The Founders and Slavery: Little Ventured, Little Gained

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The American Founding is rightly celebrated for creating a republic that allowed great liberty to its citizens, provided democratic self-rule for those who were enfranchised, and guaranteed fundamental rights and freedoms to political and religious minorities. It even allowed easy access to citizenship for voluntary migrants from other nations.[1] No nation before ours, and relatively few since, has been able to achieve these results.

The success of the political system became most apparent in 1801, when an opposition candidate, Thomas Jefferson, defeated an incumbent President, John Adams, and then peacefully took office. In his inaugural address Jefferson proudly proclaimed that Americans had "banished from our land that religious intolerance under which mankind so long bled and suffered" and promised it would not be replaced by "political intolerance."[2] He noted that "every difference of opinion is not a difference of principle," and that both his supporters and those of Adams were "brethren of the same principle."[3] Indeed, offering up a theory of freedom of expression that the Supreme Court would not truly accept until the 1960s,[4] Jefferson declared that opponents of the Constitution should be free to speak out, that they might "stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."[5] Following a nasty and often personally vicious

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1. *See* JAMES KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 173-249 (1978); *see also* PETER H. SCHUCK, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985); ROGERS W. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997).

2. Thomas Jefferson, Inauguration Address (Mar. 4, 1801), *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 322 (Adrienne Koch & William Peden eds., 1944).

3. *Id.*

4. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

5. Jefferson, *supra* note 2.

campaign, Jefferson stood ready to embrace his political opponents: "We have called by different names brethren of the same principle. We are all Republicans, we are all Federalists."[6] Unfortunately, this accommodation of political differences glossed over the fundamental contradiction of the Founding: The constitution for a free people protected slavery.

I. FAILURE AT THE FOUNDING

Although the Founders were successful in creating a republic based on democratic principles, in Lincoln's words, "conceived in liberty and dedicated to the proposition that all men are created equal,"[7] they failed to confront fully, much less come to terms with, the fundamental contradiction of slavery in a republic based on liberty and self-government. Instead, in 1787, while remaking the national compact, the Southern delegates at Philadelphia demanded special political protection for slavery in the Constitution. Some Framers from the North—what would become the free states—were uncomfortable with slavery, and a few protested a bit at the demands of the friends of slavery. But in the end they gave the slave owners at the Convention virtually everything they asked for.[8]

The success of the slave owners at the Convention was sweeping. Under the new Constitution, slaves would be counted for representation in Congress, thus augmenting the South's power in both the House of Representatives and the electoral college.[9] The Constitution prohibited the free states from liberating fugitive slaves and instead required that runaway slaves be "delivered up" on demand of the owner. The new national government promised to suppress slave rebellions or insurrections. Although it empowered Congress to regulate international and domestic commerce, the Constitution prevented the national government from stopping the African slave trade or the domestic slave

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6. *Id.*

7. Abraham Lincoln, Final Text, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), *reprinted in* 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 23 (Roy P. Basler ed., 1953).

8. In one area the proslavery Framers failed to get a concession because their demand was oblique and was never fully articulated. Late in the Convention, Charles Cotesworth Pinckney hinted that there should be a clause to protect the rights of masters to travel to free states with their slaves. This clause would have nullified the precedent in the English case, *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772), which had held that slaves brought to free jurisdictions were entitled to their liberty absent positive law that would keep them in bondage. In the last debate on the Privileges and Immunities Clause, "Genl. [Charles Cotesworth] Pinckney was not satisfied" and "seemed to wish some provision should be included in favor of property in slaves." 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 443 (rev. ed. 1966). However, Pinckney failed to make a proposal on this issue, and the clause was adopted without any change. For a full discussion, see PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981).

9. See *infra* Section V.C for a discussion of the electoral college and its relationship to slavery.

trade for *at least* twenty years.[10] Most important of all, the Constitution created a government of limited powers and precluded the national government from ending slavery in the states where it existed. Rarely in American political history have the advocates of a special interest been so successful. Never has the cost of placating a special interest been so high.

Could the Framers have ended slavery while creating a unified, "more perfect Union"?[11] Certainly not. No one at the Convention envisioned a national government with the power to regulate social institutions at the local level. Moreover, any suggestion that the national government might end slavery in the states where it existed would have been promptly voted down.

Southern sensitivity over slavery was apparent in Congressional debates during the Revolution. In a discussion about taxation, Thomas Lynch of South Carolina warned, "If it is debated, whether their slaves are their property, there is an end to the confederation. Our slaves being our property, why should they be taxed more than the land, sheep, cattle, horses, &c.?"[12] Lynch doubtless expressed sentiments held by almost all Southern political leaders during the Revolution.[13]

Similarly, with the possible exceptions of a few Virginians,[14] no Southerners at the Constitutional Convention would have supported an attack on slavery. Had the Northern majority at the Convention attempted to end slavery at the national level, most of the delegates from south of the Mason-Dixon line would have walked out. Rather than creating a "more perfect Union," the delegates might have destroyed the Union altogether if they had pushed for abolition.

But just how "perfect" was a Union in which slavery thrived, like a cancer, eating away at the body politic? It is not unreasonable to ask if the Framers might have been better off creating two separate nations, one based on slavery and one based on liberty. True, the United States would not have developed as it did, or at least not then. But there would have been no Civil War, and the North could have expanded and grown without the necessity of shaping its policies and programs to placate the slave South. The great Northern textile industry could have flourished with foreign cotton—from the "South United States"—just as England's did.

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10. U.S. CONST. art. I, § 9, cl. 1. This clause is also known as the "Migration and Importation Clause." See *infra* Sections II.D and IV.C for a discussion of the slave trade.

11. U.S. CONST. pmbl.

12. 6 JOURNALS OF THE CONTINENTAL CONGRESS 1080 (Debate of July 31, 1776); *see also* 2 THE WORKS OF JOHN ADAMS 498 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1850). Benjamin Franklin, never one to be intimidated by the bluster of a South Carolina planter, retorted: "Slaves rather weaken than strengthen the State, and there is therefore some difference between them and sheep; sheep will never make any insurrections." 6 JOURNALS OF THE CONTINENTAL CONGRESS 1080; *see also* DONALD L. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820, at 148 (1971).

13. Two exceptions were Colonel John Laurens and his father Henry Laurens.

14. Most likely, George Washington and George Wythe.

Moreover, without the Southern albatross weighing it down, a free "North United States," like England, might have developed a greater wool industry to compete with slave-based cotton. Tariffs on imported cotton might have protected such a domestic industry.[15] Furthermore, as the Garrisonian abolitionists of the antebellum period understood,[16] the presence of a truly *free* country north of the Mason-Dixon line and the Ohio River might very well have undermined slavery in the South.

The Founders, of course, were uninterested in taking this route. At one point in the Constitutional Convention Gouverneur Morris of Pennsylvania[17] suggested that the delegates had to decide if slavery simply made a union impossible. Morris, who strongly favored a more powerful national government, nevertheless noted that "[a] distinction has been set up & urged, between the N[orther]n & South[er]n States." He declared that "either this distinction is fictitious or real: if fictitious let it be dismissed and let us proceed with due confidence. If it be real, instead of attempting to blend incompatible things, let us at once take a friendly leave of each other."[18] No one at the Convention took Morris up on this suggestion, and the delegates moved on. Clearly, the majority of them had come to Philadelphia intent on maintaining and strengthening the union. A direct assault on slavery was certainly not in the cards.

Thus, rather than asking if the Framers should have tried to end slavery—or created two nations, one free and one slaveholding—we might ask the more practical question: Could the Framers have done more than they did to constrict slavery, to slow down its growth, and to weaken its hold on America? To use Lincoln's language on the eve of the Civil War, could the Founders have done more to put slavery on the "course of ultimate extinction"?[19] The answer here is surely yes.

As I will discuss below, in at least two areas of the Constitution—the Slave Trade Clause and the Fugitive Slave Clause—the Framers protected slavery in ways that were unnecessary to create the national compact. In other parts of the Constitution the Framers protected slavery more than

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15. In the 1840s the abolitionist John Brown was a wool grower and merchant who attempted to organized other wool producers. He ran a large wool warehouse in Springfield, Massachusetts. His attempt to bolster the wool industry provides hints at the possibility of a textile industry based on fibers produced by free labor.

16. *See infra* Part VII.

17. Morris was a New York lawyer and heir to a great family fortune with land holdings in New York and New Jersey. He was an early patriot and helped draft New York's first state constitution. In 1779, with New York City in British hands, and with the state increasingly controlled by his political opponents, he became a citizen of Pennsylvania. He would later return to New York to represent that state in the U. S. Senate as a Federalist.

18. 1 FARRAND, *supra* note 8, at 604. Shortly after this, in an attempt to end the constant bickering between the small and large states, Madison made much the same point, asserting that "the real difference of interests lay, not between the large and small but between the Northern and Southern States. The institution of slavery and its consequences formed the line of discrimination." 2 *id.* at 9-10.

19. Abraham Lincoln, A House Divided, Speech at Springfield, Ill. (June 16, 1858), *reprinted in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 7, at 461.

was necessary to create the new system of government. Thus, they protected slavery and missed opportunities to constrict slavery. That the Framers did not do more than they did—that they did in fact virtually nothing about slavery—is part of the tragedy of American history. The legacy of the Framers' inaction continues to haunt American society and American law more than two centuries after the Founding period. It is indeed astounding how much energy and time our courts, as well as our legislatures and countless civil rights activists, have spent trying to cope with—and undo—the legacy of slavery.

II. THE MYTH OF A DYING INSTITUTION

To understand slavery and the American Founding, we first must sweep away one of the persistent myths of U.S. history: that slavery was a dying institution at the time of the American Revolution. According to this myth, only after the invention of the cotton gin in 1793, by a bored Yale graduate visiting Georgia,[20] was slavery once again profitable and able to survive as a viable economic institution.

If we believe this myth, then of course we should not even ask the question, "What did the Founders do about slavery?" The myth allows us to dismiss the question, because the Founders believed they did not have to do anything about slavery; they simply had to let it expire on its own. The myth further tells us that the Founders saw slavery as a potential powderkeg, which might explode if they tried to deal with it. Their strategy was to ignore slavery and wait for it to collapse under its own economic dead weight. They could safely secure the Union, knowing the evil would just go away. Thus, the myth tells us, the Framers rightly ignored slavery.

Under this analysis, the Founders did not betray America by failing to face up to America's greatest problem. Instead, history betrayed the Founders, by allowing the cotton gin to save slavery from economic collapse. It is not the failure of the Framers, or the unwillingness of all Americans to face the enormity of the problem, that set the stage for secession and civil war. Rather, in an ironic twist for a society that has always been driven by invention and "progress," it is technology that doomed the United States to civil war.

A. Destroying the Myth: The Economic Argument

Upon close examination, this thesis falls apart. Serious historical scholarship demonstrates that slavery was profitable throughout the colonial period. Slavery remained profitable in the wake of the

20. CONSTANCE M. GREEN, ELI WHITNEY AND THE BIRTH OF AMERICAN TECHNOLOGY 44-46 (1956). On the importance of the gin in American history and culture, see the essays in ELI WHITNEY'S COTTON GIN, 1793-1993 (David O. Whitten ed., 1994).

Revolution. Robert McColley, for example, found that in the 1780s and 1790s, before the invention of the cotton gin, slave prices in Virginia were high.[21] Similarly, in Maryland, where cotton could not be grown, the trade in slaves was brisk both before and after the invention of the gin.[22] In Baltimore, throughout the early national period, slaves were wanted as servants, skilled laborers, and workers in the maritime industry.[23]

Even in places we do not normally associate with slave labor, there was a great demand for slaves in this period. Slavery was still legal in New York at this time, and in New York City most middle class families, especially among the Dutch, owned a few slaves who were used as domestic servants. In addition, slaves in New York were valuable as stevedores, porters, cartmen, and all manner of unskilled workers.[24] Such demand was obviously not based on cotton.

In the deep South the demand for slaves was high throughout the eighteenth century, both before and after the invention of the cotton gin.[25] During the Revolution, South Carolina and Georgia lost between a quarter and a third of their slaves because they died, escaped, or left America with the British Army.[26] Immediately after the War, South Carolina, North Carolina, and Georgia reopened the slave trade, bringing in tens of thousands of new slaves in the years preceding the Constitutional Convention. All these imports took place before the invention of the cotton gin.[27] Clearly, if slavery was unprofitable and on the road to extinction, no one would have imported these slaves, because there would have been no market for them.

Indeed, slavery was enormously profitable at the Founding. We might analogize slavery before the invention of the cotton gin to operating a profitable silver mine. In this analogy, the invention of the cotton gin would be the equivalent of discovering rich veins of gold underneath the silver. The mine was nicely profitable when it produced the Southern "silver"—tobacco and rice. It became even more profitable when it

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21. ROBERT MCCOLLEY, SLAVERY AND JEFFERSONIAN VIRGINIA 24-25 (2d ed. 1973).

22. T. STEPHEN WHITMAN, THE PRICE OF FREEDOM: SLAVERY AND MANUMISSION IN BALTIMORE AND EARLY NATIONAL MARYLAND 14-15 (1997). *See generally id.* at 8-32.

23. *Id.* at 33-60.

24. Statistics for slave-owning in New York in the 1780s are scarce and uncertain. But the experience of the decade following the Philadelphia Convention suggests the importance of slavery in New York City at that time. Between 1790 and 1800 the slave population in New York City grew by about twenty-two percent while the number of actual slave-owners grew by a third. SHANE WHITE, SOMEWHAT MORE INDEPENDENT: THE END OF SLAVERY IN NEW YORK CITY, 1770-1810, at 26-27 (1991).

25. PETER WOOD, BLACK MAJORITY (1974).

26. Philip D. Morgan, *Black Society in the Low Country, 1760-1810*, *in* SLAVERY AND FREEDOM IN THE AGE OF THE AMERICAN REVOLUTION 92 (Ira Berlin & Ronald Hoffman eds., 1983) [hereinafter SLAVERY AND FREEDOM].

27. Allan Kulikoff, *Uprooted Peoples: Black Migrants in the Age of the American Revolution*, *in* SLAVERY AND FREEDOM, *supra* note 26, at 146, estimates that South Carolina alone imported almost 20,000 slaves between 1782 and 1790.

produced Southern "gold"—cotton. Put another way, slaves were a profitable investment before the cotton gin and an even more profitable investment after its invention.

B. Destroying the Myth: Southern Commitment to Slavery

The above analysis of the economics of slavery indicates the strength of the institution at the Founding. Further evidence may be gleaned from an examination of the arguments of the Southerners involved in national politics at the time of the Founding. The Southern Founders made it clear that they expected slavery to survive for the long term. Northern politicians in the national Congress and at the Philadelphia Convention fully understood that the South was committed to slavery. Southern politicians from the 1770s through the 1790s jealously protected their interest in slave property, because they knew it was the central institution of their economy *before* the invention of the cotton gin.[28]

At the Constitutional Convention, for example, Charles Pinckney argued that there was "a solid distinction as to interest between the southern and northern states."[29] He noted that the Carolinas and Georgia "in their Rice and Indigo had a peculiar interest which might be sacrificed" if they did not have sufficient power in any new Congress.[30]

C. The Myth and the Virginia Experience

Historian Robert McColley shows that in Virginia in the 1780s and 1790s, before the cotton gin revolutionized the Southern economy, taxes for slaves were relatively high compared to land taxes, and that prices for the purchase or rent of slaves were relatively high compared to other commodities.[31] This price may have reflected the low supply of slaves due to losses during the Revolution, as thousands of slaves escaped to freedom in the North or left America with the British. However, low supply would not have affected the price of slaves if there had not also been a serious demand. The demand was there because the profit was there. We must assume that tax collectors and investors in slaves were fundamentally rational economic actors, who understood that slavery was profitable.[32]

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28. *See infra* text accompanying notes 38-47 (noting statements by Charles and Charles Cotesworth Pinckney that South Carolina was not willing to give up its slaves). *See generally* ROBINSON, *supra* note 12;

29. 1 FARRAND, *supra* note 8, at 516.

30. *Id.* at 510.

31. MCCOLLEY, *supra* note 21, at 24-25.

32. It is of course always possible for investors to speculate on relatively worthless items, like tulip bulbs, or some dot-com stocks. But the market for slaves was neither speculative nor frenzied. Southerners bought slaves because they were apparently a good investment, and slave prices fluctuated with the economy. There seems to have been little irrationality in the market for slaves over the course of the eighteenth century, or indeed in the first sixty years of the nineteenth century. Tax collectors rated slaves as high-value property, because everyone understood that slaves were indeed a

In 1796, for example, a slave over the age of twelve in Tidewater Virginia was taxed at ten percent *more* than an acre of land.[33] Tax collectors saw slaves as a steady source of revenue. Virginia planters accepted this as a reasonable tax rate for slaves; otherwise, as the most powerful political actors in the state, they would surely have forced a change in the taxation policy.

Virginia planters fully understood that their slaves were more valuable than their land. Rents for slaves "ran from seven to ten dollars for a month and from fifty to one hundred dollars per year."[34] Annual rent for a "respectable house" in Virginia ran from $115 to $230 at year, depending, then as now, on the location of the house. In the 1790s, young, healthy, adult male slaves in Virginia sold for about $400, while average slave prices were about $300, about the same as a town lot in Norfolk.[35] Real estate had a far greater economic life expectancy than a slave. Clearly, Virginians in the period before the cotton gin believed that they could recoup their investment on a slave quickly. They invested in slaves because to do so made good economic sense.

Comparing slave prices to other commodities also suggests the value of a slave. Beef sold for ten cents a pound and pork for seven cents. Whiskey was about $1 per gallon. The cost of a slave—$300 to $400—was equal to 3000 to 4000 pounds of beef, about 4000 to 6000 pounds of salt pork, between 300 and 450 bushels of wheat, or 300 to 400 gallons of whiskey. As McColley correctly concluded, "slaves were the costliest commodities in general commerce"[36] in early national Virginia. They were costly because they were a valuable, long-term investment. Virginians bought slaves because they could make money from their labor, their rent, or their natural increase. Their investments show they did not expect slavery to end anytime soon.

D. The Slave Trade Debate and the Vitality of Slavery

The staying power of slavery was made most clear during the Constitutional Convention's debates over the slave trade. The insistent demands of the delegates from the deep South for explicit protections for the slave trade show the importance of slavery at the time. Had the institution not been important, the South Carolinians and their neighbors

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valuable investment that produced a high level of income, as well as potential capital gains in the form of children who could also be sold. This was an age when corn farmers and whiskey distillers (often the same people) took up arms against a small tax on whiskey and when farmers in Western Massachusetts marched on the courthouses to prevent farm foreclosures for failure to pay mortgages or taxes. But Southern masters seem not to have complained about paying relatively high taxes for their slaves.

33. MCCOLLEY, *supra* note 21, at 80.

34. *Id.* at 78.

35. *Id.* at 25.

36. *Id.* at 24-25.

would not have argued so intensely for these provisions. The other delegates at the Convention naturally heard these arguments, and thus they knew full well that Southerners had no expectations that slavery would end any time soon, or ever. The gains of the South on this issue indicate both Southern commitment to slavery at this time and Northern indifference.

The delegates from the deep South, especially South Carolina, did not want the national government to have any power over the slave trade. They feared a national commerce power would be used to abolish the trade, which they knew was unpopular in the North. Virginians who generally supported slavery at the Convention were also hostile to the trade, mostly because they had a surplus of slaves at the time, and expected to make great profits selling their excess slaves further south. If the delegates from the deep South had expected slavery to die out, as the traditional story goes, then they would not have argued so vociferously for a continuation of the trade. At the time of the Convention, South Carolina had temporarily halted its importation of African slaves. Thus, if South Carolina expected an end to slavery, its delegates would not have demanded protection for the slave trade. Why contemplate renewing the trade if slavery itself was dying out?

But of course the South Carolina delegates had no expectations of an end to slavery or the trade. During the debate, some of the Northerners who were inclined to support South Carolina suggested that slavery might die out. Oliver Ellsworth of Connecticut, for example, declared, "As population increases; poor laborers will be so plenty as to render slaves useless. Slavery in time will not be a speck in our Country. Provision is already made in Connecticut for abolishing it. And the abolition has already taken place in Massachusetts."[37] This was foolish wishful thinking with regard to slavery in the deep South, and almost everyone at the Convention knew it.

Charles Pinckney of South Carolina underscored the absurdity of Ellsworth's argument, noting that "[i]f slavery be wrong, it is justified by the example of all the world."[38] Citing "the case of Greece Rome & other antient States," and "the sanction given by France England, Holland & other modern States," Pinckney argued that "[i]n all ages one half of mankind have been slaves."[39] This was hardly the voice of someone expecting abolition. On the contrary, he was suggesting that slavery was the only proper system of labor for any society.

In the mid-nineteenth century such arguments would form what historians call the "positive good" defense of slavery. Clearly, this

37. 2 FARRAND, *supra* note 8, at 371.
38. *Id.*
39. *Id.*

argument preceded the antebellum period. Pinckney told the Convention that "If the S[outhern] States were let alone they will probably of themselves stop importations."[40] In fact, "as a Citizen of S. Carolina" he declared he would vote to end the trade,[41] but he clearly wanted to be able to do this in his own time and his own way. And just as clearly, he was in no hurry. If great nations and societies, like Greece and Rome, required slavery, then the South needed more slaves.

Pinckney's older and more respected cousin, General Charles Cotesworth Pinckney, was even more direct. "S[outh] Carolina & Georgia cannot do without slaves," he told the Convention.[42] Noting that Virginia had a surplus of slaves, General Pinckney argued that a ban on the trade would "require S. C. & Georgia to confederate on such unequal terms."[43] Furthermore, Pinckney appealed to the economic interests of all Americans, noting that importations "would be for the interest of the whole Union. The more slaves, the more produce to employ the carrying trade; The more consumption also, and the more of this, the more of revenue for the common treasury."[44] He willingly "admitted it to be reasonable that slaves should be dutied" like any other imported good.[45] This was hardly the voice of a man who expected an end to slavery.

As this debate continued, James Wilson of Pennsylvania argued "that if S. C. & Georgia were themselves disposed to get rid of the importation of slaves in a short time as had been suggested, they would never refuse to Unite because the importation might be prohibited."[46] Wilson, known for his bluntness, was apparently ready to call the South Carolinian's bluff on the issue.

But there was really no bluff to call. General Charles Cotesworth Pinckney rejected the suggestion of his cousin that South Carolina would end the trade. He "thought himself bound to declare candidly that he did not think S. Carolina would stop her importations of slaves in any short time, but only stop them occasionally as she now does."[47] John Rutledge, Pinckney's neighbor, agreed: "If the Convention thinks that N. C; S. C. & Georgia will ever agree to the plan, unless their right to import slaves be untouched, the expectation is vain. The people of those States will never be such fools as to give up so important an interest."[48]

Thus, the Convention delegates, along with most politicians and

40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 371-72.
46. *Id.* at 372.
47. *Id.* at 373.
48. *Id.*

informed citizens, understood that slavery was not about to disappear in the South. It was part of the South.

III. THE FIRST (LIMITED) EMANCIPATION

At the time the Americans declared their independence, slavery was legal in each of the thirteen new states. Slavery was legal everywhere; slavery was found everywhere. Even in places where slaves were not central to the economy—like Massachusetts—they were valuable property. In New York slavery was an important institution. In 1771 slaves made up over fourteen percent of the population New York City, over twenty percent of the population in Richmond and Queens Counties, and about a third of the population of Kings County (Brooklyn).[49] The dislocations of the Revolution reduced the numbers and percentages of slaves, but not greatly. In 1800, for example, Kings County's 1506 slaves made up more than a quarter of the total population of 5767.[50] Enormous profits had already been made from the slave trade in Rhode Island and Connecticut, and to a lesser extent in Massachusetts, in the period leading up to the American Revolution. On the eve of the Revolution, slave populations in New England varied from slightly over one percent in New Hampshire to over six percent in Rhode Island. When the Revolution began, Pennsylvania had about 5500 slaves, New Jersey had about 15,000, and New York had nearly 20,000. Slaves were, of course, far more numerous in the South, making up about forty percent of the Virginia population and about forty-five percent in South Carolina.[51]

During the Revolution some of the Northern states began to end slavery.[52] Massachusetts abolished slavery outright in its constitution of 1780.[53] New Hampshire also ended slavery in its first constitution in

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49. WHITE, *supra* note 24, at 3-5.

50. *Id.* at xxv.

51. Figures are drawn from PAUL FINKELMAN & JOSEPH C. MILLER, THE MACMILLAN ENCYCLOPEDIA OF WORLD SLAVERY (1998); and RANDALL MILLER & JOHN DAVID SMITH, DICTIONARY OF AFRO-AMERICAN SLAVERY (rev ed. 1997). In 1790 Virginia had a free population of 454,983. The next largest free populations were Pennsylvania, 430,630; Massachusetts, 378,693; and New York, 318,824. Virginia also had 292,627 slaves, whereas the entire North had only 40,089 slaves.

52. *See generally* PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 41-45 (1981); ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION (1967).

53. MASS. CONST. art. I ("All men are born free and equal"), *quoted in* 3 FRANCIS N. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 1889 (1909); *see also* Commonwealth v. Jennison (Mass. 1783), *reprinted in* PAUL FINKELMAN, THE LAW OF FREEDOM AND BONDAGE 36-41 (1986). Vermont, which would become the fourteenth state, did the same in its constitution of 1777. The "Quock Walker" case resulted when the slave Quock Walker left his master, Nathaniel Jennison, and sought employment for wages. In May 1781 Jennison beat Walker with a stick in an attempt to force him to return to bondage. In 1783 Judge William Cushing upheld Jennison's conviction for battery, asserting that the state's constitution ended slavery by declaring "*that all born are born free and equal.*" *Jennison, reprinted in* FINKELMAN, *supra*, at 37.

1784.[54] In 1780, Pennsylvania passed a gradual emancipation statute that did not free anyone already in slavery, but provided that the children of all slaves would be born free, subject to an indenture. As the existing slaves in the state died, no new ones would replace them, and the institution itself would soon die.[55] Rhode Island and Connecticut passed similar laws in 1784.[56] This movement toward freedom continued after the adoption of the Constitution as well. In 1799 New York adopted a gradual emancipation statute, as did New Jersey in 1804.[57] Thus, when we look at the Revolutionary era as a whole, we see that some of the Founders did in fact confront slavery and, where it was in their power, destroy it.[58]

South of New Jersey the Founders did little about slavery. As chair of a committee to revise the laws of Virginia, Thomas Jefferson prevented a gradual emancipation proposal from ever reaching the floor.[59] The Virginia law professor and future judge St. George Tucker published a pamphlet on emancipation, which he later included in his five-volume edition of Blackstone, but he was unable to attract any political support for it.[60] The best Virginians could come up with was a 1782 law permitting masters voluntarily to free their slaves and allowing manumitted adult slaves to remain in the state.[61] Some 20,000 slaves gained their freedom before this law was altered in 1806. This illustrates the discomfort over slavery felt by some Virginians, including George Washington, who took advantage of the law to free his slaves in his will. But these manumissions

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54. N.H. CONST. art. I ("All men are born equally free and independent. . . ."), *quoted in* 4 THORPE, *supra* note 53, at 2453.

55. An Act for the Gradual Abolition of Slavery, Act of March 1, 1780, 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 492 (1810); *see also* GARY NASH & JEAN SODERLUND, FREEDOM BY DEGREES: EMANCIPATION IN PENNSYLVANIA AND ITS AFTERMATH (1991); and FINKELMAN, *supra* note 8, at 46-69.

56. An Act Authorizing the Manumission of Negroes, Mulattoes, and Others, and for the Gradual Abolition of Slavery, *in* RHODE ISLAND LAWS AND STATUTES 6-8 (1784); *see also* ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA 233-35 (1784). The Connecticut Gradual Abolition Act was included in the state's revised statutes of 1784, apparently added by Roger Sherman and Richard Law, whom the legislature chose to compile the revised statutes. The Gradual Emancipation Act was simply folded into the larger section of "An Act Concerning Indian, Mulatto, and Negro Servants and Slaves" in the revised statutes. *See* ZILVERSMIT, *supra* note 52, at 123-24.

57. An Act for the Gradual Abolition of Slavery, 1799 N.Y. LAWS ch. lxii; An Act for the Gradual Abolition of Slavery, *in* NEW JERSEY SESSION LAWS 251 (1804). For a discussion of these laws, see ZILVERSMIT, *supra* note 52, at 175-84, 192-200.

58. *See generally* DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION (1975).

59. PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 144-47 (2001).

60. ST. GEORGE TUCKER, A DISSERTATION ON SLAVERY: WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT, IN THE STATE OF VIRGINIA (1796); *see also* Paul Finkelman & David Cobin, *Introduction* to 1 ST. GEORGE TUCKER, TUCKER'S BLACKSTONE, at viii-ix (reprint ed., Lawbook Exchange 1997).

61. An Act To Authorize the Manumission of Slaves, 1782 VA. ACTS ch. xxi, *reprinted in* 11 THE STATUTES AT LARGE: BEING A COLLECTION OF THE LAW OF VIRGINIA SINCE THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 39 (William Waller Hening ed., 1823).

hardly made a dent in Virginia's huge slave population.

Thus, the delegates who met in Philadelphia in 1787 represented, for the most part, a slaveholding nation. Only Massachusetts and New Hampshire had banned the institution outright and only Pennsylvania, Connecticut, and Rhode Island (which sent no delegates to the Convention) had passed gradual emancipation statutes. Opposition to slavery was growing in New York and New Jersey, although the institution was still legal in both places.[62] The rest of the nation was committed to slavery. The Constitution of 1787 was made for a nation that was partially a slaveholder's republic. Thus, it is not surprising that slavery was protected by the Constitution. But as I will argue below, the Framers could have done a better a job of constricting the institution.

IV. SLAVERY IN THE CONSTITUTION: DIRECT PROTECTIONS

The word "slavery" does not appear anywhere in the Constitution until the Thirteenth Amendment, which declares that slavery is abolished. Someone unfamiliar with our history reading the Constitution for the first time might wonder why the Constitution abolished an institution that is, at first reading, not present in the Constitution. A careful reading of the Constitution, however, reveals that slavery was deeply rooted in the document. Similarly, a careful examination of the Convention debates shows that the delegates fully understood they were protecting slavery.

Throughout the Convention the delegates talked about slavery. Usually they used the term "slave," but sometimes they talked about "Negroes" or "blacks." They made no distinction between the growing free black population of the United States and the slave population. Indeed, they were usually oblivious to the fact that there were free blacks in the country. But when the Constitution was written, the delegates used euphemistic language referring to slaves as "other Persons,"[63] "such Persons,"[64] or "Person[s] held to Service or Labour."[65]

Why did the Framers use such obscure language? During the debates, William Paterson of New Jersey pointed out that the Congress under the Articles of Confederation "had been ashamed to use the term 'Slaves' & had substituted a description."[66] This shame over the word "slave" came up at the Convention during the debate over the international slave trade. The delegates from the Carolinas and Georgia vigorously demanded that

62. In the Virginia ratifying convention James Madison asserted that New York and New Jersey would "probably oppose any attempts to annihilate this species of property." 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 459 (Burt Franklin 1987) (1888).

63. U.S. CONST. art. I, § 2, cl. 3.

64. *Id.* art I, § 9, cl. 1.

65. *Id.* art. IV, § 2, cl. 3.

66. 1 FARRAND, *supra* note 8, at 561.

the trade remain open under the new Constitution. Gouverneur Morris of Pennsylvania, unable to contain his anger over this immoral compromise, suggested that the proposed clause read as follows: the "Importation of slaves into N. Carolina, S. Carolina & Georgia" shall not be prohibited.[67] Connecticut's Roger Sherman, who voted with the deep South to allow the trade, objected not only to the singling out of specific states but also to the term "slave." He declared he "liked a description better than the terms proposed, which had been declined by the old Congs & were not pleasing to some people."[68] George Clymer of Pennsylvania "concurred with Mr. Sherman" on this issue.[69] In the North Carolina ratifying convention, James Iredell, who had been a delegate in Philadelphia, explained that "[t]he word *slave* is not mentioned" because "the northern delegates, owing to their particular scruples on the subject of slavery, did not choose the word *slave* to be mentioned."[70] Thus, Southerners avoided the term because they did not want to antagonize their colleagues from the North. As long as they were assured of protection for their institution, the Southerners at the Convention were content to do without the word "slave."

Delegates from Connecticut and Massachusetts were especially afraid that if slavery were explicitly mentioned in the Constitution it would not be ratified in the North. Members of the Connecticut delegation in particular made this point. While we do not have the full text of Roger Sherman's speech on this question, it is clear that his goal was to fool his constituents, to prevent them from seeing words that "were not pleasing to some people."[71] He sought to hide the ball, to use more pleasing language, and to get the Constitution through.

Despite the Framer's obfuscation, the Constitution explicitly recognizes slavery in five places and contains numerous other clauses that were mostly or partially designed with slavery in mind. The five explicit recognitions of slavery were the following: 1) the Three-Fifths Clause;[72] 2) the Slave Trade Clause;[73] 3) the Capitation Tax Clause;[74] 4) the Fugitive Slave Clause;[75] 5) and Article V,[76] which prevented any amendment of the slave trade provision.[77]

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67. 2 *Id.* at 415.
68. *Id.*
69. *Id.*
70. 4 ELLIOT, *supra* note 62, at 176.
71. 2 FARRAND, *supra* note 8, at 415.
72. U.S. CONST. art. I, § 2.
73. *Id.* art. I, § 9, cl. 1.
74. *Id.* art I, § 9, cl. 4.
75. *Id.* art. IV, § 2, cl. 3.
76. *Id.* art. V.
77. For analytical reasons, I will discuss these clauses slightly out of the order in which they appear in the Constitution.

A. The Three-Fifths Compromise

1. The Clause

The most obvious slavery-related provision is the Three-Fifths Clause,[78] which provides for seats in the House of Representatives to be allocated among the states by adding to the entire population of free people (excluding tribal Indians) "three-fifths of all other persons." The "other persons" are slaves. Everyone at the time understood this, as the debates at the Convention and over ratification make clear.

At the onset it is worth noting that the Three-Fifths Clause was based on status, not race.[79] A persistent myth of American Constitutional history is that the Constitution declared all blacks to be three-fifths of a person. Whatever else the Framers can be blamed for, this was not a position they took. Under the Constitution free blacks counted as whole persons for purposes of representation.[80]

The extra representatives that the South gained by counting slaves mattered a good deal. The vote to admit Missouri as a slave state was extremely close, and without the representatives that the South gained from the Three-Fifths Clause, admission on those terms probably would not have passed the House. Eventually some compromise would doubtless have been reached, but perhaps one less favorable to slavery.

Similarly, without the representatives created by counting slaves, Congress would have been unlikely to pass the Fugitive Slave Law of 1850. Again, some other law might have been passed, but it would probably have been less harsh to those who gave aid to runaway slaves and might even have given alleged slaves some due process rights. Indeed, throughout the period from 1789 until the Civil War, the Three-Fifths Clause gave the South important political leverage in Congress. And, as I will note below,[81] the Three-Fifths Clause also affected the make-up of the electoral college and thus gave the South a disproportionate power in electing the President.

The Three-Fifths Clause also provided that if the national government ever levied "direct taxes," they too would be "apportioned among the several states" according to population, using the three-fifths rule for allocating these taxes to the slave states. The balance here, between slave-

78. U.S. CONST. art. I, § 2.

79. *See id.* art. I, cl. 3.

80. Indeed one of the great ironies of the American Civil War is that the South ended up with more representation in Congress after the Civil War than it had before the Civil War because suddenly all the persons counted as only "three-fifths" of a person were free and therefore counted as whole persons. Congress tried to deal with this in the Fourteenth Amendment by reducing congressional representation for states that did not give blacks the same voting rights as whites, but this provision was never implemented. *See id.* amend. XIV, § 2.

81. *See infra* Section V.C.

and free-state interests, was more apparent than real. Representation in Congress under the Constitution was a certainty, while direct taxes were unlikely ever to be levied. Gouverneur Morris, for example, scoffed at the idea that there could ever be a direct tax, as the Three-Fifths Clause allowed, because it was "idle to suppose that the General Government can stretch its hand directly into the pockets of the people scattered over so vast a Country."[82] Thus, he complained that the South would get extra representation in Congress for its slaves and have to pay nothing in return. Morris declared he "would sooner submit himself to a tax for paying for all the Negroes in the United States than saddle posterity with such a Constitution."[83]

Morris was not the only one at the Convention who understood this. Southerners at the Convention were willing to trade full taxation of slaves for counting them fully for purposes of representation.[84] They doubtless understood that direct taxation was unlikely but if such taxes were ever levied they would be well worth the cost to gain greater political power for their states.

2. The Failure of the Founders on the Three-Fifths Clause

The South would not have accepted population-based representation without somehow counting slaves. Northerners understood this, even as they hated it. But the Northerners could have fought for a better bargain.

The history of the Convention shows that the Three-Fifths Clause was applied to representation on June 11,[85] but the Convention did not apply it to taxation until July 12.[86] James Wilson suggested this connection, not as a fair bargain over competing regional interests, but more as a subterfuge, to placate Northerners (including Gouverneur Morris of his own delegation) who opposed any representatives for slaves. Thus, Wilson

> observed that less umbrage would perhaps be taken agst. an admission of slaves into the Rule of representation, if it should be so expressed as to make them indirectly only an ingredient in the rule, by saying that they should enter into the rule of taxation: and as representation was to be according to taxation, the end would be equally attained.[87]

This chronology shows that the North conceded representation based on slaves without any demand for some concession, on slavery or anything else, from the South. The application of the Three-Fifths Clause to

82. 2 FARRAND, *supra* note 8, at 223.
83. *Id.*
84. 1 *id.* 596.
85. *Id.* at 201.
86. *Id.* at 595.
87. *Id.*

taxation thus came later, as a "selling point" for gaining Northern support for the Constitution.

Thus, the North might have sought some meaningful quid pro quo for allowing slaves to be counted for representation. Or, more importantly, the delegates from Pennsylvania, Massachusetts, and New Jersey, who were most unhappy about counting slaves for representation, might have pushed for a fifty-percent ratio as a compromise. Such a change might have made a huge difference in the nation's subsequent political development. The reduction of even a few Southern congressmen might have prevented the passage of the Missouri Compromise, or at least forced a change in the compromise that would have been more favorable to freedom. The same is true for the passage of the laws surrounding the Compromise of 1850.

Moving from three-fifths to fifty percent, or even two-fifths, might have been possible. Even the Southerners knew there was something odd about counting slaves to determine representation in a nation of free people. After all, no Southern state counted slaves for purposes of representation in its legislature. As William Paterson, himself the owner of a few slaves in New Jersey,[88] noted in one debate: "[N]egroes [sic] slaves in no light but as property. They are no free agents, have no personal liberty, no faculty of acquiring property, but on the contrary are themselves property, and like other property entirely at the will of the Master."[89]

Paterson pointedly asked, "Has a man in Virga. a number of votes in proportion to the number of his slaves?" He noted that slaves were not counted in allocating representation in Southern state legislatures, and asked, "Why should they be represented in the Genl. Gov't.[?]"[90] Similarly, in opposing the clause, Gouverneur Morris of Pennsylvania argued that counting slaves for representation,

> when fairly explained comes to this: that the inhabitant of Georgia and South Carolina who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections and damns them to the most cruel bondages, shall have more votes in a Government instituted for protection of the rights of mankind, than the Citizen of Pennsylvania or New Jersey who views with a laudable horror, so nefarious a practice.[91]

Given such sentiments, the Northern delegates might have argued for a better ratio. They did not. Nor did they object when the ratio was applied

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88. At this time New Jersey was a slave state, and at least some Southern delegates, like James Madison, doubted that New Jersey or New York would end slavery soon. In the Virginia ratifying convention, Madison asserted that both states would "probably oppose any attempts to annihilate this species of property." 3 ELLIOT, *supra* note 62, at 459.

89. 1 FARRAND, *supra* note 8, at 561.

90. *Id.* at 560-561.

91. 2 *Id.* at 220-23.

to the election of the President, even though this gave the South extra power in the election of the nation's chief executive. Direct election of the President would have undermined slavery, but it would have been politically difficult to achieve. Thus, rather than strive for this, or seek some other method of choosing the President, the delegates accepted the application of the Three-Fifths Clause to the allocation of presidential electors.[92]

B. The Capitation Tax

Since before the Revolution, the terms "direct taxes" and "indirect taxes" had been in the American lexicon, yet no one seemed to have a precise definition of what they meant. The confusion of the Supreme Court in response to the first income tax laws illustrates the uncertainty of the meaning of the term. Chief Justice Melville Fuller was certain that an income tax was a "direct tax" that needed to be apportioned among the states according to their population, while Justice John Marshall Harlan argued that even at the Constitutional Convention no "delegate attempted to give a clear, succinct definition of what, in his opinion, was direct taxation."[93] Harlan cited to the Convention debates: "Mr. King asked what was the precise meaning of *direct* taxation? No one answd."[94]

Perhaps because of this imprecision, the delegates added a second clause, tied to taxation, in Article I, Section 9 of the Constitution. Known as the "Capitation Tax Clause," its meaning is at least somewhat more precise: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."[95] This clause gives us one concrete example of what a direct tax was. Such a tax, of course, would never be implemented. At least until the Civil War changed *everything* about American constitutionalism, Gouverneur Morris's observation proved correct: It was indeed "idle to suppose that the General Government can stretch its hand directly into the pockets of the people scattered over so vast a Country."[96]

C. The Slave Trade Compromise

1. The Clause

In the structure of the Constitution, the second clause obviously dealing with slavery was the "migration and importation" clause, which prevented

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92. *See infra* Section V.C.

93. Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 640 (1895) (Harlan, J., dissenting).

94. *Id.* Harlan cited to 5 ELLIOT, *supra* note 62, at 451. The quotation is found in the Convention debates at 2 FARRAND, *supra* note 8, at 350.

95. U.S. CONST. art. I, § 9, cl. 4.

96. 2 FARRAND, *supra* note 8, at 223.

Congress from prohibiting the African slave trade before 1808.[97] Despite the belief of many Americans that the clause ended the slave trade after 1808, the provision was not self-executing: It did not automatically ban the trade in 1808, but merely allowed Congress to ban it after that year.

This clause protected slavery in two important ways. Most obviously, the clause was a specific limitation on the power of Congress to regulate a single aspect of international commerce for a period of twenty years. At the end of that period Congress could, but did not have to, regulate that form of commerce. Most modern scholars have assumed that this regulation was a foregone conclusion. But such an assumption is unwarranted, because almost everyone at the Convention believed that the South was growing faster than the North and would continue to do so.[98] Thus almost all the delegates expected that in 1808 the South, especially the deep South, might very well control the House of Representatives. Such control did not require a majority of the votes, but only enough votes to build a working coalition that could prevent the passage of a law banning the trade.

The delegates in 1787 fully expected that the new states formed in the West "would vote with the South in the sectional conflict."[99] Those south of the Ohio river would naturally be slave states. Thus the South Carolinians who secured the Slave Trade Clause expected to find support among these new states for keeping the trade open as a way of lowering the price of slaves throughout the nation. But Southerners also expected that those states formed in the area north of the Ohio River—which was made "free" under the Northwest Ordinance—would support the South. These would not be slave states, but they would be agrarian, and Southerners believed they would be settled by migrants from Virginia and Kentucky, who were sympathetic to slavery.[100] Finally, some Southerners may have believed, or at least hoped, that the Northwest Ordinance would not actually create free states in that region. In 1787 slavery was a viable institution in the territories that would become Indiana and Illinois.[101] In 1822 the new state of Illinois came close to calling a constitutional convention to remake Illinois into a slave state.[102] Some Southerners in 1787 may have anticipated that such a future was likely.

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97. U.S. CONST. art. I, § 9, cl. 1.

98. *See* STAUGHTON LYND, *The Compromise of 1787*, *in* CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION: TEN ESSAYS 185 (1967). Gunning Bedford of Delaware observed in the debates of June 30 that Georgia, "though a small State at present," was "actuated by present interest and future prospects," and that North Carolina had "the same motives of present and future interest." 1 FARRAND, *supra* note 8, at 491.

99. LYND, *supra* note 98, at 190.

100. *Id.* at 191.

101. Paul Finkelman, *Slavery and the Northwest Ordinance: A Study in Ambiguity*, 6 J. EARLY REPUBLIC 343 (1986).

102. Paul Finkelman, *Evading the Ordinance: The Persistence of Bondage in Indiana and Illinois*, 9 J. EARLY REPUBLIC 21 (1989).

At the Convention and during the ratification struggle, South Carolinians also expected that they would have allies in New England in 1808. The delegates from Connecticut, Massachusetts, and New Hampshire had supported the South Carolinians at the Convention in 1787.[103] Charles Cotesworth Pinckney had made a strong economic argument in support of the slave trade, asserting that continuing it "would be for the interest of the whole Union. The more slaves, the more produce to employ the carrying trade; The more consumption also, and the more of this, the more of revenue for the common treasury."[104] At the Convention, sharp "Yankee traders," like Oliver Ellsworth of Connecticut, had concurred, asserting that "what enriches a part enriches the whole."[105] He had refused to debate the "morality or wisdom of slavery."[106]

Most histories of this period and the slave trade have been read backwards. Historians have praised the Framers for deferring the issue of the slave trade in order to accomplish "a more perfect union," knowing that they would end the trade later on. But to praise the Framers for slowing down the growth of slavery by ending the trade is to read their expectations and motivations ahistorically, from the perspective of 1808. The passage of the law in 1807, banning the trade in 1808, was not in fact the fulfillment of the expectations of the Framers. On the contrary, it happened because almost all of South Carolina's calculations and the other delegates' expectations turned out to be wrong: The North grew faster than the South; the agrarian West (on both sides of the Ohio River) did not support the slave trade; and the New England states discovered that their enrichment did not depend on greater importations of slaves. Thus, contrary to all expectations held in 1787, by 1808 the deep South was too weak to prevent an abolition of the trade.

Given the assumptions that were held by Southerners and Northerners, many delegates must have expected that by 1808 the deep South would have had the political power to block a ban on the importation of slaves. Thus, the delegates in Philadelphia were not deferring a vote on the African slave trade in order to kill it later, but were in fact deferring any consideration until a time when everyone assumed the supporters of the trade would have the political strength to prevent a ban on it.

Furthermore, because the slave trade provision was not self-executing, the deep South did not need to control the entire national government to protect the trade in 1808. The supporters of the trade only needed enough power to block passage of an anti-slave-trade bill in one house of Congress, or enough political clout to get a President to veto it. Those delegates who believed that the South would be the most populous part of

103. 2 FARRAND, *supra* note 8, at 371-75.
104. *Id.*
105. *Id.* at 363-65.
106. *Id.*

the country by 1808, and that the direction of the population and economic growth favored the deep South, assumed that by deferring the issue of the trade until 1808 they could secure the trade forever.

Even if they lacked the raw power to defeat a bill banning the slave trade in 1808, it was reasonable for the delegates from the deep South to expect that some deal could have been made to keep the trade open, say in exchange for Southern support for higher tariffs or some other program that the North wanted. From a political perspective, the beauty of this clause was that it did not actually require Northerners to *support* the slave trade; they only had to agree not to ban in it. No Northerner would have to cast a vote *for* the trade to keep it open.

These understandings go to the crux of what the Framers did, and did not do, about slavery. With the exception of Gouverneur Morris, all of the Convention delegates assumed that the South and Southwest would grow faster than the rest of the nation. They believed that what would eventually become Alabama, Mississippi, and Tennessee would attract greater settlement than the Ohio River Valley or the Great Lakes basin. They saw the American population moving South and West, rather than in the direction it eventually went—into northern New England, upstate New York, the old Northwest, and the emerging big cities of New York, Philadelphia, and Boston.

Certainly, in 1787 demography seemed to be working in favor of the South. It was obvious that well before 1808 the Southwest—what became Tennessee and Kentucky—would enter the Union, as might the future states of Mississippi and Alabama. But after Vermont, there was no obvious new Northern state. Southerners thus anticipated they would control not only the House, but perhaps also either the Senate or at least share control of the Senate with the North.

In sum, the South Carolina delegates had good reason to expect that in 1808 they could block passage of a ban on the slave trade, just as they were able to do at the Convention in 1787. Through the slave trade provision they were, in essence, buying time to create the necessary political power to keep the trade open as long as they wished.

In addition to holding these assumptions (however wrong they turned out to be), the Southern delegates expected that the states formed north of the Ohio River, settled by migrants from Virginia and Kentucky, would also be supportive of Southern interests. Finally, South Carolinians in 1787 probably assumed that their Convention alliance over the slave trade would continue after 1808, because of their mutual economic interests. Why shouldn't the New Englanders, and perhaps other Northerners, take a similar position in 1808? Indeed, if the New Englanders were willing to bargain on the slave trade in 1787—extending the trade for at least twenty years in return for Southern acquiescence on the Commerce Clause—why couldn't a similar bargain be made in 1808?

At the Convention, the support of Oliver Ellsworth of Connecticut gave

the South Carolinians good reason to believe that New England would be with them in the future. Because "he had never owned a slave," Ellsworth declared he "could not judge of the effects of slavery on character."[107] But he considered that a prohibition on the trade would be "unjust towards S. Carolina and Georgia."[108] So Ellsworth urged the Convention not to "intermeddle" in the affairs of other states.[109] But Ellsworth also supported the slave trade clause on grounds of economic self-interest, asserting that "what enriches a part enriches the whole."[110]

During ratification, David Ramsey, one of the leading intellectuals and politicians in South Carolina, argued that this same sort of economic self-interest would prevail after 1808. He argued in favor of ratification, noting: "Though Congress may forbid the importation of negroes after 21 years, it does not follow that they will. On the other hand, it is probable that they will not. The more rice we make, the more business will be for their shipping: their interest will therefore coincide with our's [sic]."[111] At the same time Ramsey wrote a Massachusetts friend that the leaders in South Carolina generally agreed that New Englanders "ought to be our carriers though a dearer freight should be the consequence."[112] He noted that the New Englanders' support for the slave trade was a smart "political thing" that would result in commercial benefits to both sections.[113] South Carolinians understood, as did New Englanders, that "what enriches a part enriches the whole."[114]

2. The Failure of the Founders on the Slave Trade Clause

All of the negotiation and rhetoric at the Convention may make it seem that the slave clause was somehow essential for the adoption of the Constitution. It this were so, then the bargain, however corrupt, the compromise, however dirty, was necessary. But is this a legitimate argument? There is strong evidence to suggest that, even without the explicit protection of the slave trade, the Constitution could have been written, signed, and ratified.

Only the delegates from the Carolinas and Georgia insisted on a specific protection for the trade, though delegates from other states acquiesced in their demands. The delegates from the Carolinas and Georgia claimed that

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107. *Id.* at 370-71.

108. *Id.* at 371.

109. *Id.* at 364.

110. *Id.*

111. Civis [David Ramsey], *To the Citizens of South Carolina*, CHARLESTON COLUMBIAN HERALD, Feb. 4, 1788, *reprinted in* 16 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 25 (Merill Jensen ed., 1976).

112. Letter from David Ramsey to Benjamin Lincoln (Jan. 29, 1788), *in* 15 DOCUMENTARY HISTORY, *supra* note 111, at 487.

113. *Id.*

114. 2 FARRAND, *supra* note 8, at 363-65.

the slave trade was essential to their prosperity. The argument that the slave trade was essential to secure the Constitution rests on the arguments of these delegates. Yet the nature of their recorded debates suggests that the Convention may have done more than the deep South delegates were demanding.

Charles Pinckney asserted that South Carolina would "never receive the plan if it prohibits the slave trade,"[115] and later warned that any prohibition of the slave trade would "produce serious objections to the Constitution which he wished to see adopted."[116] His cousin, General Charles Cotesworth Pinckney, also declared his support for the Constitution, but noted that his "personal influence . . . would be of no avail towards obtaining the assent"[117] of his home state if the trade were abolished. A prohibition of the slave trade would be "an exclusion of [South Carolina] from the Union."[118] He was emphatic that "S. Carolina and Georgia cannot do without slaves."[119] John Rutledge and Pierce Butler added similar sentiments, as did Abraham Baldwin of Georgia and Hugh Williamson of North Carolina.[120] It is worth noting that all of these statements focused on an actual ban on the trade, which in fact the Convention had never contemplated.

Some years ago William W. Freehling argued that the slave trade clause was adopted to "lure Georgia and South Carolina into the Union."[121] The Convention debates, however, suggest that the deep South did not really need to be lured into the Union; the delegates from the Carolinas and Georgia were already deeply committed to the Constitution by the time the slave trade debate occurred. Moreover, by then, the South had already won major concessions on the Three-Fifths Clause and the prohibition on taxing exports. These were permanent features of the Constitution, unlike the slave trade provision, which precluded Congressional action for only twenty years. At the time of the Convention no state was actually importing slaves. Thus, it is reasonable to believe that the Slave Trade Clause was unnecessary to secure support for the Constitution. Only South Carolina and Georgia were adamantly in favor of the ban on Congressional action. North Carolina voted with them, but its delegates said little on this issue.

Freehling has more recently reiterated his position, writing: "I believe Carolinians meant their ultimatum—and that a majority of the delegates so

115. *Id.* at 364.
116. *Id.* at 371.
117. *Id.* at 371.
118. *Id.* at 372.
119. *Id.* at 371.
120. *Id.* at 372, 373.
121. William W. Freehling, *The Founding Fathers and Slavery*, 77 AM. HIST. REV. 81, 84 (1972).

believed."[122] But it is not clear exactly what their "ultimatum" was. The language they used was one of preventing a constitutional ban on the trade. As Charles Pinckney said, his state would never accept the Constitution if it "prohibits the trade."[123] If this is the case, then in fact the Framers gave the deep South even more than it asked for.

Should we then take delegates from the deep South as seriously as Freehling does? Surrounded by Spanish colonists and hostile Indians, who received support from British agents, Georgia was desperate for the military and diplomatic protection of a stronger union. Georgia's ratification was quick and overwhelming.[124] North Carolina had a relatively small commitment to the slave trade. Many of the state's small farmers were hostile to a strong central government. The state initially rejected the Constitution, in part because it lacked a bill of rights. Thus, as it turns out, protecting the slave trade may have had no effect on that state's support for the Constitution.

The South Carolina delegates were the most adamant supporters of slavery at the Convention, and some of the largest slaveowners in the nation. They claimed that South Carolina would not ratify if the slave trade was banned, even though the state was not currently importing slaves. Their claim might have been true. But was South Carolina really ready to go it alone? Could it have formed a Southern confederacy with Georgia, over the right to import slaves? Would it have done so, since at the time South Carolina was not actually importing any slaves? This seems unlikely.

Furthermore, it seems that there was a middle ground available to the Convention. The South Carolina delegates, as we have just seen, argued against any ban on the trade. But did that require explicitly protecting the trade? Shrewdly, the South Carolina delegates equated a general commerce power with an attack on the trade, and managed to get the Convention to protect the trade explicitly, rather than simply not to ban it. But if the Convention had said nothing about the trade at all, the South Carolina Framers could have returned home and ignored the issue. If opponents of the Constitution raised the issue of the trade, the South Carolina Federalists could have argued that it was unlikely Congress would ban the trade, given the strong economic interest in the trade from New England and the deep South. The omission of any clause regulating the trade might have been noticed by some Southerners, but there is no reason to believe that shrewd politicians, like the Pinckneys, could not have convinced their neighbors of the ultimate value of the Constitution—

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122. WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776-1854, at 584 n.30 (1990).

123. 2 FARRAND, *supra* note 8, at 363-65.

124. Georgia ratified on January 2, 1788, by a unanimous vote of its Ratification Convention. JOHN FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783-1789, at 360 (1888).

especially considering that South Carolina was not actually importing slaves at the time.

By not explicitly protecting the trade, the Framers could also have diffused some Anti-Federalist sentiment. Many Northern Anti-Federalists were shocked by the explicit protection for the trade. A New Yorker complained that the Constitution condoned "drenching the bowels of Africa in gore, for the sake of enslaving its free-born innocent inhabitants."[125] In New Hampshire, Joshua Atherton opposed ratification because it would make all Americans "consenters to, and partakers in, the sin and guilt of this abominable traffic."[126]

Even some Southerners opposed the Constitution because of the slave trade. A Virginian thought the slave trade provision was an "excellent clause" for "an Algerian constitution: but not so well calculated (I hope) for the latitude of America."[127] The Framers chose to placate a small minority that favored the trade, ignoring the fact that an explicit protection had the potential for igniting opposition outside of the deep South.

Had the Framers done nothing about the trade, it is likely the Constitution would have been ratified. South Carolina might have pouted for a while and perhaps not been one of the early states to ratify. But the state would have quickly realized that it was in no condition to go it alone. The First or Second Congress might very well have banned the trade, because at that time *no* state was importing slaves. If a ban had been passed, at least 80,000 free-born Africans would not have ended up as slaves in the United States. Moreover, the United States would have made an important statement about the immorality of expanding the nation's commitment to slavery.

D. The Slave Trade and the Amendment Process

Directly tied to the slave trade provision is a small clause in Article V, which prohibited any constitutional amendment that would end the slave trade before 1808. This illustrates the fear that the delegates from the deep South had about the political process in the immediate future. They were concerned that immediately after ratification of the Constitution the Mid-Atlantic region and the upper South would band together, for different reasons,[128] to end the slave trade. The Southern farmers were determined

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125. *Letters from a Countryman from Dutchess County*, Jan. 22, 1788, *in* 6 THE COMPLETE ANTI-FEDERALIST 62 (Herbert Storing ed., 1981).

126. 2 ELLIOT, *supra* note 62, at 203.

127. *Essays by Republicus*, Mar. 12, 1788, *in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 125, at 169.

128. At the time both Maryland and Virginia had a surplus of slaves, so both states had a strong economic interest in bringing the trade to an end. Ending importations would raise the value of those slaves already in the United States, and thus enrich the masters in the upper South who had slaves to sell. It may be no accident that the President who signed the ban on the slave trade, Thomas Jefferson, had sold slaves throughout much of his adult life to finance his constant purchases of wine, art,

to prevent this. The Amendment provision in effect prevented any federal stoppage of the trade until 1808, when, as explained above, the delegates from the deep South expected to have the population and the political power to protect the trade.

E. The Fugitive Slave Provision

1. The Clause

On August 28, Pierce Butler and Charles Pinckney proposed that fugitive slaves be returned like fugitive criminals. Roger Sherman sarcastically countered that he "saw no more propriety in the public seizing and surrendering a slave or servant, than a horse." James Wilson objected that this would cost the free states money. Significantly, this opposition came from two delegates who had sided with the South on other issues. Butler wisely "withdrew his proposition in order that some particular provision might be made apart from this article."[129] The next day, after the adoption of the Commerce Clause, Butler introduced what became Article IV, Section 2, Clause 3 of the Constitution, which prohibited the free states from emancipating any fugitive slaves who reached their borders. Instead, fugitive slaves were to be "delivered up" on the claim of an owner. The Convention adopted this provision without debate or recorded vote.[130]

This might be called the "stealth" provision of the Constitution. There was virtually no debate over this clause at the Convention, and no discussion as to how it was to be implemented. Late in the Convention the South Carolina delegation asked for the provision, and, with no quid pro quo from the North, they gained it.

I have been unable to find any discussion of this clause in the North during the ratification struggle. This suggests that Northerners simply did not understand the import of the clause. Northern Anti-Federalists attacked the Slave Trade Clause and the Three-Fifths Clause. They complained about the militia provisions, which would require them to suppress slave rebellions. Similarly, Federalists tried to answer these charges. During the ratification debates, some Northerners explained away the slavery clauses, as when the Federalist James Wilson told the Pennsylvania ratifying convention that the slave trade provision would lead to an end to slavery.[131] Others attacked them, as when Joshua Atherton told the New Hampshire convention that the slave trade

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furniture, books, and other imported goods and luxuries.

129. 2 FARRAND, *supra* note 8, at 443.

130. *Id.* at 453-54.

131. 2 ELLIOT, *supra* note 62, at 484 ("I consider this as laying the foundation for banishing slavery out of this country").

provision would enmesh them in sin.[132] But the Fugitive Slave Clause, buried in Article IV with obscure, complicated language, fooled the North, and thus Northerners ignored it throughout the ratification process.

Southern Federalists, on the other hand, were thrilled with the clause.[133] As General Charles Cotesworth Pinckney told his state legislature, "We have obtained a right to recover our slaves in whatever part of America they may take refuge, which is a right we had not before."[134] In Virginia, James Madison bragged:

> Another clause secures us that property which we now possess. At present, if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws; for the laws of the states are uncharitable to one another in this respect. But in this Constitution . . . [the Fugitive Slave] [C]lause was expressly inserted, to enable owners of slaves to reclaim them.

As Madison concluded: "This is a better security than any that now exists."[135]

2. The Failure of the Founders on the Fugitive Slave Clause

The Fugitive Slave Clause was an unnecessary gift to slavery. We can never know what led to the easy adoption of this clause. Perhaps the Northern delegates had run out of steam and just lacked the energy to fight this provision. The North got nothing in return for accepting this clause, which led to a fundamental infringement on the domestic powers of the free states. The provision would cause enormous conflict in the antebellum period. It was not a lure, to use Freehling's words. Rather, it was a throwaway clause, which even the Southern delegates did not think about until the Convention was almost over.

V. THE INDIRECT PROTECTIONS OF SLAVERY

Constitutional provisions dealing with three separate issues—domestic insurrections, export taxes, and the electoral college—stand out as examples of how the Framers protected slavery throughout the Convention.

A. The Domestic Insurrections Clause

Article I, Section 8, Clause 15 empowers Congress to call "forth the

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132. He complained that, under the slave trade provision, Northerners would be "consenters to, and partakers in, the sin and guilt of this abominable traffic." *Id.* at 203.

133. This fact illustrates one of the major differences between the politics of then and now. Today it would be impossible for one section of the nation to discuss a proposed law or political issue without the rest of the nation knowing about the speeches.

134. 4 ELLIOT, *supra* note 62, at 286.

135. *Id.* at 453.

Militia" to "suppress Insurrections," including slave rebellions.[136] Similarly, Article IV, Section 4 provides that the United States government should protect states from "domestic Violence," including slave rebellions. These clauses were not solely in the Constitution to protect slavery, but this was certainly one of their purposes. The Southern delegates understood them as such and heartily approved of them. Analogously, some Northern Anti-Federalists were appalled at them.

The Domestic Insurrections Clause was probably among the most important and most reasonable parts of the new Constitution. With the memory of Shay's Rebellion fresh in their minds, Northerners as well as Southerners thought the national government should protect against domestic violence. Nevertheless, during the ratification debates a few Northerners were uncomfortable about using their military might to protect slavery.

Three opponents of the Constitution in Massachusetts noted that the Constitution bound the states together as a "whole" and that "the states" were "under obligation . . . reciprocally to aid each other in defense and support of every thing to which they are entitled thereby, right or wrong."[137] Thus they might be called on to suppress a slave revolt or in some other way defend the institution. They were of course right. The clauses, and federal troops, would be used to suppress the Nat Turner Rebellion in 1831 and John Brown's Raid at Harpers Ferry, Virginia, in 1859.[138]

B. Export Taxes

The Constitution contained two prohibitions on export taxes. The first, Article I, Section 9, Clause 5, applied to the federal government, and the second, Article I, Section 10, Clause 2, applied to the states. When looking for examples of how slavery shaped the Constitution, most readers of the Constitution today overlook the prohibition on the taxing of exports. But at the time of the Founding most American exports were commodities produced by slave labor, especially tobacco and rice. At the Convention most Southerners made it clear that a prohibition on export taxes was essential to their participation in the stronger union.

Without such a ban Southerners feared the federal government could indirectly tax slavery and in some way harm the institution. On July 23 General Charles Cotesworth Pinckney "reminded the Convention that if

136. Wendell Phillips considered this clause and Article IV, Section 4, to be among the five key proslavery provisions of the Constitution. [WENDELL PHILLIPS], THE CONSTITUTION A PRO-SLAVERY COMPACT; OR, SELECTIONS FROM THE MADISON PAPERS, at v-vi (2d ed. 1845).

137. Consider Arms, Malichi Maynard & Samuel Field, *Reasons for Dissent*, *in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 125, at 262-63.

138. Northern troops were used to return fugitive slaves from the North. Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793 (1996).

the Committee should fail to insert some security to the Southern States against an emancipation of slaves, and taxes on exports, he should be bound by duty to his State to vote against their Report."[139] The Constitution eventually banned export taxes, over the objections of Rufus King of Massachusetts, who feared the combination of protecting the slave trade, prohibiting export taxes, and including the Three-Fifths Clause. King thought "either slaves should not be represented, or exports should be taxable."[140]

C. The Electoral College

The electoral college was of course based in part on the Three-Fifths Clause and thus was directly connected with slavery. At first glance this might seem coincidental, and most textbooks, in fact, offer other explanations for the creation of the electoral college.[141] But the records of the Convention show that in fact the connection between slavery and the college was deliberate.

To understand the origin of the electoral college and its connection to slavery, we must first examine the various methods of choosing a President that the delegates considered. Initially, the Convention agreed that the President was to be elected by the Congress and to serve for seven years. Some delegates wanted a single term for the President, but a majority of the delegates ultimately opposed term limits, believing the best leaders should serve as long as the people wanted them to serve.

In rejecting term limits, the delegates faced another problem. Elbridge

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139. 2 FARRAND, *supra* note 8, at 95.

140. *Id.* at 220.

141. One common explanation is that the electoral college was created because the Framers of the Constitution were elitists who feared the average voter would be unable to choose a national candidate. Instead, the voter would choose a local "elector" who would cast a more informed vote for President. This misunderstanding of the beliefs of the Framers seems to have originated with Elbridge Gerry of Massachusetts, a shrewd politician and businessman, and the father of the "Gerrymander." At the Convention he argued that "the people are uninformed, and would be misled by a few designing men." But no else at the Convention accepted Gerry's argument because they understood that local electors could also be "designing men" who could mislead the people at the local level. Moreover, given the quality and fame of the national leaders—Washington, Franklin, Adams, Hamilton, Jefferson—it was unlikely the people would be "misled" by those seeking the nation's highest office. Also, in most places the voters were hardly the common people. It is true that Massachusetts allowed all free adult males, regardless of property ownership or race, to vote. This experience may have led to Gerry's comments. But most states had property requirements, and in a number, including Virginia, South Carolina, and Georgia, free black men could not vote. Only New Jersey allowed women to vote at this time. Officeholding was even more restrictive. With the exception of New York and Virginia, every state had a religious test for officeholding, with most requiring that an officeholder be Protestant. Given who could vote and hold office, the Framers did not need to fear that the rabble would elect some unknown person as President; in most places the rabble could not even vote. The second common explanation is that the electoral college was designed to protect the small states from dominance by the large. However, this issue never came up in the debates over the executive at the Constitutional Convention. Indeed, the delegates addressed only the opposite argument. Thus at one point the Convention considered allowing the state governors to choose the President but backed away from this in part because it would allow the small states to choose one of their own.

Gerry made the point powerfully. If the legislature were to choose the President, and the President were eligible for re-election, he would be "absolutely dependent" on the legislature.[142] This system would destroy the separation of powers that the delegates wanted to build into the new Constitution.

Thus the delegates had to find another method of electing the President. On July 19, 1787, Oliver Ellsworth of Connecticut proposed "electors" appointed by the state legislatures.[143] Under Ellsworth's plan these would be apportioned on the basis of population.

James Madison, a slaveholder from Virginia and perhaps the most influential delegate, argued that "the people at large" were "the fittest" to choose the President. But "one difficulty . . . of a serious nature" made election by the people impossible. Madison noted that the "right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes."[144]

In order to guarantee that the nonvoting slaves could nevertheless influence the presidential election, Madison favored the creation of the electoral college.[145] Hugh Williamson of North Carolina was more open about the reasons for Southern opposition to a popular election of the President. He noted that under a direct election of the President, Virginia would not be able to elect her leaders President because "her slaves will have no suffrage."[146] The same of course would be true for the rest of the South.

The Convention quickly moved to accept the idea of an electoral college, following the lead of Ellsworth, from the North, and Madison and Williamson, from the South. This sectional balance is revealing. Ellsworth almost always voted with the South on slavery-related matters, and the agreement here seems part of the same New England/deep South coalition that led to the Slave Trade Clause. The Convention decided to tie presidential electors to representation in Congress. By this time the Convention had already agreed to count slaves for representation under the three-fifths compromise, counting five slaves as equal to three free people, in order to increase the South's proportional representation in Congress. Analogously, in a presidential election, the political power Southerners gained from owning slaves would be factored into the electoral votes of each state.

The truth of Williamson's observation about the need of the South to have its slaves counted in choosing the President becomes clear when we

142. 2 FARRAND, *supra* note 8, at 57.
143. *Id.*
144. *Id.* at 56-57.
145. *Id.*
146. *Id.* at 32.

examine the election of 1800 between John Adams, who never owned a slave, and Thomas Jefferson, who owned about two hundred at the time. The election was very close, with Jefferson getting seventy-three electoral votes and Adams sixty-five. Jefferson's strength was in the South, which provided fifty-three of his electoral votes. If Jefferson had received no electoral votes based on counting slaves under the Three-Fifths Clause, John Adams would have won the election.[147]

We cannot know how American history would have played out if Adams had won re-election in 1800. But the possibilities are intriguing. When we purchased Louisiana we would have had a President opposed to slavery. When he left the presidency, Adams was on the verge of extending diplomatic relations to Haiti. Jefferson opposed relations with Haiti and did everything he could, short of war, to undermine the black regime there. If Adams had remained in office our whole relationship with Haiti would have been different, as we would probably have extended diplomatic relations to the young nation and expanded what was emerging as a useful economic and trade relationship.[148] The history of Haiti might also have been different, as that nation developed into a democracy with the help of what would have been its best trading partner. As Americans contemplate modern diplomatic and immigration problems with Haiti, it is at least worth wondering how different our situation might be if the Constitution had not used the electoral college, tied as it was to the Three-Fifths Clause, to elect the President. More importantly, we can only wonder how American history might have played out if the Founders had developed a method of choosing the President that was not weighted in favor of slavery.

VI. THE ULTIMATE PROTECTION OF SLAVERY

The Constitution of 1787 created a government of limited powers. As General Charles Cotesworth Pinckney of South Carolina told his state's House of Representatives:

> We have a security that the general government can never emancipate them, for no such authority is granted and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were

147. The complications of the 2000 presidential election suggest that this last constitutional vestige of the peculiar institution may have outlived its usefulness. After all, it is surely the most peculiar aspect of our political system. And, as election 2000 shows, it does not seem to be working very well. Now that slavery is no longer an issue, we can reexamine James Madison's original statement: "The people at large" are "the fittest" to choose the President, because "[t]he people generally could only know & vote for some Citizen whose merits had rendered him an object of general attention & esteem." *Id.* at 56-57. Perhaps it is time to heed Madison's advice.

148. FINKELMAN, *supra* note 59, at 151-52. On Jefferson and slavery, and the impact of proslavery ideology on politics, see generally *id.* at 129-96.

reserved by the several states.[149]

It is of course possible to imagine an attack on slavery by the federal government through modern interpretations of the Commerce Clause. But it would not be possible to imagine the modern interpretation of the Commerce Clause as long as slavery existed.

Thus the Constitution as written prevented any federal attack on slavery. To change this would require an amendment. But the amendment provision of the Constitution could never have been used against slavery as long as the South remained in the Union.

A constitutional amendment requires ratification by three-fourths of the states. Thus, had there been no secession in 1861, and had the fifteen slave states existing in 1860 continued to exist today as slave states, we could *to this day* not abolish slavery through a constitutional amendment. Assuming that the slave states continued to vote as a block to protect their institution, it would take a union of sixty states, with forty-five free states to outvote the fifteen slave states.

The Constitution was not "essentially open-ended with respect to slavery," as the late Don Fehrenbacher argued.[150] Nor is it true, as law professor Earl Maltz has argued, that "the Constitution took no position on the basic institution of slavery."[151] On the contrary, the Constitution provided enormous protections for the peculiar institution of the South at very little cost to that region. At the Virginia ratifying convention, Patrick Henry and other Anti-Federalists argued that the new Constitution would threaten slavery and would lead to emancipation. Edmund Randolph had been at the Philadelphia Convention but had refused to sign the Constitution. By the time of the Virginia convention, however, he had become an advocate of ratification. Trading on his experience in Philadelphia, he vigorously disputed Henry's claims, challenging opponents of the Constitution to show, "*Where* is the part that has a tendency to the *abolition of* slavery?"[152] He answered his own question: "Were it right here to mention what passed in [the Philadelphia] convention . . . I might tell you *that the Southern States, even South Carolina herself, conceived this property to be secure*" and that "there was not a member of the Virginia delegation who had *the smallest suspicion of the abolition of slavery.*"[153] South Carolinians, who had ratified the

149. 4 ELLIOT, *supra* note 62, at 286. Patrick Henry, who used any argument he could find to oppose the Constitution, feared that, "among ten thousand implied powers which they may assume, they may, if we be engaged in war, liberate every one of your slaves if they please." 3 *id.* at 589. We know that in fact the President and Congress ultimately used the war power to attack slavery, but that was during a civil war, after eleven slave states had renounced allegiance to the Constitution.

150. DON E. FEHRENBACHER, THE FEDERAL GOVERNMENT AND SLAVERY 6 n.2 (1984).

151. Earl Maltz, *Slavery, Federalism, and the Structure of the Constitution*, 36 AM. J. LEGAL HIST. 468, 469 (1992).

152. 3 ELLIOT, *supra* note 62, at 598 (emphasis in the original).

153. *Id.* at 599 (emphasis in the original).

Constitution even before Randolph spoke, would have agreed. In summing up the entire Constitution, General Charles Cotesworth Pinckney, who had been one of the most articulate defenders of slavery at the Convention, proudly told the South Carolina House of Representatives: "In short, considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could; but on the whole, I do not think them bad."[154]

VII. THE GARRISONIAN CRITIQUE OF THE CONSTITUTION

William Lloyd Garrison, the great nineteenth-century abolitionist, fully understood that the Constitution protected slavery. And while he agreed with Pinckney on the result, he disagreed on the virtues of this result. Where Pinckney saw a wonderful Constitution, Garrison saw a Constitution that was the result of a terrible bargain between slavery and freedom. He called it a "covenant with death, an agreement with hell."[155] Garrison and his followers refused to participate in a government created by such a document because they did not want to be corrupted by associating with slave owners.

Part of their opposition to electoral political activity was based on their desire to avoid personal corruption. They were, to a great extent, perfectionists willing to withdraw from traditional politics to ensure their own moral well-being. They believed that avoiding the corruption of a slaveholder's constitution was a moral necessity. In an analogy to their theology, they were unwilling to traffic voluntarily with the proslavery Caesar and would render up to him as little as possible.

Beyond this moral argument, the position of the Garrisonians reflected a practical analysis of political reality. They argued that by participating in politics they would be strengthening slavery by strengthening the Union. Furthermore, since slavery had a strangle-hold on the American Constitution and the American political system, it was impossible to change anything while working inside the political system. Since the political system and the Constitution were stacked in favor of slavery, it was a pointless waste of their time and money to try to fight slavery through electoral politics. The Garrisonian critique of the Constitution logically led to the conclusion that the free states should secede from the union. Garrison advocated this under his slogan, "No Union with Slaveholders."

It is easy to dismiss this argument more than a century and a half after it was first made. After all, we know secession as a reactionary, proslavery

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154. 4 *Id.* at 286.

155. WILLIAM E. CAIN, WILLIAM LLOYD GARRISON AND THE FIGHT AGAINST SLAVERY 34 (1995).

movement that failed. But in the 1830s and 1840s, the idea of a Northern secession as a way of destroying slavery made some sense. The Fugitive Slave Clause of the Constitution, for example, gave a master the right to hunt down a slave anywhere in the United States. Justice Joseph Story, who in some ways personified New England, nevertheless rendered one of the most proslavery rulings in Supreme Court history, which made the common law of recapture of property applicable to slavery and available to every master, and thus brought the law of slavery into the free states.[156] The Garrisonians called him the "slave-catcher-in-chief for the New England states."[157] In the 1850s the Garrisonians saw, in the Anthony Burns case, the long arm of slavery reach into the geographic heart of the abolitionist movement and remove a slave from Boston.

Under a regime of the fugitive slave law, supported by a constitutional provision, slavery was a national institution. But what would happen if the Garrisonians accomplished their goal, and the North left the Union to form a nation based on freedom instead of slavery? It would be like moving the Canadian border to the Mason-Dixon Line. Suddenly, slavery would be threatened in Kentucky and Virginia because slaves could escape to a free country just by crossing the Ohio River.

Garrison believed that such a change in political boundaries would prove fatal to slavery. The logic of the Garrisonian position was simple. As slaves crossed the Mason-Dixon Line or the Ohio and Mississippi Rivers into freedom, slavery would be weakened in the upper South. Committed slave-owners would move further South, which would further weaken slavery in the upper South. Eventually Kentucky, Maryland, Delaware, and even Missouri might give up slavery and seek to join the free country. Pressure on Virginia would increase. Slavery, and hundreds of thousands of slaves, would be forced into the deep South, where whites would become a desperate minority. Ultimately the institution would fall, perhaps after a series of rebellions in a region with a huge black majority, but just as likely from the weight of its own isolation.

Part of this theory was based on the notion that slavery was inherently unstable and needed force to be viable. The United States government provided that force, spending its resources to hunt fugitive slaves and, when necessary, to suppress rebellions. Even if rebellions were put down by local militias, those militias were armed by the national government. The South also benefited from the strength of the Northern economy. Southerners like James Henry Hammond of South Carolina thundered that "cotton is king" and declared, "No, you dare not make war on cotton. No

156. Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247.

157. AN ARTICLE ON THE LATIMER CASE 6 (1843), *reprinted in* 1 FUGITIVE SLAVES AND AMERICAN COURTS 157, 164 (Paul Finkelman ed., 1988).

power on earth dares make war upon it."[158] But as the Garrisonians saw it, without the North and the proslavery Constitution, the South was little more than a prosperous producer of commodities devoid of industry and capital, lacking in population, arms, and federal marshals to hunt fugitive slaves. In the end, it was the proslavery bargain, and the North's contractual obligation under the Constitution to protect slavery, that made the system viable.

The Garrisonian theory seems far-fetched today only because we know that the end of slavery came sooner than the abolitionists could have imagined possible, and in a less predictable way. But it was also a more costly way. More than 600,000 Americans died in the Civil War. Among them were perhaps 40,000 blacks serving in the United States Army, most of whom were former slaves. Millions more Americans, black and white, were wounded or harmed in other ways. The property loss was almost incalculable. The war left the South devastated. Nearly a century and a half later, parts of the deep South have still not recovered from the war. Nor has the nation recovered from the failure to bring about racial equality during Reconstruction.

These costs can in part be laid at the feet of the Founders. They could not have ended slavery in Philadelphia. They could not have forced the South to change its direction. But as we have seen, they could have done more than they did. They could have done something.

VIII. CONCLUSION

In his examination of the Convention, *The Constitution: A Pro-Slavery Compact; or, Selections from the Madison Papers*, the great abolitionist Wendell Phillips analyzed "that 'compromise,' which was made between slavery and freedom, in 1787; granting to the slaveholder distinct privileges and protection for his slave property, in return for certain commercial concessions upon his part toward the North."[159] Using Madison's papers, Phillips argued that "the Nation at large were [sic] fully aware of this bargain at the time, and entered into it willingly and with open eyes."[160]

The Framers did much to protect slavery, and virtually nothing to rein it in. They knew the problem was there. They chose to ignore it. A stronger national government, at any cost, was their only goal. The Northern Framers were willing to antagonize, or mislead, their own constituents rather than face down the blustering South Carolinians.

It would be comforting to argue that in the long run the Framers set the

158. James Henry Hammond, Speech on the Admission of Kansas, (Mar. 4, 1858), *in* ERIC MCKITRICK, SLAVERY DEFENDED: THE VIEWS OF THE OLD SOUTH 121 (1963).

159. [PHILLIPS], *supra* note 136, at v (2d ed. 1845).

160. *Id.* at vi.

stage for ending slavery by creating such a powerful central government, which, when the time came, could be called onto the battlefield to defeat slavery. But this interpretation ignores the period from 1789 to 1861: when the U.S. Government protected slavery; when federal marshals and federal troops were used to hunt down and return runaway slaves; and when the Presidency, the Supreme Court, and the Congress were almost always led by Southerners or their Northern allies. Had Southern hotheads not attempted to leave the Union in 1861, slavery would have continued, poised to expand into the newly acquired territories that had been opened to slavery by the Supreme Court in *Dred Scott v. Sandford*.[161] Using an original-intent argument,[162] Taney put a proslavery gloss on the Constitution that in fact reflected what the Framers had written in 1787.[163]

During the ratification struggle, three Massachusetts Anti-Federalists complained that the Constitution bound the states together as a "whole" and that "the states" were "under obligation . . . reciprocally to aid each other in defense and support of every thing to which they are entitled thereby, right or wrong."[164] Thus, they might be called on to suppress a slave revolt or in some other way defend the institution. They could not predict how slavery might entangle them in the future, but they did know that "this lust for slavery, [was] portentous of much evil in America, for

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161. 60 U.S. (19 How.) 393 (1857).

162. *See* Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989).

163. Speaking of the Declaration of Independence and the Founding generation, Taney wrote in *Dred Scott*:

> But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

60 U.S. at 409. Asserting that the intentions of the Framers prevailed on the issue of slavery, Taney declared:

> No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it.

Id. at 426. This led Taney to the conclusion that slavery was explicitly and specially protected in the Constitution.

> Now, as we have already said . . . the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied [sic] to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words-too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Id. at 451-52.

164. Arms, Maynard, & Field, *supra* note 137, at 263.

the cry of innocent blood[] . . . hath undoubtedly reached to the Heavens, to which that cry is always directed, and will draw down upon them vengeance adequate to the enormity of the crime."[165]

The events of 1861 to 1865 would prove the three Massachusetts Anti-Federalists of 1788 correct. It probably would be too much to think that these descendants of the Puritans had a vision of Shiloh and Gettysburg, but only after a civil war and three constitutional amendments could the Union be made "more perfect" by finally expunging slavery from the Constitution. The failure of the Framers to do anything about slavery at the Convention meant that it was impossible for their grandchildren to abolish slavery peacefully. In the end, only bloodshed could purge the Constitution of the proslavery provisions that the Founding Fathers had included in the document in 1787.

165. *Id.*