# A SLAVEHOLDERS' UNION:

# THE LAW AND POLITICS OF

# AMERICAN SLAVERY, 1770-1821

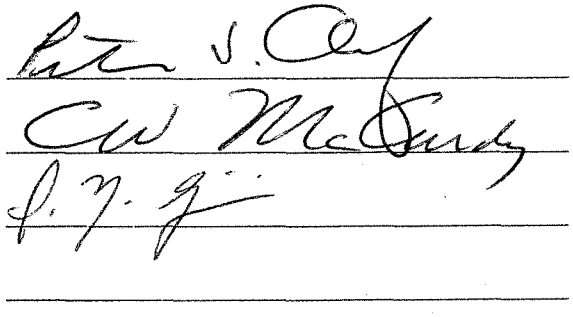
George William Van Cleve
Charlottesville, Virginia

B.A., University of Chicago, 1973
J.D., Harvard University, 1977
M.St. Leg. Rsch, University of Oxford, 2004

A Dissertation presented to the Graduate Faculty of the University of Virginia in Candidacy for the Degree of Doctor of Philosophy

Department of History

University of Virginia
May, 2008



ALD
Diss.
Hist.
2008
.V36

©
George William Van Cleve
All Rights Reserved
May 2008

# ABSTRACT

**A Slaveholders' Union: the Law and Politics of American Slavery, 1770-1821**

This dissertation examines how and why American slavery survived the American Revolution and became a permanent national legal and political institution by 1821. Was this development a paradoxical failure to fulfill the egalitarian natural rights principles of the Revolution? Or was it the disastrous harvest of the era's sectionally divisive politics, conflicting views on government and freedom, and shared desires for westward expansion? To consider this problem, the study covers the period from just before the Revolution to the second Missouri Compromise, and focuses on political and legal developments related to slavery at both the state and federal levels, using constitutions, statutes, court cases, legislative records, newspapers, pamphlets, and personal and association papers as its primary sources.

A major portion of the dissertation consists of analyses of the relation between slavery and the Articles of Confederation and the Constitution. Slavery received essential protection from the Articles and the Constitution because slave states were able to demand its protection as a sine qua non in framing governments and western expansion policy in light of Northern public indifference to slavery's fate outside the North. The dissertation concludes that the expansion of slavery was a price that Americans reluctantly but willingly paid for one of the Revolution's crowning achievements: a new

government powerful enough to help build an American empire yet committed to federalism as a central foundation of freedom.

To aid in understanding slavery's politics, the dissertation also analyzes Northern abolition and Southern manumission laws. Abolition laws often reflected changes in Northern economies and encouragement of white immigration. Such laws shifted virtually all of the socioeconomic costs of abolition to blacks, and their enforcement was exceptionally poor, reflecting community indifference and racial hostility.

Finally, the dissertation considers struggles over slavery in implementing the Constitution and during national expansion, including the Louisiana Purchase and the Missouri Controversy. By 1819, slavery had grown powerful enough to withstand the Northern states' challenge to its expansion. The outcome of that sectional struggle was a fragile equilibrium that reduced the Constitution to a compact on slavery and created a brittle new foundation for antebellum politics.

# CONTENTS


| | | |
|---|---|---|
| | Acknowledgements | vi |
| | List of Tables | ix |
| | List of Abbreviations | x |
| | **Introduction** | 1 |
| **Part I.** | **Slavery in the American Revolution** | |
| 1. | From Empire to Confederation | 22 |
| 2. | Abolition, Manumission and the Confines of Black Freedom | 94 |
| **Part II.** | **The Making of the Slaveholders' Constitution** | |
| 3. | Property and the Dilemma of Federal Representation | 160 |
| 4. | The Clash over Commerce and Westward Expansion | 211 |
| **Part III.** | **Slavery in the New Nation, 1790-1821** | |
| 5. | From Constitution to Republican Empire | 290 |
| 6. | The Missouri Compact | 348 |
| | Appendices | 428 |
| | Bibliography | 437 |

# ACKNOWLEDGEMENTS

I am deeply grateful for the assistance of the many people who have helped to make this dissertation possible. I owe my greatest thanks to my family. My wife, Mary, and my son, David, have been as supportive of this project and as tolerant of its large time and resource demands as anyone could reasonably ask. Mary has read all of my work, and offered very helpful comments on numerous drafts. Even more, she has listened with empathy for countless hours to my efforts to grapple with my work. And I am very thankful for the love and assistance I have received over many years from my adult sons, William and Michael, and my daughter, Elizabeth.

My very special thanks go to Peter S. Onuf, the chair of my dissertation committee, for his extraordinary and unstinting advice, support and encouragement throughout my work. I also wish to offer my deep thanks to his fellow committee member, Charles W. McCurdy. Their insightful scholarship provides a superb example for their students and a central foundation for this work and its methodology. Their sage advice and intellectual generosity have benefited me time and again, and their encouragement has helped to sustain my efforts. It has been an immense pleasure to write this work with their considerable assistance and under their thoughtful supervision. To them also goes the credit for suggesting the dissertation's title. My very warm thanks go to Patrick Griffin for his review and astute comments on several of its chapters. He and James W. Ceaser, the remaining members of my dissertation committee, raised incisive questions about my dissertation, which have helped to improve it significantly.

I have particularly benefited from thoughtful comments by Richard Beeman on my chapters concerning the Constitution. Craig Hammond and Emily Blanck made perceptive and helpful comments on an earlier essay on fugitive slavery, an issue that plays a significant role in this work. I also thank Craig Hammond for sharing his manuscript of *Slavery, Freedom and Expansion in the Early American West* (Charlottesville: University of Virginia Press, 2007), from which I learned a considerable amount about the political dynamics of slavery's westward movement. I thank Robert Parkinson and Padraig Riley for generously sharing their dissertations. Various scholars were generous with their time and provided helpful responses to queries: Allan Kulikoff; Lorena Walsh; and Phillip J. Lampi.

My colleagues in the study of slavery and politics, particularly William Pettigrew, Christa Dirksheide and John Ragosta, have made informative comments that have helped to shape my work over the years. I very much appreciate the careful review several of my dissertation chapters received from members of the Virginia Early American Seminar. The Missouri chapter of this dissertation benefited significantly from a thoughtful critique by several colleagues as well.

I particularly wish to thank Michael R.T. Macnair, my supervisor, and Joshua Getzler, both of St. Hugh's College, Oxford, for their strong support and significant contributions to my thesis work there, which formed an essential part of the foundation for this dissertation.

I have been fortunate to conduct my research at several archives staffed by helpful librarians who were willing partners in my work. I particularly appreciate the assistance and advice received from staff members at: the United States National Archives; the University of Virginia's Law School Library, Alderman Library and Small Special Collections Library; the Newport, Rhode Island Historical Society; the Rockefeller Library, Williamsburg, Virginia; Stratford Hall Library; the Rhode Island State Archives; the Rhode Island Judicial Records Center; the New York Historical Society; the Historical Society of Pennsylvania; and the Friends Historical Library, Swarthmore College. Part of the research for Chapter 1 was performed at British libraries. I particularly wish to thank for their assistance Guy Holborn and the staff of the Library of Lincoln's Inn, London (including their painstaking transcription of a manuscript report of an important English legal decision); the Public Records Office, London; and Duke Humfrey's Library, Oxford.

The Caroccias of Sweetgrass Ranch and Otter Creek Ranch, and Barbara Van Cleve of the Bar B Ranch—all in Melville, Montana—were wonderfully hospitable when I wrote part of this study at Otter Creek Ranch in the summer of 2006.

Finally, I would like to express my gratitude to the University of Virginia and to its Corcoran Department of History for the generous financial support I've received during my graduate studies and dissertation work. It would have been difficult indeed for me to complete this project without that support.

Despite the large contributions made to this dissertation by all those mentioned above, I am solely responsible for any errors it contains.

# LIST OF TABLES

**Table 3.1** Southern Share of House of Representatives Representation Under Various Schemes 209

**Table 4.1** Slave Imports and Population by Decade and United States Senate Senate Import Premiums 228

# LIST OF ABBREVIATIONS

| | |
|---|---|
| AC | *The debates and proceedings in the Congress of the United States: with an appendix containing important state papers and public documents, and all the laws of a public nature; with a copious index; compiled from authentic materials.* Washington : Gales and Seaton, 1834-1856 (popularly known as "The Annals of Congress"). |
| CCP | *Papers of the Continental Congress, 1774-1789.* Washington: National Archives and Records Service, General Services Administration, 1971. |
| Doc Hist FFC | De Pauw, Linda Grant; Veit, Helen E.; Charlene Bangs Bickford, et al., eds. *Documentary History of the First Federal Congress of the United States of America, March 4, 1789—March 3, 1791.* Baltimore: Johns Hopkins Press, 1972— 2004-. 15 vols. to date. |
| Elliot | Elliot, Jonathan. *The debates in the several state conventions on the adoption of the federal Constitution, as recommended by the general convention at Philadelphia, in 1787.* 2d ed. (New York: B. Franklin, 1974 reprint). |
| Farrand | Farrand, Max, ed. *The Records of the Federal Convention of 1787.* pbk ed. 3 vols. New Haven: Yale University press, 1966. |
| Farr. Supp. | Hutson, James H., ed. *Supplement to Max Farrand's The Records of the Federal Convention of 1787.* New Haven: Yale University Press, 1987. |
| Federalist | Pole, J.R., ed. *The Federalist.* Cambridge: Hackett Publishing Company, 2005. |
| GW | George Washington |
| GW Papers | Abbot, W.W., ed. *Papers of George Washington.* Charlottesville: University Press of Virginia, 1990. |
| GW Dig. Ed. | Crackel, Theodore J., ed. *The Papers of George Washington Digital Edition.* Charlottesville: University of Virginia Press, 2007. |
| Hse. Jnl. | United States. *Journal of the House of Representatives of the United States of America.* Washington: U.S. Government Printing Office, 1789- . |
| JCC | Ford, Washington C., ed. *Journals of the Continental Congress 1774-1789.* Washington: Government Printing Office, 1904-1936. |

| | |
|---|---|
| JM | James Madison |
| JM Papers | Hutchinson, William T., and William M.E. Rachal, eds. *Papers of James Madison.* 29 vols. Chicago: University of Chicago Press, 1962-83. |
| JM Writings | Hunt, Gaillard, ed. *The Writings of James Madison.* New York: G.P. Putnam's Sons, 1906. |
| Kaminski | Kaminski, John P., ed. *A Necessary Evil? Slavery and the Debate Over the Constitution.* Madison: Madison House, 1995. |
| LCRK | King, Charles. *The Life and Correspondence of Rufus King.* 6 vols. New York: G.P. Putnam's Sons, 1897. |
| LDCC | Smith, Paul H., and Ronald M. Gephart (1976), eds. *Letters of Delegates to the Continental Congress 1774-1789.* Washington: Library of Congress, 1976-2000. 26 vols. |
| MSL | Massachusetts Historical Society. "Letters and Documents Relating to Slavery in Massachusetts." In *Collections of the Massachusetts Historical Society.* Boston: Massachusetts Historical Society, 1877, 373-442. |
| Sen. Jnl. | United States. *Journal of the Senate of the United States of America.* Washington, D.C.: U.S. Government Printing Office. 1789- . |
| Somerset | *Somerset v. Stewart*, Lofft 1, 98 E.R. 499, 20 S.T. 1 (K.B. 1772) (also referred to as R. (Rex) v. Knowles). |
| ST | Howell, Thomas B., ed. *A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors from the Earliest Period to the Year 1783, with notes and other Illustrations.* London, 1816-26, 33vols. |
| Stat. | United States. *Statutes at Large of the United States of America.* Washington: U.S. Government Printing Office, 1789- . |
| TJ | Thomas Jefferson |
| TJ Papers | Boyd, J.H. and others, eds. *The Papers of Thomas Jefferson..* 32 vols. to date. Princeton: Princeton University Press, 1950-. |
| TJ Writings | Ford, Paul Leicester. *The Writings of Thomas Jefferson.* New York: G.P. Putnam's Sons, 1892-99. 10v. |

Note: Short titles of frequently cited secondary works and other citation abbreviations are found in *Bibliography, Sec. A.*

# INTRODUCTION

During the tempestuous debate over Missouri's proposed admission to statehood in early 1820, Senator Jonathan Roberts of Pennsylvania pleaded with his colleagues to prevent Missouri from becoming a slave state when admitted to the Union. Roberts gravely warned them that allowing slavery in Missouri would be a betrayal of the ideals of the Revolution expressed in the Declaration of Independence, a solemn "covenant of our fathers" entered into before the "Supreme Judge of the world." And he appealed fervently to their shared Christian beliefs, begging them not to admit Missouri as a state deformed by slavery, its features hideous and "marred as if the finger of Lucifer had been drawn across them."[1] It was all to no avail. Despite Roberts's best efforts, and those of virtually the entire political leadership of the Northern states, the representatives of the slave states remained obdurate. Missouri must be allowed to enter the Union with the sovereign right to decide for itself on slavery, they insisted, anticipating that it would become a slave state. The awful truth was that Roberts's pleas came too late; the die had long since been cast. By 1820, there were already eleven states with substantial slave populations, more than double the number of states that had had particularly sizeable slave populations at the time of the Revolution. And it is estimated that there were more than two and a half-times as many slaves in America by the time of the Missouri debate

[1] 16 *AC* 120-27, January 17, 1820 (quotations at 16 *AC* 124, 126).

as there had been when the Revolution began. How had slavery survived a Revolution that Roberts and many in the Founding generation believed was supposed to end it, and grown to the point where its representatives had the power boldly to defy Northern efforts to contain it?

Many of the advocates of restricting slavery's expansion during the Missouri controversy thought that Thomas Jefferson's views opposing slavery in the 1780's supplied the answer to that question. As Jefferson had written from Paris to the prominent English minister Dr. Richard Price in 1785, the Revolutionary era challenge to slavery was "justice in conflict with avarice and oppression." For those who thought as Jefferson did then, the expansion of slavery during the Early Republic meant that greed and exploitation had continued to triumph over the Revolution's egalitarian promise of justice to slaves.[2] But by 1820 Jefferson had engaged in a protracted political struggle that he and others saw as one for the soul of the Republic created by the Revolution, and having won that contest, had inaugurated a new era of American territorial expansion. In early 1821, he would write to John W. Taylor, the Republican Speaker of the House of Representatives and a principal leader of the Northern forces seeking to restrict slavery in Missouri, that he was not certain that the empire of liberty he had hoped to create would be preserved in America, because the "Northern bears [supporting restriction] seem bristling up to maintain the empire of force."[3] Had Jefferson lost sight of the principles of the Revolution, or had the Revolution's relationship to slavery been more complex and

---

[2] TJ to Richard Price, August 7, 1785, *The Papers of Thomas Jefferson*, ed. J. H. Boyd and others, 32 vols. (Princeton: Princeton University Press, 1950-), 8: 356.

[3] Thomas Jefferson to John W. Taylor, February 13, 1821, Taylor Papers, NYHS (unpublished).

equivocal than he had originally thought? This dissertation examines that question as part of a broad reconsideration of slavery's place in American law and politics during the Early Republic. It seeks to understand how and why slavery survived and grew after the Revolution to become a permanent national legal and political institution by 1821.

This study seeks to achieve several purposes as it traces the institution of slavery's course from the collapse of the British Empire in America to the Missouri Controversy. A careful appraisal of slavery's place in the sociopolitical life of the Early Republic will afford us a better understanding of the philosophy and structure of American federal government, including the Constitution, and hence the politics of the Founding era. We will also gain a surer grasp of the complex political terrain of the era before the Civil War that will reshape our understanding of the origins of the Civil War itself.

The traditional history of slavery and politics in the Early Republic gives an account of slavery's evolution that makes it difficult to understand why slavery did not collapse by 1820. In that account, slavery was under growing attack even before the American Revolution. The Revolution greatly intensified the power of that challenge and led to a series of successes against slavery in Northern abolition and Southern manumission reform laws.[4] Many Americans wanted to abolish slavery throughout America. They believed that they had made the necessary start by abolishing it in the Northern states and limiting slavery in the Constitution, and that time and continued

[4] The term "northern" in this work refers to the geographic area composed of the eight states that began abolition of slavery by 1804, unless the context makes clear that a different use is intended. The term "southern" refers to the five major slave states. This terminology reflects the fact that most important divisions over slavery and related economic development issues throughout this period at the national level tended to run mainly along these sectional lines, with exceptions that tend to prove the rule.

commitment to Revolutionary ideals would take care of the rest of the problem. The need to protect the fragile new Republic in the dangerous world that confronted it after Independence meant that the Revolutionary challenge to slavery had to be muted or avoided in creating national institutions and beginning national expansion. But antislavery forces continued the struggle at the state level during the Early Republic. Once pressing challenges to national survival were surmounted, most notably in the war of 1812, antislavery forces returned to the attack, challenging the expansion of slavery west of the Mississippi. Taken as a whole, this traditional history is a comforting and plausible apology for what historians agree was a pattern of inaction against slavery at the national level in the Early Republic. But it is nevertheless a significantly flawed portrait of the political and legal history of slavery in that era, whose principal vice is that it fails to account fully for slavery's growth and increased power and thus distorts our understanding of the nature of our fundamental political institutions and their development in the early Republic.

I argue that slavery was already a powerful political, economic and social institution before Independence, and that it maintained and strengthened its position after Independence (with exceptions that do not alter this general conclusion). Slavery became integral to the Union for three interrelated reasons. First, the Revolution ultimately strengthened slavery politically, in part because its ideology contained sharply conflicting strains of thought on the nature of government and its appropriate relation to property and natural rights, and therefore could not unequivocally support a consensus for national antislavery action. Second, the major slave states from Independence onward were, despite some early appearances to the contrary, substantially if not permanently

committed to slavery as an economic, social and political institution. And third, throughout the Revolutionary era most members of the Northern public viewed slavery as a local problem and were largely indifferent to its perpetuation outside their states' sectional sphere of influence. Northern citizens consequently were unwilling to support federal policies and national resource commitments that were essential to contain the growth of slavery outside the North.

These basic facts of American political life heavily influenced national and state decisions affecting slavery made beginning as early as the Revolutionary War, and continuing through the first two decades of the 1800s. I argue that in these circumstances it was not possible to create a federal republican Union of the kind Americans established, either in the Articles of Confederation or in the Constitution, to pursue their goals after Independence without providing both protection and expansion potential for slavery—that is, by creating a slaveholders' Union. But in many cases, slavery was also a well-understood, but nevertheless incidental, beneficiary of national decisions driven by broader considerations, such as desires for territorial expansion. Slavery grew apace as the nation did, until it became strong enough to obtain explicit national legal and political recognition in the face of the first major national challenge to its continued expansion during the Missouri controversy.

This dissertation's reexamination of the role of political and legal decisions in advancing slavery is prompted in part by the work of recent historians of slavery. Several of these historians conclude that beginning early in American colonial history, slavery was an economically viable institution that was very profitable for slaveholders. Their work strongly supports the view that slavery would not ultimately have collapsed in the

United States without major political intervention.[5] This study shares that perspective, and thus focuses its attention on the political and public law dimensions of slavery's evolution as an American institution.[6] It concludes that in the Early Republic, the struggle over slavery was largely an incidental result of broader sectional political calculations and disputes that were often motivated by divergent sectional economic interests. American sectional strife began during the Revolutionary War, and was interrupted or postponed largely by Americans' continued ability to obtain new territory to divide among themselves during the late eighteenth and early nineteenth centuries; in circumstances where the frontiers appeared to close, sectional strife re-emerged, and such strife often had necessary implications for slavery.

The history of struggles over slavery and territorial expansion from the Revolution through the Missouri Controversy demonstrates that the first major national attack on the expansion of slavery, which came in that Controversy, was driven in significant part by sectional economic and political motives on both sides. This history also strongly suggests that slavery's ultimate demise was not inevitable, and that its demise was caused not by modernizing forces but quite probably by a re-emergence of

---

[5] David Eltis, Frank D. Lewis, and Kenneth L. Sokoloff, eds., *Slavery in the Development of the Americas* (Cambridge: Cambridge University Press, 2004);Robert William Fogel, *Without Consent or Contract: The Rise and Fall of American Slavery*, 1994 pbk. ed. (New York: WW Norton & Company, 1989). For a critique of the work of Fogel and others (sometimes called the "cliometric" school) that nevertheless acknowledges the economic dynamism of slavery (assuming it receives necessary legal and political protection) see Gavin Wright, *Slavery and American Economic Development* (Baton Rouge: Louisiana State University Press, 2006). On the economics of slavery law see Jenny Bourne Wahl, *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery* (Cambridge: Cambridge University Press, 1998). On the economics of abolition see Robert William Fogel and Stanley L. Engerman, "Philanthropy at Bargain Prices: Notes on the Economics of Gradual Emancipation," *Journal of Legal Studies* 3, no. 2 (1974): 377-401; Claudia D. Goldin, "The Economics of Emancipation," *The Journal of Economic History* 33, no. 1 (1973): 66-85.

[6] I am indebted throughout this work to the many helpful insights and careful research of Donald Robinson. Donald L. Robinson, *Slavery in the Structure of American Politics 1765-1820* (New York: Harcourt Brace Jovanovich Inc., 1971).

sectional strife that led to the Civil War. But where sectional strife implicated slavery, other concepts of central importance to national life such as federalism, which in turn had implications for Americans' conceptions of political freedom, were often inextricably also at stake, and one of this dissertation's purposes is to examine their fate as well.[7]

How was federalism affected by slavery? Federalism in Early Republican America consisted of two basic political propositions: (1) the necessity for adequate representation of local interests in the structure of the new federal government; and (2) the need to preserve local decision-making power (i.e., state or popular sovereignty) on virtually all major domestic policy issues notwithstanding the creation of the new government.[8] One important aspect of what the second proposition meant to most Americans in the Early Republic was that decisions about what they saw as vitally important political matters ranging from religious establishments, to property laws, to slavery should be controlled by state authority.[9]

Contemporaries understood that continued local authority over domestic policy issues in the new Union would necessitate moral and political tolerance, even of practices regarded as evil—that is, federalism meant a willingness to accept that there would be diverse, even flatly contradictory, social policies concerning the same issues in different parts of the country. In this sense, tolerance was a central foundation of freedom. Where slavery was concerned, Americans understood clearly that commitment to federalism

---

[7] For an analysis of a similar historical problem, see Sir Herbert Butterfield, *The Whig Interpretation of History* (New York: AMS Press, 1978; reprint, G. Bell ed., London, 1931).

[8] The first of these issues is addressed in Chapters 1 and 3. A "strong" federalism like that found in the Articles of Confederation entailed even further restrictions on federal powers.

[9] The Federalist No. 17 (1787) in J.R. Pole, ed., *The Federalist* (Cambridge: Hackett Publishing Company, 2005), 87-91.

in the new government inevitably meant that the Union was therefore a political union that joined together states whose majorities viewed slavery as deeply immoral or imprudent with those that supported its growth. And the American commitment to federalism was based on central political beliefs that extended well beyond localist ideology and belief in the necessity (or desirability) of tolerance.

Two other widely accepted purposes of federalism's commitment to local governance were to avoid the dangers of tyranny through government centralization of power and to permit the states to form part of a system designed to disperse power in ways that would prevent sectional disputes from dissolving the growing Union. But despite the broad support in early America for federalism, the nation's territorial expansion (including that of slavery) placed the nation's commitment to federalism under extraordinary strain. Federalism's subsequent decline did not occur because slavery's expansion demonstrated the bankruptcy of federalism as a political principle and led contemporaries to reject it. Instead, the intertwined histories of America's constitutional development and of slavery's expansion in the Early Republic both show that the Union's structure and its political commitment to federalism were incapable of staving off the recurrence of destructive sectionalism permanently unless the nation was continually expanding, and renewed sectionalism became the fundamental basis of politics.

This work's account of the political and legal transformations from the Revolution to the Missouri confrontation that created a slaveholders' Union is organized as follows.

Chapter 1 considers the effects of the American Revolution on slavery. Contrary to the conventional view, the Revolutionary era strengthened slavery as a political institution. The Chapter describes the institutional situation of American slavery within the British Empire and the new challenges it faced just before Independence, which posed large risks to slavery's growth. During the Revolution, American slavery lost British imperial protection and was damaged by war and legal instability. However, at least where slavery was concerned, the Revolution had a hierarchical as well as an egalitarian ideological dimension: it was politically and legally egalitarian, but it also legitimized and valorized government as a protector of rights and unequal property holding and social hierarchy in a decentralized polity. From the outset, Americans also had sharply conflicting views of natural rights: some thought that natural rights were superior to government, and inherently limited it; others thought that governments legitimately determined the bounds of natural rights as they were embodied in collective political life.

The strength and prominence of these Early Republic conflicts about property and natural rights meant that for many of its supporters the Revolution did not unambiguously entail opposition to the institution of slavery, notwithstanding its political rhetoric of opposition to the enslavement of free men. For this and other significant reasons, such as the Revolution's shifting of the balance of power between sections, it was not inevitable that the American Revolution would lead to the extinction of slavery. Indeed, slaveholders sought and obtained new continental political and legal protections for slave property through the Articles of Confederation. From the inception of American government, then, slaveowners sought successfully to protect and strengthen slavery using national power.

Chapter 2 examines state experiments in abolition and manumission during the period from 1780 to1810. Northern states began to move toward gradual abolition, but the progress of abolition stemmed in significant part from changes in Northern labor economies and Northern white racism rather than from revolutionary ideological fervor. Northern abolition followed two bedrock political principles: slaveowners should be compensated and all social and economic costs of abolition should be borne by slaves and free blacks. Northern taxpayers were unwilling to permit use of either their own or national resources to meet the far larger economic (and socio-political) cost of abolition in the slave states. The refusal of Northern states to protect fugitives during abolition also strengthened slavery. Limited Southern slavery law reforms occurred during this era, but one of the primary purposes of Southern reforms was to deflect abolition pressure, and they had little effect on slavery. The very limited Northern public support for anti-slavery action outside the Northern states created the political environment in which Northern delegates approached the problem of slavery at the Constitutional Convention. In the southern slave states, the southern delegates were divided even about continuation of the slave trade, and that there was no Southern support for abolition through national action whatsoever.

Chapters 3 and 4 examine slavery and the negotiation and ratification of the Constitution, which was formally neutral regarding slavery, but judged in realistic political terms was pro-slavery. These Chapters argue that the Convention's bargains over slavery and sectional economic development were essential to the Constitution's ratification. Chapter 3 considers the differing fundamental motives of the Northern and Southern sections for entering into the Constitution, the influence of slavery in

structuring federal political representation, and slave representation's profound implications for the future protection of slavery. Chapter 4 analyzes the ways in which, with Northern state support, the Constitutional Convention laid the groundwork for expansion of the slave state economies and of slavery itself. A companion sectional economic development bargain inextricably related to the Constitution, which included the passage of the Northwest Ordinance and commitment to the opening of the Mississippi River to western development, was also reached during the Convention. That sectional bargain began the process of dividing the western territories into regional "spheres of influence." During the ratification process, however, Federalists deliberately misled citizens about the Convention's negotiations and compromises over issues linked to slavery, such as the structure of political representation. A slaveholders' Union had been formed.

Chapters 5 and 6 consider the expansion of slavery during the period 1790-1821. Major Congressional slavery debates during 1790 confirmed that slave states viewed slavery as a permanent institution. Congress began to authorize slavery's expansion to the West in the same year. The Fugitive Slave Act of 1793, protecting slaveowners' rights to recapture fugitive slaves, was adopted by overwhelming Congressional majorities. In the 1790s, the correspondence between St. George Tucker and Massachusetts officials as well as state anti-abolition legislation made evident that voluntary abolition would not occur in Virginia, and hence not in any major slave state. By 1797, it was certain that voluntary abolition would be confined to the North, which had less than 10 percent of all slaves. Congress played only a marginal role in a series of intense local controversies

over slavery as it expanded westward. Northern politicians generally acquiesced in the expansion of slavery into new territories and states.

The Missouri Controversy during 1819-1821 was the first major challenge by Northern states to slavery's further expansion. Yet in the Compromises, the nation agreed to sanction slavery as a national legal and political institution. Chapter 6 explores three major questions: Why did the Northern states' position change at this time? Why did the Northern states, having forced a massive political confrontation, then accede to the Compromise, accepting slavery's permanence and readily foreseeable expansion? How did the Controversy alter antebellum politics and the role of the Constitution in American life?

The Missouri Controversy is of particular historical significance because it was a dispute driven by sectional motives, though ones that necessarily implicated slavery. It was also important because the sectional dispute was exacerbated by the recurrence of a sharp, largely sectional, difference of view over what was required to make the Union a "moral" union. An irreconcilable conflict emerged between the tolerance that informed federalism, and a rising, newly providentialist nationalism in the free states. Northern states abandoned the idea that the Union should be a merely political union, and increasingly advocated the position that the Union itself must have a moral foundation beyond popular consent to be legitimate. The Northern state position necessarily rejected the expansion of the Union on federalism principles, which for Jefferson and his allies had long been one of the central premises of the Union.

But ironically, the result of the sectional confrontation over Missouri was that slavery became a permanent national political institution. By 1820, slavery was

permanently economically established in the South and Southwest, and it could not be dislodged, or its expansion prevented, without a war the Northern states unwilling to fight. Significant divisions in Northern state politics played a major role in molding the outcome of the Controversy, as did slavery's increased political and economic power.

The implications of the Missouri Compromises go well beyond the 1820s. The Compromises led thoughtful national leaders to appreciate (in private at least) that where slavery was concerned, the Union was based on a sectional compact, since the Constitution lacked agreed-upon moral foundations, allocations of political authority between different levels of government, and procedures for resolving disputes. This fragile sectional compact permitted the continued division of territory and political jurisdiction between free and slave states until the decade before the Civil War, when the sectional equilibrium collapsed. But one might well conclude that the terrible conflict that followed stemmed from many of the same unresolved economic and ideological rifts found in the Missouri controversy itself. The disturbance of the unstable equilibrium of sectional forces resulting from the Missouri Compromises led to a national cataclysm.

Some background on the concepts of slavery, "politics," and "law" as they are used in this work will assist readers. Historians often describe slavery as a legal or economic system that treats slaves as property, and this study employs that perspective.[10] But it also seeks to transform the static concept of property into a dynamic one by adding a political dimension to its analysis. Despite the common modern perception of slavery

[10] Cultural historians and sociologists often conceive of slavery analogously, as a form of "social death," where people who were slaves were regarded as nonpersons, outside all of the normal boundaries of social relations. Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge: Harvard University Press, 1982).

as mere legalized private lawlessness, American slavery was usually surrounded by a political and legal environment that advanced or retarded its growth, such as the support it received from the British Empire for the century before the American Revolution. Laws and political decisions regarding slavery constituted the ultimate expressions of society's willingness to exert control over its evolution to alter the path of its development that would have resulted from the operation of private market forces alone. I seek to understand how slavery's political environment changed over time, and how the law governing it influenced or was influenced by those changes.

This study employs a comprehensive definition of "politics," one that regards the political environment as including both formal political decisions and the public opinion that supported informal political understandings at all levels of government. It focuses heavily on understanding how public opinion influenced slavery, and what various segments of the public were willing (or unwilling) to do in order to change it. Slaves and free blacks are political actors throughout this study, because although blacks were typically not formal participants in this era's politics, assessments of how blacks would react to decisions about slavery and freedom made by whites were often central to those decisions. Slaves and free blacks also had added leverage in negotiating with masters in extraordinary circumstances such as Revolution, war, and territorial expansion.[11]

I see the institution of slavery as a powerful political force throughout this period. In describing slavery as an institution, I intend to convey not just that as law and social custom it played a central role in slave states (leading some to call them "slave

[11] Several different terms are used during this period to denote persons of African origin, including "blackamoore," "moor," "Moor," "Negro," "Aethiopian," "negroe," "negro," "African," and "black." Except in quotations or for clarity where discussing a source that uses one of the period references, I have used the modern term "black" to denote such persons.

societies"), but that its cohesion was such that its supporters consistently had the ability to call forth the unified political power of slave states in order to protect it from political challenge. The institution's power extended beyond the bounds of the slave states because it was successful in projecting itself onto the national stage as needed to protect the socioeconomic interests of those societies, including their desire to expand, and thus enabling them to weather all significant attacks prior to 1819. Slavery's centrality as a socioeconomic institution in the Southern slave states meant that it could command almost unquestioning political support from state and national politicians during every significant challenge in the period under study. Historians who have focused on the changes over time in public rhetoric on slavery at the national level have often glossed over the underlying political reality that slave state politicians voted together for policies to protect and expand the economies of the slave states, including slavery, and that they had little choice but to do so if they wished to remain in office. The debates of the Continental Congress as early as 1776 show that the political imperative to protect slavery even at the price of disunion during a time of war was present even then. As early as 1790, Virginia politicians seeking re-election to Congress were forced to defend even the smallest deviation from the wishes of Virginia slaveholders during Congressional action on slavery issues.

Outside the slave states, from the Revolution onward slavery became ever more marginal politically and in socioeconomic terms, and hence northern politicians often had the option of supporting slavery *outside* the North if they thought that doing so would advance some other significant political objective. Following Northern public opinion, Northern politicians often concluded that other political goals, especially sectional

economic development and territorial expansion, were more important than the containment or abolition of Southern slavery. Nor is there any significant indication that Northern politicians paid any political price for supporting slavery outside the North in return for obtaining other Northern political goals objectives prior to 1819. "The word of the slaveholders was law" in slave states, while Northern politicians could accommodate slavery in ways that served their constituents without facing any significant antislavery backlash.

In this climate of opinion, legal developments on slavery during this period often were guided by and intended to support the choices made by politicians. However, this dissertation does not attempt to provide a comprehensive picture of changes in the law of slavery during the period 1770-1821. Instead, it focuses on specific aspects of the law of slavery, particularly state laws on slavery, involuntary or "bound" servitude, abolition and manumission of slaves, and the Constitution's treatment of slavery. These topics comprise what might be described as the "public law" of slavery, in contrast to private law issues such as how slaves were treated under the law of marriage or inheritance. There are two broad emphases in the dissertation's analyses of the law of slavery.

First, it describes the broader social environment in which the law of slavery was embedded, and how lawmakers sought to allocate the costs of legal change on slavery where it altered that environment. This analysis provides a picture of the "character" of these laws that will permit readers to understand better the full range of social interests that were affected by legal changes. The second emphasis is on the realities of law enforcement rather than on the evolution of legal doctrine (i.e., a tracing and explanation

of the detailed changes in law over time). The dissertation seeks to understand the "law in action," not just the "law in books."

The reason for the study's emphasis on law enforcement is that (in a representative polity at least) the way in which laws are enforced is one of the best indirect means of gauging public opinion about the subject of the law being enforced. If a law is a "dead letter" on the books because the public is unwilling to see it enforced, this tells us something very important about the politics of the law's subject. A law that requires no enforcement because it is uniformly observed is one with very high public support. Most laws fall somewhere in between those two ends of the spectrum, and as a result they require workable enforcement mechanisms and adequate resources for their enforcement. An important conclusion of this study is that both state and federal antislavery laws were often poorly enforced.

A few closing words about this history's perspective are in order. Slavery is an irremediably evil form of human exploitation, but readers will not find here extended discussion of its manifold harms. The focus of this history is on understanding the path the United States traveled as it moved from accepting slavery as a social practice, to its Revolutionary condemnation, to making that system permanent until the Civil War unleashed the awful forces of war against it. Slavery is an essential part of the American past; and because it was a repressive, brutal and often corrupting institution, it is a part of our past that we have an obligation to understand. But comprehending it can also help us to appreciate better the nature of politics and society in the early American Republic. What the historian Bernard Bailyn said about the African slave trade—that it should be a

subject of both history and memory—is equally true of slavery.[12] In studying the history of slavery, it is important to keep alive the memory not only of the way in which slavery harmed countless slaves' lives but also of the profound ways in which it influenced American political institutions.

To properly understand the history of slavery's development, it is necessary to appreciate precisely the extent to which that history was contingent. Not all of the events considered here were inevitable, but certain political decisions about which America's founding generation did possess a range of choice had important consequences for slavery's future development. A good example is the decision to adopt the Three-Fifths Clause of the Constitution, which included slave wealth in allocating federal Congressional and Electoral College representation. This study argues that adoption of the Three-Fifths Clause as part of the Constitution was inevitable—but that it was inevitable because of the Convention's decision to adopt equal state voting in the Senate, about which there was a range of choice, not because it was inevitable that slave wealth would be protected no matter what national representation system was adopted. Protection of slave wealth was, in other words, a necessary consequence of the decision to give political protection through representation to states as entities in the Constitution without regard to their population or wealth. Slave representation was inseparably part of this aspect of federalism, and the Constitution's practically unalterable use of slave wealth representation in turn had necessary political consequences of its own as the

---

[12] Bernard Bailyn, "Considering the Slave Trade," *William & Mary Quarterly* 3d. Ser. 58, no. 1 (2001): 245-252.

nation grew. The question of contingency arises in connection with the broader issue of slavery's expansion as well.

Some recent historians view slavery's expansion in the Early Republic as a tragedy for which no one—or everyone—was to blame.[13] Although it is tempting to view slavery's expansion instead as a leadership failure, that view is anachronistic. This study concludes that by the late eighteenth century, there was little that could have been done to prevent slavery's expansion without profound compromises of other socioeconomic and political goals widely shared by Americans. If the necessary compromises had been made, they would in all probability either have prevented the formation of the Union or have led to its early dissolution.[14]

One of the most important compromises necessary to meet antislavery goals would have been the requirement that Americans agree to alter the fundamental nature of the Union's government itself. A majority of America's leaders and its people wanted to create a Union with a strong federal republican government that would be capable of creating an empire; but to preserve liberty, they also wanted the government to be based on federalism principles. This dissertation concludes that a government that met both of

---

[13] The historiography of slavery and abolition has thus followed the progression described by Bernard Bailyn in his classic work, *The Ordeal of Thomas Hutchinson*, in which he concluded (following Herbert Butterfield) that the writing of history about pivotal events like the Revolution moves from heroic, to whig, to tragic perspectives over time. Bernard Bailyn, *The Ordeal of Thomas Hutchinson* (Cambridge: Belknap Press of Harvard University Press, 1974), viii-x.

[14] Some significant considerations bearing on the difficulty of preventing slavery's expansion are well presented in Joseph Ellis, *Founding Brothers: The Revolutionary Generation* (New York: Alfred A. Knopf, 2000), Ch. 3. Ellis himself appears inclined to reach the conclusion that slavery's expansion was quite probably unstoppable, calling relocation "perilously close to insoluble" and compensation costs "prohibitively expensive" so that "any attempt to take decisive action against slavery in 1790, given all these considerations, confronted great, perhaps impossible, odds," with the result that even with "heroic leadership," success would have been uncertain. Ibid., 106-8.

those goals as contemporaries understood them could not have been formed and then have territorially expanded as it did without protection for slavery and its expansion.

It follows that where slavery is concerned, our focus should be on understanding the consequences of what America's leaders chose to do, as opposed to arguing about whether they failed by not taking a different path. The Founding generation's actions on that issue dramatically reshaped American politics for a century. The tragedy of the American Union's founding was that it sowed the seeds that grew into civil war despite the Founders' best efforts to invent a new system of politics that would avoid that outcome.

# I

# SLAVERY IN THE AMERICAN REVOLUTION

# 1

# FROM EMPIRE TO CONFEDERATION

During the years from 1770 to 1780, as British control over the American colonies declined and then collapsed, the wealthy and politically influential imperial institution of slavery became the subject of unprecedented disputes. This chapter considers those Revolutionary era contests. The decade's momentous disruptions had conflicting consequences for slavery as Americans chose to use their new political freedom on that issue in clashing ways.

A major challenge to imperial slavery arose from a successful court attack on its legality in England, the 1772 case of *Somerset v. Stewart*. The *Somerset* decision brought the morality of slavery and even its legality in the colonies under sharp attack, and strongly encouraged antislavery activists in England and America. In America, the decision contributed to public debate and legal and political assaults on slavery, and led to slave flight and even an attempted rebellion. It also raised politically divisive and economically damaging questions for slaveholders about whether slavery was a uniform imperial institution or a diverse colonial one.

The mounting political dangers encountered by mainland American slavery prior to Independence also included colonial struggles over limiting slave imports and liberalizing laws on slave manumission. In several cases, these efforts to curb slavery would have succeeded if the British government had not vetoed proposed legal changes.

American Independence brought further threats to slavery. After Independence, some states moved toward abolition, while the Revolutionary War sharply increased the number of fugitive slaves and the need to control slaves hampered American military efforts.[1]

Most historians agree that the Revolution was a turning point in slavery's history, but they have often differed sharply on what it meant for slavery's evolution.[2] At first view, antislavery forces appear to have gathered strength during the Revolutionary era. During the Revolutionary War alone, Vermont and Massachusetts banned slavery, Pennsylvania began abolition, Virginia liberalized its manumission laws, and Rhode

---

[1] In this work, the term "American Revolution" includes the Revolutionary War and its aftermath, the struggle over the structure and major policies of the new national and state governments that continued through about 1800. Chapters 3-5 also concern aspects of the Revolution's effects on slavery.

[2] The literature on the Revolution and slavery includes most prominently works by David Brion Davis, *The Problem of Slavery in the Age of Revolution 1770-1823* (Oxford: Oxford University Press, 1999 repr. 1975 ed.); David Brion Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (Oxford: Oxford University Press, 2006), 141-52; Ira Berlin, *Generations of Captivity* (Cambridge: Harvard University Press, 2003), 97-157; William W. Freehling, *The Reintegration of American History: Slavery and the Civil War* (Oxford: Oxford University Press, 1994), Ch. 2; William W. Freehling, *The Road to Disunion: Secessionists at Bay 1776-1854* (Oxford: Oxford University Press, 1990), 121-158; Ira Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America* (Cambridge, Mass.: Harvard University Press, 1998); Simon Schama, *Rough Crossings: Britain, the Slaves, and the American Revolution* (New York: Ecco, 2006); Matthew Mason, *Slavery and Politics in the Early Republic* (Chapel Hill: University of North Carolina Press, 2006); David C. Hendrickson, *Peace Pact: The Lost World of the American Founding* (Lawrence: University Press of Kansas, 2003); Cassandra Pybus, *Epic Journeys of Freedom: Runaway Slaves of the American Revolution and Their Global Quest for Liberty* (Boston: Beacon Press, 2006); Ira Berlin and Ronald Hoffman, eds., *Slavery and Freedom in the Age of the American Revolution* (Charlottesville: University of Virginia Press (for Capitol Historical Society), 1983); Sylvia R. Frey, *Water from the Rock* (Princeton: Princeton University Press, 1991); Gary B. Nash, *Race and Revolution* (Madison: Madison House, 1990); Duncan J. MacLeod, *Slavery, Race, and the American Revolution* (Cambridge: Cambridge University Press, 1974); Benjamin Quarles, *The Negro in the American Revolution* (New York: WW Norton & Company, 1973); Donald L. Robinson, *Slavery in the Structure of American Politics 1765-1820* (New York: Harcourt Brace Jovanovich Inc., 1971); Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (Chapel Hill: University of North Carolina Press, 1968). Don Fehrenbacher argued that slavery was no more than an "incidental" political problem during the years 1774-1787 with decisions on it driven by wartime necessities. Don E. Fehrenbacher, *The Slaveholding Republic*, ed. and completed by Ward M. McAfee (Oxford: Oxford University Press, 2001), 27-8. Throughout this work, I am much indebted to the contributions of Donald Robinson, Winthrop Jordan, David Brion Davis, William Wiecek, and Paul Finkelman for many perceptive insights into the history of slavery.

Island banned the out-of-state sale of its slaves. These and other significant movements toward abolition or reform of slavery in the aftermath of the War and through the 1780s led many contemporaries to think that progress toward abolition would continue across the United States, yet that did not happen.

One possible explanation for this turnabout is historian William Freehling's conclusion that many Founders believed that Revolution principles of freedom and equality necessarily entailed an end to slavery, but only on conditions such as mandatory colonization of freed blacks that made abolition very difficult or impossible. In his terminology, many Founders were "conditional terminators." He concludes that the result of this conditional approach was that the Founders nearly simultaneously took important steps toward abolition while also creating "bulwarks against antislavery."[3] Freehling's analysis of such conflicts suggests the need for further consideration of the power of slavery as an institution to resist legal and political change, which this chapter provides.

Still other historians argue that the events of the Revolution and its aftermath crystallized white racism, especially in the South, or caused or cemented racially exclusionary practices across the continent, and thus reinforced slavery.[4] Several recent historians have sought to understand abolition and its aftermath in the broader context of the era's race relations.[5]

---

[3] Freehling, *The Reintegration of American History,* 13.

[4] MacLeod, *Slavery, Race*; Robert Parkinson, "Enemies of the State: The Revolutionary War and Race in the New American Nation," (Ph.D. diss., Univ. of Virginia, 2005).

[5] Joanne Pope Melish, *Disowning Slavery: Gradual Emancipation and "Race" in New England, 1780-1860* (Ithaca: Cornell University Press, 1998); John Wood Sweet, *Bodies Politic: Negotiating Race in the American North, 1730-1830* (Baltimore: Johns Hopkins Press, 2003).

In another approach to the relation between the Revolution and slavery, David Brion Davis and others contend that the Revolution created a new intellectual climate regarding slavery, founded on a confluence of Enlightenment, religious and political thought.[6] They suggest that this new climate might have led to much wider abolition than actually occurred absent countervailing forces such as a desire to maintain economic class discipline or sectional interest. Finally, some historians view the disruptive events of the Revolution and black agency in those events as having transformed the basic conditions of social and economic life for both slaves and black freedmen in important ways that occurred outside the framework of conventional politics.[7]

These works provide very useful perspectives on slavery's evolution during the Revolution, but do not fully account for the political and legal changes during this decade that strengthened slavery. Where slavery was concerned, the Revolution was like the Roman god Janus, because it looked simultaneously forward to abolition and backward to the preservation of slavery. In the end, American slaveholders were able to stem the rising tide of antislavery sentiment and action. Slavery emerged from the Revolution stronger as a political institution than it had been within the British Empire just prior to the Revolution. But, contrary to the view of David Brion Davis and other leading scholars, this result was not paradoxical.[8] The Revolution shifted the political balance of

---

[6] See e.g., Davis, *Slavery in Revolution*, 82-3, 264, 303-5; Jordan, *White Over Black,* 310-11; and Davis essay in Thomas Bender, ed., *The Antislavery Debate: Capitalism and Abolitionism as a Problem in Historical Interpretation* (Berkeley: University of California Press, 1992). These arguments are discussed below.

[7] Berlin, *Generations*, 97-157; Joyce Chaplin, *An Anxious Pursuit: Agricultural Innovation & Modernity in the Lower south, 1730-1815* (Chapel Hill: University of North Carolina Press (for Institute of Early Amer. History and Culture), 1993); Schama, *Rough Crossings*.

[8] Davis, *Inhuman Bondage*, 145.

power in the continental government in a direction strongly favorable to slaveholders. Revolutionary natural rights and egalitarian ideology had limited power to undercut slavery in the face of its powerful influence and of countervailing principles of thought about morality, natural rights, and the nature and ends of government. The disruptive effects of slave flight and slavery's interference with American military operations during the Revolutionary War have been overstated.

In the crucible of the Revolution, slave state representatives obtained substantial protection for slavery from the new American government. The Articles of Confederation provided that the continental government would have no power to regulate or abolish slavery in the states. However, it would protect slaveowners against state interference with their control over the interstate movement of slaves, including slave imports and the recapture of fugitives. Slaves were also exempted from central government taxation and excluded from state military service quotas. The broad outlines of what William Wiecek referred to as the "federal consensus" on slavery were established by these and other political choices made during the Revolutionary War.[9] Imperial collapse and political realignment in a decentralized polity in the midst of war led Americans to take the first significant steps toward a slaveholders' Union that preserved and strengthened slavery.

---

[9] William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Ithaca: Cornell University Press, 1977), 16-17.

*American Slavery in the British Empire circa 1770*

The institution of slavery had a prominent place in the economic and political affairs of the British Empire and its mainland American colonies in the years just prior to the American Revolution. A major reason for American slavery's economic and political strength was its legacy of British imperial support. Slavery was given powerful protection by British and colonial law and policy, including the systematic control of fugitive slaves, and was directly linked to other important colonial social control institutions.

In 1770, the major slaveholding colonies of the British Empire, or "plantation America," accounted for 25 percent of the total private physical wealth of the Empire, even though they contained only about 12 percent of its total population.[10] One recent economic historian describes slavery as the "principal means of wealth creation in plantation America" on the eve of the Revolution.[11] Crown policy, particularly in the eighteenth century, was designed to maximize British investment in colonial slave plantation agriculture, which most contemporaries believed necessitated protection both for the slave trade and for slavery as well.

Britain had legalized and subsidized the slave trade beginning in the mid-seventeenth century. By 1770, Great Britain had firmly supported its imperial slave trade, which supplied its colonies and others with slaves, for more than one hundred years. Britain dominated the eighteenth century trans-Atlantic slave trade, and its traders

---

[10] T.G. Burnard, "'Prodigious Riches': The Wealth of Jamaica before the American Revolution," *Econ. Hist. Rev.* New Series, 54, no. 3 (2001): 506-524, 520 (Table 5); Jacob M. Price, "The Imperial Economy, 1770-1776," in *The Oxford History of the British Empire*, ed. P.J. Marshall (Oxford: Oxford University Press, 1998), 100 (Table 4.1)(population, interpolated).

[11] Burnard, "'Prodigious Riches,'" 521.

made thousands of voyages across the Atlantic in pursuit of that trade during the century. Britain's participation in the trade maintained a reliable supply of relatively inexpensive colonial forced labor while also significantly enhancing British naval power. Most British supporters of the slave trade agreed with Malachy Postlethwayt that the trade was an "inexhaustible Fund of Wealth and Naval Power to this Nation."[12] British support for the slave trade in turn led it to protect slavery, not just in the colonies but throughout its Empire.[13]

During the seventeenth and eighteenth centuries, these mutually reinforcing policy goals led the Crown to protect slavery by disallowing several American colonial efforts to limit slave imports; carefully regulating and controlling the classification of slaves as particular types of property in different colonies; protecting English plantation creditors' rights in slaves by overriding colonial law; and by approving brutal, repressive colonial slavery laws designed in large part to minimize the cost of slaveholding.[14] But Britain's intervention in the law and policy of slavery went beyond its direct intervention in colonial law and regulation of slave life and labor conditions.

---

[12] Quoted in David Brion Davis, *The Problem of Slavery in the Age of Revolution 1770-1823* (Oxford: Oxford University Press, 1999 repr. 1975 ed.), 61.

[13] For background, see Robin Blackburn, *The Making of New World Slavery* (London: Verso, 1997).

[14] For import restrictions, see Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (Chicago: The University of Chicago Press, 1967), 91; W.E. Burghardt Du Bois, *The Suppression of the African Slave Trade* (Baton Rouge: Louisiana State University Press, 1969 repub; orig. pub. 1896), 13-14 ; on slave property classification, see Thomas D. Morris, *Southern Slavery and the Law 1619-1860* (Chapel Hill: University of North Carolina Press, 1996), 61-71; on punishments, see Edmund S. Morgan, *American Slavery -- American Freedom* (New York: WW Norton; reprint, 1995 pbk. ed., 1975), 314; on creditors' rights, see *An Act for the more easy Recovery of Debts in His Majesty's Plantations and Colonies in America*, ((1731/2) 5 Geo. II c. 7)(discussed below). These British efforts to regulate slavery and impose consistency and uniformity on it do not, of course, alter the conclusion that the Empire had a generally pluralistic legal character.

In the eighteenth century, the Crown also sought to have English law treat slaves as uniform "imperial" property, since British investors and creditors thought that they needed predictable legal rules to support what they perceived as risky investments in the slave trade and colonial plantations. The Crown's two chief Law Officers issued an Opinion in 1729 that treated colonial slaves as property even when they were brought to England. This effectively meant that slaves were "imperial" property, not just property under the law of a colony. This Opinion, requested by slaveowner representatives, was widely published in the colonies.[15] This same goal of uniformity also led to Parliament's only substantive intervention in the law of slavery in a period of 250 years, a remarkable 1732 statute that specifically deemed all slaves in the colonies a protected form of property with uniform features throughout the Empire to protect British colonial investors against differing and potentially conflicting colonial laws on slavery.[16]

The British Empire's eighteenth century approach to one central aspect of the "extended polity" problem posed by slavery—the question whether "imperial" law or the law of individual colonies should apply to slavery—was thus to protect and encourage slavery by imposing at least the degree of imperial uniformity needed to support a smoothly functioning slave property system throughout the Empire. British imperial

---

[15] Marcus W. Jernegan, "Slavery and Conversion in the Colonies," *The American Historical Review* 21 (1916): 504-527. The text of the Opinion—often called the Yorke-Talbot opinion, after its authors, is found in *Knight v. Wedderburn*, 8 Fac. Dec. 5, Mor. 14545 (Scot. Ct. Sess.) (1778).

[16] *Act for more easy Recovery of Debts*. This statute classified "Negroes" (slaves) in the colonies as property for purposes of debtor-creditor relations. The statute mandated uniform rules applicable to slave property throughout all British colonies. It provided that a broad range of remedies would be available to creditors, notwithstanding colonial laws to the contrary, providing special evidence rules and that creditors for such property could take advantage of remedies available for recovery of either real or personal property. It thus created a hybrid form of property valid throughout the Empire. The statute was the legislative analogue of the 1729 Yorke-Talbot opinion's conclusion that slave property had a uniform "imperial" status throughout the Empire.

policy prohibited American colonies from disobeying key English legal principles that protected slave property and from abolishing slavery. As a result, by 1770, most informed British citizens thought that slavery was legal not just in particular colonies but throughout the Empire. This meant, among other things, that slaves in one part of the Empire were uniformly deemed property anywhere within it, or even when fugitives outside it—and this included England itself.

Throughout the first two-thirds of the eighteenth century, the institution of slavery had the unquestioning support of most members of the British and colonial political, legal, religious, and social elites. Their adherence meant that during that part of the eighteenth century there were only minor changes to colonial slavery as a legal and social system while the American mainland slave population grew significantly and slavery's imperial economic and political influence grew with it. Prior to 1770, no British or colonial court had questioned the fundamental legality of either slavery or of the slave trade. Political interventions before then by Parliament and the Privy Council regarding slavery and the slave trade virtually always favored slavery's expansion, often, ironically, by protecting or increasing competition in the slave trade and widening markets for slaves.

Due in part to its strong imperial support, slavery had become a central economic institution in the American mainland colonies by 1770. Slaves had become a major economic asset, with a collective market value of about $2.4 billion.[17] Slave prices in the

[17] In today's dollars, using 1775 male slave prices derived from David Eltis and David Richardson, "Prices of African Slaves Newly Arrived in the Americas, 1673-1865: New Evidence on Long-Run Trends and Regional Differentials," in *Slavery in the Development of the Americas*, ed. David Eltis, Frank D. Lewis, and Kenneth L. Sokoloff (Cambridge: Cambridge University Press, 2004), 181-218 (Figure 2(a)). For consistent prices, see Peter C. Mancall, Joshua L. Rosenbloom, and Thomas Weiss, "Slave Prices and the

Americas (including the mainland American colonies) had steadily increased throughout the eighteenth century, with exceptions caused primarily by war, one important indication of the economic dynamism of slavery.[18] The mainland American slave population nearly doubled between 1750 and 1770, another striking indication of that dynamism.[19] But despite slavery's large scale and dynamism, from a political perspective it was equally important that slaves were not evenly distributed throughout the American colonies.

By 1770, the overwhelming majority of mainland American slaves were concentrated in five colonies: Virginia, North and South Carolina, Georgia, and Maryland.[20] Slaves were an average of 41 percent of their total populations. The slaves held in these Southern colonies represented a major part of their total wealth, even without including the positive effect slavery had on regional land prices.

The major slave colony economies were built in significant part around the use of slave labor, principally in agriculture, and often in crops that were particularly labor-intensive and intended for export. Largely as a result of slave agriculture, exports from the South in 1770 were roughly 50 percent higher in value than exports from the New England and the mid-Atlantic colonies combined, although the populations of the two

---

South Carolina Economy, 1722-1809," *The Journal of Economic History* 61, no. 3 (2001): 616-639. Conversions were made using calculators available through http://eh.net/hmit/.

[18] Eltis et al., *Slavery in the Americas*, 191-2.

[19] Mainland slave population was about four hundred seventy thousand in 1770. Population data here and in subsequent paragraphs are taken (or derived) from Table I in Ira Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America* (Cambridge, Mass.: Harvard University Press, 1998), unless otherwise stated.

[20] These colonies had 87 percent of total mainland slave population. Id.

areas were equal.[21] According to the economic historian Gavin Wright, "at the time of the Revolution, total and per capita wealth levels of the slave colonies were far greater than those of their protofree [i.e., Northern] counterparts."[22]

In striking contrast, in the eight Northern colonies at the time of the Declaration of Independence, slaves constituted only about 4 percent of the population. In New Hampshire and Vermont combined in 1770, there were about seven hundred slaves, while in Massachusetts slave population was less than 2 percent of total population. Certain Northern states, particularly Connecticut and Rhode Island, had comparatively more slaves, but even there, between 3 and 6 percent of the population was enslaved.[23] In the mid-Atlantic states, slavery was more prevalent than in New England. But for purposes of political understanding, it is important to appreciate that slaveownership was not distributed equally geographically or in terms of economic function within the mid-Atlantic states.[24] For example, slaveholding was roughly three times as high in percentage terms in East Jersey as it was in West Jersey. Certain counties in New York

---

[21] Table 2 in Eltis et al., *Slavery in the Americas*. Some estimates of the disparity between exports by slave colonies those by northern colonies that would ultimately abolish slavery are far higher—between 5 and 8 times during the period 1755-1775. Gavin Wright, *Slavery and American Economic Development* (Baton Rouge: Louisiana State University Press, 2006), 16.

[22] Wright, *Slavery and Development*, 17 (footnote omitted). The term "northern" rather than Wright's term "protofree" is used here; except where indicated, it refers to those jurisdictions that would begin abolition of slavery by 1804.

[23] Berlin, *Many Thousands Gone*, Table I.

[24] See Christopher Hanes, "Turnover Cost and the Distribution of Slave Labor in Anglo-America," *Journal of Economic History* 56, no. 2 (1996): 307-329, and Berlin, *Many Thousands Gone*, Chs 7, 9-10.

had populations that were more than 20 percent slave, nearly double the statewide average.[25]

Some historians argue that despite the limited slave populations of the Northern colonies, slavery was nevertheless central to their economies because they depended heavily on sales to markets that existed largely by virtue of slave-based production. As late as 1770, the British West Indies accounted for more than half of Northern colony commodity exports. This trade had "immense" implications for Northern colony economic development in areas such as ports and shipbuilding.[26]

This brief sketch of the economic position and geographic distribution of American slavery might suggest that although slavery's influence was pervasive, it was more deeply embedded in the Southern slave colonies than in the Northern and mid-Atlantic colonies just before the Revolution. But British policies supporting and protecting colonial slavery to some extent masked these potentially important regional differences. Two important aspects of British policy were the relative uniformity and broad social reach of the law of slavery.

In 1770, while there were various differences in colonial slavery laws, under British policy slavery in most colonies was "classical" chattel slavery.[27] Slaves were

---

[25] Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (Chicago: The University of Chicago Press, 1967), 4-5. Throughout Chapters 1 and 2, I have relied significantly on Arthur Zilversmit's excellent research and careful appraisals of the early history of abolition.

[26] Wright, *Slavery and Development*, 30 (quoting John J. McCusker and Russell R. Menard, *The Economy of British North America, 1607-1689* [Chapel Hill: University of North Carolina Press (for Inst. Early Amer. Hist. and Culture), 1985] ).

[27] For the legal foundations of American slavery see William M. Wiecek, "The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America," *The William and Mary Quarterly* 3d Ser. Vol. 34 no. 2 (1977): 258-280, 260, 261-2. "Classical" chattel slavery is an "ideal type" of legal regime where a slave was deemed property that could be sold, bequeathed, and physically injured or destroyed with nearly complete impunity by an owner. Slavery in Virginia during 1660-1770 approached this ideal

deemed property, and normally lacked civil rights of any kind. (See appendix A). The widespread adoption in British law of property law principles as a basis for slavery meant that slaveowners would have the widest possible markets for slave property, together with the strongest possible legal protection for their property and the fewest legal impediments to its use. British legal policy was thus designed to maximize the value of slave property and to protect those who invested in it nearly as fully, if not as fully, as British law protected any cognizable form of legal interest. But slavery's influence on colonial society was considerably broader than even its powerful imperial support, economic prominence, or legitimization through the law of slavery would suggest.

American slavery was not just a brutal, oppressive labor system. It was a multi-dimensional institution of social control. In the mainland colonies, it served as a means of enforcing racial separation and subordination, of limiting the cost of poor relief for the unemployed and disabled, and of controlling crime.[28] These social control functions of slavery embedded it deeply in American culture during the eighteenth century. But the reasons for colonial elite support of slavery went well beyond its profitability and social control functions. As Edmund S. Morgan famously showed for seventeenth century Virginia, in an analysis that has considerably broader implications, slavery had important

---

type, see Aloysius Leon Higginbotham, *In the Matter of Color: Race and the American Legal Process: The Colonial Period* (New York: Oxford University Press, 1978), 53-8. The extent to which each colony's slavery regime incorporated "classical" chattel slavery is uncertain. See appendix A.

[28] Works that explore slavery's social control functions include Joanne Pope Melish, *Disowning Slavery: Gradual Emancipation and "Race" in New England, 1780-1860* (Ithaca: Cornell University Press, 1998); John Wood Sweet, *Bodies Politic: Negotiating Race in the American North, 1730-1830* (Baltimore: Johns Hopkins Press, 2003); Berlin, *Many Thousands Gone*; Jordan, *White Over Black;* Zilversmit, *First Emancipation.*

social class and racial implications that had the potential to influence the basic structure of politics.[29]

Colonial law supported and strongly reinforced slavery's social and political control functions. Slavery was deeply interwoven with the poor law system, virtually the only form of social welfare that existed in the eighteenth century. Slaveowners' ability to manumit slaves was often significantly restricted by poor law requirements, and slaveowners were required to support aged or infirm slaves to avoid poor relief costs for other taxpayers.[30] In addition, because colonial poor relief laws typically made assistance for indigent residents a local responsibility, jurisdictions eager to avoid this significant taxation burden responded with stringent rules denying residence rights to strangers such as runaway servants and slaves.[31] Slaveowners often had a legal duty to prevent crimes by their slaves and could be fined for failure to prevent them. Slaveowners were compensated for a slave's market value if the slave was convicted of certain serious crimes, in order to prevent slaveowners' perjury to protect their investments.[32]

---

[29] Morgan, *American Slavery—American Freedom*, passim.

[30] See Zilversmit, *First Emancipation*, 16-18, for manumission's dependence on poor law requirements. The duty to support slaves protected society from poor relief costs, which were a significant component of colonial taxation. For background on colonial manumission practices, particularly in Rhode Island, see Sweet, *Bodies Politic*, 232.

[31] William P. Quigley, "Reluctant Charity: Poor Laws in the Original Thirteen States," *U. Rich. L. Rev.* 31 (1997): 111-178, 116, 122; William P. Quigley, "Work or Starve: Regulation of the Poor in Colonial America," *U.S.F.L. Rev.* 31 (Fall, 1996): 35-83.

[32] In Virginia, slaveowners could be fined if their slaves were convicted of certain criminal offenses. Richard Starke, *The Office and Authority of a Justice of Peace Explained and Digested, Under Proper Titles. To Which Are Added, Full and Correct Precedents of all Kinds of Process Necessary to be used by Magistrates, in which also the Duty of Sheriffs, and other publick Officers, is properly discussed.* (Willamsburg: Purdie and Dixon, 1774), Tit. Slaves. Slaveowners were compensated for the value of a slave if the slave was found guilty of certain offenses. Id.

Colonies generally granted slaveowners the rights over slaves usually accorded to owners of chattel property under English common law.[33] In 1770, colonial slaveowner rights included the right to recapture forcibly a fugitive slave wherever the slave was found. This right existed to deter slave flight without increasing taxpayer costs.[34] Blackstone described this right's contours in English common law, terming it a right of "recaption."[35] An owner could recapture a fugitive slave in another jurisdiction either by self-help or by seeking official assistance and making a claim for the slave. English court decisions confirmed the existence of the right of recaption for slaves throughout the American mainland colonies.[36]

Various colonial statutes also protected slaveowner property rights in fugitive slaves. To protect slaveowners, the laws of several colonies made it unlawful to harbor fugitive slaves, and statutory rewards were given for their return. New Jersey adopted

---

[33] This is not an assertion that American slavery had its "source" in English common law. However, in cases involving slaves *qua* property, eighteenth century American courts typically followed English common law property rules, though slaveowner rights might have been modified in ways not material here (e.g., slaves' classification as real or personal property).

[34] At common law, an owner had a right to seize chattel property extrajudicially without recourse to any action. John H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths, 2002), 379. In some colonies only necessary force could be used. *Branch v. Bradley*, 2 Hayw. 53 (NC 1798).

[35] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765, pbk facsim. ed. U. Chi. Press 1979), 3: 4-5.

[36] Under a 1749 decision by Lord Hardwicke, Lord Chancellor of England, a colonial slaveowner had the common law right to seek damages from anyone in any colony who unlawfully withheld a slave from him, in an action of trover. *Pearne v. Lisle*, (1749) Amb. 75, 27 E.R. 47 (1749). Slaveowners also had a right (in an action of replevin) to compel the return of a specific slave. It is likely that this replevin right would also have existed under the laws of all colonies by virtue of British policy, though evidence is limited. See, as examples, *Abbot v. Abbot*, 1 Va. Col. Dec. R21 (Va. Gen. Ct. 1729) (trover action for "negroes" permitted); *Bates v. Gordon*, 3 Call 555 (Va. 1790) (approving judgment for slaves); *Margaret v. Muzzy*, (Middlesex Inf. Ct., Cambridge, Mass.) (1768) (freedom of slave tried in replevin action), in L. Kinvin Wroth and Hiller B. Zobel, eds., *The Legal Papers of John Adams*, 3 vols., vol. 2 (Cambridge: Harvard University Press, 1965), 58-9, cited in Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780-1861* (Baltimore: Johns Hopkins University Press, 1974), 12 (gives case date as 1763). For a comparison of slaveowner rights with masters' rights regarding indentured servants, see Robert J. Steinfeld, *The Invention of Free Labor* (Chapel Hill: Univ. of North Carolina Press, 1991), 32.

such legislation as early as 1694.[37] Some of the harshest criminal punishments on the books were designed to prevent slaves from becoming fugitives.

At least one colony permitted fugitive slaves to be proclaimed outlaws and as such to be killed with impunity, and also provided for harsh punishments in cases of flight, including bodily dismemberment, in order to "terrify" slaves.[38] Slave conspiracies and rebellions, which inevitably involved flight, were deemed felonies, punishable by harsh penalties, including death in Virginia and North Carolina.[39] These draconian laws sought to hold down the cost of slavery by avoiding significant costs to slaveowners. The profitability of slavery depended in significant part on preventing large numbers of slaves from becoming fugitives.

Before the Revolution, no American colony provided any substantial legal protection to fugitive slaves against efforts to recapture them.[40] Moreover, in some colonies officials were required by law to assist slaveowners from other colonies, as well as those in their own, in recapturing their slaves.[41] Colonial newspaper advertisements

---

[37] *The grants, concessions, and original constitutions of the province of New-Jersey*, (London: 1758; reprint, Evans 1st ser. no. 8205 ), 340-2.

[38] Acts of Virginia, 4 Anne (1705), Chapter XLIX, Section XXXVIII, *Virginia Colonial Session Laws*, (Buffalo, N.Y.: Hein ), 227.

[39] Laws of North Carolina 1774, Ch. XXIV, Sec. XLVII (originally enacted 1741), *North Carolina Colonial Session Laws*, (Buffalo: Hein 1987), 75, 85.

[40] The standard treatment of the law of fugitive slavery is Paul Finkelman, *An Imperfect Union: Slavery, Federalism and Comity* (Chapel Hill: UNC Press, 1981).

[41] The North Carolina slave code provided that colony officials who captured runaway slaves were required to advertise them in major newspapers in other "Provinces" so they could be recovered by their owners. Laws of North Carolina 1774, Ch. XXIV, Section XXXIX (originally enacted 1741). *North Carolina Colonial Session Laws* (Buffalo: Hein, 1987), 75, 84. Similar laws applied to runaway servants in some colonies. Abbot Emerson Smith, *Colonists in Bondage: White Servitude and Convict Labor in America, 1607-1776* (New York: W.W. Norton & Co. Inc., 1971), 266; Richard B. Morris, *Government and Labor in Early America* (New York: Columbia University Press, 1946), 436-7.

amply demonstrate that slaveowners expected that citizens in their own colony and in others would assist in recapturing their fugitive slaves for a suitable reward.[42]

Fugitive slaves were thus subject to powerful social and legal control throughout the colonies prior to 1770. As of that date, there was no legal doctrine within English or colonial law that would have emancipated fugitive slaves fleeing from one colony to another. Nevertheless, there were well-known circumstances in which a fugitive slave could become free. Since the end of the seventeenth century, Spanish Florida had emancipated fugitive slaves from the English colonies. As a result, Spanish Florida had become notorious as a "magnet" for fugitives.[43]

Despite slavery's clear economic and political importance to the British Empire, by the mid-1760s, legal and political challenges to it were beginning in various parts of the Empire.[44] By then, British law had developed to the point where in some circumstances slaves were able to seek their freedom through court actions, rather than by risking death through flight. And American colonies were increasingly seeking to curb slave imports in the decades before the Revolution.

---

[42] George Washington advertised in 1761 in a Maryland newspaper for four slaves who had escaped from Mount Vernon. *Papers of George Washington*, ed. W.W. Abbot (Charlottesville: University Press of Virginia, 1990), Col. Series Vol. 7, August 11, 1761, cited in Henry Wiencek, *An Imperfect God: George Washington, His Slaves, and the Creation of America* (New York: Farrar, Strauss & Giroux, 2003), 99 n. 30.

[43] Ira Berlin, *Generations of Captivity* (Cambridge: Harvard University Press, 2003), 44.

[44] For classic descriptions of the rise in European and British antislavery sentiment, see the works of David Brion Davis, David Brion Davis, *The Problem of Slavery in the Age of Revolution 1770-1823* (Oxford: Oxford University Press, 1999 repr. 1975 ed.) and David Brion Davis, *The Problem of Slavery in Western Culture*, 1966; pbk ed. (Oxford: Oxford University Press, 1988). For a recent account of the evolution of British abolitionism, see Christopher Leslie Brown, *Moral Capital: Foundations of British Abolitionism* (Chapel Hill: University of North Carolina Press [for Omohundro Inst. Early Amer. Cult.], 2006).

*Colonial Legal and Political Challenges to Slavery Before Independence*

By the mid-eighteenth century if not earlier, throughout the Empire the law recognized an exception to the general rule that slaves were "rightless" persons. Slaves could challenge the legal basis of their captivity, though only on limited grounds. There were numerous legal actions seeking freedom for individual slaves in the decades just before the Revolution, both in England and in the United States. As historian John Wood Sweet concludes, the changing character of these challenges over time provides evidence of increasing political strains on the institution of slavery. By the 1770s, some of these cases involved lengthy legal battles that embroiled all of the major political institutions of an entire colony, while others involved challenges to the scope of slavery in an entire jurisdiction.

By 1770, for example, Henry Marchant, a prominent Rhode Island attorney, had spent a year trying to obtain authority for his client John Randall, a Connecticut man, to purchase several Rhode Island slaves from the estate of Susannah Hazard. Hazard's clear intent had been that her slaves, an African American woman named Esther and her children, would be freed when she died. The slaves' interests were represented without charge by a prominent abolitionist attorney, Matthew Robinson.[45]

After Hazard died and the slaves were sold by the executors instead, in late 1768 Robinson personally provided a statutorily required manumission bond (which Hazard's will had not explicitly provided for) to protect the slaves and block their sale to Randall. In 1769 Marchant therefore sued Robinson personally, bringing an action of trover and

[45] *John Randall v. Matthew Robinson*, (R.I. Sup. Ct. 1769-74) (King's County), Oct. 1769, B: 217; Oct. 1772, B: 352-53; Oct. 1773, B:383; Oct. 1774, B:414-15 and files (RIJRC); Rhode Island General Assembly Petition files (Vols. 14,15, 15-2, March, 1770; August, 1773; August, 1774) (Providence: RI State Archives). Sweet, *Bodies Politic,* 239 discusses this case.

for large damages, as a means of trying title to the slaves. Before the case was resolved in 1774, Marchant had made three successful appeals to the Rhode Island legislature to protect favorable jury verdicts and overturn court rulings against his client that would have freed the slaves or granted them new trials. On Marchant's last appeal, in 1774 the legislature effectively ordered the court to enter judgement for the slaveowner, which the court then did. The case's tortuous course makes clear the wide gulf between popular opinion and elite judicial opinion in Rhode Island regarding slavery at the time. The popular jury was a cherished institution in colonial Rhode Island; at the time, it was also an institution likely to protect slaveowner property.[46]

There was a considerable amount of such colonial slave freedom litigation in the 1760s and 1770s. Historian Robert Cover considers such freedom suits in Massachusetts, where he found that juries were "somewhat notorious" by 1765 for favoring slave freedom, and in Virginia.[47] Sweet reports that historians have also found freedom lawsuits in New England, New Jersey, and Pennsylvania, and he analyzes several freedom cases in Rhode Island.[48] Another freedom suit involving a fugitive slave from Massachusetts was heard in 1764 in New Castle County, Delaware.[49] In most of these

---

[46] The court rulings Marchant attacked required the case to be resolved on the basis of a jury special verdict (one limited to finding only the facts of the case), taking the case's dispositive legal issues away from the jury.

[47] Robert M. Cover, *Justice Accused: Antislavery and the Judicial process* (New Haven: Yale University Press, 1975), 46. Cover's conclusion is supported by Emily Blanck, "Revolutionizing Slavery: The Legal Culture of Slavery in Revolutionary Massachusetts and South Carolina," Ph.D. diss., Emory, 2003, Ch. 4. Virginia cases: *Robin v. Hardaway*, 1772 Va. Lexis 1, Jeff. 109 (1772); *Howell v. Netherland*, 1770 Va. Lexis 1, Jeff. 90 (Va. S. Ct. 1770).

[48] Sweet, *Bodies Politic*, 235-9.

[49] In this case, a black man contended that he had been a free man in Massachusetts, but had been enticed to Delaware and then sold into slavery. The court entertained his claim. Papers of James Wilson (Philadelphia: HSP).

freedom cases, court challengers accepted the legitimacy of slavery as an institution, but argued that a particular slave or slaves had been freed as permitted by law (e.g., manumission), or had been illegally enslaved.

However, some slave freedom cases in the 1770s also posed novel challenges to the scope or regulation of slavery within an entire jurisdiction, and in those cases some courts demonstrated an increased willingness to place restraints on slavery. In 1770, the Virginia Supreme Court summarily rejected a fundamental attack on the legality of slavery by Thomas Jefferson, an attack which Jefferson had made the basis of his effort to free a slave.[50] In 1772, however, the same Court in *Robin v. Hardaway* rejected the argument that Native Americans were slaves in Virginia. The Court based its decision on its reading of the history of Virginia's slavery laws, in the face of an allegedly longstanding custom that Native Americans could be held as slaves there.[51]

Similarly, in the Rhode Island case of *Randall v. Robinson* discussed above, the Court was apparently strongly inclined to "interpret"—that is, effectively to alter—Rhode Island law to give effect to the testator's intent to free her slaves despite the fact that the contested will's manumission directions did not technically comply with existing Rhode Island law (noncompliance meant that the slaves would not have been freed). The Court's position showed a newfound willingness to favor freedom for slaves over the normally sacrosanct financial interests of white heirs, and its tenaciousness in persisting

---

[50] Jefferson's attack was a dramatic but rare exception to the usual basis for such challenges. The Court rejected Jefferson's challenge without listening to argument from his opposing counsel, who was the abolitionist George Wythe, Jefferson's law teacher. *Howell v. Netherland.*

[51] *Hardaway* held that because Native Americans had not been explicitly included in the 1705 slave code, they were not slaves in Virginia. Natural law principles were employed in argument by both counsel. Cover, *Justice Accused*, 19, 21-2.

in its position in the face of legislative reversals was quite striking. In an equally remarkable 1773 unreported case, the Rhode Island Supreme Judicial Court on its own initiative ordered an investigation into the circumstances of the original capture in Africa of several slaves brought to Rhode Island, and then declared them free and ordered their return to Africa after concluding that they had been kidnapped by Rhode Island slave traders.[52]

In the end, though, many of the slave freedom cases of the 1760s and 1770s nevertheless amounted to little more than judicial "policing" of the existing system of slavery. Policing refers to a situation in which a court insists that participants in a particular social or legal relationship "play by the rules," but rejects challenges to the legitimacy of the underlying relationship. So, for example, outright kidnapping was not a legal means of obtaining slaves under English law. English and colonial courts therefore often protected slaves who could prove that they had been kidnapped, as in the Delaware and Rhode Island cases described above. Ironically, such "policing" and the willingness of courts to impose boundaries on slavery, such as requiring legislative authority for its extension to politically disfavored groups such as Native Americans, helped to legitimate slavery because it meant that domestic slavery, though enormously brutal, did not appear to most contemporaries to function in an entirely arbitrary or lawless manner. While colonial courts were placing some boundaries on slavery in the years before the Revolution, colonies were also increasingly seeking to limit slave imports. Those import

---

[52] On writ of habeas corpus apparently issued on its own motion, the Court determined that the Africans had been illegally taken "contrary to law and right." *Order on Habeas Corpus*, unpub. (RI State Jud. Archives) (R.I. Sup. Ct. Sep. 1773 Newport, p. 79).

limitation efforts illustrated the political complexity of antislavery opinion, and were often ultimately frustrated by British policy.

Just before the Revolution, Americans increasingly regarded the African slave trade as an unmitigated evil both for Africans and Americans. Slavery, however, divided Americans, with some believing it was also irredeemably evil, while many others—in many parts of the country, clearly a substantial majority—believed that Christians could hold slaves if they treated them in an acceptable manner.[53] Many people refused to equate the African slave trade and American slavery despite strenuous efforts by antislavery activists to equate them based on their reliance on violence and the idea that slave buyers were buying stolen property. As historian David Brion Davis concludes, "in contrast to England, American political history showed that opposition to the slave trade could be combined with a defense of domestic slavery."[54] Historian Eva Sheppard Wolf's recent study of Virginia slavery and abolition during the Early Republic confirms Davis's view, concluding that "willingness to end the foreign importation of slaves should not be confused with a willingness to end slavery or slave trading...."[55]

There were both cultural and legal bases for the distinction drawn by many Americans between the slave trade and slavery. By the late eighteenth century, a growing proportion of all slaves were "creoles" who had been born in the American colonies, and many slave purchasers did not ever buy slaves directly from African or

---

[53] By the mid-1770s, however, the Society of Friends condemned the slave trade and slavery equally. For the gradual evolution of Friends' antislavery thought, see Jean R. Soderlund, *Quakers and Slavery: A Divided Spirit* (Princeton: Princeton University Press, 1985). For other Americans' attitudes, see ibid., 4.

[54] Davis, *Slavery in Revolution*, 312.

[55] Eva Sheppard Wolf, *Race and Liberty in the New Nation* (Baton Rouge: Louisiana State University Press, 2006), 21-8, quote at 28.

West Indian traders. As "Impartial" wrote to the *New Jersey Gazette* during an extended debate over abolition in New Jersey in 1780-81, there was no requirement to inquire about such domestic slave purchases and no "sin" or "guilt" in them.[56] Others thought that there could be no wrong in purchasing slaves, even if they had originally been stolen or kidnapped, since purchasing stolen goods was permitted by longstanding English and colonial laws and customs that protected an innocent subsequent purchaser. As a defender of slavery who styled himself "A Lover of True Justice" during that debate asked: "but suppose some to be stolen, is he who purchases under the sanction of the laws of his country answerable for that?"[57]

Many Americans also saw an important distinction between the slave trade and slavery on property rights grounds. It was generally thought that Americans enjoyed "vested rights" in property that had been lawfully acquired, and that such vested rights deserved government protection.[58] Most Americans accepted slaveowner contentions that their property rights in existing slaves were no different than other vested property rights. An important reason for their acceptance was that slaveowners forcefully pointed out that an equitable challenge to the vesting of slave property rights based on a supposed link between slaveowners' titles to slaves and their source in the slave trade was a "slippery slope" that could quickly become a broad attack on all American land titles. They argued

---

[56] "Impartial", *New Jersey Gazette*, January 10, 1781.

[57] "A Lover of True Justice", *New Jersey Gazette*, February 14, 1781.

[58] A "vested right" was a property right that had become sufficiently established in the eyes of the law so that if it could legitimately be taken away at all by government, it could be taken only in return for fair compensation.

that the way in which colonists' lands had been acquired from Native Americans would often equally open those land titles to a very similar equitable title challenge.[59]

In part because many Americans saw significant political and legal distinctions between the slave trade and slavery, slave import bans were virtually the only laws limiting slavery enacted prior to the Revolution. Such bans in both Northern and slave states frequently were supported by coalitions whose membership extended beyond abolition advocates. Prominent members of those coalitions often had policy motives other than opposition to slavery for supporting slave import limits, as the following examples from Pennsylvania, New York, and Virginia illustrate.

In 1761, Pennsylvania imposed a restrictive £10 duty on the importation of slaves (today, this would be somewhere in the range of $1,250 per slave, or perhaps 20-25 percent of the slave's market value). The duty was justified in part by the argument that preventing slave imports would protect white laborers who could provide military service, while slaves could not do so. The duty was imposed over the opposition of Philadelphia merchants who argued that slaves were needed to meet labor demand.[60] Because the 1761 duty amount was a significant fraction of total slave prices, it is likely that the purpose of that duty was not to produce revenue, but was instead to curtail demand for slave imports. In 1773, when Pennsylvania increased its duty to £20, a clearly prohibitive level, the increase was disallowed by the British Lords of Trade.[61]

---

[59] "A Lover of True Justice", *New Jersey Gazette*, February 14, 1781. The writer argued that the same defective title problem that antislavery forces claimed existed for slaves also existed for titles to New Jersey farms that had been taken from Native Americans. Pursuing the implications of their logic, he asked whether the farms "must all be ceded to them again with proper allowance for their use?"

[60] Zilversmit, *First Emancipation*, 48.

[61] Ibid., 91.

New York chose to base its more relaxed eighteenth century slave import duty laws on a discriminatory rate schedule designed to prevent the importation of slaves who were deemed socially undesirable. These were slaves from the West Indies and other colonies that New Yorkers believed should be discouraged from supplying "the Refuse of their *Negroes*." As historian Arthur Zilversmit describes the reasoning behind New York's approach:

> The West Indian planters, the New Yorkers bitterly observed, sent them slaves who would have been executed for their crimes 'had not the Avarice of their Owners, saved them from the publick justice by an early Transportation into these Parts, where they not often fail of repeating their Crimes.'[62]

Later changes in New York opinion on imports illustrate the distinction between opposing slave imports and opposing slavery. A 1773 essay strongly favoring a tighter New York ban on slave imports distinguished the undesirable abolition of slavery from a desirable ban on imports. It said that "enemies to slavery" understood that immediate emancipation would be "impracticable, as it affects property too much," but also believed that "it would be actually detrimental both to society in general, and to the persons thus made free in particular." The writer explained that emancipation would harm society because it would drive up poor relief costs, a fact that he claimed past experience confirmed. [63] Opponents of the slave trade and slave imports in other colonies also often had reasons for opposing it that had little to do with opposition to slavery.

Virginia's pre-Revolutionary efforts to limit slave imports were based, historian Duncan MacLeod concludes, on opposition that "came initially" from "large slaveholders

---

[62] Ibid., 49.

[63] Eleutheros, *The New York Journal*, February 18, 1773, 861.

of the Eastern Seaboard" who hoped to obtain "thereby a monopoly position in the supply of slaves with consequent high prices."[64] MacLeod's conclusion is strongly supported by the history of leading Virginia slaveholder and politician Richard Henry Lee's effort to tax slave imports to Virginia. During the Seven Years' War, Lee proposed a 10 percent import duty on African slaves imported into Virginia in order to raise revenue. According to Lee's biographer,

> New gentry men and small planters...denounced the plan because it would force them to pay higher prices for their slaves to large planters who already had a surplus slave population....Opponents...criticized Lee by suggesting that his motivation was to increase his own fortune by selling his slaves without having to worry about competition from slave traders....The governor [Fauquier] summarized the dispute in the House of Burgesses as a 'contest' between 'the old settlers who have bred great quantities of slaves and who would make a monopoly of them by a duty which they hoped would amount to a prohibition' [and others].

The proposed duty failed to pass the House.[65]

In her thoughtful recent study of Virginia abolition, Wolf concludes that "at least from the 1760s Virginia leaders tried to curtail the slave trade in order to strengthen their economy."[66] In 1772, in justification of its desire to impose a prohibitive duty, the Virginia House of Burgesses wrote to King George III of Great Britain that the slave trade "greatly retards the settlement of the colonies with more useful inhabitants...."[67] There is no reason to think that Virginia's 1772 duty proposal had markedly different

---

[64] Duncan J. MacLeod, *Slavery, Race, and the American Revolution* (Cambridge: Cambridge University Press, 1974), 31.

[65] J. Kent McGaughy, *Richard Henry Lee of Virginia: Portrait of an American Revolutionary* (Lanham: Rowman & Littlefield 2004), 45.

[66] Eva Sheppard Wolf, *Race and Liberty in the New Nation* (Baton Rouge: Louisiana State University Press, 2006), 23.

[67] Id.

motives than its earlier efforts, though it undoubtedly also pleased slave trade opponents like Thomas Jefferson. The 1772 effort was blocked by the Crown.[68] Wolf concludes that the eventual 1778 Virginia slave import ban "arose more from the economic interests of eastern Virginia's elites than from the ideals of the Revolution."[69]

As contemporaries understood, from an economic perspective, colonial restrictions on slave imports like those reviewed here, at least in colonies where there were already significant numbers of slaves, were a form of political "rent seeking" that benefited existing slaveowners by artificially increasing slave prices through restrictions on slave supply. For example, Henry Laurens, a major South Carolina slave trader and slaveowner prior to the Revolution, concluded that South Carolina slave import taxes imposed during the 1760s were little more than efforts by other traders and owners to manipulate slave prices.[70] For that reason, major slaveowners like Virginia's George Mason could support import bans without supporting abolition.[71]

British policy barring colonial slave import limitations had historically prevented such limitations in order to protect the competitive interests of British and American slave traders and those of colonial slave purchasers (and their English creditors and investors) against the anticompetitive efforts of major slaveowners like Lee and Mason. But this British policy also harmed colonial economies by depressing slave prices, so it

---

[68] Culpeper County, Virginia 1774 resolutions suggested a motive for slave import opposition similar to Pennsylvania's: the importation of "slaves and convict servants" obstructed the peopling of Virginia "with freemen and useful manufacturers..." *Virginia Gazette (Rind)*, July 14, 1774.

[69] Wolf, *Race and Liberty*, 21.

[70] David Duncan Wallace, *The Life of Henry Laurens* (New York: G.P. Putnam's Sons, 1915), 86.

[71] Gary M. Anderson, Charles K. Rawley, and Robert D. Tollison, "Rent Seeking and the Restriction of Human Exchange," *Journal of Legal Studies* 17, no. 1 (1988): 83-100.

was unpopular in places like Virginia and South Carolina. It was equally unpopular in other colonies that wanted to ban slave imports for other reasons, such as protecting white laborers or encouraging white immigration. And British policy on slavery itself was beginning to change just before the American Revolution in ways that would prove deeply threatening to American slaveholders. The clearest indication of this fundamental change in policy was the most notorious pre-Revolutionary slave freedom case of all, the 1772 case of *Somerset v. Stewart*.

*The Somerset Decision and Its Aftermath*

*Somerset v. Stewart* raised a direct challenge to the legitimacy of slavery as an imperial institution.[72] In that case, the English Court of King's Bench, in an opinion by Chief Justice Lord Mansfield, decided the fate of a fugitive slave, James Somerset, who had been brought to England from America by a high British North American Customs official, Charles Steuart (or Stewart).[73] However, it was generally understood from the outset of the case that Mansfield's ruling might create a precedent that would affect as many as fifteen thousand blacks then held in "near slavery" in England, and could even be broad enough to affect slavery in the colonies. As a result, the case was argued by the leaders of the London bar, and the defense of the slaveholder's position was directly

---

[72] Referred to in the English Reports as *Somerset v. Stewart*, Lofft 1, 98 E.R. 499, 20 S.T. 1 (1772). For recent discussion see George Van Cleve, "Somerset's Case and Its Antecedents in Imperial Perspective," *Law and History Review* 24 (2006): 601-645. See also leading analyses by James Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill: University of North Carolina Press, 2004); William M. Wiecek, "*Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World," *U Chi L Rev* 42 (1974): 86-146.

[73] James Somerset had been brought to England by his Virginia owner Stewart, but had become a fugitive and then had been recaptured by slave hunters. Somerset was in chains aboard a ship in London awaiting transportation to Jamaica for sale when the action was brought.

controlled by the West Indies slaveholding interests. Lord Mansfield's decision consisted of a series of rulings (or "holdings") that had broad, disruptive implications for imperial, not just English, slavery.

In his "procedural" ruling, Mansfield held that under both English law and the law of nations, the legality of slavery, an "odious" condition, was to be determined solely by positive law (i.e., statutory law or its equivalent in express, exceptionally longstanding custom), as opposed to common law. In his "conflict of laws" holding, Mansfield held that a slave's status was determined solely by the law of the jurisdiction in which the slave was found, not that of the jurisdiction from which he or she came, whether the slave was a resident, a transient brought there by its owner, *or* a fugitive. Finally, in his "substantive" ruling, Mansfield held that English law did not permit even a slave to be compelled to leave England by force, thus rejecting the view that chattel slavery existed in England itself (though lifetime involuntary servitude or "near slavery" did).[74]

Although Mansfield could readily have confined the scope of his holdings, limiting them to interpretations of English law, he chose not to do so. Mansfield intended to establish a set of legal principles regarding slavery that would be applicable throughout the British Empire. The decision's holdings had major implications for slavery and fugitive slaves. They directly challenged the morality of slavery, and abandoned the previous British policy of uniformity regarding slavery and created a rule of diversity instead. Such a rule of legal diversity would potentially allow each colony (subject to British imperial authority) to decide for itself whether it would recognize slavery *or* protect fugitives.

---

[74] Van Cleve, "Somerset's Case," 633-645.

Even without any changes in colonial law, the decision in *Somerset* would have meant that a Virginia fugitive slave who fled to free territory, such as Spanish-held Florida, would have become free under Virginia law, not just under Spanish law. Unlike the situation before *Somerset*, a Virginia slaveowner would have had no claim against the slave in Florida.[75] Under *Somerset*, the same result would have occurred if a fugitive fled from a British colony that recognized slavery to one that had outlawed it or decided to protect fugitive slaves.[76] But the wider political implications of *Somerset* were even broader and more important than its direct legal effects.

The existence of a growing debate over slavery in the Empire was made apparent by Mansfield's painstakingly crafted, intentionally ambiguous, compromise decision in *Somerset*, designed to pacify English abolitionists but also to give temporary protection to colonial slaveholders until Parliament chose to alter the law of slavery.[77] The decision in *Somerset* was bitterly attacked by colonial slaveowners in the 1770s as a surprising and destabilizing reversal of at least half a century of prior English law, which they argued (with some justification) had deemed slaves "imperial" property with a largely uniform status throughout the Empire.[78] West Indian slaveowners attacked the *Somerset* decision because they thought that it would damage colonial slavery, not because they cared about whether slaves could be brought to England. Pamphlet wars

---

[75] Defense counsel in *Somerset* used this adverse consequence as an argument in defending their position to Lord Mansfield, giving Virginia as an example. 20 State Trials (ST) 70. Mansfield's decision confirmed the correctness of the slaveholders' conclusion.

[76] Abolishing slavery before the Revolution would have required British approval, but under *Somerset* the legal principle would have been the same.

[77] Van Cleve, "Somerset's Case," 642-45.

[78] Ibid., 642-45, 619-21.

regarding the decision erupted in England and warring pamphlets were advertised for sale in the colonies.

The arguments and decision in *Somerset* were widely reported in the colonies. A survey by historian Patricia Bradley of twenty-four operating colonial newspapers for which a full year's editions have survived (out of a total of thirty-two operating papers) showed that twenty-two out of the twenty-four newspapers contained reports of the arguments, an account of the decision, or both. The longest such coverage consisted of well over two thousand words.[79] This extensive transatlantic reporting shows that it was widely believed that the *Somerset* decision would have colonial impacts.

Events in the colonies after *Somerset* provided immediate and vivid evidence of the decision's potentially powerful implications for challenging slavery and increasing slave flight. In the years before the Revolution, it was often believed in both England and in the American colonies that in *Somerset*, Mansfield had decided that slaves became free upon coming to England.[80] Others believed that Mansfield had decided that English common law prohibited slavery wherever that law applied (and some colonists believed it applied throughout the colonies).[81] Slaves from Massachusetts to Virginia appear to have been encouraged to seek their freedom by the decision.

---

[79] Patricia Bradley, "Slavery in Colonial Newspapers: The Somerset Case," *Journalism History* 12, no. 1 (1985): 2-7. The "Tory" press usually carried fuller accounts of the decision than the "Patriot" press. Bradley suggests that some of the American newspapers may have manipulated their *Somerset* coverage for political reasons, either to present British "liberty" favorably (Tory) or to play on American racial fears of British policy (Patriot). Interested readers in places such as Boston, New York, Williamsburg or Charleston could have received a balanced, complete description of the *Somerset* arguments and decision by looking at more than one paper.

[80] Finkelman, *Imperfect Union*, 39.

[81] As became clear later, Mansfield himself did not agree with these interpretations of his own decision, but he chose not to clarify his position at the time. See Van Cleve, "Somerset's Case," 635.

Some Massachusetts slaves sued their masters for freedom and back wages based on the *Somerset* decision.[82] Slaves in Boston petitioned the legislature for their freedom in 1773 asserting that they had a natural right to freedom that had not been abrogated by contract or positive law in Massachusetts, a position consistent with *Somerset*.[83] At least some Virginia slaves who learned of the decision concluded that it meant they would be free if they could escape to England. According to historian Paul Finkelman:

> One Virginia slave attempted 'to board a vessel for Great Britain...from the knowledge he has of the late Determination of Somerset's Case.' Another Virginia master complained that his runaways were bound for England 'where they imagine they will be free (a Notion now too prevalent among the Negroes, greatly to the vexation and prejudice of their Masters).'[84]

In Massachusetts, *Somerset* was cited as legal authority supporting a slave's suit for freedom in a 1774 case, clear evidence that the slave's attorney thought that the decision was intended to apply in Massachusetts.[85]

Limited but persuasive circumstantial evidence suggests that a 1774 attempted slave revolt in Virginia also resulted from the *Somerset* decision. James Madison described the abortive revolt in a letter to a close friend in Pennsylvania, William Bradford, Jr., writing that the Virginia slaves who had sought to revolt did so with the expectation that if the colonists rebelled against the British, the British would free the

---

[82] Wiecek, *Antislavery Constitutionalism*, 44. For an account of the broader reaction to *Somerset* in Massachusetts, see Thea K. Hunter, "Publishing Freedom, Winning Arguments: *Somerset*, Natural Rights and Massachusetts Freedom Cases 1772-1836," Ph.D. diss. Columbia Univ., 2005.

[83] Hunter, "Publishing Freedom," 131-2. Hunter provides no direct evidence of a link with *Somerset*, but the coincidental timing is striking.

[84] Finkelman, *Imperfect Union*, 39 (quoting Gerald W. Mullin, *Flight and Rebellion: Slave Resistance in Eighteenth Century Virginia* [New York, Oxford University press, 1972], 131).

[85] *Caesar v. Greenleaf*, Essex Inf. Ct., Newburyport, Mass. (1774), in Wroth and Zobel, *Adams Legal Papers*, 2: 64-7.

slaves if they in turn revolted against the colonists.[86] The only plausible basis at the time for the slaves' hopes for British support for their freedom would have been the decision in *Somerset*, since the unsuccessful revolt occurred more than a year before the proclamation by Virginia royal governor Lord Dunmore encouraging slave rebellion against the colonists. Madison, who had grown up in a large slaveholding family, made clear to Bradford how dangerously contagious the news of such a slave revolt could be: "it is prudent such attempts should be concealed as well as suppressed."[87]

*Somerset*'s implications went well beyond causing slave litigation and unrest because it quickly became part of an expanding American colonial debate over slavery and encouraged antislavery action.[88] Reactions to the decision in the American colonies ranged from approval to determined opposition. The decision strongly interested American abolitionists, who participated in an ecumenical trans-Atlantic antislavery network. A key member of that network was Granville Sharp, a leading English abolitionist who had been a principal force behind English legal actions against slavery in the 1760s and 1770s that had effectively set the stage for *Somerset*. Sharp sent information about Mansfield's decision and related English political developments to fellow antislavery activists in the American colonies, who soon took advantage of it in their antislavery publicity and legislative action.

---

[86] James Madison to William Bradford, Jr., November 27, 1774. William T. Hutchinson and William M.E. Rachal, eds., *Papers of James Madison*, 29 vols. (Chicago: University of Chicago Press, 1962-83), 1: 129-30.

[87] Ibid., 130. For an account of these events and the 1775 Dunmore Proclamation, see Cassandra Pybus, *Epic Journeys of Freedom: Runaway Slaves of the American Revolution and Their Global Quest for Liberty* (Boston: Beacon Press, 2006), 6-9. Pybus does not suggest any link between *Somerset* and the attempted revolt.

[88] William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Ithaca: Cornell University Press, 1977), 34-44; Van Cleve, "Somerset's Case," 602.

In a widely circulated pamphlet first published in 1772 in Philadelphia and then republished in Boston, Sharp's Philadelphia ally Benjamin Rush gleefully seized upon *Somerset* to support his argument that American political freedom was inextricably intertwined with freedom for slaves. Rush relied on the *Somerset* decision as evidence that Britain intended to abandon its support of slavery.[89] (In a sense, Rush's assessment paralleled that of the Virginia slaves who attempted the 1774 revolt described above). Anthony Benezet, a prominent Society of Friends antislavery writer based in Philadelphia, soon received Sharp's information and provided the materials to prominent New Jersey Society of Friends member and attorney Samuel Allinson.[90] Encouraged by Mansfield's decision, Allinson and other New Jersey Friends and their allies such as Elias Boudinot undertook abolition efforts in New Jersey in 1773 (discussed below).

American slaveholders reacted to *Somerset* either with criticism or with public silence.[91] There were attacks on the *Somerset* decision published in Rhode Island, Connecticut, Massachusetts, and Virginia newspapers, some of them quite extensive.[92] One British newspaper's "correspondent's" views were widely reprinted in American newspapers. He argued that *Somerset* was wrongly decided because colonial slave property must be treated as imperial property:

---

[89] Benjamin Rush, *An Address to the Inhabitants of the British Settlements in America, upon Slave-Keeping*, 2d ed. (Philadelphia: 1773), 19, 49.

[90] Anthony Benezet to Samuel Allinson, 30th 10th month, 1772, Allinson Papers (Haverford: Haverford College Quaker Collection).

[91] The correspondence of Peleg Clarke, a Newport, Rhode Island slave ship captain, contains no references to *Somerset* during the period 1771-1774. Clarke and his correspondents in England and the West Indies believed that African slave prices and American molasses prices had the largest impact on the trade. Peleg Clarke, Letterbook, 1771-1782, (Newport: Newport Historical Society).

[92] *The Providence Journal and Country Gazette*, October 10, 1772; *Virginia Gazette (Rind)*, November 12, 1772, and sources in the following note.

> This Cause seems pregnant with consequences extremely detrimental to those Gentlemen, whose estates chiefly consist in slaves; It would be a means of ruining our African Trade....[I]f the purchase of the slaves was...made in countries which allow of the traffic, then our Correspondent strenuously asserts, that no change of climate can abrogate the bargain; for it appears at first sight incongruous to suppose that a change of climate can deprive a person of that property, for which he gave a valuable consideration.[93]

A 1774 South Carolina pamphlet attacked *Somerset*. "A Back Settler," its anonymous author, clearly referring to *Somerset*, accepted that English law now freed anyone of "human Form[]" who came to England, resulting in a "general Manumission of Negroes" there. "Back Settler" used this "ruin[ous]" doctrine as an important reason why Americans would not want to adopt all English liberties.[94] But despite the publication of various general attacks on *Somerset* in major slaveowning colonies, there does not appear to have been any sustained public debate about the decision in those colonies.

No letters regarding *Somerset* from local residents have been found in major Virginia or South Carolina newspapers during the period 1772-1774, despite extensive newspaper coverage of the decision in those colonies.[95] Henry Laurens, a leading South Carolina merchant and political leader who lived in London for several years,

---

[93] This article appeared in at least the following: *Connecticut Courant*, July 30, 1772; *Boston News-Letter*, July 23, 1772; *Connecticut Journal*, July 31, 1772; *Newport Mercury*, August 3, 1772.

[94] "*Some Fugitive Thoughts*," by "A Back Settler," quoted in Jack P. Greene, "'Slavery or Independence:' Some Reflections on the Relationship Among Liberty, Black Bondage, and Equality in Revolutionary South Carolina," *South Carolina Historical Magazine* 80 (1979): 193-213, 206.

[95] One interesting reaction reprinted in the Virginia press after initial London publication was an anonymous editorial comment challenging on both natural law and prudential grounds Parliament's authority to legalize slavery in England. The author of the original comment argued that "the Laws of God" required that "a Negro cannot be less free than a man of any other Complexion," and that permitting slavery for blacks on racial grounds would inevitably lead to its extension to "every mulatto," and then "the Portuguese" and "the French," and even the "brown complexioned English." The London date and other circumstances suggest that the writer of the original comment was an Englishman. *Virginia Gazette* (Purdie & Dixon), August 20, 1772. Later that year, another prominent Virginia newspaper published a detailed attack on *Somerset*. *Virginia Gazette (Rind)*, November 12, 1772.

corresponded from London in exceptionally guarded terms about the decision, writing to a friend in South Carolina that he would not "say a word of Lord Mansfield's judgment...until we meet."[96] This general public silence in major slave colonies may have occurred because slaveholders were concerned that public discussion of the decision would be dangerous. Such discussion might have caused added slave flight or slave unrest, and might also have exposed divisions of opinion about slavery within slaveholding colonies.[97]

One observer thought that the *Somerset* decision would threaten colonial slaveowners because massive freedom litigation would result, especially in the West Indies. This "correspondent"'s hyperbolic views appeared in New York and Massachusetts newspapers:

> The late decision with regard to Somerset the Negro...will occasion a greater ferment in America (particularly the islands) than the Stamp Act itself; for slaves constituting the great value of (West Indian) property (especially) and appeals from America in all cases of a civil process to the mother country, every pettifogger will have his neighbor entirely at his mercy....[98]

But the potential imperial political implications of *Somerset* went far beyond the possibility of added unrest and freedom litigation, as can be seen from the reaction to the decision of a well-informed, activist colonial official, Henry Marchant. Marchant, the attorney for the slave purchaser in the Rhode Island slave freedom case discussed earlier

---

[96] Laurens to Dr. Alexander Garden of Charleston, August 20, 1772, quoted in Wallace, *Life of Henry Laurens*, 191. Laurens added that Mansfield's administration of the case was "suitable to the times," but it is uncertain what he meant by this. Id.

[97] As Paul Finkelman concluded, slaveowners had another reason to be concerned about British policy as expressed in *Somerset*—it might affect their ability to travel freely with their slaves. Finkelman, *Imperfect Union*, 38-9.

[98] *The New York Journal or the General Advertiser*, August 27, 1772; *Boston Post-Boy*, September 7, 1772.

(*Randall v. Robinson*), had gone to England as the colonial attorney and agent for Rhode Island in 1771. While he was in London, Marchant attended the early 1772 opening court arguments in *Somerset*. An experienced and successful attorney trained in Massachusetts, Marchant concluded that the arguments made for slave freedom in *Somerset* would apply just as well in the colonies as in England, a conclusion that would have been very threatening to any colonial slaveholder.[99] Marchant saw no legal distinction between the British slave trade, which was unquestionably legal under English law and thus essentially unchallengeable under colonial law, and the use of a slave in a business, which he thought was under attack in *Somerset*. Marchant accordingly saw the abolitionist argument in *Somerset* as a mere "plausible pretence" to "cheat an honest American of his slave."[100] Marchant's private reaction to the *Somerset* arguments was a more candid version of American slaveholders' published reactions.

It is fair to infer from Henry Marchant's reaction that many American slaveholders thought that the *Somerset* decision was an arbitrary one that created one set of legal rules regarding slavery for England and another, discriminatory set of legal rules for the colonies. This unfairly deprived Americans of their "honest" property, and made them second-class subjects. For slaveholders, this implication of *Somerset* made it a direct and wholly unpalatable parallel to British legal scholar and Mansfield ally William Blackstone's conclusion, in his widely read *Commentaries on the Laws of England,* that

---

[99] Henry Marchant, *Diary*, Papers of Henry Marchant (Providence: RIHS) (citations are to the typescript version in files of American Philosophical Society), 1: 123.

[100] Id.

the American colonies had been British conquests, and therefore were not governed by (or protected by) English common law.[101]

But the *Somerset* decision had another even more politically dangerous implication for slaveholders. It clearly meant that the British government could change British policy to permit legal diversity on slavery. Individual colonies such as Pennsylvania could be given the freedom of choice to bar slave imports that they had been seeking; or Britain could even end the slave trade or colonial slavery in one or more colonies. Such changes in British policies could significantly harm slave-dependent colonies such as Virginia by significantly increasing the costs of slavery (including slave plantation credit) or by driving down slave prices, if they did not destroy the slave colonies' economies completely.

Lord Mansfield was already notorious (and hated) in the colonies as the Crown's chief spokesman for the constitutional position that Parliament was sovereign and that no American representation in, or consent to, any of its decisions was required. Mansfield's constitutional views were anathema to many Americans, but they would have been of special concern to slaveholders when he made English slavery, and quite probably imperial slavery as well, clearly subject to future Parliamentary control in *Somerset*.[102] Both Parliament's action, while *Somerset* was under consideration by Mansfield's court,

---

[101] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765, pbk facsim. ed. U. Chi. Press 1979), 1: 104-5, 123. The *Somerset* decision resulted in part from Mansfield's effort to avoid the political implications of directly applying this principle to slavery. See Van Cleve, *Somerset's Case*, 605-6, 612, 639-40.

[102] Imperial slavery had historically typically been subject to Privy Council control. See Jonathan Bush, "The British Constitution and the Creation of American Slavery," in *Slavery & The Law*, ed. Paul Finkelman (Madison: Madison House, 1997). But the clear result of Mansfield's decision in *Somerset*, given his views of Parliamentary authority, was that Parliament could intervene to control colonial slavery if it chose to do so.

declining to legalize slaveholding in England, and the ambiguous result in *Somerset* itself, showed that antislavery activism was having political success in England.[103]

American slaveholders were thus threatened by *Somerset* with diminished imperial protection against antislavery efforts at the same time that Britain was blocking their own colonies' policies designed to maintain slave prices by limiting imports. For many slaveholders, the *Somerset* decision was more arbitrary British policy toward America. But *Somerset* was arbitrary policy on slavery, an issue that was absolutely central to slaveholders financially. It was thus entirely appropriate that George Washington used a slavery metaphor to describe British actions without any intention of abolishing slavery. "The crisis is arrived," Washington wrote in 1774, and Americans must assert their rights or "submit to every imposition that can be heaped on us till custom and use shall make us as tame and abject slaves as the blacks we rule over with such arbitrary sway."[104] *Somerset* and British slave trade policy almost certainly strongly reinforced hatred of British rule in the slave colonies. But unlike "A Back Settler" in South Carolina, most slaveholders were silent about this in contemporary public debates.

It seems likely that the political necessities of the Revolution caused this slaveowner silence. It is clear that slaveowning Americans could not afford to appeal publicly to a desire to maintain slavery as a basis for their support of the American

---

[103] In May, 1772, a month before the *Somerset* decision, Parliament refused to entertain a motion for a bill supported by West India interests to create regulations for slaves in England. *Journal of the House of Commons* XXXIII 789 (May 25, 1772), see London *Morning Chronicle*, May 26, 1772. The failed motion was an effort to avoid an adverse decision in *Somerset*. By 1776, Parliament had also refused to consider abolitionist motions attacking the slave trade. It seems likely that Parliament was divided on aspects of slavery in the years leading up to the Revolution, and that the Administration saw no useful political purpose to be served by a divisive debate. See George Van Cleve, "Somerset's Case and Its Antecedents," unpub. M. St. Leg. Rsch. thesis, University of Oxford, 2004, 87-88.

[104] George Washington to Bryan Fairfax, August 24, 1774, Papers of GW, Col. Series, Vol. 10, quoted in Wiencek, *An Imperfect God*, 157.

Revolution in light of the growing British and American political opposition to slavery without risking the loss of important potential allies in both England and Northern American colonies. Instead, they joined vociferously in general appeals for protection of American property rights and against property taxation by arbitrary government. For them, however, such appeals often directly related to their slave property, which was often their largest asset. Many American slaveholders had no great qualms about considering both existing slaves and their offspring as property, as their colonies' laws and customs had done for more than a century.

There is no evidence, for example, that Virginians thought it ridiculous for Richard Henry Lee, who became a leading Virginia revolutionary politician, to conduct a public parade in Virginia against the Stamp Act's "chains of slavery" while using his slaves to hold his protest banners.[105] In mid-1772 when *Somerset* was decided, Lee was seeking to engage in an international slave trading transaction with his brother in London as his partner. It is inconceivable that he would have willingly accepted severe limits on the slave trade to Virginia, or on Virginia slavery, imposed by the British government without Virginia's consent.[106] Like leaders in other major slave colonies, Virginia leaders such as Lee and Patrick Henry saw their state's ability to control slavery in all respects as a central part of what the Revolution was about.[107] They were simply too astute politically to broadcast such views in public during the Revolution when they were

---

[105] J. Kent McGaughy, *Richard Henry Lee of Virginia: Portrait of an American Revolutionary* (Lanham: Rowman & Littlefield 2004), 78.

[106] Ibid., 63.

[107] For Patrick Henry's vociferous attack on the Constitution because it conferred power over slavery on the new federal government, see Chapter 4.

seeking common ground with other Americans against Britain. But although slaveowners were often publicly silent on slavery, they were successful in opposing efforts in American colonies to take steps against slavery beyond import bans toward abolition during the 1770s, with one exception.[108]

Those colonial antislavery efforts are nevertheless very informative about the political dynamics of slavery abolition. In 1773, encouraged by the *Somerset* decision, prominent New Jersey legislator Elias Boudinot led an effort with Samuel Allinson and others to convince New Jersey to move toward the gradual abolition of slavery.[109] Boudinot sought to negotiate consensus antislavery legislation with slaveowners' legislative representatives, so the legislative proposals represented concessions that abolitionists thought they needed to make to gain slaveowner support for abolition or liberalized manumission. Boudinot concluded based on his discussions that slaveowners' objections to abolition were "altogether founded" on the perceived "ill consequences of having free Negroes in a Neighbourhood where there are Slaves," as "they would greatly corrupt them."[110]

As a result of the efforts of Boudinot and his allies, between 1773 and 1775 the New Jersey legislature considered two slavery-related bills, one of which was intended to liberalize manumission laws, and both failed. The fate of the manumission bill is particularly instructive. Instead of substantial liberalization of the law, the bill limited

---

[108] The Vermont constitution of 1777 ended slavery and indentured servitude for persons born in Vermont who were over twenty-one years of age.

[109] Zilversmit, *First Emancipation,* 91-2.

[110] Elias Boudinot, Letter to Samuel Allinson, July 29?, 1774, Allinson Papers (Haverford: Haverford College Quaker Collection).

manumissions by providing that masters who manumitted slaves older than twenty-one years old had to pay a fee or post a bond to protect taxpayers against poor relief costs. The bill also "severely limited" the rights of freed blacks; even though they were required to pay taxes and perform duties of citizens, they were denied the right to vote. They could serve as witnesses only against other blacks, and could not intermarry with whites. Freedmen who became indebted or were sentenced to prison could be bound out as indentured servants. Even with these onerous conditions on manumission, two petitions urged the Assembly to reject the bill, abolitionists agreed to delay it, and the bill ultimately failed by inaction.[111]

In the failed legislation, New Jersey legislators had proposed to address manumission's social and political implications by taking steps to minimize manumission's perceived social costs to white citizens. They sought to minimize both the tax burden to whites and the disruption of existing social and political stratification between whites and blacks. The latter goal was achieved by proposed racial discrimination in voting and intermarriage, rights that by then were commonly deemed customary attributes of free status.[112] Whether the New Jersey legislature was accurate in its assessment of the potential social costs of African American manumission is irrelevant. The bill's provisions reflected what the legislative majority (or its constituents) thought that the social costs were likely to be, and the majority was not willing to incur even those costs.

---

[111] Zilversmit, *First Emancipation*, 91-2.

[112] Voting was also subject to property qualifications.

The manumission proposal's discriminatory testimonial limitation was particularly important. The limitation meant that black slaves and freedmen would both be at the mercy of whites who sought to abuse or reenslave them, unless other white citizens came to their aid when such abuses occurred. As Sweet concludes in his study of Northern racial relations, whether blacks would receive such assistance from whites was very much a function of the level of political support for slavery and racial equality within a given local community.[113] A limitation on black testimony was an open invitation to unscrupulous whites to violate the law where blacks were concerned. The inclusion of a testimonial limitation in the proposed bill demonstrates that most New Jerseyans did not support rigorous enforcement of laws enacted to expand black freedom. The New Jersey majority was willing to move toward black freedom only at the high price of condemning free blacks to permanent second-class noncitizen status and a precarious life of fear and uncertainty in their dealings with whites.[114]

The years just before the Revolution also added another important political dimension to challenges to slavery when they became tools for attacks on British policy toward the colonies. This shift in the political rationale for colonial desire to limit slave imports was evident from the 1774 Rhode Island import ban.[115] The statute departed markedly from past import limitations because it was not based on heavy import taxation

---

[113] Sweet, *Bodies Politic*, 237-8.

[114] In 1778, Massachusetts voters considered a state constitution that would have explicitly recognized slavery and denied free blacks the right to vote, showing the strength there of the same sentiments that motivated New Jersey legislators (the constitution was defeated).

[115] Acts of Rhode Island, June, 1774, *Rhode Island Colonial Session Laws*, (Buffalo, N.Y.: Hein, 1987), 48-50. Attorney General Henry Marchant may have been a primary draftsman of the statute. The compromise statute attempted to address slave trade concerns of Rhode Island abolitionists without ending the slave trade or slavery. Sweet, *Bodies Politic*, 244-5.

but instead provided that any slave imported illegally would "immediately become free."[116] Addressing both domestic and foreign audiences, its preamble proclaimed an abolitionist motive—linking political freedom for the colonies to freedom for slaves—as one of its primary purposes.

The "largely symbolic" Rhode Island ban was riddled with exceptions to protect the interests of its general citizens, its slaveowners, and its traders.[117] The breadth of the exceptions strongly suggests that an important part of the statute's purpose was to tweak the unpopular British government by making a rhetorical argument about political slavery, not to advance abolition. The statute excepted "Servants of Persons travelling through this Colony," a provision helpful to Rhode Island business. To avoid discouraging immigration, it then excepted "Negroes or Mulatto Slaves, belonging to any British colonial "who shall come into this Colony, with an intention to settle or reside...therein." As to a new settler's slaves, the statute provided that the law of slave discipline in Rhode Island would be that which had applied to the slave in its colony of origin.[118] The statute also excepted many slaves temporarily held in Rhode Island for slave trade re-export, which protected nearly all of the large Rhode Island slave trade.

As historian Paul Finkelman concludes, the ban statute's "sojourner" exception had the effect of negating *Somerset*'s specific substantive holding as applied to

---

[116] Freed slaves would have the same "personal Freedom" and "private property" rights as "native Indians." Acts of Rhode Island, June, 1774, 49.

[117] Sweet, *Bodies Politic*, 244 (quotation).

[118] Acts of Rhode Island, June, 1774, 49.

sojourners.[119] But the statute's broader goal was to mould *Somerset*'s principles to Rhode Island's purposes. Rhode Island endorsed the fundamental conflict of laws principle of *Somerset*—the principle that local law (here, Rhode Island law) wholly controlled the fate of slaves once in Rhode Island, without regard to their status as property in other British colonies or foreign jurisdictions. Even before the Revolution, Rhode Island was declaring its law of slavery to be independent from that of any other colony and rejecting the imperial principle of slavery uniformity.[120]

The Rhode Island ban foreshadowed the profound legal problem—independent state legal sovereignty—that would face the institution of slavery immediately after Independence.[121] In *Somerset*, the colonies had been told in unmistakable terms by the leading English judge of the day that English common law and morality did not sanction slavery, and that exercising their independent rights on slavery was not only legitimate but even desirable under longstanding English law principles that protected freedom.[122] After Independence, slaveholders would face a diverse legal regime that was far less stable than the reasonably uniform legal regime they had experienced under the Empire.

---

[119] Finkelman sees the 1774 statute as "a direct attempt to insure" that *Somerset* would not apply in Rhode Island. Finkelman, *Imperfect Union*, 43.

[120] Connecticut adopted an import ban in 1774. The statute made clear imports' perceived harms: they were "injurious to the [white] poor and inconvenient," references to labor market competition and poor relief. Zilversmit, *First Emancipation*, 108. The Continental Association agreed to support a ban in all states as an economic sanction against England, but postwar efforts to convert that voluntary ban into Confederation law failed.

[121] In 1779, though it had not yet enacted gradual abolition, Rhode Island adopted legislation that banned the sale of Rhode Island slaves outside of Rhode Island.

[122] There were other implications of *Somerset* as well: if a colony banned slave imports, what was the status of slaves who came there? Also, *Somerset* had sought to redefine the nature of slave property—it was purely conventional, created by positive law, and not "natural" or common law property. If slaves were conventional property, this raised key questions about what type of protection and compensation, if any, such property would receive from a legislature that chose to abolish slavery. See discussion below and in Chapter 2.

*Slavery and the Revolutionary War Period*

The Revolution posed a series of important additional threats to slavery beyond the dangers posed by independent state sovereignty. These added threats included the loss of imperial military and legal protection, the problem posed by slave revolts for military defense, sharply increased numbers of fugitive slaves, and the growth of antislavery ideology and state abolition movements. But the Revolution nevertheless strengthened slavery for several reasons. It fundamentally changed the balance of political power between slave states and states that were moving toward abolition in the new republic. Antislavery ideology, even reinforced by Revolution principles, had limited effects in the face of the political and economic realities of slavery. Antislavery efforts also confronted powerful countervailing political principles that were shared throughout America, and conflicting concepts of natural rights. Although the Revolution also caused some physical disruption to slavery, the effects of Revolutionary war slave flight and military limitations have been overstated. The changed balance of power and ideological discord were sufficient to protect the largest part of the existing institution of slavery against the disruption caused by the Revolution. Slavery emerged from the Revolution stronger than it had been within the framework of the Empire, especially after *Somerset*.

The principal reason for the Revolutionary transformation of the sectional balance of power between slave states and Northern states was that the slave states represented a far larger share of the wealth and population of the total American confederation that

resulted from the Revolution than they did of the British Empire.[123] The major slave states had represented perhaps 10 percent of the total population and 14 percent of the total wealth of the British Empire in 1774.[124] By comparison, those states contained more than half of both the total population and the total wealth of the United States when the Revolution began. One immediate political effect of Independence was therefore to make the American slave states far larger stakeholders in a much smaller country. The mainland slave states were, as a result, much more strongly positioned to resist Confederation control of slavery than they would have been to resist increased British imperial control.[125]

Moreover, if the American slave states had returned to British allegiance after Independence, the Northern states would have been entirely hemmed in by British territory and the British navy. This territorial realignment would have permitted the British to strangle Northern regional external trade and would have provided excellent bases for continued British attacks. Thus both comparative resource and geopolitical considerations clearly suggested that American slave states' relative political strength in the new government would increase sharply after Independence compared to their

---

[123] In his classic work *Slavery in Revolution*, Davis concludes, looking backward from 1823, that "the Age of Revolution" had "increased" the "independent political power" of major slaveholding regimes in Brazil, Cuba, and the southern United States. Davis, *Slavery in Revolution*, 83. The argument here is that in mainland north America this transformation occurred as a result of the Revolution itself, not as a product of the evolution of plantation slavery over "a half-century." Id.

[124] T.G. Burnard, "'Prodigious Riches': The Wealth of Jamaica before the American Revolution," *Econ. Hist. Rev.* New Series, 54, no. 3 (2001): 506-524, 520 (Table 5) (wealth); Jacob M. Price, "The Imperial Economy, 1770-1776," in *The Oxford History of the British Empire*, ed. P.J. Marshall (Oxford: Oxford University Press, 1998), 100 (Table 4.1)(population).

[125] For the West Indian lobby's weakened political strength after the Empire's division, see Andrew J. O'Shaughnessy, *An Empire Divided: The American Revolution and the British Caribbean* (Philadelphia: University of Pennsylvania Press, 2000), xii.

position within the Empire. It seems quite likely that slave state leaders anticipated that sharply increased political influence would flow from their shift of allegiance given the realities of the eighteenth century British political world, where rights to office and political representation were commonly understood to flow from possession of property alone.[126]

The Revolutionary War did exacerbate the fugitive slave problem for slave states that had threatened to increase after *Somerset*. During the Revolution, the slave states lost substantial numbers of slaves through slave flight, but this flight had limited impact for several reasons. First, recent estimates suggest that slave flight was much lower than has often been thought. Some earlier estimates placed the total number of slaves who fled as high as 80-100,000, or approximately 20 percent of the total Southern slave population. A careful recent analysis shows that the number of slave runaways was very probably dramatically lower—about 20,000, or 5-6 percent of the Southern slave population.[127]

Slaves fled to the British, into backwoods areas, and into the Northern states. The British command in New York became a magnet for runaways. During British occupation, slave flight from New Jersey and New York increased sharply.[128] In Virginia,

---

[126] Jack R. Pole, *Political Representation in England and the Origins of the American Republic* (Berkeley: University of California Press, 1966 (pbk. 1971)).

[127] The issue is thoroughly reviewed in Cassandra Pybus, "Jefferson's Faulty Math: The Question of Slave Defections in the American Revolution," *William & Mary Quarterly* 62, no. 2 (2005): 243-64. Ira Berlin's analysis seems consistent, suggesting that fugitives or freed slaves were about 5-6 percent of southern slaves. Berlin, *Generations*, 112, 126, 273-4. For a much higher estimate, see Sylvia R. Frey, *Water from the Rock* (Princeton: Princeton University Press, 1991), 211 (80-100,000).

[128] Graham Russell Hodges, "Black Revolt in New York City and the Neutral Zone: 1775-1783," in *New York in the Age of the Constitution: 1775-1800*, ed. Paul A. Gilje and William Pencak (Cranbury, N.J.: Associated University Presses, 1992), 28; cited and discusssed in Pybus, "Jefferson's Faulty Math," 260.

Richard Henry Lee reported that his brother had lost sixty-five slaves to Cornwallis (roughly one-fourth of his holdings), and that other neighbors "lost every slave they had in the world."[129] In the Lower South, historian Cassandra Pybus estimates that slaveowners lost 6,000 slaves to the British, or 8 percent of their total slave populations. But overall, the economic loss to slaveowners was relatively small, and as discussed below, they quickly obtained protection against slave flight from the American revolutionary government.

The Revolutionary War also exposed some degree of military vulnerability of the slave states due to possible slave insurrections. Slaveholders were privately aware of this vulnerability even before the Revolution. As James Madison had written his close friend William Bradford, Jr. just before the war began, such insurrections were "the only part in which this Colony is vulnerable; & if we should be subdued, we shall fall like Achilles by the hand of one that knows that secret."[130] At points during the War, some colonies were occasionally hampered in their military operations against the British because they needed troops instead to maintain slave discipline, but these disruptions do not appear to have been chronic or crippling.[131]

After Independence, slaveowners also faced the reality that antislavery thought had become more prominent in the years before the Revolution both in England and in

---

[129] Richard Henry Lee to Arthur Lee, June 4, 1781; to William Lee, July 15, 1781; to the Commander in Chief of the Armies of the United States, September 17, 1781, in James Curtis Ballagh, ed., *Letters of Richard Henry Lee*, vol. 2 (New York: 1914; repr. 1970), 230, 242-43, 256, quoted in Pybus, "Jefferson's Faulty Math," 256.

[130] James Madison to William Bradford, Jr., June 19, 1775, in *JM Papers*, 1:151.

[131] Wiecek, *Antislavery Constitutionalism*, 55 (South Carolina); Edgar J. McManus, *A History of Negro Slavery in New York* (Syracuse: Syracuse University Press, 1966), 155-6.

the United States. Antislavery thought gained additional support—in some quarters—from the Revolution. Anyone familiar with Samuel Johnson's famous gibe—"How is it that we hear the loudest *yelps* for liberty from the drivers of negroes?"—will appreciate that many Englishmen and contemporary Americans (Northern and Southern) thought that there was tension between American revolutionary principles and the institution of slavery.[132] But for several reasons it would be a mistake to infer from this tension that the Revolution greatly strengthened the movement toward abolition. The conflict between slavery and Revolution principles was far more strongly felt by white citizens in the Northern states than in the South, and perhaps only by a minority even in the North. As David Brion Davis points out, only the Vermont Constitution moved directly from an endorsement of natural rights to a constitutional abolition of slavery.[133] Davis doubts that the inconsistency of revolutionary ideals with slavery was a "pressing concern to the majority of Americans, even in New England...."[134] And there were also sharply conflicting interpretations of Revolution principles where slavery was concerned. This conflict of interpretation was not limited to differences founded on conflicting views about black equality (though those existed), but implicated larger issues of federalism and the meaning of political sovereignty as well.

Historian Jack Greene argues persuasively that freedom to own slaves was one of the liberties claimed by South Carolinians, who saw no inconsistency between

---

[132] David Brion Davis, *The Problem of Slavery in Western Culture*, 1966; pbk ed. (Oxford: Oxford University Press, 1988), 3 quoting James Boswell, *The Life of Samuel Johnson* (Modern Lib. ed., New York n.d.), 747-8.

[133] Davis, *Slavery in Revolution*, 77-8.

[134] Davis, *Slavery in Revolution*, 286, and see Chs. 2-4 of this work.

enslavement of African Americans and the ideas of the Declaration of Independence.[135] Many South Carolinians were fighting the Revolution to protect their slave property, not to free slaves, and they were not alone in failing to see any inconsistency between slavery and Revolutionary ideals. Many Virginians clearly felt precisely the same way about slavery; they fought at least in part to protect their freedom as Virginians to determine for themselves what they wanted to do with their slave property. South Carolina representatives' determined efforts to protect their political rights to control their slave property were strongly supported by other slave states, including Virginia, in virtually all cases, beginning with the drafting of the Articles of Confederation and continuing with the framing of the Constitution and its aftermath in the important early constitutional implementation debates in the 1790s.[136]

More generally, thoughtful contemporaries understood that within the tradition of English thought stemming from the political convulsions of the seventeenth century, it was possible to take more than one view of the origin and character of natural rights. Natural rights could either be seen as unalterable "natural" or divine restraints on the sovereignty of any government, as in John Locke's philosophy, or as rights existing in a state of nature that could be limited by legitimate governments exercising their sovereignty through positive law, as in the philosophy of writers such as Hugo Grotius and Thomas Hobbes. Notwithstanding the ringing phrases of the Declaration of

---

[135] Greene, "Slavery or Independence."

[136] See discussion below and Chs. 2-5. A recent study of political ideology and slavery among Northern Republicans concludes that "the large majority of slaveholders" in the early nineteenth century saw no fundamental inconsistency between slavery and political liberty. Padraig Griffin Riley, "Northern Republicans and Southern Slavery: Democracy in the Age of Jefferson, 1800-1819 " Ph.D. diss., Univ. of Calif. Berkeley, 2007, 14. Wolf's study of Virginia emancipation, *Race, Liberty*, suggests that attitudes were probably much the same in Revolutionary Virginia.

Independence, later events would show that the struggle between these warring conceptions of natural rights and liberty had not been decisively ended by the Revolution, and this lack of resolution had important implications for the evolution of slavery.[137] But there were significant sectional differences in attitudes toward slavery as well.

Sectional differences over the implications of revolutionary ideals for slavery were attributable to several factors. Many of the Northern states had a distinctive religious heritage, and their leading denominations were more likely to condemn slavery as irredeemably evil than those in slave states.[138] David Brion Davis's classic studies conclude that the Revolution created a new intellectual climate regarding slavery, founded on a confluence of Enlightenment, religious and political thought. He and other historians suggest that this new climate of thought catalyzed the Northern abolition of slavery, and might have led to much wider abolition than actually occurred absent countervailing forces such as a desire to maintain economic class discipline or sectional

---

[137] Using different but roughly corresponding terminology, a similar point is made by James W. Ceaser in his study of natural rights as foundational concepts in American political development. Ceaser thinks that there are two "basic types of natural rights," "collective rights" and "individual rights." He concludes that Jeffersonians tended to place as much emphasis on collective rights as on individual rights, while Federalists emphasized individual rights, and notes Daniel Rodgers's conclusion that the Jeffersonian emphasis on collective rights began "well before slavery became a major issue of public discussion." James W. Ceaser, *Nature and History in American Political Development: A Debate* (Cambridge: Harvard University Press, 2006), 29-30. For a recent history of ideas about the social contract in America, see Mark Hulliung, *The Social Contract in American from the Revolution to the Present Age* (Lawrence: University Press of Kansas, 2007). For a general account of the evolution of the relationship between natural rights and positive law in early America, see G. Edward White, *The Marshall Court and Cultural Change 1815-1835*, abridged ed. (Oxford: Oxford University Press, 1991), chapters IX-X.

[138] For surveys of antislavery thought, see David Brion Davis, *The Problem of Slavery in Western Culture*, 1966; pbk ed. (Oxford: Oxford University Press, 1988), 291-482; *Early American Abolitionists: A Collection of Anti-Slavery Writings, 1760-1820*, ed. James G. Basker (New York: The Gilder Lehrman Institute, 2005).

interest.[139] Davis's views on this last point (and similar views of others) have been the subject of various criticisms over the years. These include the contentions that Enlightenment thought and capitalist market development themselves had equivocal implications for slavery, and that there was a limited connection between antislavery thought and political support for antislavery action.[140] Perhaps most importantly, Enlightenment moral and political thought (particularly that stemming from the Scottish Enlightenment) was entirely compatible with theories of history that permitted and even sanctioned a "modern," "progressive" variant of slavery, a view of history that appealed to many prominent citizens in slave states.[141]

Economic and social differences between the Northern states and the slave states had an impact on the Revolution's effects on slavery as well. Northern states had far less to lose from abolition either economically or through social structure disruption than the slave states did. And informed contemporaries believed that white racism, which existed throughout America, was more strongly reinforced by existing socioeconomic conditions and practices in the South.[142]

---

[139] See e.g., Davis, *Slavery in Revolution*, 82-3, 264, 303-5; Jordan, *White Over Black,* 310-11; and Davis essay in Thomas Bender, ed., *The Antislavery Debate: Capitalism and Abolitionism as a Problem in Historical Interpretation* (Berkeley: University of California Press, 1992).

[140] See the essays in Bender, ed., *The Antislavery Debate*; Peter S. Onuf and Ari Helo, "Jefferson, Morality, and the Problem of Slavery," *Willam and Mary Quarterly* 60, no. 3 (2003): 583-614; Mason, *Slavery in Early Republic*, 11-12. Donald Robinson notes that few American political figures contributed to the thought Davis surveyed. Robinson, *Slavery in Politics*, 467 n. 65.

[141] See Joyce Chaplin, *An Anxious Pursuit: Agricultural Innovation & Modernity in the Lower south, 1730-1815* (Chapel Hill: University of North Carolina Press (for Institute of Early Amer. History and Culture), 1993), 23-65 and passim.

[142] For discussion see Jordan, *White Over Black*, 300-301, 309-10; St. George Tucker to Dr. Jeremy Belknap, June 29, 1795, reprinted in Massachusetts Historical Society, "Letters and Documents Relating to Slavery in Massachusetts," in *Collections of the Massachusetts Historical Society* (Boston: Massachusetts Historical Society, 1877) ("*MSL*"), 405-6.

During the Revolution, abolitionist arguments for government action also encountered strongly countervailing political framework principles shared by most Americans that had profound implications for slavery. First, individual colonies were often regarded as sovereigns whose political legitimacy necessarily derived from local public consent. Adherents of the strongest version of this doctrine of state sovereignty (or "strong" federalism) believed that no central government could legitimately control domestic slavery because it was precisely the kind of political question reserved to governments founded on such consent. Second, it was often thought that governments existed first and foremost to protect property, which many contemporaries thought included property in slaves for reasons discussed above.

The clash of these powerfully conflicting ideological and socioeconomic forces affecting slavery, and the obvious sectional divisions of opinion about slavery, meant that there was—and could be—no uniform understanding across revolutionary-era America of the relation between slavery and revolutionary ideals. While widespread Revolutionary era clamor against political enslavement may have created the appearance of a universalizing impulse toward equality or natural rights during the Revolution with irresistible implications for American slavery itself, the political reality was far more modest. The reality was that Americans were divided over slavery, as is clear even if only the differing sectional responses to *Somerset* and the politics of import limitations are considered. Abraham Lincoln's later praise for Jefferson's phrasing in the Declaration of Independence as "subversive" where slavery was concerned fits the historical circumstances well. The groundwork had nevertheless been laid by pre-Revolutionary developments for a strenuous contest among Americans over slavery, but

significantly, it occurred in the pressing context of how to finance and conduct the Revolutionary War. This dispute turned out to be a largely sectional one in which slave states gained important protections for slavery.

*Slavery and Confederation*

Slavery bedeviled efforts to form a permanent continental government under the Articles of Confederation.[143] The political strength of the slave states contributed to the Confederation's pronounced decentralization through its classically federalist structure and to stalemates on the core structural issues of taxation and representation that guaranteed ineffectual government, both features of the Confederation that strongly protected slavery. In addition, the Articles ultimately contained a series of provisions that explicitly protected aspects of slavery against state interference.

The debate over the Articles occasioned the first confrontation between major American political leaders on slavery at the continental level. Slaveholders "won" that confrontation because they were able to threaten convincingly that they would abandon the Confederation over slavery. This allowed slave states to insist that the Confederation government should have no power to control slavery itself, a political solution tailor-made to the newly diverse and often hostile legal environment they faced. But slave states were able to dictate outcomes on a series of related issues that markedly affected

[143] The Articles of Confederation were formally adopted by Congress in November, 1777. Ratified *de facto* by 1779, the Articles were not adopted *de jure* until 1781. Congressional debates show that part of the delay occurred because the colonies thought that the Articles created binding legal obligations on them, which are referred to here as "confederal" law. As a leading scholar concluded, under the Articles, "the states were expected to obey and implement [Congress'] decisions unequivocally." Jack N. Rakove, *The Beginnings of National Politics* (New York: Alfred A Knopf Inc., 1979), 161.

slavery as well: taxes, banning military service by blacks, fugitive slaves, and the slave trade.

Historians agree that disputes over the structure of Congressional representation and confederal "quotas of contribution" (that is, taxation) that implicated slavery were central to the debate over the Articles.[144] Historians have also shown that debate over slavery was strongly influential in shaping major features of the Confederation such as military service obligations and treaty powers. Much less attention has been given to the Confederation's treatment of citizen privileges and immunities and to its ability to enforce the law where slavery was concerned.[145]

There are several reasons why historians have underestimated the protection that the Articles provided to slavery. They have often not fully appreciated just how much protection slavery received from the core structural stalemate on Confederation authority that arose primarily from clashing sectional interests. They have also generally concluded that the Articles of Confederation had no provisions on fugitive slavery.[146] But the sources suggest that slave states successfully sought complete state authority over

---

[144] Merrill Jensen, *The Articles of Confederation* (Madison: University of Wisconsin Press, 1962), 146-148;Rakove, *Beginnings of National Politics*; Robinson, *Slavery in Politics*; Wiecek, *Antislavery Constitutionalism*.

[145] Robinson, *Slavery in Politics*, 131-167; Wiecek, *Antislavery Constitutionalism,* Ch. 2. The discussion here builds on these analyses and adds new evidence from the Articles' legislative history and subsequent events.

[146] Finkelman concludes that the Articles of Confederation contained no fugitive slave provisions. Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (Armonk: M.E. Sharpe, Inc., 1996), 36. See also William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Ithaca: Cornell University Press, 1977), 59, 78.

slavery, as well as confederal controls on fugitive slavery and protection for slave property, in the Articles of Confederation.[147]

The Articles created a new division of political authority over slavery between states and the central government, a form of "pro-slavery" federalism. They restored much of the status quo ante on imperial slavery by limiting state authority over slavery, sharply curtailing the effects of the *Somerset* decision. In so doing, the Articles went beyond what historian William Wiecek referred to as the "federal consensus" on slavery, a consensus that state law alone governed slavery.[148]

The Confederation was a very decentralized form of federalism that gave the Confederation government exceptionally limited authority. The provisions of Article II, proposed by slave state representative Thomas Burke of North Carolina, recognized and protected state sovereignty by preserving to states powers not explicitly delegated to the Confederation. The Articles conferred almost no authority over domestic policy on the Confederation. These provisions meant that the drafters clearly accepted that the regulation of slavery within the new states would remain primarily under state control.[149] But structuring the Confederation also involved a series of other important disputes that fundamentally affected slavery's place in the new federal system.

In debating the Articles, leading Northern and mid-Atlantic delegates asserted that slaves should be deemed members of "confederal" society for purposes of calculating

---

[147] See especially, Emily Blanck, "Revolutionizing Slavery: The Legal Culture of Slavery in Revolutionary Massachusetts and South Carolina," Ph.D. diss., Emory, 2003, discussed below.

[148] Wiecek, *Antislavery Constitutionalism*, 16-17, 57-60. Howard Ohline argues that this consensus did not exist until the 1790s. Howard A. Ohline, "Slavery, Economics, and Congressional Politics, 1790," *Journal of Southern History* 46 (1980): 335-60.

[149] Wiecek, *Antislavery Constitutionalism*, 59.

Confederation state taxation and military service quotas. Slaves' contributions to society should be treated as part of the federal tax and military service base, they argued. They sought to distinguish between the state law status of slaves as property and their status under confederal law. Slave state delegates strenuously resisted this argument, contending that the state law status of slaves as property should determine their character for confederation purposes.

This dispute over the status of slaves was at the center of a debate that occurred on July 30, 1776 over how to fund the Confederation during the Revolutionary War. Samuel Chase of Maryland moved that tax quotas of contribution be fixed by counting only "white inhabitants." Chase argued that including "negroes" effectively would tax the South more heavily on wealth than the North because the North's cattle and horses would be excluded, and "that Negroes in fact should not be considered as members of the state more than cattle & that they have no more interest in it."[150] John Adams of Massachusetts responded to Chase that the "wealth of the state" was being taxed, and that in calculating that wealth, the free or slave status of workers was irrelevant; the issue was whether workers contributed "surplus" to the state's wealth. Adams observed that "the condition of the labouring poor in most countries...is as [painful] abject as that of slaves," but this was irrelevant. Even if "one half of the labourers of a state could in the course of one night be transformed into slaves" they would not make the state poorer or less able to pay taxes.

---

[150] *The Papers of Thomas Jefferson*, ed. J. H. Boyd and others, 32 vols. (Princeton: Princeton University Press, 1950-), 1: 320-321.

The debate broadened to consideration of slavery's burdens on and benefits to Confederation members. James Wilson of Pennsylvania argued that Chase's amendment meant that the North would bear all of the burdens of slavery, while the South received all of its benefits. The South would get to keep the profits of slavery if it were tax exempt, but exclude slaves from military defense quota obligations. Wilson then argued that the South could use free labor, but chose not to. Although "it is our duty to lay every discouragement on the importation of slaves, this amendment would [be] giv[ing] the *jus trium liberorum* to him who would import [them] slaves."[151] Wilson's broadening of the argument was met with the acid response from Thomas Lynch of South Carolina, who had served in the first Continental Congress as well, that if it were to be debated whether slaves were slaveowners' property (which Lynch apparently thought was at issue since the North wasn't proposing to tax its similarly situated chattel property), "there is an end of the confederation."[152]

Lynch's threat of southern defection had long-lasting effects on one very influential member of the Continental Congress, John Adams. Almost immediately after the tax debate, Adams opposed plans to include black troops in New Jersey forces because "S[outh] Carolina would run out of their Wits at the least Hint of such a Measure."[153] Adams was so impressed by the vehemence of the Southern response to Northern arguments on slavery that when he was contacted in 1777 by Massachusetts

---

[151] Ibid. 322. *Jus trium liberorum* were special privileges conferred by Roman law on those who had three legitimate children.

[152] *Journals of the Continental Congress 1774-1789*, ed. Washington C. Ford (Washington: Government Printing Office, 1904-1936) (hereafter, "*JCC* "), 6: 1080.

[153] Wiencek, *An Imperfect God*, 215.

legislators who were planning gradual abolition legislation in Massachusetts and sought Congress's advice about it, he advised them not even to bring it up in the legislature for fear of the Southern reaction.[154] Adams's efforts to keep slavery from becoming a divisive force in the revolutionary government even in the face of strong antislavery sentiment in Massachusetts are powerful evidence of the slave states' newfound bargaining strength in the American revolutionary coalition.

Chase's motion to exclude slaves from the tax base was defeated on August 1, 1776 on a sectional vote of 7-5. However, in late 1777 before completion the Articles were revised to include only land and buildings as the basis for calculating tax quotas, so the slave states ultimately prevailed on the critical tax issue. In mute but unmistakable testimony to slave state political strength, the Confederation was left with a completely unworkable tax system that was never used.[155] Under the Articles, Congressional representation was based on one vote per state, a system which the Southern states generally disliked but could not change.

Slave and Northern states could not agree on a workable taxation and representation system in significant part because of the conflicting effects that slavery had on sectional political calculations. The Articles of Confederation therefore ended up as a set of unworkable, purely expedient *quid pro quo* agreements developed as a wartime necessity under pressure from France. In the Articles' contorted decision-making structure, representation and taxation had no coherent relationship to each other, and neither appropriately reflected the post-Independence distribution of wealth or

---

[154] Sweet, *Bodies Politic*, 115.

[155] The Confederation's tax system was abandoned in 1783. See Chapter 3.

population in America. This inherently unworkable structure (exacerbated by a related unanimity rule) led to repeated Confederation stalemates on fundamental policy issues. This "government by stalemate" left slavery free to develop as an institution under state control without bearing Confederation tax or military burdens (except where voluntarily imposed by states).

The Confederation structure also made effective law enforcement against the slave trade or other aspects of slavery nearly impossible. In early 1777, Congress considered an important proposal to permit the Confederation directly to empower citizens to take up military deserters and bring them to a justice of the peace. In successfully opposing that proposal, Thomas Burke of North Carolina strenuously argued that this power could be exercised only by a state because it was an "act of high dominion" and could be authorized only by a local law that had the consent of the people, and "here he Illustr[at]ed by quoting the case of the Negro Somerset."[156] Burke's shorthand treatment of *Somerset* in this major Congressional debate makes clear that he believed that most delegates were already familiar with that decision, and that he could simply apply its principles to the issue at hand. Burke read *Somerset* as containing a "strong" federalism principle whose implication was that the federal government could never enforce even many of its own important laws, but must act through states to enforce them. Even in the extraordinarily unlikely event that the Confederation was empowered to control some aspect of slavery such as the slave trade, therefore, Burke's position meant that it would be compelled to rely entirely on the states to enforce

---

[156] *Letters of Delegates to the Continental Congress* ("*LDCC*"), 6: 360 (Burke's Notes of Debates February 25, 1777) (parentheses omitted).

Confederation law. Exclusive state enforcement of Confederation law meant that enforcement was very unlikely to be effective in states where those laws were unpopular. Burke's reliance on *Somerset* also effectively conceded, however, that each state had plenary authority to control (or abolish) slavery under its local law. But the story of slavery's impact on the Articles does not end there.

In the Privileges & Immunities Clause (hereafter, "Clause" or "P&I Clause"), the slave states were able to obtain agreement extending this state law legal regime governing slavery extraterritorially for the first time through confederal law. The Clause raised exceptionally contentious issues and its wording changed dramatically during the course of drafting. Several of its provisions added at the last minute dealt with slavery and the slave trade.

Why the Clause was controversial is evident from its original form in the July, 1776 proposal (the "Dickinson draft") reported to the Congress unanimously by a 12 member committee:

> Article VI. The Inhabitants of each Colony, shall henceforth always have the Same Rights, Liberties, Privileges, Immunities and Advantages in the other Colonies, which the said Inhabitants now have, in all cases whatsoever, except in those provided for by the next following Article.
>
> Article VII. The Inhabitants of each Colony shall enjoy all the Rights, Liberties, Priviledges [sic], Immunities and Advantages, in Trade, Navigation and Commerce in any other colony, and in going to and from the Same, from and to any part of the world, which the Natives of such Colony enjoy.[157]

This "Dickinson draft" Clause was breathtakingly expansive, indeed almost "imperial," in scope. It would have created a broad "confederal" law regime that

---

[157] *JCC*, 5: 546-554 (July 12, 1776). The so-called "Dickinson draft" was named after John Dickinson, by then a Delaware delegate, who is generally believed to have been its principal draftsman.

required preservation of the status quo in fundamental areas of the English law of all of the colonies. Under this provision, if slavery were legal in colony "A" at enactment, so that an inhabitant from colony "B" could hold property rights in a slave in colony "A," colony "A" could not deprive inhabitants of colony "B" of those rights in the future. Similarly, the Dickinson draft meant that if states chose to ban slave imports, they could not stipulate that fugitive slaves or "sojourning" slaves would be freed as a result of such an import ban. (For example, the Rhode Island 1774 import ban would have been consistent with these provisions, but the State could not have liberalized its laws). Such "imperial" property law would probably have been desirable from the perspective of John Dickinson, a conservative major slaveholder who was also a lawyer trained at the Middle Temple in London.

The Dickinson draft's aggressive effort to maintain existing law throughout the colonies proved so controversial that the next draft of the Articles completely omitted any Privileges and Immunities articles whatsoever. Historian Merrill Jensen's characterization of the omitted provisions was apt: "the two articles which erased state lines with respect to legal and commercial privileges and rights were likewise omitted."[158] From August, 1776 until the final day in November, 1777 on which the Articles of Confederation were adopted, there was no further public debate on the privileges and immunities issue. Yet immediately before adoption, Congress added a P&I Clause to the Articles.

On October 26, 1777 Congress agreed that each State should be given total, independent authority to prohibit imports or exports of any particular species of "goods,

---

[158] Jensen, *Articles of Confederation*, 139.

wares, or merchandize," and added a proviso to make clear that this authority would preempt the provisions of any treaty.[159] This new authority was clearly intended to permit states to ban slave imports, among other things.[160] Slaves had been regarded as a form of goods (a kind of property) under English law for international trade purposes for nearly one hundred years.[161] State power was thus being sharply expanded compared to the August, 1776 Articles draft, which could have been read to prohibit state bans on the slave trade in the event certain treaties were made. Expanded state authority broadened the potential fugitive slave problem facing the slave states, because state authority could also be used to free fugitives, to prevent slave transit through a state that banned imports or to free such slaves, or to prevent slave sales out-of-state (as Rhode Island did in 1779).[162]

On November 10, 1777, after debate on all substantive Articles was completed, a three member committee chaired by Richard Henry Lee of Virginia, and including James Duane of New York and Richard Law of Connecticut, was appointed to recommend additional necessary articles. On November 13, the Lee Committee proposed seven new provisions.[163] The Lee committee privileges and immunities proposal abandoned the comprehensive effort to use confederal law to "freeze" or limit state law proposed by the

---

[159] Ibid., 177-8.

[160] The treaty power proviso was intended to prevent treaties that "would have prohibited the states from abolishing, regulating, or taxing the international slave trade." Wiecek, *Antislavery Constitutionalism*, 59.

[161] *Opinion of C.J. Holt and Nine Judges*, Public Records Office (GB Natl. Arch.), Colonial Ser. 137/2 (1689).

[162] In 1779, Rhode Island, which had not yet enacted a gradual abolition law, adopted legislation that banned the sale of Rhode Island slaves outside of Rhode Island.

[163] Several of the committees' proposed articles related to Congressional privileges. The remaining articles largely concerned interstate legal disputes, and were intended to create binding confederal law.

Dickinson draft, except in a very few specific instances deemed important enough by the Committee to create confederal law for them.[164]

The final version of what became Article IV, recommended by the Committee and adopted on November 13, contains two sections related to slavery that have largely either been overlooked or whose intent is regarded as uncertain by historians: (1) the provision providing that any fugitive charged with "felony or other high misdemeanor in any State" shall be delivered upon demand of the "Governor or executive power" of the State from which he fled, and (2) the provision regarding Privileges and Immunities.[165]

The first part of these amendments provided:

> If any person guilty of or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

Colonial statutes made slave rebellion a felony. A declaration of outlawry against a fugitive, a statutory remedy used to combat slave flight, would have been regarded as equivalent to a charge of felony or high misdemeanor, since such a declaration permitted the killing of the outlaw with impunity by anyone. Thus the fugitive delivery provisions

---

[164] The delegates rejected one effort to amend the Lee Committee's recommendations, a proposal that demonstrates the broad power over state law that delegates thought the Articles could confer. The rejected amendment was a strong creditor's rights amendment establishing confederal law that would have required all states to permit lawsuits in their state courts to enforce foreign state court judgments against local debtors if the foreign plaintiff provided a suitable bond. This amendment had been proposed to the committee, but omitted from its report.

[165] William Wiecek noted that the P&I Clause "might have been construed" to apply to slave property. Wiecek, *Antislavery Constitutionalism*, 59. Finkelman concluded that "it is difficult to determine" how the Clause applied to slaves. Finkelman, *Imperfect Union*, 31-2. An exception is Alfred W. Blumrosen and Ruth G. Blumrosen, *Slave Nation* (Naperville: Sourcebooks, Inc., 2005), 145-155, which argues for reasons different than those given here that the P&I clause was intended to reject the *Somerset* decision and protect slaveowner property.

of the Articles would often have applied to fugitive slaves. This provision might be thought of, then, as a "proto-fugitive slave clause."

The second part of the amendments provided:

> [T]he free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States...the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, *provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant....*[166]

One specific part of this Privileges and Immunities clause was intended to protect slave property: the proviso that limited a state's power to "prevent the removal of property imported into any State...." This proviso would have been understood to include slaves. Contemporary examples of such usage include Article VII of the Treaty of Paris of 1783, which prevented the British from removing "Negroes or other property of the American inhabitants" from the United States.[167] The Articles proviso qualified a clause premised on the existence of a fundamental legal distinction between free inhabitants and slaves, one that deemed slaves property.

Handwritten drafts of the P&I Clause clarify the evolution of the Lee Committee's views. The language excluding "paupers, vagabonds and fugitives from justice" from the protection of the P&I Clause was a late addition. The Committee thus

---

[166] *JCC*, 9: 907-925 (November 15, 1777) (emphasis added).

[167] "There shall be a firm and perpetual peace between his Brittanic Majesty and the said states....[H]is Brittanic Majesty shall... without causing any destruction, or carrying away any Negroes or other property of the American inhabitants, withdraw...from the said United States..." Paris Peace Treaty of September 3, 1783, Art. VII (for text see: http://www.yale.edu/lawweb/avalon/diplomacy/britain/paris.htm). The Treaty's terminology—"Negroes" for slaves and "other property" reflecting the fact that slaves were also deemed property—was used precisely because it was commonly understood. Its American negotiators included Henry Laurens and prominent opponents of slavery such as Benjamin Franklin and John Jay.

excluded two separate and distinct classes of persons from the clause's protection: 1) slaves and 2) persons who, though nominally free, had by their poverty or criminal behavior forfeited the right to legal protection.[168] The amendment authorized states receiving such excluded persons to deny them legal protections available to free citizens. Fugitive slaves (and paupers) could be denied legal protection (including the right to reside and benefits such as poor relief) both in the state from which they fled *and* in the state to which they fled.

The handwritten drafts also show that the original Committee provision on state laws regarding the movement of property was redrafted by the Lee committee to make it considerably clearer and more emphatic as a limitation on state power. The original draft of the P&I clause had provided that "the people of each state shall have free ingress and egress for their persons and property," but as to "Merchandise" imported for commercial purposes, provided only that it would be subject only to nondiscriminatory taxation.[169] This draft contained no provision protecting the removal of separately imported property.

The later draft of the same provision, recommended by the Lee Committee and included in the Articles, contains a proviso that makes the right to removal of imported property an express limitation on state power regarding trade and commerce.[170] The proviso appears to have been the direct result of incorporating into the original draft a

---

[168] On June 25, 1778, South Carolina delegates moved unsuccessfully to amend this part of the previously adopted P&I clause to limit it to "white" inhabitants. *JCC*, 11: 652-3 (June 25, 1778). Efforts by South Carolina to amend this provision so that the P & I Clause would not protect free blacks were also defeated. Id. South Carolina's efforts to amend the Articles were pointless unless the state believed it would be legally bound by them.

[169] *Papers of the Continental Congress, 1774-1789*, (Washington: National Archives and Records Service, General Services Administration, 1971) (hereafter, "*CCP*"), Roll 61, M247.

[170] Ibid.

proposed amendment also found in the Archives and written in a different hand, which proposed a separate restriction to prohibit any state from using its authority to restrain an owner from "conveying" his property to any other state. The separate amendment drafter's apparent purpose in proposing this comprehensive amendment was to cover imported property like slaves. Slaves were probably the single most valuable form of moveable property at the time. Slaves were also quite probably the only moveable form of property at the time whose export a state would have had an interest in preventing. The separate amendment was thus a direct effort to negate the effect of the *Somerset* decision using confederal law.[171]

The wording of the final Committee version, though slightly different, made it plain that that was also the intent of the Articles proviso. This conclusion is reinforced by the fact that the handwritten draft of the Committee version of the proviso struck through the word "Goods" and replaced it with the broader word "Property," which would unquestionably have included slaves at the time.[172]

Thus, the P&I Clause proviso limited a state's power to control the removal of slaves by their owner, whether present as a sojourner or as an importer. The Articles provisions on property removal rejected the principle of interstate comity and denied states the full authority over slavery conferred by the principles of *Somerset*. The P&I

---

[171] The authorship of this separate amendment is uncertain, but informal comparison of the handwriting of the draft with the handwriting of approximately twenty-five other delegates suggests that the author was Thomas Burke of North Carolina, who represented a substantial slaveowner constituency and understood *Somerset's* implications for local authority over slavery (see text at n. 156).

[172] *CCP,* Roll 61, M247 (partially illegible separate sheet following committee report language; separate handwritten version of Committee proviso language). Noted legal historian Charles Warren also reached the conclusion that this proviso protected slave property in Charles Warren, *The Making of the Constitution* (Boston: Little, Brown & Co., 1928), 561.

proviso was also intended to deny state authority to prevent transshipments of imported slaves, which occurred frequently in certain states such as Rhode Island.[173]

Taken together, the Article IV provisions maintained the preexisting common law right of slave recapture against possible state legislation freeing fugitive slaves. A fugitive slave would often be a fugitive from justice, subject to delivery at the request of another state's executive authority, or would be the property of an owner subject to removal. That the Articles were amended to contain specific provisions directed to the issue of fugitive slaves, slave transit and slave reexport, when virtually all other provisions requiring state law to conform to confederal law were omitted by Congress, demonstrates the considerable importance placed on the problem of interstate slave movement by the delegates. The lack of debate on the proposal (particularly when contrasted to Congress' rejection of the proposed confederal creditors' rights amendment) indicates the high degree of consensus on that problem.

The very significant effects that the Articles of Confederation's provisions had on fugitive slavery can be seen from historian Emily Blanck's analysis of a 1783 controversy between South Carolina and Massachusetts regarding nine South Carolina slaves. These slaves were ultimately captured by the Boston-based privateers *Hazard* and *Tyrannicide* after first having been taken from South Carolina by British ships in 1779. The South Carolina owners sought to regain the slaves four years after their capture. At the slaveowners' request, the captured slaves had been confined to jail in Massachusetts, awaiting shipment to their owner-claimants in South Carolina.

---

[173] The problem of slave importation followed by reexportation was covered by the 1774 Rhode Island import ban statute.

But the slaves were released by Massachusetts Chief Justice William Cushing in 1783 in *Affa Hall et al. v. Commonwealth* on the ground that they had committed no crime in Massachusetts and therefore could not be confined.[174] The Governor of South Carolina then wrote to the Governor of Massachusetts, John Hancock, protesting vigorously that Cushing's ruling was a violation of the Articles of Confederation because it impaired the rights of South Carolina residents to regain their slave property. Cushing was asked to respond to this contention, and agreed that the Articles protected slaveowner rights, stating that the South Carolina owners still had an unimpaired private right of recapture of the runaway slaves in Massachusetts and to their removal, which Massachusetts would recognize; they were simply not entitled to have the slaves jailed as part of that recapture.[175] The South Carolina-Massachusetts controversy demonstrates clearly that contemporaries understood that the Articles of Confederation were intended to protect slaves as property throughout the Confederation.

---

[174] Massachusetts had judicially abolished slavery by 1783. In any event, Justice Cushing's ruling would have accorded with a narrow reading of *Somerset*.

[175] Emily Blanck, "Seventeen Eighty-Three: The Turning Point in the Law of Slavery and Freedom in Massachusetts," *The New England Quarterly* 75, no. 1 (2002): 24-51, 31-38, 36. Blanck asserts (citing no evidence) that the Articles were not drafted to cover this case, but recognizes that courts could have applied the Articles provision to cover it. Ibid., 38. As she notes, it is quite remarkable that Cushing did not deem the slaves free after they had spent four years in Massachusetts. She concludes that Massachusetts was unwilling to protect fugitive slaves before the adoption of the Constitution's Fugitive Slave Clause but after abolition there occurred.

*Conclusion*

The collapse of imperial slavery during the decade from 1770 to 1780 led to the first phase of the creation of a new political foundation for American slavery. The decade's disruptions caused a series of changes in the politics of slavery, with mixed results. Some American colonies were moving to set new boundaries for slavery even before the Revolution began, but in others, the Revolution was fought in part to protect slave property and local control over it.

As the Northern states began to take tentative steps toward gradual abolition, the public and legislative reaction to such proposals clearly foreshadowed the political difficulties facing such abolition efforts. Northern legislatures such as New Jersey's rejected efforts in the 1770s to liberalize slave manumissions because of fears of the social and political consequences of such liberalization. Vermont agreed to end slavery for persons of majority age. Rhode Island recognized the desirability of preventing its slaveowners from selling their slaves outside of Rhode Island. For differing reasons, the colonies were generally opposed to continuing slave imports, but the Confederation government imposed no prohibitions on American participation in the slave trade.

The confrontation between Northern and slave states over slavery's role in the Confederation gave clear evidence of power of the slave states, as well as of the major political weight of the institution of slavery as an element in structuring the revolutionary government. Slavery benefited significantly from the Confederation's strong federalism.

Slavery's political influence led to confederal restrictions on state power designed to protect slavery and the slave trade. It also led to a permanent Confederation stalemate on issues of taxation and representation.

# 2

# ABOLITION, MANUMISSION, AND THE CONFINES OF BLACK FREEDOM

This chapter offers a new account of the social and political boundaries of Northern abolition and Southern manumission law liberalization during the period 1780-1820. It considers the abolition process in Pennsylvania, Massachusetts, and New York and manumission reform in Virginia as representative examples. The chapter examines how states approached the problem of whether and how slaveholders should be compensated for their slaves. It considers how Northern courts addressed abolition as a constitutional issue, which had major implications for the question of compensation. The chapter also examines who paid the costs of abolition. It then considers how abolition laws were enforced, analyzing Pennsylvania as a representative example and comparing it with information about Massachusetts, New York and New Jersey enforcement. The chapter considers how Northern states dealt with the problem of fugitive slaves during abolition. It concludes by examining how and why the Northern states redefined black freedom during the abolition process.[1]

---

[1] Some recent historians of slavery have placed abolition in the context of northern race relations. John Wood Sweet argues that abolition took place in a northern society that was already strongly influenced by racial beliefs, and that those beliefs limited abolition's potential to alter the socioeconomic situation of free blacks. Joanne Pope Melish concludes that the abolition process held out to whites the promise of "black removal" to create a white republic. She contends that the subordinate status assigned to free blacks by law contributed to whites' view of them as degraded and inferior. Melish sees slavery as a system of social control over blacks, and argues that abolition was intended to continue this sytem. John Wood Sweet, *Bodies Politic: Negotiating Race in the American North, 1730-1830* (Baltimore: Johns Hopkins Press, 2003); Joanne Pope Melish, *Disowning Slavery: Gradual Emancipation and "Race" in New England, 1780-1860* (Ithaca: Cornell University Press, 1998). See also Robert J. Steinfeld, "Review, 'Disowning

*"What is Justice?": The Purposes, Costs and Consequences of Abolition*

In August, 1785, Thomas Jefferson wrote from Paris to Dr. Richard Price, a prominent English dissenting clergyman, concerning a pamphlet written by Price that contained an attack on slavery. In his letter, Jefferson provided a thumbnail sketch of public opinion about ending slavery in different parts of America. He thought that abolition in the North was inevitable: "emancipation is put in such a train that in a few years there will be no slaves Northward of Maryland." Southern abolition was a different matter. Jefferson was pessimistic about the prospects for abolition in Maryland. As for Virginia, he hoped that a younger generation trained in "the principles of liberty" would "turn the fate of this question," which he described as "the interesting spectacle of justice in conflict with avarice and oppression."[2]

As events unfolded, however, abolition in the North was not nearly as smooth a process as Jefferson expected. Nearly 70 percent of all Northern slaves in 1770 lived in jurisdictions where gradual abolition would be bitterly contested. Well over half of all slaves in the Northern United States lived in two states, New York and New Jersey, where no gradual abolition laws were even adopted until a generation after the American Revolution began. In those two states, there were more slaves in 1790 than in 1770, and there were almost as many slaves in 1810 as in 1770. And the struggle for Northern abolition was not to be a clear contest between justice on the one hand and avarice and oppression on the other.

---

Slavery: Gradual Emancipation and "Race" in New England, 1780-1860,' by Joanne Melish," *Law and History Review* 18 (2000): 470-74.

[2] TJ to Richard Price, August 7, 1785, *The Papers of Thomas Jefferson*, ed. J. H. Boyd and others, 32 vols. (Princeton: Princeton University Press, 1950-), 8: 356.

Each state that undertook the abolition of slavery faced a series of difficult and often precedent-setting questions: should slaveowners be compensated for their slaveholdings? If so, who should pay that compensation, and how much? Should fugitive slaves be protected or freed? Should slaveowners be allowed to transit a free jurisdiction with their slaves? Should slaveowners be allowed to sojourn in free jurisdictions with their slaves for some period of time, and then compel slaves to leave with them? How should the kidnapping of blacks who were free, or by law would become free, be addressed? Should citizens be prevented from engaging in the foreign or domestic slave trades? Should slaveowners be prevented from selling their slaves out of the state? Should slaveowners be allowed to separate families? What social and civil rights should free blacks possess? Who would be responsible for supporting indigent former slaves?

It is quite striking that most of the Northern states answered many of these questions in much the same way. In all of the states that adopted legislation, there was agreement that slaveowners should be compensated for their slaves, and that slaves and their children should provide that compensation through decades of wageless labor.[3] Most of the states adopted kidnapping laws and out-of-state sale bans, but often only years after adopting abolition legislation, thus giving slaveowners time to export slaves and their children without facing criminal sanctions.[4] Most Northern states sought to require slaveowners to provide poor relief assistance for indigent slaves and former

---

[3] As discussed below, in Massachusetts, where slavery was abolished through judicial action, it is likely that some slaveowners were able to obtain compensation for their slaves by selling them.

[4] The northern states engaged in abolition all barred slave imports, and by the mid-1790s, had barred participation in the slave trade by their citizens.

slaves. Virtually all, if not all, of the Northern states appear to have declined to protect fugitives, well before the adoption of the Constitution's Fugitive Slave Clause. All of the Northern states allowed slave transit, and slaveowner sojourns, through at least 1821.[5] Most Northern states imposed some discriminatory restrictions on African American civil rights, and these restrictions actually grew over time in several states.

Why did the Northern states tend to address the problems of abolition in much the same way? The argument made here is that the political balance of power on the issue of abolition in most Northern states after the Revolution was held by nonslaveholders. In Pennsylvania and New England, nonslaveholders were a voting majority after the Revolution.[6] Although slaveholder voters may have been in the majority in New York and New Jersey in 1770, by 1790 nonslaveholder households clearly predominated in those states, and slaveholder voters held only a slim and rapidly decreasing voting majority, if any. The majority of nonslaveholders were neither ardent abolitionists nor direct economic beneficiaries of slavery. Abolition was "unimportant, economically and racially, to most Northern citizens."[7] The need to accommodate nonslaveholder views in

---

[5] On legal issues regarding slave transit and protection of fugitive slaves, extensive use has been made here of the work of Paul Finkelman, particularly his comprehensive survey of the law in this area, Paul Finkelman, *An Imperfect Union: Slavery, Federalism and Comity* (Chapel Hill: UNC Press, 1981). The fugitive slave issue for Massachusetts was recently analyzed in Emily Blanck, "Seventeen Eighty-Three: The Turning Point in the Law of Slavery and Freedom in Massachusetts," *The New England Quarterly* 75, no. 1 (2002): 24-51.

[6] As appendix B shows, a conservative estimate would be that by 1780 no more than 30 percent of Pennsylvania heads of households eligible as voters would have been slaveholders, while a minimum of 70 percent of the state's eligible voters would have been nonslaveholders. The proportions of nonslaveholding households, and nonslaveholding eligible voters, in the New England states in 1780 would have been nearly as high as they were in Pennsylvania, and in some cases even higher.

[7] Freehling, "The Founding Fathers, Conditional Antislavery and the Nonradicalism of the American Revolution" (Ch. 2 of *The Reintegration of American History: Slavery and the Civil War*), 17.

resolving controversies between slaveowners and abolitionists strongly influenced abolition's course.

Nonslaveholder attitudes toward abolition ultimately reflected their own interests as well as those of slaves and society generally. As a result, nonslaveholders' views on abolition sometimes differed markedly from those of slaveholders and abolition supporters. For example, in 1795 Vice President John Adams, a Northern nonslaveholder, described his reasons for rejecting the feasibility of a gradual abolition proposal for Virginia made by the prominent attorney St. George Tucker. Adams's argument focused almost entirely on the social costs of poor relief and crime to both freed slaves and society in general.

> If I should agree with him [Tucker] in his maxim, "Fiat justitia ruat coelum," the question would still remain, What is justice? Justice to the negroes would require that they should not be abandoned by their masters and turned loose upon a world in which they have no capacity to procure even a subsistence. What would become of the old? the young? the infirm? Justice to the world, too, would forbid that such numbers should be turn'd out to live by violence, by theft, or fraud.[8]

The result, from Adams's point of view, was that it made no policy sense to do anything more about Southern abolition than to end the slave trade and to ameliorate slave conditions until the white population was sufficiently larger than the black population to make gradual abolition with slaveowner consent possible.[9] This chapter argues that nonslaveholder concerns about the same types of social costs Adams referred to in considering Virginia abolition also played an important role in shaping the terms of Northern abolition.

---

[8] "Fiat justitia ruat coelum" was the Latin expression used by Lord Mansfield during argument in *Somerset's Case*, in which he famously warned the parties that if they did not agree to a compromise, he would "let justice be done though the heavens fall."

[9] John Adams to Dr. Jeremy Belknap, October 23, 1795, reprinted in *MSL*, 416.

Historians Robert Fogel and Stanley Engerman asked: why did manufacturers, lawyers, merchants and landlords who understandably worried about limiting property rights, as abolition would, still endorse antislavery? They famously answered that this support was a result of the new moral values of the Revolution, but that it was "bargain price" philanthropy. As they put this, nonslaveholders were prepared to purchase "freedom for slaves," but only at a "very moderate cost."[10] This chapter contends that the price nonslaveholders were willing to pay was even lower than Fogel and Engerman thought.

To begin with, Fogel and Engerman's answer to the question about the basis for nonslaveholder support for abolition underestimates the benefits that Northern states expected to gain from it. There were various motives for antislavery support among Northern nonslaveholders, and revolutionary ideology, morality, benevolence and racism each played a role. But the experience of several states discussed below suggests that the rising Northern commercial elite also particularly wanted to remove slavery as an obstacle to the development of an increased supply of white labor, particularly immigrant labor, at a time of rising demand for urban labor and of speculative land development. This can be seen from a review of the circumstances surrounding the passage of major Northern abolition statutes, and the concurrent reforms Northern states made in other key labor laws.

---

[10] Fogel and Engerman, "Philanthropy," 401.

In 1780, the Pennsylvania legislature passed the first American state legislation providing for the gradual abolition of slavery.[11] The Act of 1780 created a scheme of post-nati abolition. Existing slaves would remain slaves if properly registered; their children would be deemed indentured servants and be freed at a specified age. The legislation was adopted after delay and extensive public debate. Even after considerable compromise, the legislature's vote on adoption was 34-21. A disproportionate share of the support for the legislation came from the Philadelphia area, while disproportionate opposition to it came from western and rural areas where there were concentrated slave populations.

Even in Pennsylvania, often thought of as the center of early antislavery activism, abolition was a contentious process. The 1780 Act's original provisions narrowly escaped major amendment in a later legislature, and ultimately permitted slaveowners in one part of Pennsylvania additional time to register (and thus keep) their slaves.[12] At the end of the eighteenth century many Pennsylvania residents, particularly in rural Pennsylvania, either supported slavery or were hostile to blacks or indifferent to their fate. The poignant 1789 letter from the newly formed Washington, Pennsylvania abolition society to the Pennsylvania Abolition Society, admitting that for nearly a decade the Washington society's members had remained silent because of local public support for slavery while

---

[11] *An Act for the Gradual Abolition of Slavery* (March 1, 1780) in Alexander J. Dallas, ed., *Laws of the Commonwealth of Pennsylvania*, vol. 1 (Philadelphia: Hall & Sellers, 1791-1801), 838-842. For a detailed history of the abolition of slavery in Pennsylvania, see Gary B. Nash and Jean R. Soderlund, *Freedom by Degrees: Emancipation in Pennsylvania and its Aftermath* (Oxford: Oxford University Press, 1991), 111, *passim*. Arthur Zilversmit also provides an excellent account of Pennsylvania abolition. Zilversmit, *First Emancipation*, 124-137.

[12] Zilversmit, *First Emancipation*, 133-7.

the 1780 Act was repeatedly violated there, amply testifies to continuing pro-slavery sentiment.[13]

The 1780 Act was a series of compromises between antislavery advocates and the legislative majority which had important effects on black freedom. To mollify slaveowners, the Act had more onerous provisions than other Northern abolition statutes in terms of the length of time required for abolition. The negotiated increase in the age at which slaves' children were to be freed alone probably deprived African American laborers of approximately $50 million in income in today's dollars, since the revised legislation required about 35,000 additional person-years of unpaid forced labor. The Act's provisions for substantial increases in black civil rights meant that it was facially among the most progressive of the Northern statutes. But the statute contained important loopholes and had no meaningful state or private enforcement provisions, as discussed below.[14] The Act still proved so controversial that a serious effort was made to repeal it during the legislative term succeeding its adoption.

Why was Pennsylvania the only state to take on the abolition issue during the Revolutionary War? One important clue is that the Act discriminated against Tory slaveholders. Its mandatory slave registration system was designed, among other things, to automatically free the slaves of absent Tories while protecting those of Patriots. Historians Gary Nash and Jean Soderlund conclude that Pennsylvania slavery was

---

[13] Letter from Washington Abolition Society to Pennsylvania Abolition Society, February 17, 1789, in *Papers of the Pennsylvania Abolition Society* (Philadelphia: Historical Society of Pennsylvania)(Committee of Correspondence). And see generally Nash and Soderlund, *Freedom by Degrees.*

[14] The Pennsylvania Act as originally proposed had provided that afterborn slave children would be freed at a much earlier age—eighteen for females, and twenty-one for males, but abolitionists were forced to agree to longer servitude to provide what slaveowners deemed full compensation for their property.

declining before the Revolution. It is also generally agreed that significant numbers of slaves left with Tories or were taken by the British. By 1780, the slave population in the Philadelphia area had declined by more than half from 1770 levels to 539 slaves.[15] A strong political argument could therefore have been made that the legislature should not alienate potential Patriot rural support by pressing for abolition (an argument that appears to have carried weight in other states like New Jersey). The Act's history suggests that it was in part a symbolic wartime political statement.[16]

The sharp changes in the statutory preamble between the originally proposed gradual abolition legislation and the final Act indicate that the legislature was acutely aware of the political implications of its actions. The originally proposed preamble attacked slavery as unchristian; such references were deleted in the final statute. The originally proposed preamble asserted that slavery was detrimental to morality, arts and industry; these references were deleted in the final Act. Instead, the Act's preamble portrayed abolition as progress toward enlightenment and civilization of a kind that Americans—but not the British tyrants—were capable of. But the drafters of the Act had expressed their views honestly before the statute was attacked by proslavery forces, so their first preamble provides important clues to their motives. The Act implemented established prewar Pennsylvania labor policy.

For the period before 1775 in Pennsylvania, Nash and Soderlund argue that the "renewed supply of white workers, [and] the £10 import duty on slaves" were important

---

[15] Nash and Soderlund, *Freedom by Degrees,* 18 (Table 1-4).

[16] Ibid., 103.

factors in slave population decline.[17] Nash and Soderlund conclude, therefore, that the Act itself had relatively little to do with the decline of slavery in Pennsylvania. Their argument also provides strong evidence regarding the motives that prompted at least some of the support for antislavery legislation.

The history of Pennsylvania slave import duties, which increased from 1761 onward, shows that as a matter of policy Pennsylvania aggressively sought to block slave imports. As Nash and Soderlund noted, there are indications that by 1770, in the face of substantial German and Irish immigration, slave imports had essentially ceased. In Philadelphia, according to historian Shane White, a "gradual transition to a system of capitalist labor relations" was occurring in which the percentage of bound labor would fall from about forty percent of the work force in the mid-eighteenth century to "virtually nothing in 1800."[18] The result was that artisans increasingly drew on "the large pool of unemployed recent immigrants" to satisfy their labor needs.[19]

The fact that the Pennsylvania legislature nevertheless sought to impose a prohibitive £20 slave import duty in 1773 makes clear that they wanted firmly to discourage slave imports and also wanted to publicize the colony's policy. The proposed duty was so high that it seems clear that it was chosen instead of an outright ban on imports because Pennsylvania leaders anticipated that an outright ban would not be accepted by British authorities, while a high duty might be. The import policy was intended to protect existing white laborers and to encourage additional white

---

[17] Nash and Soderlund, *Freedom by Degrees*, 103.

[18] Shane White, *Somewhat More Independent: The End of Slavery in New York City, 1770-1810* (Athens: University of Georgia Press, 1991), 36.

[19] Id.

immigration, which Pennsylvania's leaders thought slavery would discourage. Historian Gavin Wright sees concerted efforts to encourage growth through free labor immigration as a major aspect of Northern free state social policy during this period, one that began even before the Revolution.[20]

White ethnic immigration resumed shortly after the conclusion of the Revolutionary War. Pennsylvania legislated in 1785 to improve the conditions of German indentured servant immigration, and in 1788 to prevent white convict immigration. Historian William Miller argues that this legislation—and similar legislation adopted in New York—was evidence of the decline of the exploitative transatlantic white servant trade. The decline of that trade was the product of social and economic factors unrelated to the Revolution that, among other things, "mobilized free labor in the North...."[21] These legislative changes, together with restrictions on the terms and conditions under which whites could be indentured, were intended to encourage the growth of the white immigrant labor supply, which Pennsylvania leaders clearly preferred to an increase in slave imports on virtually any terms. Pennsylvania's actions were part of a broader pattern of Northern labor legislation favoring white immigration.

Historian Robert Steinfeld showed that in the late eighteenth century other Northern states also restricted the maximum terms of bound labor, particularly indentured servitude, and restricted masters' powers. In Connecticut, by 1795, nonslaves could be indentured or apprenticed on terms that permitted a master's coercion only if they were minors or "poor debtors...assigned in service." Vermont prevented all persons from

---

[20] Wright, *Slavery and American Economic Development*, 33.

[21] William Miller, "The Effects of the American Revolution on Indentured Servitude," *Pennsylvania History* VII, no. 3 (1940): 131-141, 136.

serving as servants and apprentices after the age of twenty-one (eighteen for females), except in cases of consent after the age of twenty-one, or by law for payment of debts or similar causes. In 1788, New York limited indentured service to minors and to immigrants, and in the case of immigrants, restricted the length of bound service to four years. In 1793, the Pennsylvania courts held that native-born minors could only be bound as apprentices. In 1795, Massachusetts limited bound labor to minors. Throughout the North, statutory efforts were being made by the end of the eighteenth century to eliminate the ability of masters to impose bound servitude on laborers, and to make free labor the only option legally available to employers.[22] In short, Pennsylvania's efforts to encourage white immigration were part of a similar pattern throughout the Northern states after the Revolution.

A comparison of Pennsylvania abolition with abolition in Massachusetts and New York confirms that slavery was abolished there as it became economically marginal, but also illuminates important political dimensions of abolition. As one historian aptly observed, the process by which slavery was abolished in Massachusetts is "shrouded in mystery."[23] However, it seems clear that the judicial process that led to abolition was the polar opposite of the representative political process in Pennsylvania, making it a good basis for comparison.[24] For several decades now, historians have debated how and why

---

[22] Robert J. Steinfeld, *The Invention of Free Labor* (Chapel Hill: Univ. of North Carolina Press, 1991), 129-135.

[23] Robinson, *Slavery in Politics,* 24.

[24] An abolition bill had been debated in the Massachusetts legislature in 1767, but failed. Letter, Samuel Dexter to Dr. Jeremy Belknap, February 23, 1795, *MSL*, 385.

slavery ended in Massachusetts, and these issues will not be revisited here except to sketch background essential to permit understanding of the abolition political process.[25]

The most recent historian to review this issue, Emily Blanck, concludes that slavery in Massachusetts was ended in 1783 by the charge given to the jury in *Commonwealth v. Jennison*. *Jennison* was a criminal prosecution brought against a master for assault and false imprisonment against a man he claimed to be his slave.[26] The master's defense was that as a matter of law he could not have committed the charged crimes in 1781 against the victim because the victim was a slave.[27] The Chief Justice of the Massachusetts Supreme Judicial Court, William Cushing, instructed the jury to ignore the question whether the slave had been freed by prior action of an owner because slavery had been abolished by the provisions of the 1780 Massachusetts Constitution's "free and equal" clause, and the defendant, Jennison, was convicted. As Blanck recognized, however, this decision left a variety of unanswered questions, such as how Massachusetts would handle questions regarding fugitive slaves and slave transit.

---

[25] George H. Moore, *Notes on the History of Slavery in Massachusetts* (New York: Negro Universities Press, div. Greenwood Publishing Corp., 1866 repr. 1968); William O'Brien, "Did the Jennison Case Outlaw Slavery in Massachusetts?," *Willam and Mary Quarterly* 17 (1960): 219-41; John D. Cushing, "The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the 'Quock Walker Case'," *American Journal of Legal History* (1961): 118-44; Zilversmit, *First Emancipation*, 103-105; Arthur Zilversmit, "Quok Walker, Mumbet, and the Abolition of Slavery in Massachusetts," *Willam and Mary Quarterly* 25, no. 4 (1968): 614-24; Robert Spector, "The Quock Walker Cases (1781-1783)--Slavery, Its Abolition and Negro Citizenship in Early Massachusetts," *Journal of Negro History* 53, no. 1 (1968): 12-32; Aloysius Leon Higginbotham, *In the Matter of Color: Race and the American Legal Process: The Colonial Period* (New York: Oxford University Press, 1978), 91-98; Emily Blanck, "Revolutionizing Slavery: The Legal Culture of Slavery in Revolutionary Massachusetts and South Carolina," Ph.D. diss., Emory, 2003; Emily Blanck, "Seventeen Eighty-Three: The Turning Point in the Law of Slavery and Freedom in Massachusetts," *The New England Quarterly* 75, no. 1 (2002): 24-51.

[26] Blanck, "Seventeen Eighty-Three," 25-31. The prosecution against Jennison followed several years worth of inconclusive civil litigation related to the same transactions and occurrences. Collectively, these cases are commonly known as the "Quock" (sometimes "Quok") Walker cases, after the name of the victim.

[27] The prosecution contended that the victim had been freed by a prior owner and was not a slave.

During 1783, when *Jennison* was being tried, the Massachusetts legislature was considering abolition legislation. Yet in a state where slavery had been legal until at least 1780 (as an 1808 court decision pointed out), the legislature was considering a bill that would have declared that slavery had never been legal in Massachusetts.[28] This proposed legislation was a complete turnabout from the proposed state Constitution of 1778, which expressly recognized slavery (and was rejected by voters). Not surprisingly, Massachusetts slaveowners responded by seeking legislative compensation for their slaves, and the legislation would have provided that as well, in addition to providing economic support for indigent African Americans freed by the bill. The legislation stalled and then died in the state Senate, after having passed the Assembly, and *Jennison* was decided.

As a result, Massachusetts became the first—and only—state with a significant slave population to decree total, immediate, uncompensated abolition. Abolition occurred without any meaningful public dissent from Massachusetts slaveowners, who, it must be thought, saw the error of their ways and mended them at their own expense. By the 1790 census, Massachusetts citizens reported that they held no slaves, despite the fact that at the end of the Revolution there should still have been several thousand slaves in Massachusetts, so that all Massachusetts slaves and their children had all supposedly been freed in seven years.[29] What does this abolition process—completely

---

[28] *The Inhabitants of Wichendon, Plaintiffs in Error v. The Inhabitants of Hatfield*, 4 Mass. 123; 1808 Mass. Lexis 29; Tyng 123 (Mass. 1808). The 1783 legislation is described in Robinson, *Slavery in Politics,* 26-28.

[29] There were still some slaves living in Massachusetts in 1790. Blanck, "Seventeen Eighty-Three," 30; Sweet, *Bodies Politic,* 248-9.

uncharacteristic of other states that had any significant number of slaves—tell us about the actual political history of abolition in Massachusetts?

It is generally agreed that there was strong public sentiment against slavery in post-Revolutionary Massachusetts, particularly after many Tory slaveowners there fled. Blanck contends that slaves there had substantial legal protections available to them prior to the Revolution, which included rights to sue, petition, and serve as witnesses.[30] Pre-Revolutionary Massachusetts juries were inclined to grant slaves their freedom in close cases. For these reasons, it does seem reasonable to conclude, as some historians have, that after the Revolution many Massachusetts slaves were freed voluntarily, negotiated their freedom with their masters directly, or ran away. In other words, the Revolution served to accelerate slavery's disintegration in Massachusetts, which was already well under way before the Revolution.

But it also seems likely that there is merit to John Adams's belief that slavery was extremely unpopular with Massachusetts white workers who opposed black slave labor competition. As Adams vividly expressed this, "the real cause [of abolition] was the multiplication of labouring white people, who would no longer suffer the rich to employ these sable rivals so much to their injury....[If slavery had been permitted, whether in Europe or Massachusetts] "the common white people would have put the negroes to death, and their masters too, perhaps." Adams also thought that contemptuous treatment by whites made black slaves "lazy, idle, proud, vicious, and at length wholly useless to their masters, to such a degree that the abolition of slavery became a measure of

---

[30] Blanck, "Revolutionizing Slavery," Ch. 3.

oeconomy."[31] Slavery died out in Massachusetts, Adams thought, because the Revolution permitted Massachusetts citizens to act on their previously held views that it was politically, economically, and socially marginal there.

By judicially abolishing slavery, Massachusetts avoided a divisive debate over compensation for slaveowners and avoided burdening nonslaveholder taxpayers with compensation costs. A generation of Massachusetts politicians learned a lasting lesson from judicial abolition: the easiest way to "abolish" slavery was to avoid confronting any of the difficult issues it presented in a public representative forum. Like nearly all other "national" politicians of the late eighteenth century in their own states, John Adams was largely "missing in action" during the abolition process in Massachusetts, and thus avoided the need to take a stand on a locally and nationally divisive issue. Abolition through judicial decree also meant that there was no need for public education, or for a concerted effort to build public support for a contested law.

Historian Donald Robinson observed that abolition in Massachusetts was politically very difficult, because the abolition decision had to be made by elite judges with very limited political accountability.[32] Not everyone agreed that judicial abolition had been appropriate. In 1795, when asked about the abolition process, leading Massachusetts Judge James Winthrop said that the state Constitution had been misconstrued, and several modern historians have agreed with him. In Winthrop's view,

---

[31] John Adams to Dr. Jeremy Belknap, March 21, 1795, in *MSL*, 402; discussed in Sweet, *Bodies Politic,* 253.

[32] Robinson, *Slavery in Politics,* 28-9.

Massachusetts citizens had been wrongfully deprived of lawfully acquired property.[33] It is likely that some Massachusetts slaveowners took advantage of sympathetic views such as Winthrop's to sell their slaves out of state both before and after 1785, when such kidnapping was explicitly but ineffectually made criminal (discussed below).

By 1785, abolition had become a significant political issue in New York. In that year, gradual abolition legislation was extensively considered by the New York legislature, but not adopted. The debate over that legislation makes clear that abolition legislation was being considered in an altered political environment, where public support for slavery had lessened, but that concerns about the effects of abolition were nevertheless politically very influential with nonslaveholders.

When the New York legislature passed a bill in 1785 to abolish slavery gradually, it provided as a condition of abolition that the right to vote should be denied to all blacks.[34] The New York Council of Revision led by John Jay then vetoed the legislation. It sent the legislature a sharply worded lecture on the inseparability of emancipation and civil rights, arguing that the principles of the Revolution and enlightened social policy dictated that blacks must be given the right to vote as part of their freedom.[35] In response, the Senate overrode the veto, but the bill failed in the Assembly.

---

[33] James Winthrop to Dr. Jeremy Belknap, March 4, 1795, in *MSL*, 389-90. Arthur Zilversmit concludes, after reviewing the history of the proposed Massachusetts constitution of 1778 and its constitution of 1780, that the Court's decision in *Jennison* probably reached a result that the constitution's drafters never intended. Zilversmit, *First Emancipation,* 112-13, 115. Robinson reaches the same conclusion. Robinson, *Slavery in Politics,* 26-7.

[34] The Assembly had proposed to deny outright to blacks, or to permit only on a highly discriminatory basis to them, a series of civil rights, including testimony, jury service, racial intermarriage, and officeholding. The Senate objected to all of these proposals except black disfranchisement. Edgar J. McManus, *A History of Negro Slavery in New York* (Syracuse: Syracuse University Press, 1966), 162-5.

[35] One historian termed the Council's actions "disingenuous." Duncan J. MacLeod, *Slavery, Race, and the American Revolution* (Cambridge: Cambridge University Press, 1974), 142 n. 105.

Based on the New York bill's legislative history and the responses of supporters and opponents, there is reason to think that the abolition bill's linkage between black emancipation and black civil rights had been created by abolition opponents because they hoped that linking the issues would kill the legislation. As one abolitionist wrote, those who had succeeded in creating this linkage "exceeded the Devil, their father, 'in wickedness and deceit.'"[36] A secular way of looking at these tactics, however, is that the slaveowners had successfully appealed to a pivotal group of nonslaveholders who were at least as concerned about the social consequences of abolition as they were about achieving abolition itself. In the event, the linkage tactics delayed the beginning of abolition for fifteen years. The scope of black freedom and black political rights remained contentious issues for the next forty years in New York.

When abolition did occur in New York in 1799, the state's new willingness to permit abolition was probably a result of changes in the New York economy after the Revolution. Historians of slavery in New York agree that in the last third of the eighteenth century, the New York economy was changing in ways that changed the economics of slavery. Edgar McManus argues that a rapid increase in the free labor supply in New York, particularly during the period after 1770, made slavery "relatively uneconomic," because slaveowners bore the "continuous expense of maintaining slaves during periods of idleness," while employers did not. Therefore, when wage rates fell, slavery became an "obsolete and expensive system of labor."[37] Shane White argues that

---

[36] Zilversmit, *First Emancipation*, 148-9 (quote at 149).

[37] Edgar J. McManus, *A History of Negro Slavery in New York* (Syracuse: Syracuse University Press, 1966), 172-3.

slavery's economic—and political—position changed because of a "long-term decline in the use of slave labor by New York artisans...."[38] White concludes that the process paralleled the similar process that occurred at roughly the same time in Philadelphia described above.

White's conclusion on the nature of New York's changing economy appears similar to that of Nash and Soderlund for Pennsylvania. In New York, slaves increasingly became servants for the wealthy; as historian Jack Pole once said of "near slaves" in England, they became a form of aristocratic property.[39] By 1799, property that could be useful only to landed and rising commercial aristocrats had limited political appeal in New York, and abolition followed.[40] But in virtually all cases, the abolition process was dependent on how communities approached the thorny problem of slaveowner compensation.

### *"They Saw Men as Trees Walking": Slaveowner Compensation and the Constitutionality of Slavery*

The broadest effect of nonslaveholder influence on Northern abolition—one felt throughout the Northern states—was to shift the direct economic cost of abolition away from nonslaveholders and almost entirely onto slaves and free blacks, as Fogel and

---

[38] Shane White, *Somewhat More Independent: The End of Slavery in New York City, 1770-1810* (Athens: University of Georgia Press, 1991), 36.

[39] Jack R. Pole, "Slavery and Revolution: The Conscience of the Rich," *The Historical Journal* 20, no. 2 (1977): 503-13.

[40] For a recent history arguing that the ideals of the Revolution were "hotly contested" in the late eighteenth century and did not cause abolition in New York and instead that changes in political structure adverse to slaveowners and black resistance were primarily responsible for abolition there, see David N. Gellman, *Emancipating New York: The Politics of Slavery and Freedom, 1777-1827* (Baton Rouge: Louisiana State University Press, 2006), 1-5., 170-75. Gellman also analyzes the important retarding influence of concerns about emancipation's effects on public costs borne by nonslaveholders, ibid., 175-179.

Engerman showed in an important article some thirty years ago.[41] Fogel and Engerman began by observing that during abolition it was nearly universally agreed—even by antislavery legislators—that slaveowners should be compensated for the value of their slaves.

Why was there such broad agreement about making compensation, even among ardent abolitionists such as Quaker antislavery pamphleteer Anthony Benezet? Agreement on that point among contemporaries seems to have been so broad that there was limited debate about it. Historians have offered various suggestions about why such broad agreement existed.

Fogel and Engerman argued in essence that because slavery had been legal throughout the colonies, many members of the public were reluctant to change the rules of the game retroactively and thus to impose what in some cases might have been very large economic losses on slaveowners.[42] Donald Robinson accepts this reasoning in his work. Historian Joanne Pope Melish concludes that the contemporary distinction made between the slave trade and slavery, which deemed slaves protected property, was really a politically safe means of protecting property rights.[43] But the problem of compensation raised deeper issues about property rights than simple reliance on past practice would suggest.

Fogel and Engerman thought that it was difficult to understand why Northern nonslaveholders supported abolition even after their direct economic concerns about

---

[41] Fogel and Engerman, "Philanthropy."

[42] Ibid., 378 n. 6 (analogizing to reluctance to penalize "innocent" subsequent shareholders of illegal monopolist); Robinson, *Slavery in Politics*, 37.

[43] Melish, *Disowning Slavery*, 52-3.

paying for compensation had been addressed. After all, abolition legislation was a powerful use of state coercion to outlaw a specific form of theretofore legal property; in essence, it was a form of eminent domain legislation in which property was taken by government, but not taken for public use. Thus, abolition legislation could have constituted a very dangerous precedent for owners of any form of property. As Charles McCurdy has shown, such uses of eminent domain for private takings became very controversial, and some were actually declared unconstitutional, in the Northern states in the first part of the nineteenth century.[44] But the Northern abolition statutes were designed to finesse this constitutional problem.

An important English common law doctrine that could have protected slaveowner property was the idea that slaveowners had a "vested right" in such property that could not be taken without compensation (if at all).[45] During the Revolution and afterwards, there were abolitionists who opposed that idea.[46] They argued that slavery was not authorized by English common law; even if it was authorized by the common law law, natural law would bar it, which meant that no vested rights could be acquired in slaves, and no compensation would need to be made for them. However, by the late eighteenth century the courts in both England and the colonies had protected vested rights in slave property in a broad variety of legal contexts such as contracts, marital rights, and

---

[44] Charles W. McCurdy, *The Anti-Rent Era in New York Law and Politics, 1839-1865* (Chapel Hill: University of North Carolina Press, 2001), 104-127.

[45] "Impartial" asserted that because slaves were property, the New Jersey legislature had no power to take them at all. *New Jersey Gazette*, January 10, 1781.

[46] A pro-abolition correspondent in the New Jersey debate, "A Friend to Justice," attacked the idea that one could obtain a vested right in slave property "by the laws of the land." Slavery "is utterly repugnant to the very nature and spirit of the common law;" there was no statute establishing slavery in New Jersey, and if there were, "the validity of a law for such a purpose might very justly perhaps be called in question, as being repugnant to the laws of God and nature." *New Jersey Gazette*, November 8, 1780.

inheritances. During the period after the Revolution, it was widely agreed that uncompensated property takings by government were abhorrent and should not occur barring unusual circumstances such as public safety requirements.[47]

In Northern abolition statutes, a constitutional line seems to have been drawn between property in which most people thought there was a vested property right (existing slaves), and property in which the law did not clearly recognize a vested property right (post-nati or afterborn slave children). The Northern abolition statutes did not seek to divest slaveowners of any property in which they held what could reasonably be deemed vested rights. Rights in afterborn children would not be regarded as vested rights if slavery was seen either as a form of conventional property or as analogous to a nuisance. But Northern abolition statutes took a legally very conservative approach, and also provided slaveowners de facto compensation even for afterborn children, property in which it could be argued that they had no vested right. As a result, unless one rejected the use of eminent domain-like power to address slavery at all, these laws were invulnerable to constitutional attack in Northern states.

The principal question to be resolved by gradual abolition legislation thus necessarily became who should provide compensation to slaveowners, since abolition could not occur without compensation. The abolitionist community had thought about the problem of compensation, and given some consideration to proposals that public revenues be used to provide it.[48] This approach to compensation would have deemed

---

[47] William W. Fisher III, "The law of the land: An intellectual history of American property doctrine, 1776-1880," Ph.D. diss., Harvard University, 1991, 39-44, 294-6, 314-15.

[48] Melish discusses abolition plans such as that by Levi Hart of Connecticut that included public funding. Melish, *Disowning Slavery*, 57-9. During gradual abolition, there were various objections to public funding of even limited aspects of abolition, such as education of slave children. Ibid., 64-73.

slavery a societal responsibility, like the accepted need to provide for public defense. However, nonslaveholders were adamant that they had not personally created or benefited from slavery, and should therefore not be taxed to provide any compensation to slaveowners. Slavery was an evil, but not one that society as a whole had any obligation to cure. It was a "sin," but one that slaveholders needed to end without cost to those who were not sinners.

The nonslaveholder position uniformly prevailed in Northern abolition laws. The Northern states required blacks to purchase their own freedom by at least a generation of forced, unpaid labor, avoiding any significant economic contribution from nonslaveholders. The deferral of freedom for the children of slaves meant that slaveowners could recapture the full capital value of their female slaves, which was heavily dependent on the expectation that they would bear slave children. Fogel and Engerman demonstrated that the gradual emancipation structure of Northern abolition laws meant that slaveowners typically received between 95 and 97 percent of the market value of their slaves at a minimum. By permitting full recapture, Northern legislatures amply demonstrated both their great solicitude for the protection of slaveowner property rights and their equally strong desire to avoid burdening nonslaveholders with taxes to provide compensation to them.

Northern courts generally interpreted state Constitutions in a way that was equally protective of slaveowner compensation rights. No court of last resort in any other state which had a significant number of slaves agreed with Massachusetts that slavery could be ended by an uncompensated taking of slave property. The highest courts in Pennsylvania

and Virginia were asked to hold that their state's Constitutions, which contained language similar to that of Massachusetts declaring all men "free and equal," had abolished slavery, and declined to do so.[49] A 1794 debate in Pennsylvania among abolition society lawyers about whether to bring litigation seeking a declaration that slavery had been abolished by such constitutional change is particularly revealing about why the courts differed on this issue.

In 1794, five lawyers who were PAS counselors gave their opinions on whether the "free and equal" clause of the Pennsylvania Constitution of 1790 abolished slavery.[50] Three of the five concluded that it did not. John D. Coxe's opinion relied on the fact that slavery was legal in Pennsylvania before the Constitution was adopted; the Constitution did not explicitly abolish it. Coxe said that although it was widely agreed that slavery violated natural law, wherever it was established by "the positive law of the Constitution, of the Legislature, or Sovereign" that positive law has "prevailed in the Courts of Justice, and will ever prevail, as their Duty, is to interpret and decide on the Constitution and Laws and not to make alter or abrogate them."[51] Josiah (Joseph?) Thomas also relied on the prior existence of slavery and the fact that it was not explicitly abolished by the 1790 Constitution. He added that the new federal Constitution would prevent taking away a master's rights. John Hallowell pointed out that the 1776 Pennsylvania Constitution had

---

[49] *Hudgins v. Wright*, 11 Va. (1 Hen. & Munf.) 134 (Va. Sup. Ct. App. 1806); *Negro Flora v. Joseph Graisberry* (Pa. High Court of Errors, 1798-1802).

[50] Copies or summaries of all five opinions are found in Papers of William Rawle (Philadelphia: Historical Society of Pennsylvania), Box 4.

[51] Coxe does not equate "positive law" with a statute expressly authorizing slavery, but seems to include in that concept statutes premised on the existence of slavery, or longstanding customs recognizing it, and he thinks that positive law will "trump" natural law.

had broad "equal rights" language also and that "slaves were at that time considered as a Species of Property which it was—neither illegal or immoral to possess." The 1780 Gradual Abolition Act would have been unnecessary if the 1776 Constitution had abolished slavery; the 1790 Constitution added nothing to the argument.

The two most prominent lawyers for the PAS, Miers Fisher and William Rawle, both argued that the 1790 Constitution had abolished slavery. Both relied explicitly or implicitly on the *Somerset* decision. But they filtered their analyses of that decision through distinctively Pennsylvanian (and Quaker) eyes.

Fisher argued that English common law had rejected slavery. He argued that *Somerset*, which he understood as having rejected slavery in England, had established the "Right Reason" of English common law. English common law should be applied in Pennsylvania since it had explicitly adopted that common law.[52]

Remarkably, Fisher explicitly conceded that "the warmest Friends of the Abolition of Slavery" would "scarcely contend" that any of the major founding documents—the Declaration of Independence, the Pennsylvania Declaration of Rights, or Pennsylvania's 1790 Constitution—were actually intended to end slavery. But to Fisher, lack of intent was irrelevant because the common law was based on "Right Reason" and necessary implication. He argued that the only words deemed sufficiently broad by the Founders to support their escape from "Political Slavery" were also broad enough that they "must comprehend all Mankind and lay the Axe to the Root of domestic Slavery."

---

[52] Miers Fisher, Opn. of Miers Fisher on Constitutionality of Slavery in Pennsylvania (Philadelphia: Historical Society of Pennsylvania (Papers of William Rawle)), Box 4, Rawle Legal Papers.

Fisher also admitted that it was "highly probable" that the Pennsylvania legislature in passing the Gradual Abolition Act in 1780, and amending it in 1788, had seen slaves as a "subject of Property." He said, however, that these legislatures "were but in the progress towards the Light, which was not then clearly seen, 'they saw men as trees walking' but since that time more Light has arisen on this Subject and it is now clearly seen that Mankind is not a Subject of Property...."[53]

Fisher's powerful sense of the inevitable progression of freedom through history as the basis for the interpretation of law is quintessential liberal Quaker and Enlightenment thought. Despite his universalist argument, however, Fisher's opinion conceded that the principles he advocated could not be applied to all the states. "There are some of the States wherein the great number of the Slaves would render a Sudden Emancipation extremely dangerous," so that the common law rule barring slavery should not apply there.

Fisher denied that masters were entitled to compensation for slaves, using a property title analysis to avoid a vested rights argument. Masters had a defective title to the liberty to others, and therefore restoring liberty to slaves was not taking property from masters. He based his defective title argument on the assertion that a human right to control one's labor was an inalienable part of human freedom: "all men are entitled to employ their own Time and Labor in the Pursuit of their own Happiness," slaves equally with masters.

William Rawle was one of the most prominent and respected attorneys in Philadelphia. His opinion exhibited the clearest understanding of any American lawyer

---

[53] Id.

of *Somerset*'s fundamental principle that deemed slaves purely conventional property. Rawle wrote that "slavery is not a natural but a political institution; it is the effect of avarice and luxury supported by force or fraud...If the government which authorises or permits slavery is dissolved, slavery is dissolved with it." He argued that the 1790 Constitution represented a decision by Pennsylvanians to relinquish their "odious and unnatural claims" to the perpetual labor of others. The U.S. Constitution did not bar the abolition of slavery by Pennsylvania, Rawle argued.[54]

The PAS unsuccessfully brought suit to have slavery declared unconstitutional after Fisher's and Rawle's views prevailed in its internal debate. According to a later news report of the decision (the records of the decision have been lost), Pennsylvania's highest Court decided (sometime between 1798 and 1802) that slavery had legally existed in Pennsylvania before the adoption of the 1790 Constitution, and had not been abolished by it.[55] But the internal division of opinion among the strongly antislavery PAS lawyers clearly shows why American courts were divided on the relationship between slavery, property, and natural law at the turn of the century.

Under a "higher law" analysis that understood natural rights as limits to law that could not be altered even by a Constitution, slavery would be regarded as an inherently unlawful condition that could not be established even by a constitutional provision. As Fisher and Rawle argued, no compensation would need to be made to slaveowners for ending such a condition. Their PAS colleagues disagreed with them because, following

---

[54] Rawle and Fisher understood that Massachusetts had judicially abolished slavery based on a constitution similar to Pennsylvania's.

[55] The case, *Negro Flora v. Joseph Graisberry*, (Pa. Errors 1798-1802), is described in Edward Raymond Turner, "The Abolition of Slavery in Pennsylvania," *The Pennsylvania Magazine of History and Biography* XXXVI, no. 2 (1912): 129-142, 138-9.

Lord Mansfield and the English legal tradition, they thought that positive law could alter natural rights, and had done so where slavery was concerned. It followed that compensation for slaves would be required if slavery were abolished, so that a constitutional provision declaring equality could not authorize freeing slaves. The position taken by Fisher and Rawle was the direct ancestor of the "higher law" position enunciated publicly by New York Senator Rufus King during the Missouri controversy, but they applied it only to Pennsylvania law.

In both *Negro Flora* and in *Pirate v. Dalby*, a major slavery case discussed below, the Pennsylvania courts concluded that where the legislature had acted on slavery, the boundaries established by the legislature and popular constitutional action should be observed rather than expanded on "higher law" grounds. Their approach contrasts sharply with the dismissive attitude of elite Rhode Island judges toward popular juries and the legislature's directions in *Randall v. Robinson* before the Revolution. This suggests that there was a tension between the "higher law" tradition and popular institutions in republican early America where slavery was concerned.[56] But beyond the problem of compensation, abolition could only be effective if abolition laws, no matter humane in their terms, were actually enforced, and they often were not.

---

[56] For a broad analysis of the history of natural law thought and slavery, see G. Edward White, *The Marshall Court and Cultural Change 1815-1835*, abridged ed. (Oxford: Oxford University Press, 1991), 674-740. Historian William Fisher points to examples of "natural law" reasoning in the analogous area of early American eminent domain law. But the Chase/Iredell colloquy in *Calder v. Bull*, 3 (Dall.) U.S. 386 (1798), discussed by Fisher, suggests that there were disagreements about the "higher law" concept on the Supreme Court even then. William W. Fisher III, "The law of the land: An intellectual history of American property doctrine, 1776-1880," Ph.D. diss., Harvard University, 1991, 288-94.

*The Enforcement of Abolition Laws*

As Fogel and Engerman concluded, the Northern abolition statutes often contained loopholes, and also lacked strong enforcement mechanisms. Fogel and Engerman thought of some of these loopholes and of statutory nonenforcement as means of providing additional indirect compensation to slaveholders, which they may indeed have been.[57] However, statutory loopholes and patterns of nonenforcement also reflect particular limits on the public consensus supporting abolition, such as the public's willingness or desire to avoid the problems of abolition by exporting slaves to other states (i.e., to externalize the problem). This section analyzes abolition law enforcement in Pennsylvania in detail, and then compares it with information from Massachusetts, New York and New Jersey.

The Pennsylvania gradual abolition law of 1780 had several profound defects in its protection of African Americans from slavery, some of the most important of which were recognized when it was enacted. As one historian commented, "in the eyes of those who desired the destruction of slavery the act of 1780 had two great faults: first, it was easily evaded...."[58] The Act contained weak enforcement provisions. And the Act did not clearly define the legal consequences either of slavery or of freedom.

The Act assumed that most enforcement of the law would be done by private persons, but provided no financial incentives to them (such as private recovery of part of fines imposed) for successful enforcement. The Act's drafters declined to follow a long English tradition of providing such incentives in order to stimulate aggressive private law

[57] Fogel and Engerman, "Philanthropy," 392-3.

[58] Edward Raymond Turner, "The Abolition of Slavery in Pennsylvania," *The Pennsylvania Magazine of History and Biography* XXXVI, no. 2 (1912): 129-142.

enforcement.[59] The Act as originally adopted contained no substantial civil penalties or criminal penalties for violations, instead threatening slaveowners only with some unspecified amount of loss of services of a slave or indentured servant for noncompliance. Many slaveowners proved willing to risk such consequences and to disobey the law when they stood to benefit economically. This defect was only partly remedied by the 1788 amendments to the Act, which show quite clearly that the legislature could create very large penalties and incentives when it was willing to do so. The 1788 amendments also demonstrate that the legislature was willing to impose prohibitive financial penalties only in the case of direct foreign slave trade participation by Pennsylvanians, not in the case of out-of-state slave sales.

No funds were provided for state enforcement of the Act, so enforcement of the Act was conducted principally by the Pennsylvania Abolition Society ("PAS"), an elite, relatively well-funded volunteer organization whose work was vigorously assisted by leading members of the Philadelphia bar.[60] While the PAS achieved many notable successes, and was responsible for protecting hundreds of African Americans against slavery or re-enslavement, slaveowners proved tenacious in seeking to protect their property. Although the courts were often willing to assist the PAS when its claims were solidly grounded in the Act, the PAS was unsuccessful in persuading the Pennsylvania

---

[59] An important example of this type of action was the *qui tam* action, "prosecuted by a private citizen on behalf of himself and the Crown, with any statutory penalty divided between the prosecutor and the government." Such actions were used to regulate the quality of goods, among many other things. James Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill: University of North Carolina Press, 2004), 99.

[60] There have been two detailed studies of the PAS. Richard S. Newman, *The Transformation of American Abolitionism: Fighting Slavery in the Early Republic* (Chapel Hill: University of North Carolina Press, 2002); and Wayne J. Eberly, "The Pennsylvania Abolition Society, 1775-1830," Ph.D. diss., The Pennsylvania State University, 1973.

courts judicially to abolish slavery or to expand the Act's reach, and juries sometimes discouraged aggressive PAS litigation by their verdicts as well.

The Act lacked clarity on the consequences of slavery and freedom in a number of important respects. First, the statute as adopted did not explicitly protect the right of slaves or their children to remain in Pennsylvania. It is fairly likely that the lack of a provision in the 1780 Act explicitly prohibiting the sale of slaves out of the state was a concession to political reality by Pennsylvania abolitionists. Rhode Island had adopted such a provision in 1779, well before it enacted a gradual abolition statute in 1784. Pennsylvania abolitionists, who were in close touch with their Rhode Island counterparts, were quite probably aware of the predictable danger that out-of-state sales would occur during abolition. Between 1780 and 1788, slaveowners sold slaves or slave children out-of-state, and even carried pregnant slaves out of state so that they could give birth to children who could be enslaved outside Pennsylvania.[61]

It was not until 1788, eight years after the statute was passed, that owners were prohibited from removing or selling slaves out of the state. Many owners appear to have taken advantage of this extraordinarily large "window of opportunity."[62] Pennsylvania abolition organizations had limited success in the arduous and expensive process of

---

[61] Turner, "Abolition in Pennsylvania," 138-9.

[62] The substantial amount of knowingly illegal conduct by slaveowners documented in PAS files suggests that many owners probably transferred or sold slaves out-of-state if it was to their advantage to do so. If significant out-of-state sales or removals had not been occurring, there would have been little point in amending the Act in 1788 to penalize such conduct civilly and criminally. PAS files reflect several efforts to prevent owner removals in the 1780s. *Jack v. Barnibus McShean*, (PAS ACM 1785-6 (45-7, 65, 68)); *Sam v. Elliott*, (PAS ACM June 20,1786 (78)); *Fanney Murphrey v. Thos. Landrop*, (PAS ACM June 20 1786 (78)); *Case of Charles Logan*, (PAS ACM April 15 1788). Nash and Soderlund argue that slave sales out of Pennsylvania were only one reason, and not a major one, for the decline in slave population in Pennsylvania in the last third of the eighteenth century. They argue that high slave mortality in Philadelphia, slave flight, and manumissions played a more important role than out-of-state slave sales. Nash and Soderlund, *Freedom by Degrees*, 75.

recovering slaves or kidnapped free African Americans once they were out of state. For several years after the passage of the Act, it was apparently unclear even to supporters of the Act that abolitionists wanted to prevent out-of-state sales of slaves, as opposed to simply removing them from Pennsylvania. In 1787, Tench Coxe, a very prominent and politically active officer of the PAS, arranged as co-executor of an estate to send two black women to the West Indies for sale. Then, after Coxe's arrangement was discovered and he was confronted about it, he apologized profusely to the Society. He explained that he was unaware that this offended the Society's policies, and arranged for the return of the women.[63] The wealthy Philadelphia merchant Stephen Girard in 1787 sent a five year old boy to the West Indies, and only agreed to return him after extensive pressure from the PAS.[64]

Other slaveowners ignored the out-of-state sales restriction. In 1788 Charles Logan, a Pennsylvania slaveowner who owned nine slaves, agreed in writing to manumit all of them, but then changed his mind, and took the slaves to Richmond, Virginia. Logan began to sell them to third parties, and turned a deaf ear to the PAS's entreaties to return the slaves. The Society was unable to discover any effective means of arranging for the return of the slaves even after extensive correspondence and efforts through a third party in Richmond, the prominent abolitionist Robert Pleasants. During its failed recovery efforts the PAS threatened litigation, hinted at criminal prosecution, and

---

[63] Eberly, *The Pennsylvania Abolition Society*, 52.

[64] *Sam, late with Stephen Garard (Girard)*, (PAS ACM 1787).

appealed to Logan's "honour as a gentleman" and sense of justice.[65] The Logan contretemps showed the limits of PAS's ability to control intentional lawbreaking.

The PAS sought aggressively to prevent sales of slave children out-of-state on the ground that they were free and could not be sold into slavery, and by 1786, had succeeded in obtaining court rulings that protected such children.[66] However, various slaveowners sought to evade these rulings and some succeeded. As late as 1794, a slaveowner sent two women to New Jersey after being served with a writ of habeas corpus seeking their freedom, and was not sanctioned by the Pennsylvania court despite the PAS's efforts.[67]

The 1788 amendments to the Act on slave and servant removal had their own major flaws. The amended law violation was based on a slaveowner's intent, which was often difficult to prove since a slave could not testify. The law also specifically allowed a slave or indentured servant to "consent" to removal from Pennsylvania before two justices of the peace (who, in certain parts of Pennsylvania, were likely to be slaveowner allies). Blacks repeatedly faced fraudulent efforts to induce them to leave Pennsylvania

---

[65] *Case of Charles Logan*, (PAS ACM April 15 1788). This case disappeared from the running docket in 1790, and does not appear in the PAS records index.

[66] *Worley v. Ruston*, (PAS ACM January 19 1786 (66)). The PAS opposed several other servant removals in 1786. PAS ACM, June 20, 1786 (78).

[67] *Patty and Fanney with William Height*, (PAS ACM February 21 1794). In *Jack v. Barnibus McShean*, PAS ACM, 1785-6 (45-7, 65, 68), McShean sent a child out of state to evade a writ seeking his freedom; the child was ultimately returned the next year after further court action. In *Cate v. Cooke*, (PAS ACM 1785 (32)), Cate had been declared free by a court, but was nonetheless sold as a slave and then confined to the workhouse by her owner. The PAS intervened and obtained her freedom, but declined to sue for false imprisonment damages, though the court held that it could. The PAS decision not to seek damages shows its sensitivity to the limits to its public support; the law was clear that such damages would be available.

voluntarily so that they could be kidnapped and sold into slavery.[68] As late as 1811, the PAS successfully sought the indictment and conviction of a Pennsylvania man who had sold a nine year old boy into slavery in Baltimore to a slave trader there.[69]

A second important uncertainty about the Act's effects, even nearly ten years after it was passed, was what happened when a slaveowner failed to register a slave as required by the Act. As to slaves themselves, this issue was only resolved in 1794. In a 1794 case discussed by historian Robert Steinfeld, the Pennsylvania courts held that when a slave became free under the 1780 Act due to nonregistration, the slave could be held only to the same indenture terms as a free white person, that is, until age twenty-one if male.[70] Uncertainty persisted about whether an unregistered slave's children became free, or whether a slaveowner still had the right to their services until they reached twenty-eight.[71]

The PAS began litigation seeking to expand the effects of the Pennsylvania abolition statute as early as 1784. The first reported Pennsylvania post-Revolution slavery case, *Pirate, alias Belt v. Dalby*, shows the law's evolution.[72] *Pirate* was brought as a habeas corpus action seeking the freedom of a slave brought to Pennsylvania from

---

[68] See the four extensive narratives of kidnapping cases provided to the Philadelphia Society of Friends Meeting for Sufferings in 1801 in "Meeting for Sufferings, Miscellaneous Manuscripts," (5(a) through 5(d)). (Friends Historical Library).

[69] Eberly, "The Pennsylvania Abolition Society," 57.

[70] *Respublica v. Gaoler of Philadelphia County* 1Yeates 368 (Pa. 1794), discussed in Robert J. Steinfeld, *The Invention of Free Labor* (Chapel Hill: Univ. of North Carolina Press, 1991), 140.

[71] This issue was pending before the Pennsylvania Supreme Court as early as 1789. Fisher-Tilghman opinion, Pennsylvania Abolition Society, Legal Records, Papers of the Pennsylvania Abolition Society (Philadelphia: Historical Society of Pennsylvania)("PAS LR"), January 7, 1789. See *Charity and Deborah Pero v. Mary Burris*, (PAS ACM July 1794 (311)).

[72] *Pirate, alias Belt v. Dalby*, 1 Dall. (U.S.) 167 (Pa. 1786).

Virginia by the defendant, Alexandria, Virginia merchant Philip Dalby.[73] Dalby had been in Pennsylvania on business considerably less than six months (the statutorily protected "sojourn" period) when the action began. Although it began in 1784, and declarations were taken then, the case was not tried until April 1786, suggesting that it presented difficulties for the parties or the Court.[74]

Under the law of Virginia and Maryland, plaintiff Pirate would have been a slave since his mother was a slave. The PAS and the Pennsylvania Attorney General made a series of arguments for the slave's freedom based on the principles of *Somerset*. The gist of these arguments was that the Court should hold that Pennsylvania law did not recognize slavery.

The Pennsylvania Court chose instead to ignore or reject various *Somerset* holdings, even though under its Constitution Pennsylvania explicitly followed English common law. The Court held that in the United States, slavery was derived from the civil law, not from English villeinage. It held also that since the slave was a slave in his place of origin, the slave's status continued in Pennsylvania (i.e., the Court adopted a *lex loci* rule). This rejected the key conflicts holding of the *Somerset* decision that slave status changed with the change of jurisdiction. The Court's conflicts holding occurred despite the Legislature's plain decision to follow the *Somerset* conflicts rule in drafting the 1780

---

[73] The pleadings were amended at the Court's direction to seek a writ *de homine replegiando*, a writ form traditionally used to seek freedom of a villein under English law.

[74] The important role of the jury in this case is outside the scope of this work.

abolition statute (which necessitated an explicit provision declining to protect fugitives).[75]

Although the *Pirate* Court could easily have reached the same result and disposed of the case simply by holding that the Pennsylvania 1780 abolition statute contained no provision that would free the plaintiff, it chose not to rely on the statute in reaching its conclusion.[76] In constructing a non-statutory rationale for its decision, the Court seems to have been seeking to prevent future antislavery litigation not based on alleged violation of the gradual abolition law. It is reasonable to infer that the Court sought to avoid having Pennsylvania become a haven for fugitive slaves and slave litigation, as would probably have occurred if the Court had concluded that Pennsylvania law did not recognize slavery except where specifically authorized by statute. The *Pirate* decision was calculated to—and did—avoid similar future disputes.

In 1786, before the court decided the *Pirate* case, at the defendant Dalby's request George Washington engaged in high-level lobbying to have the *Pirate* action "voluntarily" dismissed by plaintiffs. Washington wrote to Robert Morris, the Pennsylvania financier, and asked him to persuade the PAS to drop the case. Washington asserted that legislative abolition was the only proper means to address the problem of slavery, and that forcing ordinary slaveowners to litigate against the wealthy Society would mean they would lose their property because they could not afford to defend it.

---

[75] Although *Pirate* involved a slave brought to Pennsylvania by a sojourner, the reasoning of the ruling applied to fugitive slaves as well.

[76] Finkelman concludes that the Court did base its conclusion on the six month provision of the Pennsylvania abolition statute. Finkelman, *Imperfect Union*, 50.

Freedom litigation, he wrote, "begets discontent on one side and resentment on the other" and "introduces more evils than it can cure."[77]

Washington's prominence and the broad arguments he made transformed his high-level intervention on behalf of slaveholders, in what would normally have been thought of as a "private" dispute, into an extraordinary political act that demonstrated how important this issue was to slaveholders. *Pirate* had made evident to slaveowners that their practical ability to control their fugitive or transient slaves depended precariously on whether the law of other states would continue to deem those slaves property, notwithstanding the protection provided to that property by the Articles of Confederation. Because the Articles lacked a meaningful enforcement mechanism and relied instead primarily on comity, state litigation like *Pirate* could frustrate their operation.

One particularly important feature of PAS litigation policy was that the Society asserted that a former slave's status as a free person did not change once she left Pennsylvania. Between 1785 and 1794, the PAS litigated a series of re-enslavement cases to vindicate this principle.[78] PAS efforts to prevent slaveowner abuse of slaves and their children and violations of the Act depended heavily on blacks' complaints based on growing knowledge of their rights. But PAS efforts to combat kidnapping also depended heavily on white citizen cooperation, not least because of the Act's bar on slave testimony against free men.

---

[77] George Washington to Robert Morris, April 12, 1786, *GW Dig. Ed.* (print ed. Confed. Ser. 4: 15-17).

[78] *Florah and her daughter*, (PAS ACM June 20 1785); *Tom in Burlington Prison*, (PAS ACM July 31 1793); *Harry v. Benjamin Gibbs*, (PAS ACM May 26 1794); *Mulatto Sall v. Doctor Baker*, (PAS ACM 1785 (31)); *Case of Dinah*, (PAS ACM January 29 1794).

In two separate 1790s cases, concerned citizens challenged kidnappers who were seeking to leave Pennsylvania with free blacks. A 1793 kidnapping was successfully foiled when the kidnapper fled after being confronted.[79] In a 1794 case, however, a black who was supposed to have been jailed pending a further hearing on his freedom was never delivered to the jail, and with the connivance of local citizens was instead transported out of the state.[80] In 1794, in publicly defending its aggressive actions in a contested freedom case which it won against an owner's attack, the PAS asserted that there had been "many instances" of kidnapping of free blacks by their former masters who sent them to the West Indies for sale as slaves.[81]

The re-enslavement and out-of-state sales cases described above—and a significant number of deliberate kidnapping cases in the 1790s and 1800s, including the case that gave rise to the Fugitive Slave Act of 1793—make clear how tenuously freedom had been conferred on blacks by the Pennsylvania Act. In enforcing the law, its supporters had had to struggle with grasping slaveowners; indifferent white citizens; malevolent whites running systematic interstate kidnapping rings; and Pennsylvania's partial encirclement by slave jurisdictions where slaveowners could find refuge after breaking the law. Not surprisingly, abolitionists often lost, so black freedom remained fragile at best. Historian John Wood Sweet's description of the continuing difficulties

---

[79] *Dinah late with Andrew Buskirk*, (PAS ACM December 19 1793 (273)).

[80] *Kidnapping (report of Amer Bailey)*, (PAS ACM December 17 1794).

[81] *Case of Azar v. St. Victor*, (PAS ACM August 26 1794).

faced by freed blacks during Rhode Island gradual abolition seems similar to their situation in Pennsylvania.[82]

Although the PAS was often able to persuade the courts to support its clients' quests for freedom, it sometimes lost cases in ways that reflected limits on public support for its actions. In the 1791 case of *Bill, late with Jonas Philips*, the PAS brought suit against Jonas Philips for Bill's freedom, after having given a replevin bond as security for its suit.[83] The PAS later discontinued its suit on behalf of Bill after concluding that it lacked merit. Philips, the defendant, then directed the Sheriff to sue for damages on the replevin bond, and the jury awarded damages against the PAS. The damages were substantial: 56 pounds and costs of suit which together, in today's dollars, would be more than $7,000. But the jury also decided that the slave was free, so it was effectively forcing the PAS to purchase the slave and pay the slaveowner for him.

The PAS could ill afford such a Solomonic verdict, since it was not financially able to purchase slaves systematically. The verdict undoubtedly sent the intended cautionary message to the PAS against aggressive litigation. In another major 1794 case brought by the PAS, an unsuccessful, highly visible criminal indictment for kidnapping, the court essentially instructed the jury to acquit the defendant and then excoriated the

---

[82] Even though abolition freed a number of blacks, there were still significant problems facing them, Sweet found:

> [E]nslaved people continued to face serious challenges to securing manumission, and free people of color often found their freedoms fragile. The...Act, like similar laws in other states, made little provision to safeguard the interest of those it liberated. In this climate, scenarios familiar from pre-Revolutionary court cases recurred, and new modes of malfeasance emerged: masters and their heirs reneged on manumissions; indentured servants, debtors, and other free people were sold as slaves; free immigrants were claimed by so-called slave hunters; and others were kidnapped.

Sweet, *Bodies Politic*, 252.

[83] PAS ACM, February 2, 1791.

PAS and Pennsylvania authorities for their aggressive pursuit of what it deemed to be "extravagant," unfounded litigation.[84]

The sources (including the kidnapping and re-enslavement cases above) also suggest that antislavery laws were far more vigorously enforced in Philadelphia than in the remainder of Pennsylvania where most Pennsylvania slaves lived. Even in the nineteenth century, there is solid evidence of much of rural Pennsylvania's thoroughgoing lack of support for abolition. As late as the mid-1820s, a special committee of the Pennsylvania legislature found that in rural Pennsylvania the children of slave children born after 1780 were still being treated as indentured servants. It was only in 1826, nearly fifty years after the Act's passage, that the Pennsylvania Supreme Court actually barred this "misconstruction" of the law.[85]

The same Pennsylvania legislative committee discovered in the early 1830s that in rural Pennsylvania for decades previously numerous slaves from other states had been being sold into Pennsylvania as long-term indentured servants in direct violation of the Act, whose provisions should immediately have freed these individuals.[86] Remarkably, the Committee recommended that such violations of the Act be permitted on the ground that it would be better for the out-of-state slaves if they became indentured servants in Pennsylvania. The Pennsylvania gradual abolition law's limited enforceability reflected the limits of Pennsylvania public support for abolition. Pennsylvania was not alone in

---

[84] *Respublica v. Richards,* 1 Yeates 480, 2 Dallas 224 (Pa. 1795); PAS ACM, June 18, 1794.

[85] Cited in Pennsylvania General Assembly, "Report of the Senate Committee to investigate the cause of an increased number of slaves being returned for that Commonwealth, by the census of 1830, over that of 1820 " (1833) at 5, citing *Miller v. Dwilling*, 14 Serg. & Rawle 442 (Pa. 1826) (quote in Committee report).

[86] Ibid., 6.

having a weak abolition enforcement program. There were major loopholes in the laws of other states with substantial numbers of slaves which were engaged in abolition.

In Massachusetts, after the *Jennison* decision in 1783, slave sales out of the state would theoretically have been at least a civil wrong that would have given rise to a damages action by a slave. But Massachusetts did not explicitly prohibit kidnapping by statute until 1785, and it seems probable that contemporaries quickly realized that this provision was ineffectual against such abuses. In 1787, the legislature adopted a statute that granted a statutory right to the writ *de homine replegiando* to permit persons held in captivity to regain their freedom, and in 1788, it granted a statutory right to third parties to bring damages actions on behalf of kidnapped individuals who were absent. However, both the 1787 and 1788 statutes imposed significant financial barriers to bringing such actions, and explicitly shifted legal costs to losing parties, which undoubtedly deterred many such actions.[87] That these statutes were adopted at all suggests that for five years after Massachusetts abolition supposedly occurred there were serious questions about the likelihood of preventing kidnapping by successful prosecutions or civil action under the state's existing general laws, and also demonstrates that out-of-state sales were perceived as a continuing problem by Massachusetts authorities. Slave sales for export from Massachusetts would have been quite easy to arrange in a way that would have been very difficult to detect given Massachusetts' large shipping industry. No prosecutions for out-of-state sales during this period have been discovered by historians. According to both

---

[87] Mass. Sess. Laws 1785, Ch. XXXIX; Mass. Sess. Laws 1787, Ch. VIII; and Mass. Sess. Laws 1788, Ch. XI.

Arthur Zilversmit and John Wood Sweet, slaves continued to be sold in Massachusetts after *Jennison.*[88]

In 1785, shortly before the New York legislature began consideration of abolition legislation, the New York Manumission Society was formed. Its first act was to seek legislation preventing the sale of slaves for export from New York, not gradual abolition legislation.[89] However, what the legislature instead agreed to do, after defeating the 1785 abolition legislation, was to prohibit imports of slaves into New York, not exports. Owners who had concluded that abolition might ultimately occur then began to sell slaves for export. Alarmed, the Manumission Society repeated its request in 1786, but an export measure failed to pass for several years. When it did pass in 1788, the export ban prohibited the purchase of slaves intended for export, so that an owner who already possessed slaves, and had had them for any reasonable period of time, could sell them without penalty.

Historians agree that there was widespread noncompliance with the New York and New Jersey abolition laws (adopted in 1799 and 1804, respectively). For New York, McManus found that because of regional slave price differentials, slaves could be sold south for a very large profit at the time the gradual abolition law went into effect. He concluded that "it seems obvious that Negroes left the state in considerable numbers" involuntarily.[90] It is likely that the same slave price differentials would have existed for New Jersey, with the same predictable results.

---

[88] Zilversmit, *First Emancipation*, 115; Sweet, *Bodies Politic*, 248-9.

[89] Leo Hirsch Jr., "The Slave in New York," *The Journal of Negro History* 16 (1931): 383-414.

[90] McManus, *New York Slavery*, 170, 175-177.

Fogel and Engerman analyzed demographic data on black and slave population changes in Northern states that "strongly suggest" that New York and New Jersey slaveowners were selling their slaves to the South, particularly after the closing of the slave trade in 1810 caused a sharp rise in slave prices.[91] Historian Claudia Goldin analyzed similar demographic data as part of a broader analysis of the economics of emancipation and concluded that it is "entirely possible" that many thousands more slaves were sold south than were emancipated by the New York gradual abolition law itself.[92] Fogel and Engerman concluded more generally that it was probable that "to a substantial degree the decline of slavery in the north was due not to emancipation" but to slave sales by Northerners.[93]

This review of the enforcement of Northern state abolition laws shows that such laws in major states were repeatedly violated by slaveowners. Such large-scale violations could have occurred only in a climate of opinion where many citizens were willing to acquiesce in them, and remain silent through fear or indifference. The undeniable political reality was that although a majority of Northern citizens were willing to see slavery in their states abolished, and some fraction of them doubtless wanted free blacks to be given some form of "freedom" to remain as "citizens" of their states, many others thought that it was perfectly acceptable for abolition to be achieved by removing blacks from Northern states. The legal tools and enforcement resources were available to prevent free black removal, but the political will to prevent it did not exist in many parts

---

[91] Fogel and Engerman, "Philanthropy," 393.

[92] Claudia D. Goldin, "The Economics of Emancipation," *The Journal of Economic History* 33, no. 1 (1973): 66-85, 70.

[93] Fogel and Engerman, "Philanthropy," 393.

of the Northern states. This mixed climate of opinion played a major role in forming the approach that Northern delegates to the Constitutional Convention took toward slavery.

*Abolition and Northern Black "Freedom"*

Even as they envisioned abolition, Northern abolitionists recognized the need to confront the problem of the future of free blacks in white society, according to historian John Wood Sweet. In his study of Northern race relations during this era, Sweet concludes that "many citizens of the United States feared that freed slaves would overrun their communities with thievery, idleness, and debauchery, destroying civil life."[94] These fears of social disruption created a problem that had to be taken into account in framing abolition legislation, and there it was transformed largely into the narrower question of what civil rights free blacks would be permitted to possess. At critical points, many Northern states gave a racially discriminatory answer to that question, sharply differentiating between the civil rights of whites and those of blacks.

The Pennsylvania Act of 1780 contained important reforms in the conditions of servitude for some, but not all blacks and extensions of civil rights to them. Specifically, under the law the children of slaves held in servitude were to be treated in the same way as "servants bound by indenture for four years" (most of whom would have been white workers) for purposes of their terms of service, "correction and punishment," and were explicitly given the same rights to relief against "evil[]" treatment and to "freedom dues"

---

[94] Sweet, *Bodies Politic*, 249.

as indentured servants. But these legal protections against physical abuse by masters were not extended to slaves, who needed them most.[95]

The Pennsylvania Act also took a long step toward creating equal justice for some Pennsylvania blacks, providing that the "offences and crimes" of all blacks should be "enquired of, adjudged, corrected and punished" in "like manner" as the "offences and crimes of the other inhabitants of this State are, and shall be...." However, in a profound compromise of these bold principles of equality before the law, the Act provided that "a slave shall not be admitted to bear witness against a freeman." This provision was an open invitation to slaveowner abuse, export sales of slaves, and kidnapping as abolitionist forces quickly learned, if indeed they did not recognize it when the statute was passed.[96]

After its judicial abolition of slavery in 1783, Massachusetts did not amend any of its existing discriminatory legislation that applied to African Americans. It added several such statutes over the next few years. From 1788 onward, the state made systematic efforts to exclude all fugitive slaves and most indigent African Americans from Massachusetts, discussed further below. The state continued its pre-Revolutionary social customs regarding free blacks, granting free blacks certain limited civil rights, such as court access and property holding, but denying them other critically important civil rights needed if blacks were to become significant post-Revolutionary political stakeholders, particularly in Massachusetts.

---

[95] Robinson's statement that these protections extended to slaves is mistaken. Robinson, *Slavery in Politics*, 30.

[96] The Act also repealed various legal discriminations and disabilities previously imposed on blacks, such as the bar on racial intermarriage, after a heated legislative fight.

Massachusetts had excluded blacks from militia service beginning in 1776.[97] Blacks continued to be specifically excluded from Massachusetts militia service by a 1792 statute providing for "white" militia members. Given the political importance of militia service in Massachusetts, this discrimination constituted a major means to maintain black inequality.

Contrary to the view of some historians, it appears that Massachusetts denied blacks the rights to vote and hold elective office for at least a generation after the Revolution. Several very knowledgeable Massachusetts observers in 1795 reported without qualms that free blacks there could not vote or hold elective office.[98] According to Sweet, as of 1806 blacks could not vote in Massachusetts.[99]

Massachusetts did not repeal its pre-Revolutionary ban on racial intermarriage until 1843. Pennsylvania, by comparison, repealed its ban on intermarriage in 1780 while legislating to begin gradual abolition. The maintenance of a ban on racial intermarriage in Massachusetts represented a clear statement by the state's political majority that the state would not deem whites and blacks social equals in circumstances where it really mattered. The state's restrictions on militia service, voting, and intermarriage make clear that a majority of Massachusetts citizens had little desire to see the abolition of slavery lead to black social or political equality with whites in Massachusetts.

---

[97] Wiencek, *An Imperfect God*, 204-5.

[98] For contemporary statements that Massachusetts blacks could not vote in 1795, see *MSL*, 390. Lorenzo J. Greene, *The Negro in Colonial New England 1620-1776* (New York: Columbia University Press, 1942) concludes that in colonial and Revolutionary Massachusetts blacks could not vote, 300-02. For the view that Massachusetts blacks had the right to vote, at least as of 1830, see Paul Finkelman, "Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North," *Rutgers Law Journal* 17 (1985-86): 415-482, 424.

[99] Sweet, *Bodies Politic*, 312.

Massachusetts had plenty of company among the Northern states in denying various political and civil rights to African Americans after abolition. As historian Ira Berlin concluded in his comprehensive survey of the social effects of abolition in the North:

> [W]hile the old slave codes disappeared with the liquidation of slavery, many of the constraints remained. In many places, free blacks continued to be governed by the same regulations as slaves, subjected to curfews, restricted in their travels, and denied the right to vote, sit on juries, testify in court, and stand in the militia.[100]

By 1821, Connecticut, Rhode Island and New Jersey all had adopted legislation denying blacks the right to vote. In the aftermath of the Missouri controversy, New York's 1821 Constitution created universal white suffrage but imposed explicitly and highly discriminatory property qualifications on black voting that effectively disfranchised nearly all free blacks there.[101] In 1837, free blacks, who had been permitted to vote in at least some parts of Pennsylvania, lost the vote in Pennsylvania as well.[102]

As early as 1821, then, the majority (measured by population) of the Northern states had rejected the argument made by John Jay and the New York Council of Revision in 1785 that the right to vote was an integral part of freedom in post-Revolutionary America. But as universal white suffrage spread, Jay's position was

---

[100] Berlin, *Many Thousands Gone,* 239.

[101] For the relationship of the Missouri controversy to New York constitution reform, see Chapter 6.

[102] Finkelman, "Prelude to the Fourteenth Amendment," 423. Prior to 1837, there are suggestions that in some parts of Pennsylvania, the law may have been interpreted to prevent free blacks from voting. Charles H. Wesley, "Negro Suffrage in the Period of Constitution-Making, 1787-1865," *Journal of Negro History* 32, no. 2 (1947): 143-168, 160 (citing E.R. Turner, *The Negro in Pennsylvania*, 184).

rejected only where blacks were concerned. In reaction to the abolition of slavery, Revolution principles had collided with the pre-existing Northern color line.

The severance of black "freedom" from the right to vote meant that when Northern representatives during the Missouri controversy argued that blacks must be treated as citizens, their definition of citizenship certainly did not include the right to vote for blacks. It is therefore mistaken to think of the Northern state demand that blacks be treated as "citizens" as a demand for black social or political equality. As Chapter 6 will show, it is equally mistaken to think that Northern claims about black "citizenship" during Missouri were motivated by a desire to advance black civil rights in any fashion.

In the view of an exceptionally well-informed Southern abolitionist, the Virginian St. George Tucker, the nominal status of Northern blacks as free men was in reality "a form of civil slavery."[103] Most Northern white citizens did not see the end of slavery as making social or political equality for blacks either necessary or desirable, and blacks remained second-class citizens at best there.[104] Sweet describes an incident of racially motivated violence in Massachusetts in 1806 in which a black man was attacked by white children, beaten by a white adult, and then jailed for several days before being released. Sweet concludes: "If this story tells us anything, it is that the relative absence of open conflict over lines of color in the early years of the Republic may represent not so much a

---

[103] Davis, *Slavery in Revolution*, 335-6.

[104] Melish reaches a similar conclusion on somewhat different grounds. She argues that slavery was "a form of social control." Gradual abolition statutes maintained socioeconomic dependence for most blacks, denied political representation because blacks were to continue as part of white families, and their provisions regarding children were intended to provide social control and limit poor relief, not to provide for future citizenship. Melish, *Disowning Slavery*, 63-4, 75-79.

sense of racial liberality or openness as a common acceptance of the rules of racial hierarchy."[105]

The Northern states also declined to protect fugitive slaves during abolition well before 1787. As early as 1772 under *Somerset*, and certainly after the Revolution, each of the Northern states had plenary legal authority to free fugitive slaves coming from any other state or territory, or to provide them with legal protections against recapture, if they chose. Yet all of the Northern states that began abolition prior to the Constitution and that had more than minor numbers of slaves declined by law to free fugitive slaves, and instead often protected slaveowners.[106] Courts in those jurisdictions also rejected *Somerset* and interpreted the abolition statutes in ways that denied protection to fugitive slaves. As Wiecek concludes, "the interstate rendition of fugitive slaves among the American states was a well-established constitutional tradition by 1787."[107]

When Rhode Island adopted slave import limits in 1774, it also deliberately sought to prevent an inflow of fugitive slaves from other colonies. The statute imposed prohibitive fines on persons who clandestinely brought slaves into the colony seeking to

---

[105] Sweet, *Bodies Politic,* 313.

[106] Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (Armonk: M.E. Sharpe, Inc., 1996), 102 (Rhode Island, Connecticut, Massachusetts). It is uncertain whether New Hampshire and Vermont were exceptions to the rule that fugitive slaves were not freed by gradual abolition in the north, but if they were, those exceptions provided little or no practical comfort to most fugitives. See Zilversmith, *First Emancipation*, 116-17.

[107] Wiecek, *Antislavery Constitutionalism*, 78. Wiecek concludes that this was "a matter of comity between" "sovereign entities." Id. This description aptly sketches the law after the American Revolution, but would not apply before it. Under British slavery policy prior to 1772, no colony could have refused to permit the recapture of a fugitive slave owned by a British subject from another colony. There is no evidence that such a refusal occurred during the colonial period.

free them, or harbored them.[108] It mandated removal of fugitives. "Negroes" or "mulattos" brought in by abolitionists (or fugitives) should be sent out of the colony, "as other poor Persons are, by Law" because otherwise they might "be[come] free, and liable to become chargeable" (i.e., supported by poor relief taxes).[109] The Legislature declared that it did not want Rhode Island to become a haven, and thus a magnet, for fugitives.

Section 11 of the Pennsylvania gradual abolition Act of 1780 specifically preserved all previously existing legal rights of slaveowners from other states to their slaves who became fugitives in Pennsylvania. These legal rights included the right to recapture slaves, and to sue anyone who harbored a slave for damages. Pennsylvania law assisted foreign slaveowners in recapturing their fugitive slaves. In the Act, Pennsylvania affirmed that the same powers of slave recapture and damage actions belonged to its own slaveowners, even after abolition.[110]

As had been true in Rhode Island, protecting foreign slaveowner rights had benefits for Pennsylvania slaveowners and nonslaveholders alike that had little to do with interstate comity. The Pennsylvania statute imposed poor relief obligations for all "Negroe or Mulatto" slaves or servants on the person having the right to their service, unless they were freed or abandoned before age twenty-eight. The Act's provisions meant that all slaves, including fugitive slaves, would remain the financial responsibility

---

[108] The Rhode Island legislature apparently wanted to deter abolitionist activity. Rhode Island had active abolitionists. See Sweet, *Bodies Politic*, 243-55.

[109] Wiecek described this statute as a "paradigm of later efforts to abolish slavery by force of law." Wiecek, *Antislavery Constitutionalism*, 54.

[110] The statute also provided rewards for "taking up runaway" "Negroe" and "Mulatto" slaves and penalties for abolitionist activities.

of their owners. This provision addressed a key concern of nonslaveholders, which was to avoid paying increased taxes for poor relief costs.

The case files of the Pennsylvania Abolition Society ("PAS") show that in the 1780s and 1790s slaves from other states quickly became aware that if they could reach Philadelphia, they might gain powerful allies in seeking freedom. Several PAS cases involved fugitives from other states or slaves brought to Pennsylvania by sojourners.[111] But like Rhode Island's law, the Pennsylvania Act was intended to discourage fugitives from coming to Pennsylvania, both by protecting slaveowner rights and by reaffirming existing laws against harboring slaves.

Pre-revolutionary Pennsylvania's vigorous efforts to ban slave imports had been based on concerns that an influx of slaves might cause social disruptions such as labor market dislocation and discouragement of white immigration, as discussed earlier. The Pennsylvania statute's provisions on fugitive slaves, by decreasing the likelihood Pennsylvania would become a magnet for black runaways, served the same policy goal. Pennsylvania slaveowners may also have hoped that by protecting foreign slaveowners, they would encourage other states to provide reciprocal protection to them with respect to Pennsylvania fugitives as well.

Similarly, Connecticut's 1784 gradual abolition legislation did not free or protect fugitive slaves. The Connecticut abolition legislation set free only slave children "born within this State...." Fugitives were deemed "Run-aways," who might be seized by any

---

[111] In at least four cases, the PAS or affiliates intervened on behalf of fugitives, sometimes after they had been reenslaved or imprisoned in other states. There were also cases such as *Pirate v. Dalby* where the PAS intervened on behalf of slaves brought by a sojourner to Pennsylvania. Fugitive cases are found in *PAS Fugitive Cases (3)*, (PAS ACM December 29, 1790; December 17, 1794; January 29,1794) and *Anthony Butler (Fugitive)*, (PAS LR 1791).

state inhabitant, taken to an "Authority" and returned to "his or their Master or Owner...." Because "the increase of Slaves in this State is injurious to the Poor, and inconvenient," (references to labor market disruption and poor relief costs) the legislation prohibited harboring imported slaves and imposed heavy fines for harboring such slaves. To avoid poor relief tax costs, the statute also imposed on masters of manumitted slaves financial responsibility for them "in Case they come to Want...."[112]

Massachusetts made clear that it would not protect fugitive slaves even before the Constitution was adopted, as historian Emily Blanck showed.[113] In 1788 the state adopted criminal legislation that excluded all nonresident African-Americans from Massachusetts by force unless they had official certificates proving that they were "citizens" of their jurisdiction of origin. The 1788 law necessarily meant that fugitive slaves (and probably many free African-Americans) were excluded from Massachusetts.[114] This statute was consistent with prior exclusionary practices regarding slaves in Massachusetts. During the time that slavery had existed in Massachusetts, a frequent subject of litigation between different towns about slaves had been which town had to take poor relief responsibility for them.[115] The 1788 Massachusetts exclusion

---

[112] *Acts and Laws of the State of Connecticut in America,* (New London: 1784), 233-5. Connecticut did not ban slave exports until 1788. Jeffrey R. Brackett, "The Status of the Slave, 1775-1789," in *Essays in the Constitutional History of the United States in the Formative Period, 1775-1789*, ed. J. Franklin Jameson (Boston: Houghton, Mifflin and Company, 1889), 297.

[113] As to fugitive slaves, see Blanck, "Seventeen Eighty-Three," 32-42.

[114] *The perpetual laws, of the commonwealth of Massachusetts: from the establishment of its constitution to the first session of the General Court, A.D. 1788,* (Worcester: Isaiah Thomas, 1788), 349; George H. Moore, *Notes on the History of Slavery in Massachusetts* (New York: Negro Universities Press, div. Greenwood Publishing Corp., 1866 repr. 1968), 228-9.

[115] *The Inhabitants of Wichendon, Plaintiffs in Error v. The Inhabitants of Hatfield,* 4 Mass. 123; 1808 Mass. Lexis 29; Tyng 123 (Mass. 1808). See also cases cited in Nathan Dane, *A General Digest and Abridgement of American Law*, 9 vols. (Boston: Cummings, Hilliard & Co., 1823-1829), 2: Ch. 53, 411-13.

statute conveys unmistakably the prevailing Northern sentiment that fugitive slaves were unwanted social burdens.

New York reformed its manumission law in 1785, and adopted a new slave code in 1788.[116] The slave code freed slaves imported into the state in violation of law, but not fugitives, and penalized the harboring of fugitives. The liberalized manumission statute required a certificate, usually to be signed by the "overseers of the poor," certifying that a slave could support herself before manumission could occur without posting of financial security. The 1788 slave code also included a provision prohibiting owners' collusive sales of slaves to avoid paying for their maintenance when aged or infirm, which deemed the original seller to be the continuing owner of the slave for poor relief purposes.

Later judicial decisions confirmed that slaveowner recapture rights survived gradual abolition laws. The right of private reception was recognized in Massachusetts even after the judicial abolition of slavery there in 1783.[117] The Pennsylvania Supreme Court in 1795 recognized—well after gradual abolition began there—that in Pennsylvania and other states private reception was widely accepted.[118] The New York Supreme Court of Judicature concluded that a common law right of reception that

---

[116] *Laws of New York*, (1785), Ch. 68; *Laws of New York*, (1788), Ch. 40.

[117] Blanck, "Seventeen Eighty-Three," 36.

[118] Morris, *Free Men All*, 4, citing *Respublica v. Richards*, 2 U.S. (Dall.) 224 (1795).

extended to recapture in other states had existed in New York and in other states before adoption of the Constitution.[119]

Northern states were willing to offer limited freedom and protection to their resident slaves and black freedmen, but they drew the line there. The Fugitive Slave Clause of the Constitution (Art. IV., § 2) was the predictable end of decisions already made in the Articles of Confederation and by the states during abolition about the treatment of fugitive slaves. Before the Constitutional Convention began, fugitive slaves had already been condemned to remain slaves.[120] Meanwhile, limited slavery reforms such as manumission liberalization in Southern states discussed in the next section held out little hope that abolition would begin there and instead strengthened slavery politically.

*Manumission and Abolition in the South*

Many national political and intellectual leaders of the Revolutionary generation from Southern states, including men such as George Washington, Thomas Jefferson, Henry Laurens, James Madison, and St. George Tucker, were deeply troubled by slavery. Some, like Washington, acted on their convictions by private actions such as manumission. Several others made proposals to end slavery gradually, but often these proposals depended on colonization of free blacks to avoid what were deemed insurmountable problems raised by their possible incorporation into white society.[121]

---

[119] *Glen v. Hodges*, 9 Johns 67 (1812) (N.Y.).

[120] The history of the Fugitive Slave Act of 1793 confirms this conclusion. See Chapter 5.

[121] See, for example, proposals by Thomas Jefferson in his *Notes on Virginia*, James Madison's similar approach, and the 1790 proposal by Fernando Fairfax, the latter two of which are described in Jordan,

Virginia was considered by many contemporaries as the most likely of the states with large numbers of slaves to undertake gradual abolition. Yet a candid and sympathetic political observer, James Madison, advised the abolitionist Robert Pleasants in 1791 he could not assist in seeking gradual abolition legislation in Virginia because Madison's supporters opposed it. Madison told Pleasants that "those from whom I derive my public station are known by me to be greatly interested in that species of property, and to view the matter in that light."[122] In 1797 the Virginia legislature rejected out of hand the major gradual abolition proposal it received during the eighteenth century.[123] This rejection effectively meant that gradual abolition would not occur in any of the slave states. Neither Virginia's legislature, nor that of any other Southern slave state, gave serious consideration to any proposal for the systematic gradual abolition of slavery before 1830.

That did not mean, however, that slave states made no changes in their regulation of slavery as an institution during the Early Republic. Berlin and others have described the large post-Revolutionary economic changes in the slave states that altered the working and living conditions of slaves, sometimes in ways that benefited them.[124] Several of the Southern states altered their criminal laws to provide some protection to slaves against the worst forms of physical abuse by their owners.[125]

---

*White Over Black*, 552-4. Many of these proposals reflected fairly broadly held southern opinions on matters of race. See Jack P. Greene, "'Slavery or Independence:' Some Reflections on the Relationship Among Liberty, Black Bondage, and Equality in Revolutionary South Carolina," *South Carolina Historical Magazine* 80 (1979): 193-213.

[122] Madison quoted in Davis, *Slavery in Revolution*, 196.

[123] See Chapter 5.

[124] Berlin, *Many Thousands Gone*, Chs. 10-12.

Beginning with Virginia in 1782, some Southern and western slave states liberalized their manumission laws for a period that lasted somewhat over twenty years.[126] These states made no alteration, though, in the subordinate social and political condition of free blacks, and in some cases, added discriminatory restrictions during this period.[127] The political and economic implications of these Southern manumission law reforms are of interest here.[128]

In Virginia and other major slave states, manumission laws served as a political "escape valve" to avoid pressure for gradual emancipation. This was precisely the political function that such statutes had served in Northern states such as New York and New Jersey when slaveowners there were resisting abolition. Manumission liberalization had particular appeal in slave states because of such laws' inherent political equivocation regarding slavery.

Manumission laws recognized the right of slaveowners to act according to conscience and free their slaves if they chose to do so. But the statutes did not interfere with, and indeed reaffirmed, the right of other slaveowners to continue slavery since that was how they chose to deal with what manumission laws confirmed was their property. The private manumission statutes thus envisioned slavery conceptually as a pure private

---

[125] William W. Fisher III, "Ideology and Imagery in the Law of Slavery," *Chi.-Kent L. Rev.* 68 (1993): 1051-1083; Thomas D. Morris, *Southern Slavery and the Law 1619-1860* (Chapel Hill: University of North Carolina Press, 1996).

[126] The Virginia 1782 manumission law permitted manumission of slaves under age forty-five without legislative approval and without requiring free blacks to leave the state.

[127] Jordan, *White Over Black*, 406-8.

[128] For legal issues related to manumission and contrasting positions taken by different state courts on the implementation of manumission laws, see Morris, *Southern Slavery*; Robert M. Cover, *Justice Accused: Antislavery and the Judicial process* (New Haven: Yale University Press, 1975).

property institution, the complete and regressive negation of the idea that the general public (particularly the nonslaveholding public) had any legitimate interest in what happened to slavery as an institution.[129]

Manumission laws were especially appealing to those who opposed slaveholding for reasons of conscience, and wished to end their own role in what they saw as sinful actions. One study of Virginia manumission concluded that heavy Quaker lobbying was "apparently responsible" for the 1782 statute. Another study concluded that that statute was more "an acknowledgement of the religious rights of whites than of the natural rights of blacks."[130]

Manumission reform appealed to slaveholders for economic reasons as well. Berlin argues that manumission law changes in Virginia and the Chesapeake were motivated by shifts in the agricultural economies in these states which made it more profitable to be able to hire free blacks for casual labor, and actually strengthened slavery as an institution.[131] The economic changes to which Berlin points resemble in broad outline the changes in the Pennsylvania and New York economies that other historians see as a primary cause of the decline of slavery in Northern states. Berlin's conclusion is confirmed by historian Eva Sheppard Wolf's thoughtful study of Virginia manumission.

---

[129] Slaveowner rights to manumit slaves had been regarded for a century or more (in both northern and southern states) as subject to public control for society's protection. For a good discussion of this issue, see Jenny Bourne Wahl, *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery* (Cambridge: Cambridge University Press, 1998), 160-163.

[130] Davis, *Slavery in Revolution,* 197; John E. Selby, *The Revolution in Virginia: 1775-1783* (Charlottesville: University of Virginia Press, 1988), 322, quoted in review by E. Wayne Carp, *The William and Mary Quarterly*, 3rd. series, Vol. 36, No. 3 (July, 1989), 618-19.

[131] Berlin, *Many Thousands Gone*, 279-285.

Wolf shows that after an initial wave of manumissions motivated by antislavery concerns in the 1780s, Virginia manumissions served primarily as a way to reward small numbers of individual slaves for good service. Such manumissions could reinforce, rather than subvert, slavery. Wolf concludes that "many fewer people were freed than has been thought."[132] She also concludes that public support for manumission did not imply support for gradual abolition: "white Virginians...remained generally convinced of slavery's importance to their society as well as of the inferiority of black people who were enslaved," and they continued to be unwilling to abandon slavery in the late eighteenth century.[133]

The positions that leading Virginia politicians took on manumission reform as opposed to gradual abolition tell us a good deal about how they understood the politics of manumission. From the little that is known about the 1782 manumission law's legislative history, it appears that Virginia's "national" politicians—men such as Madison and Washington—were not actively or openly involved in its passage, though some of them supported or had supported this type of legislation. Other leading Virginia politicians such as Edmund Randolph emphasized what they saw as the indelible political distinction between support for manumission liberalization and support for abolition by specifically declining invitations to support abolitionist memorials.[134]

Some Virginia national leaders actually opposed manumission reform. Historian Peter Onuf argues that Jefferson opposed manumission liberalization because he believed

---

[132] Eva Sheppard Wolf, *Race and Liberty in the New Nation* (Baton Rouge: Louisiana State University Press, 2006), xi.

[133] Id.

[134] Newman, *Transformation of Abolitionism*, 33.

that it would be counterproductive unless accompanied by colonization.[135] Jefferson was not alone in viewing colonization as a necessary part of any slavery reform. In 1783, the Virginia legislature's docket included a legislative petition that sought emancipation, but the petition failed in the Assembly. Legislator John Minor's uncle, Peter Minor, wrote to him and applauded its defeat: "As to your bill for emancipating the slaves, I think it met with a very good fate for we might as well let loose a parcel of Indians or lions, as to let our slaves free without they could be sent from the country."[136]

Although much of the Virginia elite was willing to support manumission reform, its members often sharply opposed gradual abolition efforts, including legal support and advocacy by abolition supporters.[137] In the 1790s, the Virginia legislature passed several statutes designed to impair the work of the Virginia Abolition Society. These included a bar on jury membership by its members in slave freedom cases, and a 1795 statute penalizing unsuccessful freedom suits, and prohibiting abolitionist legal assistance to slaves seeking freedom.[138] The harsher of these laws was referred to by an abolitionist in 1796 as the Act for "abolishing the Abolition of Slavery throughout the State of

---

[135] Peter S. Onuf, "Domesticating the Captive Nation: Thomas Jefferson and the Problem of Slavery," (on file with author).

[136] Peter Minor (Petersburg, Virginia) to John Minor, Sept. 25, 1783, Minor and Wilson Papers (Charlottesville: University of Virginia Small Special Collections Library). I thank my student Ezra Kidane for this reference.

[137] Robert McColley, *Slavery and Jeffersonian Virginia* (Urbana: University of Illinois Press, 1978), 158-161.

[138] Duncan J. MacLeod, *Slavery, Race, and the American Revolution* (Cambridge: Cambridge University Press, 1974), 124; Newman, *Transformation of Abolitionism*, 34-5.

Virginia."[139] Abolitionist societies were "instructed by the legislature" to cease political activities.[140]

Also in the 1790s, the Maryland legislature vehemently attacked the work of the Maryland Abolition Society as abusive misuse of the law to interfere with slaveowner rights. The legislature took out official newspaper advertisements around Maryland attacking the Abolition Society's work. By the early 1800s, in the face of unremitting hostility from the slaveowner legislative majorities, the Virginia and Maryland abolition societies were defunct. Legislative majorities in both Maryland and Virginia had reacted to abolition proposals and legal actions by aggressively redefining manumission as the politically acceptable outer limit of slave law reform.

Numerous studies of manumission in different slave jurisdictions both in and outside of the United States have shown that the underlying economic reality was that slave manumission often amounted to a negotiated self-purchase of freedom by a slave, although some manumissions undoubtedly resulted from slaveholder benevolence or belief in the justness of abolition. There were many situations where such negotiated purchases served the differing but coincident interests of both slaves and masters. Slaves bargained for freedom, which could mean the right to build a stable family, and which in urban areas could mean the possibility of better employment at higher wages. Masters bargained for limits on slave flight, improved productivity, and limits on cash outlays for labor. Masters also often gave freedom to slave women with whom they had had children

---

[139] MacLeod, *Slavery, Race*, 124.

[140] Newman, *Transformation*, 34.

and to those children.[141] Manumission laws actually improved masters' bargaining position in such negotiations by making manumission easier to grant, but at their sole option.

The actual impact of manumission liberalization on the growth of slavery in the slave states was quite limited. During the period from 1790 to 1810, free blacks went from 3.4 percent of the black population in the slave states including Virginia and those to its south and west to slightly more than 5 percent of the black population in those states. During that same period, the overall slave population of those states had more than doubled, and at its end they held 97 percent of the total U.S. mainland slave population.[142]

After 1800, when several of the Southern slave states began to tighten manumission laws (by imposing bond requirements or similar obstacles), the relative voting strength of Southern slaveholders and nonslaveholders and opinions about abolition in those states were not markedly different than they had been at the beginning of the 1780s. There was no support in those states for gradual abolition (at least absent increasingly impractical colonization), but the intervening slave revolts in Santo Domingo and Gabriel's rebellion meant that there were rising white fears of slave rebellion. Many slaveowners—North and South—firmly believed that the existence of

---

[141] McManus, *New York Slavery*, 145-149; Berlin, *Many Thousands Gone*, 279-285, 331-2; Frank D. Lewis, "The Transition from Slavery to Freedom through Manumission: A Life-Cycle Approach Applied to the United States and Guadeloupe," in *Slavery in the Development of the Americas*, ed. David Eltis, Frank D. Lewis, and Kenneth L. Sokoloff (Cambridge: Cambridge University Press, 2004), 150-180.

[142] Based on data from Berlin, *Many Thousands Gone*, 372-3 (Table 2). They exclude Delaware and Maryland which were clearly atypical. Free black populations there grew at a much higher rate than in the remaining slave states below Pennsylvania. It appears that there were more manumissions in those states because their proximity to free jurisdictions made slave flight much easier, so masters in those states needed to provide additional incentives to retain their labor. William W. Freehling, *The Reintegration of American History: Slavery and the Civil War* (Oxford: Oxford University Press, 1994), 19. The persistent disputes between Maryland and Pennsylvania over fugitive slavery also support this view.

significant numbers of free blacks in a slave state increased the possibility of rebellion and other social costs such as crime and slave flight, and nonslaveowners often shared these beliefs (whose correctness is irrelevant here).

The Virginia manumission statute had been somewhat unpopular from its adoption. After Gabriel's rebellion in 1800, the legislature sought for several years to find a means of removing free blacks from the state. When it became apparent that none of the lands acquired in the Louisiana Purchase would be set aside as a free black colony as many legislators had hoped, a majority of the legislature decided that they had tolerated the problems they associated with free blacks long enough. In 1806 Virginia law was amended to provide prospectively that blacks who were freed must leave Virginia or face re-enslavement. Arguments during legislative debate on the 1806 amendment that this change in the law abandoned Revolution principles and impaired slaveowner property rights were met with the plea that protection of slaveholding as an institution made the change necessary.[143]

Virginia's sharp retreat from its liberal manumission policy led to responses by other states and caused important changes in Virginia manumission patterns. In response to Virginia's action, several nearby states shortly thereafter banned the entry of free blacks (including Delaware, which by then had a large free black population). Ironically, as may have been anticipated, the Virginia law's requirement that free blacks leave the state actually led to a sharp decline in manumissions because blacks did not want to leave their families and means of support.[144]

---

[143] Jordan, *White Over Black*, 574-81.

[144] Ibid., 576-77.

Historian Winthrop Jordan argues that Virginia's 1806 retreat on manumission was a turning point against abolition in the Southern slave states, but that position is mistaken, in the first instance because manumission was never seen as a means toward abolition. And as Chapter 5 will show, most thoughtful observers had concluded by the 1790s that gradual abolition in Virginia—and by inference, in the remainder of the South—was unlikely to occur anytime soon. Moreover, many of Virginia's late eighteenth and early nineteenth century state-level (as opposed to national) political leaders had no significant qualms about slavery, and never seriously entertained the idea that gradual abolition should occur. Littleton Waller Tazewell was fairly typical of such state leaders.

Tazewell, a son of one of Virginia's earliest United States senators, was a prominent Norfolk attorney and substantial slaveowner. His prominent political career included service to Virginia during the first third of the nineteenth century as United States representative and United States Senator, in Virginia's legislature, and as Governor. Tazewell's life was full of encounters with slavery as a legal and business problem, but in his extensive correspondence and political actions he expressed no moral or political qualms about the institution until fairly late in his career, after the 1830 Turner slave rebellion.[145] Even after that rebellion, Tazewell thought abolition should be considered as a means to prevent future rebellions only if all free blacks could be exported from Virginia. He accepted the Virginia legislature's decision to take no major

---

[145] In the early 1800s, Tazewell discovered that systematic and phenomenally profitable slave smuggling enterprises were operating in Virginia and elsewhere. He contacted his good friend, Virginia Congressman John Randolph, to see if Congress could act against them, seeking to have Virginia's state laws obeyed. Norma Lois Peterson, *Littleton Waller Tazewell* (Charlottesville: University Press of Virginia, 1983), 31-2.

actions against slavery after the Turner rebellion. In the United States Senate, Tazewell vigorously led the opposition to the use of federal funds to support colonization measures, contending they were an unwarranted extension of federal power over slavery.[146]

Tazewell's political stance regarding slavery during a long and very prominent political career was to defend the status quo on slavery at nearly every turn. Tazewell's positions on slavery throughout his career were representative of most elite Virginians' political thought. For such men, manumission was a means of salving slaveowner consciences or rewarding exemplary slaves, not a means to abolition. Like Northern abolition experiments, Southern manumission liberalization involved no cost to most slaveowners, no cost to nonslaveholders, and no significant change in the subordinate, readily exploitable, social and political position of free blacks.

*Conclusion*

The history of abolition and manumission reviewed here contains several broad lessons. The most important of these has to do with the sociopolitical character of these processes. Northern citizens made clear during abolition that they were unwilling to pay any of the economic costs of black freedom in their own states, let alone elsewhere. They were equally unwilling to permit black "freedom from slavery" to become black equality. To succeed politically in Northern states, abolition necessitated dissociation of slavery as a labor regime from slavery as an institution of social and political control in order to maintain existing social stratification. Another fundamental limitation on slave freedom

---

[146] Ibid., 150-1.

was that fugitives would not be protected or freed. Abolition was an internal process directed at state residents.

The boundaries of freedom conferred on blacks were narrow from the outset, and became more confining over time. Even as Northern citizens became more interested in abolishing slavery outside the Northern states, they became more insistent on limiting black freedom within those states. It was these cramped Northern state views of society's accountability for slavery and of the limits of black "freedom" in Northern states that largely shaped the positions their representatives took on slavery and abolition at the Constitutional Convention of 1787.

The political dynamics of Northern abolition and Southern manumission had profound implications for slavery reform at the national government level. Political support for abolition among the Northern public was like the Platte River —"mile wide, but inch deep."[147] This weak support necessarily meant that there would be little or no Northern political support for efforts at the national government level to press for abolition in the South or for containing slavery within existing states if Northern citizens were required to bear any of the costs of such reforms. The political history of Southern manumission laws demonstrated that minimal support for abolition legislation existed in the South. In this political climate, Northern politicians were not only free, but were politically required, to pursue policy goals and tradeoffs at the national level other than Southern abolition or slavery containment, while Southern politicians had little or no political ability to agree to any abolition or containment policies.

---

[147] For a very similar conclusion about New York public opinion on emancipation, see Gellman, *Emancipating New York*, 46 (emancipation enjoyed "broad but shallow support").

# II

# THE MAKING OF

# THE SLAVEHOLDERS' CONSTITUTION

# PROPERTY AND THE DILEMMA OF POLITICAL REPRESENTATION

*Introduction*

The historiography on slavery and the Constitution has addressed five major questions whose answers go to the heart of our ability to understand the American federal republic. The questions are: Was the Constitution "proslavery" or not? Was slavery perceived as a national problem or as a state problem at the time the Constitution was drafted? Were various slavery provisions of the Constitution essential to the formation of the Union? Was the Constitution intended to have a moral, social, or "revolution principles" dimension as well as a political union dimension, at least where slavery was concerned?[1] Was the Constitution's slavery compromise part of a larger "grand bargain"

[1] The historiography on slavery and the Constitution includes the following: Donald L. Robinson, *Slavery in the Structure of American Politics 1765-1820* (New York: Harcourt Brace Jovanovich Inc., 1971); Paul Finkelman, "Slavery and the Constitutional Convention: Making a Covenant with Death," in *Beyond Confederation*, ed. Richard Beeman, Stephen Botein, and Edward C. Carter II (Chapel Hill: University of North Carolina Press, 1987); Don E. Fehrenbacher, *The Slaveholding Republic*, ed. and completed by Ward M. McAfee (Oxford: Oxford University Press, 2001); Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (Armonk: M.E. Sharpe, Inc., 1996); David Brian Robertson, *The Constitution and America's Destiny* (Cambridge: Cambridge University Press, 2005);David Brion Davis, *The Problem of Slavery in the Age of Revolution 1770-1823* (Oxford: Oxford University Press, 1999 repr. 1975 ed.); Leonard L. Richards, *The Slave Power* (Baton Rouge: Louisiana State University Press, 2000); David C. Hendrickson, *Peace Pact: The Lost World of the American Founding* (Lawrence: University Press of Kansas, 2003); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage Books, 1997); Earl M. Maltz, "The Idea of the Proslavery Constitution," *Journal of the Early Republic* 17, no. 1 (1997): 37-61; Staughton Lynd, *Class Conflict, Slavery & the United States Constitution* (Indianapolis: The Bobbs-Merrill Co., Inc., 1967); Staughton Lynd, "The Compromise of 1787," *Political Science Quarterly* 81, no. 2 (1966): 225-50; William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Ithaca: Cornell University Press, 1977); Howard A. Ohline, "Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States Constitution," *William & Mary Quarterly* 3rd ser. 28 (1971): 563-84; William W. Freehling, "The Founding Fathers and Slavery," *American Historical Review* 77, no. 1 (1972): 81-93; William W. Freehling, *The Reintegration of American History: Slavery and the Civil War* (Oxford: Oxford University Press, 1994); John P. Roche, "The Founding Fathers: A Reform Caucus in Action," *American Political*

that included an agreement regarding the terms of the western expansion of the United States?[2] This introduction comments on two of these broad questions.

On the overarching question whether the Constitution was "proslavery," some historians argue that the Constitution's slavery-related provisions (a list which they define expansively) provided "enormous protections" to slavery, so that the Constitution was "proslavery." Others argue that the slavery provisions (which they define narrowly) were "marginal" to slavery.[3] How is such a discordance of views possible?

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

---

*Science Review* 55, no. 4 (1961): 799-816; and see the critique of Lynd's work in James H. Hutson, "Riddles of the Federal Constitutional Convention," *Willam and Mary Quarterly* 3rd Ser., 44, no. 2 (1987): 411-423. Slavery's influence on Constitution formation is also discussed in the broader context of differing ideas about political economy by Cathy D. Matson and Peter S. Onuf, *A Union of Interests: Political and Economic Thought in Revolutionary America* (Lawrence: University Press of Kansas, 1990), 113-119. Jack Pole's work includes a useful discussion of the Convention debate on representation. Jack R. Pole, *Political Representation in England and the Origins of the American Republic* (Berkeley: University of California Press, 1966 (pbk. 1971)). Finally, the work of William Crosskey, despite important limitations discussed below, provides valuable source material and background. William Winslow Crosskey and William Jeffrey Jr., *Politics and the Constitution in the History of the United States*, vol. III (Chicago: University of Chicago Press, 1980). For an analysis that includes a discussion of the nineteenth century historiography on slavery, see James H. Hutson, "The Creation of the Constitution: Scholarship at a Standstill," *Reviews in American History* 12, no. 4 (1984): 463-77.

[2] Lynd, "Compromise of 1787"; Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787* (Philadelphia: University of Pennsylvania Press, 1983), 169-172.

[3] Compare Finkelman, "Slavery and Constitution" 193 (analyzing fifteen Constitutional provisions, including provisions relating to taxation and Electoral College) with Fehrenbacher, *Slaveholding Republic*, 44 (there are three clauses directly related to slavery in Constitution).

that the Constitution failed to restrain the growth of slavery as much as some thought then (but especially later) that it should.

Three reasons support the view presented here that the Constitution was "pro-slavery," and created a slaveholders' Union. First, its representation system provided critically important explicit political protection for slave property (or its then functional equivalent, the political interests of slave states), an issue discussed in this Chapter. Second, the Constitution's other slavery-related provisions, by carefully preserving the Confederation status quo ante on slavery in virtually all respects, were clearly designed to permit slavery to expand without hindrance for at least an entire generation after its adoption, and as a clearly foreseeable result probably much longer (indeed permanently). Third, the Constitution was equivocal on whether slaves were property solely under state law or whether they were property under federal law as well. Although slavery was deemed a local concern in most respects and was thus expected to be governed largely by state law, it was also given unique legal protections by the Constitution that insulated it against the exercise of both national and state government powers that could otherwise have been used to control it. The second and third issues are analyzed in Chapter 4.

However, the Constitution was also notably inexplicit (and in that sense ambiguous) on certain issues that would profoundly affect the future of slavery. Delegates chose not to explicitly resolve how slavery would, or even potentially could, be addressed by Congress in fundamentally important future contexts such as the creation of new states and territories, or controlled through the use of the domestic commerce power after 1808. This constitutional silence—or issue deferral—meant that future political and legal developments had the potential to play a significant role in disputes over the growth

of slavery if and when there was a sufficient desire on the part of Northern states to control the expansion of slavery. Until that occurred, however, the Constitution was largely a "dead letter" where restriction of slavery was concerned, and served instead to protect and legitimize slavery's foreseeable expansion.

On the moral nature of the Constitution, certain recent historians argue that abolitionist William Lloyd Garrison and his followers were correct that the Constitution was indeed a "covenant with Death" and an "agreement with Hell" because of its accommodation with slavery.[4] Other historians seek to deflect this indictment of the Constitution by arguing that the Constitution was "essentially open-ended" on major issues regarding slavery.[5] Part II of this work argues that the Constitution was not intended as a moral union where slavery was concerned. That part of the Garrisonian indictment rested on an anachronism.[6] It is true, however, that the actual nature of the Constitution's slavery bargain was concealed by Federalists from the Northern public. Nevertheless, the conventional view, that Northern state citizens reasonably expected that Southern slavery would wither away over time, rests on isolated evidence which cannot justify it, and Federalist concealment does not alter that conclusion.

---

[4] Finkelman, "Slavery and Constitution"; Hendrickson, *Peace Pact*, 240-1 ("contract with the devil") ; Rakove, *Original Meanings*, 58. Whether these historians agree with Garrison's conclusion that the Constitution therefore involved "both parties in atrocious criminality" is uncertain.

[5] Fehrenbacher, *Slaveholding Republic*, 47. Fehrenbacher's description of the Constitution as "open-ended" is potentially imprecise. Its slave trade provision was "open ended" in the sense that it created a clear grant of power but made it subject to future political action, but other provisions of the Constitution such as the domestic commerce clause were legally inexplicit or ambiguous in their application to slavery —not "open-ended."

[6] On this general issue, see Matson and Onuf, *A Union of Interests*, 118-19.

In drafting and ratifying the Constitution the Northern states were "giving a hostage to fortune" where slavery was concerned.[7] Fateful silences and ambiguities remained on Congress's power to control the domestic slave trade and on its power to control slavery in territories and new states. When the Northern states sacrificed short-run control over slavery's expansion, in return for short-run political gain and the vain hope that a future generation might gain the ability to control slavery politically, they struck a losing bargain that became a permanent covenant with slavery by 1820. A major part of the real price of Union was the expansion of slavery, not just its protection. Some might call this pragmatic realism; others might call it a leadership failure of the first order; but it was without a doubt the opening act of a great national tragedy.

*Slavery and National Politics under the Articles of Confederation*

Under the Confederation's laissez-faire political regime for slavery, the institution grew significantly. During the period from 1770-1790, the slave population of the United States increased by more than 50 percent. Slave imports accounted for part of the slave population growth during that period, while the rest of the growth during these two decades resulted from natural population increase.[8] The balance between slave imports and natural slave population increase had changed in several mainland colonies by about 1720, after which "the annual rate of natural increase in the United States was greater

---

[7] This apt phrase is Donald Robinson's. He applies it to the treatment of slavery in the Constitution as a whole. Robinson, *Slavery in Politics,* 246.

[8] Slave population figures are from Berlin, *Many Thousands Gone*, and U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1970* (Washington, D.C.: U.S. Department of Commerce, Bureau of the Census, 1975).

than the annual increase due to importations."[9] Historian Philip D. Morgan concludes that "overall, from the early eighteenth century onward the mainland slave population grew faster, from natural population increase, than contemporary European populations."[10]

Slave population growth and other economic indicators such as steadily increasing slave prices suggest to some economic historians that overall, as of 1787 slavery was a vital, growing economic institution in the slave states. These historians reject the earlier view that American slavery was dying during the late eighteenth century and was resurrected only by the growth of the cotton economy.[11] In any event, by 1787 slave imports had resumed and slavery was rapidly expanding into new Southwestern territories that quickly became states after the Constitution was ratified, including Kentucky and Tennessee.

Under the Confederation, slavery was governed in most major respects by state law. Each state had unfettered authority to permit slaveowners to import and export

---

[9] Robert William Fogel, *Without Consent or Contract: The Rise and Fall of American Slavery*, 1994 pbk. ed. (New York: WW Norton & Company, 1989), 33. Fogel estimates that between the Revolution and 1810, one-third of the growth of black population was due to imports. Id. The precise relationship between population growth and slave imports during this period is controversial. See discussion in James A. McMillin, *The Final Victims: Foreign Slave Trade to North America, 1783-1810* (Columbia: University of South Carolina Press, 2004), 13-17.

[10] Philip D. Morgan, "The Poor: Slaves in Early America," in *Slavery in the Development of the Americas*, ed. David Eltis, Frank D. Lewis, and Kenneth L. Sokoloff (Cambridge: Cambridge University Press, 2004), 302.

[11] Ibid., 32. Fogel and Engerman's views on issues such as the productivity or efficiency of slavery have divided economic historians. Even some of their major critics now apparently concede that at least with legal and political support, during the late eighteenth century slavery was a dynamic economic institution. See Gavin Wright, *Slavery and American Economic Development* (Baton Rouge: Louisiana State University Press, 2006). For recent data on slave prices and slave economic status, see the essays on those topics in David Eltis, Frank D. Lewis, and Kenneth L. Sokoloff, eds., *Slavery in the Development of the Americas* (Cambridge: Cambridge University Press, 2004), chs. 6 and 10. This emphasis on the overall economic vitality of slavery is, of course, consistent with the fact that in some local areas, traditional crops were declining in importance in the late eighteenth and early nineteenth centuries, lessening the profitability of slavery there.

slaves, and to regulate domestic slavery. The Articles of Confederation provided legal protection against slave flight and for the interstate slave trade. Even Northern states engaged in abolition provided no meaningful protection to fugitive slaves against recapture.

Slaveholder interests were dominant in the governments of states where slavery was a major socioeconomic institution. In Virginia, Wolf concludes that slaveowners "almost certainly" formed a majority of eligible voters in the years after the Revolutionary War. [12] Other slave states undoubtedly had similarly composed electorates. Slaveowners usually had little difficulty in shaping both the substance of slavery laws and their enforcement to meet their collective needs. In those states, slaves were the largest single category of property assets other than land. Slaves were commonly taxed only where slaveowners believed that such taxation would help maintain slave prices, as in the case of import duties, or would serve as an efficient means to maintain slaveowner control of political institutions by shifting the burden of taxation away from non-slaveholders.[13] There was little meaningful post-Revolutionary pressure in the slave states for abolition, and what little pressure did exist was readily contained by manumission reforms that had little impact on the growth of slavery.

Thus, looked at from the vantage point of slavery only, slaveowners should have had little or no interest in changing the Confederation government stance toward slavery. Indeed, based on objections by "southern and eastern" Congressmen, in 1785 the

---

[12] Eva Sheppard Wolf, *Race and Liberty in the New Nation* (Baton Rouge: Louisiana State University Press, 2006), 6 n. 6.

[13] For a recent history of issues related to slavery, taxation, and politics see Robin Einhorn, *American Taxation, American Slavery* (Chicago: University of Chicago Press, 2006).

Confederation Congress, without even taking a vote, rejected efforts made by Congressman David Howell of Rhode Island to refer to committee a Quaker memorial seeking legislation to prohibit the slave trade. Congress was also completely deadlocked on other efforts to influence the growth of slavery at the continental level prior to 1787 by prohibiting it in new territories.[14]

But slaveowners were not immune from dislocations caused by the broader weaknesses of the Confederation. Southern interests in expanded international trade and strengthened military defense in particular were adversely affected by the fact that the Confederation could not pay its legitimate debts or raise an effective military force. Ironically, slaveowners bore a special responsibility for these weaknesses of the Confederation government, because the political strength of the institution of slavery had been largely responsible for the inability of the Confederation government to tax effectively. Slavery's influence had created a massive political roadblock to effective national government during the Articles of Confederation period that had to be removed before the Constitution could be adopted. The precise terms on which that removal occurred are the key to understanding slavery's relation to the Constitution.

In 1776 and 1777, representatives of slave states had insisted successfully in the Continental Congress that slaves should not be included in the Confederation tax base.[15] Northern state delegates had therefore reluctantly acquiesced in the creation of a taxation system that instead based state tax quotas on the value of land and buildings in each state.

---

[14] Joseph DeLaplaine to Philadelphia Friends Meeting for Sufferings, New York, 10th (?) mo. 1785, Society of Friends, Miscellaneous Documents, Philadelphia Meeting for Sufferings (Swarthmore: Friends Historical Library).

[15] See Chapter 1.

This taxation system had severe, inherent administrative and political flaws that led one historian to describe it as a "hopeless formula" that "proved an impossible remedy." The Continental Congress therefore agreed to abandon the system in 1783, so it never actually operated.[16]

Slaveowner state representatives agreed in 1783 to a compromise taxation program, one part of which permitted inclusion of slaves in the tax base. However, the proposed taxation system used the fraction of three-fifths of each slave counted in including slaves in the tax base, because slaveowner interests were willing to agree only to that fractional valuation as a compromise. This agreed upon fractional ratio of slaves to free citizens for taxation purposes quickly became known as the "federal ratio."

Because no other form of property was specifically included in the 1783 proposal's taxation base, the creation of the federal ratio represented a significant concession by slave state interests. Their concession tacitly acknowledged that Southern states would benefit from a fiscally stable central government. Northern state representatives had wanted slaves counted as full individuals for tax purposes, since that would have lessened the relative tax burden on those states. The creation of the federal ratio therefore also implied that the Northern states acknowledged that slave population was a necessary part of a population-based measure of wealth, and that the slave states were comparatively wealthier than the Northern states were.

By 1786, eleven states, including all of the slave states, had ratified the proposed 1783 change in the Articles taxation system to adopt the federal ratio. But since

---

[16] Hendrickson, *Peace Pact*, 226; Pole, *Political Representation in England*, 349 n. For the system's deep flaws, see E. James Ferguson, *The Power of the Purse: A History of American Public Finance, 1776-1790* (Chapel Hill: University of North Carolina Press, 1961), 165.

unanimity was required under the Articles for such an amendment, the proposal failed.[17] By 1786, it became clear that the Confederation had no ability to raise money through taxation, and states were refusing to pay their shares of Congressional requisitions.[18] The bankrupt Confederation had no means of recovering from its bankruptcy.

Other events in the mid-1780s also caused influential political leaders in several states to re-examine completely their views on the Confederation and moved them toward support for a national convention.[19] Political leaders in different parts of the United States concluded, at roughly the same time, that the Confederation government needed to be profoundly altered or it might collapse.[20] Although many political leaders decided that they wanted a more powerful, effective central government, they also faced a resulting dilemma: a powerful new government might deprive them of important authority they already possessed. Notwithstanding this reevaluation of the Confederation, there was also still considerable popular and elite support for continuing the weak Confederation

---

[17] New Hampshire and Rhode Island were the exceptions.

[18] See William Grayson to James Monroe, May 29, 1787, *The Records of the Federal Convention of 1787*, ed. Max Farrand, pbk ed., 3 vols. (New Haven: Yale University press, 1966) (hereafter "Farrand"), 3: 30.

[19] Historians point to different causes for this re-evaluation, including economic and social disruption. For example, Shays's Rebellion played a large role in Rufus King's sharp reversal of position on the desirability of a new government. Some historians point to disputes over territory that were largely irresolvable by the Confederation as sources of discord between the states that threatened to cause permanent divisions. Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787* (Philadelphia: University of Pennsylvania Press, 1983). Other historians emphasize the central role of the 1786 Congressional debate over the Jay-Gardoqui or "Spanish Treaty" negotiations, which made undeniable the existence of stark sectional discord and created a sense that the Confederation government not only was powerless but could cause affirmative damage to sectional interests and national unity. See discussions in Richard B. Morris, *The Forging of the Union* (New York: Harper & Row, 1987), 232-44; Crosskey, *Politics and the Constitution*, 3: 285-314, 353; and Rakove, *Original Meanings*, 43. (This work does not accept Crosskey's interpretation of the Commerce Clause, or rely on his argument that Madison fabricated certain of his notes).

[20] Leaders such as George Washington thought that the result would be "anarchy"; others foresaw the possible creation of regional confederacies with sharply conflicting interests that might lead to warfare.

government with perhaps a sizeable patch here and there. This complex political environment limited the freedom of action possessed by delegates to the Constitutional Convention. But to understand events at the Convention fully, it is also essential to appreciate the differing political goals that motivated various parts of the country as they approached the prospect of creating a new central government.

One important concern for the states was the extent of the central government's power to control commerce. During British rule, Parliament had exercised very broad authority to regulate commerce. Parliament's power included the regulation of both foreign and domestic commerce. Britain had aggressively used its foreign commerce power through its Navigation Acts. Parliament had also intervened in important cases to control commercial law throughout the Empire. Such commercial law interventions by Parliament had included the 1732 British statute that deemed slaves hybrid, uniform imperial property and created favorable rules for slave property creditors throughout the colonies. A broad grant of commerce authority to the new central government could, however, dramatically change the political and economic balance of power between the central government and the states, as well as between various parts of the United States. Thus, the precise scope of the commerce power to be granted to the central government was a consideration of first importance.

Massachusetts and other Northern states had a particularly strong interest in giving the new government sweeping commerce authority. Prominent Northern leaders like General Benjamin Lincoln expected that Massachusetts would seek to use such broad commerce power to enact a British-style Navigation Act for the United States, requiring

United States exporters to make their exports in U.S.-owned (i.e., Massachusetts) ships.[21] Pressure for the adoption of trade tariffs, at first perhaps for use as trade weapons, would not be far behind. Prominent Southern political figures believed that Massachusetts, in particular, had very little interest in changing much else about the Confederation beyond the scope of its commerce power. William Grayson, a Virginia leader and an astute political observer who became one of Virginia's first Senators after the adoption of the Constitution, cautioned James Madison in May, 1786, that if the proposed Annapolis commercial convention produced "anything decisive" in the way of commercial powers, "nothing more [was] to be expected from Massachusetts, etc., etc."[22] In fact, Massachusetts leaders thought there were limited benefits beyond commerce authority that their states could derive from a post-Confederation government, confirming Grayson's suspicions about their position.

Rufus King, then a prominent Massachusetts politician, had been informed by a trusted confidant that the South was militarily weak as a result of its dependence on slave labor.[23] King was a principal Northern state leader during the fierce, sectionally divisive Congressional debate over the Jay-Gardoqui (or "Spanish Treaty") proposal in 1786, and as his views during that debate made clear, King accepted the view that the South was militarily weak.[24] He concluded that the South's military weakness meant that the

---

[21] Benjamin Lincoln to Rufus King, February 11, 1786, quoted in Crosskey, *Politics and the Constitution*, 3: 234.

[22] William Grayson to James Madison, May 28, 1786, ibid., 3: 393.

[23] Benjamin Lincoln to Rufus King, ibid., 3: 234.

[24] The proposed treaty would have provided that in return for Spain's willingness to open its markets to U.S. products, particularly those of New England, the United States would relinquish for thirty years its claim to the right to navigate down the Mississippi River. For background on the negotiations, see Richard

principal benefits Northern states would derive from the creation of a new government would be commercial.[25]

While Northern state delegates to the Constitutional Convention included several men known as opponents of slavery, including Benjamin Franklin, there is no evidence that any of these delegates regarded action against slavery as part of their charge in creating a new government. Despite the fact that by 1787 five Northern states had begun abolition of slavery, in preparation for the Convention Northern state representatives received no instructions from any of the legislatures which appointed them that they should seek to advance an antislavery agenda of any kind, including action against the slave trade.[26] For Northern state delegates, slavery was instead seen as a powerful political obstacle that had to be dealt with in order to address other critical continental issues like effective federal taxation.

The Southern states, on the other hand, had far less interest in providing broad commerce authority to a new government than the Northern states had. Judged by the actions of the Virginia legislature, the Southern states were hostile to the idea of broad commerce powers for the new government, as historian William Crosskey reluctantly acknowledged.[27] As late as November, 1785, the Virginia legislature proposed to give the Confederation very narrow authority over commerce, limited to a tightly defined

---

B. Morris, *The Forging of the Union* (New York: Harper & Row, 1987), 232-44, and works cited in Chapter 4's discussion of the western development bargain.

[25] Speech of Rufus King in Continental Congress, August 1786 (from letters of James Monroe), quoted in Crosskey, *Politics and the Constitution*, 3: 295-6.

[26] Action against slavery was not even deemed a politically acceptable part of the convention agenda for delegates. Benjamin Franklin declined to present an antislavery memorial prepared by the Pennsylvania Abolition Society to the Convention, despite the fact that he was president of the PAS at the time.

[27] Crosskey, *Politics and the Constitution*, 3: 233.

grant of foreign commerce power and non-discrimination authority, each requiring a two-thirds vote for implementation.[28] James Madison and other Southern leaders, although professing to support broader commerce authority for the central government, were nonetheless very concerned about maritime trade domination by Northern states that would artificially constrict their states' foreign markets.[29]

The slave states' principal interest in a stronger government was instead the desire to create a powerful military force for the United States. The most important evidence for that conclusion is the political fallout from the 1786 Congressional debate over the proposed Jay-Gardoqui treaty. During that debate, Northern state leaders had made clear that they believed that it made sense to accept the proposed Spanish closure of the Mississippi River to American commerce because the Confederation had no military capability, and the North did not want to become embroiled in a war with Spain over that issue. The idea that the Mississippi River would be closed to Southern (and, in the future, western) commerce was anathema to a prominent group of Southern political leaders such as James Monroe and James Madison. They were outraged by the willingness of the "eastern" states to accept what they believed was a betrayal of Southern regional interests that would sharply threaten their hopes for western development.[30] At this time, Madison and others firmly expected the west to grow sharply within twenty-five years.[31]

---

[28] Ibid., 3: 226. The proposal was adopted and then withdrawn.

[29] Pierce Butler to Weedon Butler, May 5, 1788, Farrand, 3: 301-4 ; Crosskey, *Politics and the Constitution*, 3: 235.

[30] George Washington seems to have been willing to accept the closure of the Mississippi for a period as Spain proposed, thinking that it would be divisive to create an interest in Mississippi navigation on the part of westerners. Crosskey, *Politics and the Constitution*, 3: 288.

But Southern political leaders privately realized that Northern representatives were correct about one point made in the Jay-Gardoqui debate. The United States had no ability to use military force against Spain under the existing Confederation government framework. The Confederation wholly lacked the financial power to raise an army, even in the exceptionally unlikely event that the Continental Congress could agree on military action in the face of concerted Northern opposition to such action.

The Jay-Gardoqui debate showed political leaders across America that under the Confederation, each of the various sections of the country had the ability to prevent other sections from achieving important political goals without paying a significant political price for having done so. In that debate, the sections came face-to-face with their acute political powerlessness in a world where major countries built their relations around power. The unavoidable conclusion for Southerners like Washington was that the new central government needed to have a strong fiscal and military authority above all else, and the ability to use that power even in the face of substantial minority opposition (which meant no regional veto). These considerations readily account for the remarkably nationalist cast of the plan Virginia's leaders submitted to the Constitutional Convention with Washington's support.[32]

---

[31] James Madison to Thomas Jefferson, August 20, 1784, cited in ibid., 3: 263.

[32] Anti-Federalists centered their opposition to the new government on its tax authority, often for the reason that broad tax powers would enable it to create a powerful standing army. For an illuminating analysis of the fiscal-military issues involved in creation of the Constitution, and their subsequent history, see Max M. Edling, *A revolution in favor of government: origins of the U.S. Constitution and the making of the American state* (Oxford: Oxford University Press, 2003). On taxation issues during ratification, see Frederick Arthur Baldwin Dalzell, "Taxation with representation: Federal revenue in the early Republic," Ph.D. diss., Harvard University, 1993.

In the period just before the Convention, slaveholders thus faced their own unusual political dilemma: either the broad commerce authority sought by Northern states, or the broad fiscal and military authority sought by Southern states, for the new government could have threatened slavery if placed in the wrong political hands. By 1787, it was clear whose the wrong hands were from the perspective of the slave states—the Northern states that were busily engaged in abolition and who, coincidentally, sought political control of slave state export commerce and were intent on blocking Southwestern development for their own economic benefit. James Madison believed that the Jay-Gardoqui debate alone had led Patrick Henry of Virginia to boycott the Constitutional Convention on the grounds that only harm could come of it.[33]

It followed that Southern slaveholders could support creation of a strong central government only if they could be assured that it would not damage slavery, either as a legal or as an economic institution. Since slaveowners shared the general Southern interest in creating a fiscally and militarily strong central government, in the interest of western development and Mississippi navigation if for no other reason, this meant that slaveowners wanted a central government that they could control, or at least permanently prevent from damaging their interests. As historian Donald Robinson concluded, the prominence of slaveowner interests in Southern states meant that Southern delegates saw their task at the Convention as creation of a strong fiscal-military state that lacked any

---

[33] Madison to Jefferson, March 19, 1787, *Letters of Delegates to the Continental Congress 1774-1789*, ed. Paul H. Smith (Washington: Library of Congress, 1976-1998) (hereafter, *LDCC*), 24: 153.

form of damaging power over slavery.[34] This Southern state political economy agenda created the foundation for consideration of slavery in the Constitution.

*The Convention Struggle over Representation*

> [W]hen [Thomas Jefferson] drafted the Constitution annexed to the *Notes* [*on Virginia*], 'the infancy of the subject at that moment, and our inexperience of self-government,' [Jefferson later] observed, 'occasioned gross departures in that draught, from genuine republican canons. The abuses of monarchy had so filled our minds that we imagined everything republican that was not monarchy. We had not yet penetrated to the mother principle that governments are republican only in proportion as they embodied the will of their people, and execute it [by equal popular representation, without any federal ratio].'[35]

Historians have debated for more than a century what the rules ultimately chosen for federal Congressional representation actually signified about Revolution era politics and Americans' understanding of republicanism. Jefferson's reflections confirm historian Gordon Wood's observation that when the Constitutional debate over representation occurred, the appropriate definition of republican political representation was itself in dispute.[36] Conflicting representation theories advocated by one or more Convention delegates included those based on state, interest, or sectional representation; property representation; representation of personal rights; and popular sovereignty.

The focus here is on what the Constitution's House of Representatives representation formula combining free and slave population—commonly called the

---

[34] Robinson, *Slavery in Politics*, 210.

[35] Thomas Jefferson to S. Kercheval, July 12, 1816, quoted in Pole, *Political Representation in England*, 301.

[36] See Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1998 ed. (orig. pub. 1969)), 214-222, cited in Rakove, *Original Meanings*, 41 n. 13.

Three-Fifths Clause—signified.[37] That Clause rejected both the idea that all property should be represented and the idea that free population only should be represented. In some ill-defined way it meant that, as Gouverneur Morris of Pennsylvania said, "property ought to have its weight; but not all the weight." But what precisely did the Three-Fifths Clause mean to those who adopted it, and how did it affect the status of slavery?[38]

The adoption of the Three-Fifths Clause was not, as sometimes thought, the predictable result of a previous parallel decision about the basis for the federal taxation system. Use of the federal ratio for determining federal taxation was a foregone conclusion before the Convention began. The only open question at the Convention was whether representation would be based on taxation principles.[39] Historian David

---

[37] The term "Three-Fifths Clause" refers to Article I, § 2 of the Constitution as adopted. That section provided essentially that in determining the allocation of representation in the House of Representatives, representation for each state should be based on its proportionate share of total population as defined there. Both total population and state population were to be counted by adding to the free inhabitant population three-fifths of the slave population. The same system of proportional representation was used as part of the basis for calculating state electoral votes in electing a President.

[38] There has been considerable past writing about the issue of representation and the Three-Fifths Clause. See, e.g, Donald L. Robinson, *Slavery in the Structure of American Politics 1765-1820* (New York: Harcourt Brace Jovanovich Inc., 1971), Ch. 5; Paul Finkelman, "Slavery and the Constitutional Convention: Making a Covenant with Death," in *Beyond Confederation*, ed. Richard Beeman, Stephen Botein, and Edward C. Carter II (Chapel Hill: University of North Carolina Press, 1987); William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Ithaca: Cornell University Press, 1977), Ch. 3 and sources cited 65 n. 10; David C. Hendrickson, *Peace Pact: The Lost World of the American Founding* (Lawrence: University Press of Kansas, 2003), 227-8. For an interesting argument that the dispute over the Three-Fifths Clause at the Convention was principally an argument over popular sovereignty vs. legislative sovereignty, see Howard A. Ohline, "Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States Constitution," *William & Mary Quarterly* 3rd ser. 28 (1971): 563-84. Ohline is correct that the dispute over creation of a census was central to the dispute over the Three-Fifths Clause, but his claim that this was not a sectional dispute, but instead one over republican principles, is open to question as discussed below.

[39] As is well known, 82 percent of the total net worth of the United States at the time of the Convention was outside New England. Shays's Rebellion had demonstrated beyond question Massachusetts' inability to retire its large debts by increasing taxation. Massachusetts and other New England states, both because of relative poverty and because of their existing debt burden, had a very strong incentive to support any taxation system that would shift the burden of federal taxation away from them. Edwin J. Perkins, *American Public Finance and Financial Services 1700-1815* (Columbus: Ohio State University Press, 1994), 59 (Table 5.1).

Hendrickson observes that the Three-Fifths Clause was understood by most delegates as the principle that "most fairly represented the relative wealth of the states."[40] But it is argued here that considerably more was at stake in the decision on the Three-Fifths Clause than adoption of wealth representation as an element of republican theory.

From a political perspective, what mattered most was that adoption of the Three-Fifths Clause sanctioned the permanent use of the amount of a particular kind of wealth—slave property—as a basis for allocating Congressional representation.[41] At bottom, the Convention debate about House representation was not about republicanism, but was instead a debate about political "security arrangements" between different sections of the country, whose delegates saw the terms of representation as the basis for protecting their conflicting sectional interests. This was how leading delegates such as Rufus King of Massachusetts, Gouverneur Morris of Pennsylvania, and Southern representatives described their understanding of the negotiations over representation, and these descriptions were not met with any major objections.[42] The Three-Fifths Clause was the explicitly chosen political security foundation for the constitutional bargain protecting the political economy of the slave states.

Before the Convention began in mid-1787, James Madison thought that it was possible to predict in advance the outcome of the fight over representation that he expected would take place there. Madison was convinced that the Convention would

---

[40] Hendrickson, *Peace Pact*, 227.

[41] Jack Rakove argues that the Three-Fifths rule, although "nominally advanced to protect property had the effect of legitimating the principle that representation actually followed population" and therefore was "not a coefficient of racial hierarchy." Rakove, *Original Meanings*, 74. The Three-Fifths Clause was not a "nominal" effort to protect slave property; such protection was its understood to be its main purpose.

[42] Farrand, 1: 566.

move away from the Confederation's one vote per state voting system and adopt a proportional representation system based on population or wealth. As early as March, 1787, Madison predicted this outcome in a letter to Thomas Jefferson.[43] Madison believed that the eastern states would accept representation based on "populousness" because they expected to be in the majority at present, while the Southern states would accept it because they expected to have superior populations in the future.

Madison was destined to be somewhat disappointed in his hopes for the Constitution's system of representation, but his analysis of the political dynamics of representation was nevertheless remarkably perceptive. As Madison understood, at the Convention, the Southern states would not be able to obtain a representation formula that would force the remaining states to yield political control immediately. And, as he also understood, the Northern states would not be able to obtain a representation formula that too deeply discounted Southern wealth, even if that wealth consisted in large part of slave property. These boundaries for politically acceptable outcomes regarding the structure of representation were highly unlikely to vary no matter what powers were given to the new government by the Constitution.

The traditional view of the Convention's negotiations, described by historian Jack Rakove among others, is that the bargaining on representation that occurred at the Convention resulted in two major compromises, one on equal state voting in the Senate, and the other on the Three-Fifths Clause. According to Rakove, the first compromise was based on an "ephemeral struggle" between large and small states over the equality of

---

[43] Madison to Jefferson, March 19, 1787, *LDCC*, 24: 151-55. Madison repeated these predictions in letters to Governor Randolph of Virginia, April 24, 1787, ibid., 208-10 and to George Washington, April 16, 1787, ibid., 228-32.

state voting in the Senate, while the second resulted from a "more durable and evil-fated rift" between free and slave states that led to a set of constitutional bargains over slavery.[44] But there was an important underlying commonality as well: both bargains related evolving principles of representation to the needs of specific vested interests.

In reality, the Constitution consisted of a series of agreements about control of the future political economies of such vested interests.[45] The delegates saw the decisions made about representation as affecting the future basic economies of different areas of the country, so political and economic considerations were linked inextricably throughout the debate and negotiations. Thus, as will be shown, the core purpose of the Three-Fifths Clause was to protect interests in slave property and the related political economy of the slave states.

The idea that the Convention reached two compromises glosses over a central reality of the Constitution's creation, which is that making the first constitutional representation bargain fully determined the outcome on representation. The decision to equalize state voting in the Senate unavoidably dictated the decision to represent slave property in the House.[46] To put this point another way, to the extent that American federalism is based on the idea of equal state representation in Congress, federalism could not have been created without also providing for permanent slave representation. The

---

[44] Rakove, *Original Meanings*, 92-3.

[45] I am indebted to the work of Cathy Matson and Peter Onuf for this conceptual approach. See Cathy D. Matson and Peter S. Onuf, *A Union of Interests: Political and Economic Thought in Revolutionary America* (Lawrence: University Press of Kansas, 1990).

[46] Hendrickson also reaches this conclusion. Hendrickson, *Peace Pact*, 227.

representation bargain was intended when it was made to be practically impossible to alter. The Convention debate confirms these conclusions.

At the Convention, the small states refused to give up representation by states as the sole representation principle for the new government without a long, bitter fight. For their part, the large states were equally adamant in seeking to make proportional representation the sole representation principle.[47] As is well known, the ultimate "Connecticut Compromise" that proposed equal state representation in the Senate also proposed the use of proportional population representation in the House of Representatives, including the Three-Fifths Clause. But the proposed Compromise quickly ran into opposition as delegates from both sections sought to obtain better terms than it proposed, and the issue of House representation was sent to a new committee for review.

Skirmishing immediately began over how many representatives would be allocated to each state in the first Congress, and particularly over what system would be used to establish future representation. A committee chaired by Gouverneur Morris reported a vague future reapportionment formula ("population or wealth") that would allow future Congresses to permit reapportionment only when, as John Rutledge of South Carolina bitingly put it, "the national legislature should please." In response, Rutledge and other Southern representatives sought to require a periodic census and mandatory

---

[47] One recent analysis of the creation of equal small state representation argues that it occurred because delegates realized that an equitable division of public lands could not otherwise occur, see Matson and Onuf, *Union of Interests*, 105-112. Other historians have argued that the small states obtained equal representation in part because of their strategic location and in part because some of the large states realized that the small states would probably be useful allies. Ironically, it may have been James Madison's perspicuous candor about the political effects of differing regional economic interests that led to this realization. See Rakove, *Original Meanings*, 69; Farrand, 1: 604.

reapportionment.[48] They sharply attacked the idea that they should be willing to become mere "overseers" for the North as a permanent minority under a government that was to be given broad powers to control "the regulation of trade," the result they were certain would occur if Congress were given untrammeled discretion regarding reapportionment.[49] Such Congressional discretion was flatly unacceptable to slave state delegates.

But if the Convention had to choose a fixed rule for House representation, there were exceptionally limited choices available to delegates, as appendix 3.A. demonstrates.[50] The appendix shows that any system of proportional representation that could command enough support to be adopted in the Convention and to survive ratification would necessarily entail a compromise of both the preferred Northern state and the preferred slave state position on the basis for proportional representation (i.e., free population vs. total population).[51] The system that was ultimately chosen by the Convention was the one that was the least disadvantageous to both sides, since it balanced a measure of Northern wealth (free population) against a measure of a large fraction, but not all, of Southern wealth in order to allocate representation. The Convention debate reviewed below confirms the conclusion that in adopting the Three-Fifths Clause, the delegates understood that they were agreeing to a compromise based on sectional wealth representation intended to protect slave property.

---

[48] Randolph, July 9, Farrand, 1: 561.

[49] General C.C. Pinkney, July 10, Farrand, 1: 566-7.

[50] See below, pp. 211-13.

[51] For this argument, see Hendrickson, *Peace Pact*, 227.

As delegates began to grapple with the implications of modifying representation to depart from a pure population formula, at bottom it was not the implications for slavery of the Three-Fifths Clause that most delegates found objectionable, so most arguments made by delegates based on alleged objections to such implications were thinly veiled pretexts. A good example of a pretextual claim was the argument that slave imports would be increased by a Three-Fifths rule.[52] Delegates were also well aware that the choice between free population and a Three-Fifths (or "federal ratio") rule was effectively a choice between wealth measures that would have inverse political benefits or disadvantages for different sections of the country (see appendix 3.A.).

But it was the implications of using a Three-Fifths rule for possible future shifts in regional control of the federal government and its policies that bothered many delegates from non-slave states. They were acutely aware of the potential for sharp regional conflict on various issues such as Mississippi River navigation, which had momentous implications for war and peace in the young Republic. Madison's earlier extended observations, during the fight over small state representation, on the political divisions that had already occurred during the Confederation between states with free labor economies and those with slave labor economies had clearly heightened delegates' apprehensions about sectional control as well. Madison's position raised concerns about the sectional conflicts on trade and military policies that such continuing sectional economic divisions might well entail.[53]

---

[52] The decision about whether to import a slave was extraordinarily unlikely to be affected at all by the possibility that the voting strength of a given jurisdiction would be increased by imports. In today's dollars, "buying a vote" in the House by importing 30,000 slaves would have cost well in excess of $100 million dollars.

[53] Farrand, 1: 476, 486.

The course of the Convention debates strongly suggests that at least some Northern delegates, such as Roger Sherman of Connecticut, had privately agreed during committee consideration of the Connecticut Compromise to support the Three-Fifths rule as a permanent basis for representation in the House in return for an agreement by larger states that they would support state equality in the Senate.[54] But on the floor of the Convention, other delegates strongly resisted the idea that the Three-Fifths Clause should be a permanent basis for representation. The latter position, had it prevailed, would have destroyed the broader Connecticut Compromise.[55]

James Wilson of Pennsylvania argued without serious dissent that there was no principled basis for including slaves in representation if they were property and representation was based on personhood or free citizenship. It is worth emphasizing Wilson's point: there was no theory of republican representation that rested on the idea that free inhabitants deserve representation merely because they are free that could also justify slave representation. Nor, Wilson observed, was there any principled basis for excluding slaves from representation if representation were based on property, but then all forms of property should have been included in the formula. What accounts for the Convention's acceptance of a pragmatic compromise on this issue that met none of Wilson's criteria for consistency, other than the necessity of reaching agreement and

---

[54] See Roger Sherman's remarks, August 8, Farrand, 2: 220-1, 223.

[55] The path of Convention consideration of House representation was tortuous, but it is a mistake to infer from this tortuousness that the likely outcome was not fairly clear from the outset. The Convention had voted early in its deliberations by a large margin in favor of the use of the three-fifths ratio as a basis for proportional representation in the House (Wilson proposal of June 11, 1787, 9-2). The maneuvering that occurred in the Convention before the Three-Fifths Clause was adopted is best understood as a series of experiments by both sides testing the strength of all viable alternatives sufficiently to confirm that a permanent slave representation compromise was unavoidable.

sheer calculations of relative political force? The answer is that key Northern and Southern delegates engaged in a dialogue on representation that demonstrated to them why the Three-Fifths Clause was an essential part of the representation bargain.

On July 10, 1787 Rufus King signaled that he was willing in principle to accept the federal ratio for representation. King noted that the "four Eastern States" had more people than the "four Southern States," even counting blacks using the Three-Fifths ratio, but that they would have "1/3 fewer representatives," and this would lead to dissatisfaction. King's detailed reasoning about the political implications of representation is important:

> He believed [the Eastern people] to be very desirous of uniting with their Southern brethren but did not think it prudent to rely so far on that disposition as to subject them to any gross inequality. He was fully convinced that the question concerning a difference of interests did not lie where it had hitherto been discussed, between the great and small States; but between the Southern and Eastern.

King then continued:

> For this reason he had been ready to yield something in the proportion of representation for the security of the Southern. No principle would justify giving them a majority. They were brought as near an equality as was possible. He was not averse to giving them a still greater security, but did not see how it could be done.[56]

King's remarks publicly accepted the fundamental political premise—advanced forcefully by Madison earlier in the debates—that the slave economies of the Southern states represented a clear "difference of interests" from those of the Eastern States. King clearly took Madison's earlier remarks as having been made in complete earnest. As the Northern leader during the Spanish Treaty (or "Jay-Gardoqui negotiations") dispute

---

[56] July 10, 1787, Farrand, 1: 566.

(where Madison had been a leader on the other side), King was well placed to understand Madison's analysis that persistent sectional conflicts were an American political reality. King acknowledged that such sectional differences of interest might lead to future sectional conflicts. He agreed that the Southern states therefore needed and deserved political protection or "security" for their differing economic interests in the form of Congressional representation that exceeded their proportionate share of free population. Providing further security to account for these differing interests necessarily entailed using a wealth measure for representation, and including slave property was already understood by delegates to be the best choice for achieving this in the case of the slave states.

King's speech also acknowledged what had already been established as the common understanding of the delegates by the strenuous extended debate over representation: political protection directly through representation was the most important protection that could be provided by the Constitution to the Southern states or any other distinct interest. Delegates envisioned that under the Constitution, law—by which is meant here the basis for government action—would be based principally on legislation (as opposed to judicial decisions or executive action). A discrete interest bloc's possession of a sufficiently large, well-defined stake in the legislative process to counter potential adversaries was therefore central to its achievement of political security. Congressional representation for slave property was far more important than any Constitutional provision providing protection for the institution of slavery per se, since paper legal guarantees for an unpopular institution were of very limited value in a world

governed by legislation when compared to the political security provided by a defined, essentially unalterable stake in representation.

Just before the Convention's adoption of the Three-Fifths Clause, Edmund Randolph of Virginia provided the most direct explanation for the Southern state view on representation, that protecting politically unpopular slave property against future attacks in Congress was politically essential to the slave states:

> He urged strenuously that express security ought to be provided for including slaves in the ratio of Representation. He lamented that such a species of property existed. But as it did exist the holders of it would require this security. It was perceived that the design was entertained by some of excluding slaves altogether; the Legislature therefore ought not to be left at liberty.[57]

Randolph's remarks candidly acknowledged that politically he had no choice but to satisfy slaveowners that they would have sufficient "express security" for their property, because otherwise the Constitution would not be ratified in the slave states. Slaveholders were defining the necessary security in terms of a clearly defined political structure that left no room for Congressional discretion in representation as opposed to defining it legal or "paper guarantee" terms. The structural protection they were seeking would be unalterable without the consent of the slave states because the Constitution's amendment provisions created a regional veto on amendments.

General Charles Cotesworth Pinckney of South Carolina added the other major part of the Southern rationale for slave representation: he desired that "the rule of wealth should be ascertained and not left to the pleasure of the Legislature and that property in slaves should not be exposed to danger under a Govt. instituted for the protection of

---

[57] Randolph, July 12, Farrand, 1: 594.

property."[58] Pinckney's remarks assumed that the Three-Fifths Clause represented wealth. He again attacked the idea that Congress should have discretion to apportion representation. Pinckney, a lawyer trained at Oxford, was also insisting that slave property should be given federal constitutional protection equivalent to that of non-slave property, and that the most effective way to achieve this result was through political representation. His remarks received no direct challenge from any delegate. Instead, they were followed shortly by Morris's "fig leaf" proposal that representation be linked to direct taxation. There is no provision of the Constitution that openly and directly contradicts Pinckney's contention to the Convention that slave property should receive protection equivalent to non-slave property under the Constitution.

In sum, the slave states saw slave representation as a direct political protection for wealth consisting of slave property against possible Northern attacks on slavery, and told the Convention unequivocally that they needed such protection in order to obtain ratification of the Constitution. Although the Northern delegates such as Rufus King of Massachusetts insisted on a weighting discount for slave property in the representation formula, they accepted the principle that the Southern states advocated and gave protection of that property constitutional sanction. As Northern delegates undoubtedly understood, the restrictive nature of the amendment provisions of the Constitution (even considered wholly apart from slavery's ability to expand largely unchecked for a generation under Constitutional protection) made it extraordinarily unlikely that the representation system would ever be changed while the Constitution endured. Northern

---

[58] Pinckney, July 12, Farrand, 1: 593-4.

delegates may not have liked this outcome, but they saw no alternative, and indeed there was none.

To appreciate the significance of providing political security to slave states through representation, it is important to appreciate how strongly some leading delegates believed that paper guarantees of legal protection for rights or institutions written into the Constitution would be worthless. James Madison had defended the necessity for a complete Congressional veto over any state legislation that had been proposed by the Virginia Plan to Thomas Jefferson on just these grounds. Madison wrote Jefferson that a Congressional veto was necessary because no matter how broad federal powers were and no matter how "clearly their boundaries may be delineated, on paper," they will be "easily and continually baffled by the Legislative sovereignties of the States."[59] Madison made the same argument in a letter to George Washington shortly before the Convention.[60] For those who agreed with Madison's logic, the structure of representation became a critical means of providing protection to slavery that could not be provided by any paper legal guarantees for that institution by the Constitution.

Slave property representation not only effectively protected Southern interests in the short run, but as King and other delegates knew, using such a representation system would probably increase the South's share of representation in the government as time went on. King and most other members of the Convention were acutely aware that the South and west were growing rapidly, and thought that such growth would continue.[61]

---

[59] James Madison to Thomas Jefferson, March 19, 1787, *LDCC*, 24: 152.

[60] Madison to Washington, April 16, 1787, *LDCC*, 24: 228-32.

[61] Drew R. McCoy, "James Madison and Visions of American Nationality in the Confederation Period: A Regional Perspective," in *Beyond Confederation: Origins of the Constitution and American National*

They also understood (or would quickly learn from later Convention debate) that the ability to use slave labor would accelerate that growth and at the same time increase Southern representation.

There were several reasons for Northern delegates' acceptance of a permanent system of slave property representation. The principal reason was that many Northern delegates accepted the principle that wealth should be represented in a republican government, and they also accepted that for the purposes of the Constitution slaves were a legitimate form of wealth. Northern delegates also generally accepted that, as Rufus King had said, the Southern states were comparatively wealthier, and that the Three-Fifths Clause appropriately reflected the disproportionate wealth of the slave states. Congressional disputes over taxation earlier in the 1780s had cleared the path to a solid consensus understanding of the relative wealth of various sections and the best means for expressing it both at the time and in the future (see appendix 3.A.).

The Southern insistence on direct political security for slave property through representation was also undoubtedly motivated by the division of national opinion over slavery that existed in 1787. That division of opinion meant that the Constitution's explicit legal protection for slavery could not have been as complete as slave state representatives would have preferred without threatening ratification. In an effort to make the Constitution acceptable in the Northern states, and because some delegates such as Madison believed the Constitution should be facially neutral on the issue of slavery, slave states were forced to accept oblique (though transparent) language describing the

---

*Identity*, ed. Richard Beeman, Stephen Botein, and Edward C. Carter II (Chapel Hill: University of North Carolina Press, 1987), 226-58.

institution at several places in the Constitution. They were also forced to rely on the negative implication of the Constitution's lack of any explicit grant of authority to abolish slavery as protection against its abolition by federal authority.[62] Because Northern state delegates could not (or would not) provide further explicit legal assurances to slave states regarding the constitutional protection to be given to slave property, Northern delegates were hampered in opposing the demand for political security for that property through the inclusion of slave property in the representation scheme.

The course of Convention debate on the Three-Fifths Clause, including the creation of the taxation "fig leaf" to paper over reluctant Northern acquiescence in the Clause, strongly suggests that the slave states would not have been willing to accept half a loaf where protection of slave property was concerned. The Three-Fifths clause was an essential part of the Convention's overall agreement on security for the institution of slavery in the new Union. Northern delegates accepted the Clause with a clear understanding of what it meant to the slave states.

Convention delegates from eastern and mid-Atlantic states, of whom Gouverneur Morris and Rufus King were among the most vocal, were therefore fearful that any census mechanism would inevitably lead to Southern and western control of the House of Representatives. Among other things, harking back to the bitter Congressional debates over the Spanish Treaty, they argued that South-western control of the government would inevitably lead to war with Spain over the Mississippi.[63] Morris made the politically

---

[62] As discussed in Chapter 4, slave states also accepted several broadly worded Constitutional provisions that were silent on slavery but would later form the basis of arguments that Congress could control interstate and western slavery.

[63] G. Morris, July 13, Farrand, 1: 603-4.

incendiary point, aimed directly at wealthy Southern slave states and the limitations he and others believed were placed on their military capacity by slavery, that under the Southern proposal the Southern states might be providing the money for such wars, but the North would "spill its blood."[64] Northern delegates saw representation as the fulcrum of control of the new government, and feared that Southern control of the government based on wealth would embroil them in future wars motivated by a growing and perhaps irrepressible drive for Southwestern expansion.

Northern delegates therefore sought to avoid diluting Northern political strength by permitting Congress to retain unlimited discretion over voting apportionment. They also proposed to permanently restrict new state voting strength (advocating the political opposite of the "equal footing" principle assuring states equal rights, in other words). These efforts to prevent the use of a fixed representation formula based on a census, or to defeat the effects of such a mechanism, both failed. Similarly, several efforts by South Carolina representatives to seek full representation for their slave population predictably failed by a large margin (Pinckney-Butler motion, July 11, 3-7; July 13, Pinckney motion, 2-8).[65]

The slave representation formula linked to a census was ultimately adopted on July 13 (though not before an initial defeat whose significance is often greatly overstated). On that same day, the Convention agreed by a very large majority to extend the Three-Fifths Clause to new states. The Convention also deliberately created a "fig leaf" that disingenuously linked representation to direct taxation. The linkage was known

---

[64] G. Morris, July 10, Farrand,1: 567.

[65] Farrand, 1: 581, 596.

in the Convention to be disingenuous at the time the "fig leaf" was created because delegates did not expect the new government to impose direction taxation.[66] Once the Southern states were satisfied that they were adequately protected by their share of representation, the stage was set for bargaining over the constitutional protection to be given to the economies and governments of the slave states (discussed in Chapter 4). Of concern here is that this bargaining led to continued threats to reopen the issue of the Three-Fifths Clause which would, in turn, have destroyed the Connecticut Compromise.

The bargaining over slave state political economy was opened by the August 6 report of the Committee of Detail. In that report, a pro-commerce/slavery majority (Oliver Ellsworth of Connecticut, John Rutledge of South Carolina, and Edmund Randolph of Virginia) had quite deliberately laid out a completely one-sided pro-slavery and pro-Southern slave economy set of provisions for the Constitution. The Southern political economy proposal consisted of permanent federal tax exemptions for slave imports and slave product exports; a ban on federal limitations on slave imports; and federal defense against slave insurrections, while requiring a two-thirds vote for Navigation Acts. The provisions regarding slavery essentially maintained the

---

[66] One should not overemphasize the significance of this July 11 defeat, because although both South Carolina and Maryland voted against the Three-Fifths clause on this occasion, they voted "nay" for reasons that would not prevent them from supporting it ultimately. Considerably more significant historically was the 9-0 (1 state divided) vote on July 13 to extend the Clause to new states. Farrand, 1: 606; Hendrickson, *Peace Pact*, 227.

The usual explanation for the change in result from July 12 to July 13 on the Three-Fifths Clause is that in a *volte face*, Gouverneur Morris and James Wilson proposed an amendment to link representation to direct taxation. Such an amendment was accepted and Pennsylvania changed its vote, which provided the needed margin in the circumstances (Maryland, having voted "no" for technical reasons previously, also changed). However, the taxation linkage was intended only to provide a "fig leaf," and delegates understood this. The "fig leaf" was noncontroversial, because among other reasons delegates did not expect the new government to impose direct taxation, so they thought that the linkage between representation and taxation was insignificant. See, e.g., Hendrickson, *Peace Pact*, 227 (linkage was "disingenuous"); Rakove, *Original Meanings*, 74.

Confederation legal status quo ante on slavery, seeking to insulate the slave state economies against potential damage from new federal powers.[67] The Committee of Detail report by itself provides compelling evidence that slave states saw slavery as a permanent institution that needed broad, unalterable constitutional protection.

In the Committee of Detail report, the slave states were implicitly asserting that they should be given complete protection against federal power to control their economies after having already achieved maximum feasible permanent political representation. Their negotiating position was, in other words, that representation and adequate economic protection were independent of each other. In the words of a thoughtful historian, the Committee of Detail report was a "monument to Southern craft and gall."[68] Since the Committee of Detail proposal was not offered as a package "take it or leave it" proposal, however, it seems clear that it was intended to be a strong opening offer by the slave states in a negotiation over how their existing and anticipated future political economies would be affected by the Constitution. Northern representatives were quick to see the proposal in those terms, but also attacked it as severely impairing the broad commercial authority they sought for the new government, and threatened to reopen the issue of slave representation.

---

[67] The sole change from prior law regarding slavery proposed in the Committee of Detail report had to do with federal protection against slave insurrections. That proposal was couched in general terms that would have applied equally to protection of Massachusetts against Shays's Rebellion. When the argument was later made that this provision gave costly special protection for slaveowners, southern representatives quickly said that they would be willing to pay such costs, or to have slave rebellions excepted (Farrand, 2: 364), supporting the conclusion that rebellion protection was not the slave states' core interest in a new Constitution. It is quite striking that northern delegates did not accept the southern offer to exclude slave rebellions from the domestic violence guarantee; their complaints here sought bargaining leverage.

[68] Robinson, *Slavery and Politics*, 218.

The key early response to the Committee of Detail report was an August 8 speech by Rufus King, whose opinions appear to have been representative of those held by many delegates in the non-slave states. King's speech came immediately after what might be described as a "straw" or "test" vote on a motion by Hugh Williamson of North Carolina to change the basis for counting population for representation to use the "rule hereafter to be provided for direct taxation" (i.e., the federal ratio), which was adopted 9-2. At this point, King, a very capable lawyer and experienced legislator, deliberately interrupted the established order of clause-by-clause debate in a speech that contained a broad, blistering attack on the Committee of Detail report. King attacked the report as "end[ing] all...hopes" that the slave states would "mark a full confidence" in "the Genl. Govt" by giving it broad and flexible power over commerce. King argued that the report had "absolutely tied" "the hands of the Legislature" "[i]n two great points": slave imports could not be prohibited and exports could not be taxed. King said that the unlimited "admission of slaves" permitted by the Committee Report was a "most grating circumstance to his mind."[69] He then attacked the inconsistency of the slave state position that Southern slave imports could be allowed to increase national defense costs without limitation, but that proposed tax limitations would prevent the new government from collecting offsetting revenue to cover those costs.

King's speech deliberately paired the Three-Fifths Clause with the report's pro-slavery proposals and treated them all as part of a negotiable package, signaling unmistakably to slave state representatives that the Three-Fifths Clause would be revisited if necessary. King warned that the slave states needed to compromise their

[69] Rufus King, August 8, Farrand, 2: 220.

combined political representation and economic agenda or it would be rejected by the Northern states. The Northern states, King asserted, believed that slave states could not have both maximum feasible political representation and complete economic freedom from federal regulation under a new central government.

King offered the slave states their choice of accepting the possibility of export taxes or accepting slave trade limitations. The Northern states were not interested in trying to prohibit the slave trade in the abstract, but instead saw it as part of the issue of central government control over international trade, which should encompass Southern trade as well as Northern trade. By giving the slave states a choice of limitations, King was signaling the North's fundamental indifference to the form of trade limitation the slave states agreed to, as long as they ceded sufficient control over their trade economies to meet Northern desires to create a powerful trade weapon in the central government. King's speech made slave trade limitations entirely negotiable, and effectively transformed them into a part of a negotiation over trade authority generally.

King's position was remarkable for another reason. King had been a leader in the Continental Congress from 1785 onward in opposing the westward expansion of slavery into new territories. But at the Convention, King and other Northern delegates deliberately chose not to make any specific proposals for limitations on the westward expansion of slavery, strongly suggesting that they knew that such proposals, which worked by limiting slave demand, would be unacceptable to slave state representatives or would require unacceptable concessions in return. In his August 8 speech, King sought to draw the line on the expansion of slave supply through imports, but only if and to the extent it had adverse effects on Northern interests when looked at from the point of view

of balancing slavery's costs to the Northern states and its revenues to the new government.

Slavery's costs as King saw them could either result from crippling limitations on the reach of the proposed new federal commerce power, or from escalating federal costs without requiring corresponding tax revenues to be provided by the responsible parties. King's opposition on the slave trade issue was not framed in moral or religious terms, but rather in terms of prudential arguments, particularly his ability to defend Southern proposals to his constituents during ratification. Although King hinted that there was a moral dimension to his position, his remarks were clearly intended as an effort to make the sort of prudential case about the South's position that one practical politician makes to another.

King's speech precipitated a renewed fight over representation by those Northern state delegates who opposed the Southern vision of indefinite continuation of a slave labor-driven political economy that was plainly sketched in the Committee of Detail report. Gouverneur Morris of Pennsylvania, a classic political "loose cannon," proposed that representation be based on numbers of free inhabitants, and gave a vitriolic speech attacking the morality and prudence of slavery and the slave trade as institutions, and assaulting the Committee of Detail report as containing unjustified concessions to the "southern states."[70] Morris, the author only weeks before of the direct taxation "fig leaf," vehemently denounced the idea that slave representation could be justified by use of the three-fifths rule for direct taxation, since such taxation would never occur. Morris thus admitted that he had accommodated the Southern states on the Three-Fifths Clause solely

[70] Gouverneur Morris, August 8, Farrand, 2: 221-223.

for pragmatic reasons and was threatening to change his position. The heated public announcement of the possible defection of the two states—Massachusetts and Pennsylvania—whose vote changes had enabled initial adoption of the Three-Fifths Clause was a serious warning shot across the bow to the Southern states on their political economy stance.

In response, Roger Sherman of Connecticut defended the Three-Fifths Clause principle based on its use as a basis for federal taxation. However, like Sherman's other politically self-interested remarks on the issue of slavery, the real purpose of Sherman's intervention seems to have been to signal his continued willingness to defend the Three-Fifths Clause as a quid pro quo for small state representation even in the face of slave state economic demands.[71] With opposition from Sherman's small state allies and the Southern states, Morris's motion to limit representation to free inhabitants lost by a vote of 10-1. Every Northern state that had begun the abolition of slavery, including Morris's own state, Pennsylvania, voted against Morris's proposal. This vote was the clearest possible demonstration that state positions on abolition and their positions on federal political representation for slave property were wholly unrelated.

Charles Pinckney of South Carolina then proposed again that all slaves be counted for representation, and also lost overwhelmingly. The delegates, not surprisingly, then agreed to support the Three-Fifths Clause as a compromise between the extreme positions. While these votes were only the opening skirmish in the fight over the slave state political economy proposals, they decisively put to rest the threat that the Three-

---

[71] Sherman, August 8, Farrand, 2: 223.

Fifths Clause could be altered by the Convention, thus strengthening the South's bargaining position on slave economy issues.[72]

In confirming its adoption of the Three-Fifths Clause, the Convention had followed John Adams's earlier political advice about the structure of political representation. Historian Jack Pole traces the rise of the idea of "interests" as a representation principle in American politics. As Pole observes, John Adams had argued in a Congressional debate on representation during the creation of the Confederation that in allocating representation, the allocation of interests in a business partnership was an appropriate analogy. Adams said: "A had £50, B £500, and C £1000, in partnership: was it just that they should dispose equally of the moneys of the partnership?"[73]

As Pole points out, the governing premise of Adams's position was that "interest alone" "had weight enough to govern the councils of men," and therefore political representation should mirror interests "without doors."[74] If one looks to the Convention votes, rather than to the occasionally heated political rhetoric that surrounded them, the Convention ultimately acted as Adams had recommended and built its representation system around such interests. The compromise on representation awarded disproportionate shares of representative influence to certain vested political economy interests, one of which was the slave labor economies. Delegates also chose to make the representation system permanent (one must reluctantly conclude that this was

---

[72] The outcome of this bargaining and its significance for slavery are the subject of Chapter 4.

[73] Pole, *Political Representation in England*, 350.

[74] Id.

unavoidable, ample testimony to the powerful political influence of these vested interests).

But not everyone was satisfied with the Convention outcome on the Three-Fifths issue. James Wilson provided a remarkable coda to the Convention's consideration of the representation issue, one that constituted an ingenious effort to reframe that entire debate. Wilson directly challenged Madison's opinion that minority interests like property should receive protection in the representation process through mechanisms like the Three-Fifths Clause. Wilson argued categorically that the majority of people "wherever found ought in all questions to govern the minority." Wilson also assaulted the idea that in a republic, wealth should govern representation.

> Again he could not agree that property was the sole or the primary object of Govern. & Society. The cultivation of the human mind was the most noble object. With respect to this object, as well as to other *personal* rights, numbers were surely the natural & precise measure of Representation. And with respect to property, they could not vary much from the precise measure.[75]

Wilson's attack on the principle that wealth should be protected by government through the mechanism of political representation was a minority perspective at the Convention, though one perhaps increasingly shared in the Northern states. But Wilson's views suggested the existence of a profound political tension regarding the proper relationship between the Constitution's rules of representation and republicanism, one that would grow greatly in the early years of the Republic.

*Ratification and Slave Representation*

---

[75] July 13, Farrand, 1: 605-6 (emphasis original).

Northern Federalist politicians loathed the idea of admitting to their constituents that they had compromised with the South on representation in a way that appeared to give the South a victory on that issue. They were even more reluctant to admit that their desire to obtain (or willingness to accept) state equal voting in the Senate had forced them to accept slave representation in the House, since this rationale would have been extraordinarily unpopular in several Northern states that were closely divided on ratification, such as Massachusetts. To avoid these problems, the Federalists deliberately misled the ratification conventions on the motives for the Convention's decisions (discussed below).

It is a striking fact that attacks on the slave representation provisions at the Northern ratification conventions were quite muted, and were nearly all based not on antislavery principles but on self-interested arguments that Northern states should have gotten a larger share of representation or a better deal on taxation.[76] Opponents argued that representation should not be based on property, and that therefore slaves should not be considered in representation (which assumed that slaves were property), or that the 3/5 ratio itself was unfair to the North because slaves were more productive than had been assumed in creating the ratio. Other slavery opponents argued that Southern political representation was unfairly disproportionate since direct taxes would not ever actually be imposed, and that therefore the federal ratio unfairly increased Southern representation without any corresponding benefit to the Northern states.[77]

---

[76] See, for example, the attack by Anti-Federalists, *Northampton Hampshire Gazette*, April 9 & 16, 1788, reprtd. in Kaminski, *A Necessary Evil?*, 100-108.

[77] For a summary of arguments in the New England ratification debate, see Kaminski, *A Necessary Evil?*, 67-70.

It is possible to find arguments made by Anti-Federalists at the ratifying conventions against the underlying theory of the representation provision quite similar to those made at the Convention (slaves are property, they shouldn't be represented; why isn't all property represented?). But the underlying purpose of such arguments was not to attack the Constitution's legitimization of slavery or slave property, but instead to argue that the North should have gotten a larger share of Congressional representation, precisely the motive behind such arguments at the Convention itself. Nearly all of the attacks on the "federal ratio" in Northern conventions were attacks on the precise balance of the ratio, and constituted in essence claims that the Northern representatives hadn't driven a hard enough state or sectional bargain on taxation or representation, rather than being attacks on slavery *per se*.

In response, Northern Federalist delegates such as Rufus King chose to defend the Three-Fifths Clause on the basis that it had been part of a Convention agreement on direct taxation, which was clearly false. King told the Massachusetts Convention that the Clause was based on the federal ratio, which had become "the language of all America."[78] Other Federalist delegates such as Roger Sherman made the same taxation argument to justify the Three-Fifths clause. This was a false account of the debate over representation. As Gouverneur Morris's speech to the Philadelphia Convention on August 8, 1787 had made clear, King's was a knowingly false account, because even Morris, the author of the fig-leaf taxation language, did not expect direct taxation to occur. Numerous other delegates made statements at the Convention or later to the same effect. It is one of history's imponderables whether state conventions in Pennsylvania,

---

[78] Ibid., 84 (quoting excerpt from *Massachusetts Centinel*, January 18, 1788).

New York, and Massachusetts would have been willing to ratify the Constitution if they had honestly been told that the Three-Fifths Clause was the inevitable result of an agreement to provide equal Senate voting representation to small states. Still, Federalist deception suggests that at least some of those states would have been unwilling to accept that trade.

In the Massachusetts ratifying convention, one of the principal issues under debate was whether the use of the federal ratio would increase or decrease Massachusetts' tax burden. As the debate broadened, supporters of the Constitution pointed out that the use of a pure population formula would actually have injured the North compared to the Three-Fifths Clause. Thomas Dawes argued that there were political limits to what the Convention could have done:

> The members of the Southern States, like ourselves, have *their* prejudices. It would not do to abolish slavery, by an act of Congress, in a moment, and so destroy what our Southern brethren consider as property. But we may say, that although slavery is not smitten by an apoplexy, yet it has received a mortal wound and will die of a consumption.[79]

Dawes's comment was often cited later to demonstrate a supposedly widespread Northern expectation that the national government would eventually abolish slavery. But it immediately received an appropriately skeptical reply from another delegate, Benjamin Randall: "Sorry to hear it said that after 1808 Negroes would be free. If a southern man heard it, he would call us pumpkins [i.e., brain dead]."[80] But this exchange does show that Northern Federalists needed to convey the impression that the Constitution was

---

[79] Thomas Dawes, Massachusetts ratification debate, *Massachusetts Centinel*, January 18, 1788 (repr. in part in Kaminski, *A Necessary Evil?*, 87).

[80] Id.

intended to discourage slavery. The secret Convention debates tell quite a different story about the Three-Fifths Clause, which was openly advocated as a principal means of protecting slavery permanently.

James Madison contributed to the Federalist misleading of Northern ratification conventions on representation by his defense of the Three-Fifths Clause compromise in *The Federalist* no. 54. Madison defended the compromise principally on post hoc grounds that he must have known either had been rejected by the Northern states in prior Congressional or Convention debates or had had nothing to do with the basis for the Convention decision.[81] He then argued in the alternative that wealth should form part of the basis for representation. Madison did not answer the objections previously made by Northern representatives at the Convention that singling out slave property as the Three-Fifths Clause did for property representation was logically inconsistent. Madison's arguments for slave representation cannot have been intended to be taken particularly seriously by anyone who had thought carefully about the subject, but were largely presented so that Federalists could say that the subject had been addressed.

The real "corrupt bargain" made at the Convention was the adoption of the Three-Fifths Clause as a quid pro quo for equal state voting in the Senate. It was that quid pro quo that Madison and Northern Federalists were unwilling to explain candidly or even to acknowledge to ratifying voters, not the commerce power-slave trade agreement that was later attacked by abolitionists (discussed in Chapter 4). Given this reality, it is easy to understand why the Convention was intent on keeping its deliberations permanently

---

[81] Madison argued that slaves should be treated under the Constitution as they were under state law, a position rejected as early as 1776; and that in principle taxation and representation should go together.

secret, and why Rufus King, one of the architects of this agreement, suggested that the Convention consider destruction of all its records.[82]

Nowhere in the Northern ratification convention debates can one find any indication that any significant number of convention delegates voted against the Constitution because it recognized the legitimacy of owning slave property, or because they objected in principle to a Constitution that based representation on any principle other than free population. Most ratifying convention delegates seem to have understood and accepted the representation provisions as a pragmatic compromise that incorporated slave property wealth, and they did not see the inclusion of slave property in the representation formula as a matter of political or moral principle. If there had been substantial Northern sentiment that regarded free population representation as a bedrock principle of republicanism, the closeness of the vote in major Northern states such as Massachusetts and New York based on disagreements about other issues strongly suggests that this added factor would have led to rejection of the Constitution there (which would in turn have led ineluctably to its rejection in Virginia and the collapse of the effort). Northern sentiment on the principle of free population representation as opposed to wealth representation was at best divided, and the Northern convention majorities were willing to accept slave property representation in the House on the basis that it was property that was being represented there.

But the decision by Northern delegates to create a taxation "fig leaf" to justify the Three-Fifths Clause agreement and then to use that fig leaf as a principal basis for defending the representation compromise during ratification would come back to haunt

---

[82] Farrand, 2: 608.

them later. After 1800, the Federalist party began trying to pin part of the blame for its declining political fortunes on the existence of the Three-Fifths Clause. This led prominent former Convention delegates like Rufus King to claim subsequently that they never would have agreed to the Three-Fifths compromise if they had known that no significant direct taxation would occur (a demonstrably false claim, especially in King's case). Eventually, they argued that they would not have agreed to the Three-Fifths Clause if they had known that it would be extended to numerous new states (an equally false claim, especially in King's case).

During the Missouri controversy, the profoundly revisionist history on this issue practiced by Northern Federalist politicians became one source of significant sectional discord that would have been avoidable had they been honest about the basis for their compromise decision at the time of ratification. The closeness of the ratification contest in key Northern states fatally tempted Northern politicians in that regard, since candor about the true basis for the representation agreement that traded the "vicious" principle of small state Senate voting for the equally anti-republican principle of slave property representation intended to protect the institution of slavery permanently might well have spelled defeat.

Ironically, the slave states' strenuous insistence on making slave representation permanent to protect slavery against a popular antislavery majority had the unintended consequence that it introduced an element of modern dynamic republican representation theory into the Constitution. The creation of the mandatory census and reapportionment insisted upon by the slave states meant permanent, unalterable acceptance of James Wilson's idea that the political majority (as the Constitution defined it) should be

continuously represented in government, no matter where that majority was found within the nation's expanding boundaries. It followed that no pre-existing political majority could legitimately insulate itself against shifts in political power brought on by American demographic change and American mobility. To protect their long run position, the forces at the Convention that were least supportive of the principle of popular representation had introduced the very constitutional rules that gave that principle its real strength and dynamism.[83] The slave states had welcomed into the Constitution the forces of change that ultimately led to slavery's demise.

[83] I am indebted to Howard Ohline's "Republicanism and Slavery" for this line of thought.

Appendix 3.A.

*The Politics of Three-Fifths Clause Adoption*

Review of the representation options that had some reasonable prospect of political acceptance during debate over the Constitution shows that there was exceptionally little choice about representation available to delegates once proportional representation for the House was agreed upon, as was inevitable once equal state voting in the Senate was agreed to.[84] In reality, the only politically feasible option was the Three-Fifths Clause.

1. It was wholly impracticable to construct a measure of relative state wealth by calculating the values of all property for the following reasons: the very large administrative costs such a valuation process would entail; the existence of sharp if not irresolvable political disagreements about who would control valuation; and the fact that some of the core property values would probably have been deemed incommensurable for political purposes (as land values had been under the Articles tax system). The Continental Congress had understandably concluded that the only practicable choice for a surrogate measure of relative wealth was population. As James Wilson told the Convention:

> In 1783, after elaborate discussion of a measure of wealth all were satisfied then as they are now that the rule of numbers, does not differ much from the combined rule of numbers & wealth.[85]

---

[84] A similar argument, that the adoption of the Three-Fifths Clause was "virtually inevitable" if the Convention was to reach agreement, is made in Hendrickson, *Peace Pact*, 227.

[85] Farrand, 1: 605.

2. However, as the delegates were acutely aware, a "pure" rule using total population for apportionment of representatives would have given the Southern states considerable additional representation immediately (approximately four additional House seats), very close to a House majority based on the 1790 census (see table 3.1 below). Southern representation would quite quickly have expanded even more under such a system if either the Southwest or slavery grew. Thus, a pure population rule, even if it had been philosophically acceptable to all of the delegates (and it clearly was not) would have been politically unacceptable in Northern states, and would have defeated ratification. The total population measure therefore could not have been adopted as a representation rule even though it would unquestionably have been the best practicable measure of relative state wealth, as the Northern states had themselves repeatedly argued in taxation debates during the 1770s and 1780s.

TABLE 3.1. SOUTHERN SHARE OF HOUSE OF REPRESENTATIVES REPRESENTATION UNDER VARIOUS SCHEMES

| **Scheme of Representation** | **Total Units** | **Southern Share**** | **Southern Percentage** | **Change** |
|---|---|---|---|---|
| Articles of Confederation | 13 | 5 | 38% | |
| Total Inhabitants (1790) (slaves equal to freemen) | 3,929,000 | 1,962,000 | 49.9% | +11.9% |
| Free inhabitants (1790) slaves not counted | 3,231,000 | 1,304,000 | 41% | -8.0%*** or (+3.0%) |
| Federal ratio (1790) 5 slaves equal 3 free men | 3,651,000 | 1,700,000 | 46.5% | -3.4%*** or (+8.5%) |
| Brearley tax quota estimates (1787) | 3,000,000 | 1,248,446 | 41.6% | -8.3%*** or +3.6% |
| **Actual Apportionments** | | | | |
| House 1789 | 65 | 30 | 46.1% | +.4% |
| House post-1790 census | 105 | 48 | 45.7% | 0 |

| | | | | |
|---|---|---|---|---|
| House post-1800 census | 142 | 65 | 45.8% | +.1% |
| House post-1810 census | 186 | 78 | 41.9% | -3.8% |
| House post-1820 census* (x/Mo.) | 213 | 89 | 41.8% | -3.9% |

*Table 3.1 is adapted from Robinson, *Slavery in Politics,* Table III, p. 180. Delaware is counted as a slave state for 1810-20 purposes, but not for 1790. Brearley tax est.: Farrand, 1: 574.
**Includes five southernmost states, and southwestern states.

***For comparison purposes, two percentages are shown: difference from Confederation or difference from total inhabitants 1790.

3. By the same token, a rule of apportionment that relied solely on free inhabitant population would have nominally excluded wealth from the representation calculation. But in reality, it would have excluded only a major part of the wealth of the Southern slave states. The North's free population was a reasonably good surrogate for Northern wealth (as both sides had conceded during taxation debates). This apportionment rule would have been politically unacceptable in the South.

4. The unavoidable conclusion is that some compromise wealth measure located between representation based on total population or free population was going to be adopted by the Convention. The Three-Fifths Clause was the logical compromise choice in view of the fact that it had been vigorously debated and widely approved by Congress and eleven out of thirteen states as a wealth measure (for tax quota allocation purposes).

5. Once the Convention agreed to equal state voting in the Senate, proportional representation in the House was inevitable, and it was equally inevitable that proportional representation would be based on the Three-Fifths Clause.

# 4

# THE CLASH OVER COMMERCE AND WESTWARD EXPANSION

*Introduction*

This chapter focuses on the approach taken by Northern politicians to three major issues regarding slavery they faced at the Convention. These issues were: whether to prohibit the slave trade; fugitive slavery; and what provisions to make regarding slavery in the territories. By examining these issues, we can explore the boundaries and underpinnings of the "federal consensus" on slavery.[1]

On the slave trade, Northern politicians obtained a paper limitation designed to mollify their Northern constituents that imposed no meaningful constraints on the growth of slavery for a generation or more, allowing slave imports to fuel westward expansion. With respect to fugitives, the states ratified their existing policies against protecting fugitives in the Constitution's Fugitive Slave Clause. Some historians contend that the Fugitive Slave Clause was politically unnecessary to the adoption of the Constitution, and that the slave trade could have been prohibited, or at least cut off in less than twenty years, without threatening the Constitution's adoption. The Constitution also included

---

[1] William Wiecek identified a "federal consensus" underlying the politics of slavery during this period, which he described as follows:

> Because slavery had been regulated by law in all the mainland colonies during the eighteenth century, Americans in the early years of national independence neither questioned its legitimacy in the states where it survived nor believed that the federal government would abolish it in those states. This assumption will be called the 'federal consensus.'...It followed that the only proper posture of the national government was strict laissez faire [except for the slave trade, fugitives, and insurrections].....No one, until the emergence of radical constitutional abolitionists in the 1840s, thought to challenge the federal consensus. William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Ithaca: Cornell University Press, 1977), 16-17.

protection for slave state economies and an important "side bargain" provided for slavery's territorial expansion. This chapter argues that the Constitution's core protections for slavery and the slave state economies were essential to its ratification.

The drafting of the Constitution occurred at a time of intense interest in western settlement and American economic development. As the work of historian Peter Onuf shows, by 1787 Americans had conflicting conceptions of economic development and of the best path toward western settlement, and had been systematically debating these issues in the context of western settlement since at least 1784.[2] For Onuf, the debate over the economy of the slave states at the Convention is best understood in the context of these broader debates over economic development. Matson and Onuf conclude that although delegates shared a "conception of a dynamic and expansive national economy," and delegates drove "hard bargains" with each other on certain specific issues such as the commerce power-slave trade compromise, broader "concrete plans for a dynamic, developing economy did not materialize" in the Constitution.[3] This chapter argues that the Convention instead forged a broad tacit extraconstitutional sectional bargain on economic development issues.

Historian Staughton Lynd argues that the Constitution was part of a "grand bargain" that included the Northwest Ordinance.[4] Lynd's thoughtful conclusions were

---

[2] Peter S. Onuf, *Statehood and Union* (Bloomington: Indiana University Press, 1987); Cathy D. Matson and Peter S. Onuf, *A Union of Interests: Political and Economic Thought in Revolutionary America* (Lawrence: University Press of Kansas, 1990). The first work is the leading history of the significance and implications of the Northwest Ordinance of 1787; the second work provides important perspectives on thought about economic development in forming the Constitution and the early Republic.

[3] Matson and Onuf, *Union of Interests*, 113, 120.

[4] Staughton Lynd, "The Compromise of 1787," *Political Science Quarterly* 81, no. 2 (1966): 225-50. Lynd's analysis is criticized in James H. Hutson, "Riddles of the Federal Constitutional Convention," *Willam and Mary Quarterly* 3rd Ser., 44, no. 2 (1987): 411-423.

correct in a number of respects, but it is argued here that the bargain between the sections was broader than Lynd thought. In return for the abandonment by the Northern states of the proposed Spanish Treaty, the South agreed to the adoption of the Northwest Ordinance. This sectional bargain removed the major obstacles to each section's preferred path to economic expansion, and the sections began the process of dividing the West. The expansion of slavery was an inevitable and entirely foreseeable consequence of this division, though its principal object was sectional economic development.

The Constitution would not have been ratified without this extraconstitutional development bargain. The formal Constitution could not provide a capacious enough framework to incorporate fully the disparate goals of the sections and still obtain ratification. Therefore, the sectional development bargain that accompanied agreement on the formal Constitution necessarily remained informal and secret. The execution of that bargain would ultimately rely not on law but on political trust, good faith, and reciprocity.

As Onuf's and Lynd's work on the Northwest Ordinance shows, the part of the sectional development bargain involving the Northwest Ordinance was based to some extent on expectations that it would create shared sectional or national benefits. But in other cases, the Ordinance's anticipated benefits were not common but redistributive—viz., the generation of wealth by one region that would reduce fiscal burdens on another, or even the creation of a defense shield against foreign foes or Native Americans formed by settlers of one region that would also protect citizens of another.[5] And the sectional

---

[5] See William Grayson to James Monroe, August 8, 1787, *LDCC*, 24: 393.

bargain rested on the premise that there would be no negative spillover from one region to another as a result of the other region's development.[6] The Constitution and its accompanying bargain reflected a shared national understanding that existing and projected regional political and economic development patterns should shape the national approach to development and consequently to the slavery issue. This meant that the "eastern" and "southern" regional political economies would have largely separate "spheres of influence" into which it was anticipated they would extend through settlement.[7]

Onuf's conclusion that in early territorial policy, the "slavery issue was of only secondary importance," is clearly warranted if the focus is on settlement of the Northwest.[8] More broadly, Onuf concludes that "slavery exclusion was subordinate to the overriding concern with development and union." For the development of the Southwest, as this chapter will show, the pivotal issue at the time of passage of the Northwest Ordinance was the right to navigate the Mississippi river. The settlers who erupted into what a contemporary called a "political phrenzy" over that issue included many who could not have envisioned western settlement without slavery, and who did not believe that the national government should dictate to them on that issue in any event. Although Americans spoke a common political language on issues of settlement, that

---

[6] On such insulation as a principle of northern antislavery opinion, see Matthew Mason, *Slavery and Politics in the Early Republic* (Chapel Hill: University of North Carolina Press, 2006), 6-7.

[7] David C. Hendrickson, *Peace Pact: The Lost World of the American Founding* (Lawrence: University Press of Kansas, 2003), 229.

[8] Onuf, *Statehood and Union*, 111.

language often concealed thoroughgoing disagreements about what freedom should mean on the frontier.

These disagreements had begun to emerge by 1787, but the Convention and Federalist advocates of the Constitution did their best knowingly to sidestep them in order to obtain ratification. As Massachusetts Congressman Nathan Dane had privately recommended to his colleague Rufus King, the Convention delegates agreed to conceal the actual nature of their sectional successes and failures from the state ratifying Conventions because to have done otherwise would have threatened the defeat of the Constitution.[9] Ratification debates therefore proceeded under false or conflicting premises about the reasons for fundamental Convention decisions and sharply conflicting interpretations of key parts of the Constitution affecting slavery. The result was to defer the controversy to a later generation, by which time each section hoped it would be better placed to control its destiny without "outside" interference.[10]

---

[9] Nathan Dane to Rufus King, June 19, 1787, *LDCC*, 24: 355-6.

[10] Drew McCoy argues that the fundamental underpinning of Convention negotiations was a set of shared demographic expectations about national population growth or "imperial drift" that, it was thought, would inevitably shift power to the south and west. McCoy argues that such expectations—not divisions over slavery—account for divisions at the Convention. Criticizing Staughton Lynd's work, he argues that concentration on slavery is "anachronistic and misplaced emphasis" on a single issue. Drew R. McCoy, "James Madison and Visions of American Nationality in the Confederation Period: A Regional Perspective," in *Beyond Confederation: Origins of the Constitution and American National Identity*, ed. Richard Beeman, Stephen Botein, and Edward C. Carter II (Chapel Hill: University of North Carolina Press, 1987), 229. McCoy argues that because of mistaken assumptions about demography, "ratification took place under generally false expectations." Ibid. 230. McCoy is undoubtedly correct that certain broad demographic assumptions made by delegates turned out to be mistaken, but for present purposes, this is largely beside the point. McCoy fails to appreciate fully the extent to which correct understandings about other demographic realities influenced constitutional decisions, including sectional economic development bargains analyzed in this chapter, that foreseeably fostered slavery's expansion.

*The Slave Import Limitation*

Rufus King's August 8, 1787 speech attacking the Committee of Detail report signaled that the North was seeking an accommodation with the South on slave imports (King described this as part of the commerce power) or on export taxation. But the taxation issues were resolved without any need for any significant compromise by the slave states with Northern state interests. A coalition of slave states and non-slave states defeated efforts to permit any federal taxation of exports, and the narrow limits imposed on taxation of slave imports meant that federal taxation could not be used as a means of discouraging slave imports.[11] Slavery was thus permanently immunized from federal taxation unless the new government imposed direct taxes, which no knowledgeable delegate expected would occur (absent an emergency). Federal tax policy would never be used as a means of limiting the growth of slavery.

Historians have generally concluded that the accommodation King sought on behalf of the Northern states instead ultimately occurred principally in the form of a regional trade between the New England states and the Deep South. That trade linked Congress' ability to exercise the commerce power in the Constitution without facing a regional veto to an agreement that no federal limits would be placed on slave imports for twenty years.[12] Major commercial issues had been the source of serious regional

---

[11] For export and import taxation issues, see Matson and Onuf, *Union of Interests*, 113-120. On export taxation, see also Earl M. Maltz, "The Idea of the Proslavery Constitution," *Journal of the Early Republic* 17, no. 1 (1997): 37-61, and Don E. Fehrenbacher, *The Slaveholding Republic*, ed. and completed by Ward M. McAfee (Oxford: Oxford University Press, 2001), 45-6. Such taxes were limited to at most 5 per cent of the current price of slaves, and perhaps as little as 2 to 3 per cent, a far cry from the prohibitory duties that Pennsylvania and other states had sought to impose on imports prior to the Revolution.

[12] Historians generally agree that a trade occurred, although the evidence for such a trade is circumstantial. As Paul Finkelman noted, numerous writers have concluded that such an accommodation occurred. Paul Finkelman, "Slavery and the Constitutional Convention: Making a Covenant with Death," in *Beyond Confederation*, ed. Richard Beeman, Stephen Botein, and Edward C. Carter II (Chapel Hill: University of

conflicts in the years leading up to the Constitution, and regional vetos were a constant threat to effective action by the continental government.[13] The public bargaining process on these issues began in earnest on August 21, 1787, when the Convention reached the section of the Committee of Detail report permitting slave imports and prohibiting taxation of imported slaves, and a wide-ranging debate on slavery broke out.[14] Its highlights are summarized here to preface consideration of its political significance.

Luther Martin of Maryland proposed an amendment to permit taxation or prohibition of slave imports, arguing that imports would drive up defense costs and "it was inconsistent with the principles of the revolution and dishonorable to the American character to have such a feature in the Constitution."[15] Martin's attack met with an emphatic rebuff from John Rutledge of South Carolina, who argued that considerations of religion and humanity were irrelevant, that "Interest" should be the governing principle with "Nations," and that it was in the North's commercial interest to participate in the slave trade.[16] Oliver Ellsworth of Connecticut supported Rutledge's position, arguing that only states should be judges of the morality and wisdom of slavery. Ellsworth typified an important current of Northern political thought when he added that if individual states

---

North Carolina Press, 1987) at 218-220, and sources cited in n. 92. See also Matson and Onuf, *Union of Interests*; Hendrickson, *Peace Pact*, 237 (regions "joined hands in a marriage of convenience"); David Brian Robertson, *The Constitution and America's Destiny* (Cambridge: Cambridge University Press, 2005), 180-1; Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Ithaca: Cornell University Press, 1995), 174.

[13] Hendrickson offers a useful account of regional attitudes toward the commerce power. Hendrickson, *Peace Pact*, 235-7. See also Matson and Onuf, *Union of Interests*; and McCoy, "Madison and American Nationality," on regional conflicts and the Constitution.

[14] Report Art. VII, § 4.

[15] Farrand, 2: 364 (Martin and Rutledge).

[16] Id.

were enriched by slavery, this would enrich the whole country. Finally, Ellsworth argued that the Confederation had deemed slavery a state concern, and he saw no argument for changing that position.[17] Rutledge's and Ellsworth's arguments both supported the view that the Constitution's approach to the entire problem of slavery should be based on state law and policy, unless it was clear that a national interest would be infringed by slavery.[18] There is little question that most delegates shared that view.[19]

In debate on August 22, Roger Sherman supported the slave state position on imports. Permitting slave imports did not change current law; there was no policy argument for a change; and it was "expedient to have as few objections as possible to the proposed scheme of Government...."[20] George Mason of Virginia, although a large slaveowner, attacked the "infernal traffic." Mason argued that the slave trade was a national problem because slaves were threats to domestic security.

Mason argued that a uniform prohibition on imports was critically necessary to prevent pressure to use slaves in western development. If any state was allowed to import slaves, western settlers would demand such slaves for their settlements and "will fill" the West with slaves.[21] Mason's remarks clearly warn delegates that slave imports would be used to supply new states, not simply to replenish slave populations in existing states. John Dickinson, also a major slaveowner, joined Mason in arguing that the slave

---

[17] Id.

[18] See Matson and Onuf, *Union of Interests*, 101-123.

[19] Robinson, *Slavery in Politics*, 224.

[20] Farrand, 2: 369.

[21] Ibid., 2: 370 ("The Western people are already calling out for slaves for their new lands; and will fill that Country with slaves if they can be got thro' South Carolina and Georgia.").

trade should be prohibited "on every principle of honor and safety."[22] In contrast to these vigorous moral and prudential attacks on the slave trade and slavery, Rufus King argued that the taxation of slave imports should be analyzed as a purely political problem. From that perspective, a total exemption from import taxation for slaves would be regarded as commercially unfair by the "Northn. & middle states."[23]

In an effort to convey to Northern delegates such as Roger Sherman who thought that the slave trade or slavery would wither away that they were badly mistaken, General Charles Cotesworth Pinckney of South Carolina candidly informed delegates that he did not believe South Carolina would stop slave imports in any "short time," but instead would only interrupt them occasionally for security or price stability reasons.[24] Georgia delegates made clear that Georgia would continue imports as well, and would not ratify the Constitution without the continued ability to import slaves. These delegates' states continued to view slave imports much as they had in the past, as a matter for state policy used to manage slave prices and planter debt, not as morally abhorrent or politically dangerous. Their position was another indication that several slave states saw slavery as a permanent institution. At the conclusion of this vociferous but inconclusive debate, delegates agreed to try to reach a compromise by committing various proposed constitutional provisions to an ad hoc committee.

On August 25, 1787, the ad hoc committee reported out a commerce clause power exercisable by majority vote, as well as a clause permitting elimination of the slave trade

---

[22] Ibid., 2: 372.

[23] Farrand, 2: 373.

[24] Id.

after 1800. In a development that was remarkably informative about the politics of slavery, General Pinckney moved to extend until 1808 the period during which the states would be permitted to engage in the slave trade. James Madison attacked the Pinckney motion in very strong terms, warning the delegates that: "Twenty years will produce all the mischief that can be apprehended from the liberty to import slaves. So long a term will be more dishonorable to the National character than to say nothing about it in the Constitution."[25] Madison's speech is notable both for its brevity and its quietly agonized tone, as though he realized when he made his speech that the issue had already been lost. He understood slavery and its social and political consequences exceptionally well, and disliked it intensely.[26] His remarks endorsed the previous speakers' blistering critique of the harm done by the slave trade. His speech contained two different—and equally important—assertions about the effect of slave imports.

Madison's first assertion was that permitting slave imports for twenty years would do as much harm as failing to prevent them at all. This clearly implied that if imports were permitted for twenty years, it would be futile to prevent them after that, because all the possible harm that additional imports could cause would already have occurred. It seems likely that Madison's powerful conclusion rested on an appreciation of the demographics of slavery that he had in common with other slaveholders, and that they in turn communicated to other delegates during the Convention.

---

[25] Madison notes, August 25, 1787, Farrand, 2: 415.

[26] Madison's personal sympathy for the abolition of slavery was clear. He referred to the slave trade as "barbarism" in *The Federalist* no. 42. For Madison's general view of slavery, see Banning, *Sacred Fire of Liberty*, 83. Banning notes that "through forty years of active public service, [Madison] refused to risk his usefulness in other urgent causes by identifying with the more outspoken, active critics of the institution...." Id. In that respect, Madison and Jefferson were quite alike.

The demographic reality of American slavery by 1787 was that overall American slave populations were growing substantially and would continue to grow even without imports. Historians now agree that by early in the last half of the eighteenth century virtually all mainland American colonies had a positive slave population demography, which meant that slave populations grew by natural increase, unlike the Caribbean slave colonies where slave populations could only be sustained through slave imports.[27] The real question is what Americans knew about this undeniable demographic reality by 1787. Benjamin Franklin's well-known essay (published in 1755) about slave demography had been right about the Caribbean's import dependence on slave imports, and completely wrong about the mainland United States, though at the time he wrote Franklin was unaware of this.[28] By 1787, Franklin's view may still have been a widely held one, but there are several bases for concluding that the Convention delegates had ample reason to know better. The first is that at least one very prominent slaveholder, Thomas Jefferson, had written a widely read work about the "evil" phenomenon of rapid American slave population growth before the Convention met, his *Notes on the State of Virginia*.

Jefferson had explained in *Notes on Virginia* that slave populations, particularly in Virginia, were growing rapidly. He provided an essentially accurate and demographically detailed estimate of slave population in Virginia, based primarily on tax data of the same kind compiled in most slave states. He carefully analyzed the overall

---

[27] Philip D. Morgan, "The Poor: Slaves in Early America," in *Slavery in the Development of the Americas*, ed. David Eltis, Frank D. Lewis, and Kenneth L. Sokoloff (Cambridge: Cambridge University Press, 2004), 300-303.

[28] Robert William Fogel, *Without Consent or Contract: The Rise and Fall of American Slavery*, 1994 pbk. ed. (New York: WW Norton & Company, 1989), 116-17.

rate of total population increase for Virginia over time during the eighteenth century.[29] After considering the relative growth of white and black populations, Jefferson concluded: "Under the mild treatment our slaves experience, and their wholesome, though coarse food, this blot in our country increases as fast, or faster than the whites." He then argued that Virginia's post-Independence slave import ban would "in some measure stop the increase of this great political and moral evil...."[30] In this context, by "in some measure," Jefferson clearly meant that the rate of slave population increase would be slowed by an import ban, not that slave populations would decline.

Jefferson was not alone in basing his analysis of slavery and abolition on the reality that American slave populations would grow without imports. During the 1790 Congressional debate over slavery, Congressman William L. Smith of South Carolina argued strenuously that limiting slave imports would not stop the growth of slavery, because of the effects of natural population reproduction.[31] In the mid-1790s, the prominent Virginia judge and abolitionist St. George Tucker discussed that issue in his correspondence with senior Massachusetts officials on abolition issues. Tucker explained to them that even massive investments in colonization to remove blacks from slave states would not successfully diminish black populations because slave population growth would outstrip colonization removals.[32] Tucker explained to his Massachusetts correspondents that Benjamin Franklin's views on black population increase were

---

[29] Thomas Jefferson, *Notes on the State of Virginia* (New York: Harper & Row, 1964 ), Query VIII, 81-5.

[30] Ibid., 85-6.

[31] William L. Smith, *New York Daily Advertiser*, March 22, 1790.

[32] St. George Tucker to Dr. Henry Belknap, June 29, 1795, in *MSL*, 407-408.

mistaken and that populations of "the negroes, whose fertility and increase is immense" would grow faster than white population.[33] This demographic reality was clearly not something that Tucker had just discovered, but was instead known to slave state leaders by the time Jefferson wrote about it in the early to mid-1780s.

Jefferson's views about slavery and its demography also became known to Northern politicians before the Convention, as Secretary of Congress Charles Thomson's 1785 letter to Jefferson praising his views on slavery in the *Notes* shows. Northern delegates also understood the demography of slavery, as the Convention debates described below demonstrate. It is an unavoidable inference that those delegates like Roger Sherman who remained ignorant of slavery's demographic realities—in the face of pointed discussions about excess slave supply and the likely use of slaves in western expansion at the Convention—did so because they preferred to remain ignorant of the facts.

In addition, Convention delegates already had a fairly accurate idea of the large size of existing slave populations in slave states in 1787 as a result of prior Congressional representation and taxation debates, where the size and market value of slave populations had been directly at issue in establishing tax quotas. (See table 3.1, Chapter 3). The size and growth of slave populations were also directly relevant to the debates over the Three-Fifths Clause. Delegates who chose to inquire could have obtained extensive data about the history of slave imports, about which the slave states had compiled data because they commonly taxed such imports and negotiated continental taxation issues using such data.

---

[33] Tucker to Belknap, ibid., 419.

The Convention debates about slave imports confirmed for delegates that Jefferson was correct that American slave populations were growing without imports. The slave trade debate demonstrates that it was apparent to more thoughtful Northern delegates that the size of existing slave populations in some states already meant that slave supply was in excess of slave demand there, and that as a result some major slave states already had little or no need for slave imports. By the time of the Convention, both Virginia and Maryland were net exporters of slaves.[34] Shrewd Northern delegates like Oliver Ellsworth understood this, and explained to fellow Convention delegates that Virginia and Maryland had a surplus of slaves and did not need imports.[35] As Ellsworth strongly implied, the Chesapeake states wanted to be able to sell slaves to South Carolina and Georgia at the artificially high prices that would result from an import ban. The work of economic historians has confirmed Ellsworth's position. Historians have therefore argued that as a major Virginia slaveowner, George Mason would have personally benefited from a ban on slave imports. Mason's own arguments may therefore have been tainted from the perspective of knowledgeable Northern delegates.[36] But if states with slave surpluses could export them, continued imports would mean that slave prices would decline further and that slaves would be even more readily available to support more rapid western expansion.

---

[34] Historian Allan Kulikoff estimates that during the period from 1790-1810, the Deep South slave states imported more than 90,000 slaves—or almost half their total imports—from the Chesapeake. Allan Kulikoff, "Uprooted Peoples: Black Imports in the Age of the American Revolution, 1790-1820," in *Slavery and Freedom in the American Revolution*, ed. Ira Berlin and Ronald Hoffman (Charlottesville: University of Virginia Press (for Capitol Historical Society), 1983), 149, 152, cited in Gary M. Anderson, Charles K. Rawley, and Robert D. Tollison, "Rent Seeking and the Restriction of Human Exchange," *Journal of Legal Studies* 17, no. 1 (1988): 83-100, 89 n. 16.

[35] Farrand, 2: 371.

[36] Anderson et al. "Rent Seeking and Human Exchange," 91-2.

Perhaps because he saw Virginia as engaged in special pleading to protect prices for its slaves, Ellsworth ignored Mason's argument that a major purpose of further slave imports by the Deep South would be to supply burgeoning demand for additional slaves from western settlers, not simply to supply Georgia and South Carolina. And despite efforts by Gouverneur Morris of Pennsylvania to pin that issue down, the Convention chose not to impose any geographic limits on where imported slaves could be taken. Because the Constitution ultimately distinguished explicitly between existing and new states on whether slave imports could be continued before 1808 without federal control, including a geographic limitation on the permissible destination of imports would have been quite straightforward. Yet vociferous slave state opposition would undoubtedly have arisen if geographic limits on western slavery expansion had been proposed. In the event, the need to consider such limitations was avoided by the sectional development bargain discussed below.

Madison was undoubtedly familiar with Jefferson's views on the demographics of slavery and with the existence of Virginia's slave surplus. Madison therefore almost certainly meant to agree with prior speakers like George Mason that permitting long-term slave imports would provide an ample supply of slaves not simply to satisfy demand for existing slave states but also to fuel slavery's westward expansion, which was already known to be under way in 1787. Madison's first assertion could also have been intended as a veiled warning to delegates that an additional twenty years of slave imports would permit slavery to grow to the point where it would be more likely to become an unalterably permanent institution in the slave states. By the mid-1790s thoughtful Southern observers who strongly supported abolition such as St. George Tucker had

reluctantly concluded that slavery could not be gradually abolished in states such as Virginia in less than 100 years. It does not take much imagination to conclude that Madison already understood this when he spoke.

The intent of Madison's second assertion, about national honor, is less clear. One way of reading it is that because twenty years of slave imports would do grave harm, it would be better if the Constitution were silent on the subject, since people would regard the twenty year provision as meaning that Americans either were ignorant of the harm that they were permitting, or were cynically permitting it to occur while proclaiming their good intentions regarding abolition. Either outcome would be "dishonorable" to the "National character." Another way of reading this assertion is that Madison wanted to prevent the added political legitimacy that would be given to slavery by an explicit authorization of twenty years of additional slave imports, and might have thought of that endorsement as worse than silence on the issue. This seems consistent with Madison's later statement that it would be wrong explicitly to admit the idea of property in man into the Constitution.

As to either possible reading of Madison's second point, it was very significant that there Madison also deliberately adopted the language of national "character" on which Gouverneur Morris, Luther Martin, and others had relied in their attacks on slavery. In adopting the language of character on this issue, Madison was openly dissenting from the views expressed by delegates such as Rutledge and Ellsworth who had argued that national character was irrelevant to forming the Constitution where slavery was concerned. Madison is often seen as the founder of a political science based on factions and interest group politics, not on virtue or character, but slavery was one

problem where he felt compelled to admit publicly that forming the Constitution should take into account other considerations subsumed under the broad idea of "character." On this occasion as on few others, Madison's head and heart were at war, and his heart won. Madison's speech seems to have fallen on deaf ears and an immediate vote occurred on Pinckney's motion.

The Convention's decision to agree to Pinckney's motion increased by more than one-half the amount of time during which slave imports were constitutionally protected against federal control. The protection of the trade through 1808 permitted an increase of roughly 8 percent in the size of the American slave population by 1820. Most importantly, it also made it possible for the slave trade to provide an ample supply of slaves to western settlers, precisely as Mason had warned that it would.[37] These "excess imports" also created an added political premium for slave states based on the Three-Fifths Clause. See table 4.1.

---

[37] Historians disagree on how many slaves were imported into the United States during 1780-1810. Robert Fogel concludes that some 290,000 slaves were imported during that period, almost as many slaves as had been imported in the preceding 160 years. Robert William Fogel, *Without Consent or Contract: The Rise and Fall of American Slavery*, 1994 pbk. ed. (New York: WW Norton & Company, 1989), 32-33. Other estimates are lower, some very significantly. James McMillin concludes that about 200,000 slaves were imported during that period. James A. McMillin, *The Final Victims: Foreign Slave Trade to North America, 1783-1810* (Columbia: University of South Carolina Press, 2004), 29 (Table 6). Allan Kulikoff estimated imports at about 113,000 during that period. Ibid., 17. McMillin's work is challenged by David Eltis, who argues that McMillin's data overstates imports. David Eltis, "The Final Victims: Foreign Slave Trade to America, 1783-1810," *Journal of Social History* 40, no. 1 (2006), 237 (book review). I have used McMillin's data solely as a mid-range between conflicting estimates.

Based on Table 4.1 import data, the result of stopping imports at 1800 would have been to reduce slave imports for the period 1780-1810 by more than half. This change in turn would have reduced the size of the slave population by approximately 8 percent as of 1820. This slave population reduction might have slightly reduced the number of southern slave states as of 1820 by slowing settlement, though slaveholders might have stepped up imports before 1800 in response to an impending cutoff. An immediate slave trade cutoff would have had a larger impact on the growth of slavery in this period, probably reducing total 1820 slave population by 15-20 percent (other factors being equal). Slave population would still have increased by about 80 percent over 1790 levels to about 1.2 million by 1820, but slave states would probably have lost significant representation in both the House and Senate in this reduced growth scenario.

**TABLE 4.1 SLAVE IMPORTS AND POPULATION BY DECADE AND UNITED STATES SENATE SEAT IMPORT PREMIUMS**[38]

| Decade | Slave Imports | Total Slave Population End of Decade | Cum. House Seat Premium from post-1780 Imports | Cum. Senate Seat Premium from Imports |
|---|---|---|---|---|
| 1780-1790 | 29,000 | 697,000 | — | — |
| 1790-1800 | 60,000 | 893,000 | 2 | 2 (est.) |
| 1800-1810 | 111,000 | 1,190,000 | 4 | 2 (est.) |
| 1810-1820 | ? (smuggling) | 1,537,000 | 4 | 4-6 (est.) |

The New England states present—Massachusetts, Connecticut, and New Hampshire—supported Pinckney's proposed extension of state authority to permit the slave trade until 1808.[39] Without the support of these states, the Pinckney motion would have failed. Even more importantly, it would have been impossible to add the remarkable provision making the slave trade protection provision unamendable until 1808.[40] Each of these New England states had by this time abolished or begun to abolish slavery and the slave trade. Because their political majorities opposed any extension of slave imports, it seemed superficially that the position the New England delegates took would be unpopular with their constituents. But the potential unpopularity of their position actually reinforces the conclusion that a trade between New England and the

[38] For calculations supporting this table, see appendix C.

[39] Farrand, 2: 415.

[40] U.S. Const., Art. V.

Deep South on slave imports took place, since it was the return on their trade that protected them against attack.

In that trade, New England and the Deep South each protected what they deemed their paramount economic interest in the framing of the Constitution. New England had come to the Convention seeking the broadest possible federal political control over commerce. In the bargain, New England obtained much broader commerce powers for its willingness to permit Southern slave imports. Not only would New England potentially benefit economically (directly and indirectly) from continued slave imports, it would also be geographically insulated from the perceived negative effects of such imports. The southernmost slave states accepted a minor paper limit on their freedom to import slaves in return for New England's willingness to prevent pressure for more severe import limits, but in return they received the flexibly adapted supply of slaves needed to support the carte blanche they also obtained for slavery's Southwestern expansion.

As the discussion of ratification later in this chapter will show, contemporaries were well aware that on the commerce-slave trade issue a "marriage of convenience" had occurred, but Anti-Federalists deliberately chose not to attack that agreement in the North. That Anti-Federalist decision provides an important clue as to why Northern representatives were willing to make what seemed superficially to be a politically unpopular agreement. In 1787 Northern delegates had the necessary freedom to act from the "realpolitik," rent-seeking perspective that permitted them to make the commerce-slave trade bargain precisely because Northern support for abolition was limited. Antislavery sentiment in the North was motivated by a variety of factors, including

morality, racism, and labor economics, but it rested on the political premises that Northern citizens were concerned principally about local abolition, and that they would not finance abolition anywhere. These fundamental limitations of antislavery sentiment meant that it was not powerful enough to dictate that Northern delegates decline an otherwise advantageous and very desirable trade. The judgment made by Northern delegates that only minor limitations on slavery were politically necessary to ratify the Constitution was borne out during ratification. The morality of slavery and the slave trade were not major sources of controversy in Northern state ratifying conventions.[41]

It is quite probable that Northern delegates would have been attacked during ratification for not making the commerce-slave trade agreement. The Anti-Federalist decision not to assail this compromise shows that their political judgement was that that compromise would be popular in the North. As a result, the threats of disunion made by South Carolina and Georgia over the slave trade were politically irrelevant to Northern strategy—the Northern states were never going to put them to the test by insisting on a slave trade cutoff when public support for a cutoff in the North was relatively weak to begin with. However, such threats did provide a useful pretext for defending the compromise to antislavery advocates.[42]

The agreement on the slave trade cutoff provision reflected basic differences in the approach that the regions took to dealing with slavery in the Constitution. The

---

[41] Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (Chapel Hill: University of North Carolina Press, 1968), 325; Robinson, *Slavery in Politics*, 235-40.

[42] The threat of defection became the basis of an argument defending the slave trade provision made by "One of the People Called Quakers in the State of Virginia," *Virginia Independent Chronicle*, March 12, 1788 reprinted in John P. Kaminski, ed., *A Necessary Evil? Slavery and the Debate Over the Constitution* (Madison: Madison House, 1995), 181.

Southern states vigorously asserted that they wanted as explicitly as possible to maintain their rights and to protect existing slavery institutions using definite mechanisms (such as a date certain before which the new government could take no action), often buttressed by a permanent regional veto, all of which would limit Northern political ability to act against slavery. The slave states believed that any agreed upon limits imposed on slavery would take effect, if at all, far enough in the future that they would be able to protect themselves politically if necessary when the time arrived. When General Pinckney explained the slave trade limit to the South Carolina ratifying convention, it was as a far-off limit that they could defeat in 1808 if they deemed it necessary, not as a limit that had any meaningful impact on slave state freedom of action. South Carolina delegates, many of them slaveowners who had a great deal to lose if General Pinckney was mistaken, readily accepted his explanation.

The Northern states, on the other hand, were willing to settle for the possibility that through the Constitution's discretionary language they obtained the paper constitutional authority to reverse at some distant future time the powerful socioeconomic trends that were accelerated by the Constitution's immediate grant of constitutional political rights and protections to slavery. But the Northern states had received no assurance that after 1808 they would actually have the political power to force Congress to use its entirely discretionary authority over slave state opposition. These opposing regional political strategies on the slave trade cutoff issue closely paralleled the

contrasting approaches of the sections to the proposed Spanish Treaty, discussed in detail in the next section.[43]

Prescinding from the relative political strength of the regions, the Northern approach to both slavery and the Spanish treaty resulted from majority support for seeking short-term regional economic advantage, at least where any long-term consequences of such "rent seeking" actions fell primarily on others outside the region such as Southern settlers or enslaved blacks. The Southern approach to both issues, in contrast, was based on a powerful and openly acknowledged self-interest in maintaining slavery that sought to capture for its political majority as many of the long-term benefits and to shed as many of the burdens of slavery as possible. The regions' strategies for dealing with the constitutional issues related to the expansion of slavery into new states and territories exhibited the same sharp contrast.

*The Western Development Bargain*

James Madison told his countrymen in *The Federalist* that "the Western territory is a mine of vast Wealth to the United States...."[44] Settlers were by then moving west in what one historian described as a "staggering" surge which thoughtful political leaders like George Washington realized could be channeled but not prevented.[45] More than one

---

[43] In that dispute, the northern states argued that the country could give up Mississippi river navigation rights for twenty-five to thirty years without facing any real consequences, while the southern states insisted that giving up those rights for a generation would be tantamount to giving them up permanently.

[44] Federalist No. 38 in J.R. Pole, ed., *The Federalist* (Cambridge: Hackett Publishing Company, 2005), 204.

[45] McCoy, "Madison and American Nationality," 231.

hundred thousand settlers were in the Kentucky-Tennessee area by the end of the 1780s.[46] More than fifteen thousand of those "settlers" were slaves.

However, the creation of new territories and states was also a vast political minefield, as the Convention debate over representation had vividly demonstrated. As historian Lance Banning observed, prior to 1787 virtually all western settlement had occurred south of the Ohio River, and the flow of settlers was large enough that it was beginning to create fundamental problems regarding regional political or "federal" balance.[47] Many Northern Convention delegates were acutely aware that expanded western settlement meant that they could quickly lose control over the new government because the Constitution's proposed representation system embodied a tenuous short-term regional political balance. Finally, western expansion had also raised the sectionally divisive problem of control over foreign relations and military power.

Despite several years of debate, on the eve of the Convention, the Confederation Congress had failed to resolve major aspects of these western development issues. Among the leading unresolved issues were the bitter dispute over the Jay-Gardoqui (or "Spanish Treaty") negotiations and the struggle over the terms, including slavery, on which settlement of new territories and states would occur. These unresolved issues had potentially serious adverse effects on the course of western development, especially from the viewpoint of the Southern states.

But during the Convention, the North made no overt efforts to limit the western expansion of slavery. And there was another readily foreseeable debate that did not

---

[46] Id.

[47] Banning, *Sacred Fire*, 67-8.

occur: a debate over the Spanish Treaty negotiations. The Convention debates are virtually silent on the Treaty, which was still being debated in Congress during the Convention.[48] The important historical question is why no overt efforts were made to address either issue at the Convention. Why did the delegates instead negotiate a Constitution that was not explicit about Congress' power to prevent slavery's western expansion? Why was the Spanish Treaty issue resolved by Congress in the South's favor shortly after Virginia ratification?

The evidence, though admittedly circumstantial, suggests the following: The passage of the Northwest Ordinance and the demise of the Spanish Treaty were the quid pro quos in an informal sectional development bargain. That agreement was necessary to permit certain politically divisive issues to be avoided in the Constitution. Neither aspect of the agreement could be made public or explicitly approved in the Constitution without threatening to defeat it. The background of this informal but essential agreement follows.

Until just before James Madison left New York for the Convention in May, 1787, he and Rufus King had been the opposing leaders in a vitriolic Congressional struggle over the Spanish Treaty negotiations, a struggle in which several other Convention delegates had also participated. The proposed Treaty would have granted the United

---

[48] The Treaty (or "Jay-Gardoqui") negotations centered on whether Spain would open its markets to U.S. products, particularly New England exports such as fish, in return for an agreement that United States citizens would not navigate the Mississippi River to export goods for somewhere between twenty-five and thirty years. The agreement would have been very beneficial to New England, but would have severely hampered western expansion from the southern states. Accounts of the negotations are found in the following works: Richard B. Morris, *The Forging of the Union* (New York: Harper & Row, 1987), 232-44; McCoy, "Madison and American Nationality," 239-44; Banning, *Sacred Fire*, 66-75, 254-258; Staughton Lynd, "The Compromise of 1787," *Political Science Quarterly* 81, no. 2 (1966): 225-50; Thomas A. Bailey, *A Diplomatic History of the American People*, 8th ed. (New York: Meredith Corporation (Appleton Century Crofts), 1969), 61-2.

States important commercial rights in Spain, especially the right to sell American products such as New England fish. In return, however, Spain was seeking agreement that the United States would not exercise for thirty years its claimed right to navigate the Mississippi River. The possibility that Congress would agree to Spain's proposal outraged and "astonished the western country" and its Southern supporters. Patrick Henry declared that he "would rather part with the confederation than relinquish the navigation of the Mississippi."[49] The Northern states saw the situation quite differently. Rufus King called the Treaty a project of "vast importance to the Atlantic States."[50] Historian Staughton Lynd describes the skirmishing over the Spanish Treaty negotiations, which had preoccupied Congress during 1786 and early 1787 and was, he concludes, "the most serious sectional issue to come before the Continental Congress."[51]

The Treaty debate raised an important constitutional issue in addition to the substantive question of what should be done about American navigation of the Mississippi River. The constitutional issue was whether the Articles of Confederation permitted a majority of seven states to alter—as they wanted to—the negotiating instructions of John Jay, the American treaty negotiator, to permit him to conclude a treaty notwithstanding the Articles requirement that the votes of nine states were needed for treaty approval. If a simple majority of Confederation states could effectively dictate

---

[49] Bailey, *Diplomatic History*, 62.

[50] Quoted in Morris, *Forging of the Union*, 240.

[51] Lynd, "Compromise of 1787," 233.

the terms of a treaty, as one Congressman despairingly put it, it would "of course" turn the Confederation "into a rope of sand."[52]

Madison knew by early 1787 that if the Spanish Treaty issue were allowed to persist, that issue alone might well result in Southern rejection of the Constitution because of the perceived importance of the Mississippi River to western development. Therefore, as Lynd showed, Madison fought to neutralize the issue in Congress—if the Southern position could not prevail, Madison sought to find a means to prevent Congress from taking any action on the issue. To counter Madison's unrelenting efforts to derail Jay's negotiations with Spain, Rufus King of Massachusetts employed the most obstructionist political tactics available to him. King's tactics included a procedural maneuver specifically designed to prevent Congress from even revisiting the issue of Jay's instructions as Madison wanted. Congress lost its quorum in early May, 1787 while still deadlocked over the issue. A recent analysis of this problem concluded that "the Confederation policy process collapsed under the burden of this interstate rivalry....Obstruction and stalemate continued into 1787."[53]

Staughton Lynd and other historians such as Lance Banning have accepted Madison's statements to others that the Treaty issue had been resolved as sufficient evidence that it had been finally resolved. But their reliance is misplaced, given Madison's evident bias resulting from his partisan role in this controversy and his clear belief that the issue would have grave adverse consequences for the success of the

---

[52] Morris, *Forging of the Union*, 242-3.

[53] David Brian Robertson, *The Constitution and America's Destiny* (Cambridge: Cambridge University Press, 2005), 62.

Constitutional Convention.[54] The seriousness of Madison's fear about the political implications of the Treaty was evident when he wrote to Jefferson that Virginia leader Patrick Henry had decided to boycott the Convention because Henry believed the Convention's work would result in a government that would yield to the Northern states on the Spanish Treaty.[55] Madison's own communications about the situation to Jefferson in April, 1787 were equivocal on whether the issue had been permanently resolved, and there is no substantial evidence that others thought that it had been permanently resolved, or that the Northern states were prepared to abandon their position, when Madison left New York for Philadelphia in early May, 1787.[56] As early as May 9, John Jay asked Congress for further instructions on the issue, which would have reopened the dispute. On July 4, a Southern state-dominated Congress adopted a resolution favoring free navigation of the Mississippi, but failed to act on a committee report regarding Jay's negotiating instructions. On July 5, Nathan Dane of Massachusetts wrote to Rufus King seeking advice on how to gain eastern state attendance in Congress for a renewed effort to pursue the Treaty. It seems clear that the Northern states had not given up the fight, despite Madison's claims.

On October 14, 1787, less than a month after the Philadelphia Convention concluded, Madison wrote to George Washington enclosing Charles Pinckney's "secret"

---

[54] Lynd, "Compromise of 1787," 235; Banning, *Sacred Fire*, 268. McCoy says that "[b]y the spring of 1787... the negotiations effectively collapsed." McCoy, "Madison and American Nationality," 239.

[55] Madison to Jefferson, March 19, 1787, Ibid., 151-55.

[56] Madison's letter to Jefferson of April 23, 1787 reports that Madison thinks that he has sufficient votes to protect his position when Congress has a better representation—if Madison's vote count is right, which he is not sure about. *LDCC*, 24: 249-252. When Congress did achieve a quorum in mid-1787, composed mostly of Madison's southern state allies, no definitive action was taken on the Jay-Gardoqui issue. As late as the Virginia ratifying Convention in 1788, Madison was unable to point to a solid list of states that would support the southern position.

publication of a speech attacking the Northern position on the Treaty, which Madison referred to as "a printed sheet containing his ideas on a very delicate subject; too delicate in my opinion to have been confided to the press."[57] If the Treaty issue had actually been resolved, then Pinckney's speech would have been politically innocuous. As Madison was well aware, however, Pinckney's speech could cause political damage in the ratification fight precisely because the sectionally divisive issue had not been resolved. Only two weeks later, Madison wrote Washington that he believed that the subject "has been dormant a considerable time, and seems likely to remain so," a cautious qualification which shows that Madison still had doubts that the issue was resolved.[58]

Yet in September, 1788, and only after Virginia ratified the Constitution following an extensive fight in its Convention about the Spanish Treaty, Congress in a stunning fit of political amnesia was to declare that it had never intended to permit Spain to acquire the Mississippi, and that navigation of the Mississippi must be an American right. A secret resolution then ended the negotiation with Gardoqui.[59] The Northern states seemed to have had an abrupt change of heart on an issue that they had bitterly contested with the Southern states during most of 1786 and early 1787—right up until the eve of the Convention and, indeed, until just after the Constitution was ratified.

The reason why this about-face happened is hinted at in a July 10, 1787 letter from Congressman (and Convention delegate) Benjamin Hawkins of North Carolina reporting to the Governor of North Carolina on the state of political affairs at the

---

[57] Madison to George Washington, October 14, 1787, *LDCC*, 24: 479 (emphasis added).

[58] Madison to GW, October 28, 1787, *LDCC*, 24: 530 (emphasis added).

[59] Banning, *Sacred Fire*, 268.

continental level. Hawkins described the Treaty and Mississippi River navigation as a pressing concern for the "western citizens of the Southern States" and said that as a result of recent decisions in the Continental Congress that Treaty had "at length, from a variety of circumstances unnecessary as well perhaps as improper to relate been put in a better situation than heretofore."[60] To put things more plainly, it seems reasonable to think that the Southern states had proferred their support for the Northwest Ordinance of 1787 in return for the abandonment of the Treaty by the Northern states.

On July 13, 1787, the Continental Congress, acting in New York with a quorum composed partly of Constitutional Convention delegates who traveled from Philadelphia to New York for the specific purpose of providing a quorum, adopted the Northwest Ordinance of 1787.[61] The Northwest Ordinance was a remarkable achievement, even apart from its well-known territorial slavery prohibition.[62] The timing of the adoption of the Ordinance, the overlap, interconnections, and coordination between members of the Convention and those of the Congress, and the fact that the Ordinance and the Constitution addressed important overlapping issues, together render it reasonably certain that the adoption of the Ordinance was related to the bargaining at the Convention. The difficult historical question is precisely what that relationship was.

Historian Staughton Lynd, in a prominent and careful analysis of this issue, argues that the Northwest Ordinance was part of a "grand bargain" on slavery and the

---

[60] Benjamin Hawkins to Richard Caswell, July 10, 1787, *LDCC*, 24: 351, quoted in Lynd, "Compromise of 1787," 233 (emphasis added).

[61] *An Act for the Government of the territory of the United States North West of the River Ohio*, 32 *JCC* 334-343 (July 13, 1787); text in Onuf, *Statehood and Union*, 60-64.

[62] Onuf, *Statehood and Union*, passim.

Constitution, a sectional agreement on slavery that resembled the Missouri Compromise. Lynd argues that the Northwest Ordinance contradicted the Constitution politically, because the Northwest Ordinance contained a territorial slavery prohibition, while the Constitution did not, and he seeks to explain the reasons for this contradiction. Lynd argues that the Southern states might have chosen to support the Northwest Ordinance in 1787 for three reasons: they expected Northwest citizens, "even without slavery," to support Southern policies in Congress; the Ordinance may have "been construed as a tacit endorsement of slavery in the Southwest"; and there apparently was an agreement "to speed the admission of new states from the Northwest by lowering the population required for admission."[63]

Lynd's analysis has considerable appeal. He is clearly right that the Ordinance was part of the constitutional bargain, and equally correct that the bargain was a sectional one that resembled the Missouri Compromise. But the heart of the bargain was an agreement about western expansion, not about slavery as such, though it had implications for slavery. Strong circumstantial evidence supports the view that the core of the sectional bargain was an agreement that the Northern states would abandon the Jay-Gardoqui treaty negotiations in return for passage of the Northwest Ordinance. The expansion of slavery was seen as a necessary concomitant of such western expansion by settlers from the slave states, so that it could not be prohibited if western expansion was permitted, but the desire of both regions to pursue western expansion, not slavery, was the driving force behind the agreement. The agreement was designed to resolve both the

---

[63] Lynd, "Compromise of 1787," 237.

Spanish Treaty issue and the territorial slavery issue, removing what each region saw as a major impediment to its respective development.

As Lynd acknowledges, much of the evidence about the nature of the Northwest Ordinance bargain is circumstantial. In part this is because several of the key participants in this bargain—including Nathan Dane and Rufus King—opposed preserving politically dangerous or inconvenient documents, including records of the Convention, for posterity. They preferred to be able to explain their "in doors" political decisions either in the most politically palatable way or to avoid having to explain them at all, and destruction of documents made this possible. Dane, who is often considered the principal Northern draftsman of the Northwest Ordinance, writing one month before the enactment of the Ordinance and during the Constitutional Convention, conveyed his reasons for that view in a remarkably enlightening June, 1787 letter to Rufus King: "I think the public never ought to see any thing but the final report of the Convention, the digested result only, of their deliberations and enquiries. Whether the plans of Southern, Eastern, or middle States succeed never, in my opinion, ought to be know[n]."[64]

Dane's letter describes his understanding (which he assumes will be shared by King) that various regions of the country have conflicting interests that will be reflected in sectional "plans" to advance those interests in the Constitution. He advises King that it will be politically dangerous for "the public" to know whether those plans succeeded or failed. Dane thought that if the nature of the regional successes and failures in negotiating the Constitution became known by the public, the ratification of the Constitution would be jeopardized.

---

[64] Nathan Dane to Rufus King, June 19, 1787, *LDCC*, 24: 335.

Dane's conclusion that ratification could be defeated by public knowledge of the outcomes of sectional controversies at the Convention was probably correct for reasons discussed below, and others shared his view. Rufus King's proposal that the Convention consider destruction of all its records or permanently deposit them with George Washington to prevent "bad use" of them by those "who would wish to prevent the adoption of the Constitution" suggests that he agreed with Dane.[65] James Madison's reported belief that the Constitution could not have been adopted if the Convention had not kept its debates secret and his unwillingness to publish his notes of the Constitutional Convention during his lifetime despite repeated requests that he publish them both suggest that he shared Dane's views.[66]

Lynd's arguments regarding the Northwest Ordinance are therefore understandably based on limited information, since several of the major participants in any bargain concerning the Northwest Ordinance and the Spanish Treaty undoubtedly believed that such agreements should be kept secret and that nothing about them should be written down. Lynd relies on the testimony of a number of participants—especially William Grayson of Virginia and Nathan Dane of Massachusetts—who possessed limited information about the political events of the period. This was true in part because they were not Convention delegates, and in part because they were political opponents of Madison and King on the Constitution, so that information about the negotiations on the Constitution was concealed from them. For these reasons, it is necessary to consider

---

[65] Farrand, 2: 648.

[66] For Madison's belief that publication of the debates would have defeated adoption of the Constitution, see Farrand, 3: 478. Madison and Jefferson discussed publication of Madison's notes as early as 1799, and decided not to publish them. See Farrand, 3: 381. Madison's position on publication of his notes cannot be explained by his theory of constitutional interpretation via ratification debate, discussed below.

other events and sources of information to reconstruct the full picture of these events, which probably included Madison and King as central actors.

Lynd sought to understand the reasons for the Southern change of heart on the Northwest Ordinance. But if these reasons are carefully examined, they work much better as explanations of why the Southern states would be willing to tolerate passage of the Northwest Ordinance at all than they do as explanations for the puzzling fact that Southern states, after having resisted passage of a new western territorial Ordinance on Northern terms for several years, had a sudden change of heart during the Constitutional Convention and actively supported its passage at that precise, critical time. This turn of events strongly suggests that the Southern states had a different affirmative motive for seeking to pass the 1787 Ordinance while the Constitutional Convention was in session.

To understand the timing of the Ordinance's passage, which is critical to understanding the relationship that the Ordinance had to the Constitution, it is necessary to revisit the intertwined history of territorial settlement legislation and the Jay-Gardoqui negotiations. Since at least 1784, the states had been at loggerheads over the terms of territorial settlement. The Ordinance of 1784, drafted primarily by Thomas Jefferson, had proposed dividing the entire Northwest territory into sixteen states, ten of them north of the Ohio River. In the 1784 Ordinance, Jefferson proposed that the states be admitted to the Confederation on fairly liberal terms. These included a small minimum population requirement and a provision guaranteeing that admission would be on an equal footing with the original states, but state admission was not automatic under the terms of the Ordinance.

The Ordinance of 1784 embodied a concept of almost pure popular sovereignty, since it required only that a new state have a republican form of government and that it adopt laws that were not repugnant to the Articles of Confederation. The Ordinance left both the form and substance of territorial government almost entirely up to decisions by territorial settlers. Moreover, it lacked any substantive protections for their property rights in the settled territories or other protections for interests in liberty such as religious freedom. During the drafting of the Ordinance, Jefferson lost a close vote on an effort to ban slavery in all of the Northwest territory, which at the time included the area south of the Ohio River. [67]

The 1784 Ordinance never operated.[68] In particular, the Ordinance's provision that the territory north of the Ohio be divided into ten states was perceived as politically destabilizing, and other provisions were attacked from various quarters.[69] One motive for the 1787 Ordinance was to remedy perceived flaws in the 1784 Ordinance, but they could also easily have been repaired after the Constitution was adopted. Several possible motives for passage of the 1787 Ordinance during the Convention can also be excluded based on intervening events.

---

[67] Jefferson's later statements that if only one ill New Jersey representative had supported him, he would have won the slavery ban vote, although technically accurate, were misleading. They ignored the political reality that any Congressional decision to bar slavery in new territories would have been so unpopular that it would not have survived efforts to reverse it. Fehrenbacher, *Slaveholding Republic*, 27. Jefferson doubtless understood this quite well. The likely fate of Jefferson's antislavery proposal had it been adopted by Congress may be inferred from the fact that Jefferson's own colleagues from the Virginia delegation, together with nearly all of the remaining slave states present in Congress, voted against him. Jefferson's proposed ban would not have taken effect until 1800. By then many territories would have been settled by slaveowners, whose rights Congress would in all likelihood have protected on vested rights grounds.

[68] Morris, *Forging of the Union*, 227.

[69] Onuf, *Statehood and Union*, 49-50.

As early as 1785, proposals to bar slavery in new territories created by Congress were coupled by their Congressional supporters, led by Rufus King, with a fugitive slave clause to protect slaveowners. King recognized that a territorial slavery ban—if it was going to be acceptable at all—must be accompanied by protection to slaveowners against the possibility that the territories would become a magnet for fugitives. Despite King's efforts to broaden support for the proposed slavery ban in this manner, Congress remained completely unwilling to adopt that proposal. Similarly, as Lynd recognized based on his review of the history of the 1787 Ordinance and of the work of the Convention, inclusion of the Fugitive Slave Clause in the Constitution had relatively little to do with the South's sudden willingness in 1787 to accede to the passage of the Northwest Ordinance.[70]

Nor did Confederation financial needs motivate passage of the Northwest Ordinance. Although the Confederation was essentially bankrupt by 1787, its financial situation had been the same for several years prior to that and the states had been completely unwilling to do anything to improve it by adopting effective taxation legislation. As historian James Ferguson found, the Confederation was nevertheless able to borrow substantial amounts of money in the Netherlands in 1787 and 1788 thanks to the efforts of John Adams, notwithstanding its technical bankruptcy.[71] The Northwest Ordinance could easily have been passed after the Constitution was adopted if the

---

[70] As Lynd concludes, Edward Coles was mistaken in his recollection many years later that bargaining over the Fugitive Slave Clause had been the source of the political accommodation represented by the contemporaneous passage of the Northwest Ordinance and the Constitution. Lynd, "Compromise of 1787," 228, 246.

[71] E. James Ferguson, *The Power of the Purse: A History of American Public Finance, 1776-1790* (Chapel Hill: University of North Carolina Press, 1961), 238.

Ordinance had been adopted primarily to raise money for the Confederation (though this was a very useful political pretext).

As is well known, passage of the Ordinance was pursued by syndicates of land speculators who saw in the decline of the Confederation a golden opportunity to meet rising demand for western settlement by buying territorial land cheaply and reselling it to settlers. Large Confederation debtor states like Massachusetts would also have benefited significantly from the reduction of federal debt resulting from the large-scale land sales made possible by the passage of the Ordinance. Thus both specific Massachusetts financial interests—and the state of Massachusetts itself—stood to benefit significantly from the Northwest Ordinance.[72] Because the Northern states, especially Massachusetts, stood to benefit significantly from the Ordinance, Lynd correctly focused on Southern motives for agreeing to the Ordinance. We need to consider his account of those motives to see if it can fully explain what transpired.

The Northwest Ordinance differed from the earlier 1784 Ordinance in several key respects. The 1787 Ordinance covered only the territory north of the Ohio River, a sharply reduced geographic boundary agreed upon only in the final stages of the Ordinance's consideration. This boundary meant that as a practical matter, the Northern states were accepting that the terms of western development established in the Ordinance would only apply to the area north of the Ohio. The Ordinance would be limited to that

---

[72] For a discussion of the legislative history of the Northwest Ordinance, see Paul Finkelman, "Slavery and the Northwest Ordinance: A Study in Ambiguity," *Journal of the Early Republic* (1986): 6: 343-369. Finkelman argues that the Ordinance "may have strengthened slavery in the south"; that it did not "immediately or directly affect slavery" in the Northwest territory; that it was "not abolitionist" in the nineteenth century usage of that term and was only barely "antislavery." Ibid. 344. See also Denis P. Duffy, "The Northwest Ordinance as a Constitutional Document," *Columbia Law Review* 95, no. 4 (1995): 929-968.

area unless Northern states obtained sufficient power under the new Constitution to insist that Congress extend their preferred development terms to other territories over probable Southern opposition (an outcome which, by mid-July, 1787 when the Ordinance was passed, would have seemed exceptionally unlikely).

The Northwest Ordinance reduced sharply the number of states that could be created in the new Territory. The Ordinance limited the number of potential new states in part because of the destabilizing impact that these new States could otherwise have had on the regional balance of Congressional voting strength. Shortly before passage of the Northwest Ordinance, Rufus King had criticized the 1784 Ordinance on the floor of the Constitutional Convention for having precisely that effect. Southern politicians such as James Monroe of Virginia had shared King's concern.[73] Lynd may well have been correct that some representatives of both "eastern" and Southern states each thought that there was a possibility that citizens in at least part of the Northwest territories would support their particular regional political views on development issues. However, probably of equal importance to the passage of the Ordinance was that it had been made less politically threatening by limiting its boundaries and the number of new states that could be created from the territory.

If only a small number of new states could be created, much less political damage would potentially be done under the Ordinance to the region that lost out in any future political competition for the allegiance of the new states. This would be especially true if the new states in this territory were likely to split in their regional allegiances, as Jefferson had thought. But the idea that both regions thought they could gain some

---

[73] Farrand, 1: 541.

political support from the territory does not provide a motive that has anything to do with Southern support for the Ordinance's passage in 1787, since precisely the same logic would have applied in future years. In fact, to the extent there was uncertainty on this point, it argued for delay by the Southern states in agreeing to the Ordinance's passage until after the Constitution's representation system improved their relative political position.

The Ordinance of 1787 did include a fairly liberal automatic population-based mechanism for new state admission, in contrast to the requirements for original state approval found in the Ordinance of 1784. As Lynd concludes, this liberal admission standard for statehood was a Northern concession. Virginia representatives such as Edward Carrington favored this automatic mechanism, so this was an added motive for Southern willingness to support the Ordinance. But this was not a Southern motive for passing the Ordinance in mid-1787, because the Constitution's new states provision (Art. IV, § 3) negated any benefit from the provision for reasons discussed below.

This review of Lynd's arguments shows that although the Southern states might well have had the reasons he suggested for supporting the Northwest Ordinance, none of them adequately explains why its passage occurred when it did. In fact, on balance the Southern states would have benefited politically from a delay in the Ordinance's passage. This strongly suggests that the Southern states had another important motive for supporting the Ordinance's passage during the Convention. Persuasive circumstantial evidence suggests that that motive was a desire to obtain the agreement of the Northern states to abandon the Spanish Treaty.

In Convention action on the treaty power, the Northern state position in the Spanish Treaty negotiations that a majority of states could control diplomatic negotiations was laid to rest. In debate on that issue, Madison made pointed remarks designed to remind delegates of the South's unhappiness over Congress' efforts to apply a majority vote principle to the Spanish Treaty negotiations, which again suggests that he believed that the issue could arise again absent an informal sectional bargain. When James Wilson moved to permit treaties to be made by majority vote—essentially the Northern position on the Spanish Treaty—the motion was rejected by a large majority, and Massachusetts voted with Virginia.[74] The result was to confer a regional veto on the Southern states over any treaty.

Further strong circumstantial support for the idea that the Northwest Ordinance was intended to help lay the Treaty to rest by persuading Massachusetts and other Northern states to abandon it comes from Madison's remarks on the issue at the mid-1788 Virginia ratifying convention. In blistering separate attacks directed at obtaining the critical votes of Kentucky delegates early in the Virginia convention, Anti-Federalists Patrick Henry, William Grayson and James Monroe argued that if the Constitution were adopted, the North would continue to be willing to give up the Mississippi to Spain because its regional interests on that issue were diametrically opposed to those of the South.[75] Madison carried the burden of responding to the Anti-Federalists on the Treaty

---

[74] Efforts were made to "water down" the requirements for ratifying a treaty. On motions regarding Senate voting requirements for treaty ratification, other than the Wilson motion, Virginia and Massachusetts split. Farrand, 2: 547-9.

[75] See, e.g., 3 Jonathan Elliot, *The debates in the several state conventions on the adoption of the federal Constitution, as recommended by the general convention at Philadelphia, in 1787*, 2d ed. (New York: B. Franklin, 1974 reprint), 292 (Grayson); ibid. 340 (Monroe).

issue. If the Treaty issue had been clearly resolved in favor of the South as Madison had earlier claimed, these attacks would have had little political heft. Yet Madison repeatedly rose to debate the issue in remarkably minute detail with the leading Virginia Anti-Federalists.

Madison sought to blame the Northern position on the Treaty on the weakness of the Confederation, implicitly asserting that the strength of the new government to be created by the Constitution would "cure" the Northern states of their desire to cede Mississippi navigation rights. This line of argument was tantamount to conceding that the Northern states' political interest on the issue was diametrically opposed to Southern interests, as William Grayson (soon to become one of Virginia's first Senators) had argued. Madison also acknowledged that the military weakness of the Confederation practically prevented it from asserting rights to Mississippi river navigation. Madison's remarks on that point demonstrate his shared understanding that the ability to create an effective military force was one of the Southern states' main interests in obtaining the Constitution.[76]

Madison then engaged in an inconclusive debate with Grayson on the specific allegiances of various individual states on the Treaty issue. This debate would have been pointless unless some Convention delegates believed that the Treaty issue had not been resolved, and would arise again. Grayson responded to Madison's efforts to quell debate on the issue by claiming that "its [the Spanish treaty's] friends thought it would be renewed."[77]

---

[76] Ibid., 343, 331 (Madison).

[77] Ibid., 349.

Because he was unable to end persistent doubts on the issue, Madison could not resist assuring the Virginia convention delegates—not once, but on two separate occasions during the Convention debate—that for reasons he was not at liberty to explain to them, he was confident that the Treaty issue would never come up again.[78] The circumstantial evidence makes it quite likely that Madison was referring to the unwritten sectional bargain described above that traded the Northwest Ordinance for the Treaty, but he could not have acknowledged this without threatening Virginia ratification. By the same token, had Rufus King and others publicly acknowledged in the Northern states that they had abandoned the Treaty as part of the price for negotiating the Constitution, even in return for the Northwest Ordinance, it seems very likely that Northern Anti-Federalists, particularly in Massachusetts, would have been strengthened significantly in opposing the Constitution. The Constitution's defeat in either Massachusetts or Virginia would have been fatal: therefore, no public announcement of this informal bargain could be made. Agreement on the formal Constitution was made possible only by this informal, unwritten sectional bargain on economic development, which could not be made part of the Constitution or acknowledged at ratifying conventions. As discussed above, Congress executed the Spanish treaty portion of the bargain in September, 1788, almost immediately after Virginia ratification.

---

[78] Ibid. 349, 356 (Madison).

*Slavery, the Northwest Ordinance and the Equal Footing Doctrine*

Article VI of the Northwest Ordinance prohibited slavery in the new Territory. It also contained a provision protecting slaveowners' rights in fugitive slaves who fled to the Territory, the predecessor to the Fugitive Slave Clause of the Constitution discussed below.[79] But here the 1787 Ordinance is actually most useful as a basis for considering what the Constitution could have done, but did not do, regarding slavery, and why. The Ordinance was later cited as an important precedent for the antislavery character of the national government, and is certainly evidence of Northern antislavery sentiment. But its legal status and relationship to the Constitution suggests that it played a far more equivocal role in the slavery issue when the Constitution was drafted.

The Northwest Ordinance contained an "equal footing" clause which differed in effect from the comparable provisions of the 1784 Ordinance, even though superficially they appeared similar. The 1787 Ordinance recited that new states were to be admitted on an "equal footing" "in all respects whatever" with the original states, provided that their "constitution and government" shall be "in conformity to the principles contained in these Articles." However, the 1787 Ordinance contained a series of fundamental substantive limitations on territorial power (such as a predecessor of the Constitution's Contracts Clause). If those limitations were intended to govern the law of new states formed from within the Territory, the 1787 Ordinance's concept of equal footing was a

---

[79] The slavery prohibition in the Ordinance was a southern concession, but was not foreseen as having any adverse impact on slavery or western settlement by the south. Some prominent southern politicians saw the slavery ban of Article VI as affirmatively protecting markets for southern slave products against competition. William Grayson to James Monroe, August 8, 1787, *LDCC*, 24: 393. As Lynd notes, Richard Henry Lee was mentioned by both Nathan Dane and Ohio Company agent Manasseh Cutler "as a particularly warm supporter" of the Ordinance, which should end any argument about whether the slavery ban was seen as a potentially threatening concession by Virginia interests. Lynd, "Compromise of 1787," 232.

limited grant of sovereignty to new states. In contrast, the equal footing language of the 1784 Ordinance using only the Articles of Confederation as a limitation meant that states were free to legislate on virtually any subject other than war, peace, or monarchy.

The difference between the 1784 and 1787 Ordinances on the "equal footing" issue raised the question: what did it mean to say that new states must be equals of the original states? Did it mean that new states would have equivalent Congressional voting rights with original states, or instead that they must they be political equals in the sense that they were independent sovereigns that had as much right to decide whether to accept institutions like slavery as did the original states, and could not have such matters dictated to them by Congress? The former "colonial governance" sense of "equal footing" appears to have been the Northern state drafters' preferred understanding, given the text of the Northwest Ordinance, which appears intended to apply the territorial government limitations to new states formed there. The latter sense appears to have been the emerging Southern understanding, given the "sovereignty" language of the Virginia cession, the North Carolina cession of 1784 and the popular sovereignty structure of the Ordinance of 1784 itself.[80] However, the history of the Northwest Ordinance and subsequent legislation incorporating it by reference into several new state admissions prior to the Missouri controversy of 1819-21 suggests that contemporaries did not fully appreciate the potential significance of the difference in the "equal footing" concept as expressed in these two ordinances (except, one might argue, where slavery was

[80] For the text of the 1784 North Carolina land cession, see Walter Clark, ed., *The State Records of North Carolina*, vol. 24 (Goldsboro: 1905), 561-563.

concerned). Why did they not perceive what appears in retrospect to be an obvious difference?

There are several possible explanations for the lack of controversy over the use of "equal footing" in the Northwest Ordinance in 1787 and subsequent years. There is some evidence that Southern state Congressmen may have been indifferent to the way the concept was applied in territory they thought of as being bargained away as a quid pro quo for western expansion, particularly when the Ordinance's limitations on slavery either did not affect or may even have protected their section's vital interests.[81] But a more significant reason is that Southern representatives did not believe the Ordinance's provisions such as Article VI would apply to new states formed from within the territory. Even if the Ordinance's restrictions were intended to apply to new states, new state conformity with Article VI would only ultimately be required if the Ordinance had a solid legal footing, something it clearly lacked.[82]

As James Madison pointed out in *The Federalist* no. 38, there was no legal authority for the Ordinance under the Articles of Confederation when it was first adopted—it was unquestionably legally invalid.[83] The Ordinance had to be ratified during the First Congress to possess any legal force. That Congress had to ratify the Ordinance demonstrates beyond cavil that Congress could also have altered the

---

[81] See Grayson to Monroe, *LDCC*, 24: 393.

[82] The Ordinance can be read to permit States formed from the territory to disregard the slavery prohibition of Article VI, though its Northern drafters quite probably did not intend that result.

[83] *The Federalist* no. 38 (Northwest Ordinance passage lacked "the least colour of constitutional authority.")

Ordinance's terms.[84] The Northwest Ordinance was a piece of ordinary legislation, not a part of the Constitution, despite repeated later claims that it was a "constitutional" enactment. Its text certainly shows that its Northern drafters wanted it to be deemed "constitutional," but as Madison's attack shows, the Southern states that acceded to it were aware that it lacked any constitutional foundation.

Historians have occasionally noted but have not fully explored the implications of Madison's vigorous attack on the constitutional authority for the Northwest Ordinance. Remarkably, in a public work read primarily by Northern and particularly by New York readers, Madison characterized the Ordinance as a "usurpation" of constitutional authority.[85] As an experienced legislator and constitutional draftsman, Madison understood the significance of failing to incorporate the Northwest Ordinance into the Constitution by reference. Absent incorporation, the Ordinance was nothing more than an ordinary piece of attempted Confederation legislation.

Events at the Convention make it difficult to avoid the conclusion that the Constitution's drafters chose to deny constitutional status to the Ordinance. The Edmund Randolph/John Rutledge draft of the Constitution (prepared during the work of the Committee of Detail) originally contained a provision that would have explicitly incorporated the Northwest Ordinance into the Constitution by automatically admitting "the western" states covered by the Ordinance "on the terms specified in the act of congress...." But this provision appears to have been struck out by Randolph during the

---

[84] The Contracts Clause would not have prevented this, since the Ordinance was invalid when adopted.

[85] After a lengthy excoriation of the Confederation for acting beyond its authority on the Ordinance, Madison added a disclaimer saying that he had no objections to its substance.

Committee drafting process, and no such provision was ever offered to the Convention.[86] This proposed provision—and its deletion—demonstrate clearly that the Constitution's principal draftsmen understood that to avoid submitting new states formed from the Northwest Territory to a Congressional vote of approval (accompanied by possible alteration of the Ordinance's terms as a condition of state admission), it would be necessary to except them from the operation of the Constitution's new states provision—and they chose not to do this. In light of Madison's attack on the legal status of the Ordinance, it is reasonable to conclude that he would have agreed with—and may even have advised—this decision.

Consequently, although the Ordinance proclaimed itself an "unalterable" compact, there was nothing in the Constitution to prevent it from being amended by Congress, including upon later new state admission. Congress could, if it chose, alter or abrogate the slavery prohibition of Article VI. Only political good faith and honor would prevent that outcome, and Madison was obviously well aware of this when he wrote *The Federalist* no. 38.

As an advocate, Madison thought that pointing out the ultra vires nature of the Ordinance would encourage people to support the Constitution, because the new government would have the power to authorize what Congress had done in the Ordinance. But Madison's analysis shows that he was aware that a future Congress could

---

[86] Farrand, 2:148. The Randolph/Rutledge draft was a full conceptual draft of the Constitution prepared by two of the five members of the Committee of Detail who represented slave states. The document was a draft in the hand of Edmund Randolph, with handwritten emendations by John Rutledge, which historian Max Farrand printed from the original in the George Mason Papers, Library of Congress. See James H. Hutson, ed., *Supplement to Max Farrand's The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1987), 183, n. 1. The document also contains observations about the nature of natural rights and their relation to the Constitution that demonstrate the important divisions on such issues among early Americans.

do just the opposite, and decline to execute the Ordinance as written. A less charitable interpretation of Madison's motives for attacking the Ordinance would be that he was pointedly reminding Northern states that the Ordinance would be useless to them unless they ratified the Constitution and also kept their part of the sectional bargain, because the Southern states had effectively reserved their right to change their position on whether to implement the Ordinance.

Yet the Ordinance's incorporation into the Constitution would have caused severe, perhaps even fatal, political problems for Constitutional ratification. The incorporation of the Ordinance would have highlighted the fact that the Constitution did not assure western settlement South of the Ohio River without slavery. Had the Ordinance been incorporated, either the absence of an explicit provision regarding Congress' authority over slavery in other territories, or its presence, would have severely threatened ratification (in different regions), so the issue had to be avoided in the Constitution. The passage of the Ordinance as ordinary legislation avoided this conflict.

Another important purpose of reserving the right to Congress to ratify the Ordinance was to assure that the Northern states would abandon the Spanish Treaty. Yet Northern states could not publicly abandon the Treaty during ratification without severely threatening ratification in the North. This was true even though the failure to abandon the Treaty made the Constitution more vulnerable on this precise point in the South.

The Convention's failure to reach explicit agreement about whether expansion into new territory or the creation of new states could include slavery or not was consistent with the way slavery was treated in the remainder of the Constitution. Because no region possessed the political will to demand that the Constitution treat slavery as something

other than a local problem (except as to paper limits on the slave trade), there was no need to resolve explicitly the issue of the expansion of slavery into new states and territories except where it would affect what a region thought of as its "sphere of influence." Northern delegates protected the course of development of areas of short-run concern to their local constituencies in the Ordinance at the price of allowing potentially contradictory development to accelerate in other areas.

As ordinary legislation, Article VI of the Ordinance could not bind future Congresses in admitting new states unless it was possible to possess a vested legal right in freedom from the institution of slavery, which was not possible under the Constitution. The Constitution (through the Fifth Amendment) protects vested rights in property, which was generally understood to include existing slaves at the time it was written. But it did not create a symmetrical vested right in "freedom from slavery," despite the evident desire of the Northwest Ordinance's drafters to create such a right. "Freedom from slavery" in a geographic area was not a cognizable legal contract or property right in the Constitution, and therefore could not be protected by a court against future legislation. Notwithstanding the Ordinance, Congress had the power to alter Article VI and permit slavery in the Northwest Territory. The Ordinance's passage with Southern support meant that that issue was left to future political controversy.

Gouverneur Morris was also able to add a provision regarding the government of territories to the Constitution (Art. IV, §3, 2d par.). The territories provision was broadly worded, but its uncertain scope was not debated by the Convention. No other specific provision of the Constitution could have authorized Congressional ratification of the

Northwest Ordinance, however.[87] At the time the Ordinance was ratified by Congress, no one seems to have had any doubts about Congress' power to authorize it, and it was not challenged by Madison or other Congressmen. There were numerous assertions, by Madison among others, that Congress' constitutional power was being exceeded during debates on other contemporary issues. However, the lack of controversy could reflect prior agreement during constitutional negotiations that the Ordinance would be accepted. The ambiguity of the Territories Clause later contributed to a broader constitutional problem regarding slavery.

There is a historiographic consensus that in 1787, where it already existed slavery was then generally considered to be a local legal and political problem that should be dealt with by the states under state law.[88] But were slaves property solely under state law, or were they also "federal" property, protected by the Constitution? This issue was the same one that underlay the *Somerset* decision, transposed from an imperial context into the American federal context. The issue was complicated by the Territories Clause, which contributed to a powerful contradiction within the Constitution regarding the legal nature of slavery.

One important provision of the Constitution (the Fugitive Slave Clause, Art. IV, §2, discussed below) conceptualized slaves as conventional or "artificial" property created by and subject only to state law. Under this property concept of slavery, if a

---

[87] Under Chief Justice John Marshall's view of the Constitution, the territories were outside the Constitution, and Congress' authority over territories—at least those acquired from a foreign government—would have been plenary even if there had not been any territories clause in the Constitution. *American Insurance Company and the Ocean Insurance Company v. 356 Bales of Cotton (David Canter, Claimant)*, 26 U.S. 511 (1828).

[88] See, e.g., Robinson, *Slavery in Politics*, 159, 224; Earl M. Maltz, "Slavery, Federalism, and the Structure of the Constitution," *American Journal of Legal History* 36, no. 4 (October, 1992): 466-498.

slave left a slave state and went to a free state, the slave state lost power over her, and under the principles of *Somerset* discussed in Chapter 1, the slave became free. To prevent this, in the Fugitive Slave Clause, the Constitution employed federal law authority to negate the effects that state abolition laws could otherwise have had on fugitives.

In contrast, the Three-Fifths Clause deemed slaves wealth—legitimate, protected property within the Republic. In light of the acceptance of the Three-Fifths Clause (and later, the Fifth Amendment), many Southern citizens believed that they had the right to move slaves—their property—into new territories absent a bar on such action. The Northwest Ordinance itself was premised on the idea that slavery would be legal in a newly settled territory unless it was banned there. Yet under the Territories Clause, in a territory the slave's status would be derived from federal law, not from state law, and that status would be protected by the Constitution. The Constitution, in other words, was equivocal about the legal nature of slave property within the republic.

The broad language of the new state admission and territories provisions meant that future political limits on slavery expansion would be matters for future Congresses. The Northern states had bargained for broad, inexplicit textual language that might provide them with the power to limit future western expansion involving slavery. But these powers, though broad on their face, could be exercised only if free states could muster the political will and the political power to require such changes in slavery's expansion years later in the face of intervening settlement and weighty arguments about vested rights of settlers, and even then only if they had courts receptive to their

constitutional position on Congressional power. All in all, the North faced a formidable, if not an insurmountable, challenge on that issue.

In 1787, it was anticipated that demographic and commercial market realities would dictate that large areas of the South and west would become part of the Southwestern "sphere of influence."[89] The legislative history of the Northwest Ordinance and the Constitution demonstrates that Northern and mid-Atlantic state delegates were willing to run the obvious, large risk that future Congresses would countenance the expansion of slavery into those areas. By 1792, just that process had begun, when Kentucky was admitted to the Union as a slave state, an event that was considered likely when the Constitution was written.

*The Fugitive Slave Clause*

The Fugitive Slave Clause of the Constitution was the predictable end of states' Revolutionary era decisions about the status of fugitive slaves, not the beginning of a Revolutionary debate about their fate. The lack of early controversy surrounding the Constitution's fugitive slave provision has led some historians to view its adoption as dependent on larger issues and others to think that the provision was later misinterpreted. Paul Finkelman notes that the clause received little debate, and was less important than other slavery provisions. He concludes that the Constitution probably would have been accepted without the fugitive slave provision.[90] Historian William Wiecek sees the Clause's "easy acceptance" as a result of its proposal soon after the Convention's slave

[89] Hendrickson, *Peace Pact*, 229.

[90] Paul Finkelman, "Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision," *Civil War History* XXV, no. 1 (1979): 5-35, 13.

trade-commerce clause bargain.[91] Historian Don Fehrenbacher thinks that the fugitive slave provision was uncontroversial at the time of its adoption because it was not intended as a grant of power to Congress to limit state authority, but rather was a "vague and passive" "declaratory limitation" on state authority which would operate exclusively through interstate comity, not through federal law.[92]

But the broad rejection of *Somerset* and the development of a harmonized law of fugitive slavery and interstate slave movement between 1770 and 1787 provide strong support for a different view of the Clause's significance. Acceptance of that provision was neither a constitutional concession nor a compromise by Northern states. The unanimity about the Clause at the Convention signified not its lack of importance or misunderstandings about it, but rather, agreement on an issue important for differing reasons to all states. The Fugitive Slave Clause was born without controversy because it was a consensus means of controlling fugitive slavery, and because such control served the congruent sociopolitical interests both of Northern states engaged in (or moving toward) abolition and of slave states.

For Northern states undergoing abolition, the Clause served an important parochial purpose: it prevented an influx of runaway slaves that white taxpayer majorities believed would result in unwanted social costs such as increased poor relief taxes and discouragement of white immigration. The Clause also permitted Northern state Convention delegates to avoid politically controversial direct protection for slavery (e.g., a provision explicitly declaring slaves property protected by the Constitution) that

---

[91] William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Ithaca: Cornell University Press, 1977), 79.

[92] Fehrenbacher, *Slaveholding Republic*, 44.

would have threatened constitutional ratification. For slave states, the inclusion of the fugitive slave provision in the Constitution was an effective means of limiting the cost of slavery that also provided essential political reassurance to slaveowners that slave property would be permanently protected by the Constitution. The inclusion of a fugitive slave provision in the Constitution also had a broader, long-term significance. Rather than insisting on the principle of interstate comity where fugitive slavery was concerned, the states instead agreed that comity would not apply in the event of Congressional implementation of the Clause.

To recapitulate briefly, none of the major post-1770 developments on slavery aided fugitive slaves. Certain provisions of the Articles of Confederation were designed to prevent either the principles of *Somerset*, or state slave import (or export) bans, from protecting fugitives. During the same period, all of the major Northern states that began abolition made decisions not to protect or free fugitive slaves. Important northern courts declined to follow *Somerset*. Another significant pre-Constitutional context for the problems of fugitive slavery was the creation of new territories, which occasioned slavery debates from 1784 onward.[93]

The Northwest Ordinance reflected the political reality that had emerged from consideration of territorial slavery during the years from 1785 onward: slavery could not be barred in the new Territory without a companion provision protecting slave states

---

[93] Much previous writing on antislavery developments has focused on the Northwest Ordinance of 1787. See Peter S. Onuf, *Statehood and Union* (Bloomington: Indiana University Press, 1987); Staughton Lynd, *Class Conflict, Slavery & the United States Constitution* (Indianapolis: The Bobbs-Merrill Co., Inc., 1967), 185-216; Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (Armonk: M.E. Sharpe, Inc., 1996), 34-56; Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 2001 [pbk. reprint of 1978 ed.]).

against fugitive slavery.[94] The Ordinance provided that fugitive slaves who escaped into the Territory could be "lawfully reclaimed and conveyed to" their owners.[95] Thus, throughout the massive new jurisdiction created by the Ordinance, slave property created by state law and owners' interests in bound labor were given confederal legal protection.[96] From the perspective of Northern states then engaged in abolition and bound labor reforms, the protection of owners' interests in reclaiming bound laborers was largely pretextual, rather than a significant factor in shaping the clause.[97]

In adopting Article VI and its fugitive slave proviso, the Continental Congress accepted the recommendations of a committee with a Southern majority whose most prominent member was Richard Henry Lee of Virginia. As readers will recall, Lee had been directly involved in the drafting of the Articles of Confederation provisions that protected slave property against the principles of *Somerset* and the post-1776 legal authority of states to ban slavery. Inclusion of the Article VI fugitive slave proviso shows that a majority of Congress regarded protection against slave flight as a necessary condition of their willingness to agree that slavery could be prohibited in any new

---

[94] Robert Ernst, *Rufus King: American Federalist* (Chapel Hill: University of North Carolina Press, 1968), 55. Congress took no action on King's proposal.

[95] The Article provided: "There shall be neither Slavery nor involuntary Servitude in the said territory otherwise than in the punishment of crimes, whereof the party shall have been duly convicted; provided always that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid." *Journals of the Continental Congress*, 32: 334-43 (July 13, 1787)(text of Ordinance).

[96] For bound labor, this meant property's functional equivalent, contractual specific performance and servitude extension penalties.

[97] Limited data suggest that indentured servitude was not a major part of the northern labor economy by the last half of the eighteenth century, and that it was in sharp decline during the last part of the century. Morris, *Government and Labor*; Smith, *Colonists in Bondage*; Steinfeld, *Free Labor*; David W. Galenson, *White Servitude in Colonial America* (Cambridge: Cambridge University Press, 1981).

territory. The Ordinance's fugitive slave proviso was deemed an essential means of controlling slavery within slave states by preventing slave flight to a new "territorial magnet." But the proviso's significance extended beyond that.

The Articles of Confederation had taken the first major steps in using confederal law to achieve slavery protection, but the Articles were drafted on the premise that all states agreed that slaves were a form of property. By the time of the Northwest Ordinance a decade later, several states had begun to reject that idea in general, though not where fugitives were concerned.[98] When post-Revolutionary War circumstances dictated the use of confederal law to achieve fugitive control, this had to be done without explicitly defining the nature of slave property within the legal structure of the Confederation. The fugitive slave proviso met that need.

The Ordinance's fugitive slavery provision applied the status quo ante on intercolonial slave movement under English law prior to *Somerset v. Stewart* for the Northwest Territory, reversing *Somerset* there. It rejected the core principle of *Somerset* that slaves were property only within slave jurisdictions.[99] The proviso also overcame another fundamental holding of *Somerset* because it protected slavery using positive confederal law. The Northern states readily acquiesced to slaveowner protection against

---

[98] Nearly all northern states accepted that slaveowners should be compensated directly or indirectly for existing slave property during the abolition process. See Robert William Fogel and Stanley L. Engerman, "Philanthropy at Bargain Prices: Notes on the Economics of Gradual Emancipation," *Journal of Legal Studies* 3, no. 2 (1974): 377-401.

[99] *Somerset* is discussed in Chapter 1.

fugitive slaves in the Ordinance, though it was embedded in an ambiguous antislavery provision.[100]

On August 28, 1787, six weeks after the Northwest Ordinance was adopted, a fugitive slave provision was first proposed to the Constitutional Convention.[101] The first proposal was made immediately after the Convention considered the Constitution's Privileges and Immunities (P&I) Clause, a version far shorter than the P&I Clause of the Articles. Many of the delegates would have been familiar with the history of the Articles P&I provision (especially with the numerous unsuccessful efforts to limit it by amendment after its initial adoption by Congress). They undoubtedly understood that the Constitution's proposed P&I Clause was shot through with ambiguities. During consideration of the P&I Clause, General Pinckney of South Carolina objected to it on the ground that it should contain "some provision" "in favor of property in slaves."[102] Cooler heads prevailed, a prudent course given the likelihood that clarification of the ambiguous P&I clause would have precipitated lengthy and perhaps irresolvable disputes over matters such as what rights were to be accorded to free blacks by the various states. No effort was made to amend the P&I Clause, though delegates like General Pinckney

---

[100] On the Ordinance's ambiguity, see Paul Finkelman, "Slavery and the Northwest Ordinance: A Study in Ambiguity," *Journal of the Early Republic* (1986): 6: 343-369.

[101] By that time, Convention delegates were well aware of the terms of the Ordinance.

[102] Farrand, 2: 443. Charles Warren concluded that General Pinckney was "undoubtedly" referring to the protection provided for slave property by the Articles P&I clause proviso analyzed above. Warren, *The Making of the Constitution*, 561.

and George Mason knew that its ambiguous language omitted slavery protections important to them that had been conferred by the Articles P&I clause.[103]

Immediately after General Pinckney had raised the issue of protection for slave property, the Convention moved to consider the Constitution's fugitives from justice provision. Delegates Pierce Butler and Charles Pinckney of South Carolina moved to add to it a provision that "slaves and servants to be delivered up like criminals." Their proposal paralleled the provision of Article IV of the Articles of Confederation. It is appropriate to view it as an indirect means to achieve General Pinckney's objective while avoiding a debate over the Constitutional nature of "property in slaves." It was met with the purely economic objection by James Wilson of Pennsylvania, a slavery opponent, that state and local public authorities in receiving states should not have to bear the costs of slave reclamation.[104] The clear inference from Wilson's remarks was that Wilson would be willing to accept a private right of recapture (like that continued by Pennsylvania's gradual abolition law) that required no public expense to exercise. The Butler-Pinckney amendment was recast to avoid Wilson's objection, and adopted unanimously (one report says by a vote of 11-0) the next day without discussion.[105]

---

[103] In his proposed changes to the Committee of Style report, George Mason noted that it should, but did not, include provisions protecting the removal of property from one state to another—a key provision of the Articles P&I clause from the slave state perspective. Hutson, *Farr. Supp.*, 271.

[104] The drafting history is discussed in Paul Finkelman, "Slavery and the Constitutional Convention: Making a Covenant with Death," in *Beyond Confederation*, ed. Richard Beeman, Stephen Botein, and Edward C. Carter II (Chapel Hill: University of North Carolina Press, 1987), 219-224.

[105] Farrand, 2: 446. As proposed, the clause provided that fugitives "shall be delivered up to the person justly claiming their service or labor." Id. The amendment was revised by the Committee on Style in its report of September 12, 1787 to drop the original proposal's reference to "justly claiming" and replace it with "claim."

Madison recorded in his notes that the word "legally," which had appeared in the Committee on Style draft just before "held to service or labour," was later dropped to avoid what some delegates thought was the implication that the word "legally" meant that the delegates accepted the morality of slavery.[106] Madison may have been correct, but the earlier Convention debates make plain that the delegates he was describing were very probably not those from slave states. But why did representatives of the slave states agree to this change? The best inference is that in light of their prior experience with litigation such as *Pirate* and *Affa Hall*, their motive in agreeing to the change was to tighten the effects of the provision.

The Northwest Ordinance's repeated use of the word "lawfully" in its fugitive slave proviso created a significant ambiguity and thus the potential for antislavery litigation and interstate disputes. This ambiguity occurred because the use of the word "lawfully" created a conflict of laws problem by permitting a court in a receiving state to which a fugitive had fled to decide whether the enslavement in the state of origin was lawful in the first instance, as well as to decide whether and how the laws of the receiving state would permit a slave to be returned to the state of origin. The Ordinance also used permissive rather than mandatory language. In short, by envisioning a fugitive reclamation system based on interstate comity and state law principles, the language of the Ordinance sharply exacerbated the conflict of laws problem inherent in creating any fugitive slave legal controls in a federal system. The Ordinance proviso was a recipe for chronic interstate conflicts over fugitive slaves.

---

[106] Farrand, 2: 628.

Compared with the fugitive slave proviso of the Ordinance, the language of the Fugitive Slave Clause was substantially tightened to make it mandatory that the receiving state deliver up a fugitive without making any judgment about the lawfulness of the original enslavement (under the law of either state) and without regard to whether the law of the receiving state permitted fugitive reclamation. As legal scholar Harold Horowitz concluded, the Clause explicitly reversed the *Somerset* rule that the status of a slave was to be determined solely by the law of the jurisdiction where the slave was found, instead requiring that the status of the slave be determined by the law of the state of the slave's origin.[107] The toughening of the Clause's language sought to prevent future litigation like *Pirate v. Dalby* by eliminating conflict of laws problems.[108] But Northern states could accept its rewording because it appeared morally neutral.

But this equivocal agreement on the wording of the Clause does not explain why Northern states accepted its substance. Some historians conclude that Northern states accepted the Fugitive Slave Clause either because it was stated in the passive voice, permitting states to negotiate the terms of fugitive slave return, or because it was "declaratory" only (i.e., did not authorize federal legislation to enforce its provisions).[109] These conclusions are anachronistic for several reasons.

First, a draft of the Fugitive Slave Clause found in the files of Pierce Butler of South Carolina explicitly provided for implementation of the Clause's provisions by state

---

[107] Harold Horowitz, "Choice of Law Decisions Involving Slavery: 'Interest Analysis' in the Early Nineteenth Century," *UCLA Law Review* 17 (1970): 587-601.

[108] The Fugitive Slave Clause covered all states.

[109] Fehrenbacher, *Slaveholding Republic*, 44.

legislatures.[110] That proposal was not offered to the Convention, but it shows, as do state laws such as Pennsylvania's that explicitly addressed fugitive slave reclamation, that many Convention delegates (about half of whom were lawyers) were aware that state implementation was one possible means of implementing the Clause. Earlier developments including *Somerset* itself, the 1774 Rhode Island import ban statute, and *Pirate*—all well known to contemporaries—all strongly suggest that many contemporary lawyer-politicians understood that creating a fugitive slave provision in a federal system where slavery was grounded on local law would unavoidably create chronic conflict of laws problems about which jurisdiction's law (including federal law) would govern the status of fugitives and slave reclamations. Yet no one chose to propose either state law implementation of the Fugitive Slave Clause, or receiving state legal authority to decide fugitive status, to the Convention as a means of resolving such conflicts.

However, Congress was not explicitly given implementation power by the Clause, unlike several other parts of Article IV. That silence has been relied on to contend that the Convention intended to deny Congress power to implement the Clause. An equally reasonable inference from this silence, however, is that many delegates preferred silence on the locus of authority as a means to finesse that issue during negotiation and ratification, not as a means of prohibiting Congressional implementation of the Clause. The latter interpretation is confirmed by the history of the Fugitive Slave Act of 1793, where during an extended debate over the law, no one contended that Congress lacked power to adopt it (see chapter 5).

---

[110] Hutson, *Farr. Supp.*, 246.

*The Slavery Debate in Ratifying Conventions*

The ratification debates show that Northern conventions, particularly in Massachusetts, specifically debated whether the Union should be a moral union, that is, one based on common moral principles. If so, anti-Federalists argued, the Constitution should be defeated because it forced free states into a union with slaveholders. The northern conventions rejected that idea in favor of the view that the Union was solely a political union. But Federalists misled Northern ratification conventions about the nature of Philadelphia Convention debates over slavery. Delegates to Northern and Southern conventions were also given sharply conflicting interpretations of Congress' power over slavery under the Constitution. The ratification debates also shed important light on contemporary understandings of constitutional interpretation and representative government.

James Madison argued early in his post-Constitutional political career that the ratification debates on the Constitution, not the debates of the Convention, formed the best basis for its interpretation, since ratification formed the public understanding of the document.[111] The history of the ratification debates over slavery, however, shows what a remarkably unreliable guide such debates were to understanding the true nature of the Constitutional compromises on that issue. The ratification debates over slavery call into question the value of Madison's theory of Constitutional interpretation. They also raise significant questions about the Federalist conception of representative government.

As is well known, the Convention was conducted in secret, and all the major participants agreed for many years to suppress their notes of debates. Some delegates

---

[111] Farrand, 3: 374 (1796).

went further and advocated destruction of the Convention's records, and those records were not made public until 1819.[112] In the 1780s, legislative secrecy was regarded as unexceptionable. However, in the case of the Constitution's ratification, this secrecy appears to have given delegates defending the Constitution in the ratification debates the ability to provide explanations of the motives for various decisions by the Convention that were clearly contrary to fact, and to have enabled delegates in differing state conventions to provide conflicting interpretations of the Constitution on major issues such as slavery. Had the delegates to state ratifying conventions understood the nature of the sectional agreements that were made at the Convention, and had they also been aware that there were sharply conflicting interpretations of certain provisions, it is possible that one or more of the closely divided large state conventions would have declined to ratify the Constitution. As is well known, in three pivotal states, New York, Massachusetts, and Virginia, failure to ratify in any one of which would likely have defeated the Constitution, ratification was agreed to by approximately 52 percent of the voting delegates.[113]

But such a potentially decisive shift in public sentiment against the Constitution, which might have occurred had delegates been candid with the public about their work, would not have resulted from antislavery sentiment per se. Antislavery sentiment

---

[112] Madison withheld publication of his notes until after his death. As early as February, 1799, Jefferson and Madison had consulted about whether to publish Madison's notes, and decided not to publish them. Farrand, 3: 381. Writing to Jefferson before their meeting where possible publication would be discussed, Madison specifically referred to the "Despotism at present exercised over the rules of construction" (a reference to executive or judicial interpretations of the Constitution that Madison disliked) as a problem to be considered in determining whether to publish the notes. Id.

[113] In Massachusetts, the vote was 187—168; in New York, the vote was 30—27; and in Virginia, the vote was 89—79. The average approval percentage for these states is 52 percent.

appears to have played a minor role in the politics of constitutional ratification. There is no substantial evidence that any significant number of delegates voted against ratification solely or even primarily as a result of opposition to the Constitution's provisions regarding slavery. One of the few exceptions was a Quaker minister, James Neal, a delegate to the Massachusetts ratification convention who announced he would vote against the Constitution based on its slavery provisions.[114] Yet all eight Quaker delegates to the Pennsylvania ratifying convention reportedly voted for the Constitution. It seems likely from the available evidence that a substantial majority of Quakers there and in other States, who would have been expected to be the strongest opponents to the slavery provisions of the Constitution, believed that ratification was desirable even though the slavery provisions were objectionable.[115]

As might be expected given the very limited Northern public support for abolition efforts outside the North, though there was debate over slavery in the Northern ratifying conventions, it was a relatively minor part of the overall ratification debate.[116] The character of the Northern ratifying convention debate regarding slavery is also quite significant. Two issues arose repeatedly during those debates: the Three-Fifths Clause or federal ratio, and the provisions permitting slave imports until 1808. Attacks on the

---

[114] Kaminski, *A Necessary Evil?*, 90.

[115] Ibid., 128-9 (James Pemberton to Moses Brown, November 16, 1787); 146-7 (Benjamin Rush to Jeremy Belknap, February 28, 1788).

[116] Similar conclusions about the relative unimportance of slavery in the ratification debates are reached by Robinson, *Slavery and Politics*, 235-40; Jordan, *White Over Black*, 325; Fehrenbacher, *Slaveholding Republic,* 38, and Ohline, "Republicanism and Slavery," 582-4 (Three-Fifths Clause).

Fugitive Slave Clause, and on constitutional provisions regarding admission of new states, in Northern ratifying convention debates were virtually nonexistent.[117]

The principal focus of moral attack in the Northern conventions was the slave importation provisions. Some opponents attacked the morality either of slavery, of the slave trade, or of both. As part of their argument on morality, New England Anti-Federalists argued that the guilt of slave imports should be imputed to the Northern states since the Constitution allowed the continuation of the trade. One variant of this imputed guilt argument was an Anti-Federalist argument that the Constitution obligated states to defend each other, and that states such as Massachusetts would therefore have to help suppress slave rebellions.[118]

Despite the fact that it was well known to Convention delegates that there had been a slave trade-commerce power bargain at the Convention, and despite vociferous attacks on this bargain by prominent delegates Luther Martin and George Mason in the South, this allegation was not used as a basis for the attack on the slave trade provision in Northern ratifying conventions. There is strong evidence that the Anti-Federalists deliberately chose not to make this specific attack in Northern states. Strong Federalist Oliver Ellsworth of Connecticut specifically attacked the anti-Federalists for failing to repeat Mason's attacks on the commerce power issue in states north of the Mason-Dixon

---

[117] The ratification debate on the Three-Fifths Clause issue was discussed in Chapter 3. Northern ratification debates are silent on the fugitive slave issue, despite extended discussion of other aspects of slavery. Since northern states had already declined to free fugitive slaves in their laws, the marginal political cost to their representatives of agreeing to waive constitutionally their sovereign discretion on fugitive slavery was small. Southern Federalists argued that the Fugitive Slave Clause showed that the Constitution accepted the idea that slaves were property, and thus conferred no power on the federal government to abolish slavery. Kaminski, *A Necessary Evil*, 193-4. They also argued for political reasons that the Fugitive Slave Clause was a major gain for the slave states. Id.

[118] Ibid., 106-7.

line.[119] Madison wrote to George Washington that through an Anti-Federalist "trick[]" Mason's attack had been deliberately "mutilated of that which pointed at the regulation of Commerce" when published in Boston.[120] Northern supporters of the Constitution, for their part, chose not to defend the slave import provisions on the basis that they had successfully traded these provisions (or their extension) for broadened Congressional commerce powers to benefit the Northern states.

Both Federalists and Anti-Federalists, in other words, understood that they would lose support from an honest account of the Convention decisions on the commerce-slave trade issue that would offset, and might even outweigh, any gains that they would make by providing an honest account.[121] Thus, far from being a "secret" compromise that was hidden from the public at the time, the commerce-slave trade clause deal was hidden from the Northern public—but by independent parallel decisions of the Northern elite combatants, since neither side thought it had anything to gain from raising the issue of that compromise. It therefore seems quite unlikely that the revelation of this "dirty

---

[119] Ellsworth, Farrand, 3: 164-5. He portrayed Mason's attacks on the commerce power provision of the Constitution as based on Mason's desire for a 2/3 regional veto on the commerce power, not as based on an alleged agreement on the commerce power in return for slave importation extension. Mason broadcast his attack alleging a sectional bargain in the south. Mason told Jefferson before the Virginia ratifying convention that the compromise on the slave trade clause was the key compromise in the Convention. Mason to Jefferson, May 26, 1788, Farrand, 3: 304-5. Luther Martin of Maryland made similar allegations in attacking the Constitution during Maryland ratification. Farrand, 3: 210-11; Eliga H. Gould, "Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772," *William and Mary Quarterly* (2003): 471-510.

[120] Madison to Washington, December 20, 1787, Farrand, 3: 168.

[121] Southern Federalists portrayed the slave importation limitation as the result of a bargain. See e.g., Gen. Pinckney remarks to South Carolina ratifying convention, Kaminski, *A Necessary Evil?*, 169-170; Pierce Butler letter to Weedon Butler, May 5, 1788, Farrand, 3: 301-4.

compromise" in the North would have changed the outcome of ratification debates, and this aspect of the neo-Garrisonian argument on slavery and the Constitution fails.[122]

Instead, Northern Federalists often argued that Southern slavery was not a moral issue for the North for several reasons. Most importantly, "their [the south's] consciences are there own, tho' their wealth and strength be blended with ours."[123] Others pointed out that use of "imputed guilt" as a reason not to confederate was of "late date," because it had not been applied to Great Britain before the Revolution despite Great Britain's support for the slave trade, and it was not urged against alliance with France, though France had had the same slavery policy as England. If the imputed guilt argument were taken seriously, Massachusetts could not confederate with New York or Connecticut, which still permitted slavery.[124] Other supporters pointed out that all states were still free to bar slave imports.

Similarly, supporters of the federal ratio attacked their opponents' arguments on representation by arguing that even though slavery was repugnant to justice, the fact that others were unjust in their "internal concerns" was not reason to refuse to confederate with them. While they sympathized with their opponents' desire to have slaves emancipated, "even in this laudible pursuit, we ought to temper the feelings of humanity with political wisdom. Great numbers of slaves becoming citizens, might be burdensome

---

[122] Leonard L. Richards, *The Slave Power* (Baton Rouge: Louisiana State University Press, 2000), 55-6; Finkelman, "Slavery and Constitution."

[123] Landholder VI (Oliver Ellsworth), *Connecticut Courant*, December 10, 1787. This essay was reprinted twenty-one times within two months from New Hampshire to South Carolina. Kaminski, *A Necessary Evil?*, 77-8, 77 n. 16.

[124] Philanthrop, Northampton *Hampshire Gazette,* April 23, 1788 in Kaminski, *A Necessary Evil?*, 108.

and dangerous to the Public. These inconveniences ought to be regarded."[125] In striking contrast to his secret remarks to the Convention that Southern slavery contributed to national wealth, Ellsworth wrote in an anonymous widely circulated publication that "[A]ll good men wish the entire abolition of slavery, as soon as it can take place with safety to the public, and for the lasting good of the present race of slaves."[126]

From the slave state Federalist perspective, the fugitive slave provision was a substantial gain. The political history of the Northwest Ordinance suggests that given their prior experience with disruption from fugitive slavery and the progress by 1787 of Northern state abolition, the slave states would have been exceptionally reluctant, if not unwilling, to enter into the Constitution without obtaining what they deemed adequate federal legal protection for slavery against fugitive slave flight. Inclusion of the Clause meant that the slave states could avoid the future creation of any significant free jurisdiction "magnets" for fugitive slaves, just as they had avoided that problem for the Northwest Territory. At the same time, the Clause permanently legitimized their control of slave property by establishing direct Constitutional legal protection for it. Accordingly, the Clause became a significant means that Federalists in states such as South Carolina and Virginia used to defend the position that the Constitution sufficiently protected slavery against pervasive and vigorous Southern Anti-Federalist charges that it did not provide enough protection.[127]

---

[125] Mark Antony, Boston *Independent Chronicle*, January 10, 1788 in ibid., 79.

[126] Landholder VI, Farrand, 3: 165.

[127] See remarks of James Madison to the Virginia ratifying convention, June 17, 1788: "this is a better security than any that now exists," in David Robertson, *Debates and other proceedings of the Convention of Virginia, convened at Richmond, on Monday the second day of June, 1788 for the purpose of*

Some Massachusetts delegates directly attacked the morality of slavery and the slave trade. General Samuel Thompson advocated refusal to confederate because of slavery, and claimed that the Constitution was a Southern "contrivance" with George Washington the now-tarnished slaveholder at its head. James Neal warned the delegates that they would "all suffer for joining" slaveholders when they allow the slave trade.[128] Supporters of the Constitution agreed that the slave trade and slavery were deplorable, but rejected the imputed guilt argument and argued that it was sufficient that the Constitution was an improvement over the Articles of Confederation.

The argument that the new federal Union was a political union and did not need also to be a moral union prevailed during Northern ratification. Constitution supporters there generally were willing to accept what many agreed was Southern immorality as a local moral issue and to regard it as the price of Union. The imputed guilt argument was answered seriously by Federalists such as General William Heath in Massachusetts, but it does not appear to have swayed any previously supportive delegates against the Constitution. Federalists also sought to deflect the moral argument by placing it in the context of overriding political considerations. Widely circulated pro-Constitution essays pointed out that the objections to the Constitution made by George Mason, a large slaveowner, were not moral but prudential. They argued that Constitution supporters shared Mason's reservations, and had made the best slavery agreement possible by obtaining power to cut off imports after twenty years.[129]

---

*deliberating on the Constitution recommended by the grand Federal convention.* (Richmond: Worsley & Davis, 1805), reprinted in Farrand, 3: 325.

[128] Massachusetts ratification debate, January 25, 1788, in Kaminski, *A Necessary Evil?*, 88.

[129] Landholder VI, ibid., 77-8.

Supporters of the Constitution in the Northern conventions also at times relied on interpretations of the Constitution on slavery that would have been anathema to the Southern states. General William Heath argued in Massachusetts that the Constitution could not control slavery, because states were "sovereign and independent to a certain degree, and they have a right, and will regulate their own internal affairs," and control of slavery was a part of state sovereignty, a position of which slave states would doubtless have approved. But he then also argued that the Constitution's provisions protecting the slave trade were necessary to create the Union, and that they were limited to existing states only, and would not apply in new states, a view that would certainly have come as a surprise to the Southern slave states based on the Convention debate.[130] James Wilson told delegates to the Pennsylvania ratifying convention that Congress would have the power to "exterminate slavery from within our borders" after 1808, and to control it in new states before then, an interpretation of the Constitution's powers over slavery that would undoubtedly have caused grave doubts about ratification in the slave states if they had heard it.[131] The fact that Anti-Federalists such as Patrick Henry did not regale the Virginia convention with an account of Wilson's remarks strongly suggests that Henry was unaware of them. They would have been very useful fodder for his cannonade against the Constitution's ineffectual protection of slavery, a main point of his attack against it. Historian Donald Robinson argues that Wilson's remarks, if known, would have resulted in rejection of the Constitution by at least two, and perhaps as many as four,

---

[130] Massachusetts ratification debates, January 30, 1788, *Massachusetts Centinel* in Kaminski, *A Necessary Evil?*, 89-90.

[131] Pennsylvania ratification debate, December 3-4, 1787 in ibid., 137- 38.

Southern slave states.[132] Historian Don Fehrenbacher also concludes that there was a sharp conflict between Northern and Southern ratifying conventions regarding interpretations of key constitutional issues relating to slavery.[133]

Northern Federalists also challenged the idea that Southern abolition could or should have occurred through the Constitution, relying on abolition's high costs to the South. The Connecticut Landholder [Oliver Ellsworth] said: "[S]laves are so numerous in the Southern states, should an emancipation take place, they will be undone...."[134] The Northern ratification debates contain no suggestion that the Northern states should have contributed financially or devoted any national resources to the costs of emancipating Southern slaves.

The debates at the Northern ratifying conventions mirrored the political approach of the Northern delegates at the Constitutional Convention. The focus of ratification debates was virtually completely confined—in the minds of the overwhelming majority of delegates, whether supporters or opponents of the Constitution—to how Northern political and economic interests were affected by the slavery provisions of the Constitution. Northern supporters argued that the provisions that protected slavery (or did not restrict it enough) were a necessary evil and a reasonable price to pay for Union, and adequately protected the North's political and financial interests. Most Northern opponents of the Constitution agreed that this was a correct way to frame the issues even if they disagreed with the conclusion. The minor exception to this statement seems to

---

[132] Robinson, *Slavery in Politics*, 241.

[133] Fehrenbacher, *Slaveholding Republic*, 38.

[134] Connecticut Landholder [Oliver Ellsworth], quoted in Adelos, Northampton *Hampshire Gazette*, February 6, 1788 in Kaminski, *A Necessary Evil?*, 97.

have been the debate over continued slave imports, where there was considerably more moral outrage expressed about the evils of the slave trade, but even there, appeals to the idea that slavery was local and to the idea of a purely political Union prevailed.

But the Northern ratifying conventions either were not told or were affirmatively misled about how the Convention's most important agreements—on slave representation; on slavery in new western territories and states; on the Northwest Ordinance; and on the Spanish Treaty—had actually occurred. While the ratification debates suggest that disclosure of the compromises made on the issues of the slave trade and fugitive slavery would probably not have changed the outcome, they also strongly suggest that candid disclosure of other compromises of state or sectional interests made to reach agreement, such as those made on representation or on the Spanish Treaty, might well have changed the outcome.

The Federalists effectively concealed the Convention's actual negotiation process and regional compromises on major issues from the ratification conventions, as Dane had recommended to Rufus King, and the Constitution was narrowly ratified. Whether it was desirable to obtain ratification at the cost of systematically concealing the actual nature of the structure of national politics from the ratifying public is another matter. It is difficult, however, to defend Madison's argument that ratification debates should form the basis of Constitutional interpretation given this history.

Federalist concealment and deception regarding Convention decisions—implicitly sanctioned by the Convention itself—also suggest that Federalists believed that they had no fundamental obligation of candor toward their "constituents." This belief was founded a conception of government by elites at odds with the principles of meaningful

democratic representation (whether based on the idea that representatives may be instructed or not). Ratification based on misleading accounts of the Convention created false expectations among the Northern public regarding the way that the new government and the Constitution would operate in the future. In particular, the Federalist approach to ratification created false expectations about the actual political cost of the Union, and it concealed the lack of agreement on the meaning of freedom during western expansion in the new Constitution.

At Southern ratifying conventions, supporters of the Constitution were generally no more candid with delegates than Northern Federalists about the nature of various Constitutional compromises and sectional bargains. As ratification necessitated, supporters of the Constitution argued strenuously that the Constitution protected slavery, in part because the Constitution did not authorize the federal government to take action against it. The idea that the federal government would have the power to control slavery beyond cutting off slave imports seems to have received little discussion in most Southern conventions, though Virginia Anti-Federalists did make this argument. In response, supporters of the Constitution attacked as fanciful the assertions of Anti-Federalists that the Constitution was insufficiently protective of slavery.

Southern Federalists explained that the few areas in which concessions had been made on slavery—such as terminology, and the 1808 cutoff date for slave imports—were politically inconsequential, since the South would not need to agree to make any changes in policy even after 1808. They argued that the minor limits on slavery were necessary concessions to "prejudices" on the part of Northern citizens which they had made to Northern delegates in order to assist ratification of the Constitution. There is no

indication that there was any slave state where lingering concerns about the possible adverse effects of the Constitution on slavery or its westward expansion significantly increased voting against the Constitution. In sum, the predominant Southern view during ratification was that slavery had received a large measure of permanent protection in the Constitution, while at the same time in several Northern ratifying conventions delegates were being led to believe that Congress could act to limit its expansion before 1808 and extirpate it after that.

*Conclusion*

Madison supported the idea that the Constitution should be formally neutral on slavery. There is no provision in which the Constitution explicitly sanctions slavery as a permanent federal legal institution.[135] However, as the Convention debates on slavery show, delegates were aware that the terminology of slavery was being avoided in the Constitution to protect the Constitution during Northern ratification, precisely because various parts of it recognized, protected, or were premised on the long-term existence of the institution of slavery. Whatever the Convention's "scruples against admitting the term 'Slaves' into the Instrument" may have been, the delegates clearly envisioned many of their decisions as having direct implications for the advancement or retardation of the institution of slavery. The Constitution's formal neutrality on slavery had very limited utility in light of the effects of its provisions.[136] Those provisions meant that slavery

---

[135] Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge: Cambridge Univ. Press 2006), 66.

[136] James Madison to Robert Walsh, November 27, 1819, Farrand, 3: 436.

became a recognized de jure state—and, indeed, de facto sectional—institution protected by—and, more importantly, usually from—state and national authority.

Slavery emerged from the Convention not only intact, but with a constitutionally protected path for its growth, a path widened by a fundamentally important sectional economic development bargain. The Constitution's formal and informal protections for slavery resembled a broad and well-built canal through which a growing river of slave labor could flow unimpeded. The expansion of slavery would be driven by the growth of slave state economies and western settlement unless and until public opinion in Northern states altered to the point where the Northern states were willing to sacrifice politically to block it.

Secretary of Congress Charles Thomson had written to Jefferson that slavery was a cancer that needed to be cut out of the body politic:

> It grieves me to the soul that there should be such just grounds for your apprehensions respecting the irritation that will be produced in the southern states by what you have said of slavery [in the *Notes on Virginia*]. However I would not have you discouraged. This is a cancer that we must get rid of.. It is a blot on our character that must be wiped out. If it cannot be done by religion, reason & philosophy, confident I am that it will one day be by blood.[137]

Instead, the Convention chose to obtain the allegiance of the slave states by protecting and enhancing the political and economic prospects of slavery as an institution for a generation. The Northern state delegates, constrained by public opinion there, were unwilling to make any political concessions to the slave states in order to change Southern policy on slavery, and instead sought to extract sectional political gain from agreeing to limit federal control over slavery.

---

[137] Charles Thomson to Thomas Jefferson, November 2, 1785, *LDCC*, 22: 716-717.

The delegates could not have avoided creating this slaveholders' Union if the Constitution was to confer on the federal government the broad powers over commerce, western settlement, taxation, and the military that its drafters sought. Each section had considerable leeway to withhold its consent from the Constitution unless its central political goals were achieved and its central concerns about the powers of the new Union were satisfied. In the case of the slave states, such satisfaction meant creating a government capable of asserting strong military power that also provided long-term political, economic and legal protection for slavery in a Southern "sphere of influence."

The political necessity to accommodate slavery in the Constitution was at bottom a result of the lack of political support for Southern slavery's abolition or containment on the part of the Northern white majority as well as on the part of the slave states. The segment of American society in 1787 which had the largest degree of political and economic freedom of action on the issue of slavery—the Northern white majority—saw the containment and eventual abolition of Southern slavery as a problem almost wholly external to their region's interests and concerns.[138] They saw Southern slavery containment or abolition as a merely abstract goal, one whose achievement was not their responsibility, and one that could readily be sacrificed for even short run regional advantage. Northern willingness to leave open to future political action certain key issues intimately related to slavery's dynamism, like imports and the status of slavery in new territories and states, opened wide the door to Southern slavery's expansion. It seems apparent that many Northern as well as Southern delegates to the Convention

---

[138] See Chapter 2. For Matthew Mason's very similar conclusion, see Matthew Mason, *Slavery and Politics in the Early Republic* (Chapel Hill: University of North Carolina Press, 2006), 26-7.

either understood and accepted that such expansion would occur, or were indifferent about that fact.

The North's conscious decision to seek temporary political and commercial policy dominance in the Constitution in return for open-ended provisions permitting slavery expansion sharply exacerbated the problem of "foreign" slavery in the vain hope that it would be addressed by a subsequent generation. However, such political "generational transfer" was the course of action on slavery that Northern majority public opinion supported, and it seems highly unlikely that it would have supported a contrary course. Ironically, slaveholders like James Madison and George Mason, both of whom had great experience with slavery as a political and economic institution, told the Northern delegates that they were deferring an unavoidable problem. Northern Federalists chose not to heed such warnings. As long as Northern states and Southern states could both expand geographically and economically without interfering with each other's expansion, a change in Northern public opinion on slavery would not occur, and slavery would continue to expand. In this race against time, much would need to change before the centralist tortoise caught up with the localist hare. But this would inevitably renew questions about the nature of the Union.

In 1787, French charge d'affaires Louis-Guillame Otto described post-Revolutionary War American politics as commercial rivalry writ large:

> Their [American] politics, which confines itself to their commercial speculations, nevertheless inspires among them reciprocal aversion and jealousy, passions which were absorbed during the war by the enthusiasm for liberty and independence, but which have begun to recover all their force.[139]

---

[139] Louis-Guillame Otto, French charge d'affaires, to the Secretary of State of France for Foreign Affairs, Comte de Montmorin, April 10, 1787, Farrand 3: 16 (author's translation).

Otto's description applied exceptionally well to the Constitution's treatment of slavery. The Constitution's federalism was in an important sense a sectional commercial treaty, as exemplified by its representation structure, its commerce-slave trade agreement and its accompanying informal sectional economic development bargain. But George Washington's observations in October, 1787 on the Constitution's commerce power show that he understood that governance of the Union required far more than seeking mutual commercial benefit under such a treaty.

Writing to a political confidant, Washington answered George Mason's objections to the commerce power. He began by observing that a regional veto of the kind Mason sought was politically unworkable in general: "I am mistaken if any men, bodies of men or Countries, will enter into any compact or treaty" that included such a veto. But Washington then added that he thought reciprocity would govern the use of the commerce power and thus limit its abuse—"there must be reciprocity or no Union." He concluded: "which of the two is preferable, will not become a question in the mind of any true patriot." [140]

But could the reciprocity essential to Union continue to exist between sections of the country which, if they did not already differ fundamentally on what freedom meant—whether in the context of republican representation, or of slavery, or of western settlement—would shortly do so? The idea that the Union must be a moral union had not been vanquished permanently in the Northern states. It was a minority view that had been suppressed temporarily and that would reemerge with greatly renewed vigor in the Missouri Controversy. Could the need for common ground on the meaning of freedom

---

[140] George Washington to Dr. David Stuart, October 17, 1787, Farrand, 3: 128.

be successfully avoided by creating a solely political federal Union, as the Constitution's advocates boldly claimed? Or was the dismal Old World political science that viewed liberty and empire as inherent enemies a better guide to the political future for a growing slaveholders' Union?

# III

# SLAVERY IN THE NEW NATION, 1790-1821

# 5

## FROM CONSTITUTION TO REPUBLICAN EMPIRE

In two 1790 letters to his confidant David Stuart, George Washington reflected on the vitriolic Congressional debate on federal power over slavery under the new Constitution that occurred that year. Stuart had written periodically to Washington about Virginia politics, emphasizing that many Virginians were upset that Congress was debating slavery. Based on statements by Madison and others during the ratification contest, Virginians believed that the slavery issue had been resolved in their favor and was closed until 1808. Fears of possible federal action against slavery were being used by anti-Federalists to continue agitation against the Constitution, and the collapse in slave prices caused by the debate "embittered" opponents "much more against it."[1]

Other Virginians, angered by the Northern states' position in the Congressional debate, assaulted the Northwest Ordinance's bar on slavery in Northern newspapers. "Virginia" argued that the Ordinance was sectional legislation that anti-competitively reserved massive federal lands for Northern citizens.[2] Another writer saw the Congressional attack on slavery as a sectional effort to create a "formidable union" to "destroy the southern states" by limiting Southern population, thus giving the "eastern

---

[1] David Stuart to George Washington, March 15, 1790 and June 2, 1790, in Theodore J. Crackel, ed., *The Papers of George Washington Digital Edition* (Charlottesville: University of Virginia Press, 2007)(hereafter, *"GW Dig. Ed")*, 5: 236, 459 (quotation at 459).

[2] "Virginia," *Gazette of the United States (N.Y.)*, March 27, 1790 (reprinted from *Virginia Independent Chronicle*).

states...the balance of power and votes in Congress...."[3] Both the foundational constitutional bargain on national expansion and the Constitution itself were being placed at risk by the debate.

Washington was nevertheless confident that the slavery debate was not only over, but that slavery would not arise again in any important way as a political issue until 1808 or later. He told Stuart, "The memorial of the Quakers (and a very *malapropos* one it was) has at length been put to sleep, and will scarcely awake before the year 1808."[4] Slaveholders had gotten "as favorable" a decision "as the proprietors of this species of property could well have expected, considering the light in which slavery is viewed by a large part of this Union."[5] As historian Joseph Ellis concludes, Washington's predictions proved strikingly accurate, and this chapter explores why. It considers the significance of the intense debates over slavery that occurred during the nation's struggles over implementing the Constitution and the creation of the new federal government, as well as the status of antislavery action in the states and Congressional disputes over the expansion of slavery into new states and territories in the years prior to the 1808 slave import ban.

---

[3] "A Citizen of the Union", *New York Journal and Weekly Register*, March 18, 1790.

[4] George Washington to David Stuart, March 28, 1790, in Jared Sparks, *The Writings of George Washington; Being His Correspondence, Addresses, Messages, and Other Papers, Official, and Private*, vol. X (Boston: 1836), 85. The letter as printed in the Washington papers refers to the Memorial and says it "has at length been put to sleep, from which it is not [illegible] it will awake before the year 1808." *GW Dig. Ed.*, 5: 286-288, quote at 288.

[5] George Washington to David Stuart, June 15, 1790 in Sparks, *Writings of GW*, X: 94-101, quotation at 99. The quoted portion of the letter as printed in the Washington papers concludes "considering the great dereliction to Slavery in a large part of this Union." *GW Dig. Ed.*, 5: 523-5 (quotation at 525).

Most historians agree that slavery expanded between 1790 and 1808 with the affirmative support or acquiescence of the federal government.[6] Northern resistance to the admission of slave states prior to 1800 was "weak and largely unconnected" to slavery.[7] The narrowly circumscribed federal laws enacted on slavery during this period, such as those limiting direct American involvement in the slave trade, imposed minor limits on the growth of slavery that were ineffective or unenforceable in any event.[8] The most plausible candidate for an exception to the preceding statements, 1804 temporary legislation for the government of Louisiana Territory that imposed limits on slave imports to that territory, was deliberately drafted so that it was unlikely ever to take effect and was then repealed before it ever became effective.[9] The 1804 statute's attempt to control territorial slavery was the high water-mark of federal efforts during this period.[10]

---

[6] See, e.g., John Craig Hammond, *Slavery, Freedom and Expansion in the Early American West* (Charlottesville: University of Virginia Press, 2007), 3-7; Donald L. Robinson, *Slavery in the Structure of American Politics 1765-1820* (New York: Harcourt Brace Jovanovich Inc., 1971); Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 2001 [pbk. reprint of 1978 ed.]); Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (Chapel Hill: University of North Carolina Press, 1968); David Brion Davis, *The Problem of Slavery in the Age of Revolution 1770-1823* (Oxford: Oxford University Press, 1999 repr. 1975 ed.).

[7] Mason, *Slavery in Early Republic*, 25.

[8] For the ineffectiveness of 1794 Act enforcement, see Robert H. Gudmestad, *A Troublesome Commerce: The Transformation of the Interstate Slave Trade* (Baton Rouge: Louisiana State Univerity Press, 2003); McMillin, *The Final Victims*, 43. The PAS had some success in slave trade enforcement. Newman concludes that the PAS prosecuted dozens of violations between 1794 and 1808. Richard S. Newman, *The Transformation of American Abolitionism: Fighting Slavery in the Early Republic* (Chapel Hill: University of North Carolina Press, 2002), 74-5. Don Fehrenbacher also argues that antislavery groups had some success in enforcing the 1794 Act, but he concedes that the traffic "increased sharply after it became illegal under federal law." Fehrenbacher, *Slaveholding Republic*, 140-2, quote at 140. But PAS enforcement occurred mostly in northern states where the trade had little impact, and PAS enforcement efforts were dwarfed by the size of imports during this period.

[9] *An Act for the Organization of Orleans Territory and the Louisiana District*, March 26, 1804, 1 Stat. 283 (8th Cong., 1st sess.).

[10] Don E. Fehrenbacher, *Sectional Crisis and Southern Constitutionalism* (Baton Rouge: Louisiana State University Press, 1980), 12-13.

Even in the Northwest Territory, where slavery was formally prohibited by the Northwest Ordinance, the federal government chose to protect slave property where it existed when the Ordinance was adopted. "Northerners made only fleeting and ineffectual efforts to restrict slavery in territories where it was already entrenched...."[11] Moreover, at least through 1808 the federal government permitted expansion of de facto slaveholding regimes in major parts of the Northwest Territory, including what became the state of Indiana.[12] Whether other parts of the Northwest Territory such as Ohio would permit slavery was heavily contested during statehood debates.[13]

Slavery's development without significant federal interference meant that by 1808, there were more than one million slaves in the United States, a 70 percent increase over 1790 levels despite slavery's sharp decline in the Northern states through abolition and out-of-state slave sales. By 1808, American slavery had expanded into two additional states, Kentucky and Tennessee, and massive new areas of federal territory obtained from Spain and France, including the Mississippi Territory, Orleans Territory, and Louisiana Territory. By 1810, more than 16 percent of the total slave population of the United States lived in this new trans-Appalachian West, and slaves constituted more than 20 percent of that area's population of about 800,000.[14] Slavery had become an

---

[11] Mason, *Slavery and Early Republic*, 24.

[12] Paul Finkelman, "Slavery and the Northwest Ordinance: A Study in Ambiguity," *Journal of the Early Republic* (1986): 6: 343-369; Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 2001 [pbk. reprint of 1978 ed.]), 85.

[13] Hammond, *Slavery, Freedom and Expansion,* Ch. 5.

[14] Ira Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America* (Cambridge, Mass.: Harvard University Press, 1998), Table I; United States Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1957* (Washington, D.C.: Government Printing Office, 1961), Series A 95-122, Series A 123-80.

integral Southwestern institution by 1808, its growth more than matching the immense flood of westward white settlement during the early republic.

Slavery-related developments during this period shattered the Revolutionary era dreams of Northern abolitionists about the eventual withering away of slavery. Perhaps the crowning blow to abolitionist hopes was the voluntary reopening of the slave trade by South Carolina in 1803. The trade's reopening "shocked and outraged the rest of the nation."[15] By the end of the period, Northern antislavery forces were left only with the utopian hope that prohibition of slave imports (after January 1, 1808) could control the burgeoning slave population.

What explains the fact that antislavery goals faced repeated frustration and outright defeat at the national level and in the slave states just at the period when slavery began its fatal westward expansion? Historians often point to the new nation's political and economic weakness as a principal explanation. They argue that the new United States was distracted both by the need to develop national institutions and by international controversies such as major European wars, over which it had no control. Accordingly, the imperatives of forging and maintaining national unity dictated that the divisive issue of controlling slavery be shunted away from the political agenda.[16] A recent development of this argument is the "fragile republic" thesis, which posits that the

---

[15] David B. Davis, "American Slavery and the American Revolution," in Berlin and Hoffman eds., *Slavery and Freedom in the Age of the American Revolution*, (Charlottesville: University of Virginia Press), 262-280, 267. On the causes and consequences of the reopening of the trade, see W.E. Burghardt Du Bois, *The Suppression of the African Slave Trade* (Baton Rouge: Louisiana State University Press, 1969 repub; orig. pub. 1896), 84-5; Jed Handelsman Shugerman, "The Louisiana Purchase and South Carolina's Reopening of the Slave Trade in 1803," *Journal of the Early Republic* 22, no. 2 (2002): 263-290.

[16] Robinson, *Slavery in Politics*, Ch. 7. Although framed in terms of "the perishability of revolutionary time" and a perceived increased need for national unity, this appears to be Davis's view as well. Davis, *Slavery in the Age of Revolution*, 306-342.

United States was an "over-extended republic" during this period. One important price the country paid for over-extension was the inability to control slavery in the face of insistent local demands to permit its expansion into new states and territories. Historian John Craig Hammond argues that fears of frontier rebellion against national authority, combined with the lack of any meaningful administrative structure supporting that authority, forced the fledgling federal government to defer to local opinion on matters such as slavery. In essence, a form of "popular sovereignty" developed on the frontier due to federal government weakness, Hammond argues.[17]

Still other historians argue that most of the choices made about slavery in the 1790s were dictated by pre-existing circumstances such as the fact that slavery already existed in a particular area.[18] They add, however, that later decisions to permit its expansion, such as those by Jefferson regarding the organization of Upper Louisiana, were matters of choice where decisions were often driven by sectional or racist views.[19] Popular sovereignty was a "fact of life" on the frontier, "whether installed as official policy or not."[20] Other historians explain Northern indifference to slavery expansion during this period by arguing that Northern success in abolishing slavery there, and the clear prospect of abolishing the slave trade, provided a basis for Northern optimism that slavery would eventually wither away.[21]

---

[17] Hammond, *Slavery, Freedom and Expansion,* passim.

[18] Fehrenbacher, *Dred Scott,* 85.

[19] Ibid., 90, 85.

[20] Ibid., 85.

[21] Mason, *Slavery in Early Republic,* 15-16.

These explanations clearly deserve some weight. The new United States was subject to political and economic circumstances beyond its control during the Early Republic. By consensus, governments protected vested interests in existing slavery. Antislavery action had had some success at the state and federal level. Frontier settler allegiance was tenuous in various cases. But the federal government's support for the growth of slavery before the War of 1812 was quite predictable on other grounds.

First, the Constitution drastically limited both the legal and political grounds on which slavery expansion could be contested, creating an iron cage that rendered federal law and politics largely irrelevant to slavery's expansion during this period.[22] The Constitution's allocation of Congressional representation guaranteed that no significant political action against slavery could be taken in the face of united slave state opposition at least as long as Washington or another slave state representative was President. A similar Electoral College logic dictated that politicians who sought the Presidency after Washington must shy away from aggressive action to support or oppose slavery. The federal courts had little to say about slavery, which was perceived largely as a matter of state law. Slave imports continued in significant numbers throughout the period, and

[22] The Electoral College system's allocation of sectional voting strength meant that it would be exceptionally difficult to be elected President after George Washington's retirement without cross-sectional support. That is, in order to win any Northern politician would quite probably need at least some Southern state support, and vice versa. Because it was widely understood that in slave states, an antislavery political record would be the political "kiss of death," that arithmetic compelled prominent northern politicians of both parties who sought the Presidency, such as John Adams, Rufus King, and Aaron Burr, to avoid support for aggressive federal action against slavery. To garner Northern state support, southern politicians with presidential aspirations like Thomas Jefferson and James Madison sought to position themselves on slavery so that they were, or appeared to be, willing to support certain narrow kinds of antislavery action, but only those forms that were acceptable to their southern constituencies. Just this sort of calculation led Thomas Jefferson's South Carolina supporters during the election of 1800 to make authorized statements disclaiming any desire on Jefferson's part to use federal power against slavery.

slavery's western expansion was protected by Congressional decisions as early as 1790. The Constitution's protections for slavery's expansion proved a great success.

Second, during this period the United States embarked on a massive expansion of national territory. America expanded using a Jeffersonian republican or "anti-colonial" expansion strategy that afforded territorial residents a reasonable amount of political autonomy and eschewed the use of a significant standing army and federal infrastructure to maintain political control on the frontier. Historian Peter Onuf explained Jefferson's political logic in seeking to create an empire of liberty based on republican expansion:

> Liberty and equality of the contracting parties, whether individuals or states...were the essential preconditions of true and lasting union. Only by securing this equality—defined as the absence of any external coercion or control—could lasting commitments and obligations be voluntarily undertaken and the passions that fostered social harmony be given full scope.[23]

This republican expansion strategy was enormously popular, because it promised large territorial, population and economic gains at very low cost in taxation and military service obligations. But republican expansion also necessarily meant the federal government would yield to local prejudices on slavery. Enforcing federal antislavery legislation in former slave territories or new states would undoubtedly have required an extensive and costly network of federal officials backed by military force, a system that was antithetical to the entire conception underlying republican expansion. Thus, adoption of a republican strategy for continental expansion meant that it was highly unlikely that the federal government would seek to impose antislavery laws on pro-

---

[23] Peter S. Onuf, *Jefferson's Empire: The Language of American Nationhood* (Charlottesville: University Press of Virginia, 2000), 115 (emphasis added).

slavery local citizens.[24] In a slaveholders' Union built on a pro-slavery Constitution and republican expansionism, slavery would be permitted to grow as the country did.

*The 1790 Slavery Debate and Slavery's Permanence*

The remarkable slavery debate of February-March, 1790 about which Washington wrote to Stuart has been a source of considerable fascination to historians.[25] David B. Davis describes its outcome as a "critical setback" for the abolition movement.[26] Joseph Ellis goes further. He argues perceptively that the debate raised grave questions about whether abolition had already become politically impossible by 1790, and shows that the adversary positions rested on irreconcilable visions of the Constitution.[27] Gary Nash argues that the debate was the "moment of truth" that proved that the North was politically unwilling to pursue abolition.[28] The debate does confirm that major slave states already saw slavery as a permanent institution. But it also illuminates both the

---

[24] This is an extension of Max Edling's argument about the relationship between the constitution and Early Republic politics. See Max M. Edling, *A revolution in favor of government: origins of the U.S. Constitution and the making of the American state* (Oxford: Oxford University Press, 2003).

[25] Accounts of this debate include Robinson, *Slavery in Politics*, 302-312; Richard S. Newman, "Prelude to the Gag Rule: Southern Reaction to Antislavery Petitions in the First Congress," *Journal of the Early Republic* 16, no. 4 (1996): 571-599; Fehrenbacher, *Slaveholding Republic,* 138-9; Howard A. Ohline, "Slavery, Economics, and Congressional Politics, 1790," *Journal of Southern History* 46 (1980): 335-60; Gary B. Nash, *Race and Revolution* (Madison: Madison House, 1990), 38-42; W.E. Burghardt Du Bois, *The Suppression of the African Slave Trade* (Baton Rouge: Louisiana State University Press, 1969 repub; orig. pub. 1896), 75-80. Ellis made the debate the subject of extended reflections on the issue of slavery in Joseph Ellis, *Founding Brothers: The Revolutionary Generation* (New York: Alfred A. Knopf, 2000), Ch. 3. See also David P. Currie, "The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791," *The University of Chicago Law Review* 61, no. 3: 775-865.

[26] Davis, *Slavery in Revolution*, 330.

[27] Ellis, *Founding Brothers*, Ch. 3.

[28] Gary B. Nash, *Race and Revolution* (Madison: Madison House, 1990), 38-42 (quotation at 38).

political and legal straitjacket created by the Constitution for antislavery action and the Achilles' heel of Northern antislavery politics, westward expansion.

It was not surprising that a Congressional slavery debate occurred in 1790. After all, based on Northern Federalist claims about Congressional powers over slavery under the Constitution, many Northern Congressmen thought the slavery issue was still open. The shocked reaction of slave state Congressmen was primarily a result of the fact that Southern Federalists had told their ratifying conventions quite a different story about slavery and the Constitution, and had led them to believe that the subject was closed.[29]

But the 1790 debate also represented an escalation of the antislavery attack, thanks in part to Benjamin Franklin's efforts. The petitions ultimately offered to Congress in 1790 were much broader in substance and political effect than the planned Pennsylvania Abolition Society ("PAS") petition of 1787, which had addressed only the slave trade.[30] The 1790 debate began on February 11 over Quaker petitions from Pennsylvania and New York limited to the slave trade, but the vociferous opposition from slave state representatives to those petitions and their attacks on the Quaker sponsors apparently led Pennsylvania Congressmen to offer the PAS petition signed by Benjamin

---

[29] See Chapter 4.

[30] The Pennsylvania Abolition Society had planned to petition the 1787 Convention, but Benjamin Franklin declined to offer that petition. Ellis concludes that Franklin intended to offer the petition, but was persuaded not to do so. Ellis describes the 1790 PAS petition as "essentially the same proposal" that Franklin had planned to offer in 1787. Ellis, *Founding Brothers*, 110-111. Ellis's citation, to Tench Coxe's March 31, 1790 letter to James Madison, does not support Ellis's description, because Coxe's letter refers only to the slave trade. There is other contemporary evidence that the planned 1787 PAS petition was limited to the slave trade; a copy of the proposed 1787 petition was published in the newspaper during the 1790 debate in *The Federal Gazette and Philadelphia Evening Post*, February 23, 1790. Franklin's 1790 petition was far broader and more inflammatory than the 1787 proposal. It is fair to conclude that Franklin thought that Congress could still combat slavery, even after adoption of the Constitution, and he wanted to ignite the strongest possible debate. In his honor, the ensuing debate might properly be called "Franklin's debate."

Franklin on February 12. This helped to deflect criticism based on the earlier petitions' Quaker sponsorship.[31] The Franklin/PAS petition explicitly urged Congress to "step to the verge" of its Constitutional authority to combat slavery, not just the slave trade.

The timing of the slavery petitions, which were presented smack in the middle of a heated debate over proposals for the assumption of state debts, understandably raised questions about their sponsors' and supporters' motivations.[32] The petitions had another distinctive feature that raised precedent-setting questions about Congress' powers in responding to citizen petitions. Although the Quaker petitions were based in part on Northern slave trader efforts to evade state law slave trade prohibitions, a practice that could constitutionally have been corrected by federal law, both the Quaker petitions and the Franklin/PAS petition lacked any request for specific legislation and could be read to request actions exceeding Congress' constitutional authority.[33]

Slave state representatives from the Deep South reacted with outrage—like "stuck pigs" in one historian's vivid phrase—to the petitions, seeking their dismissal. They argued that Congress had no constitutional authority to address the issues raised by the petitions, particularly as they implicated slavery. Various Congressmen challenged this

---

[31] Letter from Pennsylvania Abolition Society Acting Committee to London Society for Effecting the Abolition of the Slave Trade, February 28, 1790, PAS AC Corr., HSP.

[32] This timing—and the debate's outcome —led Quakers to conclude that political bargains on the debt assumption issue affected the outcome on the slavery petitions, a view advocated also by some historians. Howard A. Ohline, "Slavery, Economics, and Congressional Politics, 1790," *Journal of Southern History* 46 (1980): 335-60. But the outcome of the slavery debate was regarded as an authoritative precedent by Daniel Webster as late as 1833, which suggests that it was unlikely that the outcome was based on a one-issue political trade. Ellis, *Founding Brothers*, 118.

[33] Quakers believed that Pennsylvania slave trade interests had decided to shift their trading to New York in order to escape Pennsylvania prohibitions. A New York legislature committee responded that although it "agree[d] in sentiment" with the Quakers, the slave trade had been made an exclusively federal issue by the Constitution, so New York could not act. "Report of the New York legislative committee on Quaker slave trade petition," *Pennsylvania Mercury, and Universal Advertiser*, February 9, 1790.

position. Elbridge Gerry argued that because Congress had the resources to purchase all southern slaves using the proceeds of federal land sales, it had the right to consider the petitions.[34] But the most important intervention on the constitutional issue came from James Madison, who asserted that Congress had authority to control both the slave trade and slavery expansion, and vigorously advocated that the petitions be referred to committee.[35]

A detailed account of Madison's remarks was published in several newspapers:

> Mr. Madison ...then entered into a critical review of...the ideas upon the limitation of the powers of congress to interfere in the regulation of the commerce in slaves—and shewed that they undoubtedly were not precluded from interposing in their importation—and generally to regulate the mode in which every species of business shall be transacted—He adverted to the western country—and the session [sic] of Georgia in which congress have certainly the power to regulate the subject of slavery, which shews that the gentlemen are mistaken in supposing that congress cannot constitutionally interfere in the business in any degree whatever—He was in favour of committing the petition, and justified the measure by repeated precedents....[36]

---

[34] Gerry quickly added that he was not making such a proposal, and neither he nor any other representative made one before the Missouri controversy. Gerry assumed a valuation for southern slaves an order of magnitude lower than their actual valuation. Ellis estimates that buying out all slaves would have approximately doubled the national debt as it stood after Revolutionary War debt assumption. Ellis, *Founding Brothers*, 106-7. Gerry also made the ludicrously inaccurate claim that Massachusetts had liberated "between twenty and thirty thousand slaves" in one day when it adopted its 1780 Constitution (Massachusetts had fewer than 5,000 slaves by then, and many were probably sold rather than freed). *New York Daily Gazette*, March 26, 1790. A southern Congressman responded acidly that Gerry's argument on the ease of abolition could only be regarded as "a piece of pleasantry." Id.

[35] In the *Annals of Congress*, after the introduction of the Franklin antislavery petition, Madison is reported to have said: "He admitted, that Congress is restricted by the Constitution from taking measures to abolish the slave trade; yet there are a variety of ways by which it could countenance the abolition, and regulations might be made in relation to the introduction of them [slaves] into the new States to be formed out of the Western Territory." 1 *AC* 1246, 1st Congress, 2d sess. (February 12, 1790). Madison argued that a memorial should be referred even if its prayer was partly unconstitutional.

[36] *Freeman's Journal or North American Intelligencer (Phila.)*, February 24, 1790; *Gazette of the United States*, February 17, 1790 (N.Y.) reprinted in Helen E. Veit et al., eds., *Documentary History of the First Federal Congress of the United States of America*, vol. XII (Baltimore: Johns Hopkins Press, 1994)("*Doc. Hist. FFC*") 12: 304-5; *Federal Gazette and Philadelphia Evening Post*, February 20, 1790, reprinted in part *without source* in 4 *Elliot* 408 (first published 1830).

Madison was already known as a vigorous opponent of the slave trade, having made his antipathy clear during a 1789 Congressional debate on unsuccessful efforts to impose the $10/slave tax on slave imports permitted by the Constitution.[37] In his 1790 remarks, he asserted that the Constitution gave Congress power to control: (1) the manner in which the slave trade was conducted; (2) whether slaves were permitted to be imported into western territories; and (3) the regulation or prohibition of slavery in the territories. Madison's remarks also showed that he believed that if the growth of slavery was to be contained, Congress would need to act to control not just the slave trade, but western slavery expansion as well. Congress would need to control the demand for slaves, not just one source of slave supply that the Constitution had already placed largely beyond control for a generation, in order to prevent slavery's expansion.

A recorded vote was demanded on whether the antislavery memorials should be referred to committee, and by a vote of 43-11 they were referred to a select committee.[38] The Senate had already refused to consider the Quaker and PAS petitions, making the likelihood that any legislation would result even if the House acted remote at best. Senator Rufus King, now a protege of Alexander Hamilton representing New York in the

---

[37] Madison said that a tax would help to "destroy" the trade, and "save ourselves from reproaches, and our country from the imbecility ever attendant on a country filled with slaves." 1 *AC* 903, 1 Cong. 1st sess.

[38] All votes against referral came from slave state representatives, and all but one came from below the Mason-Dixon line. The Virginia delegation voted 7-2 in favor of referral. 1 *AC* 1247, 1st Cong., 2nd Sess. Both Madison and Representative Page of Virginia later sought to explain their support for referral on slave trade opposition grounds. For Page's speech asserting that the debate was solely about slave trade restriction, and that neither Congress nor state legislatures had power to emancipate slaves, see *Virginia Independent Chronicle*, August 11, 1790, reprinted in *Doc. Hist. FFC*, 12: 778-9.

Under the Constitution, recorded votes by yeas and nays could be demanded by "one fifth of those Present" in either House, which meant that where political circumstances made it desirable, it was comparatively easy to compel recorded votes to require Congressmen to take a public stand on an issue. In understanding the politics of slavery during this period, it is therefore important to understand why such recorded votes occurred in some cases and why in other cases they did not.

Senate, opposed any consideration of the petitions.[39] Vice President John Adams sharply disparaged the petitions as well.[40] The House committee therefore proceeded to consider the petitions largely as an abstract exercise in analyzing Congress's constitutional authority over slavery.

On March 5, 1790, the House select committee reported on the slavery petitions.[41] Its report consisted primarily of a series of legal assertions about Congressional authority over slavery. In substance, the Committee report concluded: (1) Congress had no power to control the slave trade in existing states before 1808; (2) Congress had no power to emancipate slaves born in or imported into the United States before 1808; (3) Congress could not dictate to the states how slaves were to be treated regarding education, adequacy of food or clothing, re-enslavement of "free negroes," or in any other respect; (4) Congress had power to tax imported slaves up to $10/slave; (5) Congress had power to prohibit United States citizens from participating in the African slave trade, or to regulate that trade where citizens were supplying slaves to non-American citizens; and (6) Congress could prevent aliens from using United States ports to further the African slave trade. (For text, see appendix D).

The select committee's report made clear how drastically the Constitution constrained antislavery action at the federal level. The Committee accepted that

---

[39] Ohline, "Slavery, Economics," 344. King took the position that Congress had no power to interfere with slavery. Robert Ernst, *Rufus King: American Federalist* (Chapel Hill: University of North Carolina Press, 1968), 171.

[40] Ohline, "Slavery, Economics," 344.

[41] Hse Jnl., March 5, 1790, reprinted in *Doc. Hist. FFC*, 3:316. A contemporary reported that when the subject of the "southwestern frontiers" was taken up that day, the galleries were shut. *Doc. Hist. FFC*, 12: 639. This House action is not recorded in the journal.

Congress would be constitutionally prevented from controlling most aspects of slavery for at least twenty years. But it was the committee report's deliberate effort to escape the Constitution's iron cage protecting slavery by construing the Constitution as narrowly as possible that caused the most controversy. The report clearly implied that Congress had immediate authority to prevent slave importation to any territory or new state, and to bar slavery there. By implication, Congress also had power to emancipate slaves both in existing states and in new states after 1808. The report implied further that Congress had power to control treatment of slaves in territories or new states. It implied that Congress had fairly broad authority to impede the slave trade. One might think of the report as expressing the broad view of Congressional power over slavery espoused by James Wilson of Pennsylvania during ratification. None of the report's implications were disavowed during the debate by the report's authors while the report was bitterly assaulted, strong evidence that they were intended.

Slave state representatives from the Deep South immediately made efforts to block House consideration of the report, but by a bare majority the House agreed to consider it. The lengthy debate provided an extraordinary insight into the public opinions of political leaders regarding slavery. It also provided James Madison with a golden opportunity to narrow sharply the committee report's provisions in order to leave Congress largely devoid of constitutional authority over slavery in existing or new states (as opposed to territories) both before and after 1808, one which he seized with alacrity.

During the debate, representatives of Deep South slave states—led by William L. Smith of South Carolina and James Jackson of Georgia—defended the morality of both slavery and the slave trade. They defended the trade on relative harm grounds, arguing

that slavery in Africa predated the slave trade, and that slaves were better off in the United States than they were in Africa. They defended slavery as an accepted practice throughout history, justified by the Bible, and by the racial inferiority of blacks. In making the racial inferiority argument, they relied extensively on Jefferson's *Notes on Virginia*. No Congressman challenged either their characterization of Jefferson's position or attacked the merits of Jefferson's position itself. Nor did any Congressman defend political or social equality for African-Americans, although several attacked slavery.[42]

Deep South representatives also argued in great detail that it was impractical to do anything to end the slave trade or abolish slavery. Their impracticability argument had two prongs: cost and social disruption. They argued that slaveowners were entitled to compensation for their slaves, but the other states could not afford to compensate them. They contended that emancipation without colonization was politically completely unacceptable, because race war would result, but there was no practical way that colonization could occur. Abolitionists were well aware by 1789 that the need to provide for colonization following emancipation was an important objection to emancipation proposals, as their internal correspondence about Sierra Leone showed.[43] Slave state representatives also strenuously asserted that limiting slave imports would not stop the

---

[42] Shortly before, Congress had agreed to limit eligibility for U.S. citizenship naturalization to "free white persons." Robinson, *Slavery in Politics*, 253.

[43] PAS Acting Committee to London Society for Effecting the Abolition of the Slave Trade, June 24, 1789, PAS AC Corr., HSP.

growth of slavery, because of natural population increase.[44] No Northern Congressman challenged their position on the feasibility of Southern emancipation.

Georgia and South Carolina representatives argued further that during ratification, objections had been raised against the Constitution based on its allegedly insufficient protection for slavery, and that if slave state citizens had not believed the Constitution "secured and guaranteed" their "property" to them, "they never would have adopted it."[45] Their states would never have agreed to allow the commerce clause to be exercised by majority vote without protection for the slave trade; without "security for their slave property...the union never would have been compleated."[46] Based on the ratification debates, it seems quite likely that this was an accurate political assessment, not only of the Deep South, but of Virginia.

And in an important speech, Representative Abraham Baldwin of Georgia, who had been a Constitutional Convention delegate, went further. He argued that precisely because future majoritarian attacks on slavery had been foreseen, the Constitution had been designed to protect slavery permanently against them. He said:

> It is well known that there was a clashing of feelings, and of interest, in the different parts of this country, on that subject [slavery, before the Constitutional Convention]; it was long a doubt whether it was not an insuperable bar to their being united as one people under one government: but it was happily surmounted in the constitution, and, so far as he had been informed, almost to universal satisfaction. It was not unknown on which side was the majority: the strength and violence of the majority was expected on this subject, and therefore security against it was settled deep down amongst the pillars of your government, and, he would add, not one was more strongly fortified; when this was jostled the rest could not be strong.

---

[44] William L. Smith, S.C., *New York Daily Advertiser*, March 22, 1790. See Chapter 4.

[45] William. L. Smith, *Gazette of the United States* February 17, 1790, reprinted in *Doc. Hist. FFC* 12: 303.

[46] *New York Daily Gazette*, March 26, 1790 (Jackson, Ga.), reprinted in *Doc. Hist. FFC* 12, 823.

Although House action on slavery might reflect "the passions of the people," Baldwin had no doubt that the Senate, President Washington, and the Supreme Court, if necessary, would protect slavery. He concluded that "[t]he uproar of contending waves is not pleasant, but still they are dashing against a rock."[47] Baldwin's description of the Constitution's "strongly fortified" protection for slavery as a "pillar[]" of "your government" aptly conveyed the slave state view, and also clearly conveyed that many slave state representatives saw slavery as permanent.[48]

Review of the extraordinarily lengthy, factually detailed, and comprehensive speeches by Deep South Congressmen has persuaded several historians that they made virtually all of the "positive good" arguments that were later made by Southern representatives during the antebellum period.[49] These speeches were broadly representative of majority public opinion in the Deep South states. No one who listened to them could have believed that these states would voluntarily abolish slavery in the foreseeable future; indeed, their representatives were passionately engaged in justifying the expansion of slavery.

Northern representatives responded with horror to the defense of the slave trade. A Pennsylvania congressman asserted that "[a]n advocate for slavery, in its fullest latitude, at this age of the world, and on the floor of the American Congress too, is, with

---

[47] Baldwin, *New York Daily Gazette*, March 26, 1790, reprinted in *Doc. Hist. FFC*, 12: 773-6 (quotations at 775-6). Baldwin's speech was not printed in the published reports of Congressional debates.

[48] Deep South representatives contested the idea that they were the only parties to the slavery debate motivated by "interest." Representative Burke of North Carolina argued that there were "numbers of Africans held in [New York] and other middle and eastern states" whose owners wanted to dispose of them not by freeing them but by selling them into slavery. *Daily Advertiser*, March 19, 1790, reprinted in *Doc. Hist. FFC*, 12: 746-49.

[49] Ellis, *Founding Brothers*, 97; Robinson, *Slavery in Politics*, 309.

me, *a phenomenon in politics*....with me they defy, yes, mock all belief."[50] Congressman Elias Boudinot, a soft-spoken long-time antislavery activist from New Jersey, described the slave traffic as "iniquitous" and argued that it was indefensible either on grounds of Christianity or "the genius of our government and the principles of the revolution." Boudinot drew a sharp distinction, however, between opposition to the slave trade and support for emancipation:

> There is a wide difference between justifying this ungenerous traffick and supporting a claim to property, vested at the time of the constitution, and guaranteed thereby. Besides it would be inhumanity itself to turn these unhappy people loose to murder each other or to perish for want of the necessaries of life. I never was an advocate for so extravagant a conduct.[51]

Another antislavery Congressman, John Vining of Delaware, made what at first appeared to be a slashing attack on both slavery and the slave trade. Vining applied the principles of the Declaration of Independence to slavery, and made one of the most concise, elegant attacks on the view that slavery and republicanism were compatible that had appeared in print to date. Slavery was completely incompatible with the principle of equality among men that underlay republican government, and instead led inevitably to "absolute tyranny" on one side, "and on the other debasing servility."[52] Yet the real point of Vining's attack on slavery was, it turned out, only to make a veiled political threat about what might happen if slave states were unwilling to support slave trade limits. Vining's real goal was that the slave trade should be regulated to protect slaves on humanitarian grounds. But Vining's attack on slavery demonstrated the sharp

---

[50] Scott (Pa.), *New York Daily Gazette*, March 26, 1790, quoted in Ellis, *Founding Brothers*, 112.

[51] *Daily Advertiser (N.Y.)*, March 24, 1790 (Mar. 22 debate).

[52] *New York Daily Gazette*, March 26, 1790.

philosophical divide between Northern representatives who increasingly saw slavery as incompatible with a republican society and Southern representatives who saw no incompatibility between slavery and a republican government. Congressman Smith argued in response to Boudinot and Vining that the Declaration of Independence had never been intended to apply to slaves.[53]

The Virginia political leadership was notable for its lack of public participation in the debate regarding slavery. Madison took almost no part in the debate. In private, however, contemporary observers thought that Madison was active in seeking compromise amendments to the Committee report, and he also played a public central role in the deliberately ambiguous manner in which the report was finally dealt with by Congress.[54] As Madison later acknowledged, his own constituency was so pro-slavery that he could not be involved even in presenting a petition to the Virginia assembly seeking gradual abolition legislation.[55] Madison saved his criticism of the Deep South representatives for his private correspondence. In Virginia, he then defended his role in the Congressional debate—his "true policy"—on the ground that he had increased the constitutional protection for slavery, which was clearly an accurate claim.[56] Washington refused to intervene on the slavery issue after meeting with antislavery representatives. Jefferson made no comment about the debate in his correspondence, although his *Notes*

---

[53] *Daily Advertiser* (N.Y.), March 25, 1790, reprinted in *Doc. Hist. FFC* 12: 809.

[54] Ohline, "Slavery, Economics," 351.

[55] Madison to Robert Pleasants, October 30, 1791, *JM Papers*, 14: 117.

[56] Madison wrote to Edmund Randolph, March 21, 1790, that the "true policy of the Southern members...was to obtain along with an assertion of the powers of Congress a recognition of the restraints imposed by the Constitution." Gaillard Hunt, ed., *The Writings of James Madison* (New York: G.P. Putnam's Sons, 1906), 6: 8-9. Madison had also thrown antislavery forces a bone, by helping them establish that Congress had limited powers over the slave trade before 1808.

*on Virginia* was cited in the debate and reported in the New York newspapers as proof of the inferiority of blacks while he was in New York. Jefferson had arrived to assume his duties as Secretary of State during the debate, and reported "immediately" to Washington.[57]

In the early part of the debate, the House agreed to amend the committee report to state explicitly that Congress had no power to emancipate slaves "within any of the States" either before or after 1808. This eviscerated the report's thrust against the eventual abolition of slavery through federal action. The House also agreed to broaden the statement that Congress had no power to interfere in the treatment of slaves so that it was all-encompassing (and elided the question of control over free blacks). Madison appears to have been primarily responsible for brokering these fundamental changes to the Committee report.[58]

In the only area where federal legislation prior to 1808 was explicitly authorized by the House action, the foreign slave trade, the final House action also narrowed the scope of Congressional authority compared to the original report.[59] No mention was made of Congress' supposed power to prevent aliens from outfitting for the trade in United States ports; therefore, states could permit such outfitting without federal interference. The House action also effectively prevented aliens such as British or Spanish merchants who imported slaves from being barred by Congress from the trade if

---

[57] Jefferson arrived Sunday, March 21. Dumas Malone, *Jefferson and His Time*, vol. 2 (Boston: Little, Brown and Company, 1951), 255.

[58] Ohline, "Slavery, Economics," 351. For the full text of the final House action, see appendix E.

[59] The House action provided that Congress could restrain United States citizens from "carrying on the African trade for the purpose of supplying foreigners with slaves" and could regulate slave conditions during their importation by United States citizens.

states permitted their involvement. Therefore if Congress acted against or regulated U.S. citizen involvement, it would simply create a competitive preference for alien slave traders absent international regulation, which was virtually nonexistent.[60] These omissions protected the interests of slave traders and states desirous of importing slaves. They also significantly contributed to rendering subsequent federal laws restricting direct U.S. citizen involvement in the foreign slave trade before 1808 ineffectual in controlling the level of slave imports to the United States, through illegal fraudulent use of foreign flag shipping among other means.

The growth of slavery during national expansion was particularly encouraged by the failure of the 1790 House action to specify any explicit authority for federal action to control slavery in territories or new states. Compared to Congress' broad implied powers in this area in the original committee report, the House action on this point deliberately narrowed that authority. In describing the slavery powers of "states," the House deleted the cross-reference in the select committee report to "said states," which had been intended to establish that Congress' power to control state action was restricted only as to existing states. Instead, the House action referred to "the states" or "the several states" as having sole authority over slaves, thus placing the authority of new states over slavery on a par with that of existing states. Given that the Washington Administration was to propose the long-anticipated admission of Kentucky (commonly expected to be a slave state) within a few months of the slavery debate, this subtle but very explicit language change cannot be regarded as coincidental. Madison had been by far the strongest

---

[60] Britain imposed limited humanitarian regulation on its slave trade beginning in 1788, but little other regulation existed before 1807.

advocate of adding an "equal footing" clause to the Constitution to protect the powers of new states against Congressional control.[61] Madison and other advocates of the "equal footing" concept believed it included popular sovereignty over slavery, and the House action of 1790 embodies their preferred view of "equal footing" for new states where slavery was concerned.

The House action to protect state authority over slavery against federal power sought inconspicuously to create an unbridgeable Constitutional divide between Congress's power over slavery in territories and its power over slavery in new states. The House action inevitably raised serious questions about the constitutionality of Article VI, the slavery bar of the Northwest Ordinance, if that Ordinance was read to bar slavery in new states created from within the Territory. But to avoid a remarkably similar political controversy in 1789, Madison had already ignored the flimsy legal fiction created to supply legal authority for the Northwest Ordinance under the new Constitution when it was ratified by Congress.[62] Not surprisingly, Madison chose not to raise these potentially explosive issues publicly during the slavery debate. Madison's actions were thus remarkably consistent with the political strategy of continued public evasion of this

---

[61] Some historians argue that the Northwest Ordinance was the origin of the "equal footing" concept. David P. Currie, "The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791," *The University of Chicago Law Review* 61, no. 3: 775-865 When Congress first used the "equal footing" concept in legislation other than the Ordinance, in 1796 when admitting Tennessee, it clearly meant that states had popular sovereignty on slavery, while the Ordinance deemed states on an "equal footing" with other states even though it explicitly deprived them of popular sovereignty on that issue. See Chapter 4.

[62] The Ordinance ratification statute, August 7, 1789, 1 Stat. 50, 1st Cong., 1st Sess., recited that it was adopted so that the Ordinance "may continue to have full effect," but Madison had already argued forcefully in public that the Continental Congress lacked any authority to adopt the Ordinance in the first place (see chapter 4). The Ordinance had therefore never gone into effect; thus it could not be "continued" in force, but creating this legal fiction allowed Congress to avoid the question of precisely what authority it had under the new Constitution for the Ordinance's provisions, particularly Article VI. Madison chose not to raise any of these issues.

constitutional issue he recommended to President James Monroe during the Missouri Controversy.[63]

Representatives of the Deep South presented arguments against action on slavery based on differing grounds, described by one historian in the context of later debates as "conditional termination" and as "perpetuationist" rationales.[64] Southern representatives' public rhetoric on slavery—and particularly the slave trade—may have been framed in different terms by Congressmen representing different parts of the region. But as had been true at the Convention, at bottom intra-regional differences about the foreign slave trade were based largely on economic grounds. The Upper South, especially Virginia, needed to export slaves and stood to benefit handsomely from a protected market for doing so if the slave trade was curtailed. But there were no important intra-regional differences on federal regulation of slavery. In the final analysis, the action taken by the House in 1790 demonstrates that the Upper South and Deep South were allies when it came to protecting both slavery itself—and the core of the slave trade—against federal power.[65]

The 1790 debate shows that both the Constitution's text and the sectionally balanced political structure it created effectively constrained the contest over slavery. The Pennsylvania Abolition Society had had high hopes for the 1790 Congressional

---

[63] In 1820, Madison counselled Monroe to avoid a public statement that the Missouri compromise language barring slavery "forever" from the states in the area north of the compromise line was unconstitutional, although he assured him that it was. Madison also advised Monroe to accept territorial slavery restrictions, which (in a clear reversal of his 1790 position) he argued were probably unconstitutional as well, on political grounds. James Madison to James Monroe, February 23, 1820; Madison to Robert Walsh, November 27, 1819, both in *Writings of James Madison*, ed. Gaillard Hunt, Vol. 9.

[64] William W. Freehling, *The Road to Disunion: Secessionists at Bay 1776-1854* (Oxford: Oxford University Press, 1990), 121-143.

[65] For further discussion, see Newman, "Prelude to the Gag Rule," 597.

debate. It reported to its allies in the London Society for the Abolition of the Slave Trade after the debate began that "we now entertain pleasing hopes that a foundation will be laid for extirpating the disgraceful practice of enslaving our fellow Creatures," though, the PAS said, this would be a "very gradual work" because of "Long habits and Strong Interests...."[66] After the debate concluded, the PAS inexplicably reported to the London Society that "it is however agreed that the momentious Cause we are engaged to promote has been greatly Advanced by this measure [the debate], and we hope will excite the attention of the state Legislatures more earnestly in its favor than heretofore."[67] Even more remarkably, the PAS informed the French antislavery group Amis des Noirs in August, 1790, that "from the rapid progress which these principles have already made throughout the United States of America, we may venture to predict that the time is not very distant when they will be universally received and firmly established."[68] We are left to wonder whether PAS officials attended a different debate than the one Congress conducted.

But by the end of 1790, some degree of realism seems to have set in, and PAS officials had accepted that their future efforts in Congress needed to be limited to attacks on the foreign slave trade.[69] Historian David Brion Davis describes the related development of Northern quiescence regarding slavery. In 1793, Noah Webster envisioned slavery as an "unfortunate accident" that judging by European precedents,

---

[66] PAS to London Society, February 28, 1790, PAS Acting Comm. Correspondence, HSP.

[67] PAS to London Society, April 2, 1790, ibid.

[68] PAS to Amis des Noirs, August 30, 1790, ibid.

[69] Newman, *Transformation of American Abolitionism*, 49.

would wither away in the free New World in two centuries "without any extraordinary efforts to abolish it."[70]

It was quite significant that the House chose, within days after concluding its intense and divisive debate over slavery, to act on North Carolina legislation that ceded part of its claimed territory to the United States. The federal legislation was modeled generally on the Northwest Ordinance, but accepted a cession that explicitly provided as a condition that Congress could not legislate in a way that would "tend to emancipate slaves" in the ceded area. In the ceded area, which became the state of Tennessee in 1796 (see below), there were already significant numbers of slaves by 1790, so North Carolina's insistence on protecting slavery there is not surprising.

What is surprising is that the House acceded to the cession legislation after rejecting an effort to amend its slavery provision without taking a recorded vote.[71] This action—which was not reported in the official journal of the House of Representatives—meant that there were fewer than thirteen members of the House who were willing to force a recorded vote on the slavery provision, despite the fact that the broader 1790 slavery debate itself was begun and resolved by recorded votes. Such reticence supports an important inference—even antislavery Northern members of Congress were not willing to force their colleagues to take an explicit position on the continuation or extension of slavery to the west. The most likely explanation for such reticence is that Congressional permission for the expansion of slavery to the Southwest was understood as a quid pro quo for the Northwest Ordinance.

---

[70] Davis, *Slavery in Revolution*, 316.

[71] *Federal Gazette and Philadelphia Evening Post*, March 31, 1790 (March 26, 1790 debate; see House of Representatives Journal, *Doc. Hist. FFC* 3: 344-5).

*The Fugitive Slave Act of 1793*

When an interstate fugitive slavery dispute between Pennsylvania and Virginia that began in 1788 neared impasse in 1791, President Washington overruled the recommendation of Attorney General Edmund Randolph to permit the states to resolve the matter themselves.[72] Instead, as requested by the Governor of Pennsylvania (a leading abolition state), Washington asked Congress for federal legislation to establish rules that would govern such disputes. Washington's request resulted in the passage of the Fugitive Slave Act of 1793, which also addressed the problem of fugitives from justice (the underlying dispute implicated both subjects).[73] Where fugitive slaves were concerned, Washington saw the limitations of interstate comity in resolving disputes.

During the extensive consideration given by Congress to the 1793 Act between late 1791 and early 1793, which included at least twelve separate days of "bitter" debate in the Senate, so far as is known, no member of Congress argued that that legislation was not authorized by the Constitution or voted against it on those grounds.[74] Yet during precisely those years, Congressional debates contain repeated, extensive and often vehement arguments that the Constitution did not authorize other legislation, such as the

---

[72] Randolph thought that Congress had power to legislate on the issue, but opposed legislation or Presidential action as premature. Presidential Communication No. 22, 2d Cong., 1st Sess., October 27, 1791, Item 8, United States Congress, *American State Papers*, 38 vols. (Washington: Gales & Seaton, 1832-1861) Class X: Miscellaneous, I, 41-2. Washington's action was consistent with his position on the 1786 Pennsylvania slavery case, *Pirate v. Dalby.*

[73] *An Act Respecting Fugitives from Justice, and Persons Escaping from the Service of their Masters,* February 12, 1793, 1 Stat. 302 (1845)(the "Act of 1793").

[74] Finkelman, Paul. "The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793," *The Journal of Southern History* 56, no. 3 (1990): 397-422, 413-15, 418.

creation of the Bank of the United States.[75] Congress debated and then amended the Act of 1793 in ways unmistakably detrimental to the legal, particularly procedural, protection to be afforded to fugitive slaves in challenging their enslavement. Provisions rejected during drafting included those that would have denied the necessary certificates of removal for long-time black residents or those born in the state where the recapture action occurred, and provisions reducing the penalty for aiding fugitives.[76] Pennsylvania abolitionists were acutely aware when the Act was passed that its judicial oversight provisions could be abused, but their exceptionally able and sophisticated counsel (people with national reputations like William Rawle) did not challenge its constitutionality.[77]

The 1793 Act passed both Houses of Congress with overwhelming support from all regions of the country.[78] Longtime antislavery activists such as Elias Boudinot of New Jersey voted for the bill, as did every member of the Pennsylvania delegation who voted. A careful search of contemporary newspapers for major states reveals no significant newspaper controversy about the Act at the time it passed.[79] It is entirely possible that antislavery forces believed that the Act was a lesser evil than slaveowners' continued exercise of a purely private right of recaption, since the Act provided for at least limited

---

[75] The Congressional debate over the National Bank was full of arguments that there was no constitutional authority for its creation. That constitutional question was deemed so important that Washington required written opinions from his Cabinet on it.

[76] Finkelman, "Fugitive Slave Act of 1793," 416-17.

[77] Ibid., 420.

[78] The Act passed the House 48-7, and the Senate by voice vote. Members of the House of Representatives from six states that had begun abolition prior to the passage of the Act supported it by a margin of 18-4. Hse Jnl., 2nd Congress, 2d Sess., 1: 690 (February 5, 1793); Sen Jnl., 2nd Cong., 2d Sess., 1: 472, January 18, 1793.

[79] All newspapers contained in the America's Historical Newspapers database (Chester: Readex Microprint Corporation, 2004-, online) were searched for the period 1793-94, and no significant public debate over the Act was found.

judicial oversight of recaptures. The broad Congressional and public support for the Act, the complete lack of attacks on its constitutionality, and the fact that other available alternatives for claiming fugitive slaves were deemed worse, all suggest that later arguments that the Fugitive Slave Clause was intended to eliminate slaveowners' private right of recaption or to be "declaratory" only were nineteenth century litigation inventions, not the contemporary understanding of the Clause.

Contemporary courts saw the Clause as a means of meeting a need for uniformity. The New York Supreme Court of Judicature in *Glen v. Hodges* (decided in 1812 after New York began abolition) viewed the Fugitive Slave Act of 1793 as a set of uniform legislative rules for implementing a common law right of slave reclamation that had been preserved to slaveowners by the Constitution.[80] In that case, the Court upheld the private reclamation of a slave in Vermont, a free state, by a slaveowner from New York, and found a Vermont citizen liable for trespass for attempting to interfere in the slave's reclamation. Without the Act, the New York Court would have needed to determine what legal rules would apply to reclamations in other states, and the Vermont courts could have made their own potentially inconsistent determination on the same issues, which would ultimately have required resolution by the Supreme Court. Such conflicts would have occurred repeatedly absent federal legislation. *Glen v. Hodges* was understood to be a generally accepted statement of the law at the time. In the 1820s, Nathan Dane (one of the primary authors of the Northwest Ordinance), in his prominent legal treatise *Dane's Abridgement*, cited *Glen v. Hodges* for the proposition that

---

[80] *Glen v. Hodges*, 9 Johns 67 (N.Y.1812).

slaveowners had a general right of fugitive slave reclamation that was preserved by the adoption of the Fugitive Slave Clause.[81]

The Fugitive Slave Act of 1793 was a shared reaction by Northern and Southern states to the threat that they thought fugitive slaves posed to their political majorities' desire to maintain their existing social and labor systems—even during abolition—at the lowest possible social cost. Antislavery sentiment during this era grew sufficiently to support Northern state "bargain philanthropy" and some resistance to slavery by private individuals' assistance to fugitives, but it was clearly insufficient to prevent the passage of Northern state laws protecting slaveowners against fugitive slaves, particularly where such laws also served Northern white taxpayer interests. Tragically, in choosing to protect themselves against fugitive slaves, the Northern states were also agreeing to protect Southern slavery against a considerable vulnerability, since a Northern legal regime that freed fugitive slaves would have sharply increased the cost of slavery to the slave states and thus have helped to discourage its continuance.[82] But during more than a generation between the Constitution and the Missouri Compromise, while Northern states resisted slave state efforts to amend the Fugitive Slave Act of 1793 to make it even more protective of slaveholder interests, their primary focus was on protecting their own residents from kidnapping, not on helping fugitive slaves.[83] A large majority of citizens in the decades after the Revolution had no strong desire to protect fugitives, and they chose to deny such protection with their eyes wide open. But to provide a complete

---

[81] Nathan Dane, *A General Digest and Abridgement of American Law*, 9 vols. (Boston: Cummings, Hilliard & Co., 1823-1829) 2: Ch. 53, a. 3, Sec. 35.

[82] Fogel, *Without Consent or Contract*, 39.

[83] For those legislative efforts, see Robinson, *Slavery in Politics*, 290-93.

picture of antislavery sentiment in the 1790s, we need to consider the status of abolition in the slave states.

*The End of Abolition Efforts in the Slave States*

Virginia was generally regarded as the linchpin of slave state abolition.[84] But by 1797, it became clear that gradual abolition would not occur in Virginia. In that year, the Virginia legislature rejected without debate a thoughtful gradual abolition plan developed by St. George Tucker, a prominent Virginia judge. The legislature's decision made clear that barring a cataclysm, Virginia would not abolish slavery voluntarily. Thus, informed Northern observers had every reason to know before 1800 that Southern voluntary abolition would not occur.

Tucker's research to prepare his gradual abolition plan had included an extensive correspondence between 1795 and 1797 regarding slavery in Massachusetts and Virginia between Tucker and Dr. Jeremy Belknap, a prominent minister who was an official of the Massachusetts Historical Society.[85] That correspondence sheds important light on the factors influencing the early republican politics of slavery as well-informed observers in different parts of the country understood them in candid private discussions.[86] None of the participants in this extraordinary correspondence saw achieving a political solution to

---

[84] Ellis, *Founding Brothers*, 103; Jordan, *White Over Black*, 315-16, 347.

[85] Massachusetts Historical Society, "Letters and Documents Relating to Slavery in Massachusetts," in *Collections of the Massachusetts Historical Society* (Boston: Massachusetts Historical Society, 1877) (hereafter, *MSL*).

[86] My discussion of the Tucker-Massachusetts correspondence is indebted to the treatment in Jordan, *White Over Black*, 555-561. The correspondence is also discussed in Newman, *Transformation of American Abolitionism*, 36-7.

the problem of slavery as a simple matter of "justice in conflict with avarice and oppression," as Jefferson had described it in his 1785 letter to Richard Price.[87] Instead, the focus of the correspondence was how to mollify politically powerful fears of social disruption that might be caused by large-scale emancipation.

Tucker first asked the Massachusetts officials to tell him how and why slavery had been abolished in Massachusetts, and about the status of free blacks there. To obtain information, Belknap polled a series of prominent political, professional and religious figures in Massachusetts for their views, and seven, including John Adams and Judges James Sullivan and James Winthrop, responded to him.[88] After receiving that information, Tucker forwarded to the Massachusetts officials his thoughts on plans for gradual abolition in Virginia, and asked for their comments, which are considered here.

Tucker began by explaining the political obstacles to abolition in Virginia. There were two key demographic differences between Virginia and Northern states: slaves were a much larger part of the population in Virginia, and slave populations were very unevenly distributed throughout Virginia.

---

[87] TJ to Richard Price, August 7, 1785, *The Papers of Thomas Jefferson*, ed. J. H. Boyd and others, 32 vols. (Princeton: Princeton University Press, 1950-), 8: 356.

[88] The Massachusetts officials and citizens polled by Belknap differed about how and why slavery there had been abolished, and about the status and treatment of free blacks in Massachusetts, even on such basic points as whether free blacks were able to vote or hold political office as of 1795. Two of them, one a prominent judge, reported that free blacks could not vote or hold office in Massachusetts. *MSL*, 390, 393. One of the officials polled, Judge James Winthrop, Chief Justice of the Massachusetts Court of Common Pleas, defended the slave trade. Ibid., 391.

From this political demography Tucker concluded:

> [I]t will appear that the most populous and cultivated parts of Virginia would not only bear an infinite disproportion in the diminution of property by a general emancipation, but that the dangers and inconveniences of any experiment to release the blacks from a state of bondage must fall exclusively almost upon these parts of the state.[89]

Tucker then observed that racial prejudice, which his Massachusetts correspondents had noted existed there, was far worse in Virginia because it had been reinforced by slavery. Slaveowners in Virginia would "cheerfully concur in any feasible plan for the abolition of" slavery, but there were numerous objections to such proposals. Virginians shared a "general opinion of their [blacks'] mental inferiority, and an aversion to their corporeal distinctions from us..."; they feared "the danger of granting them a practical admission to the rights of citizens" and "the possibility of their becoming idle, dissipated, and finally a numerous banditti...."[90] Tucker pointed out that Virginians also feared the injury to their agricultural economy from the loss of slave labor, and the "impracticability, and perhaps the dangerous policy, of an attempt to colonize them within the limits of the United States, or elsewhere."

Tucker then mounted a detailed attack on proposals to require colonization of freed blacks as a condition of emancipation. He specifically attacked Thomas Jefferson's colonization proposal—which had considerable support among antislavery forces in Virginia, he thought—as completely impractical. According to Tucker's calculations,

---

[89] Ibid., 406. See discussion in Jordan, *White Over Black,* 555-6, which emphasizes the political importance of racial fears, including those brought on by the Santo Domingo rebellion, to Tucker's analysis.

[90] *MSL,* 407 (Tucker to Belknap, June 29, 1795); see discussion in Jordan, *White Over Black,* 556-7. Tucker understood Jefferson's position to be that blacks were "an inferior race." Jordan, *White Over Black,* 558, quoting St. George Tucker, *A Dissertation on Slavery* (Philadelphia 1796).

even colonization within the United States would be too expensive to permit more than a small fraction of the 800,000 slaves to be colonized annually, and so the remaining black population, which Tucker explained in detail was growing rapidly, would "continually encrease" despite colonization.[91] Besides, colonization would be inhumane, leading to hardships and destruction of the blacks, and this would be especially true of trying to send blacks to "their native country," which could require "the most cruel oppression" to effect.[92]

Thus, twenty years before there was an American Colonization Society, one of the leading, most ardent, and most thoughtful Southern antislavery advocates rejected the practicality of colonization. None of Tucker's readers among the Massachusetts correspondents thought that colonization was workable. Nor did they claim that finding a means to render abolition socially acceptable was not politically essential to emancipation; some instead expressed skepticism that there was any way to abolish slavery in Virginia. And Judge James Sullivan of the Massachusetts Supreme Judicial Court (later Attorney General and Governor of Massachusetts) indicated that he was very familiar with Jefferson's views and that he had specifically told Jefferson himself that colonization was unworkable.[93]

---

[91] Tucker pointed out to Belknap that the "negroes...fertility and increase is immense." He compared this with situation Benjamin Franklin's data on white population growth, saying that black population would increase faster than white population, thus making clear his view that Franklin's assertions about the growth of slave population were wrong for the American slave states. *MSL*, 419. If Tucker knew this in 1797, it is implausible to think that it was not understood in 1787 (for further discussion, see Ch. 4). But as long as northern politicians such as Elbridge Gerry remained wilfully ignorant about the economic and demographic realities of slavery, they could delude themselves and their constituents into thinking that the problem was one that would wither away.

[92] Ibid., 408.

[93] Ibid., 412.

Tucker argued that because colonization was impracticable, other means must be found to solve the problem of white unwillingness to accept African-Americans in society. He thought that there were three possible choices regarding slavery: incorporation of blacks into society; freedom without "any participation of civil rights"; or "retain them in slavery." If blacks are inferior, Tucker said, then the white population could be "depress[ed]" by their elevation. Moreover, an effort at incorporation could in any event be frustrated by "prejudices too deeply rooted to be eradicated," which might lead to a "civil war."[94] Tucker then sought his Massachusetts' correspondents' opinions on his proposed approach to abolition.

Tucker's plan assumed that compensation must be provided to Virginia slaveholders for their slaves. None of the Massachusetts correspondents questioned the necessity of such compensation, despite the fact that several of them believed that Massachusetts had abolished slavery without compensating slaveholders. As had been the case with Northern gradual abolition statutes, Tucker assumed that slaveholder compensation would take the form of continued forced servitude of slaves and their children for several generations. Tucker estimated that it would require perhaps 100 years to provide full compensation.

Tucker also concluded that a majority of Virginia whites would be unwilling to accept any form of emancipation of slaves that led to equality for African-Americans or created potential social costs for remaining slaveholders such as increased poor relief or increased crime. Therefore, Tucker's plan proposed that blacks be stripped of all civil rights during the entire emancipation process, to minimize the perceived free black threat

---

[94] Ibid., 408.

to the white majority. He thought that if his proposal completely denied civil rights to blacks, this would encourage them to resettle elsewhere, but Tucker clearly opposed conditioning emancipation on resettlement, so his position on incorporation was directly contrary to Jefferson's. Judge James Sullivan criticized Tucker's civil rights denial proposal as politically unworkable, and apparently believed that there was no practical system that would lead to gradual abolition without unacceptable social costs to blacks, whites, or both. Sullivan argued that nothing could be done to change the current status of slaves without unacceptable cost to them or disruption to society, but that instead they should be educated for several generations before any effort to change their status was undertaken. John Adams's comments generally agreed with Sullivan's conclusion.

But Tucker's diligent efforts to find a way to make abolition palatable to the Virginia legislature were wholly unavailing. When he presented his plan to the legislature, it was rejected without debate in 1797, and Tucker received a perfunctory letter of thanks for his efforts. After the rejection, on August 13, 1797, Tucker wrote bitterly to Belknap, noting that none of the legislators even appeared to have read his proposal before rejecting it. He had "endeavoured to lull avarice itself to sleep" by making the proposal as gradual as possible, but "[n]obody was prepared to meet the blind fury of the enemies of freedom." The legislature had been split over a federal political issue, and either side would "probably" have been weakened "among its partizans" by a willingness to entertain a slavery proposal. But, he cautioned, "when I thus express myself, I must be understood as not cherishing the smallest hope of advancing a cause so

dear to me as the abolition of slavery. Actual suffering will one day, perhaps, open the oppressors' eyes. Till that happens, they will shut their ears against argument."[95]

The rejection of Tucker's plan was the death knell for voluntary slavery abolition not only in Virginia, but throughout the slave South. In a tragic irony, not long after Tucker wrote to Belknap that his plan had been rejected, Thomas Jefferson wrote to Tucker. Though Jefferson had done nothing to assist Tucker's efforts before the Virginia legislature or to support any other actual abolition proposal that did not include conditions that knowledgeable contemporaries deemed impossible to fulfill, Jefferson wrote that if the work of emancipation and colonization was not quickly begun, in view of the Santo Domingo uprising and European revolutionary currents, "we shall be the murderers of our own children."[96] The Tucker-Massachusetts correspondence, and the fate of the carefully thought out Tucker plan, showed that well before the purchase of Louisiana, anyone who made reasonable efforts to understand the politics of slavery would have been forced to conclude that unless effective federal action was taken to contain slavery, it would continue to grow in response to market demand. To avoid that result, abolitionists needed to confront the territorial expansion of slavery.

*New State and Territorial Creation*

As early as 1790 Congress began to admit new slave states and territories with almost no Northern opposition. This section considers the politics of such decisions. Congressional action in 1790 to create the territory that included the North Carolina

---

[95] Ibid., 428 (Tucker to Belknap, August 13, 1797).

[96] Jefferson to St. George Tucker, August 28, 1797, in Ford, *TJ Writings*, 7: 168, quoted in Robinson, *Slavery in Politics*, 97.

cession, the Southwest Territory, set a pattern for the creation of new territories by Congress during the 1790s and into the 1800s. Typically, Congress provided that such new territory would be governed as provided in the Northwest Ordinance of 1787, and then added provisions of local concern, such as the protection of various existing land claims in the case of the North Carolina cession. In creating the Southwest Territory, Congress also in effect agreed to except the territory from the operations of the Northwest Ordinance's slavery prohibition. This pattern of uncontested action argues strongly that contemporaries accepted that Congress had power to control slavery in the territories.[97]

The pattern of new state admission legislation was different, however. In the case of Vermont and Kentucky, the states were admitted as "new and entire" members of the Union, without any attempt to describe or limit their authorities.[98] As Henry Clay later noted, the admission of the two states seems to have been informally linked, because the equal size of their House of Representatives representation was established in one statute, and it maintained the sectional balance of power which delegates to the Constitutional Convention had clearly been concerned to maintain.[99]

The formal effect of the statehood admission formula chosen for Kentucky and Vermont was that the new states had popular sovereignty over slavery. But as a political matter, it was widely expected that Vermont would be a free state, as had been envisioned by its Constitution in 1777. It was also anticipated that Kentucky, which was

---

[97] Fehrenbacher, *Dred Scott*, 87.

[98] *An Act for the Admission of the State of Vermont into this Union*, (February 18, 1791), 1 Stat. 191, 1st Cong., 3rd Sess. (Vermont).

[99] *An Act declaring the consent of Congress, that a new State be formed within the jurisdiction of the commonwealth of Virginia, and admitted into this Union, by the name of Kentucky*, (February 4, 1791), 1 Stat 189, 1st Cong., 3rd Sess.; *Act of February 25, 1791*, 1 Stat. 191, 1st Cong., 3rd. Sess.

carved out of Virginia, would become a slave state. As Hammond found, local sentiment in Kentucky overwhelmingly favored slavery, and there were a considerable number of slaves there before the state was admitted to the Union.[100]

Tennessee, the next state admitted, was also expected to be a slave state based on the fact that slavery had existed there since it became United States territory. Tennessee was the first state created from a prior United States territory, and was explicitly admitted on an "equal footing with the original States, in all respects whatever" with other states. This meant, among other things, that Tennessee had full authority over slavery. But this use of "equal footing" contradicted the use of the term in the Northwest Ordinance, where "equal footing" did not include popular sovereignty over slavery. No challenge was made to Tennessee's admission where any aspect of slavery's growth was concerned. Although by 1796 nearly every state had barred foreign slave imports, there was no effort in Congress to bar slave imports to Tennessee, or to seek gradual abolition there.

The almost complete indifference of Northern Congressmen to the extension of slavery to Tennessee was strikingly symbolized by one of the very few references to slavery during the admission debate. Representative (and later Senator) Theodore Sedgwick of Massachusetts expressed surprise that there were slaves in the Southwest Territory, the area that was to become Tennessee, because he mistakenly thought that the Northwest Ordinance slavery bar applied to it. Sedgwick's comments show that he was unaware that that the Southwest Territory had been excepted from the operation of the

---

[100] Hammond, *Slavery, Freedom and Expansion*, 11-12.

slavery bar of the Ordinance in 1790, though he had been a member of Congress when that happened.[101]

But although slavery extension was not an issue during the Tennessee admission debate, there was a major fight in the House of Representatives over the admission of Tennessee and it appears to have continued another important pattern. Tennessee's admission quite likely was based on partisan—and also largely sectional—considerations. In the House vote to accept the report favoring Tennessee admission, in May, 1796, every state delegation that gave majority support to Tennessee's admission represented a state that later supported Thomas Jefferson for President.[102] Every state delegation whose majority opposed Tennessee's admission later supported John Adams for President.[103] In the admission debate, the House majority led by James Madison brusquely shouldered aside arguments that Tennesseans had intentionally conducted a fraudulent population count and that they were not entitled by the Northwest Ordinance to be automatically admitted as a state without any condition simply because they claimed 60,000 residents even if their state Constitution was defective in various respects.[104]

In the 1796 election, Jefferson became Vice President rather than President because he fell three votes short of Adams in the Electoral College. Both candidates received a largely sectional vote (a pattern reasonably similar to that of the 1800 presidential election). Without Tennessee and the additional sectional votes provided by

---

[101] 4 *AC*, 1307-07, 4th Cong., 1st Sess. (May 5, 1796). The 1790 House action creating the Southwest Territory had quietly exempted the area that became Tennessee from Article VI of the Ordinance. *Act of May 26, 1790*, 1 Stat. 123, 1st Cong., 2d Sess.

[102] 4 *AC* 1328-9, 4th Cong., 1st Sess. (May 6, 1796).

[103] Id.

[104] 4 *AC* 1308-9, 4th Cong., 1st Sess. 1308-9.

the operation of the Three-Fifths Clause, Jefferson would not even have come close to Adams in the Electoral College vote. And without the voting premium created by the Three-Fifths Clause, Tennessee would not have been admitted in 1796 in the first place.[105] These results provided dramatic evidence of the power of the Three-Fifths Clause premium in advancing candidacies supported by slave states and even in altering the sectional balance of political forces itself. But Congress's lack of interest in barring slavery expansion continued, as reflected in Congressional action regarding the Mississippi Territory.

In the debate over the 1798 bill to create the Mississippi Territory (a cession acquired finally from Spain by the 1795 Treaty of San Lorenzo), Congress refused by a very large majority to impose a ban on slavery in the territory. An amendment to ban slavery offered by Representative George Thatcher of Massachusetts was supported by a total of 12 representatives (out of 105 members). No recorded vote was taken on the amendment.[106] This was the last Congressional effort to bar slavery east of the Mississippi.[107] Historian Donald Robinson concludes that a sectional argument prevailed in this debate—that just as the Northwest Territory was reserved de facto to New England, so it was reasonable that Southerners should be able to settle Mississippi Territory, which they could not do if slavery was banned there.[108]

---

[105] The largely sectional House vote on admission, 41-35, meant that the report would have failed if the slave state representation had been reduced by elimination of the Three-Fifths Clause.

[106] As Hammond points out, the Administration supported permitting Mississippi territorial slavery, even though Administration officials included opponents of slavery such as Secretary of State Timothy Pickering. Hammond, *Slavery, Freedom and Expansion*, 23, 28-9.

[107] Fehrenbacher, *Dred Scott*, 89.

[108] Robinson, *Slavery in Politics*, 391.

Congress agreed to bar slave imports from outside the United States into the Mississippi Territory, but this restriction was clearly directed at the foreign source of the slaves, not at depriving the territory of a supply of new slaves, because the necessary slaves could readily be imported from within the United States. Several slave state representatives advocated permission for domestic slave imports as a means of pursuing diffusion to protect slaveowners against rebellions.[109] In reality, the foreign import ban may have been imposed primarily to improve the economic position of domestic slave traders by protecting them from competition, though it also reflected Santo Domingo slave rebellion fears.[110] An overwhelming Congressional majority supported the growth of slavery in Mississippi Territory, as long as it could be settled with "safe" slaves.

The foreign import ban imposed on the Mississippi Territory was patently unenforceable. There were no criminal penalties provided by the statute for illegal importation, an omission which by itself guaranteed smuggling would occur if market conditions made it profitable. The statute's provision for civil anti-smuggling enforcement before territorial courts by citizens was unlikely to be effective, because the statute would be practically unenforceable unless territorial residents themselves decided that foreign slave imports should be prevented.[111] Historians have concluded that the bar was ineffective.[112]

---

[109] Adam Rothman, *Slave Country: American Expansion and the Origins of the Deep South* (Cambridge: Harvard University Press, 2005), 25.

[110] Du Bois, *Slave Trade*, 88.

[111] *Act of April 7, 1798*, 1 Stat. 549-551.

[112] Adam Rothman, "The Expansion of Slavery in the Deep South, 1790-1820," Ph.D. diss., Columbia University, 2000, 46; see also, Rothman, *Slave Country*, 26.

*The Louisiana Purchase and Republican Expansion*

But it was the debate over the Louisiana Purchase and the related dispute over organization of the territory that brought both old and new concerns surrounding the growth of slavery during national expansion to a head.[113] Jefferson saw Louisiana as a major national and international policy issue. In addressing it, he wanted to avoid a change in United States policy toward Europe and to avoid military action involving Louisiana, but he wanted to obtain at least the core of the Louisiana territory, which would necessarily raise the question of slavery's status there. At the outset, Jefferson had to mesh his republican approach to expansion with geopolitical realities and domestic political pressures on Louisiana.

Jefferson's purchase of Louisiana was undertaken in part as a form of national self-defense, because he believed that it was unacceptable for the United States to have France as a long-term territorial neighbor. Jefferson wrote to his Minister to France Robert Livingston in the Spring of 1803 that "the session of Louisiana...by Spain to France works most sorely on the U.S....It compleatly reverses all the political relations of the U.S. and will form a new epoch in our political course." New Orleans was a fertile

---

[113] For accounts of the Louisiana Purchase and the politics of slavery see, John Craig Hammond, *Slavery, Freedom and Expansion in the Early American West* (Charlottesville: University of Virginia Press, 2007), 30-54; Robinson, *Slavery in the Structure of Politics*, 392-400; Fehrenbacher, *Slaveholding Republic*, 259-90; Adam Rothman, *Slave Country: American Expansion and the Origins of the Deep South* (Cambridge: Harvard University Press, 2005), 26-34; Peter J. Kastor, *The Nation's Crucible: The Louisiana Purchase and the Creation of America* (New Haven: Yale University Press, 2004). On the constitutional issues raised by the Louisiana Purchase, see Everett S. Brown, *The Constitutional History of the Louisiana Purchase* (Clifton: August M. Kelley, 1972 (repr. of 1920 ed., Univ. Cal. Press)); Gary Lawson and Guy Seidman, "The First "Incorporation" Debate," in *The Louisiana Purchase and American Expansion*, ed. Sanford Levinson and Bartholomew H. Sparrow (Lanham: Rowman and Littlefield Publishers, Inc., 2005). On the broader historical ramifications of the Purchase see Peter S. Onuf, "'The Strongest Government on Earth': Jefferson's Republicanism, the Expansion of the Union, and the New Nation's Destiny," in *The Louisiana Purchase and American Expansion 1803-1898*, ed. Sanford Levinson and Bartholomew H. Sparrow (Lanham: Rowman and Littlefield Publishers, Inc., 2005).

area that "will ere long yield more than half of our whole produce and contain more than half our inhabitants."[114] Jefferson added that whatever country possessed New Orleans would become the "natural and habitual enemy" of the United States. "The day that France takes possession of N. Orleans...we must marry ourselves to the British fleet and nation," joining Britain in an effort to control the Atlantic ocean.[115] Jefferson was not alone in regarding French control of Louisiana as a national calamity: a Charleston Federalist newspaper, the *Courier*, announced that French possession of the territory would lead to "the dismemberment of [the American] empire, and the dissolution of our union thereby being affected [*sic*]."[116]

Jefferson was also under political pressure to make the Purchase to avoid military action over Louisiana. Many Americans shared Alexander Hamilton's view that Louisiana should be taken from France by force if necessary, but Jefferson and the Republicans opposed such action.[117] Republican opposition was based in part on traditional concerns about to the danger to civil democracy if American military power increased, such as those expressed by New York Senator De Witt Clinton. But it was also

---

[114] From Jefferson's discussion, it appears that he used "New Orleans" to refer to both the city and the surrounding territory.

[115] TJ to Robert Livingston, April 18, 1802, Ford, *TJ Writings*, 8: 143-7. The letter reflects Jefferson's clear appreciation of the profound geopolitical significance of Louisiana. Although Jefferson undoubtedly regarded a British alliance as a last resort, he deliberately conveyed to Livingston his willingness to fundamentally alter United States policy if necessary to end French control of New Orleans. In a sign of Jefferson's earnestness, the letter begins with Jefferson's explanation of a special cipher he wanted Livingston to use for further communications with him.

[116] Charleston S.C. *Courier*, January 11, 1803, quoted in Shugerman, "South Carolina's Reopening of the Slave Trade," 272.

[117] For an excellent account of the Republican philosophy underlying the acquisition of Louisiana and American expansion during this period generally, see Peter S. Onuf, "The Expanding Union," in *Devising liberty: preserving and creating freedom in the new American republic*, ed. David T. Konig (Palo Alto: Stanford University Press, 1995), 50-80.

based on the broader Jeffersonian view that creating a republican "empire of liberty" must occur without force or coercion, through "pacific and open negociation" which would lead to freely chosen association between Americans and new territories.[118] In the event, Napoleon was willing to sell, cheaply, far more territory than Jefferson had originally planned to buy. The United States was also likely to be able to acquire Louisiana without facing powerful conflicting claims to it.[119]

Thus, the residents of the new territory created from the Louisiana Purchase were to a considerable extent probably going to have to live with the government the United States chose to give them. Jefferson's negotiators, who included Robert Livingston, brother of Louisiana leader Edward Livingston, made accepting this unpleasant reality much easier for local residents by using the existence of slavery in Louisiana as a principal reason why France should sell the territory to the United States. Livingston argued that the United States could supply the territory with slaves to aid settlement while

---

[118] Id.

[119] The relatively small numbers of residents of the purchased territory area that ultimately became Louisiana (roughly 15,000 whites) were probably incapable of mounting a successful military rebellion against the United States without foreign assistance. France's desperate and worsening financial condition made it unlikely that France would have supported them. The Spanish government, an empire "on its last legs," had already indicated its strong inclination to decline further American territorial expansion in the area in the Pinckney Treaty, and by its cession of Louisiana to France. Sean Wilentz, *The Rise of Democracy: Jefferson to Lincoln* (New York: W.W. Norton & Co., Inc., 2005), (quotation) 108; Thomas A. Bailey, *A Diplomatic History of the American People*, 8th ed. (New York: Meredith Corporation (Appleton Century Crofts), 1969), 113. Spain chose not to oppose the French sale to the United States, despite being in actual possession of the territory. A recent historian concludes that "after 1803 the Spanish posed no threat to the United States. They were helpless to prevent the crumbling of their tenuous foothold in North America...France, had retreated from North America...." Robert Kagan, *Dangerous Nation* (New York: Alfred A. Knopf, div. Random House, Inc., 2006), 135. Britain had agreed to abandon important mainland interests in Jay's Treaty. Britain was willing enough to leave the scene that British bankers were permitted to float the massive bond issue that financed the American purchase of Louisiana. Bailey, *Diplomatic History*, 108 n. 9. By 1803 the major European empires were steadily withdrawing from the eastern half of the North American mainland as a scene of imperial contest. J.H. Elliott, *Empires of the Atlantic World: Britain and Spain in America, 1492-1830* (New Haven: Yale University Press, 2006), 399-400; Robert Kagan, *Dangerous Nation* (New York: Alfred A. Knopf, div. Random House, Inc., 2006), 135.

France could not.[120] Remarkably, Livingston had been assured that permitting increased slavery in the southern United States would not mean an increased risk of rebellion in an extensive analysis written by Tench Coxe.[121] As Secretary of State Madison's negotiating instructions required, Jefferson's negotiators agreed in the treaty they negotiated with France to respect all existing property rights of the residents, which was commonly understood to include their slaves, and also that residents should be "incorporated in the Union of the United States as soon as possible."

Quite apart from its national security ramifications, a very significant part of the popularity of the Louisiana Purchase was based on the general enthusiasm arising from the belief that such a vast new territory promised a major new source of wealth to the American people.[122] As the Charleston *Courier*, which had earlier advocated military annexation of Louisiana, said: "The mind of man can scarcely prescribe bounds to the probable greatness and glories of a vast nation, extending from the Atlantic to the Pacific ocean."[123] These golden dreams had a specific focus in the slave states. Based on the course of negotiations and the terms of the Treaty dictated by the Jefferson Administration, which France accepted virtually without change, many Americans in those states eagerly anticipated that Louisiana would become slave territory.

---

[120] Shugerman, "South Carolina's Reopening of the Slave Trade," 272-3.

[121] Tench Coxe to Robert Livingston, June 10, 1802, discussed in Rothman, "Expansion of Slavery," 37-9. Coxe was a Pennsylvania politician who was an official of the Pennsylvania Abolition Society as early as 1787 and served in both the Washington and Jefferson Administrations.

[122] Onuf, "The Expanding Union."

[123] Charleston (S.C.) *Courier*, January 15, 1803, quoted in Shugerman, "South Carolina's Reopening of the Slave Trade," 272.

South Carolinians in particular were so excited about the expansion of America's empire that their legislature agreed to reopen the South Carolina slave trade in anticipation of the creation of the new territory. As historian Jed H. Shugerman argues persuasively, a major reason for the reopening of the slave trade was the prospect of increased business for the Charleston slave trade and the ability of Carolinians to invest in Louisiana slave plantation property. Accordingly, South Carolinians—especially the largely Republican back country representatives in the legislature—sharply changed their positions on the desirability of permitting slave imports once the Louisiana Purchase was clearly in prospect.[124] In view of the promises of great wealth and sharply increased national security, the proposed Purchase was enormously popular, but a hardy band of New England Federalists nevertheless fought an obviously losing battle against it.

Federalist opposition to the Purchase Treaty was based in part on "Country party" concerns about fiscal imprudence and republican over-extension and the consequent need for a standing army, but also in significant part on concerns over loss of Northern political influence. The Treaty's Article III "incorporation" provision was commonly understood to guarantee that Louisiana would be granted statehood, but the treaty hedged about when and how this would occur. Federalist Treaty opponents such as Senator Uriah Tracy of Connecticut opposed it on the basis that the Constitution was a compact among the original states, so that a treaty could not constitutionally authorize Congress to admit a new state from foreign territory by majority vote.[125] Tracy admitted that the

---

[124] Ibid, 274-80. In his classic work on the slave trade, W.E.B. Du Bois concluded that the Louisiana Purchase was one of the causes of the reopening of the trade. Du Bois, *Suppression of the Slave Trade*, 84-5.

[125] Everett S. Brown, *The Constitutional History of the Louisiana Purchase* (Clifton: August M. Kelley, 1972 (repr. of 1920 ed., Univ. Cal. Press)), 68-9.

underlying basis for his opposition was that "the relative strength which this admission [of Louisiana territory] gives to a Southern and Western interest, is contradictory to the principles of our original Union."[126]

By 1803, Rufus King had served as a New York Senator and as Ambassador to Great Britain, and had returned to the United States as a private citizen but remained a prominent political figure. King objected to the Purchase on largely sectional political grounds. It would create new states where the Three-Fifths Clause would apply, which conflicted with King's view that the Three-Fifths Clause should not apply to any jurisdiction that was not part of the original states. King wrote to Senator Timothy Pickering of Massachusetts that the free states had "injudiciously" agreed to the Three-Fifths Clause because "taxation and representation are inseparable" and because they had mistakenly believed that direct taxation would finance the government. King suggested that perhaps the Constitution should be amended on that point.[127] The fact that there was no prospect of success whatsoever for such an amendment effort may suggest either that King's political judgement was flawed or that he thought opposition to the Three-Fifths Clause would be good politics. Pickering adopted King's reasoning when he objected to the Purchase on the ground that Louisiana would chiefly employ slave labor, and that the sectional political balance would therefore be altered.[128] Such advocacy of the need to

---

[126] Ibid., 69, quoting *A C*, 8th Cong., 1st sess., 54-6.

[127] Rufus King to Timothy Pickering, November 4, 1803, *LCRK*, 4: 324. King had had second thoughts about the Three-Fifths Clause since playing a key role in its adoption at the Convention and defending it on what he knew were spurious grounds during ratification. King abandoned even his 1803 position that "taxation and representation are inseparable" during the Missouri controversy.

[128] Howard A. Ohline, "Politics and Slavery: The Issue of Slavery in National Politics, 1787-1815," Ph.D. diss., Univ. Oklahoma, 1969, 355.

maintain a sectional balance of power, also expressed vociferously by Josiah Quincy, Jr. during the Louisiana purchase debate, was dismissed as "reactionary" by Republicans at the time.[129]

Treaty opponents lost the vote on the Treaty by a wide margin, since the Treaty divided even Northern Congressmen. The Senate supported the Treaty by a vote of 24-7, and on the critical vote on Treaty funding, the Senate voted 26-5 in favor. Funding opponents were Federalist Senators from three Northern states, about half the Senate Federalists. [130] Virtually all the House of Representatives opposition to the Treaty came from New England, and even the New England representatives were divided on the issue.[131] Alexander Hamilton supported the Treaty, and its popularity helped reduce the Federalists to "sectional impotence."[132] But agreement on the Treaty meant that Jefferson and Congress had to confront territorial organization issues, including slavery.

Strong support for slavery expansion in Louisiana existed in slave states such as South Carolina and Virginia. Opposition to its expansion had formed part of the basis for Northern opposition to the Treaty. Historian John Craig Hammond shows that there was also clearly strong local support in Louisiana for the continuation and expansion of slavery there.[133] In planning the proposed territorial government, Jefferson supported the continuation and expansion of slavery in Louisiana, but a significant number of

---

[129] Onuf, "The Expanding Union," 79.

[130] 8 *AC* 73, 8th Cong, 1st Sess. (Nov. 3, 1803).

[131] Robinson, *Slavery in Politics*, 395. The House implementation vote was 90-25.

[132] Bailey, *Diplomatic History*, 112, 114.

[133] Hammond, *Slavery, Freedom and Expansion*, 32-36.

Congressmen had different views. Congress's views about the proper government of the new territory were also markedly different from Jefferson's.[134]

As noted, Jefferson's and Madison's instructions to the negotiators with France guaranteed the continuation of slavery in the territory by requiring the preservation of existing rights. Jefferson intended that only whites would be citizens of Louisiana, despite his awareness of the presence of some 1500 free blacks there.[135] He made sure that Senators understood that he warmly supported his proposal that part of the territory be used to resettle Indians (who would be self-governed under his proposal), and to segregate them from whites.[136] But despite Jefferson's continuing rhetorical support for slave colonization, he did not propose the use of any part of the Purchase for that purpose.

Jefferson proposed that it be permissible for slaves to be imported into Louisiana from parts of the United States that had banned foreign slave imports (so that only "safe" creoles would be imported to Louisiana).[137] It may be that, as historian William Freehling concludes, Jefferson had shifted his thinking and sincerely believed in diffusion as a form of enlightened slavery policy. But as Freehling notes, Jefferson apparently always thought that diffusion must be followed by colonization before abolition could occur. This condition meant that as a practical matter abolition would never occur, particularly

---

[134] See Robinson, *Slavery and Politics*, 392-400; and the Plumer Memorandum (Brown, *Constitutional History*, Appendix). See also Ohline, "Politics and Slavery," 353-398.

[135] Robinson, *Slavery in Politics*, 396.

[136] Senator Jackson described Jefferson's position on Indian land exchange as a "favorite measure of the President's—he has assured me so." Brown, *Constitutional History*, 233.

[137] Brown, *Constitutional History*, 97, quoting TJ to Albert Gallatin, November 9, 1803.

in Louisiana.[138] Thus, Jefferson envisioned Louisiana as a white man's republic, where slavery expansion using "safe" slaves would have been a matter of local choice. But some Congressmen favored a different policy.

In considering the territorial government issue, the Senate debated and rejected an amendment by Senator James Hillhouse of Connecticut that would have led to very gradual abolition of slavery in Louisiana. The 17-11 vote against this Hillhouse proposal is instructive about slavery expansion politics, since it failed because both Republicans and Federalists from Northern states split almost evenly on it, while slave state Senators virtually all voted against it. Northern Senators who went on to acclaim as antislavery leaders, such as John Quincy Adams, voted against the proposal. In a comment typical of the sentiments of many Northern citizens, Adams explained that "slavery in a normal sense is an evil; but as connected with commerce it has important uses."[139] Nearly two-thirds of the Northern votes against the proposal were cast by Senators from states that had already undertaken abolition, suggesting that countervailing considerations, such as support for vested rights or local freedom of choice, were at stake in this vote.[140]

The Senate then agreed to prohibit foreign slave imports to Louisiana, and restricted domestic imports except when slaves accompanied bona fide new residents and had been imported prior to 1798 (thus being "safe"). The Senate action reflected

---

[138] William W. Freehling, "The Louisiana Purchase and the Coming of the Civil War," in *The Louisiana Purchase and American Expansion 1803-1898* (Lanham: Rowman and Littlefield Publishers, Inc., 2005), 68, 72.

[139] Brown, *Constitutional History*, Appendix, 215.

[140] Similar sharp divisions occurred in the northern Congressional delegations during the February, 1804 efforts to impose a $10/slave tax on imported slaves after South Carolina's 1803 reopening of the slave trade, and in the 1805 vote to require gradual abolition in the District of Columbia. In each case, the New England states cast half or less of their votes in favor of abolitionist-supported proposals. New York and Pennsylvania representatives, by contrast, voted far more heavily in favor of these proposals.

widespread Congressional fears about insurrections that might result from the growth of the American slave population, and about the potentially dangerous effects of permitting slave imports from areas such as the West Indies. The dominant concern of Senators was to prevent "another Santo Domingo," not to end slavery. The foreign slave import ban passed by a very large majority, since many Senators, including slave state Senators, changed sides from their vote on gradual abolition. There were several factors that contributed to the creation of a broad coalition supporting this goal.

Several Southern and western Senators advocated limiting slave imports to domestic imports as a policy that would diminish the risk of slave rebellions, serving as a "pressure valve for the East" that, some of them hoped, would perhaps also lead to better conditions for slaves and possible future emancipation.[141] Clearly, in the short run, they believed that diffusion would increase security for American slaveowners in states outside Louisiana.[142] Even South Carolina in reopening its trade had barred slaves from the West Indies, recognizing the security risks of foreign importation from those areas.[143] Senators also sought by the bar to prevent South Carolina's slave trade reopening from becoming a general reopening of the African trade to the United States (which it became despite the Senate's efforts). But despite broad support for restrictions, concerns were raised about their enforceability during the Senate debate.

Senator Samuel Smith of Maryland predicted during the debate on the Hillhouse proposal that the proposed import ban—and the requirement that new slaves be

---

[141] Kastor, *The Nation's Crucible*, 51.

[142] Adam Rothman, "The Expansion of Slavery in the Deep South, 1790-1820," Ph.D. diss., Columbia University, 2000, 50, 52-3. (Breckenridge and Smith statements).

[143] Ibid., 42.

accompanied by masters who intended to reside in Louisiana—would be unenforceable and would cause a local rebellion: "the local people will not submit to it. I[t] will render a standing army necessary."[144] There was no Senate support for a standing army to enforce antislavery provisions, and such a policy would have violated the basic tenets of republican expansion in any event. If Senator Smith was correct, Congress would have to abandon its effort to control slavery in Louisiana. But Senate policy divisions about the organization of Louisiana were not limited to the issue of slavery. The Senate also disagreed with Jefferson about the proper form of territorial government there.[145]

Jefferson's proposed temporary government for the Louisiana area was essentially a Presidential dictatorship, in which he or his appointees would appoint all of the significant territorial officials, who in turn would administer the territory without a legislature. Even white residents would be denied jury trial rights in all but capital cases, and would lack any voting or other basic civil rights. This form of government followed logically from Jefferson's patronizing view that Louisianans were "as yet incapable of self-government as children...."[146]

Many Congressmen were unhappy with Jefferson's proposed departure from the Northwest Territory model for territorial organization in favor of a markedly more "colonial" government. Jefferson's proposal violated republican principles as Northern Congressmen like John Quincy Adams understood them, because residents would have

---

[144] Senator Samuel Smith of Maryland, January 31, 1804, in Brown, *Constitutional History,* 223.

[145] The House adopted an amendment to prevent the introduction of any slaves into Louisiana, but it was rejected in the House-Senate conference. There were no yeas and nays on the House amendment, though there was a recorded vote tally; the House divided 40-36. Howard A. Ohline, "Politics and Slavery: The Issue of Slavery in National Politics, 1787-1815," Ph.D. diss., Univ. Oklahoma, 1969, 380.

[146] TJ to De Witt Clinton, December 2, 1803, Ford, *TJ Writings*, 7: 283.

had no role in the territory government and because local residents would have been deprived of many accepted civil rights. One Senator described the Administration's proposal as a "military despotism," another as a "system of tyranny." But, like Jefferson, many Congressmen did not trust Louisianans to run their own government or to make prudent decisions in the national interest if they did. Repeated efforts to alter the Louisiana government organization bill to permit the election of members of a territorial legislative council were defeated. Louisiana residents were to be denied the right of suffrage entirely.

The Senate divided sharply over whether Louisiana residents should have the right of jury trial not just in capital cases but in all criminal cases, but even there the Senate ultimately accepted the Administration position. A majority of the Senate also agreed that no free black should be permitted to serve on a jury in the territory.[147] Since territorial residents were already denied the right of suffrage, the denial of jury service rights to free blacks amounted to a complete denial of key civil rights to free blacks in the territory, which was consistent with Jefferson's proposal to deny citizenship to blacks there.

The sharp controversy in Congress about territorial government organization ultimately divided the House and Senate.[148] The House adopted a two-year time limit on the legislation, "on account principally of the great powers conferred on the Executive" by the bill.[149] The result was that a House-Senate conference provided that the legislation

---

[147] According to Senator Plumer's notes, most Senate Democrats supported denying free blacks the right to serve on juries.

[148] Robinson, *Slavery in Politics*, 397.

[149] 8 *AC* 1198-99, 8th Cong., 1st sess. , March 16, 1804.

would not even go into effect for a year. If and when it ever went into effect, the operation of the temporary government provisions was subject to a "sunset" provision: they were limited to a term defined as one year plus any time remaining in a subsequent session of Congress. These provisions were designed to kill the legislation. The clear expectation of supporters of the compromise was that the legislation would be reconsidered by the next Congress, and would not become operative law—and it never did.

Predictably, local residents of Louisiana territory were unhappy about the new law. Both the law's government provisions and its restrictions on slavery were deemed unacceptable by local interests. Historian John Craig Hammond argues that local opposition meant that the federal government was powerless to do anything but repeal it.[150] But the circumstances of the law's adoption and revision suggest an alternative possibility.

Before Congress reconsidered the legislation, a delegation of Louisianans had visited Congress and various Administration officials in Washington to discuss their objections to the law. Senator William Plumer's notes of his meeting with the Louisianans state that they were "gentlemen of the first respectability" who "resemble[d] New England men more than the Virginians." Plumer's notes contain no reference to the Louisianans' having raised the subject of slavery, but say they instead complained of the lack of a representative government and incompetent Jeffersonian administrators.[151]

---

[150] Hammond, *Slavery, Freedom*, 46-51.

[151] Everett S. Brown, ed., *William Plumer's Memorandum of Proceedings in the United States Senate 1803-1807* (New York: The Macmillan Company, 1923), 222-4.

Jefferson met with the Louisiana representatives but took a "hands off" position, claiming that the territorial issue was up to Congress, and then formally requested that Congress consider their complaints.

A House committee reported on January 25, 1805 concerning the complaints of the citizens of Louisiana. Representative John Randolph of Virginia presented the report, which concluded that there were only two ways to get people situated as the Louisianans were to obey: force and affection. He continued by expounding the republican theory of expansion: the use of force is "repugnant to all our principles and institutions of Government."[152] The Committee therefore recommended that residents of the territory should be permitted to make their own "internal government regulations," a phrase that at the time was commonly understood to include local control over slavery. The Committee recommended that Congress continue the bar on foreign slave imports.

The Senate reconsidered the territorial issue based on a bill introduced by Senator William Branch Giles of Virginia, Jefferson's de facto Senate floor leader. The Giles bill contained no domestic slave trade restriction, and an ineffectual foreign slave trade restriction (since, among other things, slaves imported through South Carolina could then be sold into Louisiana), but also provided a Northwest Ordinance-style government for the territory.[153] Senator Hillhouse supported it. Senator Hillhouse's abrupt abandonment of his strongly antislavery position suggests that in the interim a political bargain had

---

[152] 8 *AC* 1016, 8th Cong., 2nd Sess..

[153] Historian Howard Ohline found that Quakers tried to preserve the restrictions of the 1804 legislation by memorializing Congress. The Senate agreed to receive the memorial, but a motion to refer it to the Committee managing the Louisiana bill lost on a 14-14 vote. After this debate, Senator Plumer wrote: "This very subject of Negro slavery will I am convinced eventually produce a division of the United States." Brown, *Plumer Memorandum*, 250-1, discussed in Ohline, "Politics and Slavery," 386-7.

occurred on some issue. It is unknown what issue was involved, but it may have been the Administration's willingness to accept a more republican form of government for the territory which the new legislation contained. The new Orleans territory government was modeled directly on that of Mississippi Territory, thus following the Northwest Ordinance model.[154]

In the final Louisiana government legislation, Congress and Jefferson had knowingly opened the floodgates to Southwestern slavery. There was no question that the federal government had the constitutional power to bar slavery and slave imports in Louisiana, and little doubt that it had the power to enforce its decision to do so over local opposition. But it is equally clear that the federal government lacked the political desire to take the unpalatable law enforcement steps necessary to impose its will on recalcitrant local residents by subjecting them to a "colonial" government in the face of their desire for more slaves, and the equally strong desire of existing slave state residents to trade slaves to Louisiana and to invest in slavery there. Americans' avid pursuit of territory employing the ideal of "republican" expansion inevitably entailed the growth of western slavery.

As their dreams of state and federal antislavery action collapsed in the face of early westward expansion, abolitionists knew they faced a daunting task. By 1804, a leading Northern abolitionist anticipated that abolition might take 100 years or more, "though every fair exertion shall be made...."[155] Before the 1808 foreign slave trade

---

[154] *An Act further providing for the government of the territory of Orleans*, (March 2, 1805) 2 Stat. 322 (8th Cong., 2d Sess.); *An Act further providing for the government of the district of Louisiana*, (March 3, 1805), 2 Stat. 331.

[155] Speech of William Griffith, President of New Jersey Society for Promoting the Abolition of Slavery, 1804, quoted in Davis, *Slavery in Revolution,* 315.

prohibition went into force, acting with broad Congressional support from all regions, the federal government had permitted slavery to become established irreversibly in the Southwest. During the founding generation, the Constitution's text and political structure had successfully protected slavery's market-driven expansion. In a country governed by such a Constitution, a national commitment to republican expansion made slavery's southwestward movement virtually unstoppable.

# 6

# THE MISSOURI COMPACT

*Introduction*

The Missouri Controversy of 1819-1821 was a dramatic economic and political struggle between America's Northern and Southern sections over their westward expansion. That dispute necessarily implicated slavery. But the stakes were higher still: the Controversy was also a bitter battle for long-term national political control. The lacerating strife ended only when, as the Pennsylvania Abolition Society declared in petitioning Congress against the Compromise, for "the first time" Congress gave "a solemn and deliberate sanction" to "the continuance of domestic slavery."[1] Recognizing slavery as a permanent national institution, the Missouri Compromise formally divided parts of the West into free and slave territory.[2] A major price of continued Union was

---

[1] Pennsylvania Abolition Society, Petition to Congress, April 13, 1820, Gilder Lehrman Collection (New York: NYHS), opposing the first Missouri compromise and advocating rejection of Missouri statehood. Gilder Lehrman Collection, New York Historical Society (GLC 00777). This was the same way Rufus King characterized the outcome. See Rufus King to Robert Troup, February 29, 1820, Charles King, *The Life and Correspondence of Rufus King*, 6 vols. (New York: G.P. Putnam's Sons, 1897)(hereafter, *LCRK*), 6: 284-6.

[2] There were technically two Missouri compromises. The first occurred in 1820, when Congress agreed to admit Maine as a state, permitted Missouri to draft a constitution without a slavery restriction, and provided that slavery would be "forever prohibited" in territory within the Louisiana Purchase and north of 36' 30" north latitude but outside the state of Missouri. Glover Moore, *The Missouri Controversy 1819-1821*, repr. 1953 ed. (Gloucester: Peter Smith 1967), 88-9, 100. The 1821 compromise provided that Missouri would be admitted when the President determined that it had agreed that neither its state constitution or any of its laws would be construed in a manner that would violate the Constitution's Privileges & Immunities Clause. Ibid., 155.

the expansion of slavery for another two generations. But the Compromise temporarily resolved only the Controversy's economic dimension. The deeper political and constitutional contest ended in deliberate stalemate. This stalemate created a fragile equilibrium that thoughtful politicians recognized had transformed the Constitution into a sectional compact on slavery, since the Constitution lacked agreed upon moral foundations, allocations of political authority between levels of government, or constitutional dispute resolution procedures where slavery was concerned.[3]

The Compromise resulted from the collapse of the Northern state coalition opposed to slavery expansion when critical members abandoned it. Key New York Bucktail Republicans led by Martin Van Buren allied themselves with the slave states in opposition to "restriction" (i.e., Congress's power to bar slavery in Missouri). The sources suggest that Van Buren and his followers were strongly motivated by Jeffersonian republican principles and by New York partisan political struggles in making that alliance. Strongly antislavery Northern politicians such as Senator Jonathan Roberts of Pennsylvania reluctantly concluded that restriction was a partisan (or New York) plot led by New York Senator Rufus King.[4] Others such as Representative Henry Baldwin of Pennsylvania concluded that the Constitution barred restriction. Forced to

---

[3] I thank Patrick Griffin for suggesting this chapter title.

[4] King, a prior and potential future Federalist candidate for President, played an equivocal role during the controversy, unable to dispel persistent doubts about his true motives even while advancing apparently sincere religious nationalist claims against slavery. Some contemporaries saw King's central positions during Missouri as inconsistent with his prior actions while a delegate to the Constitutional Convention and strong supporter of it during ratification. Other contemporaries King needed as allies found him a "cunning" opportunist rather than a principled statesman, the precise opposite of the way he saw himself. Still other contemporaries, such as Martin Van Buren and John Quincy Adams, seem to have thought King's political judgement was sometimes flawed, again quite the opposite of the way he saw himself. For background, see Robert Ernst, *Rufus King: American Federalist* (Chapel Hill: University of North Carolina Press, 1968).

choose, leading "doughface" politicians supported compromise based on principles they deemed critical to preserving a federal republican Union.

The Constitution and its history served as a focal point for Congressional debate over Missouri, but the Constitution's provisions for resolving disputes played no role in resolving any of the Missouri issues. There were no federal appellate or Supreme Court precedents interpreting the Constitution or the law of slavery to provide meaningful guidance to leaders. Proposals for judicial resolution of the constitutional issues that divided them were quickly dismissed. The merits of clashing arguments about the constitutionality of the restrictionist position proved largely irrelevant absent a workable constitutional mechanism for resolving the dispute.

Even more troubling, the Controversy led to the sharp restatement of a Constitutional antinomy—two utterly irreconcilable visions of the moral foundation of the Constitution and of nationhood. One vision, advanced by leading Senators such as Rufus King, saw the Constitution as grounded on a "higher law" whose source was religious. For them, the Constitution embodied a religious mandate to expand freedom by ending slavery expansion, even if this broadened federal power over states. The higher law arguments made at the state level by Pennsylvania antislavery advocates in the 1790s had been nationalized. These leaders envisioned a unified morally transcendent nation.

For adherents of the alternative moral vision, the Constitution was grounded on popular consent alone. Following Jefferson, advocates of this strain of secular republicanism such as the Van Buren Bucktail Republicans viewed the Constitution as a charter to expand freedom by progressively broadening popular sovereignty. Human

liberty was subject to decisions made by republican governments grounded on such popular consent, without regard to whether popular decisions expanded slavery or not. In their vision, the nation was a federal Union of states whose principal purpose was to protect the liberty of its citizens by maintaining an unchanging balance of federal and state powers as the Union expanded.

The Missouri controversy revealed that neither side could offer compelling proof that its vision of the Constitution was the one true vision given America's history. Despite their proclaimed universality, the diametrically opposed visions were ultimately only persuasive to majorities within the sections from which they originated. But these conflicting Constitutional visions had extraordinarily divisive political consequences. If valid, the principle of restriction opened the door to a sharp expansion of national power over the government of new states. Restriction threatened to create permanent American colonies, repeating the pattern of British imperialism. Unrestrained national authority over new states was anathema to adherents of the Jeffersonian-Madisonian vision of equal footing for all states, which they saw as a core Revolution principle.

The Missouri controversy revealed the profound limitations imposed on national politics by the Constitution's essentially unalterable political structure on slavery. Leading Northern restrictionists such as United States House of Representatives Speaker John W. Taylor were painfully aware that the Missouri compromise was not a "constitutional" compromise because Congress could repeal it at will. Northern restrictionists were equally well aware that the slave states strongly desired further geographical expansion of slavery into territories not yet acquired by the United States. Slavery's foreseeable further expansion after the Compromise meant that it would be

only a matter of time until the slave states sought its repeal. But the Constitution provided no politically feasible means of making the Missouri compromise permanent. The Constitution left the North no alternative other than disunion to achieve a better settlement or even to protect the one it negotiated. This Hobson's choice provided precisely the protection to slavery that the Constitution's Southern supporters had sought from it.

Northern leaders proved unwilling to engage in a showdown over the Union after they failed to derail the Compromise. They "blinked" for a simple reason. In a continuation of the Early Republic historical pattern, their constituency, the Northern public, lost interest in blocking western slavery expansion as soon as slavery had been excluded from the North's preferred settlement path and the problem of barring free blacks from Missouri (and hence, the North) had been "solved." John Quincy Adams expressed this well in analyzing New York Senator Rufus King's lack of interest in continuing the fight over Missouri during its second phase in 1820-21: "Upon the Missouri Question he [Mr. King] has much cooled down since last winter....[H]e has discovered that the people of the North...flinch from the consequences of this question, and will not bear their leaders out."[5]

Despite their awareness of the Compromise's enormous limitations and fragility, Northern leaders adopted the same political strategy in making the Compromise that their representatives had followed on slavery in negotiating the Constitution thirty years earlier. The North temporized. Despite their rhetoric, its leaders failed to heed abolitionists' repeated warnings that slavery had reached an absolutely critical juncture in

---

[5] *LCRK*, 6: 300, quoting John Quincy Adams, *Memoirs*, 5: 206.

its development where they must contain it if they were ever to abolish it. John Quincy Adams fecklessly told his diary that the country would have been better off if dissolution had occurred, followed by a negotiation for a new Constitution. Adams's diary was as far as his actions went; his presidential ambitions hung in the balance. The North deferred the "poisonous" problem of slavery's expansion for further generations, inevitably casting slavery's growing burdens and the horrors of war on millions of its children and grandchildren, those of the slave states, and generations of slaves and their children as well.

One aspect of the sectional power struggle over Missouri was a second dispute that nominally concerned the right of black Americans as citizens to emigrate to Missouri. In theory, this dispute was resolved by the second Missouri compromise of 1821 that attempted to prevent Missouri from barring the emigration of free blacks there. But prominent Northern antislavery leaders attacked Missouri's original bar not to protect black rights but because they saw free black emigration as an "evil" that must be borne by Missouri in return for receiving the "benefits" of slavery. Key Northern states moved to deny black political rights at home even as they advocated far less important rights for them in faraway Missouri. An unavoidable consequence of continued Northern antislavery action was the sociopolitical degradation of free blacks.

The Missouri controversy's sectional war made the slaveholders' Union permanent. The searing experience of sectional division forced the most thoughtful members of the rising generation of politicians to accept the truth of George Washington's profound insight: in American politics, the only alternative to inter-regional alliances was sectional parties. The formation of sectional parties inevitably

meant that disunion would follow. Despite Madison's hopes, the Constitution could not prevent sectional alliances or peacefully resolve sectional controversies. The struggle therefore laid the political foundations for the Second Party System.[6] The partisan realignment that occurred after 1828 concealed from public scrutiny—but did nothing else to alter—these fundamental dynamics of American Constitutional politics. As Jefferson and others feared, sectional lines in politics proved ineradicable.

**********

Historians have explained the causes and consequences of the Missouri Controversy in markedly different ways.[7] Some historians see the debate over slavery as concealing a struggle over more fundamental underlying political, economic or constitutional issues. Included in this group are historians who argue that Missouri was a

---

[6] For a similar conclusion, see Richard H. Brown, "The Missouri Crisis, Slavery, and the Politics of Jacksonianism," *South Atlantic Quarterly* 65 (1966): 55-72. I thank Sean Nalty for bringing this source to my attention.

[7] For a useful review of the historiography on the Missouri Controversy see Joshua Michael Zeitz, "The Missouri Compromise Reconsidered: Antislavery Rhetoric and the Emergence of the Free Labor Synthesis," *Journal of the Early Republic* 20 (2000): 447-485, at 448-9. Glover Moore's study of the Missouri Compromise until recently was the only book length treatment of the Missouri Compromise. Moore, *Missouri Compromise*. A new study is Robert Pierce Forbes, *The Missouri Compromise and its Aftermath: Slavery and the Meaning of America* (Chapel Hill: University of North Carolina Press, 2007). There are extensive analyses of the Missouri controversy and its background in important works by John Craig Hammond, *Slavery, Freedom and Expansion in the Early American West* (Charlottesville: University of Virginia Press, 2007) and Matthew Mason, *Slavery and Politics in the Early Republic* (Chapel Hill: University of North Carolina Press, 2006). Other significant general treatments of the Missouri controversy include William W. Freehling, *The Road to Disunion: Secessionists at Bay 1776-1854* (Oxford: Oxford University Press, 1990); Peter S. Onuf, *Jefferson's Empire: The Language of American Nationhood* (Charlottesville: University Press of Virginia, 2000), Ch. 4; Peter S. Onuf, "Federalism, Republicanism, and the Origins of American Sectionalism," in *All over the Map: Rethinking American Regions*, ed. Edward L. Ayers, et al. (Baltimore: Johns Hopkins Press, 1996), 11-37; William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Ithaca: Cornell University Press, 1977), 106-125; Peter B. Knupfer, *The Union As It Is: Constitutional Unionism and Sectional Compromise, 1787-1861* (Chapel Hill: University of North Carolina Press, 1991), 86-118; Leonard L. Richards, *The Slave Power* (Baton Rouge: Louisiana State University Press, 2000); William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* (Ithaca: Cornell University Press, 1972), 141-50; David Brion Davis, *Challenging the Boundaries of Slavery* (Cambridge: Harvard University Press, 2003), Ch. 2; Don E. Fehrenbacher, *Sectional Crisis and Southern Constitutionalism* (Baton Rouge: Louisiana State University Press, 1980), 9-24; and Andrew Lenner, *The Federal Principle in American Politics, 1790-1833* (Lanham, Maryland: Rowman & Littlefield, 2001).

sectional controversy where economic conflict or a struggle for political power was the primary force or a significant factor motivating the adversaries (such as a struggle over the Three-Fifths Clause).[8] Against these arguments, some recent historians have asserted that Missouri was at bottom a dispute over the merits of slavery which resulted from persistent struggles over slavery in developing areas, or from Northern reaction to the growing power of slavery, including resentment of slavery's growing incursions into Northern states' "separate sphere."[9]

Another group of historians sees the Missouri controversy primarily as an artifact of the structural limitations of the American federal republic, or as a chapter in the history of American disputes over the changing meanings of federalism and Union.[10] Peter Onuf argues that antebellum sectional conflict was not a product of "fundamentally different social systems" or differences in morality but was instead "integral to the original conception and construction of the federal system." During ratification, the concepts of Union and section were "inextricably paired" as opposites. But Federalists also sought to dissociate the concepts of section and interest. They argued that the pursuit of interest would lead toward greater union; but they relied on a contingent, expanding Union to dissolve sectional differences. At the same time, however, democratization in an expanding Union's periphery would lead to shifts in the balance of power, and increased

---

[8] In this group would fall works by Moore, Simpson, and Zeitz cited in note 7.

[9] In this group would fall works by Forbes, Mason, Hammond and Richards cited in note 7.

[10] In this category would fall works by Onuf, Knupfer and Lenner cited in note 7.

tensions between center and periphery. When political developments threatened expansion, sectional differences would intensify and become "essential."[11]

For Onuf, the Federalist concept of contingent Union was an effort to finesse the danger of sectionalism, which could only succeed as long as certain political and economic conditions existed, including a perception of the fragility of that Union. The Missouri controversy occurred because there the conditions needed to support the finesse were absent. Taking an alternative but compatible view, Peter Knupfer argues that the Constitution functioned because it was supported by an extra-constitutional political tradition of constitutional compromise to protect Union, and considers how that tradition influenced and supported the Missouri compromises.

The view presented here is that the Missouri controversy was in the first instance a sectional economic struggle in which directly conflicting western settlement interests of the Northern and Southern sections were at issue, and which therefore necessarily implicated slavery. As Onuf's analysis suggests, during the Missouri conflict the basic conditions supporting the rise of sectional feeling were present. The Missouri struggle was a recurrence of sectional tensions that had existed since the post-Revolutionary period but had previously been suppressed by the creation of the federal constitutional structure and by very rapid national expansion. Debate over slavery's merits was inextricably part of the Missouri conflict, yet it was at bottom a struggle over how sectional interests would be helped or harmed by slavery expansion. But the conflict had larger stakes still. Long term sectional control of the Senate, and thus dominance over all aspects of national policy, was also at issue.

---

[11] Onuf, "Origins of American Sectionalism," 12, 13, 26-7, 30.

As it spiraled out of control, the conflict escalated into a renewed struggle over the fundamental character of the Union. The Missouri dispute was resolved, however, not on the basis of any agreement about constitutional principles, but as a compact between sections that permitted slavery's continued growth. Concerns about preservation of the Union played a significant role in its resolution. Before discussing the Controversy itself, it is necessary to understand rapid, disruptive changes in American social and political conditions that were occurring in the years before the Controversy and that continued while it was in progress.

*The Changing American Landscape and the Missouri Controversy*

In late 1818, John Randolph of Roanoke, a Republican Congressman from Virginia and major slaveholder, wrote several letters about his life in Virginia to his old friend Harmanus Bleecker, a former New York Congressman. Randolph described the dramatic changes were occurring in Virginia slavery in a heartfelt letter:

> Salem lies about 20 miles to the South near the Roanoke [River]. It is on the great western road, along which the tide of emigration pours its redundant flood, to the wide region that extends from the Gulph of Mexico to the Missouri. Alibama is at present the loadstone of attraction: Cotton, Money, Whiskey & as the means of obtaining all those blessings, Slaves—the road is thronged with droves of these wretches & the human carcase-butchers, who drive them on the hoof to market & recall to memory Clarkson's Prize Essay on Slavery & the Slave trade, which I read upwards of thirty years ago. One might almost fancy oneself on the road to Calibar [Calabar]....[12]

---

[12] Letter, John Randolph to Harmanus Bleecker, October 10, 1818, Papers of John Randolph of Roanoke (Charlottesville: Small Special Collections Library, University of Virginia). Randolph, who vehemently opposed the Missouri compromise, was a classic paternalist on slavery: "The nature of the property that I hold obliges me to extort from the labouring portion of my slaves as much profit as will support them and their families in sickness and in health, in infancy and when past labour; reserving to myself, if practicable, a fair rent for my land and profit on my stock....I have often bewailed the fate that made me 'their keeper.' I now bow... to the decree of him who has called me to this state...." John Randolph to Harmanus Bleecker, November 16, 1818, ibid.

The flood of postwar emigration was not confined to rivers of population flowing from the Upper South to the Lower South and West. In late 1816, New York Senator Rufus King wrote to a correspondent that "the Tide of Emigration from every one of the New Eng[land] States, and especially from Vermont, is very great—and it is a proof of good sense among the Emigrants; for the exchange as respects climate and fertility of soil, are greatly on the side of the western world...." King bemoaned the decline of benign Northern political influence that would result from this emigration. [13]

These accounts reflected a massive shift of American population to the West, particularly in the years after 1815. All of the original Atlantic coast states except New York lost population in relative terms during the 1810-1820 period, while the Trans-Appalachian states experienced large population increases. Virtually all of the western population growth above natural increase was the result of westward movement among Americans, not foreign immigration.

Other important demographic changes were also occurring in the regional structure of the United States during this period. By 1820, the population disparity between North and South had sharply increased over 1810 levels, and the North's population was nearly 20 percent larger than that of the South.[14] The population of the West was increasing dramatically. The North Central region population was slightly more than half as large as that of New England by 1820. The North Central region states grew dramatically between 1810 and 1820, at a rate almost six times as high as the

---

[13] Rufus King to Christopher Gore, November 5, 1816, *LCRK* 6: 34.

[14] Campbell Gibson and Kay Jung, "Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origins, 1970 to 1990, for the United States, Regions, Divisions & States," (Bureau of the Census ), Table F-1, accessed 9/04/07, at www.census.gov/population/www/documentation/twps0056.html.

national average increase during that period.[15] The expanding South Central region states grew at a lower average rate, but that rate was still nearly twice the national average increase in population.[16]

The development of the South Central region was largely fueled by use of imported slave laborers such as those whose forced march John Randolph had observed. By 1820, the Trans-Appalachian slave population had exploded, at least doubling since 1810. By then, there were more than 350,000 slaves west of the Appalachians, a population nearly the size of Virginia's entire 1810 slave population. The western slave population was already 26 percent of the total South Central region population in 1820, and the region had almost no free blacks. A new Western slave world was under rapid construction, its expansion fueled by the end of war with Britain in 1815.[17]

Much of the supply of new slaves to the Southwest came from older slaveholding areas, as Allan Kulikoff, Ira Berlin, and other historians have demonstrated. Illegal importation undoubtedly also played a role in the continued growth of slavery, particularly in Southwestern coastal states. When Representative James Tallmadge, Jr. of New York claimed during House debate in 1819 that it was a "well known fact" that 14,000 slaves had been illegally imported the previous year, his statement was not

---

[15] In 1820, the North Central region included Ohio, Illinois, Indiana, Michigan and Missouri.

[16] Data are taken from U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1970* (Washington, D.C.: U.S. Department of Commerce, Bureau of the Census, 1975). The South Central area in 1820 comprised Kentucky, Tennessee, Alabama, Mississippi, Louisiana, and Arkansas Territory. See also Robinson, *Slavery and Politics*, Table IV, p. 404.

[17] Ira Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America* (Cambridge, Mass.: Harvard University Press, 1998); Allan Kulikoff, "Uprooted Peoples: Black Imports in the Age of the American Revolution, 1790-1820," in *Slavery and Freedom in the American Revolution*, ed. Ira Berlin and Ronald Hoffman (Charlottesville: University of Virginia Press (for Capitol Historical Society), 1983) ; Adam Rothman, *Slave Country: American Expansion and the Origins of the Deep South* (Cambridge: Harvard University Press, 2005).

challenged. Tallmadge's estimate was probably fairly accurate, as Congress's decision to tighten slave import prohibition laws in 1818 and 1820 confirmed. Slave smuggling was not new. Antislavery forces had been fighting slave smuggling in violation of state or federal laws systematically since at least 1805, and episodically since the mid-1790s. [18]

Economic pressure to emigrate westward was so powerful that in late 1819 during the Missouri Controversy and in the midst of a major economic depression, large immigration into the west, and Missouri in particular, continued. Before it was clear whether Missouri would be admitted as a state at all, the Saint Louis *Enquirer* "reported that the immigration to Missouri continued to be astonishingly great. It estimated that from thirty to fifty wagons daily crossed the Mississippi at the various ferries, bringing in an average of from four to five hundred new settlers each day. 'The emigrants...bring great numbers of slaves....'"[19]

These major demographic shifts during the period after 1810 resulted in an equally dramatic transformation in the regional distribution of political power in Congress that favored the West. Before 1820, Illinois and Indiana achieved statehood. Between the 1810 and 1820 Congressional reapportionments, Ohio gained more seats in Congress than did New York, and actually became larger than Massachusetts. By comparison, Virginia's percentage of total House representation declined by 30 percent

---

[18] Donald L. Robinson, *Slavery in the Structure of American Politics 1765-1820* (New York: Harcourt Brace Jovanovich Inc., 1971), 342-4. Tallmadge's assertion re slave imports: 15 *AC* 1210, February 16, 1819. The files of federal district Judge Matthias B. Tallmadge of New York, Representative James Tallmadge's brother, contain records of trials of a number of illegal slave trade and slave smuggling cases (several of which Pennsylvania Abolitionist Society agents played a role in prosecuting) during the period 1805-1808. Papers of Matthias B. Tallmadge (New York: NYHS).

[19] Glover Moore, *The Missouri Controversy 1819-1821* (Lexington: University of Kentucky Press, 1953)(hereafter, Moore, *Controversy*), 271 (quoting the *St. Louis Enquirer*, October 30, 1819).

between 1800 and 1820. But slave state representation in the House of Representatives fell only about 1 percent, from 43 percent to 42 percent, between 1810 and the 1820 census reapportionment. The slaveholding states received a sizeable political representation premium in both the House and Senate from the Three-Fifths Clause.[20]

Although the slave state position in House representation remained relatively stable, the balance of power in sectional representation in the United States Senate had altered. In the Senate, between 1796 and 1818, the free states either had voting parity with the slave states, or a one- to two-state advantage. By late 1819, there were eleven free states and eleven slave states. The admission of either Missouri or Maine without the other would have adversely altered the Senate balance from the perspective of one section or the other.[21] In the face of rapid demographic change favoring the North's future political influence, the prospects for political balance seemed especially precarious to many Southerners. This shifting political demography was an important element in the politics of the Missouri controversy.

During the years between the War of 1812 and the beginning of the Missouri controversy, slavery debates often occurred at the state level. These debates and their

---

[20] Kenneth C. Martis and Gregory A. Elmes, *The Historical Atlas of State Power in Congress, 1790-1990* (Washington: Congressional Quarterly, Inc., 1993), 48 (Table 2-12). The operation of the constitution's Three-Fifths Clause for establishing House representation conferred what free states saw as a political premium on the slaveholding states. Political scientists today agree with observers during the Missouri controversy that slave state representation in the House in 1820 was approximately eighteen seats higher than it would have been without the Three-Fifths clause—or about 8 percent of the total House seats and almost 16 percent of total slave state representation. Statistics computed or extracted from Ibid., 46-8, and Theodore J. Lowi, Benjamin Ginsberg, and Kenneth Shepsle, *American Government: Power and Purpose* 9th ed. (New York: W.W. Norton & Co., 2006), Ch. 2. As of 1820 it seems likely that there were several Senate seats held by slave states, particularly in the West, whose existence was attributable to the demographic effects of permitting the slave trade to continue through 1808 and smuggling thereafter.

[21] Barry Weingast, "The Political Foundations of Democracy and the Rule of Law," *American Political Science Review* 91, no. 2 (1997): 245-263, at 259; Robinson, *Slavery and Politics*, 405.

influence in strengthening the view that slavery was anti-republican have been thoroughly considered in an illuminating analysis by John Craig Hammond.[22] State debates over legalizing slavery were largely confined to newly settling states.[23] But such state disputes were separate from clashes over slavery at the federal level before 1818, primarily because Congress refused to become involved in them. Congress had rejected without serious debate all proposals to modify application of the Northwest Ordinance to areas within the Northwest Territory, whether territories or states. Hammond concludes that although slavery was a continuing issue at the state level in the Northwest, the Missouri Controversy itself was not foreseeable.[24] Historian Matthew Mason argues that the Missouri dispute was predictable because of pent up Northern resentment of the aggressiveness of Southern slaveholding during the 1810s in particular.[25]

What is clear in any event is that the admission of new states and territories caused little controversy over slavery through 1818. When Missouri was raised to

---

[22] John Craig Hammond, *Slavery, Freedom and Expansion in the Early American West* (Charlottesville: University of Virginia Press, 2007).

[23] At the time of the Missouri Controversy there was a continuing debate over whether slavery should be permitted in new states, even when they were located in the Northwest Territory. This meant that efforts might be made to "turn back the clock" in some of those states by legalizing slavery where it had previously been illegal, and antislavery forces were concerned that this might occur in Ohio, Indiana, and Illinois. Ibid., Chs. 4-6.

[24] Hammond, *Slavery, Freedom*, 152-154.

[25] Matthew Mason has recently provided a perceptive and helpful analysis of efforts after 1810 by northern states such as New York and Pennsylvania to strengthen their state law protections for slaves and free blacks within their states. As Mason points out, very often such northern legislation to protect black citizens' freedom was also based on a determination to protect northern states against "encroachment from the slave states." Mason, *Slavery in the Early Republic*, 130-143, quote at 143. Mason also usefully analyzes several slavery-related issues addressed by Congress during the period after 1815, such as fugitive slave law and slave trade prohibition amendments, and shows that slavery caused growing northern anger and political resentment. Ibid., Chs. 5-6. For Congress's efforts to resolve these specific issues (or sidestep them), see 16 AC 94-100, 16th Cong., 1st sess.; Robinson, *Slavery and Politics*, 342-4; Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780-1861* (Baltimore: Johns Hopkins University Press, 1974).

second-class territory status, in 1812, only seventeen members of the House of Representatives (out of 181) supported an effort by Representative Abner Lacock and Representative (and future Senator) Jonathan Roberts of Pennsylvania to bar importation of slaves to the territory.[26] Mississippi was admitted as a slave state without serious dispute, while Indiana had been admitted in 1816 as a free state. According to Mason, "[a]lmost all newspapers in all parts of the North welcomed statehood for Mississippi and Alabama, with nary a comment about their constitutional protections for slavery."[27]

The first significant controversy over slavery during a state admission concerned the 1818 admission of Illinois.[28] The Illinois Constitution was a compromise between antislavery and proslavery forces that permitted continued slavery in certain areas and grandfathered involuntary servitude agreements that amounted to *de facto slavery.* [29] The challenge to admission led by Representative James Tallmadge, Jr. of New York nevertheless lost overwhelmingly.[30]

---

[26] Mason, *Slavery in Early Republic*, 145.

[27] Ibid., 148.

[28] In Illinois, pro- and anti-slavery forces were far more evenly matched than was generally the case in the West. This division strongly influenced the politics of the Missouri controversy. See Mason, *Slavery in Early Republic*, 149-55, 182-4.

[29] Ibid., 150. The Illinois constitution banned the importation of new slaves, and freed afterborn slave children, but it explicitly permitted the continued use of slave labor imported from Missouri through 1825 to work southern Illinois salt mines, and also indefinitely grandfathered agreements for involuntary servitude in Illinois. Lifetime involuntary servitude "agreements" had been widely used in both Illinois and Indiana to create *de facto* slavery. Gavin Wright, *Slavery and American Economic Development* (Baton Rouge: Louisiana State University Press, 2006) 42. In Northern states, the legal and political climate had swung sharply against the continuation of *de facto* slavery by the time of Missouri. In 1821 the Indiana Supreme Court declared such involuntary servitude agreements void under Indiana law, even if entered into without coercion, in *Case of Mary Clark, a Woman of Color*, 1 Blackf. 122 (Ind. Sup. Ct.1821). Steinfeld correctly sees that decision as a triumph for free labor ideology. Robert J. Steinfeld, *The Invention of Free Labor* (Chapel Hill: Univ. of North Carolina Press, 1991), 144-46.

[30] Tallmadge's challenge to Illinois's admission lost badly in the House, 117 votes to 34. 15 *AC* 306-311, 15th Cong., 1st Sess., November 23, 1818 (debate and vote). Only 20 percent of the House, or one-third of the members from New England and Middle Atlantic states, supported Tallmadge's proposal.

*Sectional Economic Interests in Western Expansion*

The Missouri Controversy began with a sharp preliminary skirmish during February, 1819 debate over amendments offered by Representatives Tallmadge and John W. Taylor of New York to phase out slavery in Missouri and Arkansas by barring the future importation of slaves and requiring gradual abolition there.[31] The two-year debate that ensued changed few if any minds among legislators, but it was an extraordinarily important debate nevertheless. The controversy unfolded under intense newspaper and public scrutiny, which mattered because Congressmen believed that they had to justify their positions to their constituents. Because the Missouri controversy was the first "popular" American debate over slavery, participants' public positions and their private sentiments and actions sometimes differed greatly.

Most Congressmen believed that the Missouri bill would set an enormously important precedent. Senator Jonathan Roberts of Pennsylvania said: "There is no ground on which slavery can be extended in Missouri, that will not apply to the whole region west of the Mississippi."[32] Representative Taylor, an upstate New York Republican who became a leading Northern restriction advocate in the House who became Speaker in 1820, expressed a similar view. But if, as one recent historian

---

[31] It is a curious, little known fact that Representatives Tallmadge and Taylor were both unsuccessful in seeking political appointments from the Monroe Administration within months of proposing these amendments. Tallmadge to Taylor, March 4, 1819, July 7, 1819, Papers of John W. Taylor (New York: NYHS); Taylor to Tallmadge, April 4, 1819, Papers of James Tallmadge (New York: NYHS). Tallmadge and Taylor demonstrated extraordinary naivete in making those efforts. Various circumstances strongly suggest that Tallmadge and Taylor inadvertently ignited a political firestorm—but what sustained that firestorm is another matter entirely.

[32] 16 *AC* 128, January 17, 1820.

concluded, the Missouri debate was a "referendum on the meaning of America," it is essential to know precisely what was at stake in that referendum in order to understand its results.[33]

The political configuration on slavery restriction that had existed as late as the debate over Illinois at the end of 1818 changed dramatically when Representative Tallmadge offered his slavery restriction proposal during consideration of Missouri's statehood request in early 1819.[34] On the first vote regarding Missouri and in the debate on the creation of Arkansas Territory which occurred nearly contemporaneously, Tallmadge's position split the House along sharply sectional lines, with approximately 90 percent of Northern members supporting Tallmadge's position. The level of support for the Tallmadge position nearly tripled compared to the Illinois admission fight, increasing from thirty-four votes to the consistent range of about ninety House votes throughout the Missouri conflict.

What caused this dramatic change in support? Both Glover Moore and Matthew Mason argue, correctly in my view, that a very important factor in causing the sharp division was that the 1819 antislavery proposals disrupted the existing historical pattern of the regional geography of slavery and freedom.[35] The critical issue, discussed below, is why maintaining this historical pattern suddenly assumed paramount importance during the Missouri Controversy.

---

[33] Forbes, *Compromise*, 43.

[34] Tallmadge's proposal had two parts: it barred importation of slaves into Missouri, and it required that afterborn children be freed when they reached twenty-five years of age. The slave import restriction had considerably more Senate support than did the abolition requirement from the outset of the controversy.

[35] Moore, *Controversy*, 60.

The Northwest Ordinance of 1787 was a sectional compromise that had implicitly divided the country into zones of slavery and freedom using the Ohio River as a boundary.[36] The slave or free development of trans-Appalachian states had largely followed that implicit division through 1818. By 1819, many Congressmen therefore understandably anticipated that that pattern would continue, and that areas south of the Ohio River line (extended westward) might become slave territory, while areas north of that line would become free territory. That expectation is apparent in one aspect of Representative Taylor's justification for his position on Missouri: "Missouri lies in the same latitude [as other parts of the Northwest Territory]. Its soil, productions and climate are the same, and the same principles of government should be applied to it."[37]

In explaining why he agreed to support the Southern position on Arkansas, a swing voter, Federalist Representative Ezekiel Whitman of Massachusetts, one of the small group of Congressmen who had voted with Tallmadge to oppose Illinois admission, said that he thought that an equitable division of territory among slave and free states had been the traditional pattern, and that that should continue.[38] But restriction in Arkansas Territory or the absence of restriction in Missouri would upset that pattern in one direction or the other. Why were efforts made to upset that historical pattern? For the first time during the Missouri controversy, the national debates over slavery expansion concerned territory that large numbers of both Northern free settlers and slaveholders wanted to settle.

---

[36] Staughton Lynd, "The Compromise of 1787," *Political Science Quarterly* 81, no. 2 (1966): 225-50. See discussion in Chapter 4.

[37] 15 *AC* 1172, February 15, 1819.

[38] Moore, *Controversy*, 62.

Representative Taylor made clear during the Missouri and Arkansas debates that an increasing collision was occurring between Northern and Southern white settlement as settlers from different sections began to cross paths more frequently in the west. He asserted unequivocally the spread of slavery would exclude Northern emigrants from settlement. He contended that it was unfair for Arkansas Territory, which contained extensive potential cotton territory, to be reserved to Southern slaveholding emigrants, since Northern emigrants deserved the opportunity to grow cotton as well. But free Northern settlers would be deprived of that opportunity if slavery were permitted in Arkansas Territory and "he saw no good reason why that portion of the Union...should be excluded from participating in this valuable species of agriculture."

Taylor believed that the same exclusion of Northern settlers would occur if Missouri were to become a slave state: "That such would be the effect of allowing a free introduction of slaves, he had fully demonstrated when the bill for the admission of Missouri was under consideration."[39] Taylor described the emigrants into New York from the "eastern hive" as the same kind of people who might also subsequently emigrate to the west. Of these emigrants into New York, Taylor said: "Do you believe these people will settle in a territory where they must take rank with negro slaves?"[40] Taylor saw emigration to the West as a safety valve against the risk of overpopulation of New York and its undesirable social consequences. Other prominent New York politicians such as De Witt Clinton expressed similar concerns about overpopulation.

---

[39] Ibid., 1223.

[40] 15 *AC* 1176, February 15, 1819.

Nor was Taylor alone in expressing the belief that slavery extension would block Northern free settler migration. Senator Roberts of Pennsylvania made a very similar argument during Senate debate in 1820: "admit Missouri, a slaveholding State, without limitation, and you place the citizens of the non-slaveholding States under an interdict, as to settlement, that they cannot overcome." [41] The editor of *Niles Weekly Register*, one of the most widely read publications on politics and current affairs, took the same stance. The editor said in analyzing the problem of slavery in Missouri: "'The northern hive,' the New England states, will furnish few emigrants to the new state [if there is slavery in Missouri], and the European emigrant, we know, nine times in ten if a farmer, seeks the country in which he expects to be treated like a *man*."[42] The Hartford, Connecticut citizens' memorial to Congress against Missouri slavery described slavery as "so discouraging to the gradual progress, through a vast and growing territory, of a bold and hardy yeomanry, tillers of their own soil...."[43] A letter to *Niles Weekly Register* in late 1820 made the same argument.[44] Senator David Morril of New Hampshire argued at length using historical census data that "involuntary servitude discourages and impedes a white population."[45] Most importantly, though, leading slave state Congressmen held precisely the same view about the relationship between legalizing slavery and settlement patterns that Taylor did.

---

[41] 16 *AC* 336, February 1, 1820.

[42] *Niles Weekly Register*, August 14, 1819.

[43] Noble E. Cunningham Jr., *The Early Republic, 1789-1828* (Columbia: University of South Carolina Press, 1968), 109.

[44] *Niles Weekly Register*, December 30, 1820

[45] 16 *AC* 151-2, January 17, 1820.

Early in the Missouri debate a key slave state Congressman, Representative Philip Barbour of Virginia, made clear that the slave states also saw the issue of exclusion as the center of their concerns. They believed that barring slavery would have the effect of barring Southern emigration "in almost every instance...," which would be a "monstrous injustice."[46] Senator Macon of North Carolina made clear in his polite but pointed way that he saw the Northern restrictionist position as a territorial grab that would unjustly exclude Southerners from the West.[47] Senator Ninian Edwards of Illinois expressed the same view.

The similar opinions about regional exclusion expressed by politicians from all parts of the country strongly suggest that Glover Moore correctly describes the issue of regional exclusion as "one of the fundamental causes of the Missouri Controversy...."[48] The fact that Congress' decision about restriction would mean exclusion for settlers from one section or the other meant that both the North and the South saw the Missouri controversy as a "zero sum" game where their expansion was concerned. There is considerable evidence beyond these opinions to support the conclusion that regional settlement exclusion was at the heart of the sectional division over Missouri.[49]

---

[46] 15 *AC* 1188, February 15, 1819.

[47] 16 *AC* 222, 225, January 20, 1820.

[48] Moore, *Controversy*, 49.

[49] Rufus King, like other restrictionists, attempted to dismiss the southern exclusion argument with the legally accurate but substantively irrelevant response that only slaves, and not slaveowners, were being excluded from Missouri by a restriction. This argument cannot be taken seriously as an effort to refute the South's economic position; it is an argument for home section consumption. Rufus King, *Substance of Two Speeches...on the Subject of the Missouri Bill* (New York: Kirk and Mercein, 1819), 28-9. By 1820, Taylor had changed his tack in recognition of the power of the southern exclusion argument, and was attempting to deflect the force of southern arguments about regional exclusion from slavery restriction by contending that barring slavery would not exclude the "middling class of emigrants" from the south. According to Taylor,

Taylor vigorously attacked Henry Clay's position against restriction, arguing that diffusion of slaves into the west as Clay and other Southerners advocated would expand slavery.[50] Central to Taylor's argument was his assertion that as a matter of economic logic, increased slave demand would defeat antislavery law enforcement: "in vain will you enact severe laws against the importation of slaves, if you create for them an additional demand, by opening the western world to their employment."[51] A "new and boundless" market for slaves would "double[]" the price of slaves, and thus 'frustrate[]' the intentions of those who sought colonization, and also "tempt the cupidity" of those who might otherwise gradually emancipate their slaves if slave prices did not increase.[52]

Taylor had plenty of company for his economic attack on diffusion. For example, Senator Roberts argued that: "Establish slavery over this territory, and you, of consequence, increase the value of slave-property...."[53] Senator Morril made the same argument, adding that antislavery law enforcement would be impossible in the face of increased slave demand.[54]

Recognition of the central role played by market demand for slaves—as opposed to the supply of slaves—in maintaining slavery was at the heart of the Northern attack on Missouri slavery. Taylor and other Northern representatives such as Senator James

---

that class, even in the south, was being harmed by slavery, and protection of that class's interests should be the object of national settlement policy. 16 *AC* 954, January 27, 1820.

[50] 15 *AC* 1174-5, February 15, 1819.

[51] Ibid.,1175.

[52] Ibid.,1184, February 15, 1819.

[53] 16 *AC* 337, February 1, 1820.

[54] 16 *AC* 156, January 17, 1820.

Burrill, Jr. of Rhode Island linked demand for slaves to the maintenance of slave prices, and to continuation of both the domestic and foreign slave trade.[55] Taylor argued that in the face of such demand, even strengthening laws against slave imports as Clay had suggested, by making illegally imported slaves free, would "in practice...be found altogether inoperative" because it would confer on a slave a theoretical right [to sue for freedom] that could not be enforced by the slave.[56]

Northern restrictionists now rejected diffusion as an acceptable slavery policy, though it had been the *de facto* national slavery policy since before the Louisiana Purchase (see Chapter 5). They asserted that diffusion would result in slave population growth, a point conceded by leading slaveholding state representatives in the Senate such as Senator William Pinkney of Maryland.[57] Senator Walter Lowrie of Pennsylvania, for example, made an extended argument, based directly on Malthusian population principles, that if the West were opened to slavery, "this class of population will increase with a rapidity heretofore unknown."[58]

In summary, leaders on both sides of the controversy understood the economics of slavery expansion in the same way: expansion would increase aggregate demand for slaves and maintain or increase slave prices and increase slave populations; restriction, on the other hand, would limit slave demand, and cause a decline in slave prices,

---

[55] Taylor rejected the argument that declines in slave prices resulting from Missouri restriction were a problem for which restrictionists needed to take responsibility; such declines were "incidental" to restriction. 15 *AC* 1175-6, February 15, 1819. Other northern Congressmen argued that such declines were a positive good.

[56] 15 *AC* 1175, February 15, 1819.

[57] Several slaveholding state representatives in the House, and some Senators, denied diffusion would increase slave population, but their arguments on the point were internally inconsistent.

[58] 16 *AC* 208, January 20, 1820.

constraining slave population. This meant that sectional interests on slavery expansion were in direct conflict. As had been true since 1787, it was in the interest of the slaveholding states as a whole to expand slaveholding settlement westward, because such expansion would economically benefit both existing and new slaveholding states.[59]

But adopting slavery in new territories would exclude many Northern settlers from those areas, so Northern representatives sought a free labor policy for western settlement to protect their settlement path. A free labor policy would in turn inevitably harm slaveholding states' economies, particularly slaveholders' existing asset values. As a result of this clash of interests, Senator Edwards of Illinois, who represented a constituency strongly interested in economic development and land prices, but closely divided between pro- and anti-slavery forces, sought to maximize population growth in the western country, by offering "fair and equal inducements to emigration of citizens of every section...."[60] Edwards opposed restriction because it would exclude Southern residents.

Northern representatives could have made precisely the same arguments about the need to restrict demand for slaves during the debates over the Louisiana Purchase, but did not. A common explanation offered for that earlier failure is that antislavery forces had not experienced the failure of 1808 slave import restrictions to prevent slave smuggling,

---

[59] During the period 1790-1820, the economy of the slave south had been transformed, so that some subregions became large net exporters of slaves, while others became large net importers. Permitting slavery expansion would thus increase slave prices in the exporting states. Existing slaveholding states would benefit from maintenance of slave prices overall (protecting land values and exporting) and by enabling existing slaveholders to seek higher returns on their slave property assets in new, more productive geographic areas. New territories would benefit, they thought, from increasing demand for agricultural land and encouragement of faster, export-oriented agricultural development.

[60] 16 *AC* 189-190, January 19, 1820.

and learned only after 1808 that controlling slave supply was insufficient to stem expansion.[61] This argument is flawed for several reasons. As Chapter 4 showed, it was well understood by 1787 by knowledgeable observers that slave populations would expand even without imports. But abolitionists also had considerable experience with slavery and abolition law enforcement from 1780 onward at the state and federal level. That experience also taught the unmistakable lesson that the exceptionally high profitability of slavery, together with widespread racial animus against blacks, severely corrupted public willingness to observe and enforce laws against slave import or export trading, smuggling and kidnapping. All such laws were likely to be only partially enforced, if enforced at all, especially in slave states and territories, unless reinforced by limits on demand for slaves.

The legal files of the Pennsylvania Abolition Society and those of United States District Judge Matthias B. Tallmadge of New York amply document the fact that abolitionists had been fighting illegal foreign slave smuggling and trading in violation of various federal and state laws since the 1790s. Northern abolitionists were aware of systematic state law violations involving domestic slave and free black smuggling and kidnapping by slaveowners in the 1780-1810 period (especially after 1800), and repeatedly sought to tighten state laws in response.[62] Northern representatives thus had ample reason to understand by the time of the Louisiana Purchase that the profitability of slavery, which was clearly growing significantly according to the 1800 census, and which by then already involved several billion dollars worth of total assets (in today's dollars),

[61] Mason makes this argument, citing John Ashworth. Mason, *Slavery in Early Republic*, 132. Robinson also sees this as a factor in prompting northern action on Missouri. Robinson, *Slavery in Politics*, 406.

[62] See Chapters 2 and 5.

meant that an import cutoff would not end illegal smuggling or, in any event, end the growth of slavery. Contemporary discussions of this issue demonstrate that awareness as well.

During the Missouri controversy, Rufus King went to great lengths to rationalize previous northern inaction against western slavery expansion. King understood that it appeared the Northern states were changing policy in opposing Missouri admission though they had never previously opposed admission of a state that already had slavery. King's public explanation for previous Northern inaction against slavery's western expansion was not Northern lack of understanding of slavery demographics or economics, but instead that the Northern states could not legally oppose slavery in new western states because they were formed out of territorial cessions by slave states.[63] In private, King gave a different and at least somewhat more accurate explanation which contradicted his public claim, writing to Richard Peters of the Pennsylvania Abolition Society that "[t]he admission of new States into the union, while confined to our primitive territory, has been a subject of little attention on the part of the people...."[64]

But Senator Morril of New Hampshire was both perceptive and far more candid than King in describing the economic realities of smuggling and slavery absent limits on slave demand: "The people of this country are fond of property. It is impossible to restrain them within legal bounds, when you present to them a pecuniary advantage, even from illicit commerce."[65] Senator Morril's observation would have applied just as well to

---

[63] King, *Two Speeches*, 10-11.

[64] Rufus King to Richard Peters Jr., November 30, 1819, *LCRK*, 6: 236.

[65] 16 *AC* 155, January 17, 1820.

slavery expansion during the Louisiana Purchase as it would have to Missouri. Morril's was an economic argument about market demand and its corrupting effects on law enforcement. His observation was not dependent on slave smuggling after 1808 for its force, since it would have applied equally well to New England tea and rum smuggling's long histories.

A much better explanation of Northern failure to press demand-based arguments against slavery expansion before Missouri is that the politics of opposing slave supply, and the politics of opposing increased slave demand, were completely different throughout the Early Republic period. From the 1780s onward, Northern antislavery Congressman had been able to find some Southern allies for their opposition to continued slave supply through imports. Attacking slave supply also limited future supply only, so it did not raise a "vested rights" issue, which made it an even easier political target. But from the 1780s onward, Northern representatives had faced concerted Southern and western opposition to efforts to constrain demand for slaves, particularly when the acquisition of new national territory was involved.

As the history of post-Revolutionary efforts to control slavery showed, constraining future market demand for slaves was politically far more difficult than attacking future supply. Northern state unwillingness to do the hard bargaining and face the tough political choices needed to constrain market demand for slaves in an expanding nation built partially on slave labor, and not inexperience or ignorance, explains Northern inaction before Missouri. The novel Northern restrictionist willingness to challenge market demand for slaves during Missouri provides strong additional evidence that Northern settler exclusion, not abstract opposition to slavery, motivated Northern

restrictionism. It was now worth taking on the much harder political challenge because Northern sectional interests were directly at stake. But as the course of the Missouri controversy showed, the stakes were actually higher than the limited, though very important, question of which region's settlers would be excluded from Missouri. Ultimately at stake was long-term control of the national government.

*Sectional Political Interests in the Missouri Controversy*

Before the Missouri debate resumed in early 1820, state legislatures and some prominent state politicians intervened in the debate. New York Governor De Witt Clinton deliberately made the Missouri controversy a major issue in his address to the New York legislature in early 1820, an election year.[66] Clinton's intervention in this issue, though it may have been in part a New York electioneering appeal, understandably also fed suspicions about his presidential ambitions. His position on Missouri also contributed to fears that either development of the Erie Canal and a regional economic trade bloc—or New York's economic aggrandizement in general—was driving the New York position on Missouri slavery restriction.

Such suspicions were openly voiced during the opening of the 1820 Congressional debate, in which Congressman John Holmes, a Massachusetts Congressman representing the Maine district, attacked the restrictionist position on the grounds that it involved "jugglers behind the screen" who were playing a "deeper game."[67] Holmes's attack was clearly primarily directed at Clinton and Rufus King, both

---

[66] Clinton's New York electioneering motives for doing so are discussed below.

[67] 16 *AC* 966-7, January 27, 1820.

of whom were potential Presidential aspirants. But he launched a broad political attack against restriction supporters generally, arguing that they were motivated by sectional interests. Holmes closed by quoting Washington's warning in his Farewell Address against "characterizing parties by *geographical* discrimination."[68]

Representative Alexander Smyth of Virginia then broadened the political attack. In a transparent bid for western support, Smyth argued that the Mississippi River navigation rights of the Northwest Territory states had been preserved by the Southern states, while New York politicians had sought power to "cede the navigation of the Mississippi to Spain." Senator Barbour made the same argument directed against "the East" in the Senate.[69] Rufus King thought that the Mississippi navigation argument was politically important enough that his notes for his Missouri speech contain a detailed effort to refute it.[70]

Smyth added that New York politicians had opposed the admission of Illinois, Alabama, and now Missouri to the Union. He argued that New York was seeking to bar sectional rivals to "keep down the rising power of the West."[71] This argument clearly resonated with some western Congressmen. Senator Edwards of Illinois said that he saw

---

[68] 16 *AC* 990, January 27, 1820 (emphasis original).

[69] 16 *AC* 333, February 1, 1820.

[70] Papers of Rufus King (New York: NYHS)("King Papers"), Box 81, Folder 1, NYHS (unpublished)(it is uncertain whether King delivered this part of his speech to the Senate, but he did try to mollify feelings on this issue in his 1819 published speech).

[71] 16 *AC* 1015, January 28, 1820.

restriction as a sectional plot by those who "dread our growth and would gladly put a stop to emigration from every other quarter [than their own]."[72]

Was there a "deeper game" involved in the Missouri controversy as Holmes and Smyth charged? Moore concluded that there was indeed a political "plot" by the Federalists (or Clinton) to use the Missouri restriction issue to build a Northern Presidential campaign or a Northern party.[73] But was this "Federalist plot" argument instead really just a smokescreen, a Southern pretext to dissolve Northern solidarity or to give political cover to Northern allies, as historian Robert Forbes argues?

The answer to the "deep game" question depends on what is really meant by the question. Whether King, Clinton or Clay had personal ambitions for the Presidency that they thought would be advanced by their Missouri positions is largely irrelevant to understanding the political decisions made by Northern Congressmen as a whole.[74] But what King, generally regarded as the Northern restriction leader, clearly did believe was that the North should function as a voting bloc—or party, for lack of a better word—advancing policies that would serve Northern political interests. King thought that Northern policies (not necessarily Federalist policies) would better serve the national interest on a host of issues, from naval and tariff policy to slavery. King described his views on the political question posed by Missouri to his confidants and allies on a number of occasions, almost always in balance of power terms.

---

[72] 16 *AC* 189, January 19, 1820.

[73] Moore, *Controversy*, 106, 183.

[74] Clinton may indeed have had such ambitions personally, as did several other Missouri actors, including Henry Clay, John Quincy Adams, John Calhoun, and James Monroe. Whether King did is uncertain, but Martin Van Buren did not think he had them.

At the outset of the Missouri controversy, King wrote to an important political confidant, former Massachusetts Senator Christopher Gore, that an important reason why it would be desirable to admit Maine to statehood was that "as respects the balance of power in the Senate, which shifts rapidly towards the West, it is a good policy to multiply the numbers of this body from the North."[75] King met in Massachusetts in late 1819 with Congressman Daniel Webster, Supreme Court Justice Joseph Story and others, and told them that "the question was the most important one that had been brought forward since the adoption of the Constitution—it was in fact to decide whether the slave holding States should hereafter decidedly preponderate, and all the evils of the accursed slave trade be enhanced a hundred fold."[76] King wrote that the Compromise would "settle[] forever the dominion of the Union," ensuring that Presidents and Supreme Court justices would henceforth almost always come from the "slave region."[77] After the first round of Missouri, King wrote to a political intimate that "by the multiplication of new states" the slave states had "become a controlling power in our government tho' a minority."[78] Similar views were held by Senator Roberts of Pennsylvania, who argued that slavery needed to be restricted in Missouri because otherwise "[t]he scale of political power will preponderate in favor of the slaveholding states."[79]

---

[75] Rufus King to Christopher Gore, February 11, 1819, *LCRK* 6: 211-212, quotation at 212.

[76] William Tudor to Joseph Hopkinson, November 8, 1819, Papers of Joseph Hopkinson (Philadelphia: HSP), quoted in Moore, *Controversy*, 74.

[77] Rufus King to John A. King, February 6, 1820, *LCRK* 6: 267.

[78] Rufus King to Jeremiah Mason (of New Hampshire) May 4, 1820, *LCRK* 6: 336.

[79] 16 *AC* 337, February 1, 1820.

Northern House restrictionist leader John Sergeant of Pennsylvania argued that the North needed to restrict Missouri as a counterbalance to Florida, which would enter as a slave state.[80] Joshua Cushman, a Democratic Massachusetts (and then Maine) Congressman, sent a circular letter to his constituents arguing that the interests of the North could only be protected by maintaining a superior balance of power against the Southern states, so the Missouri dispute should be kept open.[81] Senator Harrison Gray Otis of Massachusetts argued that Southern policy was motivated by a desire to control the Senate balance of power (the North was different, of course).[82]

Southern leaders who were involved in the dispute, such as President James Monroe, and even somewhat more distant observers, such as Thomas Jefferson and James Madison, concluded that Northern restriction was a mask for a power grab, not really a position based on humanity or morality as Northerners claimed.[83] These Southern leaders' views could be dismissed as self-interested. But there were Northern politicians of unimpeachable integrity who had strong antislavery convictions, such as Senators Roberts and Lowrie of Pennsylvania, who ultimately supported compromise because they believed that doing so would advance what they thought were higher public

---

[80] Moore, *Controversy*, 160-1.

[81] The revelation of Cushman's letter ignited a heated debate in the House about northern motives. Ibid., 161. Theodore Dwight, the ultra-Federalist antislavery editor of the New York *Advertiser*, argued that the "standing and influence of the free states" would be lost forever if the south prevailed on Missouri. Ibid., 75.

[82] 16 *AC* 110, January 14, 1820.

[83] Some Missouri controversy participants who wrote later, like Thomas Hart Benton, reached the same conclusion: "The real struggle was political, and for the balance of power, as frankly declared by Mr. Rufus King, who disdained dissimulation.... [I]t was a political movement for the balance of power balked by the Northern democracy, who saw their own overthrow and the mutual separation of the States in the establishment of geographical parties divided by a slavery and anti-slavery line." Thomas Hart Benton, *Thirty Years' View*, 1: 10, quoted in *LCRK* 6: 301 n*.

values than restriction. It was the defection of key Pennsylvania and New York politicians in particular that was central to the Northern coalition's collapse, so their decisions are discussed below.[84]

The reasons underlying Senator Roberts's willingness to support the Compromise are especially important. Roberts, a Quaker, was strongly morally opposed to slavery. His integrity was unquestionable, and there is no plausible basis for the argument that he traded other political objectives for his support. To support an attack on the position that Northern restrictionists were engaged in a political plot, one recent historian argues at length that Senator Roberts was deceived or flattered into supporting the South.[85] But the sources suggest that Senator Roberts decided on the basis of firsthand information that Senator Rufus King of New York, who had been and might soon again be a Federalist Presidential candidate, was using the Missouri issue for political purposes. Roberts wrote to his brother on February 16, 1820 that

> The obstinate Southerns will not yield at all & King and Otis I believe are factious. I cannot apologize for King's conduct. He would not go for freeing the children hereafter born in Missouri. He and Otis prevented me from trying it. Yet on this limited & inoperative restriction he now says he would keep Maine out of the Union for 20 years rather than yield.

---

[84] The Missouri controversy also involved hard-knuckle politics, with threats and blandishments made both in private and in public. There were allegations of varying substance, many of them discussed in Forbes, *Compromise*, that southern politicians and northern economic interests intervened for or against politicians in elections and even financially depending on their position on Missouri slavery restriction. But the available evidence firmly supports the view that the key northern politicians whose defection from the northern coalition is analyzed in this Chapter were not motivated by political pressure or economic bribery.

[85] Forbes, *Compromise*, 75-81.

Roberts continued: "Keep the question open and King will very probably be the next Pres[iden]t."[86]

Based on Rufus King's own arguments about Congressional power to restrict slavery, there was no constitutional distinction between the proposed "slave import" and "afterborn child" restrictions on Missouri.[87] Since neither involved what King classified as a "federal right," both restrictions were within Congress's power to impose in admitting a new state. As Roberts thought, King's position could not be defended on principled grounds. But there was a political difference, which is that there was more Senate opposition to the afterborn child restriction than there was to a slave import restriction.

By late January, 1820, Roberts wrote in private correspondence "[n]o doubt there is much of ambition in New York as well as in Virginia."[88] Roberts referred to antislavery forces as "Ultra federalists," and said that they no doubt "look to better things thro' the slave question."[89] Roberts ultimately accepted the Southern argument that Missouri was a "Federalist" or "New York" plot because he had firsthand evidence that persuaded him that it was true.[90]

---

[86] Jonathan Roberts to Matthew Roberts, February 16, 1820, Papers of Jonathan Roberts (Philadelphia: HSP). Forbes ascribes Roberts's position to the "turbulence of his [Roberts's] mind...." *Compromise*, 79-80.

[87] Recall that the Tallmadge amendment as originally proposed had two elements: a prohibition on imports of slaves to Missouri, and a requirement that Missouri free all afterborn (postnati) slave children once they reached 25, as the northern states had done in their gradual abolition laws.

[88] Jonathan Roberts to Matthew Roberts, January 27, 1820, Roberts Papers.

[89] Jonathan Roberts to Matthew Roberts, Feb. 25, 1820, Roberts Papers.

[90] In his unpublished memoirs, Roberts described King as a man "who might have been great," but "sunk himself into a cunning man." Memoirs of Jonathan Roberts, (Philadelphia: HSP), 135.

As Roberts explained to his brother privately, he believed compromise was essential to the "harmony & Union of these states," even though "it will be seized by knaves to injure me."[91] He later wrote to prominent Philadelphian Tench Coxe that "my convictions determined me to offer myself a sacrifice if it had been necessary to have settled [the Missouri controversy] last year. It was not necessary but those who took the same course for the most part are prostrate."[92] Representative Henry Baldwin of Pennsylvania also concluded that restrictionists were manipulating that issue for political reasons. Senator Lowrie of Pennsylvania, a strongly antislavery "pious evangelical" (according to Forbes), reached the same conclusion. A fundamental reason why these and other key Northern politicians opposed restrictionism was that they saw it as having an unacceptably "partisan" basis, though partisanship to them could mean party, sectional (or even subsectional) bias. But of equal historical importance is that key Southern politicians also saw the Missouri issue in the same way King did—in balance of power terms.

Because politicians from all sections were well aware that the North would increase its dominance in the House after 1820, control of the Senate became the linchpin of national policy control for them.[93] John Tyler, a Republican Congressman and future President from Virginia, wrote to Spencer Roane, Chief Justice of the Virginia Supreme Court, about the Missouri issue in February, 1820. Tyler told Roane that "[t]he non slave holding States now have the majority of us and that majority will be increased at the next

---

[91] Jonathan Roberts to Matthew Roberts, February 21, 1820, Roberts Papers.

[92] Jonathan Roberts to Tench Coxe, November 15, 1820, Papers of Tench Coxe (Philadelphia: HSP).

[93] Forbes, *Compromise*, 45 (citing von Holst).

census—In what then does our safety consist? In nothing but the firmness of the President."[94] Because the North would dominate the House of Representatives after the 1820 census, Tyler was especially worried that the South would lose control of the Senate (and hence of Congress) if Missouri was admitted under a restriction. He believed that Monroe would veto any legislation that was too extreme from the Southern point of view.

Representative Charles Pinckney of South Carolina, ever indiscreet, wrote to South Carolina newspapers after the 1820 compromise, crowing that the Compromise was "a great triumph" for the "southern interest" because it would "give the southern interest in a short time an addition of six, and perhaps eight, Members in the Senate of the United States."[95] The Boston *Centinel* promptly attacked Pinckney's letter as "*The Cloven foot uncovered,*" a "fair disclosure of the deep laid plan and anxious desire to establish forever the *ascendency of the slaveholding States*, and to control by means of the Senate the voice of the nation."[96] Rufus King's gloomy private assessment of the first Compromise was strikingly similar to Pinckney's.[97]

Balance of power concerns also directly influenced sectional stances on new territory accessions during the Missouri controversy. In 1820, James Monroe counseled

---

[94] John Tyler to Spencer Roane, February 14, 1820, Gilder-Lehrman Collection (New York: NYHS), GLC03670.

[95] *City Gazette and Commercial Advertiser (Charleston)*, March 10, 1820, quoted in Moore, *Controversy*, 114-5.

[96] *Columbian Centinel (Boston)*, April 1, 1820, quoted in Moore, *Controversy*, 115.

[97] "[T]he settlement amounts to this, that Missouri, Arkansas, and the territory west of them, and south of 36.30" N.L. with the Spanish province of Texas...are to be slave states; and that for the present, and until our masters the slave states are pleased to order otherwise, the Territory north of 36.30" may be considered as exempt from slavery—but with the avowed understanding that whenever Congress choose they may make the same or any part thereof a slave Region, and...that whenever any new State shall be formed there, that it must and will be free to establish slavery." Letter draft, March 3, 1820, King Papers, NYHS (unpublished).

Andrew Jackson against efforts to acquire Texas "for the present" for fear that the North would see it as upsetting the sectional balance of power.[98] Southern newspapers attacked the Adams-Onis Treaty because it relinquished American claims to Texas. One important ground was that Texas was needed to "maintain the balance between the North and the south...."[99] The 1821 resolution of the Treaty negotiations, omitting Texas, may have influenced Northern willingness to enter into the second Missouri compromise.[100]

Former Senator Lacock of Pennsylvania, a Republican, wrote to President Monroe that he understood that politicians from both sections saw the Missouri dispute in balance of power terms: "the possession of the western domain by either the one or the other [slave or free states] is expected to give them a lasting ascendancy in the government."[101] John Quincy Adams understandably concluded that the political power motive operated about equally on both sides of the dispute.[102] Both Southern and Northern leaders privately saw the sectional balance of power as the central issue in the Missouri debate.[103]

---

[98] Moore, *Controversy*, 345-6, quoting James Monroe to Andrew Jackson, May 23, 1820.

[99] Ibid., 344, quoting Frankfort, Kentucky, *Argus of Western America*, March 9, December 7, 1820.

[100] Robert V. Remini, *Henry Clay: Statesman for the Union* (New York: W.W. Norton & Company, 1991), 190. By the same token, Robert Remini argues, the Missouri compromise actually made "the acquisition of Texas" "essential to the hopes and needs of southern expansionists." Ibid., 193.

[101] Abner Lacock to James Monroe, January 30, 1820, quoted in Moore, *Controversy*, 127.

[102] Moore, *Controversy*, 127.

[103] For an argument that sectional balance of power concerns driven by southern desire to maintain slave state dominance were central to the Missouri controversy, see the essay by Eric S. Steinhart introducing *Papers Relative to the Restriction of Slavery* (Philadelphia: 1819), which compiled King's speeches and others on Missouri, in James G. Basker, ed., *Early American Abolitionists: A Collection of Anti-Slavery Writings, 1760-1820* (New York: The Gilder Lehrman Institute, 2005), 319-323.

In the final analysis, there was a "deeper game" in the Missouri controversy—whether one section or the other could take permanent long-term control of the national government.[104] The eventual Compromise resulted from a stalemate on this central political issue which left the combatants poised in a fragile equilibrium. The following review of the debate over the Constitution during the Missouri controversy confirms that the sections were primarily divided by their economic and political interests. That division of interests necessarily implicated slavery, and it ominously escalated to the renewal of profound disagreements over the nature of the Union.

*The Constitutional Debate*: *Sectional Interest and the Moral Nature of the Union*

From the outset of the renewed Missouri debate in 1820, members of Congress were determined to have Congress—and not the courts—address the constitutional issue whether Congress had power to restrict slavery in new states. On January 27, 1820, Representative (later Senator) Samuel A. Foot of Connecticut moved to postpone consideration of the Missouri bill. Foot proposed instead to place all western territories on the same footing as territory covered by the Northwest Ordinance. Foot's proposed compromise barred territorial slavery in the west in return for popular sovereignty on the issue for any States formed there, with any further disputes to be resolved judicially. Representative William Lowndes of South Carolina, a slave state House leader, opposed

---

[104] Moore's is an inaccurate description of the politics of reopening the compromise—Northern antislavery forces sought its reopening, not just Federalists. For example, James Wilson, the Ohio editor of the *Steubenville Gazette*, a vigorous advocate of reopening the Compromise, was an ardent Republican, who spent a good part of his editorial time in 1819 fervently defending the State of Ohio's attack on the National Bank as an example of the "Spirit of '98." The reality was that the Compromise was supported by a minority in the Northern states. The Northern majority was not satisfied by the outcome, and hoped to better it. This conclusion is supported by Moore's own excellent analysis of the voting patterns in the House and Senate, *Controversy*, 107-112.

Foot's proposal on the grounds that it could not prevent the Congressional "interchange of opinions" on Missouri statehood. As Lowndes' later actions showed, the slave states were not interested in having the restriction issue taken to the courts.[105]

But a majority of Northern representatives did not want the restriction issue to go to the courts either. Restrictionists did not offer to agree that the Supreme Court could determine the constitutionality of restriction. Foot's proposal to refer the constitutionality of slavery restriction in new States to the Supreme Court was defeated by voice vote, in sharp contrast to the numerous recorded votes taken throughout the Missouri controversy. This clearly demonstrated that neither side of the House Missouri debate wanted the issue to go to the Supreme Court. Foot's was the last serious proposal to submit the issue of restriction to the federal courts during the Missouri debate. As noted, later slave state proposals to let the courts decide the constitutionality of Missouri's proposed exclusion of free blacks were rejected by Northern representatives.

Rufus King thought that the Supreme Court could not intervene in the dispute over Missouri because the Constitution had exclusively referred the issue of new state admission to Congress. King's notes for the Missouri debate show that he thought that state admissions constituted an unchangeable compact between Congress and a new state. If a state that had already been admitted to the United States passed an unconstitutional law, only the judiciary had power to annul it. King had asserted in his published Missouri speech in 1819 that the federal courts could intervene to protect people who

---

[105] 16 *AC* 949-50, January 27, 1820. It was Representative Lowndes who about a year later offered precisely the same sort of proposal for court intervention to resolve the narrower constitutional issue raised by the second round of the Missouri controversy, Missouri's claim that it had the right to exclude free blacks. That proposal was quickly rejected by northern Congressmen, who claimed that Congress needed to decide the issue.

were enslaved under a state law enacted in violation of a Congressional restriction against slavery in a new state.[106]

But despite presenting a detailed analysis of the constitutional issue, King did not explain in his published Missouri speech that where the question was the constitutionality of a condition imposed by Congress on a new state before admission, his view was that the Constitution reserved to Congress the exclusive power to decide on it in most cases.[107] From the fate of the Foot proposal in the House, and King's position in the Senate, it is a fair inference that most members of Congress either agreed with King that the federal courts had no authority on the restriction issue, or did not trust the federal courts to resolve the issue in a way that was satisfactory to their side of the dispute.[108]

Congressmen on both sides nevertheless made various constitutional arguments for their position. The lion's share of these arguments were directed at their own sectional constituencies rather than their adversaries. This can be seen from the following analysis of the major arguments that seem to have had broad influence (space will not permit an exhaustive account).

Like King and Taylor, most Northern Congressmen supported their constitutional argument on restriction principally by relying on the broad discretion conferred on

---

[106] Rufus King, *Two Speeches*, 18-19.

[107] Rufus King's notes on admission of new states, King Papers, Box 81, Folders 1, 6, NYHS.

[108] The uncertainty about what position the Supreme Court would take on the constitutionality of restriction was the result of the conflict between the Court's record on "economic nationalism" issues like the constitutionality of the national Bank and its uncertain position on slavery. See G. Edward White, *The Marshall Court and Cultural Change 1815-1835*, abridged ed. (Oxford: Oxford University Press, 1991), 675-682; Mark R. Killenbeck, *M'Culloch v. Maryland: Securing a Nation* (Lawrence: University Press of Kansas, 2006).

Congress by the new state admission clause.[109] Northern Congressmen such as Senators Benjamin Ruggles and William A.Trimble of Ohio, Representative Taylor and others used the Northwest Ordinance of 1787 and its Congressional application to the Northwest Territory states, Ohio, Illinois, and Indiana, on their admission to statehood as a precedent for restricting new states regarding slavery.[110] Congressman Daniel Cook of Illinois buttressed this argument by pointing out during House debate that the Constitutional Convention journals showed that the Convention had rejected by a large majority an effort led by James Madison and George Mason to make an "equal footing" clause part of the Constitution.[111] Other Northern members contended that the concept of "equal footing" as it was used in the Northwest Ordinance and in subsequent laws patterned on it did not support a constitutional right of new states to make decisions about slavery without restriction.

The slaveholding state position in response was the assertion that States were constitutionally entirely distinct from territories. Whatever power Congress had over territories, Congress's power to restrict state admission was always limited by a Constitutional "equal footing" doctrine (not one based on cessions limitations).[112] Those

---

[109] U.S. Const., Art. IV., § 3.

[110] 16 *AC* 275-295, January 27, 1820 (Senators Ruggles and Trimble).

[111] 16 *AC* 1101, February 4, 1820.

[112] Congressman Phillip Barbour had argued earlier that the Ordinance was "utterly void" because it violated the Virginia cession's requirement that States formed from that cession must be admitted to the union on an equal footing. Therefore, it could not bind States formed from within the Territory on slavery. 16 *AC* 1187, February 15, 1819. Senator James Barbour of Virginia also pointed out that some believed that Virginia consent to the Northwest Ordinance's slavery provision had been coerced, because it had been based on a political deal to end the dispute over the Spanish Treaty (discussed in Chapter 4):

"As to the consent of the Virginia delegation to the restriction in question [of slavery in the Northwest Ordinance] whether [it was] the result...as is said by some, a political measure to counteract

who supported the "equal footing" doctrine saw it as a structural principle of fundamental importance to the Constitution and republicanism, and supporters included several key Northern Congressmen who became "dough faces" (supporters of the Compromise).

Congressmen such as Representatives Henry Meigs and Henry Storrs of New York (two of the Bucktail Republican "dough faces") argued that the "equal footing" principle, broadly interpreted, was an essential part of the Constitutional understanding about what a republic was, and how the Republic would expand. This was the Jefferson-Madison position on the equal footing issue.[113] It countered Northern arguments that slavery was anti-republican.[114] Meigs argued that opposition to Missouri's admission without restriction was ultimately founded on opposition to the basic theory of republican government.[115] For Meigs, as for Jefferson, republican expansion of the nation required

---

certain schemes then going on, whose object was, according to the rumor of the day, a severance of the Union [the Spanish Treaty dispute], it is not now important to decide." 16 *AC* 332, February 1, 1820.

Although there is no direct evidence to support this inference, it is likely that Senator Barbour's assertion regarding the Spanish Treaty was a result of discussions with either James Madison or Charles Pinckney, both of whom had been heavily involved in that dispute. Madison was a near neighbor of Barbour in Virginia.

[113] See the excellent analysis of Jefferson's thought on expansion and the Missouri controversy in Peter S. Onuf, *Jefferson's Empire: The Language of American Nationhood* (Charlottesville: University Press of Virginia, 2000), 109-146.

[114] For an analysis of northern arguments on republicanism and slavery, see William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* (Ithaca: Cornell University Press, 1972), 141-50.

[115] Meigs was a trusted political ally of Martin Van Buren who had apparently been recruited to run for Congress by Van Buren. Henry Meigs to Josiah Meigs, August 22, 1819, Papers of Henry Meigs (New York: NYHS). Meigs was the carrier of the famous "Green Bag" correspondence in which Van Buren sought removal of a series of New York postmasters (political appointees). Meigs defended his and Van Buren's action to his father on the ground that he had told the Postmaster General to remove any officials "who neglected or prostituted his office for party purposes be his party what it might." Henry Meigs to Josiah Meigs, July 2, 1820, ibid.

that the people of new states be permitted to form their own Constitutions without restriction.[116]

More broadly, Meigs saw the Missouri dispute as based on "neither more nor less than sectional feeling," even though advocates' positions were nominally based on religious or moral principles. He claimed it resembled earlier religious wars in which both sides had thought that they had God on their side.[117] Meigs's position on Missouri clearly reflected New York Bucktail Republican leader Martin Van Buren's private position as well, because it is extraordinarily unlikely that Meigs would ever have taken a position on restriction at variance with Van Buren's views.

Meigs's constitutional position was based entirely on his political principles. In writing to his father, Josiah Meigs, an "ardent Jeffersonian" who served as a high official in the Madison and Monroe administrations, Henry Meigs made clear that his Missouri vote had "deeply offended many of my political friends," and might cause his "political death," to which he had "no objection."[118] He had voted out of his principled convictions as a republican, even though 19 out of 20 of his constituents would have preferred "Civil war."[119]

---

[116] 16 *AC* 945, January 26, 1820.

[117] "Is it forgotten that the...archbishop of one belligerent, goes to the temple of the Almighty and chants 'Te Deum laudamus,' for the victory obtained by his country with carnage and devastation, over the enemy; while the archbishop of another belligerent is at the same time entering the house of God, and singing also 'Te Deum laudamus pro victoria,' upon the other side of the line, the creek, or the river? We, who know these things, should profit by our knowledge, learn liberality, and practice it." 16 *AC* 943, January 26, 1820.

[118] Henry Meigs to Josiah Meigs, July 11, 1820, May 6, 1821, Meigs Papers, NYHS. Josiah Meigs is described as an "ardent Jeffersonian" by his biographer in the *Dictionary of American Biography*. Josiah Meigs served as a high official in the Madison and Monroe administrations.

[119] Henry Meigs to Josiah Meigs, May 6, 1821, Meigs Papers, NYHS. In earlier correspondence, Meigs had made clear his strong republicanism, and described Rufus King, Senate leader of restrictionists, as an

Meigs argued that neither side of the Missouri debate was actually interested in doing anything to help slaves by emancipating and colonizing them, despite the lip service paid to these goals. To emancipate slaves, Meigs had proposed legislation that would dedicate the proceeds of public land sales to the purchase and colonization of slaves. Congress, of course, ignored Meigs's resolution because neither Northern or Southern members were willing to devote large amounts of what they thought of as their section's money to emancipating slaves. It seems quite likely that Meigs was aware that his resolution would receive no support from other Congressmen. Their indifference to Meigs's resolution made precisely the point Meigs wanted to make—Congressmen were not interested in debating practical means of emancipating and colonizing slaves because despite the high flown rhetoric, helping to free blacks was not what the Missouri debate was actually about for either section.

Meigs also pointed to the limits of the Constitution's ability to resolve the issue of slavery and to the dangers of sectionalism in language that strongly resembled Jefferson's own views on the Missouri controversy:

> Our free constitution was made by men who were wise enough to know the danger of sectional divisions. This Constitution is no more than a profoundly wise agreement to differ....If we, sir, shall be unhappily so unwise as to forget this, nothing will be left for us and our posterity but awful combats at parallels of latitude, or physical lines of demarcation.[120]

Representative Henry Baldwin of Pennsylvania took the same constitutional position as Meigs, arguing that the Constitution did not permit Congress to dictate to Missouri what it should do about slavery. Historians have mistakenly dismissed

---

"aristo fed" who should not be re-elected to the Senate unless he became a republican. Henry Meigs to Josiah Meigs, May 20, 1819, Meigs Papers, NYHS.

[120] 16 *AC* 946, January 26, 1820.

Baldwin's position as a self-interested one, based on his desire to obtain tariff protection for Pennsylvania interests he represented and was allegedly indebted to.[121] Baldwin denied this and fervently defended his position in an eight page letter to an influential constituent, Pittsburgh newspaper editor John Gilmore.

Baldwin insisted that his Missouri position was based on principle: "it is a matter of conscience." He "never gave" a vote "in favor of slavery" "and never will," but did not think that the Missouri issue was about slavery; instead, it was a matter of constitutional principle. Baldwin had been told he could be Governor of Pennsylvania if he voted with restrictionists on Missouri, but he was convinced that the Constitution did not give Congress the power restrictionists sought.[122]

Baldwin's papers also contain detailed notes—prepared in the form of a lawyer's brief—on the constitutional arguments over Missouri. These notes confirm that Baldwin thought that new states were intended to possess the same rights as "old states."[123] Congress's power over new state admission was not unlimited—it could not violate "general principles" or dictate Constitutions for them. Because the original states had possessed unfettered rights to decide whether to legalize slavery prior to formation of the Constitution, and slavery was a matter of "internal policy," Baldwin thought that new

---

[121] Forbes, *Compromise*, 82.

[122] Baldwin also explained that he had been told personally by William Major Jackson, Secretary of the Constitutional Convention, that the Convention had actually broken up over slavery. Only Washington's personal intervention had persuaded the delegates to remain together, and they had agreed as a result that Congress would never interfere with slavery except to control the slave trade and the migration of imported slaves. Baldwin believed that the South would break up the Union over Missouri because they thought that restriction violated this fundamental constitutional agreement, and would be the precedent for further Congressional action against slavery. Henry Baldwin to John Gilmore, February 12, 1820, Henry Baldwin Papers (Society Small Collection) (Philadelphia: HSP).

[123] Baldwin Papers, HSP.

states were constitutionally entitled to such rights as well. Freedom from restriction was necessary to give them "full sovereignty," like the original states. Baldwin's constitutional position may have been mistaken, though he was a future Supreme Court justice, but his constitutional position was clearly sincere, and he believed that he was paying a high political price for it.

Baldwin also strongly believed on the basis of firsthand evidence that Northern restrictionists were motivated by a desire for political power. As he wrote to Gilmore:

> It is political power—It is not slavery but Slave representation which they wish to abolish—Not to give freedom to Blacks but to give power to themselves that the warm advocates of restriction now contend —
> [O]n Friday I observed to a very distinguished Federalist that I was afraid that by provoking the southern people we should lose the Bankrupt Law and our measures for the protection of manufactures and commerce. He replied nearly in these words This is a grand struggle for political power and rather than not succeed I would agree to have no Bankrupt Law no Commerce no Manufactures. This is the true Secret....

Baldwin's then extended his discussion of the partisan politics influencing the debate:

> It is only lately that these [political] views have become apparent. Gen'l. William King of the Province of Maine in a letter which I saw yesterday says this is the object and such an opinion from him has great weight—he is the brother of Rufus King—In a few days I will give you more specific evidence of this sort.... I believe this to be the decided opinion of Mr. Lowrie [Pennsylvania's junior Senator] tho' I am not authorized by him to say so and you must not quote him or authority for it.[124]

Although Baldwin based his opposition to Missouri restriction squarely on his understanding of the Constitution, he made a fallback political argument as well. This argument was not one Baldwin made as a result of personal dependence on manufacturing interests, but rather was a "realpolitik" assessment of Pennsylvania's

---

[124] Henry Baldwin to John Gilmore, February 12, 1820, Baldwin Papers, HSP.

interests. Baldwin drew an important conclusion about Pennsylvania's political welfare from his conclusion that Missouri restriction was really a Northern state power grab. He concluded that it was not in Pennsylvania's interest to join in that power grab. The reason was that Pennsylvania's interests as a state were different than those of the Northern states such as New York, whose leaders were seeking separate political gains from restriction. He wrote:

> We are appealing to the liberality of the South to protect our manufacturers—this is not a time to provoke them on questions which come [illeg.] to their throat —If we succeed in [illeg] Legislation on the subject of Slavery it will not build up our iron works—We gain nothing they lose everything—The southern people are very much divided about Manufacturers—they will oppose iron warmly—we risk a good deal by [illeg.] this question and we risk it for mere theory and pride of opinion for our state or its legislature have no political views. The northern [states] have and they may gain by the contest but we are sure to lose both politically and in our most important interests.[125]

Representative Henry Storrs of New York, another "dough face," was a prominent lawyer who had opposed the Tallmadge restriction amendment from the outset and who also saw Missouri as a sectional conflict. Storrs argued that restriction denied Missouri the right to be admitted on "an equal footing with the original states."[126] Representative Louis McLane of Delaware contended that equal footing for states was a central structural principle of the Union. For McLane, the equal footing doctrine was based on the need to maintain national unity by protecting equal states' rights in return for equal contributions to the Union.[127] In short, many of the Northern "dough faces"

---

[125] Id.

[126] 15 *AC* 1215, February 16, 1819.

[127] 15 *AC* 1232-3, February 17, 1819.

agreed with the Jefferson-Madison constitutional position on the equal footing doctrine, and that position formed a primary basis for their willingness to oppose restriction.

The Northern states' abiding concern over the regional balance of power was evident in the argument made by many Northern Congressmen in support of restriction that Missouri's admission as a slave state would extend the operation of the Three-Fifths Clause. Some historians conclude that an effort to destroy the Three-Fifths Clause was the underlying motive for the Northern attack on Missouri, while others point to discontent over the Clause as one of the major factors leading to the Missouri controversy.[128] But although Northern restrictionists generally opposed the Three-Fifths Clause, such opposition had not united the North before Missouri.

The Northern attack on the Three-Fifths Clause began at least as early as the 1800 Presidential election. New England representatives opposed the Louisiana Purchase in part because the Clause's operation would be extended to new states created from within the purchased territory. The Hartford Convention proposals of 1814 had included abolition of the Three-Fifths clause.[129] But no official representative from either New York or Pennsylvania attended that Convention, and politicians from those states showed no subsequent interest in advancing the Hartford agenda.

As Mason notes, the Pennsylvania state Senate rejected the Hartford Convention proposal to abolish the Three-Fifths Clause (or "slave representation"), arguing that Pennsylvania and other large mid-Atlantic states were under-represented in the Senate

---

[128] Albert F. Simpson, "The Political Significance of Slave Representation, 1787-1821," *Journal of Southern History* 7, no. 3 (1941): 315-342; Wiecek, *Antislavery Constitutionalism*, 106-8.

[129] On the historical background of the Convention, see James M. Banner Jr., *To the Hartford Convention: The Federalists and the Origins of Party Politics in Massachusetts, 1789-1815* (New York: Alfred A. Knopf, 1970).

compared to New England.[130] Another major reason for the lack of interest by major states such as Pennsylvania and New York in advancing the Hartford Convention agenda was that other issues were more important to legislators in those states, and in some cases, they thought that they needed Southern support to achieve them. That New York and Pennsylvania later joined Hartford Convention states in opposing Missouri admission strongly suggests that they had their own motives beyond pure enthusiasm for the Hartford agenda, a conclusion confirmed by an analysis of Northern arguments against the Three-Fifths Clause.

Northern representatives did not claim that they had textual support for their constitutional position that the Three-Fifths clause should not apply to new states that had slaves. Instead, restrictionists such as Rufus King argued that the intent of the Constitution was to limit the Three-Fifths Clause to states created from the original territory of the United States. There was no support in the Convention debates for this position, as King was undoubtedly well aware. The debates arguably supported the opposite position. James Madison argued in a letter to President James Monroe that King's position was actually a variant of the argument that Northern states should be protected against being outvoted by new western states, a position that had been defeated at the Convention.[131]

King's revisionist history went further. He conceded that the Three-Fifths rule had originally been adopted by 1783 as a taxation rule, because it was a reasonably fair means of apportioning tax burdens using a population standard that approximated

---

[130] Mason, *Slavery in Early Republic*, 65.

[131] James Madison to James Monroe, Feb. 23, 1820, available online in Library of Congress, American Memory, *JM Papers*.

wealth.[132] But he then denied that the American Revolution was based on the idea that representation and taxation needed to be proportional at all.[133] He argued that virtual representation for property violated "our theory of equality of personal rights," and that representing only one form of property conferred disproportionate political power on some states. He asserted that this was understood at the time of the Convention, and that the Three-Fifths Clause was therefore the "greatest" concession made by northern states for adoption of the Constitution.

The inference is unavoidable that King knew that he was preaching to the Northern choir in presenting this one-sided version of the Convention's deliberations on the Three-Fifths Clause. King's argument ignored the fact that at the Founding, Northern leaders like John Adams, and many Northern Convention delegates (though by no means all), supported the idea that property should form a primary—if not the sole—basis of representation. It also ignored the repeated, strenuous and successful arguments of Southern delegates at the Convention that their states' slave property was entitled to representation as a means of permanently securing its existence against political attack. King's argument ignored the fact that no effort whatsoever had been made at the Convention to limit the Three-Fifths Clause to existing states. That omission was in sharp contrast to the Constitution's provisions regarding the slave trade, which explicitly differentiated between existing and new states. King's contentions certainly failed to persuade Senator Edwards of Illinois, who might have been expected to sympathize with

---

[132] King, *Two Speeches*, 21-2.

[133] This directly contradicted King's analysis of the Three-Fifths Clause in his 1803 letter to Timothy Pickering, where he asserted that the Clause had been adopted because "taxation and representation are inseparable." Rufus King to Timothy Pickering, November 4, 1803, *LCRK*, 4: 324.

his position, but who instead pointed out that an attack on the Three-Fifths Clause might easily lead to an attack on state equality in Senate representation, since it was equally vulnerable to King's critique.[134]

Senators King and Roberts used as a primary support for their Three-Fifths Clause position reasoning that was quite similar to the "states' rights" reasoning employed by the slave states in their equal footing argument, but that privileged the position of the original states. King reasoned that the Three-Fifths Clause was a concession by Northern states that weakened their political power; that any extension of the Clause that weakened their power further was inconsistent with the idea that the Constitution was intended to maintain their equal relative political power; and that therefore, extending the Clause was inconsistent with constitutional intent.[135]

Representative Taylor of New York followed King's state power analysis in attacking slaveholding states' "lust of acquiring" large additional slave territory, "the Floridas," "Cuba," and other "islands in the Gulf [of] Mexico." Taylor threatened disunion if Northern states' representation rights were unfairly diluted by slave territory expansion:

> You may have the power to pass such laws, but beware how you may use it....if there be a transgression which in its very nature is beyond forgiveness, it consists in admitting into the concern new and unexpected partners...[whose admission would] destroy the rights of the original owners."[136]

---

[134] 16 *AC* 190, January 19, 1820.

[135] Excerpt from King speech to Senate, February 11, 1820, *LCRK*, 6: 276.

[136] 16 *AC* 965-66, January 27, 1820. The other basis for the northern states' argument against the extension of the Three-Fifths Clause was the assertion that it was inequitable to extend the Clause because the government was not based on direct taxes, as they had assumed that it would be in drafting the Constitution. This too was revisionist history. Northern representatives, particularly Rufus King, had justified the Three-Fifths clause during ratification on the basis that it was linked to direct taxes, even though they knew at the time that direct taxes would rarely be used by the government. Madison attacked King's reversal. See James Madison to James Monroe, February 23, 1820, *JM Papers*, LOC (online).

Northern attacks on the continued operation of the Three-Fifths Clause during the Missouri debate can best be understood as part of the broader Northern concern over regional control of political power. The core of Northern concern was that such representation supported influence and control of the national government by states whose economies were based on slave export agriculture and thus were often unwilling to support policies favoring Northern economic interests. Representative John Holmes of Maine was candid about this distinction. He explained in a circular letter to his constituents defending his support for the Missouri compromise that:

> Young, interprising, and industrious you will need the aid and friendship of the slave-holding States. Your navigation, commerce, fisheries, and manufactures must be cherished and improved. Protection to these is generally taxation upon their products of agriculture. On these subjects they have hitherto been liberal and magnanimous. But engage in this crusade against them...and you provoke a hostility at once destructive of your own interests, and the safety of the nation.[137]

Holmes's statement that preferred Northern economic policies were "generally taxation" on slave state agriculture was a clear recognition that Northern and Southern economic interests were antithetical in important respects. Rufus King agreed, as did other Northern state politicians, particularly those from New England such as William King of Maine and Harrison Gray Otis of Massachusetts. The Three-Fifths Clause mattered to Northern states because it limited Northern power to obtain their preferred policies over Southern sectional opposition. But the Missouri Constitutional debate escalated beyond such sectional arguments over policy that implicated slavery to a struggle over the character of the Union.

---

[137] Congressman John Holmes's Letter to the People of Maine on the Missouri Compromise, reprinted in part in Noble E. Cunningham Jr., *The Early Republic, 1789-1828* (Columbia: University of South Carolina Press, 1968), 116.

It is of great historical significance that during the Missouri debate, leading Northern Congressmen and Senators of both major political parties also made overtly religious claims not simply to attack the morality of slavery, as had often been done in the past, but instead as the basis for their constitutional arguments against slavery. [138] These claims asserted that the Constitution itself had a religious foundation. Slave state Congressmen vociferously denounced such religious arguments about law and the Constitution. Thus the combatants renewed an argument about natural rights that had a long, divisive history.

Senator Roberts, a leading advocate of restriction, presented his argument against slavery expansion by describing the Constitution and United States history on slavery in almost purely religious terms.[139] According to Roberts, the United States had earned its liberty by appealing to God for its freedom against British oppression in the Declaration of Independence. God had answered the United States' appeal then, and this had created a new covenant between the United States and God which the United States had to honor by advancing freedom, which among other things meant an obligation to eliminate slavery.[140] This covenant meant that the Constitution must be interpreted to prohibit

---

[138] At the beginning of the Missouri debate in 1819, Representative Taylor suggested that proclaiming slavery a curse while supporting its extension risked the "censure...pronounced by the Saviour of Mankind...." 15 *AC* 1174, February 15, 1819.

[139] Historian Robert Forbes accurately terms Roberts's position "sacred history." Forbes, *Compromise*, 76.

[140] 16 *AC* 120-27, January 17, 1820. The parallel with earlier American forms of covenant theology is a striking one. David Brion Davis has pointed to a parallel development in Unitarian theology, William Ellery Channing's April 1819 Baltimore sermon. David Brion Davis, *Challenging the Boundaries of Slavery* (Cambridge: Harvard University Press, 2003), 50-59.

slavery wherever it was not necessary. It was unnecessary in the new states, and therefore the Constitutional covenant prohibited slavery there.[141]

Roberts saw American history as based on a new covenant, which meant that Congress could not rely on any other nation's history for guidance. America was exceptional in the world: "We must search for their meaning [of republicanism] in our own history only: here a different system of political morality has prevailed, and political truth taught without corruption."[142] Roberts and others such as Senator Ruggles of Ohio denied that republican sovereignty could ever lawfully include the ability to impose slavery on anyone.

Senator Roberts was not alone in viewing the Constitution as a covenant with God on freedom which Americans must honor. Representative Arthur Livermore of New Hampshire termed slavery the "commission of a sin" by slaveholding states in which they were "indulged" by the Constitution.[143] Similar arguments were made by Senator Morril of New Hampshire. Representative Tallmadge of New York, a religious member of a devoutly religious family, asserted that he acted in a "great and glorious cause," the cause of "unredeemed and unregenerated human beings," a comment unmistakably directed at slaveholders as well as slaves. Slavery was an "abomination of heaven," a "canker in your breast...poison...a vulture on your heart...," Tallmadge said.[144] Representative

---

[141] The United States had honored its covenant with God in the Northwest Ordinance. "In the Northwest Ordinance [of 1787], [e]very thing seems to have been done in the divine spirit, breathed by the representatives of an oppressed people, in the Declaration of Independence...." 16 *AC* 123, January 17, 1820.

[142] 16 *AC* 338, February 1, 1820.

[143] 15 *AC* 1192, February 15, 1819.

[144] 15 *AC* 1206, February 16, 1819.

Charles Rich of Vermont argued that the legality of slavery must be determined by "the laws of nature and natural rights, and not" the Constitution.[145] Senator Ruggles of Ohio argued that Biblical history condemned slavery, and said he hoped that the "Divine displeasure" would not "scourge our own countrymen" who held slaves. Ruggles described the Northwest Ordinance as "a cloud by day, and a pillar of fire by night."[146] But Senator Roberts's use of biblical imagery may have been the most vivid: "[D]o not urge us to admit Missouri...with her features marred as if the finger of Lucifer had been drawn across them."[147] Senator Rufus King's invocation of a religious argument as an ultimate ground for Constitutional action against slavery was thus part of a broader emerging religious interpretation of the Constitution and national history.

King's views are of particular interest for our understanding of the law and politics of slavery at this time because they blend religion, law and the Constitution into a new religious nationalism. Before the Missouri debate began, King had referred to the slave trade in Senate debate as an "abomination on the earth" whose extirpation by international concert "our religion itself called for."[148] King's 1819 published speech supporting Missouri restriction had contained no religious denunciation of slavery. King chose, however, to escalate the debate by making a religious attack on slavery in February, 1820 in speaking to the Senate before an audience that included members of the public. While King said during that speech that he would have preferred to make his

---

[145] 16 *AC* 1396, February 17, 1820, quoted in Wiecek, *Antislavery Constitutionalism*, 120.

[146] 16 *AC* 281, January 27, 1820.

[147] 16 *AC* 127, January 17, 1820.

[148] 15 *AC* 76, January 2, 1818.

religious attack "with closed doors," (i.e., with the Senate's public galleries closed), there is no evidence that he invoked the Senate's procedures for closing debate to the public.

It is not widely understood that in his 1820 speech, according to a newly discovered report, King also advocated beginning abolition in the existing states. King argued that by the "laws of nature" slave populations would increase if diffusion occurred, so that if abolition plans were not "begun now, they never will" be. To begin the process, King proposed that slaves in existing and new states be transformed into *villeins regardant.*[149] Treating slaves as *villeins regardant* would have eliminated their owners' ability to sell them separately from the land, or even to transport them if the owner moved, limitations that would have been anathema to slave state representatives. Transforming slaves into villeins would also have sharply devalued slave property, but there is no indication that King proposed to compensate slaveholders. King seems to have thought—utterly mistakenly—that his advocacy of a "bold position" on villeinage and the law of nature would persuade restrictionists to remain firm in a "desperate cause" and help to force slaveholders to compromise on Missouri in a way he deemed acceptable.[150]

King argued that tying slaves to the land as villeins would improve slaves in their "mental and moral faculties" to the point where they could then be colonized "in

---

[149] King's proposal referred to the English legal institution of "villeinage," in which villeins were persons subjected to an onerous form of forced servitude, but one regarded as less onerous than slavery in some respects. *Villeins regardant* were villeins who were legally tied to the land they worked.

[150] Rufus King to John A. King, February 11, 1820, *LCRK* 6: 269-70.

their own continent." Existing colonization plans were unworkable, but when the groundwork had been laid "all the support it will require ought to be furnished to it."[151] King's advocacy of villeinage followed by colonization was a clear public statement by the leader of Northern restriction forces that he agreed with slave state representatives that slaves could never be successfully integrated into either Southern—or Northern—American society once they were freed. And although King did not recognize this further implication, his argument actually implied that American slavery could not be ended, since there was no evidence that colonization was workable. As we have seen, thoughtful southern abolitionists such as St. George Tucker had rejected the feasibility of colonization as early as the mid-1790s.

As is well known, in this speech King also argued that the law of nature condemned slavery, and required that it be abolished except where it was protected by the Constitution. King later wrote a detailed account of this aspect of his 1820 speech to former Massachusetts Senator Christopher Gore, an old friend:

> I referred the decision of the Restriction on Missouri to the broad Principles of the Law of Nature, a law established by the creator...everywhere, and at all times, binding upon mankind...the foundation of all constitutional, conventional and civil laws, none of which are valid if contrary to the Law of Nature—that according to this law all men are born free, and justly entitled to the possession of Life & Liberty, and to the free pursuit of happiness—hence that man could not enslave man; and that States could not make men Slaves... That no act of the State...if contrary to natural law could be valid. That the political Reasons against the extension of Slavery were enough to restrain Congress from consenting to it—but were this not the Case, the Law of Nature imposes this Restraint, and as slavery may be prohibited by Congress, they are bound to prohibit it....[152]

---

[151] All quotations are from a recently discovered report of King's speech contained in Richard Peters Jr. to Roberts Vaux, February 12, 1820, Papers of Roberts Vaux (Philadelphia: HSP). Richard Peters, Jr. later became the reporter of the Supreme Court of the United States.

[152] Rufus King to Christopher Gore, February 17, 1820, *LCRK*, 6: 276-277.

King also argued that "by the principles of Christianity" no man could enslave another man.[153] His position on natural rights was consistent with the Lockean view of the social contract, but it clearly had a religious basis as well.[154]

King's "Law of Nature" argument was not new. It was a restatement of the higher law argument made by Miers Fisher and William Rawle of the Pennsylvania Abolition Society in 1794 and other American natural law advocates before that. But Fisher and Rawle had sought to apply their position only to Pennsylvania law, not to the nation as a whole, while King argued that his position applied to every exercise of Congress's powers under the Constitution. King had indeed moved on to politically "dangerous higher ground" in nationalizing the higher law position.[155]

King's higher law position lacked any warrant in the Constitutional Convention debates or agreements over slavery in which he had personally participated. In condemning all slavery on religious grounds, King necessarily condemned the earlier Constitutional compromise on slavery. In stark contrast, the Constitution's original compromise on slavery had depended on a federalist approach that was necessarily predicated on federal neutrality on the morality of slavery and that accepted that states had power to authorize it under state law.[156]

---

[153] Peters to Vaux, February 12, 1820, see n. 151.

[154] Mark Hulliung, *The Social Contract in American from the Revolution to the Present Age* (Lawrence: University Press of Kansas, 2007), passim.

[155] The quotation is from Wiecek, *Antislavery Constitutionalism*, 120.

[156] Ironically, King's argument supported the very position that had been rejected in the Massachusetts ratification convention where he advocated ratification of the Constitution. The Massachusetts Convention rejected the argument that the Constitution was illegitimate because as an agreement with slave states it implicated the free states in the sinfulness of slavery.

No one who took King's argument seriously could regard the existence of slavery in the slave states, or Constitutional arrangements that supported it, as lawful in any ultimate sense. In a private letter, Alabama Senator John W. Walker reacted sharply to King's speech, saying that King had "emancipated the whole of our slaves by one potent ipse dixit....[S]lavery cannot exist."[157] Wittingly or not, King's slavery attack provided the legal and philosophical foundation for the next generation of abolitionist thought, which saw the legality of slavery as determined by a moral law independent of and superior to the Constitution, which in turn made the Founders' intent either irrelevant or abhorrent. In response, slave state Senators heaped scorn upon his position.

Senator William Smith of South Carolina said that King had not been content to limit himself to arguments about interpretation of the Bible, but had instead "present[ed] to your acceptance the religion of nature....This was the religion preached up in the French Convention in the days of Robespierre." This "universal law of nature and religion dissolves us from all obligations."[158] Smith then pointed out that King had played a leading role in creating the Three-Fifths Clause, and linking it to direct taxes at the Convention. King was now contradicting himself, since if that linkage could justify the Clause then, it was sufficient to justify it now.[159]

Smith argued that the Northern states had sufficient political strength in Congress even with the Three-Fifths Clause, but were not politically united enough to govern the country. Uniting around slavery in Missouri was the North's effort to paper over its own

---

[157] John W. Walker to Charles Tait, February 11, 1820, quoted in Wiecek, *Antislavery Constitutionalism*, 120-1.

[158] 16 *AC* 382, February 11, 1820.

[159] Ibid., 383.

chronic political disunity.[160] In private, King understood national politics similarly. He saw the slave states' unified interest in "the Labor of Slaves" as permanently inimical to Northern political goals, but the North was chronically divided by "rival and opposing occupations and interests...." If the free states could not unite against slave states as a result of such divisions, they "ought to and will be treated as slaves."[161]

Smith then attacked King's reliance on the *Somerset* decision. From Smith's comments, it can be inferred that—like Miers Fisher and William Rawle—King had argued that *Somerset* was an authoritative interpretation of English common law, which held that that law barred slavery, and which should be followed in the United States given America's English legal heritage. Smith argued that despite the *Somerset* decision, in reality British slavery policy was completely hypocritical because Britain enslaved its own citizens politically at home, and had enslaved the West Indies and "more than seventy millions" of people in Asia.[162] "England has ceased to enslave men, unless it is in this way [through impressment of seamen]; they have latterly found it more profitable to enslave nations."[163]

Senator William Pinkney of Maryland was widely acknowledged to be one of the foremost lawyers of the day, having argued numerous cases, including *McCulloch v. Maryland*, in the Supreme Court. He responded to King's speech at length, describing King's position as based on "deadly speculations" about the "infinite perfectibility of

---

[160] Id.

[161] Rufus King to unnamed recipient, March 3, 1820, King Papers, NYHS. Unpublished.

[162] 16 *AC* 385-6, February 11, 1820.

[163] Ibid., 388.

man and his institutions" that are "identical with, the worst visions of the political philosophy of France...."[164] He reviewed Roman and English legal precedents on which King had relied for his position that "man cannot enslave his fellow man," and argued (with considerable justification) that none of them supported King's position that slavery was barred by the law of nature or nations even where a sovereign permitted it.[165]

Pinkney then reached the heart of his disagreement about the underlying political structure of the Constitution with King and other natural law moralists:

> It is idle to make the rightfulness of an act the measure of sovereign power. The distinction between sovereign power and the moral right to exercise it, has always been recognised....The power of declaring war is a power of vast capacity for mischief....Is a citizen, or are the courts of justice to inquire whether that, or any other law, is just before they obey or execute it? And are there any degrees of injustice which will withdraw from sovereign power the capacity of making a law?[166]

King's position that slavery's morality was the ultimate test of its legality was antinomian, and would, if accepted, destroy the sovereignty of a republic. Pinkney's position was a view of the social contract and natural law that closely resembled the thought of Grotius and Hobbes.

Pinkney's attack on the position that republican governments could not legally authorize slavery was equally scathing: "no eccentricity in argument can be more trying to human patience" than that argument. Pinkney quite reasonably asserted that the argument wholly ignored the history of the Constitution's formation.[167] Pinkney also

---

[164] 16 *AC* 391, February 15, 1820.

[165] Ibid., 403-5.

[166] Ibid., 405-6.

[167] Ibid., 412.

made a reductio ad absurdum argument: if the republicanism argument were taken seriously, this would require universal suffrage, particularly the vote for women. He argued that republicanism allowed the limitation of natural rights by popular consent:

> Who does not see that...from false notions...the true theory of a republican Government is mistaken; and that, in such a Government, rights, political and civil, may be qualified by the fundamental law, upon such inducements as the freemen of the country deem sufficient?[168]

As the Missouri debate escalated, sectional advocates had delineated two clear, and fundamentally opposed, visions of the nature of the Union. In one conception, the Union was a progressively improving union of Americans seeking unified moral ends, based on a Constitution founded on a religiously grounded (or ethically universalist) higher law. In the other, the Union was a political union dedicated to preserving political and moral freedom, based on a Constitution founded on popular consent embodying federalism principles that accepted moral diversity. As the clear enunciation of these irreconcilable visions of the Constitution by leading Americans might suggest, the Missouri debate also had broad parallel ramifications for New York—and hence national—politics and for our ability to understand what contemporaries meant by black citizenship.

*The Missouri Controversy, New York Politics, and Black Citizenship*

The first round of the Missouri controversy was settled by an early 1820 compromise intended to admit Maine and Missouri while placing some territory off-limits to slavery. That compromise was reopened after a Missouri state Constitutional

---

[168] 16 *AC* 419, February 16, 1820, quoted in part in Wiecek, *Antislavery Constitutionalism*, 121.

Convention held in the summer of 1820 adopted a proposed Constitution that prohibited the abolition of slavery and required the legislature to pass a law excluding free blacks from Missouri. The second round of Congressional debate on this issue resulted in a further compromise that allowed President Monroe to make the final decision about Missouri admission, because Congress could not agree. The second round of debate nominally centered around whether free blacks were citizens and, if so, whether this meant they had a constitutional right to emigrate to Missouri. But contemporaneous events in New York and other states suggest that Congress' debate on that issue had little or nothing to do with protecting the rights of free blacks. Political events in New York also provide a way to grasp the momentous implications of the Missouri debate for national politics.

In 1820, Governor De Witt Clinton faced Vice President Daniel Tompkins, the Bucktail Republican candidate, in a fierce contest for the governorship of New York. Clinton ultimately won the election by some 1,700 votes out of a total vote cast of 94,000.[169] The closeness of the election meant that any significant issue that could shift a bloc of voters from one side to the other could affect the outcome. Free black voters in New York were one such important bloc. As the work of historian Dixon Ryan Fox has made clear, sharply partisan efforts to control or limit the substantial free black vote in New York—which had typically supported Federalist candidates during the early nineteenth century—had been under way in New York for at least a decade.[170]

---

[169] *Albany Argus*, June 6, 1820. I thank Philip Lampi of the American Antiquarian Society for providing this source.

[170] Dixon Ryan Fox, "The Negro Vote in Old New York," *Political Science Quarterly* 32, no. 2 (1917): 252-275.

From the beginning of 1820 onward, the Missouri Controversy played a significant role in the New York gubernatorial election. Governor Clinton's conduct made clear that he regarded the issue as politically very significant when he did a remarkable *volte face*. In early 1819, Clinton had made a fervent appeal for national unity to the New York legislature based on the construction of the Erie Canal, arguing that "liberty and union are inseparably connected." Clinton said:

> A dissolution of the nation may therefore be considered the natural death of our free government. And to avert this awful calamity, all local prejudices and geographical distinctions should be discarded...and the whole republic ought to be bound together by the golden ties of commerce and the adamantine chains of interest. When the Western Canal is finished and a communication is formed between Lake Michigan and the Illinois river, or between the Ohio and the waters of lake Erie....The...distinctions of eastern and western, of southern and northern interests, will be entirely prostrated.[171]

In 1820, by contrast, Clinton substituted for his earlier appeal for national unity a fervent warning against the extension of slavery, in spite of the "geographical distinctions" restrictionism was "unfortunately calculated to produce":

> Highly important as it is to allay feelings so inauspicious, and to cultivate the most friendly communion with every member of the confederacy, yet I consider the interdiction of the extension of slavery, a paramount consideration. Morally and politically speaking, slavery is an evil of the first magnitude; and whatever may be the consequences, it is our duty to prohibit its progress in all cases where such prohibition is allowed by the constitution. No evil can result from its inhibition more pernicious than its toleration; and I earnestly recommend the expression of your sense on this occasion, as equally due to the character of the state and the prosperity of the empire.[172]

---

[171] De Witt Clinton, Address to NY Legislature, Jan. 5, 1819, in De Witt Clinton, *The Speeches of Governor Clinton before the Legislature of New-York* (New York: 1823), 23.

[172] Ibid., 48-9.

Clinton continued that if "the people" did not act to prevent slavery, thus cultivating "religion and morality," the "right of self-government" would be "extinguished in darkness."

During the 1820 campaign, pro-Clinton forces attacked New York Bucktail politicians who opposed the restriction of slavery. "Wilberforce," a Clinton supporter, who published one of the few surviving 1820 New York campaign broadsides, asked "*Who in New-York are the Advocates of Slavery?*" His answer was Vice-President Daniel Tompkins; Congressmen Caleb Tompkins (his brother), Henry Meigs, and Henry Storrs; a principal Bucktail state legislative leader, Erastus Root; and Martin Van Buren, at that time the Bucktail party leader in New York.[173]

"Wilberforce" pointed out that Meigs and Storrs, the latter "a recent convert to the Bucktail principles," had spoken and voted against restriction. The Tompkins brothers had absented themselves during key Missouri votes. Root had opposed Clinton's resolutions supporting Missouri restriction in the New York legislature. And Van Buren, "after having permitted his name to be used, in calling a meeting of the Citizens of Albany, to express their opinions on the Missouri question, refused to sign a respectful remonstrance against the extension of Slavery, as one of the Committee appointed by that meeting." Wilberforce's charges were entirely accurate. The New York Bucktail Republicans had in several cases opposed slavery restriction in Missouri, undoubtedly following Van Buren's lead. But also following Van Buren's lead, the Bucktail forces

---

[173] "Wilberforce", Broadside Collection No. 113 (New York: NYHS) (1820).

had where necessary sought to do this in a subterranean manner that would minimize damage to them politically in New York.[174]

During the 1820 campaign, Martin Van Buren urgently sought Rufus King's endorsement for Daniel Tompkins' election against Clinton. To assuage King's concerns about Tompkins' Missouri position, and to protect Tompkins against damage on the Missouri issue, Van Buren wrote two letters to Rufus King within two days in March, 1820 denying that Tompkins supported Southern arguments on restriction. However, Van Buren also coupled these assurances with a veiled, seemingly friendly but exceptionally blunt political warning to King not to continue to push the Missouri issue:

> ...I have seen the Vice President...on the subject of the Missouri question & he informed me that he...did not think that the restriction was unconstitutional, nor had he ever questioned its expediency. At some future day I will give you my ideas upon the question of the expediency of making this a party question. I am persuaded that notwithstanding the people of this state have felt a strong interest in the question, the excitement which exists in regard to it, or which is likely to arise from it, is not so great as you suppose.[175]

King responded that he was "satisfied" by Van Buren's explanations on Tompkins' behalf. King declined, however, to endorse Tompkins despite repeated requests by King's sons, both New York state politicians who had bolted the Federalist party during the election to support Tompkins.[176]

---

[174] Craig Hanyan and with Mary L. Hanyan, *De Witt Clinton and the Rise of the People's Men* (Montreal: McGill-Queen's University Press, 1996), 11.

[175] Martin Van Buren to Rufus King, March 23, 1820, *LCRK*, 6: 322.

[176] Moore is mistaken in saying that King supported Tompkins. Moore, *Controversy*, 182-3. King's papers suggest that he suspected that Tompkins and other Bucktails had reached a modus vivendi with the south on Missouri. King's endorsement probably would have carried the election for Tompkins. But King also later decided to take only a passive role during the second round of the Missouri controversy in the 1820-1 period.

Some historians assert that Van Buren's prime motive for his actions during the Missouri controversy was a lust for power, but this misunderstands Van Buren's motives.[177] Like King, Van Buren sought power as a means to other political ends. What Van Buren wanted to do was to control New York politics, but for the purpose of reforming government on republican terms, as the discussion of the New York Constitutional Convention of 1821 below will show. Van Buren wanted then to use unified control of New York politics as a lever for increasing Northern and Republican power. He told King as much in a remarkable early 1820 letter seeking King's assistance in trying to replace Vice President Tompkins with Secretary of the Navy Smith Thompson as the Bucktail gubernatorial candidate against Clinton. Van Buren wrote King that if King persuaded Thompson to run, "you will do a lasting benefit to the Republican Interest of this State" and that "New York instead of continuing to be the headquarters of faction might look forward to some respect & consideration in the union."[178]

What the Northern restriction fight over Missouri effectively offered Van Buren instead of Republican control of New York was a junior partnership in a Federalist-dominated Northern alliance party, and he rejected such an alliance in favor of one with Southern Republicans. Van Buren and his "radical republican" New York followers agreed in principle with the slave states in seeing Missouri admission as raising an "equal footing" issue. It followed that Van Buren was willing to accept the expansion of slavery as a consequence of adherence to popular sovereignty principles, a position that could

---

[177] Forbes, *Compromise*, 138 and passim.

[178] Van Buren to King, January 19, 1820, *LCRK* 6: 252-3.

enable an overall political bargain with Southern Republicans. As Henry Meigs (and therefore quite probably Van Buren as well) saw, the Missouri controversy made clear that in national politics, the only alternative to such inter-regional alliances was regional parties, which inevitably meant disunion and sectional warfare. In this sense, the Missouri controversy effectively laid the groundwork for the Second Party System.[179]

The effects of the Missouri Controversy rippled through New York state politics. Fox concludes that Clinton gained the free black vote in that election.[180] New York politicians' Missouri actions undoubtedly played a role in influencing that vote, although Clinton had some Federalist support as well. The Controversy clearly also affected the short-term fortunes of some of the Bucktail "dough face" Congressmen such as Henry Storrs, who attributed their failure to be renominated for Congress to that issue.[181] And the Missouri issue may also have played a role in at least one significant state Senate election, in New York City. There, leading restrictionist and former Representative James Tallmadge, spurned by Bucktail Republicans (and apparently by Clinton as well), was expected to have as his primary base of support the Quaker, antislavery and free black vote, support which he had obtained through his Missouri restriction efforts.[182] (Tallmadge lost nevertheless).

---

[179] For an analysis that reaches a similar conclusion on this point using somewhat different reasoning, see Richard H. Brown, "The Missouri Crisis, Slavery, and the Politics of Jacksonianism," *South Atlantic Quarterly* 65 (1966): 55-72. Brown also concludes that Van Buren's motives for a southern alliance included a commitment to Jeffersonian republicanism. Ibid., 63.

[180] Fox, "Negro Vote," 257-8; Moore, *Controversy*, 181-3.

[181] Henry Meigs to Josiah Meigs, May 6, 1821, Meigs Papers, NYHS. Storrs was subsequently re-elected to Congress, as were some other "dough face" Congressmen.

[182] Theodorus Bailey (son or nephew of New York political leader Theodore Bailey) to Matthias B. Tallmadge, April 27, 1819, Papers of Matthias B. Tallmadge (New York: NYHS).

The Missouri Controversy's influence on New York's federal and state elections helps to explain the willingness of New York politicians like Rufus King to defend the right of free blacks to emigrate to Missouri during the second round of the Missouri controversy. During the second round of debate, King privately called the free black emigration issue a "small affair," one of "comparative insignificance" compared to restriction. King made clear to his confidants that he did not plan to take an active role in opposing Missouri statehood on that basis.[183] Northern politicians such as King could appeal to free blacks by supporting their right to emigrate to western states in an effort to maintain or obtain free black votes, while at the same time defending black emigration rights to home-state white voters by reassuring them that it meant that they would not be required to accept more of what Governor Clinton had called the "unwelcome" "African population" in his 1819 address to the New York legislature.

In that 1819 address, Clinton noted that New York policy was to bar imports of the "African population," and that through attrition, that population would eventually diminish, but that for the present "this race" of blacks had "a strong propensity" to "congregate in our great towns" where they were "peculiarly exposed to bad example...and were "contemplated in a degraded light by public opinion."[184] A year earlier, in his 1818 address to the legislature, Clinton had called attention to the "alarming" extent of "pauperism" in our "great towns," which had rendered the "burden

---

[183] Rufus King to unknown, November 24, 1820, *LCRK*, 6: 360; Rufus King to Charles A. King, December 10(?) 1820, King Papers, NYHS (unpublished); Rufus King to John King, December 1, 1820 (King papers, NYHS (unpublished). In part King's view appears to have been that the fight over free black exclusion was simply a rematch on Missouri admission with restriction, which was a losing cause.

[184] De Witt Clinton, *The Speeches of Governor Clinton before the Legislature of New-York* (New York: 1823), 30.

of taxation" so heavy as to "menace a diminution of the population" of New York City.[185] He had recommended a system of reduced charitable expenses and "coercive labor" to reduce "the inducement to pauperism." It is a fair conclusion from Clinton's speeches that he would have included free blacks forced to emigrate from Southern states (where state laws mandated re-enslavement of newly freed blacks who did not leave) among the "unwelcome" population of potential paupers that New York policy sought to exclude.

New York was not alone in expressing concern about possible free black emigration in the years before Missouri. According to historian Matthew Mason, "a majority group in the Northwest...feared an influx of former slaves from the South."[186] Indiana citizens petitioned against the introduction of "Slaves or free negroes in any shape" in 1814.[187] In late 1816, the Indiana legislature denied entrance to a group of forty blacks whose Tennessee owner wanted to free them in Indiana. The Governor of Ohio in 1817 assured the Governor of Kentucky that Ohio citizens not only wanted to get rid of slavery, they wanted to "get rid of every species of negro population."[188]

During the Missouri Controversy, James Wilson, the antislavery editor of an Ohio newspaper who vehemently supported Missouri slavery restriction, nevertheless vigorously opposed the settlement in Ohio of some 300 former slaves from Virginia. The former slaves had been freed under the will of one Giles there and were then forced to leave Virginia to avoid re-enslavement. A letter to Wilson's newspaper about the

---

[185] Ibid., 15.

[186] Mason, *Slavery in the Early Republic*, 151.

[187] Ibid., 152.

[188] Id.

resettlement of those former slaves from an Ohioan said that he believed that "nineteen twentieths of the people of Ohio" are firmly opposed to slavery in Ohio, "yet in justice to themselves and their posterity, they will refuse admittance to such a population."[189]

Wilson heartily concurred. When slavery was abolished, "it would be much more politic to permit the blacks to extend themselves over the face of the country...," he wrote. But to permit diffusion before that would be permit "the *slave* states to liberate, and cast upon the *free* states, the most depraved and wicked part of their black population" and to "entail upon those who deny to themselves the services of the blacks, the task of reforming them, or of becoming the victims of their vices and crimes." Wilson concluded:

> No facility should be afforded to those states which enjoy the 'benefits' of slavery, toward enabling them to rid themselves of its evils; as soon as they choose to abandon the *system*, every philanthropist will lend a helping hand toward relieving them from their superabundant black population, either by colonization or otherwise. But if the legislature of Ohio does not take some measures of precaution and prevention, as to such emigrations as that above described, they may set about building a new penitentiary, and making a judicial circuit after the manner of Hamilton county, in the midst of every negro settlement.[190]

The editor of the widely read *Niles Weekly Register* of Baltimore was also familiar with the situation of the 300 former slaves who had been freed in Ohio by Giles's will. He described the decision to free them there as "an injury" "inflicted upon Ohio" by a well-intentioned but "ill-judged" decision of their owner. The owner's

---

[189] *Western Herald & Steubenville Gazette*, July 1, 1820.

[190] Id. By March, 1820, the Ohio free black settlement was in need of relief, and the Western Herald carried a column in support of relief donations to it. Ibid., March 25, 1820.

decision was wrong "unless he has made provision also, for taking care of them until the degrading properties of slavery are eradicated from the objects of his solicitude."[191]

Meanwhile, the editors of another Ohio newspaper, the Scioto *Gazette*, defended the enforcement of the Fugitive Slave Clause in Ohio on the ground that not to enforce it would lead to the "encreasing the numbers of an ignorant, slothful and immoral race...." Wilson of the *Western Herald* responded by attacking slave state politicians for their willingness to do just that by extending slavery to Missouri.[192] Other states responded similarly. Illinois's first state legislature dealt with free black emigration by imposing prohibitively high bond requirements on free blacks who attempted to enter that state.[193]

Matthew Mason concludes that many Americans in the Northwest saw "draconian Southern manumission laws" that excluded free blacks from slave states as "hand in hand with the drive to fix slavery's parade of evil consequences on what should be the free, white states of the Northwest."[194] Like the Ohio editor, many Northwest whites believed that the "burdens" of slavery—that is, free blacks—should go hand in hand with the "benefits" of slavery. Senator Burrill of Rhode Island advocated Missouri restriction primarily on the ground that it could keep both slaves and free blacks out of the West.[195] Senator Otis of Massachusetts made an apparently similar argument to Burrill's, favoring western settlement by "a white population," as opposed to one of mixed race.[196]

---

[191] *Niles Weekly Register*, November 4, 1820.

[192] *Western Herald & Steubenville Gazette*, July 1, 1820.

[193] Mason, *Slavery in Early Republic*, 153.

[194] Id.

[195] 16 *AC* 217, January 20, 1820.

[196] 16 *AC* 254, January 25, 1820.

Governor Oliver Wolcott of Connecticut wrote confidentially to Rufus King that permitting slave states to force blacks out of those states would be "an effort to throw an intolerable burden on the northern states...," but that though "cruel and unjust" it was a matter for Southern states alone to determine.[197]

Northern racism and concerns about increased social welfare costs were the fundamental exclusionist motives behind much Northern Congressional opposition to the Missouri Constitution provision excluding free blacks. An Ohio Congressman analyzed the Missouri Constitution's exclusion of free blacks and wrote to his constituents that it left him "perfectly convinced" that slave states are "taking measures to throw their worthless black population into Ohio, Indiana, and Illinois."[198] These motives were quite similar to those on which Northern policy toward fugitive slaves was based. There was another reason as well for whites to oppose the Missouri exclusion provision. Like Rufus King, others concluded that if Missouri could ban free blacks, then other states such as Maine could ban emigration of disfavored native whites to Maine based on their ethnic descent.[199] White Northern Congressmen opposed Missouri's exclusion of blacks primarily because it would harm Northern whites, not because they sought to protect blacks. This conclusion about Northern motives is amply confirmed by contemporaneous New York political developments.

---

[197] Oliver Wolcott to Rufus King, December 25, 1820 (King Papers, NYHS)(unpublished).

[198] Quoted in Mason, *Slavery in Early Republic*, 183.

[199] *Niles Weekly Register*, November 4, 1820; Rufus King to Unknown, November 24, 1820, *LCRK*, 6: 359-60.

In the aftermath of their disastrous loss in the 1820 New York gubernatorial election, New York Bucktail Republicans became even more determined to destroy De Witt Clinton's political authority. For this purpose, they forced through the New York legislature a bill that required the calling of a Constitutional Convention with an unlimited agenda. When the Convention convened in 1821, it was chaired by none other than Daniel Tompkins. Rufus King, Martin Van Buren, Erastus Root, and other New York political leaders served as delegates.

The Convention agreed to profound reforms in New York government that had as their primary motivation the destruction of the Governor's power and the popularization of both law and the court system by broadening the franchise and subjecting many judicial offices to popular control. The New York Constitution was republicanized thoroughly, and transformed from one of the most conservative, English-style Constitutions in the United States to one of the most progressive. Rufus King opposed many of the proposed reforms at the Convention. But in one important case, he went from opposing a proposed "reform" to being silent in his opposition. That Convention reform stripped the vote from nearly every free black in New York.

An initial proposal to take the vote completely away from blacks was made by Erastus Root, Van Buren's Bucktail leader in the New York Assembly who had opposed Clinton's Missouri restriction resolution. Root made no bones about his reasons; a bloc of black votes that generally supported Federalists had cost Republicans elections that they would win if only whites were allowed to vote.[200] Though Root chose to use as his

---

[200] Jabez D. Hammond, *The History of Political Parties in the State of New-York*, facsim. Ann Arbor: Univ. Micro. Intl. 1981 ed. ([orig. pub. Albany: C. Benthuysen, 1842]).

example the election of 1813, where he argued that a "few hundred Negroes" "virtually gave law to the state," it was lost on no one that the most recent example of such an election was Tompkins' narrow loss to Clinton.[201] Root argued that black votes could be bought, and that this could only be prevented by taking the vote away from them. As another leading Republican, Colonel Young, put this, blacks were a "degraded people...an unsafe depository for the right of suffrage."[202] Against this position, Peter A. Jay, son of the leading New York Federalist John Jay, argued that taking the vote away from an estimated 30,000 free blacks was inconsistent with the support that New York leaders who were members of the Convention had just given to Missouri restriction.[203]

At the Convention, Rufus King and other major Federalists originally opposed taking the vote entirely away from free blacks. In the Senate, King had opposed the Missouri Constitution free black exclusion provision on the ground that it was inconsistent with the Privileges & Immunities Clause. In the New York Convention, he argued that under the Constitution, persons born into slavery could never vote, but free born blacks could do so, and that the Privileges & Immunities Clause meant that free blacks could not be stripped of the vote if they were similarly situated to whites. At precisely this point in the Convention's deliberations, King received a timely warning from his son John King, who was closely monitoring the Convention from Albany, that his support for continuing black voting was politically unwise.

---

[201] Ibid., 2: 18; Fox, "Negro Vote."

[202] Id.

[203] Jabez Hammond, *Political Parties in New-York*, 2: 16-17.

John King reported in a letter to Rufus King that Tompkins had stacked the Convention committee on suffrage to get a report favoring extending the suffrage for whites, and taking away the black vote. He advised Rufus King to attack vigorously the report's white suffrage extension, which dramatically expanded the white franchise.[204] He then explained that there was an important exception:

> New York is making common cause against Negroes—all seem to regret that the privilege of voting should have been continued to them—this feeling also extends to our county. I understand that the country members in the convention have been and will be [illegible: expected?] to retrace their steps upon this subject.[205]

By "New York," John King probably meant the area in and around metropolitan New York, which he represented in the legislature, and where he and his father both lived, though he might have meant the state as a whole. In either event, John King was clearly warning his father that there would be a concerted effort made to take the vote away from blacks, that it would be nonpartisan, and that his father should not oppose it. The New York convention then overwhelmingly supported an amendment—proposed by a committee controlled by Martin Van Buren—which effectively stripped the vote from virtually all free blacks in New York. It is uncertain whether King supported the amendment, but he firmly supported the reformed Constitution, and never publicly objected to the decision to strip the vote from virtually all free blacks.

As Peter Jay's argument showed, the Convention's decision to take the vote away from free blacks spoke volumes about the forces motivating New York politicians in their opposition to Missouri slavery. Like most white citizens of the Northwest, most New

---

[204] By one estimate, white suffrage at the gubernatorial and senatorial level was increased 158 percent. Hanyan and Hanyan, *De Witt Clinton*, 14.

[205] John A. King to Rufus King, October 3, 1821, King Papers, NYHS (unpublished).

York politicians and their constituents had little more use for free blacks than they did for slaves. Their political concern was not ultimately with protection for the rights or welfare of blacks, whether slave or free, but instead with how an influx of slaves or free blacks into areas Northern whites wanted to settle would affect their taxpaying constituents.

The right to vote was an essential foundation of free blacks' ability to exercise other political, social and civil rights. It is extraordinarily difficult—if not impossible—to reconcile disinterested expressions of concern for the welfare of free blacks elsewhere with a deliberate decision to strip the most fundamental political right of all from free blacks at home. The decision to deprive free blacks of the vote while sharply expanding white suffrage was explicit racial discrimination, which a large majority of New York voters heartily endorsed.

The New York Convention's actions on black voting show that Van Buren and his allies were supporters of white democracy long before Stephen Douglas declared that as the purpose of the Democratic party. And they were not alone. By 1840 free blacks had lost the suffrage in New York, New Jersey, Connecticut, and Pennsylvania (among others), all states in which they had previously voted. By 1840, 93 percent of free blacks in the North lived in states that either banned or severely restricted their right to vote.[206]

---

[206] Paul E. Johnson, *The Early American Republic, 1789-1829* (Oxford: Oxford University Press, 2007) 133-4.

**Epilogue**

During the Missouri debate, Senator Nathaniel Macon of North Carolina responded to repeated Northern restrictionist arguments that Thomas Jefferson's classic attack on slavery in his *Notes on Virginia* supported their cause by pointing out that Jefferson's actions showed that Jefferson supported a "democracy" of "the white family," not an end to slavery.[207] In a newly discovered letter, Jefferson himself weighed in on the Missouri debate directly to Speaker of the House and Northern restrictionist leader John Taylor. Taylor had written to Jefferson during the 1821 Missouri debate asking for information about the history of the Phi Beta Kappa society. After making his inquiry, Taylor stated his admiration for Jefferson's efforts on behalf of liberty over the years, and offered his good wishes. In an obvious reference to the Missouri controversy, Jefferson responded to Taylor that he was not certain that liberty would be preserved, because the "Northern bears seem bristling up to maintain the empire of force."[208]

For Jefferson, the "empire of liberty" included the right of the sovereign people to choose even slavery; for the Northern states, it meant the extinction of that right and the redefinition of popular sovereignty in a republic. Both sides agreed, however, that full citizenship in the American republic was for whites only. As Macon said, "it may be stated, without fear of contradiction, that there is no place for the free blacks in the United States—no place where they are not degraded."[209] In the years after 1815, support for abolition had growing political power to create a broad-based white cross-class

---

[207] 16 *AC* 229, January 20 1820.

[208] John W. Taylor to Thomas Jefferson, January 30, 1821; Thomas Jefferson to John W. Taylor, February 13, 1821, Taylor Papers, NYHS (unpublished).

[209] 16 *AC* 228, January 20, 1820.

coalition to eliminate a repressive labor status whose expansion impeded Northern state interests in western settlement. But a necessary price of continued Northern and Midwestern antislavery action was continued black inequality at home to assuage the fears of white voters there about the consequences of black freedom where it had the potential to affect them.

The Missouri controversy was a battle between sections of America for western territory and national dominance, and disputes over slavery and black rights were incidental to that struggle. The Compromises constituted a pragmatic economic settlement that deliberately left the sectional political contest in stalemate, and did not resolve the underlying constitutional issues. Acceptance of this political and constitutional stalemate effectively redefined the Constitution as a sectional compact, since on slavery the Constitution lacked agreed upon moral foundations, allocations of political authority to different levels of government, or procedures for constitutional dispute resolution. The new compact bought a deceptive peace for the Republic, but permitted the largely unrestrained growth of slavery for two more generations. The political choices made in the Missouri controversy's maelstrom had made the slaveholders' Union permanent.

Appendix A

*Notes on the Law of Slavery and Bound Labor*

In 1770, slaveowners' rights in most colonies with regard to chattel slave property included the right to use brutal physical force (generally not including dismemberment without court sanction), including force sufficient to result in accidental death, to compel slaves to labor and otherwise behave as masters demanded.[1] Slaves in most respects were deemed property without legal rights; they usually were denied legal rights to contract, own property, or marry; they lacked standing (i.e., the ability to sue) in court (with a possible exception for freedom cases); they could not testify in court, except against each other (in Virginia, then only in capital cases);[2] and they could not appeal county court verdicts against them even in capital cases in some jurisdictions.[3]

Slaveowners in American colonies had virtually unlimited rights to buy and sell slaves in 1770, an important means of maintaining slave marketability. Slave sales transactions between colonists in different colonies resulted in a small domestic slave trade. Slaveowners also participated in a much larger foreign trade between the colonies, Africa, and the West Indies.[4]

---

[1] In Virginia, causing the death of a slave through manslaughter was not punishable as late as 1774. Starke, *Justice of the Peace*, 326. Slaves had only recently been held to be "Subjects of the Realm," so that owners could be punished for mutilating them without court permission. Id.

[2] Slaves were prosecuted criminally without juries in summary proceedings in which the rules of evidence could be disregarded, and defendants' confessions (even if obtained by torture) were admissible. William W. Fisher III, "Ideology and Imagery in the Law of Slavery," *Chi.-Kent L. Rev.* 68 (1993): 1051-1083.

[3] William Waller Hening, *The New Virginia Justice, Comprising the Office and Authority of a Justice of the Peace, In the Commonwealth of Virginia. Together with a Variety of Useful Precedents Adapted to the Laws Now in Force.* (Richmond: T. Nicolson, 1795), 416.

[4] The American foreign slave trade seems to have been quite profitable, as reflected by the prominence of the individuals who conducted it and by the remarkably high insurance premiums often paid to cover slave trading voyages. One 1785/6 slave voyage insurance policy proposed for issuance by a Newport, Rhode

In some respects, the temporary legal disabilities of colonial servants were similar to those imposed on slaves: servants could not marry or contract with third parties without permission, leave an employer or obtain new employment without a certificate of freedom, or travel without a pass. In some colonies, the services of indentured servants could be sold, often without their consent.[5] Colonial laws provided severe penalties for indentured servants or apprentices who ran away.[6] However, there were critical differences: servants were specifically protected against physical brutality (euphemistically termed "immoderate correction") and could appeal to local courts for protection against it, including transfer to a new master; servants could own property; servants were entitled to jury trials in criminal cases, could testify, and had the same rights of appeal in such cases as free persons; and in some cases, servants were entitled to "freedom dues," that is, payments of certain kinds on completion of service. Colonial law conferred various important legal protections on servants that slaves conspicuously lacked.[7]

In some cases, however, slaves' customary rights were inconsistent with the theoretical principles of slave law. Slaves in South Carolina were permitted to till certain

---

Island insurer called for a premium of 11 percent of ship and cargo value, which would have been acceptable only to insureds who expected to make a very large profit from the voyage. The policies also specifically insured against slave insurrections on board the ship. Samuel Sanford Papers (Newport: Newport HS).

[5] Apprentices and indentured servants were deemed free persons for many purposes. But during servitude, many rights of free people were denied to bound servants to minimize the cost of their labor.

[6] For discussion of laws applicable to runaway servants and their enforcement in various colonies, see Richard B. Morris, *Government and Labor in Early America* (New York: Columbia University Press, 1946), 415 ff., 429, 434-61; Abbot Emerson Smith, *Colonists in Bondage: White Servitude and Convict Labor in America, 1607-1776* (New York: W.W. Norton & Co. Inc., 1971).

[7] For comparison of slaveowner rights with masters' rights regarding indentured servants, see Robert J. Steinfeld, *The Invention of Free Labor* (Chapel Hill: Univ. of North Carolina Press, 1991), 32.

property, to sell the produce to third parties and to keep the proceeds, a practice that the legislature refused to prohibit.[8] In Virginia, slaves were permitted to raise and sell produce and stock including horses and hogs.[9] There are also indications that some slaveowners paid their slaves for certain services and for sales of commodities to them. In other words, as Berlin and others have pointed out, the terms of slavery were often the result of negotiations between masters and slaves, and these negotiated terms changed over time and differed by region, occupation, and other factors.

There is also uncertainty about the extent to which each colony observed all aspects of chattel slavery. First, some colonies permitted slaves certain customary rights that were inconsistent with classical chattel slavery and with existing slavery laws. Emily Blanck asserts that slaves in Massachusetts had various civil rights, including the right to sue in court, to own property, to serve as a witness, and to petition.[10] Second, there may well have been differences between colonies in terms of the acceptable levels of labor demanded from slaves, and in the amount of physical brutality that could be inflicted on slaves by slaveowners with impunity.[11]

---

[8] Jenny Bourne Wahl, *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery* (Cambridge: Cambridge University Press, 1998), 158; Robert William Fogel, *Without Consent or Contract: The Rise and Fall of American Slavery*, 1994 pbk. ed. (New York: WW Norton & Company, 1989),189-93.

[9] Berlin, *Many Thousands Gone*, 270.

[10] Emily Blanck, "Revolutionizing Slavery: The Legal Culture of Slavery in Revolutionary Massachusetts and South Carolina," Ph.D. diss., Emory, 2003, 150.

[11] See, e.g., Edgar J. McManus, *A History of Negro Slavery in New York* (Syracuse: Syracuse University Press, 1966) 93; Lorenzo J. Greene, *The Negro in Colonial New England 1620-1776* (New York: Columbia University Press, 1942), 130-143.

Appendix B

*Calculating Nonslaveholder Voting Strength*

Following is an example of the calculations that support the view that in many Northern states, nonslaveholder voters held a voting majority after the Revolution. These calculations are meant to be indicative only, and thus are based on a series of conservative assumptions added to certain known base statistics.

Nash and Soderlund calculate that fifteen percent of Philadelphia households owned slaves in 1767, when slave ownership peaked before the Revolution.[12] This means that 85 percent of Philadelphia households were headed by nonslaveholders in 1767.

To calculate nonslaveholder voting eligibility, we conservatively assume a broader than actual dispersion of slaveownership throughout Pennsylvania and that every slaveowner was eligible to vote, while only thirty percent of nonslaveholder heads of household could vote, which probably significantly understates the scope of the suffrage given the 1776 Constitution's taxpayer voting qualification.

Assuming approximately 60,000 Pennsylvania households given its estimated population of 241,000 at 1770, about 18,000 households would have had eligible voters, and of these, approximately 5,500 would have been headed by slaveholders assuming very broad slave ownership dispersion, or 30 percent of total households. Even using these conservative assumptions, no more than 25 percent of eligible Pennsylvania voters would have been slaveholders, while at least 75 percent would have been nonslaveholders as of 1770.[13] If one chooses a larger number of households, the percentage changes in voting eligibility increase in favor of nonslaveholders, so the precise number of households is not particularly important to the result. Similarly, post-Revolutionary increases in population and numbers of households are not matched by increases in slaveholding, so these ratios would go down from 1776 over time.

Using similarly conservative assumptions for calculations, the ratios between slaveholder and nonslaveholder voters would clearly have been less favorable to slaveholders in most New England states.

---

[12] Nash and Soderlund, *Freedom by Degrees*, 16.

[13] Slaveowners were still a significant force in the Pennsylvania legislature that considered abolition in 1780 (just under half of the legislators for whom information on slaveholding could be obtained). Ibid., 107. In the event, more than one-third of the slaveowning Pennsylvania legislators supported abolition.

Appendix C

*Calculations in Support of Table 4.1*

Note: The calculations presented below indicate how table 4.1 was prepared, but no claim is made that the simple model employed would satisfy professional demographers or economists. The calculations are simply intended to provide an approximation of the broad effects of the Convention's decision to extend slave imports.

1790

End of decade slave population would be increased 31,358 over natural growth levels. Computed by assuming that imports were even throughout the decade, and that natural growth occurred at 2%/year once a slave was imported. House seats based on 1 representative per 33,000 population (3/5 of slave population), rounded to lowest whole number of seats.

1800

Computed using same assumptions as 1790, except that one-half of the additional growth from the slaves that had been imported as of 1790 is added to the 1800 total (this is a conservative assumption). Total addition from imports (1783-1800) is 104,875. Same rounding; same apportionment rules.

1810

Computed using 1790 assumptions. Total addition from imports 1783-1810 is 246,205. 35,000 population used for apportionment.

1820

Maintains 1810 levels, though smuggling could have increased total seats by 1. Population increased by natural growth of 1790-1800 (1/2) and 1800-1810 import cohorts only, so total is 234,000. 40,000 population used for apportionment. If continued contribution from the 1783-90 cohort is assumed, this would probably add 1 seat.

Senate Seats

For these estimates, the question is how much the expansion of the slave population through imports enabled settlement to accelerate. Since the total slave population is increased roughly 15% by 1820 through imports, it seems likely that at least one, and probably several, slave states were settled by 1820 that would not have been settled by then without the availability of slave labor. Precisely how many states fall in this category is a matter of judgment, but the size of the new state populations is small enough at that time to make it reasonable to think that the settlement of 2-3 new slave states was enabled by imports. This estimate is open to the counterargument that

settlement would have occurred at the same rate through non-slave labor migration, but the settlement patterns and economics of these new slave states suggest otherwise.

Appendix D

*Report of the House Select Committee on the Quaker Memorials, 1790*

The Committee to whom was referred sundry memorials from the people called Quakers, and also a memorial from the Pennsylvania Society, for promoting the abolition of slavery, reported:

That from the nature of the matters contained in those memorials, they were induced to examine the powers vested in Congress, under the present constitution, relating to the abolition of slavery, and are clearly of opinion:

First, that the general government is expressly restrained from prohibiting the importation of such persons as any of the states now existing shall think proper to admit until the year 1808.

Secondly, That Congress, by a fair construction of the constitution, are equally restrained from interfering in the emancipation of slaves, who already are, or who may, within the period mentioned, be imported into, or born within any of the said states.

Thirdly, That Congress have no authority to interfere in the internal regulations of particular states, relative to the instruction of slaves in the principles of morality and religion, to their comfortable clothing, accommodation and subsistence; to the regulation of their marriages, and the prevention of the violation of the rights thereof, or to the separation of children from their parents; to a comfortable provision in cases of sickness, age or infirmity, or to the seizure, transportation, or sale of free negroes, but have the fullest confidence in the wisdom and humanity of the legislatures of the several states, that they will revise their laws, from time to time, when necessary, and promote the objects mentioned in the memorials, and every other measure that may tend to the happiness of slaves.

Fourthly, That nevertheless, Congress have authority, if they shall think it necessary to lay at any time, a tax or duty, not exceeding ten dollars for each person, of any description, the importation of whom shall be by any of the states, admitted as aforesaid.

Fifthly, That Congress have authority to interdict, or (so far as it is, or may be carried on by citizens of the United States, for supplying foreigners) to regulate the African trade, and to make provision for the humane treatment of slaves, in all cases while on their passages to the United States, or to foreign ports, as far as it respects the citizens of the United States.[14]

---

[14] Du Bois concludes, mistakenly I think, that the terms "interdict" and "regulate" are transposed here. The committee was asserting authority to ban aliens from the foreign slave trade to the United States.

Sixthly, That Congress have also authority to prohibit foreigners from fitting out vessels in any port of the United States for transporting persons from Africa to any foreign port.

Seventhly, That the memorialists be informed, that in all cases, to which the authority of Congress extends, they will exercise it for the humane objects of the memorialists, so far as they can be promoted on the principles of justice, humanity and good policy.[15]

[15] House of Representatives Journal, March 23, 1790, *Hist. Docs. FFC*, 3:340-1.

Appendix E

*House Action Amending the Select Committee Report on the Quaker Memorials on Slavery, 1790*

Strike out the first clause, together with the recital thereto, and in lieu thereof insert, "That the migration of importation of such persons, as any of the states now existing shall think proper to admit, cannot be prohibited by Congress prior to the year 1808."

Strike out the second and third clauses, and in lieu thereof insert, "That Congress have no authority to interfere in the emancipation of slaves or in the treatment of them within any of the states, it remaining with the several states alone, to provide any regulation therein, which humanity and true policy may require."

Strike out the fourth and fifth clauses, and in lieu thereof insert, "That Congress have authority to restrain the citizens of the United States from carrying on the African trade for the purpose of supplying foreigners with slaves, and of providing by proper regulations for the humane treatment, during their passage, of slaves imported by the citizens into the said states admitting such importation."[16]

Strike out the seventh clause.

[16] House of Representatives Journal, March 23, 1790, *Hist. Docs. FFC*, 3:341.

# Bibliography

## *A. WORKS CITED BY ABBREVIATION*

### I. Printed primary sources (including modern editions)

#### a. Primary Documents and Document Collections


AC — *The debates and proceedings in the Congress of the United States: with an appendix containing important state papers and public documents, and all the laws of a public nature; with a copious index; compiled from authentic materials.* Washington : Gales and Seaton, 1834-1856 (popularly known as "The Annals of Congress").

CCP — *Papers of the Continental Congress, 1774-1789.* Washington: National Archives and Records Service, General Services Administration, 1971.

Doc Hist FFC — *Documentary History of the First Federal Congress of the United States of America, March 4, 1789—March 3, 1791.* De Pauw, Linda Grant; Veit, Helen E.; Charlene Bangs Bickford, et al., eds. Baltimore: Johns Hopkins Press, 1972 - 2004-. 15 vols. to date.

Elliot — Elliot, Jonathan. *The debates in the several state conventions on the adoption of the federal Constitution, as recommended by the general convention at Philadelphia, in 1787.* 2d ed. (New York: B. Franklin, 1974 reprint).

Farrand — Farrand, Max, ed. *The Records of the Federal Convention of 1787.* pbk ed. 3 vols. New Haven: Yale University press, 1966.

Farr. Supp. — Hutson, James H., ed. *Supplement to Max Farrand's The Records of the Federal Convention of 1787.* New Haven: Yale University Press, 1987.

Federalist — Pole, J.R., ed. *The Federalist.* Cambridge: Hackett Publishing Company, 2005.

GW Papers — Abbot, W.W., ed. *Papers of George Washington.* Edited by W.W. Abbot. Charlottesville: University Press of Virginia, 1990.

GW Dig. Ed. — Crackel, Theodore J., ed. *The Papers of George Washington Digital Edition.* Charlottesville: University of Virginia Press, 2007.

| | |
|---|---|
| Hse Jnl. | United States. *Journal of the House of Representatives of the United States of America.* Washington: U.S. Government Printing Office, 1789- . |
| JCC | Ford, Washington C., ed. *Journals of the Continental Congress 1774-1789.* Washington: Government Printing Office, 1904-1936. |
| JM Papers | Hutchinson, William T., and William M.E. Rachal, eds. *Papers of James Madison.* 29 vols. Chicago: University of Chicago Press, 1962-83. |
| JM Writings | Hunt, Gaillard, ed. *The Writings of James Madison.* New York: G.P. Putnam's Sons, 1906. |
| Kaminski | Kaminski, John P., ed. *A Necessary Evil? Slavery and the Debate Over the Constitution.* Madison: Madison House, 1995. |
| LCRK | King, Charles. *The Life and Correspondence of Rufus King.* 6 vols. New York: G.P. Putnam's Sons, 1897. |
| LDCC | Smith, Paul H., and Ronald M. Gephart (1976), eds. *Letters of Delegates to the Continental Congress 1774-1789.* Washington: Library of Congress, 1976-2000. 26 vols. |
| MSL | Massachusetts Historical Society. "Letters and Documents Relating to Slavery in Massachusetts." In *Collections of the Massachusetts Historical Society.* Boston: Massachusetts Historical Society, 1877, 373-442. |
| Sen. Jnl. | United States. *Journal of the Senate of the United States of America.* Washington, D.C.: U.S. Government Printing Office. 1789- . |
| ST | Howell, Thomas B., ed. *A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors from the Earliest Period to the Year 1783, with notes and other Illustrations.* London, 1816-26, 33vols. |
| Stat. | United States. *Statutes at Large of the United States of America.* Washington: U.S. Government Printing Office, 1789- . |
| TJ Papers | Boyd, J.H. and others, eds. *The Papers of Thomas Jefferson..* 32 vols. to date. Princeton: Princeton University Press, 1950-. |
| TJ Writings | Ford, Paul Leicester. *The Writings of Thomas Jefferson.* New York: G.P. Putnam's Sons, 1892-99. 10v. |

### b. Reported Cases

*Somerset v. Stewart*, Lofft 1, 98 E.R. 499, 20 S.T. 1 (K.B. 1772) (also referred to as R. (Rex) v. Knowles).

## II. Manuscript sources

### a. Records and correspondence

PAS LR Pennsylvania Abolition Society, Legal Records (Philadelphia: HSP).

PAS Corr. Pennsylvania Abolition Society, Acting Committee Correspondence (Philadelphia: HSP).

PAS ACM Pennsylvania Abolition Society, Acting Committee Minutes ("ACM").

## III. Secondary works

Davis, *Slavery in Revolution*: Davis, David Brion. *The Problem of Slavery in the Age of Revolution 1770-1823*. Oxford: Oxford University Press, 1999 repr. 1975 ed.

Mason, *Slavery in Early Republic*: Mason, Matthew. *Slavery and Politics in the Early Republic*. Chapel Hill: University of North Carolina Press, 2006.

Robinson, *Slavery in Politics*: Robinson, Donald L. *Slavery in the Structure of American Politics 1765-1820*. New York: Harcourt Brace Jovanovich Inc., 1971.

## *B. OTHER WORKS*

## I. Printed primary sources (including modern editions)

### a. Works other than periodicals

Ballagh, James Curtis, ed. *Letters of Richard Henry Lee*. Vol. 2. New York, 1914; repr. 1970.

Basker, James G. ed. *Early American Abolitionists: A Collection of Anti-Slavery Writings, 1760-1820*. New York: The Gilder Lehrman Institute, 2005.

Blackstone, William. *Commentaries on the Laws of England.* Oxford: Clarendon Press, 1765, pbk facsim. ed. U. Chi. Press 1979.

Clark, Walter, ed. *The State Records of North Carolina.* Vol. 24. Goldsboro, 1905.

Clinton, De Witt. *The Speeches of Governor Clinton before the Legislature of New-York.* New York, 1823.

Congress of the United States. *American State Papers* (Washington: Gales & Seaton, 1832-1861), 38 vols.

Dane, Nathan. *A General Digest and Abridgement of American Law.* 9 vols. Boston: Cummings, Hilliard & Co., 1823-1829.

Gibson, Campbell, and Kay Jung. "Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origins, 1970 to 1990, for the United States, Regions, Divisions & States." Washington: Bureau of the Census. Available at: www.census.gov/population/www/documentation/twps0056.html (9/07).

Hening, William Waller. *The New Virginia Justice, Comprising the Office and Authority of a Justice of the Peace, In the Commonwealth of Virginia. Together with a Variety of Useful Precedents Adapted to the Laws Now in Force.* Richmond: T. Nicolson, 1795.

Jefferson, Thomas. *Notes on the State of Virginia.* New York: Harper & Row, 1964.

Journal of the House of Commons (Great Britain), vol. 33 (May, 1772).

King, Rufus. *Substance of Two Speeches...on the Subject of the Missouri Bill.* New York: Kirk and Mercein, 1819.

Moore, George H. *Notes on the History of Slavery in Massachusetts.* New York: Negro Universities Press, div. Greenwood Publishing Corp., 1866 repr. 1968.

Pennsylvania General Assembly. "Report of the Senate Committee to investigate the cause of an increased number of slaves being returned for that Commonwealth, by the census of 1830, over that of 1820" (1833).

Robertson, David. *Debates and other proceedings of the Convention of Virginia, convened at Richmond, on Monday the second day of June, 1788 for the purpose of deliberating on the Constitution recommended by the grand Federal convention.* Richmond: Worsley & Davis, 1805.

Rush, Benjamin. *An Address to the Inhabitants of the British Settlements in America, upon Slave-Keeping.* 2d ed. Philadelphia, 1773.

Sparks, Jared. *The Writings of George Washington; Being His Correspondence, Addresses, Messages, and Other Papers, Official, and Private.* Vol. X. Boston, 1836.

Starke, Richard. *The Office and Authority of a Justice of Peace Explained and Digested, Under Proper Titles. To Which Are Added, Full and Correct Precedents of all Kinds of Process Necessary to be used by Magistrates, in which also the Duty of Sheriffs, and other publick Officers, is properly discussed.* Willamsburg: Purdie and Dixon, 1774.

Wroth, L. Kinvin, and Hiller B. Zobel, eds. *The Legal Papers of John Adams.* 3 vols. Cambridge: Harvard University Press, 1965.

**b. Statutes**

**i. English statutes**

*An Act for the more easy Recovery of Debts in His Majesty's Plantations and Colonies in America.* (1731/2) 5 Geo. II c. 7.

**ii. Colonial and State Statutes**

*Acts and Laws of the State of Connecticut in America.* New London, 1784.

*Massachusetts Session Laws*, 1785; 1787; and 1788 (Buffalo: Hein; also in *The perpetual laws, of the commonwealth of Massachusetts: from the establishment of its constitution to the first session of the General Court, A.D. 1788.* Worcester: Isaiah Thomas, 1788).

*The grants, concessions, and original constitutions of the province of New-Jersey.* London, 1758. (Reprint, Evans 1st ser. no. 8205).

New-York (State). *Laws of the State of New-York passed by the Legislature of said state, at their last meeting of the eighth session.* (New-York: printed by Samuel Loudon, printer to the State,1785).

New-York (State). *Laws of the State of New-York, passed by the Legislature of said state, at their eleventh session.* (New-York: printed by Samuel and John Loudon, printers to the State, 1788).

*North Carolina Colonial Session Laws.* Buffalo: Hein 1987.

Dallas, Alexander J., ed. *Laws of the Commonwealth of Pennsylvania.* Vol. 1. Philadelphia: Hall & Sellers, 1791-1801.

*Rhode Island Colonial Session Laws*. Buffalo, N.Y.: Hein, 1987.

*Virginia Colonial Session Laws*. Buffalo, N.Y.: Hein, 1987.

*An Act for the Gradual Abolition of Slavery*. March 1, 1780. (Pennsylvania).

**iii. United States Statutes**

*An Act for the Government of the territory of the United States North West of the River Ohio*, 32 *JCC* 334-343 (July 13, 1787)(Confederation).

*Act of May 26, 1790*. 1 Stat. 123, 1st Cong., 2d Sess.

*An Act declaring the consent of Congress, that a new State be formed within the jurisdiction of the commonwealth of Virginia, and admitted into this Union, by the name of Kentucky*. February 4, 1791,1 Stat. 189, 1st Cong., 3rd Sess.

*Act of February 25, 1791*, 1 Stat. 191, 1st Cong., 3rd. Sess.

*An Act for the Admission of the State of Vermont into this Union*. February 18, 1791, 1 Stat. 191, 1st Cong., 3rd Sess.

*An Act Respecting Fugitives from Justice, and Persons Escaping from the Service of their Masters*, 1 Stat. 302, February 12, 1793, 2d Cong., 2d Sess.

*Act of April 7, 1798*, 1 Stat. 549-551, 5th Cong., 2d Sess.

*An Act for the Organization of Orleans Territory and the Louisiana District*, March 26, 1804, 1 Stat. 283, 8th Cong., 1st Sess.

*An Act further providing for the government of the territory of Orleans*. March 2, 1805, 2 Stat. 322, 8th Cong., 2d Sess.

*An Act further providing for the government of the district of Louisiana*. March 3, 1805, 2 Stat. 331, 8th Cong., 2d Sess.

**c. Reported Cases (British and American)**

*Abbot v. Abbot*, 1 Va. Col. Dec. R21 (Va. Gen. Ct. 1729).

*American Insurance Company and the Ocean Insurance Company v. 356 Bales of Cotton (David Canter, Claimant)*, 26 U.S. 511 (1828).

*Bates v. Gordon*, 3 Call 555 (Va. 1790).

*Branch v. Bradley*, 2 Hayw. 53 (N.C. 1798).

*Calder v. Bull*, 3 (Dall.) U.S. 386 (1798).

*Case of Mary Clark, A Woman of Color*, 1 Blackf. 122 (Ind. 1821).

*Glen v. Hodges*, 9 Johns 67 (N.Y.1812).

*Howell v. Netherland*, 1770 Va. Lexis 1, Jeff. 90 (Va. S. Ct. 1770).

*Hudgins v. Wright*, 11 Va. (1 Hen. & Munf.) 134 (Va. Sup. Ct. App. 1806).

*The Inhabitants of Wichendon, Plaintiffs in Error v. The Inhabitants of Hatfield*, 4 Mass. 123; 1808 Mass. Lexis 29; Tyng 123 (Mass. 1808).

*Miller v. Dwilling*, 14 Serg. & Rawle 442 (Pa. 1826).

*Knight v. Wedderburn*, 8 Fac. Dec. 5, Mor. 14545 (Scot. Ct. Sess.) (1778).

*Pearne v. Lisle*, Amb. 75, 27 E.R. 47 (1749)

*Pirate, alias Belt v. Dalby*, 1 Dall. (U.S.) 167 (Pa. 1786).

*Respublica v. Gaoler of Philadelphia County*, 1Yeates 368 (Pa. 1794).

*Respublica v. Richards*, 2 U.S. (Dall.) 224 (Pa. 1795).

*Robin v. Hardaway*, 1772 Va. Lexis 1, Jeff. 109 (Va. 1772).

### d. Periodicals

Note: This listing does not include newspapers or magazine articles cited in the text that are reprinted in collections of primary source documents, the most notable of which are *Doc Hist FFC* and *Kaminski* (see ***A.* I.** above), or which are quoted in extenso in secondary works cited. Nor does it refer to database searches for newspaper articles, the results of which are discussed in footnotes. The listing is for specific articles cited in the text and footnotes, arranged chronologically by year and then alphabetically, rather than sources reviewed, except as indicated, but gives a general idea of source coverage.

*Boston News-Letter*, July 23, 1772.

*Boston Post-Boy*, September 7, 1772.

*Connecticut Courant*, July 30, 1772.

*Connecticut Journal*, July 31, 1772.

*London Morning Chronicle*, May 26, 1772.

*Newport Mercury*, August 3, 1772.

*The New York Journal or the General Advertiser*, August 27, 1772.

*The Providence Journal and Country Gazette*, October 10, 1772.

*Virginia Gazette* (Purdie & Dixon), August 20, 1772.

*Virginia Gazette* (Rind), November 12, 1772.

"Eleutheros." *The New York Journal*, February 18, 1773.

*Virginia Gazette* (Rind), July 14, 1774.

"Impartial". *New Jersey Gazette*, January 10, 1781.

"A Lover of True Justice". *New Jersey Gazette*, February 14, 1781.

*Daily Advertiser*, March 19, 1790.

*Daily Advertiser (N.Y.)*, March 24, 1790; March 25, 1790.

*Federal Gazette and Philadelphia Evening Post*, February 20, 1790.

*The Federal Gazette and Philadelphia Evening Post*, February 23, 1790.

*Freeman's Journal or North American Intelligencer (Phila.)*, February 24, 1790.

*Gazette of the United States*, February 17, 1790.

"Virginia." *Gazette of the United States (N.Y.)*, March 27, 1790.

"A Citizen of the Union." *New York Journal and Weekly Register*, March 18, 1790.

*New York Daily Advertiser*, March 22, 1790.

*New York Daily Gazette*, March 23, 1790.

"Report of the New York legislative committee on Quaker slave trade petition." *Pennsylvania Mercury, and Universal Advertiser*, February 9, 1790.

*Virginia Independent Chronicle*, August 11, 1790.

*Edwardsville (Ill.) Spectator*, 1819.

*Niles Weekly Register*, August 14, 1819.

*St. Louis Enquirer*, October 30, 1819.

*Western Herald & Steubenville Gazette*, July 3, 1819; December 11, 1819.

*Albany Argus*, June 6, 1820.

*City Gazette and Commercial Advertiser (Charleston)*, March 10, 1820.

*Columbian Centinel (Boston)*, April 1, 1820.

*Edwardsville (Ill.) Spectator*, 1820.

*New York Columbian,* 1820.

*New York Commercial Advertiser*, 1820.

*New York Daily Advertiser*, 1820.

*New York Evening Post*, 1820.

*New York National Advocate*, 1820.

*Niles Weekly Register*, December 30, 1820.

*Northern Whig*, 1820.

*Western Herald & Steubenville Gazette*, 1820.

## II. Manuscript sources[1]

### a. Collections of Papers

Allinson Family Papers (Haverford: Quaker Collection).

---

[1] Repository Abbreviations:

| | |
|---|---|
| Columbia | Columbia University Rare Books Library, New York |
| HSP | Historical Society of Pennsylvania |
| Newport | Newport Historical Society, Rhode Island |
| NYHS | New York Historical Society |
| NYPL | New York Public Library |
| Haverford | Haverford College, Pennsylvania (Quaker Collection) |
| Swarthmore | Swarthmore College, Pennsylvania (Friends Historical Library) |
| RIHS | Rhode Island Historical Society, Providence |
| RIJRC | Rhode Island Judicial Records Center, Providence |
| RI St. Archs. | Rhode Island State Archives, Providence |
| Small | Small Special Collections Library, University of Virginia |

Henry Baldwin Papers (Society Small Collection) (Philadelphia: HSP).

James Barbour Papers (New York: New York Public Library).

Clarke, Peleg, Letterbook, 1771-1782 (Newport: Newport Historical Society).

Papers of Tench Coxe (Philadelphia: HSP).

Society of Friends, Papers of the Philadelphia Meeting for Sufferings (Swarthmore: Friends Historical Library).

Gilder-Lehrman Collection (New York: NYHS) (online review only).

Papers of Joseph Hopkinson (Philadelphia: HSP).

Papers of John Jay (New York: Columbia Univ.)

Papers of Peter A. Jay (New York: Columbia Univ.)

Papers of Rufus King (New York: NYHS).

Letterbooks of William Lee (Stratford Hall, Virginia)

Papers of Henry Marchant (Providence: RIHS; Newport: Newport Historical Society).

Papers of Henry Meigs (New York: NYHS).

Papers of Minor and Wilson Families (Charlottesville: Small Library).

Papers of James Barbour (New York: New York Public Library)

Papers of John Randolph of Roanoke (Charlottesville: Small Library).

Papers of William Rawle (Philadelphia: HSP, 1749-1836). Included: Miers Fisher Legal Opinion on Constitutionality of Slavery in Pennsylvania (Philadelphia: HSP)(Rawle Legal Papers, 1794).

Memoirs of Jonathan Roberts (Philadelphia: HSP).

Papers of Jonathan Roberts (Philadelphia: HSP).

Samuel Sanford Papers (Newport: Newport HS).

Papers of Matthias B. Tallmadge (New York: NYHS).

Papers of James Tallmadge, Jr. (New York: NYHS).

Papers of John W. Taylor (New York: NYHS).

Papers of Littleton Waller Tazewell (Richmond: Library of Virginia; Small Special Collections Library, Charlottesville).

Papers of Roberts Vaux (Philadelphia: HSP).

Papers of James Wilson (Philadelphia: HSP).

Pennsylvania Abolition Society, 1820 Petition to Congress, Gilder Lehrman Collection (New York: NYHS).

"Wilberforce," Broadside Collection, No. 113 (New York: NYHS).

**b. Unreported cases, other legal disputes, and legal opinions (British and American)**

*Anthony Butler (Fugitive)*, (PAS LR 1791).

*Caesar v. Greenleaf*, Essex Inf. Ct., Newburyport, Mass. (1774) (Adams legal papers).

*Case of Azar v. St. Victor*, (PAS ACM August 26 1794).

*Case of Charles Logan*, (PAS ACM April 15 1788).

*Case of Dinah*, (PAS ACM January 29 1794).

*Cate v. Cooke*, (PAS ACM 1785 (32)).

*Charity and Deborah Pero v. Mary Burris*, (PAS ACM July 1794 (311)).

*Dinah late with Andrew Buskirk*, (PAS ACM December 19 1793 (273)).

*Fanney Murphrey v. Thos. Landrop*, (PAS ACM June 20 1786 (78)).

*Florah and her daughter*, (PAS ACM June 20 1785).

*Harry v. Benjamin Gibbs*, (PAS ACM May 26 1794).

*Jack v. Barnibus McShean*, (PAS ACM 1785-6 (45-7, 65, 68)).

*Kidnapping (report of Amer Bailey)*, (PAS ACM December 17 1794).

*Margaret v. Muzzy*, (Middlesex Inf. Ct., Cambridge, Mass.) (1768)(Adams legal papers).

*Mulatto Sall v. Doctor Baker*, (PAS ACM 1785 (31)).

*Negro Flora v. Joseph Graisberry*, (Pa. Errors 1798-1802).

*Opinion of C.J. Holt and Nine Judges*, Public Records Office (GB Natl. Arch.), Colonial Ser. 137/2 (1689).

*Order on Habeas Corpus*, (RI State Jud. Archives) (R.I. Sup. Ct. Sep. 1773, Newport, p. 79).

*PAS Fugitive Cases*, (PAS ACM December 29 1790; December 17 1794; January 29 1794).

*Patty and Fanney with William Height*, (PAS ACM February 21 1794).

*John Randall v. Matthew Robinson*, (R.I. Sup. Ct. 1769-74) (King's County), Oct. 1769, B: 217; Oct. 1772, B: 352-53; Oct. 1773, B:383; Oct. 1774, B:414-15 and files (RIJRC); Rhode Island General Assembly Petition files (Vols. 14,15, 15-2, March, 1770; August, 1773; August, 1774).

*Sam v. Elliott*, (PAS ACM June 20,1786 (78)).

*Sam, late with Stephen Garard (Girard)*, (PAS ACM 1787).

*Tom in Burlington Prison*, (PAS ACM July 31 1793).

*Worley v. Ruston*, (PAS ACM January 19 1786 (66)).

*Yorke-Talbot Opinion* (1729)(also known as "Opinion of the Law Officers")

## III. Secondary works

### a. Works other than periodicals

Bailey, Thomas A. *A Diplomatic History of the American People*. 8th ed. New York: Meredith Corporation (Appleton Century Crofts), 1969.

Baker, John H. *An Introduction to English Legal History*. 4th ed. London: Butterworths, 2002.

Banner, James M. Jr.. *To the Hartford Convention: The Federalists and the Origins of Party Politics in Massachusetts, 1789-1815*. New York: Alfred A. Knopf, 1970.

Banning, Lance. *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic*. Ithaca: Cornell University Press, 1995.

Bender, Thomas, ed. *The Antislavery Debate: Capitalism and Abolitionism as a Problem in Historical Interpretation*. Berkeley: University of California Press, 1992.

Berlin, Ira, and Ronald Hoffman, eds. *Slavery and Freedom in the Age of the American Revolution.* Charlottesville: University of Virginia Press (for Capitol Historical Society), 1983.

Berlin, Ira. *Many Thousands Gone: The First Two Centuries of Slavery in North America.* Cambridge, Mass.: Harvard University Press, 1998.

———. *Generations of Captivity.* Cambridge: Harvard University Press, 2003.

Blackburn, Robin. *The Making of New World Slavery.* London: Verso, 1997.

Blumrosen, Alfred W., and Ruth G. Blumrosen. *Slave Nation.* Naperville: Sourcebooks, Inc., 2005.

Brown, Christoper Leslie. *Moral Capital: Foundations of British Abolitionism.* Chapel Hill: University of North Carolina Press [for Omohundro Inst. Early Amer. Cult], 2006.

Brown, Everett S. *The Constitutional History of the Louisiana Purchase.* Clifton: August M. Kelley, 1972 (repr. of 1920 ed., Univ. Cal. Press).

Brown, Everett S., ed. *William Plumer's Memorandum of Proceedings in the United States Senate 1803-1807.* New York: The Macmillan Company, 1923.

Butterfield, Sir Herbert. *The Whig Interpretation of History.* New York: AMS Press, 1978. Reprint, G. Bell ed., London, 1931.

Ceaser, James W. *Nature and History in American Political Development: A Debate.* Cambridge: Harvard University Press, 2006.

Census, U.S. Bureau of the. *Historical Statistics of the United States, Colonial Times to 1970.* Washington, D.C.: U.S. Department of Commerce, Bureau of the Census, 1975.

Census, United States Bureau of the. *Historical Statistics of the United States: Colonial Times to 1957.* Washington, D.C.: Government Printing Office, 1961.

Chaplin, Joyce. *An Anxious Pursuit: Agricultural Innovation & Modernity in the Lower south, 1730-1815.* Chapel Hill: University of North Carolina Press (for Institute of Early Amer. History and Culture), 1993.

Congress, United States. *American State Papers.* 38 vols. Washington: Gales & Seaton, 1832-1861.

Cover, Robert M. *Justice Accused: Antislavery and the Judicial process.* New Haven: Yale University Press, 1975.

Crosskey, William Winslow, and William Jeffrey Jr. *Politics and the Constitution in the History of the United States*. Vol. III. Chicago: University of Chicago Press, 1980.

Cunningham. Noble E., Jr. *The Early Republic, 1789-1828*. Columbia: University of South Carolina Press, 1968.

Davis, David Brion. *The Problem of Slavery in Western Culture*. 1966; pbk ed. Oxford: Oxford University Press, 1988.

———. *Challenging the Boundaries of Slavery*. Cambridge: Harvard University Press, 2003.

———. *Inhuman Bondage: The Rise and Fall of Slavery in the New World*. Oxford: Oxford University Press, 2006.

Du Bois, W.E. Burghardt. *The Suppression of the African Slave Trade*. Baton Rouge: Louisiana State University Press, 1969 repub.; orig. pub. 1896.

Edling, Max M. *A revolution in favor of government: origins of the U.S. Constitution and the making of the American state*. Oxford: Oxford University Press, 2003.

Einhorn, Robin. *American Taxation, American Slavery*. Chicago: University of Chicago Press, 2006.

Elliott, J.H. *Empires of the Atlantic World: Britain and Spain in America, 1492-1830*. New Haven: Yale University Press, 2006.

Ellis, Joseph. *Founding Brothers: The Revolutionary Generation*. New York: Alfred A. Knopf, 2000.

Eltis, David, Frank D. Lewis, and Kenneth L. Sokoloff, eds. *Slavery in the Development of the Americas*. Cambridge: Cambridge University Press, 2004.

Ernst, Robert. *Rufus King: American Federalist*. Chapel Hill: University of North Carolina Press, 1968.

Fehrenbacher, Don E. *The Slaveholding Republic*. Edited by and completed by Ward M. McAfee. Oxford: Oxford University Press, 2001.

———. *Sectional Crisis and Southern Constitutionalism*. Baton Rouge: Louisiana State University Press, 1980.

———. *The Dred Scott Case: Its Significance in American Law and Politics*. New York: Oxford University Press, 2001 (pbk. reprint of 1978 ed.).

Ferguson, E. James. *The Power of the Purse: A History of American Public Finance, 1776-1790*. Chapel Hill: University of North Carolina Press, 1961.

Finkelman, Paul. *Slavery and the Founders: Race and Liberty in the Age of Jefferson*. Armonk: M.E. Sharpe, Inc., 1996.

———. *An Imperfect Union: Slavery, Federalism and Comity*. Chapel Hill: UNC Press, 1981.

Fogel, Robert William. *Without Consent or Contract: The Rise and Fall of American Slavery*. pbk 1994 ed. New York: WW Norton & Company, 1989.

Forbes, Robert Pierce. *The Missouri Compromise and its Aftermath: Slavery and the Meaning of America*. Chapel Hill: University of North Carolina Press, 2007.

Freehling, William W. *The Road to Disunion: Secessionists at Bay 1776-1854*. Oxford: Oxford University Press, 1990.

———. *The Reintegration of American History: Slavery and the Civil War*. Oxford: Oxford University Press, 1994.

Frey, Sylvia R. *Water from the Rock*. Princeton: Princeton University Press, 1991.

Galenson, David W. *White Servitude in Colonial America*. Cambridge: Cambridge University Press, 1981.

Gellman, David N. *Emancipating New York: The Politics of Slavery and Freedom, 1777-1827*. Baton Rouge: Louisiana State University Press, 2006.

Graber, Mark A. *Dred Scott and the Problem of Constitutional Evil*. Cambridge: Cambridge Univ. Press 2006.

Greene, Lorenzo J. *The Negro in Colonial New England 1620-1776*. New York: Columbia University Press, 1942.

Gudmestad, Robert H. *A Troublesome Commerce: The Transformation of the Interstate Slave Trade*. Baton Rouge: Louisiana State University Press, 2003.

Hammond, Jabez D. *The History of Political Parties in the State of New-York*. facsim. ed. Univ. Micro. Intl., 1981 ed. Albany: C. Van Benthuysen, 1842.

Hammond, John Craig. *Slavery, Freedom and Expansion in the Early American West*. Charlottesville: University of Virginia Press, 2007.

Hanyan, Craig, and with Mary L. Hanyan. *De Witt Clinton and the Rise of the People's Men*. Montreal: McGill-Queen's University Press, 1996.

Hendrickson, David C. *Peace Pact: The Lost World of the American Founding.* Lawrence: University Press of Kansas, 2003.

Higginbotham, A.L. (Aloysisus Leon). *In the Matter of Color: Race and the American Legal Process: The Colonial Period.* New York: Oxford University Press, 1978.

Hulliung, Mark. *The Social Contract in American from the Revolution to the Present Age.* Lawrence: University Press of Kansas, 2007.

Jensen, Merrill. *The Articles of Confederation.* Madison: University of Wisconsin Press, 1962.

Johnson, Paul E. *The Early American Republic, 1789-1829.* Oxford: Oxford University Press, 2007.

Jordan, Winthrop D. *White Over Black: American Attitudes Toward the Negro, 1550-1812.* Chapel Hill: University of North Carolina Press, 1968.

Kagan, Robert. *Dangerous Nation.* New York: Alfred A. Knopf, div. Random House, Inc., 2006.

Kastor, Peter J. *The Nation's Crucible: The Louisiana Purchase and the Creation of America.* New Haven: Yale University Press, 2004.

Killenbeck, Mark R. *M'Culloch v. Maryland: Securing a Nation.* Lawrence: University Press of Kansas, 2006.

Knupfer, Peter B. *The Union As It Is: Constitutional Unionism and Sectional Compromise, 1787-1861* Chapel Hill: University of North Carolina Press, 1991.

Lenner, Andrew. *The Federal Principle in American Politics, 1790-1833.* Lanham, Maryland: Rowman & Littlefield, 2001.

Lowi, Theodore J., Benjamin Ginsberg, and Kenneth Shepsle. *American Government: Power and Purpose* 9th ed. New York: W.W. Norton & Co., 2006.

Lynd, Staughton. *Class Conflict, Slavery & the United States Constitution.* Indianapolis: The Bobbs-Merrill Co., Inc., 1967.

MacLeod, Duncan J. *Slavery, Race, and the American Revolution.* Cambridge: Cambridge University Press, 1974.

Malone, Dumas. *Jefferson and His Time.* Vol. 2. Boston: Little, Brown and Company, 1951.

Martis, Kenneth C., and Gregory A. Elmes. *The Historical Atlas of State Power in Congress, 1790-1990.* Washington: Congressional Quarterly, Inc., 1993.

Matson, Cathy D., and Peter S. Onuf. *A Union of Interests: Political and Economic Thought in Revolutionary America.* Lawrence: University Press of Kansas, 1990.

McColley, Robert. *Slavery and Jeffersonian Virginia.* Urbana: University of Illinois Press, 1978.

McCurdy, Charles W. *The Anti-Rent Era in New York Law and Politics, 1839-1865.* Chapel Hill: University of North Carolina Press, 2001.

McCusker, John J., and Russell R. Menard. *The Economy of British North America, 1607-1789.* Chapel Hill: University of North Carolina Press (for Inst. Early Amer. Hist. and Culture), 1985.

McGaughy, J. Kent. *Richard Henry Lee of Virginia: Portrait of an American Revolutionary.* Lanham: Rowman & Littlefield 2004.

McManus, Edgar J. *A History of Negro Slavery in New York.* Syracuse: Syracuse University Press, 1966.

McMillin, James A. *The Final Victims: Foreign Slave Trade to North America, 1783-1810.* Columbia: University of South Carolina Press, 2004.

Melish, Joanne Pope. *Disowning Slavery: Gradual Emancipation and "Race" in New England, 1780-1860.* Ithaca: Cornell University Press, 1998.

Moore, Glover. *The Missouri Controversy 1819-1821.* repr. 1953 ed. Gloucester: Peter Smith, 1967.

Morgan, Edmund S. *American Slavery—American Freedom.* New York: WW Norton. Reprint, 1995 pbk. ed., 1975.

Morris, Richard B. *Government and Labor in Early America.* New York: Columbia University Press, 1946.

———. *The Forging of the Union.* New York: Harper & Row, 1987.

Morris, Thomas D. *Southern Slavery and the Law 1619-1860.* Chapel Hill: University of North Carolina Press, 1996.

———. *Free Men All: The Personal Liberty Laws of the North, 1780-1861.* Baltimore: Johns Hopkins University Press, 1974.

Nash, Gary B. *Race and Revolution.* Madison: Madison House, 1990.

Nash, Gary B., and Jean R. Soderlund. *Freedom by Degrees: Emancipation in Pennsylvania and its Aftermath.* Oxford: Oxford University Press, 1991.

Newman, Richard S. *The Transformation of American Abolitionism: Fighting Slavery in the Early Republic.* Chapel Hill: University of North Carolina Press, 2002.

O'Shaughnessy, Andrew J. *An Empire Divided: The American Revolution and the British Caribbean.* Philadelphia: University of Pennsylvania Press, 2000.

Oldham, James. *English Common Law in the Age of Mansfield.* Chapel Hill: University of North Carolina Press, 2004.

Onuf, Peter S. *Statehood and Union.* Bloomington: Indiana University Press, 1987.

———. *Jefferson's Empire: The Language of American Nationhood.* Charlottesville: University Press of Virginia, 2000.

———. *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787.* Philadelphia: University of Pennsylvania Press, 1983.

Patterson, Orlando. *Slavery and Social Death: A Comparative Study.* Cambridge: Harvard University Press, 1982.

Perkins, Edwin J. *American Public Finance and Financial Services 1700-1815.* Columbus: Ohio State University Press, 1994.

Peterson, Norma Lois. *Littleton Waller Tazewell.* Charlottesville: University Press of Virginia, 1983.

Pole, Jack R. *Political Representation in England and the Origins of the American Republic.* Berkeley: University of California Press, 1966 (pbk. 1971).

Pybus, Cassandra. *Epic Journeys of Freedom: Runaway Slaves of the American Revolution and Their Global Quest for Liberty.* Boston: Beacon Press, 2006.

Quarles, Benjamin. *The Negro in the American Revolution.* New York: WW Norton & Company, 1973.

Rakove, Jack N. *The Beginnings of National Politics.* New York: Alfred A Knopf Inc., 1979.

———. *Original Meanings: Politics and Ideas in the Making of the Constitution.* New York: Vintage Books, 1997.

Remini, Robert V. *Henry Clay: Statesman for the Union.* New York: W.W. Norton & Company, 1991.

Richards, Leonard L. *The Slave Power*. Baton Rouge: Louisiana State University Press, 2000.

Robertson, David Brian. *The Constitution and America's Destiny*. Cambridge: Cambridge University Press, 2005.

Rothman, Adam. *Slave Country: American Expansion and the Origins of the Deep South*. Cambridge: Harvard University Press, 2005.

Schama, Simon. *Rough Crossings: Britain, the Slaves, and the American Revolution*. New York: Ecco, 2006.

Smith, Abbot Emerson. *Colonists in Bondage: White Servitude and Convict Labor in America, 1607-1776*. New York: W.W. Norton & Co. Inc., 1971.

Soderlund, Jean R. *Quakers and Slavery: A Divided Spirit*. Princeton: Princeton University Press, 1985.

Steinfeld, Robert J. *The Invention of Free Labor*. Chapel Hill: Univ. of North Carolina Press, 1991.

Sweet, John Wood. *Bodies Politic: Negotiating Race in the American North, 1730-1830*. Baltimore: Johns Hopkins Press, 2003.

Wahl, Jenny Bourne. *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery*. Cambridge: Cambridge University Press, 1998.

Wallace, David Duncan. *The Life of Henry Laurens*. New York: G.P. Putnam's Sons, 1915.

Warren, Charles. *The Making of the Constitution*. Boston: Little, Brown & Co., 1928.

White, G. Edward. *The Marshall Court and Cultural Change 1815-1835*. abridged ed. Oxford: Oxford University Press, 1991.

White, Shane. *Somewhat More Independent: The End of Slavery in New York City, 1770-1810*. Athens: University of Georgia Press, 1991.

Wiecek, William M. *The Sources of Antislavery Constitutionalism in America, 1760-1848*. Ithaca: Cornell University Press, 1977.

———. *The Guarantee Clause of the U.S. Constitution*. Ithaca: Cornell University Press, 1972.

Wiencek, Henry. *An Imperfect God: George Washington, His Slaves, and the Creation of America*. New York: Farrar, Strauss & Giroux, 2003.

Wilentz, Sean. *The Rise of Democracy: Jefferson to Lincoln.* New York: W.W. Norton & Co., Inc., 2005.

Wolf, Eva Sheppard. *Race and Liberty in the New Nation.* Baton Rouge: Louisiana State University Press, 2006.

Wood, Gordon S. *The Creation of the American Republic, 1776-1787.* Chapel Hill: University of North Carolina Press, 1998 ed. (orig. pub. 1969).

Wright, Gavin. *Slavery and American Economic Development.* Baton Rouge: Louisiana State University Press, 2006.

Zilversmit, Arthur. *The First Emancipation: The Abolition of Slavery in the North.* Chicago: The University of Chicago Press, 1967.

**b. Book sections**

Bush, Jonathan. "The British Constitution and the Creation of American Slavery." In *Slavery & The Law*, edited by Paul Finkelman. Madison: Madison House, 1997, 379-418.

Eltis, David, and David Richardson. "Prices of African Slaves Newly Arrived in the Americas, 1673-1865: New Evidence on Long-Run Trends and Regional Differentials." In *Slavery in the Development of the Americas*, edited by David Eltis, Frank D. Lewis and Kenneth L. Sokoloff. Cambridge: Cambridge University Press, 2004, 181-218.

Finkelman, Paul. "Slavery and the Constitutional Convention: Making a Covenant with Death." In *Beyond Confederation*, edited by Richard Beeman, Stephen Botein and Edward C. Carter II. Chapel Hill: University of North Carolina Press, 1987, 188-225.

Freehling, William W. "The Louisiana Purchase and the Coming of the Civil War." In *The Louisiana Purchase and American Expansion 1803-1898.* Lanham: Rowman and Littlefield Publishers, Inc., 2005, 69-85.

Hodges, Graham Russell. "Black Revolt in New York City and the Neutral Zone: 1775-1783." In *New York in the Age of the Constitution: 1775-1800*, edited by Paul A. Gilje and William Pencak. Cranbury, N.J.: Associated University Presses, 1992

Kulikoff, Allan. "Uprooted Peoples: Black Imports in the Age of the American Revolution, 1790-1820." In *Slavery and Freedom in the American Revolution*, edited by Ira Berlin and Ronald Hoffman. Charlottesville: University of Virginia Press (for Capitol Historical Society), 1983.

Lawson, Gary, and Guy Seidman. "The First 'Incorporation' Debate." In *The Louisiana Purchase and American Expansion*, edited by Sanford Levinson and Bartholomew H. Sparrow. Lanham: Rowman and Littlefield Publishers, Inc., 2005, 19-40.

Lewis, Frank D. "The Transition from Slavery to Freedom through Manumission: A Life-Cycle Approach Applied to the United States and Guadeloupe." In *Slavery in the Development of the Americas*, edited by David Eltis, Frank D. Lewis and Kenneth L. Sokoloff. Cambridge: Cambridge University Press, 2004, 150-180.

McCoy, Drew R. "James Madison and Visions of American Nationality in the Confederation Period: A Regional Perspective." In *Beyond Confederation: Origins of the Constitution and American National Identity*, edited by Richard Beeman, Stephen Botein and Edward C. Carter II. Chapel Hill: University of North Carolina Press, 1987, 226-258.

Morgan, Philip D. "The Poor: Slaves in Early America." In *Slavery in the Development of the Americas*, edited by David Eltis, Frank D. Lewis and Kenneth L. Sokoloff. Cambridge: Cambridge University Press, 2004, 288-323.

Onuf, Peter S. "'The Strongest Government on Earth': Jefferson's Republicanism, the Expansion of the Union, and the New Nation's Destiny." In *The Louisiana Purchase and American Expansion 1803-1898*, edited by Sanford Levinson and Bartholomew H. Sparrow. Lanham: Rowman and Littlefield Publishers, Inc., 2005, 41-68.

———. "Federalism, Republicanism, and the Origins of American Sectionalism." In *All over the Map: Rethinking American Regions*, edited by Edward L. Ayers, Patricia Nelson Limerick, Stephen Nissenbaum and Peter S. Onuf (coauthors). Baltimore: Johns Hopkins Press, 1196, 11-37.

———. "The Expanding Union." In *Devising liberty: preserving and creating freedom in the new American republic*, edited by David T. Konig. Palo Alto: Stanford University Press, 1995, 50-80.

———. "Domesticating the Captive Nation: Thomas Jefferson and the Problem of Slavery," (on file with author).

Price, Jacob M. "The Imperial Economy, 1770-1776." In *The Oxford History of the British Empire*, edited by P.J. Marshall. Oxford: Oxford University Press, 1998, 78-104.

Steinhart, Eric S. "Introduction: 'Papers Relative to the Restriction of Slavery.'" In *Early American Abolitionists: A Collection of Anti-Slavery Writings, 1760-1820*, edited by James G. Basker. New York: Gilder Lehrman Institute, 2005, 319-323.

**c. Works in Periodicals**

Anderson, Gary M., Charles K. Rawley, and Robert D. Tollison. "Rent Seeking and the Restriction of Human Exchange." *Journal of Legal Studies* 17, no. 1 (1988): 83-100.

Bailyn, Bernard. "Considering the Slave Trade." *William & Mary Quarterly* 3d. Ser. 58, no. 1 (2001): 245-252.

Blanck, Emily. "Seventeen Eighty-Three: The Turning Point in the Law of Slavery and Freedom in Massachusetts." *The New England Quarterly* 75, no. 1 (2002): 24-51.

Bradley, Patricia. "Slavery in Colonial Newspapers: The Somerset Case." *Journalism History* 12, no. 1 (1985): 2-7.

Brown, Richard H. "The Missouri Crisis, Slavery, and the Politics of Jacksonianism." *South Atlantic Quarterly* 65 (1966): 55-72.

Burnard, T.G. "'Prodigious Riches': The Wealth of Jamaica before the American Revolution." *Econ. Hist. Rev.* New Series, 54, no. 3 (2001): 506-524.

Carp, E. Wayne, "Review of John E. Selby, *The Revolution in Virginia*, 1775-1783," *William & Mary Quarterly* 3rd Ser. 36 (1989), 618-19.

Currie, David P. "The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791." *The University of Chicago Law Review* 61, no. 3: 775-865.

Cushing, John D. "The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the 'Quock Walker Case'." *American Journal of Legal History* (1961): 118-44.

Duffy, Denis P. "The Northwest Ordinance as a Constitutional Document." *Columbia Law Review* 95, no. 4 (1995): 929-968.

Eltis, David. "The Final Victims: Foreign Slave Trade to America, 1783-1810." *Journal of Social History* 40, no. 1 (2006).

Finkelman, Paul. "Slavery and the Northwest Ordinance: A Study in Ambiguity." *Journal of the Early Republic* (1986): 6: 343-369.

———. "Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North." *Rutgers Law Journal* 17 (1985-86): 415-482.

———. "Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision." *Civil War History* XXV, no. 1 (1979): 5-35.

———. "The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793." *The Journal of Southern History* 56, no. 3 (1990): 397-422.

Fisher III, William W. "Ideology and Imagery in the Law of Slavery." *Chi.-Kent L. Rev.* 68 (1993): 1051-1083.

Fogel, Robert William, and Stanley L. Engerman. "Philanthropy at Bargain Prices: Notes on the Economics of Gradual Emancipation." *Journal of Legal Studies* 3, no. 2 (1974): 377-401.

Fox, Dixon Ryan. "The Negro Vote in Old New York." *Political Science Quarterly* 32, no. 2 (1917): 252-275.

Freehling, William W. "The Founding Fathers and Slavery." *American Historical Review* 77, no. 1 (1972): 81-93.

Goldin, Claudia D. "The Economics of Emancipation." *The Journal of Economic History* 33, no. 1 (1973): 66-85.

Gould, Eliga H. "Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772." *William and Mary Quarterly* (2003): 471-510.

Greene, Jack P. "'Slavery or Independence:' Some Reflections on the Relationship Among Liberty, Black Bondage, and Equality in Revolutionary South Carolina." *South Carolina Historical Magazine* 80 (1979): 193-213.

Hanes, Christopher. "Turnover Cost and the Distribution of Slave Labor in Anglo-America." *Journal of Economic History* 56, no. 2 (1996): 307-329.

Hirsch Jr., Leo. "The Slave in New York." *The Journal of Negro History* 16, no. 4 (1931): 383-414.

Horowitz, Harold. "Choice of Law Decisions Involving Slavery: 'Interest Analysis' in the Early Nineteenth Century." *UCLA Law Review* 17 (1970): 587-601.

Hutson, James H. "The Creation of the Constitution: Scholarship at a Standstill." *Reviews in American History* 12, no. 4 (1984): 463-77.

———. "Riddles of the Federal Constitutional Convention." *William and Mary Quarterly* 3rd Ser., 44, no. 2 (1987): 411-423.

Jernegan, Marcus W. "Slavery and Conversion in the Colonies." *The American Historical Review* 21 (1916): 504-527.

Lynd, Staughton. "The Compromise of 1787." *Political Science Quarterly* 81, no. 2 (1966): 225-50.

Maltz, Earl M. "Slavery, Federalism, and the Structure of the Constitution." *American Journal of Legal History* 36, no. 4 (October, 1992): 466-498.

———. "The Idea of the Proslavery Constitution." *Journal of the Early Republic* 17, no. 1 (1997): 37-61.

Mancall, Peter C., Joshua L. Rosenbloom, and Thomas Weiss. "Slave Prices and the South Carolina Economy, 1722-1809." *The Journal of Economic History* 61, no. 3 (2001): 616-639.

Miller, William. "The Effects of the American Revolution on Indentured Servitude." *Pennsylvania History* VII, no. 3 (1940): 131-141.

Newman, Richard S. "Prelude to the Gag Rule: Southern Reaction to Antislavery Petitions in the First Congress." *Journal of the Early Republic* 16, no. 4 (1996): 571-599.

O'Brien, William. "Did the Jennison Case Outlaw Slavery in Massachusetts?" *Willam and Mary Quarterly* 17 (1960): 219-41.

Ohline, Howard A. "Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States Constitution." *William & Mary Quarterly* 3rd ser. 28 (1971): 563-84.

———. "Slavery, Economics, and Congressional Politics, 1790." *Journal of Southern History* 46 (1980): 335-60.

Onuf, Peter S., and Ari Helo. "Jefferson, Morality, and the Problem of Slavery." *Willam and Mary Quarterly* 60, no. 3 (2003): 583-614.

Pole, Jack R. "Slavery and Revolution: The Conscience of the Rich." *The Historical Journal* 20, no. 2 (1977): 503-13.

Pybus, Cassandra. "Jefferson's Faulty Math: The Question of Slave Defections in the American Revolution." *William & Mary Quarterly* 62, no. 2 (2005): 243-64.

Quigley, William P. "Reluctant Charity: Poor Laws in the Original Thirteen States." *U. Rich. L. Rev.* 31 (1997): 111-178.

———. "Work or Starve: Regulation of the Poor in Colonial America." *U.S.F.L. Rev.* 31 (Fall, 1996): 35-83.

Roche, John P. "The Founding Fathers: A Reform Caucus in Action." *American Political Science Review* 55, no. 4 (1961): 799-816.

Shugerman, Jed Handelsman. "The Louisiana Purchase and South Carolina's Reopening of the Slave Trade in 1803." *Journal of the Early Republic* 22, no. 2 (2002): 263-290.

Simpson, Albert F. "The Political Significance of Slave Representation, 1787-1821." *Journal of Southern History* 7, no. 3 (1941): 315-342.

Spector, Robert. "The Quock Walker Cases (1781-1783)—Slavery, Its Abolition and Negro Citizenship in Early Massachusetts." *Journal of Negro History* 53, no. 1 (1968): 12-32.

Steinfeld, Robert J. "Review, 'Disowning Slavery: Gradual Emancipation and "Race" in New England, 1780-1860,' by Joanne Melish." *Law and History Review* 18 (2000): 470-74.

Turner, Edward Raymond. "The Abolition of Slavery in Pennsylvania." *The Pennsylvania Magazine of History and Biography* XXXVI, no. 2 (1912): 129-142.

Van Cleve, George. "Somerset's Case and Its Antecedents in Imperial Perspective." *Law and History Review* 24 (2006): 601-645.

Weingast, Barry. "The Political Foundations of Democracy and the Rule of Law." *American Political Science Review* 91, no. 2 (1997): 245-263.

Wesley, Charles H. "Negro Suffrage in the Period of Constitution-Making, 1787-1865." *Journal of Negro History* 32, no. 2 (1947): 143-168.

Wiecek, William M. "*Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World." *U Chi L Rev* 42 (1974): 86-146.

———. "The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America." *The William and Mary Quarterly* 3d Ser. Vol. 34 no. 2 (1977): 258-280.

Zeitz, Joshua Michael. "The Missouri Compromise Reconsidered: Antislavery Rhetoric and the Emergence of the Free Labor Synthesis." *Journal of the Early Republic* 20 (2000): 447-485.

Zilversmit, Arthur. "Quok Walker, Mumbet, and the Abolition of Slavery in Massachusetts." *Willam and Mary Quarterly* 25, no. 4 (1968): 614-24.

**d. Theses and Dissertations**

Blanck, Emily. "Revolutionizing Slavery: The Legal Culture of Slavery in Revolutionary Massachusetts and South Carolina." Ph.D. diss., Emory, 2003.

Dalzell, Frederick Arthur Baldwin. "Taxation with representation: Federal revenue in the early Republic." Ph.D. diss., Harvard University, 1993.

Eberly, Wayne J. "The Pennsylvania Abolition Society, 1775-1830." Ph.D. diss., The Pennsylvania State University, 1973.

Fisher III, William W. "The law of the land: An intellectual history of American property doctrine, 1776-1880." Ph.D. diss., Harvard University, 1991.

Hunter, Thea K. "Publishing Freedom, Winning Arguments: *Somerset*, Natural Rights and Massachusetts Freedom Cases 1772-1836." Ph.D. diss. Columbia Univ., 2005.

Ohline, Howard A. "Politics and Slavery: The Issue of Slavery in National Politics, 1787-1815." Ph.D. diss., Univ. Oklahoma, 1969.

Parkinson, Robert. "Enemies of the State: The Revolutionary War and Race in the New American Nation." Ph.D. diss., Univ. of Virginia, 2005.

Riley, Padraig Griffin, "Northern Republicans and Southern Slavery: Democracy in the Age of Jefferson, 1800-1819." Ph.D. diss., Univ. of Calif. Berkeley, 2007.

Rothman, Adam. "The Expansion of Slavery in the Deep South, 1790-1820." Ph.D. diss., Columbia University, 2000.

Van Cleve, George. "Somerset's Case and Its Antecedents." M. St. Leg. Rsch. thesis, University of Oxford, 2004.