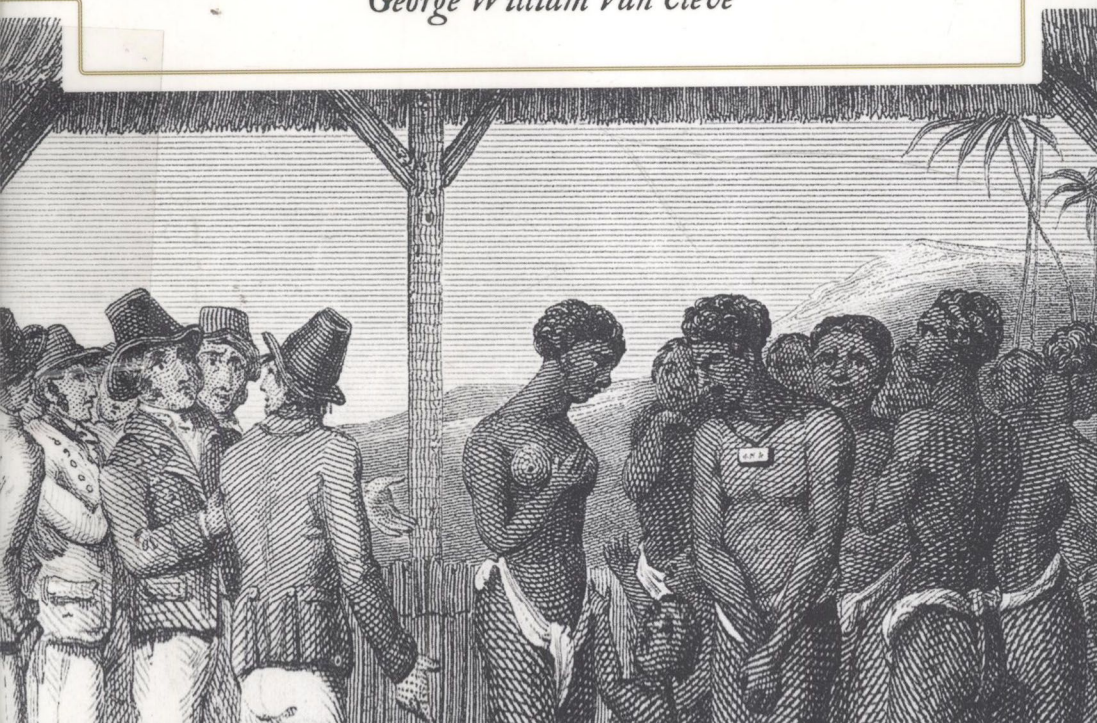




A SLAVEHOLDERS' UNION

SLAVERY, POLITICS, AND THE CONSTITUTION
IN THE EARLY AMERICAN REPUBLIC

George William Van Cleve



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A SLAVEHOLDERS' UNION

FOR MY WIFE AND CHILDREN AND OUR FELLOW CITIZENS,
NOW AND IN THE YEARS TO COME

To hear this history rehearsed, for that there be inserted in it no fables, shall be perhaps not delightful. But he that desires to look into the truth of things done, and which (according to the condition of humanity) may be done again, or at least their like, he shall find enough herein to make him think it profitable. And it is compiled rather for an everlasting possession, than to be rehearsed for a prize.

Thucydides, *The Peloponnesian War*
(trans. Thomas Hobbes)

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INTRODUCTION

On July 2, 1785, Richard Price, a prominent British minister, wrote to Thomas Jefferson in Paris, thanking him for a copy of Jefferson's *Notes on the State of Virginia*. In it, Jefferson portrayed slavery as an antirepublican, culturally corrupting institution that encouraged "unremitting despotism," "degrading submissions," and "a perpetual exercise of the most boisterous passions."¹ Price congratulated Jefferson on the "wisdom and liberality" of his sentiments, but questioned whether they were shared by other American leaders. Price said that he had written a pamphlet advocating the gradual abolition of slavery that South Carolina leaders had "agreed in reprobating," because they regarded abolition as a measure that "will never find encouragement in that State." Price asked Jefferson whether it was therefore "ridiculous" to claim, as Price had, that the American Revolution was dedicated to bringing an end to American slavery.²

In response, Jefferson provided an optimistic survey of the American progress of the revolutionary challenge to slavery, which offered the "interesting spectacle of justice in conflict with avarice and oppression: a conflict wherein the sacred side is gaining daily recruits . . ." Slavery would be abolished "in a few years" everywhere north of Maryland, he predicted. Jefferson admitted that "Southward of the Chesapeake" Price's pamphlet would "find but few readers concurring with it . . . on the subject of slavery." In Virginia, he hoped that young men then being educated would see slavery as an evil that needed to be extirpated by their generation: "to them I look with anxiety to turn the fate of this question."³

But Jefferson's hopes for the progress of abolition were to be disappointed, particularly from Maryland southward. In the early decades of the new Republic, slavery grew markedly instead. By early 1820, shortly after the Missouri controversy began, there were ten states with substan-

tial slave populations, double the number of such states at the time of the Revolution. There were more than two and a half times as many slaves in America as there had been when the Revolution began.

During the vitriolic congressional debates over Missouri statehood in 1820, Senator Jonathan Roberts of Pennsylvania pleaded with his colleagues to “restrict” Missouri from becoming a slave state. Roberts warned them that allowing slavery in Missouri would betray the ideals of the Revolution expressed in the Declaration of Independence, a solemn “covenant of our fathers” entered into before the “Supreme Judge of the world.” And he begged them as fellow Christians not to admit Missouri deformed by slavery, its features hideous and “marred as if the finger of Lucifer had been drawn across them.”⁴

Slave state representatives remained obdurate. They insisted that Missouri must be allowed to enter the Union with the right to decide for itself on slavery (anticipating that it would become a slave state). Thomas Jefferson joined their ranks. In the spring of 1820, he wrote to Congressman John Holmes passionately opposing restriction, describing it as a betrayal of the 1776 Revolution’s principles of self-government that was “treason against the hopes of the world.” In early 1821, he wrote to House of Representatives Speaker John W. Taylor, a New York congressman and major restriction leader, saying that he was not certain that the American empire of liberty he had hoped to create would be preserved, because the “Northern bears [supporting restriction] seem bristling up to maintain the empire of force.”⁵

How had slavery survived a revolution that Roberts, like many in the Founding generation, believed was supposed to end it? How had it grown to the point where its representatives had the power to defy Northern efforts to contain it? Why did Roberts and Jefferson take opposing views of the Revolution’s implications for slavery? Had Jefferson lost sight of the Revolution’s principles, or had the Revolution’s relationship to slavery been more complex and equivocal than he had earlier thought? This book examines these questions as part of a broad reconsideration of slavery’s place in American politics and law during the early Republic. It seeks to understand how and why slavery’s long-term presence in much of America was sanctioned by the Missouri compromises.

By reappraising slavery’s place in early American political life, we can gain a new appreciation of the relationship between the underlying forces that shaped early American society and politics, on the one hand, and the Revolution, the Constitution, and America’s rapid progress toward conti-

nental empire on the other. This reassessment will provide a clearer sense of the Constitution's political limitations, including a better understanding of the origins and significance of foundational concepts such as federalism and the tensions in its efforts to govern by majority rule while protecting minority interests through the rule of law. It will shed new light on the complex coalition politics of the Founding era. And it will permit us to obtain a clearer grasp of important shifts in the political terrain of the early nineteenth century as the nation expanded westward.

To achieve these purposes, this book creates an integrated portrait of major state and federal political and legal developments related to slavery during the years 1770 to 1821.⁶ It is not intended as a comprehensive account either of the entire law of slavery, or of the history of slavery or race relations, during that period. Nor is it a history of party politics. Instead, it combines evidence drawn from public law and the history of a series of pivotal moments in slavery's evolution to provide a better integrated account of slavery's relation to politics and law in the early Republic. It synthesizes current knowledge in certain areas, and offers new evidence, analysis, and interpretations in several others. Following is a brief overview of the main points of its argument.

The widespread adoption of slave plantation agriculture in British American mainland colonies with the encouragement of the British Empire gave rise to wealthy slave labor-dominated economies in the southern colonies by the late eighteenth century. The British and colonial law of slavery developed largely in support of this aspect of Britain's imperial economy. Slavery came under broad legal and political attack just before the American Revolution, but in the American colonies, the political and legal results of that attack were mixed, and in important ways reinforced opposition to Britain. The Revolution itself ultimately strengthened slavery.

James 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—as Madison put this, by “[the effects of] having or not having slaves.” The sources suggest that the Constitution was an effort to finesse this sectional division by sharing power between sections. The protection of slavery and the first sectional division of the West were integral to the Constitution's adoption. Slavery was able to expand in response to market forces without substantial federal government interference for nearly fifty years after the Revolution.

Despite Madison's hopes, the Constitution ultimately failed as a means for controlling sectional divisions. Sectional tensions were evident as early as the presidential election of 1796. What temporarily suppressed these sectional divisions was the massive western expansion that began under Washington and accelerated sharply under Jefferson and his Virginia successors, accompanied by the rise of Jeffersonian Republican ideology. When the sections' expanding settlement paths collided, as they did in 1820, and the frontiers appeared to close, sectional tensions reemerged.⁷

The Constitution's political and judicial means for resolving disputes—in other words, its rule of law—could not control the conflict between slave economies and an emerging free-labor, free-land ideology espoused by the Northern states.⁸ Unlike England, in the early American republic the law played a relatively dependent role in slavery's evolution. The rise of republican government meant that early American courts, facing continued resistance to their role as constitutional arbiters, either avoided divisive issues like slavery or deferred to legislatures on them.

Although Northern states engaged in abolition and slaveowners' rights to manumit slaves were liberalized after the Revolution, those changes had little effect on the political environment facing slavery nationally or in the slave states, or on the course of its westward expansion. On the positive side, the actions of states that undertook gradual abolition or liberalized manumission freed about 11 percent of the total American black population by 1800. But during the period from 1770 to 1800 alone, the North American slave population nearly doubled, growing from about 470,000 in 1770 to nearly 900,000 by 1800.

Failure to control slavery's growth resulted from slave-state efforts to expand slavery combined with divided northern public opinion about abolition and black equality. Slave states united in seeking to expand slavery westward. Their early differences over continued slave imports had little effect on slavery's development. Northern state abolition laws shifted the costs of abolition to blacks, and often had major loopholes for years or were poorly enforced. Such laws represented the most that white majorities were willing to do to assist even those states' resident blacks, let alone slaves elsewhere.

The result of these political decisions at the state and federal levels and their implementation through Jeffersonian Republican-style national expansion that opposed federal coercion in governing new territory was that slavery was far larger and politically stronger in the slave states and at the federal level by the time of the Missouri controversy than it had been in

1770 under the British Empire. The Missouri compromises, far from settling slavery on a “course of ultimate extinction,” as Lincoln thought, ratified the long-term existence of slavery in a large part of the country. They left open the prospect that slavery would expand further both through territorial acquisition and through legislative reversal of the compromises. In the end, slave states won the “war on the ground” (as opposed to the rhetorical war), as they had won the war on the ground from the beginning of the Republic. The controversy meant an end to the rule of law under the Constitution where slavery was concerned, effectively transforming it into a sectional “compact” instead. The Constitution’s mechanisms for allocating political authority and resolving disputes effectively no longer applied to slavery, and future disputes over it could be resolved only by political force, rather than by an agreed-upon rule of law.

Much has been written about slavery and politics in early America, but many aspects of that relationship remain contested.⁹ One important debate over slavery and the Founding focuses on whether slavery was “central” or “incidental” to early American politics. The “republican” school of historiography led by Bernard Bailyn and Gordon Wood treats slavery as incidental to the republican enterprise, while the “progressive” school, whose prominent members include Staughton Lynd, sees it as central and as an aspect of a broader economic, often class-based, analysis of American politics.¹⁰ That historiographic divide occasions a series of observations about this book’s approach and goals.

First, there is a fundamental difference between tracing the evolution of republican ideology, on the one hand, and understanding the political and economic processes that made it possible to create a functioning early American national government, on the other. While ideology and the state-building process may overlap or even coincide at times, at others they may bear relatively little relation to each other. This book focuses primarily on the nature of the actual political and legal accommodations made to create and expand the Republic, how slavery influenced them, and how they influenced slavery. But it also traces continuity and change in how British and American law dealt with the problem of slavery and natural rights and their relationship to republicanism, constitutionalism, and the rule of law during this period.

Second, much of the historiography of slavery is “Whig history” in British historian Sir Herbert Butterfield’s sense.¹¹ It concludes that the progress of liberty was inevitable or that it necessarily resulted from the triumph of forces supporting what appear to us today to be just, morally

right principles. An important purpose of this book is to examine whether such conclusions can be justified with respect to the survival and growth of American slavery in the early Republic.

Third, historians from the “republican” and “progressive” schools of thought are debating a question that is irresolvable for this book’s purposes, because it is not possible to characterize slavery as invariably either “central” or “incidental” to early Republic politics. By 1770, slavery was a large-scale (billions of today’s dollars in assets) socioeconomic institution that was central to slave state agricultural economies and represented one-third or more of their wealth. As Madison thought, its relation to national politics was fundamentally driven by those states’ interests. When acute economic development-related (or autonomy) conflicts that implicated those sectional interests periodically arose in national politics, slavery became central to their resolution, as in the drafting of the Articles of Confederation.

However, slavery was at times incidental to the resolution of major issues in early American politics, because while such issues had implications for slave state interests, they also had others much broader than those interests. An example is the Louisiana Purchase. In 1803/4, there was a strong national consensus favoring the territory’s acquisition followed by American settlement, but no equally broad consensus supported excluding slavery from the purchase. Although slavery’s expansion was raised as an issue by purchase opponents, that concern was overwhelmed politically by the nationwide desire for expansion into the territory, and hence was “incidental” to (i.e., not a central factor in determining) the outcome. As these examples suggest, to understand slavery’s politics a different analysis is required.

As historian Peter Onuf’s work over several decades has demonstrated, early American politics worked quite differently when Americans believed the political universe (or the national territory) in which they lived was expanding than it did when they believed they were engaged in a zero-sum game, because such beliefs strongly influenced Americans’ willingness to accommodate each other’s sectional interests.¹² The sectional politics of slavery is an important case that provides support for this more general historical conclusion. As Onuf’s work implies, rather than continuing to debate slavery’s “centrality” *vel non* to the Founding era, it is preferable to analyze precisely what effects it had on various aspects of American political formation and development. The following detailed description of the book’s contents also further sketches my analysis.

Chapter 1 analyzes the effects of the American Revolution on slavery. The chapter describes the institutional situation of American slavery within the British Empire and the new challenges it faced just before Independence. These challenges included the famous English slavery case *Somerset v. Stewart*. The chapter reviews the American reception of *Somerset*, providing new evidence that Americans were divided over *Somerset* and its perceived effects in the colonies before the Revolution. It begins consideration of the problem of slavery's relationship to conceptions of natural rights, ordinary law, and constitutional law in the early Republic.¹³

During the Revolution, American slavery faced added challenges as it lost British protection and was damaged by war and legal instability. Recent historiography has given particular attention to the Revolution's effects in challenging slavery and expanding the rights of free blacks.¹⁴ Chapter 1 examines the direct effects of the Revolution (as opposed to socioeconomic conditions) on abolition and fugitive slavery.

But at least where slavery was concerned, the Revolution had a hierarchical as well as an egalitarian ideological dimension. Americans had sharply conflicting views of natural rights and their relation to republicanism and constitutional law. For many of its supporters, the Revolution did not unambiguously entail opposition to the institution of black slavery. The Revolution also shifted the balance of power between the sections. It was by no means inevitable that the American Revolution would lead to the extinction of slavery.

Contrary to the traditional view, the Revolutionary era strengthened slavery as a political institution. In part as a reaction to challenges to slavery, the drafting of the Articles of Confederation was heavily influenced by slave state interests, and not just in the important area of taxation. Slave state representatives ardently supported the Confederation's extreme federalism. And the Articles included provisions that were specifically designed to protect both the slave trade and slavery itself (particularly with respect to fugitive slavery) beyond those previously identified by historians. Slavery's influence led to government by stalemate.

Chapter 2 examines state experiments in abolition and manumission during the period from 1780 to 1810. Northern abolition was an important achievement, but it had profoundly significant political limitations. The progress of abolition stemmed in significant part from changes in Northern labor economies and white racism as well as from humanitarian motives and revolutionary ideology. Some northern citizens were concerned about competition from slave labor or thought abolition would permit "black re-

moval,” and a majority supported abolition only if it could be achieved at no cost to them. The chapter provides new evidence on the limited coverage and weak enforcement of abolition laws that resulted from this climate of public opinion. It also offers new information on contemporary views of the relations among natural rights, property law, and constitutional law in the context of slavery. The chapter concludes by analyzing northern unwillingness to protect fugitive slaves before the Constitution’s adoption, and the adverse effects of Southern slavery law reforms on abolition prospects. It shows that there was very limited political support in the northern states, and almost none in the southern states, for aggressive national action to end slavery throughout the country, and that the Constitution’s limited efforts to combat slavery reflected this climate of opinion.

Historians writing about slavery and the Constitution have addressed five major questions that go to the heart of our understanding of the American federal republic.¹⁵ They are, Was the Constitution “proslavery” or not? Was the Constitution intended to have a moral, social, or “revolution principles” dimension where slavery was concerned? Were various slavery provisions of the Constitution essential to the formation of the Union? Were the Constitution’s slavery compromises part of a larger “grand bargain” that included an agreement regarding the western expansion of the United States? How did the Constitution’s slavery provisions influence early American politics? Part 2 addresses these questions. Chapters 3 and 4 examine slavery and the negotiation and ratification of the Constitution.

Several historians and political scientists conclude in recent works that developments in early American law and politics, particularly the Constitution, provided strong institutional protections for slavery.¹⁶ Some argue that the Constitution’s slavery-related provisions (a list that they define expansively) provided “enormous protections” to slavery, so that the Constitution was “proslavery.” Don Fehrenbacher argues, on the other hand, that many such claims about the Constitution’s effects on slavery are mistaken because it was “open-ended” on slavery.¹⁷ He argues that its slavery provisions (which he defines narrowly) were “marginal” to slavery.¹⁸ How is such a discordance of views possible?

In part the problem is one of definition. When used in connection with the Constitution, the term “proslavery” could mean markedly different things. It could mean that the Constitution did not permit the federal government to abolish slavery where it existed; or that the Constitution’s provisions politically legitimized the continuation and expansion of slavery; or that the Constitution provided affirmative legal protection or economic

support to the institution and its expansion. Finally, “proslavery” could mean that the Constitution failed to restrain the growth of slavery as much as some thought then (but especially later) that it should.

This book’s claims that the Constitution was “proslavery” and that it materially advanced the creation of a slaveholders’ union are based on a series of conclusions. First, its representation system provided critically important political protection for slave property (or its then functional equivalent, the political economies of slave states) through the three-fifths clause, an issue analyzed in chapter 3. Chapter 3 begins by considering the overlapping but nevertheless differing motives and objectives of the Northern and Southern sections for entering into the Constitution. It examines the political significance of ratification debates over the clause, and provides new evidence that the long-term impact of the clause on early American politics was less than sometimes thought.

Second, the Constitution’s other slavery-related provisions, by carefully preserving the Confederation legal status quo ante on slavery in virtually all respects, were designed to permit slavery to expand for at least an entire generation after its adoption, and as a foreseeable result probably much longer. Chapter 4 analyzes the ways in which the Constitutional Convention laid the groundwork for expansion of the slave state economies and of slavery itself. As part of this process, a sectional economic development side bargain, which included the passage of the Northwest Ordinance and commitment to the opening of the Mississippi River to western development, was also reached. In addition, the Constitution was equivocal on whether slaves were to be treated as property solely under state law or whether they were regarded as property under federal law as well. Although slavery was expected to continue to be governed largely by state law, it was also given unique legal protections by the Constitution that insulated it against the exercise of both national and state government powers that could otherwise have been used to control it. The chapter closes by reviewing other major aspects of the ratification debates over slavery, particularly debate over whether the Union must be a moral, as opposed to a political, Union.

Political scientist Mark Graber’s provocative work analyzing the problem of “constitutional evil” raises important issues about the Constitution’s relationship to politics and slavery.¹⁹ This book seeks to historicize that problem further, particularly in its discussions of how contemporaries understood the relationship of natural rights and law and the problem of moral union. Early Americans did not share widely agreed-upon views

on the relation of natural rights, republicanism, and constitutional law, at least where slavery was concerned. They reluctantly accepted that a political union might encompass moral evil. But Americans' views on such issues sharply diverged by 1820.

Chapters 5 and 6 consider the expansion of slavery during the period 1790–1821. Chapter 5 begins by examining the powerful implications of major congressional slavery debates during 1790. It expands on the historiography by exploring in detail both the political significance of the extensive proslavery arguments made in those debates by slave state representatives and James Madison's role as a political "double agent," seeking to gain restrictions on the slave trade while protecting slavery and the right of the slave states to expand westward into new states. Next it analyzes the law and politics of the Fugitive Slave Act of 1793, and the circumstances surrounding the admission of new slave states and territories. It extensively considers the Virginia abolition proposal by St. George Tucker, including the light it sheds on northern antislavery opinion, its analysis of colonization proposals by Jefferson and others, and the implications of its failure in 1797. The chapter considers the historical support for the view that "conditional termination" of slavery espoused by leaders such as Jefferson (or Virginia opinion on slavery generally) might have led to wider abolition.²⁰ It concludes by examining the politics of the Louisiana Purchase, which led to a sharp expansion in western slavery.

Chapter 6 presents an analysis of the Missouri controversy of 1819–21, the first major challenge by Northern states to slavery's further westward expansion. The chapter explores three major questions: Why did the Northern states' position on expansion change at this time? Why did the Northern states, having forced a massive political confrontation, then accede to the compromise, accepting slavery's continuance and readily foreseeable expansion? How did the controversy alter antebellum politics and the role of the Constitution in it?

The chapter argues that Missouri was the first "free labor, free land" conflict over sectional expansion, not an ideological dispute over slavery or one stemming from free state fears about their penetration by slavery.²¹ Its analysis relies in part on new evidence about the views and motives of participants in the Missouri debates. The Missouri controversy was also important because the dispute was exacerbated by the emergence of a sharp, largely sectional, difference of view over what was required to make the Union a "moral" union where slavery was concerned.

An irreconcilable conflict emerged during the controversy between