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Slavery, the Constitution, and the Union

Virtually every American loves the Constitution, but more often than not their love for it is inversely proportional to their knowledge of it–and all too many love it dearly. In his volume, *Slavery and the Founders: Race and Liberty in the Age of Jefferson*, Paul Finkelman provides a fine antidote for a portion of that ignorance. His is a well-reasoned, extensively researched, and eminently readable account of slavery in the 1787 Constitution and its legal status in the new nation's early years. According to Finkelman, the writing and ratifying of the Constitution were conditioned on slavery's protection. Agreeing with the Garrisonians, he contends that the Constitution was a "slaveholder's compact" (p. ix). He also argues that the 1787 Northwest Ordinance and the 1793 Fugitive Slave Act reflected the intellectual and moral environment that produced the proslavery Constitution. Finally, he contends that the proslavery constitutional and legal system faithfully registered Thomas Jefferson's notions about slavery.

Finkelman analyzes the Constitution's direct and indirect protection of slavery in supporting his argument that the Philadelphia conclave accorded it an exalted status. Proslavery delegates won slavery's protection, in good part, by linking it with representation, through the three-fifths clause of Article I, Section 2. From the nation's beginning slavery enjoyed enhanced power in the House of Representatives, which translated into a comparably enlarged power in the Electoral College, without which Jefferson would have lost the election of 1800. Additional direct protections include the prohibition against ending the international slave trade before 1808, the fugitive slave clause, the "direct tax" clause, which assured that slaves could be taxed at only three-fifths the rate of whites, and the Article V provision that prohibited slave importation and tax clause amendments before 1808. Ironically, the new frame of government, designed to replace the virtually unamendable Articles of Confederation, had but one unamendable feature, which went to slavery's protection.

In addition to the Constitution's direct protections, Finkelman also found thirteen indirect protections, such as requiring three-fourths of the states to amend the Constitution, a provision that gave slave states a "perpetual veto over any constitutional changes" (p. 5), and the "full faith and credit" clause, which required free states to recognize and honor slave-state law. He contends that slaveholders won without giving major concessions to anti-slavery delegates, except for the "dirty compromise" (p. 22), by which southerners agreed to allow commercial acts by a simple majority instead of a two-thirds vote in exchange for clauses protecting the slave trade and prohibiting an export tax. Other than this compromise and sporadic, disjointed verbal attacks on the institution, slavery's defenders won its protection with relative ease from the Framers.

In the same year that the Framers wrote the Constitution, Congress, which continued meeting under the Articles of Confederation, passed the Northwest Ordinance, which prohibited slavery north of the Ohio River and east of the Mississippi. On first blush the Ordinance was antislavery, but Finkelman argues that it had little negative impact on slavery until the 1830s and 1840s. The Ordinance passed with broad support from southerners, who believed that it "actually fortified slavery" (p. 36). The same clause that prohibited slavery included a fugitive slave clause, the first recognition by the national government that masters had a right to recover slaves who absconded to northern free states. In addition, the absence of an enforcement clause in the antislavery provision and Congress's lack of will to implement the Ordinance made it ineffectual.

In careful case studies of the measure's impact in Indiana and Illinois, Finkelman shows that quasi-slavery persisted in the Northwest into the 1830s and 1840s. Congressional indifference to black servitude, demands for labor to promote economic development, arguments that

diffusion of slavery foretold slavery's eventual demise, and the migration of slaveowners into the Northwest conspired to assure that the Ordinance had no immediate impact. The territorial assemblies of Indiana and Illinois adopted laws, based in part on southern slave codes, that assured slavery's persistence. Legislation in both territories protected and nurtured "bondage and de facto slavery" (p. 71). Eventually, both ended slavery, but well after statehood: Indiana effectively by the 1830s, forty years after the Ordinance; Illinois in 1848 in the state's second constitution.

Evasion of the Ordinance protected slavery's interests; the 1793 Fugitive Slave Act supplemented that protection. In the only detailed consideration of the act in book form, Finkelman argues that the measure was "one of the first fruits of the proslavery Constitution" (p. 80). He notes that the act issued from an attempt to protect free blacks from kidnapping. Ironically, however, it probably improved the chances of such kidnappings. The Bill of Rights, with its limitations on federal power and procedural protections, had become part of the Constitution in 1791, yet the act did not honor the amendments' requirements for fair trials and due process. Equally ironic, the measure expanded federal power, probably beyond what the Constitution actually sanctioned. The fugitive slave clause did not delegate power to Congress; it was in the only section of Article IV that did not grant power to the national government. States' rights southerners, who might oppose the Federalists' use of national power on economic issues, effectively used that power to protect and preserve slavery. Most slave owners and slave traders were Jeffersonians, but whatever their constitutional scruples on other matters, they wanted broad national powers to protect slavery. The Constitution was conditioned on protecting slavery; perhaps it was only logical that the same condition be imposed on its interpretation. Such an interpretation, Finkelman concludes, "made the Constitution even more proslavery than it perhaps was" (p. 81).

In addition to arguing that slavery was central to the nation's founding, he also asserts that it created a "tension between the professed ideals of America, as stated in the Declaration of Independence, and the reality of early national America" (p. ix). No one reflected that tension better than Thomas Jefferson. In spite of the ideals that he expressed in the Declaration, Jefferson was a slaveholder–simply a slaveholder–with general slaveholder values. Rhetorically, Finkelman notes, Jefferson hated slavery, but that hatred was based on several factors which demonstrated Jefferson's inability to transcend class and race or to honor the principles of his Declaration. He hated slavery because he despised blacks; they were, Jefferson believed, of a different order from whites. "Race, more than their status as slaves, doomed blacks to permanent inequality" (p. 108). He hated slavery because it brought Africans to the nation and made them permanent residents. He hated slavery because of its impact on whites, not because of what it did to blacks.

Above all, for one who affirmed independence to be the ultimate political and social value and one who celebrated the yeoman farmer for his independence, Jefferson hated slavery because it made him dependent on his slaves; dedicating his life to independence, he lived a life of dependency. Finkelman argues that Jefferson could not continue his "extravagant life-style" without slaves (p. 107). The natural rights of slaves had to be subordinated to his grand style of living, his unrestrained spending habits and his compulsively acquisitive character. He contends that historians have misconstrued one of Jefferson's more famous quotes about slavery: "[W]e have the wolf by the ear, and we can neither hold him, nor safely let him go. Justice is in one scale, and self-preservation in the other." The quote, Finkelman argues, did not reflect fears of a slave revolt. The self-preservation to which Jefferson alluded went to his way of life, premised as it was on slavery. The "wolf" he was holding was probably "the wolf of gluttony and greed" (p. 150).

The Declaration and Constitution had powerful antislavery potential and, given his status in the new nation's history, Jefferson could have energized that potential. Finkelman contends that the test for Jefferson's views on slavery should not be whether he was better "than the worst of his generation but whether he was the leader of the best," not whether he embodied the values of southern planters, but whether he transcended his economic and sectional interests. In both cases, Finkelman concludes that "Jefferson fails the test" (p. 105). Indeed, he argues, Jefferson was behind his time. He sold slaves and broke up families to preserve his high-living style and to pay his debts; after a shopping spree in France, he sold eighty-five slaves (p. 150). Morally, Finkelman implies, he was also a laggard. For all the debate about Jefferson's relationship with Sally Hemings, his half-sister-in-law, scholars have missed a more critical issue than whether Hemings bore him children: "for most of his adult life, Jefferson enslaved a generation of people–Sally Hemings and her siblings–who were his in-laws." This causes Finkelman to wonder whether it mattered "[f]or the sake of character…whether Jefferson enslaved his own children or merely his blood relatives and his wife's blood relatives" (p. 142).

Rhetorically, Jefferson insisted that future generations must end slavery and vindicate the hopes of the Declaration of Independence and the Constitution for liberty. Unfortunately, however, instead of nurturing their potential for liberating slaves, Jefferson committed treason to the very cause that he ardently advocated for whites. Slavery must end, he thought, but only on the condition of "expatriation" of the slaves (p. 128). It was not simply slavery that Jefferson found so repugnant, but race. The one, a temporary status created by law, could be ended; the other, a reflection of a sub-human or nearly sub-human species, could not be. The "all" men in the Declaration meant "only white men;" in his scale of values blacks had no legitimate place in the nation's future. If slavery trumped the Constitution, race trumped the future that Jefferson envisioned. Instead of being a prophetic voice for extending benefits of the Revolution to slaves, by word and deed he became "the intellectual godfather of the racist pseudoscience of the American school of anthropology" (p. 110).

Finkelman's work has a compelling ring of plausibility, even truth, when placed in its larger historical context. Edmund S. Morgan demonstrated that before colonial America moved "toward the republic," it had already moved from slavery "toward racism." He noted that race-based slavery made it safer to preach equality, because slaves could not become part of a leveling mob. He continued, "This is not to say that a belief in republican equality had to rest on slavery, but only that in Virginia (and probably in other southern colonies) it did."[1] And in its move "toward the republic," to use Morgan's phrase, Gordon S. Wood observed that "No political conception was more important to Americans in the entire Revolutionary era than representation."[2] Strategically, slaveowners probably could not have done better than using the three-fifths clause to link their race-based institution with the key political ideal of the Revolution. Central to the Revolutionary movement against England as early as the 1765 Stamp Act controversy, representation was yoked by slaveowners to protecting and preserving slavery in the Constitution. In the 1760s Americans linked representation to liberty; twenty years later, they joined it to slavery, an unholy alliance that continued into the Civil War era. And just as slavery trumped the Constitution in 1787, it threatened to trump the Constitution's "more perfect Union" in 1860-61.

Referring to the concentration of slaves "in the southern part" of the Union in his second inaugural, Abraham Lincoln noted that "these slaves constituted a peculiar and powerful interest." "Peculiar" implies something unique, distinctive, out of the ordinary or particular. However peculiar slavery became in the last few decades before the Civil War, it had long been a "powerful interest," to use Lincoln's phrase, but was far from being peculiar. Echoing the notion of its peculiarity, Kenneth M. Stampp described slavery as *The Peculiar Institution* in his classic 1956 work. But in spite of the "peculiarity" that developed in the second quarter of the nineteenth century, slavery's power threatened the Union like nothing before or since. It is very difficult, if not impossible, to explain how a sectional, peculiar institution could have so seriously imperiled the Union without having had a determining, if tragic role, in shaping that Union from its beginning. Finkelman's book focuses on slavery's shaping power–but lack of peculiarity–at the Constitutional Convention.

Race-based slavery was a fatal flaw in the 1787 document; that flaw was so inextricably ingrained in the Constitution that it took the terrible scourge of war and major constitutional amendments to remove it. "[A]ll knew that this interest was somehow the cause of the war," Lincoln affirmed in his second inaugural. Likewise, all who wanted to remove the war's cause and the Constitution's corruption knew that amendments to correct the flaws of 1787 had to become part of the Constitution. If slavery began about 1660 and ended, at least officially, in the 1860s, Finkelman provides a powerful and poignant perspective on slavery's terrible career at its midpoint in the nation's experience. In addition, he provides a sharp focus from which to examine slavery's larger impact in American history and to consider the role of the nation's most famous revolutionary leader, Thomas Jefferson.

In his 1963 volume, *Jefferson and Civil Liberties: The Darker Side*, Leonard Levy challenged the then-prevailing notion about Jefferson's legacy to freedom and liberty. Finkelman challenges that legacy at an even deeper level than did Levy. He notes that Jefferson's admirers "would like him to be one of us–an opponent of slavery," but he was not (p. 138). Most of Jefferson's biographers have tried to shape Jefferson into an antislavery liberal, ignoring or fudging evidence to the contrary. He observes that critics of Levy's *Darker Side* work rejected his conclusions because such verdicts did not "bolster their modern political agendas" (p. 143). Very likely Finkelman's assessment of Jefferson will also be challenged on grounds of being presentist revisionism. Finkelman, however, rightly rejects that notion in his concluding chapter, a brilliant essay on Jefferson, historians, and myths. He examines Jefferson's ideas about race and slavery, not by modern notions, but "on *his* terms" (p. 145, emphasis in the original).

By raising the issue of presentism, Finkelman puts in sharp relief history's fundamental question: does history matter? Perhaps understandably, he insists that it does. However, he is cautious about how history might be used. He notes that James Parton, Jefferson's first professional biographer, wrote that "If Jefferson was wrong, America is wrong. If America is right, Jefferson was right," and observes that "The historian who questions Jefferson, it would seem, implicitly questions America" (p. 143). Acceptance of this logic presents the nation with a daunting challenge that probably could never be satisfactorily met. At the conclusion of his analysis of the way that revolutionary Virginians linked racism with republican ideology, Edmund Morgan raised a haunting question: "Is America still colonial Virginia writ large? More than a century after Appomattox the question lingers."[3]

If Parton's logic controls, it forces one of several conclusions. First, accepting Parton's presumption that Jefferson was right, it reinforces the inclination of most of Jefferson's modern biographers to shape Jefferson into a late-twentieth-century, antislavery liberal. However, with the evidence that Finkelman presents, such an image can at best be a gross distortion of the historical record. It would transform Jefferson into a reverse modern doughface. A "doughface" in pre-Civil War America was a northern man whose contours had been shaped by proslavery principles, so a reverse doughface would be a southern man with antislavery sentiments. Bingo! Jefferson fits the picture and gives a usable past. On another occasion, using the same tactic, he becomes the Revolutionary precursor to the National Association of Manufacturers. But if such is the case, history is little more than using the past, indeed, inventing the past, for present needs.

Second, Parton's logic and presumption that Jefferson was right, if applied to Finkelman's analysis of Jefferson's principles, force a troubling, haunting answer to Morgan's question: there would be no escaping the assertion that America is still colonial Virginia writ large. They carry an even more haunting implication: not only is the nation colonial Virginia writ large, but there is not much anyone can do about it. If Jefferson was right, and if Finkelman's analysis of his attitudes about race and slavery are correct, then Jefferson was not only the intellectual vanguard of the pseudoscientific proslavery argument of the pre-Civil War era, but he was also the prophet for late-twentieth-century racism in the United States. If such is the case, either history must be the new "dismal science" or both Jefferson and America are wrong.

But Finkelman insists that a third option exists. Scholars have created "a mythical man–someone who in [Merrill] Peterson's words went up to Mount Olympus." After creating the Jeffersonian myth, they "further burdened him with an image that carries with it our conception of the United States" (p. 167). But as Levy did in 1963, Finkelman does in 1996: he argues that it is time to look at Jefferson as an important Revolutionary leader, a person with virtues and faults. From this perspective, Jefferson's views on race "are embarrassing, not just by the standards of our age but by the standards of his own age" (p. 165). However, though Jefferson failed to join the best of his generation to end slavery and challenge racism, it is possible to see his virtues and the power of his ideas "because we will see them in the context of his own humanity" (p. 167).

Put differently, if history is important, at least one element of that importance has to be the insights that it offers. But if those insights, or perspectives, are to be valid, it is important that scholars give heed to the full weight of historical evidence. Precisely because history seems to offer insights and perspectives on the present, it becomes a battleground–often a heated one–on what we remember and what we forget. History creates a common memory that holds individuals and institutions together and binds them in a common enterprise. "Selective" forgetting can distort the past as much as creative invention. To question Jefferson's ideas about slavery and racism is not to question America. To question Jefferson is to follow the best of the Jeffersonian tradition of examining institutions, with the hope of preserving the best ones, reforming others, and rebelling against the rest.

Perhaps no better instruction exists for that daunting task than using "Experience," a notion that figures prominently in Jefferson's Declaration of Independence. However, if that experience is derived–another good Jeffersonian term from the Declaration–from a contrived past, it would convey misguided perspectives, perhaps as pernicious in their impact as those derived from abstract reasoning. If Jefferson has relevance to modern America on race and slavery, it is not because he stood outside of history by ascending Mt. Olympus, but because he was a major historical figure who continues to inform the present. Our image of Jefferson matters but, in insisting on his humanity, "we can better understand something about ourselves and our country's past" (p. 167).

Rhetorically, Jefferson looked to slavery's end at some undefined future. Tragically, it was left to Lincoln's generation to begin ending slavery and to start "bind[ing] up the nation's wounds" that slavery and racism caused.

The scourge of the "terrible war" that Lincoln memorialized at Gettysburg has passed, but the quest for that "new birth of freedom" and the realization of the Jeffersonian "proposition that all men are created equal," remain "unfinished work," to use Lincoln's memorable phrases. Perhaps that unfinished work is at the heart of any shared memory and common enterprise for late-twentieth-century Americans. If it is, then it seems imperative that a precise definition of that work be carefully limned. History is important to Finkelman–vitally important–so in writing this volume he assumed that it was an imperative to be careful and precise.

By some standards, Finkelman's is a slim volume. The text is only 167 pages, supported by extensive notes and bibliography. More important, his is a compelling account of the history of slavery and racism at the nation's founding and of Jefferson's place in that history. It is written by a discerning scholar who has devoted his professional career to examining the constitutional and legal dimensions of slavery, but presented in clear, readable form. Happily, this volume could be used in survey courses, in period courses on the Revolutionary or the Early National eras, and in courses on constitutional history. With its many references to the works of other scholars, it would fit nicely into courses on historiography and historical method. Graduate students would profit from its use in their courses, as would law students; indeed, graduate and law school seminars could be organized around it. It deserves a wide readership. Anyone who wants to talk intelligently about the history of slavery and ideas about race in the nation's history should feel compelled to come to terms with his book. And the publisher, M.E. Sharpe, is to be congratulated for simultaneously offering the volume in paper and hardcover formats.

Notes

[1] Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: W.W. Norton, 1974), pp. 363, 316, 381.

[2}Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969), p. 164.

[3] Morgan, *American Slavery, American Freedom*, p. 387.

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