THE SLAVERY AND THE CONSTITUTIONAL CONVENTION: HISTORICAL PERSPECTIVES

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From September 17, 1787 to the present day, the United States Constitution has been the subject of much debate. Its vague language and ambiguous wording have created disputes for generations about the true meaning of particular clauses or the original intent of the Framers. In its essence, the Constitution is a framework, an outline, for government, leaving future generations to add color and depth to a broad, somewhat undefined blueprint. James Madison's detailed notes on the Convention have partially illuminated the struggle going on behind the closed doors of Independence Hall, but they have also raised still more questions. It seems as though the more we know about what the delegates believed during the summer of 1787, the harder it is to link their spoken words with their written ones.

The Constitutional aspects of slavery are one of those problems historians have disagreed about the most. How could staunch antislavery delegates allow the continued enslavement of millions under the government they helped form? More generally, did the delegates to the Constitutional Convention betray the principles of the Declaration of Independence by forming a union that seemed to restrict such principles to a select portion of the population? From the documentation provided thus far, it seems as though popular opinion fully supported emancipatory efforts. A detailed overview of the slavery debates can help to answer this contradiction, but historical interpretation is just as useful. Indeed, historians view the very same clauses in markedly different ways, and it is important to trace the reasons for these differences in order to better judge the Framers' words and actions.

The neo-Garrisonians have dominated the historical debate on slavery and the Constitution for the past fifty years. Using the nineteenth-century abolitionist William Lloyd Garrison's description of the Constitution as a "covenant with death and agreement with Hell" as their creed, they have chiefly criticized those northern and middle state antislavery delegates for their inability, or lack of will, to

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end slavery at the Convention. Neo-Garrisonians also depict the southern slave owning delegates as staunchly proslavery, unified in defending the institution, and expert bargainers. Paul Finkelman is perhaps the strongest critic of the founders. Depicting the southern delegates as a slave lobbying group, he writes "Rarely in American political history have the advocates of a special interest been so successful. Never has the cost of placating a special interest been so high." When Finkelman asks whether the framers could have done more to slow slavery's growth and weaken its permanence on the American landscape, he says, "surely yes." In fact, the delegates' lack of conviction in doing anything substantial about slavery "is part of the tragedy of American history." [1]

Neo-Garrisonian criticism has not only focused on the three specific clauses which historians have generally agreed mention some aspect of slavery; they have also cited any clause which tends to reinforce slavery rather than diminish it. For example, Article I, Section 8, Clause 15 provides for the militia to suppress insurrections; Article IV, Section 4 protects the states from domestic violence; and the slave states gained added representation in Congress and therefore, through the Electoral College, "their votes for President were far more potent than the votes of northerners."[2] Jack Rakove has wondered whether northern accommodation "had to go as far as it did." "Did the electoral college have to give southern states additional votes on behalf of their slaves," he asks, "when it could have been argued that if this form of property deserved any representation, the House alone would suffice?"[3]

John Hope Franklin laments that the nation's highest law of government "authorizes the continuation of the slave trade for at least another twenty years, asserts the right to count three-fifths of the slaves for purposes of representation in Congress," and demands that runaway slaves be caught and dragged back to perpetual servitude.[4] And while certain compromises were vital to forming the Union, they came, in Richard B. Morris's words, "at a terrible price."[5] With so many peripheral concessions, Finkelman says it is difficult not to conclude that the Framers "knew the problem was there. They chose to ignore it."[6]

[1] Paul Finkelman, "The Founders and Slavery: Little Ventured, Little Gained," 415-417.

[2] Finkelman, "Garrison's Constitution: The Covenant with Death and How It was Made," 242.

[3] Jack Rakove, *Original Meanings*, 93.

[4] John Hope Franklin, "Who Divided this House?" 28.

[5] Richard B. Morris, *The Forging of the Union*, 287.

[6] Finkelman, "Founders and Slavery," 447.

The charges leveled by the neo-Garrisonians are, in a way, easy to make. They have two hundred years of historical hindsight to stand upon, including a brutal Civil War, decades of lynches, and a civil rights struggle still unfolding to this day. From this perspective, it seems unusual and indeed absurd that the men who wrote the Constitution did little, if anything, to place slavery on the road to extinction. In the late 1780s a small window was opened by the recent wave of natural rights ideology brought on by the Revolution, and it seems as though the Framers missed the one golden opportunity they had to abolish forever the inhumane practice. On face value, this theory has some merit. Slavery was not abolished in 1787, and there were compromises made during the Convention that allowed for it to continue. But compromise is a two-way street, and the southern proslavery delegates may have given up just as much *to keep* their slaves than antislavery delegates yielded to their demands.

Southern delegates conceded much to the antislavery forces at the Convention, including the "strengthening of the National Government, especially with respect to the regulation of commerce and the levying of taxes." Provisions also allowed Western states to enter the Union "on an equal footing with the original States."[7] Earl M. Maltz has described what the "ideal Constitution" would have looked like from the slave state perspective. If the slaveholding delegates had gotten all they wanted, "Congress would be apportioned according to population, with slaves counted fully in the basis of representation." In addition, slaves "would not be considered in determining liability for capitation taxes." Only a supermajority in Congress could pass navigation acts, and the power to tax exports would be an exclusive state power. Finally, South Carolina and Georgia, "the two most radical slave states," would have expressly forbade Congress from ever interfering with the slave trade or even taxing those slaves imported. From this perspective, it is difficult to suggest that the compromises over slavery reflected an "overwhelming victory for the slave states" at the Convention.[8]

When slavery was brought up during the Convention, South Carolina's Charles Pinckney defended the practice on historical grounds, and Connecticut's Oliver Ellsworth "on grounds of expediency." Despite these justifications, "the defenders of slavery were an isolated and embarrassed minority."[9] A clear majority of not

[7] George Anastaplo, *Abraham Lincoln: A Constitutional Biography*, 64.

[8] Earl M. Maltz, "The Idea of the Proslavery Constitution," 41-2. Maltz says that "rather than a one-sided document, the Constitution is in fact a true compromise, reflecting substantial concessions from representatives of the slave states as well as their opponents," 38.

[9] Don B. Kates, Jr., "Abolition, Deportation, Integration: Attitudes Toward Slavery in the Early Republic," 34.

only states, but individual delegates, wished to either end the practice or at least sanction it and restrict its growth. This is reflected in the final draft of the Constitution, which did not establish any general law endorsing slavery, but instead "established laws to regulate a condition already existing." The primary purpose of those laws and regulations "was to confine slavery to those places where it then existed with the view of setting slavery on a course of eventual extinction."[10] The containment powers under the Constitution were the only means of promoting both liberty and equality at the time, because slavery was a precondition that directly and indirectly affected millions of people. As noted earlier, in the South it was a practice inherited from previous generations, rooted in economic necessity. Therefore, it is remarkable what the delegates *did do* to restrict an institution, and indeed, even a way of life.

"One of the most important, if fleeting, consequences of Revolutionary Northern abolition and the resulting legal sectionalism of slavery," writes Anthony Iaccarino, "was the fact that the delegates to the Convention explicitly restricted slavery's legality to state, not federal law."[11] Iaccarino is correct on one level: the slave trade clause prevented the federal government from ending the trade for twenty years, and the fugitive slave clause allowed citizens of one state to retrieve their fleeing slaves from another. However, relegating slavery to state control prevented the federal government from ever approving the practice in its higher law. With such words as "justly" and "lawfully" removed from the final draft, it was implicitly defined as a local state custom and not higher law, thus reflecting its dubious nature.[12] This careful phrasing "carried no implication of national sanction or protection of the institution, and it lent no explicit reinforcement to the idea of human property."[13] While Finkelman states that southerners tried to avoid using the actual term *slave* in the Constitution because "they did not want unnecessarily to antagonize their colleagues from the North," it is still significant that the document is free of the word.[14] Nowhere is it specifically recognized, thus adding weight to the argument that the "language of the

[10] John Alvis, "The Slavery Provisions of the U.S. Constitution: Means for Emancipation," 244.

[11] Anthony Iaccarino, "Virginia and the National Contest Over Slavery in the Early Republic, 1780-1833," 46.

[12] Anastaplo, *Abraham Lincoln*, 56.

[13] Don E. Fehrenbacher, *The Slaveholding Republic*, 41.

[14] Finkelman writes that North Carolina delegate James Iredell explained that "The word *slave* is not mentioned" because "the northern delegates, owing to their particular scruples on the subject of slavery, did not choose the word *slave* to be mentioned." Finkelman, "Founders and Slavery," 232.

document conveys a stance towards slavery that can be fairly characterized as a stance against it in principle."[15]

Throughout the debates, the southernmost states threatened to leave the Convention if certain concessions regarding slavery were not made. These eventual compromises not only extinguished this serious threat of disunion from South Carolina and Georgia, but they also prevented those states from establishing a separate confederacy free of any limitations on slavery. Historians have thoroughly studied the need for compromise in order to preserve the Union. Martin Torodash writes that "Failure to recognize the institution would have resulted in failure of the scheme of the Constitution." Daniel Waite Howe says that "it is certain that South Carolina and Georgia would not ratify the Constitution without the concessions made to slavery." "To expect the southern states to join the Union…was both unreasonable and unrealistic," writes Earl Maltz.

Peter S. Onuf has called attention to "the problematic character of the union—and the very real possibility of disunion," during the years immediately preceding the Convention. Conflicts over access to western lands, anger over a feeble navigation treaty, the slow pace of the Confederation Congress, and widespread dissatisfaction with taxes led many to consider "radical alternatives", including "the creation of new regional confederations."[16] In late November 1787, after the Constitution had been distributed to the general population, George Washington still believed that "there are characters who prefer disunion, or separate Confederacies," saying that "nothing in my conception is more to be deprecated than a disunion."[17] John Jay warned a month earlier that "politicians now appear, who insist…that instead of looking for safety and happiness in union, we ought to seek it in a division of the states into distinct confederacies or sovereignties," and Alexander Hamilton said that "we already we hear it whispered in the private circles of those who oppose the new constitution, that the Thirteen States are of too great extent for any general system, and that we must of necessity resort to separate confederacies of distinct portions of the whole."[18]

Clearly the most important objective at the Convention was to preserve the Union, and the compromises on slavery reflect that goal.

[15] Alvis, "Slavery Provisions," 246.

[16] Martin Torodash, "Constitutional Aspects of Slavery," 246; Daniel Waite Howe, *Political History of Slavery*, 9; Earl Maltz, "Proslavery Constitution," 58; and Peter S. Onuf, "Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective," 356-359.

[17] George Washington to David Stuart, November 30, 1787, in John C. Fitzpatrick, ed., *Writings of George Washington, Vol. 29*, 323.

[18] John Jay, "Federalist 2" (October 31, 1787) and Alexander Hamilton, "Federalist 1" (October 27, 1787); in Pole, ed., *The Federalist*, 5, 4.

The Slave Trade And The Constitutional Convention

Many of the delegates to the Constitutional Convention understood that the slave trade could only be sanctioned, and perhaps prohibited, by investing the federal government with broad powers. At the same time, though, there was strong opposition towards any proposal which limited the practice, most notably from South Carolina and Georgia delegates. These southern delegates used the threat of disunion to gain leverage in the debates, claiming that an end to the slave trade would prevent them from signing the Constitution. For example, Charles Pinckney of South Carolina declared that his state "can never receive the plan if it prohibits the slave trade." He added that if each state was left to either stop or continue the trade, as was the practice under the Articles, "South Carolina may perhaps, by degrees, do of herself what is wished…"[19] Fellow South Carolinian John Rutledge said that the "true question at present is, whether the Southern States shall or shall not be parties to the Union."[20] Rutledge himself delivered a special committee report on August 6, proposing that Congress can neither prohibit the importation of "such persons as the several States shall think proper to admit," nor tax them.[21]

The small contingent of southern delegates who wished to protect the slave trade faced a strong opposition from the northern and middle states, including upper-south delegates from Maryland and Virginia. These delegates opposed the trade for various reasons. Some believed the entire practice of slavery to be morally wrong. Virginia's George Mason called the trade an "infernal traffic" and famously opined that "Every master of slaves is born a petty tyrant. They bring the judgment of heaven on a Country."[22] Others, such as Massachusetts delegate Rufus King, thought that an increased slave population would invite domestic insurrection and foreign invasion. "Shall all the States…be bound to defend each," he asked, "and shall each be at liberty to introduce a weakness which will render defence more difficult?"[23] Despite the various reasons for opposing the trade, the majority opinion in the Convention universally wished for it to be sanctioned, or prohibited, under the Constitution.

The South Carolina and Georgia delegates maintained that their respective states would not agree to any federal government that ended the slave trade. Charles Cotesworth Pinckney, Charles Pinckney's cousin, said plainly, "South Carolina and Georgia cannot do without slaves." If the Convention rejected the report on the slave

[19] Kaminski, 7.

[20] Ibid., 58.

[21] Ibid., 55.

[22] Ibid., 59.

[23] Ibid., 55.

trade, it would mean "an exclusion of South Carolina from the Union."[24] Georgia's Abraham Baldwin said that a national government should take on "national objects" only, not local practices. If his state were left alone, "she may probably put a stop to the evil."[25] Hugh Williamson of North Carolina thought "the Southern States could not be members of the Union if the clause should be rejected, and that it was wrong to force any thing down, not absolutely necessary…."[26] Rutledge spoke the loudest when he stood to declare an ultimatum. "If the Convention thinks that North Carolina, South Carolina and Georgia will ever agree to the plan, unless their right to import slaves be untouched, the expectation is vain. The people of those states will never be such fools as to give up so important an interest."[27]

Virginia's Edmund Randolph undoubtedly spoke for many when he wished "that some middle ground might, if possible, be found." If Rutledge's proposal, forbidding any federal interference with the trade, became a part of the Constitution, Randolph and many other northern and middle state delegates would have to deal with angry antislavery constituencies in open revolt. "On the other hand," he said "two States might be lost to the Union."[28] This dilemma brought the delegates to the table of compromise for the sake of the Union. On August 24, the special committee returned with a revised clause, which stated, "The migration or importation of such persons as the several States now existing shall think proper to admit, shall not be prohibited by the Legislature prior to the year 1800, but a tax or duty may be imposed on such migration or importation…"[29] The next day, Charles Cotesworth Pinckney asked that the trade be kept opened until 1808, and several other delegates called for a ten dollar maximum tax on each slave imported.[30] Both motions were agreed to, but James Madison reminded the delegates that "Twenty years will produce all the mischief that can be apprehended from the liberty to

[24] Kaminski, 60.

[25] Ibid.

[26] Ibid., 61.

[27] Ibid.

[28] Ibid., 62.

[29] Ibid.

[30] At the time, the Confederation Congress could tax imports, but not exports, while slave importations were specifically restricted from any duties. The special committee charged with revising the slave trade clause struck out the last section, which in its rough draft form stated that a two-thirds majority in each house of Congress was need to pass any navigation acts. In the final draft, a only a simple majority was needed to tax imported slaves. For the full record of the debate over the navigation acts, see Winton U. Solbert, ed., *The Constitutional Convention and the Formation of the Union*, 278-287.

import slaves. So long a term will be dishonorable to the American character than to say nothing about it in the Constitution."[31] In twenty years, Congress would in fact outlaw the slave trade, thus exerting its authority the first year it could do so.

Despite these limiting actions taken both in 1787 and 1808, historians have not been unified in their praise for the founders. Finkelman is critical that the Constitution "prevented the national government from stopping the African slave trade or the domestic slave trade for at least twenty years." He also notes that in 1787 no state was in fact importing slaves. Therefore, "it is reasonable to believe that the Slave Trade Clause was unnecessary to secure support for the Constitution."[32] Matthew E. Mason decries the twenty year window in the clause because from 1803 to 1807, South Carolina alone imported "tens of thousands of new slaves…a number far in excess of the state's need for labor."[33] Eric Foner more generally criticizes the Convention, saying, "Whatever its other merits, the Constitution represented a step backwards when it came to slavery." Indeed, as Don Fehrenbacher writes, recent historical accounts are "virtually an indictment of the members of the Constitutional Convention. They are accused of passing up a golden opportunity to take action against slavery and of drafting instead a frame of government that legitimated and protected the institution."[34]

There are several important aspects of the slave trade clause, and the overall history of the trade, which must be addressed in order to demonstrate that these historians are mistaken. First, the history prior to the Convention shows that the slave trade was prohibited by all the states only under duress, when war with Britain required a unified trading prohibition. More importantly, the Continental Association of the Revolutionary years was a purely voluntary commitment, neither binding nor enforceable. The states individually agreed to end the slave trade for a period of time, and some eventually chose to start it again.

This was the same situation among the states under the Articles of Confederation. Several states outlawed the slave trade in their respective legislatures, while others continued the trade as needed. This "state sovereignty" approach stands in contrast to Congress's national authority under the Constitution. Despite the twenty-year continuance, ending the trade was a power expressly granted to Congress. James Madison reiterated the importance of this

[31] Kaminski, 62-3.

[32] Paul Finkelman, "The Founders and Slavery: Little Ventured, Little Gained," 414-15, 435.

[33] Matthew Mason, "Slavery Overshadowed: Congress Debates Prohibiting the Atlantic Slave Trade to the United States, 1806-1807," 62.

[34] Don Fehrenbacher, *Slaveholding Republic*, 39.

new federal power during the Virginia ratifying convention in 1788. "We are not in a worse situation than before," he said. "The union in general is not in a worse situation. Under the articles of confederation, it might be continued forever: But by this clause an end may be put to it after twenty years. There is therefore an amelioration of our circumstances."[35]

The very wording of the clause itself is also significant, because in every instance, the language is at odds with slavery. The first portion, "The Migration or Importation of such Persons," says nothing of slaves or slavery. While it is acknowledged that "such persons" meant slaves, it is critical that the word is not in the clause, nor in any part of the Constitution. John Alvis recognizes this important omission, writing that "the avoidance of any explicit acknowledgment of slavery suggests that one cannot look to the supreme law of the land for authorization in owning human beings. Ownership of men will not derive from federal authority."[36] Designating slaves as "persons" also conferred upon them some level of rights under the broad definition Jefferson outlined in the Declaration of Independence. "Persons" have natural rights, such as the right to life, liberty, and the pursuit of happiness. The use of "persons" is a clear sign that those antislavery delegates at the Convention sought to offer slavery the least possible protection under the new government.

The second portion of the clause pertains to "any of the States now existing." This subtle phrase gave Congress federal power to prohibit the slave trade in any new states admitted to the Union. Congress was only barred from legislating against the slave trade in the thirteen states existing in 1787, and more specifically, to those southern states who did in fact engage in the practice. This restriction, when read in conjunction with the Northwest Ordinance of 1787 which outlawed slavery in the Northwest Territory, "indicated a general disposition to view slavery as the exception rather than the rule in an expanding government."[37] Alvis has said that with this important qualification, "at least one door was closed to the admission of slaves into new lands."[38]

The last provision of the clause says that a maximum duty of ten dollars may be placed on each slave imported. This tax was not meant to demean slaves as being equivalent to taxable goods or merchandise. Indeed, during the Convention debates, Roger Sherman

[35] James Madison, William T. Hutchinson and William M.E. Rachal, eds., *Papers of James Madison*, 150.

[36] John Alvis, "The Slavery Provisions of the U.S. Constitution: Means for Emancipation," 247.

[37] Fehrenbacher, *Slaveholding Republic*, 43.

[38] Alvis, "Slavery Provisions of the U.S. Constitution", 253.

of Connecticut said he was against laying taxes on slaves, "as acknowledging men to be property, by taxing them as such under the character of slaves." Massachusetts's Nathaniel Gorham asked Sherman to reconsider, "not as implying that slaves are property, but as a discouragement to the importation of them."[39] Many southerners realized the crippling affect that taxing slaves would have on the South. During the South Carolina ratification debates, Rawlins Lowndes said that even with the twenty year concession, "care had been taken to make us pay for this indulgence." "Negroes were our wealth," he said, "our only natural resource, yet behold how our kind friends in the North were determined soon to tie up our hands, and drain us of what we had."[40] When the final draft of the clause is compared with John Rutledge's original proposal, which barred Congress from either interfering with the slave trade or taxing any import, the result was a positive gain for antislavery proponents.

The need for compromise in order to preserve the union has been thoroughly studied, but few historians have taken the next logical step to ask what the plight of slaves would have been under a southern confederacy. Would they have been better off under a southern union of states rather than the Constitution, or is such postulating ahistorical by nature? For as much as neo-Garrisonians have criticized the founders, they have at least acknowledged the consequences of disunion. Finkelman states that if the northern delegates had tried to outright end slavery nationally, "most of the delegates from south of the Mason-Dixon line would have walked out. Rather than creating a 'more perfect Union,' the delegates might have destroyed the Union altogether if they had pushed for abolition." But rather than emphasize the importance of compromise for the sake of keeping that very Union together, he says, "It is not unreasonable to ask if the Framers might have been better off creating two separate nations, one based on slavery and one based on liberty." Finkelman believes that the problem could have been solved by cutting off the problem, thus making it a non-issue.[41]

What Finkelman fails to recognize is that the threat of disunion highlights the necessity for compromise on the slave trade. Every time slavery was subjected to criticism during the Convention debates, the South Carolina and Georgia delegates threatened to leave the Union. Finkelman has been highly suspicious of these threats, claiming that the creation of a separate Southern confederacy seemed at best "unlikely." He says that if the framers had done nothing about the slave trade, "it is likely the Constitution would have been ratified" and that South Carolina "might have pouted for a while and perhaps

[39] Kaminski, 63-4.

[40] Bernard Bailyn, ed., *The Debate on the Constitution: Part Two*, 21.

[41] Finkelman, "The Founders and Slavery," 415.

not been one of the early states to ratify. But the state would have quickly realized that it was in no condition to go it alone."[42]

Finkelman's theory rests on the dubious assumption that the South would be weakened without the defensive protections offered by the Union, and he fails to realize the enormous gains the slaveholding states would reap without any limitations on slavery. An independent Southern confederacy would be free to continue the slave trade indefinitely; it would certainly not tax any slave imports, and the institution in general would largely be free of criticism. James Madison echoed this fear at the ratification debates when he reminded his fellow Virginians that South Carolina and Georgia would not have joined the Union if the slave trade was immediately outlawed. [43] The framers never entertained the thought of splitting the states into two countries, because the consequences would have been detrimental to the entire nation.

Finkelman's "all or nothing" approach indeed would have benefited neither the northern or southern states. George Anastaplo has reasoned that if the work in Philadelphia had ended without agreement and the Union was disbanded, "The South would have been left as an independent, slavery-dominated country." There were "reasons to believe that [a Southern Union] would have been…an expansionist power, moving with its slave codes into the Gulf of Mexico, Cuba, Mexico, and even further South." In contrast to Finkelman, he says that "such a Southern move to go it alone probably could not have been stopped in 1787."[44] "What, then, was in the interest of the slaves," he asks. "[T]o be abandoned completely to the control of a country governed altogether by the slaveholding interests or to be left in a country in which compromises had to be made with slavery in order to preserve" the Union?"[45] From this perspective, it is not only reasonable that such compromises, and even concessions, were made at the Convention, but it was the only way to prevent slavery from being sealed off from attack in a separate sovereign confederacy.

Anastaplo's theory has merit, because the rising antislavery opposition detailed earlier was at the time still diffuse and lacked the structure it would develop in the nineteenth century. Pennsylvania Quakers and Methodist and Virginia Baptists had been petitioning Congress for restrictions on the slave trade since the early 1780s, but there never was any coordination to their efforts, and instead their petitions amounted to complaint letters. At the time of the Convention, slavery was "supported by the laws of every state except

[42] Finkelman, "The Founders and Slavery," 436-7.

[43] Bailyn, *Debate on the Constitution: Part Two*, 707.

[44] George Anastaplo, *Abraham Lincoln: A Constitutional Biography*, 62-4.

[45] Anastaplo, *Abraham Lincoln*, 62.

Vermont, New Hampshire, and Massachusetts," while the practice and acceptance of the institution had been entrenched in the southern mind for generations.[46] It therefore is extraordinary that not only was the slave trade limited and ultimately abolished, but that a nascent antislavery opposition made significant Constitutional gains at a time when slavery was the accepted norm.

In addition, the ideal slave state Constitution which Maltz describes adds further proof that the final product was antislavery in its overall language. The final draft consigned slavery to state custom and gave it no direct federal protection. Simultaneously, it established a national forum, the United States Congress, where the issue could be questioned and debated. Although by 1787 slavery was deeply ingrained in the country, the Constitution gave the government the means to restrict its growth, and the opportunity to discuss its merits.

Debates Outside The Convention

During the ratification debates in the state legislatures, the slave trade was the most contentious of all the slavery clauses. Delegates to these conventions held numerous opinions on the compromise, and their arguments for and against the trade demonstrate a real concern that the greater institution of slavery would ultimately be either expressly legalized or entirely criminal. In northern conventions, delegates eased their constituents' fears by pointing to the fact that the word "slavery" was never mentioned in the Constitution. "Northern delegates could return home asserting that the Constitution did not recognize the legality of slavery," writes Finkelman. "In the most technical linguistic sense they were perhaps right."[47]

Here, Finkelman misjudges the importance of such an omission. If the framers sanctioned that which they could not bring themselves to name, what does this say about the Constitution they wrote? Most assuredly, that such a term was anathema to them. On another level, putting slaves on par with other persons speaks to the document's universal nature. If the framers intended to keep slavery protected in the Constitution, then why was it only vaguely referred to? The answer cannot be that "persons" would be more palatable to northern ears, because if everyone knew that "persons" meant slaves, then why go through pains to *not* have slavery written into the document? The only logical answer is that the framers intended to write a charter of government that transcended the present local perplexities and customs within various regions, one that spoke to current and future

[46] David Brion Davis, "The Significance of Excluding Slavery from the Old Northwest in 1787," 81.

[47] ibid., 242.

generations, even for those who in 1787 were doomed to perpetual servitude.

The slave trade clause was discussed more than any other issue related to slavery in the ratifying conventions, mainly because of its potential to limit the trade in the future, but also because many believed it amounted to a delayed power of abolishment. Many northern citizens lamented the very practice, but looked toward a promising pattern emerging in many states. Simeon Baldwin of Connecticut said that most "of the southern & middle states have made salutary provision by law for the future emancipation of this unfortunate race of men," and it was enlightening that the southern states had "consented to [the slave trade clause] in our new constitution evidently calculated to abolish a slavery upon which they calculated their riches."[48]

Even before the Constitution was sent to the states for debate and ratification, the political propaganda and campaigning had already begun. In early October 1787, just weeks after the Convention ended, Pennsylvania state representative Robert Waln wrote to his brother in Philadelphia about the Constitution's power to influence slavery. Waln thought that "as each state is still at liberty to enact such laws for the abolition of slavery as they may think proper, the Convention cannot be charg'd with holding out any encouragement to it."[49] Noah Webster believed the Constitution wisely allowed each state to decide on emancipation, because an "immediate abolition of slavery would bring ruin upon the whites, and misery upon the blacks, in the southern states." During the twenty-one years before Congress could outlaw the slave trade, each state was free to "pursue its own measures."[50]

Northern newspapers were filled with abolitionist and antislavery tracts, and they led the initial assault on slavery and the slave trade in the fall of 1787. The Providence *United States Chronicle* referred to the trade as the "horrid Practice" and "that Heaven-daring Wickedness."[51] Tench Coxe wrote that the slave trade clause laid a "solid foundation…for exploding the principles of negro slavery." He reasoned that any "*temporary* reservation…must be deemed an admission that it should be done away."[52] Samuel Hopkins, however, did not agree that the slave trade clause benefited the cause. The

[48] Simeon Baldwin, New Haven Connecticut (July 4, 1788); in Bailyn, *Debate on the Constitution, Part Two*, 525.

[49] Robert Waln to Richard Waln, Philadelphia (October 3, 1787); in Kaminski, 118.

[50] Noah Webster, Philadelphia (October 17, 1787); in Bernard Bailyn, ed., *The Debate on the Constitution, Part One*, 153.

[51] October 18, 1787; in Kaminski, 73.

[52] October 21, 1787; in ibid., 119.

delegates, Hopkins wrote to Moses Brown, "have carefully secured the practice of it in these States for 20 years…They have taken it out of the hands of Congress." Hopkins also believed that compromises such as this were necessary to establishing the Constitution. He knew that the southern delegates had insisted on the slave trade provision, and "obstinately refused to consent to any constitution, which did not secure it." Therefore, it was apparent to him "that if this constitution be not adopted by the States, as it now stands, we shall have none, and nothing but anarchy and confusion can be expected."[53]

William Rotch was less forgiving than Samuel Hopkins, and in a letter to Moses Brown in November 1787, he wrote that "it is evident to me [the Constitution] is founded on *Slavery* and that is on *Blood*…"[54] Both Rotch's and Hopkins's views on the Constitution relate the essence of northern opinion on the slavery provisions: they were seen as either a necessity to ward off greater evils (like disunion), or they were atrocities added purely to placate southerners in some underhanded bargain. Benjamin Workman strongly voiced his disapproval of the Constitution, writing how strange it was "that the professed enemies of *negro* and every other species of *slavery*, should themselves join in the adoption of a constitution whose very basis is *despotism* and *slavery*." The plan of government, Workman said, "militates so far against freedom, that even their own religious liberty may probably be destroyed."[55] Oliver Ellsworth, writing in the *Connecticut Courant*, was more optimistic. "The only possible step that could be taken towards it by the convention was to fix a period after which they should not be imported."[56]

In the Pennsylvania convention, Thomas McKean rejoiced that the "abolition of slavery is put within the reach of the federal government."[57] Anthony Wayne, like so many others, compared the clause to the lack of any restraint under the Articles of Confederation. James Wilson worked to persuade others that the slave trade had been dealt a fatal blow. He said that at present "states may admit the importation of slaves as long as they please," but "by this article after the year 1808, the congress will have power to prohibit such importation…" Wilson thought that Congress's powers would, or

[53] Samuel Hopkins to Moses Brown, Newport, Rhode Island (October 22, 1787); in ibid., 73.

[54] William Rotch, Sr., to Moses Brown, Nantucket, Rhode Island (November 8, 1787); in Ibid., 74.

[55] Benjamin Workman, Philadelphia's *Freeman's Journal* (November 28, 1787); in ibid., 134.

[56] Oliver Ellsworth, *Connecticut Courant* (December 10, 1787); in ibid., 78.

[57] Thomas McKean, Pennsylvania Ratification Convention Debates (November 28, 1787); in ibid., 135.

should, extend to outright abolition. Combined with the power to tax imported slaves, he believed the twenty year limit laid "the foundation for banishing slavery out of this country; and though the period is more distant than I could wish, yet it will produce the same kind, gradual change, which was pursued in Pennsylvania."[58] Believing that the tax on imported slaves was "an immediate advantage," Wilson told his fellow delegates that during the subsequent twenty years, "the new states which are to be formed, will be under the control of congress…and slaves will never by introduced amongst them."[59] In his view, the clause was one of the more "lovely" features in the Constitution. "Yet the lapse of a few years," he said, "and Congress will have power to exterminate slavery from within our borders."[60]

A large portion of the delegates to the Massachusetts ratifying convention were uneasy about the slave trade clause. While many voiced concern that the trade would continue for twenty years, a strong group of Federalists worked to ease such fears. Reverend Isaac Backus explained that "we have now gained a check which we had not before," hoping that "in time we shall stop the slave trade."[61] He would also reason that with the delayed prohibition, "a door is now opened" to end the trade.[62] General Samuel Thompson stood to elaborate on Backus's rationalization, reminding the convention that under the Articles of Confederation there was no such prohibitive power. The Constitution, however, provided "that Congress may, after 20 years, totally annihilate the slave trade; and that all the states, except two, have passed laws to this effect, it might reasonably be expected that it would then be done." In addition, because "all the states, except two, have passed laws to this effect, it might reasonably be expected, that it would then be done." In the meantime, "all the states were at liberty to prohibit it."[63]

William Heath reminded the Massachusetts convention that while compromise meant northern states acquiesced to southern demands protecting the trade, the slave states did not get what they entirely wanted either. "The federal Convention went as far as they could," Heath said. The "migration or importation, &c. is confined to the States now *existing only*, new States cannot claim it. Congress by their ordinance for erecting new States…declared, that the new States shall be republican, and that there shall be no slavery in them."[64] At

[58] Ibid., 137.

[59] James Wilson (December 3, 1787); in Bailyn, *Debate on the Constitution, Part One*, 830.

[60] Ibid., 138.

[61] Kaminski, 88.

[62] Ibid., 91.

[63] Ibid., 89.

[64] Ibid., 90.

the same time, though, he cautioned radical antislavery advocates that in 1808 many southern states would not emancipate their slaves.[65]

On January 30, Heath elaborated on his conviction that the north could not force the south to abolish slavery. "Each state is sovereign and independent to a certain degree," he said, "and they have a right, and will regulate their own internal affairs, as to themselves appears proper." Heath was expounding upon the notion, born out of the Revolutionary era, that the individual should ideally be at liberty to possess private property free of government intrusion. Bluntly stating that "we are not in this case partakers of other men's sins, for in nothing do we voluntarily encourage the slavery of our fellow men," he at the same time drew a line between northern antislavery and southern proslavery ideals.[66]

The location of slaves influenced the arguments used in the ratifying conventions. As Fehrenbacher has said, "advocates of ratification were likely to stress [the Constitution's] proslavery features in the South and its antislavery potential in the North. Opponents of ratification tended to do the reverse."[67] David Ramsay of Charleston, South Carolina said that though "Congress may forbid the importation of negroes after 21 years, it does not follow that they will. On the other hand, it is probable that they will not." Ramsay believed the rice crops would increase business in the north, and they would in turn allow for the slave trade to continue.[68] In such upper south states as Virginia, however, it was difficult to frame the Constitution either way, because there was a strong mixture of both pro- and antislavery sentiment in the area. At the Virginia convention, George Mason and James Madison both pointed out that the clauses concerning the general welfare and defense, and those pertaining to taxation, could be interpreted as expressly opposing slavery. "Their expressed concerns should give pause to historians who suggest that the Constitution was an unequivocally proslavery document," writes Anthony Iaccarino.[69]

The genuine disagreement in Virginia over whether slavery would be protected or abolished under the Constitution highlights the institution's potential vulnerability at the time, and shows that all did not agree that it was safe from federal intervention. Patrick Henry thought that several confederacies would best protect slavery, and he

[65] General William Heath, Massachusetts Ratification Convention Debates (January 30, 1788); in Bailyn, *Debates*, 916.

[66] Heath (January 30, 1788), Kaminski, 90.

[67] Don. E. Fehrenbacher, *The Slaveholding Republic*, 37.

[68] David Ramsay, Charleston *Columbia Herald* (February 4, 1788); in Kaminski, 178.

[69] Anthony Iaacarino, "Virginia and the National Contest Over Slavery in the Early Republic, 1780-1833," 2.

believed such a framework was possible at the time. "Compared to such a consolidation, small Confederacies are little evils," he said. Virginia and North Carolina "could exist separated from the rest of America" and they would not be "swallowed up" in any Union they did not agree to.[70] Zachariah Johnston reminded his fellow Virginians that, though slavery was at least acknowledged under the Constitution, the document as a whole was better than anything yet produced. "This Constitution may have defects," he said. "There can be no human institution without defects. We must go out of this world to find it otherwise. The annals of mankind do not shew us one example of a perfect Constitution."[71]

A dissolution of the union was on the minds of many citizens when they read the slavery provisions, and they realized that such concessions were needed in order to maintain a solid union of states. Governor Edmund Randolph gave an impassioned speech on the consequences of failure. "I entertain no less horror at the thought of partial confederacies," he wrote. A confederacy composed of southern states would be weighed down by their slave populations; their ability to defend themselves would be diminished "by the mixture of unhappy species of property."[72] George Washington also believed secession was not only dreadful, but a very real possibility. "I am fully persuaded it is the *best that can be obtained at this Time*," he said, "and that *it* or *Disunion* is before us to choose from."[73] Still, there were many who supported Simeon Baldwin's view that "an odious slavery, cruel in itself, degrading to the dignity of man, and shocking to human nature, is tolerated, and in many instances practised with barbarian cruelty." Threat of disunion or not, Baldwin scorned the delegates for missing a prime opportunity to abolish the institution.[74]

As mentioned earlier, Virginia's George Mason emerged as the leading opponent of the slave trade, but his criticism conflicted with his firm belief that slavery within the states should be protected. On June 11, 1788, he spoke of "the continuation of this detestable trade," but then complained that "there is no clause in the Constitution that will prevent the Northern and Eastern States from meddling with our whole property of that kind. He argued for a clause "to secure us that

[70] Patrick Henry, Virginia Ratification Convention (June 9, 1788); in Herbert J. Storing, ed., *The Anti-Federalist*, 317.

[71] Zachariah Johnston, Virginia Ratification Convention (June 25, 1788); in Bernard Bailyn, ed., *The Debate on the Constitution, Part Two*, 755.

[72] Governor Edmund Randolph, Richmond, Virginia (December 27, 1787); in Bailyn *Part One*, 603-605.

[73] George Washington to Charles Carter, *Virginia Herald* (December 27, 1787; in ibid., 612.

[74] Simeon Baldwin's Oration, New Haven, Connecticut (July 4, 1788); in Kaminski, 113.

property, which we have acquired under our former laws, and the loss of which would bring ruin on a great many people."[75] Incredulous, Henry Lee explained that Mason "abominates [the Constitution], because it does not prohibit the importation of slaves, and because it does not secure the continuance of the existing slavery!" Lee asked, "if it be reprehensible in the one case, it can be censurable in the other?"[76]

Mason tried to elaborate on his position, explaining that "the augmentation of slaves weakens the States; and such a trade is diabolical in itself, and disgraceful to mankind." He even said that he "would not admit the Southern States into the Union, unless they agreed to the discontinuance of this disgraceful trade," because it would weaken the Union.[77] It seems Mason opposed the slave trade more because he thought it weakened the nation's defensive capabilities, and less because of its "disgraceful" nature. Indeed, it was difficult for him to criticize a trade providing the landed gentry of which he was a part with the very species of property he wished to protect. On the contrary, Mason had ample reason to abhor the trade but tolerate the practice of slavery. In 1787-88 Virginia had a surplus of slaves and did not need anymore; slave owners sought to sell the excess slaves to planters from other states, and therefore wanted greater protection for a commodity that was scarce elsewhere.

James Madison, rising to answer Mason's charges, agreed that such a clause would seem imprudent, "if it were on of those things which could be excluded without encountering greater evils." Such an evil was disunion, Madison explained. "The Southern States would not have entered into the Union of America, without the temporary permission of that trade. And if they were excluded from the Union, the consequences might be dreadful to them and to us."[78] Turning to the language of the clause itself, Madison said, "We are not in a worse situation than before." Virginia already prohibited the trade, and they were free to continue its proscription. Even the Union was better off with the clause, because "an end may be put to it after twenty years," and a tax "may be laid in the meantime."

The slave trade compromise, when compared to no sanctions or rules under the Articles, provided "an amelioration of our circumstances." Madison again reminded Mason and others that, "Great as the evil is, a dismemberment of the Union would be worse. If those States should disunite from the other States, for not indulging them in the temporary continuance of this traffic, they might solicit

[75] George Mason, Virginia Ratifying Convention Debates (June 11, 1788); in ibid., 185-186.

[76] Ibid., 186-7.

[77] Mason (June 17, 1788); in ibid., 186-187.

[78] James Madison, ibid., 187.

and obtain aid from foreign powers."[79] George Nicholas readily agreed with Madison that disunion was worse than twenty years more of the slave trade. "As the Southern States would not confederate without this clause," Nicholas asked "if Gentlemen would rather dissolve the Confederacy than to suffer this temporary inconvenience, admitting it to be such?"[80] The point was clear: the southernmost states would not have signed the Constitution if slavery was abolished.

If the northern, middle, and upper south ratifying conventions demonstrate a consistent belief that the slave trade was put in jeopardy under the Constitution, then it seems that Deep South conventions should conversely be pervasive with defenses of the trade, and praise for its continuation. Instead, many southerners were upset that the trade would be subject to review in twenty years, and they criticized their delegates for bargaining away their rights to import slaves. For example, in the South Carolina House of Representatives Rawlins Lowndes asked pointedly, "Why confine us to 20 years, or rather why limit us at all?" He thought "this trade could be justified on the principles of religion, humanity and justice," and without slaves, "this state would degenerate into one of the most contemptible in the union." While slaves "were our wealth, our only natural resource," the northern states "were determined soon to tie up our hands, and drain us of what we had." Citing the lack of any restrictions on New England importations, Lowndes wondered why anyone would "call this a reciprocal bargain, which took all from one party to bestow it on the other?"[81]

Charles Cotesworth Pinckney, who had bargained for the slave trade clause in Philadelphia, tried to answer Lowndes's charges. Pickney said that the South Carolina and Georgia delegations "had to contend with the religious and political privileges of the eastern and middle states, and with the interested and inconsistent opinion of Virginia, who was warmly opposed to our importing more slaves." The southernmost states could not acquire an unsanctioned slave trade; they had to bargain for any allowance. Turning to the clause itself, Pinckney highlighted the advantageous portions for the House members. "By this settlement we have secured an unlimited importation of negroes for twenty years; nor is it declared that the importation shall be then stopped; it may be continued." In addition, the south would have "a security that the general government can never emancipate them, for no such authority is granted." When all the circumstances were considered, Pinckney thought "we have made

[79] Ibid., 187-188.

[80] Ibid., 189.

[81] Rawlins Lowndes, South Carolina House of Representatives, Debate over the Calling of a State Ratifying Convention (January 16, 1788); in ibid., 167-168.

the best terms for the security of this species of property it was in our power to make."[82] Robert Barnwell stood to support Pickney, saying that "Congress has guaranteed this right for that space of time, and at is expiration may continue it as long as they please."[83] Picnkey and Barnwell were correct in a sense, but in another, the limited power of the new government with respect to slavery implicitly acknowledged that such powers *needed* to be stated. The very act of stating powers, or restrictions on power, implies that they have been challenged, either in the Federal Convention or in public opinion throughout the country. That such powers and restrictions were necessary to settle disputes of ambiguity points to a certain degree of slavery's vulnerability. To men like Rawlins Lowndes, the delegates had not attained a ringing endorsement of slavery, but only a temporary continuation of a vital "resource."

During the North Carolina ratifying convention slavery was, for some, a problem with no clear solution; the slave trade clause presented an opportunity to limit at least one aspect of the practice. On July 26, 1788, James Iredell said that "were it practicable to put an end to the importation of slaves immediately, it would give me the greatest pleasure; for it certainly is a trade inconsistent with the rights of humanity, and under which great cruelties have been exercised." While he believed that emancipation "will be an event which must be pleasing to every generous mind, and every friend of human nature," he added that "we often wish for things which are not attainable."[84] The final version of the clause settled upon, Iredell explained, "was the utmost that could be obtained." Wishing that more could have been done, he asked the convention delegates, "Where is there another country in which such a restriction prevails? We, therefore…set an example of humanity, by providing for the abolition of this inhuman traffic, though at a distant period."[85] James Galloway also spoke in favor of the clause, saying he wished "to see this abominable trade put an end to."[86]

The debates over the slave trade in the state ratifying conventions suggest that the majority of delegates voting on the Constitution wished for the trade to end as soon as possible, while many also despised the larger practice of slavery. Only in the Deep South was slavery, much less the importation of slaves, viewed as something along the lines of a positive good. Those advocates such as

[82] Charles Cotesworth Pinckney, S.C. House (January 17); in ibid., 169-170.

[83] Ibid.

[84] James Iredell, North Carolina Ratifying Convention Debates (July 26, 1788); in ibid., 198-199.

[85] Ibid., 199.

[86] Ibid.

Charles Pinckney, who judged the slave trade clause as great concession to the south, were in the clear minority, but the fact remains that it was indeed added to the Constitution.

Despite the fervent antislavery stance in the northern and middle states, the established government would allow for the slave trade to continue. It is clear, however, that while the Constitution indirectly acknowledged slavery to exist within the states, this was in no way a positive endorsement of the institution, much less the importation of slaves. The slave trade clause was the most forceful stance a fledgling country could take at a time when disunion was a genuine threat. A nation that had cut ties with slave states would never see the problem diminish, but only expand and grow at an even faster rate. The slave trade clause restricted this expansion and stunted this growth.