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## No Call to Glory: Thurgood Marshall's Thesis On the Intent of a Pro-Slavery Constitution

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# No Call to Glory: Thurgood Marshall's Thesis On the Intent of a Pro-Slavery Constitution

*Raymond T. Diamond\**

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## I. INTRODUCTION

Thurgood Marshall sits as an Associate Justice on the United States Supreme Court, the only black person ever to do so. Before taking that office he served as the Solicitor General of the United States and as a judge on the United States Court of Appeals for the Second Circuit. In these offices he has been called upon to bring his powers of judgment to bear on a multitude of matters concerning this Nation's Constitution.<sup>1</sup> His views on the Constitution, therefore, cannot be easily

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1. Justice Marshall's judgment has been informed greatly by his experience in the segregated South as the grandson of a slave and by his training at the Howard University School of Law—a school dedicated in the early twentieth century to the establishment of a class of black lawyers who would assault the shackles of racial discrimination and unfair treatment. True to that training and to an ethic of racial advancement, Marshall became a young lawyer whose pursuit of his peo-

dismissed.

The 200th anniversary of the Constitution was not only a time of celebration, but also a time of widespread political debate over the meaning of the Constitution's text and whether it should be construed in keeping with the "original intent" of the Framers. Justice Marshall chose this time to sound a discordant note to the self-congratulatory theme of the bicentennial celebration. In a speech before the San Francisco Patent and Trademark Law Association, Justice Marshall presented a simple theme: That the Constitution as originally written was profoundly racist.<sup>2</sup>

That the Constitution is a racist document is a powerful statement and one demanding close scrutiny, especially since the Constitution does not explicitly mention slavery and race and deals squarely with the issue of slavery in only three places.<sup>3</sup> Article I, section 2, clause 3 apportioned direct or capitation taxes and membership in the House of Representatives in accordance with population, but counted a slave as only three-fifths of a person.<sup>4</sup> Article I, section 9, clause 1 forbade Congress to limit the importation of slaves until 1808, a period of twenty years.<sup>5</sup>

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ple's civil rights compromised his financial welfare until he received an appointment to the legal staff of the National Association for the Advancement of Colored People, which staff he later headed until his appointment to the Court of Appeals for the Second Circuit in 1961. Marshall served as Solicitor General from 1965 until 1967, when he took his seat on the Supreme Court. See R. BLAND, PRIVATE PRESSURE ON PUBLIC LAW, THE LEGAL CAREER OF JUSTICE THURGOOD MARSHALL 3, 11, 22, 130, 157, 178-179 (1973); M. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950, at 30-31, 45-47 (1987).

2. Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?* 40 VAND. L. REV. 1337 (1987). Justice Marshall avoided use of the term "racist"; the gravamen of his complaint respecting the Constitution, however, is that the Constitution actively tolerated slavery, a virulent manifestation of racism.

3. See U.S. CONST. art. I, § 2, cl. 3; art. I, § 9, cl. 1; art. IV, § 2, cl. 3.

4. U.S. CONST. art. I, § 2, cl. 3. The clause provides:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

*Id.* By extension, Article I, § 2, clause 3 affected the scheme of selecting the President and Vice-President, as defined in Article II, § 1, clause 2, which provided for their election by "a Number of Electors, equal to the whole Number of Senators and Representatives to which [each] State may be entitled in the Congress. . . ." Moreover, Article I, § 2, clause 3 was buttressed by Article I, § 9, clause 4, which provided that "[n]o Capitation, or other direct, Tax shall be laid unless in Proportion to the Census or Enumeration herein before directed to be taken." Article V excluded both Article I, § 2, clause 3 and Article I, § 9, clause 1 from amendment until 1808.

5. U.S. CONST. art. I, § 9, cl. 1. The clause provides:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

*Id.*

Article IV, section 2, clause 3 provided that fugitive slaves who escaped into another state would be returned to their owners.<sup>6</sup> Historians universally concede that this treatment of slavery was the result of compromise between proslavery and antislavery forces at the Constitutional Convention, represented largely by Southern and Northern States respectively. Without this compromise, the new Constitution and the union of states that it represented might not have been possible.

This Article is intended to examine Justice Marshall's position that, because of the manner in which the Constitution dealt with the matter of race and slavery, the Constitution was "defective from the start."<sup>7</sup> Part II of this Article contrasts Justice Marshall's position on the framing of the Constitution with the positions of his critics. Part III argues that Justice Marshall's position is defensible even on broader grounds than he articulated, for to a significant extent the role that slavery played in the compromise that produced the Constitution cemented political control of the federal government in the hands of the slave states. Part IV suggests some implications of the constitutional compromise on slavery for the study of the Constitution and American law.

## II. THE MARSHALL THESIS AND ITS CRITICS

In his speech Justice Marshall refused to accept "a complacent belief that the vision of those who debated and compromised in Philadelphia yielded the 'more perfect Union'" that many claim we now enjoy. Instead, he questioned the Framers' "wisdom, foresight, and sense of justice," and found them not "particularly profound," indeed, morally offensive.<sup>8</sup> Marshall argued that the Framers of the Constitution deliberately ignored the interests of slaves and protected the institution of slavery. Thus they compromised individual liberty to selfish economic interest.<sup>9</sup> He concluded that the government devised by the Framers was "defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today."<sup>10</sup> The Constitution as

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6. U.S. CONST. art. IV, § 2, cl. 3. The clause provides:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

*Id.*

7. Marshall, *supra* note 2, at 1338.

8. *Id.*

9. *Id.*

10. *Id.*

originally framed not only was not color-blind in protecting individual liberty, but also was consciously and intentionally oppressive with respect to color and race.

In support of his position Justice Marshall suggested an examination of the first three words of the Constitution, "We the People." Slaves were not counted among "the People" who established the Constitution. Even while slaves were counted as three-fifths of a person for purposes of determining the voting power of whites, the slaves themselves obtained no rights as persons and would remain ignored by the federal government until the passage of the Civil War Amendments.<sup>11</sup>

As the Constitution ignored the rights of slaves, it also perpetuated the institution of slavery. Justice Marshall pointed out that the Constitution permitted the import trade in slaves to continue and even guaranteed that the trade would persist for at least twenty years.<sup>12</sup> Northern States acceded to this demand in return for Southern support for the commerce clause of the Constitution. Moreover, New Englanders employed in the "carrying trade" expected to profit from both the transport of slaves from Africa and the goods produced in America by slaves.<sup>13</sup>

Justice Marshall argued that the Constitution was not only oppressive to the rights of black slaves, but also oppressive to the rights of free blacks.<sup>14</sup> The Constitution carried with it the inherent contradiction "between guaranteeing liberty and justice for all, and denying both to Negroes."<sup>15</sup> In support of this statement Justice Marshall quoted

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11. *Id.* at 1340-41; see U.S. CONST. amend. XIII, § 1, amend. XIV, § 1, amend. XV, § 1. Section 1 to the thirteenth amendment states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. Section 1 to the fourteenth amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. Section 1 to the fifteenth amendment states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

12. Marshall, *supra* note 2, at 1339; see U.S. CONST. art. I, § 9, cl. 1. This guarantee was underscored and further protected by the prohibition in Article V of the Constitution that the importation clause might not be amended in any way prior to the year 1808. The slave importation clause was not an insignificant concession, and contributed to the importation of "about as many Africans . . . into the United States during the thirty years from 1780 to 1810 as during the previous hundred and sixty years of the U.S. involvement in the slave trade." R. FOGEL & S. ENGERMAN, *TIME ON THE CROSS* 24 (1974).

13. Marshall, *supra* note 2, at 1338.

14. *Id.* at 1340.

15. *Id.*

Chief Justice Roger Taney's 1857 opinion in *Scott v. Sandford*,<sup>16</sup> which stated that blacks, both slave and free, "are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."<sup>17</sup> In fact, Chief Justice Taney opined that at the time of the framing of the Constitution, blacks "had no rights which the white man was bound to respect."<sup>18</sup>

The constitution that Justice Marshall would celebrate, therefore, is not the Constitution framed at the Philadelphia convention in 1787 and ratified by the states in the months that followed, but is instead a different constitution, forged in the crucible of the Civil War, after which the Union survived, but the Constitution did not. In its place "arose a new, more promising basis for justice and equality"—the fourteenth amendment—which "ensur[ed] protection of the life, liberty, and property of *all* persons against deprivations without due process, and guarantee[d] equal protection of the laws."<sup>19</sup> To celebrate that first Constitution, argued Justice Marshall, would be "little more than a blind pilgrimage to the shrine of the original document."<sup>20</sup> Instead, he suggested the need for "a sensitive understanding of the Constitution's inherent defects, and its promising evolution through 200 years of history."<sup>21</sup> That evolution cannot be understood as occurring by the process of interpretation, but rather as the result of a revolution that came in the form of amendments to the Constitution—amendments that abolished slavery and ensured that citizens of all races would be equal under the law.<sup>22</sup>

In Justice Marshall's view, recognition of that revolution is necessary to celebrate the Constitution for what it truly is: A living document with a history both proud and ugly.<sup>23</sup> That history includes constitutional enslavement and, later, constitutional emancipation. The history includes disenfranchisement and segregation under the Constitution, and later the beginnings of racial equality under the same document.<sup>24</sup> Because the consequences of slavery bore greatly on the American Constitution and on American law, Justice Marshall argued

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16. (*Dred Scott*), 60 U.S. (19 How.) 393 (1857).

17. *Id.* at 404.

18. *Id.* at 407. Chief Justice Taney's opinion on the citizenship of blacks holds only the status of dicta and is founded on questionable historical interpretation. See *infra* note 108.

19. Marshall, *supra* note 2, at 1340-41 (emphasis in original).

20. *Id.* at 1341.

21. *Id.*

22. *Id.* at 1340-41.

23. *Id.* at 1341-42.

24. *Id.* at 1340-41.

that to understand, to appreciate, and to celebrate the Constitution one must consider the institution of slavery and the concessions the Framers made to it.<sup>25</sup>

Justice Marshall's views received immediate and extensive recognition in the media. Headlines throughout the country read similarly to that in the *Los Angeles Times*: "Marshall on Constitution: 'Defective from Start.'"<sup>26</sup> The Marshall thesis instigated widespread response from both public and private organizations and individuals.

The Washington Legal Foundation, for example, suggested that the Justice resign his seat on the Supreme Court because his remarks "reflect[ed] a deepseated bitterness and dislike that impair his capacity."<sup>27</sup> The *National Review* suggested that Justice Marshall merely was ignorant of the peculiarities and limitations of eighteenth century liberalism under which blacks, as Chief Justice Taney had indicated in 1857, were the peculiar exception to the equality to which all men were otherwise heirs.<sup>28</sup>

The initial reactions of shock and dismay to Justice Marshall's comments that the Framers and the document they produced were morally deficient are understandable. Marshall's comments might well seem incongruous, for they came at a time "dedicated to the memory of the Founders,"<sup>29</sup> whose "achievements . . . knowledge and experience," as well as "the nature of the government they established, its origins, its character, and its ends," had become the subject of reverent remembrance.<sup>30</sup> Shock and dismay were precisely the initial reactions of Donald Hodel, Secretary of the Interior, who thought at first that "the remarks were a gratuitous insult to our charter document and to such Framers as Madison and Franklin, whose memories we honor."<sup>31</sup> Upon further reflection and after reading the full text of Marshall's speech, however, Secretary Hodel conceded that the Justice's remarks inspired a different response. No honor was lost in recognizing that "the Constitution, as originally drafted, was not perfect in all respects."<sup>32</sup> The Constitution did, after all, condone slavery, and this condonation was one of

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25. *Id.* at 1338.

26. L.A. Times, May 7, 1987, § 1, at 4, col. 1.

27. 102 U.S. NEWS & WORLD REP., Sept. 19, 1987, at 12.

28. 39 NAT'L REV. 16 (1987).

29. COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, FIRST FULL YEAR'S REPORT: PREPARATION FOR A COMMEMORATION 6 (Sept. 1986), *quoted in* Marshall, *supra* note 2, at 1337.

30. COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, FIRST REPORT 6 (Sept. 17, 1985), *quoted in* Marshall, *supra* note 2, at 1337.

31. D. Hodel, Remarks of the Secretary of the Interior at Ceremonies Dedicating the United States Supreme Court Building as a Historical Landmark, Washington D.C., Dept. of the Interior News Release, at 2 (May 12, 1987).

32. *Id.*

the "significant failings of the original document."<sup>33</sup> In Secretary Hodel's view, however, these failings were not cause for condemnation, because the Framers had created the amendment process for the express purpose of correcting the Constitution's failings.<sup>34</sup>

William Bradford Reynolds, Assistant Attorney General in charge of the Justice Department's Civil Rights Division, in a speech at Vanderbilt University, took a stance similar to Secretary Hodel's—a stance critical of the Constitution's failings but, with the hindsight of history, optimistic about the Constitution's capacity to accommodate change.<sup>35</sup> The Constitution, Reynolds recognized,

was intended to be the culmination of a great struggle for the natural rights of men. . . . When the Framers sought to protect in the Constitution the fundamental rights of man but failed to guarantee explicitly those rights to every individual, they introduced a self-contradiction that preordained struggles and conflicts we continue to confront today.<sup>36</sup>

Reynolds argued that "to be reminded of the compromise on slavery during the making of the Constitution" was reasonable, but that it was not reasonable to encourage the view of two constitutions—one framed in 1787 and another that emerged from the Civil War's aftermath.<sup>37</sup> According to Reynolds, it was our system of constitutional government, "one of divided governmental authority and separated government powers,"<sup>38</sup> that allowed the Civil War Amendments to be effective.

On the issue of slavery, Reynolds contended that "the Framers were faced with a Hobson's choice," for consensus on the new Constitution required the assent of the Southern States.<sup>39</sup> The Framers were limited to settling for the maintenance of slavery in a constitutional system that was amenable to slavery's elimination and sown with "the seeds for the expansion of freedom to all individuals when circumstances would permit."<sup>40</sup> Moreover, the Justices on the Supreme Court shared the blame with the Framers because of their "loose, disingenuous, and result-oriented" decisions such as the *Scott v. Sandford*.<sup>41</sup> In

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33. *Id.*

34. *Id.* at 3.

35. Reynolds, *Another View: Our Magnificent Constitution*, 40 VAND. L. REV. 1343 (1987) [hereinafter *Another View*]. *Another View* is indeed a different view from Justice Marshall's, but it is the same view that Reynolds has espoused previously. See Reynolds, *Securing Liberty in an Egalitarian Age*, 52 Mo. L. Rev. 585 (1987). But see Middleton, *Securing Justice: A Response to William Bradford Reynolds*, 52 Mo. L. Rev. 607 (1987).

36. *Another View*, *supra* note 35, at 1345.

37. *Id.*

38. *Id.* at 1346.

39. *Id.* at 1347.

40. *Id.*

41. *Id.* at 1348 (quoting Cooper & Lund, *Landmarks of Constitutional Interpretation*, 40 POL'Y REV., Spring 1987, at 20).

Scott the Court forewent the opportunity to extend the principles of equality under the Constitution and instead allowed "the theoretical opinions of individuals . . . to control . . . [the Constitution's] meaning."<sup>42</sup>

The confession and avoidance gloss on constitutional history elaborated by Secretary Hodel and Assistant Attorney General Reynolds was typical of many of the responses to the Marshall thesis. Critics, however, were hard pressed to disagree that acceptance of and support for the institution of slavery was an unfortunate facet of the 1787 Constitution. Yet that failing, the critics stressed, does not shatter the essential greatness of the original document, because the moral compromise was a political necessity; and more importantly, the compromise was pregnant with the means for outgrowing even this defect.

For example, Jack Valenti, writing in the *New York Times*, suggested that to omit the black and the slave from the protection of the Constitution's umbrella of liberty was a necessary evil. Otherwise, the issue of slavery "would [have] rupture[d] the unity so sorely required" for the Constitutional Convention to succeed and the union of states to survive.<sup>43</sup> Syndicated columnist Cal Thomas wrote that if Justice Marshall was right to argue that the Framers "believed liberty and equality to be the exclusive preserve of white males," the Justice was nonetheless wrong to assert that the government devised by the Framers was defective from the start.<sup>44</sup> According to Thomas, "the Constitution's real strength . . . is derived from its grounding in a set of fixed absolutes"—absolutes that render the Constitution "a self-correcting document."<sup>45</sup> The amendment process, in conjunction with the ideological absolutes of liberty, constitutes "one of the document's great strengths."<sup>46</sup> Columnist Robert Akerman recognized that the Framers demonstrated "a sacrifice of 'inoral principles' to economic interests," yet he argued that the Framers should not be blamed, for "the 'moral principles' of the age did not permit any tampering," and the Constitution did provide for an amending process through which "slavery could have been abolished by amendment at any time the society was ready to do it."<sup>47</sup> Moreover, Akerman argued, the Framers had established a structure of government under which "the will of the majority must be

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42. Scott v. Sandford (Dred Scot), 60 U.S. (19 How.) 393, 620-21 (1857) (Curtis, J., dissenting), quoted in *Another View*, *supra* note 35, at 1348.

43. Valenti, *Despite Slavery, a Constitution that Built a Nation*, N.Y. Times, June 6, 1987, at 27, col. 1 (city ed.).

44. Houston Post, May 15, 1987, at B2, col. 1.

45. *Id.*

46. *Id.*

47. Akerman, *Justice Marshall Takes Us Part of the Way to Understanding Constitution*, Atlanta Const., May 10, 1987, at C3, col. 1.

enacted with due regard for minority rights.”<sup>48</sup> These responses imply that Marshall’s thesis suffers from a selective focus on the molehill of slavery and from a refusal, at best ignorant and at worst contumacious, to recognize the mountain of greatness in the original Constitution.

The *Atlanta Constitution* called such critical comments the sounds of “[l]esser men sniping at Justice Marshall” and opined that “[a]n appalling number of cheap righteousness points are being run up by persons willfully misunderstanding [Marshall’s thoughts].”<sup>49</sup> This Article takes no position on whether the critics’ failure to understand was willful or even petty. This Article will show, however, that the failure of understanding is real and substantial—that Justice Marshall’s critics rushed to judgment partially blinded by the dazzle of the bicentennial celebration.

Part III will argue that the commentators have failed to reckon with the details of the compromise on slavery. Thus, the commentators have missed an otherwise inescapable conclusion: Even if the Constitution had within it the seeds of change, no change compromising the institution of slavery and the economic interests that it represented could take place without the consent of the slave states. At its core, the original document was intended to place control over the levers of change in the hands of those who could not be expected to permit the institution of slavery to weaken. The Constitution, by design, delivered political control of the federal government to the South. If the Constitution eventually changed to accomplish for blacks the individual liberties afforded to whites, it changed not because of an internal imperative mandating the substitution of freedom for slavery, but instead because of an extraconstitutional act of colossal proportions—the Civil War.

### III. ORIGINAL INTENT: PROTECTION FOR SOUTHERN INTERESTS IN SLAVERY

None of the participants could have doubted that slavery would be a subject of discussion at the Philadelphia convention. England’s mainland colonies had developed a long history of slavery. In certain colonies, legislatures had sanctioned slavery soon after empirical experience with the subject. Massachusetts, for example, sanctioned slavery in 1641, three years after the first recorded existence of slavery in the colony.<sup>50</sup> In Carolina, before the first blacks arrived, the constitution

48. *Id.*

49. *Lesser Men Sniping at Justice Marshall*, Atlanta Const., May 16, 1987, at A18, col. 1.

50. A. HIGGINBOTHAM, IN THE MATTER OF COLOR, RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 61-62 (1978). John Winthrop’s journal “of 1638 is apparently ‘the earliest recorded account of Negro slavery in New England. . . . Negroes may have been enslaved before that time but earlier allusions to slavery are inferential and even contemporaries were apparently

drafted for the governance of the colony that later became North Carolina and South Carolina<sup>51</sup> guaranteed the authority of every free person over every slave.<sup>52</sup> Other states gradually adopted the institution of slavery. The first blacks arrived in Virginia in 1619, before blacks had arrived in Massachusetts, and although Virginia's legislature and courts would deal on a piecemeal basis with problems occasioned by the existence of slavery,<sup>53</sup> it was not until 1680 and 1682 that the colony passed its first slave codes.<sup>54</sup> In 1735, three years after the granting of Georgia's charter, the trustees of that colony passed a law outlawing the use of blacks as slaves.<sup>55</sup> The passage of this law did not mean that Georgians were nonracialists, for concomitant to prohibiting slavery the trustees banned the importation of all blacks into the colony.<sup>56</sup> A scant fifteen years later, in 1750, largely for economic reasons, Georgia repealed the ban on slavery. A statute encouraging slavery was passed in its stead and Georgia soon established one of the harshest slave codes of the period.<sup>57</sup>

Even in 1776, when the statement "all men are created equal" was etched into the consciousness and the conscience of America, the laws of each of the states countenanced slavery.<sup>58</sup> The ascendancy of slavery, however, was less complete in 1787, the year of the framing of the Constitution. Massachusetts had ended slavery through judicial interpretation of its constitution, which had provided that all men were "free and equal."<sup>59</sup> Vermont, which became the Nation's fourteenth state, had

no more certain of the facts.'" *Id.* at 61 (quoting L. GREEN, THE NEGRO IN COLONIAL NEW ENGLAND, 1620-1776, at 17 (1942)). The 1641 Body of Liberties made an exception to its prohibition against slavery so that slaves might be

lawful captives taken in juste warres, and such strangers as willfully sell themselves or are sold to us. And these shall have all the liberties and Christian usages which the law of God established in Israell concerning such persons doth morally require. This exempts none from servitude who shall be judged thereto by Authoritie.

COLONIAL LAWS OF MASSACHUSETTS REP. FROM 1660 SUPP. TO 1672, at 91 (1889), quoted in A. HIGGINBOTHAM, *supra*, at 62.

51. See A. HIGGINBOTHAM, *supra* note 50, at 153 & n.12.

52. *The Fundamental Constitution of Carolina drawn up by John Locke*, 1 S.C. Stats. at Large 55 (Cooper 1936).

53. See A. HIGGINBOTHAM, *supra* note 50, at 22-30, 32-38.

54. Act X (1680), reprinted in 2 Va. Stats. at Large 481 (Hening 1823); Act III (1682), reprinted in *id.* at 492.

55. 1 A. CANDLER, COLONIAL RECORDS OF THE STATE OF GEORGIA 50-52 (1904).

56. *Id.*

57. A. HIGGINBOTHAM, *supra* note 50, at 217, 236-66.

58. D. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 15-17 (1978).

59. The litigation that ended slavery in Massachusetts concerned the slave Quock Walker and involved three cases: *Walker v. Jennison* (1781), reprinted in 1873-75 PROC. MASS. HIST. SOC. 296; *Jennison v. Caldwell* (1781), reprinted in *id.*; and *Commonwealth v. Jennison* (1783), reprinted in *id.* The cases are reproduced in 4 H. CATTERALL, JUDICIAL CASES CONCERNING AMERICAN

outlawed slavery explicitly in its constitution.<sup>60</sup> Pennsylvania, Rhode Island, and Connecticut each had passed gradual emancipation statutes intended to eliminate slavery.<sup>61</sup> Delaware, Maryland, New York, New Jersey, and Virginia had passed laws prohibiting the importation of slaves within their borders.<sup>62</sup> Abolitionist societies had been instituted

SLAVERY AND THE NEGRO 478-81 (1968). Article I of the Massachusetts Constitution of 1780 provided:

All men are free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

MASS. CONST. art. I (1780), *reprinted in MASS. GEN. STATS.* 15 (1860). The provisions of the 1780 constitution were not such a far cry from the Massachusetts 1691 colonial charter, which mandated that every inhabitant of the colony "shall enjoy all Liberties and Immunities of Free and natural [sic] Subjects." *Charter of the Province of Massachusetts-Bay 1691*, at 1, 14, *reprinted in 1 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS-BAY*, 1692-1714 (1869). Reported cases do not reveal that slave status was ever challenged as a violation of the colonial charter or that the charter was construed otherwise to prohibit slavery. See 4 H. CATTERALL, *supra*, at 465-81. Courts construing the free and equal clause of the constitution, however, had the benefit of Lord Mansfield's opinion in *Somerset v. Stewart*, 12 Geo. 3 (Loft 1772), *reprinted in 98 Eng. Rep.* 499 (K.B. 1772), which had declared that slavery lacked the support of positive law and was "so odious, that nothing can be suffered to support [it]." 98 Eng. Rep. at 510. See Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86, 115, 124-25 (1974). The Quock Walker litigation is described in A. HIGGINBOTHAM, *supra* note 50, at 91-99; see also Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the "Quock Walker Case,"* 5 AM. J. LEGAL HIST. 118 (1961); O'Brien, *Did the Jennison Case Outlaw Slavery in Massachusetts?* 17 WM. & MARY Q. 219 (1960).

60. See 12 A. SOULE, *STATE PAPERS OF VERMONT* 8 (1964). Article I of the Declaration of Rights in the Vermont Constitution of 1777 provided that "all men are born equally free and independent," and forbade servitude for any male past the age of twenty-one and for any female past the age of eighteen, "unless they are bound by their own consent, after they arrive at such age, or bound by law, for the payment of debts, damages, fines, costs, or the like." *Id.*; see also A. ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* 116 (1967). But compare the treatment by the Virginia Supreme Court of Appeals of the "free and independent" clause of the state's 1776 Declaration of Rights, in *Hudgins v. Wrights*, 11 Va. (1 Hen & M.) 133 (1806). The Declaration of Rights declared

[t]hat all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

10 W. SWINDLER, *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* 49 (1979). The Declaration of Rights, it was found, "was notoriously framed with a cautious eye [on the subject of slaves], and was meant to embrace the case of free citizens or aliens only." *Hudgins*, 11 Va. (1 Hen & M.) at 141 (Tucker, J.). The court limited the application of the Declaration of Rights to "white persons and native American Indians" and rejected the notion that the Declaration of Rights applied to "native Africans and their descendants, who have been and are now held as slaves." *Id.* at 144.

61. See W. DUBoIS, *THE SUPPRESSION OF THE AFRICAN SLAVE TRADE TO THE UNITED STATES OF AMERICA, 1638-1870*, at 23, 36, 37 (1965); see also P. FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 43-44 (1981).

62. See W. DUBoIS, *supra* note 61, at 12-15, 19, 24-25; see also P. FINKELMAN, *supra* note 61, at 45; A. ZILVERSMIT, *supra* note 60, at 155.

in several states,<sup>63</sup> and thoughtful Southerners found slavery to be a questionable moral practice.<sup>64</sup> Some slaveholders even questioned the economic benefits of slavery.<sup>65</sup> And some Americans, especially in the North and the Mid-Atlantic South, hoped that slavery would gradually disappear.<sup>66</sup>

Yet slavery was still both a social and economic fact of American life at the time of the Constitutional Convention. Slavery was of lesser importance in the North, where the proportion of slaves to the free population was small and where the economic impact of slavery was minimal. Slavery was of much greater importance in the South, where slavery's tremendous economic significance had spawned a slave population so great that it posed a threat to social control.<sup>67</sup> As an important aspect of American life, slavery warranted major consideration at the Constitutional Convention.

#### A. Representation in Congress and the Three-Fifths Clause

Many of the delegates to the Constitutional Convention believed that one of the major faults of the Articles of Confederation was that

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63. A. ZILVERSMIT, *supra* note 60, at 147, 162-63, 173-74. Abolitionist societies already existed in New York and Pennsylvania; Connecticut, Delaware, Maryland, and New Jersey established societies by 1794. *Id.*

64. Patrick Henry of Virginia wrote of "an abhorrence of slavery," and was struck by the inherent conflict in the existence of slavery "in a country, above all others, fond of liberty." Letter from Patrick Henry to Robert Pleasants (Jan. 18, 1773), reprinted in H. COMMAGER & R. MORRIS, *THE SPIRIT OF 'SEVENTY-SIX: THE STORY OF THE AMERICAN REVOLUTION AS TOLD BY PARTICIPANTS* 402 (1975). George Washington wrote of his desire for some plan of gradual abolition. Letter to John Francis Mercer (Sept. 9, 1786), reprinted in 11 W. FORD, *THE WRITINGS OF GEORGE WASHINGTON* 62 (1891). Thomas Jefferson, who had written in the first draft of the Declaration of Independence that slavery violated the "most sacred rights of life and liberty," Draft, *Declaration of Independence*, reprinted in H. COMMAGER & R. MORRIS, *supra*, at 316, believed that the "commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other. Indeed I tremble for my country when I reflect that God is just . . .!" 20 A. LIPSCOMB & A. BERGH, *THE WRITINGS OF THOMAS JEFFERSON* 225-28 (1903), reprinted in B. MAYO, *JEFFERSON HIMSELF: THE PERSONAL NARRATIVE OF A MANY-SIDED AMERICAN* 35 (1942).

65. See 7 P. FORCE, *AMERICAN ARCHIVES*, 494, 523, 616, 641, 600, 530 (4th ser. 1837) (noting the resolutions of Prince George, Culpepper, Hanover, Princess Anne, Fairfax, and Nasemond Counties in Virginia). Nasemond County resolved that the "African trade is injurious to this Colony, obstructs the population of it by freemen, prevents manufacturers and other useful emigrants from Europe from settling among us, and occasions an annual increase of the balance of trade against this colony." *Id.* at 530 (emphasis in original).

66. See W. DUBOIS, *supra* note 61, at 50; D. FEHRENBACHER, *supra* note 58, at 19; see also *infra* text accompanying notes 140-42. Whether this view was reasonable or wishful thinking is questionable. Freehling, *The Founding Fathers and Slavery*, 77 AM. HIST. REV. 81, 86-90 (1972).

67. See H. APTHEKER, *AMERICAN NEGRO SLAVE REVOLTS* (1983); cf. Cottrol & Diamond, Book Review, 56 TUL. L. REV. 1107, 1110-1112 (1982) (reviewing A. HIGGINBOTHAM, *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978)) (discussing the concerns over slavery and security in the Northern States).

each state had received the same number of votes in Congress.<sup>68</sup> Many representatives, especially those of the large states, perceived a need to rectify this matter. On the third day of the Convention, when Virginia's Governor Edmund Randolph proposed as part of the "Virginia Plan"<sup>69</sup> that representation in the new Congress be divided not equally among states, but instead be proportioned on the basis of population,<sup>70</sup> controversy over the question of slavery was inevitable. Despite all the conflict it produced between large and small states, Randolph's proposal was not unreasonable. By introducing population as the basis of voting power, however, Randolph had broached the subject of whether and how to count the slave population. Randolph's proposal provided that votes in Congress be apportioned according to either "the number of free inhabitants" or "the Quotas of contribution," whichever was deemed more appropriate under the circumstances.<sup>71</sup> By "Quotas of contribution" Randolph meant to grant representation for interests in slaves.<sup>72</sup>

The slavery issue casts a peculiar light on the Convention's representation debate. Popular historical mythology teaches that small states favored equal representation and large states favored proportional representation. This statement is only partially true and is misleading in its simplicity. The three most populous states, Virginia, Pennsylvania, and Massachusetts, were staunch supporters of proportional representation. Three of the smallest states, Connecticut, New Jersey, and Delaware, fought vigorously for equal representation. Yet the relatively unpopulous states of South Carolina and Georgia provided staunch, un-

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68. See, e.g., 1 W. BENTON, 1787: DRAFTING THE CONSTITUTION 104, 149 (1986) (remarks of James Wilson of Pennsylvania); *id.* at 114 (remarks of Alexander Hamilton of New York); *id.* at 124-25 (remarks of James Madison of Virginia); *id.* at 141 (remarks of William Pierce of Georgia); *id.* at 141-42 (remarks of Elbridge Gerry of Massachusetts). This position was not unanimous and was generally at odds with the position of smaller states. See, e.g., *id.* at 134 (remarks of Roger Sherman of Connecticut).

69. 1 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20-22 (1911); see also DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 953-63 (C. Tansill comp. 1927).

70. 1 M. FARRAND, *supra* note 69, at 20.

71. *Id.*

72. The term "Quotas of contribution" finds its genesis in the attempts of the Continental Congress to overcome the limitations of Article VIII of the Articles of Confederation, which had designated the value of land as the measure of the contribution each state would make to the payment of the national government's expenses. This method of apportionment had been inadequate, and Congress had fastened upon a more workable, more ascertainable formula by basing the apportionment of revenues on population. Slaves were counted under this formula by adding three-fifths of their number to make the "proportion" or "quota" that each state was expected to contribute. Thus, in proposing to base representation on quotas of contribution, Randolph was proposing to base representation in part on the slave population. See 24 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 41, 230, 258 (1922); 25 *id.* at 637-38, 951-52; 30 *id.* at 102-08 (1924); see also *infra* text accompanying notes 95-101.

wavering support for proportional representation, while the relatively populous state of New York was steadfast in favor of equal representation.<sup>73</sup> Virginia's James Madison described the stark conflict among the states concerning slavery and representation: "[T]he States were divided into different interests not by their difference of size, but by other circumstances . . . principally from [the effects of] their having or not having slaves."<sup>74</sup> The great division in the young United States did not lie between large and small states, in Madison's view, but between those of the North and those of the South, and the difference arose over slavery.<sup>75</sup> Equal representation meant that the eight states above the Mason-Dixon line would hold sway over the five below it. For the union of states to succeed, however, the North would have to give the South "defensive power" to protect slavery.<sup>76</sup> In Madison's view, equal representation would not accomplish this goal.<sup>77</sup>

Even while Southerners in western Virginia and in Franklin (western North Carolina) were agitating for statehood,<sup>78</sup> the delegates in Philadelphia were aware that the people of Maine were instigating a separation from Massachusetts,<sup>79</sup> that Vermont would soon be a state,<sup>80</sup> and that Congress under the Articles of Confederation had designated as many as five new free states to be carved out of the Northwest Territory.<sup>81</sup> Equality of representation reasonably could be anticipated to

73. S. LYND, CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION 174, 204 (1967); D. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820, at 177-78 (1971).

74. 1 M. FARRAND, *supra* note 69, at 486.

75. Madison thought it "pretty well understood that the real difference of interests lay, not between the large & small but between the N. & Southn. States. The institution of slavery & its consequences formed the line of discrimination." 2 M. FARRAND, *supra* note 69, at 10; *see also* 1 *id.* at 486 (remarks of James Madison); 2 *id.* at 450 (remarks of Charles Pinckney of South Carolina); 1 W. BENTON, *supra* note 68, at 371 (remarks of Rufus King of Massachusetts, who was "fully convinced that the question concerning a difference of interests did not lie where it had hitherto been discussed, between the great and small States; but between the Southern and Eastern").

76. 1 M. FARRAND, *supra* note 69, at 486.

77. *Id.*; *see also* 1 W. BENTON, *supra* note 68, at 371-72.

78. See 2 M. FARRAND, *supra* note 69, at 455 (remarks of Luther Martin of Maryland); *see also* S. EASLEY, HISTORY OF TENNESSEE 189-98 (1887 & reprint 1979); S. FOLMSSEE, R. CORLEW, & E. MITCHEL, TENNESSEE, A SHORT HISTORY 79-97 (1969).

79. 1 W. BENTON, *supra* note 68, at 363.

80. See 2 M. FARRAND, *supra* note 69, at 455 (remarks of Luther Martin).

81. Act of July 13, 1787 (the Northwest Ordinance), art. V, *reprinted in* 2 TERRITORIAL PAPERS OF THE UNITED STATES 39, 48-49 (C. Carter ed. 1934) [hereinafter TERRITORIAL PAPERS]; *see also* 1 M. FARRAND, *supra* note 69, at 541 (remarks of Rufus King). The Constitution was adopted by the Convention on September 17, 1787. 2 M. FARRAND, *supra* note 69, at 641, 665. The Northwest Ordinance was adopted by the Continental Congress on July 13, 1787, two months earlier. Additionally, although the Philadelphia convention was conducted in secret, several delegates to the Constitutional Convention were also representatives in Congress, and a number carried tales back and forth from Philadelphia to New York, Congress's seat at the time. Thus, the provisions of the Northwest Ordinance, even while being debated in Congress, had an effect upon the Convention. S. LYND, *supra* note 73, at 187-89; *see, e.g.*, 1 W. BENTON, *supra* note 68, at 363-64. It would

mean perpetual preponderance of Northern, nonslaveholding power.<sup>82</sup>

By contrast, proportional representation meant relative advantage to the South for two reasons. First, with five of thirteen votes in the Confederation's Congress, the South held only 38.5 percent of congressional power. Under a plan of proportional representation that included the slave population on the same basis as the free population, the South would hold 49.9 percent of congressional power. Even if no representation were given for the slave population, an unlikely result, the South, with 41 percent of the free population, would experience a net gain of 2.5 percent over the equality of representation scheme.<sup>83</sup> Thus, any plan of proportional representation would produce a net gain for the South. Once it was decided that representation in one house of the new Congress would be proportioned according to population, the only real question was how large that gain would be.

The second reason that proportional representation meant an advantage for the South was that the delegates to the Convention expected population to expand at a greater rate in the South than in the North. Pennsylvania's Gouverneur Morris feared that a majority of the Nation's population would soon live in North Carolina, South Carolina, and Georgia.<sup>84</sup> South Carolina's Pierce Butler dismissed that fear as a misapprehension of a trend that Butler saw—that “[t]he people and strength of America are evidently bearing Southwardly and South west-

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be a mistake, however, to presume that the Northwest Ordinance implied that the Philadelphia convention or the Southern States believed that slavery was doomed never to expand beyond the states in which it existed in 1787. By its terms, the Northwest Ordinance applied only to territories north of the Ohio River, which included western lands already ceded by New York, Massachusetts, Connecticut, and Virginia, 2 TERRITORIAL PAPERS, *supra*, at 3, 6, 10-22, but not those lands belonging to North Carolina, South Carolina, or Georgia. Of this latter group, North Carolina in 1789 and Georgia in 1802 specifically reserved rights to slavery in the lands they ceded, even though they adopted the remainder of the Northwest Ordinance as the territories' governing instrument. 4 TERRITORIAL PAPERS, *supra*, at 3, 7; 5 *id.* at 142, 145. Given South Carolina's strong proslavery concerns at both the Philadelphia convention and the ratifying convention that followed, its act of cession, which was passed less than one month after the Northwest Ordinance and which did not mention slavery at all, indicates that South Carolina was not apprehensive about the future of slavery south of the Ohio River. Act of Aug. 24, 1787, 5 S.C. Stats. at Large 1346, at 4 (Cooper 1936). The argument that the Southern States had no power to limit the authority of the federal government respecting slavery in the territories does not acknowledge that the lower South was under no obligation to cede its lands to the federal government. If it had been deemed impossible to limit the federal government's authority to prohibit slavery in the territories, the lower South simply would not have ceded its lands, and what became population growth in new Southern States simply would have been population growth in the original Southern States. This result would have made no difference to the political power of the South in the House of Representatives or to the political interests of the South as a region.

82. See 2 M. FARRAND, *supra* note 69, at 9-10 (remarks of James Madison).

83. See D. ROBINSON, *supra* note 73, at 179-80.

84. 1 W. BENTON, *supra* note 68, at 394.

wardly."<sup>85</sup> Madison observed that "the people are constantly swarming from the more to the less populous places—from Europe to [America] from the Northn. & middle parts of the U.S. to the Southern & Western. They go where land is cheaper, because labour is dearer."<sup>86</sup> This shift of population made it reasonable to expect that the South eventually would hold a majority of the population. Thus, proportional representation meant a plan under which many anticipated that as the South's population grew relative to that of the North, the South's influence and its power to protect slavery also would grow.<sup>87</sup>

Hence arose the impetus for what has become known as the three-fifths compromise, embodied in article I, section 2, clause 3 of the Constitution:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.<sup>88</sup>

The "other Persons" referred to were slaves.<sup>89</sup> Southerners at the Con-

85. *Id.*

86. 1 M. FARRAND, *supra* note 69, at 585-86.

87. 2 M. FARRAND, *supra* note 69, at 10. Madison explained that if a plan of proportional representation were adopted, "the N. Side would still outnumber the other: but not in the same degree, at this time; and every day would tend towards an equilibrium." *Id.*; see also 1 W. BENTON, *supra* note 68, at 394 (remarks of Gouverneur Morris and Pierce Butler). For Rufus King, the expected population shift was a reason for the North to be scrupulously fair in dealing with the Southern States on the issue of representation:

He was far from wishing to retain any unjust advantage whatever in one part of the Republic. If justice was not the basis of the connection it could not be of long duration. He must be shortsighted indeed who does not foresee that whenever the Southern States shall be more numerous than the Northern, they can and will hold a language that will awe them into justice. If they threaten to separate now in case injury shall be done them, will their threats be less urgent or effectual, when force shall back their demands.

*Id.* at 389.

88. U.S. CONST. art. I, § 2, cl. 3.

89. Antislavery crusaders later argued that this indirect reference to slaves, along with the others in the Constitution (both in Article I, § 9, clause 1 and in Article IV, § 2, clause 3 slaves are not referred to by name but instead as "Persons"), was an indication that the Constitution was an antislavery document. See, e.g., 2 THE FREDERICK DOUGLASS PAPERS 226-27 (J. Blasingame ed. 1979) (remarks of Samuel R. Ward, Jan. 17, 1850) [hereinafter DOUGLASS PAPERS]; see also 3 *id.* at 385-86 (Douglass' address entitled *What to the Slave is the Fourth of July?* (July 5, 1852)); 3 *id.* at 151-62 (remarks during a debate on whether the Constitution is antislavery in intent (May 20-21, 1857)); *id.* at 163, 181-83 (address on the Dred Scott decision (May 14, 1857)); E. FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 73-102 (1970). Antislavery forces were far from unanimous on this position. See, e.g., W. PHILLIPS, THE CONSTITUTION A PRO-SLAVERY COMPACT (1856); see also W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 229-48 (1977). Even Douglass at one time had argued that the Constitution was a proslavery document. See 2 DOUGLASS PAPERS, *supra*, at 231-32 (remarks of Frederick Douglass (Jan. 17, 1850)).

vention wanted to count slaves on the same basis as free persons.<sup>90</sup> This method of counting slaves would have given the South a clear advantage, for the overwhelming majority of slaves were held in the South.<sup>91</sup> By contrast, Northern delegates did not wish to count slaves at all;<sup>92</sup> the relative advantage in this position was with the North.<sup>93</sup> No representation for the slave population, however, might have forced the South out of the Union; equal representation for the slave population might have brought the same result for the North. A compromise was necessary.<sup>94</sup>

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90. See 1 W. BENTON, *supra* note 68, at 364. For South Carolina's Charles Pinckney (to be distinguished from his cousin and fellow South Carolina delegate Charles Cotesworth Pinckney), "[t]he number of inhabitants appeared . . . the only just and practicable rule. He thought the blacks ought to stand on equality with the whites." *Id.* Pinckney's colleagues from the state, Charles Cotesworth Pinckney and Pierce Butler, agreed strenuously. *See id.* at 378, 386, 389. All members of the Southern delegation, however, did not hold this position. In response to a motion by Pierce Butler and Charles Cotesworth Pinckney of South Carolina—that slaves be weighted equally with, as opposed to three-fifths of, free persons in any rule of representation—Virginia's George Mason argued that despite the tremendous economic value of slaves, he "could not however regard them as equal to freemen and could not vote for them as such." *Id.* at 379. When Butler and Pinckney's motion came to a vote, only South Carolina and Georgia voted in favor; Maryland, North Carolina, and Virginia voted against it. *Id.* This vote occurred after considerable discussion, debate, and compromise, and undoubtedly was anticipated even by the South Carolinians. As part of the "South Carolina Plan," like Randolph's Virginia Plan introduced on the third day of the Convention, Charles Pinckney proposed that one house of the federal legislature be apportioned in accordance with population, "3/5 of Blacks included." *Sketch of Pinckney's Plan for a Constitution, 1787*, 9 AM. HIST. REV. 735, 742 (1904).

91. The 1790 census reveals that of the Nation's 698,000 slaves, 649,000, or 93% were held in the five most Southern States. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1790-1978, at 11-12 (1979).

92. See 1 W. BENTON, *supra* note 68, at 299-300 (remarks of Elbridge Gerry of Massachusetts); *id.* at 368 (remarks of William Patterson of New Jersey); *id.* at 379, 385-87 (remarks of Gouverneur Morris); *id.* at 383-84 (remarks of Rufus King). This position was not unanimous, however. Regarding representation, William Johnson of Connecticut believed that "the number of people ought to be established as the rule, and that all descriptions including blacks *equally* with whites, ought to fall within the computation," the issue of slavery notwithstanding. *Id.* at 387.

93. To be sure, politics was not the sole reason for desiring not to count slaves at all. Elbridge Gerry of Massachusetts opined that slaves ought not be recognized as equal to freemen when as property slaves were on the same level as horses and cattle. *Id.* at 296-97. Gouverneur Morris believed that representation for interests in slaves would be "doing injustice to . . . human nature," and would give encouragement to the slave trade. *Id.* at 385.

94. Rufus King feared that any representation for interests in slaves "would excite great discontents among the States having no slaves." *Id.* at 383. North Carolina's William Davie was "sure that North Carolina would never confederate on any terms that did not rate them [slaves] at least 3/5. If the Eastern States meant therefore to exclude them altogether the business was at an end." *Id.* at 387. Gouverneur Morris warned: "[I]t is in vain for the Eastern States to insist on what the Southern States will never agree to. It is equally vain for the latter to require what other States can never admit"; he believed that his own Pennsylvania would "never agree to a representation of Negroes." *Id.* Rufus King was correct in predicting that representation for interests in slaves would be a point of objection for nonslaveholding states in the North. *See, e.g.*, Brutus, *Essay III*, N.Y. Journal, Nov. 15, 1787, *reprinted in* THE ESSENTIAL ANTIFEDERALIST 269, 270-71 (W. Allen & G.

The resolution of this issue was suggested by Randolph's proposal that under certain circumstances representation would be based on "Quotas of contribution" or wealth. One view, not exclusive to either Northern or Southern delegates, held that government is instituted to protect property and to encourage wealth.<sup>95</sup> Under this proposition, which embodies the views of John Locke,<sup>96</sup> wealth and property, as "the Main object[s] of Gov[ernmen]t,"<sup>97</sup> "the principal object[s] of Society,"<sup>98</sup> and the "great means of carrying . . . [government] on,"<sup>99</sup> should be the measures of power as well. The delegates holding this view believed that "money was power . . . and . . . the states ought to have weight in the Gov[ernmen]t—in proportion to their wealth."<sup>100</sup>

One method by which to measure wealth was to measure population, for a state produced wealth through its labor force. While all free labor was presumed to be equally efficient, that same presumption of equality did not obtain with respect to slave labor. The Continental Congress had agreed in 1783, in an attempt to apportion tax burdens, that the value of a slave's labor was to be measured at three-fifths the value of a free person's.<sup>101</sup> Though this ratio had never been applied under the Articles of Confederation, it provided a familiar refuge for those seeking to calculate the efficiency of slave labor.

Certain Southern delegates urged at the Constitutional Convention that slaves and whites were equally efficient laborers, and thus that the weight of slave representation in Congress should be equal to that of whites.<sup>102</sup> Others, such as Virginia's George Mason, "could not regard

Lloyd eds. 1985); *see also* 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 227-28 (1888) (remarks at the New York ratifying convention by Melancton Smith, who, finding the idea of slave representation "utterly repugnant," argued against the three-fifths clause). *But see* 2 *id.* at 39 (remarks at the Massachusetts ratifying convention by Samuel Nasson, who complained about the tax question embodied in the three-fifths clause and remarked that "this state will pay as great a tax for three children in the cradle, as any of the Southern States will for five hearty working negro men").

95. See 1 M. FARRAND, *supra* note 69, at 533. Gouverneur Morris put the case as well as anyone at the Convention: "The savage State was more favorable to liberty than was the Civilized; and sufficiently so to life. It was preferred by all men who had not acquired a taste for property . . . which could only be secured by the restraints of regular Government." *Id.*

96. See, e.g., J. LOCKE, TWO TREATISES OF GOVERNMENT (1884); *see also* D. ROBINSON, *supra* note 73, at 184-85.

97. 1 M. FARRAND, *supra* note 69, at 533 (remarks of Gouverneur Morris).

98. 1 W. BENTON, *supra* note 68, at 358 (remarks of John Rutledge).

99. *Id.* at 364 (remarks of Pierce Butler).

100. 1 M. FARRAND, *supra* note 69, at 196 (remarks of John Rutledge).

101. *See supra* note 72.

102. See 1 W. BENTON, *supra* note 68, at 389. Charles Pinckney argued that equality of representation was "nothing more than justice. The blacks are the labourers, the peasants of the Southern States: they are as productive of pecuniary resources as those of the Northern States. They add equally to the wealth, . . . to the strength of the nation." *Id.*; *see also* *id.* at 378 (remarks of

. . . [slaves] as equal to freemen and could not vote for them as such."<sup>103</sup> North Carolina's Hugh Williamson agreed with the recollection of Nathaniel Gorham of Massachusetts, "that if the Southern States contended for the inferiority of blacks to whites when taxation was in view, the Eastern States on the same occasion contended for their equality."<sup>104</sup> Williamson, however, concurred in neither extreme, but instead "approved of the ratio of 3/5."<sup>105</sup> In the end, only South Carolina and Georgia voted in favor of equality of representation for interests in slaves,<sup>106</sup> and the three-fifths compromise was enshrined in the Constitution.

While it is important to note what the compromise tragically implied for the future of the Nation, equally noteworthy is what the compromise did *not* mean. The compromise did not mean that blacks or slaves were only three-fifths human. For one thing, the census counted a free black as a whole person, just like a free white. For another, the humanity of blacks was not among the many questions and points of controversy discussed and resolved, or even left unresolved, at the Convention. The three-fifths compromise was based mainly on the issues of whether and to what degree the South would be advantaged in Congress by its wealth in slaves; in some smaller measure the compromise was based on the degree to which the South would be taxed on that wealth. The compromise resolving those questions represented the calculation that slave labor was less efficient than free labor—that five slaves produced as much wealth as only three free persons.<sup>107</sup>

Thus, the Framers should not be criticized for having agreed to count the slave as a fraction of a free person. To engage in such criticism would logically require one to praise the Southern delegates for wanting to count the slave as a whole person, and, by the same reasoning, to redouble criticism of the Northern delegates for arguing at first that slaves should not be counted at all. The Southern position—that slaves would be governed by whites and would contribute their number to the determination of white power in a government in which the slaves themselves would have no voice—was the more racist position. Compromise with the North mollified this extreme position and gave

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Pierce Butler).

103. *Id.* at 379.

104. *Id.* Gorham recalled that Southern delegates to the Continental Congress had argued previously that slave labor was inferior to free labor by a factor greater than what had been decided upon. Gorham announced that "[t]he arguments on the former occasion had convinced him that 3/5 was pretty near the just proportion and [that] he should vote according to the same opinion now." *Id.* at 378; see also D. ROBINSON, *supra* note 73, at 157 n.

105. 1 W. BENTON, *supra* note 68, at 379.

106. *Id.* On a previous vote, Delaware had joined the two deep South states. *Id.*

107. See D. ROBINSON, *supra* note 73, at 156-57, 188.

the South some advantage in Congress, but not the complete advantage that the South had sought.

None of these explanations, however, deflects Justice Marshall's fundamental criticism of the Framers for having agreed to the three-fifths compromise. Justice Marshall's criticism is especially appropriate if the implications of Chief Justice Taney's dictum in *Scott v. Sandford* are correct: that blacks were not considered to be and could never become citizens of the United States, and that in effect the government under the Constitution was of whites, by whites, and for whites only.<sup>108</sup> Even more damning of the Framers' efforts, however, is that the three-fifths compromise represented the expectation of a major cession of federal political power to the Southern States, whose prime interests included the protection of slavery.

Moreover, the delegates to the Convention were aware that the overrepresentation of the South in determining the course of federal power was itself an incentive for the South to keep slavery intact.<sup>109</sup> Even if slavery became only a marginally feasible economic institution, the maintenance of slavery would help to maintain the South's political power. Although some might argue that the South's interest in maintaining congressional power might have led the South to free its slaves,

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108. *Scott v. Sandford* (Dred Scott), 60 U.S. (19 How.) 393, 405 (1857). In effect, Chief Justice Taney maintained that blacks, regardless of their status as free or slave, were mere inhabitants of the United States, never to be citizens, *id.* at 418-19, even if a state independently granted them citizenship, *id.* at 405-06. In reaching his conclusion, Chief Justice Taney gave emphasis to the mass of discriminatory state legislation and constitutional law limiting the rights of free blacks. *Id.* at 412-16; see also L. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860 (1961). Chief Justice Taney ignored or otherwise deliberately dismissed a body of politically and physically liberating legislative and constitutional law that both free and slave states had adopted in the wake of the American Revolution—law that had cast doubt upon the legitimacy of the point that the Chief Justice was making. See *Dred Scott*, 60 U.S. (19 How.) at 564, 572-76 (Curtis, J., dissenting); see also Diamond & Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255, 260-62 (1983). The citizenship *vel non* of free blacks under the 1787 Constitution as unamended is not the subject and is beyond the scope of this Article. Yet, it must be pointed out that Chief Justice Taney's opinion regarding the citizenship of blacks was not shared by a majority of the Supreme Court. Chief Justice Taney's opinion was styled "the opinion of the court," *Dred Scott*, 60 U.S. (19 How.) at 399, but it was joined in full only by Justice Wayne, who saw fit to write his own opinion nonetheless. *Id.* at 454. Justice Daniel wrote his own opinion and did not join at all in the Taney opinion, but agreed with the Chief Justice on a point for point basis. *Id.* at 469. Four Justices, Grier, Nelson, Campbell, and Catron, agreed with the result as announced by Chief Justice Taney, but did not reach the issue of citizenship. *Id.* at 457 (Nelson, J., concurring); *id.* at 469 (Grier, J., concurring); *id.* at 494 (Campbell, J. concurring); *id.* at 519 (Catron, J., concurring). Two Justices, McLean and Curtis, dissented with respect to both the result and the issue of citizenship. *Id.* at 529 (McLean, J., dissenting); *id.* at 564 (Curtis, J., dissenting). Thus, only three members of the Court had declared that blacks were outside the Constitution because of their race, and two members had dissented vigorously. This alignment hardly constituted a firm national consensus on this issue.

109. See 1 M. FARRAND, *supra* note 69, at 561 (remarks of William Patterson); 2 *id.* at 222 (remarks of Gouverneur Morris).

deny them the vote, and count their whole number instead of three-fifths toward representation, this argument is flawed. The South could not have risked freeing its slaves, because freed slaves would have been able to vote with their feet—to leave the South for Northern lands, where their numbers would redound to the benefit of Northern States and to the detriment of the South.

Nor should criticism on this point be mollified by the provision in the three-fifths clause that direct taxes would be apportioned in the same manner as representation in the House of Representatives. Even at the Convention the delegates did not expect that the power to levy direct taxes would amount to much. When Rufus King of Massachusetts expounded on what was planned for the new government's powers of taxation, he spoke not of direct taxes, but stated that indirect taxation was to be substituted for the tax power of the Continental Congress.<sup>110</sup> Madison had the same expectation. He reported that, "it seemed to be understood on all hands" that "future contributions . . . would be principally levied on imports and exports."<sup>111</sup> Moreover, the Convention certainly had been warned by Gouverneur Morris of Pennsylvania: "Let it not be said that direct taxation is to be proportioned to representation. It is idle to suppose that the Gen[era]l Gov[ernmen]t can stretch its hand directly into the pockets of the people scattered over so vast a Country."<sup>112</sup> As a result, the potential liability to the South under the three-fifths clause was likely to be small, if any.<sup>113</sup>

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110. 2 *id.* at 6. Later, Rufus King stated that he had been correct in his appraisal of likely taxation sources. In a letter dated November 4, 1803, he wrote:

Had it been foreseen that we could raise revenue to the extent we have done, from indirect taxes, the Representation of Slaves wd. never have been admitted; but going upon the maxim that taxation and Representation are inseparable, and that the Genl. Govt. must resort to direct taxes, the States in which Slavery does not exist, were injudiciously led to concede to this unreasonable provision of the Constitution.

3 *id.* at 400.

111. 1 *Id.* at 585.

112. 2 *id.* at 223.

113. See THE FEDERALIST No. 12, at 143-44 (A. Hamilton) (H. Jones ed. 1961). New York's Alexander Hamilton was not sanguine about the prospect of raising revenue under any system of direct taxation:

It is evident from the state of the country, from the habits of the people, from the experience we have had on the point itself, that it is impracticable to raise any very considerable sums by direct taxation. Tax laws have in vain been multiplied; new methods to enforce the collection have in vain been tried; the public expectation has been uniformly disappointed, and the treasuries of the States have remained empty. The popular system of administration inherent in the nature of popular government, coinciding with the real scarcity of money incident to a languid and mutilated state of trade, has hitherto defeated every experiment for extensive collections, and has at length taught the different legislatures the folly of attempting them.

*Id.* Most Southerners were unconcerned about the possibility of direct taxes. Charles Cotesworth Pinckney, possibly the staunchest of slavery's defenders at the Philadelphia convention, argued to the ratifying convention in South Carolina, "I did not expect that we had conceded too much to

### B. Importation of Slaves and the 1808 Clause

An understanding of the Framers' expectations of population expansion and their intentions concerning Southern influence over the House of Representatives is critical to a proper interpretation of the Convention's treatment of the African slave trade. The provisions to which the Convention agreed are known as the 1808 clause:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.<sup>114</sup>

The provisions of the 1808 clause impliedly recognized the inherent ability of Congress, under the commerce clause if no other provision, to outlaw the importation of slaves into the Nation.<sup>115</sup> It is important, however, to understand that the 1808 clause was not a grant of power to Congress, but a limitation on Congress's power. The 1808 clause demanded nothing from Congress. Instead, the clause merely prevented Congress from acting to prohibit the African slave trade for a period of twenty years.

The ratifying conventions of Southern States evinced mixed reactions to the provisions of the 1808 clause, because the upper and lower Southern States had different interests concerning the importation of slaves. South Carolina and Georgia were lightly populated and considered their strength to be southerly population expansion;<sup>116</sup> they considered the slave population to be their wealth, "[their] only natural resource."<sup>117</sup> One South Carolinian at the ratifying convention opined

the Eastern States, when they allowed us a representation for a species of property which they have not among them." 4 J. ELLIOT, *supra* note 94, at 283. He boasted further that "we have made the best terms for the security of this species of property [slaves] it was in our power to make." *Id.* at 286. Edward Rutledge, Pinckney's colleague at the South Carolina convention and the Governor of the State, insisted that provisions in the Constitution relating to direct taxes worked to the advantage of the South: "All the free people (and there are few others) in the Northern States are to be taxed by the new Constitution; whereas only the free people, and two fifths [sic] of the slaves, in the Southern States, are to be rated, in the apportioning of taxes." *Id.* at 277. For this reason, George Nicholas, speaking at the Virginia convention, said that the three-fifths clause "is a great security." 3 *id.* at 457. Also at the Virginia convention, Governor Randolph was able to ask rhetorically: "Where is the part [of the Constitution] that has a tendency to *the abolition of slavery?*" *Id.* at 598 (emphasis in original). Compare *id.* at 457, 458 (remarks of George Mason and Patrick Henry at the Virginia convention) with *id.* at 458-59 (James Madison's response).

114. U.S. CONST. art. I, § 9, cl. 1.

115. Those favoring a federal government with limited power were greatly concerned by the 1808 clause and its implications for Congress' implied powers under the commerce clause. See 3 J. ELLIOT, *supra* note 94, at 454-56 (remarks of Mr. John Tyler and Patrick Henry at the Virginia ratifying convention).

116. See 4 *id.* at 283 (remarks of Charles Cotesworth Pinckney at the South Carolina ratifying convention).

117. *Id.* at 273 (remarks of Rawlins Lowndes at the South Carolina ratifying convention).

that “[w]ithout negroes, this state would degenerate into one of the most contemptible in the Union.”<sup>118</sup> But Maryland and Virginia already had prohibited the importation of slaves,<sup>119</sup> and North Carolina had levied an importation tax.<sup>120</sup> For each of these states a large percentage of slaves represented a domestic security risk.<sup>121</sup> Moreover, Virginia was

This belief on the part of South Carolinians originated many years prior. A colonist in 1682 wrote:  
 a rational man will certainly inquire, *when I have land, what shall I doe [sic] with it?* What commoditys [sic] shall I be able to produce that will yield me the money in other countrys [sic] that I may be inabled [sic] to buy Negro slaves (without which a Planter can never do any great matter) and purchase other things for my pleasure and convenience, that Carolina doth not produce.

A. HIGGINBOTHAM, *supra* note 50, at 162-63 (emphasis in original) (quoting Wilson, *An Account of the Province of Carolina*, in *NARRATIVES OF EARLY CAROLINA*, 1650-1708, at 174 (A. Salley ed. 1911)).

118. 4 J. ELLIOT, *supra* note 94, at 272 (remarks of Rawlins Lowndes).

119. 1 Md. Laws ch. 23 (Kilty 1783); see also Act 1 (1778), reprinted in 9 Va. Stats. at Large 471 (Hening 1823); Act 33 (1780), reprinted in 10 id. at 307 (allowing relief for South Carolina and Georgia war refugees); Act 77 (1785), reprinted in 12 id. at 182.

120. 1 N.C. Acts of Assembly 413, 492 (Martin 1780).

121. See Anderson, Rowley & Tollison, *Rent Seeking and the Restriction of Human Exchange*, 17 J. LEGAL STUD. 83, 87 n.10 (1988). Exact figures for the population in 1787 are unclear. See generally F. DEXTER, *ESTIMATES OF POPULATION IN THE AMERICAN COLONIES* (1887). According to Charles Cotesworth Pinckney, the figures for the Southern States on which the Philadelphia convention based the initial apportionment of seats in the House of Representatives were as follows:

State	Population (thousands)	Slaves (thousands)	Slave %
Maryland	250	80	32
Virginia	532	280	53
North Carolina	224	60	27
South Carolina	182	80	44
Georgia	98	20	20

4 J. ELLIOT, *supra* note 94, at 282. At the Virginia ratifying convention, Governor Randolph estimated the population figures for Virginia differently, with 236,000 slaves and 352,000 whites. 3 id. at 73. Three years later, the first decennial census emerged with these presumably more accurate figures for the original Southern States:

State	Population (thousands)	Slaves (thousands)	Slave %
Maryland	320	103	32
Virginia	748	293	39
North Carolina	394	101	26
South Carolina	249	107	43
Georgia	83	29	35

BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, NEGRO POPULATION IN THE UNITED STATES, 1790-1915, at 57 (1968); 1 BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 29, 36, 32, 34, 26 (1975) [hereinafter HISTORICAL STATISTICS]. Regardless of the actual count, it is clear that Southerners thought that a large slave population represented vulnerability. Governor Randolph asked his colleagues at the ratifying convention:

Are we not weakened by the population whom we hold in slavery? The day may come when

considered an exporter of slaves and thus would benefit from the cessation of slave imports.<sup>122</sup>

Thus, delegates to conventions in the upper South complained that the new Constitution would continue for twenty years an "abominable traffic"<sup>123</sup> and "nefarious trade,"<sup>124</sup> which was "diabolical in itself, and disgraceful to mankind."<sup>125</sup> Yet, these delegates also were concerned that the Constitution had not provided greater security for the South's interests in the slaves already present in the United States.<sup>126</sup> This conflict between concerns of morality and of self-interest was explained at the Virginia convention by George Mason: "[T]he continuation of this detestable trade adds daily to our weakness . . . [Thus] [i]t is far from being a desirable property; but it will involve us in great difficulties and infelicity to be now deprived of them. . . . and the loss of which would bring ruin on a great many people."<sup>127</sup>

Delegates to the ratifying convention in South Carolina, a lower South State, had a more straightforward and internally consistent reaction to the 1808 clause. Rawlins Lowndes noted the importance of slaves to the South Carolina economy and bitterly lamented the possible exclusion of slaves twenty years hence: "[B]ehold how our kind friends in the north were determined soon to tie up our hands, and drain us of what we had!"<sup>128</sup> Charles Cotesworth Pinckney stated both his opposition to a prohibition on slave imports and his view on the importance of a continuing influx of slaves:

I am of the same opinion now as I was two years ago, when I used the expressions the gentleman has quoted—that, while there remained one acre of swamp-land uncleared of South Carolina, I would raise my voice against restricting the importation of negroes. I am as thoroughly convinced as that gentleman is, that the nature of our climate, and the flat, swampy situation of our country, obliges us to cultivate our lands with negroes, and that without them South Carolina would soon be a

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they may make an impression upon us. Gentlemen who have been long accustomed to the contemplation of the subject, think there is a cause of alarm in this case . . . Our negroes are so numerous, and are daily becoming so. When I reflect on their comparative number, and comparative condition, I am more persuaded of the great fitness of becoming more formidable than ever.

3 J. ELLIOT, *supra* note 94, at 73, 192. Fear of slave rebellion plagued slaveholders in the United States from colonial times to the Civil War, see generally H. APTHEKER, *supra* note 67, at 18-52, 162-208: the more slaves in a society, the more a society had to fear. Cottrol & Diamond, *supra* note 67, at 1110-12.

122. 1 W. BENTON, *supra* note 68, at 949.

123. 4 J. ELLIOT, *supra* note 94, at 101 (remarks of James Galloway of North Carolina).

124. 3 *id.* at 269 (remarks of George Mason).

125. *Id.* at 452 (remarks of George Mason).

126. See, e.g., *id.* at 270, 452-53 (remarks of George Mason); *id.* at 101 (remarks of James Galloway).

127. 3 *id.* at 269-70.

128. 4 *id.* at 273.

desert waste.<sup>129</sup>

Delegates to the ratifying conventions of the Northern States were equally straightforward, but, in opposition to the views emerging from the deep South, expressed their antipathy for the African slave trade. According to the Northern delegates, it was a "reproachful trade"<sup>130</sup> and a "wicked practice."<sup>131</sup> Joshua Atherton of New Hampshire complained that by accepting the 1808 clause "we become *consenters to*, and *partakers in*, the sin and guilt of this abominable traffic, at least for a certain period, without any positive stipulation that it should even be brought to an end."<sup>132</sup> Yet, by approving the Constitution, Northern ratifying conventions, like their counterparts in other states, approved the 1808 clause. They did so based on an understanding that the 1808 clause was the result of compromise. At the Philadelphia convention the delegates had been aware that for South Carolina and Georgia the importation of slaves was a question on which union might turn.<sup>133</sup> Delegates from Connecticut were willing to accede to the Southern demand on this point,<sup>134</sup> and delegates from Massachusetts were conspicuously silent on the 1808 question. Others from the Northern and Mid-Atlantic States opposed unlimited importation. They argued that importation of slaves not only added to the threat of slave insurrection,<sup>135</sup> but

129. *Id.* at 285.

130. 2 *id.* at 452 (remarks of William Wilson of Pennsylvania).

131. *Id.* at 149 (remarks of Isaac Backus of Massachusetts).

132. *Id.* at 203 (emphasis in original).

133. See 1 W. BENTON, *supra* note 68, at 947 (remarks of Charles Pinckney); *id.* at 952 (remarks of Edmund Randolph).

134. *Id.* at 948. Roger Sherman wanted "to have as few objections as possible to the proposed scheme of Government," and he thought it probable that the import trade would be outlawed by the states in due time. *Id.*; see also *id.* at 942, 952 (additional remarks by Sherman). Oliver Ellsworth was more crass about the matter. Sherman at least had averred that he "regarded the slave trade as iniquitous," *id.* at 942, but Ellsworth declared, "Let every State import what it pleases. The morality or wisdom of slavery are considerations belonging to the States themselves. What enriches a part enriches the whole, and the States are the best judges of their particular interest." *Id.* at 946. William Johnson, the third member of Connecticut's delegation, did not speak on this subject, but during the prior debate on representation Johnson had been heard to support the South's initial position in favor of full representation for its slave population. *Id.* at 387.

135. See *id.* at 941-42 (remarks of Rufus King); *id.* at 943 (remarks of Gouverneur Morris); *id.* at 946 (remarks of Luther Martin). Luther Martin later reported to the Maryland legislature on the Convention debate concerning the issue of slavery and domestic security:

It was further urged that, by this system of government, every State is to be protected both from *foreign invasion* and from *domestic insurrections*; that, from this consideration, it was of the *utmost importance* it should have a power to restrain the importation of slaves; since in *proportion* as the number of slaves are increased in any State, in the *same proportion* the State is *weakened*, and *exposed* to foreign invasion or domestic insurrection, and *by so much less* will it be able to protect itself against *either*. . . .

3 M. FARRAND, *supra* note 69, at 212 (emphasis in original). Article IV, section 4 of the Constitution provides that "[t]he United States . . . shall protect each [state] . . . against Invasion; and . . . against domestic Violence." U.S. CONST. art IV, § 4.

also repudiated the ideology of the Revolution,<sup>136</sup> induced moral failure,<sup>137</sup> and caused economic stagnation.<sup>138</sup> The Convention faced a dilemma on the importation question: To risk either that "two States might be lost to the Union," or that strong antislavery elements in free states might be alienated.<sup>139</sup>

Those who opposed and those who favored slave importation both thought that they had something to gain by the compromise embodied in the 1808 clause. Some of those who opposed the trade believed that a halt to the slave trade twenty years hence might "totally annihilate the slave trade"<sup>140</sup>—that within the "lapse of a few years, . . . Congress will have power to exterminate slavery from within our borders."<sup>141</sup> This view resulted from a misreading of the 1808 clause: the clause did not establish the power of Congress to abolish slavery; the clause merely limited the exercise of congressional power to abolish the import trade in slaves. Nonetheless, the 1808 clause caused considerable optimism among Northerners who thought that "although slavery is not smitten by an apoplexy, yet it has received a mortal wound, and will die of a consumption."<sup>142</sup>

Those Southerners in favor of the international slave trade knew better than to fear the death of slavery from a lack of foreign replacements. For all the hyperbolic racket South Carolina's ratifying convention raised about the state's economy and its need for foreign sources of slaves, South Carolina's leaders had seen slavery survive quite well during and after the Revolution,<sup>143</sup> and they knew of Virginia's surplus of slaves.<sup>144</sup> For all their unhappiness with the 1808 clause, South Carolina's leaders agreed to the clause and to the Constitution as a whole for the same simple reason as the states to the north: The compromises on the 1808 clause and the Constitution allowed the Union to continue, and with union there was strength.

The deep South, however, had another reason for agreeing to postpone the day of reckoning on foreign slave trade until 1808. Delegates to the deep South ratifying conventions, like those delegates at the Convention in Philadelphia, expected population to increase rapidly to-

136. 1 W. BENTON, *supra* note 68, at 946 (remarks of Luther Martin).

137. *Id.* at 948-49 (remarks of George Mason).

138. *Id.* at 948.

139. *Id.* at 952 (remarks of Edward Randolph).

140. 2 J. ELLIOT, *supra* note 94, at 107 (remarks of General Thompson of Massachusetts).

141. *Id.* at 484 (remarks of William Wilson of Pennsylvania). North Carolina's James Galloway similarly apprehended that the intentions of compromisers who desired to halt the slave import trade within twenty years might lead to the end of slavery altogether. See 4 *id.* at 101.

142. 2 *id.* at 41 (remarks of Thomas Dawes of Massachusetts).

143. See P. FINKELMAN, *supra* note 61, at 25.

144. See 4 J. ELLIOT, *supra* note 94, at 285 (remarks of Charles Cotesworth Pinckney).

ward the South and Southwest.<sup>145</sup> By preventing Congress from banning the foreign slave trade until 1808, the deep South had delayed a decision on the matter until a time when the deep South, together with its allies, might have the votes to forestall a prohibition altogether.<sup>146</sup>

This possibility casts a sinister light on the agreement that produced the 1808 clause. Four days after the Convention agreed to the twenty-year extension for foreign slave traffic, the South carried out its end of the bargain when the Convention decided the outcome of a proposal that acts of Congress regulating commerce would require a two-thirds majority.<sup>147</sup> This issue was perceived strictly as a sectional conflict, with the Northern States favoring a simple majority and the Southern States favoring the wider majority.<sup>148</sup> Northern States wanted freedom to defend their commercial interests against foreign interference. Southern States saw their interests in opposition to those of the North and wanted protection from the Northern majority that would exist for the short term in both houses of Congress. The vote at the Convention went along geographic lines with one exception: Of the five Southern States, South Carolina voted with the seven Northern States in favor of a simple majority.<sup>149</sup> Charles Cotesworth Pinckney explained South Carolina's position as follows: It was in the "true interest of the S[outhern] States to have no regulation of commerce," but after considering the "liberal conduct" of the New England States toward the South Carolina position on freedom to import slaves, South Carolina felt that a simple majority vote on commercial regulation would suffice.<sup>150</sup>

What did Pinckney mean by "liberal conduct?" The day before the final vote on the 1808 clause, the Convention had assigned the slave importation question to a committee in order to resolve the conflict between the forces that opposed slavery and importation, and the states

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145. *Id.* at 282 (remarks of Charles Cotesworth Pinckney).

146. See W. DUBOIS, *supra* note 61, at 70-73. The positions of the states respecting foreign importation of slaves did indeed change by 1808, but not in the direction South Carolina and Georgia might have hoped at the time of the Convention. The successful revolt of the slaves in Haiti in 1791 caused attitudes respecting slave importation to shift in the negative. Georgia forbade slave imports in 1798. South Carolina vacillated on the subject, alternately forbidding then allowing the slave import trade from 1788 until 1803, when slave traffic was opened on a permanent basis pending the by then expected federal closure of the trade in 1808. North Carolina repealed its prohibitory tax in 1790, but in 1794 forbade the importation of slaves outright. *Id.*

147. 2 M. FARRAND, *supra* note 69, at 449.

148. See *id.* at 449-53.

149. *Id.* at 453.

150. *Id.* at 449-50; see also *id.* at 451 (remarks of another South Carolinian, Pierce Butler, who "considered the interests of [the Southern States] and of the Eastern States, to be as different as the interests of Russia and Turkey," but who supported the simple majority because he was "notwithstanding desirous of conciliating the affections of the East").

of South Carolina and Georgia, who threatened secession.<sup>151</sup> The committee returned the following day with a proposal that the slave trade's freedom from congressional limitation extend only to the year 1800.<sup>152</sup> Pinckney then moved to substitute the year 1808, and this motion was seconded by Nathaniel Gorham of Massachusetts.<sup>153</sup> Despite the notable dissent of James Madison, a wealthy slaveholder himself who protested this further extension as "dishonorable to the American character,"<sup>154</sup> the motion passed with the votes of Massachusetts, New Hampshire, and Connecticut deciding the issue in favor of the South Carolina proposal.<sup>155</sup>

Thus, the New England States had traded their votes on a longer period of protected slave importation in exchange for South Carolina's vote on less restrictive commercial regulation.<sup>156</sup> This compromise is omitted from the popular histories of the Constitutional Convention, for it was an underhanded, "sleazy compromise,"<sup>157</sup> reeking of self-interest and cynicism. The self-interest involved was not merely the self-evident concerns of Southern slaveholders, but also the more subtle concerns of New England shipping interests, who stood to gain from prolonged slave commerce with the South<sup>158</sup> and desired to regulate

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151. See 1 W. BENTON, *supra* note 68, at 952.

152. *Id.* at 953-54.

153. *Id.* at 954.

154. *Id.*

155. *Id.*

156. See 2 M. FARRAND, *supra* note 69, at 449. Madison's notes on the Philadelphia convention belie any accusation of faulty inference. He reported: "An understanding on the two subjects of navigation and slavery, had taken place between those two parts of the Union, which explains the vote on the Motion depending, as well as the language of Genl. Pinckney and others." *Id.* Moreover, in his report to the Maryland legislature, Luther Martin recounted the proceedings within the committee that formulated for the Convention the original compromise on the issue of slave imports:

This committee, of which I had the honor to be a member, met and took under their consideration the subjects committed to them. I found the *eastern* States, notwithstanding their *aversion to slavery*, were very willing to indulge the southern States, at least with a temporary liberty to prosecute the *slave-trade*, provided the southern States would, in their turn, gratify them, by laying *no restriction on navigation acts*; and after a very little time the committee, by a great majority, agreed on a report, by which the general government was to be prohibited from preventing the importation of slaves for a limited time, and the restrictive clause relative to navigation acts was to be omitted.

3 *id.* at 210-11 (emphasis in original).

157. *Id.*; see P. Finkelman, *Legal History and Constitutional Developments Post 1800*, Remarks at the American Association of Law Librarians 80th Annual Meeting (July 7, 1987) (audiotape available through Mobiltape Company, Inc.). The term "sleazy compromise" is attributable to Paul Finkelman, who has used it to describe the New England-South Carolina agreement.

158. See 1 W. BENTON, *supra* note 68, at 949. During the debate on the 1808 clause, George Mason recognized "that some of our Eastern brethren had from a lust of gain embarked on this nefarious traffic." *Id.* Charles Cotesworth Pinckney appealed directly to the profit motive when he reminded the Convention that "[t]he more slaves, the more produce to employ the carrying trade."

commerce on the basis of a simple consensus, without the difficulty of seeking a supermajority.<sup>159</sup>

### C. The Fugitive Slave Clause and Taxation

The Constitution's third direct regulation of slavery is found in the fugitive slave clause, article IV, section 2, clause 3:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.<sup>160</sup>

The clause was based on article VI of the Northwest Ordinance, which had forbidden slavery in the Northwest Territory, but concomitantly had provided for the return of fugitive slaves from the territory.<sup>161</sup> Because the fugitive slave clause aroused virtually no debate at the Constitutional Convention, little can be divined about the Framers' intent.<sup>162</sup> The fugitive slave clause was neither a major nor even a significant issue at the Constitutional Convention.

Of greater importance at the Convention was the issue of taxation, a matter on which the Southern States held views different from, but compatible with, their Northern sisters. The Convention emerged with provisions that limited the taxing authority of both the federal and

*Id.* at 950. Some have argued that at this time New England shipping interests dealt little with slave imports. See 2 W. WEEDEN, ECONOMIC AND SOCIAL HISTORY OF NEW ENGLAND, 1620-1789, at 834-36 (1890). Such commerce was at least a subject of social approbation and legal interdiction. *Id.*; see also W. DUBoIS, *supra* note 61, at 29-38, 48-50. Yet, laws prohibiting participation in the slave trade were difficult to enforce, and smuggling was considered "flagrant and widespread." D. ROBINSON, *supra* note 73, at 318.

159. See generally 2 M. FARRAND, *supra* note 69, at 449-53. This desire was in New England's interest only in the short term if sectional conflict was as real as the Convention perceived and if the Convention's expectations for population growth were realized; for soon the Southern States, whose interests were contrary to those of the North, would predominate in the House of Representatives. On the other hand, for this reason the simple majority represented a long-term benefit to the South.

160. U.S. CONST. art. IV, § 2, cl. 3.

161. 2 TERRITORIAL PAPERS, *supra* note 81, at 39, 49.

162. The entire debate over the clause takes up less than two full pages of Farrand's *Records of the Federal Convention of 1787*. Late in the Convention Pierce Butler and Charles Pinckney introduced a proposition "to require fugitive slaves and servants to be delivered up like criminals." 2 M. FARRAND, *supra* note 69, at 443. This proposal was too much even for the jaded sensibilities of Connecticut's Roger Sherman, who had supported the deep South in its demand for a complete prohibition on congressional power to ban slave imports. See *supra* note 134 and accompanying text. Sherman declared that he saw "no more propriety in the public seizing and surrendering a slave or servant, than a horse." 2 M. FARRAND, *supra* note 69, at 443. Butler then withdrew the proposal, *id.*, but returned the following day with a more gingerly worded proposal that passed without objection. *Id.* at 453-54. The Convention's committee of style revised the clause yet another time, *id.* at 601-02, and so did the Convention as a whole, in deference to some who objected that the committee's version had "favor[ed] the idea that slavery was legal in a moral view." *Id.* at 628.

state governments. Article I, section 9, clause 5 provided simply: "No Tax or Duty shall be laid on Articles exported from any State."<sup>163</sup> Article I, section 10, clause 2 provided a similar prohibition against impositions of corresponding state taxes.<sup>164</sup> Charles Cotesworth Pinckney had warned that South Carolina's agreement to the Constitution would be in jeopardy if the Convention did not agree to protect against the taxation of exports.<sup>165</sup> Other Southern delegates echoed Pinckney's concerns.<sup>166</sup> These delegates were concerned that taxation of exports might be an instrument of sectional conflict and that, by taxing exports produced by the Southern States' slaves, the new government could in effect tax slavery.<sup>167</sup>

Northern delegates who disfavored the power of taxation over exports feared federal discrimination against certain states and potential damage to the interests of particular states. These delegates saw an opportunity for consuming states to free themselves from unwelcome taxes placed on goods by producer states<sup>168</sup> and banded with the South to pass the two prohibitions.<sup>169</sup> Thus, the South's interest in protecting slavery again was accommodated by Northern States who wished to satisfy their own selfish interests.

With the agreements that limited the power of Congress to disadvantage Southern interests in slavery, and especially with the compromise over representation embodied in the three-fifths clause, the South had achieved through hard bargaining and joint effort a structural ad-

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163. U.S. CONST. art. I, § 9, cl. 5.

164. Article I, § 10, clause 2 declares:

No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

U.S. CONST. art. I, § 10, cl. 2.

165. See 2 M. FARRAND, *supra* note 69, at 95.

166. See 1 W. BENTON, *supra* note 68, at 973. George Mason hoped that "the Northern States did not mean to deny the Southern this security." *Id.* North Carolina's Hugh Williamson and John Francis Mercer, along with Daniel Carroll of Maryland, also spoke against export taxes. *Id.* at 974-76. Pierce Butler declared "that he would never agree to the power of taxing exports." *Id.* at 984. Southern delegates were nearly unanimous on the tax issue. Compare, however, the remarks of James Madison, who wholeheartedly favored the power to levy taxes on exports. *Id.* at 974, 980-81. Among Southern delegates, only George Washington joined Madison in this position. *Id.* at 982.

167. See *id.* at 981-82 (remarks of George Mason); *id.* at 958 (remarks of Charles Cotesworth Pinckney). Elbridge Gerry of Massachusetts shared the view that the taxing power over exports "might be made use of to compel the States to comply with the will of the General Government." *Id.* at 981.

168. See generally *id.* at 975-82.

169. *Id.* at 982. The five Southern States voted with Massachusetts and Connecticut to adopt the federal prohibition. *Id.* Only Massachusetts and Maryland voted against prohibition on state taxation of imports. *Id.* at 1086.

vantage in the composition and powers of the legislative branch of the federal government. Moreover, the three-fifths clause gave the South an additional bonus. Not only was the South's interest in slaves to be counted in determining the distribution of power in the legislative branch, but the same formula would be used in determining the weight of Southern votes in the election of the chief of the executive branch, the President.

#### *D. Election of the President*

The Constitution did not provide for direct election of the President by the populace, but instead for indirect election by a college of electors appointed from each state. The number of electors would be determined based on the number of senators and representatives to which the state was entitled in Congress.<sup>170</sup> Thus, just as the three-fifths clause granted the South additional representation in Congress, the clause also added to Southern influence in the selection of the President.

This convoluted method of selecting a President was the product of compromise between those who favored popular election and those who favored appointment by the Congress.<sup>171</sup> Roger Sherman of Connecticut and James Wilson of Pennsylvania championed the two opposing positions. Sherman was "for the appointment by the Legislature, and for making [the President] absolutely dependent on that body"; an independent executive, Sherman believed, was the essence of "tyranny."<sup>172</sup> Wilson was "for an election by the people;" experience, Wilson believed, had shown "that an election of the first magistrate by the people at large, was both a convenient and successful mode."<sup>173</sup>

Both positions had their detractors at the Convention. Pennsylvania's Gouverneur Morris proposed that a President appointed by Con-

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170. U.S. CONST. art. II, § 1, cl. 1, 2. The provisions state:

The executive Power shall be vested in a President of the United States of America. He shall . . . be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.

*Id.*

171. These were not the only methods of selection considered by the Convention. The Convention overwhelmingly rejected Elbridge Gerry's motion that the President be elected by the equal votes of the states' governors. 2 W. BENTON, *supra* note 68, at 1117-18. New York's Alexander Hamilton, arguing that "no good [executive] could be established on Republican principles," *id.* at 1121, proposed an executive with life tenure, to be elected by electors chosen from election districts into which the states would be divided. *Id.* at 1123-24. Hamilton's proposal was never reduced to a motion, nor was it voted on by the Convention.

172. *Id.* at 1101.

173. *Id.*

gress would be "the mere creature of the Legislature. . . . [the President] ought to be elected by the people at large, by the freeholders of the Country."<sup>174</sup> Madison agreed with the need for an independent executive branch and thought it "essential . . . that the appointment of the Executive should either be drawn from some source, or held by some tenure, that will give him a free agency with regard to the Legislature."<sup>175</sup> James Wilson added his belief that "[t]he appointment to great offices" should not be left to the legislature, for this process was "the most corruptly managed of any that had been committed to legislative bodies."<sup>176</sup>

Pierce Butler of South Carolina argued, however, that popular election would be "so complex and unwieldy so as to disgust the States."<sup>177</sup> Elbridge Gerry of Massachusetts also was opposed to a popular election. He believed that the people were "uninformed, and would be misled by a few designing men."<sup>178</sup> Virginia's George Mason similarly believed that popular election simply was not practicable. He maintained that

it would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man. The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates.<sup>179</sup>

Thus, delegates from both North and South were divided about the merits of popular election versus legislative appointment of the President. Although much of the Convention debate on this issue represented an honest quest for a selection method that favored good government,<sup>180</sup> sectional issues continued to influence the discussions. Virginia's Governor Randolph alluded to these sectional issues when he spoke in favor of a tripartite executive, "to be drawn from different portions of the Country."<sup>181</sup> North Carolina's Hugh Williamson stressed the inherent danger of a sole executive with veto power and argued that the "essential difference of interests between the Northern and Southern States" required a tripartite executive.<sup>182</sup>

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174. *Id.* at 1126. Moreover, Morris warned, "If the Legislature elect, it will be the work of intrigue, of cabal, and of faction; it will be like the election of a pope by a conclave of cardinals; real merit will rarely be the title to the appointment." *Id.*

175. *Id.* at 1136.

176. *Id.* at 1128.

177. *Id.* at 1151. Nor was Butler enamored of election by the Congress: "The two great evils to be avoided are cabal at home, and influence from abroad. It will be difficult to avoid either if the Election be made by the National Legislature." *Id.*

178. *Id.* at 1137.

179. *Id.* at 1128.

180. See generally *id.* at 1094-1184.

181. *Id.* at 1112; see also *id.* at 1104.

182. *Id.* at 1143. Williamson had other reasons for desiring a three-headed executive:

Sectional issues bore directly upon Southern opposition to popular election. Many Southern delegates opposed popular election because they feared that “[t]he most populous States by combining in favor of the same individual will be able to carry their points.”<sup>183</sup> This fear was not inconsistent with the Convention’s expectation that population movement would favor the Southern States. Regardless of the relative degrees of population growth, a significant portion of the Southern population would be slaves who, as the Convention delegates recognized, would “have no suffrage,”<sup>184</sup> and therefore no voice in a popular election.

Madison spoke directly to the problem and to its solution. Whatever the relative merit of popular election,<sup>185</sup> Madison stated that “[t]here was one difficulty . . . of a serious nature attending an immediate choice by the people. 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 Negroes.”<sup>186</sup> While population movement and the passage of more liberal access to the ballot might ameliorate the South’s disadvantage, popular election of the President would, nonetheless, require the sacrifice of Southern interests.<sup>187</sup> The answer as Madison saw it was the “substitution of electors[, which] obviated this difficulty and seemed on the whole liable to fewest objections.”<sup>188</sup>

In the end, popular election was voted down by the Convention<sup>189</sup> in favor of election by joint ballot of the Congress.<sup>190</sup> Madison pronounced this solution “not . . . unreasonable,” even though it increased the power of small states.<sup>191</sup> While small states received an advantage

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Another objection against a single Magistrate is that he will be an elective King, and will feel the spirit of one. He will spare no pains to keep himself in for life, and will then lay a train for the succession of his children. It was pretty certain he thought that we should at some time or other have a King; but he wished no precaution to be omitted that might postpone the event as long as possible.

*Id.*

183. *Id.* at 1127 (remarks of Charles Pinckney).

184. *Id.* at 1128 (remarks of Hugh Williamson).

185. *Id.* at 1136-37. Madison stated:

The people at large were . . . the fittest [source for appointment]. It would be as likely as any that could be devised to produce an Executive Magistrate of distinguished Character. The people generally could only know and vote for some Citizen whose merits had rendered him as object of general attention and esteem.

*Id.* at 1137. All tolled, “[w]ith all its imperfections he liked this best.” *Id.* at 1150.

186. *Id.* at 1137; *see also id.* at 1150.

187. *Id.* at 1150.

188. *Id.* at 1137.

189. *Id.* at 1159-60.

190. *Id.* at 1155, 1160.

191. *Id.* at 1160.

by adding in the ballot for President an equal number of Senate votes to the House votes proportioned to the population, the South, as a region, gained more. The joint ballot compromise meant that the South had stretched its slave representation advantage beyond one-half of the legislative branch into the entire power to elect the President. When the Convention approved the proposal of an electoral college apportioned in the same manner as the state delegations to Congress,<sup>192</sup> Northern interests once again had combined with Southern desires to achieve the maximum protection for Southern interests in slavery by giving political advantage to the South.

Significantly, the President retained the power to control the personnel of the third branch of government, the judiciary. Vested in the President was the duty, "by and with the Advice and Consent of the Senate, [to] appoint . . . Judges of the [S]upreme Court."<sup>193</sup> By extension, therefore, the South's influence over the election of the Chief Executive would result in increased Southern influence over the judicial branch, especially over the Supreme Court, whose opinions on matters of federal law would be supreme. In a case before the Supreme Court regarding slavery, the South reasonably might hope that Southern Presidents or Presidents beholden to the South might have appointed Southern judges or judges otherwise friendly to Southern interests. The South also might hope that if its anticipated power in Congress ever failed, or if its influence over the office of the President had diminished, that the South's influence over the Supreme Court, developed during prior years of influence over the other branches, might help to maintain slavery.

Eventually, the Nation rid itself of the cancer of slavery in spite of the Framers of the Constitution, who actively protected Southern interests in slavery by their adoption of the 1808 clause, the fugitive slave clause, and the export tax clauses, and who intended to protect slavery passively through the three-fifths clause. Moreover, the Framers of the Constitution delivered to the white South an influence beyond its numbers over the executive branch and, by extension, over the Supreme Court. Regardless of the ultimate fate of slavery in the United States, the Framers of the Constitution stand condemned by their intent to deliver to the South the means of the federal government to maintain slavery so long as the South desired to maintain it. Only developments unforeseen by the Framers forestalled perpetual control over the slavery issue by the Southern States, who had political incentives—created by the Constitution itself—to maintain slavery.

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192. *Id.* at 1165-66, 1179.

193. U.S. CONST. art. II, § 2, cl. 2.

#### IV. THE EVENTUAL OUTCOME: CALCULATION OR MISCALCULATION?

Beyond any doubt, the delegates to the Constitutional Convention created a document rife with compromise over the issue of slavery. It may be, as Assistant Attorney General Reynolds has argued, that these compromises resolved for the Northern delegates a Hobson's choice of either acquiescing to the protection of slavery or forgoing union.<sup>194</sup> That this choice existed does not detract from Justice Marshall's criticism of the Constitution as a document flawed by a failure of "wisdom, foresight, and sense of justice."<sup>195</sup> For the Framers did not simply trade a limited protection of slavery in order to ensure union; instead they delivered to the white South advantages in the very structure of the new government intended to give the South veto power over federal regulation of slavery. In effect, the Framers delivered to the South the power to maintain slavery as long as it chose, regardless of antislavery sentiment in the North. Thus, the Framers built the system of individual liberty that characterizes this Nation and the structure that protects it on a foundation not of freedom, but of slavery. That this foundation would be rebuilt into one based on freedom was not inevitable, for the Framers intended that the South, at whose insistence the slavery compromises were accomplished, would control the federal levers of change.

If Justice Marshall's criticism of the Constitution and its Framers has borne the need to explore the Convention and the ratification debates, his criticism also raises questions about what happened after the ratification of the Constitution. The Framers' expectations of population growth, and thus of power in Congress, were not met. Population did not grow toward the South and Southwest, but instead toward the North and Northwest.<sup>196</sup> Thus, unanticipated population trends raise further questions, not of the intent but of the effect of the Constitution on the conduct of slavery in the Nation. If the South did not obtain a majority in the House of Representatives,<sup>197</sup> then what advantage did it obtain? In the House, did votes attributable to the South's slave population affect or even change the course of national policy? Were Presidents elected by slave votes?<sup>198</sup> Was Southern influence over the federal government, magnified by its slave population, responsible for Southern dominance of the Supreme Court?<sup>199</sup> If, as Justice Marshall has argued,

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194. *Another View*, *supra* note 35, at 1347.

195. Marshall, *supra* note 2, at 1338.

196. 1 HISTORICAL STATISTICS, *supra* note 121, at 22.

197. See 2 *id.* at 1085.

198. Of the fourteen men elected President before the Civil War, seven were Southerners. Southern Presidents governed the Nation for forty-one of the seventy-one years of constitutional government through 1860. 1988 WORLD ALMANAC AND BOOK OF FACTS 320-22.

199. Only from 1796 to 1798 and from 1829 to 1837 did the full complement of the Supreme

the Framers' compromises on slavery render suspect their sense of wisdom, foresight, and justice, then answers to these questions can tell much about the degree to which the Framers lacked these qualities.

Answers to these questions also can tell us whether the Framers' failure of wisdom, foresight, and justice, and their sacrifice of political morality for political expedience embodied merely constitutional impediments to change, or served primarily as a model for later governmental action respecting slavery. Indications that the Framers' moral compromise represented a model for future governmental action surfaced in an event that took place in 1861, after the secession of the Southern States had begun<sup>200</sup> and as the Nation stood on the brink of a great military conflict that would either maintain or dissolve the Union. On March 2, 1861, two days before Abraham Lincoln took office as President, Congress passed a joint resolution to amend the Constitution to include a thirteenth amendment:

No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.<sup>201</sup>

Congress had not passed this resolution in a vacuum. Lincoln had won the 1860 Presidential election without the benefit of a single Southern or border state.<sup>202</sup> The platform of Lincoln's Republican Party had advocated no further geographic extension of slavery, even though the platform promised no interference with slavery's existence within the slave states themselves.<sup>203</sup> Nonetheless, within three months of Lincoln's November victory, seven states had seceded.<sup>204</sup> The need for a compromise to save the Union was apparent.<sup>205</sup>

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Court contain a majority of non-Southern Justices. H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 71-115, 384-87 (2d ed. 1985).

200. 2 A. NEVINS, THE EMERGENCE OF LINCOLN 318-62 (1950).

201. J. RES. 13, 12 Stat. 251 (1861).

202. 2 A. NEVINS, *supra* note 200, at 312-13; see also CONGRESSIONAL QUARTERLY, GUIDE TO U.S. ELECTIONS 232 (1975).

203. See K. PORTER & D. JOHNSON, NATIONAL PARTY PLATFORMS, 1840-1960, at 31-32 (2d ed. 1961). The 1860 Republican party platform promised to slave states that the maintenance of each state's right to "control its own domestic institutions . . . is essential to . . . the perfection and endurance of our political fabric," but declared as "dangerous political heresy" the holding of *Scott v. Sandford*, which had declared unconstitutional congressional legislation banning slavery from United States territories. *Id.* Moreover, the platform "den[ied] the authority of Congress, of a territorial legislature, or of any individuals, to give legal existence to slavery in any territory of the United States." *Id.*; see also E. FONER, *supra* note 89, at 261-317.

204. 2 A. NEVINS, *supra* note 200, at 318-28; see also 3 J. RHODES, HISTORY OF THE UNITED STATES 159 (1928).

205. "Compromise" in the context of the slavery issue meant capitulation. The history of sectional conflict before the Civil War is the history of Southern demands for extension of slave territory and of limits on the federal government's ability to affect that extension. It is also the

Attention was focused on the proposals of Kentucky Senator John Crittenden. Crittenden had proposed a series of constitutional amendments dealing extensively with Southern concerns over slavery. These amendments included: (1) the extension of the Missouri Compromise line to California, prohibiting slavery above the line but protecting slavery below it; (2) a prohibition on the abolition of slavery in any federal enclave inside a slave state, including the District of Columbia so long as Virginia or Maryland maintained slaves; (3) a limitation on federal interference with interstate transportation of slaves and a toughening of the federal position on fugitive slaves; and (4) a prohibition on constitutional amendments tampering with slavery.<sup>206</sup> Lincoln, however, steered his party away from acceptance of Crittenden's compromise proposal.<sup>207</sup> All the proposed amendments were rejected except the last, which formed the basis for what originally was proposed as the thirteenth amendment.<sup>208</sup> The entire Crittenden proposal was more like Northern surrender to the slave states rather than compromise; but the proposed thirteenth amendment provided the opportunity, if the South would have accepted it, to maintain the Union, though at the cost of affirming what the Constitution of 1787 had only implied—that slavery would continue in the United States so long as the Southern States desired.

Lincoln implicitly approved of the proposed amendment in his inaugural address when he repeated a pledge from an earlier speech: "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so."<sup>209</sup> Thus, in 1861, a President unbothered by the South for his election and a Congress from which many Southern members had resigned offered the South the same contract that the Northern delegates to the Constitutional Convention had sealed with their Southern brethren: Continued union in exchange for continued slavery. Only the South's intransigence led to the refusal of the new deal, the subsequent Civil War, and the end of slavery.

The story of the proposed thirteenth amendment tells less about

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history of Northern surrender to the demands. See generally W. COOPER, THE SOUTH AND THE POLITICS OF SLAVERY, 1828-1856 (1978); A. CRAVEN, THE GROWTH OF SOUTHERN NATIONALISM, 1848-1861 (1953); G. MOORE, THE MISSOURI CONTROVERSY, 1819-1821 (1953); D. ROBINSON, *supra* note 73; A. SIMPSON, *The Political Significance of Slave Representation, 1787-1821*, 7 J.S. HIST. 315 (1941). Thus, demand for compromise amounted to a demand for the North to capitulate.

206. S.J. RES. 50, 36th Cong., 2d Sess. (1860), reprinted in E. MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE GREAT REBELLION 64-65 (1865); see also 2 A. NEVINS, *supra* note 200, at 390-91.

207. D. POTTER, LINCOLN AND HIS PARTY IN THE SECESSION CRISIS 156-87 (1942).

208. 2 A. NEVINS, *supra* note 200, at 397-410.

209. 6 J. NICOLAY & J. HAY, COMPLETE WORKS OF ABRAHAM LINCOLN 170 (1894).

the influence of slave representation in Congress than it tells about slavery's influence on politics during the period prior to the Civil War. The story confirms Justice Marshall's criticism of the 1787 Constitution: That the document as written originally was flawed, perhaps fatally, by compromises with racism and slavery. The story of the proposed thirteenth amendment, however, goes beyond the Marshall thesis by suggesting that this Nation's fundamental interest in union outweighed its interest in liberty and equality, not merely at the time of the Constitutional Convention but even beyond.

#### V. CONCLUSION

The implications of Justice Marshall's thesis are simple and powerful. First, under the slavery compromises at the Constitutional Convention, an extra measure of political power was delivered to the South based on its slave population. The Framers intended that this political power would allow the South to protect and defend its interest in slavery. Second, this power constituted an incentive for the South to maintain slavery, for the maintenance of slavery protected Southern political power. If these implications are correct, then Justice Marshall's critics simply were incorrect in asserting that the Framers left open the possibility of eliminating slavery through constitutional amendment. Further, if the implications of Justice Marshall's thesis are correct, the beauty of the Constitution, as his critics described it, is irrelevant to the discussion of slavery; for the Framers left closed the possibility that the constitutional structure would ever liberate slaves without the active agreement and participation in the amending process by those states that had a political interest in maintaining slavery.

The Framers chose to sell the soul of the Nation—the promise of the Declaration of Independence that "all men are created equal"—in exchange for the life of the Nation as a unified whole. Perhaps, however, as indicated by the story of the thirteenth amendment as it might have been, the Framers should not be singled out for their political surrender to the evil of slavery. Justice Marshall's thesis can be tested by empirical data that can confirm or deny the thesis's accuracy. These data also can determine whether those who followed the Framers as decisionmakers also merit criticism on the issue of slavery and union. These data exist in decennial census counts related to apportionment; in the votes of Congress and congressional committees on issues related to slavery, such as territorial expansion, fugitive slaves, tariffs, and the enforcement of regulations forbidding foreign imports of slaves after 1808; and in the records of Presidential elections.

Research into these data may reveal just how much the Congresses and Presidents that followed the framing of the Constitution were

bound by the South's extra votes in the House of Representatives and in the electoral college, and how much they were bound instead by lack of desire and failure of will. This research also may reveal whether Justice Marshall was correct to criticize the Framers for selling the Nation's soul, or whether instead his criticism should have been that the Nation's soul simply was incapable of salvation.

