



Slavery and the Constitution

Briefing Document

INTRODUCTION

Big Question #1: Slavery was embedded into America’s fabric by the time of the ratification of the Constitution. Do you think this affected how long slavery lasted in America and how it ended?

Big Question #2: The 13th, 14th, and 15th Amendments ended slavery in America and tried to rebuild our nation on a stronger constitutional foundation. Do you think that these amendments changed the Constitution so much that it was like a re-birth—a “Second Founding”—of our nation?

The Constitution

Generations of Americans battled over slavery and the Constitution—with each side laying claim to the Constitution’s text and history.

These battles culminated in some of the biggest constitutional debates in American history (over the Constitution’s meaning and its relation to slavery), important national compromises (like the Missouri Compromise), infamous Supreme Court decisions (like *Dred Scott*), pivotal historical events (like the rise of the Republican Party and the election of Abraham Lincoln), the bloodiest war in American history (the Civil War), powerful attacks on slavery (like Lincoln’s Emancipation Proclamation), a decisive Union victory, and a series of transformational amendments to the U.S. Constitution—the 13th, 14th, and 15th—that brought the Constitution more in line with the Declaration of Independence’s promise of freedom and equality.

To begin to think through our big question, let’s start—as we always do when interpreting the Constitution—with the Constitution’s text.

There are many parts of the original Constitution that touch on the issue of slavery.

Here are some of the big ones:

- The **“Three-fifths Clause,”** Article I, Sect. II, Cl. 3: “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”

- Note interaction with Electoral College—increases strength of slaveholding states.
- Note influence across national government—increases pro-slavery strength in Congress, in the presidency (through the Electoral College), and at the Supreme Court (through electing pro-slavery presidents, who appoint those justices). By the Mexican-American War, many Northerners would refer to this as the “slave power conspiracy.”
- The **“Fugitive Slave” Clause, Article IV, Sect. II, Cl. 3**: “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”
 - Permits slaveholders to go into Northern—increasingly free states—and try to reclaim formerly enslaved people who escaped to freedom. (But not self-executing—requires the passage of the Fugitive Slave Act in 1793.)
 - Few protections for free African Americans when they’re accused of having escaped a slaveholder—so, many free African Americans wrongly sent to the slaveholding South. And even fewer protections under the Fugitive Slave Act of 1850 (principally, no jury trials for captured alleged fugitives, Northern citizens were now forced to aid in recapture).
 - Northern states increasingly pass personal liberty laws to offer new protections for African Americans. A powerful example of states’ rights/federalism promoting freedom.
- **“Slave Trade Clause”**: Article 1, Section 9, Clause 1, Congress is limited, expressly, from prohibiting the “Importation” of enslaved people, before 1808, “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”
 - By the founding, even many slaveholders opposed the inhumane Atlantic slave trade.
 - This clause protected this brutal slave trade until 1808.
 - At that point, Congress had the power to abolish it. (And so it did.)

Considering these provisions together, it’s important to note that a range of voices—*both* pro-slavery *and* anti-slavery—turned to this language and constructed arguments to favor their side of the great constitutional battles over slavery in the 1800s.

But it’s also important not to forget the human cost of slavery. The violence. The forced labor. The families torn apart. Wives sold away from their husbands. And children from their parents. And with every right that we cherish violated. No right to speak. Or pray. Or gather together. Or to a fair process before we are punished or lose our freedom. Or to marry and raise a family. Or to earn a freely chosen living. And so on.

Let’s keep that in mind as we walk through the history of American slavery and the Constitution today.

But let's also use this history to think through the ways in which we transformed the Constitution *after* the Civil War with the ratification of the 13th, 14th, and 15th Amendments. To review:

- The [13th Amendment](#) abolished slavery.
- The [14th Amendment](#) wrote the Declaration of Independence's promise of freedom and equality into the U.S. Constitution.
- And the [15th Amendment](#) banned racial discrimination in voting.

Role of African Americans in Constitutional Transformation

African Americans played a central role in this constitutional transformation.

Consider a few examples. In the late 18th century and into the 19th century, black Americans played a key role in the nascent abolitionist movement—recall that it was Prince Hall in January 1777 petitioning the Massachusetts legislature to abolish slavery soon after the Declaration of Independence. (This was also true of the Pennsylvania Anti-Slavery Society, launched in 1787, as while Benjamin Franklin was the president, black leadership was key as were the goals of civic participation and black empowerment.)

Early goal is, in the words of historian Paul Polger, the “basic validity of black freedom” in the 1780s—they defended the rights of free blacks and demanded a widening of statutory or legal emancipation. (Polgar says that the magnitude of black participation in these early anti-slavery and abolitionist societies has not been traditionally understood and therefore, we have not appreciated the impact of gradual emancipation laws even if they did not grant anyone immediate freedom.)

These societies, with biracial membership, achieved a steady stream of laws that moved the anti-slavery fight forward, from Pennsylvania's 1780 gradual emancipation law to New York's 1817 bill to set a date for the total abolition of slavery.

Black abolitionists also criticized the colonization movement that was broadly supported in the early 19th century in favor of immediate abolition, inspiring emerging white allies like William Lloyd Garrison.

Broadly, the abolitionist movement was movement that cut across race and gender, with white and black Americans, men and women, as well as immigrants, joining ranks to call for the end of slavery.

Constitutional arguments were a significant part of the abolitionist movement and black constitutionalism emerged as a result. Frederick Douglass prominently changed his mind, moving from a Garrisonian pro-slavery reading of the Constitution to an anti-slavery reading of the text.

The Big Idea

While the original Constitution—plus the Bill of Rights—remains a powerful statement of many of America’s most enduring principles, the 13th, 14th, and 15th Amendments truly represent (to borrow from Eric Foner and other scholars) our nation’s “Second Founding.”

While America has struggled to realize the promise of our nation’s Second Founding, these transformational amendments represent some of our Constitution’s most important principles—and protections.

FOUNDING STORIES: THE FOUNDING GENERATION AND THE EARLY REPUBLIC

Slavery is obviously older than the U.S. Constitution. And slavery itself was written into colonial law as early as the 1660s in places like Virginia and the Carolinas. (Brought a particularly brutal system from the Caribbean to the Carolinas.)

By the 1700s, these colonial slave codes transformed slavery itself—making it inheritable. In other words, it was passed down from mother to child and was a lifelong condition based on race. This was known as “chattel slavery.” This was a fundamental shift in slavery in the world.

And in the 1700s, American slavery expanded. To give just the example of Virginia—enslaved people grew from just 7% of the population in 1680 to 28% in 1700 and, finally, to a whopping 46% (nearly half of the Virginia population) in 1750.

Slavery became a massive part of the Southern population—and white Southern wealth—in the 1700s.

Declaration of Independence

Let’s fast forward now to 1776—and to the Declaration of Independence. While drafting the Declaration, Thomas Jefferson—himself, a slaveholder—initially included a complaint against King George III, attacking the international slavery trade.

Jefferson used powerful language, so it’s worth quoting in some detail:

King George III “has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating & carrying them into slavery in another hemisphere or to incur miserable death in their transportation thither. . . . Determined to keep open a market where Men should be bought & sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or restrain this execrable commerce. And that this assemblage of horrors might want no fact of distinguished die, he is now exciting those very people to rise in arms among us, and to purchase that liberty of which he has deprived them, by murdering the people on whom he has obtruded them: thus paying off former crimes committed against the Liberties of one people, with crimes which he urges them to commit against the lives of another.”

Pressured by southern delegates—especially powerful political leaders from South Carolina—Jefferson replaced this language with a passage blaming the king for inciting “domestic insurrections among us.”

This episode reminds us that, for the founding generation, there was a difference between slaveholders in the Upper South like Virginia versus those in the lower South like South Carolina.

Virginians like Jefferson, Madison, and George Mason opposed the Atlantic slave trade—viewing it as an inhumane institution—even as they themselves were slaveholders. Many slaveholders in the lower South continued to support it. (These Virginians treated the slave trade as particularly inhumane and different from slavery itself, something Lower South politicians saw as hypocrisy.) This split continued at the Constitutional Convention.

Constitutional Convention

Let’s fast forward again—this time, roughly a decade to 1787 and to the Constitutional Convention in Philadelphia. What role did slavery play there?

First, a quick backstory on the push towards emancipation—the end of slavery—in the North:

Throughout the colonial period, slavery wasn’t only a Southern phenomenon. There were enslaved people in the North—in some places, for instance, New York, there were many of them. However, during the 1780s, many Northern states took steps towards freeing enslaved people.

- Vermont ended slavery in their 1777 constitution.
- A state supreme court decision ended slavery in Massachusetts in 1783.
- Pennsylvania passed a (very) gradual emancipation bill in 1780, followed by Rhode Island and Connecticut in 1784. (These bills gradually freed the children of currently enslaved people in later years.)
- Even Virginia made it easier for slaveholders to emancipate their slaves by their wills.
- But some Northern states—those with a greater number of slaves like New York and New Jersey—were more reluctant to act. (Acts in 1799 and 1804, respectively.)

All told, 25 of the 55 convention delegates were slaveowners (roughly 45%), and slavery was critical to many of these delegates’ wealth—and to the economies of their home states.

At the Constitutional Convention, the framers refused to recognize the right of property in men. However, they *did* compromise over the issue of slavery, enshrining protections for slaveholders in the Constitution—insofar as slavery was created as a property right under state law it would be permitted under the Constitution. (Broadly, the reason for compromise—the biggest goal is a strong national union and government. For some Northern states, that means securing economic power. But South Carolina and Georgia—among others—wouldn’t agree to a Union without protections for slavery.)

As we just discussed, the original Constitution prohibited Congress from ending the slave trade until 1808, counted enslaved people as 3/5 of a person for purposes of representation in Congress, and protected the slaveholder's power to retrieve those who escaped slavery.

Let's quickly talk about each of these compromises.

The Three-Fifth Clause

Let's begin with (arguably) the most important of the three—the Three-Fifth Clause.

The U.S. House of Representatives draws up districts based on a state's population—the larger the state, the greater the number of districts it gets. And the greater the number of districts for each state—and for each region of the country (North v. South)—the greater the political power.

The key question in the debate over the Three-Fifths Clause was how to count enslaved people when setting the number of representatives in the U.S. House.

James Wilson wrote the original draft of the clause, borrowing language from a proposed 1784 amendment to the Articles of Confederation. It counted enslaved people as 3/5 of a person.

But this clause was debated multiple times during the convention—as the delegates struggled over how best to structure Congress. At the convention, pro-slavery Southerners argued that enslaved people should count as a full person—5/5s.

But anti-slavery Northerners shouted hypocrisy: How could the Southern delegates treat slaves as full persons for purposes of representation in the national government but at the same time deny their humanity by treating them as property?

For instance, Massachusetts delegate Elbridge Gerry asked how slaves who were property in the South could be counted as persons any more than “the cattle and horses of the North.” And New York delegate Gouverneur Morris called slavery a “nefarious institution— . . . the curse of heaven on the states where it prevailed.”

Morris then attacked the Three-Fifths Clause for giving “the inhabitant of Georgia and South Carolina who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections and damns them to the most cruel bondages, . . . more votes in a government instituted for the protection of the rights of mankind, than the citizen of Pennsylvania or New Jersey who views with a laudable horror so nefarious a practice.”

The convention rejected Southern attempts to count enslaved people as a full person, and Northern attempts to exclude them from the count altogether.

Ultimately, Roger Sherman of Connecticut pushed through the Connecticut Compromise—securing support for the Three-Fifth Clause. (The Southern delegates were unhappy that Northern reps would have a 36-29 advantage in the House, but they accepted the compromise as a key protection against future Northern attempts to limit slavery.)

Of course, the framers avoided using the word “slave” in the clause.

And this clause had a huge impact over time. While the delegates didn’t spend much time discussing slavery when debating how to elect the president, the lower South preferred a system in which Congress—where they might have an advantage due to the Three-Fifths Clause—would elect the president, while Northerners like James Wilson preferred popular election. The Electoral College ultimately gave them a similar advantage.

The Three-Fifths Clause increased pro-slavery strength in Congress (by counting enslaved people as 3/5 of a person), in the presidency (through the Electoral College), and at the Supreme Court (through electing pro-slavery presidents, who appoint those justices).

The Fugitive Slave Clause

There was little debate at the convention over the Fugitive Slave Clause’s language. And the language itself wasn’t new. It was mostly taken from *both* the Articles of Confederation *and* the Northwest Ordinance of 1787.

The Articles of Confederation was our nation’s first framework of government—coming before the U.S. Constitution. And the Northwest Ordinance was based off efforts by Thomas Jefferson in his time in Congress in 1784 to deal with slavery in the territories, and it banned slavery in the territories. However, it also granted slaveholders the power to recapture enslaved people that escaped into the territories.

At the convention, the delegates unanimously approved Pierce Butler’s language for the clause. Again, the framers avoided using the word “slave” in the clause.

The Slave Trade Clause

This provision led to heated debates at the convention. For instance, George Mason—himself a major slaveholder—used powerful language to capture the harm of slavery to the American character, which “produce[s] the most pernicious effect on manners” among the slaveholders by making every one of them a “petty tyrant.”

Mason, John Dickinson, and Rufus King proposed an outright ban on the Atlantic slave trade, but the delegates rejected it.

Instead, to the annoyance of Morris and Madison and others, the convention reached a compromise over the slave trade. Congress could prohibit the slave trade, but only 20 years after the ratification of the Constitution—which they did on January 1, 1808.

In the end, the anti-slavery Northern delegates wanted to block the expansion of slavery and did *not* want to write explicit protection for slavery—recognition of the so-called “right of property in man”—into the Constitution.

However, they were also open to protecting the existing property rights of the slaveholders and were willing to compromise with Southern slaveholders in order to form a new Union, ratify the Constitution, and create a new national government stronger than the government under the Articles of Confederation.

At the same time, Southern slaveholders fought to build in protections against *future* anti-slavery Northerners’ attempts to restrict (and even abolish) slavery.

FOUNDING STORIES: THE ANTI-SLAVERY MOVEMENT, THE BATTLE OVER THE CONSTITUTION’S MEANING IN PRE-CIVIL WAR AMERICA, AND THE SUPREME COURT THROUGH *SCOTT V. SANDFORD*

Prior to the Civil War, *both* pro-slavery *and* anti-slavery advocates debated the Constitution’s meaning and its relationship to slavery. Several different visions emerged.

Pro-Slavery Advocates

First, pro-slavery advocates like John C. Calhoun looked to the Constitution’s text and history and argued that the Constitution was a pro-slavery document. They argued that provisions like the Three-Fifths Clause and the Fugitive Slave Clause made clear that the Constitution was designed to protect the Southern slaveholders’ right to hold their slaves as property—what they referred to as a “right to property in man.”

And they made the historical argument that the slaveholding states never would have agreed to the Constitution if they hadn’t been able to strike that bargain.

Finally, over time, the pro-slavery argument became even more aggressive—eventually arguing that the Constitution didn’t just protect slavery in the existing slaveholding states, but also denied Congress the power to ban slavery elsewhere, including in the territories.

Anti-Slavery Advocates

Second, anti-slavery advocates also battled over the meaning of the Constitution and its relationship to slavery. These anti-slavery constitutional visions took on a variety of (sometimes conflicting) forms.

To begin, here’s some quick background on the larger movement itself.

The movement to end slavery gained momentum in the early-to-mid 1800s, eventually drawing the entire nation’s attention. Because the Constitution allowed slavery to continue in the states, some wondered how it could ever be abolished through constitutional means.

Abolitionism was an interracial movement, bringing black and white Americans together in a common cause. Black and white Northerners—women and men, alike—increasingly joined anti-slavery societies. Their members sent petitions to Congress, pressed state legislatures to pass laws that protected the rights of alleged fugitives, and organized to resist slavecatchers and kidnappers.

A wide range of abolitionist and anti-slavery thought emerged as the country grappled with how to deal with slavery. Ideas about freedom, equality, and the Constitution that emerged in the anti-slavery movement became the foundation for the birth of the Republican Party, the rise of Abraham Lincoln, and the ratification of the transformational Reconstruction Amendments after the Civil War.

Some anti-slavery politicians pressed the federal government to end slavery in places where it seemed to have unquestioned authority: the U.S. territories and the District of Columbia.

Some sought to build an anti-slavery political party, separate from the two major parties. Others argued for a spiritual rejuvenation that would lead to the immediate abolition of slavery everywhere.

In Northern states, black activists and their allies pressed for racial equality in citizenship, including the right to vote.

And in the white South, Southern leaders felt threatened by talk of ending or even limiting slavery. They aimed to suppress anti-slavery thought, as well as slave rebellions, and in doing so, violated core rights like free speech and religious liberty.

A major division emerged among abolitionist and anti-slavery leaders over the relationship between slavery and the Constitution.

The Garrisonian Interpretation: The Garrisonians or “radical abolitionists”—including Harvard-trained Wendell Phillips—maintained that the Constitution was “**a covenant with death and an agreement with hell.**”

Ironically, Phillips, William Lloyd Garrison, and their supporters agreed with pro-slavery advocates. They argued that the Constitution was a pro-slavery compact. They burned Constitutions and opposed involvement in political parties, arguing that the only way to end slavery was through moral persuasion and activism.

An Anti-Slavery Constitution: Other anti-slavery advocates opposed the Garrisonian vision and argued that the Constitution gave anti-slavery forces the power they needed to end slavery. For instance, anti-slavery advocates like Lysander Spooner rejected the Garrisonian argument and countered with a vision of the Constitution as a fundamentally anti-slavery document.

And a group led by Salmon P. Chase—the future chief justice—adopted the view that, while the Constitution didn’t empower the national government to interfere with slavery where it already existed in the slaveholding states, the federal government *was* free to abolish slavery in the District of Columbia, in the territories, and on all federal installations.

Scholars sometimes call this group the “political abolitionists” for its willingness to engage in electoral politics to achieve the end of slavery. Their slogan was “Freedom National, Slavery Local.” They sought to limit the spread and influence of slavery in the hopes that it might eventually die out without war or the end of the Union. This stance became the constitutional platform of the Liberty Party, the Free Soil Party, and eventually the Republican Party.

Frederick Douglass: Douglass was one of the most powerful (and influential) anti-slavery voices in pre-Civil War America.

Douglass began as a Garrisonian, but later changed his mind—influenced by anti-slavery voices like Spooner and Chase.

In a famous 1860 speech, Douglass read the Constitution’s text as a “glorious liberty document.” It’s a radically *textualist* speech, interpreting various clauses of the Constitution in an anti-slavery direction. Douglass reasoned that the Constitution doesn’t mention the word “slavery,” and argued that future generations shouldn’t search the history for “secret motives” or “dishonest intentions,” looking to protect slavery.

For instance, Douglass says that the Fugitive Slave Clause doesn’t explicitly apply to slaves but to laborers. He reads the Three-Fifths Clause as opening the door to freedom by recognizing the humanity of enslaved people. He reads the Constitution’s optimistic preamble as bending towards freedom, *not* slavery and he argues that Fifth Amendment’s Due Process Clause should be read to support the claims of slaves—*not* slaveholders—as it protects the property rights of enslaved people in their own labor.

Douglass: “Its language is ‘we the people.’ Not we the white people, not even we the citizens, not we the privileged class, not we the high, not we the low, but we the people.”

Douglass: “If the South has made the Constitution bend to the purposes of slavery, let the North now make that instrument bend to the cause of freedom and justice.”

Finally, we see Abraham Lincoln draw together many of these strands in his own famous Cooper Union Speech in 1860.

To prepare for this speech—a speech that many later viewed as helping launch his path to the presidency—Lincoln spent months poring over the records of the Constitutional Convention and early Congresses to determine the founders’ views on slavery.

He viewed them as fundamentally anti-slavery and argued that his generation should look to restore the founders’ policies and restrict the spread of slavery. (He pointed in particular to the Northwest Ordinance.)

Lincoln also stressed the moral issue of slavery, calling it the “precise fact upon which depends the whole controversy.”

In the end, these constitutional visions helped frame a series of important debates in Congress and at the Supreme Court.

Pre-Civil War Milestones in the History of American Slavery

- **Petitions in the First Congress:** For those of you who joined us a couple of weeks ago, we discussed the debate over slavery in the First Congress. Briefly, in 1789-90, Benjamin Franklin and the Pennsylvania Abolitionist Society petitioned Congress to consider abolishing slavery. This kicked off a heated debate in Congress, with Congress ultimately setting aside (or tabling) the petition.
- **1793 Fugitive Slave Act:** The nation's first fugitive slave law, the act enforced the Constitution's Fugitive Slave Clause and permitted slaveholders to cross state lines to retrieve alleged fugitives. (Passed by 48-7 vote, with 14 members abstaining and no debate recorded.) The Fugitive Slave Clause itself didn't lay out who enforces the clause or how, but this act creates a legal mechanism for slaveholders to recapture alleged fugitives and punishes those who stand in their way. Free states later respond with personal liberty laws which grant protections to those accused of being fugitives.
- **Slavery in Native American territory:** Beginning in the late 18th century, with the "civilization" strategy, many Native American tribes looked to adapt and incorporate themselves into American society—passing constitutions based off of the federal constitution and in the South, adopting the cotton/plantation economy (especially among the "Five Tribes"—Chickasaws, Cherokee, Choctaws, Creek, and Seminoles). (At most, around 15% held people in bondage.)
- **Ban on Importation of Slaves:** In 1807, Congress passed a law banning "the importation of slaves into any port or place within the jurisdiction of the United States . . . from any foreign kingdom, place or country," beginning on January 1, 1808. This was as early as the Constitution permitted Congress to impose such a ban.
- **Missouri Compromise (1819-21):** The Missouri Compromise emerged from an early debate between slaveholding and free states over the admission of new states and the balance of power within Congress. This was one of the most important early flashpoints over the future of American slavery—sharpening arguments on *both* the anti-slavery side *and* the pro-slavery side. Congress enacted the Missouri Compromise in 1820, admitting Missouri as a slaveholding state and Maine as a free state. It also banned slavery to the North of a set line within the Louisiana Territory.
- **Nat Turner's Rebellion (1831):** Nat Turner led a slave rebellion in Virginia that killed more than 50 people. Local white militia put down the rebellion and Turner and 21 of his colleagues were executed. (The rebellion led Southern states to double down on slavery after some states, like Virginia, considered moving away from the institution in some ways. Southern states pass harsh laws to ban teaching enslaved people to read, allowing any African American gatherings, etc. By 1838, Calhoun is making the argument that slavery is a positive good, and even Northern states also restrict some African American rights—voting, jury service, etc.)

- ***Barron v. Baltimore (1833)***: In 1833, the Marshall Court ruled that the Bill of Rights only applied against abuses by the national government—not those of the states. Following the Civil War, the 14th Amendment would extend the protections of the Bill of Rights to state abuses.
- **“Gag Rule” in Congress (1830s)**: Again, for those of you who joined us a couple of weeks back, we discussed the battle over the “Gag Rule” in Congress—beginning in 1835, banning the U.S. House from considering anti-slavery petitions. The rule automatically tabled the petitions and took no further action on them. Representative (and former president) John Quincy Adams fought the gag rule, arguing that the resolution was “a direct violation of the Constitution of the United States”—namely, its commitment to the First Amendment’s right to petition. Adams finally defeated the rule in December 1844.
- ***Prigg v. Pennsylvania (1842)***: *Prigg* is one of the most important pre-Civil War Supreme Court cases on slavery. There, Pennsylvania passed an anti-kidnapping law, providing protections for those accused of being fugitive slaves. A slave catcher was convicted under this law, and the slave catcher challenged the Pennsylvania law as violating the Constitution’s Fugitive Slave Clause and the Fugitive Slave Act of 1793.

The Supreme Court—in an opinion by Justice Joseph Story—struck down the Pennsylvania law as unconstitutional. Justice Story concluded that the Fugitive Slave Clause was meant to secure the slaveholders’ complete right to slaves as property within every state. Story argued that the clause was a “fundamental article” designed to guard against efforts by “free” states to abolish the property rights of slaveholders or block them from recapturing allegedly escaped slaves. The danger was that—without this protection—slaves might escape to free states, become free, and then receive protection from the free states through their state personal liberty laws. On this view, the Fugitive Slave Clause was for the security of Southern states—the “positive, unqualified right” for slaveowners to “immediate possession” of their property, one that no free state could interrupt, limit, or delay.

The Fugitive Slave Act provided *national* legislative aid to protect this right. In short, the Constitution guaranteed right, and the national government had the authority to enforce it.

However, Story *did* provide one final caveat. On his view, state officials couldn’t be compelled to execute the clause, which was the duty of the national government to enforce. This left room for states to pass “Personal Liberty” laws commanding state officers to not follow commands to aid in recapture of alleged fugitives.

Of course, without laws like the Pennsylvania liberty law, African Americans had few protections when they were accused of being fugitives. And free African Americans were always at risk of being wrongly accused—and, in turn, wrongly captured and enslaved.



- **The Mexican-American War:** The Mexican-American War ran from May 1846 to May 1848. The War ceded extensive new territory to the United States, including territory that would later become California, Nevada, Utah, New Mexico, most of Arizona and Colorado, and parts of Oklahoma, Kansas, and Wyoming. These new territories gave rise to sectional conflicts over whether new states would enter as slaveholding or free.
- **Compromise of 1850 & Fugitive Slave Act (1850):** Henry Clay brokered the Compromise of 1850 to address sectional tensions arising from the Mexican-American War. California entered the United States as a free state. The act also strengthened the federal Fugitive Slave Act. It ended the slave trade in Washington, D.C. And it opened the Utah and New Mexico territories to slavery on the principle of popular sovereignty (leaving the issue of slavery to a decision by the settlers).
- **Kansas-Nebraska Act (1854):** The Kansas-Nebraska Act repealed the Missouri Compromise and established territories in Kansas and Nebraska with the issue of slavery to be decided by popular sovereignty. The act became the focus of great sectional conflict and helped spur the rise of the Republican Party.
- **“Bleeding Kansas” (1854 – 1861):** Following the Kansas-Nebraska Act, pro-slavery and anti-slavery settlers began a period of open conflict in Kansas over the issue of slavery, resulting in widespread violence.
- **Lecompton Constitution controversy (1857-1858):** The pro-slavery and anti-slavery settlers in Kansas each established their own territorial governments. Pro-slavery advocates drafted a state constitution in Lecompton, Kansas, with provisions excluding free blacks and protecting slavery. President James Buchanan embraced it as a framework for Kansas statehood, but Kansas voters rejected it. Kansas eventually entered the United States as a free state in January 1861.
- **Dred Scott decision (1857):** *Dred Scott* is the most important—and infamous—Supreme Court decision on slavery.

Dred and Harriet Scott were enslaved people brought by a slaveholder into areas where slavery was banned and then returned to areas where slavery was permitted. The Scotts sue for their freedom—arguing that their time on free soil made them free.

The Supreme Court rejected their claim.

Chief Justice Roger Taney concluded that the “People of the United States” and “sovereign people” do not include African Americans, who are considered a “subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power the Government might choose to grant them.”



Taney reviewed constitutional history, legislation, and even the language of the Declaration of Independence and concluded that neither African Americans brought to America as slaves nor their children—whether they were free or enslaved—were “acknowledged as part of the people or intended to include in the general words used in” the Constitution.

In short, African Americans “had no rights that the white man was bound to respect,” and so the Scotts couldn’t sue for their freedom.

The Supreme Court then went on to declare the Missouri Compromise unconstitutional, attacking Congress’s power to ban slavery in the territories—*the* core of the Republican Party’s political (and constitutional) platform. Taney argued that the Missouri Compromise conflicted with the Fifth Amendment’s Due Process Clause—taking the property of slaveholders without due process of law.

Leading Republicans—including Abraham Lincoln during the Lincoln-Douglas debates criticized the *Dred Scott* decision—and the 14th Amendment overturned *Dred Scott* after the Civil War. (And Justice Curtis’s *Dred Scott* dissent used history to show that many state constitutions *did* allow for voting by free African Americans at the time of ratification.)

- **Harpers Ferry raid (1859):** Abolitionist John Brown led a failed attack on the federal armory at Harpers Ferry, Virginia. Brown had hoped to lead a slave rebellion. Brown and his colleagues were hanged. The raid alarmed the slaveholding states, inspired many anti-slavery advocates, and heightened sectional tensions.
- **Election of 1860:** Republican Abraham Lincoln won the 1860 presidential election with a plurality of the vote. The Democratic Party split between its Southern and Northern wings—represented by John C. Breckinridge and Stephen A. Douglas, respectively. And John Bell ran as the Constitutional Union candidate. Lincoln became the nation’s first anti-slavery president, leading to a wave of secessions by slaveholding states in the South.
- **The Confederate Constitution:** To sum up briefly, the Confederate Constitution largely copied the U.S. Constitution, but replaced certain key provisions with specific protections for slavery. It added “slaves” to the Three-Fifths Clause; the phrase “negroes of the African race” to the ban on the Atlantic slave trade; the phrase any “slave or other persons held in service or labor” to the Fugitive Slave Clause; and clear protections for citizens traveling to any state “with their slaves and other property” to the Comity Clause. It also guaranteed that “the institution of negro slavery” was protected in all territories and that inhabitants would have the right to carry with them into the territories “any slaves lawfully held by them”; and second, banning any law “denying or impairing the right of property in negro slaves.”

FOUNDING STORIES: THE SECOND FOUNDING, INCLUDING EARLY ACTIONS DURING THE CIVIL WAR AND THEN THE RECONSTRUCTION AMENDMENTS

Finally, I'd like to turn to the series of transformational amendments ratified after the Civil War—the 13th, 14th, and 15th Amendments.

Big Idea: These amendments wrote the Declaration of Independence's promise of freedom and equality into the Constitution and began to fulfill President Lincoln's promise (made at Gettysburg) of "a new birth of freedom."

The Civil War

Of course, some of this work began during the Civil War. For instance, African Americans escaping to Union lines. And through the Confiscation Acts, Congress recognized the right of the Union Army to take enslaved persons away from rebels and free them. And in May 1862, Washington, D.C., abolished slavery.

Most famously, on January 1, 1863, President Lincoln issued the Emancipation Proclamation, using his war powers to free all enslaved people held within the Confederacy. This was a massive push for emancipation—unthinkable before the Civil War. At the same time, it didn't affect enslaved people held in the border states, which remained loyal to Lincoln and the Union—Maryland, Delaware, Kentucky, and Missouri.

Compared to how things stood at the start of the Civil War, these were massive changes—bringing freedom to thousands of formerly enslaved people.

African Americans also signed up for the Union Army—with hundreds of thousands of African Americans fighting the Confederacy—and laying claim to the promise of equal citizenship.

And African Americans in Convention—before, during, and after the Civil War—demanded their rights, petitioning Congress for equal rights, key liberties (like free speech, religious liberty, and the right to keep and bear arms), and for the right to vote.

Ratification of the Reconstruction Amendments

However, following the Civil War, we finally transformed our *Constitution*—and its very text—forever.

Why do some scholars—including leading Reconstruction historian, Eric Foner—refer to this as America's Second Founding?

Following the Civil War, our nation confronted a series of vexing questions.

- What was the meaning of the Civil War—a bloody, bloody war killing 750,000 Americans—and what should be the terms of a lasting peace?

- How should our nation answer the Declaration of Independence’s prophetic call for freedom and equality?
- How should we define what it means to be a U.S. citizen?
- How broadly should the right to vote sweep?
- And what role—if any—should the federal government play in protecting (and defining) the civil and political rights of all?

And make no mistake, the Reconstruction Amendments transformed our Constitution forever.

Recall where the Constitution stood before this critical period. Of course, it didn’t mention the word “slavery.” However, various constitutional provisions—including the Three-Fifths Clause and the Fugitive Slave Clause—had increased the political power of the slaveholding states throughout the pre-Civil War period.

The Constitution was silent on the Declaration’s promise of equality and on the issue of African American voting rights. States could violate key Bill of Rights protections like free speech with impunity—and many Southern states did just that, banning abolitionist speech, with at least one state punishing such advocacy with death. And citizenship rights were left to the states and the courts—with Chief Justice Roger Brooke Taney infamously concluding in *Dred Scott* that African Americans could not be citizens and that they had **“no rights which the white man was bound to respect.”**

And after our nation’s Second Founding?

- Our Constitution abolished slavery.
- It made everyone born on American soil a U.S. citizen.
- It promised equality for all.
- It protected us from state abuses of important rights like free speech.
- It guaranteed the right to vote free of racial discrimination.
- And it gave the federal government the authority to protect the civil rights of all.

So, while the American people rightly revere George Washington, James Madison, Alexander Hamilton, and their fellow framers, it’s important to remember that it took the heroic efforts of Abraham Lincoln, Thaddeus Stevens, Frederick Douglass, Harriet Tubman, John Bingham, Frances Harper, Jacob Howard, and many others to create the “more perfect Union” that we live in today.

Now, of course, the Second Founding wasn’t perfect. It was thwarted in its own time by white supremacy and violence in the South, a mix of racism and indifference in the North, and a desire for North-South (white) reconciliation, more generally. (Constitutionally, many leaders debated how much of traditional federalism survived the Reconstruction Amendments.)

It would take nearly a century and the courage of Dr. King and the Civil Rights Movement to begin to fulfill the promises enshrined in the Reconstruction Amendments. Nevertheless, Lincoln, Stevens, Bingham, Douglass, Tubman, Harper, and their allies made an important start.

So, how did we get each of the Reconstruction Amendments? Here's a quick overview.

13th Amendment

The [13th Amendment](#) abolished slavery.

Note that it abolished slavery in everywhere but Native American territory, which were sovereign nations or "Indian Territory." Native Americans fought on both sides of the war, with over 20,000 joining as soldiers mostly on the side of the Confederacy, as well as continuing conflict with the North throughout Indian territory (particularly in the Dakota Territory or modern-day Minnesota and Wisconsin, and in the West). Enslaved peoples in Indian territory were freed after a separate treaty, the Treaties of 1866, which ended wartime hostilities and freed all African Americans from slavery. However, the Five Tribes eventually rescinded the citizenship of freed peoples who were previously considered tribal members, leading to lawsuits by descendants in 2017 (with a victory against the Cherokee Nation).

During 1864, many Republicans and their allies pushed for an amendment ending slavery—with Frederick Douglass and Radical Republicans like Thaddeus Stevens taking the early lead.

In April 1864, the Senate passed the 13th Amendment, but the measure failed in the House two months later.

The amendment's fate would be determined, in part, by the election of 1864—and so it was. Later in 1864—and spurred, in part, by the bravery of African American soldiers and eventually by his own reelection—President Lincoln began to push hard for the amendment.

Lincoln understood the amendment's constitutional importance. Lincoln thought that the 13th Amendment was the only constitutional way for the nation to abolish slavery. While Lincoln may have freed a number of enslaved people with the Emancipation Proclamation, he relied on his war powers to do so and feared that his constitutional authority after the war was more limited. Abolishing slavery by constitutional amendment would resolve all constitutional difficulties by eliminating slavery outright and providing Congress with clear authority to enforce this new constitutional command.

Congress finally approved the 13th Amendment on January 31, 1865. The next day, and even though the president has no formal role in the amendment process, Lincoln took the unusual step of signing the amendment before sending it along to the states for ratification, calling it a "King's cure" for the evils of slavery.

This powerful moment took place a mere two months before President Lincoln's tragic assassination in April 1865. The American people finally ratified the 13th Amendment on December 6, 1865, forever banning slavery in the United States.

Abolitionists varied in their response to the new amendment. For instance, William Lloyd Garrison declared victory and looked to close up shop. He called on the American Anti-Slavery Society to close its doors (it

didn't). For Garrison, the 13th Amendment transformed the Constitution from "a covenant with death" to "a covenant with life." As he explained, with its ratification, "my vocation, as an abolitionist" was over.

At the same time, for other abolitionists like Senator Charles Sumner, the abolitionist's work had just begun. As Sumner explained, "Liberty has been won. The battle for equality is still pending."

A Final Word on the Criminal Exception Language: The criminal exception language was drawn largely from the Northwest Ordinance of 1787—familiar language borrowed for many constitutions and laws throughout American history. Eric Foner explains the effects of this provision well: "Despite the 13th Amendment, involuntary black labor—justified by the criminal exception—was central to these laws. They required all adult black men at the beginning of each year to sign a labor contract to work for a white employer or face prosecution for vagrancy or other vaguely defined crimes. Those convicted would be fined and, if unable to pay, forced to labor for a white employer." Slavery by another name.

14th Amendment

We'll be covering the 14th Amendment next week, so we can cover more of the details then. But here's a sneak peek at how we got the 14th Amendment—and what it says.

The [14th Amendment](#) wrote the Declaration of Independence's promise of freedom and equality into the Constitution.

In April 1865, Robert E. Lee surrendered, and President Lincoln was assassinated. Andrew Johnson replaced Lincoln as president. With Congress in recess, Johnson advanced a very lenient vision of Reconstruction—pardoning many powerful ex-Confederates and forcing the former Confederate states to do very little before returning to the national government. As a key concession, they had to ratify the 13th Amendment. That's about it. The Southern states then passed the "Black Codes," essentially returning formerly enslaved people back to slave-like conditions.

Northerners may have won the war, but congressional Republicans—the party of Lincoln and of Union—feared that they might well lose the peace. The Republican Congress pushed back and tried to secure a new vision of freedom and equality for African Americans.

Enter the Joint Committee on Reconstruction and one of its key leaders, Rep. John Bingham of the great state of Ohio. Congress established the Joint Committee on Reconstruction in December 1865. The body was tasked with studying the conditions in the post-Civil War South and recommending a congressional response—one that might counter President Johnson, rally the Republican Party, and provide a new blueprint for Reconstruction. (This was after Thaddeus Stevens and other Congressional Republicans barred the door to Congress and had the clerk refuse to read the name of the Southern legislators trying to take their seats after Johnson's Reconstruction plan allowed them back into office.) Scholar Gerard Magliocca has called it a "Second Constitution Convention."

The Committee’s most enduring legacy is Section 1 of the 14th Amendment, and this critical text was written largely by Ohio Rep. John Bingham. The great Justice Hugo Black would later call Bingham the 14th Amendment’s James “Madison.” And here’s how Magliocca described him: “Lincoln was our greatest constitutional poet, but Bingham was the man who turned the poetry into prose.”

Congressional Republicans began their push with the first major civil rights act in American history—the Civil Rights Act of 1866, which granted African Americans citizenship and basic liberties. And the Republican efforts then culminated in the 14th Amendment—arguably, the most important language added to the Constitution after the founding era.

As mentioned above, Bingham’s 14th Amendment wrote the Declaration of Independence’s commitment to liberty and equality into our Constitution.

- For instance, take the **EQUAL PROTECTION CLAUSE**. As Bingham explained, he sought “a simple, strong, plain declaration that equal laws and equal and exact justice shall hereafter be secured within every State of the Union,” guaranteeing “equal protection” for “any person, no matter whence he comes, or how poor, how weak, how simple—no matter how friendless.”

This is the text that brought us *Brown v. Board of Education*—declaring segregated schools unconstitutional. But this language is so familiar that it’s easy to forget how revolutionary it was at the time. For instance, we often forget (as I mentioned earlier) that the 1787 Constitution was silent on the Declaration’s promise of equality. Not so today, and we have John Bingham to thank for that.

But the 14th Amendment did even more than that—reinforcing the equality guarantees of the Equal Protection Clause (and the Civil Rights Act of 1866) and advancing additional protections.

- It promised equal citizenship to everyone born on American soil—rejecting the infamous *Dred Scott* decision.

CITIZENSHIP CLAUSE

- And it extended the key protections—like the rights enshrined in the Bill of Rights (rights to free speech and religious liberty)—to cover state abuses. (What lawyers call “incorporation.”)

PRIVILEGES OR IMMUNITIES CLAUSE

DUE PROCESS CLAUSE

- And it gave Congress the power to enforce these protections—to advance “a new birth of freedom” in post-Civil War America.

ENFORCEMENT CLAUSE

For those of you who love the Supreme Court, it’s worth noting that so many of the most important constitutional cases each term turn on the 14th Amendment’s meaning. It’s impossible to overstate the amendment’s importance.

Of course, the 14th Amendment wasn't perfect. The amendment *did* compromise on one critical front: voting rights. Therefore, we needed to ratify a third amendment to secure political equality for the formerly enslaved people and, in turn, complete our nation's Second Founding.

15th Amendment

The 15th Amendment promised to end racial discrimination in voting.

Some Republicans supported a broader amendment that included women and established broader voting rights. But battles in Congress led to a narrower amendment.

In February 1869, Congress passed the amendment, and it was ratified a year later—in February 1870.

Over time, the Supreme Court narrowly interprets the amendment to allow states to pass laws that limited African American voting, including poll taxes and literacy tests. Even so, it was a powerful statement of post-Civil War America's commitment to interracial democracy.

As is often the case, Frederick Douglass may have best captured the power of this moment: "The revolution wrought in our condition by the fifteenth amendment to the Constitution of United States, is almost startling, even to me. I view it with something like amazement."

CONCLUSION

Big Question #1: Slavery was embedded into America's fabric by the time of the ratification of the Constitution. How did this affect how long slavery lasted in America and how it ended?

Big Question #2: The 13th, 14th, and 15th Amendments ended slavery in America and tried to rebuild our nation on a stronger constitutional foundation. Do you think that these amendments changed the Constitution so much that it was like a re-birth—a "Second Founding"—of our nation?

Big Idea:

While the original Constitution—plus the Bill of Rights—remains a powerful statement of many of America's most enduring principles, the 13th, 14th, and 15th Amendments truly represent (to borrow from Eric Foner and other scholars) our nation's "Second Founding."

While America has struggled to realize the promise of our nation's Second Founding, these transformational amendments represent some of our Constitution's most important principles—and protections.

It's only after Lincoln, emancipation, victory in the Civil War, and the ratification of the Reconstruction Amendments that the Constitution begins to fully emerge as the inspiring document that it is today,



redeeming us from the framers' original sin of slavery and beginning to give our nation what Lincoln promised at Gettysburg—"a new birth of freedom."

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