text/83/36>

\**Civil Rights Cases*, 109 U.S. 3 (1883), available online at:

<http://www.law.cornell.edu/supremecourt/text/109/3>

\**Plessy v. Ferguson*, 163 U.S. 537 (1896), available online at:

<http://www.law.cornell.edu/supremecourt/text/163/537>

\*Review Justice John Marshall Harlan's dissents in the *Civil Rights Cases* and *Plessy v. Ferguson* (above)

**Suggested Reading:**

\*R. Kent Newmyer, "Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence," *Journal of American History* 74:3 (December 1987): 814-835. [JSTOR]

\*Morton J. Horwitz, "Santa Clara Revisited: The Development of Corporate Theory," *West Virginia Law Review* 882; (Fall 1985): 173-224.

[HeinOnline]

**[Supplemented by some brief remarks on the Court's radical interpretation of the 14th in favor of big business; and on the response of Blacks after the Civil War--using Litwack, *Been in the Storm So Long*]**