"Plant Yourselves on its Primal Granite": Slavery, History and the Antebellum Roots of Originalism

AARON R. HALL

Hundreds of spectators converged on Philadelphia's Independence Hall in late November of 1851. Inside the statehouse, they pressed past the recently restored convention chamber where the Federal Constitution had been drafted and Declaration of Independence adopted. It was not a patriotic commemoration that drew them to this edifice of national memory. A small-town miller, Castner Hanway, was standing trial for treason in the upstairs hall. People came to hear a dozen lawyers representing the federal government, Hanway, and the State of Maryland argue whether that crime lay in the civilian's refusal to help capture fugitives from slavery.[1] Acting under cover of the Fugitive Slave Law of 1850, an armed band had stormed a Pennsylvania farmhouse sheltering runaways from Maryland slaveholder Edward Gorsuch. After a fatal bullet struck Gorsuch during his attack, federal officials convened a grand jury in Independence Hall and indicted thirty-eight people for treason. Passerby Hanway had not only denied

1. Frank M. Etting, *An Historical Account of the Old State House of Pennsylvania Now Known as the Hall of Independence* (Boston: James R. Osgood, 1874), 164–65. "The Late Christiana Riots – Commencement of the Trials," *New York Herald*, November 25, 1851, 3.

Aaron R. Hall is a Presidential Postdoctoral Fellow at Cornell University and will be an assistant professor of history at the University of Minnesota beginning in 2020 <aaronrhall06@berkeley.edu>. He thanks Karen Tani, Robin Einhorn and an anonymous reader with *Law and History Review* for insightful comments on a prior draft of this article, and is likewise grateful for helpful remarks by participants in a session of the New York University Law School Legal History Colloquium devoted to related research.

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statutorily required aid but had also, according to a witness, uttered the constitutionally unsound words that "negroes had rights and could defend themselves."[2] United States District Judge John Kane, taking aim at those who "represent the Constitution of the land as a compact of iniquity, which it were meritorious to violate or subvert," told the grand jury that such incendiary anticonstitutionalism was tantamount to war against the United States.[3] Seizing on the opportunity, he instructed jurors that the Constitution, "made within these very walls, will never be repudiated here."[4] Under Article III, treason lay "only in levying war against [the United States], or in adhering to their enemies, giving them aid and comfort."[5] But what the indictment lacked in legal merit, officials sought to develop through the authority of the constitutional Founding.

The circuit court trial before Kane and Supreme Court Justice Robert Grier became a makeshift public ceremony. If the treason charge seemed a stretch, legal professionals hoped that constitutional veneration and ascribed original intentions would afford elasticity to secure convictions and the Union. Prosecutors spun stories of unwritten promises and an absolute commitment to slave rendition at the Founding, without which, per United States Attorney John Ashmead, "the powerful, prosperous, and glorious Republic of the United States, never could have existed among the nations of the earth."[6] United States Senator James Cooper of Pennsylvania, assuming a prosecutorial role for his birth state of Maryland, chimed in that the "framers did not intend that the duties which it enjoined, should be stintedly and hesitatingly performed."[7] Maryland Attorney General Robert Brent, aiding the prosecution by consent of the federal government, announced that failing to abide by such original constitutional promises waged war on a government designed to enforce them. Jurors, Brent argued, were duty bound to convict Hanway to uphold the "solemn bond and covenant which your great forefathers entered into, and which binds you in common honesty as religiously as if you had with your own hands and seals accepted it; because you are the descendants of those forefathers, and you are enjoying the blessings

2. *United States v. Hanway*, 2 Wall. Jr. 139 (1851), 155; and Thomas P. Slaughter, *Bloody Dawn: The Christiana Riot and Racial Violence in the Antebellum North* (New York: Oxford University Press, 1991).

3. "Judge Kane's Charge to the Grand Jury," in *Report of the Trial of Castner Hanway for Treason, in the Resistance of the Execution of the Fugitive Slave Law of September, 1850*, ed. James J. Robbins (Philadelphia: King & Baird, 1852), 268.

4. "Charge of Judge Kane to the Grand Jury," in ibid., 267.

5. U.S. Const. Art. 3 § 3.

6. Robbins, *Report of the Trial of Castner Hanway for Treason*, 49.

7. Ibid., 221.

which that contract has procured for you."[8] With unhelpful precedents, these legal professionals relied on available authority in constitutional culture.

Amid the architecture of the Founding and peals of the Liberty Bell, the legal performance around Hanway enlisted veneration for the Fathers' Constitution and deference to imputed original intentions to govern a slaveholding republic.[9] Ashmead's final words sounded like the finale of a Fourth of July oration, concluding that the laws of slavery must "be vindicated and maintained, and that the promises of the Constitution shall be kept… in the spirit and in the truth, with which that instrument came to us from the great Fathers of the Revolution."[10] Citizen cooperation in upholding slavery became a nontextual command issued from the Founding. Refusal became rebellion. Ultimately, Justice Grier recognized the "indignation felt by the people of Maryland" but followed text and precedent to instruct that "when the object of an insurrection is of a local or private nature, not having a direct tendency to destroy all property and all government, by numbers and armed force, it will not amount to treason."[11] A verdict of not guilty followed, accompanied by public dispute over "the views entertained… by the great statesmen who framed the Constitution."[12]

Across antebellum America, constitutional cases touching slavery unfolded in less evocative structures than Independence Hall. But if proceedings lacked the immediate power conferred by that space, they drew mightily on the authority of the Founding that resided in many Americans' minds.[13] The Hanway trial displayed an effort to surmount plain text through the naked force of ascribed Founding imperatives. More often, popular history was presented as constitutional law, legitimating and cloaking judicial choices as original commitments of national fathers. This article considers how the Founding's cultural power produced legal authority as antebellum courts confronted slavery's constitutional identity. Attorneys and judges grasped reverent historical memory for the Founding to manage the most explosive domain of national constitutional

8. Ibid., 195.

9. William Henry Johnson, *Autobiography of Dr. William Henry Johnson* (Albany, NY: Argus Company, 1900), 118

10. Robbins, *Report of the Trial of Castner Hanway for Treason*, 54.

11. Ibid., 246.

12. A Member of the Philadelphia Bar, *A History of the Trial of Castner Hanway and Others, for Treason, at Philadelphia in November, 1851* (Philadelphia: Uriah Hunt & Sons, 1852), 4; Robert Brent, *Report of Attorney General Brent, to His Excellency, Gov. Lowe, in Relation to the Christiana treason trials, in the Circuit Court of the United States, Held at Philadelphia* (Annapolis, MD: Thomas E. Martin, 1852).

13. Charlene Mires, *Independence Hall in American Memory* (Philadelphia: University of Pennsylvania Press, 2002).

politics, as the Hanway prosecution illustrates. The bar worked with the legitimating power of original visions to persuade judges, juries, and spectators. Judges wielded the Founding's authority as a resource for justifying rulings and conducting didactic, disciplinary, and diplomatic functions to control sectional politics. As courts assimilated the Founding, antebellum America experienced the interpenetration of vernacular constitutional culture and formal jurisprudence. The gravity of slavery bent and bowed constitutionalism in high judicial halls as well as in popular understanding.

Through a discussion of the Founding and examples drawn from a larger body of constitutional cases involving slavery, this article charts how lawyers and judges used vernacular constitutionalism to litigate and govern the most volatile of subjects. It was overwhelmingly that body of cases that ushered Founding narratives into courts during the Early Republic, just as it was slavery and sectional conflict that catalyzed intensive labors of research and imagination about constitutional history. Diverse interpretative techniques were available to antebellum jurists across areas of constitutional litigation. These included "strict construction" of text and inquiring into the "intent of the parties" about a specific portion of text, an approach resembling common law reasoning about legislative intent based on text itself.[14] Cases implicating slavery, however, inspired an effort to produce settled authoritative answers through stories about original promises, expectations, and intentions, an approach that recruited popular history and faith in a fathers' Constitution.[15] They pushed jurists to move beyond principles of strict or latitudinarian construction and to claim historical truths, whether in support of an expansive federal program to capture fugitives or the exclusion of black Americans from "the People."

14. St. George Tucker, *Blackstone's Commentaries: With Notes of Reference [. . .]*, vol. 1 (Philadelphia: William Young Birch and Abraham Small, 1803), appendix 151–55; Joseph Story, *Commentaries of the Constitution of the United States; with a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution*, vol. 3 (Boston: Hilliard, Gray, and Co., 1833), 382–442; Theodore Sedgwick, *A Treatise on the Rules which Govern the Interpretation and Application of Statutory and Constitutional Law* (New York: John S. Voorhies, 1857); and D. A. Jeremy Telman, "John Marshall's Constitution: Distinguishing Originalism from *Ipse Dixit* in Constitutional Adjudication," Valparaiso University Legal Studies Research Paper No. 18–9, September 14, 2018. https://ssrn.com/abstract=3249726 (last accessed May 23, 2019).

15. Historical literature in the United States at this time was inherently "popular" as opposed to professional in character, although differing in erudition and accessibility. The first full-fledged monographic treatment of the Constitution was an epic narrative by George Ticknor Curtis, a leading New England lawyer and conservative politician. George Ticknor Curtis, *History of the Origin, Formation, and Adoption of the Constitution of the United States; with Notices of its Principal Framers*, 2 vols. (New York: Harper and Brothers, 1857–61).

This linkage among slavery, vernacular constitutionalism, and discursive practices in legal arguments and judicial opinions belongs to the history of originalism. Accounts of originalism's origins generally turn to the latter decades of the twentieth century to trace an internal process of interpretative refinement or an external story of conservative political backlash.[16] Constitutional contestation over slavery yields a historical perspective attuned to the deep roots of originalism's appeal. The question of *when* is the history of originalism depends on *what* the object is. In addition to being a legal theory, originalism can be understood as a form of constitutional engagement both in court and out of doors that integrates public memory culture and legal reasoning. As a jurisprudential discourse, it presents claims of historical meaning that, as several scholars argue, sound in ethical terms of national identity, defying ready classification in conventional modalities of constitutional argument.[17] More broadly, it is an instrument of power clutched at two ends: by a public who believes in the Founding's authority and by legal professionals who tender meanings labeled with the reassuring mark of "original."[18] In this way, originalism sustains an intra-elite quest for theoretical legitimacy in the legal academy while securing popular legitimacy through the perceived promise of historical truths from the Founding Fathers.[19] A meeting point of these ends is visible in the persistent reliance on "Founders' and Framers' purposes, goals, expectations, and intentions" in argumentation by lawyers and judges, even as academic originalism abjures historical inquiry.[20]

16. Logan E. Sawyer III, "Principle and Politics in the New History of Originalism," *American Journal of Legal History* 57 (2017): 198–222; Eric Segall, *Originalism as Faith* (New York: Cambridge University Press, 2018); Robert Post and Reva Siegel, "Originalism as a Political Practice: The Right's Living Constitution," *Fordham Law Review* 75 (2006): 545–74; Mary Ziegler, "Originalism Talk: A Legal History," *Brigham Young University Law Review* (2014): 869–926; and Daniel T. Rogers, *The Age of Fracture* (Cambridge, MA: Belknap Press of Harvard University Press, 2011), 232–42.

17. Jamal Greene, "On the Origins of Originalism," *Texas Law Review* 88 (2009): 1–89; and Jack M. Balkin, "The New Originalism and the Uses of History," *Fordham Law Review* 82 (2013): 641–719.

18. Jamal Greene, "Selling Originalism," *Georgetown Law Journal* 97 (2009): 657–721; and Rebecca E. Zietlow, "Popular Originalism? The Tea Party Movement and Constitutional Theory," *Florida Law Review* 64 (2012): 483–511.

19. Compare Jeremy K. Kessler and David E. Pozen, "Working Themselves Impure: A Life Cycle Theory of Legal Theories," *University of Chicago Law Review* 83 (2016): 1886. The popular face of originalism complicates any effort to treat it as a teetering legal theory.

20. Jonathan Gienapp, "Historicism and Holism: Failures of Originalist Translation," *Fordham Law Review* 84 (2015): 935–56; Balkin, "The New Originalism and the Uses of History," 653; and Richard H. Fallon, Jr., "Legitimacy and the Constitution," *Harvard Law Review* 118 (2005): 1787–853.

Approaching originalism as not only a theory of constitutional interpretation but also as a form of public constitutional engagement directs attention toward the formation of the constitutional culture that sustains originalism. The ethos of a venerated Founding had to develop, and legal professionals had to introduce the authority inhering in public memory into legal practice. Both occurred through contestation over slavery and state power. The roots of originalism lie in this past.

Creating the Founding

Americans constructed an authoritative Founding between 1819 and 1835: between the impasse over whether Missouri would enter the Union with slavery and the crisis over South Carolina's assertion of a constitutional power to nullify federal law. These events unfolded at a conjuncture—new schisms over slavery erupted in concert with the demise of the first party system, passing of the revolutionary generation, and transformation of the country's economic and geopolitical landscape—and they encompassed a transformative moment in public constitutionalism. Previously, the popular authority of the Federal Convention had been shallow and uncertain. Many citizens admired and debated the Constitution as a framework and set of principles, but they did not figure claims around ascribed authorial visions, much less invoke original understandings to dispute slavery.[21] There were no printed narratives of the Founding prior to the 1820s, and original documentary sources were unpublished, scarce, or uncompiled. This changed within a generation. A divided public turned to the constitutional past to litigate slavery's future, constrain political choice, define the Union, and govern the unstable present.[22]

Jurists drew upon and participated in constructing an authoritative Founding. In 1833, for example, the former judge Nathaniel Chipman joined the outpouring of new constitutional literature with a textbook on American constitutionalism, *Principles of Government*. The Middlebury College professor explained that even if over time, "the meaning of words or terms is changed, the meaning of the constitution" remains

21. On transformative congressional debates on the nature of the "unfinished" Constitution during the Early National Period, see Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (Cambridge, MA: Belknap Press of Harvard University Press).

22. These themes and related arguments are explored in greater depth in Aaron Hall, "Claiming the Founding: Slavery and Constitutional History in Antebellum America" (PhD diss., University of California, Berkeley, 2019); compare Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Alfred A. Knopf, 1986), 43–124.

fixed, making it "necessary to seek and learn the meaning intended by the framers." For example, it was "clearly intended by the framers" and "so understood by the parties ratifying" that the Constitution would create "not a federal but a national union."[23] Tellingly, not a word about framers and intention appeared in Chipman's 1793 *Sketches of the Principles of Government*. Constitutional culture had shifted, bringing these concepts to the fore in the intervening span.[24] If locating framers' understanding of constitutional text might seem to present a broadly applicable approach, a far different reality prevailed. First, it was an approach that became salient only in divisive cases, when political pressures loomed, legal arguments were exhausted, and the Constitution itself seemed to offer no suitable answer. Thus, with constitutional slavery cases leading the way, antebellum judges gradually began using Founding documentary sources primarily to bring dead-hand authority to bear on politically contentious cases.[25] Second, as Chipman's historical assertion of "not a federal but a national union" suggests, searching for original visions invited people to find or fashion a constitutional past they could believe in fervently. Whereas the meaning of the Constitution ostensibly remained fixed, the Founding opened the document to narrative world building. Professing or demanding obedience to ascriptions of paternal intentions, promises, and expectations became a workaround for textual fixity, textual paucity, and text that left unwelcome room for present-day policy making. During an era in which much American law shifted toward formalism, a countermovement developed around the most politically and morally fraught site of constitutional dispute.[26] The scope of the Constitution as a bearer of answers expanded with meanings written into the past as original settlements.

The rise of popular faith in the Founding undergirded this transformation in constitutionalism. Free black abolitionist Charles Lenox Remond testified to its near hegemonic presence in 1844. As abolitionists argued at the New England Anti-Slavery Convention, Remond heard delegates

23. Nathaniel Chipman, *Principles of Government: A Treatise on Free Institutions, Including the Constitution of the United States* (Burlington, VT: Edward Smith, 1833), 254, 264.

24. Nathaniel Chipman, *Sketches of the Principles of Government* (Rutland, VT: J. Lyon, 1793).

25. Ira C. Lupu, "Time the Supreme Court and *The Federalist*," *George Washington Law Review* 66 (1998): 1324–36; and Pamela C. Corley, Robert M. Howard, and David C. Nixon, "The Supreme Court and Opinion Content: The Use of the Federalist Papers," *Political Research Quarterly* 58 (2005): 329–40.

26. Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, MA: Harvard University Press, 1977).

defend the Constitution as a "sacred instrument" and observed that it was easy for white men "to speak of the awe and reverence they feel as they contemplate the Constitution"; but it was impossible for him and his enslaved brethren to regard it with the requisite "filial reverence."[27] Founding idioms and strictures pervaded antebellum discourse, sprouting from society's fissures. As Southern states threatened secession in 1860, for example, Ezra Chase's popular *Teachings of Patriots and Statesmen* explained that what "voters of this country desire in reference to the question of slavery is to know from an authentic source what the framers of the Constitution meant to do with it"; with such knowledge, "they will steadily pursue the path marked out by their fathers."[28] This premise reflected the authority that Americans had spent decades vesting in the Founding.

For lawyers manning the political decks of their states and sections, fluency with the Founding was an essential tool of the trade, allowing easy movement between formal knowledge and passionate historical claims. Writing to his uncle, law student and future president Rutherford Hayes reported his fascination with Justice Joseph Story's lectures at Harvard Law School because they "give many items of valuable information in relation to the history of the Constitution, its framers, their views and intentions, and its practical workings, which are not to be found in print."[29] In the realm of unwritten stories, constitutional law acquired a narrative form and mythos. Meaning could stretch and grow. Hayes also transcribed the lesson that abolitionists might render "the Constitution worse than a dead letter, an apple of discord in our midst, a fruitful source of reproach, bitterness, and hatred, and in the end, discord and civil war."[30] For lawyers and judges no less than other interested white Americans, the politics of slavery stimulated a corollary to veneration: fear of losing the constitutional patrimony.

Spreading Authority

The legitimating capacity of constitutional history developed over time for the judiciary. In the era of the Missouri statehood crisis, as the country reverberated with a new discourse of clashing original visions for slavery's

27. "Speech by Charles Lenox Remond," in *The Black Abolitionist Papers*, vol. 3, ed. C. Peter Ripley (Chapel Hill: University of North Carolina Press, 1991), 442–45 (reprinted from *National Anti-Slavery Standard*, July 18, 1844).

28. Ezra B. Chase, *Teachings of Patriots and Statesmen; or, the 'Founders of the Republic' on Slavery* (Philadelphia: J. W. Bradley, 1860), 6.

29. Charles Richard Williams, ed., *Diary and Letters of Rutherford Birchard Hayes*, vol. 1 (Columbus: F. J. Heer Printing, 1922), 159.

30. Ibid., 131.

future, courts reached for the same vernacular constitutionalism to impose framer-sanctified settlements. Initially, the Founding entered the courtroom as a vague directive to make good on an original sectional compromise. In 1822, for example, Massachusetts Chief Justice Isaac Parker heard arguments against the 1793 Fugitive Slave Act after Virginian Camillus Griffith attempted to drag New Bedford resident John Randolph back into slavery. Exposed to a local Northern and distant Southern gaze, the jurist turned to the Convention to sanction Griffith's assault on Randolph.

> We must reflect, however, that the constitution was made with some States in which it would not occur to the mind, to inquire whether slaves were property. It was a very serious question, when they came to make the constitution, what should be done with their slaves. They might have kept aloof from the constitution. That instrument was a compromise. It was a compact by which all are bound. We are to consider then what was the intention of the constitution. The words of it were used out of delicacy so as not to offend some in the convention whose feelings were abhorrent to slavery; but we there entered into an agreement that slaves should be considered as property.[31]

Parker's invocation of attributed intentions corresponding to ongoing sectional fears and a closed arc of paternal decisions marked the emerging Founding ethos and its juridical application. The judge cited no sources for his history. He described the Founding that lay in his imagination. It was one that many Americans could share.

By 1824, local trial judge Philadelphia District Court President Moses Levy knew how to summon Founding authority to justify performing his "painful but imperious duty": the return of George to enslavement by Virginian John Winder. The case was a straightforward application of the Fugitive Slave Act, but Levy had public opposition and personal regret to assuage. "Let it be recollected that this constitution gave us the rank and high standing among nations which we now enjoy. It never could have been adopted, it never could have been ratified by a majority of the States, if the clause alluded to, or some equivalent provision, had not been introduced into it," he opined. After giving a brief history of American slavery culminating in the Federal Convention, Levy concluded that he must obey "that Constitution which is the ark of our safety, the foundation of our glory; that has furnished the great model for newly emancipated nations to fashion their charters of freedom by, and which it is our first duty to preserve entire."[32] Levy had experienced the ascent

31. *Commonwealth v. Griffith*, 2 Pick. 11 (1823), 18; and Kathryn Grover, *The Fugitive's Gibraltar: Escaping Slaves and Abolitionism in New Bedford* (Amherst: University of Massachusetts Press, 2001), 94–97.

32. *The American Farmer*, October 8, 1824, 230–31.

of a vernacular constitutionalism around slavery that privileged original genius, and he spoke it fluently from the bench. As courts leaned upon its legitimating authority, public constitutional history became a kind of constitutional law. Cases such as *Griffin* and that of George showed that popular historical authority and formal legal justification would move together. The former comprised a discursive technology through which legal professionals could negotiate the constitutional politics of slavery. Just as reporters and treatises moved across the country, so too did the precedential dimensions of the Founding spread through the United States.

In the 1820s and early 1830s, the judicial narrative of the Founding was a bare-bones affair. Jurists invoked it as a brief set of facts and principles to justify decisions that variously appeased or disappointed slaveholders when enslaved lives hung in the balance. Over the following decades, thin representations developed into thicker imaginings. In response to new demand and availability, publishers, editors, and government officials transformed the extent to which legal actors could craft constitutional narratives through the reproduction and circulation of important archival materials, especially the 1840 release of James Madison's Convention notes. As the leading legal periodical *The American Jurist* extolled, the Constitution is "a miracle," and Madison "had a prophetic insight" for having "foreseen that the time would come" when the people would need to consult the Convention. The terms of ascribed original bargains became ever more favorable to slavery as the Founding grew more elaborate inside courtrooms.[33]

Ruling through the Past

The Madisonian window opened before a watershed moment in the Founding's judicial ascent. In 1842, advocates and justices at the Supreme Court grasped the authority of constitutional history with unprecedented invention and research in *Prigg v. Pennsylvania*.[34] A team of Maryland men had carried off Margaret Morgan, of disputed status, and her family from Pennsylvania without complying with statutory process.

33. "The Madison Papers," *The American Jurist* 52 (1842): 393. Documentary productions, as revised, curated, and edited, were politically influenced constructions. See Mary Sarah Bilder, *Madison's Hand: Revising the Constitutional Convention* (Cambridge, MA: Harvard University Press, 2015); and H. Jefferson Powell, "The Principles of '98: An Essay in Historical Retrieval," *Virginia Law Review* 80 (1994): 689–743.

34. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842); and H. Robert Baker, Prigg v. Pennsylvania*: Slavery, the Supreme Court, and the Ambivalent Constitution* (Lawrence: University Press of Kansas, 2012).

The tragedy inflicted on the Morgans and indictment of the kidnappers presented an opportunity for the Court to govern slavery. Fugitive renditions had exposed dissonant constitutional understandings, as Northern states enacted procedures contravening slaveholders' rights-claiming. Pennsylvania Attorney General Ovid Johnson explained that *Prigg* was "designed to settle the agitating and delicate questions referred to, by the decision of the highest tribunal in the Union."[35] But to impose a settlement, the Court did not rely upon institutional stature alone. It recruited the Founding's cultural power to ordain as original meaning a new order where the framers had left combustible silence.

Prigg posed a quest for prescriptions hidden beyond the plain, limited language of the Fugitive Slave Clause. Maryland attorney Jonathan Meredith offered the "well-known history" of a grand sectional bargain in which "the north agreed to recognise and protect the existing institutions of the south." The scope of this promise yawned without limit. In the Baltimore attorney's account, the framers had intended the clause as a totalizing vow that slaveholders could seize alleged slaves wherever found. Proof came in the "history of the times" and Governor Randolph's Virginia Ratifying Convention assurance that: "Were it right to mention what passed in convention on the occasion, I might tell you that the southern states, even South Carolina herself—conceived this property to be secured by these words."[36] Against this historical claim, Thomas Hambly averred that "no one, either in the debates upon the formation of the Constitution, or at its adoption by the States, ever asserted that to be the meaning of this clause." The York County district attorney came prepared with pioneering invocations of "the Madison Papers" and a command of popular constitutional poetics. "Any irreverential touch given to this ark of public safety should be rebuked, and every violence chastened," he declared.[37] For Maryland and slavery, Jonathan Meredith further argued that the framers had intended federal rendition because "every southern mind in the convention" had feared inadequate state laws.[38] Pennsylvania Attorney General Ovid Johnson, citing "the Federalist, Nos. 41, 42, and 43; but especially 42," mocked this contention that a great national power lurked unnoticed "by the keen eyes of Hamilton, Madison, or Jay." *The Federalist*, he announced, had been "read by almost every-one" at the Founding and taken as explicating true meaning.[39] To make his primary

35. "Correspondence of the Inquirer & Courier," *Pennsylvania Inquirer and Daily Courier*, May 29, 1840, 2.
36. *Prigg*, 41 U.S. (16 Pet.), 564–65.
37. Ibid., 572, 575–76.
38. Ibid., 575.
39. Ibid., 593–94.

historical argument, he advanced a fictive secondary claim about reading practices.

Johnson concluded with the most forceful invocation of the Founding he could deliver. The final passages of his argument laid bare the authority at work in litigating slavery's constitutional identity. Little in his words registered in conventional idioms of legal construction. They called forth the judicial power to produce a settlement by following the Founding.

> The framers of our glorious Constitution, appear to have been little less than inspired. They not only guarded the liberties of their own age, but they looked into futurity, and provided for the liberties of ages to follow them—constitutional indemnities which must then have been established, or never established at all. . . . The most skeptical must trace the finger of God in this work; and acknowledge that he has sanctified it in the councils of his Providence. It is adapted to our condition in every stage of our national advancement. . . . *The Constitution of our fathers is still solid and entire, the Constitution of their descendants*.[40]

The state attorney ushered vernacular constitutionalism into the Court. He affirmed the framers' divine wisdom, elevated the Founding's authority and temporal discontinuity, and avowed the infinite suitability of the original "Constitution of our fathers." These elements provided the ethical heart of his claims.

The Court rejected Johnson's historical arguments but recruited the faith that he modeled. Story's "Opinion of the Court" developed the decade-old origin story of the Fugitive Slave Clause presented in his *Commentaries on the Constitution*.[41] "Historically, it is well known that the object of this clause was to secure to the citizens of the slave-holding States the complete right and title of ownership in their slaves, as property, in every State in the Union," explained Story, a promise that "constituted a fundamental article without the adoption of which the Union could not have been formed." This became true as a matter of law while expanding from its prior formulation. Now the framers had intended to prevent states "from intermeddling with, or obstructing, or abolishing the rights" of slaveholders.[42] This articulation of original visions recast state process laws as unconstitutional. Now the Founding demanded uniform federal action. Redeeming the promise had taken a half-century and a confluence of politics and personnel on the Court. Constitutional faith and historical imagination—in the guise of original meaning—rendered such a transformation possible and legitimate.

40. Ibid., 606–7 (emphasis added).
41. Story, *Commentaries of the Constitution of the United States*, 676–78.
42. *Prigg*, 41 U.S. (16 Pet.), 611.

Concurring justices advocated their particular Foundings. Associate Justice James Wayne of Georgia brought contemporary Southern constitutional faith to the bench. While agreeing that the federal government must legislate to capture fugitives, his predicate past was a total triumph for slaveholders, who received "a full and perfect security for their slaves as property when they fled into any of the States of the Union; the fact is not more plainly stated by me than it was put in the convention." Wayne happily deferred to the imputed will of slaveholding national fathers. "I am satisfied with what was done, and revere the men, and their motives for insisting, politically, upon what was done."[43] Planting arguments on Founding authority enabled him to slip the constraints of strict construction. *Prigg* showed that when slavery came before the Court, justices could sound much like politicians and the people themselves.

The justices constituted themselves as a court of history to govern slavery. They ventured beyond their competency as jurists to assert expertise as arbiters of historical facts. In doing so, they entered a terrain where people bearing their own notions of the past could more readily object. As one self-professed upholder of original compromises wrote in the *Cleveland Herald*, "it certainly was not the intention of the framers of that instrument to protect the negro-stealer in arresting and dragging back into bondage" alleged slaves or free black people, and the "imputation would be a libel upon the great and good men by whom that Constitution was framed."[44] Antebellum judicial narratives seemed to absorb proslavery constitutional history. After *Prigg*, proceedings pursuant to the 1850 Fugitive Slave Law impelled jurists to unfurl new justificatory Founding tales. *Dred Scott v. Sanford* (1857) represented an even more ambitious project to govern slavery through ascribed racial notions "upon which the statesmen of that day spoke and acted."[45] These courtroom claims accompanied political flash points, particularly slavery in the Western Territories, waged with arguments over original meaning. Some free-state citizens developed alternative narratives to reconcile constitutional faith with their moral and political lives. Pushing the bounds of textual and historical plausibility, they imagined redeeming a Founding that anticipated the end of slavery.[46] As Samuel

43. Ibid., 638–39.

44. Liber, *Cleveland Herald*, July 22, 1846, 2.

45. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), 409.

46. Reflecting, in part, the continued importance afforded to the original intentions and values of "Founding Fathers," the relative proslavery or antislavery character of the Constitution remains a subject of debate. See, for example, Sean Wilentz, *No Property in Man: Slavery and Antislavery at the Nation's Founding* (Cambridge, MA: Harvard University Press, 2018); and David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (New York: Hill and Wang, 2009).

Chase asserted in *Jones v. Van Zandt* (1847), "It is thought by some that a leading object in the formation of the Federal Constitution was to secure to the citizens of the slaveholding states their rights of property in slaves." This proslavery Founding was "not the Constitution," but rather "a pernicious parasite… planted by the side of the constitutional oak by other hands than those of the Founders of the Republic."[47] Over the 1850s, events caught up with such unlikely claims. Redeeming original meaning gained support in and out of courts at the moment that judges, Southerners, and conservative unionists wielded the authority of a proslavery Founding to the fullest possible extent.

Restoring Public Memory

In 1859, a protracted legal performance in Ohio showed the authority of the past decoupling from the legal order that it had long sustained. A federal marshal seized John Price, a refugee from slavery, near the abolition-friendly town of Oberlin in the fall of 1858. After mass action by residents forced his release, judicial process sprang into motion. The United States government secured indictments against dozens of participants. As this case wended through federal and state courts, legal professionals attempted to discipline citizens and sway outcomes with the Founding.[48] But it was an increasingly untamed cultural power that they sought to harness. In 1854, Wisconsin's Supreme Court had struck down the 1850 Fugitive Slave Law on the basis of original meaning. "One great aim of the founders of our government, (among others), was to secure beyond contingency personal liberty, and to protect and preserve, as far as practicable, the independence and sovereignty of the respective States," Judge Abram Smith opined to acclaim and excoriation.[49] Subsequently, *Dred Scott*'s majority and dissenting opinions had promulgated divergent renditions of the Founding for black Americans. This fracture among prevailing judicial narratives and popular history became central to Republican campaigning to redeem the Constitution by ignoring the Court and appointing justices who would honor thy fathers.

With national attention trained on the proceedings, the antislavery community drew close the legitimating power of the Founding. At a "felons'

47. Salmon P. Chase, *Reclamation of Fugitives from Service: Mr. Chase's Argument, in Defence of John Vanzandt, Before the Supreme Court of the United States* (Cincinnati: R. P. Donogh, 1847), 75, 82.

48. Steven Lubet, *Fugitive Justice: Runaways, Rescuers, and Slavery on Trial* (Cambridge, MA: Harvard University Press, 2010), 229–93.

49. *Unconstitutionality of the Fugitive Slave Act: Decisions of the Supreme Court of Wisconsin in the Cases of Booth and Rycraft* (Milwaukee: Rufus King & Co., 1855), 88.

feast" dedicated to the prisoners before trials commenced, black leader John Langston, president of the Ohio Anti-Slavery Society, assessed the moment. "[W]hat is the work of the American citizen of to-day to accomplish? It is this. He is to reinstate the Declaration of Independence, and to reinstate the Constitution of the United States. American Slavery has stricken down the first; the Fugitive Slave Law the latter."[50] Saving Price was an act of constitutional rescue. Inside federal district court, prominent antislavery attorney Rufus Spaulding translated Langston's declaration into legal argumentation. The former Ohio Supreme Court justice presented his cause as a defense of original meaning: "I would that I had power to bring to the vindication of the true History of the Constitution of the United States, more ability than I possess. I would rescue it from the infamy cast upon it by the prosecution in this case." He told a declension narrative in the style that antebellum generations learned to fear. The framers did "not allow the word '*slave*' to be placed anywhere in that instrument, for any consideration," insisted Spaulding, but "now we bring our school children into court, that they may hear District Attorneys of the United States read indictments" for helping the enslaved. The attorney pit the framers against precedent and supporters of the Fugitive Slave Law, including a Court that had implicitly "declared that these men were all ignoramuses." In Spaulding's alternative Founding, the "fugitive servant" clause was not originally "looked upon as one of the compromises between the North and the South… and never was so regarded anywhere else, until a very modern date." Seeking a writ of habeas corpus at the Ohio Supreme Court, he elaborated this argument during a full afternoon tracing the formation of the Constitution. The clause "would never have been adopted in that convention, if it had not been the general belief South as well as North, that slavery was a temporary evil," he contended, and people would never have ratified the Constitution "if leading men had not insisted" the same.[51] This lesson reversed the oft-rehearsed premise that the clause had been the constitutional keystone and an expansive promise to protect slavery. In his telling, the framers and ratifiers belonged to the antislavery community. This constitutionalism denied the finality of Supreme Court rulings and sought deeper legitimacy through history that people could believe in.

For the prosecution, former United States Representative George Bliss repeated the Convention story that framers had agreed on the necessity of federal slave rendition. He demanded that Ohioans feel the bonds of

50. Jacob R. Shipherd, comp., *History of the Oberlin-Wellington Rescue* (Boston: John P. Jewett, 1859), 8.

51. Ibid., 63–64, 66, 110.

this history. "How, then, can they stand up to day and repudiate and impugn this same Constitution?" he queried.[52] United States District Judge Hiram Willson endorsed the government's narrative, directing the all-Democrat jury to maintain a Constitution designed to serve slaveholders. It complied, first convicting Simeon Bushnell and then black leader Charles Langston. Afforded a moment to speak, Langston, whose white father had fought in the War of Independence, raised the image of Philadelphia's Constitutional Convention Hall. He proposed, "Let me stand in that Hall, and tell a United States Marshal that my father was a Revolutionary soldier; that he served under Lafayette, and fought through the whole war, and that he always told me that he fought for *my* freedom as much as for his own, and he would sneer at me, and clutch me with his bloody fingers, and say he had a *right* to make me a slave!"[53] The Founding became an instrument through which Langston indicted the degraded present.

The full bench of the Ohio Supreme Court convened in May 1859 to consider habeas petitions by Bushnell and Langston. Under now-Governor Salmon Chase, Ohio sent Attorney General Christopher Wolcott to support constitutional redemption. The United States Supreme Court, reversing the defiant Wisconsin fugitive decision, had just castigated the judicial resistance now sought. The proceedings reopened the question of which constitutional view of the Fugitive Slave Law would prevail: the vision promoted by antislavery constitutionalists or the one held by constitutional unionists, Southerners, and most judges. Wolcott spoke exhaustively of the Founding, filling pages of transcription, to delegitimize the federal slave-catching power. He delivered a history in which the modern meaning of the fugitive clause was a myth "never hinted at till long after all those compromises had been definitely settled; and not, indeed, until after all the provisions deemed essential to be incorporated in the Constitution had been agreed on." A moment telling of the authority carried by Founding narratives arose when Chief Justice Joseph Swan interjected to note "one statement" in the Convention that Wolcott had missed: "Mr. Pinckney, of South Carolina, said he would not vote for any Constitution unless it protected property his slaves." But having mined the Convention records, Wolcott could respond that no one supported Pinckney. The attorney concluded that "this solitary remark of a solitary man upon a solitary occasion, certainly furnishes no justification" for making the clause into a fundamental promise to protect slave property.[54] Antebellum constitutional culture, as it

52. Ibid., 165.
53. Ibid., 177.
54. Ibid., 212.

crystalized around contesting slavery, forged together visions of national purpose and national history. In the space of a courtroom, ostensibly limited to legal discourse, Attorney General Wolcott worked through these elements. Like Spaulding before him, his argument culminated in an ardent plea for the original Constitution. "GO BACK, I SAY, TO THE TEXT OF THE CONSTITUTION, PLANT YOURSELVES ON ITS PRIMAL GRANITE," he thundered.[55]

The court denied relief by a 3–2 vote. Swan disappointed fellow Republicans by rejecting a constitutional insurgency, explaining that "the work of revolution should not be begun by the conservators of the public peace."[56] In dissent, however, Justice Jacob Brinkerhoff endorsed returning to Walcott's primal granite. "The federal legislature has usurped a power not granted by the Constitution, and a federal judiciary has, through the medium of reasonings lame, halting, contradictory, and of far-fetched implications, derived from unwarranted assumptions and false history, sanctioned the usurpation," he wrote. Opining that "history confirms" that the framers never provided for federal enforcement, Brinkerhoff argued that the Fugitive Slave Law's violation of the Constitution's "most sacred and fundamental guaranties" required putting Founding visions before precedents. For this dissenter, the Founding could legitimate revolution from the bench—to overturn other jurists' "false history."[57]

After the judges retired, constitutional veneration was the only clear victor. An Omaha, Nebraska newspaper related happily that the court had decided that Ohio would "respect the Constitution."[58] In a note titled "Schoolmaster on the Constitution," a Middletown, New York paper mocked the failed pretentions of antislavery constitutionalism: "The Oberlin rescue cases have led some abolition pedagogue to study the foundation of the Union and the Charter of our liberties; and lo! he has discovered that the clause which provides for the rendition of fugitives from labor is not good grammar. . .. We can tell him how it is to be parsed by those who forcibly resist its provisions—*by fine and imprisonment*."[59] Newspapers reported the vindication of the Constitution; but in Ohio, where officials detained the United States marshal for kidnapping until the federal government released the rescuers, constitutional convictions hardly abated.[60] Mass meetings readjudicated the case. At a Cleveland

55. Ibid., 224.
56. Ibid., 226.
57. Ibid., 228.
58. "Nullification in Ohio," *Omaha Nebraskian*, June 11, 1859, 2.
59. "Schoolmaster on the Constitution," *Banner of Liberty*, June 15, 1859, 1.
60. "The Supreme Court of Ohio and the Fugitive Slave Law," *Charleston Mercury*, June 4, 1859, 3.

rally, Governor Chase urged the assembled to apply the "great remedy" of "the people themselves at the ballot box" to elect men to "administer the Constitution of our fathers, the securer of liberty and not the prop of slavery."[61] The fathers themselves went unquestioned. Paralleling recent courtroom arguments—which had paralleled popular discourse—this rhetoric sounded in constitutional restoration.

Conclusion

The antebellum quest to follow the original "Constitution of our fathers" stood at odds with the stability and "liquidation" of constitutional meaning.[62] As a site of research, imagination, and narration, the Founding opened space for the protracted production, contestation, and revision of meaning. Recurring to the Founding was an exercise of power in a field of struggle, one undertaken at the confluence of political commitments, public memory, and documentary resources. Original visions of national fathers, as invented, invoked, and refined over time, legitimated changing configurations of slavery's constitutional identity. Proslavery policy marched forward on the ground of preserving the fathers' Constitution. Yet there was a degree of play in the joints between method and substance. While proto-originalism legitimated proslavery constitutional claims in courts, legislatures, and public sphere, the extrajudicial authority of popular constitutional history allowed for challenging their legitimacy on the same grounds in these forums, albeit with limited efficacy in court. The effort to cultivate consciousness of an antislavery Founding took place within this limited opening.

As legal professionals marshaled the authority of historical narratives from outside the courtroom into arguments and opinions, they entrenched deference to the Founding in formal constitutionalism. Conflict over slavery and state power catalyzed the development of originalism as a form of constitutional politics practiced by jurists and the public. Rhetorical and conceptual frameworks of the Founding that emerged in popular politics during the Early Republic began immediately to perform the same work in the judiciary: legitimating constitutional claims as original settlements and dispossessing living generations of interpretive and policy-making authority. In court and out of doors, antebellum Americans confronting slavery under the Constitution integrated public memory culture and legal reasoning, an entanglement that has been the taproot of originalism

61. Shipherd, *History of the Oberlin-Wellington Rescue*, 255; and "Great Mass Meeting," *Daily Cleveland Herald*, May 25, 1859, 3.

62. William Baude, "Constitutional Liquidation," *Stanford Law Review* 71 (2019): 1–70.

as a form of constitutional engagement. During this formative period, the close connection between calling upon a Founding ethos in popular constitutional culture and pursuing ascribed original meanings in constitutional law was plain. In its visibility, this history demonstrates how recurring to purported original meanings and claiming a dispositive past facilitates adjudication that obscures the act of choosing meaning and making policy. This was the original function of the Founding in political and legal debate. As a jurisprudence of original meaning grew in slavery cases, it depended on a vernacular constitutionalism that demanded belief in the availability of authoritative original truths.

Contemporary originalism operates in the currents of this constitutional culture. If originalism is not merely a theoretical plaything but a powerful instrument wielded jointly by legal professionals and the public, it is because a significant strand of contemporary constitutionalism believes in an authoritative Founding. As antebellum constitutional struggles over slavery show, however, that authority—and its judicial application—did not exist at the moment of constitutional genesis but rather was cultivated amid intractable political divisions and incalculable human trauma. Yet constitutional culture does not stand apart from the press of historical change; cultivations of authority may wither without new sources of energy. The construction of a governing Founding during the Early Republic suggests that its persistent authority should be approached as a contingent project over time. Indeed, the Founding's sway has not been constant, but rather waning in moments when living generations have taken more direct responsibility for their constitutional fate.[63] For the authority of the Founding to reach us and for antebellum vernacular constitutionalism to register with familiarity, a tortuous history lies between today and the actual Founding Era. The authority of that past in subsequent moments and in our present has depended on its revitalization and reproduction across wars, crises, and social conflict.[64] In the past half century, these forces include the rise of the modern originalism movement itself, which has both encouraged and drawn strength from popular faith in the Founding. In considering the production of the Founding's authority over time, contemporary originalism appears as both a recent participant in, and the result of, a long history of constitutional strife.

63. Bruce A. Akerman, *We the People*, *Vol. 2: Transformations* (Cambridge, MA: Belknap Press of Harvard University Press, 2000).

64. Aziz Rana, "Constitutionalism and the Foundations of the Security State," *California Law Review* 103 (2015): 335–386.