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BOOK REVIEW

FOUNDING A SLAVEHOLDING REPUBLIC

Timothy S. Huebner*

Slavery and the Founders: Race and Liberty in the Age of Jefferson. By Paul Finkelman.¹ Armonk, N.Y.: M.E. Sharpe, 2001. Pp. 296. \$64.95.

With this second edition of *Slavery and the Founders*, a significant revision of the original work published in 1996, Paul Finkelman does more to disparage the founding generation than any historian since Charles A. Beard. Author of *An Economic Interpretation of the Constitution of the United States*, published in 1913, Beard argued that the founders' distinct class interests played a pivotal role in the drafting and ratification of the Constitution of 1787.² Because the book challenged the prevailing nineteenth-century view of the founders as heroic men who had acted under divine inspiration, Beard's treatise sent shockwaves across America. Written at the height of the Progressive Era—while judges, lawmakers, and reformers grappled with issues such as establishing health and safety regulations for workers, instituting suffrage rights for women, and generally making government more accountable to the people—Beard's critique appeared at a time when the Constitution groaned under enormous strain. Professors, Supreme Court justices, even presidents publicly discussed the book and its implications for the policy debates of the day. Like its early twentieth century counterpart, Finkelman's *Slavery and the Founders* speaks to current issues. In our own time, when urban riots, affirmative action,

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1. Chapman Distinguished Professor of Law, University of Tulsa College of Law.
2. Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (The Macmillan Co. 1913). For a review of Beard's analysis, see Cecelia M. Kenyon, *An Economic Interpretation of the Constitution After Fifty Years*, 7 Centennial Rev. of Arts & Science 327 (1963).

minority voting rights, racial profiling, and reparations for slavery rank among the important topics of public discussion, Finkelman's incisive critique of the founding generation's record with regard to African Americans deserves a wide audience.

In some respects, this book represents the culmination of more than two decades of scholarship by Professor Finkelman on the historical relationship between slavery and the American legal system. In his books, edited volumes, as well as dozens of articles in law reviews and historical journals, Finkelman has ably demonstrated the centrality of slavery throughout America's legal development.³ Although much of his work over the years has focused on the legal rights of fugitive slaves in the antebellum North, slavery in the courtrooms of the Old South, and the records of state appellate judges and United States Supreme Court justices in slave cases, none of these topics stir debate in the same way as an examination of slavery and the founders. The men who drafted the Declaration of Independence and Constitution—though in academic circles no longer referred to reverentially as “the Founding Fathers”—remain among the most admired figures in and the most enduring symbols of the United States. Among constitutional and legal historians, moreover, “the Founding,” particularly the framers’ “original intent,” still generates passionate debate.⁴ Taking account of recent scholarship in this second edition, Finkelman has extensively rewritten three of the chapters from the first edition and added a new chapter. Because he brings his considerable skills and experience as a historian to such a controversial subject, this book—although much of it has appeared in print before—is sure to spawn fresh discussion in undergraduate classrooms as well as the professional academic community.

Finkelman argues that “slavery was a central issue of the American founding.”⁵ Defining “the founding” and “[f]ounders” broadly, so as to include American political and constitutional development from the

3. See Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (U. N.C. Press 1980); Paul Finkelman, *The Centrality of Slavery in American Legal Development, in Slavery and the Law 3* (Paul Finkelman ed., Madison House Publishers, Inc. 1997). Some of Finkelman's most important works include: Paul Finkelman, *Hooted Down the Page of History: Reconsidering the Greatness of Chief Justice Taney*, 1994 J. S. Ct. Hist. 83; Paul Finkelman, *The Law of Freedom and Bondage: A Casebook* (Oceana Publications 1986); Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 Rutgers L.J. 415 (1986); Paul Finkelman, *Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Uses of a Pro-Slavery Decision*, 25 Civil War History 5 (1979); and Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 S. Ct. Rev. 247.

4. See generally Leonard W. Levy, *Original Intent and the Framers' Constitution* (Macmillan & Collier 1988); M. E. Bradford, *Original Intentions: On the Making and Ratification of the United States Constitution* (U. Ga. Press 1993); Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (Alfred A. Knopf, Inc. 1996).

5. Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* ix (2d ed., M.E. Sharpe, Inc. 2001) [hereinafter *Slavery and the Founders*].

1780s to the 1820s,⁶ he begins with an analysis of the Constitutional Convention of 1787.⁷ Finkelman draws the title of his first chapter, "Making a Covenant with Death," from the famous description of the Constitution by abolitionist William Lloyd Garrison,⁸ and he echoes Garrison in contending that the framers created a "proslavery compact."⁹ Five of the Constitution's provisions, Finkelman claims, "dealt directly with slavery:" Article I, Section 2 provided that "three-fifths of all slaves" would be counted "for purposes of representation in Congress;" Article I, Section 9 addressed slavery both by preventing Congress from banning the slave trade before the year 1808 and by stating that any "capitation' or other 'direct, tax'" be levied based on the census, meaning that three-fifths of the slave population would be counted; Article IV, Section 2 forbade emancipation of fugitive slaves and required that they "be returned to their owners;" and Article V prohibited any amendment affecting the Slave Trade Clause described above.¹⁰ Several additional clauses of the Constitution, moreover, "indirectly guarded slavery," he argues, including the grant of power to Congress to "suppress insurrections;" "the creation of the electoral college," which augmented southern voting strength; and a ban on federal taxes on exports, which protected the South's export-producing economy.¹¹ Although Finkelman discusses the debates over a few of these provisions,¹² particularly the Three-Fifths Clause,¹³ he focuses much of his attention on what he terms "The Dirty Compromise" that emerged during the Constitutional Convention.¹⁴ Commercially minded northern delegates granted Congress the power to regulate interstate and international commerce, while pro-slavery southerners received assurance that congressional control of commerce would exclude the regulation of the slave trade until 1808 and never include the power to tax exports.¹⁵

By asserting that slavery "permeated the debates of 1787" and pervaded the structure of the Constitution in its final form,¹⁶ Finkelman challenges historians who have claimed that the Constitution either took no position on slavery or leaned toward antislavery.¹⁷ The late Don E.

6. *Id.* at x.

7. *See id.* at 3-36.

8. *Id.* at 3.

9. *Id.* at 34-36.

10. Finkelman, *Slavery and the Founders*, *supra* n. 5, at 6-7 (quoting United States Constitution).

11. *Id.* at 7-8 (quoting United States Constitution). Here Finkelman's analysis resembles that of William Wiecek. *See* William Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* 62-63 (Cornell U. Press 1977).

12. *See* Finkelman, *Slavery and the Founders*, *supra* n. 5, at 10-36.

13. *See id.* at 10-21.

14. *Id.* at 22-32.

15. *See id.*

16. *Id.* at x.

17. The most comprehensive examination of the work of the founders does not even

Fehrenbacher, for example, argued that only three provisions (the Three-Fifths, Slave Trade, and Fugitive Slave Clauses) of the Constitution "were directed at" the South's peculiar institution.¹⁸ None of these, Fehrenbacher asserted, specifically "authorized" or "forbade" slavery; instead, these provisions concerned only "certain peripheral features of the institution."¹⁹ Fehrenbacher further pointed out that all of these clauses referred to the enslaved as "persons," that only one (the Three-Fifths Clause) "expressly differentiated between free and unfree persons," and that none referred to slaves as "property."²⁰ Neglecting to take account of Fehrenbacher's analysis of the text, Finkelman looks for—and finds—slavery in nearly every nook and crevice of the Constitution. Finkelman even contends that some clauses of the Constitution, although not "considered to affect slavery" at the time they were debated, "ultimately protected the institution" because of the way in which they were "interpreted" or "implemented."²¹ He mentions the Territories Clause as an example, which the Supreme Court in the Dred Scott case read as giving Congress the power "to protect slavery in the territories but not to ban the institution" there.²² In making this argument, Finkelman challenges William Freehling, who views the framers as essentially antislavery and argues that their work must be evaluated from a long-term perspective—based on what they hoped and expected would happen to slavery in the decades after ratification.²³ With southerners in control of the executive branch of the national government for much of its early history,²⁴ Finkelman shows, the country's initial development took a decidedly proslavery turn. By his reckoning, a total of eighteen different clauses, either intentionally or unintentionally, proved beneficial to slaveholders' interests.²⁵

include the word "slavery" in the index. See Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (U. N.C. Press 1969).

18. Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* 26 (Oxford U. Press 1978).

19. *Id.*

20. *Id.*

21. Finkelman, *Slavery and the Founders*, *supra* n. 5, at 8.

22. *Id.* at 9.

23. William W. Freehling, *The Founding Fathers and Slavery*, 77 *Am. Historical Rev.* 81, 92-93 (1972).

24. See Finkelman, *Slavery and the Founders*, *supra* n. 5, at x.

25. In addition to the five main provisions described above, Finkelman lists U.S. Const. art I, § 9, cl. 5 (which "prohibited federal taxes on exports"); U.S. Const. art. I, § 10, cl. 2 (which prohibited state taxes on imports and exports); U.S. Const. art. II, § 1, cl. 2 (which provided for an electoral college); U.S. Const. art. IV, § 3, cl. 1 (which allowed for "admission of new states"); U.S. Const. art. IV, § 4 (which guaranteed that the U.S. government would protect against "domestic Violence"); U.S. Const. art. V (which required a three-fourths majority of states to ratify constitutional amendments); U.S. Const. art. I, § 8, cl. 17 (which allowed Congress to regulate institutions in the nation's capital); U.S. Const. art. III, § 2, cl. 1 (which limited the right to sue in federal courts to "citizens of different states"); U.S. Const. art. IV, § 1 (the Full Faith and Credit Clause); U.S. Const. art. IV, § 2, cl. 1 (the Privileges and Immunities Clause); and U.S. Const. art. IV, § 3, cl. 2 (the

Of course, Finkelman has to come to terms with the fact that the Constitution included neither the word "slavery" nor "slave." He does so by quoting some of the Convention delegates themselves, who stated that they avoided such language so as not to antagonize northern representatives.²⁶ That the Constitution never used these words, Finkelman argues, mattered not, because "[a]s long as they were assured of protection for their institution, the southerners at the Convention were willing to do without the word 'slave.'"²⁷ But in writing and interpreting a Constitution, words *do* matter. The striking absence of the terms "blacks," "Negroes," and "slaves" from the text—especially in light of the fact, as Finkelman demonstrates, that delegates freely used these terms in the course of debate²⁸—at least meant that the slavery question had not been settled in the decisive manner that Finkelman implies. The omission of such language left room for dissent, and use of the term "persons" to refer to slaves allowed for the rise of an antislavery constitutional argument in the early nineteenth century. Because the United States Constitution's ambiguity on this question permitted a broad range of opinions, nearly three-quarters of a century later southerners took a much more intentional approach when they drafted the Confederate Constitution. As if to acknowledge that the South had not gotten it right in Philadelphia, in 1861 the Confederate framers re-wrote the portions of the United States Constitution relating to slavery, so that their founding charter explicitly guaranteed property in "negro slaves" and referred specifically to slavery in six different clauses.²⁹ There is, in short, much more significance to the wording of the United States Constitution with regard to slavery than Finkelman is willing to admit. Although he presents compelling evidence from the convention debates that slavery loomed large in 1787, Finkelman fails to offer a fully convincing explanation of why the founders went through rhetorical contortions to avoid using the word "slave."

After discussing the Constitutional Convention, Finkelman devotes the next several chapters of the book to the problem of slavery in the nation's early political and constitutional development.³⁰ Contrary to the claims of most historians, Finkelman asserts, the slavery question figured prominently in national politics during the three decades between the Constitutional Convention and the Missouri Crisis of 1819-

Territories Clause). *Id.* at 7-9.

26. See Finkelman, *Slavery and the Founders*, *supra* n. 5, at 6.

27. *Id.* at 6.

28. *Id.*

29. Conf. St. Am. Const. art. I, § 9, cl. 1; Conf. St. Am. Const. art. I, § 9, cl. 2; Conf. St. Am. Const. art. I, § 9, cl. 4; Conf. St. Am. Const. art. IV, § 2, cl. 2; Conf. St. Am. Const. art. IV, § 2, cl. 3; and Conf. St. Am. Const. art. IV, § 3, cl. 3.

30. See Finkelman, *Slavery and the Founders*, *supra* n. 5, at 37-128.

1821.³¹ He begins with an analysis of the Northwest Ordinance's prohibition of slavery, a "sacred text" of the antislavery movement in the antebellum era³² and an important piece of evidence for historians interested in the founders' views on slavery.³³ Finkelman shows, in chapters on the adoption of the Ordinance and on the persistence of slavery in two of the states where it had supposedly been banned, that the 1787 law failed to serve an antislavery purpose.³⁴ Instead, he argues, because "the Ordinance itself was ambiguous, internally inconsistent, and written by men who were uncertain of their own objectives,"³⁵ it took sixty years to accomplish final abolition in Illinois.³⁶ Slave owners in the territories in question believed that the law violated their property rights, and federal officials failed to enforce the measure.³⁷ Some Indiana masters continued to hold slaves into the 1830s, while not until the ratification of the Illinois Constitution of 1848 did that state finally end slavery.³⁸ Although the Ordinance took on an "ideological life of its own" as a weapon in the antislavery arsenal during the 1840s and 1850s,³⁹ in practice, Finkelman convincingly demonstrates, the law proved ineffective in halting the spread of the peculiar institution.⁴⁰

If the Northwest Ordinance virtually failed as antislavery legislation, the Fugitive Slave Law of 1793 only confirmed the founding generation's commitment to preserving slavery. The law grew out of a controversy involving alleged fugitive slave John Davis of Virginia, whose Virginia captors faced kidnapping charges in Pennsylvania.⁴¹ The dispute over the fate of the three Virginians accused of kidnapping culminated in the passage of federal legislation regulating interstate extradition and the rendition of fugitive slaves.⁴² Finkelman skillfully outlines the Davis case and the various versions of the bill that eventually became known as the Fugitive Slave Law of 1793.⁴³ He concludes that passage of the act ultimately showed that "the founding generation accepted what historian William Wiecek has called the 'federal consensus' on slavery—that the national government could not interfere with slavery in the states and that support for slavery was part of the national compact

31. *Id.* at 105, 107-09.

32. *Id.* at 37.

33. *See id.* at 39.

34. *See id.* at 37-80.

35. *Id.* at 39.

36. Finkelman, *Slavery and the Founders*, *supra* n. 5, at 58.

37. *Id.* at 49-55.

38. *Id.* at 56.

39. *Id.*

40. *See id.*

41. *Id.* at 84-86.

42. Finkelman, *Slavery and the Founders*, *supra* n. 5, at 89-99.

43. *See id.* at 84-99.

necessary to keep the union together.”⁴⁴ On the one hand, in making this claim, Finkelman buttresses his earlier argument about the compromise sealed at the Constitutional Convention: northerners and southerners agreed in conferring constitutional protection upon the South’s peculiar institution.⁴⁵ On the other hand, though, his characterization of the Constitution as a pro-slavery compact undermines the basic argument of the only new chapter in the second edition, “The Problem of Slavery in the Age of Federalism.”⁴⁶ Here Finkelman attempts to prove that slavery served as a defining issue for the nation’s first political parties.⁴⁷ Examining debates over a variety of policies—including the Northwest Ordinance, which he surprisingly uses as evidence for the antislavery views of its supporters⁴⁸—Finkelman concludes that Democratic-Republicans and Federalists took contrasting positions on questions relating to slavery and race.⁴⁹ “Federalists advocated some measure of racial equality,” Finkelman asserts, “in contrast to the Jeffersonians, who fostered the emerging, racially based, proslavery argument and a concomitant attack on the rights of free blacks.”⁵⁰ After reading Finkelman’s description of the divisions over slavery that existed between Democratic-Republicans and Federalists,⁵¹ one cannot help but wonder whether a federal consensus really existed.

The final two chapters depart from the chronological and thematic structure of the rest of the book by focusing on America’s most revered founder, Thomas Jefferson. The most familiar of the previously published portions of this volume, these essays explore the apparent contradiction between Jefferson’s rhetorical commitment to liberty in the Declaration of Independence and his lifelong devotion to slavery as a member of the Virginia elite.⁵² “Because Jefferson was the author of the Declaration of Independence and a leader of the American enlightenment,” Finkelman reasons, “the test of his position on slavery is not whether he was better than the worst of his generation, but whether he was the leader of the best. . . .”⁵³ Judged against fellow southerners and revolutionary-era leaders such as George Washington, Colonel John Laurens, Robert Carter, and Judge St. George Tucker—who either advocated some form of emancipation, freed substantial numbers of

44. *Id.* at 103 (quoting Wiecek, *supra* n. 11, at 16).

45. *See id.* at 3-36.

46. *Id.* at 105-28.

47. *See id.*

48. Finkelman, *Slavery and the Founders*, *supra* n. 5, at 107-14.

49. *Id.* at 108-09.

50. *Id.* at 109.

51. *See id.* at 107-28.

52. *See id.* at 129-96.

53. *Id.* at 129.

their own slaves, or both⁵⁴—”Jefferson fails the test.”⁵⁵ Finkelman condemns “the master of Monticello” not only for his unwillingness to act publicly in any way to help bring about emancipation, but also for his personal beliefs and practices with regard to slavery and race.⁵⁶ Time and time again, Finkelman shows, Jefferson refused to exercise his extraordinary talents and powers to abet the movement for emancipation.⁵⁷ As author of the Declaration of Independence, member of the national Congress, Virginia lawmaker and governor, and as president, Jefferson did nothing to help bring an end to slavery.⁵⁸ Moreover, as the owner of 10,000 acres of land and nearly two hundred bondspersons, Jefferson clung tenaciously to his own slave property.⁵⁹ He made a concerted effort to track down those slaves carried off his plantation by the British during the American Revolution,⁶⁰ and he routinely sold slaves in order to pay off debts to maintain his extravagant lifestyle.⁶¹ Over the course of his lifetime, Jefferson freed only eight slaves, all of them relatives of Sally Hemmings.⁶² His most extensive writings on slavery and race relations, contained in his *Notes on the State of Virginia*, show that Jefferson held deeply racist views about blacks and could never get past his fear of the social consequences of emancipation.⁶³ Meticulously researched and soundly reasoned, Finkelman’s discussion takes account of recent DNA evidence regarding Jefferson and Hemmings, as well as the vast scholarly and popular literature dealing with Jefferson.⁶⁴ The result is a compelling critique of Jefferson and his many admirers.

The discrete nature of the chapters in this book—all but one of which first appeared as journal articles—hinders Finkelman’s ability to fashion them into a coherent whole. Although he convincingly demonstrates that the slavery question figured prominently during the era of the American founding, he falls short in his attempt to prove that the framers created a “slaveholders’ compact.”⁶⁵ The framers of the Constitution did not once and for all establish the meaning of the text during that hot summer in Philadelphia. On the slavery question—as with a variety of issues where the language of the text left room for a diversity of opinions—subsequent Supreme Court justices,

54. Finkelman, *Slavery and the Founders*, *supra* n. 5, at 129-30, 135-36, 146.

55. *Id.* at 129.

56. *See id.* at 129-62.

57. *See id.*

58. *See id.* at 139-52.

59. *Id.* at 134.

60. Finkelman, *Slavery and the Founders*, *supra* n. 5, at 141-42.

61. *Id.* at 131.

62. *Id.* at 153-54.

63. *See id.* at 133-34, 150, 160, 180-81, 191.

64. *See id.* at 163-96.

65. *Id.* at *ix*.

congressmen, presidents, and reformers of every stripe imbued the Constitution with their own ideals. Finkelman demonstrates this very point when he shows the opposition to slavery expressed by many Federalists during the late Eighteenth and early Nineteenth Centuries.⁶⁶ Later, members of the Liberty and Free Soil Parties, as well as Whigs and Republicans, developed a powerful antislavery critique that relied on the nation's founding documents for support. Just as the Northwest Ordinance's prohibition of slavery north of the Ohio River became a potent weapon in the arsenal of the antislavery movement, so did the Declaration of Independence's claim that "all men are created equal" and the Constitution's Fifth Amendment guarantee that no person "be deprived of life, liberty, and property, without due process of law." Americans debated slavery so vociferously precisely because the Constitution had *not* settled the issue.

By arguing that the Constitution definitively sanctioned slavery *and* that slavery remained a central issue in American politics, Finkelman tries to have it both ways: he supports the Garrisonian view of the Constitution as a "covenant with death" at the same time that he praises antislavery constitutionalists Salmon P. Chase, Charles Sumner, and Abraham Lincoln for "challeng[ing] the nation to live up to its ideals."⁶⁷ Chase, Sumner, and Lincoln, of course, flatly disagreed with Garrison; they believed that the founders' Constitution stood squarely on the side of antislavery. At one point in the book, Finkelman himself seems to agree with antislavery constitutionalists. He devotes several pages to showing how the Fugitive Slave Law of 1793 violated the Constitution⁶⁸—this after his first chapter argued that the Constitution directly recognized slavery in five different clauses!⁶⁹ Such inconsistencies weaken Finkelman's otherwise compelling case for the significance of the slavery issue in the early republic.

Despite this shortcoming, Finkelman's *Slavery and the Founders* will be the authoritative work on the subject for many years to come. He devotes careful attention to his primary sources, engages in thoughtful and reasoned debate with his fellow scholars, and writes in a clear and engaging manner accessible to experts and laypersons alike. Like the early twentieth century historian Charles A. Beard, Finkelman brings to light an unpleasant but important side of America and some its founders. As the twentieth century began, Beard provided the reading public with a controversial reappraisal of the work of the nation's founders at a time when popular movements for social justice and equal rights shook the very foundations of the American political system. At

66. Finkelman, *Slavery and the Founders*, *supra* n. 5, at 107-28.

67. *Id.* at ix-x.

68. *See id.* at 99-103.

69. *Id.* at 6-7.

the dawn of the twenty-first century, when racial and ethnic demographic changes promise to transform the United States in the near future, Finkelman's book provides readers with significant information and insight about how the nation's first generation of leaders confronted and debated the issue of racial slavery.