A SLAVEHOLDERS' UNION

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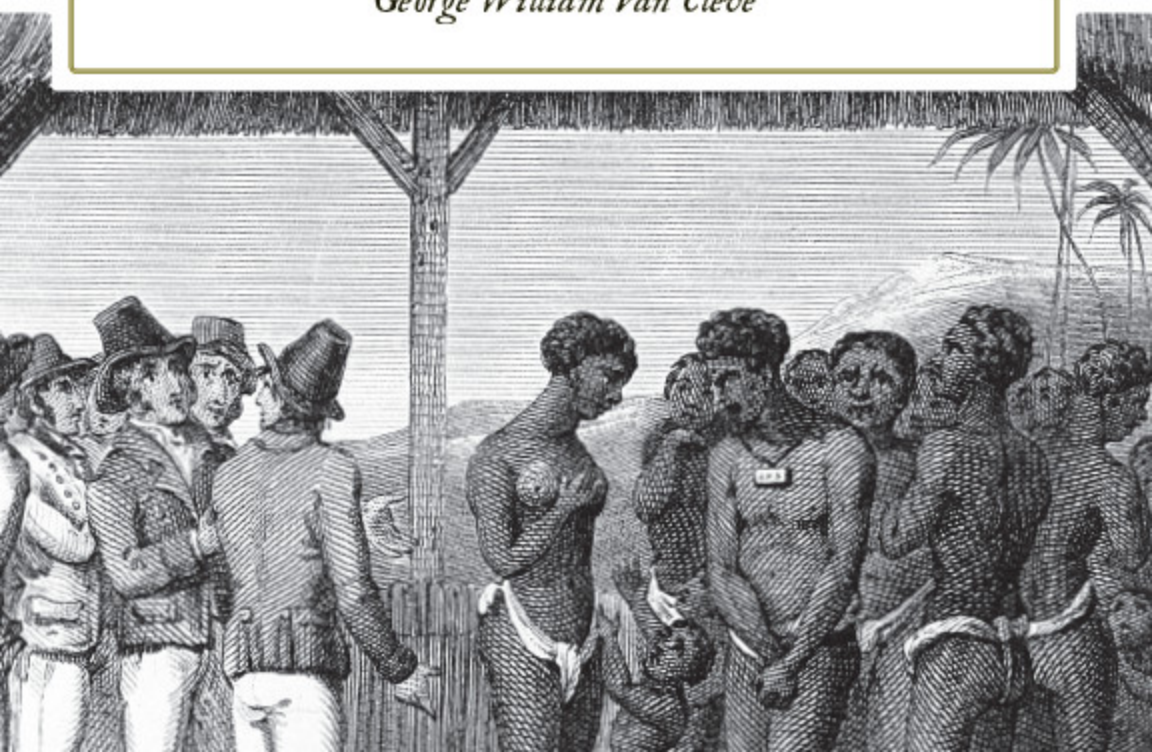

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FOR MY WIFE AND CHILDREN AND OUR FELLOW CITIZENS,
NOW AND IN THE YEARS TO COME

To hear this history rehearsed, for that there be inserted in it no fables, shall be perhaps not delightful. But he that desires to look into the truth of things done, and which (according to the condition of humanity) may be done again, or at least their like, he shall find enough herein to make him think it profitable. And it is compiled rather for an everlasting possession, than to be rehearsed for a prize.

Thucydides, *The Peloponnesian War*
(trans. Thomas Hobbes)

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INTRODUCTION

On July 2, 1785, Richard Price, a prominent British minister, wrote to Thomas Jefferson in Paris, thanking him for a copy of Jefferson's *Notes on the State of Virginia*. In it, Jefferson portrayed slavery as an antirepublican, culturally corrupting institution that encouraged "unremitting despotism," "degrading submissions," and "a perpetual exercise of the most boisterous passions."[1] Price congratulated Jefferson on the "wisdom and liberality" of his sentiments, but questioned whether they were shared by other American leaders. Price said that he had written a pamphlet advocating the gradual abolition of slavery that South Carolina leaders had "agreed in reprobating," because they regarded abolition as a measure that "will never find encouragement in that State." Price asked Jefferson whether it was therefore "ridiculous" to claim, as Price had, that the American Revolution was dedicated to bringing an end to American slavery.[2]

In response, Jefferson provided an optimistic survey of the American progress of the revolutionary challenge to slavery, which offered the "interesting spectacle of justice in conflict with avarice and oppression: a conflict wherein the sacred side is gaining daily recruits . . ." Slavery would be abolished "in a few years" everywhere north of Maryland, he predicted. Jefferson admitted that "Southward of the Chesapeak" Price's pamphlet would "find but few readers concurring with it . . . on the subject of slavery." In Virginia, he hoped that young men then being educated would see slavery as an evil that needed to be extirpated by their generation: "to them I look with anxiety to turn the fate of this question."[3]

But Jefferson's hopes for the progress of abolition were to be disappointed, particularly from Maryland southward. In the early decades of the new Republic, slavery grew markedly instead. By early 1820, shortly after the Missouri controversy began, there were ten states with substan-

tial slave populations, double the number of such states at the time of the Revolution. There were more than two and a half times as many slaves in America as there had been when the Revolution began.

During the vitriolic congressional debates over Missouri statehood in 1820, Senator Jonathan Roberts of Pennsylvania pleaded with his colleagues to "restrict" Missouri from becoming a slave state. Roberts warned them that allowing slavery in Missouri would betray the ideals of the Revolution expressed in the Declaration of Independence, a solemn "covenant of our fathers" entered into before the "Supreme Judge of the world." And he begged them as fellow Christians not to admit Missouri deformed by slavery, its features hideous and "marred as if the finger of Lucifer had been drawn across them."[4]

Slave state representatives remained obdurate. They insisted that Missouri must be allowed to enter the Union with the right to decide for itself on slavery (anticipating that it would become a slave state). Thomas Jefferson joined their ranks. In the spring of 1820, he wrote to Congressman John Holmes passionately opposing restriction, describing it as a betrayal of the 1776 Revolution's principles of self-government that was "treason against the hopes of the world." In early 1821, he wrote to House of Representatives Speaker John W. Taylor, a New York congressman and major restriction leader, saying that he was not certain that the American empire of liberty he had hoped to create would be preserved, because the "Northern bears [supporting restriction] seem bristling up to maintain the empire of force."[5]

How had slavery survived a revolution that Roberts, like many in the Founding generation, believed was supposed to end it? How had it grown to the point where its representatives had the power to defy Northern efforts to contain it? Why did Roberts and Jefferson take opposing views of the Revolution's implications for slavery? Had Jefferson lost sight of the Revolution's principles, or had the Revolution's relationship to slavery been more complex and equivocal than he had earlier thought? This book examines these questions as part of a broad reconsideration of slavery's place in American politics and law during the early Republic. It seeks to understand how and why slavery's long-term presence in much of America was sanctioned by the Missouri compromises.

By reappraising slavery's place in early American political life, we can gain a new appreciation of the relationship between the underlying forces that shaped early American society and politics, on the one hand, and the Revolution, the Constitution, and America's rapid progress toward conti-

nental empire on the other. This reassessment will provide a clearer sense of the Constitution's political limitations, including a better understanding of the origins and significance of foundational concepts such as federalism and the tensions in its efforts to govern by majority rule while protecting minority interests through the rule of law. It will shed new light on the complex coalition politics of the Founding era. And it will permit us to obtain a clearer grasp of important shifts in the political terrain of the early nineteenth century as the nation expanded westward.

To achieve these purposes, this book creates an integrated portrait of major state and federal political and legal developments related to slavery during the years 1770 to 1821.[6] It is not intended as a comprehensive account either of the entire law of slavery, or of the history of slavery or race relations, during that period. Nor is it a history of party politics. Instead, it combines evidence drawn from public law and the history of a series of pivotal moments in slavery's evolution to provide a better integrated account of slavery's relation to politics and law in the early Republic. It synthesizes current knowledge in certain areas, and offers new evidence, analysis, and interpretations in several others. Following is a brief overview of the main points of its argument.

The widespread adoption of slave plantation agriculture in British American mainland colonies with the encouragement of the British Empire gave rise to wealthy slave labor–dominated economies in the southern colonies by the late eighteenth century. The British and colonial law of slavery developed largely in support of this aspect of Britain's imperial economy. Slavery came under broad legal and political attack just before the American Revolution, but in the American colonies, the political and legal results of that attack were mixed, and in important ways reinforced opposition to Britain. The Revolution itself ultimately strengthened slavery.

James Madison was correct that after the Revolution, the political interests of the American regions were often principally divided by whether the states in them had major slave agricultural economies or not—as Madison put this, by "[the effects of] having or not having slaves." The sources suggest that the Constitution was an effort to finesse this sectional division by sharing power between sections. The protection of slavery and the first sectional division of the West were integral to the Constitution's adoption. Slavery was able to expand in response to market forces without substantial federal government interference for nearly fifty years after the Revolution.

Despite Madison's hopes, the Constitution ultimately failed as a means for controlling sectional divisions. Sectional tensions were evident as early as the presidential election of 1796. What temporarily suppressed these sectional divisions was the massive western expansion that began under Washington and accelerated sharply under Jefferson and his Virginia successors, accompanied by the rise of Jeffersonian Republican ideology. When the sections' expanding settlement paths collided, as they did in 1820, and the frontiers appeared to close, sectional tensions reemerged.[7]

The Constitution's political and judicial means for resolving disputes—in other words, its rule of law—could not control the conflict between slave economies and an emerging free-labor, free-land ideology espoused by the Northern states.[8] Unlike England, in the early American republic the law played a relatively dependent role in slavery's evolution. The rise of republican government meant that early American courts, facing continued resistance to their role as constitutional arbiters, either avoided divisive issues like slavery or deferred to legislatures on them.

Although Northern states engaged in abolition and slaveowners' rights to manumit slaves were liberalized after the Revolution, those changes had little effect on the political environment facing slavery nationally or in the slave states, or on the course of its westward expansion. On the positive side, the actions of states that undertook gradual abolition or liberalized manumission freed about 11 percent of the total American black population by 1800. But during the period from 1770 to 1800 alone, the North American slave population nearly doubled, growing from about 470,000 in 1770 to nearly 900,000 by 1800.

Failure to control slavery's growth resulted from slave-state efforts to expand slavery combined with divided northern public opinion about abolition and black equality. Slave states united in seeking to expand slavery westward. Their early differences over continued slave imports had little effect on slavery's development. Northern state abolition laws shifted the costs of abolition to blacks, and often had major loopholes for years or were poorly enforced. Such laws represented the most that white majorities were willing to do to assist even those states' resident blacks, let alone slaves elsewhere.

The result of these political decisions at the state and federal levels and their implementation through Jeffersonian Republican-style national expansion that opposed federal coercion in governing new territory was that slavery was far larger and politically stronger in the slave states and at the federal level by the time of the Missouri controversy than it had been in

1770 under the British Empire. The Missouri compromises, far from setting slavery on a "course of ultimate extinction," as Lincoln thought, ratified the long-term existence of slavery in a large part of the country. They left open the prospect that slavery would expand further both through territorial acquisition and through legislative reversal of the compromises. In the end, slave states won the "war on the ground" (as opposed to the rhetorical war), as they had won the war on the ground from the beginning of the Republic. The controversy meant an end to the rule of law under the Constitution where slavery was concerned, effectively transforming it into a sectional "compact" instead. The Constitution's mechanisms for allocating political authority and resolving disputes effectively no longer applied to slavery, and future disputes over it could be resolved only by political force, rather than by an agreed-upon rule of law.

Much has been written about slavery and politics in early America, but many aspects of that relationship remain contested.[9] One important debate over slavery and the Founding focuses on whether slavery was "central" or "incidental" to early American politics. The "republican" school of historiography led by Bernard Bailyn and Gordon Wood treats slavery as incidental to the republican enterprise, while the "progressive" school, whose prominent members include Staughton Lynd, sees it as central and as an aspect of a broader economic, often class-based, analysis of American politics.[10] That historiographic divide occasions a series of observations about this book's approach and goals.

First, there is a fundamental difference between tracing the evolution of republican ideology, on the one hand, and understanding the political and economic processes that made it possible to create a functioning early American national government, on the other. While ideology and the state-building process may overlap or even coincide at times, at others they may bear relatively little relation to each other. This book focuses primarily on the nature of the actual political and legal accommodations made to create and expand the Republic, how slavery influenced them, and how they influenced slavery. But it also traces continuity and change in how British and American law dealt with the problem of slavery and natural rights and their relationship to republicanism, constitutionalism, and the rule of law during this period.

Second, much of the historiography of slavery is "Whig history" in British historian Sir Herbert Butterfield's sense.[11] It concludes that the progress of liberty was inevitable or that it necessarily resulted from the triumph of forces supporting what appear to us today to be just, morally

right principles. An important purpose of this book is to examine whether such conclusions can be justified with respect to the survival and growth of American slavery in the early Republic.

Third, historians from the "republican" and "progressive" schools of thought are debating a question that is irresolvable for this book's purposes, because it is not possible to characterize slavery as invariably either "central" or "incidental" to early Republic politics. By 1770, slavery was a large-scale (billions of today's dollars in assets) socioeconomic institution that was central to slave state agricultural economies and represented one-third or more of their wealth. As Madison thought, its relation to national politics was fundamentally driven by those states' interests. When acute economic development–related (or autonomy) conflicts that implicated those sectional interests periodically arose in national politics, slavery became central to their resolution, as in the drafting of the Articles of Confederation.

However, slavery was at times incidental to the resolution of major issues in early American politics, because while such issues had implications for slave state interests, they also had others much broader than those interests. An example is the Louisiana Purchase. In 1803/4, there was a strong national consensus favoring the territory's acquisition followed by American settlement, but no equally broad consensus supported excluding slavery from the purchase. Although slavery's expansion was raised as an issue by purchase opponents, that concern was overwhelmed politically by the nationwide desire for expansion into the territory, and hence was "incidental" to (i.e., not a central factor in determining) the outcome. As these examples suggest, to understand slavery's politics a different analysis is required.

As historian Peter Onuf's work over several decades has demonstrated, early American politics worked quite differently when Americans believed the political universe (or the national territory) in which they lived was expanding than it did when they believed they were engaged in a zero-sum game, because such beliefs strongly influenced Americans' willingness to accommodate each other's sectional interests.[12] The sectional politics of slavery is an important case that provides support for this more general historical conclusion. As Onuf's work implies, rather than continuing to debate slavery's "centrality" *vel non* to the Founding era, it is preferable to analyze precisely what effects it had on various aspects of American political formation and development. The following detailed description of the book's contents also further sketches my analysis.

Chapter 1 analyzes the effects of the American Revolution on slavery. The chapter describes the institutional situation of American slavery within the British Empire and the new challenges it faced just before Independence. These challenges included the famous English slavery case *Somerset v. Stewart*. The chapter reviews the American reception of *Somerset*, providing new evidence that Americans were divided over *Somerset* and its perceived effects in the colonies before the Revolution. It begins consideration of the problem of slavery's relationship to conceptions of natural rights, ordinary law, and constitutional law in the early Republic. [13]

During the Revolution, American slavery faced added challenges as it lost British protection and was damaged by war and legal instability. Recent historiography has given particular attention to the Revolution's effects in challenging slavery and expanding the rights of free blacks.[14] Chapter 1 examines the direct effects of the Revolution (as opposed to socioeconomic conditions) on abolition and fugitive slavery.

But at least where slavery was concerned, the Revolution had a hierarchical as well as an egalitarian ideological dimension. Americans had sharply conflicting views of natural rights and their relation to republicanism and constitutional law. For many of its supporters, the Revolution did not unambiguously entail opposition to the institution of black slavery. The Revolution also shifted the balance of power between the sections. It was by no means inevitable that the American Revolution would lead to the extinction of slavery.

Contrary to the traditional view, the Revolutionary era strengthened slavery as a political institution. In part as a reaction to challenges to slavery, the drafting of the Articles of Confederation was heavily influenced by slave state interests, and not just in the important area of taxation. Slave state representatives ardently supported the Confederation's extreme federalism. And the Articles included provisions that were specifically designed to protect both the slave trade and slavery itself (particularly with respect to fugitive slavery) beyond those previously identified by historians. Slavery's influence led to government by stalemate.

Chapter 2 examines state experiments in abolition and manumission during the period from 1780 to 1810. Northern abolition was an important achievement, but it had profoundly significant political limitations. The progress of abolition stemmed in significant part from changes in Northern labor economies and white racism as well as from humanitarian motives and revolutionary ideology. Some northern citizens were concerned about competition from slave labor or thought abolition would permit "black re-

moval," and a majority supported abolition only if it could be achieved at no cost to them. The chapter provides new evidence on the limited coverage and weak enforcement of abolition laws that resulted from this climate of public opinion. It also offers new information on contemporary views of the relations among natural rights, property law, and constitutional law in the context of slavery. The chapter concludes by analyzing northern unwillingness to protect fugitive slaves before the Constitution's adoption, and the adverse effects of Southern slavery law reforms on abolition prospects. It shows that there was very limited political support in the northern states, and almost none in the southern states, for aggressive national action to end slavery throughout the country, and that the Constitution's limited efforts to combat slavery reflected this climate of opinion.

Historians writing about slavery and the Constitution have addressed five major questions that go to the heart of our understanding of the American federal republic.[15] They are, Was the Constitution "proslavery" or not? Was the Constitution intended to have a moral, social, or "revolution principles" dimension where slavery was concerned? Were various slavery provisions of the Constitution essential to the formation of the Union? Were the Constitution's slavery compromises part of a larger "grand bargain" that included an agreement regarding the western expansion of the United States? How did the Constitution's slavery provisions influence early American politics? Part 2 addresses these questions. Chapters 3 and 4 examine slavery and the negotiation and ratification of the Constitution.

Several historians and political scientists conclude in recent works that developments in early American law and politics, particularly the Constitution, provided strong institutional protections for slavery.[16] Some argue that the Constitution's slavery-related provisions (a list that they define expansively) provided "enormous protections" to slavery, so that the Constitution was "proslavery." Don Fehrenbacher argues, on the other hand, that many such claims about the Constitution's effects on slavery are mistaken because it was "open-ended" on slavery.[17] He argues that its slavery provisions (which he defines narrowly) were "marginal" to slavery.[18] How is such a discordance of views possible?

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

support to the institution and its expansion. Finally, "proslavery" could mean that the Constitution failed to restrain the growth of slavery as much as some thought then (but especially later) that it should.

This book's claims that the Constitution was "proslavery" and that it materially advanced the creation of a slaveholders' union are based on a series of conclusions. First, its representation system provided critically important political protection for slave property (or its then functional equivalent, the political economies of slave states) through the three-fifths clause, an issue analyzed in chapter 3. Chapter 3 begins by considering the overlapping but nevertheless differing motives and objectives of the Northern and Southern sections for entering into the Constitution. It examines the political significance of ratification debates over the clause, and provides new evidence that the long-term impact of the clause on early American politics was less than sometimes thought.

Second, the Constitution's other slavery-related provisions, by carefully preserving the Confederation legal status quo ante on slavery in virtually all respects, were designed to permit slavery to expand for at least an entire generation after its adoption, and as a foreseeable result probably much longer. Chapter 4 analyzes the ways in which the Constitutional Convention laid the groundwork for expansion of the slave state economies and of slavery itself. As part of this process, a sectional economic development side bargain, which included the passage of the Northwest Ordinance and commitment to the opening of the Mississippi River to western development, was also reached. In addition, the Constitution was equivocal on whether slaves were to be treated as property solely under state law or whether they were regarded as property under federal law as well. Although slavery was expected to continue to be governed largely by state law, it was also given unique legal protections by the Constitution that insulated it against the exercise of both national and state government powers that could otherwise have been used to control it. The chapter closes by reviewing other major aspects of the ratification debates over slavery, particularly debate over whether the Union must be a moral, as opposed to a political, Union.

Political scientist Mark Graber's provocative work analyzing the problem of "constitutional evil" raises important issues about the Constitution's relationship to politics and slavery.[19] This book seeks to historicize that problem further, particularly in its discussions of how contemporaries understood the relationship of natural rights and law and the problem of moral union. Early Americans did not share widely agreed-upon views

on the relation of natural rights, republicanism, and constitutional law, at least where slavery was concerned. They reluctantly accepted that a political union might encompass moral evil. But Americans' views on such issues sharply diverged by 1820.

Chapters 5 and 6 consider the expansion of slavery during the period 1790–1821. Chapter 5 begins by examining the powerful implications of major congressional slavery debates during 1790. It expands on the historiography by exploring in detail both the political significance of the extensive proslavery arguments made in those debates by slave state representatives and James Madison's role as a political "double agent," seeking to gain restrictions on the slave trade while protecting slavery and the right of the slave states to expand westward into new states. Next it analyzes the law and politics of the Fugitive Slave Act of 1793, and the circumstances surrounding the admission of new slave states and territories. It extensively considers the Virginia abolition proposal by St. George Tucker, including the light it sheds on northern antislavery opinion, its analysis of colonization proposals by Jefferson and others, and the implications of its failure in 1797. The chapter considers the historical support for the view that "conditional termination" of slavery espoused by leaders such as Jefferson (or Virginia opinion on slavery generally) might have led to wider abolition.[20] It concludes by examining the politics of the Louisiana Purchase, which led to a sharp expansion in western slavery.

Chapter 6 presents an analysis of the Missouri controversy of 1819–21, the first major challenge by Northern states to slavery's further westward expansion. The chapter explores three major questions: Why did the Northern states' position on expansion change at this time? Why did the Northern states, having forced a massive political confrontation, then accede to the compromise, accepting slavery's continuance and readily foreseeable expansion? How did the controversy alter antebellum politics and the role of the Constitution in it?

The chapter argues that Missouri was the first "free labor, free land" conflict over sectional expansion, not an ideological dispute over slavery or one stemming from free state fears about their penetration by slavery.[21] Its analysis relies in part on new evidence about the views and motives of participants in the Missouri debates. The Missouri controversy was also important because the dispute was exacerbated by the emergence of a sharp, largely sectional, difference of view over what was required to make the Union a "moral" union where slavery was concerned.

An irreconcilable conflict emerged during the controversy between

the tolerance essential to federalism and a rising, newly providentialist nationalism. Northern states increasingly advocated the position that the Union itself must have a moral foundation beyond popular consent to be legitimate. That position rejected the expansion of the Union on federalism principles, which for Jefferson and his allies had long been one of the central premises of the Union. Significant divisions in Northern state politics, including constitutional disagreements, played a major role in the outcome of the controversy, as did slavery's increased political and economic power.

The Missouri compromises had implications that extended well beyond the 1820s, not the least of which was the beginning of what became a major political realignment, the Second Party System. The compromises led thoughtful national leaders to appreciate that where slavery was concerned, the Union was based on a sectional compact, since the Constitution lacked agreed-upon moral foundations, allocations of political authority between different levels of government, and procedures for resolving disputes—the essential elements of a rule of law. This meant that ultimately agreements on slavery could be negotiated based only on calculations of political force, including threatened dissolution of the Union—the antithesis of the rule of law. This fragile sectional compact permitted the continued division of territory and jurisdiction between free and slave states until the decade before the Civil War, when the sectional equilibrium collapsed.

Following is some background on the concepts of slavery, politics, and law as used in this book. Slavery is commonly described as a legal or economic system that treats slaves as property. This study transforms property into a dynamic concept by adding political and historical dimensions to its analysis. American slavery was historically surrounded by a political and legal environment that advanced or retarded its growth. The book asks how slavery's political environment changed over time, and how the law governing it influenced or was influenced by those changes.

In describing slavery as an institution, I intend to convey not just that as law and custom it played a central role in major slave states, but also that its cohesion was such that its supporters consistently had the ability to call forth the unified political power of those states to protect it from political challenge. To put this colloquially, "the word of the slaveholders was law" in such states. The institution's power extended beyond the slave

states, enabling them to weather all significant attacks prior to 1819. During that period, northern politicians often had the option of supporting slaveholders' political goals *outside* the North if doing so would advance some other significant political objective, without facing any significant antislavery backlash.

In this climate of opinion in an increasingly democratic republic, court decisions on slavery often were guided by and intended to support the choices made by elected politicians. The book does not seek to provide a comprehensive account of changes in the law of slavery during this period. It focuses on specific aspects of the law of slavery, particularly state and federal laws on slavery, involuntary or "bound" servitude, abolition and manumission, and the treatment of slavery in state and federal constitutions. These topics comprise the "public law" of slavery.

There are two broad emphases in the book's analysis of slavery law. It examines the social and political environment in which the law of slavery was embedded, and how lawmakers allocated the sociopolitical costs of legal change on slavery. It focuses on the realities of law enforcement rather than on the evolution of legal doctrine (i.e., a tracing of the detailed changes in law over time). The book seeks to understand the "law in action," not just the "law in books." Public opinion is divided about most laws, and as a result they require both workable enforcement mechanisms and adequate resources for their enforcement. The book examines whether various laws designed to limit slavery were actually enforced and, if not, why not.

This study gives particular attention to two aspects of the problem of historical contingency that arise in the political and legal history of slavery. The first is the extent to which the actions of individual leaders made a significant difference in the outcome of various decisions. I agree with Sir Isaiah Berlin that proper moral judgments about past actions can be made only after one fully appreciates the actual degrees of freedom—the realistic choices—available to historical actors. An important purpose of this book is to recreate and understand the broader economic and sociopolitical context in which early American leaders acted on the issue of slavery, to provide the necessary perspective for such judgments.

The second aspect of contingency in slavery's history addressed in this book is whether significant events in its history were contingent when considered in relation to other important events forming part of that history. A good example of this type of question is the Philadelphia Convention's decision to adopt the three-fifths clause of the Constitution. The book ar-

gues that adoption of the three-fifths clause as part of the Constitution was virtually inevitable—but that it was inevitable not in some abstract sense (or considered in isolation) but because of the Convention's prior decision to adopt equal state voting in the Senate. Protection of slave wealth was, in other words, a necessary consequence of the decision to give political protection through representation to states as entities in the Constitution without regard to their population or wealth. A final broad purpose of this book is to analyze this aspect of contingency in considering the course of slavery's expansion in the early American republic.

PART ONE

Slavery in the American Revolution

1

FROM EMPIRE TO CONFEDERATION

During the years from 1770 to 1780, as Great Britain's control over its mainland American colonies declined and then collapsed, the wealthy and politically influential imperial institution of slavery became the subject of unprecedented controversy. The decade's disruptions had conflicting consequences for slavery as Americans used their new political freedom on that issue in clashing ways. But American slavery emerged from the Revolution stronger as a political institution than it had been within the British Empire just prior to the Revolution. This chapter explores how and why this occurred. It opens with a discussion of British imperial support for slavery and its character as an institution in the mainland American colonies shortly before the Revolution. Next, it analyzes a series of challenges to slavery in the years before the Revolution. Finally, it considers how the Revolution affected slavery and how slaveholders responded to its stresses, particularly their role in shaping the Articles of Confederation.[1]

A major challenge to imperial slavery arose from a court attack on its legality in England, the closely watched 1772 case of *Somerset v. Stewart*. Though it was technically a dispute over slavery in England, the decision had political effects far broader than its precise legal holding. Lord Mansfield, the most prominent jurist in the British Empire, used his decision in *Somerset* both to announce a novel conception of slavery's legal character threatening to slaveholders and to challenge its morality. As an unintended consequence, it brought slavery's legality under sharp attack in some mainland colonies. It contributed to political assaults on slavery, and added to the chronic problem of slave flight. Slaveholders vigorously attacked Mansfield's decision; it often strengthened their preexisting view

that arbitrary British government policies on slavery and taxation threatened their economic well-being and political freedom.

The obstacles encountered by mainland American slavery in the years prior to Independence also included widening slave freedom litigation, struggles over limiting slave imports, and new laws on slave manumission. Independence brought further threats. The Revolutionary War sharply increased the number of fugitive slaves, and the need to control slaves hampered American military efforts. State and Confederation controversies erupted over the use of slaves and free blacks in both the British and American armies. During the Revolutionary War alone, Vermont and Massachusetts banned slavery, Pennsylvania began abolition, Virginia liberalized its manumission laws, and Rhode Island banned the out-of-state sale of resident slaves.

Most historians agree that the Revolution was a turning point in slavery's history, but they have differed sharply on what it meant for slavery's evolution.[2] The important strides toward abolition and slavery reform in the war and its aftermath led prominent Americans to think that progress toward abolition would continue across the United States, yet that did not happen. Historians have offered varying explanations for this post-revolutionary decline. Most of these explanations share the view that the Revolution was an impetus toward abolition, which was then defeated by powerful opposing counterforces such as white racism or economic self-interest.

One group of historians sees the Revolution as creating a strong impulse toward freedom for slaves.[3] Ira Berlin and other historians view the Revolution's disruption and black agency as having transformed the basic conditions of life for both slaves and freedmen.[4] Others such as Gary Nash instead conclude that the Revolution either crystallized or was strongly influenced by white racism, which ultimately defeated its antislavery thrust.[5]

William Freehling thinks that the Revolution had equivocal implications for slavery because many Founders believed that Revolution principles of freedom and equality necessarily entailed an end to slavery, but were "conditional terminators," willing to end it only on conditions such as mandatory colonization of freed blacks that made abolition very difficult or impossible. The result, Freehling concludes, was that the Founders took important steps toward abolition while nearly simultaneously creating "bulwarks against antislavery."[6]

This chapter takes a different approach to assessing the Revolution's impact on slavery. It begins by considering slavery's ability to resist change, that is, its staying power as an institution. It asks what benefits for slavery and disruptions to slavery the Revolution actually created. And it closely examines how slaveowners and slave states responded to these pressures when they faced antislavery activism before the Revolution and participated in framing the Confederation government.

Historians increasingly recognize that slavery emerged from the Revolution stronger as a political institution than it had been within the British Empire just prior to the Revolution. But, contrary to the view of David Brion Davis and other leading scholars, the evidence reviewed here suggests that this result was not paradoxical.[7] The Revolution led to the creation of an American government that was far less capable of controlling slavery than the British Empire had been. It shifted the political balance of power in the new government in a direction strongly favorable to slaveholders. Revolutionary natural rights and egalitarian ideology had limited power to undercut slavery in the face of its powerful influence and of countervailing principles of thought about natural rights and limited government. The disruptive effects of slave flight and slavery's interference with American military operations during the Revolutionary War have been overstated.

As a result, in the crucible of the Revolution, slave state representatives obtained substantial protection for slavery from the new American government. The exceptionally decentralized federalism of the Articles of Confederation, ardently advocated by slave state representatives, meant that the continental government would have no legal power either to regulate or abolish slavery in the states or, as a practical matter, to control the slave trade or slave imports. And new evidence suggests that the Confederation also agreed in the Articles to protect slaveowners against state interference with their control over the interstate movement of slaves, including slave imports and the recapture of fugitives. Slave property was exempted from the Confederation's state taxation-quota calculations and excluded from its state military quotas. As a consequence of having met slave state demands, the Confederation was capable only of "stalemate government." Imperial collapse and political realignment in a decentralized polity in the midst of war had led Americans to take the first significant steps toward a slaveholders' union that preserved and strengthened slavery.

AMERICAN SLAVERY IN THE BRITISH EMPIRE CIRCA 1770

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

In 1770, the major slaveholding colonies of the British Empire, or "plantation America," accounted for 25 percent of the total private physical wealth of the empire, even though they contained only about 12 percent of its total population.[8] Slavery was the "principal means of wealth creation in plantation America" on the eve of the Revolution.[9] Crown policy, particularly in the eighteenth century, was designed to maximize British investment in colonial slave plantation agriculture, which most contemporaries believed necessitated protection for the slave trade and for slavery as well.

Britain had legalized and subsidized the slave trade beginning in the mid-seventeenth century.[10] By 1770, it had firmly supported its imperial slave trade for more than one hundred years. Britain dominated the eighteenth-century transatlantic slave trade, and its traders made thousands of voyages across the Atlantic during the century. Its participation in the trade maintained a reliable supply of relatively inexpensive colonial forced labor while also significantly enhancing British naval power. Most British supporters of the slave trade agreed with Malachy Postlethwayt that the trade was an "inexhaustible Fund of Wealth and Naval Power to this Nation."[11] British support for the slave trade in turn led it to protect slavery, not just in the colonies but throughout its empire, both by providing military support and by regulating slavery policy.

During the seventeenth and eighteenth centuries, these goals led the Crown to protect slavery by disallowing several American colonial efforts to limit slave imports; by carefully regulating and controlling the classification of slaves as particular types of property in different colonies; and by approving brutal, repressive colonial slavery laws that minimized the cost of slaveholding.[12] But Britain's intervention in the law and policy of slavery went beyond its direct supervision of colonial law. As to slavery, Britain departed from its general imperial policy of legal pluralism, or

"de facto federalism" between metropolis and colonies, and instead sought to impose a degree of uniformity.

In the eighteenth century, the Crown sought to have English law treat slaves as uniform "imperial" property, since British investors and creditors thought that they needed predictable legal rules to support what they perceived as risky investments in the slave trade and colonial plantations. The Crown's two chief Law Officers, one of whom later rose to become Lord Chancellor of England, issued an opinion in 1729 that treated colonial slaves as property even when they were brought to England. Under that opinion, their owners could compel them to leave England and return to slavery. This effectively meant that slaves were "imperial" property, not just property under the law of individual colonies. The opinion, requested by slaveowner representatives, was widely published in the colonies.[13]

The goal of enforcing uniformity also led to one of Parliament's very few substantive interventions in the law of slavery in a period of 250 years. In 1732, Parliament passed a "sweeping" statute that guaranteed uniform imperial treatment of slave property for debt-recovery purposes in England and its colonies, overriding all contrary colonial laws. Under this law, the Debt Recovery Act of 1732, "fiercely opposed" by Virginians, "Negroes" (slaves) in the colonies were classified as property for purposes of debtor-creditor relations. Creditors throughout the empire were given a broad range of remedies to protect their interests in such property. The law provided special evidence rules in such creditor actions. The act thus created a hybrid form of property valid throughout the empire. It effectively overruled a House of Lords decision that had respected colonial law in this area. It was the legislative analogue of the 1729 Law Officers' (or Yorke-Talbot) Opinion's conclusion that slave property had a uniform "imperial" status throughout the empire. The evidence suggests that colonial slave imports increased as a result.[14]

Through these policies, Britain sought to protect and encourage slavery by imposing at least the degree of imperial uniformity needed to support a smoothly functioning slave property system throughout the empire, despite the existence of a variety of local differences in the law of slavery. This meant, among other things, that slaves in one part of the empire were regarded as property anywhere within it. And, as the 1729 Law Officers' Opinion shows, many thought that this included England itself.

In 1749, the Lord Chancellor of England, Lord Hardwicke (Sir Philip Yorke), decided that English law would recognize a trover claim for slaves—

that is, a common-law claim to recover slaves (more precisely, damages for their withholding) premised on the idea that slaves were property. Hardwicke held that the law in all colonies must therefore recognize such claims as well.[15] Hardwicke's decision reaffirmed the policy he had helped to establish in 1729 in the Law Officers' Opinion, that slave status did not change when slaves were brought to England. Hardwicke's position was shared by at least one leading contemporary legal treatise. Viner's *Abridgement*, a prominent treatise first published in 1746, stated that English law recognized trover claims for "Negroes" and treated as dissenting opinions on that issue early-eighteenth-century English court decisions holding that coming to England would end the slave status (if not necessarily the servitude) of blacks brought there.[16]

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

Due in part to its strong imperial support, slavery had become a central economic institution in the mainland American colonies by 1770. Slaves had become a major economic asset class, with a conservatively estimated collective market value of about £14 million (about $2.4 billion today).[17] Slaves constituted nearly 20 percent of total private wealth in the thirteen colonies in 1774. Slave prices in the Americas (including the mainland colonies) had steadily increased throughout the eighteenth century, with exceptions caused primarily by war, an important indication of the growing demand for slave labor.[18] The mainland American slave population nearly doubled between 1750 and 1770, a striking measure of slavery's growing economic significance there. By 1770, it had grown to about 470,000.[19]

But to understand the politics of slavery, it is also quite important to appreciate that slaves (and related wealth) were very asymmetrically distributed throughout the American colonies. By 1770, the overwhelming majority of mainland American slaves were concentrated in five colonies: Virginia, North and South Carolina, Georgia, and Maryland.[20] Slaves

were an average of 41 percent of their total populations. Slaves constituted more than 30 percent of all physical wealth in the southern colonies, which meant that as a class of assets they were nearly as large a share of southern wealth as the estimated value of all land in those colonies.[21]

The major slave-colony economies were built in substantial part around the use of slave labor, principally in agriculture, often in crops that were particularly labor-intensive and intended for export. Largely as a result of slave agriculture, exports from the South in 1770 were roughly 50 percent higher in value than exports from the New England and the mid-Atlantic colonies combined, although the populations of the two areas were equal.[22] The slave colonies grew wealthy as a result. "At the time of the Revolution, total and per capita wealth levels of the slave colonies were far greater than those of their protofree [i.e., Northern] counterparts."[23]

In striking contrast, in the eight Northern colonies at about the time of the Declaration of Independence, slaves constituted only about 4 percent of the population. In New Hampshire and Vermont combined in 1770, there were about seven hundred slaves, while in Massachusetts, slave population was less than 2 percent of total population. Certain Northern states, particularly Connecticut and Rhode Island, had comparatively more slaves; there, between 3 and 6 percent of the population was enslaved.[24] In the New England colonies, slaves constituted less than 1 percent of total physical wealth.[25]

In the mid-Atlantic states, slavery was more prevalent than in New England. There, slaves constituted about 4 percent of total physical wealth, and about 16 percent of household heads had slaves or servants. For political analysis, it is also important to appreciate that slaveownership was not distributed equally geographically or in terms of economic function within the mid-Atlantic states.[26] For example, slaveholding was roughly three times as high in percentage terms in colonial East Jersey as it was in West Jersey. Certain counties in New York had populations that were more than 20 percent slave, nearly double the statewide average.[27]

Some historians argue that despite the limited slave populations of the Northern colonies, slavery was nevertheless central to their economies because they depended heavily on sales to markets that existed largely by virtue of slave-based production. As late as 1770, the British West Indies accounted for more than half of Northern-colony commodity exports. This trade had "immense" implications for Northern-colony economic development in areas such as ports and shipbuilding.[28]

This brief sketch of the economic position and geographic distribution

of American slavery might suggest that although slavery's influence was pervasive, it was more deeply economically and politically embedded in the Southern slave colonies than in the Northern and mid-Atlantic colonies just before the Revolution. As the later history of gradual abolition suggests, there is considerable truth to this observation. But British policies supporting and protecting colonial slavery to some extent masked these important regional differences. Two important aspects of British policy were the relative uniformity and broad social reach of the law of slavery.

In 1770, under British policy slavery in most colonies was "classical" chattel slavery, though there were various differences in colonial slavery laws.[29] Chattel slaves were deemed to be property for many legal purposes, and normally lacked civil rights of any kind.[30] (See appendix A.) The widespread adoption in British and colonial law of property-law principles as a basis for slavery law meant that slaveowners would have the widest possible markets for slave property, the strongest possible legal protection for it, and the fewest legal impediments to its use. But slavery's influence on colonial society was broader than even its imperial military and policy support, economic prominence, or protection through the law of slavery would suggest.

American slavery was not just a brutal, oppressive labor system. As historians have shown, it was a multidimensional institution of social control. In the mainland colonies, it served as a means of enforcing racial separation and subordination, of limiting the cost of poor relief for the unemployed and disabled, and of controlling crime.[31] These social-control functions of slavery embedded it deeply in American culture. But the reasons for colonial elite support of slavery went well beyond its substantial profitability and usefulness as a means of social control of blacks. As Edmund S. Morgan famously showed for seventeenth-century Virginia, slavery had profound social class and racial implications that had the potential to influence the basic structure of white majority politics.[32]

Colonial law supported and reinforced slavery's social- and political-control functions. Slavery was deeply interwoven with the poor-law system, virtually the only form of social-welfare provision that existed in the eighteenth century. Slaveowners' ability to manumit slaves was often significantly restricted by poor-law requirements, and slaveowners were required to support aged or infirm slaves to avoid poor-relief costs for other taxpayers.[33] Because colonial poor-relief laws typically made assistance for indigent residents a local responsibility, jurisdictions eager to avoid this taxation burden responded with stringent rules denying residence rights

to strangers such as runaway servants and slaves.[34] Slaveowners often had a legal duty to prevent crimes by their slaves and could be fined for failure to prevent them.[35]

In 1770, colonial slaveowners had the right forcibly to recapture a fugitive slave wherever the slave was found.[36] An owner could recapture a fugitive slave in another jurisdiction either by self-help or by seeking official assistance and making a claim for the slave. William Blackstone described this right's contours in English common law, terming it a right of "recaption."[37] English court decisions confirmed the existence of the right of recaption for slaves throughout the American colonies.[38] To protect slaveowners, the laws of several colonies made it unlawful to harbor fugitive slaves, and statutory rewards were given for their return. New Jersey adopted such legislation by 1694.[39]

Some of the harshest criminal punishments known to the law were placed there to prevent slaves from becoming fugitives. At least one colony permitted fugitive slaves to be proclaimed outlaws and as such to be killed with impunity, and provided for harsh punishments in cases of flight, including bodily dismemberment, in order to "terrify" slaves.[40] Slave conspiracies and rebellions, which inevitably involved flight, were deemed felonies, punishable by harsh penalties, including death in Virginia and North Carolina.[41] These draconian laws sought to hold down the cost of slavery by avoiding significant costs to slaveowners. The statutes reflected legislative recognition that the profitability of slavery depended in part on preventing large numbers of slaves from becoming fugitives.

Before the Revolution, no American colony provided any substantial legal protection to fugitive slaves against efforts to recapture them.[42] Moreover, in some colonies officials were required by law to assist slaveowners from other colonies, as well as those in their own, in recapturing their slaves.[43] Colonial newspaper advertisements show that slaveowners expected that citizens in their own colony and in others would assist in recapturing their fugitive slaves for a suitable reward.[44] At the time, there was no legal doctrine within English or colonial law that would have emancipated fugitive slaves fleeing from one British colony to another. Nevertheless, there were well-known circumstances in which a fugitive slave could become free. Since the end of the seventeenth century, Spanish Florida had emancipated fugitive slaves from the English colonies who converted to Catholicism. As a result, Berlin concludes that Spanish Florida had become notorious as what he calls a "magnet" for fugitives.[45]

Yet despite slavery's economic and political importance to the British

Empire, by the mid-1760s, legal and political challenges to it were beginning.[46] By then, British law had developed to the point where slaves were sometimes able to seek their freedom through court actions, rather than by risking death through flight. And American colonies were increasingly seeking to curb slave imports and considering liberalized slave manumission in the decades before the Revolution.

COLONIAL LEGAL AND POLITICAL CHALLENGES TO SLAVERY

By the mid-eighteenth century, throughout the empire the law recognized an exception to the general rule that slaves were "rightless" persons: slaves could challenge the legal basis of their captivity, though only on narrow grounds. There were numerous court actions seeking freedom for individual slaves in the decades just before the Revolution, both in England and in the United States. As historian John Wood Sweet concludes, the changing character of these challenges over time provides evidence of increasing political strains on the institution of slavery. By the 1770s, some of these cases involved lengthy legal battles that embroiled all of the major political institutions of an entire colony, while others involved challenges to the scope of slavery in an entire jurisdiction. A good example of the former is the extensive legal efforts of Henry Marchant, a prominent Rhode Island attorney (who eventually became its first United States federal district court judge), on behalf of a Connecticut slaveowner in *Randall v. Robinson*, a case discussed by Sweet.[47]

Beginning in the late 1760s, Marchant was forced to spend five years trying to obtain legal authority for his client John Randall, a Connecticut man, to purchase several Rhode Island slaves from the estate of Susannah Hazard. As shown by her will, Hazard's clear intent had been that her slaves, an African American woman named Esther and her children, would be freed when she died, but her will did not provide for the filing of a manumission bond required by law before the slaves could be freed. After Hazard died, the slaves were sold to Randall by her executors instead, because her heirs wanted the money from the sale. Then in late 1768, a prominent abolitionist attorney, Matthew Robinson, personally provided the manumission bond to protect the slaves, seeking to block their sale to Randall by freeing them.

In 1769, Marchant therefore sued Robinson personally, bringing an

action of trover and seeking large damages as a means of trying title to the slaves, in *Randall v. Robinson*. Robinson represented the slaves' interests without charge. Before the case was resolved in 1774, Marchant had been forced to make three successful appeals to the Rhode Island legislature to maintain favorable jury verdicts for Randall and to overturn court rulings against Randall that would have freed the slaves or granted them new trials. On Marchant's last appeal, in 1774 the legislature effectively ordered the court to enter judgment for Randall, which it then did. The case's tortuous course, pitting the courts against the legislature and popular juries, makes clear the wide gulf between popular opinion and elite judicial opinion in Rhode Island regarding slavery at the time.[48]

There was considerable colonial slave freedom litigation in the 1760s and 1770s. Legal historian Robert Cover analyzes such freedom suits in Massachusetts, where he found that juries were "somewhat notorious" by 1765 for favoring slave freedom, and in Virginia.[49] Sweet notes that historians have also found freedom lawsuits in New England, New Jersey, and Pennsylvania, and he analyzes several significant freedom cases in Rhode Island.[50] Another freedom suit, involving Peter Lee, a fugitive slave from Massachusetts, was heard in 1764 in New Castle County, Delaware.[51] Lee contended that he had been born free in Massachusetts, but had been enticed to Delaware and then sold into slavery. The court agreed to consider his claim. In most of these freedom cases, challengers accepted the legitimacy of slavery as an institution, but argued that a particular slave or slaves had been freed as permitted by law (e.g., manumission), or had been illegally enslaved.

However, as Cover concludes, some slave freedom cases in the 1770s also posed novel challenges to the scope or regulation of slavery within an entire jurisdiction, and in those cases some courts demonstrated an increased willingness to place restraints on slavery. In 1770, in *Howell v. Netherland*, the Virginia Supreme Court summarily rejected a fundamental attack on the legality of slavery by Thomas Jefferson, a challenge Jefferson had made the basis of his effort to free a slave.[52] In 1772, however, the same court in *Robin v. Hardaway* rejected the argument that Native Americans were slaves in Virginia. The court based its decision on its review of the history of Virginia's slavery laws, in the face of an allegedly long-standing custom that Native Americans could be held as slaves there.[53]

Similarly, in *Randall v. Robinson*, the court appeared willing to "interpret"—that is, effectively to alter—Rhode Island law to give effect to the testator's intent to free her slaves despite the fact that the contested will's

manumission directions did not technically comply with Rhode Island law (noncompliance meant that the slaves would not have been freed and could therefore be sold). The court's position showed a newfound willingness to favor freedom for slaves over the normally sacrosanct financial interests of white heirs, and its tenaciousness in persisting in its position in the face of legislative reversals was quite striking.

In an equally remarkable unreported 1773 case, the Rhode Island Supreme Judicial Court, on its own initiative, ordered an investigation into the circumstances of the original capture in Africa of several slaves brought to Rhode Island. The court then declared them free and ordered their return to Africa after concluding that they had been kidnapped by Rhode Island slave traders.[54] As these Rhode Island and Virginia cases show, colonial courts in the early 1770s were willing to constrain slavery in at least some respects. And in the years before the Revolution, colonial legislatures were also increasingly seeking to limit slave imports. Those efforts were often frustrated by British policy, but they usefully illustrate the complexity of antislavery opinion and coalitions before the Revolution.

Just before the Revolution, significant numbers of colonists regarded the African slave trade and resulting slave imports as unmitigated evils both for Africans and for Americans. As legal historian Lawrence Friedman concludes, there was "widespread agreement that the slave trade was an abomination . . ."[55] Slave-import taxation laws were virtually the only laws limiting slavery enacted prior to the Revolution. Such import taxes (some of which amounted to bans because their rates were so high) in both Northern and slave states frequently were supported by coalitions. Opposition to the slave trade and antislavery motives played a significant role in support for import limits. But prominent members of those coalitions sometimes had motives other than opposition to slavery for supporting them, as the following examples from Pennsylvania, New York, and Virginia illustrate.

In 1761, Pennsylvania imposed a restrictive £10 duty on the importation of slaves (today, this would be somewhere in the range of $1,250 per slave, or perhaps 20–25 percent of the slave's market value). The duty was justified in part by the argument that preventing slave imports would protect white laborers who could provide military service, while slaves could not do so. The duty was imposed over the opposition of Philadelphia merchants who argued that slaves were needed to meet labor demand.[56] Because the 1761 duty amount was a significant fraction of total slave prices, it is likely that the purpose of that duty was not simply to produce revenue, but also to

curtail demand for slave imports. In 1773, Pennsylvania increased its duty to £20, a clearly prohibitive level; the increase was disallowed by the British Lords of Trade in 1774.[57]

New York chose to base its more relaxed eighteenth-century slave-import duty laws on a discriminatory rate schedule designed to prevent the importation of slaves deemed socially undesirable. These were slaves from the West Indies and other colonies that New Yorkers believed should be discouraged from supplying "the Refuse of their *Negroes*." Historian Arthur Zilversmit describes the reasoning behind New York's approach: "The West Indian planters, the New Yorkers bitterly observed, sent them slaves who would have been executed for their crimes 'had not the Avarice of their Owners, saved them from the publick justice by an early Transportation into these Parts, where they not often fail of repeating their Crimes.'"[58]

New York writing just before the Revolution illustrates the sharp political distinctions drawn at the time between slave imports and slavery. A 1773 essay strongly favoring a tighter New York ban on slave imports distinguished it from the undesirable abolition of slavery. The writer claimed that even New Yorkers who were "enemies to slavery" not only understood that immediate emancipation would be "impracticable, as it affects property too much," but also believed that "it would be actually detrimental both to society in general, and to the persons thus made free in particular." Emancipation would harm society because it would drive up poor-relief costs.[59]

Virginia's prerevolutionary efforts to limit slave imports were based on opposition that "came initially" from "large slaveholders of the Eastern Seaboard" who hoped to obtain "thereby a monopoly position in the supply of slaves with consequent high prices."[60] This conclusion is supported by the reaction to leading Virginia slaveholder and politician Richard Henry Lee's effort to tax slave imports to Virginia. During the Seven Years' War, Lee proposed a 10 percent import duty on African slaves imported into Virginia in order to raise revenue. According to his biographer,

> New gentry men and small planters . . . denounced the plan because it would force them to pay higher prices for their slaves to large planters who already had a surplus slave population. . . . Opponents . . . criticized Lee by suggesting that his motivation was to increase his own fortune by selling his slaves without having to worry about competition from slave traders. . . . The governor [Fauquier]

> summarized the dispute . . . as a "contest" between "the old settlers who have bred great quantities of slaves and who would make a monopoly of them by a duty which they hoped would amount to a prohibition" [and others].

The proposed duty failed to pass the House of Burgesses.[61]

A recent study of Virginia slavery concludes that "at least from the 1760s Virginia leaders tried to curtail the slave trade in order to strengthen their economy."[62] British leaders at the time saw the effects of such curtailment quite differently. King George III instructed the royal lieutenant and governor general of Virginia in December 1770 to disallow any future increase in slave-import taxes there similar to the one that had been disallowed by the Privy Council in 1769. But he also specifically instructed the Virginia governor that "upon Pain of our highest Displeasure" the governor should veto any other law "by which the Importation of Slaves shall be in any respect prohibited or obstructed." British policy was to require Virginia to remain open to slave imports, whether Virginia wanted to do so or not. Among the reasons given in the king's instructions were that curtailment of slave imports would harm the "Cultivation and Improvement" of Virginia and "prejudice and obstruct as well the Commerce of this Kingdom . . ."[63]

Britain saw the effects of slave-import limits as detrimental to Virginia's and Britain's economy, while Virginia slaveowners saw them as positive. The eventual 1778 Virginia slave-import ban was a continuation of earlier efforts to protect Virginia's slave economy that "arose more from the economic interests of eastern Virginia's elites than from the ideals of the Revolution," though both motives contributed to the ban.[64] Because they would benefit from such political "rent seeking," which aided existing slaveowners by artificially increasing slave prices through restrictions on slave supply, major slaveowners like Virginia's George Mason could support import bans while also opposing abolition.[65]

British policy barring colonial slave-import limitations protected the interests of British slave plantation investors, slave traders, and colonial slave purchasers in maximizing the supply of slaves at the lowest possible prices. But British policy also harmed colonial economies by depressing slave prices and tax revenues, so it was unpopular in places like Virginia and South Carolina. It was equally unpopular in other colonies that wanted to ban slave imports for other reasons, such as protecting white laborers or encouraging white immigration, or from humanitar-

ian concerns about the slave trade. And British policy on slavery itself was beginning to change just before the American Revolution in ways that would also prove threatening to American slaveholders. The clearest indication of this potentially far-reaching shift in the direction of policy was the most notorious prerevolutionary slave freedom case of all, the 1772 case of *Somerset v. Stewart*.

THE *SOMERSET* DECISION AND ITS AFTERMATH

Somerset v. Stewart directly challenged the legitimacy of slavery as an imperial institution.[66] In that case, the English Court of King's Bench, in an opinion by Chief Justice Lord Mansfield, decided the fate of a fugitive slave, James Somerset, who had been brought to England from America by a high British North American customs official, Charles Steuart (or Stewart). Some time after coming to England, Somerset fled and was then recaptured by slave hunters. Somerset was in chains aboard a ship in London awaiting transportation to Jamaica for sale when the action seeking his freedom was brought.

It was generally understood from the outset of the case that Mansfield's ruling might create a precedent that would affect as many as fifteen thousand blacks then held in "near slavery" in England, and could even be broad enough to affect slavery in the colonies. As a result, the case was argued by the leaders of the London bar, and the defense of the slaveholder's position was directly controlled by West Indies slaveholding interests. Mansfield's decision consisted of a series of rulings (or "holdings") that had broad, disruptive implications for imperial, not just English, slavery. In some respects, this was probably a result more of surrounding prerevolutionary political circumstances than it was of Mansfield's intentions.

Mansfield held that Somerset's status in England was governed by English law and not by colonial law. It was of profound importance to the history of slavery that in so holding Mansfield conceived of a slave primarily as a person whose legal status was slavery, not as a form of property. Mansfield apparently thought of slavery as an extreme form of master-servant relationship (though slaves were regarded as property for certain legal purposes). Because slavery was a status, its character could change as a slave moved from one jurisdiction to another, depending on the new jurisdiction's laws. As Mansfield was aware, this novel conception of slavery rejected an important aspect of the eighteenth-century British imperial

slavery policy created by Mansfield's mentor, Lord Hardwicke, that the status of slaves brought to England did not change in England.[67]

Mansfield's decision devalued slave property by rejecting slaveowner contentions that slavery had a uniform character throughout the empire, determined by its status as property under colonial law. He also rejected the idea that slavery had any foundation in natural law, holding that it could be legitimated solely by positive law (i.e., statutory law or its equivalent in express, exceptionally long-standing custom). Under both English law and the law of nations, Mansfield concluded, the legality of slavery, an "odious" condition, was to be determined solely by positive law, as opposed to common law. As Mansfield put this, deliberately emphasizing the breadth of his conclusion, "in no country or age" can the origin of slavery "be traced back to any other source."[68] That conclusion raised substantial questions about slaveowner rights to compensation if slavery were curtailed or ended.[69] And if colonists possessed English constitutional rights (as they increasingly asserted), that holding implied that in the colonies slavery would exist only if it were established by positive law.[70] If so, *Somerset* itself might operate to bar slavery in some colonies.

Finally, Mansfield held in *Somerset* that English law did not permit anyone held in servitude, even someone claimed as a slave, to be taken forcibly out of the country. Again assuming that colonists had English rights, this holding implied that a colonial fugitive slave could not be forcibly recaptured in and then removed from another colony. If a slave's status depended solely on positive law, the decision in *Somerset* would also have meant that a Virginia fugitive slave who fled to a free jurisdiction could have become free. Unlike the situation before *Somerset*, a Virginia slaveowner would have had no claim to the slave in the free jurisdiction.[71]

In areas other than slavery, eighteenth-century British imperial policy was a form of de facto federalism, because it usually respected legal diversity between the metropolis and the colonies. Mansfield's decision adopted a federalist approach for slavery, implying that slavery was legal in some colonies even though unauthorized in England. A rule recognizing legal diversity would potentially allow each colony (subject to British imperial authority) to decide for itself whether it would recognize slavery *or* protect fugitives. But Mansfield's decision also removed any doubt that if Parliament chose to limit or end the slave trade or colonial slavery, it could do so, and meant that colonial slaveholders could not argue that their property or contract rights prevented such action.[72]

Mansfield's decision also had considerably broader political ramifica-

tions, whether he intended all of them or not.[73] The political impact of *Somerset* was not limited to England, although many historians conclude that it was intended as a legal matter only to apply to slavery there. The decision ignited a substantial controversy in the American colonies. The wider political implications of *Somerset* were even broader and more important than its direct legal effects.

The decision was bitterly attacked by colonial slaveowners in the 1770s as a surprising and destabilizing reversal of at least half a century of prior English law, which they argued (with some justification) had deemed slaves "imperial" property with a largely uniform status throughout the empire.[74] West Indian slaveowners attacked the *Somerset* decision because they thought that it would damage colonial slavery, not because they cared about whether slaves could be brought to England. Pamphlet wars regarding the decision erupted in England, and opposing pamphlets were advertised for sale in the mainland colonies.

The arguments and decision in *Somerset* were widely reported in the mainland colonies. A survey of twenty-four operating colonial newspapers for which a full year's editions have survived (out of a total of thirty-two operating papers) showed that twenty-two out of the twenty-four newspapers contained reports of the arguments, an account of the decision, or both. The longest such coverage consisted of well over two thousand words.[75] This extensive transatlantic reporting shows that it was widely believed that the *Somerset* decision could have colonial impacts. Events in the colonies after *Somerset* provided several forms of immediate and vivid evidence of the decision's mixed but potentially powerful implications for colonial slavery and politics: new slave freedom litigation, slave flight, strongly intensified political debate over slavery, and reinforcement of slaveholder antipathy to Crown policy on slavery and taxation.

Some colonists believed that Mansfield had decided that English common law prohibited slavery not just in England but wherever that law applied. Significant numbers of colonists believed English common law applied throughout the colonies, at least where English fundamental rights were concerned. As a result, in Massachusetts, *Somerset* was cited as legal authority supporting a slave's suit for freedom in a 1774 case. This meant that the slave's attorney contended that the decision's principles were intended to apply in Massachusetts. That claim would in turn necessarily have been founded on the further arguments that Massachusetts had no positive law establishing slavery, and that under *Somerset*, this meant that slavery did not exist there.[76] The continuing political force of this line of

reasoning in the prerevolutionary debate over slavery (and over the justifications for colonial resistance to British rule itself) can be seen in the eloquent argument made by a Pennsylvania writer in mid-1774:

> We declare with a joint voice, that ALL *the inhabitants of America* are entitled to the privileges of the inhabitants of Great-Britain; if so, by what right do we support slavery?—The instant a slave sets foot in England, he claims the protection of the laws, and puts his master at defiance; if British rights extend to America, who shall detain him in bondage? . . .
>
> I contend that, by the laws of the English constitution and by our *own declarations*, the instant a negro sets his foot in America, he is as free as if he had landed in England.[77]

This writer contended that if colonists insisted that their possession of British rights meant that they were exempt from "the controul of Parliamentary power," to be consistent they must also accept that the same British laws and constitution that protected them from Parliament abolished slavery in America as well as in England. If not, there would be no reason for the people of England to respect the colonists' own rights.

Others in both England and the American colonies took the narrower view that in *Somerset*, Mansfield had decided that slaves became free upon coming to England.[78] In the colonies, slaves from Massachusetts to Virginia appear to have been encouraged to seek their freedom by the decision.[79] According to historian William Wiecek, some Massachusetts slaves sued their masters for freedom and back wages based on *Somerset*.[80] A recent account of the Massachusetts reaction to *Somerset* reports that slaves in Boston petitioned the legislature for their freedom in 1773, asserting that they had a natural right to freedom that had not been abrogated by contract or positive law in Massachusetts, a position that may have been based on, and in any event was certainly consistent with, *Somerset*.[81] At least some Virginia slaves who learned of the decision concluded that it meant they would be free if they could escape to England. As historian Paul Finkelman describes these events, "One Virginia slave attempted 'to board a vessel for Great Britain . . . from the knowledge he has of the late Determination of Somerset's Case.' Another Virginia master complained that his runaways were bound for England 'where they imagine they will be free (a Notion now too prevalent among the Negroes, greatly to the vexation and prejudice of their Masters).'"[82] When one combines the Massachusetts and Virginia accounts, it seems fair to conclude that among slaves the word about

the *Somerset* decision had "gotten around" from one end of the colonies to the other.

But in the longer run, *Somerset*'s implications went well beyond contributing to slave freedom litigation and slave flight. It quickly became part of an expanding American colonial debate over slavery and encouraged antislavery action.[83] Reactions to the decision in the American colonies ranged from approval to determined opposition. The decision strongly interested American abolitionists, who participated in an ecumenical transatlantic antislavery network. A key member of that network was Granville Sharp, a leading English abolitionist who had been a principal force behind English legal actions against slavery in the 1760s and 1770s that had effectively set the stage for *Somerset*. Sharp promptly sent information about Mansfield's decision and related English political developments to fellow antislavery activists in the American colonies, who soon took advantage of it in their antislavery publicity and legislative action.

In a widely circulated pamphlet first published in 1772 in Philadelphia and then republished in Boston, Sharp's Philadelphia ally Benjamin Rush gleefully seized upon *Somerset* to support his argument that American political freedom was inextricably intertwined with freedom for slaves. He relied on the decision as evidence that Britain intended to abandon its support of slavery: "We have the more reason to expect relief from an application [to bar slave imports] at this juncture, as, by a late decision in favor of a Virginia slave at Westminster-Hall, the clamors of the whole nation are raised against them [slave importers]."[84] Anthony Benezet, a prominent antislavery writer based in Philadelphia, received Sharp's information and provided the materials to prominent New Jersey attorney Samuel Allinson.[85] Encouraged by Mansfield's decision, Allinson and his allies soon undertook legislative abolition efforts.

American slaveholders reacted to *Somerset* either with criticism or with public silence.[86] There were attacks on the *Somerset* decision published in Rhode Island, Connecticut, Massachusetts, and Virginia newspapers, some of them quite extensive.[87] One British newspaper's "correspondent's" views were widely reprinted in American newspapers. He argued that *Somerset* was wrongly decided because colonial slave property must be treated as imperial property that retained its unchanging character as property even as it changed jurisdictions.

> This Cause seems pregnant with consequences extremely detrimental to those Gentlemen, whose estates chiefly consist in slaves; It would

> be a means of ruining our African Trade. . . . [I]f the purchase of the slaves was . . . made in countries which allow of the traffic, then our Correspondent strenuously asserts, that no change of climate can abrogate the bargain; for it appears at first sight incongruous to suppose that a change of climate [jurisdiction] can deprive a person of that property, for which he gave a valuable consideration.[88]

A 1774 South Carolina pamphlet attacked *Somerset* as a dangerous inroad on South Carolina laws and customs. "A Back Settler," its anonymous author, clearly referring to *Somerset*, accepted that English law now freed anyone of "human Form" who came to England, resulting in a "general Manumission of Negroes" there. Back Settler used this doctrine, which would "complete the Ruin of many *American* Provinces, as well as the *West India* Islands" if adopted there, as an important reason why Americans would not want to adopt all English liberties as his fellow colonists were now claiming should be done.[89]

Although press coverage alone is a limited measure of public opinion, the Virginia press coverage of the decision suggests that slavery opinion there may have been somewhat divided. A prominent Virginia newspaper published a detailed attack on *Somerset*.[90] But another newspaper there reprinted an anonymous comment challenging Parliament's authority to legalize slavery in England, though on grounds that many Virginians would probably have rejected. The author argued that "the Laws of God" required that "a Negro cannot be less free than a man of any other Complexion," and that permitting enslavement of blacks on racial grounds would inevitably lead to its extension to "every mulatto," and then "the Portuguese" and "the French," and even the "brown complexioned English."[91]

One observer claimed that the *Somerset* decision would threaten colonial slaveowners because massive freedom litigation would result, especially in the West Indies. This "correspondent's" views appeared in New York and Massachusetts newspapers: "The late decision with regard to Somerset the Negro . . . will occasion a greater ferment in America (particularly the islands) than the Stamp Act itself; for slaves constituting the great value of (West Indian) property (especially) and appeals from America in all cases of a civil process to the mother country, every pettifogger will have his neighbor entirely at his mercy. . . ."[92]

But the political implications of *Somerset* went far beyond the possibility of further freedom litigation, as can be seen from the reaction to the decision of a well-informed colonial official, Henry Marchant. Marchant,

the attorney for the slave purchaser in the Rhode Island slave freedom case discussed above (*Randall v. Robinson*), had gone to England as the colonial attorney and agent for Rhode Island in 1771. While in London, Marchant personally attended the early 1772 opening court arguments in the *Somerset* case. An experienced attorney trained in Massachusetts, Marchant concluded that the arguments made by Somerset's attorneys for his freedom would apply just as well in the colonies as in England, a conclusion that would have been very threatening to any colonial slaveholder.[93] Marchant saw no legal distinction between the British slave trade, which was unquestionably legal under English law and thus essentially unchallengeable under colonial law, and the use of a slave in a business, which he thought was under attack in *Somerset*. He saw the abolitionist argument in *Somerset* as a mere "plausible pretence" to "cheat an honest American of his slave."[94]

Both Henry Marchant's reaction and the published attacks on *Somerset* provide evidence that American slaveholders thought that the decision was an arbitrary ruling that destroyed their valid property rights. This unfairly deprived Americans of their "honest" property, and made them second-class subjects. For slaveholders, this made *Somerset* a direct and wholly unpalatable parallel to British legal scholar (and Mansfield ally) William Blackstone's conclusion, in his widely read *Commentaries on the Laws of England*, that the American colonies had been British conquests, and therefore were not governed by (or protected by) English common law.[95]

Somerset also created an important problem of political "jurisdiction" for slaveowners. As is well known, Mansfield's views on parliamentary supremacy and virtual representation were anathema to many Americans. But they would have become of immediate practical concern to colonial slaveholders when he made English slavery, and quite probably imperial slavery as well, subject to future parliamentary control in *Somerset* by denying that courts had authority to authorize it because slavery was purely a creature of positive law.[96] There were immediate practical consequences of this shift in "political jurisdiction." While *Somerset* was under consideration, in May 1772 Parliament declined a request by slaveowners to legislate to legalize slaveholding in England. Parliament's action, like the result in *Somerset* itself, showed that antislavery activism was having some success in England.[97]

American slaveholders were thus threatened by *Somerset* with diminished imperial protection for slavery—through threatened invalidity of their property rights outside their colonies and even inside some colonies—at the same time that Britain was blocking their own colonies' policies in-

tended to maintain slave prices by limiting imports through taxation. But in American slave colonies, white majorities sought to end arbitrary British government policy on slavery not by abolishing slavery, but by insisting on local autonomy over it, including its taxation.

Thomas Jefferson's opinions on slavery in his *Notes on Virginia* notwithstanding, many American slaveholders just before the Revolution had no great qualms about considering existing slaves as property, as their colonies' laws and customs had done for more than a century. As Jefferson himself explained to a correspondent many years later, few prominent Virginians doubted then that slaves were "as legitimate subjects of property as their horses and cattle."[98] Consider, for example, the conduct of Richard Henry Lee, the Virginia leader who moved the formal congressional resolution declaring American independence in June 1776. There is no evidence that Virginians had thought it ridiculous for Lee to conduct a public parade in Virginia against the Stamp Act's "chains of slavery" while literally using his slaves to hold his protest banners.[99] In mid-1772 when *Somerset* was decided and Virginia's legislature was opposing continued slave imports, Lee was attempting to engage in an international slave-trading transaction with his brother in London as his partner.[100] From this, it appears that for Lee the central Revolutionary-era political issue raised by slavery was not its morality or expediency, but instead Virginia's right to control it without British interference. As is shown by their views in forming the Confederation, leaders such as Lee and Patrick Henry, like Revolutionary leaders in other major slave colonies, saw their state's untrammeled ability to control slavery as a central part of what the Revolution was about.[101] As Landon Carter, a major Virginia slaveowner, wrote in a different but analogous context to George Washington in 1776, the right to "do as we please with our own property" is "the very basis of the American contest."[102]

Leaving aside general attacks on arbitrary British policy, which many of them saw as damaging to slavery, many slaveowners were publicly silent on slavery in the period just before the Revolution. But they were often successful in opposing efforts during that period to take direct steps toward abolition. And they were successful in protecting slavery in important ways in the Articles of Confederation once the Revolution had begun, even as abolition began.

Colonial antislavery efforts that failed are nevertheless very informative about the political dynamics of slavery abolition. In 1773, encouraged by the *Somerset* decision, New Jersey legislator Elias Boudinot led an effort with Quaker leader Samuel Allinson and others to convince New Jersey

to move toward the gradual abolition of slavery.[103] Boudinot sought to negotiate consensus antislavery legislation with slaveowners' representatives, whose objections to abolition were "altogether founded" on the perceived "ill consequences of having free Negroes in a Neighbourhood where there are Slaves," as "they would greatly corrupt them."[104]

As a result of the Boudinot alliance's efforts, between 1773 and 1775 the New Jersey legislature considered two slavery-related bills. Both bills failed. The fate of the manumission bill is particularly instructive about New Jersey public opinion. Instead of substantial liberalization of the law, the bill discouraged manumissions by providing that masters who manumitted slaves older than twenty-one years had to pay a fee or post a bond to protect taxpayers against poor-relief costs. The bill also "severely limited" the rights of freed blacks; even though they were required to pay taxes and perform duties of citizens, they were denied the right to vote. They could serve as witnesses only against other blacks, and could not intermarry with whites.[105] New Jersey legislators had addressed manumission's consequences by minimizing its perceived socioeconomic costs to white citizens. Even with these onerous conditions on manumission, petitions urged the New Jersey Assembly to reject the bill, abolitionists agreed to delay it, and the bill failed by inaction.[106]

The years just before the Revolution also added another political dimension to slave-import laws when they became tools for attacks on British policy toward the colonies. This shift in the political rationale for colonial efforts to limit slave imports was evident from the 1774 Rhode Island import-ban law.[107] The statute departed markedly from past import limitations because it was not based on heavy import taxation but instead provided that any slave imported illegally would "immediately become free." Addressing both domestic and foreign audiences, its preamble proclaimed an abolitionist motive—linking political freedom for the colonies to freedom for slaves—as one of its primary purposes.

Rhode Island's ban statute was "largely symbolic"; it was riddled with exceptions to protect the interests of its citizens, its slaveowners, and its traders.[108] The statute excepted "Servants of Persons travelling through this Colony," a provision helpful to Rhode Island business. To avoid discouraging immigration, it then excepted "Negro or Mulatto" slaves, belonging to any British colonial "who shall come into this Colony, with an intention to settle or reside . . . therein." As to a new settler's slaves, remarkably, the statute provided that the law of slave discipline in Rhode Island would be the same law that had applied to the slave in its colony of

origin.[109] The statute also excepted many slaves temporarily held in Rhode Island for slave-trade reexport, which protected nearly all of the large Rhode Island slave trade.

As Paul Finkelman concludes, the ban statute's "sojourner" exception had the effect of negating *Somerset*'s specific substantive holding as applied to them.[110] The statute's broader goal was to adapt *Somerset*'s principles to Rhode Island's purposes. The legislation was premised on the fundamental conflict-of-laws principle of *Somerset*—the principle that local law (here, Rhode Island law) wholly controlled the fate of slaves once in Rhode Island, without regard to their status as property in other British colonies or foreign jurisdictions. Even before the Revolution, Rhode Island was declaring its law of slavery to be independent from that of any other colony and rejecting the imperial policy of slavery uniformity, following *Somerset*'s logic.[111]

The Rhode Island ban foreshadowed the profound legal problem—independent state legal sovereignty—that would face the institution of slavery immediately after Independence.[112] In *Somerset*, the colonies had been told in unmistakable terms by the leading English judge of the day that English common law and morality did not sanction slavery, and that exercising their independent legal rights on slavery was not only legitimate but even desirable under long-standing English-law principles that protected freedom. After Independence, slaveholders would face a diverse legal regime that was far less stable than the reasonably uniform legal regime they had experienced under the empire before *Somerset*. Until a new revolutionary government was in place, they no longer had any assurance that their slave property would be protected by other states.

SLAVERY AND THE REVOLUTIONARY WAR PERIOD

The Revolution posed a series of important additional threats to slavery. These included the loss of imperial military and legal protection, the problem posed by slave revolts for military defense, sharply increased numbers of fugitive slaves, and the growth of antislavery ideology and state abolition movements. But the Revolution nevertheless strengthened slavery for several reasons. It fundamentally changed the balance of political power between slave states and states that were moving toward abolition in the new republic. Antislavery ideology, even reinforced by Revolution

principles, had limited effects in the face of the political and economic realities of slavery. Antislavery efforts also encountered countervailing political principles that were shared throughout America, including conflicting concepts of natural rights. Although the Revolution also caused some physical disruption to slavery, the effects of Revolutionary War slave flight and military limitations have been overstated. By far the largest part of the institution of slavery survived the Revolution's disruptions. Slavery emerged from the Revolution stronger than it had been within the framework of the empire, especially after *Somerset*.

The principal reason for the Revolutionary transformation of the sectional balance of power between slave states and Northern states was that the slave states represented a far larger share of the wealth and population of the total American confederation that resulted from the Revolution than they did of the British Empire. In their status as British colonies, the major American slave states had represented approximately 10 percent of the total population and 14 percent of the total wealth of the British Empire in 1774.[113] By comparison, those states contained more than 50 percent of both the total population and the total wealth of the United States when the Revolution began. One immediate political effect of Independence was to make the American slave states far larger stakeholders in a much smaller country. As debates in the new government quickly showed, the slave states also had strong common interests in various government policies. As a political matter, given their large resources and political cohesion, slave states were much more strongly positioned to resist Confederation control of slavery than they would have been to resist increased British imperial control of it.[114] Whether rebellious Americans anticipated that American independence would confer added political influence on the slave states or not, it quickly became apparent from the Continental Congress debates discussed below that where slavery was concerned, the slave states held a political veto over Confederation policy. Revolutionary politicians adjusted their policies accordingly.

The Revolutionary War did sharply exacerbate the fugitive slave problem for slave states. During the Revolution, the slave states lost substantial numbers of slaves through slave flight, but this loss had limited impact for several reasons. First, recent estimates suggest that slave flight was much lower than has often been thought. Some earlier estimates placed the total number of slaves who fled as high as 80,000–100,000, or approximately 20 percent of the total Southern slave population. A careful recent analysis by historian Cassandra Pybus shows that the number of slave runaways was

very probably dramatically lower—about 20,000, or 5–6 percent of the Southern slave population.[115]

Slave flight had varied effects in different parts of the country. Slaves fled to the British, into backwoods areas, and into the Northern states. The British command in New York became a magnet for runaways. During British occupation, slave flight from New Jersey and New York increased sharply.[116] In Virginia, Richard Henry Lee reported that his brother had lost sixty-five slaves to Cornwallis (roughly one-fourth of his holdings), and that other neighbors "lost every slave they had in the world."[117] In the Lower South, Pybus estimates that slaveowners lost six thousand slaves to the British, or 8 percent of their total slave populations. But overall, the economic loss to slaveowners was relatively small. And as discussed below, they obtained protection against future slave flight from the new American revolutionary government.

The Revolutionary War also exposed some degree of military vulnerability of the slave states due to possible slave insurrections. Slaveholders were privately aware of this vulnerability even before the Revolution. As James Madison had written his close friend William Bradford, Jr., just before the war began, such insurrections were "the only part in which this Colony is vulnerable; & if we should be subdued, we shall fall like Achilles by the hand of one that knows that secret."[118] At points during the war, some colonies were occasionally hampered in their military operations against the British because they needed troops instead to maintain slave discipline, but these disruptions do not appear to have been chronic or crippling.[119]

After Independence, slaveowners also faced the reality that antislavery thought had become more prominent in the years before the Revolution both in England and in the United States. Antislavery thought gained additional support—in some quarters—from the Revolution. Anyone familiar with Samuel Johnson's famous gibe—"How is it that we hear the loudest *yelps* for liberty from the drivers of negroes?"—will appreciate that many Englishmen and contemporary Americans (Northern and Southern) thought that there was tension between American revolutionary principles and the institution of slavery.[120] Wartime efforts to employ blacks in the military undoubtedly increased this tension.[121] But for several reasons it would be a mistake to infer that the Revolution greatly strengthened the movement toward abolition throughout the country.

The conflict between slavery and Revolution principles was far more strongly felt by white citizens in the Northern states than in the South,

and perhaps only by a minority even in the North. As David Brion Davis points out, only the Vermont Constitution moved directly from an endorsement of natural rights to a constitutional abolition of slavery.[122] Davis doubts that the inconsistency of revolutionary ideals with slavery was a "pressing concern to the majority of Americans, even in New England. . . ."[123] And there were also sharply conflicting interpretations of Revolution principles where slavery was concerned. This conflict was not limited to differences founded on clashing views about black equality, but implicated larger issues of federalism and political sovereignty as well.

Historian Jack Greene argues persuasively that freedom to own slaves was one of the liberties claimed by South Carolinians, who saw no inconsistency between enslavement of African Americans and the ideas of the Declaration of Independence.[124] Many South Carolinians were fighting the Revolution to protect their slave property, not to free slaves, and they were not alone in failing to see any inconsistency between slavery and revolutionary ideals. Although there were notable exceptions, many Virginians felt precisely the same way about slavery; they fought at least in part to protect their freedom as Virginians to determine for themselves what they wanted to do with their slave property. Virginians' determination to protect local control of slavery was evident in the deliberate modification of the 1776 Virginia Declaration of Rights during its drafting to exclude slaves from its protection, and in Richard Henry Lee's key role in the drafting of the Articles of Confederation to protect slavery (discussed below).[125]

More generally, informed contemporaries understood that within the tradition of English thought stemming from the political convulsions of the Civil War and Restoration, it was possible to take more than one view of the origin and character of natural rights. Natural rights could either be seen as unalterable "natural" or divine restraints on the sovereignty of any government, as in John Locke's thought, or as rights existing in a state of nature that could be limited by legitimate governments exercising their sovereignty through positive law, as in the work of writers such as Hugo Grotius and Thomas Hobbes.[126] Colonists were divided on which concept of natural rights they supported in the 1770s, as the carefully articulated views in a 1774 South Carolina pamphlet written by "A Back Settler" show. That author responded to an attack on parliamentary supremacy over the colonies by beginning with the argument that natural law could not control the decisions of a sovereign government: "The unequal Dictates of natural Law being wisely restrained for the general Benefit of the

Community, and reduced to a subordinate Limitation, no Arguments, on the supposed Impropriety of such Measures as were adopted by the acknowledged Legislative Power could be admitted, being in their Nature opposed to the constitutional principles on which the State or Society was founded."[127] Notwithstanding the ringing phrases of the Declaration of Independence, later events, including the drafting and ratification of the Constitution on the basis of popular sovereignty, would show that the struggle between these warring conceptions of natural rights and liberty had not been decisively ended by the Revolution.[128] That irresolution had important implications for the evolution of slavery. And there were significant sectional differences in attitudes toward slavery as well.

Sectional differences over the implications of revolutionary ideals for slavery were attributable to several factors. Many of the Northern states had a distinctive religious heritage, and their leading denominations were more likely to condemn slavery as irredeemably evil than those in slave states.[129] David Brion Davis's classic studies conclude that the Revolution created a new intellectual climate regarding slavery, founded on a confluence of Enlightenment, religious, and political thought. He and other historians suggest that this new climate of thought catalyzed the Northern abolition of slavery, and might have led to much wider abolition than actually occurred, absent countervailing forces such as a desire to maintain economic class discipline or sectional interest.[130] But other historians have responded that Enlightenment thought and capitalist market development themselves had equivocal implications for slavery, and that there was a limited connection between antislavery thought and political support for antislavery action.[131] Perhaps most importantly, Enlightenment moral and political thought (particularly that stemming from the Scottish Enlightenment) was entirely compatible with theories of history, appealing to many prominent citizens in slave states, that permitted and even sanctioned a "modern," "progressive" variant of slavery.[132]

Economic and social differences between the Northern states and the slave states had an impact on the Revolution's effects on slavery as well. Northern states had far less to lose from abolition either in economic terms or through social-structure disruption than the slave states did (discussed further in chapter 2). And informed contemporaries believed that white racism, which existed throughout America, was more strongly reinforced by existing socioeconomic conditions and practices in the South.[133]

As the creation of the Confederation showed, during the Revolution, arguments for government action against slavery also encountered

strongly countervailing political principles shared by many Americans that had profound implications for its future. Individual colonies were often seen as sovereigns whose political legitimacy necessarily derived from local public consent. Adherents of the strongest version of this doctrine of state sovereignty (or "strong" federalism) believed that no central government could legitimately control domestic slavery because it was precisely the kind of political issue reserved to governments founded on such consent. It was also often thought that governments existed first and foremost to protect property. These views were reflected in the Articles of Confederation where slavery was concerned.

The clash of these powerfully conflicting ideological and socioeconomic forces affecting slavery, combined with sectional divisions of opinion about slavery itself, meant that there was—and could be—no uniform understanding across Revolutionary-era America of the relation between slavery and "Revolution principles." Widespread Revolutionary-era clamor against political enslavement may have created the appearance of a universalizing impulse toward equality or protection of natural rights during the Revolution with irresistible implications for American slavery itself, but the political reality was far more modest. Americans were divided over slavery, as is clear even if only the differing sectional responses to *Somerset* and the politics of slave-import limitations are considered. The groundwork had nevertheless been laid by prerevolutionary developments for a strenuous contest among Americans over slavery. But significantly, it occurred in the pressing context of how the Confederation would finance and conduct the Revolutionary War. The debate revolved around conflicting sectional interests, and slave states gained important protections for slavery as a result of it.

SLAVERY AND CONFEDERATION

Slavery severely complicated many aspects of Revolutionary leaders' efforts to form a permanent continental government under the Articles of Confederation.[134] The debate over the Articles occasioned the first confrontation on slavery between American political leaders at the continental level. Slaveholders "won" that confrontation because they were able to threaten convincingly that they would abandon the Confederation over slavery. Slave states insisted that the Confederation should have no power to control slavery or slave property, even to support the war effort. The

political strength of the slave states was not the only cause of the Confederation's pronounced decentralization, but slave state representatives ardently supported the most extreme version of federalism during its formation. Slave state political strength did lead directly to stalemates on core structural issues of taxation and representation that protected slavery directly from Confederation authority and also guaranteed ineffectual Confederation government no matter what formal powers over slavery the Confederation was given. Slave states were also able to dictate outcomes on a series of related issues that affected slavery: black military service, fugitive slaves, and the slave trade.

Historians have underestimated the protection that the Articles provided to slavery. They agree that disputes over confederal "quotas of contribution" (that is, taxation) that implicated slavery and over congressional representation were central to the debate over the articles.[135] They have also shown that slavery strongly influenced the shape of major features of the Confederation such as military-service obligations and its treaty powers. But far less attention has been given to implications of slave state advocacy of the Confederation's extreme federalism and to the Confederation's treatment of citizens' privileges and immunities.[136]

In particular, historians have generally concluded that it is uncertain whether the Articles of Confederation had any provisions related to fugitive slavery.[137] But the sources suggest that slave states responded to the existence of new postrevolutionary state authority to abolish slavery by obtaining "confederal" protections—that is, Confederation laws binding on all states—against fugitive slavery and protection for imported slave property in the Articles of Confederation. These provisions were intended to limit the effects of the *Somerset* decision even in states such as Massachusetts where its principles were being applied.[138] Thus the articles went beyond what historian William Wiecek described as the "federal consensus" on slavery, which included a consensus that state law governed slavery.[139]

The Articles had as a central principle the concept of federalism, which as Americans understood it entailed both a formal division of substantive policymaking authority between levels of government and political protection for state power within the national government structure. Federalism was undoubtedly a product of the strongly and widely held belief that maintaining the strength of local government would protect freedom against possible central government tyranny. But it was also a virtue born of political necessity. Federalism permitted constitutional drafters to avoid very divisive, indeed probably irresolvable, disputes between the

states over a variety of controversial social issues, such as the separation of church and state, the extent of suffrage, and slavery. No union would have been possible if the principle of federalism had not been applied to slavery, as shown by Confederation slavery debates analyzed below.

But the Confederation was not just a federalist government; it was an extremely decentralized form of federalism that gave the Confederation government exceptionally limited authority with respect to both law-making and law enforcement. While a number of Revolutionary leaders throughout the country favored extreme decentralization, some important leaders such as Benjamin Franklin clearly did not, and many of its most ardent advocates were to be found in the slave states. Article 2 of the Articles, proposed by slave state representative Thomas Burke of North Carolina, was intended to explicitly recognize and protect state sovereignty, preserving to states the large realm of powers not expressly delegated to the Confederation. Although no direct evidence is available, their political views then and later suggest that Virginia members of Congress at the time, such as Richard Henry Lee, would have supported Burke's position. Both because it excluded the national government from nearly all domestic policy matters and because changes in national powers were made virtually impossible without unanimous consent of the states, article 2 established at least as wartime national policy a conception of federal authority that was the polar opposite of parliamentary supremacy under the British constitution.

The Articles drafters accepted that the regulation of slavery within the states would remain primarily under state control.[140] In theory, this would permit abolition to move forward in Northern states but, since at the time nearly 90 percent of all slaves were located in states where slavery was central to the economy, this decision also made it quite unlikely that the status of most American slaves would change at least in the near to medium term (discussed further in chapter 2). Creating the Confederation also involved a series of other important disputes that fundamentally affected slavery's place in the new federal system.

As historian Robin Einhorn has shown in a careful and illuminating analysis, sectional divisions over slavery prevented the Confederation from creating even a workable taxation system.[141] In debating the Articles, leading Northern and mid-Atlantic delegates advanced a new conception of slave status for Confederation purposes. They asserted that slaves should be deemed members of "confederal" society for purposes of calculating Confederation state taxation and military-service quotas. Northern delegates

sought to distinguish between the state-law status of slaves as property and their status under confederal law. Slave state delegates strenuously contended that the state-law status of slaves as property should fully determine their character for Confederation purposes.

This fundamental dispute over the Confederation legal status of slaves was at the heart of a well-known debate that occurred on July 30, 1776, over how to fund the Confederation during the Revolutionary War. Delegate Samuel Chase of Maryland moved that tax quotas of contribution be fixed by counting only "white inhabitants." Chase argued that including "negroes" effectively would tax the South more heavily on wealth than the North because the North's cattle and horses would be excluded. Chase also contended "that Negroes in fact should not be considered as members of the state more than cattle & that they have no more interest in it."[142] John Adams of Massachusetts responded to Chase that the "wealth of the state" was being taxed, and that in calculating that wealth, the free or slave status of workers was irrelevant; the issue was instead whether workers contributed "surplus" to the state's wealth. Adams observed that "the condition of the labouring poor in most countries . . . is as [painfully] abject as that of slaves," but for Confederation purposes, that status was irrelevant. Even if "one half of the labourers of a state could in the course of one night be transformed into slaves," they would not make the state poorer or less able to pay taxes.

The debate broadened to consideration of slavery's differing effects on Confederation member states. James Wilson of Pennsylvania argued that Chase's amendment meant that the North would bear all of the burdens of slavery, while the South received all of its benefits. The South would get to keep the profits of slavery, but could still exclude slaves from military-defense quota obligations, which would be particularly unfair if they were tax exempt. Wilson then expanded his attack based on antislavery considerations. He argued that the South could use free labor, but chose not to. Although "it is our duty to lay every discouragement on the importation of slaves, this amendment would give the *jus trium liberorum* to him who would import slaves."[143] Wilson's broadening of the argument was met with the acid response from slave state delegate Thomas Lynch of South Carolina, who had served in the first Continental Congress as well, that if it were to be debated whether slaves were slaveowners' property, "there is an end of the confederation."[144]

Lynch's threat of Southern defection in the face of efforts by Massachusetts and Pennsylvania delegates to incorporate slaves into the tax and

military-service base of the Confederation laid bare the ultimate basis of slave state political power in the revolutionary government. It had long-lasting effects on one very influential member of the Continental Congress, John Adams, who understood that wholesale Southern defection would be a death sentence for the Revolution. Almost immediately after the tax debate, Adams opposed plans to include black troops in New Jersey forces because "S[outh] Carolina would run out of their Wits at the least Hint of such a Measure."[145] Adams was so impressed by the vehemence of the Southern response to Northern arguments on slavery policy that when he was contacted in 1777 by Massachusetts legislators who were planning gradual abolition legislation in Massachusetts and sought Congress's advice about it, he advised them not even to bring it up in their legislature for fear of the Southern reaction.[146]

Adams's alarmed reaction to the prospect of Massachusetts abolition legislation was quite remarkable. His arguments during the taxation debate showed that he understood that there was ultimately no legal dispute in the Confederation itself about Massachusetts's power to abolish slavery if it wanted to do so. Adams apparently believed that slave states thought that Northern moves toward abolition would threaten slavery in the slave states, and deferred to their fears. His short journey from aggressive efforts to include slave wealth and military capacity in the Confederation's resources to efforts to keep slavery from becoming a divisive force in the revolutionary government provides strong evidence of his view of slave states' bargaining strength in the revolutionary coalition.

Chase's motion to exclude slaves from the tax base was defeated on August 1, 1776, on a sectional vote of 7–5. However, in late 1777 the draft Articles were revised to include only land and buildings as the basis for calculating tax quotas, so the slave states ultimately prevailed on the taxation issue. In mute but unmistakable testimony to slave state political strength, the Confederation was left with a completely unworkable tax system that was never used. (See chapter 3.) Slave and Northern states could not agree on a workable taxation system in significant part because of the conflicting effects that slavery had on sectional political calculations.[147]

The sectional stalemate over slavery also had significant implications for the structure of congressional representation under the Confederation. In the Articles, congressional representation was based on one vote per state, a system that the Southern states generally disliked, given their disproportionately large wealth and population. However, once they had insisted on federalism by incorporating state sovereignty as a governing principle,

and on a taxation system that bore little if any relationship to wealth or population, they had no plausible basis for insisting on a change in the representation system.

The Articles of Confederation therefore ended up as a set of unworkable, purely expedient quid pro quo agreements. In the Confederation, representation and taxation had no politically coherent relationship to each other, and neither appropriately reflected the postindependence distribution of either wealth or population in America. This inherently flawed governance process was, ironically, inconsistent with the Revolution's principle that in a just government, representation and taxation must bear some reasonable relationship to each other. It led to repeated Confederation stalemates on fundamental policy issues. But government by stalemate and ad hoc accommodation also left slavery free to develop as an institution under state control without bearing Confederation tax or military burdens (except those voluntarily imposed by states).

The Confederation's extreme federalism extended to enforcement of its own laws. Representative Thomas Burke of North Carolina was able to deny direct law-enforcement authority to the Confederation even on issues central to its ability to execute its agreed-upon powers. Ironically, Burke's rationale for his opposition to Confederation law-enforcement authority was based on his understanding of the implications of the law of slavery.

In early 1777, Congress considered an important proposal to permit the Confederation directly to empower citizens to take up military deserters and bring them to a justice of the peace. In successfully opposing that proposal, Thomas Burke strenuously argued that this power could be exercised only by a state because it was an "act of high dominion" and could be authorized only by a local law that had the consent of the people, and "here he Illustr[at]ed by quoting the case of the Negro Somerset."[148] Burke's shorthand treatment of *Somerset* in this debate makes clear that he believed that most delegates were already familiar with that decision, which meant that he could simply apply its principles to the issue at hand. Burke interpreted *Somerset* as containing a "strong" federalism principle applicable to a range of issues such as military desertion. Its implication was that the confederal government could not directly enforce even some of its own major laws, but must act through states to enforce them.[149] Beyond successful efforts to minimize Confederation authority over their states, slave states' impact on the Articles extended to new confederal limits on the power of all states to interfere with slavery as well.

Where slaves were concerned, the Articles accepted the fundamental principle that state law determined slave status, but they also carefully either protected state authority over slaves, or imposed limits on state authority over them, in specific cases. In the privileges and immunities clause (hereafter, P&I clause), the slave states were able to obtain agreement extending the reach of this state-law legal regime governing slavery extraterritorially for the first time through confederal law (that is, Confederation law binding on all states). The clause raised exceptionally contentious issues, and its wording changed dramatically during the course of drafting. Several of its provisions added at the last minute dealt with slavery and the slave trade.

Why the clause was controversial is evident from its original form in the July 1776 proposal (the "Dickinson draft," named after delegate John Dickinson, commonly thought to be its author) reported to Congress unanimously by a twelve-member committee:

> ARTICLE VI. The Inhabitants of each Colony, shall henceforth always have the same Rights, Liberties, Privileges, Immunities and Advantages, in the other Colonies, which the said Inhabitants now have, in all Cases whatever, except in those provided for by the next following Article.
>
> ARTICLE VII. The Inhabitants of each Colony shall enjoy all the Rights, Liberties, Privileges, Immunities, and Advantages, in Trade, Navigation, and Commerce, in any other Colony, and in going to and from the same from and to any Part of the World, which the Natives of such Colony enjoy.[150]

The Dickinson draft privileges proposal was breathtakingly expansive, indeed almost "imperial," in scope. It would have created a broad "confederal" law regime that required preservation of the status quo (or "freezing" of the law) in fundamental areas of the English law of all of the colonies. Under this provision, if slavery were legal in colony A at enactment, so that an inhabitant from colony B could hold property rights in a slave in colony A, colony A could not deprive inhabitants of colony B of those rights in the future. Similarly, because it "froze" the law, the Dickinson draft meant that if states chose to ban slave imports, they could not stipulate that fugitive slaves or slaves whose masters were sojourning in the state would be freed as a result of such an import ban. For example, the Rhode Island 1774 import ban would have been consistent with these provisions,

but the state could not have liberalized its laws. John Dickinson, a conservative major slaveholder who was also a lawyer trained at the Middle Temple in London, would probably have thought it desirable to create such "imperial" property law, requiring continued protection of existing property rights throughout the country.

The Dickinson draft's aggressive effort to maintain existing law throughout the colonies proved so controversial that the next draft of the Articles completely omitted any privileges and immunities articles whatsoever. Historian Merrill Jensen's characterization of the omitted provisions was an apt description of their purpose: "the two articles which erased state lines with respect to legal and commercial privileges and rights were likewise omitted."[151] From August 1776 until the final day in November 1777 on which the Articles of Confederation were adopted, there was no further public debate on the privileges and immunities issue. Yet immediately before adoption, Congress added a P&I clause to the Articles.

On October 26, 1777, Congress agreed that each state should be given total, independent authority to prohibit imports or exports of any particular species of "goods, wares, or merchandize," and added a proviso to make clear that this authority would preempt the provisions of any treaty.[152] As William Wiecek concludes, this new authority was intended to permit states to ban slave imports, among other things.[153] Slaves had been regarded as a form of goods (a kind of property) under English law for international trade purposes for nearly one hundred years.[154] State power over slavery was thus being sharply expanded compared to the August 1776 Articles draft, which could have prohibited state bans on slave imports in the event certain treaties were entered into by the Confederation. But this expansion of state authority broadened the potential slavery issue facing the slave states, because state authority could also be used to free fugitives or imported slaves, to prevent slave transit through a state that banned imports, or to prevent slave sales out of state (as Rhode Island soon did).[155]

On November 10, 1777, after debate on all substantive articles was completed, a three-member committee chaired by Richard Henry Lee of Virginia, and including James Duane of New York and Richard Law of Connecticut, was appointed to recommend additional necessary articles. On November 13, the Lee committee proposed seven new provisions.[156] The Lee committee's privileges and immunities proposal abandoned the comprehensive effort to use confederal law to "freeze" or limit state law proposed by the Dickinson draft, except in a very few specific instances

deemed important enough by the committee to create confederal law for them. During debate, Congress rejected one proposal that demonstrates the broad power over state law that delegates thought the Articles could confer. The rejected amendment was a strong creditor's rights amendment using confederal law to require all states to permit lawsuits in their state courts to enforce foreign state-court judgments against local debtors if the foreign plaintiff provided a suitable bond. It had been proposed to the Lee committee, but omitted from its report.

The final version of what became article 4, recommended by the committee and adopted on November 13, contained two sections with potential effects on slavery: (1) the provision that any fugitive charged with "felony or other high misdemeanor in any State" shall be delivered upon demand of the "[g]overnor or executive power" of the state from which he fled, and (2) the provision regarding privileges and immunities.[157]

The first of these provisions stated: "If any person guilty of or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence." This provision was broad enough to include fugitive slaves, for several reasons. Colonial statutes such as those in Virginia made slave rebellion a felony. In addition, a declaration of outlawry against a fugitive, a statutory remedy often used at the time of the Revolution to combat slave flight, would have been regarded as equivalent to a charge of felony or high misdemeanor. An outlawry declaration permitted the killing of the outlaw with impunity by anyone. In 1770 alone, the Virginia legislature compensated two slaveowners whose fugitive slaves had been outlawed and then killed.[158] Thus the fugitive delivery provisions of the Articles would often have applied to fugitive slaves. This provision might be thought of, then, as a "proto–fugitive slave clause."

The second of the relevant Lee committee provisions stated:

> [T]he free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States . . . the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein the privileges of trade and commerce, subject to the same duties, impositions, and restrictions

> as the inhabitants thereof respectively, *provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant*. . . .[159]

The P&I clause itself was premised on the existence of a fundamental legal distinction between free inhabitants and slaves, authorizing rights required to be accorded to all free inhabitants to be denied to slaves in every state. The following analysis provides evidence from the Articles' drafting history that supports the conclusion reached many years ago by noted legal historian Charles Warren that this clause also protected slaveowner property, and explores the implications of Warren's conclusion.[160]

One specific part of the P&I clause was intended to protect slave property: the proviso that prohibited use of state power to "prevent the removal of property imported into any State . . ." The proviso's reference to "property" would have been understood at the time to include slaves. A contemporaneous example of usage of the term "property" to include slaves was article 7 of the Treaty of Paris of 1783, which prohibited British forces from removing "Negroes or other property of the American inhabitants" from the United States. Article 7's language classified "Negroes" (slaves) as a form of property.[161]

Handwritten drafts of the Articles' P&I clause clarify the evolution of the Lee committee's views on the clause and its proviso.[162] These drafts show that language excluding "paupers, vagabonds and fugitives from justice" from the protection of the P&I clause was a late addition to the proposal. The committee therefore ultimately agreed to exclude two separate classes of persons from the clause's guarantee of equal treatment to all American inhabitants: (1) slaves and (2) persons who, though nominally free, had by their poverty or criminal behavior forfeited their right to nondiscriminatory treatment.[163] Under the redrafted provision, persons such as fugitive slaves and paupers could be denied various fundamentally important legal and social-welfare protections by a state to which they came, including the right to reside there and benefits available to other inhabitants such as poor relief.

The handwritten drafts of the Lee committee's work also show that the original version of the committee provision on state laws regarding the movement of property was redrafted by the committee to make it considerably clearer and more emphatic as a limitation on the power of every confederated state. The original draft of the P&I clause had provided that "the people of each state shall have free ingress and egress for their persons

and property," but as to "Merchandise" imported for commercial purposes, had provided only that it would be protected against discriminatory taxation.[164] This draft contained no provision protecting the right to remove imported property. The later draft of the same provision, recommended by the Lee committee and included in the Articles, contains a proviso that makes the right to remove imported property an express limitation on state power regarding trade and commerce.[165] In this context, "imported" could mean either property brought into a state by its owner, whether while in transit through a state or during a sojourn there, or property separately imported into a state for the purpose of removal by the owner.

The new proviso appears to have been the direct result of incorporating into the original draft a proposed amendment written in a different hand, which proposed a separate restriction to prohibit any state from using its authority to restrain a property owner from "conveying" his property to any other state.[166] On its face, the separate amendment's language was broad enough to include slaves. Even leaving aside its probable authorship by slave state congressman Thomas Burke, there are reasons to think its author intended to include them. Slaves were among the most valuable forms of movable property in the new nation. Slaves were also quite probably one of the few forms, if not the only form, of movable form of property whose export or reexport a state would have had a policy interest in preventing at the time.

The separate amendment thus appeared to be a direct effort to use confederal law to overcome the clear implication of the *Somerset* decision that states had power to limit slave removal by owners who were sojourners or slave importers. The final committee version, though slightly different in wording, had the same intent. This conclusion is reinforced by the fact that the handwritten draft of the committee version of the proviso struck through the word "Goods" and replaced it with the broader term "Property," which then commonly included slaves.[167]

The Articles provisions on property removal limited interstate comity by denying states the full authority over slavery conferred by the principles of *Somerset*. Although it served as a limit on state authority to prevent slave transit or an owners' removal of slaves after a sojourn in a state, the privileges and immunities proviso was broad enough that it also effectively denied state authority to prevent commercial-scale transshipments of imported slaves, which occurred frequently in certain states such as Rhode Island.[168] That the Articles were amended to contain specific provisions directed to the issue of fugitive slaves, slave transit, and slave reexport,

when virtually all other provisions proposed for inclusion in the Articles requiring state law to conform to confederal law were omitted by Congress, demonstrates the importance placed on the problem of interstate slave movement by the delegates in the context of defining interstate obligations.

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

But the slaves were released by Massachusetts chief justice William Cushing in 1783 in *Affa Hall et al. v. Commonwealth*, on the ground that they had committed no crime in Massachusetts and therefore could not be confined.[169] The governor of South Carolina then wrote to the governor of Massachusetts, John Hancock, protesting vigorously that Cushing's ruling was a violation of the Articles of Confederation because it impaired the rights of South Carolina residents to regain their slave property. Justice Cushing was asked to respond to this contention.

Cushing agreed that the Articles protected slaveowner rights to recapture slaves. He stated that the South Carolina owners still had an unimpaired private right of recapture of the runaway slaves in Massachusetts and a right to their removal, which Massachusetts would recognize; but in his view, they were not entitled to have the slaves jailed as part of that recapture. As Blanck notes, it is quite remarkable that Cushing did not deem the slaves free even after they had spent four years in Massachusetts.[170] The South Carolina–Massachusetts controversy demonstrates that contemporaries with sharply conflicting views on slavery and abolition nevertheless agreed that the Articles of Confederation were intended to protect fugitive slaves as property throughout the Confederation. The article 4 provisions and the evidence from the South Carolina–Massachusetts controversy together suggest that contemporaries thought that the Articles maintained slaveowners' common-law rights of slave recapture both by protecting them against state legislation freeing or protecting fugitives and by permitting private recapture.

CONCLUSION

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

As the Northern states began to take tentative steps toward gradual abolition, the public and legislative reaction to such proposals clearly foreshadowed the political difficulties facing such abolition efforts. Northern legislatures such as New Jersey's rejected efforts in the 1770s to liberalize even slave manumissions because of widespread fears of the social and political consequences of such liberalization. Vermont agreed to end slavery for persons of majority age. In a path-breaking decision, Rhode Island passed a law to prevent its slaveowners from selling their slaves outside of the state.

The confrontation between Northern and slave states over slavery's role in the Confederation provided dramatic evidence of the power of the slave states, as well as of the major political weight of the institution of slavery as an element in structuring the revolutionary government. Slavery benefited significantly from the Confederation's exceptionally decentralized federalism. Slave states' political influence also led to a permanent Confederation stalemate on issues of taxation and representation, which effectively exempted slave property from taxation and military-service obligations, even at the price of ineffectual government. Although the colonies were generally opposed to continuing slave imports, the Confederation government imposed no legally binding prohibitions on American participation in the slave trade, or on such imports. Slavery's political influence led to confederal restrictions on state power designed to protect slavery and the slave trade, including restrictions against state power to shield fugitives. The first steps toward creating a slaveholders' union had been taken as a politically necessary part of founding a new government to direct the Revolution.

2

ABOLITION, SLAVERY REFORM, AND THE CLIMATE OF OPINION

The abolition of slavery in the United States began during the Revolutionary War. Most states north of the Mason-Dixon line had begun gradual abolition of slavery by 1797, and the remaining Northern states would soon follow. During the Revolution, Southern slave states also began to reform their laws to make slave manumission significantly easier. These unprecedented developments freed about 11 percent of the total American black population by 1800.[1]

This chapter considers the abolition process in Pennsylvania, Massachusetts, Connecticut, and New York and manumission reform in Virginia as representative examples of abolition politics and law. It examines the major political and economic factors that gave rise to abolition. It considers how states approached the problem of whether and how slaveholders should be compensated for their slaves and how Northern courts addressed abolition as a constitutional issue. It analyzes who paid the economic and social costs of abolition. It then discusses how abolition laws were enforced, addressing Pennsylvania in detail and comparing its experience with information about Massachusetts, Connecticut, New York, and New Jersey enforcement. It also examines how Northern states dealt with the rendition of fugitive slaves during abolition. It concludes by considering the limits of southern slavery reform through manumission legislation.

Some states had attempted strenuously to discourage the growth of slavery even before the Revolution, but had been prevented from doing so

by British policy. The Revolution eliminated British actions as an obstacle. Abolition support stemmed from religious, humanitarian, and "Revolution principles" motives, but also from economic changes in Northern states that rendered slavery increasingly inefficient and from growing northern support for labor policies that would encourage white immigration. For these reasons, historian Gavin Wright's description of the Northern states before they began abolition as "proto-free" states is an appropriate shorthand that depicts an important historical reality.[2]

Abolition often also raised politically divisive questions stemming not from disputes over whether slavery should continue, but from abolition's perceived social, political, and economic consequences. On those issues, the laws were decisively shaped by the interests of white nonslaveholders who increasingly held the balance of political power in many of the new states after the Revolution. They supported abolition for various reasons, but most supported it only if they could be assured that they would bear none of its economic or social costs. Many northern white citizens, even those who opposed slavery, were either racists who were hostile to blacks or indifferent to their fate, or viewed free blacks, like the rest of the poor, as unwanted economic and social burdens. Many whites who were antislavery also believed that any responsibility that their states had toward blacks ended at the state boundaries. Accordingly, northern abolition laws often had large loopholes and were poorly enforced, and new northern labor policies adopted in lieu of slavery were often damaging to blacks.

This overall climate of "broad, but very shallow" northern support for abolition in turn played an important role in shaping the politics of slavery at the national level. Northern majorities were unwilling to support either state or national government expenditures or other political trade-offs needed to limit slavery outside their borders. At the same time, Southern majorities were unwilling to support limits on slavery unless they were made contingent on conditions that could not realistically be fulfilled.

In August 1785, Thomas Jefferson wrote to Dr. Richard Price, a prominent English clergyman. For Price's benefit, Jefferson sketched his views on public opinion about ending slavery in different parts of America. Abolition in the North was inevitable: "emancipation is put in such a train that in a few years there will be no slaves Northward of Maryland." Southern abolition was a different matter. Jefferson was pessimistic about the prospects for abolition in Maryland. As for Virginia, he hoped that a younger generation trained in "the principles of liberty" would "turn the fate of

this question," which he described as "the interesting spectacle of justice in conflict with avarice and oppression."[3]

Abolition in the North was not as smooth a process as Jefferson expected. Nearly 70 percent of all Northern slaves in 1770 lived in jurisdictions where gradual abolition would be bitterly contested. Well over half of all slaves in the northern United States lived in two states, New York and New Jersey, where no gradual abolition laws were even adopted until more than a generation after the American Revolution began. In those states, there were more slaves in 1790 than in 1770, and there were almost as many slaves in 1810 as in 1770.[4] And, unlike Jefferson, many Americans did not see the struggle for abolition as a simple clash between justice on the one hand and avarice and oppression on the other. Even in Northern states, where slaves were comparatively few, abolition was often inextricably connected with other politically divisive and racially charged issues of social policy, such as the rights of free blacks to vote or to intermarry with whites.

Moreover, each state that undertook the abolition of slavery almost immediately faced a series of complex, often precedent-setting, questions: Should slaveowners be compensated? If so, who should pay compensation, and how much? Should fugitive slaves be protected or freed? Should slaveowners be allowed to transit a free jurisdiction with their slaves? Should they be allowed to sojourn in free jurisdictions with their slaves for some period, and then compel slaves to leave with them? How should the state address the possible kidnapping of blacks who were free or would become free? Should slaveowners be prevented from selling their slaves out of the state? Should they be allowed to separate slave families? Who would be responsible for supporting indigent former slaves?

It is quite remarkable that most of the Northern states answered many of these questions in much the same way. In all of the states that adopted abolition legislation, there was agreement that slaveowners should be compensated for their slaves, and that slaves and their children should provide that compensation through decades of future wageless labor.[5] Most of the states adopted kidnapping laws and out-of-state sale bans, but often only years—in several cases nearly a decade—after adopting abolition legislation, thus effectively giving slaveowners time to export slaves and their children without facing criminal sanctions or even significant fines.[6] Virtually all, if not all, of the Northern states declined to protect fugitives, well before the adoption of the Constitution's fugitive slave clause. All of the Northern states allowed slave transit, and slaveowner sojourns, through

at least 1821.[7] Why did the Northern states tend to address the problems raised by abolition in similar ways? The answer lies in the politics and economics of abolition.

THE CONTENTIOUS POLITICS OF NORTHERN ABOLITION

Over the past several decades, historians have carefully analyzed the views of both antislavery activists and slaveholders in abolition controversies.[8] But the majority of nonslaveholders were neither ardent abolitionists nor direct economic beneficiaries of slavery. Abolition was "unimportant, economically and racially, to most Northern citizens."[9] The political necessity of accommodating the views and interests of these nonslaveholders in resolving controversies between slaveowners and antislavery advocates strongly influenced abolition's course, as a recent history of New York abolition shows.[10] After the Revolution, nonslaveholder political authority increased throughout the North as both the structure of suffrage and that of slavery changed.

In Pennsylvania and throughout New England, the sources suggest that nonslaveholders constituted a majority of eligible voters after the Revolution.[11] In Pennsylvania, by 1780 a conservative estimate would be that no more than 30 percent of heads of households eligible as voters would have been slaveholders, which meant that a minimum of 70 percent of the state's eligible voters would have been nonslaveholders. In 1770, slaveholder voters may still have been in the majority in New York and New Jersey, but by 1790 nonslaveholder households predominated in those states, and slaveholder voters either were a slim and rapidly decreasing voting majority there, or had become a minority. There were various motives for antislavery action among Northern nonslaveholders, and revolutionary ideology, morality, benevolence, economic interests, and racism each played a role. But nonslaveholders' views on abolition ultimately reflected their own interests and perceptions, which sometimes differed markedly from those of either slaveholders or antislavery activists. Their views shaped important aspects of abolition legislation, including issues such as slaveowner compensation and abolition-law enforcement.

At the same time that nonslaveholders were becoming politically more influential, Northern economies were changing in ways that marginalized slavery. A rising Northern commercial elite also particularly wanted to

remove slavery as an obstacle to the development of an increased supply of white labor, particularly immigrant labor, at a time of rising demand for urban labor and speculative land development. These points can be illustrated by a review of the circumstances surrounding the passage of major Northern abolition statutes, and concomitant reforms Northern states made in key aspects of their labor laws.

In 1780, the Pennsylvania legislature passed the first American state legislation providing for the gradual abolition of slavery.[12] The act of 1780 created a postnati abolition scheme: existing slaves would remain slaves if properly registered; their children would be deemed indentured servants and be freed at a specified age. The legislation was adopted after extensive public debate. Even in Pennsylvania, a major center of early antislavery activism, abolition was a fairly contentious process.

Despite considerable compromise on the substance of the legislation, the legislature's vote on adoption was 34–21, or 62 percent to 38 percent, which meant that a sizable part of the population opposed abolition (even after discounting for overrepresentation of slaveowners in the legislature). The 1780 act's provisions narrowly escaped major amendment in a later legislature, and the act as amended ultimately permitted slaveowners in one part of Pennsylvania additional time to register (and thus keep) their slaves.[13] A disproportionate share of the support for the legislation came from the Philadelphia area, while disproportionate opposition to it came from western and rural areas where there were concentrated slave populations.

The skewed distribution of support for abolition in Pennsylvania reflected the fact that at the end of the eighteenth century numerous Pennsylvania residents, particularly in rural Pennsylvania, either continued to support slavery, were hostile to blacks, or were indifferent to their fate. A poignant 1789 letter from the newly formed Washington, Pennsylvania, abolition society, located in southwestern Pennsylvania, to the older, established Pennsylvania Abolition Society (PAS), based in Philadelphia, provides useful evidence about the climate of opinion on slavery in parts of rural Pennsylvania. In their letter, Washington Society members ruefully admitted to the PAS leaders that for nearly a decade they had remained silent—apparently out of fear of slaveowner retribution—because of local public support for slavery while the 1780 act was repeatedly violated in their part of Pennsylvania. They wrote to inform the PAS that they had belatedly formed the Washington Society to end their silence and to act against such intentional lawbreaking.[14]

The 1780 act included a series of compromises by antislavery advocates that had important implications for black freedom. To mollify slaveowners, the act had more onerous provisions than later Northern abolition statutes, requiring longer service by children of slaves before their emancipation. The negotiated increase in the age at which slaves' children were to be freed deprived African American laborers of approximately $50 million in income in today's dollars, since the compromise legislation required about thirty-five thousand additional person-years of unpaid forced labor.[15] The act's provisions for substantial increases in black civil rights meant that it was superficially among the most progressive of the Northern statutes. But the statute also contained important loopholes. It provided no civil or criminal penalties for violation or resources for state enforcement. Equally importantly, it also wholly lacked strong economic incentives to encourage private law enforcement of the kind well known to British law and used later in other Pennsylvania slavery statutes.

Historians Gary Nash and Jean Soderlund argue persuasively that the 1780 act played little part in the process of abolition in Pennsylvania, because slavery was already declining there for other reasons before its enactment. In addition to declines related to changes in labor markets, it is generally agreed that significant numbers of slaves left Pennsylvania with Tories or were taken by British occupiers. By 1780, when the act was passed, the slave population in the Philadelphia area had declined by more than half from 1770 levels, to 539 slaves.[16] But it appears that the act's sponsors nevertheless sought the law's passage because it had political goals beyond abolition, and supported other important Pennsylvania social policies. To begin with, it effectively discriminated against Tory slaveholders. The structure of its slave registration system automatically freed the slaves of absent Tories while protecting those of Patriots. But despite declining populations and the possibility that some rural Patriot support would be weakened or lost by abolition, the legislature pressed forward. The sources suggest that the law was passed in 1780 in part because it was a symbolic wartime political statement.[17]

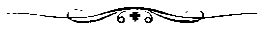
The Pennsylvania legislative majority's members were acutely aware of the political implications of their actions, as can be seen from the marked changes in the statutory preamble between the originally proposed legislation and the act as passed. The originally proposed preamble attacked slavery as unchristian: "America is made the scene of this new invasion of the rights of mankind, after the spirit of Christianity had abolished it from the great part of Europe . . ." Such references were deleted in the statute—and

not because its drafters had had a change of heart on that point. Originally, the preamble asserted that slavery was "highly detrimental to morality, industry and the arts."[18] These references were also deleted in the act. Instead, the act's preamble portrayed abolition as progress toward enlightenment and civilization of a kind that Americans—but not British tyrants—were capable of. But the original preamble's reference to the damage to arts and industry also provides an important clue to the drafters' policy motives. For them, the act also implemented established prewar Pennsylvania labor policy favoring white immigration to replace slave labor.

The history of Pennsylvania slave-import duties, which increased from 1761 onward, shows that as a matter of policy Pennsylvania aggressively sought to block slave imports. For the period before 1775 in Pennsylvania, Nash and Soderlund argue that the "renewed supply of white workers, [and] the £10 import duty on slaves" were important factors in slave population decline.[19] Nash and Soderlund found that by 1770, in the face of substantial German and Irish immigration, slave imports had essentially ceased. At the same time, the economics of the labor market were beginning to change significantly. In Philadelphia at the time, a "gradual transition to a system of capitalist labor relations" was occurring in which the percentage of bound labor would fall from about 40 percent of the work force in the mid-eighteenth century to "virtually nothing in 1800."[20] The result was that artisans increasingly drew on "the large pool of unemployed recent immigrants" to satisfy their labor needs.[21]

The fact that despite the decline in slave imports and the changing labor market, the Pennsylvania legislature nevertheless sought to impose a prohibitive and probably unnecessary £20 slave-import duty in 1773 (more than $2,000 per slave in 2006 dollars) suggests that it wanted firmly to discourage slave imports, but that it also wanted to publicize the colony's policy against imports. The proposed duty was so high that it is reasonable to conclude that it was chosen instead of an outright ban on imports because Pennsylvania leaders anticipated that an outright ban would not be accepted by British authorities, while a high duty might be. As historian Arthur Zilversmit suggests, Pennsylvania's slave-import restriction policy was intended to protect existing white laborers and to encourage additional white immigration, which Pennsylvania's leaders thought slavery would discourage. Similarly, Pennsylvania abolition was designed in part to encourage white immigration, as were Pennsylvania labor laws adopted in the 1780s (discussed later). Comparison of Pennsylvania's abolition history with the process of abolition in Massachusetts and New York confirms

that slavery was abolished in Northern states as it became economically marginal, and illuminates other important political and social dimensions of abolition.



As Donald Robinson aptly observed, the process by which slavery was abolished in Massachusetts is "shrouded in mystery."[22] However, the judicial process that led to abolition there was the polar opposite of the open, representative process employed in Pennsylvania, making it a good basis for political comparison. For several decades, historians have debated precisely how slavery ended in Massachusetts, and my purpose here is not to advance a particular view of these events, but instead to sketch background essential to better understanding of the political process.[23]

The most recent historian to study this issue concludes that slavery in Massachusetts was ended in 1783 by the charge given to the jury in *Commonwealth v. Jennison*. That case was a criminal prosecution brought against a master named Jennison for assault on and false imprisonment of a man he claimed was his slave.[24] Jennison's defense was, in part, that as a matter of law he could not have committed the charged crimes against the victim, because the victim was a slave, that is, a person whom the law did not protect against assault or false imprisonment.[25] The chief justice of the Massachusetts Supreme Judicial Court, William Cushing, instructed the jury that slavery had been abolished by the provisions of the 1780 Massachusetts Constitution's "free and equal" clause. The jury then convicted Jennison.

During 1783, when *Jennison* was being tried, the Massachusetts legislature was considering abolition legislation. Remarkably, although many people thought slavery had been legal until at least 1780 in Massachusetts, the legislature was considering a bill that would have declared that slavery had never been legal there.[26] This proposed legislation was a complete turnabout from the proposed state constitution of 1778, which would have expressly recognized slavery (and was rejected by voters, though exactly why is uncertain). Massachusetts slaveowners responded to the 1783 legislation by seeking compensation for their slaves, and the 1783 legislation would have provided it, in addition to providing economic support for indigent African Americans it freed. The legislation stalled and then died in the state senate, after having passed the Assembly, and *Jennison* was de-

cided. As a result, Massachusetts became the first—and only—state with a significant slave population to decree total, immediate abolition through judicial action.

The *Jennison* decision effectively meant that slaveowners would receive no compensation for their slaves, since the court concluded that the 1780 Massachusetts Constitution had declared it illegal to hold them. Despite this, abolition occurred without substantial public dissent by Massachusetts slaveowners. By the 1790 census, Massachusetts citizens reported that they held no slaves, although at the end of the Revolution there should still have been several thousand slaves in Massachusetts, so that all Massachusetts slaves and their children had supposedly been freed in seven years.[27] What can this formal abolition process tell us about the actual political history of abolition in Massachusetts?

It is generally agreed that there was strong public sentiment against slavery in postrevolutionary Massachusetts, particularly after many Tory slaveowners there fled. Slaves there had had substantial legal protections available to them prior to the Revolution, which included rights to sue, petition, and serve as witnesses.[28] There is evidence that prerevolutionary Massachusetts juries were strongly inclined to grant slaves their freedom in close cases.[29] And recent historians have shown that Massachusetts blacks were vigorous in asserting that their rights should be included in the colonists' expanded conception of natural rights.[30] For these reasons, it is reasonable to conclude, as some historians have, that after the Revolution many Massachusetts slaves were freed voluntarily, negotiated their freedom with their masters directly, or ran away. In other words, the Revolution served to accelerate slavery's disintegration in Massachusetts, which was already under way before the Revolution.

But to round out the picture, it is also important to recall John Adams's belief that slavery was extremely unpopular with Massachusetts white workers who opposed black slave labor competition. As Adams vividly expressed this, "the real cause [of abolition] was the multiplication of labouring white people, who would no longer suffer the rich to employ these sable rivals so much to their injury. . . . [If slavery had been permitted, whether in Europe or Massachusetts] the common white people would have put the negroes to death, and their masters too, perhaps." Adams also thought that contemptuous treatment by whites made black slaves "lazy, idle, proud, vicious, and at length wholly useless to their masters, to such a degree that the abolition of slavery became a measure of oeconomy."[31]

Slavery died out in Massachusetts, Adams thought, because the Revolution permitted Massachusetts citizens to act on their prerevolutionary views that it was politically, economically, and socially marginal there.

Abolition in Massachusetts may well have been very difficult to achieve politically, because the abolition decision ultimately had to be made by elite judges subject to very limited political accountability.[32] This approach to abolition had important consequences. By judicially abolishing slavery, Massachusetts avoided a divisive debate over compensation for slaveowners and at the same time avoided burdening nonslaveholder taxpayers with compensation costs. Abolition through judicial decree also meant that there was no need for public education, for a concerted effort to build public support for a contested law that could strengthen law enforcement, or for compromise, as there had been in Pennsylvania.

Not everyone agreed that judicial abolition in Massachusetts had been authorized by its 1780 constitution. In 1795, when asked about the Massachusetts abolition process, leading state judge James Winthrop said that the state constitution had been misconstrued. Winthrop concluded that Massachusetts citizens had been wrongfully deprived of their property without compensation. Several modern historians have agreed with him.[33] There are also significant questions, discussed later, about whether some Massachusetts slaveowners simply ignored the *Jennison* decision, relying on loopholes in Massachusetts law to sell slaves out of the state.

New York's experience provides an example of a different type of political problem that faced abolition proposals. By 1785, abolition legislation in New York was being considered in an altered political environment, where both public support for slavery and slaveholder political strength had lessened compared to the period before the Revolution. But concerns about the effects of abolition nevertheless proved politically very influential with nonslaveholders.

When the New York legislature passed a bill in 1785 to abolish slavery gradually, it provided as a condition of abolition that the right to vote should be denied to all blacks.[34] The New York Council of Revision led by John Jay vetoed the legislation. It sent the legislature a tartly worded lecture on the indissoluble connection between emancipation and civil rights. The council argued that both the principles of the Revolution and enlightened social policy mandated that blacks must be given the right to vote on

equal terms as part of their freedom.[35] In response, the Senate overrode the council's veto, but the bill failed in the Assembly.

There is good reason to think that the New York abolition bill's linkage between emancipation and black civil rights had been created by proslavery forces because they hoped that linking the issues would kill the legislation, judging from its legislative history and the responses of supporters and opponents. As one antislavery advocate who could nicely turn a phrase wrote, those who had succeeded in creating the linkage "exceeded the Devil, their father, 'in wickedness and deceit.'"[36] As this attack conceded, by creating this linkage slaveowners had successfully appealed for support to a pivotal group of nonslaveholders who were at least as concerned about the social consequences of abolition, particularly maintaining white (or in some cases perhaps, propertied class) political supremacy, as they were about achieving abolition itself. Proslavery linkage tactics contributed to a delay in the beginning of abolition in New York for fifteen years.

In the last third of the eighteenth century, the New York economy was changing in ways that altered the economics of slavery. A rapid increase in the free labor supply in New York, particularly during the period after 1770, made slavery "relatively uneconomic," because slaveowners bore the "continuous expense of maintaining slaves during periods of idleness," while employers did not face comparable welfare costs. Therefore, when wage rates fell, slavery became an "obsolete and expensive system of labor."[37] At the same time, slavery's economic—and political—position changed because of a "long-term decline in the use of slave labor by New York artisans. . . ."[38] These changes in New York appear similar to the changes in Pennsylvania's economy, which contributed to slavery's decline there.

In New York, toward the end of the eighteenth century, slaves increasingly became servants for the wealthy. As historian Jack Pole once wrote in another context, slaves became a form of "aristocratic" property.[39] By 1799, property useful only to people perceived as landed and rising commercial aristocrats had limited political appeal in New York, where politics was becoming steadily more popular in nature. When abolition legislation was finally adopted in New York in 1799, the state's new willingness to permit abolition was probably a result of changes in the New York economy after the Revolution, together with the decline in the political power of slaveholders. Even then, the dimensions of black freedom, particularly political rights, remained contentious, often sharply partisan, issues for the next thirty years in New York. Eventually, as an indirect consequence of

the Missouri controversy, New York's constitution was amended to deny virtually all free blacks the right to vote (see chapter 6).

As this brief review of abolition in Pennsylvania, Massachusetts, and New York shows, support for abolition stemmed from a variety of motives and forces, but it was in important part the result of the increased political strength of nonslaveholders and changing labor economies after the Revolution. Abolition also presented what appeared to contemporaries to be difficult problems of political and civil integration in northern societies, and in some cases resistance to integrating blacks into society—whether based on white racism, fears of social disruption such as increased crime, or economic interest—was strong enough to stymie or significantly retard progress toward abolition itself. Despite the variety of local circumstances that influenced northern abolition efforts, Northern states' labor policies were altered in one common way at the same time: they gave new encouragement to white immigrant labor, a policy that would have strong potential to displace blacks, both slave and free.

At the same time that Northern states were beginning to abolish slavery, several of the largest states were liberalizing their labor laws. In Pennsylvania, white ethnic immigration resumed shortly after the conclusion of the Revolutionary War. The state legislated in 1785 to improve the conditions facing German indentured servants who chose to immigrate, and acted in 1788 to prevent white convict immigration. These legislative changes were intended to encourage the growth of the white immigrant labor supply. This legislation—and similar legislation adopted in New York at about the same time—were related to the decline of the exploitative transatlantic white servant trade. The decline of that trade was the product of social and economic factors unrelated to the Revolution that, among other things, "mobilized free labor in the North. . . ."[40] And Pennsylvania was not alone. Its actions were part of a broader pattern of postwar Northern labor legislation intended to encourage white immigration. This pattern supports the conclusion that concerted efforts to encourage growth through free white labor immigration formed a major aspect of Northern state social policy during this period, one that began even before the Revolution.[41]

Historian Robert Steinfeld showed that in the late eighteenth century, various Northern states restricted the maximum terms of bound labor, particularly indentured servitude, and restricted masters' powers. In Con-

necticut, by 1795, nonslaves could be indentured or apprenticed on terms that permitted a master to engage in coercion only if they were minors or "poor debtors . . . assigned in service." Vermont prevented all persons from serving as indentured servants or apprentices after the age of twenty-one (eighteen for females), except in certain cases of consent or by law for payment of debts or similar causes. In 1788, New York limited indentured service to minors and to immigrants, and in the case of immigrants, restricted the length of bound service to four years. In 1793, the Pennsylvania courts held that native-born minors could only be bound as apprentices, not as indentured servants. In 1795, Massachusetts limited bound labor to minors.

In sum, throughout the North, efforts were being made by the end of the eighteenth century to eliminate the ability of masters to impose bound servitude on laborers, and to make free wage labor the only option legally available to employers.[42] Northern states recognized that slavery was economically marginal there, and for them, white immigration was the preferred alternative for expanding the labor supply and developing lands in the new states. Northern states' preferences for increasing white immigrant labor had a strong potential to worsen economic conditions for free blacks who remained there (unless their economies grew rapidly enough to absorb the added labor supply). As historians have shown, in many cases northern blacks remained second-class citizens economically as well as in terms of civil rights during this period.[43]

Although Northern states moved toward abolition on somewhat varying paths, in virtually every case, the process required communities to confront the thorny problems of slaveowner compensation and the postabolition protections available to law to slaves, free blacks, and their children. Here the views of nonslaveholders were of particular importance.

"WHAT IS JUSTICE?" THE PURPOSES, COSTS, AND CONSEQUENCES OF ABOLITION

In 1795, Vice President John Adams, a Northern nonslaveholder, explained his reasons for rejecting the feasibility of a major gradual abolition proposal for Virginia made by the prominent attorney St. George Tucker. Adams's argument focused almost entirely on what he saw as the social and economic costs to freed slaves and to "the world," that is, society in general, that would result from abolition. He said: "If I should agree with

him [Tucker] in his maxim, 'Fiat justitia ruat coelum,' the question would still remain, What is justice? Justice to the negroes would require that they should not be abandoned by their masters and turned loose upon a world in which they have no capacity to procure even a subsistence. What would become of the old? the young? the infirm? Justice to the world, too, would forbid that such numbers should be turn'd out to live by violence, by theft, or fraud."[44] These considerations led Adams to conclude that it would be counterproductive to do anything more about Southern abolition than to end the slave trade and to ameliorate slave conditions until the white population was sufficiently larger than the black population to make gradual abolition possible with slaveowner consent.[45] Studies of abolition and northern race relations confirm that white nonslaveholder concerns about the economic and social effects of abolition on whites similar to Adams's played a significant role in shaping Northern abolition laws and their enforcement.[46]

The broadest effect of nonslaveholder influence on Northern abolition—one felt throughout the Northern states—was to shift the direct economic cost of abolition away from slaveowners and nonslaveholders and almost entirely onto slaves and free blacks, as historians Robert Fogel and Stanley Engerman showed in a seminal analysis some thirty years ago.[47] They began by observing that during abolition it was nearly universally agreed—even by antislavery legislators—that slaveowners should be compensated for the value of their slaves.

Why was there such broad agreement about providing compensation, even including ardent abolitionists such as Quaker antislavery pamphleteer Anthony Benezet (who had repeatedly attacked the immorality of the slave trade)? Agreement on that point among contemporaries seems to have been so broad that there was limited debate about it. Historians have reached varying conclusions about why this consensus existed.[48] The problem of compensation is worth a closer look, because it raises several complex issues that had implications for contemporaries' understanding of property rights, and because it can tell us a considerable amount about the shape of Northern public opinion regarding slavery.

Abolition legislation was a powerful—almost unprecedented—use of government coercion to outlaw a specific form of previously lawful property. In a sense, abolition legislation might be conceived as an unusual use of eminent-domain authority. It resembled the exercise of eminent-domain power because through abolition, "property" was "taken" by government without the consent of its owner, but differed from it because

the property was not taken for public use, as was typically (though not always) the case when eminent-domain authority was used. Thus, abolition legislation could have constituted a very dangerous precedent for owners of any form of property, because it suggested that government eminent-domain power was not limited by any requirement that a taking of property be for public use. Indeed, during the Revolution, some slaveowners had challenged abolition legislation essentially on that basis.[49]

As historian Charles McCurdy has shown, such uses of eminent-domain power for private takings became very controversial in the early Republic. Some long-standing uses of eminent-domain power were actually declared unconstitutional as private takings in the Northern states in the first part of the nineteenth century.[50] But Northern abolition statutes were designed to finesse this constitutional problem by forestalling slaveowner court challenges to legislative action. One important consequence was that Northern courts were not required to define the precise nature or extent of slaveholder property rights at a time when American legal doctrines about property rights were themselves evolving.

An important English common-law doctrine that might have protected slaveowner property was the idea of "vested rights," which were property rights deemed sufficiently established by customary forms of investment or legitimate reliance on them to deserve protection against taking by government without compensation.[51] After the Revolution, Americans generally agreed that uncompensated takings of vested property rights by government were abhorrent and should not occur, barring unusual circumstances such as protecting public safety.[52]

During the Revolution, though, there were antislavery advocates who argued that it was impossible for anyone to possess vested rights in slaves. As "A Friend to Justice" wrote in 1780, slavery "is utterly repugnant to the very nature and spirit of the common law."[53] He argued further that even if slavery was authorized by the common law, natural law would bar it, which meant that no vested rights could be acquired in slaves. If no vested right in slaves existed, no compensation would need to be made for slaves when slavery was abolished. Both Northern abolition statutes and Northern courts effectively rejected that position, except in Massachusetts. The statutes instead provided generous compensation for slaveowner property rights, arguably going beyond what the law required. In general, antislavery advocates compromised on the issue of property rights as a means of smoothing the way for abolition legislation.

In typical postnati abolition statutes, a distinction was drawn between

existing slaves, as to which most people apparently accepted that vested property rights could exist, and their future children, as to which it was uncertain whether the law would recognize a vested property right because they had not existed when the statutes were adopted. As to existing slaves, Northern abolition laws enacted before the turn of the century deemed them slaveowner property and declined to free them, avoiding the compensation issue.[54] But antislavery forces could plausibly have argued that even if rights in existing slaves were treated as vested rights, rights in afterborn children should not be considered vested because slavery contravened natural law. Instead, Northern abolition statutes took a very conservative approach, and provided slaveowners de facto compensation even for afterborn children by classifying such children as indentured servants and emancipating them only when they became adults (or even later). Because such generous compensation was provided to slaveowners by abolition statutes, unless courts rejected the validity of government use of eminent-domain-like power to address the problem of slavery at all, these laws were invulnerable to constitutional attack in Northern states.

The principal political question to be resolved by gradual abolition legislation thus necessarily became who should provide compensation to slaveowners. The antislavery community had thought about the problem of compensation. Prominent abolitionist Levi Hart of Connecticut proposed a plan that included public funding to compensate slaveholders.[55] A public-funding approach to compensation would have recognized that abolishing slavery was a social responsibility, like the widely accepted need to provide for public defense.

However, legislatures that adopted gradual abolition legislation did not give significant consideration to public funding for slaveholder compensation. To the contrary, even proposals for important forms of ancillary public support for newly freed blacks, such as education for children or poor relief, if adopted at all were quickly sharply scaled back or abandoned.[56] Nonslaveholders, who were in the political majority by the turn of the century in virtually all Northern states, believed that they had not personally created or benefited from slavery, and should therefore not be taxed to provide any compensation to slaveowners. For them, slavery was inexpedient at best and often seen as a "sin," but it was not a problem that taxpayers as a whole had any obligation to pay to remedy. Instead, some other form of financing for emancipation had to be found. The nonslaveholder position on financing uniformly prevailed in Northern abolition laws.

Ironically, it was slavery's victims who paid the costs of their own

emancipation. In legislating gradual abolition, Northern states that had significant numbers of slaves commonly required blacks and their children to purchase their children's freedom by at least a generation of forced, unpaid labor. The deferral of freedom for the children of slaves meant that slaveowners could recapture the full capital value of all their slaves, since the capital value of their female slaves was heavily dependent on the expectation that they would bear slave children. Fogel and Engerman demonstrated that the gradual emancipation structure of Northern abolition laws meant that slaveowners typically received between 95 and 97 percent of the market value of their slaves at a minimum. By permitting full recapture, Northern legislatures demonstrated both their solicitude for the protection of slaveowner property rights and their equally strong desire to avoid burdening nonslaveholders with taxes to compensate owners.

Northern courts generally interpreted state constitutions in a way that was equally protective of slaveowner compensation rights. No court of last resort in any other state that had a significant number of slaves agreed with Massachusetts that slavery could be ended by an uncompensated taking of slave property. The highest courts in Pennsylvania and Virginia were asked to hold that their state's constitutions, which contained language similar to that of Massachusetts declaring all men "free and equal," had abolished slavery, and declined to do so.[57] These rulings rested on the courts' views of constitutional drafters' intent, and the courts concluded that a significant factor in determining that intent was whether voters or the legislature would have freed slaves without providing compensation, as the decision in *Hudgins v. Wright* shows. A 1794 internal debate in Pennsylvania among abolition society lawyers about whether to seek a court ruling that slavery there had been abolished by the state's constitution sheds additional light on why the courts disagreed on this issue. Ultimately, they differed in their views of the proper relationship between natural law and positive law.

In 1794, five strongly antislavery lawyers who were PAS counselors gave their opinions on whether the "free and equal" clause of the Pennsylvania Constitution of 1790 abolished slavery.[58] Three of the five concluded that it did not. John D. Coxe's opinion relied on the fact that slavery was legal in Pennsylvania before its constitution was adopted, and that the state constitution did not explicitly abolish it. Coxe wrote that although it was widely agreed that slavery violated natural law, wherever it was established by "the positive law of the Constitution, of the Legislature, or Sovereign," positive law has "prevailed in the Courts of Justice, and will ever prevail, as their Duty, is to interpret and decide on the Constitution and Laws and

not to make alter or abrogate them."[59] Coxe's position was the traditional English-law view, that positive law superseded natural law even where slavery was concerned, a position that Lord Mansfield would have endorsed. In the context of American republican thought, this position was ultimately grounded on the view that courts should defer to the popular will, even where slavery—a violation of natural law—was concerned.

A second PAS attorney, Josiah (Joseph?) Thomas also relied on the prior existence of slavery and the fact that it was not explicitly abolished by the 1790 constitution. He added that in his view, the new federal constitution would prevent taking away a master's property rights (without compensation). John Hallowell, a third lawyer, pointed out that the 1776 Pennsylvania Constitution had had broad "equal rights" language also, and that "slaves were at that time considered as a Species of Property which it was—neither illegal or immoral to possess." The 1780 Gradual Abolition Act would have been unnecessary if the 1776 constitution had abolished slavery; the 1790 constitution added nothing to the argument in Hallowell's view.

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

Fisher argued that English common law had rejected slavery. He argued that *Somerset*, which he understood as having rejected slavery in England, had established the "Right Reason" of English common law. English common law should be applied in Pennsylvania since the state had explicitly adopted that common law, and Pennsylvania law therefore barred slavery, he concluded.[60]

Fisher's opinion admitted that "the warmest Friends of the Abolition of Slavery" would "scarcely contend" that any of the major founding documents either of the nation or of Pennsylvania—the Declaration of Independence, the Pennsylvania Declaration of Rights, or Pennsylvania's 1790 constitution—were actually intended to end slavery. But for Fisher, that lack of antislavery intent was irrelevant, because in his view the common law was based on "Right Reason" and on necessary implication. As to the latter, he argued that the only words deemed sufficiently broad by the Founders to support their escape from "Political Slavery"—the Declaration's statement of equal rights—were also broad enough that they "must comprehend all Mankind and lay the Axe to the Root of domestic Slav-

ery." In effect, Fisher argued that from political necessity the Revolution had been based on a broad assertion of human equality, and that the Declaration therefore committed the United States to actions to make good on that broad claim to redeem the Revolution, including abolition.

Unlike Lord Mansfield, Fisher also saw legislative intent as irrelevant to the law's approach to slavery because he saw law itself as an implementation of human progress toward enlightenment. He admitted that it was "highly probable" that the Pennsylvania legislature in passing the Gradual Abolition Act in 1780, and amending it in 1788, had seen slaves as a "subject of Property." In a memorable description, he wrote that these legislatures "were but in the progress towards the Light, which was not then clearly seen, 'they saw men as trees walking' but since that time more Light has arisen on this Subject and it is now clearly seen that *Mankind* is not a *Subject* of Property. . . ."[61]

Fisher's powerful conviction that the inevitable progression of freedom through history should serve as the basis for interpretation of the law was quintessential liberal Quaker and Enlightenment thought, and many of his contemporaries (including Jefferson, some might argue) shared such views. But despite his universalist argument, Fisher conceded that the principles he advocated could not be applied to all the states. "There are some of the States wherein the great number of the Slaves would render a Sudden Emancipation extremely dangerous," he wrote, so that the common-law rule barring slavery should not apply there.

Fisher denied that masters were entitled to compensation for slaves when abolition occurred, relying on a property-title argument to counter a vested-rights analysis that would require compensation. Masters had a defective title to the liberty of others, and therefore restoring liberty to slaves was not taking property from masters. Unlike other antislavery advocates, who made similar defective-title arguments based on the illegality of the slave trade, Fisher based his argument on the assertion that a human right to control one's labor was an inalienable part of human freedom: "all men are entitled to employ their own Time and Labor in the Pursuit of their own Happiness."[62]

William Rawle, the final PAS attorney involved in this debate, was one of the most respected attorneys in Philadelphia. His opinion exhibited the clearest understanding shown by any late-eighteenth-century American lawyer of the implications of *Somerset*'s fundamental conclusion that slavery was a status, and that slaves were deemed property solely by positive law, rather than a form of traditional common-law property. Rawle wrote

that "slavery is not a natural but a political institution; it is the effect of avarice and luxury supported by force or fraud . . . If the government which authorises or permits slavery is dissolved, slavery is dissolved with it." He argued that the 1790 constitution represented a decision by Pennsylvanians to relinquish their "odious and unnatural claims" to the perpetual labor of others.[63]

The PAS unsuccessfully brought suit to have slavery declared unconstitutional after Fisher's and Rawle's views prevailed in its internal debate. According to news reports of the decision in that suit, *Negro Flora v. Joseph Graisberry* (the records of the decision have reportedly been lost), Pennsylvania's highest court unanimously decided in 1802 that slavery had legally existed in Pennsylvania before the adoption of the 1790 constitution, and had not been abolished by it.[64] But the internal division of opinion among the strongly antislavery PAS lawyers provides important insight into why American courts were divided on the relationship between slavery, property, and natural law at the turn of the century.

Under a "higher law" analysis that conceived natural rights as limits to human law, slavery would be regarded as an inherently unlawful condition that could not be legalized even by a constitutional provision authorizing it. As Fisher and Rawle argued, no compensation would need to be made to slaveowners for ending such an unlawful condition. The Fisher-Rawle position was the direct ancestor of the "higher law" position advocated by New York senator Rufus King and his allies with respect to the federal Constitution's treatment of slavery during the Missouri controversy (see chapter 6). Their PAS colleagues disagreed with that position because, following Lord Mansfield and the English legal tradition, they thought that positive law—particularly legislative or constitutional provisions—could alter natural law and rights, and that it had done so in Pennsylvania where slavery was concerned. It necessarily followed for them that compensation for slaves would be required if slavery were abolished, so that a constitutional provision declaring human equality could not by itself authorize freeing slaves because it did not provide compensation to slaveowners. The strong division within the PAS mirrored the deep divisions in American courts on the relation between natural law and slavery.

After the Revolution, there was a sharp tension between the inherently antimajoritarian American "higher law" tradition and majoritarian republican institutions where slavery was concerned.[65] Deference to republican institutions appears to have led courts to defer to legislative decisions about slavery in some cases. In both *Negro Flora* and in *Pirate, alias Belt v. Dalby*,

a major early slavery case discussed below, the Pennsylvania courts concluded in essence that where the legislature had acted regarding slavery, the limitations established by the legislature should be observed rather than expanded on "higher law" grounds. At the same time, in later cases, Pennsylvania courts sometimes provided "gap-filling" protection to slaves where the legislature had not legislated unambiguously on a particular aspect of abolition, while they denied such protection in other cases.[66] The ongoing tension between respect for popular will and "higher law" considerations can be seen not only in the limitations and loopholes found in abolition laws but in their often weak enforcement as well.

THE ENFORCEMENT OF ABOLITION LAWS

Several decades ago, Fogel and Engerman asked, why did manufacturers, lawyers, merchants, and landlords who understandably worried about limiting property rights, as abolition would, still endorse antislavery laws? They answered that this support was philanthropically motivated, that it was a product of the new moral values of the Revolution, but that it was "bargain price" philanthropy. Nonslaveholders were prepared to purchase "freedom for slaves," but only at a "very moderate cost."[67] But close examination of the loopholes in Northern abolition laws and their enforcement suggests that the price nonslaveholders were willing to pay was even lower than Fogel and Engerman thought.

As Fogel and Engerman concluded, Northern abolition statutes often contained loopholes, and lacked strong enforcement mechanisms. They thought of loopholes and statutory nonenforcement as means of providing additional indirect compensation to slaveholders, which they may well have been.[68] But it is useful to look at loopholes and enforcement problems from another perspective. Particular statutory loopholes and patterns of nonenforcement also reflect limits on the public consensus supporting abolition. This section analyzes abolition-law enforcement in Pennsylvania in detail, and then compares it with information from Massachusetts, Connecticut, New York, and New Jersey in order to examine limits on public support for abolition.

One very important limit on such support was significant public willingness to tolerate "black removal" from Northern states as a form of abolition (i.e., externalization of the problem). Northern public willingness to tolerate the out-of-state sale or transfer of black slaves and even kidnap-

ping of free blacks in some cases was probably a result of a combination of white racism and animus against the poor by taxpayers seeking to avoid poor-relief costs or economic competition—but whatever its motives, its effects were the same. Northern slaves in many states faced the risk of slavery outside the North in sometimes far harsher or even deadly conditions for decades after abolition began, while free blacks were exposed to the risk of reenslavement in such conditions.

The Pennsylvania gradual abolition law of 1780 had several profound defects in its protection of African Americans from slavery, some of the most important of which were recognized when it was enacted. As one historian commented, "[I]n the eyes of those who desired the destruction of slavery the act of 1780 had two great faults: first, it was easily evaded; and, second, it was an act for gradual abolition only."[69] As to ease of evasion, this conclusion was clearly correct. The act contained important loopholes. It wholly lacked strong enforcement provisions. And it did not clearly define the legal consequences either of slavery or of freedom.

The 1780 act did not by its terms protect the right of slaves or their children to remain in Pennsylvania. The act's failure to include provisions explicitly prohibiting the sale of slaves out of the state may have been a concession to political reality by Pennsylvania abolitionists. Rhode Island had adopted a provision barring out-of-state sales of resident slaves in 1779 to protect slaves there, well before it enacted a gradual abolition statute in 1784.[70] Pennsylvania abolitionists, whose correspondence shows that they were in close communication with their Rhode Island counterparts, may have been aware of the danger that out-of-state sales would occur during abolition if not prohibited.

The act assumed that most enforcement of the law would be done by private persons, but provided no financial incentives to them for successful enforcement. For several centuries, English law had recognized that private law enforcement played a major role in the enforcement of law generally, and English statutes therefore often provided very large financial rewards to persons who undertook private enforcement of laws that were important to the Crown. An important example of this type of private action, still used in America today, was the *qui tam* action, "prosecuted by a private citizen on behalf of himself and the Crown, with any statutory penalty divided between the prosecutor and the government." Such actions were used to regulate the quality of goods, among many other things.[71] English law recognized a series of other actions, often called informer's actions or relator's actions, as means of encouraging private law enforcement as well.

In many such actions, private citizens were given substantial monetary rewards by statute for participating in successful prosecutions for various law violations.

The 1780 act's drafters did not follow the long English tradition designed to stimulate aggressive law enforcement. The act as originally adopted contained no substantial rewards, civil penalties, or criminal penalties to deter violations of the rights of slaves and their children—to put this colloquially, it had no teeth. Slaveowners proved willing to risk the act's consequences and to disobey the law when they stood to benefit economically. As historian Edward Turner points out, "some Pennsylvanians openly kept up the slave trade . . . some masters separated families and sold slaves out of the State . . . [others] sent their pregnant female slaves" out of the state to have slave children.[72]

It was not until 1788, eight years after the statute was passed, that owners were explicitly prohibited from removing or selling slaves out of the state. Some owners appear to have taken advantage of this substantial eight-year window of opportunity. PAS files document several efforts to prevent slaveowner removals of their slaves or their children during the 1780s.[73] If significant out-of-state sales or removals had not been occurring, there would have been little point in amending the act in 1788 to penalize them.

The 1780 law's defects were only partly remedied by the 1788 reform amendments to the act. The amendments do show that the legislature understood quite well how to create very large penalties and incentives for private enforcement against some aspects of slavery when it possessed the political will to do so. But in the 1788 amendments, the legislature agreed to impose prohibitive financial penalties only in the case of direct foreign slave-trade participation by Pennsylvanians, not in the case of out-of-state slave sales or removals. Under the 1788 amendments, the legislature provided for forfeiture of ships and all of their tackle, furniture, and so forth, together with a substantial £1,000 penalty for slave-trade prohibition violations (well over $100,000 in today's dollars). One-half of the penalty would go to a private citizen enforcer, a large enforcement incentive.

In sharp contrast, the 1788 amendments provided a penalty of £75 for violations of the slave removal provisions (perhaps $7,500, or about one to two times an average slave's value), with one-half of the penalty going to a citizen enforcer.[74] The 1788 amendments provided criminal penalties against kidnapping or "seduc[tion]" of blacks with "a design and intention of . . . causing" them to be a "slave or servant for term of years," but the Supreme Court of Pennsylvania later indicated (in dictum) that these

criminal penalties did not apply to acts that harmed slaves, but only to those against free blacks. The result was that the law's minor civil penalties were the only deterrent against illegal exports of slaves or long-term indentured servants by their masters.[75]

No state funds were provided directly for enforcement of the 1780 act, so enforcement of the act was conducted principally by the PAS, an elite, relatively well-funded volunteer organization whose work was vigorously assisted by leading members of the Philadelphia bar.[76] The PAS achieved many notable successes, and was responsible for protecting hundreds of African Americans against slavery or reenslavement over several decades. But Pennsylvania and foreign slaveowners proved tenacious in seeking to protect their property. Slaveowners proved willing to risk the act's consequences and to disobey the law when they stood to benefit economically.[77]

For several years after the passage of the 1780 act, it was apparently unclear even to strong supporters of the act that abolitionists wanted to prevent out-of-state sales of slaves, as opposed to simply removing them from Pennsylvania to "solve" the state's slavery problem. In 1787, Tench Coxe, a very prominent and politically active officer of the PAS, who later became a senior treasury official under Alexander Hamilton, arranged as coexecutor of an estate to send two black women to the West Indies for sale. After Coxe's arrangement was discovered and he was confronted about it, he apologized profusely to the PAS. He explained that he was unaware that his actions offended PAS policies, and arranged for the return of the women.[78] That same year, Philadelphia merchant Stephen Girard sent a five-year-old boy to the West Indies, and agreed to return him only after extensive pressure from the PAS.[79]

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

and sense of justice.[80] The Logan contretemps showed the limits of the PAS's ability to control slaveowners' intentional lawbreaking.

The PAS sought aggressively to prevent sales of slave children out of state on the ground that they were free and could not be sold into slavery and by 1786 had succeeded in obtaining court rulings that protected such children.[81] However, various slaveowners sought to evade court rulings, and some succeeded. As late as 1794, a slaveowner sent two women to New Jersey even though he had already been served with a writ of habeas corpus seeking their freedom, and was not sanctioned by the Pennsylvania court despite PAS efforts to obtain sanctions against him.[82]

The 1788 amendments to the act on slave and servant removal had other important flaws. Under the amended law, a violation was based on a slaveowner's intent, which was often difficult to prove. The law also specifically allowed a slave or indentured servant to "consent" to removal from Pennsylvania before two justices of the peace (who, in certain parts of Pennsylvania, were likely to be slaveowner allies). Pennsylvania blacks repeatedly faced fraudulent, and in some cases exceptionally well-organized, criminal efforts to induce them to leave the state voluntarily so that they could be kidnapped and sold into slavery.[83] As late as 1811, the PAS successfully sought the indictment and conviction of a Pennsylvania man who had sold a nine-year-old boy into slavery in Baltimore to a slave trader there.[84]

An important uncertainty about the 1780 act's effects, even nearly ten years after it was passed, was what happened when a slaveowner had failed to register a slave as required by the act. As to slaves themselves, this issue was only resolved in 1794. In a 1794 case, the Pennsylvania courts held that when a slave became free under the 1780 act due to nonregistration, the slave could be held only to the same indentured-servitude terms as a free white person, that is, until age twenty-one if male.[85] Uncertainty persisted about whether an unregistered slave's children became free, or whether a slaveowner still had the right to their services until they reached twenty-eight.[86] Although the courts were often willing to assist the PAS when its claims were solidly grounded in the act, it was unsuccessful in persuading the Pennsylvania courts judicially to abolish slavery or to expand the act's reach. Juries sometimes discouraged aggressive PAS litigation by their verdicts as well.

By 1784, in *Pirate, alias Belt v. Dalby*, the PAS began litigation seeking to expand the effects of the Pennsylvania abolition statute.[87] The first reported Pennsylvania post-Revolution slavery case, *Pirate* shows the evolu-

tion of the law of slavery. It was brought as a habeas corpus action seeking the freedom of a slave brought to Pennsylvania from Virginia by the defendant, an Alexandria, Virginia, merchant named Philip Dalby.[88] Dalby had been in Pennsylvania on business considerably less than six months (the protected "sojourn" period established by the act of 1780) when the PAS action began.

Under the law of either Virginia, where he had been prior to coming to Pennsylvania, or Maryland where he had been born, plaintiff Pirate would have been regarded as a slave because his mother had been a slave; in those states, a slave child's status was based on the mother's condition. The PAS and the Pennsylvania attorney general argued for the slave's freedom based on the principles of *Somerset*. The gist of these arguments was that the court should hold that Pennsylvania law applied to the plaintiff, and that it did not recognize slavery because no positive law established it.

The Pennsylvania court chose instead to ignore or reject various *Somerset* holdings, even though Pennsylvania's constitution provided explicitly that the state followed English common law. It held that in the United States, slavery was derived from the civil law, not from English villenage. It determined further that because the slave was a slave in his place of origin, the slave's status continued in Pennsylvania (i.e., the court adopted what is termed a *lex loci* rule in conflicts-of-laws terminology). This rejected the key conflicts holding of the *Somerset* decision that slave status changed when a slave changed jurisdictions. The court's conflicts holding occurred despite the legislature's decision to follow the *Somerset* conflicts rule in drafting the 1780 abolition act. The legislature's decision was apparent from the act's provision declining to protect fugitive slaves owned by foreign slaveholders, since without such a provision those fugitives would have been freed by the operation of the act. (Although *Pirate* involved a slave brought to Pennsylvania by a sojourner, the reasoning of the ruling would have applied to fugitive slaves as well.)

Although the *Pirate* court could easily have reached the same result and disposed of the case simply by holding that the Pennsylvania 1780 abolition statute contained no provision that would free the plaintiff, it chose not to rely specifically on the statute in reaching its conclusion.[89] One possible explanation for the court's effort to create a nonstatutory rationale for its decision is that the court was seeking to prevent future antislavery litigation that depended on claims other than alleged violation of the gradual abolition law. The legislature had already declared that it was state policy not to protect fugitive slaves against foreign slaveowners, and the court's

decision protected those slaveowners as well, discouraging freedom litigation against them except where specifically authorized by statute. The *Pirate* decision appeared calculated to avoid similar future disputes. The surrounding circumstances suggest that this may have been the court's goal.

In 1786, before the court decided the *Pirate* case, at Dalby's request his fellow Virginian George Washington had engaged in high-level lobbying to have the *Pirate* action "voluntarily" dismissed by plaintiffs. Washington wrote to Robert Morris, the Pennsylvania financier, and asked him to persuade the PAS to drop the case. Washington asserted that legislative abolition was the only proper means to address the problem of slavery, and that forcing ordinary slaveowners to litigate against the wealthy PAS would mean they would lose their property because they could not afford to defend it. Freedom litigation, he wrote, "begets discontent on one side and resentment on the other" and "introduces more evils than it can cure."[90]

Washington's prominence and the broad arguments he made transformed his high-level intervention on behalf of slaveholders into a highly visible political act that demonstrated how important this issue was to them. The *Pirate* litigation reminded slaveowners that their practical ability to control fugitive or transient slaves depended precariously on whether the law of other states would continue to deem those slaves property, notwithstanding the protection provided to them for their slaves by the Articles of Confederation. Because the articles lacked a meaningful enforcement mechanism and relied instead primarily on interstate comity on most issues, state litigation like *Pirate* could frustrate their operation. But the Pennsylvania court's decision effectively prevented such a result.

The PAS was often able to persuade the Pennsylvania courts to support its clients' quests for freedom. In 1784, 1789, and 1799, for example, the PAS won suits freeing slaves or their children because their owners had not properly registered them under the 1780 act.[91] In 1797 in *Respublica v. Blackmore*, the Supreme Court of Pennsylvania freed two women held as slaves on grounds that they had not been properly registered under the law.[92] Such registration cases were only a small fraction of the hundreds handled by PAS lawyers over several decades, many of which were settled without litigation by compromises, which in some cases were based on new indentures providing for reduced terms of service followed by freedom.[93]

But the PAS sometimes lost cases in ways that indicated that there were significant limits to public support for its actions. In the 1791 case of *Bill, late with Jonas Philips*, the PAS brought suit against owner Jonas Philips for the freedom of a slave named Bill. To bring the suit, the PAS was required

by law to give a replevin bond, a form of security against court costs.[94] The PAS later discontinued its suit on behalf of Bill after concluding that it lacked legal merit. Philips, the defendant, then directed the sheriff to sue for damages on the replevin bond, and the jury awarded damages against the PAS. The damages were substantial: £56 and costs of suit which together, in today's dollars, would be roughly $6,000. But the jury also decided that the slave was free, so the jury's decision effectively forced the PAS to purchase the slave and pay the slaveowner for him.

The PAS could ill afford such a Solomonic verdict, since it was not financially able to purchase slaves systematically. The case's outcome undoubtedly sent a cautionary message to the PAS against aggressive litigation, since it could not afford to win its cases that way. In another major 1794 case brought by the PAS, an unsuccessful, highly visible criminal indictment for kidnapping, the court essentially instructed the jury to acquit the defendant and then excoriated the PAS and Pennsylvania authorities for their aggressive pursuit of what it deemed to be "extravagant," unfounded litigation.[95]

PAS efforts to prevent slaveowner abuse of slaves and their children and violations of the act through exports or reenslavement depended heavily for their success on blacks' complaints based on growing knowledge of their rights. But PAS efforts to combat kidnapping also depended heavily on white citizen cooperation. In two separate 1790s cases described in PAS files, concerned Pennsylvania citizens challenged kidnappers who were seeking to leave the state with free blacks. A 1793 kidnapping was successfully foiled when the kidnapper fled after being confronted.[96] In a 1794 case, however, a black who was supposed to have been jailed to maintain the status quo pending a further hearing on his right to freedom was never delivered to the jail, and with the connivance of local citizens was instead transported out of the state.[97] These do not appear to have been isolated cases. In 1794, the PAS asserted, in publicly defending its aggressive prosecution in a contested freedom case that it had won against an owner's attack on its conduct, that there had been "many instances" of kidnapping of free blacks by their former masters who sent them to the West Indies for sale as slaves.[98] If this was true, as seems likely, local whites were often less than vigilant in protecting blacks against blatant lawbreaking.

The sources (including the kidnapping and reenslavement cases above) also suggest that antislavery laws were far more vigorously enforced in Philadelphia than in the remainder of Pennsylvania, where most Pennsylvania slaves actually lived. Even in the nineteenth century, there is evi-

dence of much of the rural population's lack of support for abolition. In the early 1830s, a special committee of the Pennsylvania legislature found that as late as the mid-1820s, in rural Pennsylvania the children of slave children born after 1780 were still being treated as indentured servants, which was plainly illegal. It was only in 1826, nearly fifty years after the act's passage, that the Pennsylvania Supreme Court actually barred this "misconstruction" of the law.[99]

The same Pennsylvania legislative committee discovered in the early 1830s that in rural Pennsylvania, for decades previously, numerous slaves from other states had been sold into Pennsylvania as long-term indentured servants in direct violation of the 1780 act, whose provisions should immediately have freed these individuals.[100] Remarkably, despite the law's clarity on this point, the committee recommended that such violations of the act continue to be permitted on the ground that it would be better for the out-of-state slaves if they became indentured servants in Pennsylvania.

The reenslavement and out-of-state sales cases—considered together with a significant number of deliberate kidnapping cases in the 1790s and 1800s, including the case that ultimately gave rise to the Fugitive Slave Act of 1793—suggest just how tenuously freedom had been conferred on blacks by the Pennsylvania act. In enforcing the law, blacks and their supporters had had to struggle with grasping slaveowners; indifferent or racially or economically hostile white citizens; malevolent whites running systematic interstate kidnapping rings; and Pennsylvania's partial encirclement by slave jurisdictions where slaveowners could find easy refuge after breaking the law. Not surprisingly, abolitionists often lost despite their best efforts, so black freedom in Pennsylvania remained fragile at best.

Black freedom may have been equally precarious in at least some other Northern states, particularly where slavery and the slave trade had historically played a large role in the state economy. Historian John Wood Sweet's detailed study of race relations and abolition in Rhode Island describes the continuing difficulties faced by freed blacks during Rhode Island gradual abolition. Sweet concludes:

> [In Rhode Island], free people of color often found their freedoms fragile. The . . . [abolition] Act, like similar laws in other states, made little provision to safeguard the interest of those it liberated. In this climate, scenarios familiar from pre-Revolutionary court cases recurred, and new modes of malfeasance emerged: masters and their heirs reneged on manumissions; indentured servants, debtors, and

other free people were sold as slaves; free immigrants were claimed by so-called slave hunters; and others were kidnapped.[101]

The Pennsylvania gradual abolition law's limited enforceability reflected the boundaries of Pennsylvania public support for abolition. Pennsylvania was not alone in having a weak abolition enforcement program. There were major loopholes in the abolition laws of other states that had substantial numbers of slaves.

In Massachusetts, after the *Jennison* decision in 1783, slave sales out of the state would theoretically have been at least a tort, that is, a civil wrong, that would have given rise to a damages action by a slave who was wrongfully sold. But here again, it appears that slaveowners were given a legal window of opportunity against enforcement. Massachusetts did not explicitly prohibit kidnapping by statute until 1785, and it appears that contemporaries quickly realized that this provision was ineffectual against such abuses. In 1787, the legislature passed a law that granted a statutory right to the writ *de homine replegiando* to permit persons held in captivity to seek to regain their freedom. In 1788, it granted a statutory right to third parties to bring damage actions on behalf of kidnapped individuals who were absent.

But both the 1787 and 1788 statutes deliberately imposed significant financial barriers to bringing such actions to assist slaves. And they explicitly shifted the legal costs of such actions to losing parties, a quite unusual provision (given the normal "American rule" against fee shifting), which may well have deterred some such actions, given the often large disparity between the financial resources of slaves and their allies, on the one hand, and those of slaveowners on the other.[102]

More importantly, the fact that the 1787 and 1788 statutes were adopted at all strongly suggests that after Massachusetts abolition was judicially decreed, there were serious questions about the likelihood of successfully preventing kidnapping, and that out-of-state sales were perceived as a continuing problem by Massachusetts authorities even five years after the *Jennison* decision. Slave sales for export from Massachusetts would have been quite easy to arrange and difficult to detect, given Massachusetts' large shipping industry. No Massachusetts prosecutions for out-of-state sales during this period have been discovered. According to several historians, slaves continued to be sold in Massachusetts after *Jennison*.[103]

A similar problem with slave sales for export existed in Connecticut. There the state's 1784 gradual abolition act "imposed no limits on the export of slaves, and the law gave Connecticut masters ample incentive to

sell their slaves on the interstate market," because the value of slaves, and particularly of slaves' children, was considerably higher in states where slavery was still legal.[104] Four years after abolition began, Connecticut adopted a law to prevent forcible kidnapping of slave children and their removal from Connecticut—but the law applied only to slave children, not to slaves. Finally, in 1792, Connecticut amended its laws to prevent the kidnapping and exportation of slaves. The law did not apply to slaveowners who moved out of Connecticut. They were permitted to take their slaves—and the slaves' children—with them.

But even after Connecticut law was changed in 1792, and a fine of £100 was imposed on kidnappers, kidnappings and unlawful out-of-state sales continued. One antislavery advocate, Isaac Hillard, brought court actions against six separate individuals in 1796 and 1797 alleging that they had illegally sold slaves or their children out of Connecticut. Hillard faced difficulties in pursuing these cases. He later sought reimbursement from the legislature for the costs of his actions on at least four occasions, claiming that the reward offered by the statute (half of the fine) was not sufficient in view of the "extraordinary Cost Trouble and expence" of bringing such actions.[105] Hillard's foes were not the only ones breaking Connecticut laws against kidnapping free blacks. In 1786, Connecticut convicted a man named Hunn Beach, who had assaulted, imprisoned, and sold a free black into slavery in South Carolina.[106]

The problem of out-of-state slave sales appears to have been significant in New York as well. In 1785, the New York Manumission Society was formed. Its first act was to seek legislation preventing the sale of slaves for export from New York, not gradual abolition legislation.[107] However, what the legislature instead agreed to do (after defeating the 1785 abolition legislation discussed earlier) was to prohibit imports of slaves into New York, not exports. Owners who had concluded that abolition legislation might ultimately pass then began to sell slaves for export. Understandably alarmed by this, the Manumission Society repeated its request in 1786, but an export measure failed to pass for several years. When it did pass in 1788, the export ban prohibited not sales for export, but only the purchase of slaves intended for export, so owners themselves faced no penalty for attempting to sell slaves outside the state, and an owner could take a short trip out of state to complete a sale.[108]

There appears to have been widespread noncompliance with the New York and New Jersey abolition laws (adopted in 1799 and 1804, respectively). For New York, McManus found that because of regional slave price

differentials, slaves could be sold south for a very large profit at the time the gradual abolition law went into effect. He concluded that "it seems obvious that Negroes left the state in considerable numbers" involuntarily.[109] The situation in New Jersey seems to have been similar.

Demographic data on black and slave population changes in Northern states "strongly suggest" that New York and New Jersey slaveowners were selling their slaves to the South, particularly after the closing of the slave trade in 1810 caused a sharp rise in slave prices.[110] Historian Claudia Goldin analyzed demographic data as part of her broader analysis of the economics of emancipation and concluded that it is "entirely possible" that many thousands more slaves were sold south than were emancipated by the New York gradual abolition law itself.[111] Fogel and Engerman concluded more generally that it is probable that "to a substantial degree the decline of slavery in the north was due not to emancipation" but to slave sales by northerners.[112]

This review of the enforcement of major Northern state abolition laws shows that those laws contained important loopholes, particularly in their critical early years. Notwithstanding the available loopholes, the laws themselves were violated by slaveowners. Significant numbers of such violations could have occurred only in a climate of opinion where many citizens were willing to acquiesce in them, and remained silent through fear, racist hostility, economic interest, or indifference. A majority of Northern citizens were willing to support the abolition of slavery, and some part of them wanted free blacks to be given some form of "freedom" to remain as "citizens" of their states. But the evolution of the abolition statutes and the law-enforcement evidence suggests that a significant minority of citizens thought that it was perfectly acceptable for abolition to be achieved by removing blacks from Northern states—in essence, pursuing their own form of "colonization" solution to the problem of slavery for racist or economic-interest reasons. The legal tools and enforcement resources were available to prevent slave and free black removal, but the political will to prevent it did not exist in many parts of the Northern states.[113] Northern unwillingness to provide taxpayer funding and vigorous abolition law enforcement in their states also very strongly suggested, if it did not guarantee, that northern majorities would be unwilling to support federal resource expenditures—or agree to significant political trade-offs affecting their states' interests—to contain southern slavery. This conclusion is reinforced by Northern state treatment of fugitive slaves before the adoption of the federal Constitution.

Well before 1787, the Northern states declined to protect fugitive slaves during abolition. After the Revolution, each of the Northern states had plenary legal authority to free fugitive slaves coming from any other state or territory, or to provide them with legal protections against recapture, if they chose. Yet as historian Paul Finkelman has shown, all of the Northern states that began abolition prior to the Constitution and that had more than minor numbers of slaves declined to free fugitive slaves, and instead often protected slaveowners' property interest in them.[114] Courts in those jurisdictions also rejected some aspects of *Somerset* and interpreted their abolition statutes in ways that denied protection to fugitive slaves. As William Wiecek concludes, "the interstate rendition of fugitive slaves among the American states was a well-established constitutional tradition by 1787."[115]

When Rhode Island adopted slave-import limits in 1774, it also deliberately sought to prevent an inflow of fugitive slaves from other colonies. Its 1774 statute imposed prohibitive fines on persons who clandestinely brought slaves into the colony seeking to free them, or who harbored them.[116] It mandated removal of fugitives. The law provided that any "Negro" or "Mulatto" brought in by abolitionists (or fugitives) should be sent out of the colony, "as other poor Persons are, by Law" because otherwise they might "be[come] free, and liable to become chargeable" (i.e., supported by poor-relief taxes).

Pennsylvania law assisted foreign slaveowners in recapturing their fugitive slaves. The Pennsylvania act of 1780 specifically preserved all previously existing legal rights of slaveowners from other states to their slaves who became fugitives in Pennsylvania, which included established rights to recapture slaves, and to sue for damages anyone who harbored a slave. Under its law, Pennsylvania afforded the same powers of slave recapture and damage actions to its own slaveowners, even after abolition. Indeed, it went further, and gave Pennsylvania slaveowners a five-year grace period in which they could round up fugitives and bring them back to Pennsylvania for registration under the act, protecting their status as slaves.[117]

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

owners. They reflected the view expressed by John Adams, and relatively common throughout the United States among whites, that freed blacks would be poor and likely to commit crimes as a result.[118]

Evidence from the case files of the PAS shows that in the 1780s and 1790s slaves from other states quickly became aware that if they could reach Philadelphia, they might gain powerful allies in seeking freedom. Several PAS cases involved fugitives from other states or slaves brought to Pennsylvania by sojourners.[119] But like Rhode Island's law, the Pennsylvania act was intended to discourage fugitives from coming to Pennsylvania.

Similarly, Connecticut's 1784 gradual abolition legislation did not free or protect fugitive slaves. The Connecticut abolition legislation set free only slave children "born within this State. . . ." Fugitives were deemed "Run-aways," who might be seized by any state inhabitant, taken to an "Authority," and returned to "his or their Master or Owner. . . ." Because "the increase of Slaves in this State is injurious to the Poor, and inconvenient" (references to labor-market disruption and poor-relief costs), the legislation prohibited harboring imported slaves and imposed heavy fines for harboring such slaves. To avoid poor-relief tax costs, the statute also imposed on masters of manumitted slaves financial responsibility for them "in Case they come to Want. . . ."[120]

Massachusetts made clear that it would not protect fugitive slaves even before the Constitution was adopted.[121] In 1788, the state adopted criminal legislation that excluded all nonresident African Americans from Massachusetts by force unless they had official certificates proving that they were "citizens" of their jurisdiction of origin. The law provided in part: "[N]o person being an African or Negro, other than . . . a citizen of some one of the United States . . . shall tarry within this Commonwealth, for a longer time than two months . . ." The necessary result of the 1788 law was that fugitive slaves (and probably many free African Americans as well) were excluded from Massachusetts.[122] This statute was consistent with prior exclusionary practices regarding slaves in Massachusetts. During slavery's existence there, a frequent subject of litigation between different towns about slaves had been which town had to take poor-relief responsibility for them, because poor relief was a local responsibility that towns eagerly sought to avoid.[123] The prevailing Northern sentiment in the postrevolutionary era was that fugitive slaves were unwanted social burdens.

New York reformed its manumission law in 1785, and then adopted a new slave code in 1788.[124] The slave code freed slaves imported into the state in violation of law, but not fugitives, and penalized the harboring of

fugitives. The liberalized manumission statute still required a certificate, usually to be signed by the "overseers of the poor," certifying that a slave could support herself before manumission could occur without posting of financial security. The 1788 slave code also included an innovative provision intended to prevent owners' collusive or "sham" sales of slaves to avoid paying for their maintenance when aged or infirm, which deemed the original seller to be the continuing owner of the slave for poor-relief purposes.

Later judicial decisions confirmed that slaveowner rights to recapture fugitives survived gradual abolition laws. The right of private reception was recognized in Massachusetts after the judicial abolition of slavery there in 1783.[125] The Pennsylvania Supreme Court in 1795 concluded—after gradual abolition began there—that in Pennsylvania and other states private slave reception was widely accepted.[126] The New York Supreme Court of Judicature held in the early nineteenth century that a common-law right of slave reception that extended to recapture in other states had existed in New York and in other states before adoption of the federal Constitution.[127] Northern states were willing to offer limited freedom and protection to their resident slaves and black freedmen, but they drew the line there and excluded fugitives from their protection, even before the Constitution's adoption.

Meanwhile, limited slavery reforms such as manumission liberalization in Southern states held out little real hope that abolition would occur there, and instead strengthened slavery politically.

MANUMISSION AND ABOLITION IN THE SOUTH

Many national political and intellectual leaders of the Revolutionary generation from Southern states, including men such as George Washington, Thomas Jefferson, Henry Laurens, James Madison, and St. George Tucker, were deeply troubled by slavery. Some, like Washington, acted on their convictions by private actions such as manumission. Several others made proposals to end slavery gradually, but often these proposals depended on colonization of free blacks (i.e., exporting them from the state, often involuntarily) to avoid what were viewed as insurmountable problems raised by their possible incorporation into white society.[128]

Virginia was considered by many contemporaries as the most likely of the states with large numbers of slaves to undertake gradual abolition after

the Revolution. But in 1785, the Virginia House of Delegates unanimously rejected Methodist petitions praying for a general emancipation of slaves through gradual abolition.[129] George Washington had declined to write in support of the Methodist petitions unless the legislature was willing to debate them seriously, and it was not.[130] A candid political observer sympathetic to antislavery concerns, James Madison, advised the abolitionist Robert Pleasants in 1791 that he could not assist Pleasants in seeking gradual abolition legislation even in Virginia because his political supporters opposed it. Madison told Pleasants that "those from whom I derive my public station are known by me to be greatly interested in that species of property, and to view the matter in that light."[131]

As chapter 5 will discuss in detail, in 1797 the Virginia legislature rejected out of hand the major gradual abolition proposal it received during the eighteenth century. As a practical matter, this meant that gradual abolition would not occur in any of the major slave states. A recent historian concludes that after the Revolution, Upper South whites had economic, religious, and "Revolution principles" concerns about slavery, but that their heavy investment in it and continued ability to profit from it, combined with "the unanswered question of how whites could live peacefully with their former slaves to sustain a powerful if ambivalent attachment to slavery among many upper South whites."[132] As a result, gradual emancipation and colonization plans received little support. Neither Virginia's legislature, nor that of any other Southern slave state, gave serious consideration to any proposal for the systematic gradual abolition of slavery before 1830.

That did not mean, however, that slave states made no changes in their regulation of slavery as an institution during the early Republic.[133] Several of the Southern states altered their criminal laws to provide some protection to slaves against the worst forms of physical abuse by their owners.[134] Beginning with Virginia in 1782, some Southern and western slave states significantly liberalized their manumission laws during a period that lasted somewhat over twenty years, and some owners freed their slaves as a result for reasons of benevolence, religious principle, or "Revolution principles."[135] However, in Virginia and other major slave states, manumission laws served principally as a political "escape valve" to avoid pressure for gradual emancipation.

Manumission liberalization had particular appeal in slave states because of such laws' inherent political equivocation regarding slavery. The new manumission laws recognized the right of a slaveowner to free slaves in

many cases if he chose to do so. But the statutes did not interfere with, and indeed reaffirmed, the right of other slaveowners to continue slavery. The manumission statutes conceived of slavery as creating purely private property, the complete negation of the idea that the general public (particularly the nonslaveholding public) had any legitimate interest in what happened to slavery as an institution. In a sense, this was regressive legislation, because slaveowner rights to manumit slaves had been regarded for a century or more (in both northern and southern states) as subject to public control for society's protection.[136]

Liberalized manumission laws were especially appealing to those who opposed slaveholding for reasons of conscience, and wished to end their participation in what they saw as sinful actions. One study of Virginia manumission concluded that heavy Quaker lobbying was "apparently responsible" for the 1782 statute. Another study concluded that that statute was more "an acknowledgement of the religious rights of whites than of the natural rights of blacks."[137]

Manumission reform appealed to slaveholders for economic reasons as well. Studies of manumission in different slave jurisdictions, both within and outside of the United States, have shown that in economic terms, it often amounted to a system permitting negotiated self-purchase of freedom by a slave. Some manumissions certainly resulted from slaveholder benevolence or belief in the injustice of slavery. But in many situations, such negotiated purchases served the differing but coincident interests of both slaves and masters. Slaves bargained for freedom, which could mean the right to build a stable family, and which in urban areas could mean the possibility of better employment at higher wages. Masters bargained for limits on slave flight, improved productivity, and limits on cash outlays for labor. Masters also often gave freedom to slave women with whom they had had children and to those children.[138] Manumission laws actually improved masters' bargaining position in such negotiations by making manumission easier to grant, but at their sole option.

In the Chesapeake, or Upper South, manumission law changes were motivated in part by shifts in the agricultural economies in these states that made it more profitable to be able to hire free blacks for casual labor, and actually strengthened slavery as an institution.[139] A recent study of Virginia manumission suggests that economic considerations were also heavily involved in manumissions that occurred there.[140]

After an initial wave of manumissions motivated by antislavery concerns in the 1780s, Virginia manumissions served primarily as a way to reward

small numbers of individual slaves for good service. Such manumissions could reinforce, rather than subvert, slavery. The study concludes that "many fewer people were freed [in Virginia] than has been thought."[141] It also concludes that Virginians' support for manumission did not imply support for gradual abolition: "white Virginians . . . remained generally convinced of slavery's importance to their society as well as of the inferiority of black people who were enslaved," and they continued to be unwilling to abandon slavery in the late eighteenth century.[142]

The positions that leading Virginia politicians took on manumission reform—as opposed to gradual abolition—tell us a good deal about how they understood the politics of manumission. From what little is known about the 1782 manumission law's legislative history, it appears that Virginia's "national" politicians—men such as Madison and Washington—were not actively or openly involved in its passage, though some of them supported or had supported this type of legislation. Other leading Virginia politicians such as Edmund Randolph emphasized what they saw as the indelible political distinction between their support for manumission liberalization and their unwillingness to support abolition by specifically declining invitations to support abolitionist memorials.[143]

Some Virginia national leaders actually opposed even manumission reform. Thomas Jefferson opposed manumission liberalization because he believed that it would be counterproductive unless accompanied by mandatory colonization.[144] Jefferson was not alone in viewing colonization as an essential part of changes in slavery. In 1783, the Virginia legislature's docket included a legislative petition that sought emancipation, but the petition failed in the Assembly. Virginia legislator John Minor's uncle, Peter Minor, wrote to him and applauded its defeat: "As to your bill for emancipating the slaves, I think it met with a very good fate for we might as well let loose a parcel of Indians or lions, as to let our slaves free without they could be sent from the country."[145] It seems likely that Jefferson's position that abolition, if undertaken at all, should be made dependent on colonization represented the view of at least a substantial minority, if not indeed a majority, of southern whites.

But although much of the Virginia elite was willing to support manumission reform, its members often sharply opposed even small steps toward gradual abolition, including the provision of legal support for slave freedom claims and advocacy by abolition supporters.[146] In the 1790s, the Virginia legislature passed several statutes designed to frustrate the efforts of the Virginia Abolition Society. These included a bar on jury member-

ship by its members in slave freedom cases, and a 1795 statute penalizing unsuccessful freedom suits and prohibiting abolitionist legal assistance to slaves seeking freedom.[147] The harsher of these laws was referred to by an abolitionist in 1796 as the act for "abolishing the Abolition of Slavery throughout the State of Virginia."[148] Abolitionist societies were "instructed by the legislature" to cease political activities.[149]

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

The actual impact of manumission liberalization on the growth of slavery in the slave states was quite limited. During the period from 1790 to 1810, free blacks went from 3.4 percent of the black population in the slave states including Virginia and those to its south and west to slightly more than 5 percent of the black population in those states. During this same period, the overall slave population of those states had more than doubled, and as of 1810 they held 97 percent of the total United States mainland slave population.[150]

After 1800, several of the Southern slave states began to tighten manumission laws (by imposing bond requirements or similar obstacles). The relative voting strength of Southern slaveholders and nonslaveholders and their opinions about abolition then were not markedly different than they had been at the beginning of the 1780s.[151] But opinions about manumission laws had changed. The intervening slave revolts in Santo Domingo and Gabriel's rebellion in Virginia had led to rising white fears of slave rebellion. Many slaveowners—north and south—firmly believed that the existence of significant numbers of free blacks in a slave state increased the possibility of rebellion and other social costs such as crime and slave flight, and nonslaveowners often shared these beliefs (whose correctness is irrelevant here). These views led to regressive manumission-law changes. Virginia's history provides a useful example.

After Gabriel's rebellion in 1800, the Virginia legislature sought for several years to find a means of removing free blacks from the state. When it became apparent that none of the lands acquired in the Louisiana Purchase

would be set aside as a free black colony, as many legislators had hoped, a majority of the legislature decided that they had tolerated the problems they associated with free blacks long enough. In 1806, Virginia law was amended to provide prospectively that blacks who were freed must leave Virginia or face reenslavement. During legislative debate on the 1806 amendment, arguments that this change in the law abandoned Revolution principles and impaired slaveowner property rights failed in the face of the contention that protection of slavery as an institution made the change necessary.[152]

Virginia's sharp retreat from its liberal manumission policy led to reactions by other states and caused important changes in Virginia manumission patterns. In response to Virginia's action, several nearby states shortly thereafter banned the entry of free blacks (including Delaware, which by then had a large free black population). Ironically, as may have been anticipated, the Virginia law's requirement that free blacks leave the state actually led to a sharp decline in manumissions because slaves did not want to leave their families and means of support.[153]

It is sometimes argued that Virginia's 1806 retreat on manumission was a turning point in the prospects for abolition in the Southern slave states. But as we have seen, from the outset key Virginia leaders drew a sharp distinction between permitting some liberalized manumission and moving toward gradual abolition, especially without colonization. There is no reason to think that the politics of this issue were substantially different in other major slave states. At least some of Virginia's late-eighteenth- and early-nineteenth-century state-level (as opposed to national) political leaders had no significant qualms about slavery, and never seriously entertained the idea that gradual abolition should occur. Littleton Waller Tazewell was fairly typical of those state leaders, as is evidenced by his very prominent political career.

Tazewell, a son of one of Virginia's earliest United States senators, was a leading Norfolk attorney and substantial slaveowner. His political career included service to Virginia during much of the first third of the nineteenth century as a United States representative, United States senator, in Virginia's legislature, and as governor. Tazewell's life involved nearly daily encounters with slavery as a legal and business problem, but in his extensive correspondence and political actions he expressed no moral or political qualms about the institution until fairly late in his career, after the 1830 Turner slave rebellion.[154] Even after that rebellion, Tazewell thought abolition should be considered as a means to prevent future rebellions only

if all free blacks could be exported from Virginia for colonization. He accepted the Virginia legislature's decision not to take action against slavery after the Turner rebellion. In the United States Senate, Tazewell vigorously led the opposition to the use of federal funds to support colonization measures, contending they were an unwarranted extension of federal power over slavery.[155]

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

CONCLUSIONS

The history of Revolutionary-era abolition and slavery reform leads to several conclusions. The most important of these has to do with the sociopolitical character and limits of these processes. Northern citizens demonstrated as they moved toward abolition that they were unwilling to pay any of the economic costs of black freedom in their own states, let alone elsewhere. Loopholes and poor enforcement of Northern laws permitted "black removal" as a part of slavery's abolition. Northern citizens were often unwilling to permit black "freedom from slavery" to become black equality. To succeed politically in Northern states, abolition necessitated dissociation of slavery as a labor regime from slavery as an institution of social and political control, in order to maintain existing social stratification. This often meant the continued economic and political subordination of blacks, as well as policies such as encouragement of white immigrant labor that had the potential to worsen blacks' social and economic position. Another fundamental limitation of reform was that fugitive slaves would not be protected or freed by law. Abolition was viewed as an internal process directed at state residents.

These Northern views of society's limited accountability for slavery and of the boundaries that should be imposed on black "freedom" in Northern states were strongly influential in shaping the positions their

representatives took on slavery and abolition at the Constitutional Convention of 1787. Political support for abolition among the Northern public was like the Platte River in the American West—"mile wide, but inch deep."[156] Abolition's limited public support necessarily meant that there would be little or no Northern political support for efforts at the national-government level to press for abolition in the South or for containing slavery within existing states if Northern citizens were required to bear any of the costs of such reforms. The political history of Southern manumission laws demonstrates that minimal support for abolition legislation existed in the South. In this political climate, Northern politicians were not only free, but indeed were effectively required, to pursue policy goals and trade-offs for their constituents at the national level other than Southern abolition or slavery containment. Southern politicians, on the other hand, had little if any political ability to support action against slavery.

PART TWO

The Making of the Slaveholders' Constitution

3

PROPERTY AND REPUBLICAN REPRESENTATION

SLAVERY AND NATIONAL POLITICS BEFORE THE PHILADELPHIA CONVENTION

Under the Confederation's laissez-faire political regime for slavery, the institution grew significantly. From 1770 to 1790, the estimated slave population of the United States increased by more than 50 percent.[1] Slave imports accounted for part of the slave population growth during that period, while the rest of the growth resulted from natural population increase. The earlier historic balance between slave imports and natural population increase, where imports outweighed the contribution of natural increase to growth, had changed markedly in several mainland American colonies by about 1720, after which "the annual rate of natural increase in the United States was greater than the annual increase due to importations."[2] The positive demographic pattern of slavery in the American colonies throughout most of the eighteenth century, where slave populations grew by natural increase even without imports, was dramatically different from the negative demography of slavery in the British Caribbean.

The growth of the mainland American slave population due to natural increase was large by any contemporary standard. In a recent analysis, historian Philip Morgan concludes that "overall, from the early eighteenth century onward the mainland slave population grew faster, from natural population increase, than contemporary European populations."[3] In Virginia, for example, from 1730 to 1800, "the natural rate of increase of Virginia's black population was about two or more percent a year," a rate that probably equaled, and may have exceeded, the rate of white population

growth during that period. Morgan concludes that mainland American slave populations increased naturally throughout the colonies, including South Carolina, from at least 1760 onward, except during the Revolution, and that this trend began much earlier in colonies other than South Carolina. As Morgan notes, "the one exception to this remarkable success story . . . concerned cities (where, of course, proportionately few North American slaves lived)."[4]

The positive demography of American slavery meant that, unlike the Caribbean, mainland slave populations could grow significantly even without slave imports if worldwide economic demand for products produced by slave labor continued and sufficient land to support production was available. Through natural growth alone, by the late eighteenth century slave populations in Virginia, for example, would increase by nearly 30 percent per decade. By 1787, slavery was rapidly expanding into new southwestern territories that quickly became states after the Constitution was ratified, including Kentucky and Tennessee.

In the 1780s, slaveholder interests dominated the governments of states where slavery was a major socioeconomic institution. In Virginia, slaveowners "almost certainly" formed a majority of eligible voters in the years after the Revolutionary War.[5] Other slave states had similarly composed electorates. Slaveowners in those states usually had little difficulty in shaping both the substance of state slavery laws and their enforcement to meet their collective needs, and faced little postrevolutionary political pressure for abolition. In slave states, slaves were the largest single category of property assets other than land. Slave property taxation played a part in maintaining slaveholder control of state governments. Slaves were commonly taxed only where slaveowners believed that such taxation would help maintain slave prices, as in the case of import duties, or would serve as an efficient means to maintain slaveowner control of political institutions by shifting the burden of taxation away from nonslaveholders.[6]

Thus, looked at from the vantage point of slavery only, slaveowners should have had little or no interest in changing the Confederation government stance toward slavery. Indeed, based on objections by "southern and eastern" congressmen, in 1785 the Confederation Congress, without even taking a vote, rejected an effort by Congressman David Howell of Rhode Island to refer to committee for consideration a Quaker memorial seeking Confederation-wide legislation to prohibit the slave trade, needed because earlier bans had been purely voluntary for states.[7] Congress was also deadlocked on other efforts to contain the growth of slavery at the

continental level prior to 1787 by prohibiting it in new territories. Despite Thomas Jefferson's famous complaint that his 1784 proposal to bar slavery in the western territories after 1800 had failed only by a single vote due to a sympathetic congressman's illness, the political reality facing such proposals was quite different. Even though Jefferson's proposal would effectively have permitted tens of thousands of slaves in the western territories, Congress declined to act further on it—or other restrictions on territorial slavery proposed by congressmen such as Rufus King—until 1787, during the Philadelphia Convention.

But slaveowners were not immune from dislocations caused by the broader weaknesses of the Confederation. Southern interests in expanded international trade and strengthened military defense in particular were adversely affected by the fact that the Confederation could not control American commerce or pay even its legitimate debts, including those to its veterans. Thomas Jefferson complained from Paris—where he was a vocal advocate for American, and especially southern, trade interests—that foreign governments would not negotiate trade agreements with him because of the Confederation's weaknesses, including its lack of commerce powers: "they supposed everything in America was anarchy, tumult, and civil war."[8] By the late 1780s, Jefferson had reluctantly concluded that protection of the "natural" free trading rights of the United States would require increased American military power that the Confederation could not provide.[9]

Ironically, slave states bore a special responsibility for these weaknesses of the Confederation government, because the political strength of the institution of slavery had been largely responsible for the inability of the Confederation government to tax effectively. Slavery's influence had created a massive political roadblock to effective national government during the Confederation period that had to be removed before any workable new government framework could be adopted. The precise terms on which removal of that obstruction occurred are the key to understanding slavery's relation to the Constitution.

In 1776 and 1777, representatives of slave states had insisted successfully in the Continental Congress that slaves should not be included in the Confederation tax base. (See chapter 1.) Northern state delegates had therefore reluctantly acquiesced in the creation of a taxation system that instead based state tax quotas on the value of land and buildings in each state. This taxation system had severe, inherent administrative and political flaws that led one historian to describe it as a "hopeless formula" that "proved an im-

possible remedy." The Continental Congress therefore agreed to abandon the system in 1783, so it never actually operated.[10]

Slaveowner state representatives instead agreed in 1783 to a compromise taxation program, one part of which permitted inclusion of slaves in the tax base. However, the proposed taxation system used the fraction three-fifths for each slave counted in including slaves in the tax base, because slaveowner interests were willing to agree only to that fractional valuation as a compromise. This agreed-upon fractional ratio of slaves to free citizens for taxation purposes quickly became known as the "federal ratio."

The result of this aspect of the 1783 tax proposal would have been to create a Confederation tax base that included a disproportionate share of southern wealth. Creation of the federal ratio thus represented a significant political concession by slave state interests. It was a tacit acknowledgment that Southern states believed that they would benefit from a fiscally stable central government sufficiently that they were willing to pay a disproportionate share of its costs in certain circumstances. Northern state representatives had instead advocated a total population measure for taxation, which counted slaves as full individuals for tax purposes, since that would have lessened the relative tax burden on those states even further than the use of the federal ratio did. They accepted the federal ratio to gain agreement that the wealthier Southern states would permit the largest possible share of their wealth to be included in the tax base.

By 1786, eleven states, including all major slave states, had ratified the proposed 1783 change in the Articles taxation system to adopt the federal ratio. But since unanimity was required under the Articles for such an amendment to be adopted, the proposal failed.[11] By then, it had become clear that the Confederation had little or no ability to raise money through taxation, and states were refusing to pay their shares of congressional requisitions.[12] The Confederation had no politically workable means of recovering from its insolvency. But as the Confederation's continued ability to borrow internationally demonstrated, the United States was not bankrupt. Instead, it lacked the political power to tax effectively the nation's large assets by overcoming state resistance.

Events other than insolvency in the mid-1780s, such as Shays's rebellion, also contributed to major American political leaders' willingness to reexamine their views on the Confederation and moved them toward support for a national convention to revise the Articles.[13] Leaders in different parts of the United States concluded that the Confederation government needed to be profoundly altered or it might collapse.[14] Although many

Americans decided that they wanted a more powerful, effective central government, historians have long recognized that state leaders faced a dilemma: a new government might deprive them of important existing authorities they possessed. And there was still considerable popular and elite support for continuing the weak Confederation government with perhaps a sizable patch here and there; revolutionary leaders as diverse in other respects as Samuel Adams and Thomas Jefferson appear to have preferred that approach.[15]

A major concern of the states in the period before the Convention was the appropriate extent of the central government's power to control commerce. There was support across the country for expanded central power to regulate commerce, but serious apprehension about the use of such power was widespread as well. A broad grant of commerce powers to the new American central government could dramatically change the existing political and economic balance of power between the central government and the states, as well as between various sections of the United States. Thus the precise scope of the commerce power to be granted to the central government would be a critical issue for the states considering a convention.

There were Northern leaders who believed that Massachusetts and other Northern states could gain from sweeping commerce authority. Former Revolutionary War general Benjamin Lincoln expected that Massachusetts would seek to use such broad commerce power to enact a British-style navigation act for the United States, requiring United States exporters to ship their exports in United States–owned (i.e., often Massachusetts-owned or -built) ships.[16] Broad commerce authorities were also important to provide the United States with sufficient bargaining power to enable it to reach international agreements that opened foreign markets to United States trade, which had been a goal of Continental Congress policy since 1784. Congress's proposed mechanism was to create a trade weapon, restricting foreign imports and exports for a period of fifteen years unless they were carried either in United States ships or ships owned by citizens of nations that had agreed to commercial treaties with the United States. This proposed policy would benefit Massachusetts as well as exporting states opposed to British trade dominance, such as Virginia.[17]

Based on their experience in the Continental Congress, however, prominent Southern political figures believed in the mid-1780s that Massachusetts had little interest in changing much about the Confederation beyond broadening its commerce power. William Grayson, an astute political ob-

server who became one of Virginia's first senators after the adoption of the Constitution, privately cautioned James Madison in May 1786 that if the proposed Annapolis commercial convention that Madison was pursuing to expand the Confederation's commerce power produced "anything decisive" in the way of new powers, "nothing more [was] to be expected from Massachusetts, etc., etc."[18] Grayson believed that Massachusetts would oppose other changes to expand Confederation powers and alter the Confederation's political structure sought by states such as Virginia if it succeeded in obtaining expanded Confederation commerce authority.

At the time, key Massachusetts leaders believed that there were limited benefits beyond broadened commerce authority their state could derive from a new government, lending substance to Grayson's concerns. General Benjamin Lincoln informed Rufus King, a prominent Massachusetts politician who was soon to become a leading figure at the Philadelphia Convention, that the South was militarily weak as a result of its dependence on slave labor.[19] Other influential Massachusetts delegates in Philadelphia, such as Nathaniel Gorham, shared that view.[20]

King was a—if not the—principal Northern-state leader during the fierce, sectionally divisive congressional debate over the Jay-Gardoqui (or "Spanish treaty") proposal in 1786, which became a sectional crisis.[21] The proposed treaty would have provided that in return for Spain's willingness to open its markets to United States products, particularly those of New England such as fish, the United States would relinquish for thirty years its claimed right to navigate down the Mississippi River.[22] As his speeches during the treaty debate showed, King accepted General Lincoln's view that the South was militarily weak. He argued to support his position during congressional debate on the treaty that the South's military weakness meant that the principal benefits Northern states would derive from the creation of any new national government would be commercial.[23] Indeed, in late 1785 King privately opposed even the expansion of Confederation commerce powers, since he thought that that would necessarily entail creation of a government dominated by "aristocrats" (a term that included the southern states in King's view).[24] King's views changed after Shays's rebellion demonstrated Massachusetts's inability to raise taxes on its citizens without facing a threat to its very existence.

Both northern and southern state leaders wanted an enforceable national tax system that could provide adequate revenue to the central government. The 1783 Confederation negotiations on taxation suggest that southern states were willing to structure the taxation system in a manner

favorable to northern states as an inducement to create such a system. As is well known, 82 percent of the total net worth of the United States at the time of the Convention was outside New England.[25] Massachusetts and other New England states, both because of their relative poverty and because of their existing debt burden, had a very strong incentive to support any taxation system that would shift the burden of federal taxation away from them, as use of the "federal ratio" would. This meant that the underlying political difficulty that remained in creating a more powerful national government was the allocation of political control of discretionary national government authorities such as commerce and military powers that could have both major policy and major tax-burden consequences. As King's views—and the Philadelphia Convention debate—showed, here the interests of the sections were potentially adverse, and both sections were reluctant to cede political control over them.

The sources suggest that Northern state delegates faced very limited home-state pressure to address the problem of slavery at the national level in creating a new government, just as would have been expected given the course of Northern state abolition. Northern state delegates to the Philadelphia Convention included several men known as opponents of slavery, including Benjamin Franklin and Rufus King. But there is little evidence that any of these delegates regarded action against slavery as part of their charge in creating a new government. Despite the fact that by 1787 five Northern states had begun abolition of slavery, in preparation for the Convention Northern state delegates received no instructions from any of the legislatures that appointed them that they should seek to advance an antislavery agenda of any kind, even with respect to action against the slave trade. Action against slavery was not even deemed a politically acceptable part of the Convention agenda by some northern leaders.[26] Northern delegates instead saw slavery primarily as a force that weakened the slave states and as a powerful obstacle to the effective exercise of national powers such as taxation that had to be dealt with to create an effective new government.

The Southern states, on the other hand, had less interest in providing broad, politically uncontrollable commerce authority to the central government than the Northern states did. As even historian William Crosskey, who advocated an exceptionally broad view of the commerce clause, reluctantly acknowledged, judged by the actions of the Virginia legislature, many Southern leaders were hostile to the idea of broad commerce powers for the new government (notwithstanding James Madison's views on ex-

panded commerce authority).[27] As late as November 1785, the Virginia legislature grudgingly proposed to give the Confederation only very narrow expanded authority over commerce, limited to a tightly defined grant of foreign commerce power and domestic nondiscrimination authority, each requiring a two-thirds vote for implementation.[28] As was well understood by contemporaries, such a two-thirds vote requirement would have made these powers subject to a sectional veto, particularly in circumstances such as the conflict over the Spanish treaty.

The Virginia legislature's 1785 decision to insist on major limits on the Confederation commerce power reflected a very strong current of opinion in Virginia and the southern states. When Georgia agreed to provide the Confederation with expanded foreign commerce authority, it made its approval conditional on agreement that the new power would not be used to prohibit "importation of negroes."[29] Southern skepticism about central-government commerce powers was intensified by the 1786 Jay-Gardoqui treaty debates. By early 1787, James Madison concluded that the treaty debates had played a major part in Patrick Henry's decision to boycott the Philadelphia Convention on the ground that only harm could come of expanded federal commerce powers.[30] Other Southern leaders, although willing to support broader commerce authority for the central government, were nonetheless concerned about maritime trade domination by Northern states that would artificially constrict their states' foreign export markets.[31] As a leading southern delegate put this in Philadelphia, "the true interest of the S. States [is] to have no regulation of commerce . . ."[32] These deep reservations about federal commerce power coexisted with the broad nationalism of the Virginia Plan ultimately offered by Washington and his allies to the Convention. Such serious southern misgivings about granting a new government broad commerce powers could only have been overcome by other features of that government deemed more important by the skeptics.

As their willingness in the early 1780s to include slaves in the Confederation tax base showed, an important focus of the slave states' interest in creating stronger federal powers was the desire to create a broad, effective, national taxation authority. A principal purpose of this coercive tax power was to enable the federal government to raise adequate revenues to pay the government's existing debts, including those to its veterans. But a strong taxation system could also be used to support the creation of a powerful national military capability for the United States for use when needed. Such forces were the principal purpose for which governments of this era

raised revenue (other than to support royal courts and administrations). The necessity of providing adequate military defense for Virginia and the Union was a major element of George Washington's thought about the Constitution.

In the course of a letter defending the Constitution after the Convention had completed its work, Washington wrote to his nephew Bushrod Washington analyzing in detail Virginia's military situation if it did not join the Union. He dismissed the possibility that Virginia could stand on its own militarily. After asking precisely who Virginians would be willing to ally with—including the British—and suggesting that Virginia would not find any acceptable allies outside the states that would ratify the Constitution, Washington continued:

> I am sorry to add in this place that Virginians entertain *too* high an opinion of the importance of their own Country. In extent of territory—In number of Inhabitants (*of all descriptions*) & In wealth I will readily grant that it certainly stands first in the Union; but in point of *strength*, it is, comparatively, weak. To this point, my opportunities authorise me to speak, decidedly; and sure I am, in every point of view, in which the subject can be placed, it is not (considering also the Geographical situation of the State) more the interest of any one of them to confederate, than it is the one in which we live.[33]

Washington regarded a union for purposes of military defense as being very much in Virginia's interest because it was "comparatively, weak." Indeed, he regarded Virginia as having the greatest interest of *any* state in agreeing to the Union precisely because of its military weakness. His description of Virginia's advantages implied that its weakness stemmed in part from slavery—when he referred to "Inhabitants (*of all descriptions*)," he was quite probably referring to Virginia's very large slave population and using this means of referring to it as a way of quietly drawing his correspondent's attention to this specific point. Finally, Washington relied explicitly on his experience as America's commander in chief during the Revolutionary War as the basis for his assessment of Virginia's military weakness—emphasizing both the importance of his conclusion and his certainty that it was correct: "my opportunities authorise me to speak, decidedly."

The conclusion that increased central-government military power was of particular importance to southern states is also supported by the large political fallout in the southern states from the 1786 congressional debate

over the proposed Spanish treaty. During that debate, Northern state leaders had made clear that they believed that it made sense to accept the proposed Spanish closure of the Mississippi River to American commerce for thirty years because the Confederation had no military capability, and the North did not want to become embroiled in a war with Spain over that issue that could not be won. But the idea that the Mississippi River would be closed to Southern (and, in the future, western) commerce was anathema to a prominent group of rising Southern political leaders such as James Monroe, James Madison, and Thomas Jefferson. They were outraged by the willingness of the "eastern" states to accept what they believed was a betrayal of Southern regional interests that would greatly damage their hopes for western development.[34] Jefferson wrote Madison from Paris that "the act which abandons the navigation of the Mississippi is an act of separation between the Eastern and Western country. It is a relinquishment of five parts out of eight of the territory of the United States . . ."[35]

But as James Madison's later statements during the Virginia ratification convention showed, he and other Southern leaders privately agreed that Northern representatives were correct in one of their central contentions in the Spanish treaty debate. The United States had absolutely no ability to use—or even credibly to threaten—military force against Spain under the existing Confederation government. The Confederation wholly lacked the coercive financial power to raise a large army, even in the exceptionally unlikely event that the Continental Congress could agree on military action against Spain in the face of concerted Northern opposition to such action (given the Confederation voting structure and supermajority requirements).

In Philadelphia, Madison argued to support a majority-vote commerce power that using a federal navigation act (passage of which was considered likely if such a power were granted) to build American naval power would give the "Southern States" "an essential advantage in the general security afforded by the increase of our maritime strength. He stated the vulnerable situation of them all, and of Virginia in particular."[36] General Pinckney described the southern states as "weak" and the "Eastern states" as strong in explaining why it was desirable to unite even if this meant accepting constitutional provisions on commerce power adverse to the interests of the southern states.[37] Other southern delegates saw stronger military power as important as well. As a leading southern delegate put this in Philadelphia, "We are laying the foundation for a great empire."[38] Another delegate, Abraham Baldwin of Georgia, wanted a union that had the military ca-

pability to deal successfully with the Spanish and the Indians, as did other Georgians.[39]

As political scientist David Robertson's insightful analysis concludes, the Jay-Gardoqui debate showed political leaders across America that under the Confederation, each of the various sections of the country had the ability to prevent other sections from achieving important political goals without paying a significant political price for having done so, a perfect recipe for long-term political stalemate or dissolution of the Union.[40] The conclusion drawn by southerners such as George Washington was that the new central government needed to have strong fiscal and military authorities above all else, and the ability to use that power if necessary even in the face of substantial minority or state opposition. As historian Max Edling has argued, this meant, first and foremost, eliminating the Confederation's supermajority governance rules for both taxation and military action, and preventing state interference with the exercise of such powers.[41]

Even Thomas Jefferson, an ardent opponent of powerful central government throughout much of his career and a notably late and reluctant convert to the new Constitution, ultimately concluded that creation of such federal fiscal and military powers was essential and that the new Constitution was justified on that basis, despite his other significant reservations about it. He wrote George Washington in late 1788: "calculation has convinced me that circumstances may arise, and probably will arise, wherein all the resources of taxation will be necessary for the safety of the state" to raise military forces when European governments tyrannically deprive the United States of "the natural right of trading with our neighbors," actions that Jefferson described as "the source of war."[42] These considerations help to account for the remarkably nationalist cast of the plan Virginia's leaders submitted to the Constitutional Convention with Washington's support.

In the period just before the Convention, slaveholders thus faced their own unusual political dilemma: either the broad commerce authority sought particularly by Northern states, or the powerful fiscal and military authority sought by Southern states, for the new government could have threatened slavery if placed in the wrong political hands. As Donald Robinson concluded, the prominence of slaveowner interests in Southern states meant that Southern delegates saw their task at the Convention as creation of a strong fiscal-military state that lacked any form of damaging power over slavery.[43] By 1787, slaveholders knew whose the wrong hands were—the Northern states, which were increasingly engaged in abolition

and which, in an unfortunate coincidence, also sought political control of slave state export commerce and were intent on blocking southwestern development for their own economic benefit.

It followed that Philadelphia Convention representatives from the slave states wanted a central government that they could control, or at least permanently prevent from damaging their interests, which they thought could be adversely affected through legal, political, or economic means. As the Convention debates showed, many delegates thought that legal protections had little meaning in comparison to political protections, which had the added benefit that they could prevent economic damage or provide economic protection. This Southern state political economy agenda formed the foundation for establishing slavery's place in the constitutional order. At the heart of the Philadelphia debate over the Constitution's redistribution of power was the conflict over the structure of representation, a debate in which slavery and its wealth played a pivotal role.

THE PHILADELPHIA CONVENTION STRUGGLE OVER REPRESENTATION

When Thomas Jefferson drafted the proposed Virginia Constitution annexed to his *Notes on Virginia* in the late 1770s, he reflected several decades later to Samuel Kercheval: "the infancy of the subject at that moment, and our inexperience of self-government, occasioned gross departures in that draught, from genuine republican canons. The abuses of monarchy had so filled our minds that we imagined everything republican that was not monarchy. We had not yet penetrated to the mother principle that governments are republican only in proportion as they embodied the will of their people, and execute it [by equal popular representation, without any federal ratio]."[44]

In 1813, a few years prior to his letter to Kercheval, Jefferson had written to John Adams criticizing the idea that wealth should be represented in a republican government.[45] Jefferson was not alone, even in the slave states, in perceiving wealth representation through devices such as the "federal ratio" as antirepublican by the end of first quarter of the nineteenth century. The continued use of wealth as the basis of representation in Virginia's state government was attacked in 1830 in Virginia on the ground that it was fundamentally undemocratic.[46] But political attitudes toward wealth representation in a republic both in the Philadelphia Convention

and in America generally more than forty years earlier had been quite different.[47]

Historians have debated for more than a century what the rules ultimately chosen for federal congressional representation by the Philadelphia Convention actually signified about Revolutionary-era politics and Americans' understanding of republicanism.[48] Jefferson's reflections confirm historian Gordon Wood's observation that when the constitutional debate over representation occurred, the appropriate definition of republican political representation was itself in dispute.[49] Conflicting representation theories advocated by one or more Convention delegates included those based on state, interest, or sectional representation; property representation; representation of personal rights; and popular sovereignty.

The particular concern of the slavery historiography has been about what the Constitution's House of Representatives representation formula combining free and slave population—commonly called the three-fifths clause—signified.[50] That clause rejected both the idea that all property should be represented and the idea that free population only should be represented. In some ill-defined way it meant that, as Gouverneur Morris of Pennsylvania said, "property ought to have its weight; but not all the weight." But what precisely did the three-fifths clause mean to those who adopted it, and how did it affect the status of slavery?[51] We can begin to answer these questions by considering a series of common but problematic views about how the three-fifths clause was adopted, and what it meant to contemporaries.

The first of these flawed views is that adoption of the three-fifths clause was the predictable result of political decisions, either before or at the Convention, about the proper basis for the federal taxation system. Use of the federal ratio for determining some aspects of federal taxation was indeed a foregone conclusion before the Convention began. However, the question at the Convention was instead whether representation would be based on taxation principles, or would instead employ completely different principles such as equal state representation. As is well known, the text of the Constitution ultimately created a linkage between representation and direct taxation, nominally basing both on the three-fifths clause. But as historian Paul Finkelman argues, the Convention debate makes clear that substantial agreement on the three-fifths clause preceded Convention agreement to link representation and taxation nominally in the Constitution's text.[52] A recent study by historian Robin Einhorn provides strong confirmation for Finkelman's argument, because it shows that leading

Convention delegates understood that direct taxation was an "empty set," that is, a circumstance that was unlikely ever to occur, which meant that they understood that the nominal linkage between such taxation and representation was a political and legal fiction.

Einhorn carefully traces the creation of the fictional direct taxation "fig leaf" nominally linking representation and direct taxation during Convention debate as a political pretext that was intended for use during ratification to defend the Convention's willingness to agree to the three-fifths clause for representation. She shows that Pennsylvania delegates James Wilson and Gouverneur Morris, who were responsible for creating the fiction, later explicitly acknowledged during the Convention's debates that they did not expect the federal government to levy direct taxes, except perhaps in emergencies. This was an admission that they had created a political fiction, particularly when they made these statements in the context of threatening to withdraw their support for the three-fifths clause.[53] As an obviously irate Gouverneur Morris said on August 8, 1787, in the course of vehemently attacking the Committee of Detail report's broad protections for slavery and slave state economies: "The Southern States are not to be restrained from importing fresh supplies of wretched Africans . . . and are at the same time to have their exports & their slaves exempt from all contributions to the public service. Let it not be said that direct taxation is to be proportioned to representation. It is idle to suppose that the Genl Govt. can stretch its hand directly into the pockets of the people scattered over so vast a Country. They can do it only through the medium of exports imports & excises."[54] There is no substantial evidence that the three-fifths clause was a result of the Convention's agreement to use the federal ratio for direct taxation. To the contrary, the evidence supports the view that the use of this fiction was "disingenuous."[55]

A second common view is that the three-fifths clause measured population. Einhorn argues that the three-fifths clause involved counting population, not representing property.[56] The three-fifths clause does use an awkward measure of population as a means of determining representation. But appearances are deceiving here as well. The House of Representatives representation system as the delegates themselves understood it was an agreement to use relative sectional wealth, not population, as a means of determining representation. Leading Northern delegates such as Nathaniel Gorham of Massachusetts made clear that they regarded the three-fifths clause as a means of measuring wealth, and said in debate that prior con-

gressional debates on taxation had persuaded them that its "federal ratio" most fairly represented the relative wealth of the states.[57]

That view reflected an important social reality: at the time of the Convention, there was a very high correlation between population and wealth in the United States as a whole, so that one could serve as an excellent surrogate for the other. As James Wilson told the Convention: "In 1783, after elaborate discussion of a measure of wealth all were satisfied then as they are now that the rule of numbers, does not differ much from the combined rule of numbers & wealth."[58] But considerably more was at stake in the decision on the three-fifths clause than adoption of wealth representation as an element of republican theory.

From a political perspective, what mattered most was that adoption of the three-fifths clause sanctioned the essentially permanent use of the amount of a particular kind of wealth—slave property—as a basis for allocating congressional representation. The Convention debate about representation was not an abstract debate about how to implement republican principles, but was instead, as political scientist Mark Graber argues, a debate about political "security arrangements" between different sections of the country, whose delegates saw the terms of representation as the basis for protecting their conflicting sectional interests.[59] This was how leading delegates such as Rufus King of Massachusetts, Gouverneur Morris of Pennsylvania, and Southern representatives described their understanding of the negotiations over representation, and these descriptions were not met with any major objections.[60] The three-fifths clause was the explicitly chosen political-security foundation for the constitutional bargain protecting the political economy of the slave states.[61]

A third common view about the Convention debate over representation generally, including the three-fifths clause, is that its outcome was influenced by delegates' mistaken understanding of the likely future geographic patterns of settlement development of the United States. Several historians argue that the constitutional bargain was influenced by a widely shared but incorrect prediction of the patterns of population growth, immigration, and western settlement that would occur in the United States over the succeeding several decades.[62] At the time, they argue, many Americans—both southerners and northerners—believed that the American South and West would grow and flourish in the nineteenth century. Convention delegates thought this meant that the southern states and their allies would come to dominate the House of Representatives, if not the Congress as a whole.

But this "demographic mistake" argument conflicts with the historical realities.

As the Convention debates discussed below show, the creation of the sectional bargain on representation occurred largely independently of any understanding about the extent of future southwestern development. The Convention's representation bargain would have occurred even if there had been a different understanding of the nation's future demography since, as discussed below, it was a near certainty, if not indeed inevitable, that southern slave wealth would be included in representation once the states agreed to provide for equal state voting in the Senate.[63] To clarify the implications and limitations of the Convention's representation bargain, it is useful to examine its negotiations and related contemporary developments.

Before the Convention began in mid-1787, James Madison thought that it was possible to predict the outcome of the fight over representation that he expected would take place there. Madison was convinced that the Convention would move away from the Confederation's one-vote-per-state voting system and adopt a proportional representation system based on population or wealth. As early as March 1787, Madison predicted this outcome in a letter to Thomas Jefferson.[64] Madison believed that the eastern states would accept representation based on "populousness" because they expected to be in the majority at present, while the Southern states would accept it because they expected to have superior populations in the future.

Madison was destined to be disappointed in his high hopes for the Constitution's adoption of a fully proportional system of representation, but his analysis of the political dynamics of representation was nevertheless remarkably perceptive. As his analysis shows he understood, at the Convention the Southern states would not be able to obtain a representation formula that would force the remaining states to yield political control of the national government immediately. And, as he also understood, the Northern states would not be able to obtain a representation formula that too deeply discounted Southern wealth, even if that wealth consisted in large part of slave property. These outer boundaries for politically acceptable outcomes regarding the structure of sectional representation necessary if the Convention was to reach agreement were highly unlikely to vary no matter what powers were given to the new government by the Constitution.

During the Philadelphia Convention's negotiations, the bargaining on

representation is generally described as having resulted in two major compromises, one on equal state voting in the Senate, and the other on the three-fifths clause. According to historian Jack Rakove, the first compromise was based on an "ephemeral struggle" between large and small states over the equality of state voting in the Senate, while the second resulted from a "more durable and evil-fated rift" between free and slave states that led to a set of constitutional bargains over slavery.[65] But this description of the representation dispute as being resolved through two compromises is unfortunately quite incomplete from a political perspective.

It glosses over a central reality of the Constitution's creation, which is that making the first constitutional representation bargain on equal state voting in the Senate fully determined the outcome on congressional representation as a whole. Politically, the adoption of equal state voting in the Senate dictated a system of proportional representation in the House of Representatives. Historian David Hendrickson concludes that the three-fifths clause was the only available middle ground for determining proportional representation for the House of Representatives in a situation where there was no substantial political support for either of two extreme alternatives, the use of free population and the use of total population.[66] In other words, the decision to equalize state voting in the Senate unavoidably dictated the decision to represent slave property in the House. To put this another way, to the extent that American federalism is based on the idea of equal state representation in the Senate, which consciously disregarded both the relative size and relative wealth of the states, it could not have been created without also providing for permanent representation of slave wealth. The following considerations support these conclusions.

As an initial matter, it is important to appreciate that it was wholly impracticable to construct an alternative measure of relative state wealth by calculating the values of all property. The reasons for this included the very large administrative costs such a valuation process would entail, the existence of sharp if not irresolvable political disagreements about who would control valuation, and the fact that some of the core property values would probably have been deemed incommensurable for political purposes (as land values had been under the Articles of Confederation tax system). The Continental Congress had understandably concluded years before that the only practicable choice for a surrogate measure of relative wealth was population.

As the delegates were acutely aware, however, a "pure" rule using total population for apportionment of representatives would have given

the Southern states considerable additional representation immediately (approximately four additional House seats in the first Congress), very close to a House majority based on the 1790 census (see table 3.1). Southern representation would quite quickly have expanded even more under such a system if either the southwest or slavery grew. Thus a pure total-population rule would have been politically unacceptable in Northern states for sectional reasons, and its adoption almost certainly would have led to the Constitution's rejection. The total-population measure therefore could not have been adopted as a representation rule even though it would unquestionably have been the best practicable measure of relative state wealth, as the Northern states had themselves repeatedly argued in taxation debates during the 1770s and 1780s.

By the same token, a rule of apportionment that relied solely on free-inhabitant population would nominally have excluded wealth from the representation calculation. But in reality, it would have disproportionately excluded a major part of the wealth of the Southern slave states, while including all of Northern wealth. The North's free population was a reasonably good surrogate for Northern wealth (as both sides had conceded during earlier taxation debates and northern delegates reaffirmed at the Convention), while the South's free population was comparatively poorly correlated with total southern wealth because so much of southern wealth consisted of slaves (and related land values). An apportionment rule based solely on free population would therefore have been politically unacceptable in the South, and would also almost certainly have led to the Constitution's rejection.

Based on these considerations, it was exceptionally likely—some might say inevitable—that some compromise wealth measure located between House representation based on total population or on free population was going to be adopted by the Convention, since if the Convention had adopted either of the extreme alternatives, one section or the other of the country would have rejected the Constitution. Any system of proportional representation that could command enough support to be adopted in the Convention *and* to survive ratification would necessarily entail a compromise of the preferred Northern state and the preferred slave state position (i.e., free population versus total population). The three-fifths clause was by far the most likely compromise choice in view of the fact that it had been vigorously debated and widely approved by Congress and eleven out of thirteen states as a fair relative state-wealth measure (for tax-quota allocation purposes).

TABLE 3.1 Southern share of House of Representatives representation under various schemes

Scheme of representation	*Total units*	*Southern share*[a]	*Southern percentage*	*Change (%)*
Articles of Confederation	13	5	38.0	
Total inhabitants (1790), slaves equal to free men	3,929,000	1,962,000	49.9	+11.9
Free inhabitants (1790), slaves not counted	3,231,000	1,304,000	41.0	−8.0[b] or +3.0
Federal ratio (1790), 5 slaves equal 3 free men	3,651,000	1,700,000	46.5	−3.4[b] or +8.5
Brearley tax-quota estimates (1787)	3,000,000	1,248,446	41.6	−8.3[b] or +3.6
Actual apportionments				
House 1789	65	29	44.6	+0.4
House post-1790 census	105	47	44.8	+0.2
House post-1800 census	141	65	46.1	+1.3
House post-1810 census	181	78	43.1	−3.0
House post-1820 census[c]	212	89	42.0	−1.1

Sources: Adapted from Robinson, *Slavery in Politics*, 180, table 3. Brearley tax-estimation source: Farrand, 1:574.
Note: Delaware is counted as a slave state for 1800–1820 purposes, but not for 1790.
[a]Includes five southernmost states, and southwestern states.
[b]For comparison purposes, two percentages are shown: difference from total inhabitants in 1790 and difference from Confederation.
[c]Excludes Missouri.

In summary, once the Convention agreed to equal state voting in the Senate, proportional representation in the House was inevitable; and it was a near certainty, if not indeed inevitable as Hendrickson argues, that proportional representation would be based on the three-fifths clause. The Convention debate confirms these conclusions and helps to identify important structural limits of these constitutional representation bargains.

At the Convention, the small states refused to give up representation by states as the sole representation principle for the new government without a long, bitter fight. For their part, the large states were equally adamant

in seeking to make proportional representation the sole principle. These debates added little of substance to the positions on this issue that had been articulated during the debates on the Articles of Confederation. Madison tried unsuccessfully to end the large state–small state division by suggesting that a fundamental economic distinction had given rise to the conflicting political interests of states: "(the effects of) their having or not having slaves."[67] As is well known, the ultimate "Connecticut compromise" proposed equal state representation in the Senate and proposed the use of proportional population representation in the House of Representatives, including the three-fifths clause. But the proposed compromise quickly ran into opposition as delegates from both sections sought to obtain better terms than it proposed, and the issue of House representation was sent to a new committee for review.

Skirmishing immediately began over how many representatives would be allocated to each state in the first Congress, and particularly over what system would be used to establish future representation beyond that. A committee chaired by Gouverneur Morris of Pennsylvania reported a vague future reapportionment formula ("population or wealth") that would allow future congresses to permit reapportionment only when, as John Rutledge of South Carolina bitingly put it, "the national legislature should please." In response, Rutledge and other Southern representatives sought to require a periodic census and mandatory reapportionment to eliminate Congress's discretion over that subject.[68] They sharply attacked the idea that they should be willing to become mere "overseers" for the North as a permanent minority under a government that was to be given broad powers to control "the regulation of trade," the result they were certain would occur if Congress were given untrammeled discretion regarding reapportionment.[69] Such congressional discretion was flatly unacceptable to those delegates.

As delegates began to grapple with the implications of modifying representation to depart from a pure population formula, at bottom it was not the implications for slavery of the three-fifths clause that most of them found objectionable. At least some arguments on that issue made by delegates based on alleged objections concerning slavery were thinly veiled pretexts. A good example of such a pretextual claim was the argument that slave imports would be increased by adoption of a three-fifths rule, a claim that ignored the economics of slavery.[70]

Instead, it was the implications of using a three-fifths rule for possible future shifts in sectional control of the federal government and its policies

that bothered many delegates from nonslave states. Like the slave states, they were acutely aware of the potential for sharp sectional conflict on various issues such as Mississippi River navigation, which had momentous implications for war and peace in the young Republic. Madison's earlier extended observations during the fight over small-state representation, on the political divisions that had already occurred during the Confederation between states with free labor economies and those with slave labor economies, had clearly heightened delegates' already substantial apprehensions about sectional control as well. Madison's position also raised concerns about the conflicts on trade and military policies that such continuing sectional economic divisions might well entail.[71]

The course of the Convention debates strongly suggests that at least some Northern delegates, such as Roger Sherman of Connecticut, had privately agreed during committee consideration of the Connecticut compromise to support the three-fifths rule as a permanent basis for representation in the House in return for an agreement by larger states that they would support state equality in the Senate.[72] Sherman responded to Rufus King's attack on the slave-trade provisions of the Committee on Detail report on August 8, and King's threat to revisit the three-fifths clause compromise unless they were altered, by saying that he "regarded the slave trade as iniquitous, but the point of representation having been Settled after much difficulty and deliberation, he did not think himself bound to make opposition . . ."[73] Sherman then argued that the slave-trade issue could be addressed later. After Gouverneur Morris's slashing attack on the same report's support for slavery and his challenge to the three-fifths clause agreement, Sherman responded that he "did not regard the admission of Negroes as liable to such insuperable objections. It was the freemen of the South. States who were in fact to be represented according to the taxes paid by them, and the Negroes are only included in the Estimate of the taxes."[74] But on the floor of the Convention, other delegates strongly resisted the idea that the three-fifths clause should be a permanent basis for representation. The latter position, had it prevailed, would inevitably have destroyed the Connecticut compromise.[75]

James Wilson of Pennsylvania argued without serious dissent that there was no principled basis for including slaves in representation if they were property and representation was based on personhood or free citizenship. Wilson said that he "did not well see on what principle the admission of blacks in the proportion of three fifths could be explained. Are they admitted as Citizens? Then why are they not admitted on an equality with

White Citizens? Are they admitted as property? Then why is not other property admitted into the computation? These were difficulties however which he thought must be overruled by the necessity of compromise."[76] As Wilson's remarks implied, there was no theory of republican representation that rested on the idea that free inhabitants deserved representation merely because they were free that could also justify slave representation. What accounts for the Convention's acceptance of a pragmatic compromise on this issue that met none of Wilson's criteria for consistency, beyond the sheer necessity of reaching agreement coupled with calculations of relative political leverage and willingness to risk disunion?

The answer is that key Northern and Southern delegates engaged in a dialogue on representation that demonstrated to them the political rationale that made the three-fifths clause an essential part of the representation bargain. The House of Representatives representation system that was ultimately chosen by the Convention was the one that was the least disadvantageous to both sides. In adopting the three-fifths clause, the delegates understood that they were agreeing to a compromise based on sectional wealth representation intended to protect slave property.

On July 10, 1787, Rufus King signaled that he was willing in principle to accept the use of the federal ratio for representation. King noted that the "four Eastern States" had more people than the "four Southern States," even counting blacks using the three-fifths ratio, but that they would have "⅓ fewer representatives," and this would lead to dissatisfaction. King's detailed reasoning about the political implications of representation is important: "He believed [the eastern people] to be very desirous of uniting with their Southern brethren but did not think it prudent to rely so far on that disposition as to subject them to any gross inequality. He was fully convinced that the question concerning a difference of interests did not lie where it had hitherto been discussed, between the great and small States; but between the Southern and Eastern." King then continued: "For this reason he had been ready to yield something in the proportion of representation for the security of the Southern. No principle would justify giving them a majority. They were brought as near an equality as was possible. He was not averse to giving them a still greater security, but did not see how it could be done."[77]

King's remarks publicly accepted the fundamental political premise—advanced forcefully by Madison earlier in the debates—that the slave economies of the Southern states represented a clear "difference of interests" from those of the eastern states. King took Madison's remarks as

having been made in earnest. He not only accepted Madison's political logic, he wanted the Convention to know that he did so. As the Northern leader during the Spanish treaty (or "Jay-Gardoqui negotiations") dispute (where Madison had been a major leader on the other side), King was very well placed to understand Madison's view that persistent sectional conflicts were an American political reality.

King acknowledged that such sectional differences of interest might lead to future conflicts where the sections would have adverse interests. He agreed that the Southern states therefore needed and deserved political protection or "security" for their differing economic interests in the form of congressional representation that exceeded their proportionate share of free population. Providing further security to account for these differing interests necessarily entailed using a wealth measure for representation, and including slave property in representation was already understood by delegates to be the best choice for achieving this in the case of the slave states.

King's speech also acknowledged what had already been established as the common understanding of the delegates by the strenuous extended debate over representation: political protection directly through representation was the most important protection that could be provided by the Constitution to the Southern states or any other distinct interest. Delegates envisioned that under the Constitution, law—by which is meant here the basis for government action—would be based principally on legislation (as opposed to judicial or executive action). A discrete interest bloc's possession of a sufficiently large, well-defined stake in the legislative process to counter potential adversaries was therefore central to its achievement of political security. Virtually unalterable congressional representation for slave property was far more important than any constitutional provision providing protection for the institution of slavery per se, since paper legal guarantees for an unpopular institution were of very limited value in a world governed by legislation.

Just before the Convention's adoption of the three-fifths clause, Edmund Randolph of Virginia provided the most direct explanation for the Southern state view on representation: "He urged strenuously that express security ought to be provided for including slaves in the ratio of Representation. He lamented that such a species of property existed. But as it did exist the holders of it would require this security. It was perceived that the design was entertained by some of excluding slaves altogether; the Legislature therefore ought not to be left at liberty."[78] Randolph argued

that protecting politically unpopular slave property against future attacks in Congress directly (or by adverse taxation) was politically essential to the slave states. His remarks candidly acknowledged that politically he had no choice but to satisfy Virginia's slaveowners that they would have sufficient "express security" for their property, because otherwise the Constitution would not be ratified there or in other slave states. In Randolph's view, slaveholders defined the necessary security as consisting in a clearly defined political structure that left no room for congressional discretion on representation, as opposed to defining security in legal or "paper guarantee" terms. The structural protection they were seeking would be unalterable without the consent of the slave states because the Constitution's amendment provisions created a sectional veto over amendments.

General Charles Cotesworth Pinckney of South Carolina added the other major feature of the Southern rationale for slave representation: he desired that "the rule of wealth should be ascertained and not left to the pleasure of the Legislature and that property in slaves should not be exposed to danger under a Govt. instituted for the protection of property."[79] Pinckney's remarks assumed that the three-fifths clause represented a "rule of wealth." He again vigorously attacked the idea that Congress should have discretion to apportion representation. Pinckney, a lawyer trained at Oxford, was also insisting that slave property should be given federal constitutional protection equivalent to that of nonslave property, and that the most effective way to achieve this result was through political representation. His remarks received no direct challenge from any delegate. Instead, they were shortly followed by Wilson's "fig leaf" proposal that representation be linked to direct taxation, which was his effort to find a way to accommodate slave state demands that would be accepted in Pennsylvania. There is no provision of the Constitution that openly and directly contradicts Pinckney's contention to the Convention that slave property should receive constitutional protection equivalent to nonslave property.

In sum, the slave states saw slave representation as a direct political protection for wealth consisting of slave property against possible Northern attacks on slavery, and told the Convention unequivocally that they needed such protection in order to obtain ratification of the Constitution. Although Northern delegates such as Rufus King insisted on a weighting discount for slave property in the representation formula, they accepted the principle that the Southern states advocated and gave protection of that form of property constitutional status using that means. As Northern

delegates undoubtedly understood, the restrictive nature of the amendment provisions of the Constitution made it extraordinarily unlikely that the representation system would ever be changed while the Constitution endured. Northern delegates might not have liked this outcome, but it is clear that they ultimately saw no alternative.

To appreciate fully the significance of providing political security to slave states through the representation mechanism, it is important to understand how strongly leading delegates believed that paper guarantees of legal protection for rights or institutions written into the Constitution would be worthless. Before the Convention, James Madison had defended the necessity of providing in the Constitution for a complete congressional veto over any state legislation (as had been proposed by the Virginia Plan) to Thomas Jefferson on just those grounds. Madison wrote that a congressional veto was necessary because no matter how broad federal powers were and no matter how "clearly their boundaries may be delineated, on paper," they will be "easily and continually baffled by the Legislative sovereignties of the States."[80] Madison made the same argument in a letter to George Washington shortly before the Convention.[81] For those who agreed with Madison's logic, as did many delegates, including slave state representatives, the structure of representation became a critical means of providing protection to slavery that could not be provided by any paper legal guarantees for that institution in the Constitution.

Slave property representation not only effectively protected Southern interests in the short run, but as King and other delegates had reason to know, using such a representation system would probably increase the South's share of representation in the government as time went on. King and most other members of the Convention were acutely aware that the South and west were growing rapidly, and thought that such growth would continue.[82] They also understood (or would soon learn from Convention debates) that the ability to use slave labor would accelerate westward growth and at the same time increase Southern representation.

A principal reason for Northern delegates' acceptance of a permanent system of slave property representation was that many Northern delegates accepted the principle that wealth should be represented in a republican government. Northern delegates also generally agreed that, as Rufus King said, the Southern states were comparatively wealthier, and that the three-fifths clause appropriately reflected the disproportionate wealth of the slave states. The existence of significant northern public sentiment supporting

wealth representation as a part of the basis of republican government is evident from the provisions of the Massachusetts Constitution of 1780. That constitution provided for representation in the Massachusetts state senate on the basis of the relative wealth of different areas of Massachusetts.[83]

Southern insistence on providing political security for slave property through representation was also motivated by the division of national opinion over slavery that existed in 1787. Because some delegates such as Madison believed the Constitution should be facially neutral on the issue of slavery, and perhaps also to avoid arguments on the issue during northern ratification, slave states were forced to accept oblique (though transparent) language describing the institution at several places in the Constitution. They were also forced to rely during ratification on the negative implication of the Constitution's lack of any explicit grant of authority to abolish slavery as evidence of slavery's protection against federal authority.[84] Because Northern state delegates either could not (or would not) provide explicit legal assurances regarding the constitutional protection to be given to slave property, the demand for political security through the inclusion of slave property in representation became more urgent.

The three-fifths clause was an essential part of the Convention's overall agreement on security for the institution of slavery in the new Union. Northern delegates accepted the clause with a clear understanding of what it meant to the slave states. But both sides were forced to accept some significant limits on the reach of the representation bargain as well.

Convention delegates from eastern and mid-Atlantic states, of whom Gouverneur Morris and Rufus King were among the most vocal, were fearful that any census mechanism attached to the representation provisions would inevitably lead to Southern and western control of the House of Representatives. Among other things, harking back to the bitter congressional debates over the Spanish treaty, they argued that Southern and western control of the government would inevitably lead to war with Spain over the Mississippi.[85] Morris made the politically incendiary point, aimed directly at wealthy Southern slave states and the military weaknesses he and others believed slavery entailed on them, that under the Southern proposal the Southern states might be supplying the money for such wars, but the North would "spill its blood."[86] Northern delegates saw representation as the fulcrum of control of the new government, and feared that Southern control of the government based on wealth would embroil them in future wars motivated by a growing and perhaps irrepressible drive for southwestern expansion.

Northern delegates therefore sought to avoid future dilution of Northern political strength by permitting Congress to retain unlimited discretion over voting apportionment. They also proposed permanently to restrict new-state voting strength so that original states could not be outvoted (advocating the political opposite of the "equal footing" principle assuring states equal rights, in other words). These efforts to prevent the use of a fixed representation formula based on a census, or to defeat the effects of such a mechanism, both failed.[87]

Notably, however, Convention efforts by southern states to provide permanent protection for their sectional political interests also failed. The three-fifths clause did not receive the absolute protection against amendment in the Constitution's article 5 amendment provisions that the equal state Senate voting provisions did.[88] Madison and George Mason of Virginia proposed an amendment that would have required that new states be admitted on an equal footing ("the same terms") with original states, which would have benefited growing, particularly western, areas, and their proposal was handily defeated.[89]

These northern and southern defeats meant that neither section was able to convince the Convention to provide it with a permanent constitutional guarantee that it would be able to maintain control over part of the Congress, let alone over the presidency. In short, when they ratified the Constitution, all states and sections accepted the political principle that if in the future American population and settlement moved in a direction adverse to their interests, they could lose control of the House of Representatives, and would have a weaker position in the Electoral College as well. Consequently, both sections accepted some political risk that they would ultimately be adversely affected by federal policy shifts flowing from changes in the distribution of political power enabled by the representation system as the country grew. The "bisectional constitution" concept, which envisioned a constitution in which each section was awarded a "practical veto" over actions by the other section, thus had fundamental political limits that were established in the Philadelphia Convention.[90]

The slave representation formula linked to a census was ultimately adopted on July 13, 1787. On that same day, the Convention agreed by a very large majority to extend the three-fifths clause to new states. Once the Southern states were satisfied that they were adequately protected by their share of representation, the stage was set for bargaining over the constitutional protection to be given to the economies and governments of the slave states (the substance of which is discussed in chapter 4). This

bargaining led, however, to continued threats to reopen the issue of the three-fifths clause, which would, in turn, have destroyed the Connecticut compromise.

The bargaining over slave state political economy was opened by the August 6 report of the Committee of Detail. In that report, a procommerce/slavery majority (Oliver Ellsworth of Connecticut, John Rutledge of South Carolina, and Edmund Randolph of Virginia) had laid out a completely one-sided set of proslavery and pro-Southern slave-economy provisions proposed for the Constitution. Their proposal consisted of permanent federal tax exemptions for slave imports and slave product exports; a ban on federal limitations on slave imports; and federal defense against slave insurrections, while requiring a two-thirds vote to authorize navigation acts (protectionist shipping laws that were envisioned as one of the primary uses of the commerce power). The provisions regarding slavery essentially maintained the Confederation legal status quo ante on that subject, seeking to insulate the slave state economies against potential damage from new federal powers.[91] The expansive protection for slave state economies sought by the Committee of Detail report by itself provides compelling evidence that delegates from those states saw slavery as a long-term institution that needed and deserved broad, practically unalterable constitutional protection against federal power.

In proposing the Committee of Detail report, the slave states were implicitly asserting that they should be given complete protection against federal power to control their economies after having already achieved maximum feasible permanent political representation for their interests through the three-fifths clause. Their negotiating position was, in other words, that representation and what they deemed to be sufficient economic protection should be independent of each other. In the words of a thoughtful historian, the Committee of Detail report was a "monument to Southern craft and gall."[92] Since the Committee of Detail proposal was not offered as a package "take it or leave it" proposal, however, it was probably intended to be a strong opening offer by the slave states in what they anticipated would be a negotiation over how their existing and anticipated future political economies would be affected by the Constitution. Northern representatives were quick to see the proposal in those terms. They attacked it as severely impairing the broad commercial authority they sought for the new government, and threatened to reopen the issue of slave wealth representation in return.

The key early response to the Committee of Detail report was an Au-

gust 8 speech by Rufus King, whose opinions appear to have been representative of those held by many delegates in the nonslave states, judging from the tenor of the subsequent Convention debates on the slave trade and the commerce power. King's speech came immediately after what might be described as a "straw" or "test" vote on a motion by Hugh Williamson of North Carolina to change the basis for counting population for representation to use the "rule hereafter to be provided for direct taxation" (i.e., the federal ratio). At this point, King, a very capable lawyer who had received extensive training in Massachusetts and an experienced legislator, deliberately interrupted the established order of clause-by-clause debate in a speech that contained a broad, blistering attack on the Committee of Detail report. King attacked the report as "end[ing] all . . . hopes" that the slave states would "mark a full confidence" in "the Genl. Govt" by giving it broad and flexible power over commerce. King argued that the report had "absolutely tied" "the hands of the Legislature" "[i]n two great points": slave imports could not be prohibited and exports could not be taxed. He said that the unlimited "admission of slaves" permitted by the committee report was a "most grating circumstance to his mind."[93] He attacked the inconsistency of the slave state position that Southern slave imports could be allowed to increase national defense costs without limit, but that proposed limits on constitutional taxation authority would prevent the new government from collecting offsetting revenue to cover those costs.

King's speech deliberately paired the three-fifths clause with the report's proslavery proposals and treated them all as part of a negotiable package, signaling unmistakably to slave state representatives that the three-fifths clause would be revisited if necessary. He warned that the slave states needed to compromise their overall agenda or it would be rejected by the Northern states. Those states, King asserted, believed that the southern states could not have both maximum feasible political representation and complete freedom from economic regulation under a new central government.

In his August 8 speech, King offered the slave states their choice of accepting the possibility of export taxes or accepting slave-trade limitations. While King was undoubtedly opposed to the slave trade, his approach strongly suggests that the Northern states were not interested in trying to prohibit the slave trade in the abstract, but instead saw it as part of the issue of central government control over international trade, which they believed should encompass all Southern trade as well as Northern trade. This dovetails well with the understanding of southern delegates such as Pinckney and Rutledge that the Northern states at the Convention were

seeking federal power to control all United States foreign commerce, at a minimum.

By explicitly giving the slave states a choice of limitations, King was indicating the North's fundamental indifference to the form of trade limitation the slave states agreed to, as long as they ceded sufficient control over their trade economies to satisfy Northern desires to create a sufficiently powerful trade weapon in the central government to enable it to reach agreements with foreign governments. This meant that the federal government needed authority at least to control all United States foreign commerce. King's speech made slave-trade limitations negotiable, and effectively transformed them into a part of a negotiation over trade authority generally.[94]

Slavery's undesirable costs as King portrayed them could result either from crippling limitations on the reach of the proposed new federal commerce power, or from escalating federal costs without requiring corresponding tax revenues to be provided by the responsible parties. King's opposition on the slave-trade issue was not framed primarily in moral or religious terms, but was based instead on prudential arguments, particularly his ability to defend Southern proposals to his constituents during ratification. Although he hinted that there was also a moral dimension to his position, his remarks made the sort of prudential case about the South's position that one practical politician makes to another.

As is well known, King's speech precipitated a renewed fight over representation by those Northern state delegates who opposed the Southern vision of indefinite continuation of a slave-labor-driven political economy that was plainly sketched in the Committee of Detail report. Gouverneur Morris of Pennsylvania proposed that House representation be based solely on numbers of free inhabitants, and gave a vitriolic speech attacking the morality and prudence of slavery and the slave trade as "nefarious" institutions, and assaulting the Committee of Detail report as containing unjustified concessions to the "Southern States."[95] Morris vehemently denounced the idea that slave representation could be justified by use of the three-fifths rule for direct taxation, since such taxation would never occur (discussed above). Morris thus admitted that he had accommodated the Southern states on the three-fifths clause solely for pragmatic reasons. The heated public announcement of the possible defection of the two states—Massachusetts and Pennsylvania—whose vote changes had enabled initial adoption of the three-fifths clause was a serious warning shot across the bow to the Southern states on their political-economy stance.

In response, Roger Sherman of Connecticut defended the three-fifths clause principle based on its use as a basis for federal taxation.[96] With opposition from Sherman's small-state allies and the Southern states, Morris's motion to limit representation to free inhabitants lost by a vote of 10–1. Every Northern state that had begun the abolition of slavery, including Morris's own state, Pennsylvania, voted against his proposal. Large numbers of delegates who might have been expected to insist that limiting federal representation to free inhabitants only was a bedrock element of republicanism did not do so, even though they were accepting representation of slave property as the alternative. This strongly suggests that the Convention agreement centered around a willingness to structure representation based on perceptions of political security and acceptance of wealth as a basis for representation, rather than abstract adherence to a conception of republican philosophy limiting representation to free men on an equal basis.

Charles Pinckney of South Carolina then proposed again that all slaves be counted for representation, and also lost overwhelmingly. The delegates, not surprisingly, then agreed to support the three-fifths clause. While these votes were only the opening skirmish in the fight over the slave state political-economy proposals, they decisively put to rest the threat that the three-fifths clause could be altered by the Convention, thus strengthening the South's bargaining position on slave economy issues.[97]

In adopting the three-fifths clause, the Convention had followed John Adams's advice a decade earlier about the desirable structure of political representation. As historian Jack Pole observes, Adams had argued in a congressional debate on representation during the creation of the Confederation that in allocating representation, the allocation of interests in a business partnership was the proper analogy to follow. Adams had said: "A had £50, B £500, and C £1000, in partnership: was it just that they should dispose equally of the moneys of the partnership?"[98]

As Pole points out, the political premise of Adams's representation position was that "interest alone" "had weight enough to govern the councils of men," and therefore a durable system of political representation should mirror interests "without doors."[99] If one looks to the Convention votes, rather than to the occasionally heated—and in some cases pretextual—political rhetoric that surrounded them, the Convention ultimately acted as Adams had recommended and built its representation system around such interests. The compromise on representation awarded disproportionate shares of representative influence to certain vested political-economy

interests, one of which was the slave labor economies. Delegates also chose to make the representation system permanent as a practical matter, ample testimony to the power of these interests.

But not everyone was satisfied with the Convention outcome on the three-fifths issue. James Wilson provided a remarkable "true republican" coda to the Convention's consideration of the representation issue, one that constituted an ingenious effort to reframe that entire debate. Wilson directly challenged Madison's opinion that minority interests such as property or wealth should receive protection in representation through mechanisms like the three-fifths clause. Wilson argued categorically that the majority of people "wherever found ought in all questions to govern the minority." He also assaulted the idea that in a republic, wealth should govern representation. "Again he could not agree that property was the sole or the primary object of Governt. & Society. The cultivation of the human mind was the most noble object. With respect to this object, as well as to other *personal* rights, numbers were surely the natural & precise measure of Representation. And with respect to property, they could not vary much from the precise measure."[100]

Wilson's attack on the principle that wealth should be protected by government through political representation was a minority perspective at the Convention, though one perhaps beginning to be shared more widely in the Northern states. But his views suggested the existence of a profound tension between the Constitution's principles of interest representation (whether of wealth or states) and evolving concepts of republicanism. This tension would grow greatly in the early years of the Republic, to the point where even in Virginia Jefferson was abandoning wealth representation in principle by 1813 and its use in state government was under public attack there by 1830. Even in the nineteenth century, however, the Convention's representation bargain could not be altered, despite growing complaints about it. This was true not simply because of slave state resistance to the alteration of the three-fifths clause, but because, as it turned out, altering the three-fifths clause would in all likelihood have required revisiting its constitutional Siamese twin, equal state voting in the Senate (see chapter 6).

RATIFICATION AND SLAVE REPRESENTATION

Some recent historians argue that abolitionist William Lloyd Garrison and his followers were correct that the Constitution was indeed a "covenant

with Death" and an "agreement with Hell" because of its accommodation with slavery.[101] Others seek to deflect this indictment of the Constitution by arguing that it was "essentially open-ended" on major issues regarding slavery.[102] But as the following discussion of ratification debates over slave representation (and consideration in chapter 4 of other slavery issues during ratification) will show, the Constitution was not intended as a moral union where slavery was concerned; during ratification it was defended against antislavery attacks as a political—as opposed to a moral—union. That part of the Garrisonian indictment rejected the Founding generation's understanding of the constitutional bargain.[103]

Slavery's powerful political influence nevertheless affected the character of the constitutional ratification process in important ways. The sources suggest that during ratification, the origins and trade-offs of the Constitution's bargain on representation were defended on pretextual grounds. George Washington believed that during the ratification controversy, Anti-Federalists were offering pretexts for their opposition to the Constitution, and hiding their real reasons.[104] It should not surprise us that, tempted by the desire for success in a hotly contested debate, some Federalists did the same to support it.

In important respects, the debate over the Constitution's slave-representation provisions at the Northern ratification conventions mirrored the debate at the Convention itself. Most objections to these provisions were based not on antislavery principles but on arguments that Northern states should have received a larger share of representation or driven a better deal on taxation.[105] Opponents of these provisions argued that representation should not be based on property, and that therefore slaves should not be considered in representation (which in turn assumed that slaves were property and that representation had been based on wealth), or that the three-fifths ratio itself was unfair to the North because slaves were more productive than had been assumed in creating it.[106] Other opponents of the representation provision argued that Southern political representation was unfairly disproportionate since direct taxes would not ever actually be imposed, and that therefore the federal ratio unfairly increased Southern representation without any corresponding benefit to the Northern states.[107]

Anti-Federalists also made arguments at the ratifying conventions against the theory of the slave-representation provision similar to those made at the Convention by various Northern delegates: if slaves are property, they shouldn't be represented at all; but if property can be represented, why

isn't all property represented if some is?[108] Again, the underlying purpose of such arguments was generally not to attack the Constitution's legitimization of slavery or slave property, but instead to argue that the North should have gotten a larger share of congressional representation. These Anti-Federalist attacks were made in the alternative, since Anti-Federalists attacked both property representation as a principle and the supposedly defective implementation of that same principle, strongly suggesting that they believed that they could not command majority support for an attack limited to challenging the principle of property representation itself.

In response, Northern Federalist delegates such as Rufus King chose to defend the three-fifths clause on the basis that it had been part of a Philadelphia Convention agreement on direct taxation. King told the Massachusetts convention that the clause was based on the federal ratio, which had become "the language of all America." He said, "it is a principle of this constitution, that representation and taxation should go hand in hand," leading delegates to believe that the three-fifths clause had been negotiated based on the relationship between taxation and representation under the Constitution.[109] Federalist delegate Roger Sherman of Connecticut made the same argument to justify the clause. The decision by leading Federalists to defend the clause on pretextual grounds suggests that they believed that an honest account of the Convention's bargaining would impair the Constitution's ratification chances.

James Madison contributed a largely pretextual defense of the three-fifths clause compromise in *Federalist* 54.[110] Writing for a predominantly northern audience, he argued that slaves should be treated as they were under state law, a position that, as he was quite probably aware, had been rejected by Northern states for national government purposes such as taxation as early as 1776. He contended that in principle taxation and representation should go together, which he knew had had little to do with the Convention decision. He then argued in the alternative that wealth should form part of the basis for determining representation. Madison did not answer the objection previously made by Northern delegates at the Philadelphia Convention that singling out slave property, as the three-fifths clause did, for a system of property representation was logically inconsistent.

As we have seen, the Philadelphia Convention's acceptance of what James Wilson called the "vicious" principle of equal state voting in the Senate had inevitably resulted in the adoption of the three-fifths clause as a quid pro quo. The sources suggest that it was that quid pro quo which Madison and Northern Federalists, particularly in Massachusetts, were un-

willing to explain candidly to state ratifying-convention delegates. One important underlying reason for the Federalists' approach, at least in Massachusetts, was that the Senate equal state-representation provision was politically extremely sensitive and unpopular there.

Elbridge Gerry's labored defense at the Massachusetts convention of his support in the Philadelphia Convention for equal state Senate voting was clear evidence of the provision's unpopularity. Gerry wrote a controversial letter in January 1788 to the Massachusetts convention defending his decision to support equal state representation in the Senate. He argued strenuously that he had only supported equal state Senate voting because it had been combined with proposed limits on the power of the Senate to alter revenue bills.[111] But as a sharp-tongued public critic of Gerry's actions quickly pointed out, Gerry wrote the letter because he had been overwhelmed by "very irritable passions" merely because it had been mentioned to the Convention that he had supported equal state voting in the Senate, which seemed like a ridiculous overreaction. The critic then derided what he saw as Gerry's motives for writing: "But stop, what may be sport to us, might be death to him—I mean political death. What, shall it be understood in that honourable body, that Mr. E. Gerry had reported in favor of an *equal* representation of states in the Senate? For this is the utmost extent of the information of his honourable colleague. Yet he is greatly alarmed at it, and determines in a rage, to wipe away 'the injuries resulting from its unfavourable impressions.'"[112] Due to the unpopularity of the equal state Senate voting provision, at least in Massachusetts, and probably in other major Northern states, it would probably have been extraordinarily difficult for Federalists to defend the three-fifths clause successfully on the basis that there was no alternative but to accept it once equal state voting had been agreed upon, and it was necessary instead to defend it on pretextual grounds.

Another important reason for the Federalists' lack of candor on slave representation may well have been that they felt the need to create the impression that the Constitution would eventually lead to limits on slavery. In Massachusetts, prominent Federalist Thomas Dawes argued that there were political limits to what the Convention could have done about slavery in the short run, but contended that the Constitution would eventually end slavery: "The members of the Southern States, like ourselves, have *their* prejudices. It would not do to abolish slavery, by an act of Congress, in a moment, and so destroy what our Southern brethren consider as property. But we may say, that although slavery is not smitten by an

apoplexy, yet it has received a mortal wound and will die of a consumption."[113] Dawes's comments on the slave-trade provision have been cited as an example demonstrating that Northern Federalists created expectations that the national government would eventually abolish slavery.[114] But these comments immediately received a skeptical reply from another delegate, Benjamin Randall: "Sorry to hear it said that after 1808 Negroes would be free. If a southern man heard it, he would call us pumpkins [i.e., brain dead]."[115] This exchange suggests that at least some northern citizens doubted that the Constitution would discourage slavery, despite Federalist arguments that it would. In other Northern states, Federalists went further in their claims on this point. Leading Federalist Thomas McKean told the Pennsylvania convention that through the slave-trade provision "the abolition of slavery is put within reach of the federal government."[116] The Philadelphia Convention debates reviewed here tell a different story about the three-fifths clause, which was openly advocated in the Convention as a principal means of protecting slavery against political challenge over the long term.

Despite various antislavery attacks on the Constitution during ratification, in the final analysis, nowhere in the Northern ratification debates can one find any indication that any significant number of convention delegates voted against the Constitution because it recognized the legitimacy of owning slave property, or because they objected in principle to a constitution that based representation on any principle other than free population. Most ratifying convention delegates seem to have understood and accepted the representation provisions as a pragmatic compromise that incorporated slave property wealth. They did not see the inclusion of slave property in the representation formula as a matter of political or moral principle.

If there had been substantial Northern sentiment that regarded free population representation as a bedrock principle of republicanism, the closeness of the ratification vote in major Northern states such as Massachusetts and New York based on disagreements about other constitutional issues suggests that it would have been likely that this added factor would have led to rejection of the Constitution there, which would in turn probably have led to major changes to the Constitution.[117] But the sources suggest that, to the contrary, there was little political support during Northern ratification for any modification of the three-fifths clause. None of the Northern states that proposed amendments to the Constitution during ratification proposed any change in the three-fifths clause, though collectively they

proposed dozens of amendments. Key Anti-Federalist minority reports, issued during ratification in Northern states, that proposed other amendments not accepted by Federalists did not propose such changes either.[118]

It seems reasonable to conclude from the Philadelphia Convention debates and the ratification sources that Northern sentiment on the principle of free population representation as opposed to wealth representation was at best divided in 1788. Northern convention majorities were willing, though perhaps reluctantly, to accept slave property representation in the House of Representatives on the basis that it was property that was being represented there. By the time of the Missouri controversy in 1820, when Northern states outside New England first made concerted attacks on the three-fifths clause, wealth representation had become far less popular throughout the country, as is evident from the fact that by then suffrage was almost universally granted to white males without property or tax qualifications in new states.

But the decision by northern delegates at the Philadelphia Convention to create a taxation "fig leaf" to justify the three-fifths clause agreement and to use that fig leaf as a principal basis for defending the slave-wealth representation compromise during ratification would come back to haunt them later. After 1800, the Federalist Party began trying to pin part of the blame for its declining political fortunes on the three-fifths clause. This led politically prominent former Convention delegates like Rufus King (who became a Federalist candidate for president) to claim that they never would have agreed to the three-fifths compromise if they had known that no significant direct taxation would occur. Later, they argued that they would not have agreed to the three-fifths clause if they had known that it would be extended to numerous new states. As we will see, these revisionist claims buttressed Northern arguments during the Missouri controversy. And such claims seem to have led some recent historians to overstate the importance of the three-fifths clause in shaping the politics of the early Republic.

SLAVERY, THE THREE-FIFTHS CLAUSE, AND EARLY REPUBLICAN POLITICS

After Thomas Jefferson was elected in 1800, some Federalist politicians chose to blame the three-fifths clause for John Adams's loss, despite the fact that leading Federalists, including Alexander Hamilton and the Federalist

Speaker of the House of Representatives, Massachusetts congressman Theodore Sedgwick, had themselves declared Adams "unfit" for office during the campaign. Federalist leaders such as Massachusetts senator (and former secretary of state) Timothy Pickering derisively referred to Jefferson as the "Negro president," arguing that he had been elected only because of slave representation. Some historians, including John Ferling, author of a recent history of the election of 1800, accept that claim.[119] Historian Garry Wills goes further and argues that the outcome of major controversies, such as the Missouri compromise, was strongly influenced if not determined by the existence of the three-fifths clause.[120] These conclusions are anachronistic and overstate the importance of the clause. Political scientist Mark Graber concludes that southern state control of federal politics in the early Republic was "aided" by the clause, which makes it useful to ask, just how much aid did it provide?[121] These points can be explored through an analysis of early Republic presidential politics, beginning with the presidential election of 1800.

The 1800 election occurred just over a decade after the Constitution was ratified. In the interim, three states (two slave and one free) had been admitted to the Union, and there had been relatively little change in the country's sectional population balance. William Freehling concludes that as of 1800, the three-fifths clause provided a twelve-vote premium in the Electoral College to the slave states, and that since Jefferson's margin of victory there over Adams was eight votes, the three-fifths clause was responsible for Jefferson's victory.[122]

It is certainly true that the three-fifths clause created a "premium" benefiting slave state Electoral College representation, as was intended. But in 1800, this premium was not significantly larger than it was anticipated that it would be when the Constitution was drafted. In other words, in the 1800 election, the three-fifths clause worked just the way it was expected that it would work when the Constitution was ratified. When Federalists argued that Jefferson had been elected illegitimately because part of his vote consisted of a three-fifths clause premium, they were effectively arguing that the Constitution should not have been ratified in the first place, since creation of the voting premium that supposedly contributed significantly to his election was one of the purposes of the clause, and the Constitution could not have been ratified without it. If Jefferson's election on this basis was illegitimate, the Constitution itself was illegitimate.

The argument that Jefferson was elected by virtue of the effects of the three-fifths clause also ignores the realities of the 1800 election. During

that election, state-legislature majorities in various states manipulated election rules in an effort to deprive their minority partisan opponents of Electoral College votes to which they would have been entitled under previous rules, as historian Sean Wilentz concludes. These rules changes often involved shifting from a system of congressional district voting for Electoral College members to statewide general ticket voting for them, a modification intended to prevent the minority party in a state from receiving any of its electoral votes (i.e., moving to a "winner take all" system, commonly used in America today). Legislatures in at least Pennsylvania, Massachusetts, Connecticut, and Virginia manipulated their voting rules for such purposes during the 1800 campaign.[123] In Pennsylvania alone, the legislature's partisan deadlock resulted in an agreement to split Pennsylvania's Electoral College vote 8–7, thus quite probably depriving Jefferson of at least seven electoral votes he would otherwise have won. Wilentz concludes that partisan manipulation of election rules at the state level deprived Jefferson of sufficient numbers of votes to offset any benefit he received from the three-fifths clause, so that he would have won the election in any event.[124] Ferling argues, however, that Virginia's manipulation probably deprived Adams of some votes, offsetting Jefferson's losses, and that Adams's loss cannot be explained by Federalist disaffection.

The broader point to appreciate is not which historian's position about the effect of the clause on the election of 1800 is correct, but rather that it is easy to overstate the political significance of the three-fifths clause by considering it in isolation from other relevant political circumstances. The clause's Electoral College premium for slave state representation played a very limited role in presidential politics during the early Republic. Between 1800 and 1828, neither slavery nor the three-fifths clause appears to have been an issue that swayed significant numbers of votes in an American presidential campaign. During that period of Republican dominance, no Federalist candidate for president ever came close enough to being elected for the three-fifths clause premium, even as it grew somewhat over time, to make any difference in the presidential election outcome.

As the discussion of the Missouri controversy in chapter 6 will show, it is highly unlikely that the three-fifths clause determined the result of that dispute. Instead, the three-fifths clause made it easier for slave states to pursue policies they believed to be in their interest, because they needed to "buy" fewer northern votes in Congress than they otherwise would have needed to buy in order to achieve their political goals. It lowered the political cost to the slave states of pursuing preferred sectional poli-

cies, rather than determining the outcome of most elections or issues. The clause conferred a premium of roughly 6–10 percent of House votes on the slave states between 1790 and 1820, and is estimated at 8 percent in 1820.[125] In that sense, the three-fifths clause distorted national policy, but this distortion occurred in the direction, and in roughly the amount, that Northern states had bargained for at the Philadelphia Convention in agreeing to the clause.

The distortion of national policy supported by the three-fifths clause premium was in turn a pure artifact of the Constitution's structural federalism, which had been essential to its creation. The Convention's acceptance of equal state voting in the Senate had dictated its acceptance of the three-fifths clause. The subsequent revisionist history engaged in by Northern politicians—particularly Rufus King—on the reasons for their willingness to accept the three-fifths clause (discussed in chapters 5 and 6) cannot change the reality that the country got what they, as Convention delegates, had bargained for. Neither should the influence of the three-fifths clause on early American politics be overstated because they chose to blame it for their declining political fortunes, with which it had little to do.

However, the slave states' strenuous insistence on making slave representation permanent to protect slavery against a popular antislavery majority in northern states did have the unintended consequence that it introduced an element of modern dynamic republican representation theory into the Constitution, separating popular representation from interest representation. The creation of the mandatory census and reapportionment insisted upon by the slave states meant acceptance of James Wilson's idea that the political majority (as the Constitution defined it) should be continuously represented in government, no matter where that majority was found within the nation's expanding boundaries. It followed that no preexisting political majority could legitimately insulate itself against shifts in political power brought on by American demographic change and mobility. To protect what they saw as their long-run position, the forces at the Convention that were least supportive of the principle of pure popular representation had introduced the very constitutional rules that gave that principle its real strength and dynamism.[126] Far from creating a bisectional constitution, the slave states had instead welcomed into the Constitution the forces of popular change that ultimately led to slavery's demise.

4

SECTIONAL BARGAINING AND MORAL UNION

This chapter considers how Philadelphia delegates addressed three key slavery issues they faced at the Convention: whether to prohibit slave imports; what provisions to make regarding slavery in territories and new states; and fugitive slave rendition. It concludes by examining how these issues were debated during ratification, particularly the role played by moral arguments over slavery and the nature of the proposed union. Convention action on these slavery issues reflected the fundamentally different strategies the sections employed regarding them.

The very limited northern public demand for control of slavery outside the north meant that Northern delegates were free to make bargains on slavery designed to maximize northern economic development, while Southern delegates sought tenaciously to protect southern slave economies and their expansion potential. As to slave imports, Northern politicians agreed to accept a congressional power over such imports that imposed little constraint on the growth of slavery for a generation, allowing slave sales and imports to fuel westward expansion. On western settlement, a "side bargain" that included adoption of the Northwest Ordinance of 1787 also spurred slavery's territorial expansion. At the same time, Congress's formal powers over slavery in territories and new states were not explicitly limited. With respect to fugitives, the states ratified their existing policies against protecting them in the Constitution's fugitive slave clause. The Constitution's major policy protections for slavery and its expansion (including the western side bargain) were essential to its drafting and ratification.

The Constitution and its side bargain reflected a shared elite under-

standing that existing and projected regional political and economic development patterns should be accommodated in the national approach to development, and consequently to slavery.[1] The side bargain also rested on the premise that there would be no negative spillover from one region to another as a result of the other region's development.[2] It envisioned that the "eastern" and "southern" regional political economies would have largely separate "spheres of influence" into which it was anticipated they would extend through settlement.[3]

The Convention delegates agreed to keep the Convention's deliberations permanently secret, as Massachusetts congressman Nathan Dane had recommended to Philadelphia delegate Rufus King. Dane had advised King that the Convention should conceal the actual nature of sectional successes and failures from state ratifying conventions, because to do otherwise would jeopardize the Constitution: "I think the public never ought to see any thing but the final report of the Convention, the digested result only, of their deliberations and enquiries. Whether the plans of Southern, Eastern, or middle states succeed never, in my opinion, ought to be know[n]."[4] Ratification debates therefore often proceeded under inaccurate or conflicting premises about the reasons behind fundamental Convention decisions, and differing interpretations of the significance of key parts of the Constitution affecting slavery were advanced in various parts of the country. One important result of this "incomplete" ratification process was to defer much controversy for several generations, and it erupted again at a time when the economic and political circumstances of the sections had changed dramatically.

THE SLAVE-IMPORT LIMITATION

Rufus King's August 8, 1787, speech attacking the pro–slave state Committee of Detail report signaled that the North was seeking an accommodation with the South either on slave imports (which King described as part of the commerce power) or on export taxation. But the taxation issues were resolved without any need for any significant compromise by the slave states with Northern state interests.[5] A coalition of slave states and nonslave states defeated efforts to permit any federal taxation of exports, and the narrow limits imposed on permissible taxation of slave imports prevented the use of federal taxation as a means of discouraging them.[6]

Slavery was thus permanently immunized from federal taxation unless the new government imposed direct taxes, which no knowledgeable delegate expected would occur (absent an emergency). Federal tax policy would never be used as a means of limiting the growth of slavery.

Historians have generally concluded that the accommodation King sought on behalf of the Northern states instead ultimately occurred principally in the form of a sectional bargain between the New England states and the Deep South. That trade linked Congress's ability to exercise the commerce power in the Constitution by majority vote—that is, preventing the exercise of a sectional veto—to an agreement that no federal limits would be placed on slave imports for twenty years. Historians generally agree that such a trade occurred, although the evidence for this is circumstantial.[7] The public bargaining process on these issues in Philadelphia began in earnest on August 21, 1787, during discussion of the Committee of Detail report.[8] Its well-known highlights are summarized here to enable consideration of its political significance.

Luther Martin of Maryland proposed an amendment to permit taxation or prohibition of slave imports, arguing that imports would drive up defense costs and that "it was inconsistent with the principles of the revolution and dishonorable to the American character to have such a feature in the Constitution."[9] Martin's attack met with an emphatic rebuff from John Rutledge of South Carolina, who argued that considerations of religion and humanity were irrelevant, that "Interest" should be the governing principle with "Nations," and that it was in the North's commercial interest to participate in the slave trade.[10] Oliver Ellsworth of Connecticut supported Rutledge's position, arguing that only states should be judges of the morality and wisdom of slavery. He added that if individual states were enriched by slavery, this would enrich the whole country. Finally, Ellsworth argued that the Confederation had deemed slavery a state concern, and he saw no argument for changing that position.[11] Rutledge's and Ellsworth's arguments both supported the position that the Constitution's approach to the entire problem of slavery should be based on state law and policy, unless it was clear that a national interest would be infringed by slavery.[12] Most delegates shared that view.[13]

On August 22, Roger Sherman supported the slave state position on imports. Permitting slave imports did not change current law; there was no policy argument for a change; and it was "expedient to have as few objections as possible to the proposed scheme of Government . . ."[14] George

Mason of Virginia, though a large slaveowner, attacked the "infernal traffic." He argued that the slave trade was a national problem because slaves were threats to domestic security.

Mason also argued that a uniform prohibition on imports was critically necessary to prevent use of slaves in western development. If any state was allowed to import slaves, "the Western people are already calling out for slaves for their new lands; and will fill that Country with slaves if they can be got thro' South Carolina and Georgia."[15] He warned delegates that slave imports would be used to supply new states with slaves, not simply to replenish slave populations in existing states. John Dickinson, also a major slaveowner, joined Mason in arguing that the slave trade should be prohibited "on every principle of honor and safety."[16] Rufus King argued that the taxation of slave imports should be analyzed as a purely political problem; a total exemption from import taxation for slaves would be regarded as commercially unfair by the "Northn. & middle states."[17]

In an effort to convey to Northern delegates such as Roger Sherman that they were mistaken in thinking that either the slave trade or slavery would wither away, General Charles Cotesworth Pinckney of South Carolina informed delegates that he did not believe South Carolina would stop slave imports in any "short time," but instead would only interrupt them occasionally for security or price-stability reasons.[18] Georgia delegates made clear that their state would continue imports as well, and would not ratify the Constitution without the continued ability to import slaves. These delegates' states continued to view slave imports much as they had in the past, as a matter in which state policy was used to manage slave prices and planter debt, not as morally abhorrent or politically dangerous. Their position was another indication that several slave states saw slavery as a long-term institution.

It is tempting to conclude from Martin's and Mason's opposition to continued slave imports that at the time, the Chesapeake states were more open to the abolition of slavery than the Deep South states, but here again appearances are deceiving. The political history of slave-import limits and gradual abolition in the Upper South discussed in chapters 1 and 2 (and further in chapter 5) shows how little political support there actually was in those states for gradual abolition throughout the 1780s and 1790s. National-level politicians from Upper South states were therefore free to please both their own slaveholders and antislavery constituencies by opposing slave imports. If imports were limited, slaveholders would benefit from increased slave prices, while antislavery constituencies would be satis-

fied that what they perceived as antislavery actions (but ones which were unlikely to have much effect if any on abolition) were occurring. At the Convention, some leading Northern delegates believed that Chesapeake delegates' support for slave-import limits was politically self-interested in just this sense.

At the conclusion of this vociferous but inconclusive initial debate on slave imports, delegates agreed to try to reach a compromise through means of an ad hoc committee. On August 25, 1787, the ad hoc committee reported out an agreement providing for a commerce-clause power exercisable by majority vote, as well as a clause permitting congressional prohibition of slave imports after 1800. General Pinckney then moved to extend until 1808 the period during which the states would be permitted to engage in slave imports.

James Madison attacked the Pinckney motion in very strong terms, warning the delegates that "[t]wenty years will produce all the mischief that can be apprehended from the liberty to import slaves. So long a term will be more dishonorable to the National character than to say nothing about it in the Constitution."[19] Madison understood slavery and its social and political consequences exceptionally well, and disliked it and the slave trade personally.[20]

It is uncertain precisely what Madison meant by his comments, but his language strongly suggests that he intended to associate himself with the earlier criticisms of slave imports. He seems to have been arguing that permitting imports for a long period would do a very large amount of damage, including all of the different kinds of "mischief" that could be anticipated. There were two broad potential harms that could flow from continued imports. One was that imported slaves would be used to settle the West. The other was that an additional twenty years of slave imports might permit slavery to grow to the point where it would become more deeply entrenched as a long-term institution in the existing slave states. Madison's appraisal of the harms that would be caused by permitting another generation of imports depended in part on his understanding of the demographics of slavery.

The demographic reality of American slavery by 1787 was that in slave states, overall slave populations were growing substantially—and would continue to grow—even without imports (assuming continued demand for slave-labor products and available land). By early in the last half of the eighteenth century, virtually all major slave states had a positive slave-population demography, which meant that slave populations grew by

natural increase, unlike Caribbean colonies where slave populations could only be sustained through slave imports.[21] Permitting continued slave imports to the United States would therefore not only enable slavery to continue, but would accelerate its growth; and permitting imports for a generation as Pinckney proposed could potentially enable substantial additional growth.

What did Americans know about this demographic reality by 1787? Benjamin Franklin's well-known 1755 essay about slave demography had been right about the Caribbean's dependence on slave imports, but wrong that the mainland colonies were similarly dependent, though when he wrote, Franklin was unaware of this.[22] By 1787, Franklin's opinions may still have been widely held, but there is reason to think that by then Convention delegates such as Madison knew better, even leaving aside their personal observations. Madison's good friend Thomas Jefferson had written in his *Notes on Virginia* about the "evil" phenomenon of rapid American slave-population growth several years before the Convention met.[23]

Jefferson had explained in the *Notes* that the slave population in Virginia was growing rapidly without imports. He provided an essentially accurate estimate of slave population growth there based primarily on historical tax data. After considering the relative growth of white and black populations, he concluded: "Under the mild treatment our slaves experience, and their wholesome, though coarse food, this blot in our country increases as fast, or faster than the whites." He then argued that Virginia's postindependence slave-import ban would "in some measure stop the increase of this great political and moral evil. . . ."[24] By "in some measure stop," Jefferson meant that the rate of slave population increase would be slowed by an import ban.

Jefferson's views about Virginia slave demography were known at least to Madison and John Adams by 1785, because Jefferson had shared copies of his manuscript of *Notes on Virginia* with them. Adams had written to Jefferson in 1785 congratulating him on the *Notes*, saying "it is our Meditation all the day long," and particularly commending its sections dealing with slavery, which he said were worth "diamonds." Jefferson and Madison had discussed issues raised by the *Notes*, and corresponded about its appropriate distribution in Virginia, particularly in view of the obvious sensitivity of its sections on politics and slavery.[25] Jefferson's *Notes on Virginia* also became known to some other Northern leaders considerably before the Convention, as Secretary of Congress Charles Thomson's 1785 letter to Jefferson praising his views on slavery there shows. Others in the South ex-

pressed demographic views quite similar to Jefferson's, though at slightly later times.[26]

At the Convention, some Northern delegates also understood the large size of slave populations and the positive demography of slavery. Convention delegates already had a fairly accurate idea of the large size of existing slave populations in slave states in 1787 as a result of prior congressional representation and taxation debates, where the size and market value of slave populations had been directly at issue in establishing state tax quotas.[27] They appreciated that these slave-population dynamics had important implications for the politics of the slave trade within the South. By the time of the Convention, both Virginia and Maryland were net exporters of slaves.[28] Shrewd Northern delegates like Oliver Ellsworth understood this, and to discount the Chesapeake delegates' support for slave-import limits, Ellsworth explained to fellow delegates that Virginia and Maryland had a surplus of slaves and did not need imports.[29]

As Ellsworth strongly implied, the Chesapeake states wanted to be able to sell slaves to South Carolina and Georgia at the artificially high prices that would result from an import ban.[30] Ellsworth was not alone in that view. Delegates from South Carolina and Georgia objected to Virginia representatives that they believed that "the slaves of Virginia would rise in value, and we should be obliged to go to your markets" if imports were banned.[31]

However, Ellsworth ignored Mason's argument that a major purpose of further slave imports by the Deep South would be to supply burgeoning demand for additional slaves from western settlers, not simply to supply Georgia and South Carolina. But if states with slave surpluses were allowed to export them, then permitting continued imports would mean that slave prices would decline even further than they otherwise would, and that slaves would be even more readily available to support more rapid western expansion. Despite efforts by Gouverneur Morris of Pennsylvania to pin that issue down by restricting the permissible destination of imported slaves, the Convention chose not to impose any geographic limits on where imported slaves could be taken after their importation. No direct geographic limits on western slavery expansion were proposed for inclusion in the Constitution at any point in the Convention. Madison's attack on Pinckney's motion fell on deaf ears, and the Convention agreed to prevent congressional action to prevent slave imports before 1808.

The Convention's decision to agree to Pinckney's motion increased by more than one-half the amount of time during which slave imports were

TABLE 4.1 Slave imports and population by decade and United States Congress seat premiums

Decade	*Estimated slave imports*	*Total slave population at end of decade*	*Cumulative House seat premium from imports*	*Cumulative Senate seat premium from imports*
1780–1790	29,000	697,000	—	—
1791–1800	60,000	893,000	2	2 (est.)
1801–1810	111,000	1,190,000	4	2 (est.)
1811–1820	? (smuggling)	1,537,000	4	4–6 (est.)

Note: For sources on estimated imports, refer to note 32. For calculations supporting this table and related text, see appendix C.

constitutionally protected against federal government limitation. The added protection of the import trade through 1808 permitted an increase of roughly 8 percent in the size of the American slave population by 1820. Most importantly, it also made it possible for the slave trade to provide an ample supply of slaves to western settlers, precisely as Mason had warned that it would.[32] These "excess imports" also created an added political premium for slave states based on the three-fifths clause, especially in the Senate. See table 4.1.

The New England states present—Massachusetts, Connecticut, and New Hampshire—supported Pinckney's proposed extension of state authority to permit the slave trade until 1808. Without the support of these states, the Pinckney motion would have failed.[33] Each of these states had by this time abolished or begun to abolish slavery and slave imports. In that political climate, it might seem that the position New England delegates took would have been unpopular with their constituents. But the potential unpopularity of their position actually reinforces the conclusion that a trade between New England and the Deep South on slave imports took place, since it was in part their gain from the bargain that would protect them against attack (as the ratification debates showed).

In the commerce-power–slave-import bargain, New England and the Deep South each protected what they deemed their paramount economic interest in the framing of the Constitution. New England states had generally come to the Convention seeking broad federal control over commerce. New England and other Northern states obtained (on paper) the

ability to exercise much broader commerce powers in return for their willingness to permit continued Southern slave imports. Pennsylvania delegate George Clymer stressed the critical importance of this provision for majority control of the commerce power to Northern states' ability to trade: "The Northern and middle States will be ruined, if not enabled to defend themselves against foreign regulations."[34]

Not only would New England potentially benefit economically (directly and indirectly) from continued slave imports, it would also be geographically insulated from the perceived negative effects of such imports. The southernmost slave states accepted what they saw as a minor paper limit on their freedom to import slaves, but in return they received the flexibly adapted supply of slaves needed to support the carte blanche they obtained at the Convention for slavery's southwestern expansion. Leading Southern delegates also acknowledged that the South's comparative military weakness made union desirable even if it required giving Northern states authority to impose undesirable commerce regulations.[35]

The agreement on the slave-trade cutoff provision reflected basic differences in the political approaches that the sections took to dealing with slavery in the Constitution. Southern representatives vigorously asserted that they needed to maintain their rights as explicitly as possible and to protect existing slavery institutions using definite mechanisms (such as a certain date before which the new government could take no action), often buttressed by a permanent sectional veto, all of which would limit Northern political ability to act against slavery.[36] The slave states believed that any agreed-upon limits imposed on slavery would take effect, if at all, far enough in the future that they would be able to protect themselves politically if necessary when the time arrived.

When General Pinckney explained the slave-import limit to the South Carolina House of Representatives, it was as a far-off limit that they could defeat in 1808 if they deemed it necessary, not as one that had any meaningful impact on slave states' freedom of action. Pinckney said: "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 . . ."[37] Federalist Robert Barnwell added: "[T]he constitution . . . has declared that the United States shall not at any rate consider this matter for 21 years . . . Congress has guaranteed this right for that space of time, and at its expiration may continue it as long as they please. . . . I am of opinion, that without we ourselves put a stop to them that the traffic of negroes will continue for ever."[38] South Carolina delegates, many

of them slaveowners who had a great deal to lose if General Pinckney and the Federalists were mistaken, readily accepted these explanations. As the great historian W. E. B. Du Bois concluded many years ago, other prominent South Carolinians understood the demographic and political realities of the slave-import limitation in much the same way. Du Bois quoted Dr. David Ramsay, a member of the South Carolina ratifying convention, as follows:

> Though Congress may forbid the importation of negroes after 21 years, it does not follow that they will. On the other hand, it is probable that they will not. The more rice we make, the more business will be for their shipping; their interest will therefore coincide with ours. Besides, we have other sources of supply—the importation of the ensuing 20 years, added to the natural increase of those we already have, and the influx from our northern neighbours who are desirous of getting rid of their slaves, will afford a sufficient number for cultivating all the lands in this state.[39]

The Northern states, on the other hand, were willing to settle for the paper constitutional authority to exercise broad commerce powers and to reverse at some distant future time the powerful socioeconomic trends such as the pressure for western expansion that were being accelerated by the Constitution's immediate grant of constitutional protections to slavery. But they received no assurance that they would be politically able to compel congressional exercise of those broad commerce powers, or that after 1808 they would actually have the political power to force Congress to use its discretionary authority over slave state opposition. These opposing regional political strategies on the issue of the slave-import cutoff closely paralleled the contrasting approaches the sections had taken to the proposed Spanish treaty.[40]

The Northern approach to both slavery and the Spanish treaty resulted from majority support for seeking short-term sectional economic advantage, at least where any long-term consequences of such "rent seeking" behavior fell primarily on others outside the region such as Southern settlers or enslaved blacks. The Southern approach to both issues, in contrast, was based on a powerful and openly acknowledged self-interest in maintaining slavery that sought to capture for its political majority as many of the long-term benefits and to shed as many of the burdens of slavery as possible. In short, the South sought to win the slavery "war on the ground," while the North bargained for short-term advantage combined with a theoretical

right to alter conditions at a much later time. The sections' strategies for dealing with the constitutional issues related to the expansion of slavery into new states and territories exhibited the same sharp contrast.

THE NORTHWEST ORDINANCE AND THE WESTERN DEVELOPMENT BARGAIN

James Madison told his countrymen in *The Federalist* that "the Western territory is a mine of vast Wealth to the United States. . . ."[41] By 1787, settlers were moving west in a "staggering" surge that thoughtful political leaders like George Washington realized could be channeled but not prevented.[42] Over one hundred thousand settlers were in the Kentucky-Tennessee area by the end of the 1780s.[43] More than fifteen thousand of those "settlers" were slaves. Prior to 1787, virtually all western settlement had occurred south of the Ohio River.[44]

The creation of new territories and states was also an equally vast political minefield, as the Convention debate over representation had vividly demonstrated. On the eve of the Convention, the Confederation Congress had failed to resolve major western development issues. This irresolution threatened substantially to retard western development. Among the leading unresolved issues were the Spanish treaty negotiations and the terms, including slavery, on which settlement of new territories and states would occur.

Since at least 1784, the states had been at loggerheads in Congress over the terms of territorial settlement. The Ordinance of 1784, drafted primarily by Thomas Jefferson, had proposed dividing the Northwest Territory (then defined to include all western territory claimed by the United States or any state) into sixteen states, ten of them north of the Ohio River.[45] During congressional consideration of the ordinance, Jefferson lost a close vote on an effort to ban slavery after 1800 in all of the territory, which at that time included the western areas both north and south of the Ohio River.[46] The 1784 ordinance never operated.[47]

As early as 1785, proposals to bar slavery in all new territories were coupled by their congressional supporters, led by Congressman Rufus King, with a clause providing for rendition of fugitive slaves to protect slaveowners. King recognized that a territorial slavery ban—if it was going to be acceptable at all—must be accompanied by protection to slaveowners against the possibility that the territories would become a haven for fugi-

tives.[48] Despite King's efforts to broaden support for the proposed slavery ban in this manner, Congress remained unwilling to adopt it.

But during the Philadelphia Convention, the Northern states made no overt efforts (slave imports after 1808 aside) to limit the western expansion of slavery. And there was another readily foreseeable debate that did not occur: one over the bitterly divisive Spanish treaty, which readers will recall proposed to trade expanded United States commercial rights in Spain for relinquishment of Mississippi River navigation by Americans for up to thirty years.[49] The Convention debates are virtually silent on the treaty, which was still being debated in Congress during the Convention. Why did the delegates negotiate a Constitution that was not explicit about Congress's power to prevent slavery's western expansion? Why was the Spanish treaty issue resolved by Congress in the South's favor shortly after Virginia's ratification of the Constitution? The evidence suggests that both of these issues were resolved by a political bargain reached at the Convention, but *outside* the formal Constitution submitted for ratification.

A useful starting point for understanding this bargain is that in the middle of the Philadelphia Convention, on July 13, 1787, the Continental Congress, acting in New York with a quorum composed in significant part of Constitutional Convention delegates who had traveled for several days from Philadelphia for the specific purpose of providing that quorum, adopted the Northwest Ordinance of 1787. The Northwest Ordinance was a remarkable achievement, even apart from its well-known territorial slavery prohibition.[50] The timing of the ordinance's adoption in the middle of the Convention's heated debate over representation; the deliberate creation of a congressional quorum using Convention delegates to enable its adoption; the continuing interconnections and coordination between members of the Convention and those of the Congress on economic-development issues; and the fact that the Northwest Ordinance and the Constitution addressed fundamentally important issues in overlapping ways that had significantly different political and legal consequences, are a set of circumstances that taken together render it reasonably certain that the adoption of the ordinance was related to the bargaining at the Convention.

The Northwest Ordinance differed from the earlier 1784 ordinance in several key respects.[51] The 1787 ordinance covered only the territory north of the Ohio River, a sharply reduced geographic boundary agreed upon only in the final stages of the ordinance's consideration. As a practical matter, this meant that the Northern states were accepting that the terms of western development established in the ordinance would only apply to

the area north of the Ohio, because they would not have sufficient power under the new Constitution to insist that Congress extend their preferred development terms to other western territories over Southern opposition. The ordinance also reduced sharply the number of states that could be created in the new territory.[52]

Article 6 of the Northwest Ordinance prohibited slavery in the new territory. It also contained a provision protecting slaveowners' rights in fugitive slaves who fled to the territory, the predecessor to the fugitive slave clause of the Constitution.[53] But for present purposes, the 1787 ordinance is actually most useful as a basis for considering what the Constitution could have done, but did not do, regarding slavery, and why. It was later cited as an important precedent for the antislavery character of the national government, and is certainly evidence of Northern antislavery sentiment.[54] But its legal status, and in particular its relationship to the Constitution, suggests that it played a far more equivocal role in dealing with the slavery issue when the Constitution was drafted.

The Northwest Ordinance contained an "equal footing" clause that differed in effect from the comparable provisions of the 1784 ordinance, though superficially they appeared similar. The 1787 ordinance recited that new states were to be admitted on an "equal footing" "in all respects whatever" with the original states, provided that their "constitution and government" shall be "in conformity to the principles contained in these Articles." However, the 1787 ordinance also contained a series of fundamental substantive limitations on territorial power (including its slavery bar, and a predecessor of the Constitution's contracts clause). If those limitations were intended to govern the law not just of the territory but also of new states formed from within the territory, the 1787 ordinance's concept of equal footing constituted a limited grant of "sovereignty" to new states. In contrast, the equal-footing language of the 1784 ordinance meant that states were free to legislate on virtually any subject other than war, peace, or monarchy.

These differences on the "equal footing" issue raised the question: What did it mean to say that new states must be equals of the original states? Did it mean that new states would have equivalent congressional voting rights with original states, or instead that they must be political equals in the broader sense that they were regarded as independent sovereigns that had as much right to decide whether to accept institutions like slavery as did the original states? The former "colonial governance" sense of "equal footing" appears to have been the Northern Ordinance drafters' preferred

understanding. The latter sense appears to have been the emerging Southern understanding. The 1784 Virginia cession was conditioned on the formation of states "having the same rights of sovereignty, freedom, and independence as the other states"; the North Carolina cession of 1784 was similar; and Jefferson's 1784 ordinance employed a "popular sovereignty" structure, prohibiting only legislation repugnant to the Articles of Confederation.[55]

However, the history of the Northwest Ordinance and subsequent legislation incorporating it by reference into several new state admissions prior to the Missouri controversy of 1819–21 suggests that in the 1780s and 1790s contemporaries did not fully appreciate the potential significance of the difference in the "equal footing" concept as expressed in these two ordinances (except, one might well argue, where slavery was concerned). Why did they not perceive what appears in retrospect to be an obvious difference?

There are several possible explanations for the lack of controversy over the use of "equal footing" in the Northwest Ordinance in 1787 and subsequent years. There is some evidence that Southern-state congressmen may have been indifferent to the way the concept was applied in the Northwest Territory, since they thought that the ordinance's limitations on slavery did not adversely affect, and might even protect, their section's vital interests.[56] But a more significant reason may be that Southern representatives did not believe the ordinance's provisions such as article 6 would necessarily apply to new states formed from within the territory. New-state conformity with article 6 would ultimately be required only if the ordinance had a legal foundation that was unalterable, something it clearly lacked.[57]

As James Madison pointed out in *Federalist* 38, there was no legal authority for most of the ordinance under the Articles of Confederation when it was first adopted—it was invalid. Madison's claim was correct: article 9 of the Articles of Confederation gave the Confederation no authority to provide for governance of territories or to establish rules for admission of new states, particularly in ways inconsistent with land cessions made by states to it, so that important parts of the ordinance would have been invalid unless the Articles were amended (requiring unanimous agreement of the states).[58] The ordinance therefore had to be ratified during the First Congress to possess legal force. This meant that Congress could have substantively altered its terms.

The Northwest Ordinance was not a part of the Constitution, despite

repeated later claims that it was a "constitutional" enactment. Its text shows that its Northern drafters wanted it to be deemed "constitutional," but as Madison's attack shows, the Southern states that acceded to it were aware that it lacked a constitutional foundation in the Articles. Remarkably, in a work read primarily by northern and particularly by New York citizens, Madison characterized the ordinance as a "usurpation" of constitutional authority.[59] As an experienced legislator and constitutional draftsman, Madison understood the significance of failing to incorporate the Northwest Ordinance into the new Constitution by reference. Absent incorporation, it was nothing more than an ordinary piece of unauthorized Confederation legislation.

Events at the Philadelphia Convention strongly suggest that some of the Constitution's key drafters wanted to deny constitutional status to the ordinance. The Edmund Randolph/John Rutledge draft of the Constitution originally contained a provision that would have explicitly incorporated the Northwest Ordinance into the Constitution by automatically admitting "the western" states covered by the ordinance "on the terms specified in the act of congress. . . ." But this provision appears to have been struck out by Randolph during the Committee of Detail drafting process, and no such provision was ever offered to the Convention.[60] This proposed provision—and its deletion—demonstrate that several of the Constitution's principal draftsmen understood that to avoid submitting new states formed from the Northwest Territory to a congressional vote of approval (accompanied by possible alteration of the ordinance's terms as a condition of state admission), it would be necessary to except them from the operation of the Constitution's new-states provision—and they chose not to do this.

Consequently, although the Northwest Ordinance proclaimed itself an "unalterable" compact, there was nothing in the Constitution (leaving aside vested-property-rights arguments) to prevent it from being amended by Congress, including upon later admission of new states. As ordinary legislation, article 6 of the ordinance prohibiting slavery could not bind future Congresses in admitting new states unless it was possible to possess a vested legal right in "freedom from" the institution of slavery. The Constitution did not create such a right, despite the apparent desire of the Northwest Ordinance's drafters to create one. Only political good faith and honor would prevent the ordinance's alteration.

Yet the alternative—to have incorporated the ordinance into the Constitution—would have caused severe political problems for its ratification.

The incorporation of the ordinance would have signified by inference that the Constitution did not prevent western settlement south of the Ohio River with slavery. And in all likelihood, for political reasons, the Constitution would instead then also have had explicitly to disclaim congressional authority over slavery in territories other than the Northwest Territory. Incorporation might also have precipitated an immediate fight over whether Congress possessed authority to control slavery in new states, as opposed to territories. The separate passage of the ordinance as ordinary legislation deferred such conflicts.

Adoption of the Northwest Ordinance during the Convention was a planned, coordinated action that resolved a stalemate that had continued for three years in the Continental Congress by dividing the entire western territory of the United States into two territorial areas: one in which slavery was prohibited and another in which slavery's fate was *nominally* left to future decisions by Congress.[61] Because the Northern and slave states had been deadlocked over the issue of territorial slavery since 1784, for reasons that will become clear it is very difficult indeed to imagine that slave states suddenly removed their objections to the Northwest Ordinance's limits on territorial slavery in a major part of the western United States without receiving a substantial quid pro quo in return (though this is a matter of strong inference, not one for which there is firm evidence).

The circumstances of the ordinance's adoption and the breaking of this critical deadlock support the conclusion that the difficult historical question is not whether a bargain involving the Northwest Ordinance occurred; it is precisely what the quid pro quo for the ordinance was. Based on the existing historical record, the latter question unfortunately cannot be answered with the degree of certainty that most historians prefer, because of the lack of documentation for this "trade" compared, for example, to the Convention and ratification record that supports the commerce-power–slave-import bargain. But it is still possible to determine which of various possible trades for the ordinance best fits the available historical facts, and thus to conclude that it is more likely than the others to have been the quid pro quo for the Northwest Ordinance.

The circumstantial evidence suggests that the passage of the Northwest Ordinance and the demise of the Spanish treaty were the quid pro quos in an informal sectional western development bargain that substituted for explicit constitutional provisions to address those issues.[62] An agreement was necessary to resolve these politically divisive issues, because as long as they were unresolved they would have stymied western development by

either section, and it was reached with ratification of the Constitution in mind. The background of this bargain follows.

Until just before James Madison left New York for the Convention in May 1787, he and Rufus King of Massachusetts had been the opposing leaders in a vitriolic congressional struggle over the Spanish treaty, a struggle in which several other Convention delegates had also participated. In August 1786, Congress had voted 7–5 on sectional lines to alter Secretary of Foreign Affairs John Jay's treaty-negotiating instructions to permit him to relinquish American navigation rights to the Mississippi for several decades.[63] Congress's apparent willingness to yield those rights to obtain the Spanish treaty outraged and "astonished the western country" and its Southern supporters. In response, Patrick Henry declared that he "would rather part with the confederation than relinquish the navigation of the Mississippi."[64] Charles Pinckney of South Carolina told Congress that "to those in the least acquainted with that country [the western territory] it is evident that the value of their lands must altogether depend on the right to navigate the Mississippi. . . . Inform them you have consented to relinquish it even for a time, you check, perhaps destroy, the spirit of emigration . . ."[65] The Northern states saw the situation quite differently. Rufus King called the treaty a project of "vast importance to the Atlantic States."[66] The persistent conflict over the Spanish treaty negotiations, which preoccupied Congress during 1786 and early 1787, was "the most serious sectional issue to come before the Continental Congress."[67]

Madison knew by early 1787 that if the Spanish treaty issue was allowed to persist, that alone might well result in Southern rejection of the Constitution. Therefore, as historian Staughton Lynd showed, Madison fought hard to neutralize the issue in Congress. Rufus King in turn used the most obstructionist political tactics available to prevent Congress from even revisiting the issue of Jay's instructions. Congress lost its quorum in early May 1787 while still deadlocked over the issue.

Several historians have accepted Madison's statements to others that the treaty issue had been resolved as sufficient evidence that it had been finally resolved.[68] But Madison believed that the issue could threaten the success of the Constitutional Convention. The seriousness of Madison's fears was apparent when he wrote to Jefferson that Patrick Henry had decided to boycott the Convention because Henry believed its work might result in a government that would yield to the Northern states on the treaty. As Madison described Henry's decision, "Mr. Henry's disgust [at Northern efforts to yield Mississippi River navigation] exceeded all measure and I am not

singular in ascribing his refusal to attend the Convention to the policy of keeping himself free to combat or espouse the results of it according to the result of the Mississippi business among other circumstances."[69] Madison reported to Jefferson in late April 1787 that the "Spanish negociation is in a very ticklish situation," and that Madison was uncertain whether he could corral enough state votes to get Congress to reverse its existing position favoring relinquishing the right of Mississippi navigation.[70]

Leaders other than Madison did not think that the treaty issue had been permanently resolved, or that the Northern states were prepared to abandon their position, when Madison left New York for Philadelphia in early May 1787. As early as May 9, John Jay asked Congress for further instructions on the issue, which would have reopened the dispute. On July 4, a temporarily Southern-state–dominated Congress adopted a resolution favoring free navigation of the Mississippi, but failed to act on a committee report regarding Jay's negotiating instructions. On July 5, 1787, during the Philadelphia Convention and eight days before the adoption of the Northwest Ordinance, Congressman Nathan Dane of Massachusetts (commonly regarded as the ordinance's primary author) wrote to his ally, Rufus King, in Philadelphia seeking advice on how to gain eastern state attendance in Congress and whether to "renew the subject of the S. Treaty."[71] The Northern states had not given up the treaty fight, despite Madison's claims.

On October 14, 1787, shortly after the Philadelphia Convention concluded its work, Madison wrote to George Washington enclosing Charles Pinckney's publication of a 1786 speech attacking the Northern position on the treaty, which Madison referred to as "a printed sheet containing his ideas on a very delicate subject; too delicate in my opinion to have been confided to the press."[72] Washington's prompt response to Madison showed that he did not believe the treaty issue had been resolved, and he strongly implied that debating the treaty would jeopardize the ratification of the Constitution. He wrote:

> Mr. C. Pinkney is unwilling (I perceive by the enclosures contained in your letter of the 13th) to loose any fame that can be acquired by the publication of his sentiments. If the discussion of the navigation of the Mississippi *could* have remained as silent, & glided as gently down the Stream of time for a few years, as the waters do, that are contained within the banks of that river, it would, I confess, have

> comported more with my ideas of sound policy than any decision the case can obtain at this juncture.[73]

Washington's preferred strategy for handling the treaty issue was to "let sleeping dogs lie" during ratification in order to protect the Constitution. Six days later, Madison wrote Washington that he believed that the subject "has been dormant a considerable time, and seems likely to remain so."[74]

In midsummer 1788, Virginia ratified the Constitution following an extensive fight in its convention over the Spanish treaty. In September 1788, in a stunning fit of political amnesia, Congress then declared that it had never intended to permit Spain to acquire the Mississippi, and that navigation of the Mississippi must be an American right. A secret congressional resolution then ended the negotiation with Spain.[75] Three months later, the Virginia legislature adopted legislation to modify its 1784 cession of its northwest land claims to remove important conflicts between that cession and the 1787 ordinance, effectively giving its consent to the ordinance's actual implementation.[76]

The Northern states supported Congress's 1788 actions to end the Spanish treaty negotiations. They seemed to have had an abrupt change of heart on an issue that they had bitterly contested with the Southern states during most of 1786 and 1787, during the Convention and, indeed, until just after the Constitution was ratified. The North Carolina congressional delegation, whose members had pressed Congress in 1788 to adopt a resolution affirming the right of Mississippi River navigation, reported to Governor Samuel Johnston in a letter that conveyed their surprise and skepticism at how Congress's reversal of position came about:

> It is also true that the Delegates from several States in the Union seemed to think that the Navigation of the Mississippi might be *profitably* and *prudently* bartered with Spain for certain commercial Privileges for a given number of Years, but the delegates from those very States seem now to be perfectly convinced that the Measure would not be *prudent* nor *practicable*. The subject is now much better understood and the late Increase of Settlers in the western Country has been so rapid beyond all their ideas of probability that they are now fully agreed with us that Nature and the fitness of things must have their due Operation. All the States referred to voted with us on the late Question . . .[77]

As their repeated, deliberate use of italicization to emphasize the expediency of the Northern position in this portion of their letter suggests, the North Carolina congressmen were skeptical that the reasons they had been offered were the true reasons behind the Northern reversal. The ostensible reasons given for the Northern state shift were wholly unpersuasive, because they did not represent any significant change in conditions from the year before when the North's position had been just the reverse. But the political world had indeed changed: in the interim, the Northwest Ordinance had been passed and the Constitution had been adopted.

The actual reason why this Northern about-face happened is hinted at in a July 10, 1787, letter from Congressman (and Philadelphia Convention delegate) Benjamin Hawkins of North Carolina, reporting to the governor of North Carolina on continental affairs. Writing three days before passage of the Northwest Ordinance, Hawkins described the right of Mississippi River navigation as a pressing concern for the "Western citizens of the southern States" and said that as a result of recent decisions in the Continental Congress that treaty had "at length, from a variety of circumstances unnecessary as well perhaps as improper to relate been put in a better situation than heretofore."[78] To put things more plainly, it seems reasonable to think from the phrasing as well as the timing of Hawkins's letter that the Southern states had proffered their support for the Northwest Ordinance of 1787 in return for the abandonment of the treaty by the Northern states (in the event that the Constitution was ratified), in effect compensating the Northern states for their loss.

The political heart of that bargain was an understanding that each section would be able to pursue western expansion on its own terms to maximize its economic development. For the Northern states, this meant that the Northwest Ordinance could include a series of "colonialist" governance provisions restricting territorial freedom of action, such as a predecessor of the Constitution's contracts clause and restrictions on slavery, provisions that they believed would encourage northern and white immigrant settlement. For the slave states, northern abandonment of the treaty had even more powerful benefits.

It would permit western settlers to use the Mississippi River to reach interstate and foreign markets, which westerners thought was essential to encourage western settlement. From the slave state perspective, territorial slavery could not be prohibited if significant western expansion from their states was to occur. The bargain would effectively permit them to settle the southwest with slaves (subject to Congress's purely nominal authority

to prevent this). And abandonment of the treaty also effectively committed the United States to an expansionist policy that made it likely that the United States would protect settlers militarily against whatever foreign country held New Orleans. As Pinckney's 1786 speech on the treaty had said, resistance to Spanish "occlusion" of American navigation "must be supported by force . . . a reliance on the support and protection of their parent state, will operate as a spur to emigration."[79]

The western bargain permitted southwestern slavery expansion because the desires of northern citizens to pursue western expansion north of the Ohio on their own terms overwhelmed northern concerns about slavery's southwestern expansion. Thus the sections' common interest in maximizing economic development of their sections was the ultimate driving force behind the agreement, not an agreement limited to slavery policy. The western development bargain was designed to remove what each region saw as a major impediment to its respective development.

There is an alternative view of the quid pro quo for the ordinance, but it does not fit the political circumstances as well. Historian Staughton Lynd argues instead that the Northwest Ordinance was part of a "grand bargain" on slavery and the Constitution, a sectional agreement on slavery that resembled the Missouri compromise. He argues that the Southern states might have chosen to support the Northwest Ordinance in 1787 for three reasons: they expected northwest citizens, "even without slavery," to support Southern policies in Congress; the ordinance may have "been construed as a tacit endorsement of slavery in the Southwest"; and there apparently was an agreement "to speed the admission of new states from the Northwest by lowering the population required for admission."[80]

It is important to note that Lynd's view and the "Spanish treaty" view presented here have similar effects where slavery is concerned. If Lynd's view is correct, then in return for the ordinance it was understood that slavery was to be permitted to expand south of the Ohio River. If the alternative theory proposed here is correct, the west was to be permitted to expand with the firm expectation that the Mississippi River could be used to export western crops, a policy that would quite probably have the effect of expanding slavery in similar fashion. The important political difference was that, as Gouverneur Morris feared, the United States was also thereby committed to southwestern expansion, by force if necessary.

The reasons Lynd suggests for southern support of the ordinance work much better as explanations of why Southern states would be willing to accept passage of the ordinance at all than as explanations for why those

states had a sudden change of heart on it during the Constitutional Convention. One motive for the 1787 ordinance was to remedy perceived flaws in the 1784 ordinance, but they could also easily have been repaired after the Constitution was adopted.[81] Nor did Confederation financial needs motivate passage of the Northwest Ordinance during the Convention.[82] That both regions thought they could gain some political support from the territory does not explain Southern support for the ordinance in 1787, since the same logic would have applied in future years.

To the extent there was slave state concern about any aspect of the ordinance, it actually argued strongly for delay by those states in agreeing to the ordinance's passage until after the Constitution sharply improved their relative bargaining position in Congress.[83] It follows that the Southern states had another motive for supporting the ordinance's passage during the Convention. The circumstantial evidence including Convention action suggests that they wanted to obtain the agreement of the Northern states to abandon the Spanish treaty (assuming the Constitution was adopted).

In Convention action on the treaty power, the Northern position in the Spanish treaty negotiations that a majority of states could control Jay's diplomatic negotiations was permanently laid to rest. Madison reminded delegates of the South's unhappiness over Congress's efforts to apply a majority-vote principle to the Spanish treaty negotiations. When James Wilson of Pennsylvania moved to permit treaties to be made by majority vote—essentially the Northern position on the Spanish treaty—the motion was rejected by a large majority, and Massachusetts voted with Virginia.[84] The result was to confer a sectional veto on the Southern states over any future treaty, including the Spanish treaty. This meant that the Spanish treaty was effectively dead once the Constitution was ratified. But its burial would not be formally announced by Congress until September 1788, once ratification was complete.

Further support for the view that the Northwest Ordinance was intended to help lay the treaty to rest by persuading Northern states to abandon it comes from Madison's remarks on the issue at the mid-1788 Virginia ratifying convention. In blistering separate attacks, Anti-Federalist leaders Patrick Henry, William Grayson, and James Monroe argued that under the Constitution, the North would continue to be willing to give up the Mississippi to Spain because its sectional interests on that issue were diametrically opposed to those of the South.[85] Grayson, who became one of Virginia's first United States senators, said, "I look upon this as a contest

for empire. . . . This contest of the Mississippi involves this great national contest—That is, whether one part of this continent shall govern the other. The Northern states have the majority and will endeavor to retain it."[86] Madison carried the burden of responding to the Anti-Federalists on the treaty issue. If the issue had been clearly resolved in favor of the South as Madison had earlier claimed, these attacks would have had little political heft. Yet Madison repeatedly rose to contest the issue in remarkably minute detail.

Madison began by blaming the Northern position on the treaty on the military weakness of the Confederation, which had prevented it from asserting rights to Mississippi River navigation.[87] He then engaged in an inconclusive debate with Grayson on the specific allegiances of various states on the treaty issue. This debate would have been pointless unless some Convention delegates believed that the treaty issue would arise again.

Because he was unable to end persistent doubts on the issue, Madison could not resist assuring the Virginia convention delegates that for reasons he was not at liberty to explain to them, he was confident that the treaty issue would never come up again. He said: "There are some circumstances within my knowledge which I am not at liberty to communicate to this house. . . . Were I at liberty, I could develop some circumstances which would convince this house that this project will never be revived in Congress, and that, therefore no danger is to be apprehended."[88] Grayson responded to Madison by saying that "[w]hen I was last in Congress . . . its [the Spanish treaty's] friends thought it would be renewed."[89] After further debate, Madison offered the remarkably vague argument that because "the project was repugnant to the wishes of a great part of America" "in all probability" it would "never be revived."[90]

Had Madison acknowledged that a political trade had been made over the Northwest Ordinance, even to obtain abandonment of the Spanish treaty, it is likely that this would have threatened Virginia ratification, because the ordinance's slavery bar was seen as unfairly exclusionary by many Virginians (see chapter 5), and ratification there was ultimately agreed to by a very small margin. By the same token, had Rufus King and others publicly acknowledged in the Northern states that they had abandoned a treaty of "vast importance to the Atlantic states" or permitted slavery to expand westward as part of the price for negotiating the Constitution, even in return for the Northwest Ordinance, it seems very likely that Northern Anti-Federalists, particularly in Massachusetts, would have been strengthened quite significantly.

In the final analysis, it is very likely that a western bargain involving the Northwest Ordinance and southwestern settlement (which entailed slavery expansion) occurred, no matter what conclusion one ultimately reaches about its precise form. Agreement on the formal Constitution was made possible only by an informal sectional bargain on economic development that began the process of dividing the West. It was this sectional bargain that permitted delegates to escape the "zero-sum" game that allocating political authority at the national level would otherwise have been and to reach agreement on the Constitution itself, while finessing the issue of western slavery expansion to help the Constitution survive ratification.

Gouverneur Morris was also able to add a provision regarding the government of territories to the Constitution (art. 4, sec. 3, par. 2). The territories provision was broadly worded, but its scope was not debated by the Convention. If, as many believed, specific constitutional authority was needed to authorize congressional governance of territories, no other provision of the Constitution could have authorized congressional ratification of the Northwest Ordinance, however.[91] When the ordinance was ratified by Congress, no one seems to have had any doubts about Congress's power to authorize it, and it was not challenged by Madison or other congressmen.

The ambiguity of the territories clause later contributed to a broader constitutional problem regarding slavery. There is a historiographic consensus that in 1787, where it already existed slavery was generally considered to be a local legal and political problem that should be dealt with by the states under state law.[92] But were slaves property solely under state law, or were they also "federal" property, protected by the Constitution? This issue was the same one that underlay the *Somerset* decision, transposed from an imperial context into the American federal context. The issue was complicated by the territories clause, which contributed to a powerful contradiction within the Constitution regarding the legal nature of slavery.

One significant provision of the Constitution (the fugitive slave clause, art. 4, sec. 2, discussed below) conceptualized slaves as conventional or "artificial" property created by and subject only to state law. Under this conventional-property concept of slavery, if a slave left a slave state and went to a free state, the slave state lost power over her, and if the state followed the principles of *Somerset* discussed in chapter 1, the slave became free. To prevent this, in the fugitive slave clause, the Constitution employed federal authority to negate the effects that state abolition laws could otherwise have had on fugitives.

In contrast, the three-fifths clause deemed slaves a form of wealth—legitimate, protected property within the Republic. In light of the three-fifths clause (and shortly afterwards, the Fifth Amendment), many Southern citizens believed that they had the right to move slaves—their property—into new territories absent a bar on such action. The Northwest Ordinance itself was premised on the view that slavery would be legal in a newly settled federal territory unless it was banned there. Yet under the territories clause, in a territory a slave's status would be derived from federal law, not from state law, and that status would be protected by the Constitution. The Constitution, in other words, was equivocal about the legal nature of slave property within the Republic.

The broad language of the new-state admission and territories provisions meant that future political limits on slavery expansion would be matters for future Congresses. The Northern states had bargained for language that conceivably might provide them with the power to limit future western expansion involving slavery.[93] But these powers, though broad on their face, could be exercised practically only if free states could muster both the political will and the political power to challenge slavery's expansion much later in the face of intervening settlement and arguments about vested rights of settlers, and even then only if courts were receptive to their constitutional position on congressional power. All in all, the North's political bargain left it faced with a formidable challenge in controlling western slavery expansion.

In 1787, it was anticipated that demographic and commercial market realities would dictate that large areas of the South and West would become part of a southwestern "sphere of influence."[94] The histories of the Northwest Ordinance and the Constitution demonstrate that Northern and mid-Atlantic state delegates were willing to run the risk that future Congresses would countenance the expansion of slavery into those areas. By 1792, just that process had begun, when Kentucky was admitted to the Union as a slave state, an event that was considered likely to occur when the Constitution was written.

THE FUGITIVE SLAVE CLAUSE

The lack of controversy surrounding the adoption of the Constitution's fugitive slave provision has led some historians to view its adoption as dependent on larger issues and others to think that the provision was later

misinterpreted. Paul Finkelman notes that the clause received little debate, and was less important than other slavery provisions. He concludes that the Constitution probably would have been accepted without the fugitive slave provision.[95] Historian William Wiecek sees the clause's "easy acceptance" as a result of its proposal soon after the Convention's commerce-power–slave-import bargain.[96] Another historian concludes that the fugitive slave provision was uncontroversial at the time of its adoption because it was not intended as a grant of power to Congress to limit state authority, but rather was a "vague and passive" "declaratory limitation" on state authority that would operate exclusively through interstate comity, not through federal law.[97]

But the development of a harmonized law of fugitive slavery and interstate slave movement between 1770 and 1787 discussed in chapter 2 supports a different view of the clause's significance. Acceptance of that provision was neither a constitutional concession nor a compromise by Northern states. The unanimity about the clause at the Convention signified not its lack of importance or misunderstandings about it, but rather, agreement on an issue important for differing reasons to various states. The fugitive slave clause was born without controversy because it was a consensus means of controlling fugitive slavery that served the congruent sociopolitical interests of various states.

An important preconstitutional context for understanding the Constitution's treatment of fugitive slavery was the creation of new territories, which occasioned slavery debates from 1784 onward. The Northwest Ordinance reflected the political reality that had emerged from consideration of territorial slavery during the years from 1785 onward: slavery could not be barred in the new territory without a companion provision protecting slave states against fugitive slavery.[98] The ordinance provided that fugitive slaves who escaped into the territory could be "lawfully reclaimed and conveyed to" their owners.[99] Thus, throughout the massive new jurisdiction created by the ordinance, slave property created by state law and owners' interests in bound labor were given confederal legal protection.[100]

In adopting article 6 and its fugitive slave proviso, the Continental Congress accepted the recommendations of a committee with a Southern majority whose most prominent member was Richard Henry Lee of Virginia. Lee had also been directly involved in the drafting of the Articles of Confederation provisions that protected slave property against the operation of the principles of the *Somerset* decision and the post-1776 legal authority of states to ban slavery. Slave states deemed the ordinance's fugitive

slave proviso an essential means of controlling slavery within slave states by preventing slave flight to a new "territorial magnet."

The ordinance's fugitive slavery provision applied to the Northwest Territory the status quo ante on intercolonial slave movement under English law prior to *Somerset v. Stewart*, preventing *Somerset*'s application to fugitives there. As to fugitives, it rejected the core principle of *Somerset* that slaves were property only within slave jurisdictions.[101] The Northern states acquiesced to slaveowner protection against fugitive slaves, though it was embedded in what some historians see as the ordinance's ambiguous antislavery provision.[102]

On August 28, 1787, when delegates were well aware that the Northwest Ordinance had been adopted six weeks earlier, a fugitive slave provision was first proposed to the Constitutional Convention. The initial proposal seems to have been prompted by Convention consideration of the Constitution's privileges and immunities (P&I) clause. Many of the delegates would have been familiar with the detailed Articles of Confederation P&I provision. By comparison, the Constitution's brief proposed P&I clause contained important ambiguities.

As is well known, during consideration of the P&I clause, General Pinckney of South Carolina objected to it on the ground that it should contain "some provision" "in favor of property in slaves."[103] In this context, Pinckney would have been referring to the protection of slaveowners' property not in their own states, but in states other than their state of residence. Cooler heads prevailed, a prudent course given the likelihood that clarification of the ambiguous P&I clause would have precipitated lengthy disputes over matters such as what rights were to be accorded to free blacks by the states (judging from the earlier vigorous and extensive Continental Congress debates over that issue in connection with the Articles P&I clause). No effort was made to amend the proposed P&I clause, though delegates like General Pinckney and George Mason apparently realized that its ambiguous language omitted slavery protections important to them that had been conferred by the Articles P&I clause. In his proposed changes to the Committee of Style report (draft of the Constitution), Mason noted that it should, but did not, include provisions protecting the removal of property from one state to another—a key provision of the Articles P&I clause from a slave state perspective.[104]

Immediately after General Pinckney had raised the issue of protection for slave property, the Convention turned to consideration of the Constitution's fugitives-from-justice provision. Delegates Pierce Butler and

Charles Pinckney of South Carolina moved to add to it a provision that "slaves and servants to be delivered up like criminals." Given the context, it is reasonable to view their proposal as an indirect means to achieve General Pinckney's objective of protecting slaveowners while avoiding the complications that would have been entailed in a debate over the precise constitutional nature of "property in slaves" or other issues embedded in the P&I clause. It was met with the objection by James Wilson of Pennsylvania, a slavery opponent, that state and local public authorities in receiving states should not have to bear the costs of slave reclamation.[105] Wilson's remarks suggested that he would be willing to accept a private right of recapture (like that preserved by Pennsylvania's gradual abolition law) that involved no public expense. The Butler-Pinckney amendment was recast to avoid Wilson's objection, and adopted unanimously (one report says by a vote of 11–0) the next day without discussion.[106]

Madison recorded in his notes that the word "legally," which had appeared in the Committee of Style draft of the fugitive slave clause just before "held to service or labour," was later dropped to avoid what some delegates thought was the implication that the word "legally" meant that the delegates accepted the morality of slavery.[107] The Convention debates indicate that the delegates he was describing were probably not those from slave states, and James Iredell later told the North Carolina ratifying convention that it was Northern delegates who did not want the word "slave" used.[108] Why did representatives of the slave states agree to drop the word "legally"? Aside from political accommodation, another possible motive for agreeing to the change may actually have been to tighten the effects of the provision. We can see this by comparing the Northwest Ordinance's provision for fugitive slave rendition to the Constitution's provision.

The Northwest Ordinance's repeated use of the word "lawfully" in its fugitive slave proviso created a significant ambiguity and thus the potential for extensive antislavery litigation and interstate disputes. This ambiguity occurred because the use of the word "lawfully" created a conflict-of-laws problem by permitting a court in a receiving state (to which a fugitive had fled) to decide whether the enslavement in the state of origin was lawful in the first instance, as well as to decide whether and how the laws of the receiving state would permit a slave to be returned to the state of origin. The ordinance also used permissive ("may") rather than mandatory ("shall") language. In short, by envisioning a fugitive-rendition system based on interjurisdictional comity (voluntary cooperation between states) and local law principles, the ordinance exacerbated the conflict-of-laws problem in-

herent in creating fugitive slave controls in a federal system. It was a recipe for chronic state-territorial conflicts over fugitive slaves.

Compared with the fugitive slave proviso of the ordinance, the language of the fugitive slave clause was substantially tightened to make it mandatory that the receiving state deliver up a fugitive without making any judgment about the lawfulness of the original enslavement (under the law of either state) and without regard to whether the law of the receiving state permitted fugitive rendition.[109] As legal historian Harold Horowitz concluded, as to fugitives the clause explicitly reversed the *Somerset* rule that the status of a slave was to be determined solely by the law of the jurisdiction where the slave was found, instead requiring that the status of the slave be determined by the law of the state of the slave's origin.[110] This tightening of the clause's language would prevent future litigation similar to *Pirate v. Dalby* by eliminating conflict-of-laws problems.

But agreement on the wording of the clause does not explain why Northern states accepted its substance. Some historians conclude that Northern states accepted the fugitive slave clause either because it was stated in the passive voice, permitting states to negotiate the terms of fugitive slave return, or because it was "declaratory" only (i.e., did not authorize federal legislation to enforce its provisions).[111] These conclusions are anachronistic.

A draft of the fugitive slave clause found in the files of Convention delegate Pierce Butler of South Carolina explicitly provided for implementation of the clause's provisions by state legislatures.[112] That proposal's existence indicates that Convention delegates (about half of whom were lawyers) were aware that state implementation was one possible means of implementing the clause. In addition, earlier legal developments including *Somerset* itself, the 1774 Rhode Island import-ban statute, and *Pirate* make it very likely that many contemporary lawyer-politicians understood that creating a fugitive slave provision in a federal system where slavery was grounded on local law would necessarily create conflict-of-laws problems about which jurisdiction's law would govern the status of fugitives and slave rendition. Yet no one chose to propose to the Convention either pure state-law implementation of the fugitive slave clause, or "receiving state" legal authority to decide fugitive status, as a means of addressing such conflicts.

At the same time, though, Congress was not explicitly given implementation power by the clause, unlike several other parts of article 4. That silence was later relied on to claim that the Convention intended to deny

Congress power to implement the clause. But during the adoption of the Fugitive Slave Act of 1793, no one contended that Congress lacked power to adopt it, although attacks on congressional power to legislate on particular subjects under the Constitution were common at the time.[113] In the early Republic, congressional power to implement the clause seems to have been widely accepted, and served the common interest of the states in controlling fugitives without chronic interstate disputes.

From the slave state Federalist perspective, the fugitive slave clause was a substantial gain. Slave state insistence from 1785 onward on including a fugitive slave clause in the Northwest Ordinance suggests that given their prior experience with disruption from fugitive slavery and the progress by 1787 of Northern state abolition, the slave states would have been reluctant, perhaps even unwilling, to agree to the Constitution without obtaining what they deemed adequate federal legal protection against fugitive slave flight. Inclusion of the clause meant that the slave states could avoid the future creation of any significant northern free jurisdiction "magnets" for fugitive slaves, just as they had insisted that that problem be avoided for the Northwest Territory. At the same time, the clause added legitimacy to their control of slave property by establishing direct constitutional legal protection for it.[114] Fortunately, at the time Northern states undergoing abolition also had an interest in controlling fugitives. As chapter 2 shows, for them the clause served several purposes: it prevented an influx of runaway slaves whose presence white taxpayer majorities often either objected to on racist grounds or believed would result in unwanted social costs such as increased poor-relief taxes and discouragement of white immigration.

THE SLAVERY DEBATE IN RATIFYING CONVENTIONS

The Philadelphia Convention was conducted in secret, and most of its major participants declined to publish their notes of debates for many years. Even the Convention's basic records were not made public until 1819.[115] But despite this, ratification debates shed important light on the climate of public opinion about slavery as a moral and political problem in forming the Union.

Antislavery sentiment appears to have played a minor role in the politics of constitutional ratification. There is no substantial evidence that any significant number of delegates voted against ratification solely or even

primarily as a result of opposition to the Constitution's provisions regarding slavery. One of the few exceptions was a Quaker minister, James Neal, a delegate to the Massachusetts ratification convention who announced he would vote against the Constitution based on its slavery provisions.[116] All eight Quaker delegates to the Pennsylvania ratifying convention reportedly voted for the Constitution. It seems likely from the available evidence that a substantial majority of Quakers there and in other states, who would have been expected to be the strongest opponents to the slavery provisions of the Constitution, believed that ratification was desirable even though the slavery provisions were objectionable; some quite probably saw the Constitution's slavery provisions as an improvement over the Articles of Confederation on that issue.[117]

As might be expected given the very limited Northern public support for abolition efforts outside the North, though there was debate over slavery in the Northern ratifying conventions, it was a relatively minor part of the overall debate.[118] The character of the Northern ratifying convention debate regarding slavery was also quite significant. Two issues arose repeatedly during those debates: the three-fifths clause or federal ratio, and the provisions permitting slave imports until 1808.[119]

The principal focus of moral attack in the Northern conventions was the slave-importation provisions. Some opponents attacked the morality of slavery, of the slave trade, or of both. But one significant moral claim was absent from that debate—leading Anti-Federalists chose not to attack the Convention's decision to trade weakened slave-import limits for enhanced commerce powers. Despite the fact that it was well known to Convention delegates that there had been a commerce-power–slave-import bargain, and despite vociferous attacks on that bargain by prominent delegates Luther Martin of Maryland and George Mason of Virginia circulated in at least those two states, this allegation was not used as a basis for the attack on the slave-import provision in Northern ratifying conventions.

There is evidence that the Anti-Federalists chose not to challenge the commerce-power–slave-trade bargain in the Northern states. When George Mason's objections to the Constitution were originally supplied to Northern newspapers by Anti-Federalists, they omitted Mason's attack on the commerce power. More than twenty newspapers in New England and mid-Atlantic states printed his objections in that incomplete form.[120] The omission was discovered by Federalists, and Mason's attack on the commerce power was then printed in a few newspapers. But contemporaries thought the political implications of the earlier omission by Anti-

Federalists were clear. As one of them wrote to the Massachusetts *Centinel*: "The copy of the objections of Col. Mason to the federal Constitution—which I sent to you a few weeks since, I obtained from a certain antifederal character, in this city—who, it since appears, like a true antifederalist, omitted one objection, which was the principal in Col. Mason's mind—and which he well knew, would, if published in the northern States, be an inducement to them to accept of the Constitution. I shall only remark on this his Machiavelian conduct—that the enemies to the Federal plan, ought no longer to complain of deception."[121] Federalist Philadelphia delegate Oliver Ellsworth of Connecticut attacked the Anti-Federalists for failing to repeat George Mason's charges of a deal on the commerce power issue in states north of the Mason-Dixon line.[122] James Madison wrote to George Washington caustically observing that through an Anti-Federalist "trick" of a sort that is "not uncommon," Mason's attack had been deliberately "mutilated of that which pointed at the regulation of Commerce" when published in Boston.[123] Both Ellsworth and Madison assumed in making their criticisms that northern support for the Constitution's expanded majority-vote commerce powers would outweigh any concerns about the twenty-year delay in limiting slave imports. At the same time, though, Northern Federalists also chose not to defend the slave-import provisions on the basis that they had successfully traded loosening these provisions for broadened congressional commerce powers to benefit the Northern states.

Both Northern Federalists and Anti-Federalists, in other words, understood that they risked losing some support from a complete, honest account of the Convention decisions on the commerce-power–slave-trade issue that would offset, and might even outweigh, any gains that they would make by providing such an account.[124] Thus, far from being a truly secret compromise that was hidden from the general public and Anti-Federalists at the time, the commerce-power–slave-trade clause deal was an "open secret," hidden from the Northern general public by independent parallel decisions of the Northern elite combatants, since neither side thought it had anything to gain from raising the issue of that compromise. It therefore seems unlikely that the revelation of this "dirty compromise" in the North would have changed the outcome of ratification debates.[125]

Anti-Federalist unwillingness to attack the commerce-power–slave-import agreement also strongly supports the inference that in 1787, Northern Convention delegates had the necessary freedom to act from the realpolitik, rent-seeking perspective that permitted them to make that bargain

precisely because Northern support for national government abolition efforts was limited. Antislavery sentiment in the North was motivated by a variety of factors, including Revolution principles, morality, racism, and labor economics, but as chapter 2 showed, it rested ultimately on the political premises that Northern citizens were concerned principally about local abolition, and that they would not pay taxes or give up a share of national resources to finance abolition at home or anywhere else. The Northern ratification debates contain no suggestion that the Northern states should have contributed financially or devoted any national resources to the costs of emancipating Southern slaves. These fundamental limitations of antislavery sentiment meant that it was not powerful enough to dictate that Northern delegates decline an otherwise advantageous and very desirable political trade on the commerce power.

The apparent judgment made by Northern state delegates in Philadelphia that only limited restrictions on slavery were politically necessary to obtain ratification of the Constitution was borne out during ratification. This allows us to conclude as well that the threats of disunion made by South Carolina and Georgia over the slave-import issue were politically irrelevant to Northern Convention political strategy—the Northern states were never going to put them to the test by insisting on a slave-import cutoff when public support for such a cutoff in the North was relatively weak to begin with.[126]

To the contrary, Northern Federalists challenged the idea that Southern abolition could or should have occurred through the Constitution, relying on abolition's high economic and social costs to the South. The Connecticut Landholder [Oliver Ellsworth] said: "[S]laves are so numerous in the Southern states, should an emancipation take place, they will be undone. . . ."[127] While they sympathized with their opponents' desire to have slaves emancipated, "even in this laudible pursuit, we ought to temper the feelings of humanity with political wisdom. Great numbers of slaves becoming citizens, might be burdensome and dangerous to the Public. These inconveniences ought to be regarded."[128]

Some Massachusetts delegates, undeterred by such prudential arguments, directly attacked the morality of slavery and the slave trade. New England Anti-Federalists argued that the guilt of slave imports should be imputed to the Northern states since the Constitution allowed the continuation of the trade. One variant of this imputed guilt argument was an Anti-Federalist argument that the Constitution obligated states to defend each other, and that states such as Massachusetts would therefore have to

help suppress slave rebellions.[129] General Samuel Thompson advocated refusal to confederate because of slavery, and claimed that the Constitution was a Southern "contrivance" with George Washington the now-tarnished slaveholder at its head. James Neal told the delegates that "making merchandize of men" when they allowed the slave trade prevented him from supporting the Constitution.[130] Supporters of the Constitution responded that the slave trade and slavery were deplorable, but rejected the imputed guilt argument and argued that it was sufficient that the Constitution was an improvement over the Articles of Confederation on slavery.

Northern Federalists argued that Southern slavery was not a moral problem for the North for several reasons. Most importantly, "their [the South's] consciences are their own, tho' their wealth and strength be blended with ours."[131] Preventing the evil behavior of people in other states in continuing slavery did not become a moral obligation of northern citizens when they agreed to form a political and commercial union intended to combine national "wealth" and "strength." Others pointed out that use of "imputed guilt" as a reason not to confederate was of "late date," because it had not been applied to Great Britain before the Revolution despite Great Britain's support for the slave trade, and it was not urged against alliance with France, though France had had the same slavery policy as England. If the imputed guilt argument were taken seriously, Massachusetts could not confederate with New York or Connecticut, which still permitted slavery.[132] Similarly, supporters of the federal ratio attacked their opponents' arguments on representation by arguing that even though slavery was "repugnant to our notions of justice," the fact that others were unjust in their "internal concerns" was not reason to refuse to confederate with them.[133]

The argument that the Union was a political union prevailed during Northern ratification. Constitution supporters generally were willing to accept what many agreed was Southern immorality as a local moral issue and to regard it as part of the price of union. The imputed guilt argument was answered seriously by Federalists such as General William Heath in Massachusetts. Heath told the Convention: "Each State is sovereign and independent to a certain degree, and they have a right, and will regulate their internal affairs, as to themselves appears proper; and shall we refuse to eat, or to drink, or to be united, with those who do not think, or act, just as we do, surely not. 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, a restriction is laid on the federal government, which could not

be avoided and a union take place . . ."[134] The imputed-guilt argument does not appear to have swayed any previously supportive delegates against the Constitution. Federalists also sought to deflect the moral argument by placing it in the context of overriding political considerations. Widely circulated pro-Constitution essays pointed out that the objections to the Constitution made by George Mason, a large slaveowner, were not moral but prudential or self-interested. They argued that Constitution supporters shared Mason's reservations, and had made the best slavery agreement possible by obtaining power to cut off imports after twenty years.[135] In sum, Federalists confidently advanced a broad array of arguments against the idea that where slavery was concerned, the Union must be a moral as well as a political union. Many northern citizens accepted the idea that federalism necessarily entailed a willingness to tolerate evil conduct by citizens in other states.

The debates at the Northern ratifying conventions mirrored the political approach taken to slavery by Northern delegates at the Constitutional Convention. The focus of ratification debates over slavery was largely confined—in the minds of the overwhelming majority of delegates, whether supporters or opponents of the Constitution—to how Northern political and economic interests were affected by the slavery provisions of the Constitution. Northern supporters argued that the provisions that protected slavery (or did not restrict it enough) were a necessary evil and a reasonable price to pay for union, and adequately protected the North's political and financial interests. Most Northern opponents of the Constitution agreed with this framing of the issues even if they disagreed with the conclusion. The exception to this statement seems to have been the debate over continued slave imports, where there was considerably more moral outrage expressed about the evils of the slave trade, but even there, appeals to the idea that slavery was local and to the idea of a purely political union prevailed.

At Southern ratifying conventions, supporters of the Constitution argued strenuously that the Constitution protected slavery, in part because the Constitution did not authorize the federal government to take action against it. The idea that the federal government would have the power to control slavery beyond cutting off slave imports received relatively little discussion in most Southern conventions. Anti-Federalist arguments claiming Congress had been given power to end slavery made by Patrick Henry and others were rejected by slave state ratifying conventions. In Virginia, Federalists attacked as fanciful the assertions of Anti-Federalists

that the Constitution was insufficiently protective of slavery, claims that relied on provisions such as the "general welfare" clause and the "necessary and proper" clause.[136]

Southern Federalists explained that the few areas in which concessions had been made on slavery—such as terminology, and the 1808 cutoff date for slave imports—were politically inconsequential, since the South would not need to agree to make any changes in policy even after 1808. They argued that the minor limits on slavery were necessary concessions to "prejudices" on the part of Northern citizens that they had made to Northern delegates in order to assist ratification of the Constitution. There is no indication that there was any slave state where lingering concerns about the possible adverse effects of the Constitution on slavery or its westward expansion significantly increased voting against the Constitution. In sum, the predominant Southern view during ratification was that slavery had received a large measure of long-term protection in the Constitution.

At the same time, in Northern ratifying conventions delegates in major states such as Pennsylvania and Massachusetts were being led to believe that Congress could act to limit slavery's expansion before 1808 in new states and extirpate it after that by prohibiting slave imports. James Wilson told delegates to the Pennsylvania ratifying convention that the Constitution laid the foundation for "banishing slavery out of this country" after 1808 by eliminating the slave trade, and by empowering Congress to control slavery in new states before then, so that "slavery will never be introduced among them." Wilson's broad description of the Constitution's powers over slavery might have increased doubts about ratification in the slave states if they had heard it, but it is significant that he did not explicitly assert that Congress had power to eliminate slavery in existing states.[137]

CONCLUSIONS FOR PART 2

James Madison thought that the Constitution should be formally neutral on slavery. There is no provision in which the Constitution explicitly sanctions slavery as a permanent federal legal institution.[138] However, as the Convention debates on slavery suggest, most delegates may also have understood that one important reason why the terminology of slavery was being avoided in the Constitution was to protect it during northern ratification, precisely because various parts of it recognized, protected, or were premised on the long-term existence of the institution of slavery.

Whatever the Convention's "scruples against admitting the term 'Slaves' into the Instrument" may have been, delegates saw many of their decisions as having direct implications for the advancement or retardation of the institution of slavery.[139] The Constitution's formal neutrality on slavery had very limited utility in light of the effects of its provisions, which provided strong political and economic protection for slavery and its expansion, as well as some (less important) legal protection for it. Those provisions meant that slavery became a recognized de jure state—and, indeed, de facto sectional—institution protected by—and, more importantly, usually from—state and national authority.

After reading the copy of *Notes on Virginia* that Thomas Jefferson had sent to him, Secretary of Congress Charles Thomson had written presciently to Jefferson in 1785 that slavery was a cancer that needed to be cut out of the body politic: "It grieves me to the soul that there should be such just grounds for your apprehensions respecting the irritation that will be produced in the southern states by what you have said of slavery [in the *Notes on Virginia*]. However I would not have you discouraged. This is a cancer that we must get rid of. It is a blot on our character that must be wiped out. If it cannot be done by religion, reason & philosophy, confident I am that it will one day be by blood."[140] The Convention chose instead to obtain the allegiance of the slave states by protecting and enhancing the political and economic prospects of slavery as an institution for a generation or more.

As political scientist Mark Graber concludes, based on his analysis of the Constitution's text and the politics of its drafting and ratification, "slavery was not placed 'in the course of ultimate extinction' in 1787."[141] To the contrary, the history presented here shows that far from being set "on a course of ultimate extinction," slavery emerged from the Convention not only intact, but with a constitutionally protected political and legal path for its growth, a path widened by critically important sectional economic-development bargains. The result was a slaveholders' union. The Constitution's formal and informal protections for slavery resembled a broad and well-built canal through which a growing river of slave labor could flow unimpeded. The expansion of slavery would be driven by the growth of slave state economies and western settlement unless and until public opinion in Northern states altered to the point where the Northern states were willing to sacrifice politically to block it.

The political necessity to accommodate slavery in the Constitution was due in part to slavery's sectional strength, but it was also due in part to the

lack of support for Southern slavery's containment by Northern taxpayer majorities. The segment of American society in 1787 that had the largest degree of political and economic freedom of action on slavery—the Northern white majority—saw the containment and eventual abolition of Southern slavery as a problem almost wholly external to their region's interests and concerns.[142] Southern slavery containment or abolition was an abstract goal, one whose achievement was not their responsibility—"their consciences are their own"—and one that could legitimately be sacrificed for short-run regional advantage. Northern willingness to leave open to future political action certain key issues intimately related to slavery's dynamism, such as imports and the status of slavery in new territories and states, opened wide the door to Southern slavery's expansion.

The Convention forged an extraconstitutional sectional "side bargain" on economic-development issues to benefit the desire of both major sections for maximum economic development. The historical evidence makes it reasonably certain that a side bargain occurred; the more difficult question is its precise nature. But the fundamental implication of both alternative views of that bargain discussed in this chapter is that the western expansion of slavery was a central consequence. Union was purchased by dividing up national resources and deferring controversy over slavery to a later generation, an approach to politics commonly referred to today as "intergenerational transfer."

Ironically, slaveholders like James Madison and George Mason, both of whom had great experience with slavery as a political and economic institution, told the Northern delegates that in extending the slave trade they were deferring an inescapable problem. Northern Federalists either did not appreciate or chose not to heed such warnings. As long as Northern and Southern states could both expand geographically and economically without interfering with each other's expansion, a change in Northern public opinion on slavery would not occur, and slavery would be able to continue to expand.

The Constitution's text and structure were understood by contemporaries to place restraints on federal authority over slavery and emancipation in existing states, and were not "open-ended" on slavery as some argue.[143] The Constitution's legal protections for slavery included its structure as a government of limited powers. During ratification, Northern claims that the Constitution could enable action against slavery typically were considerably more limited in scope than they were in the nineteenth century, and centered around the 1808 slave-trade prohibition, and control of slav-

ery in new states. The slave-trade prohibition was regarded as practically unimportant in the slave states, but was used in the Northern states to help advocate the Constitution as an improvement over the Articles of Confederation in addressing slavery. The ease with which the Constitution's fugitive slave clause was adopted and the very limited controversy it engendered during ratification reflected the congruent interests of Northern and Southern states in controlling slavery. Congress's nominal constitutional power to control slavery in new states was of dubious legal and political value from 1787 forward, for reasons that will become clear in subsequent chapters.

It has been suggested that "the framers self-consciously rejected more explicit textual restraints on federal power over slavery," based on the defeat of delegate Roger Sherman's proposal that "no state shall without its consent be affected in its internal police" (and a similar earlier motion), but for several reasons, no inference can usefully drawn about slavery from that proposal's rejection.[144] It has also been suggested that "the constitutional text provides little support for subsequent claims that Congress had no power to emancipate slaves," which is true if the text is read without any historical context.[145] But here historical context is essential. Anti-Federalist textual arguments to the effect that Congress could emancipate all slaves, premised on "bootstrapping" interpretations of federal power under provisions such as the necessary and proper clause, were apparently not advanced by Federalists in Northern conventions and were rejected at Southern ratifying conventions and, more importantly, in the 1790 congressional debates discussed in chapter 5.

In 1787, French chargé d'affaires Louis-Guillaume Otto described post–Revolutionary War American politics as commercial rivalry writ large: "Their [American] politics, which confines itself to their commercial speculations, nevertheless inspires among them reciprocal aversion and jealousy, passions which were absorbed during the war by the enthusiasm for liberty and independence, but which have begun to recover all their force."[146] Otto's description applied well to the Constitution's treatment of slavery, as to which the Constitution resembled a sectional commercial treaty in important ways, including its federal representation structure, its protection for slave state economies, its commerce-power–slave-import agreement and its western economic-development bargain.

George Washington's observations in October 1787 on the Constitution's commerce power show that he understood that successful governance of the Union required more than seeking mutual benefit under

such a commercial treaty. Writing to a political confidant, Washington answered George Mason's objections to congressional majority control of the federal commerce power. He began by observing that a regional veto of the kind Mason sought was politically unworkable in general, and then added that he thought sectional reciprocity would govern the use of the majority-vote commerce power and thus limit its abuse—"there must be reciprocity or no Union."[147] Washington did not say what would lead to continued reciprocity rather than eventual disunion.

As is well-known, James Madison's fervent advocacy of the Constitution as a workable solution to the country's political difficulties—which he thought were primarily sectional in nature, and stemmed from the skewed geographic distribution of slave economies—rested on certain fundamental conclusions about politics. He argued in *Federalist* 10 that a continental republic that was a solely political union governed by clashing interest groups could endure and preserve freedom. He (and Jefferson) also contended that the Constitution would enable America to escape the dismal Old World political science of Montesquieu and others that viewed liberty and empire as permanent enemies and sovereignty as indivisible. The Constitution's attempt through its federalism to prevent sectional differences from destroying union rested on Madison's political premises. But as we will see, the sectional divisions it sought to control did not disappear as a result; they were instead masked by the rise of Jeffersonian Republicanism and the massive national expansion that occurred during the next several decades until the Missouri controversy erupted and Madison's views were put to a stern test.

In drafting and ratifying the Constitution, the Northern states were "giving a hostage to fortune" where slavery was concerned, to use Donald Robinson's fine metaphor.[148] When the Northern states sacrificed short-run control over slavery's expansion in return for short-term political gain and the hope that a future generation might gain the ability to control slavery politically, they struck a losing bargain that became a long-term covenant with slavery in 1820. A major part of the true price of union was the expansion of slavery, not just its protection where it existed.

The most important broad conclusion supported by this study of the Philadelphia Convention's work is that the delegates could not have avoided founding a slaveholders' union if they wanted to create a central government that had a federal structure and also wanted to confer on it broad powers over commerce, western expansion, taxation, and the military. Each section had considerable leeway to withhold its consent from the

Constitution unless its central political goals were achieved and its principal concerns about the powers of the new Union were satisfied. In the case of the slave states, such satisfaction meant creating a government capable of exerting strong fiscal and military power that also provided long-term political, economic, and legal protection for slavery within an expanding Southern "sphere of influence." Founding a slaveholders' union was the price to be paid for designing a federal republic capable of creating an American continental empire in the face of persistent sectional divisions. The federal republic created by the Constitution brilliantly harnessed divergent interests together to strengthen the Union and create its empire, but it was also the opening act of a great national tragedy.

PART THREE

Slavery in the New Nation

5

FROM CONSTITUTION TO REPUBLICAN EMPIRE

In a series of 1790 letters, George Washington and his confidant David Stuart discussed the political implications of that year's venomous congressional debate on federal power over slavery. Stuart reported that many slaveholding Virginians were "much enraged" that Congress had debated slavery at all, "taking up a subject which they were precluded by the Constitution from medling with for the present." Based on Federalists' statements during the bitter Virginia ratification contest, they had believed that the slavery issue had been resolved in their favor and was closed until 1808. Fears of possible federal action against slavery were being used by Anti-Federalists to continue agitation against the Constitution. Stuart said that the collapse in slave prices caused by the debate "embittered" opponents "much more against it."[1] And the 1790 debate had still broader implications.

Angered by the Northern states' expansive antislavery position in the congressional debate, other Virginians vigorously assaulted the Northwest Ordinance's bar on slavery in attacks reprinted in Northern newspapers. "Virginia" argued that the ordinance was a piece of sectional legislation that anticompetitively reserved massive federal lands for Northern citizens.[2] A writer in New York saw the northern initiation of a congressional debate on slavery in 1790 as a sectionally motivated effort to create a "formidable union" to "destroy the southern states" by limiting Southern population, thus giving the "eastern states . . . the balance of power and votes in Congress. . . ."[3] As these strongly felt sentiments expressed in Virginia and New York suggest, the political stakes were high—both

the ordinance and the Constitution itself were being placed at risk by the congressional debate.

Washington nevertheless confidently assured Stuart that the congressional debate was not only over, but that slavery would not arise again in any important way as a political issue until 1808 or later. He wrote Stuart, "The memorial of the Quakers (and a very *malapropos* one it was) has at length been put to sleep, and will scarcely awake before the year 1808."[4] He concluded that slaveholders had gotten "as favorable" a decision "as the proprietors of this species of property could well have expected, considering the great dereliction to slavery in a large part of this Union."[5] This chapter explores why Washington's predictions proved so accurate by examining key aspects of the political history of slavery in the new Republic during the 1790s and early 1800s. It considers the way in which the 1790 debate became a means for explicitly narrowing federal authority over slavery; the broad national support for adoption of the Fugitive Slave Act of 1793; the dismal fate of antislavery efforts in the slave states; and the politics of congressional disputes over the expansion of slavery into new states and territories, particularly the Louisiana Purchase, in the years prior to the 1808 slave-import ban.

Most historians agree that slavery expanded between 1790 and 1808 with the affirmative support or acquiescence of the federal government.[6] Northern resistance to the admission of slave states prior to 1800 was "weak and largely unconnected" to slavery.[7] This conclusion might reasonably be extended to the end of 1817, when Mississippi was admitted. The narrow federal laws on slavery enacted before 1808, such as those limiting direct American involvement in the slave trade, imposed minor limits on the growth of slavery that were ineffectual in their design, and often unenforceable in any event.[8] Disputes over territorial slavery provoked minor Northern opposition, often focused as much or more on controlling the danger of slave rebellion as on slavery itself. Even the 1804 legislation for the government of Louisiana Territory, which imposed broad limits on slave imports to that territory, was repealed before it had any practical effect.[9] The 1804 statute was the high-water mark of federal efforts during this period.[10]

Even in the Northwest Territory, where slavery was formally prohibited by the Northwest Ordinance, the federal government chose to protect slave property where it existed when the ordinance was adopted. Moreover, at least through 1808 the federal government permitted expansion of de facto slaveholding regimes in major parts of the Northwest Territory,

including what became the state of Indiana.[11] In other parts of the Northwest Territory such as Ohio and Illinois, the legalization of slavery was heavily contested during statehood debates.[12]

Slavery's development without significant federal intervention meant that by 1808, there were more than one million slaves in the United States, an increase of more than 50 percent over 1790 levels, despite slavery's sharp decline in the Northern states. By 1808, American slavery had expanded into two additional states, Kentucky and Tennessee, and into massive new areas of federal territory obtained from foreign governments, including the Mississippi Territory, Orleans Territory, and Louisiana Territory. By 1810, more than 16 percent of the total slave population of the United States lived in this new trans-Appalachian West, and slaves constituted more than 20 percent of that area's population of about eight hundred thousand people.[13] Slavery had become an integral southwestern institution by 1808, its growth more than matching the immense flood of westward white settlement.

Slavery-related developments during this period shattered the Revolutionary-era dreams of Northern abolitionists about the eventual withering away of slavery. Perhaps the crowning blow to abolitionist hopes was South Carolina's 1803 voluntary reopening of the slave trade, which Congress proved unable (or unwilling) to prevent from serving as a major source of slave supply to the Louisiana Territory.[14] By the end of the period, Northern antislavery forces were left only with the hope that prohibition of slave imports after January 1, 1808, would control the burgeoning slave population.

What explains the fact that antislavery goals faced repeated frustration and outright defeat at the national level just as slavery began its fatal westward expansion? Historians often point to the new nation's political and economic weakness as a principal explanation. In their view, the imperatives of forging and maintaining national unity in a perilous world dictated that the divisive issue of controlling slavery be shunted away from the political agenda.[15] They view the United States as an "over-extended republic" during this period. One important price paid for overextension was the country's inability to control slavery in the face of insistent local demands to permit its expansion into new states and territories.[16]

Some historians argue that most choices made about slavery in the 1790s were dictated by preexisting circumstances such as the fact that slavery already existed in a particular area. Popular sovereignty—local choice on slavery—was a "fact of life" on the frontier, "whether installed as offi-

cial policy or not."[17] Other historians account for Northern indifference to slavery expansion during this period by arguing that Northern success in abolishing slavery there, and the clear prospect of abolishing the slave trade, provided a basis for Northern optimism that slavery would eventually wither away.[18]

These explanations deserve some weight. The United States was compelled to respond to influential political and economic circumstances beyond its control during the early Republic. Governments did protect vested interests in existing slaves. Antislavery action had some successes at the state and federal levels. Frontier settler allegiance was tenuous in various cases. But the federal government's acquiescence in (and in some cases, support for) the growth of slavery before the War of 1812 was predictable on other grounds. In a slaveholders' union built on a proslavery Constitution and governed by an ideology of Jeffersonian Republican expansion, slavery would be permitted to grow as the country did.

The Constitution drastically limited both the legal and political grounds on which slavery expansion could be contested, creating an "iron cage" that rendered federal law and politics largely irrelevant to slavery's expansion during this period. Its allocation of congressional representation between the sections guaranteed that no significant political action against slavery could be taken in the face of united slave state opposition, at least as long as Washington or another slave state representative was president. A similar Electoral College political arithmetic dictated that politicians seeking the presidency after Washington must shy away from aggressive action to support or oppose slavery. The Electoral College system's allocation of sectional voting strength meant that it would be exceptionally difficult to be elected president without cross-sectional support.[19] Slave imports (illegal as well as legal) occurred in significant numbers during the period. Slavery's western expansion was protected by congressional decisions as early as 1790. The Constitution's political and legal protections for slavery's expansion proved a great success for several generations.

During this period the United States also embarked on a massive expansion of national territory. Particularly after 1800, America expanded by employing a Jeffersonian Republican or "anticolonial" ideology, which sought to create what Jefferson called an "empire of liberty." Jefferson's republican ideology in most cases afforded territorial residents considerable political autonomy, and perhaps more importantly, eschewed the use of a significant standing army and federal infrastructure to maintain political control on the frontier. Historian Peter Onuf concludes that Jefferson's

logic in seeking to create an empire of liberty based on republican expansion was central to his political thought: "Liberty and equality of the contracting parties, whether individuals or states . . . were the essential preconditions of true and lasting union. Only by securing this equality—defined as the absence of any external coercion or control—could lasting commitments and obligations be voluntarily undertaken and the passions that fostered social harmony be given full scope."[20]

Jefferson's republican expansion strategy was enormously popular, because it promised large territorial, population, and economic gains at very low cost in taxation and military-force requirements. But republican expansion also necessarily meant the federal government would often yield to local prejudices on slavery. As the 1804–5 debate over the government of Louisiana Territory demonstrated, enforcing federal antislavery legislation in former slave territories or new states would have required an extensive and costly network of federal officials backed by military force, a process that was antithetical to the entire conception underlying republican expansion. Adoption of a republican strategy for expansion meant that it was highly unlikely that the federal government would seek to impose antislavery laws on proslavery local citizens. Slavery would be permitted to grow as the country did, if frontier settlers wanted it to grow.

THE 1790 SLAVERY DEBATE AND SLAVERY'S FUTURE

The well-known congressional slavery debate of February–March 1790 about which Washington wrote to Stuart has fascinated historians.[21] The debate confirmed that major slave states—including Virginia—already were prepared to defend slavery as a long-term institution. But it also illuminated the importance of the political and legal straitjacket created by the Constitution for antislavery action. And it permitted James Madison to cultivate Northern antislavery forces by making limited concessions to them while simultaneously protecting slavery's westward expansion, the Achilles' heel of Northern antislavery politics.

It should not surprise us that a congressional slavery debate occurred in 1790. After all, based on Northern Federalist claims about congressional power to discourage slavery under the Constitution, many Northern congressmen thought that the slavery issue was still open. The shocked reaction of slave state representatives to their challenge was primarily a

result of the fact that Southern Federalists had told their ratifying conventions quite a different story about slavery and the Constitution, and had led them to believe that the subject was closed.[22]

But the 1790 debate also represented an escalation of the antislavery attack, thanks in part to Benjamin Franklin's efforts. The slavery petitions that began the debate in Congress in 1790, one of which was signed by Franklin, were much broader in substance and political effect than the planned PAS petition of 1787, which had addressed only the slave trade.[23] The 1790 debate began over Quaker petitions limited to the slave trade. These petitions attacked the "licentious wickedness of the African trade for slaves" and asked Congress to act "to the full extent of your power" to "produce the abolition of the slave trade."[24] But vociferous opposition from slave state representatives to those petitions apparently led Pennsylvania congressmen to offer the PAS petition signed by Benjamin Franklin. The PAS petition said: "From a persuasion that equal liberty was originally the portion, and is still the birth-right of all men; . . . they earnestly entreat your serious attention to the subject of slavery; that you will be pleased to countenance the restoration of liberty to those unhappy men; . . . and that you will step to the very verge of the power vested in you for discouraging every species of traffic in the persons of our fellow-men."[25] This petition helped to deflect criticism based on the earlier petitions' Quaker sponsorship.[26] But at the same time, the Franklin/PAS petition explicitly urged Congress to "step to the verge" of its constitutional authority to combat slavery, not just the slave trade, which made it far more politically inflammatory.

The timing of the slavery petitions understandably raised questions about their sponsors' and supporters' motivations, since they were presented smack in the middle of a heated debate over exceptionally controversial proposals for the federal government's assumption of state debts and could plausibly be seen as an effort to realign votes in the assumption debate.[27] The petitions had another distinctive feature that raised precedent-setting questions about Congress's powers. Although the Quaker petitions were based in part on Northern slave-trader efforts to evade state-law slave-trade prohibitions, which probably could constitutionally have been corrected by federal law, both the Quaker petitions and the Franklin/PAS petition lacked any request for specific legislation and could be read to request actions exceeding Congress's constitutional authority.[28]

Slave state representatives from the Deep South reacted with outrage—like "stuck pigs" in legal historian David Currie's vivid phrase—to the

petitions. They argued that Congress had no authority to address the issues raised by the petitions, particularly as they implicated slavery. Various congressmen challenged this position. Elbridge Gerry of Massachusetts argued that because Congress had the resources to purchase all southern slaves using the proceeds of federal land sales, it had the right to consider the petitions. Gerry quickly added that he was not making such a proposal. Neither he nor any other representative made one considered by Congress before the Missouri controversy. Historian Joseph Ellis estimates that buying out all slaves would have approximately doubled the national debt as it stood after Revolutionary War debt assumption.[29]

But the most important intervention on the constitutional issue came from James Madison, who asserted that Congress had authority to control both the slave trade and slavery expansion, and vigorously advocated that the petitions be referred to committee. A detailed account of Madison's remarks was published in several newspapers:

> Mr. Madison . . . then entered into a critical review of . . . the ideas upon the limitation of the powers of congress to interfere in the regulation of the commerce in slaves—and shewed that they undoubtedly were not precluded from interposing in their importation—and generally to regulate the mode in which every species of business shall be transacted—He adverted to the western country—and the [c]ession of Georgia in which congress have certainly the power to regulate the subject of slavery, which shews that the gentlemen are mistaken in supposing that congress cannot constitutionally interfere in the business in any degree whatever— . . .[30]

Madison was already known as a vigorous opponent of the slave trade, having made his antipathy clear during a 1789 congressional debate on unsuccessful efforts to impose the $10/slave tax on slave imports permitted by the Constitution. In an eloquent speech, Madison had said that a tax would help to "destroy" the trade, and "save ourselves from reproaches, and our country from the imbecility ever attendant on a country filled with slaves."[31]

By a recorded vote, the antislavery memorials were referred to a House select committee.[32] But the Senate had already refused to consider the Quaker and PAS petitions, making it fairly unlikely that any new legislation would result even if the House acted. New York senator Rufus King (a recent transplant from Massachusetts to New York, and a protégé of Alexander Hamilton) opposed any consideration of the petitions.[33] On Feb-

ruary 15, 1790, King spoke in support of the position taken by the South Carolina senators, who opposed consideration of the Quaker memorials.[34] Vice President John Adams sharply disparaged the petitions as well, introducing them with a "sneer" as being offered by "self-constituted" societies, and referring to them in a letter as the "silly petition of Franklin and his Quakers."[35] The House committee therefore proceeded to consider the petitions as somewhat of an abstract exercise in analyzing Congress's constitutional authority over slavery, but its wide-ranging debate led to an explicit restatement and narrowing of that authority at the national political level.

On March 5, the House select committee reported on the slavery petitions.[36] Its report consisted primarily of a series of legal assertions about congressional authority over slavery. On major issues, the committee report concluded (1) Congress had no power to control the slave trade in existing states before 1808; (2) Congress had no power to emancipate slaves born in or imported into the United States before 1808; (3) Congress had power to prohibit United States citizens from participating in the African slave trade, or to regulate that trade where citizens were supplying slaves to non-American citizens; and (4) Congress could prevent aliens from using United States ports to further the African slave trade.[37] (For text, see appendix D.)

The report made clear how drastically the Constitution constrained antislavery action at the federal level. It accepted that Congress would be constitutionally prevented from controlling most aspects of slavery for at least twenty years. But it was the report's simultaneous effort to escape the Constitution's protections for slavery by construing its text as narrowly as possible in order to expand federal slavery powers, particularly after 1808, that caused the most controversy. The report clearly implied that Congress had immediate authority to prevent slave importation to any territory or new state, and to bar slavery there. It implied that Congress also had power to emancipate slaves both in existing states and in new states after 1808. The report said in part:

> First, that the general government is expressly restrained from prohibiting the importation of such persons as any of the states *now existing* shall think proper to admit until the year 1808.
>
> Secondly, That Congress, by a fair construction of the constitution, are equally restrained from interfering in the emancipation of

> slaves, who already are, or who may, within the period mentioned, be imported into, or born within any of the said states.[38]

The report implied further that Congress had power to control the treatment of slaves in territories or new states. It also implied that Congress had substantial authority to impede the slave trade. None of the report's powerful implications for congressional slavery power were disavowed during the debate by its authors while it was under bitter assault, strong evidence that they were intended.

Representatives from the Deep South immediately made efforts to block any House consideration of the report, but the House agreed to consider it. The debate provides extraordinary insight into contemporary elite political opinion regarding slavery and race. It also provided James Madison with a golden opportunity, which he seized with alacrity, to narrow sharply the committee report's conclusions in order to leave Congress largely devoid of constitutional authority over slavery in existing or new states (as opposed to territories) both before and after 1808.

During the debate, representatives of Deep South slave states—led by William L. Smith of South Carolina and James Jackson of Georgia—defended the morality of both slavery and the slave trade. They defended the trade on relative-harm grounds, arguing that slavery in Africa predated the slave trade, and that slaves were better off in the United States than they were there. They defended slavery as an accepted practice throughout history, justified by the Bible, and by the racial inferiority of blacks.[39]

In making their racial inferiority argument, they relied extensively on Jefferson's *Notes on Virginia*. According to the report of debates, Congressman Smith "then read some excerpts from Jefferson's *Notes on Virginia*, proving that negroes were by nature an inferior race of beings; and that the whites would always feel a repugnance at mixing their blood with that of the blacks. Thus, he proceeded, that respectable author, who was desirous of countenancing emancipation, was, on a consideration of the subject, induced candidly to avow that the difficulties were insurmountable."[40] During the 1790 debate, no Northern congressman challenged their claim that Jefferson thought blacks were racially inferior, or attacked their assertion that blacks were inferior. Nor did any congressman defend political or social equality for African Americans, although several attacked slavery. Shortly before this, apparently without serious debate on the racial qualification, Congress had agreed to limit eligibility for United States

citizenship through naturalization to "free white persons."[41] The 1790 slavery debate shows once again that challenges to slavery often coexisted with white racism in both Northern and Southern states.

Deep South representatives also argued at length that it was impractical to do anything to abolish southern slavery. Their impracticability argument had two prongs: high cost and social disruption. They argued that slaveowners were entitled to compensation for their slaves, but that the other states could not afford to compensate them. They contended—as did Jefferson—that emancipation without colonization was politically completely unacceptable, because race war would result. But unlike Jefferson, they argued that there was no practical way that colonization could occur. Congressman Smith argued that because colonization would not work, the alternative was what he thought Northern congressmen would agree was undesirable race mixing, racial hostility, or race war: "A proper consideration of this business must convince every candid mind, that emancipation would be attended with one or other of these consequences; either that a mixture of the races would degenerate the whites, without improving the blacks, or that it would create two separate classes of people in the community involved in inveterate hostility, which would terminate in the massacre and extirpation of one or other . . ."[42] These were essentially the views on the necessary connection between emancipation and colonization that Jefferson had expressed in *Notes on Virginia*, but Jefferson contended throughout his career that colonization could be successful. Deep South congressmen also strenuously asserted that limiting slave imports would not stop the growth of slavery, because of natural population increase.[43] No Northern congressman challenged their arguments on the infeasibility of Southern emancipation or colonization.

Georgia and South Carolina representatives argued further that during ratification, objections had been raised against the Constitution based on its supposedly insufficient protection for slavery. They contended that if slave state citizens had not believed the Constitution "secured and guaranteed" their "property" to them, "they never would have adopted it." Their states would never have allowed the commerce clause to be exercised by majority vote without protection for the slave trade; without "security for their slave property . . . the union never would have been compleated."[44] Based on the evidence of the ratification debates, it seems quite likely that this was an accurate political assessment, not only of sentiment in the Deep South, but of majority public opinion in Virginia as well.

And in an important speech, Representative Abraham Baldwin of Georgia, who had been a Constitutional Convention delegate and later became a Georgia senator, went further. He argued that precisely because future majoritarian attacks on slavery had been foreseen, the Constitution had been designed to protect slavery against them. He said:

> It is well known that there was a clashing of feelings, and of interest, in the different parts of this country, on that subject [slavery, before the Constitutional Convention]; it was long a doubt whether it was not an insuperable bar to their being united as one people under one government: but it was happily surmounted in the constitution, and, so far as he had been informed, almost to universal satisfaction. It was not unknown on which side was the majority: the strength and violence of the majority was expected on this subject, and therefore security against it was settled deep down amongst the pillars of your government, and, he would add, not one was more strongly fortified; when this was jostled the rest could not be strong.[45]

Although House action on slavery might reflect "the passions of the people," Baldwin had no doubt that the Senate, President Washington, and the Supreme Court, if necessary, would protect slavery. Baldwin said that if the House did try to restrain slavery, "should there be any doubt of the constitutionality of our measures, they cannot be carried into execution without the approbation of the Supreme Court of the United States, composed of six of our most venerable sages who, from the independence of their situation, possess our highest confidence. . . ." He concluded that "[t]he uproar of contending waves is not pleasant, but still they are dashing against a rock."[46] Baldwin's description of the Constitution's "strongly fortified" protection for slavery as a "pillar" of "your government" aptly conveyed that Deep South slave state representatives saw slavery as a long-term institution, and as Virginia's role in the ultimate House action showed, its representatives effectively agreed.

Review of the extraordinarily lengthy, factually detailed, and comprehensive speeches by Deep South congressmen has persuaded several historians that they made virtually all of the "positive good" arguments that were later made by Southern representatives during the antebellum period.[47] No one who listened to them could have believed that these states would voluntarily abolish slavery in the foreseeable future; indeed, their representatives were passionately engaged in justifying the expansion of slavery.

Northern representatives responded with horror to defense of the slave trade. Pennsylvania representative Thomas Scott asserted that "[a]n advocate for slavery, in its fullest latitude, at this age of the world, and on the floor of the American Congress too, is, with me, *a phenomenon in politics*. . . . with me they defy, yes, mock all belief."[48] Representative Elias Boudinot of New Jersey, a longtime antislavery activist, described the slave trade as "iniquitous" and argued that it was indefensible on grounds either of Christianity or of "the genius of our government and the principles of the revolution." But Boudinot drew a sharp distinction between opposition to the slave trade and support for emancipation: "There is a wide difference between justifying this ungenerous traffick and supporting a claim to property, vested at the time of the constitution, and guaranteed thereby. Besides it would be inhumanity itself to turn these unhappy people loose to murder each other or to perish for want of the necessaries of life. I never was an advocate for so extravagant a conduct."[49]

Another antislavery representative, John Vining of Delaware, made what at first appeared to be a slashing attack on both slavery and the slave trade. Vining applied the principles of the Declaration of Independence to slavery. Slavery was completely incompatible with the principle of equality among men that underlay republican government, and instead led inevitably to "absolute tyranny" on one side, "and on the other debasing servility."[50] Yet it turned out that the real point of Vining's attack on slavery was to make a veiled political threat about how federal powers might be used if slave states were unwilling to support slave-trade limits. Vining's real goal was to have the slave trade regulated to protect slaves on humanitarian grounds.

But Vining's attack on slavery illustrated the sharp philosophical divide between Northern representatives who increasingly saw slavery as incompatible with a republican society and Southern representatives who saw no incompatibility between slavery and republican government. Congressman William L. Smith of South Carolina argued in response to Boudinot and Vining that the Declaration of Independence had never been intended to apply to slaves.[51]

The Virginia national leadership as a whole was notable for its lack of participation in the House debate regarding slavery, but some of its members played significant private roles. James Madison took a limited part in the debate. Contemporary observers thought that Madison was privately active in seeking compromise amendments to the committee report, and he also played a central role in the deliberately ambiguous manner in which

the report was finally dealt with by Congress.[52] But in those negotiations, he appears to have played a double role, assisting Northern antislavery forces in seeking slave-trade limits while simultaneously narrowing congressional authority over slavery in existing and new western states.

Madison had to tread exceptionally carefully where slavery was concerned. As he later acknowledged to a correspondent, his own constituency was so proslavery that he could not be involved even in presenting a petition to the Virginia legislature seeking state gradual abolition legislation: "those from whom I derive my political station are known by me to be greatly interested in that species of property, and to view the matter in that light."[53] Madison saved his criticism of what he saw as the Deep South representatives' needlessly obstructionist actions for his private correspondence. But at home in Virginia, he then defended his role in the congressional debate and House action—his "true policy"—on the ground that he had increased the explicit constitutional protection for slavery, which was clearly accurate. Madison wrote to Edmund Randolph on March 21 that the "true policy of the Southern members . . . was to obtain along with an assertion of the powers of Congress a recognition of the restraints imposed by the Constitution."[54]

President George Washington, despite his strong personal reservations about slavery, refused to intervene in the 1790 debate after meeting with antislavery representatives who requested that he do so. Thomas Jefferson made no comment about the debate in his correspondence, although he appears to have been present in New York for part of it; his *Notes on Virginia* was relied on as proof of the inferiority of blacks; and the Declaration of Independence's applicability to slaves became a focal point of debate.[55]

In the course of its debate, the House significantly narrowed the original report's claims of federal authority over slavery and the slave trade in both existing and new states. Early in the debate, the House agreed to amend the committee report to state explicitly that Congress had no power to emancipate slaves "within any of the States" either before *or* after 1808. This eviscerated the report's thrust against the eventual abolition of slavery through federal legislation. Madison appears to have been primarily responsible for brokering these fundamental changes to the committee report.[56]

In the only area where federal legislation prior to 1808 was explicitly authorized by final House action, the foreign slave trade, its action also narrowed the scope of congressional authority compared to the original report.[57] The House action effectively permitted United States citizens to

carry on the slave trade, if permitted to do so by their states, so long as they were not supplying "foreigners with slaves." It also prevented aliens such as British or Spanish merchants who imported slaves to the United States from being barred by Congress from the trade if individual states permitted their involvement. These changes to the House report protected both the interests of slave traders and those of states that wanted to import slaves. They also made subsequent federal laws restricting direct United States citizen involvement in the foreign slave trade before 1808 less effectual in controlling slave imports to the United States, because fraudulent use by United States citizens of foreign flag ships to evade restrictions (which later occurred) became harder to detect as a result.

The growth of slavery during national expansion was particularly encouraged by the failure of the 1790 House final action to specify any explicit authority for federal action to control slavery in territories or new states. Compared to Congress's broad implied powers on this point in the original report, the final House action sharply narrowed its authority. In describing the slavery authorities of "states," the House deleted the cross-reference in the earlier report to "said states," which had been intended to establish that Congress's power to control state action was restricted only as to existing states. Instead, the House action referred to "the states" or "the several states" as having sole authority over slaves, including power over emancipation, thus placing the authority of new states over slavery on a par with that of existing states. In light of the fact that the Washington administration was to propose the long-anticipated admission of Kentucky (commonly expected to be a slave state) within a few months after the slavery debate, this subtle change asserting new state authority does not appear to have been coincidental. Readers will recall that James Madison had been a strong advocate of adding an "equal footing" clause to the Constitution to protect the powers of new states against congressional control, which also suggests that this change was not coincidental.

Madison and other advocates of the "equal footing" concept such as Thomas Jefferson believed it included popular sovereignty over slavery.[58] The final House action of 1790 embodies their preferred view of "equal footing" for new states where slavery was concerned.[59] And as the Missouri controversy would demonstrate, Congress's actual power to control slavery in new states would ultimately depend critically on whether the Supreme Court would be willing (or even politically able) to uphold its authority in the face of Jeffersonian Republican contentions that that power was fundamentally inconsistent with their conception of the Constitution

as a compact between states that could only be expanded by mutual consent. Madison staked out the foundation of this constitutional position as to slavery in the 1790 debate, and he and Jefferson had broadened it into a foundation of their whole theory of government before 1800, particularly in the Alien and Sedition Act debates. Congress's power over slavery in new states would remain a "parchment power" for many years while slavery expanded.

During the 1790 debate, representatives of the Lower South presented arguments against action on slavery on somewhat differing grounds, which were described by one historian in the context of later slavery debates as "conditional termination" and "perpetuationist" rationales. In theory, the former rationale accepted that slavery should be ended, but imposed fundamentally important preconditions on its termination, while the latter rationale defended its indefinite continuance, and even argued that it was a positive good.[60] The existence of different rhetorical justifications for slavery's continuance has led some historians to conclude that prospects for antislavery action in the Upper South were greater at this time than they were in the Lower South. But the House action in the 1790 debate tells a quite different story.

When one moves away from the level of rhetoric to the terms of the House action on slavery, the slave states divided on federal power over the slave trade, but were united on federal power over slavery in every other significant respect. Just as had been true at the Philadelphia Convention, during the 1790 congressional debate, it is likely that southern intrasectional differences about the foreign slave trade were based largely on economic grounds, though other considerations, including divergent political interests and moral objections, played a role. The Upper South, especially Virginia, needed to export surplus slaves, and stood to benefit handsomely from a protected market for doing so if the slave trade was curtailed, so its representatives could be expected to agree with Northern states to support at least some slave-trade limits. Its national leaders could also gain Northern political support from showing flexibility on that issue, and please Virginia slaveowners at the same time.

But the House action makes clear that there were no important intrasectional differences concerning federal power to regulate slavery itself, either in existing or new states. In the final analysis, the action taken by the House in 1790 to limit federal authority demonstrates that the Upper South and Lower South were firm allies against federal power when it came to protecting both slavery and its expansion into new states—as well

as in preserving state power to permit slave imports before 1808.[61] All of the major slave states, including Virginia, saw slavery as a long-term institution that needed constitutional protection against federal authority.

The 1790 debate shows that both the Constitution's text and the sectionally balanced political structure it created effectively constrained the contest over slavery. The PAS had had high hopes for the 1790 congressional debate. It reported to its allies in the London Society for the Abolition of the Slave Trade after the debate began that "we now entertain pleasing hopes that a foundation will be laid for extirpating the disgraceful practice of enslaving our fellow Creatures," though, the PAS said, this would be a "very gradual work" because of "Long habits and Strong Interests. . . ."[62]

After the debate concluded, the PAS inexplicably reported to the London Society that "it is however agreed that the momentious Cause we are engaged to promote has been greatly Advanced by this measure [the debate], and we hope will excite the attention of the state Legislatures more earnestly in its favor than heretofore."[63] Even more remarkably, the PAS informed the French antislavery group Amis des Noirs in August 1790 that "from the rapid progress which these principles have already made throughout the United States of America, we may venture to predict that the time is not very distant when they will be universally received and firmly established."[64] While it is understandable that PAS officials were pleased that Congress had debated slavery, judging from its results they appear to have attended a different debate than the one Congress conducted.

The House of Representatives agreed, within days after concluding its slavery debate, to act on North Carolina state legislation that ceded part of its claimed territory to the United States. The federal legislation accepting the cession was modeled generally on the Northwest Ordinance, but it agreed to a cession that explicitly provided as a condition that Congress could not legislate in a way that would "tend to emancipate slaves" in the ceded area. In that area, which became the state of Tennessee in 1796 (see below), there were already significant numbers of slaves by 1790, so North Carolina's insistence on protecting slavery there was not surprising. What is surprising is that there was so little controversy about accepting slavery in the ceded area that the House agreed to the legislation after rejecting an effort to amend its slavery provision without taking even a recorded vote on the issue. This action—not reported in the official journal of the House of Representatives—meant that there were fewer than thirteen members of the entire House who were willing to force a recorded vote

on the North Carolina cession slavery provision, despite the fact that the broader 1790 slavery debate itself had been begun and resolved by recorded votes.[65]

By the end of 1790, some degree of realism seems to have set in at the PAS as a result of the 1790 debate, and officials there had accepted that their future efforts in Congress needed to be limited to attacks on the foreign slave trade.[66] The foreign slave trade was, rhetoric aside, the only aspect of the slavery issue where Northern antislavery forces could expect any measure of cross-sectional support in Congress. At the same time, Northern quiescence regarding further action against slavery seems to have increased. In 1793, Noah Webster envisioned slavery as an "unfortunate accident" that, judging by European precedents, would wither away in the free New World in two centuries "without any extraordinary efforts to abolish it."[67]

THE FUGITIVE SLAVE ACT OF 1793

Although rendition of fugitive slaves was not a matter of pressing national concern in the 1790s, it had been important enough to be addressed in the Constitution. As it turned out, it was also an important enough issue for President George Washington to become personally involved in deciding how the federal government would address it. When an interstate fugitive slave dispute between Pennsylvania and Virginia that began in 1788 neared impasse in 1791, Washington overruled the recommendation of his attorney general Edmund Randolph to permit the states to resolve the matter themselves.[68] Instead, as requested by the governor of Pennsylvania, Washington asked Congress to adopt federal legislation to establish rules that would govern such disputes. His request resulted in the passage of the Fugitive Slave Act of 1793, which also addressed the problem of fugitives from justice (the original interstate dispute implicated both subjects).[69] Washington requested legislation because he thought that interstate comity (voluntary interstate cooperation) was a flawed means of resolving disputes involving fugitive slaves.

During the extensive consideration given by Congress to the 1793 act between late 1791 and early 1793, which included at least twelve separate days of "bitter" debate in the Senate, so far as is known, no member of Congress argued that that legislation was not authorized by the Constitution or voted against it on those grounds.[70] Yet during this same period,

congressional debates contain repeated, extensive, and often vehement arguments that the Constitution did not authorize other legislation, such as the creation of the Bank of the United States.[71] Congress debated and then amended the act of 1793 in ways unmistakably detrimental to the legal, particularly procedural, protection to be afforded to fugitive slaves in challenging their enslavement. Provisions rejected during drafting included those that would have denied slaveowners the certificates that they needed to effect fugitive removal in cases involving long-time black residents of states where removal actions occurred, or for persons born in those states, as well as provisions reducing the penalty for aiding fugitives.[72] Pennsylvania abolitionists were also acutely aware when the act was passed that its judicial-oversight provisions could be abused. But none of these defects in the law led their exceptionally able and sophisticated counsel (strongly antislavery attorneys with national reputations like William Rawle) to challenge its constitutionality.[73]

The 1793 act passed both houses of Congress with overwhelming support from all regions of the country.[74] The act passed the House 48–7, and the Senate by voice vote. Members of the House of Representatives from six states that had begun abolition prior to the passage of the act supported it by a margin of 18–4. Long-time antislavery activists such as Representative Elias Boudinot of New Jersey voted for the bill, as did every member of the Pennsylvania delegation who voted. A search of contemporary newspapers for major states discloses no significant controversy about the act at the time it passed.[75]

It is entirely possible that the act received support from antislavery forces because they believed that it was a lesser evil than slaveowners' continued exercise of a purely private right of recaption without any government supervision, since the act provided for at least limited judicial oversight of recaptures. The broad congressional and public support for the act, the complete lack of attacks on its constitutionality at the time, and the fact that other available alternatives for claiming fugitive slaves were deemed worse, all suggest that later arguments that the fugitive slave clause of the Constitution was intended to eliminate slaveowners' private right of recaption, or to be "declaratory" only (i.e., Congress lacked power to implement it through legislation), were nineteenth-century litigation inventions, not the contemporary understanding of the clause.[76]

At least some contemporary courts saw the clause's implementation by the 1793 act as a desirable means of providing uniformity in fugitive slave

rendition that would avoid interstate disputes. The New York Supreme Court of Judicature in *Glen v. Hodges* (decided in 1812, after New York began abolition) viewed the Fugitive Slave Act of 1793 as a set of uniform legislative rules for implementing a common-law right of slave reclamation that had been preserved to slaveowners by the Constitution.[77] In that case, the court upheld the private reclamation of a slave in Vermont, a free state, by a slaveowner from New York, and found a Vermont citizen liable for trespass for attempting to interfere in the slave's reclamation. Without the act, the New York court would have needed to determine which state's laws would apply to the contested reclamations in another state, and the Vermont courts could have made their own potentially inconsistent determination on the same issues, which would ultimately have required resolution by the United States Supreme Court. Such conflicts could have occurred repeatedly absent either federal legislation or numerous Supreme Court rulings. *Glen v. Hodges* was understood to be a generally accepted statement of the law at the time. In the 1820s, Nathan Dane (one of the primary authors of the Northwest Ordinance), in his prominent legal treatise *Dane's Abridgement*, cited *Glen v. Hodges* for the proposition that slaveowners had a general right of fugitive slave reclamation that was preserved by the adoption of the fugitive slave clause.[78]

Tragically, in agreeing to rendition of fugitive slaves, the Northern states were also agreeing to protect Southern slavery against a considerable vulnerability, since a Northern legal regime that freed fugitive slaves would have sharply increased the cost of slavery to the slave states and thus have helped to discourage its continuance.[79] But during more than a generation between the Constitution and the Missouri compromise, while Northern states resisted slave state efforts to amend the Fugitive Slave Act of 1793 to make it more protective of slaveholder interests, their primary focus was on protecting their own residents from kidnapping, not on assisting fugitive slaves.[80]

At the close of the eighteenth century, Northern abolition at the state level was expanding. But to round out the picture of antislavery action at the state level in the 1790s, it is important to consider the demise of abolition efforts in the slave states. We will then consider the very limited Northern opposition to western slavery expansion.

THE END OF ABOLITION EFFORTS IN THE SLAVE STATES

Virginia was generally regarded as the political linchpin of slave state abolition in the years after the Revolution.[81] But in 1797, the Virginia legislature rejected without debate a thoughtful gradual abolition plan developed by St. George Tucker, a prominent Virginia judge. The legislature's action made clear that barring a cataclysm, Virginia would not abolish slavery voluntarily. Between 1797 and 1821, the Virginia legislature gave no further consideration to abolition legislation, and in 1806, it sharply restricted even future slave manumissions in Virginia. Given Virginia's historic leadership on such issues, informed Northern observers had strong reason to think before 1800 that Southern voluntary abolition would not occur.

The careful development of the Tucker abolition plan and its rejection tell us a great deal not just about sentiment on slavery in Virginia, but about attitudes on slavery and race in Massachusetts as well. Tucker's research to prepare his gradual abolition plan included an extensive correspondence between 1795 and 1797 regarding slavery in Massachusetts and Virginia with Dr. Jeremy Belknap, a prominent minister who was an official of the Massachusetts Historical Society and who in turn involved a series of other leading figures in the correspondence.[82] This remarkable correspondence sheds important light on the factors influencing the politics of slavery in the early Republic as observers in different parts of the country expressed them in candid private discussions.[83] None of the participants in the correspondence saw achieving a political solution to the problem of slavery as a simple matter of "justice in conflict with avarice and oppression," as Jefferson had described it in his 1785 letter to Richard Price.[84] Instead, the principal focus of the correspondence was how to mollify politically powerful fears of the social disruption that might be caused by large-scale emancipation.

Tucker first asked the Massachusetts officials to tell him how and why slavery had been abolished in Massachusetts and to provide information about the status of free blacks. In response, Belknap polled a series of prominent political, professional, and religious figures in Massachusetts for their views, and seven, including Vice President John Adams and judges James Sullivan and James Winthrop, responded to him. The Massachusetts citizens polled by Belknap differed about how and why slavery there had been abolished, and about the status of free blacks in Massachusetts, even

on such basic points as whether free blacks were able to vote or hold political office as of 1795. Two of them, one a prominent judge, reported that free blacks could not vote or hold office there. One of the officials polled, James Winthrop, chief justice of the Massachusetts Court of Common Pleas, defended the slave trade.[85] After receiving that information, Tucker forwarded to the Massachusetts officials his thoughts on plans for gradual abolition in Virginia, and asked for their comments.

He began by explaining the political obstacles to abolition in Virginia. There were two key demographic differences between Virginia and Northern states: slaves were a much larger fraction of the total population in Virginia, and slave populations were very unevenly distributed geographically throughout Virginia. Even a brief glance at a map of Virginia counties overlaid with 1790 census data for total and slave populations confirms Tucker's point. There were dramatic disparities in slave populations as a percentage of total population in counties across the state, and slaves were very heavily concentrated in certain counties even within eastern Virginia, the historic center of Virginia slavery. (See figure 5.1.) From this political demography Tucker concluded that emancipation would have very disproportionate impacts on different parts of Virginia: "[I]t will appear that the most populous and cultivated parts of Virginia would not only bear an infinite disproportion in the diminution of property by a general emancipation, but that the dangers and inconveniences of any experiment to release the blacks from a state of bondage must fall exclusively almost upon these parts of the state."[86] Tucker then observed that racial prejudice, which his Massachusetts correspondents had noted existed there, was far worse in Virginia because it had been reinforced by slavery. Slaveowners in Virginia would "cheerfully concur in any feasible plan for the abolition of" slavery, but there were numerous objections to such proposals. Virginians shared a "general opinion of their [blacks'] mental inferiority, and an aversion to their corporeal distinctions from us . . ."; they feared "the danger of granting them a practical admission to the rights of citizens" and "the possibility of their becoming idle, dissipated, and finally a numerous banditti. . . ."[87] Tucker pointed out that Virginians also feared the injury to their agricultural economy from the loss of slave labor, and the "impracticability, and perhaps the dangerous policy, of an attempt to colonize them within the limits of the United States, or elsewhere."

Tucker then mounted a concerted attack on proposals to require colonization of freed blacks as a condition of emancipation. He specifically

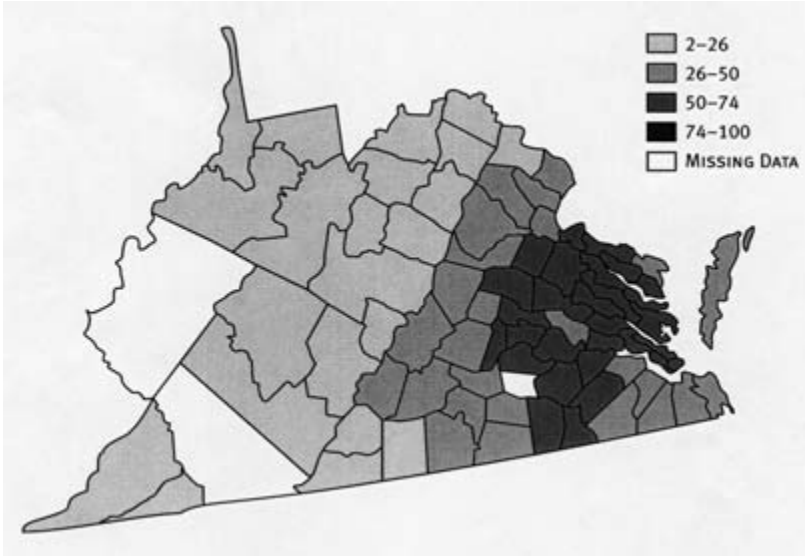


FIGURE 5.1 Virginia counties in 1790, slaves/total population (percent)
Data retrieved from the University of Virginia Library, Historical Census Browser, Geospatial and Statistical Data Center, http://fisher.lib.virginia.edu/collections/stats/histcensus/index.html.

attacked Thomas Jefferson's colonization proposal—which had considerable support among antislavery forces in Virginia, he thought—as completely impractical. According to Tucker's calculations, even colonization within the United States would be too expensive to permit more than a small fraction of the eight hundred thousand slaves to be colonized annually, and so the remaining black population, which Tucker explained was growing rapidly, would "continually encrease" despite colonization.[88] Tucker pointed out to Belknap that the "negroes . . . fertility and increase is immense." He compared this situation with Benjamin Franklin's data on population growth. Tucker asserted that black population would increase faster than white population. In his view, Franklin's assertions that slave population would not grow without imports were wrong for the American slave states. Besides, colonization would be inhumane, leading to hardships and destruction of the blacks, and this would be especially true of trying to send blacks to "their native country," which could require "the most cruel oppression" to effect.[89]

Thus, twenty years before the founding of the American Colonization Society, a leading, ardent, and thoughtful Southern antislavery advocate

flatly rejected the practicality of colonization. None of Tucker's Massachusetts readers thought that colonization was feasible either. To the contrary, Judge James Sullivan of the Massachusetts Supreme Judicial Court (later attorney general and governor of Massachusetts) indicated that he was very familiar with Jefferson's views on colonization and emancipation, and that he had *personally* told Jefferson that colonization was unworkable.[90] But Tucker's correspondents did not claim as a result that finding a means to render abolition socially acceptable in Virginia was politically unnecessary; some instead expressed skepticism that there was any way to abolish slavery in Virginia.

Tucker himself concluded that because colonization was impracticable, other means must be found to solve the problem of white unwillingness to accept African Americans in society. In his view, there were three possible choices regarding slavery: incorporation of blacks into society, freedom without "any participation of civil rights," or "retain them in slavery." If blacks were inferior, Tucker said, then the white population could be "depress[ed]" by their elevation. Moreover, an effort at incorporation could in any event be frustrated by "prejudices too deeply rooted to be eradicated," which might lead to a "civil war."[91] Tucker then sought his Massachusetts correspondents' opinions on his proposed approach to abolition, which relied on long-term denial of civil rights to blacks.[92]

Tucker concluded that a majority of Virginia whites would be unwilling to accept any form of emancipation of slaves that led to equality for African Americans or created potential social costs for remaining slaveholders such as increased poor relief or added crime. Therefore, his plan proposed that blacks be stripped of all civil rights during the entire emancipation process to minimize the perceived free black threat to the white majority. He thought that if his proposal completely denied civil rights to blacks, this would encourage them to resettle elsewhere, but he opposed conditioning emancipation on resettlement, unlike Jefferson. James Sullivan criticized Tucker's proposed denial of civil rights as politically unworkable, and apparently believed that there was no practical system that would lead to gradual abolition without unacceptable social costs to blacks, whites, or both. Sullivan argued that nothing could be done to change the current status of slaves without unacceptable costs to them or disruption to society, but that instead they should be educated for several generations before any effort was undertaken to change their status. John Adams's comments generally agreed with Sullivan's conclusion.

But Tucker's diligent efforts to find a way to make abolition palatable

to the Virginia legislature were wholly unavailing. When he presented his plan to the legislature, it was rejected without debate, and Tucker received a perfunctory letter of thanks for his efforts. After the plan's rejection, on August 13, 1797, Tucker wrote bitterly to Belknap, noting that none of the legislators even appeared to have read his proposal before rejecting it. He had "endeavoured to lull avarice itself to sleep" by making the proposal as gradual as possible, but "[n]obody was prepared to meet the blind fury of the enemies of freedom." True, at the time the legislature had been split over a federal political issue, and either side would "probably" have been weakened "among its partizans" by a willingness to entertain a slavery proposal. But, he cautioned, "when I thus express myself, I must be understood as not cherishing the smallest hope of advancing a cause so dear to me as the abolition of slavery. Actual suffering will one day, perhaps, open the oppressors' eyes. Till that happens, they will shut their ears against argument."[93] The rejection of Tucker's plan was the death knell for voluntary slavery abolition not only in Virginia, but throughout the slave South. For the next thirty years, succeeding Virginia legislatures viewed slavery as a long-term institution, and other slave states took the same approach.

In one of history's ironies, not long after Tucker wrote to Belknap about his plan's rejection, Vice President Thomas Jefferson wrote from Monticello to Tucker thanking him for a copy of his plan, which Tucker had sent him. Jefferson had done nothing to support Tucker's plan or any concrete alternative proposal that knowledgeable contemporaries deemed workable. But Jefferson disagreed with Tucker's emancipation proposal because he insisted that emancipation must be followed by colonization, writing that "as to the mode of emancipation, I am satisfied that it must be a matter of compromise between the passions, the prejudices, and the real difficulties which will each have their weight in that operation." Jefferson continued that if the work of emancipation and colonization was not quickly begun, in view of the Santo Domingo uprising, "the first chapter of that history," and European revolutionary currents, "the day which begins our combustion must be near at hand." "If something is not done, & soon done, we shall be the murderers of our own children."[94]

The Tucker-Massachusetts correspondence, and the fate of Tucker's carefully designed plan, showed that well before the purchase of Louisiana, anyone who made reasonable efforts to understand the politics of slavery would have been forced to conclude that unless effective federal action was taken to contain slavery, it would continue to grow in response to world

market demand for slave-labor products. To avoid that result, antislavery forces would need to confront the territorial expansion of slavery.

NEW STATE AND TERRITORIAL CREATION

As early as 1790, Congress began to admit new slave states and territories with almost no Northern opposition. Congressional action in 1790 to create the territory that included the North Carolina cession, the Southwest Territory, set a pattern for the creation of new territories by Congress during the 1790s and into the 1800s. Typically, Congress provided that such new territory would be governed as provided in the Northwest Ordinance of 1787, and then added provisions of local concern, such as the protection of various existing land claims in the case of the North Carolina cession. In creating the Southwest Territory, Congress also in effect agreed to except the territory from the operations of the Northwest Ordinance's slavery prohibition.[95] This pattern of uncontested action supports the inference that contemporaries accepted that Congress had power to control slavery in the territories.[96]

The pattern of legislation for admitting new states was different, however. In the case of Vermont and Kentucky, the states were admitted as "new and entire" members of the Union, without any attempt to describe or limit their authorities.[97] As Henry Clay later noted, the admission of the two states seems to have been informally linked, because the equal size of their House of Representatives representation was established in one statute, and it maintained the sectional balance of power that delegates to the Constitutional Convention had clearly been concerned to maintain.[98]

The formal effect of the statehood admission formula chosen for Kentucky and Vermont was that the new states had popular sovereignty over slavery. But as a political matter, it was widely expected that Vermont would be a free state, as had been envisioned by its constitution in 1777. It was also anticipated that Kentucky, which was carved out of Virginia, would become a slave state. As historian John Craig Hammond found, local sentiment in Kentucky overwhelmingly favored slavery, and there were a considerable number of slaves there before the state was admitted to the Union.[99]

Tennessee, admitted as the next state in 1796, was also expected to be a slave state based on the fact that slavery had existed there since it became

United States territory. Tennessee was the first state created from a prior United States territory, and was explicitly admitted on an "equal footing with the original States, in all respects whatever" with other states. In historical context, this meant, among other things, that Tennessee had full authority over slavery. But this use of "equal footing" contradicted the use of the term in the Northwest Ordinance, where "equal footing" did not include popular sovereignty over slavery. No challenge was made to Tennessee's admission where any aspect of slavery's growth was concerned. Although by 1796 nearly every state had barred foreign slave imports, there was no effort in Congress to bar slave imports to Tennessee, or to seek gradual abolition there.

The almost complete indifference of Northern congressmen to the extension of slavery to Tennessee was strikingly symbolized by one of the very few references to slavery during debate over its admission. Representative (and later Senator) Theodore Sedgwick of Massachusetts expressed surprise that there were slaves in the Southwest Territory, the area that was to become Tennessee, because he mistakenly thought that the Northwest Ordinance's slavery bar had applied to it. Sedgwick's comments show that he was unaware that that the Southwest Territory had been excepted from the operation of the slavery bar of the ordinance in 1790, though he had been a member of Congress when that happened.[100]

But although slavery extension was not an issue during the Tennessee admission debate, there was a major fight in the House of Representatives over the admission of Tennessee that is very informative about the underlying structure of early Republic politics. Like the 1796 presidential election, Tennessee's admission in 1796 quite likely was based largely on sectional considerations. In the House vote to accept the report favoring Tennessee admission, in May 1796, every congressional state delegation that gave majority support to Tennessee's admission represented a state that several months later supported Thomas Jefferson for president. Every state delegation whose majority opposed Tennessee's admission soon supported John Adams for president.[101] In the admission debate, the House majority led by James Madison brusquely shouldered aside arguments that Tennesseans had intentionally conducted a fraudulent population count, and that they were not entitled by the Northwest Ordinance to be automatically admitted as a state without any conditions simply because they claimed sixty thousand residents, even if their state constitution was defective in various respects.[102]

The 1796 presidential election itself "laid bare once more the nation's

sectional divisions."[103] In that election, Thomas Jefferson became vice president rather than president because he fell three votes short of John Adams in the Electoral College. Both candidates received a largely sectional vote (a pattern relatively similar to that of the equally sectional 1800 presidential election). Jefferson did not win a single Electoral College vote in the north outside Pennsylvania.

Congress's continued lack of interest in barring slavery expansion was reflected in 1798 congressional action regarding the Mississippi Territory. In the debate over the bill to create the Mississippi Territory (a cession acquired finally from Spain by the 1795 Treaty of San Lorenzo), Congress refused by a very large majority to impose a ban on slavery in the territory. An amendment to ban slavery there offered by Representative George Thatcher of Massachusetts was supported by a total of twelve representatives (out of 105 members). No recorded vote was taken on the amendment.[104] This was the last congressional effort to bar slavery east of the Mississippi.[105] A sectional argument was prominent in this debate—that just as the Northwest Territory was reserved de facto to New England, so it was reasonable that southerners should be able to settle Mississippi Territory, which they could not do if slavery was banned there.[106]

Congress agreed to bar slave imports from outside the United States into the Mississippi Territory, but this restriction was directed at the foreign source of the slaves, not at depriving the territory of a supply of new slaves, because the necessary slaves could readily be imported from within the United States. Several slave state representatives advocated permission for domestic slave imports as a means of pursuing diffusion to protect slaveowners against rebellions, echoing Jefferson's concerns.[107] In reality, as historian W. E. B. Du Bois concluded, the foreign import ban may have been imposed primarily to improve the economic position of domestic slave traders, notably South Carolinians, by protecting them from competition, though it also reflected slave-rebellion fears stemming from the bloody Santo Domingo revolt.[108] The result was that a very large congressional majority supported or acquiesced in the growth of slavery in Mississippi Territory, as long as it could be settled with "safe" slaves.

The Mississippi Territory ban on importing foreign slaves was ineffective.[109] Its provisions essentially made it unenforceable. There were no criminal penalties provided by the statute for illegal importation, an omission that by itself made it likely that smuggling would occur if market conditions made it profitable. And the statute's provision for civil antismuggling enforcement in territorial courts by citizens was unlikely to

be effective, because the statute would be practically unenforceable unless territorial residents themselves decided that foreign slave imports should be prevented.[110]

"LOUISIANA IS TO BE A FIELD OF BLOOD": THE LOUISIANA PURCHASE, REPUBLICAN EXPANSION, AND SLAVERY

It was the 1804–5 debate over the Louisiana Purchase and the related dispute over organization of the territory that brought to a head both old and new concerns surrounding the growth of slavery during national expansion.[111] President Thomas Jefferson saw the acquisition of New Orleans and control of Mississippi River navigation as a major national and international issue. In addressing it, he wanted to avoid a change in United States policy toward Europe and to avoid military action if possible, but he also wanted to obtain at least the core of the Louisiana territory for the United States, which would necessarily raise the question of slavery's status there. At the beginning of the controversy over Louisiana, Jefferson had to mesh his republican approach to expansion with geopolitical realities and domestic political pressures for action on Louisiana.

Jefferson's purchase of Louisiana began in part as what he perceived as a form of national defense, because he believed that it was unacceptable for the United States to have France as a long-term territorial neighbor controlling New Orleans and thus Mississippi River navigation. He wrote to his minister to France, Robert Livingston, in the spring of 1803 that "the session of Louisiana . . . by Spain to France works most sorely on the U.S. . . . It compleatly reverses all the political relations of the U.S. and will form a new epoch in our political course." Jefferson saw New Orleans, a term he apparently used to refer to both the city and its surrounding territory, as a fertile area that "will ere long yield more than half of our whole produce and contain more than half our inhabitants."

Jefferson added that whatever country possessed New Orleans would become the "natural and habitual enemy" of the United States. "The day that France takes possession of N. Orleans . . . we must marry ourselves to the British fleet and nation," joining Britain in an effort to control the Atlantic Ocean.[112] Jefferson was not alone in regarding French control of Louisiana as a national calamity: a Charleston, South Carolina, Federalist newspaper, the *Courier*, announced that French possession of the territory

would lead to "the dismemberment of [the American] empire, and the dissolution of our union thereby being affected [*sic*]."[113]

Jefferson was also under intense political pressure to make the purchase to avoid military action over Louisiana. Many Americans shared Alexander Hamilton's view that Louisiana should be taken from France by force if necessary, but Jefferson and the Republicans opposed such action.[114] Republican opposition was based in part on traditional concerns about the danger to civil society if American military power increased, such as those expressed by New York senator De Witt Clinton. But it was also based on the broader Jeffersonian view that creating a republican "empire of liberty" must occur without force or coercion, through "pacific and open negociation" that would lead to freely chosen association between Americans and new territories.[115]

In the event, Napoleon was willing to sell, cheaply, far more territory than Jefferson had originally planned to buy. The United States was also likely to be able to acquire Louisiana without facing powerful conflicting claims to it. By 1803, the major European empires were steadily withdrawing from the eastern half of the North American mainland as a scene of imperial contest.[116]

Thus the residents of the new territory created from the Louisiana Purchase were for the most part probably going to have to live with the government the United States chose to give them. Jefferson's negotiators, who included Robert Livingston, brother of Louisiana leader Edward Livingston, made accepting this unpleasant reality much easier for local residents by using the existence of slavery in Louisiana as a principal reason why France should sell the territory to the United States. Livingston argued that the United States could supply the territory with slaves to aid further settlement while France could not: "[S]lavery alone can fertilize those colonies, and slaves cannot be procured but at great expense. . . . How would the possession of Louisiana be useful to [France]?"[117]

Remarkably, Livingston had been assured in an extensive analysis written by former PAS official Tench Coxe that permitting increased slavery in the southern United States would not mean an increased risk of rebellion.[118] As Secretary of State Madison's treaty-negotiating instructions required, Jefferson's negotiators agreed with France to respect all existing property rights of the residents, which was commonly understood to include their slaves, and agreed that residents should be "incorporated in the Union of the United States as soon as possible."

A very significant part of the popularity of the Louisiana Purchase was

based on the general enthusiasm arising from the belief that such a vast new territory promised a massive new source of wealth to the American people.[119] As the *Charleston Courier*, which had earlier advocated military annexation of Louisiana, said: "The mind of man can scarcely prescribe bounds to the probable greatness and glories of a vast nation, extending from the Atlantic to the Pacific ocean."[120] These bright golden dreams had a specific focus in the slave states. Based on the course of negotiations and the terms of the treaty dictated by the Jefferson administration, which France accepted virtually without change, many Americans in those states eagerly anticipated that Louisiana would become slave territory.

South Carolinians in particular were so excited about the expansion of America's empire that their legislature agreed to reopen the South Carolina slave trade in anticipation of the creation of the new territory. As historian Jed H. Shugerman argues persuasively, major reasons for the reopening of the slave trade were the prospect of increased business for the Charleston slave trade and the ability of Carolinians to invest in Louisiana slave plantation property. Accordingly, South Carolinians—especially the largely Republican back-country representatives in the legislature—sharply changed their positions on the desirability of permitting slave imports once the Louisiana Purchase was clearly in prospect.[121]

In view of its promises of great wealth and sharply increased national security, the proposed purchase was enormously popular, but a hardy band of New England Federalists nevertheless fought an obviously losing battle against it. Federalist opposition to the purchase treaty was based in part on "Country party" concerns about fiscal imprudence, national overextension, and the consequent need for a standing army, but also in significant part on concerns over loss of Northern political influence. The treaty's article 3 "incorporation" provision was commonly understood to guarantee that Louisiana would be granted statehood, but the treaty hedged about when and how this would occur. Federalist treaty opponents such as Senator Uriah Tracy of Connecticut opposed it on the basis that the Constitution was a compact among the original states, so that a treaty could not constitutionally authorize Congress to admit a new state from foreign territory by majority vote.[122] Tracy admitted that the underlying basis for his opposition was that "the relative strength which this admission [of Louisiana territory] gives to a Southern and Western interest, is contradictory to the principles of our original Union."[123]

By 1803, Rufus King had served as a United States senator from New

York and as ambassador to Great Britain. He had returned to the United States as a private citizen but remained a prominent political figure. King objected to the purchase on largely sectional political grounds. It would create new states where the three-fifths clause would apply, which conflicted with King's view that the three-fifths clause should not apply to any jurisdiction that was not part of the original states. King wrote to Senator Timothy Pickering of Massachusetts that the free states had "injudiciously" agreed to the three-fifths clause because "taxation and representation are inseparable" and because they had mistakenly believed that direct taxation would finance the government. King suggested that perhaps the Constitution should be amended on that point.[124] The fact that there was no prospect of success whatsoever for such an amendment may suggest either that King's political judgment was flawed or that he thought opposition to the three-fifths clause would just be good politics. Pickering adopted King's reasoning when he objected to the purchase on the ground that Louisiana would chiefly employ slave labor, and that the sectional political balance would therefore be altered.[125] Such advocacy of the need to maintain a sectional balance of power, also expressed vociferously by Josiah Quincy, Jr., during the Louisiana Purchase debate, was dismissed as "reactionary" by Republicans at the time.[126]

Treaty opponents lost the 1803 vote on the treaty by a wide margin, since the treaty divided even Northern congressmen. The Senate supported the treaty by a vote of 24–7, and on the critical vote on treaty funding, the Senate voted 26–5 in favor. Funding opponents were Federalist senators from three Northern states, about half the senate Federalists.[127] Virtually all the House of Representatives opposition to the treaty came from New England, and even its representatives were divided on the issue.[128] Alexander Hamilton supported the treaty, and its popularity contributed to the decline of the Federalist Party as a whole to "sectional impotence."[129] But congressional agreement on the treaty meant that Jefferson and Congress had to confront territorial organization issues, including slavery.

Strong support for slavery expansion in Louisiana existed in slave states such as South Carolina and Virginia. Opposition to its expansion had formed part of the basis for Northern opposition to the treaty. Historian John Craig Hammond shows that there was also strong local support in Louisiana for the continuation and expansion of slavery there.[130] In planning the proposed territorial government, Jefferson supported the continuation and expansion of slavery in Louisiana, but a significant number

of congressmen had different views. Congress's views about the proper structure for government of the new territory were also markedly different from Jefferson's.[131]

As noted, Jefferson's and Madison's instructions to the negotiators with France guaranteed the continuation of slavery in the territory by requiring the preservation of existing rights. Jefferson intended that only whites would be citizens of Louisiana, despite his awareness of the presence of some 1,500 free blacks there.[132] He made sure that senators understood that he warmly supported his proposal that part of the territory be used to resettle Indians (who would be self-governed under his proposal), and to segregate them from whites.[133] But despite Jefferson's continuing rhetorical support for slave colonization, he did not propose the use of any part of the vast purchase territory for that purpose.

Jefferson proposed that it be permissible for slaves to be imported into Louisiana from parts of the United States that had banned foreign slave imports (so that only "safe" creoles would be imported to Louisiana).[134] It may be that, as historian William Freehling concludes, Jefferson had by then shifted his thinking and sincerely believed in diffusion as a form of enlightened slavery policy. But as Freehling notes, Jefferson apparently always thought that diffusion must be followed by colonization before abolition could occur.[135] This condition meant that as a practical matter abolition would never occur, particularly in Louisiana. Thus Jefferson envisioned Louisiana as a white man's republic, where slavery expansion using "safe" slaves would have been left to local choice.[136] But some congressmen favored a different policy.

In considering the territorial government issue, the Senate debated and rejected an amendment by Senator James Hillhouse of Connecticut that would have led to very gradual abolition of slavery in Louisiana. The 17–11 vote against this Hillhouse proposal is instructive about slavery expansion politics, since it failed because both Republicans and Federalists from Northern states split almost evenly on it, while slave state senators virtually all voted against it. Antislavery advocates thought that Louisiana's purchase offered a grim prospect for slaves. As one said: "It may be added that Louisiana is to be a field of blood before it is cultivated; and indeed a field of blood while it is cultivated."[137] But Northern senators who went on to acclaim as antislavery leaders, such as John Quincy Adams, voted against the proposal. In a comment that was probably typical of the sentiments of many Northern citizens, Adams explained that "slavery in a normal sense is an evil; but as connected with commerce it has important uses."[138]

Nearly two-thirds of the Northern votes against the proposal were cast by senators from states that had already undertaken abolition, suggesting that countervailing considerations, such as support for vested rights or local freedom of choice, were influential in this vote.[139]

The Senate then agreed instead to prohibit foreign slave imports to Louisiana, and restricted domestic imports except when slaves accompanied bona fide new residents and had been imported prior to 1798 (thus being "safe"). The Senate action reflected widespread congressional fears about insurrections that might result from the growth of the American slave population, and about the potentially dangerous effects of permitting slave imports from areas such as the West Indies. The dominant concern of senators was to prevent "another Santo Domingo," not to end slavery. The foreign slave-import ban passed by a very large majority, as many senators, including slave state senators, changed sides from their vote on gradual abolition. There were several factors that contributed to the creation of a broad coalition supporting this goal.

Several Southern and western senators advocated limiting slave imports to domestic imports as a policy that would diminish the risk of slave rebellions, serving as a "pressure valve for the East" that, some of them hoped, would perhaps also lead to better conditions for slaves and possible future emancipation.[140] Clearly, in the short run, they believed that diffusion would increase security for American slaveowners in states outside Louisiana.[141] Even South Carolina in reopening its trade had barred slaves from the West Indies, recognizing the security risks of foreign importation from those areas.[142] Senators also sought by the bar to prevent South Carolina's slave-trade reopening from becoming a general reopening of the African trade to the United States (which it effectively became, despite the Senate's efforts). But despite broad support for Louisiana slave-import restrictions, concerns were raised about their enforceability during the Senate debate.

Senator Samuel Smith of Maryland predicted during the debate on the Hillhouse proposal that the proposed import ban—and the requirement that new slaves be accompanied by masters who intended to reside in Louisiana—would be unenforceable and would cause a local rebellion: "the local people will not submit to it. I[t] will render a standing army necessary."[143] There was no Senate support for a standing army to enforce antislavery provisions, and such a policy would have violated the basic tenets of Jefferson's concept of republican expansion in any event. If Senator Smith was correct, Congress would eventually have to abandon its effort to control slavery in Louisiana. But Senate policy divisions about the

organization of Louisiana were not limited to the issue of slavery. The Senate also disagreed with Jefferson about the proper form of territorial government there.[144]

Jefferson's proposed temporary government for the Louisiana area was essentially a presidential dictatorship, in which he or his appointees would appoint all of the significant territorial officials, who in turn would administer the territory without a legislature. Even white residents would be denied jury-trial rights in all but capital cases, and would lack any voting or other basic civil rights. This form of government followed logically from Jefferson's patronizing view that Louisianans were "as yet incapable of self-government as children. . . ."[145]

Many congressmen were unhappy with Jefferson's proposed departure from the Northwest Territory model for territorial organization in favor of a markedly more "colonial" government. Jefferson's proposal violated republican principles as Northern congressmen like John Quincy Adams understood them, because residents would have had no role in the territorial government and would have been deprived of many civil rights. One senator described the administration's proposal as a "military despotism," another as a "system of tyranny." But, like Jefferson, many congressmen did not trust Louisianans to run their own government or to make prudent decisions in the national interest if they did. Repeated efforts to alter the Louisiana government-organization bill to permit the election of members of a territorial legislative council were defeated. Louisiana residents were to be denied the right of suffrage entirely.

The Senate divided sharply over whether Louisiana residents should have the right of jury trial not just in capital cases but in all criminal cases, but even there the Senate ultimately accepted the administration position. A majority of the Senate also agreed that no free black should be permitted to serve on a jury in the territory.[146] Since territorial residents were already denied the right of suffrage, the denial of jury-service rights to free blacks amounted to a complete denial of key civil rights to free blacks in the territory, which was entirely consistent with Jefferson's proposal to deny citizenship to blacks there. Congress intended Louisiana to be a white man's republic.

The sharp controversy in Congress about territorial government organization ultimately divided the House and Senate.[147] The House adopted a two-year time limit on the legislation, giving as its reason that it acted "on account principally of the great powers conferred on the Executive" by the bill.[148] The result was that a House-Senate conference provided that

the legislation would not even go into effect until late in 1804, after that year's slave imports had been completed. And the operation of the temporary government provisions was subject to a "sunset" provision: they were limited to a term defined as one year plus any time remaining in a subsequent session of Congress. These provisions may fairly be regarded as designed to kill the legislation. The clear expectation of supporters of the compromise was that the legislation would be reconsidered by the next Congress, and would not become operative law. The act's slavery restriction was repealed within months after it took effect, so that it had no practical effect whatsoever.

Predictably, local residents of Louisiana Territory were unhappy about the new law. Both the law's governance provisions and its restrictions on slavery were deemed unacceptable by local interests. Historian John Craig Hammond argues that local opposition meant that the federal government was powerless to do anything but repeal it.[149] But the circumstances of the law's adoption and revision suggest an alternative possibility.

Before Congress reconsidered the legislation, a delegation of Louisianans had visited Congress and various administration officials in Washington to discuss their objections to the law. Senator William Plumer's notes of his meeting with the Louisianans state that they were "gentlemen of the first respectability" who "resemble[d] New England men more than the Virginians." Plumer's notes contain no reference to the Louisianans' having raised the subject of slavery, but say they instead complained of the lack of a representative government and incompetent Jeffersonian administrators.[150] Jefferson met with the Louisiana representatives but took a hands-off position, claiming that the territorial issue was up to Congress, and then formally requested that Congress consider their complaints.

A House committee reported on January 25, 1805, concerning the complaints of the citizens of Louisiana. Representative John Randolph of Virginia presented the report, which concluded that there were only two ways to get people situated as the Louisianans were to obey: force and affection. He continued by expounding the republican theory of expansion: the use of force is "repugnant to all our principles and institutions of Government."[151] The committee therefore recommended that residents of the territory should be permitted to make their own "internal government regulations," a phrase that at the time was commonly understood to include local control over slavery, but also recommended that Congress continue the bar on foreign slave imports.

The Senate reconsidered the territorial issue based on a bill introduced

by Senator William Branch Giles of Virginia, Jefferson's de facto Senate floor leader. The Giles bill contained no domestic slave-trade restriction, and an ineffectual foreign slave-trade restriction (since, among other things, slaves imported through South Carolina could then be sold into Louisiana), but also provided a Northwest Ordinance–style government for the territory.[152] The new Orleans territory government finally adopted in March 1805 was modeled directly on that of Mississippi Territory, thus following the more liberal Northwest Ordinance governance model, but exempted the Orleans territory from the slavery bar of the Northwest Ordinance. Territorial officials interpreted this exemption as a repeal of the 1804 temporary legislation's bar on domestic slave trading (that is, the importation of slaves from other parts of the United States into Orleans territory). At the same time, Congress adopted legislation organizing the remainder of the Louisiana Purchase into a new Louisiana Territory. There, slavery would continue to be legal because it had been legal under prior law, and the Louisiana Territory legislation made no effort to change this. It seems likely that the Louisiana Territory legislation would have permitted at least the importation of domestic slaves to that territory as well.[153]

In the final Louisiana territorial-government legislation, Congress and Jefferson had opened the floodgates to southwestern slavery. Contemporaries seem to have agreed that the federal government had the constitutional power to bar slavery (with compensation for existing slaves) and slave imports in the territory of Louisiana, and there was little doubt that it had the necessary power to enforce its decision to do so over local opposition. But the federal government lacked the political desire to take the unpalatable law-enforcement steps necessary to impose its will on recalcitrant local residents by subjecting them to a "colonial" government in the face of their desire for more slaves, and the equally strong desire of existing slave state residents such as those in South Carolina to trade slaves to Louisiana and to invest in slavery there. Americans' avid pursuit of this rich new territory while employing the ideal of "republican" expansion as a means of governance inevitably entailed the growth of western slavery.

As their dreams of state and federal antislavery action collapsed in the face of early westward expansion, abolitionists knew they faced a daunting task. By 1804, a leading Northern abolitionist anticipated that abolition might take one hundred years or more, "though every fair exertion shall be made. . . ."[154] Before the 1808 foreign slave-trade prohibition went into force, acting with broad congressional support or acquiescence from all re-

gions, the federal government had permitted slavery to become established irreversibly in the southwest. During the founding generation, the Constitution's text and political structure had successfully protected slavery's market-driven expansion. In a country governed by such a constitution, a national political commitment to Jeffersonian republican expansion made slavery's southwestward movement virtually unstoppable.

6

THE MISSOURI COMPACT AND THE RULE OF LAW

The Missouri controversy of 1819–21 was a titanic economic and political struggle between America's sections over their westward expansion. Their dispute placed slavery in a clash with an emerging free-labor ideology. In 1820, Congress agreed to admit Maine as a state, permitted Missouri to draft a constitution without a slavery restriction, and provided that slavery would be "forever prohibited" in territory within the Louisiana Purchase and above 36´30˝ north latitude but outside the state of Missouri.[1] The PAS declared that in that compromise for "the first time" Congress had given "a solemn and deliberate sanction" to "the continuance of domestic slavery."[2] Recognizing slavery as a long-term national institution, the first Missouri compromise formally divided parts of the West into free and slave territory.

But the combatants saw the stakes as higher still: they were fighting over the nation's identity and long-term national political control. As Senator Rufus King of New York wrote in a letter to his son, the Missouri compromise would "settle[] forever the dominion of the Union . . ."[3] Even after the slave/free territory partition, the dispute was not over. After it was reopened, a second 1821 compromise provided that Missouri would only be admitted when the president determined that it had agreed that neither its state constitution nor any of its laws would be construed in a manner that would violate the Constitution's P&I clause.[4]

Despite two years of struggle, these agreements temporarily resolved only the controversy's economic dimension. The deeper political and constitutional contest ended in stalemate when neither side proved willing to risk civil war. That stalemate created a fragile equilibrium that thoughtful

politicians recognized had transformed the Constitution into a sectional "compact" on slavery, since the Constitution lacked the essential elements of a rule of law—agreed-upon moral foundations, allocations of political authority between levels of government, and judicial dispute resolution—where slavery was concerned.[5]

The compromise resulted from the collapse of the Northern state coalition opposed to slavery expansion when critical members abandoned it, and this chapter considers in detail their reasons for defection. Defectors included New York Bucktail Republicans led by Martin Van Buren, strongly antislavery Northern politicians such as Senator Jonathan Roberts of Pennsylvania, and others such as Pennsylvania representative Henry Baldwin. Forced to choose, these leading "doughface" politicians supported compromise based on principles they saw as critical to preserving a federal republican union.

The Constitution and its history served as a focal point for congressional debate over Missouri, but the Constitution's provisions for judicially resolving disputes played no part in resolving the Missouri issues. There were no federal-court precedents interpreting the Constitution or the law of slavery regarded widely enough as relevant and controlling to provide meaningful guidance. The Supreme Court's views on congressional power over slavery were uncertain, and its authority to resolve finally such an issue was widely questioned. Proposals for judicial resolution of the constitutional issues that divided the combatants were dismissed by both sides.

More troubling still, the controversy led to the clear articulation of a constitutional antinomy—two utterly irreconcilable visions of the moral foundations of America and its constitution. The terms of the debate over national identity had changed profoundly since the 1780s. One vision, advanced by leading senators such as Rufus King, saw the Constitution as grounded on and subordinate to a "higher law" whose source was moral or religious, creating a unified, morally transcendent nation.[6] In their view, the Constitution contained a mandate to expand freedom by ending slavery's expansion.

For adherents of the other major moral vision, the Constitution was founded on popular consent alone. Following Jefferson, advocates of this strain of secular republicanism such as the Van Buren Bucktail Republicans viewed the Constitution as a charter to expand freedom by broadening popular sovereignty. Human liberty was subject to decisions made by republican governments, without regard to whether such decisions expanded slavery or not. Their ideal nation was a federal union of states.

Another historically significant aspect of the sectional power struggle over Missouri was a dispute that nominally concerned the right of black Americans as citizens to emigrate to Missouri. But prominent Northern antislavery leaders attacked Missouri's original bar on black emigration to Missouri not primarily to protect black rights, but instead in part because they saw free-black emigration as an "evil" that must be borne by Missouri in return for receiving the "benefits" of slavery. Key Northern states moved to deny blacks political rights at home even as they advocated less important rights for them in faraway Missouri. Northern antislavery action during Missouri was ultimately based on free-labor ideology, which challenged slavery as a repressive labor status but did not require any effort to equalize black rights, not on an inclusive republicanism, despite its republican rhetoric.

Historians have explained the causes and consequences of the Missouri controversy in markedly different ways.[7] Some historians see the debate over slavery as concealing a struggle over more fundamental underlying political, economic, or constitutional issues.[8] Against these arguments, some recent historians have asserted that Missouri was at bottom a dispute over the merits of slavery, which resulted from persistent struggles over slavery in developing areas, or from Northern reaction to the growing power of slavery, including resentment of slavery's growing incursions into Northern states' "separate sphere."[9]

Historian Peter Onuf argues instead that antebellum sectional conflict was not a product of "fundamentally different social systems" or differences in morality but was instead "integral to the original conception and construction of the federal system." Federalists argued that the pursuit of interest would lead toward greater union, but they relied on a contingent, expanding Union to dissolve sectional differences. When political developments threatened expansion, sectional differences would intensify and become "essential."[10]

The history of the Missouri controversy supports Onuf's analysis. The Missouri struggle was at base a recurrence of sectional tensions that had existed since the postrevolutionary period but had previously been suppressed by the creation of the federal constitutional structure and by very rapid national expansion. During the Missouri conflict, the basic conditions supporting the recrudescence of sectional divisions were present.

Before considering the controversy itself, it is necessary to have some appreciation of the rapid and very disruptive changes in American social and political conditions that were occurring in the years before the controversy and continued while it was in progress.

THE CHANGING AMERICAN LANDSCAPE AND THE MISSOURI CONTROVERSY

In late 1818, John Randolph of Roanoke, a Republican congressman from Virginia and major slaveholder, wrote about his life in Virginia to his old friend Harmanus Bleecker, a former New York congressman. Randolph described the dramatic changes that were occurring in Virginia slavery in heartfelt terms:

> Salem lies about 20 miles to the South near the Roanoke [River]. It is on the great western road, along which the tide of emigration pours its redundant flood, to the wide region that extends from the Gulph of Mexico to the Missouri. Alibama is at present the loadstone of attraction: Cotton, Money, Whiskey & as the means of obtaining all those blessings, Slaves—the road is thronged with droves of these wretches & the human carcase-butchers, who drive them on the hoof to market & recall to memory Clarkson's Prize Essay on Slavery & the Slave trade, which I read upwards of thirty years ago. One might almost fancy oneself on the road to Cal[a]bar. . . .[11]

The flood of postwar emigration was not confined to rivers of population flowing from the Upper South to the Deep South and West. In late 1816, Rufus King wrote to a correspondent that "the Tide of Emigration from every one of the New Eng[land] States, and especially from Vermont, is very great—and it is a proof of good sense among the Emigrants; for the exchange as respects climate and fertility of soil, are greatly on the side of the western world. . . ."[12]

Economic pressure to emigrate westward was so powerful that even in late 1819 during the Missouri controversy and in the midst of a major economic depression, many continued to emigrate to the west, and to Missouri in particular. Before it was clear whether Missouri would be admitted as a state at all, the *St. Louis Enquirer* "reported that the immigration to Missouri continued to be astonishingly great. It estimated that from thirty to fifty wagons daily crossed the Mississippi at the various ferries, bringing

in an average of from four to five hundred new settlers each day and that '[t]he emigrants . . . bring great numbers of slaves. . . .'"[13]

These accounts reflected aspects of a massive shift of American population to the West, particularly in the years after 1815. All of the original Atlantic coast states except New York lost population in relative terms during the 1810–20 period, while the trans-Appalachian states experienced large population increases. Virtually all of the western population growth above natural increase was the result of westward movement by Americans, not foreign immigration.

Other important demographic changes were also occurring in the regional structure of the United States during this period. By 1820, the North's population was nearly 20 percent larger than that of the South.[14] Population in the north central region grew exponentially, and was slightly more than half as large as that of New England by 1820. States in the expanding south central region grew at a lower average rate, but that rate was still nearly twice the national average increase in population.[15]

The development of the south central region was largely fueled by use of imported slave laborers such as those whose forced march John Randolph had observed. By 1820, the trans-Appalachian slave population had exploded, at least doubling since 1810. By then, there were more than 350,000 slaves west of the Appalachians, or a population nearly the size of Virginia's entire 1810 slave population. The western slave population was already 26 percent of the total population in the south central region in 1820, and the region had almost no free blacks. A new western slave world was under rapid construction, its expansion fueled by the end of war with Britain in 1815.[16]

Much of the supply of new slaves to the southwest came from older slaveholding areas. Illegal importation also played a role in the continued growth of slavery, particularly in southwestern coastal states. Representative James Tallmadge, Jr., of New York claimed during House debate in 1819 that it was a "well known fact" that fourteen thousand slaves had been illegally imported the previous year. Tallmadge's estimate had at least some substance, as Congress's decisions to tighten slave-import prohibition laws in 1818 and 1820 confirmed. Slave smuggling was not new. Antislavery forces had been fighting slave smuggling in violation of state or federal laws systematically since at least 1805, and episodically since the mid-1790s.[17]

These demographic shifts after 1810 resulted in an equally dramatic transformation in the regional distribution of political power in Congress

favoring the West. Between the 1810 and 1820 congressional reapportionments, Ohio gained more seats in Congress than did New York, and actually became larger than Massachusetts. But slave state representation in the House of Representatives fell only about 1 percent, from 43 percent to 42 percent, between 1810 and the 1820 census reapportionment. The slaveholding states received a political representation premium in Congress from slave population growth and the three-fifths clause; in the House it was about 8 percent of total House seats as of 1820.[18]

Although the slave state position in House representation remained relatively stable, the balance of power in sectional representation in the United States Senate had altered. In the Senate, between 1796 and 1818, the free states either had voting parity with the slave states, or a one- to two-state advantage. By late 1819, there were eleven free states and eleven slave states. The admission of either Missouri or Maine to statehood without the other would have adversely altered the Senate balance from the perspective of one section or the other.[19]

During the years between the War of 1812 and the beginning of the Missouri controversy, slavery debates often occurred at the state level.[20] State debates over legalizing slavery were largely confined to newly settling states.[21] But before 1818, Congress refused to become involved in them. Congress had rejected without serious debate all proposals to modify application of the Northwest Ordinance to areas within the Northwest Territory, whether territories or states.[22]

The admission of new states and territories caused little controversy over slavery through 1818. When Missouri was raised to second-class territory status, in 1812, only seventeen members of the House of Representatives (out of 181) supported an effort by Representative Abner Lacock and Representative (and future Senator) Jonathan Roberts of Pennsylvania to bar importation of slaves to the territory.[23] Mississippi was admitted as a slave state without serious dispute, while Indiana had been admitted in 1816 as a free state.

The first significant controversy over slavery during a state's admission concerned the 1818 admission of Illinois.[24] The Illinois constitution was a compromise between antislavery and proslavery forces that permitted continued slavery in certain areas and grandfathered involuntary-servitude agreements that amounted to de facto slavery.[25] The challenge to its admission led by Representative James Tallmadge, Jr., of New York, who argued that the state constitution unduly protected slavery, nevertheless lost overwhelmingly. Only 20 percent of the House, or one-third of the

members from New England and Middle Atlantic states, supported Tallmadge's proposal.[26]

SECTIONAL ECONOMIC INTERESTS IN WESTERN EXPANSION

The Missouri controversy began with a sharp preliminary skirmish during February 1819 debate over amendments offered by Representatives Tallmadge and John W. Taylor of New York to phase out slavery in Missouri and Arkansas by barring the future importation of slaves and requiring gradual abolition there. The two-year debate that ensued changed few if any minds among legislators, but it was an extraordinarily important debate nevertheless. The controversy unfolded under intense newspaper and public scrutiny, which meant that congressmen believed that they had to justify their positions to their constituents. The controversy was the first truly "popular" American national debate over slavery.

Many congressmen believed that the Missouri bill would set an enormously important precedent. Senator Jonathan Roberts of Pennsylvania said: "There is no ground on which slavery can be extended in Missouri, that will not apply to the whole region west of the Mississippi."[27] But if the Missouri debate was a "referendum on the meaning of America," it is essential to know precisely what was at stake there in order to understand its results.[28]

The political configuration on slavery restriction that had existed as late as the debate over Illinois at the end of 1818 changed dramatically when Representative Tallmadge offered his slavery restriction proposal during consideration of Missouri's statehood request in early 1819. Tallmadge's proposal had two parts: it barred importation of slaves into Missouri, and it required that afterborn slave children be freed when they reached twenty-five years of age.[29] On the first vote regarding Missouri and in the debate on the creation of Arkansas Territory, which occurred nearly contemporaneously, Tallmadge's proposal split the House along sharply sectional lines, with approximately 90 percent of Northern members supporting Tallmadge's position. The level of support for the Tallmadge position thus nearly tripled compared to the Illinois admission fight, increasing from thirty-four votes to the consistent range of about ninety House votes throughout the Missouri conflict.

What caused this dramatic increase in support? A critically important

factor in causing the sharp division was that the 1819 antislavery proposals disrupted the historical pattern of the regional geography of slavery and freedom.[30] The crucial issue is why maintaining that pattern suddenly assumed paramount importance during the Missouri controversy.

The Northwest Ordinance of 1787 had implicitly divided the country into zones of slavery and freedom using the Ohio River as a boundary. (See chapter 4.) The slave or free development of trans-Appalachian states had largely followed that division through 1818. Some, perhaps even many, congressmen therefore anticipated that that pattern would continue, and that areas south of the Ohio River line (extended westward) might become slave territory, while areas north of that line would become free territory. That expectation formed part of Representative Taylor's justification for his restrictionist position on Missouri: "Missouri lies in the same latitude [as other parts of the Northwest Territory]. Its soil, productions and climate are the same, and the same principles of government should be applied to it."[31] In explaining why he agreed to support the Southern position on Arkansas, a swing voter, Federalist Representative Ezekiel Whitman of Massachusetts (who had voted with Tallmadge to oppose Illinois admission), said that he thought that an equitable division of territory among slave and free states had been the traditional pattern, and that that should continue.[32] But either restriction in Arkansas Territory or the absence of restriction in Missouri would upset the historic pattern. Efforts were made to upset it for the first time during the Missouri controversy because for the first time the national debates over slavery expansion concerned territory that large numbers of Northern free settlers and slaveholders both wanted to settle.

Representative Taylor argued during the Missouri and Arkansas debates that an increasing collision was occurring between Northern and Southern white settlement as settlers from different sections began to cross paths more frequently in the West. He asserted that the spread of slavery would exclude Northern emigrants from settlement. He contended that it was unfair for Arkansas Territory, which contained extensive potential cotton lands, to be reserved to Southern slaveholding emigrants, since Northern emigrants deserved the opportunity to grow cotton as well. But free Northern settlers would be deprived of that opportunity if slavery were permitted in Arkansas Territory, and "he saw no good reason why that portion of the Union . . . should be excluded from participating in this valuable species of agriculture."

Taylor believed that exactly the same exclusion of Northern settlers

would occur if Missouri were to become a slave state: "That such would be the effect of allowing a free introduction of slaves, he had fully demonstrated when the bill for the admission of Missouri was under consideration."[33] The consequence of exclusion, he said, would be to prevent the large numbers of emigrants who had come into New York from the "eastern hive" from migrating further to the west. Of these emigrants into New York, he said: "Do you believe these people will settle in a territory where they must take rank with negro slaves?"[34] Taylor thus expressed two related but distinct concerns about slavery's advance: New York would lose the economic "safety valve" provided by westward emigration, and its citizens would lose economic opportunities to which they were entitled.

Taylor was not alone in expressing the belief that slavery extension would block Northern free-settler migration. Senator Roberts of Pennsylvania made a very similar argument during Senate debate in 1820: "admit Missouri, a slaveholding State, without limitation, and you place the citizens of the non-slaveholding States under an interdict, as to settlement, that they cannot overcome."[35] The editor of *Niles Weekly Register*, a widely read publication on current affairs, took the same stance. He said in analyzing the problem of slavery in Missouri: "'The northern hive,' the New England states, will furnish few emigrants to the new state [if there is slavery in Missouri], and the European emigrant, we know, nine times in ten if a farmer, seeks the country in which he expects to be treated like a *man*."[36] Senator David Morril of New Hampshire argued at length using historical census data that "involuntary servitude discourages and impedes a white population."[37]

Leading slave state congressmen held precisely the same view about the relationship between legalizing slavery and settlement patterns that Taylor and Roberts did. Early in the Missouri debate a key slave state congressman, Representative Philip Barbour of Virginia, argued that for the slave states, the issue of exclusion was a central concern. They believed that barring slavery would have the effect of barring Southern emigration "in almost every instance . . . ," which would be a "monstrous injustice."[38] Senator Nathaniel Macon of North Carolina agreed that the Northern restrictionist position was a territorial grab that would unjustly exclude southerners from the West.[39] Senator Ninian Edwards of Illinois expressed the same view.

The very similar opinions about regional exclusion expressed by politicians from all parts of the country strongly suggest that Glover Moore correctly describes the issue of regional exclusion as "one of the fundamental

causes of the Missouri Controversy. . . ."[40] The fact that Congress's decision about restriction would mean exclusion for settlers from one section or the other meant that both the North and the South saw the Missouri controversy as a "zero-sum game" where their expansion was concerned. There is other evidence to support the conclusion that regional settlement exclusion was at the heart of the sectional division over Missouri.[41] Northern representatives made a systematic, politically novel attack on both the concept of slavery diffusion and national policies that created demand for slaves.

Representative Taylor vigorously attacked Henry Clay's position against restriction, arguing that diffusion of slaves into the West as Clay and other southerners advocated would expand slavery.[42] Central to Taylor's argument was his assertion that as a matter of economic logic, increased slave demand would defeat antislavery law enforcement: "in vain will you enact severe laws against the importation of slaves, if you create for them an additional demand, by opening the western world to their employment. While a negro man is bought in Africa for a few gewgaws or a bottle of whiskey, and sold at New Orleans for twelve or fifteen hundred dollars, avarice will stimulate to the violation of your laws."[43] A "new and boundless" market for slaves would "double" the price of slaves, and thus "frustrate" the intentions of those who sought colonization, and also "tempt the cupidity" of those who might otherwise gradually emancipate their slaves if slave prices did not increase.[44]

Taylor had plenty of company for his economic attack on diffusion. Senator Roberts argued: "Establish slavery over this territory, and you, of consequence, increase the value of slave-property. . . ."[45] Senator Morril made the same argument, adding that antislavery law enforcement would be impossible in the face of increased slave demand.[46]

Recognition of the central role played by market demand for slaves—as opposed to the supply of slaves—in maintaining slavery was the politically novel claim at the heart of the Northern attack on Missouri slavery. Taylor and other Northern representatives such as Senator James Burrill, Jr., of Rhode Island linked demand for slaves to the maintenance of slave prices, and to continuation of both the domestic and foreign slave trade.[47] Taylor argued that in the face of such demand, even strengthening laws against slave imports as Clay had suggested, by making illegally imported slaves free, would "in practice . . . be found altogether inoperative" because it would confer on a slave a theoretical right (to sue for freedom) that could not be enforced by the slave.[48]

Northern restrictionists now rejected diffusion as an acceptable slavery policy, though it had arguably been de facto national slavery policy since before the Louisiana Purchase (see chapter 5). They asserted that diffusion would result in slave population growth, a point conceded by leading slaveholding-state representatives in the Senate such as Senator William Pinkney of Maryland.[49] Senator Walter Lowrie of Pennsylvania, for example, made an extended argument, based on Malthusian population principles, that if the West were opened to slavery, "this class of population will increase with a rapidity heretofore unknown."[50]

In summary, leaders on both sides of the controversy understood the economics of slavery expansion in much the same way: expansion would increase aggregate demand for slaves, maintain or increase slave prices, and increase slave populations; restriction, on the other hand, would limit slave demand and cause a decline in slave prices, constraining slave population. This meant that sectional interests on slavery expansion were in direct conflict. As had been true since 1787, it was in the interest of the slaveholding states as a whole to expand slaveholding settlement westward, because such expansion would economically benefit both existing and new slaveholding states.[51]

But adopting slavery in new territories would exclude many Northern settlers from those areas, so Northern representatives sought a free-labor policy for western settlement to protect their settlement path, a policy that would in turn harm slaveholding states' economies, particularly slaveholders' existing asset values. Faced with this clash of interests, Senator Edwards of Illinois, who represented a constituency strongly interested in economic development and land prices, but closely divided between pro- and antislavery forces, sought to maximize population growth in the western country, by offering "fair and equal inducements to emigration of citizens of every section. . . ."[52] Edwards opposed restriction because it would exclude Southern residents, reducing overall demand for land. Northern representatives could have made precisely the same arguments about the need to restrict demand for slaves during the debates over the Louisiana Purchase, but did not do so.[53]

During the Missouri controversy, Rufus King went to considerable lengths to rationalize previous Northern inaction against western slavery expansion. King understood that it appeared that the Northern states were changing policy in opposing Missouri admission, though they had never previously opposed admission of a state from an area that already had slavery. King's public explanation for previous Northern inaction against

slavery's western expansion was that the Northern states could not legally oppose slavery in new western states because they were formed out of territorial cessions by slave states.[54] In private, King gave a different explanation based on northern indifference to expansion, writing to Richard Peters of the PAS that "[t]he admission of new States into the union, while confined to our primitive territory, has been a subject of little attention on the part of the people. . . ."[55]

But Senator Morril of New Hampshire was both more perceptive and more candid than King in describing the economic realities of smuggling and slavery absent limits on slave demand. He said: "The people of this country are fond of property. It is impossible to restrain them within legal bounds, when you present to them a pecuniary advantage, even from illicit commerce."[56] Senator Morril's observation would have applied just as well to slavery expansion during the Louisiana Purchase as it would have to Missouri. His was an economic argument about market demand and its corrupting effects on law enforcement. His observation was not dependent on new experience of slave smuggling after 1808 for its force, since it would have applied equally well to New England tea and rum smuggling's long history.

A preferable explanation for Northern failure to press demand-based arguments against slavery expansion before Missouri is that the politics of opposing slave supply, and the politics of opposing increased slave demand, were far different throughout the early Republic period because it was possible to form intersectional coalitions on the former issue, but not on the latter. From the 1780s onward, Northern antislavery congressmen had often been able to find some Southern allies for their opposition to continued slave supply through imports. Attacking slave supply also limited future supply only, so it did not raise a "vested rights" issue, which made it an easier political target. But from the 1780s onward, Northern representatives had faced concerted Southern and western opposition to efforts to constrain demand for slaves, particularly when the acquisition of new national territory was involved.

The history of postrevolutionary efforts to control slavery thus showed that constraining future market demand for slaves was politically far more difficult than attacking future supply. Northern state unwillingness to do the hard bargaining and face the tough political choices needed to constrain market demand for slaves in an expanding nation built partially on slave labor explains Northern inaction before Missouri, not inexperience or ignorance. The newfound Northern willingness to challenge policies

increasing market demand for slaves during Missouri provides strong additional evidence that Northern settler exclusion, not abstract opposition to slavery, motivated Northern restrictionism. It was now worth taking on that much harder political challenge because Northern sectional interests were directly at stake. But as the course of the Missouri controversy showed, the stakes were actually higher than the limited, though very important, question of which region's settlers would be excluded from Missouri. Ultimately at stake was long-term control of the federal government and national policy.

SECTIONAL POLITICAL INTERESTS IN THE MISSOURI CONTROVERSY

Before the Missouri debate resumed in early 1820, state legislatures and some prominent state politicians intervened in the debate. New York governor De Witt Clinton made the Missouri controversy a major issue in his address to the New York legislature in early 1820, an election year. Clinton's intervention in this issue fed suspicions about his presidential ambitions. His position on Missouri also contributed to fears that either development of the Erie Canal and a regional economic trade bloc, or New York's economic aggrandizement in general, was driving the New York position on Missouri slavery restriction.

Such suspicions were openly voiced during the opening of the 1820 congressional debate, in which Massachusetts congressman John Holmes, representing the Maine district, attacked the restrictionist position on the grounds that it involved "jugglers behind the screen" who were playing a "deeper game."[57] Holmes's attack was in part directed at Clinton and Rufus King. But he launched a broad political attack against restriction supporters generally, arguing that they were motivated by sectional interests.

Representative Alexander Smyth of Virginia broadened the political attack. In a transparent bid for western support, Smyth argued that the Mississippi River navigation rights of the Northwest Territory states had been preserved by the Southern states, while New York politicians (read, Rufus King) had sought power to "cede the navigation of the Mississippi to Spain."[58] Senator Barbour made the same argument against "the East" in the Senate.[59] Rufus King's notes for his Missouri speech contain a detailed effort to refute it.[60] This line of argument clearly resonated with some western congressmen. Senator Edwards of Illinois said that he saw restric-

tion as a sectional plot by those who "dread our growth and would gladly put a stop to emigration from every other quarter [than their own]."[61]

Was there a "deeper game" involved in the Missouri controversy as various congressmen charged? Or was this argument instead really just a smoke screen, a Southern pretext to dissolve Northern solidarity or to give political cover to Northern allies?[62] The answer to the "deeper game" question depends on what is really meant by the question.

We can put aside the question whether King, Clinton, or Clay had personal ambitions for the presidency that they thought would be advanced by their Missouri positions, as this would not tell us much about the motives of congressmen as a group. But what King, generally regarded as the Northern restriction leader, clearly did believe was that the North should function as a voting bloc—or party, for lack of a better word—advancing policies that would serve Northern political interests. He thought that Northern policies (not necessarily Federalist policies) would better serve the national interest on a host of issues, from naval and tariff policy to slavery. King described his views on the political question posed by Missouri to his confidants and allies on a number of occasions, almost always in balance-of-power terms.

At the outset of the Missouri controversy, King wrote to a long-time confidant, former Massachusetts senator Christopher Gore, that an important reason why it would be desirable to admit Maine to statehood was that "as respects the balance of power in the Senate, which shifts rapidly towards the West, it is a good policy to multiply the numbers of this body from the North."[63] He met in Massachusetts in late 1819 with Congressman Daniel Webster, Supreme Court Justice Joseph Story, and others, and told them that "the question was the most important one that had been brought forward since the adoption of the Constitution—it was in fact to decide whether the slave holding States should hereafter decidedly preponderate, and all the evils of the accursed slave trade be enhanced a hundred fold."[64] He wrote to his son that the compromise would "settle[] forever the dominion of the Union," ensuring that presidents and Supreme Court justices would henceforth almost always come from the "slave region."[65] After the first round of the Missouri controversy, King wrote to a political intimate that "by the multiplication of new states" the slave states had "become a controlling power in our government tho' a minority."[66]

Senator Roberts of Pennsylvania argued similarly that slavery needed to be restricted in Missouri because otherwise "[t]he scale of political power

will preponderate in favor of the slaveholding states."[67] Northern House restrictionist leader John Sergeant of Pennsylvania argued that the North needed to restrict Missouri as a counterbalance to Florida, which would enter as a slave state.[68] Joshua Cushman, a Democratic Massachusetts (and then Maine) congressman, sent a circular letter to his constituents arguing that the interests of the North could only be protected by maintaining a superior balance of power against the Southern states, so the Missouri dispute should be kept open.[69] Senator Harrison Gray Otis of Massachusetts argued that Southern policy was motivated by a desire to control the Senate balance of power.[70]

Southern leaders who were involved in the dispute, such as President James Monroe, and more distant observers, such as Thomas Jefferson and James Madison, concluded that Northern restriction was a mask for a power grab, not really a position based on humanity or morality as northerners claimed. These Southern leaders' views could be dismissed as self-interested. But there were Northern politicians of unimpeachable integrity who had strong antislavery convictions, such as Senators Roberts and Lowrie of Pennsylvania, who ultimately supported compromise because they became convinced that doing so would advance what they thought were higher public values than restriction, whose supporters they saw as tainted by political bias. It was the defection of key Pennsylvania and New York politicians in particular that was central to the Northern coalition's collapse.[71]

One of the most important defectors was Senator Jonathan Roberts. The reasons underlying Senator Roberts's willingness to support the compromise are particularly significant. Roberts, a Quaker, was strongly morally opposed to slavery. His integrity was unquestionable, and there is little reason to think that he traded other political objectives for his support. To support his challenge to the position that Northern restrictionists were engaged in a political plot, a recent historian argues that Senator Roberts was deceived or flattered into supporting the South.[72] But the sources suggest that Senator Roberts decided on the basis of firsthand information that Senator Rufus King, who had been and might soon again be a presidential candidate, was using the Missouri issue for political purposes. Roberts wrote to his brother on February 16, 1820, that "[t]he obstinate Southerns will not yield at all & King and Otis I believe are factious. I cannot apologize for King's conduct. He would not go for freeing the children hereafter born in Missouri. He and Otis prevented me from trying it. Yet on this

limited & inoperative restriction he now says he would keep Maine out of the Union for 20 years rather than yield." Roberts continued: "Keep the question open and King will very probably be the next Pres[iden]t."[73]

Roberts's reasoning about King's inconsistent positions on aspects of limiting Missouri slavery was clearly correct. Based on King's own arguments about congressional power to restrict slavery, there was no constitutional distinction between Congress's power over the proposed "slave import" and "afterborn child" restrictions on Missouri.[74] Since neither involved what King classified as a "federal right," under his own analysis both restrictions were within Congress's power to impose in admitting a new state. As Roberts thought, King's position could not be defended on principled grounds. But there was a political difference, which is that there was more Senate opposition to the afterborn-child restriction than there was to a slave-import restriction.

By late January 1820, Roberts wrote in private correspondence, "No doubt there is much of ambition in New York as well as in Virginia."[75] Roberts referred to antislavery forces as "Ultra federalists," and said that they no doubt "look to better things thro' the slave question."[76] Roberts ultimately accepted the Southern argument that Missouri was a "Federalist" or "New York" plot because firsthand evidence persuaded him that it was true. In his unpublished memoirs, Roberts described King as a man "who might have been great," but "sunk himself into a cunning man."[77]

As Roberts explained to his brother privately, he believed compromise was essential to the "harmony & Union of these states," even though "it will be seized by knaves to injure me."[78] He later wrote to prominent Philadelphian Tench Coxe that "my convictions determined me to offer myself a sacrifice if it had been necessary to have settled [the Missouri controversy] last year. It was not necessary but those who took the same course for the most part are prostrate."[79]

Representative Henry Baldwin of Pennsylvania also decided that restrictionists were manipulating that issue for political reasons. Senator Lowrie of Pennsylvania, a strongly antislavery "pious evangelical," reached the same conclusion.[80] A fundamental reason why these and other key Northern politicians opposed restrictionism was that they saw it as having an unacceptably "partisan" basis, though partisanship to them could mean party or sectional bias. But of equal historical importance is that key Southern politicians also saw the Missouri issue in the same way King did—in balance-of-power terms.

Because politicians from all sections were well aware that the North

would increase its dominance in the House after 1820, control of the Senate became the linchpin of national-policy control for them.[81] John Tyler, a Republican congressman and future president from Virginia, wrote to Spencer Roane, chief justice of the Virginia Supreme Court, about the Missouri issue in February 1820. Tyler told Roane that "[t]he non slave holding States now have the majority of us and that majority will be increased at the next census—In what then does our safety consist? In nothing but the firmness of the President."[82] Tyler was especially worried that the South would lose control of the Senate (and hence of Congress) if Missouri was admitted under a restriction.

Representative Charles Pinckney of South Carolina, ever indiscreet, wrote to South Carolina newspapers after the 1820 compromise, crowing that the compromise was "a great triumph" for the "southern interest" because it would "give the southern interest in a short time an addition of six, and perhaps eight, Members in the Senate of the United States."[83] The Boston *Centinel* promptly attacked Pinckney's letter as "*The Cloven foot uncovered*," a "fair disclosure of the deep laid plan and anxious desire to establish forever the *ascendency of the slaveholding States*, and to control by means of the Senate the voice of the nation."[84] Rufus King's gloomy private assessment of the first compromise was strikingly similar to Pinckney's, and he also acknowledged that in the future, the compromise could be modified further in favor of the slave states. King said:

> [T]he settlement amounts to this, that Missouri, Arkansas, and the territory west of them, and south of 36.30′ N.L. with the Spanish province of Texas . . . are to be slave states; and that for the present, and until our masters the slave states are pleased to order otherwise, the Territory north of 36.30′ may be considered as exempt from slavery—but with the avowed understanding that whenever Congress choose they may make the same or any part thereof a slave Region, and . . . that whenever any new State shall be formed there, that it must and will be free to establish slavery.[85]

Balance-of-power concerns also directly influenced sectional stances on new territorial accessions during the Missouri controversy. In 1820, James Monroe counseled Andrew Jackson against efforts to acquire Texas "for the present" for fear that the North would see it as upsetting the sectional balance of power.[86] Southern newspapers attacked the Adams-Onis treaty because it relinquished American claims to Texas. One important ground was that Texas was needed to "maintain the balance between the North

and the south. . . ."[87] The 1821 resolution of the treaty negotiations, omitting Texas, may have influenced Northern willingness to enter into the second Missouri compromise.[88]

Former Senator Abner Lacock of Pennsylvania, a Republican, wrote to President Monroe that he understood that politicians from both sections saw the Missouri dispute in balance-of-power terms: "the possession of the western domain by either the one or the other [slave or free states] is expected to give them a lasting ascendancy in the government."[89] Monroe's secretary of state, John Quincy Adams, understandably concluded that the political-power motive operated about equally on both sides of the dispute.[90]

In the final analysis, there was a "deeper game" in the Missouri controversy—whether one section or the other could take long-term control of the national government.[91] The eventual compromise resulted from a stalemate on this central political issue, which left the combatants poised in a fragile equilibrium.[92] The following review of the debate over the Constitution during the Missouri controversy shows why there was no workable judicial mechanism for resolving the stalemate, and confirms that the sections were primarily divided by their economic and political interests. That division of interests necessarily implicated slavery, but it escalated ominously to irreconcilable disagreements over the nature of the Union.

THE CONSTITUTIONAL DEBATE: SECTIONAL INTEREST AND THE MORAL NATURE OF THE UNION

In theory, congressional divisions over constitutional issues might have led to proposals that the Supreme Court should resolve the underlying constitutional questions about Congress's authority to restrict slavery in territories and new states. The Court had asserted its authority finally to resolve such constitutional questions in *Marbury v. Madison*, and it had resolved a series of major conflicts between federal and state authority by the time of the Missouri controversy, including *Martin v. Hunter's Lessee*.[93] The political reality was, however, that the Court's power to intervene in such structural constitutional disputes involving different branches or levels of government had been controversial from the beginning, and was under particularly heavy political fire at the time of Missouri, especially in Virginia, in the wake of its ruling on Congress's power to create the

Second National Bank in *McCulloch v. Maryland*.[94] In light of these political challenges to its powers, it is doubtful whether the Court had sufficient political authority to resolve the controversy even if a majority in Congress had wanted it to do so.[95]

But that may have been a moot point, because from the outset of the renewed Missouri debate in 1820, members of Congress were determined to have Congress—and not the courts—address the constitutional issue whether Congress had power to restrict slavery in new states. On January 27, 1820, Representative (later Senator) Samuel A. Foot of Connecticut moved to postpone consideration of the Missouri bill. Foot proposed to place all western territories on the same footing as territory covered by the Northwest Ordinance. His proposed compromise barred territorial slavery in the West in return for popular sovereignty on the issue for any states formed there, with any further disputes to be resolved judicially. Representative William Lowndes of South Carolina, a slave state leader, opposed Foot's proposal on the grounds that it could not prevent the congressional "interchange of opinions" on Missouri statehood. As Lowndes's later actions showed, however, in reality the slave states did not want the restriction issue taken to the courts.[96]

But a majority of Northern representatives did not want the restriction issue to go to the courts either. Restrictionists did not offer to agree that the Supreme Court could determine the constitutionality of restriction, as they might have had they been confident of victory there. Despite recent suggestions by some historians that the Court would have ruled in favor of restriction based on its broad reading of congressional authority in *McCulloch*, both the Court's early slavery rulings and Chief Justice Marshall's views on slavery suggested that the Court might well take a more conservative approach to slavery issues than restrictionists wanted.[97] Historian Kent Newmyer concludes after a careful review of Marshall's thought and decisions on slavery that Marshall's views on that issue were "squarely in the tradition of southern paternalism . . . ," and that he was "not among those Virginians who condemned it on moral grounds." Marshall opposed slavery intellectually, but nevertheless agreed with his colleagues on the Court that "slavery was embedded in American law," and "his system of federalism deferred to the states on the question of slavery." Marshall believed that "the positive law of the Constitution sanctioned the institution; that the constitutional compromises on slavery made union possible."[98]

Marshall's constitutional views on Congress's power to restrict territorial and new-state slavery were uncertain. Historians have traditionally

concluded that he opposed restriction during the Missouri controversy.[99] Whether that conclusion is correct or not, what mattered most was that contemporaries could not be certain of Marshall's views, in all likelihood because he did not want them known. His private correspondence shows that he regarded slavery as an issue to be avoided by the Court if at all possible because of its extraordinary political sensitivity.[100] While Justice Joseph Story, a strongly religious Massachusetts native, publicly supported restriction, he was the only justice to do so.[101] The Court's subsequent decisions in major slavery cases indicate that he and Marshall, who were usually allies, nevertheless strongly disagreed on the fundamental question of how natural law related to sovereign power over slavery and the slave trade.[102] For these reasons, Northern congressman lacked strong reasons to be confident that their position on restriction would prevail in the Supreme Court.

Foot's proposal to refer the constitutionality of slavery restriction in new states to the Supreme Court was defeated by voice vote, in sharp contrast to the numerous recorded votes taken throughout the Missouri controversy. The failure to insist on a readily obtainable recorded vote, which would have forced all members to take public positions on court review of the constitutional issue, demonstrated that neither side of the House Missouri debate wanted the issue to go to the Supreme Court. Foot's was the last serious proposal to submit the issue of restriction to the federal courts during the Missouri debate. Later slave state proposals to let the courts decide the constitutionality of Missouri's proposed exclusion of free blacks were rejected by Northern representatives.

Rufus King thought that the Supreme Court lacked authority to intervene in the dispute over Missouri because the Constitution had exclusively referred the issue of new-state admission to Congress. Where the question was the constitutionality of a condition imposed by Congress on a new state before admission, his view was that the Constitution reserved to Congress the exclusive power to decide on it in most cases.[103] Judging from the fate of the Foot proposal in the House, and King's position in the Senate, it is a fair conclusion that most members of Congress either agreed with King that the federal courts had no authority on the restriction issue, or did not trust the federal courts to resolve the issue in a way that was satisfactory to their side of the dispute.[104]

Congressmen on both sides nevertheless made various constitutional arguments in support of their position. But they were arguing before the court of public opinion rather than the federal courts, and often seeking

to rally their constituents rather than to persuade their opponents. This can be seen from the following analysis of the major arguments that seem to have been broadly influential (space will not permit an exhaustive account).

Most Northern congressmen supported their constitutional argument on restriction principally by relying on the broad discretion conferred on Congress by the new-state admission clause.[105] Senators Benjamin Ruggles and William A. Trimble of Ohio, Representative Taylor, and others used the Northwest Ordinance of 1787 and its congressional application to the Northwest Territory states, Ohio, Illinois, and Indiana, on their admission to statehood as precedents for restricting new states regarding slavery.[106] Other Northern members contended that the concept of "equal footing," in the sense in which it was used in the Northwest Ordinance and in subsequent laws patterned on it, did not support a constitutional right of new states to make decisions about slavery without restriction. Congressman Daniel Cook of Illinois buttressed this argument by pointing out during House debate that the Constitutional Convention journals (recently made public) showed that the Convention had rejected by a large majority an effort led by James Madison and George Mason to make an "equal footing" clause part of the Constitution.[107]

The slaveholding-state response was that states were constitutionally entirely distinct from territories. Whatever power Congress had over territories, Congress's power to restrict state admission was always limited by a constitutional "equal footing" doctrine that guaranteed states political sovereignty.[108] Those who supported the "equal footing" doctrine saw it as a structural principle of fundamental importance to the Constitution and republicanism.

Congressmen such as Representatives Henry Meigs of New York (a trusted lieutenant of New York Republican leader Martin Van Buren) and Henry Storrs of New York, two of the Bucktail Republican "doughfaces" who supported the compromise, argued that the "equal footing" principle, broadly interpreted, was an essential part of the constitutional understanding about what a republic was, and how the Republic would expand. This was the Jefferson-Madison position on the equal-footing issue.[109] It countered Northern arguments that slavery was antirepublican.[110]

Meigs argued that opposition to Missouri's admission without restriction was ultimately founded on opposition to the basic theory of republican government.[111] For Meigs, as for Jefferson, republican expansion of the nation required that the people of new states be permitted to form their

own constitutions without restriction.[112] Meigs's position on Missouri is a strong indication of New York Bucktail Republican leader Martin Van Buren's position as well, because it is unlikely that Meigs would have taken a position on restriction at variance with Van Buren's views.

Ultimately, Meigs saw the Missouri dispute as based on "neither more nor less than sectional feeling," even though advocates' positions were nominally based on religious or moral principles. It resembled earlier religious wars in which both sides had thought that they had God on their side: "Is it forgotten that the . . . archbishop of one belligerent, goes to the temple of the Almighty and chants 'Te Deum laudamus,' for the victory obtained by his country with carnage and devastation, over the enemy; while the archbishop of another belligerent is at the same time entering the house of God, and singing also 'Te Deum laudamus pro victoria,' upon the other side of the line, the creek, or the river? We, who know these things, should profit by our knowledge, learn liberality, and practice it."[113] In writing to his father, Josiah Meigs, an "ardent Jeffersonian" who served as a high official in the Madison and Monroe administrations, Henry Meigs made clear that his Missouri vote had "deeply offended many of my political friends," and might cause his "political death," to which he had "no objection."[114] He had voted out of his principled convictions as a republican, even though nineteen out of twenty of his constituents would have preferred "Civil war."[115]

Meigs argued that neither side of the Missouri debate was actually interested in doing anything to help slaves by emancipating and colonizing them, despite the lip service paid to these goals. To emancipate slaves, Meigs proposed legislation that would dedicate the proceeds of public-land sales to the purchase and colonization of slaves. Congress, of course, ignored Meigs's resolution because neither Northern nor Southern members were willing to devote large amounts of what they thought of as their section's share of such money to emancipating slaves. Their indifference to Meigs's resolution made precisely the point Meigs wanted to make—congressmen were not interested in debating practical means of emancipating and colonizing slaves because despite the high-flown rhetoric, helping to free blacks was not what the Missouri debate was actually about for partisans of either section.

Meigs also pointed to the limits of the Constitution's ability to resolve the issue of slavery and to the dangers of sectionalism, in language that strongly resembled Jefferson's views of the political significance of the Missouri controversy: "Our free constitution was made by men who were

wise enough to know the danger of sectional divisions. This Constitution is no more than a profoundly wise agreement to differ. . . . If we, sir, shall be unhappily so unwise as to forget this, nothing will be left for us and our posterity but awful combats at parallels of latitude, or physical lines of demarcation."[116]

Representative Henry Baldwin of Pennsylvania, a future Supreme Court justice, took the same constitutional position as Meigs, arguing that the Constitution did not permit Congress to dictate to Missouri what it should do about slavery. Baldwin fervently defended his position in an eight-page letter to a constituent, John Gilmore (apparently a Pittsburgh newspaper editor). He said that he "never gave" a vote "in favor of slavery" "and never will," but did not think that the Missouri issue was about slavery; instead, it was a matter of constitutional principle. Baldwin said he had been told he could be governor of Pennsylvania if he voted with restrictionists on Missouri, but he was convinced that the Constitution did not give Congress the power restrictionists sought.[117]

Baldwin's papers also contain detailed notes—in the form of a lawyer's brief—on the constitutional arguments over Missouri, which show that he thought that new states were intended to possess the same rights as "old states."[118] Congress's power over new-state admission was not unlimited—it could not violate "general principles" or dictate constitutions for them. Because the original states had possessed unfettered rights to decide whether to legalize slavery prior to formation of the Constitution, and slavery was a matter of "internal policy," Baldwin thought that new states were constitutionally entitled to such rights as well. Freedom from restriction was necessary to give them "full sovereignty," like the original states.

Baldwin also strongly believed that he had firsthand evidence that Northern restrictionists were motivated by a desire for political power. As he wrote to Gilmore:

> It is political power—It is not slavery but Slave representation which they wish to abolish—Not to give freedom to Blacks but to give power to themselves that the warm advocates of restriction now contend—
>
> [O]n Friday I observed to a very distinguished Federalist that I was afraid that by provoking the southern people we should lose the Bankrupt Law and our measures for the protection of manufactures and commerce. He replied nearly in these words This is

> a grand struggle for political power and rather than not succeed I would agree to have no Bankrupt Law no Commerce no Manufactures. This is the true Secret. . . .

Baldwin then extended his discussion of the partisan politics influencing the debate:

> It is only lately that these [political] views have become apparent. Gen'l. William King of the Province of Maine in a letter which I saw yesterday says this is the object and such an opinion from him has great weight—he is the brother of Rufus King—In a few days I will give you more specific evidence of this sort. . . . I believe this to be the decided opinion of Mr. Lowrie [Pennsylvania's junior senator] tho' I am not authorized by him to say so and you must not quote him or authority for it.[119]

Although Baldwin based his opposition to Missouri restriction squarely on his understanding of the Constitution, he made a fallback political argument as well. Baldwin's argument was based on a "realpolitik" assessment of Pennsylvania's interests. He drew an important conclusion about Pennsylvania's political welfare from his conclusion that Missouri restriction was really a Northern state power grab: it was not in Pennsylvania's interest to join in that power grab. Pennsylvania's interests as a state were different than those of the Northern states such as New York, whose leaders were seeking separate political gains for their states from restriction. He wrote:

> We are appealing to the liberality of the South to protect our manufacturers—this is not a time to provoke them on questions which come [illegible] to their throat—If we succeed in [illegible] Legislation on the subject of Slavery it will not build up our iron works—We gain nothing they lose everything—The southern people are very much divided about Manufacturers—they will oppose iron warmly—we risk a good deal by [illegible] this question and we risk it for mere theory and pride of opinion for our state or its legislature have no political views. The northern [states] have and they may gain by the contest but we are sure to lose both politically and in our most important interests.[120]

Representative Storrs of New York argued that restriction denied Missouri the right to be admitted on "an equal footing with the original states."[121] Representative Louis McLane of Delaware contended that equal footing for states was a central structural principle of the Union. He thought that the equal-footing doctrine was based on the need to maintain national unity by protecting equal states' rights in return for equal contributions to the Union.[122] As these examples indicate, several of the Northern "doughfaces" agreed in principle with the Jefferson-Madison constitutional position on the equal-footing doctrine, and that position formed a primary basis for their willingness to oppose restriction.

Many Northern congressmen argued in support of restriction that Missouri's admission as a slave state would unconstitutionally extend the operation of the three-fifths clause.[123] Such opposition had not united the North before Missouri. To the contrary, as historian Matthew Mason notes, the Pennsylvania state senate had rejected the Hartford convention proposal to abolish the three-fifths clause (or "slave representation"), arguing instead that the real constitutional problem was that Pennsylvania and other large mid-Atlantic states were underrepresented in the Senate compared to New England.[124] That most New York and Pennsylvania representatives later joined in opposing Missouri admission suggests that they had motives other than enthusiasm for challenging the three-fifths clause.

Northern representatives did not claim that they had textual support in the Constitution for their position that the three-fifths clause should not apply to new states that had slaves. Indeed, the Philadelphia Convention had specifically voted to apply the clause to new states. But Rufus King argued that the intent of the Constitution had been to limit the three-fifths clause to states created from the original territory of the United States.[125]

King conceded that the three-fifths rule had originally been adopted by 1783 as a taxation rule, because it was a reasonably fair means of apportioning tax burdens using a population standard that approximated wealth.[126] But he then denied that the American Revolution was based on the idea that representation and taxation needed to be proportional at all. King had defended the three-fifths clause to the Massachusetts ratification convention on the ground that taxation and representation went hand in hand, and in his 1803 letter to Timothy Pickering he had asserted that it had been adopted because "taxation and representation are inseparable."[127] He now argued instead that virtual representation for property violated "our theory of equality of personal rights," and that representing only one form

of property conferred disproportionate political power on some states. He asserted that this was understood at the time of the 1787 Convention, and that the three-fifths clause was therefore the "greatest" concession made by northern states for adoption of the Constitution.[128]

While King's views on property representation and taxation may have been popular in New York in 1820 (the state was on the verge of sharply liberalizing white suffrage), they would certainly have had many fewer supporters there or in Massachusetts in 1787. King's contentions on the three-fifths issue failed to persuade Senator Edwards of Illinois, who instead pointed out that an attack on the three-fifths clause might easily lead to an attack on state equality in Senate representation, since it was equally vulnerable to King's critique.[129] The three-fifths clause and state equality in Senate representation continued to be political Siamese twins during the Missouri controversy, as they had been since 1787.

Ultimately, Northern attacks on the three-fifths clause can be understood as part of the broader Northern concern over sectional control of political power. States whose economies were based on slave export agriculture were often unwilling to support policies favoring Northern economic interests such as protective tariffs. Representative John Holmes of Maine candidly explained in a circular letter to his constituents defending his support for the Missouri compromise that "[y]oung, interprising, and industrious you will need the aid and friendship of the slave-holding States. Your navigation, commerce, fisheries, and manufactures must be cherished and improved. Protection to these is generally taxation upon their products of agriculture. On these subjects they have hitherto been liberal and magnanimous. But engage in this crusade against them . . . and you provoke a hostility at once destructive of your own interests, and the safety of the nation."[130]

Holmes's statement that preferred Northern economic policies were "generally taxation" on slave state agriculture acknowledged that Northern and Southern economic interests were antithetical in important respects. The three-fifths clause mattered to Northern states at least in part because it limited their power to achieve their preferred national policies over Southern sectional opposition. But the Missouri constitutional debate escalated beyond such sectional differences over control of policy to a divisive struggle over the nature of the Union itself.

During the Missouri debate, for the first time leading Northern congressmen and senators of both major political parties also made overtly religious and moral claims not simply to attack the morality of slavery, as

had often been done in the past, but instead as the basis for their constitutional arguments against slavery. These claims asserted that the Constitution itself had a religious or moral foundation (sometimes expressed as its subordination to natural law) separate from popular consent. Some American courts had previously accepted somewhat similar arguments about natural law as the basis for protecting property rights against legislative action.[131] But slave state congressmen vociferously denounced such religious and moral arguments about natural law and the Constitution where slavery was concerned. Thus the combatants renewed an argument about the meaning of natural rights and their relation to republicanism that had extraordinarily divisive potential.

Senator Roberts, a leading advocate of restriction, presented his argument against slavery expansion by describing the Constitution and America's history on slavery in almost purely religious terms, as a form of "sacred history."[132] According to Roberts, the United States had earned its liberty by appealing to God for its freedom against British oppression in the Declaration of Independence. God had answered the United States' appeal then, and this had created a new covenant between the United States and God which the United States had to honor by advancing freedom, which among other things meant an obligation to eliminate slavery.[133] This covenant dictated that the Constitution must be interpreted to prohibit slavery wherever it was not necessary. Since it was unnecessary in the new states, the constitutional covenant prohibited slavery there.[134]

Because American history was based on a new covenant, Congress could not rely on any other nation's history for guidance. America was exceptional in the world: "We must search for their meaning [of republicanism] in our own history only: here a different system of political morality has prevailed, and political truth taught without corruption."[135] Roberts and others such as Senator Ruggles of Ohio denied that republican sovereignty could ever lawfully include the ability to impose slavery on anyone.

Senator Roberts was not alone in viewing the Constitution as a covenant with God on freedom that Americans must honor. Representative Arthur Livermore of New Hampshire termed slavery the "commission of a sin" by slaveholding states in which they were "indulged" by the Constitution.[136] Similar arguments were made by Senator Morril of New Hampshire. Representative Tallmadge of New York, a religious member of a devoutly religious family, asserted that he acted in a "great and glorious cause," the cause of "unredeemed and unregenerated human beings," a comment unmistakably directed at slaveholders as well as slaves. Slavery

was an "abomination of heaven," a "canker in your breast . . . poison . . . a vulture on your heart . . . ," Tallmadge said.[137] Representative Charles Rich of Vermont argued that the legality of slavery must be determined by "the laws of nature and natural rights, and not" the Constitution.[138] Senator Ruggles of Ohio argued that biblical history condemned slavery, and said he hoped that the "Divine displeasure" would not "scourge our own countrymen" who held slaves. He described the Northwest Ordinance as "a cloud by day, and a pillar of fire by night."[139] But Senator Roberts's use of biblical imagery may have been the most vivid: "[D]o not urge us to admit Missouri . . . with her features marred as if the finger of Lucifer had been drawn across them."[140] Senator Rufus King's invocation of religious principles as an ultimate ground for constitutional action against slavery was thus part of a broader emerging religious interpretation of the Constitution and national history.

King's views are of particular interest for our understanding of the law and politics of slavery at this time because they blended religion, law, and the Constitution into a new religious nationalism. King's 1819 published speech supporting Missouri restriction lacked a religious denunciation of slavery. King chose, however, to escalate the debate by making an attack on slavery on religious grounds in February 1820 in speaking to the Senate before an audience that included members of the public.[141]

It is not widely understood that in this 1820 speech, according to a newly discovered report of it, King advocated beginning the process of abolition in all of the existing states. He argued that by the "laws of nature" slave populations would increase if diffusion occurred, so that if abolition plans were not "begun now, they never will" be. However, King was not asserting that the Constitution gave Congress power to compel existing states to begin abolition. He was very careful to limit narrowly the legal grounds for his arguments on congressional power to control slavery in new states, and never asserted that the Constitution's general powers or structure provided authority to act in existing states.

To begin what King envisioned as a cooperative process of abolition, he proposed that slaves in existing and new states be transformed into *villeins regardant*.[142] Treating slaves as *villeins regardant* would legally have eliminated their owners' ability to sell them separately from the land, or even to transport them if the owner moved, limitations that would have been anathema to slave state representatives. Transforming slaves into villeins would have sharply devalued slave property. King seems to have thought—utterly mistakenly—that his advocacy of a "bold position" on villenage and the

law of nature would persuade restrictionists to remain firm in a "desperate cause" and help to force slaveholders to compromise on Missouri in a way he deemed acceptable.[143]

King argued that tying slaves to the land as villeins would improve slaves in their "mental and moral faculties" to the point where they could then be colonized "in their own continent." Existing colonization plans were unworkable, he thought, but when the groundwork had been laid, Northern states would support funding for it: "all the support it will require ought to be furnished to it." King's advocacy of villenage for slaves followed by colonization was a public acknowledgment by the leader of Northern restriction forces that he agreed with slave state representatives that slaves could not be successfully integrated into either Southern—or Northern—American society once they were freed. King's argument actually implied that American slavery could not be ended peacefully, since there was no evidence that colonization was or could ever be made workable, though King did not realize this. As we have seen, thoughtful southern abolitionists such as St. George Tucker had rejected the feasibility of colonization as early as the mid-1790s.

As is well known, in this speech King also argued that the law of nature condemned slavery, and required that it be abolished except where it was protected by the Constitution. King later wrote a detailed account of this aspect of his speech to former Massachusetts senator Christopher Gore, an old friend:

> I referred the decision of the Restriction on Missouri to the broad Principles of the Law of Nature, a law established by the creator . . . everywhere, and at all times, binding upon mankind . . . the foundation of all constitutional, conventional and civil laws, none of which are valid if contrary to the Law of Nature—that according to this law all men are born free, and justly entitled to the possession of Life & Liberty, and to the free pursuit of happiness—hence that man could not enslave man; and that States could not make men Slaves . . . That no act of the State . . . if contrary to natural law could be valid. That the political Reasons against the extension of Slavery were enough to restrain Congress from consenting to it—but were this not the Case, the Law of Nature imposes this Restraint, and as slavery may be prohibited by Congress, they are bound to prohibit it. . . .[144]

King also argued that "by the principles of Christianity" no man could enslave another man.[145] His position on natural rights was consistent with the

Lockean view of the social contract, including the inalienability of rights, but his conception of natural rights clearly had a religious basis as well.[146]

King's "Law of Nature" argument was not new. It was a restatement of the higher-law argument made by Miers Fisher and William Rawle of the PAS in 1794, and other American natural-law advocates before that. But Fisher and Rawle sought to apply their position only to Pennsylvania law, not to the nation as a whole, while King argued that his position applied to every exercise of Congress's powers under the Constitution. King had indeed moved on to politically "dangerous higher ground" in nationalizing the higher-law position.[147]

King's higher-law position lacked any warrant either in the Constitutional Convention debates or agreements over slavery in which he had participated. In condemning all slavery on religious and natural-law grounds, King condemned the earlier constitutional compromise on slavery (though he said he accepted that existing slavery was constitutionally protected). In stark contrast, wholly apart from the Constitution's great practical support for and protection of the institution, the Constitution's original compromise on slavery had depended on a federalist approach that accepted that where slavery existed it would be tolerated (even if perceived as evil), and that republican governments had sovereign power to authorize it.

No one who took King's argument seriously could regard the existence of slavery in the slave states, or constitutional arrangements that supported it, as lawful in any ultimate sense. In a private letter, Alabama senator John W. Walker reacted sharply to King's speech, saying that King had "emancipated the whole of our slaves by one potent ipse dixit. . . . [S]lavery cannot exist."[148] Wittingly or not, King's slavery attack provided the legal and philosophical foundation for the next generation of abolitionist thought, which viewed the legality of slavery as determined by a moral law independent of and superior to the Constitution, which in turn made the Founders' intent either irrelevant or abhorrent. In response, slave state senators heaped scorn upon his position.

Senator William Smith of South Carolina said that King had not been content to limit himself to arguments about interpretation of the Bible, but had instead "present[ed] to your acceptance the religion of nature. . . . This was the religion preached up in the French Convention in the days of Robespierre." This "universal law of nature and religion dissolves us from all obligations."[149] He then pointed out that King had played a leading role in creating the three-fifths clause, and linking it to direct taxes at the convention. King was now contradicting himself.[150]

Smith also argued that the Northern states had sufficient political strength in Congress even in light of the three-fifths clause. Uniting around slavery in Missouri was the North's effort to paper over its own chronic political disunity.[151] In private, King agreed with Smith. The slave states' unified interest in "the Labor of Slaves" was permanently inimical to Northern political goals, King thought, but he believed the North was chronically divided by "rival and opposing occupations and interests. . . ." If the free states could not unite against slave states as a result of such divisions, in King's striking phrase they "ought to and will be treated as slaves."[152]

Smith then attacked King's reliance on the *Somerset* decision. Judging from Smith's comments, King had argued that *Somerset* was an authoritative interpretation of English common law, which held that that law barred slavery, and which should be followed in the United States given America's English-law heritage. Smith argued that despite the *Somerset* decision, in reality British slavery policy was completely hypocritical, because Britain enslaved its own citizens politically at home, and had enslaved the West Indies and "more than seventy millions" of people in Asia.[153] "England has ceased to enslave men, unless [through impressment of seamen]; they have latterly found it more profitable to enslave nations."[154]

Senator William Pinkney of Maryland challenged King's position even more fundamentally. Pinkney was widely acknowledged to be one of the foremost lawyers of the day, having argued numerous cases, including *McCulloch v. Maryland*, in the Supreme Court. He responded to King's speech at length, describing King's position as based on "deadly speculations" about the "infinite perfectibility of man and his institutions" that are "identical with, the worst visions of the political philosophy of France. . . ."[155] He reviewed Roman and English legal precedents on which King had relied for his position that "man cannot enslave his fellow man," and argued (with considerable justification) that none of them supported King's position that slavery was barred by the law of nature or nations even where a sovereign permitted it.[156]

Pinkney then reached the heart of his disagreement about the underlying political structure of the Constitution and the rule of law with King and other natural-law moralists: "It is idle to make the rightfulness of an act the measure of sovereign power. The distinction between sovereign power and the moral right to exercise it, has always been recognised. . . . The power of declaring war is a power of vast capacity for mischief. . . . Is a citizen, or are the courts of justice to inquire whether that, or any other law, is just before they obey or execute it? And are there any degrees of

injustice which will withdraw from sovereign power the capacity of making a law?"[157] King's position that slavery's morality was the ultimate test of its legality was therefore antinomian and would, if accepted, destroy the sovereignty of a republic.

Finally, Pinkney directly challenged the entire conception of the relation between natural rights and law in a republic espoused by King and others. He argued that republicanism allowed the limitation of natural rights by popular consent: "Who does not see that . . . from false notions . . . the true theory of a republican Government is mistaken; and that, in such a Government, rights, political and civil, may be qualified by the fundamental law, upon such inducements as the freemen of the country deem sufficient?"[158] Pinkney's position was founded on a view of the social contract and natural law that closely resembled the thought of Hugo Grotius and Thomas Hobbes on those issues.[159]

In the Missouri debate, sectional advocates had delineated two fundamentally opposed visions of the nature of the Union. In one conception, the Union was a progressively improving nation seeking unified moral ends, based on a constitution founded on and subordinate to a religiously grounded (or ethically universalist) higher law. In the other, the Union was a political union of states dedicated to preserving political and moral freedom, based on a constitution founded only on popular consent and federalism principles that tolerated moral diversity even on evils such as slavery.

But this debate had ominous implications for the national government's political legitimacy. Both King's view and the opposing Jeffersonian stance lacked a concept of the rule of law that was widely politically acceptable. For King, majoritarian principles applied except when trumped by natural law, but it was unclear what could serve as a generally accepted source of natural law, and if the federal courts were to resolve such conflicts, this would be politically unacceptable in large parts of the country. For Jefferson, an unchanging division of authority limited the use of federal majoritarian power against state governance, but he rejected federal courts as arbiters of such conflicts, a view that was equally unacceptable in much of the country. Since King and Jefferson would not have agreed on what constituted the "rule of law" under the Constitution, they ultimately had no basis for agreement on what constituted legitimate political sovereignty in the Union beyond pure majoritarian rule, which both rejected. The Constitution had deferred the problem of sovereignty, but not solved it, despite Federalists' claims.

By 1825, in its decision in a prize case involving the slave trade, *The Antelope*, the Supreme Court had effectively rejected King's higher-law position and ruled that where positive law and natural law were in conflict, positive law would prevail where slavery was concerned. Despite the fact that parliamentary supremacy had been rejected as a constitutional principle in the United States, the Supreme Court effectively agreed with Mansfield's decision in *Somerset* that at least where slavery was concerned, natural rights could be modified by positive law, whether found in ordinary law, a constitution, or the law of nations. As historian G. Edward White concludes, Marshall's position for the Court on slavery in *The Antelope* "foreclosed unwritten natural law as a substantive source of legal rules."[160] But as the rise of northern immediatist abolitionism shortly afterwards indicated, the Supreme Court had not quelled the debate over the proper moral foundations of political action.

THE MISSOURI CONTROVERSY, NEW YORK POLITICS, AND FREE LABOR

The Missouri debate can also significantly enhance our understanding of contemporary thought about the relation between antislavery action and black civil rights. By comparing the debate in Congress that nominally centered around that issue with how the same problem was viewed in New York at the time, we can see that the primary purpose of antislavery action was to destroy slavery as a repressive labor status in order to foster an emerging white free-labor regime and encourage white western settlement, not to increase black civil rights.

The first Missouri compromise was reopened after a Missouri state constitutional convention held in the summer of 1820 adopted a proposed constitution that prohibited the abolition of slavery and required the legislature to pass a law excluding free blacks from Missouri.[161] The second debate nominally centered around whether free blacks were citizens and, if so, whether this meant they had a constitutional right to emigrate to Missouri. But contemporaneous events in New York and other states suggest that Congress's debate on that issue had little or nothing to do with protecting the rights of free blacks, and instead that northern representatives viewed slavery as a repressive labor regime inconsistent with western white free-labor settlement.

In 1820, Governor De Witt Clinton faced Vice President Daniel Tomp-

kins, the Bucktail Republican candidate, in a fierce contest for the governorship of New York. Clinton ultimately won the election by some 1,700 votes out of a total vote of 94,000.[162] In such an election, any significant issue that could shift a bloc of voters from one side to the other could affect the outcome. Free-black voters in New York had historically been one such important bloc. As the work of political scientist Dixon Ryan Fox showed, partisan efforts to control or reduce the substantial free-black vote in New York—which had typically supported Federalist candidates during the early nineteenth century—had been under way in New York for at least a decade before 1820.[163]

From the beginning of 1820 onward, the Missouri controversy played a significant role in the New York gubernatorial election. Governor Clinton's conduct suggested that he regarded the issue as politically very significant. In early 1819, Clinton made a fervent appeal for forging national unity and an end to sectionalism to the New York legislature through the construction of the Erie Canal, arguing that "liberty and union are inseparably connected." He said:

> A dissolution of the nation may therefore be considered the natural death of our free government. And to avert this awful calamity, all local prejudices and geographical distinctions should be discarded . . . and the whole republic ought to be bound together by the golden ties of commerce and the adamantine chains of interest. When the Western Canal is finished and a communication is formed between Lake Michigan and the Illinois river, or between the Ohio and the waters of lake Erie . . . distinctions of eastern and western, of southern and northern interests, will be entirely prostrated.[164]

In 1820, by contrast, Clinton substituted for his appeal for national unity an equally pressing warning to the legislature against the extension of slavery, in spite of the "geographical distinctions" restrictionism was "unfortunately calculated to produce," no matter what consequences resulted: "I consider the interdiction of the extension of slavery, a paramount consideration. Morally and politically speaking, slavery is an evil of the first magnitude; and whatever may be the consequences, it is our duty to prohibit its progress in all cases where such prohibition is allowed by the constitution. No evil can result from its inhibition more pernicious than its toleration. . . ."[165]

During the 1820 campaign, pro-Clinton forces attacked New York Bucktail politicians who opposed the restriction of slavery. "Wilberforce,"

a Clinton supporter, who published one of the few surviving 1820 New York campaign broadsides, asked "Who in New-York are the Advocates of Slavery?" His answer was Vice President Daniel Tompkins; Congressmen Caleb Tompkins (his brother), Henry Meigs, and Henry Storrs; a principal Bucktail state legislative leader, Erastus Root; and Martin Van Buren, at that time the Bucktail party leader in New York.[166] Wilberforce's charges were entirely accurate. The Bucktail Republicans had opposed slavery restriction in Missouri, following Van Buren's lead. But they had sought to do this in a subterranean manner that would minimize damage to them politically in New York.[167]

During the 1820 campaign, Martin Van Buren—who had earlier supported King's heavily contested reelection to the Senate by the New York legislature, where he controlled a large bloc of votes—urgently sought Rufus King's endorsement for Daniel Tompkins's election against Clinton. To assuage King's concerns about Tompkins's Missouri position, and to protect Tompkins against damage on the Missouri issue, Van Buren wrote two letters to Rufus King within two days in March 1820, denying that Tompkins supported Southern arguments on restriction. However, Van Buren also coupled these assurances with a seemingly friendly but nevertheless pointed political warning to King not to continue to push the Missouri issue:

> . . . I have seen the Vice President . . . on the subject of the Missouri question & he informed me that he . . . did not think that the restriction was unconstitutional, nor had he ever questioned its expediency. At some future day I will give you my ideas upon the question of the expediency of making this a party question. I am persuaded that notwithstanding the people of this state have felt a strong interest in the question, the excitement which exists in regard to it, or which is likely to arise from it, is not so great as you suppose.[168]

King responded that he was "satisfied" by Van Buren's explanations on Tompkins's behalf. He declined, however, to endorse Tompkins despite repeated requests by his sons, both New York state politicians who had bolted from the Federalist Party during the election, to support Tompkins.[169]

Some historians assert that Van Buren's prime motive for his actions during the Missouri controversy was his lust for power, but this is an incomplete account of his motives.[170] Van Buren wanted to control New York politics, but for the purpose of reforming its state government on republican lines. He then wanted to use unified control of New York politics

as a lever for increasing Northern and Republican power. He told King as much in a remarkable early 1820 letter seeking King's assistance in trying to replace then vice president Tompkins with Secretary of the Navy Smith Thompson as the Bucktail gubernatorial candidate against Clinton. Van Buren wrote King that if King persuaded Thompson to run, "you will do a lasting benefit to the Republican Interest of this State" and that "New York instead of continuing to be the headquarters of faction might look forward to some respect & consideration in the union."[171]

What the Northern restriction fight over Missouri offered Van Buren instead of Republican control of New York was a junior partnership in a Federalist-dominated Northern alliance party, and he rejected such an alliance in favor of one with Southern Republicans. Van Buren and his "radical republican" New York followers agreed in principle with the slave states in seeing Missouri admission as raising an "equal footing" issue. It followed that Van Buren was willing to accept the expansion of slavery as a consequence of adherence to popular sovereignty principles, a position that could enable an overall political bargain with Southern Republicans. As Henry Meigs (and therefore quite probably Van Buren as well) saw, the Missouri controversy demonstrated that in national politics, the only alternative to such intersectional alliances was sectional parties, which inevitably meant disunion and sectional warfare. In this sense, the Missouri controversy effectively laid the groundwork for the Second Party System as the politically influential defectors built a new intersectional alliance.[172]

The effects of the Missouri controversy rippled through New York state politics, and caused a series of reactions there. Fox concludes that Clinton gained the free-black vote in that election.[173] As the Wilberforce broadside shows, New York politicians thought that the Missouri controversy would influence that vote and others. The controversy clearly also affected the short-term fortunes of some of the Bucktail "doughface" congressmen such as Henry Storrs, who attributed their failure to be renominated for Congress to that issue, though the extent of the long-term political damage is often overstated.[174]

The issue of black rights to emigrate to Missouri played a significant role in New York politics during this period as well. During the second round of Missouri debate, King privately called the free-black emigration issue a "small affair," one of "comparative insignificance" compared to restriction. King informed his confidants that he did not plan to take an active role in opposing Missouri statehood on that basis, but he sup-

ported the Northern position favoring black emigration rights.[175] King's position appears to have had political support in New York. Many white New York voters had no interest in accepting more of what Governor Clinton in addressing New York's legislature in 1819 had called the "unwelcome" "African population" that was "seen in a degraded light by public opinion," and protecting black rights to emigrate would help to alleviate this problem.[176]

New York was not the only state whose citizens expressed concern about possible free-black emigration in the years before Missouri. Governor Oliver Wolcott of Connecticut wrote confidentially to King that permitting slave states to force blacks out of those states would be "an effort to throw an intolerable burden on the northern states . . ."[177] According to historian Matthew Mason, "a majority group in the Northwest . . . feared an influx of former slaves from the South."[178] Indiana citizens petitioned against the introduction of "Slaves or free negroes in any shape" in 1814.[179] The governor of Ohio in 1817 assured the governor of Kentucky that Ohio citizens not only wanted to get rid of slavery, they wanted to "get rid of every species of negro population."[180]

During the Missouri controversy, James Wilson, the antislavery editor of an Ohio newspaper who vehemently supported restriction, nevertheless vigorously opposed the settlement in Ohio of some three hundred former slaves from Virginia. They had been freed under the will of one Giles there and were then forced by law to leave Virginia to avoid reenslavement. A letter to Wilson's newspaper about the resettlement of those former slaves from an Ohioan said that he believed that "nineteen twentieths of the people of Ohio" are firmly opposed to slavery in Ohio, "yet in justice to themselves and their posterity, they will refuse admittance to such a population."[181]

Wilson heartily concurred. When slavery was abolished, "it would be much more politic to permit the blacks to extend themselves over the face of the country . . . ," he wrote. But to permit diffusion before that would be permit "the *slave* states to liberate, and cast upon the *free* states, the most depraved and wicked part of their black population" and to "entail upon those who deny to themselves the services of the blacks, the task of reforming them, or of becoming the victims of their vices and crimes." Wilson concluded:

> No facility should be afforded to those states which enjoy the "benefits" of slavery, toward enabling them to rid themselves of its evils;

> as soon as they choose to abandon the *system*, every philanthropist will lend a helping hand toward relieving them from their superabundant black population, either by colonization or otherwise. But if the legislature of Ohio does not take some measures of precaution and prevention, as to such emigrations as that above described, they may set about building a new penitentiary, and making a judicial circuit after the manner of Hamilton county, in the midst of every negro settlement.[182]

The editor of the widely read *Niles Weekly Register* of Baltimore was also familiar with the situation of the three hundred former slaves who had been freed in Ohio by Giles's will. He described the decision to free them there as "an injury" "inflicted upon Ohio" by a well-intentioned but "ill-judged" decision of their owner. The owner's decision was wrong "unless he has made provision also, for taking care of them until the degrading properties of slavery are eradicated from the objects of his solicitude."[183]

Meanwhile, the editors of another Ohio newspaper, the Scioto *Gazette*, defended the enforcement of the fugitive slave clause in Ohio on the ground that nonenforcement would lead to the "encreasing the numbers of an ignorant, slothful and immoral race. . . ." Wilson of the *Western Herald* responded by attacking slave state politicians for their willingness to do just that by extending slavery to Missouri.[184] Other states responded similarly. Illinois's first state legislature dealt with free-black emigration by imposing prohibitively high bond requirements on free blacks who attempted to enter that state.[185] The Ohio controversy over resettlement supports Mason's conclusion that many Americans in the northwest saw "draconian Southern manumission laws" that excluded free blacks from slave states as "hand in hand with the drive to fix slavery's parade of evil consequences on what should be the free, white states of the Northwest."[186]

Many congressmen and state leaders also believed that the "burdens" of slavery—that is, free blacks—should go hand in hand with the "benefits" of slavery. Senator Burrill of Rhode Island advocated Missouri restriction primarily on the ground that it could keep both slaves and free blacks out of the West.[187] Senator Otis of Massachusetts made an apparently similar argument to Burrill's, favoring western settlement by "a white population," as opposed to one of mixed race.[188] An Ohio congressman quoted by Mason analyzed the Missouri constitution's exclusion of free blacks and wrote to his constituents that it left him "perfectly convinced" that slave states are "taking measures to throw their worthless black population

into Ohio, Indiana, and Illinois."[189] White Northern congressmen opposed Missouri's exclusion of blacks primarily because they thought it would harm Northern whites, not because they sought to protect blacks.

Despite King's lukewarm support for black emigration rights in Congress, in New York the contemporaneous reaction to blacks' exercise of civil rights was quite different, as was King's attitude. In the aftermath of their disastrous loss in the 1820 New York gubernatorial election, Van Buren's Bucktail Republicans became even more determined to destroy De Witt Clinton's authority. They forced through the New York legislature a bill that required the calling of a constitutional convention with an unlimited agenda. When the convention convened in 1821, it was chaired by none other than the defeated Daniel Tompkins.

The convention agreed to profound reforms to republicanize New York government that had as their primary motivation the destruction of the governor's patronage power and the popularization of both law and the court system by broadening the franchise and subjecting many judicial offices to popular control. Rufus King opposed many of the proposed reforms. But in one important case, he went from opposing a proposed "reform" to giving it tacit support. That reform stripped the vote from nearly every free black in New York.

An initial proposal to take the vote completely away from blacks was made by Erastus Root, Van Buren's Bucktail leader in the New York Assembly, who had opposed Clinton's resolution in favor of Missouri restriction. Root made no bones about his reasons; a bloc of black votes that generally supported Federalists had cost Republicans elections that they would win if only whites were allowed to vote.[190] Though Root chose to use as his example the election of 1813, where he argued that a "few hundred Negroes" "virtually gave law to the state," it was lost on no one that the most recent example of such an election was Tompkins's narrow loss to Clinton.[191] Root argued that black votes could be bought, and that this could only be prevented by taking the vote away from them. As another leading Republican, Colonel Young, put this, blacks were a "degraded people . . . an unsafe depository for the right of suffrage."[192] Against this position, Peter A. Jay, son of John Jay, argued that taking the vote away from an estimated thirty thousand free blacks was inconsistent with the support that New York leaders who were members of the convention had just given to Missouri restriction.[193]

At the New York convention, Rufus King and other major Federalists originally opposed taking the vote entirely away from free blacks. There

King argued that under the federal Constitution, persons born into slavery could never vote, but that free-born blacks could do so, and that the Constitution's P&I clause meant that free blacks could not be stripped of the vote if they were similarly situated to whites. But at precisely this point in the convention's deliberations, King received a timely warning from his son John King, who was closely monitoring it from Albany, that his support for continuing black voting was politically unwise.

John King reported in a letter to Rufus King that Tompkins had stacked the convention committee on suffrage to get a report favoring extending the suffrage for whites, and taking away the black vote. He advised Rufus King to attack vigorously the report's white suffrage extension, which dramatically expanded the white franchise.[194] He then explained that there was an important exception: "New York is making common cause against Negroes—all seem to regret that the privilege of voting should have been continued to them—this feeling also extends to our county. I understand that the country members in the convention have been and will be [illegible] to retrace their steps upon this subject."[195] By "New York," John King probably meant the area in and around metropolitan New York, which he represented in the legislature, and where he and his father both lived, though he may have meant the state as a whole. In either event, John King was warning his father that there would be a concerted effort made to take the vote away from blacks, that it would be nonpartisan, and that his father should not oppose it. The New York convention then overwhelmingly supported an amendment—proposed by a committee controlled by Martin Van Buren—which effectively stripped the vote from virtually all free blacks in New York using a racially biased wealth discrimination. It is uncertain whether King supported the amendment, but he firmly supported the reformed constitution, and never publicly objected to the decision to strip the vote from nearly all free blacks.

The New York convention's actions on black voting show that Van Buren and his allies—and most New York voters—were supporters of white democracy long before Stephen Douglas declared that as the purpose of the Democratic Party. They were not alone. By 1840, free blacks had lost the suffrage in New Jersey, Connecticut, and Pennsylvania, all states in which they had previously voted.

That northern retrenchment of black rights occurred just as the antislavery movement expanded was not a coincidence. Instead, it supports the conclusion that the core impetus for antislavery action during the Missouri controversy was the drive for free labor and free land for whites, particu-

larly in order to extend the white man's republic into the West. In the years after 1815, antislavery action in the northern states had growing political power to create a broad-based white cross-class coalition to eliminate a repressive labor status whose expansion had begun to impede Northern interests. But even as Northern and Midwestern antislavery action expanded, black political inequality at home was also expanded to assuage the fears of white voters about black freedom where it had the potential to affect them directly. The Missouri antislavery challenge was principally a drive for white free labor on western farms; any improvements in black rights were its incidental by-product.

During the congressional Missouri debate, Senator Nathaniel Macon of North Carolina responded to restrictionist arguments that Thomas Jefferson's attack on slavery in his *Notes on Virginia* supported their cause by pointing out that Jefferson's actions showed that Jefferson supported a "democracy" of "the white family," not an end to slavery.[196] As a recently discovered letter shows, Jefferson himself felt strongly enough about the Missouri issue that he addressed it directly in writing to Speaker of the House and Northern restrictionist leader John Taylor. Taylor had written to Jefferson during the 1821 Missouri debate asking for information about the history of the Phi Beta Kappa Society. Taylor stated his admiration for Jefferson's efforts on behalf of liberty over the years. In response, in an obvious reference to the Missouri controversy and criticism of Taylor, Jefferson wrote that he was not certain that liberty would be preserved, because the "Northern bears seem bristling up to maintain the empire of force."[197]

For Jefferson, America's "empire of liberty" included the right of the sovereign people to choose even to impose black slavery; for the Northern states, it now meant the extinction of that right and the redefinition of popular sovereignty in a republic. Both sides agreed, however, that full citizenship in the American republic was for whites only. As Macon said, "[I]t may be stated, without fear of contradiction, that there is no place for the free blacks in the United States—no place where they are not degraded."[198]

The Missouri compromises were a pragmatic economic settlement that left the sectional political contest in stalemate, and failed to resolve the underlying constitutional issues. Acceptance of this stalemate effectively

redefined the Constitution as a sectional compact on slavery, since on that issue, the Constitution was now perceived to lack the critical elements of a rule of law: agreed-upon moral foundations, allocations of political authority between different levels of government, and procedures for judicial dispute resolution. The new compact bought a deceptively fragile peace for the Republic as it realigned politics in a way that permitted the largely unrestrained growth of slavery for two more generations.

Northern leaders proved unwilling to engage in a showdown over the Union after they failed to derail the compromise. They "blinked" for a simple reason. In a continuation of an earlier historical pattern, their constituency, the Northern public, lost interest in blocking western slavery expansion as soon as slavery had been excluded from the North's preferred settlement path and the problem of barring free blacks from Missouri (which meant they might head north instead) had been "solved." John Quincy Adams expressed this political conclusion well in analyzing New York senator Rufus King's lack of interest in continuing the fight over Missouri during its second "black rights" phase in 1820–21: "Upon the Missouri Question he [Mr. King] has much cooled down since last winter. . . . [H]e has discovered that the people of the North . . . flinch from the consequences of this question, and will not bear their leaders out."[199]

Despite their awareness of the compromise's limitations, Northern leaders adopted the same political strategy in making the compromise that their representatives had followed on slavery in negotiating the Constitution thirty years earlier. They temporized. Despite their rhetoric, Northern leaders failed to heed abolitionists' repeated warnings that slavery had reached an absolutely critical juncture in its development where they must contain it if they were ever to abolish it. John Quincy Adams told his diary that the country would have been better off if the Union had been dissolved, followed by a negotiation for a new constitution. Adams's diary was as far as his actions went; his driving presidential ambitions would have been destroyed had he acted on his beliefs, and as he had observed in King's case, the people of the North would have flinched from the consequences. So the North deferred the "poisonous" problem of slavery's expansion for further generations, leaving it to be resolved by fields of blood.

CONCLUSION

SLAVERY AND THE DISMAL FATE OF MADISONIAN POLITICS

Most early Americans did not view ending black slavery nationwide as an important objective of the American Revolution, judging from their actions. Just before the Revolution slavery was under increasing political and legal fire, which the Revolution intensified somewhat in parts of the country, but it was a wealthy, established institution that was still widely regarded as legitimate and necessary to the future growth of the southern states. They were deemed essential participants in the revolt against Britain. The Confederation government accordingly protected slavery in important ways.

American gradual abolition, though an important achievement, occurred only where it could take place without causing significant political, economic, or social disruption for white taxpayers who feared abolition's effects. Northern abolition occurred where slavery was marginal in socioeconomic terms, and it progressed in the northern states as slavery became more marginal there toward the end of the eighteenth century. These states usually legislated abolition with generous de facto compensation for slaveowners and, even then, allowed major loopholes that protected slaveholder interests while accommodating the racial fears and economic interests of their white majorities. Much of the broad protection given to slaveholder rights by gradual abolition legislation was probably not constitutionally required, since it depended on the extent of vested rights in slavery, which was fairly debatable within the English common-law tradition after *Somer-*

set. Granting "liberal" protection at blacks' expense avoided more divisive disputes over slavery among white taxpayers.

Most Northern whites benefited as much from abolition as northern slaves and their children did. The Northern labor policies that replaced slavery and indentured servitude encouraged white immigration eagerly sought by landed whites, while white workers found that abolition increased their mobility and eliminated slave-labor competition. In contrast, these same policies often effectively disadvantaged free blacks who still faced continuing discrimination in competition with whites for jobs and land.

Racism played an important role in the form abolition took in the northern states. White northern majorities were happy to be rid of slavery, but at least some whites were also pleased by the prospect of getting rid of blacks as well. White support for abolition sometimes occurred in the form of permitting blacks' removal from their states through kidnapping, slave sales, and unwillingness to protect fugitives. Whites also refused to provide taxpayer funds for slaveholder compensation, forcing blacks and their children to buy their children's freedom. That decision could be attributed to racism, but it also seems to have reflected a widespread feeling that financing the ending of slavery should be a private, not a public, responsibility. Racism and widespread solicitude for property rights (including opposition to redistributive taxation) each probably played some role in the parsimonious form taken by northern abolition. Yet many northern white racists did oppose slavery, and supported gradual abolition even while continuing to oppose civil equality for blacks.

The political path of least resistance that northern states took to abolition in order to deal with white racism was to dissociate slavery as a repressive labor status from other aspects of black-white relations. Abolition failed where it was not possible to dissociate them sufficiently, as in New York in 1785. In some northern states, steps were taken in the direction of black civil equality after abolition, while in others, such reforms were stoutly resisted. Overall, most northern antebellum free blacks were denied critical civil rights by white majorities. Most of them lost the right to vote well before the Civil War, and they could not serve on northern juries before then.

There was no meaningful prospect for voluntary Southern state abolition of slavery or limits on its expansion before the Missouri controversy. Slavery continued to be a profitable and socially viable institution in the major southern slave states, and white majorities there saw no substantial

benefits from its abolition or containment (notwithstanding early slave state disagreements about slave-trade policy). But it would be a mistake to conclude that slave state opposition to abolition was simply a result of greater white racism in southern as compared to northern states. Slavery and racism overlapped significantly, but they were not perfectly correlated in the early Republic.

There is little question that southern white racism played a role in perpetuating slavery throughout this period. Many southern leaders and citizens were open racists or believed that large numbers of free blacks and the institution of slavery could not coexist. But southern unwillingness to undertake gradual abolition did not stem only from greed for slavery's profits and racism. It also had to do with widespread concerns about large-scale social disruption that might result from the development of a large free-black population, which many southerners believed would potentially lead to race war, threaten slavery where it remained, and possibly lead to growth in crime and increased poor-relief requirements. By the late eighteenth century, Southern abolition was widely perceived as a social quagmire even by citizens with antislavery views, not as a simple matter of "justice in conflict with avarice and oppression" as Jefferson had earlier believed. Northern contemporaries who supported abolition nevertheless often viewed these southern fears about the effects of widespread abolition as relatively legitimate concerns, especially after the Santo Domingo revolt.

Massachusetts leaders who supported abolition in the 1790s, including John Adams, acknowledged the legitimacy of St. George Tucker's concerns about the political difficulty of integrating free blacks successfully into Virginia society during gradual abolition. Tucker was much more farsighted than most leaders in rejecting the feasibility and justice of colonization in his gradual abolition proposal. Many of his northern correspondents could see no other means of gaining southern acceptance for gradual abolition besides colonization. A majority of Tucker's southern contemporaries, including Thomas Jefferson, thought that gradual abolition without colonization was unacceptable. If Tucker was correct in rejecting the practicability of colonization (and he was), their position meant that voluntary gradual abolition in the slave states would never occur.

The contours of abolition politics did not change markedly during the more than two decades after Tucker's plan failed in Virginia. When Rufus King publicly encouraged the Southern states to begin abolition of slavery in 1820 by explicitly promising them northern support for federal

colonization funding if they did so, he was accepting southern concerns about the disruption that would be caused by large numbers of free blacks as legitimate. He was also acknowledging that the Northern states were no more willing to integrate large numbers of free blacks into their states than the Southern states were.

The Constitution was an obstacle to ending black slavery in America. It was proslavery in its politics, its economics, and its law. The critical question is why. In drafting the Constitution, the Founders were centrally concerned with creating a new framework for continental government. That framework had to respect Americans' concerns about both political liberty and political power because national unity—and national strength—depended on it. By the late 1780s, a majority of Americans wanted to create a union with a strong republican government that would be capable of creating a continental empire; but to preserve liberty within that empire, they also wanted a government based on federalism principles.

The Constitution's proslavery character was a necessary result of its drafters' effort to endow the national government with strong military, fiscal, and commerce powers and to suppress sectional conflict while also adopting federalism as its core structural principle. If the new republic's government had not met all of these goals, this would in all probability either have prevented the formation of the Union or have led to its early dissolution. But a government that met all of those goals could not have been formed and then have territorially expanded as America did unless it protected slavery and its expansion.

The reason for this was that the federal republic created by the Constitution could not act against slavery at the national level and still be strong enough to support American expansion into the West and to govern a continental empire. For America to become an empire on that scale, the Southern states had to be willing partners in that enterprise, and a major part of the price of their allegiance was the continued protection of slavery as it expanded. Since many other Americans also saw advancing westward expansion as a major part of the American government's raison d'être, to obtain their goal with slave state support the early American government would need to acquiesce in and protect slavery's expansion. The proslavery Constitution reflected this political reality.

The Constitution's attempt to solve the problem of sectionalism went significantly beyond providing slave wealth representation and explicit protections for slavery. To pursue their economic development, in drafting the Constitution northern states traded a majority-vote federal commerce

power for state power to continue slave imports for a generation, despite well-informed (and clearly correct) warnings that this would greatly facilitate slavery's expansion into the western United States. Northern states also accepted a sectional division of national territory through the Northwest Ordinance of 1787 and informally agreed in return to abandon their efforts to obtain a Spanish treaty that would have closed the Mississippi River to navigation for decades. These "constitutional" agreements stemmed from the sections' shared desire to maximize their respective economic development through western expansion, which in turn permitted the unrestricted development of slave economies and slavery's growth for two generations. The resulting freedom from federal interference during the surge of westward expansion was all the "head start" that slavery needed to escape from significant federal control until its continued expansion became politically uncontrollable—a raging torrent that leaped the banks of the political river.

Americans were willing to compromise with "constitutional evil" with their eyes open to create the federal republic, at least where slavery was concerned. They explicitly debated whether the Union was a political union only or a moral one as well during ratification debates over slavery. The Constitution's federalism forced Americans to accept that theirs was a political Union that inherently required them to be willing to tolerate what they saw as evil behavior by their fellow citizens in other parts of the country, whether it consisted of established state churches or of slavery.

Bent on the pursuit of economic expansion at home and to the west, the northern white majority chose not to insist on aggressive action against slavery outside the north in making the Constitution or during early national expansion. Instead, northern states repeatedly sought to profit politically and economically from allowing slavery's domain to expand in their negotiations over the Constitution and early federal government policies.

THE MISSOURI CONTROVERSY AND ANTEBELLUM ANTISLAVERY

During the Missouri controversy, northern restrictionists such as Rufus King contended for the first time that the Constitution itself was governed by natural or moral law where slavery was concerned. In effect, King was arguing that the Union was a moral union, not just a political one. Slave state representatives in 1819–21 rejected King's concept of the Union

as antirepublican for several reasons. They did not agree that natural law trumped the popular will where slavery was concerned or that republican political sovereignty could not include the establishment of slavery. They also rejected the idea of a unitary federal government. King's providentialist nationalism was antithetical to southern state representatives' republican conception that the federal government was founded only on popular will—rather than on moral law—and to their view of the Constitution as a compact between states. These stark disagreements show that the Constitution and federal law and court decisions made under it had been unable to create a politically workable "rule of law" that had cross-sectional support where slavery was concerned.

The Constitution's creation of a federal republic was a decision to evade the problem of political sovereignty in the new government. Federalists claimed that the problem had been solved through popular sovereignty, did not need to be solved at all, or could be avoided through the rule of law. Despite such claims, the problem of sovereignty had not been solved, because the Constitution made an unstable allocation of political authority between rival potential claimants for sovereignty. Consequently, disputes over the reach of federal power vis-à-vis the states that ultimately had important implications for slavery began as early as 1790, and intensified sharply before 1800 as the Jeffersonian Republicans rose to power.

In part because it established no clear sovereign, the Constitution was an unworkable instrument for managing change on slavery when the political center of gravity within the federal government began to shift late in the first quarter of the nineteenth century. Federal control of slavery in new states depended not only on the creation of a congressional political majority to support it, but on the willingness of the Supreme Court to uphold this congressional power against very likely challenges. Yet the same sectionalism that characterized slavery as a political issue meant that it would have been extraordinarily difficult for the Supreme Court to intervene clearly on one side or the other during the Missouri controversy in a way that would have resolved the bitter political debate, and neither side was willing to have it do so in any event. The Court's nominal power of judicial review was a dead letter at that time where major political intervention on the issue of slavery was concerned.

The controversy also revealed the procrustean constraints imposed on national politics by the Constitution's unalterable political structure on slavery. The Missouri compromise settlement provided that its terms would apply "forever," but that is not what knowledgeable contempo-

raries thought the Constitution required. Leading Northern restrictionists such as House of Representatives Speaker John W. Taylor and Senator Rufus King were painfully aware that the Missouri compromise was not a "constitutional" compromise because Congress could alter or repeal it at will. Like the Northwest Ordinance, continued observance of the Missouri compromise depended only on political good faith, not on the Constitution's rule of law.

The Constitution provided no politically feasible means of making the compromise permanent because its supermajority amendment requirements meant it could not be modified to resolve sectional disputes. It left the North no alternative other than disunion to achieve a better or more permanent settlement. This Hobson's choice provided the protection to slavery that the Constitution's southern supporters had originally sought from it, but showed its inherent inability to resolve sectional disputes peacefully as well. In this sort of long-term stalemate, each section could only fundamentally improve its situation by exercising the "nuclear option" of civil war. Short of that, the sectional war over slavery's expansion could be fought only "on the ground." Slavery was not placed on a "course of ultimate extinction" by the Missouri compromises, as Lincoln argued it had been; instead, its long-term existence was ratified, and the war on the ground continued.

At the time the Constitution was adopted, a majority of Americans had apparently accepted Madison's argument in *Federalist* 10 that by pitting interest groups against one another they could create a stable balance between liberty and power. Madison argued that that balance would be stable because the federal government could not be "captured" permanently by any durable faction. When the sectional dispute over Missouri slavery broke out, it exposed the unstable foundations of the Constitution's balance between liberty and power. The Constitution provided no means of controlling the reemergence of sectionalism, which had persisted but had been concealed by the massive westward expansion of the preceding decades. Missouri leaders on *both* sides rejected Madison's view that their freedom would be protected by the continuing competition of "large republic" interest-group politics. Instead, they believed that under the Constitution long-term capture of the federal government by one section or the other was entirely possible, and that no reciprocity in governing would then be required, so that the losing side would be exploited by the victors in a zero-sum game.

To avoid the irresolvable issues of political sovereignty and natural

law raised by the Missouri controversy, the compromise was designed to suppress slavery disputes by maintaining a sectional balance of power and territory. But the price of compromise was that it effectively transformed the Union into a political "compact" on slavery, in the sense that no constitutional rule of law applied to it—there was no agreed-upon permanent allocation of authority between federal and state governments where slavery expansion was concerned, and no agreement on a neutral constitutional referee for disputes over it. The compromises deferred the problem of slavery for another two generations, at the cost of permitting it to expand further.

The searing experience of sectional division during the Missouri controversy forced the most thoughtful members of the rising generation of politicians to accept the truth of George Washington's profound insight: in early American politics, the only alternative to interregional alliances was sectional parties, whose formation would inevitably lead to disunion. The Missouri struggle therefore laid the political foundations for the Second Party System.[1] Despite Madison's hopes, the Constitution could not prevent intrasectional alliances or peacefully resolve sectional controversies unless national expansion continued. The partisan realignment that occurred after 1828 concealed from public scrutiny—and suppressed for a time, but did not alter fundamentally—the sectional dynamics of slavery and American constitutional politics. As Jefferson and others had feared, the Missouri settlement was "a reprieve only. . . . A geographical line, coinciding with a marked principle, moral and political, once conceived and held up to the angry passions of men will never be obliterated."[2]

The early Republic struggle over slavery's survival and expansion was principally a result of the ongoing sectional struggle for political sovereignty, a struggle over "the dominion of the Union," as Rufus King put it. Eighteenth- and early-nineteenth-century moral, religious, and Enlightenment values and Revolutionary ideology played some role in shaping political decisions on slavery, as did negotiations between masters and slaves. However, major decisions made about slavery during the formation of the Union, northern abolition, and westward expansion stemmed primarily from white majority self-interest in maximizing economic growth.

Decisions that benefited white majorities in different parts of America by expanding their economic-development opportunities at the price of maintaining and expanding slavery adjusted sectional conflicts over the formation of the Union and as the nation advanced westward. During the pivotal Missouri controversy, it was principally the strong Northern state

interest in providing western land to white settlers that actually advanced the antislavery cause, not abstract northern concern for black rights or equality, or burgeoning moral opposition to slavery. The intimate connection between the expansion of slavery and white majority public opinion supporting economic growth and America's push toward empire also strongly suggests that the slavery views and actions of individual leaders—even prominent figures such as Thomas Jefferson and James Madison—played a fairly limited role in the ultimate course of slavery's expansion, particularly when compared to the growing power of public opinion on such issues in an increasingly democratic white republic.

The temporizing agreements reached in the Missouri controversy's maelstrom ratified the long-term existence of slavery, making the slaveholders' union permanent until it was destroyed in the earthquake of civil war. The success of the Founding generation and its descendants in seeking to defer the sectional problem of slavery for four generations may seem to some to be a credit to the Founders' wisdom and foresight. But to others their approach to government will suggest the terrible costs that were involuntarily imposed on posterity by such intergenerational transfer of profoundly vexing problems, even by a republic committed to human freedom.

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Despite the large contributions made to this book by all those mentioned above and by the many able and dedicated historians on whose work I have relied, I am solely responsible for any errors it contains.

APPENDIX A

NOTES ON THE LAW OF SLAVERY AND BOUND LABOR

In 1770, slaveowners' rights in most colonies with regard to chattel slave property included the right to use brutal physical force (generally not including dismemberment without court approval), including force sufficient to result in accidental death, to compel slaves to labor and behave as masters demanded.[1] Slaves in most respects were deemed property without legal rights; they usually were denied legal rights to contract, own property, or marry; they lacked standing (i.e., the ability to sue) in court (with an apparent exception for freedom cases); they could not testify in court, except against each other (in Virginia, then only in capital cases);[2] and they could not appeal county-court verdicts against them even in capital cases in some jurisdictions.[3]

Slaveowners in American colonies had virtually unlimited rights to buy and sell slaves in 1770. Sales between colonists in different colonies resulted in a small domestic slave trade. Slaveowners participated in a much larger foreign trade between the colonies, Africa, and the West Indies.[4]

In some respects, the temporary legal disabilities of colonial servants were similar to those imposed on slaves: servants could not marry or contract with third parties without permission, leave an employer or obtain new employment without a certificate of freedom, or travel without a pass. In some colonies, the services of indentured servants could be sold, often without their consent.[5] Colonial laws provided severe penalties for indentured servants or apprentices who ran away.[6] But there were critical differences: servants were specifically protected against physical brutality (euphemistically, "immoderate correction") and could appeal to local courts for protection against it, including transfer to a new master; ser-

vants could own property; servants were entitled to jury trials in criminal cases, could testify, and had the same rights of appeal in such cases as free persons; and in some cases, servants were entitled to "freedom dues," that is, payments of certain kinds on completion of service. In sum, colonial law conferred various important legal protections on servants that slaves conspicuously lacked.[7]

In some cases, however, slaves' customary rights were inconsistent with theoretical principles of slave law. Slaves in South Carolina were permitted to till certain property, to sell the produce to third parties, and to keep the proceeds, a practice that the legislature refused to prohibit.[8] In Virginia, slaves were permitted to raise and sell produce and stock, including horses and hogs.[9] Some slaveowners paid their slaves for certain services and for sales of commodities to them. As Ira Berlin and others have pointed out, the terms of slavery were often the result of negotiations between masters and slaves, and these negotiated terms changed over time and differed by region, occupation, and other factors.

There is also uncertainty about the extent to which each colony observed all aspects of chattel slavery. As noted, some colonies apparently permitted slaves certain customary rights that were inconsistent with chattel slavery and even with existing slavery laws. Emily Blanck concludes that slaves in Massachusetts had various civil rights, including the right to sue in court, to own property, to serve as a witness, and to petition.[10] There may also have been differences between colonies in terms of the acceptable levels of labor that could be demanded from slaves, and in the amount of physical brutality that could be inflicted with impunity on slaves by slaveowners.[11]

APPENDIX B

CALCULATING NONSLAVEHOLDER VOTING STRENGTH

Following is an example of calculations supporting the view that in many Northern states, nonslaveholder voters held a voting majority after the Revolution. These calculations are meant to be indicative only, and thus are based on a series of conservative assumptions added to certain known base statistics.

Nash and Soderlund calculate that 15 percent of Philadelphia households owned slaves in 1767, when slave ownership peaked before the Revolution.[1] This means that 85 percent of Philadelphia households were headed by nonslaveholders in 1767.

To calculate nonslaveholder voting eligibility in Pennsylvania, assume a broader than actual dispersion of slaveownership throughout Pennsylvania and that every slaveowner was eligible to vote, while only 30 percent of nonslaveholder heads of household could vote, which probably significantly understates the actual breadth of the suffrage.

Assuming approximately 60,000 Pennsylvania households in an estimated population of 241,000 at 1770, of these, approximately 5,500 households would have been headed by slaveholders (assuming very broad slaveownership dispersion), while about 16,350 household heads would have been nonslaveholders eligible to vote. No more than 25 percent of eligible Pennsylvania voters would have been slaveholders, while at least 75 percent would have been nonslaveholders as of 1770. If one chooses a larger number of households, the percentage changes in voting eligibility increase in favor of nonslaveholders, so the precise number of households is not par-

ticularly important to the result. Postrevolutionary increases in population and numbers of households are not matched by increases in slaveholding, so these ratios go down over time.

Using similar assumptions, the ratios between slaveholder and non-slaveholder voters would clearly have been less favorable to slaveholders in most New England states.

APPENDIX C

CALCULATIONS IN SUPPORT OF TABLE 4.1

These calculations indicate how table 4.1 was prepared, but no claim is made that the simple model employed would satisfy professional demographers or economists. The calculations are intended to provide an approximation of the effects of the Constitutional Convention's decision to extend to 1808 the period before which Congress could bar slave imports.

1790

The population for 1790 was computed by assuming that imports were even throughout the decade, and that natural growth occurred at 2 percent a year once a slave was imported. End-of-decade slave population increased 31,358 over natural growth levels. House seats are based on 1 representative per 33,000 population (three-fifths of slave population), rounded to lowest whole number.

1800

The population for 1800 was computed using same assumptions as 1790, except that one-half of the additional growth from the slaves that had been imported as of 1790 is added to the 1800 total (a conservative assumption). Addition from imports (1783–1800) is 104,875. The same rounding and same apportionment rules were used.

1810

The population for 1810 was computed using 1790 assumptions. Total addition from imports 1783–1810 is 246,205. House seats are based on 1 representative per 35,000 population.

1820

The population for 1820 maintains 1810 levels, though smuggling could have increased total seats by one. Population increased by natural growth of 1790–1800 (one-half) and 1800–1810 import cohorts only, so the total is 234,000. House seats are based on 1 representative per 40,000 population. If continued contribution from the 1783–90 cohort is assumed, this would probably add one seat.

SENATE SEATS

How much did the expansion of the slave population through imports enable settlement to accelerate? Since the total slave population is increased roughly 15 percent by 1820 through imports, it seems likely that at least one, and probably several, slave states were settled by 1820 that would not otherwise have been settled by then. How many states fall in this category is a matter of judgment, but the size of the new-state populations is small enough at that time to make it reasonable to think that the settlement of two to three new slave states was enabled by imports (and would not have occurred through free-labor migration by then).

EFFECTS OF EARLIER IMPORT CUTOFF

Based on table 4.1 import data, the result of stopping imports at 1800 would have been to reduce slave imports for the period 1780–1810 by more than half. This change in turn would have reduced the size of the total slave population by approximately 8 percent as of 1820. This slave-population reduction might have slightly reduced the number of southern slave states as of 1820 by slowing settlement, though slaveholders might have stepped up imports before 1800 in response to an impending cutoff. An immedi-

ate slave-trade cutoff would have had a larger impact on the growth of slavery in this period, probably reducing total 1820 slave population by 15–20 percent (other factors being equal). Slave population would still have increased by about 80 percent over 1790 levels to about 1.2 million by 1820, but slave states would probably have lost significant representation in both the House and Senate in this reduced-growth scenario.

APPENDIX D

HOUSE OF REPRESENTATIVES ACTION ON THE QUAKER MEMORIALS

The Report of the United States House of Representatives Select Committee on the Quaker Memorials, and the text of the action taken by the House of Representatives on that report, are reprinted in full below. Source: House of Representatives, *Journal*, March 23, 1790, repr. *Doc. Hist. FFC*, 3:340–41.

REPORT OF THE HOUSE SELECT COMMITTEE ON THE QUAKER MEMORIALS

The Committee to whom was referred sundry memorials from the people called Quakers, and also a memorial from the Pennsylvania Society, for promoting the abolition of slavery, reported:

That from the nature of the matters contained in those memorials, they were induced to examine the powers vested in Congress, under the present constitution, relating to the abolition of slavery, and are clearly of opinion:

First, that the general government is expressly restrained from prohibiting the importation of such persons as any of the states now existing shall think proper to admit until the year 1808.

Secondly, That Congress, by a fair construction of the constitution, are equally restrained from interfering in the emancipation of slaves, who already are, or who may, within the period mentioned, be imported into, or born within any of the said states.

Thirdly, That Congress have no authority to interfere in the internal regulations of particular states, relative to the instruction of slaves in the principles of morality and religion, to their comfortable clothing, accommodation and subsistence; to the regulation of their marriages, and the prevention of the violation of the rights thereof, or to the separation of children from their parents; to a comfortable provision in cases of sickness, age or infirmity, or to the seizure, transportation, or sale of free negroes, but have the fullest confidence in the wisdom and humanity of the legislatures of the several states, that they will revise their laws, from time to time, when necessary, and promote the objects mentioned in the memorials, and every other measure that may tend to the happiness of slaves.

Fourthly, That nevertheless, Congress have authority, if they shall think it necessary to lay at any time, a tax or duty, not exceeding ten dollars for each person, of any description, the importation of whom shall be by any of the states, admitted as aforesaid.

Fifthly, That Congress have authority to interdict, or (so far as it is, or may be carried on by citizens of the United States, for supplying foreigners) to regulate the African trade, and to make provision for the humane treatment of slaves, in all cases while on their passages to the United States, or to foreign ports, as far as it respects the citizens of the United States.

Sixthly, That Congress have also authority to prohibit foreigners from fitting out vessels in any port of the United States for transporting persons from Africa to any foreign port.

Seventhly, That the memorialists be informed, that in all cases, to which the authority of Congress extends, they will exercise it for the humane objects of the memorialists, so far as they can be promoted on the principles of justice, humanity and good policy.

HOUSE ACTION AMENDING THE SELECT COMMITTEE REPORT ON THE QUAKER MEMORIALS ON SLAVERY

Strike out the first clause, together with the recital thereto, and in lieu thereof insert, "That the migration of importation of such persons, as any of the states now existing shall think proper to admit, cannot be prohibited by Congress prior to the year 1808."

Strike out the second and third clauses, and in lieu thereof insert, "That Congress have no authority to interfere in the emancipation of slaves or

in the treatment of them within any of the states, it remaining with the several states alone, to provide any regulation therein, which humanity and true policy may require."

Strike out the fourth and fifth clauses, and in lieu thereof insert, "That Congress have authority to restrain the citizens of the United States from carrying on the African trade for the purpose of supplying foreigners with slaves, and of providing by proper regulations for the humane treatment, during their passage, of slaves imported by the citizens into the said states admitting such importation."

Strike out the seventh clause.

ABBREVIATIONS

AC	*The Debates and Proceedings in the Congress of the United States: With an Appendix Containing Important State Papers and Public Documents, and All the Laws of a Public Nature; with a Copious Index; Compiled from Authentic Materials*. Washington, D.C.: Gales and Seaton, 1834–56. (Popularly known as *The Annals of Congress*.)
DHRC	Merrill Jensen, John P. Kaminski, Gaspare J. Saladino, Richard Leffler, and Charles H. Schoenleber, eds. *The Documentary History of the Ratification of the Constitution*. 22 vols. to date. Madison: State Historical Society of Wisconsin, 1976–.
Doc. Hist. FFC	Linda Grant De Pauw, Helen E. Veit, Charlene Bangs Bickford, William Charles diGiacomantonio, LaVonne Marlene Siegel (Hauptman), and Kenneth R. Bowling, eds. *Documentary History of the First Federal Congress of the United States of America, March 4, 1789–March 3, 1791*. 17 vols. to date. Baltimore: Johns Hopkins University Press, 1972–.
Elliot	Jonathan Elliot. *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787*. 2d ed. 5 vols. 1836–45. Reprint, New York: B. Franklin, 1974.
Farrand	Max Farrand, ed. *The Records of the Federal Convention of 1787*. Paperback ed. 4 vols. New Haven: Yale University Press, 1966.
Farr. Supp.	James H. Hutson, ed. *Supplement to Max Farrand's The Records of the Federal Convention of 1787*. New Haven: Yale University Press, 1987.
Federalist	J. R. Pole, ed. *The Federalist*. Cambridge, U.K.: Hackett Publishing Co., 2005.
GW Dig. Ed.	Theodore J. Crackel, ed. *The Papers of George Washington Digital Edition*. Charlottesville: University of Virginia Press, 2007.

GW Print Ed.	W. W. Abbot, Dorothy Twohig, Philander D. Chase, et al., eds. *The Papers of George Washington*. 52 vols. to date. Charlottesville: University of Virginia Press, 1983–. The *GW Papers* have been published chronologically, in five series: Colonial (Col.), Revolutionary War (Rev. War), Confederation (Confed.), Presidential (Pres.), and Retirement (Ret.).
HSP	Historical Society of Pennsylvania, Philadelphia.
JCC	Washington C. Ford, ed. *Journals of the Continental Congress, 1774–1789*. Washington, D.C.: Government Printing Office, 1904–36.
JM Papers	William T. Hutchinson and William M. E. Rachal, eds. *Papers of James Madison*. 29 vols. Chicago: University of Chicago Press, 1962–83.
LCRK	Charles King. *The Life and Correspondence of Rufus King*. 6 vols. New York: G. P. Putnam's Sons, 1897.
LDCC	Ralph M. Gephart and Paul H. Smith, eds. *Letters of Delegates to the Continental Congress, 1774–1789*. 26 vols. Washington, D.C.: Library of Congress, 1976–2000.
MSL	Massachusetts Historical Society. "Letters and Documents Relating to Slavery in Massachusetts." In *Collections of the Massachusetts Historical Society*, ser. 5, vol. 7. Boston: Massachusetts Historical Society, 1877, 373–442.
NYHS	New York Historical Society, New York.
PAS	Pennsylvania Abolition Society. Legal Records; Acting Committee Correspondence and Minutes; Committee of Correspondence files. HSP, Philadelphia.
PAS ACM	Pennsylvania Abolition Society, Acting Committee Minutes.
Stat.	United States. *Statutes at Large of the United States of America*. Washington, D.C.: Government Printing Office, 1789–.
TJ Papers	Julian P. Boyd, Charles T. Cullen, John Catanzariti, and Barbara B. Oberg, eds. *The Papers of Thomas Jefferson*. 36 vols. to date. Princeton: Princeton University Press, 1950–.
TJ Writings	Thomas Jefferson. *Writings*. New York: Literary Classics of the United States, 1984.

NOTES

INTRODUCTION

1. Thomas Jefferson, *Notes on the State of Virginia*, ed. William H. Peden (Chapel Hill: University of North Carolina Press, 1954), 162.

2. Richard Price to TJ, July 2, 1785, *TJ Papers*, 8:258–59.

3. TJ to Richard Price, August 7, 1785, *TJ Papers*, 8:356.

4. *AC*, 16:120–27, January 17, 1820 (quotations at 124, 126).

5. TJ to John Holmes, April 22, 1820, Library of Congress, American Memory, The Thomas Jefferson Papers, 1806–1827, http://memory.loc.gov/ammem/collections/jefferson_papers/; TJ to John W. Taylor, February 13, 1821, Taylor Papers, NYHS.

6. A superb example of the method employed here is Charles W. McCurdy, *The Anti-Rent Era in New York Law and Politics, 1839–1865* (Chapel Hill: University of North Carolina Press, 2001).

7. Peter S. Onuf, "Federalism, Republicanism, and the Origins of American Sectionalism," in *All over the Map: Rethinking American Regions*, ed. Edward L. Ayers, Patricia Nelson Limerick, Stephen Nissenbaum, and Peter S. Onuf (Baltimore: Johns Hopkins University Press, 1996), 11–37.

8. The term "Northern" refers to the geographic area composed of the eight states that began abolition of slavery by 1804: Vermont, New Hampshire, Massachusetts, Pennsylvania, Connecticut, New Jersey, New York, and Rhode Island. The term "Southern" refers to the five major early slave states: Maryland, Virginia, North Carolina, South Carolina, and Georgia.

9. Major works with broad coverage on this issue include Don E. Fehrenbacher, *The Slaveholding Republic*, ed. and completed by Ward M. McAfee (Oxford: Oxford University Press, 2001); Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson*, 2d ed. (Armonk, N.Y.: M. E. Sharpe, 2001); David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770–1823* (1975; repr., Oxford: Oxford University Press, 1999); Robin Einhorn, *American Taxation, American Slavery* (Chicago: University of Chicago Press, 2006); Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge: Cambridge University Press, 2006); Gary B. Nash, *Race and*

Revolution (Madison, Wis.: Madison House, 1990); Ira Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America* (Cambridge, Mass.: Harvard University Press, 1998); Matthew Mason, *Slavery and Politics in the Early Republic* (Chapel Hill: University of North Carolina Press, 2006); John Craig Hammond, *Slavery, Freedom and Expansion in the Early American West* (Charlottesville: University of Virginia Press, 2007); Staughton Lynd, *Class Conflict, Slavery and the United States Constitution* (Indianapolis: Bobbs-Merrill Co., 1967). Throughout this work, I am particularly indebted to the careful research and insights in Donald L. Robinson, *Slavery in the Structure of American Politics, 1765–1820* (New York: Harcourt Brace Jovanovich, 1971).

10. David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (New York: Hill and Wang, 2009), 10–19. I thank Professor Waldstreicher for sharing his manuscript. He argues that slavery is best thought of as a "form of government over people." He suggests that early American constitutional politics was a conflict over whether slavery would be regarded as a legitimate form of government. Ibid., 18–19.

11. Sir Herbert Butterfield, *The Whig Interpretation of History* (1931; repr., New York: AMS Press, 1978).

12. See, e.g., Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775–1787* (Philadelphia: University of Pennsylvania Press, 1983); Peter S. Onuf, "The Expanding Union," in *Devising Liberty: Preserving and Creating Freedom in the New American Republic*, ed. David T. Konig (Palo Alto, Calif.: Stanford University Press, 1995), 50–80; Cathy D. Matson and Peter S. Onuf, *A Union of Interests: Political and Economic Thought in Revolutionary America* (Lawrence: University Press of Kansas, 1990); Onuf, "Origins of American Sectionalism"; Peter S. Onuf, *The Mind of Thomas Jefferson* (Charlottesville: University of Virginia Press, 2007).

13. The term "American Revolution" includes the Revolutionary War and its aftermath, the struggle over the structure and major policies of the new national and state governments that continued through about 1800. Chapters 2–5 also concern aspects of the Revolution's effects on slavery.

14. See Philip A. Klinkner with Rogers M. Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America* (Chicago: University of Chicago Press, 1999), 12–24.

15. Studies of slavery and the Constitution include Fehrenbacher, *Slaveholding Republic*; Richard Beeman, *Plain, Honest Men: The Making of the American Constitution* (New York: Random House, 2009); Finkelman, *Slavery and the Founders*; Graber, *Dred Scott*; Einhorn, *American Taxation, American Slavery*; David Brian Robertson, *The Constitution and America's Destiny* (Cambridge: Cambridge University Press, 2005); David C. Hendrickson, *Peace Pact: The Lost World of the American Founding* (Lawrence: University Press of Kansas, 2003); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Vintage Books, 1997); Davis, *Slavery in Revolution*; Leonard L. Richards, *The Slave Power* (Baton Rouge: Louisiana State University Press, 2000), chap. 2; Freehling, *Reintegration of American History*; Paul Finkelman, "Slavery and the Constitutional Convention: Making a Covenant with Death," in *Beyond Confederation*, ed. Richard Beeman, Stephen Botein, and Edward C. Carter II (Chapel Hill: University of North Carolina Press, 1987), 188–225; William M. Wiecek,

The Sources of Antislavery Constitutionalism in America, 1760–1848 (Ithaca: Cornell University Press, 1977); Earl M. Maltz, "The Idea of the Proslavery Constitution," *Journal of the Early Republic* 17, no. 1 (1997): 37–61; Donald L. Robinson, *Slavery in the Structure of American Politics, 1765–1820* (New York: Harcourt Brace Jovanovich, 1971); Lynd, *Class Conflict*; Staughton Lynd, "The Compromise of 1787," *Political Science Quarterly* 81, no. 2 (1966): 225–50.

16. Finkelman, *Slavery and the Founders*; Einhorn, *American Taxation, American Slavery*; Graber, *Dred Scott*.

17. Fehrenbacher, *Slaveholding Republic*, 28–47.

18. Compare Finkelman, "Slavery and the Constitutional Convention," 193 (fifteen constitutional provisions, including provisions relating to taxation and Electoral College), with Fehrenbacher, *Slaveholding Republic*, 44 (three clauses directly related to slavery in Constitution).

19. Graber, *Dred Scott*.

20. William W. Freehling, *The Road to Disunion: Secessionists at Bay, 1776–1854* (Oxford: Oxford University Press, 1990), 201–40.

21. For these alternative views see Mason, *Slavery in Early Republic*; and Robert Pierce Forbes, *The Missouri Compromise and Its Aftermath: Slavery and the Meaning of America* (Chapel Hill: University of North Carolina Press, 2007).

CHAPTER ONE

1. Throughout this work, I am indebted to seminal contributions to the history of slavery by Donald Robinson, Winthrop Jordan, David Brion Davis, William Wiecek, and Paul Finkelman.

2. The literature on the Revolution and slavery includes most prominently works by Davis, *Slavery in Revolution*; David Brion Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (Oxford: Oxford University Press, 2006), 141–52; Fehrenbacher, *Slaveholding Republic*; Finkelman, *Slavery and the Founders*; Klinkner and Smith, *Unsteady March*; Ira Berlin, *Generations of Captivity: A History of African-American Slaves* (Cambridge, Mass.: Harvard University Press, 2003), 97–157; William W. Freehling, *The Reintegration of American History: Slavery and the Civil War* (Oxford: Oxford University Press, 1994), chap. 2; Freehling, *Road to Disunion*, 121–58; Berlin, *Many Thousands Gone*; Simon Schama, *Rough Crossings: Britain, the Slaves, and the American Revolution* (New York: Ecco, 2006); Mason, *Slavery in Early Republic*; David C. Hendrickson, *Peace Pact: The Lost World of the American Founding* (Lawrence: University Press of Kansas, 2003); Cassandra Pybus, *Epic Journeys of Freedom: Runaway Slaves of the American Revolution and Their Global Quest for Liberty* (Boston: Beacon Press, 2006); Ira Berlin and Ronald Hoffman, eds., *Slavery and Freedom in the Age of the American Revolution* (Charlottesville: University Press of Virginia, 1983); Sylvia R. Frey, *Water from the Rock* (Princeton: Princeton University Press, 1991); Nash, *Race and Revolution*; Duncan J. MacLeod, *Slavery, Race, and the American Revolution* (Cambridge: Cambridge University Press, 1974); Benjamin Quarles, *The Negro in the American Revolution* (New York:

W. W. Norton and Co., 1973); Robinson, *Slavery in Politics*; Winthrop D. Jordan, *White over Black: American Attitudes toward the Negro, 1550–1812* (Chapel Hill: University of North Carolina Press, 1968).

3. Klinkner and Smith conclude that the Revolution was the impetus for broad-scale abolition and manumission activity and black rights expansion in both Northern and Southern states. Klinkner with Smith, *Unsteady March*, 12–24. Davis and others contend that the Revolution created a new intellectual climate opposed to slavery. See, e.g., Davis, *Slavery in Revolution*, 82–83, 264, 303–5; Jordan, *White over Black*, 310–11; and David Brion Davis, "The Problem of Slavery in the Age of Revolution, 1770–1823," in *The Antislavery Debate: Capitalism and Abolitionism as a Problem in Historical Interpretation*, ed. Thomas Bender (Berkeley: University of California Press, 1992), 17–103, 290–309.

4. Berlin, *Generations of Captivity*, 97–157; Joyce Chaplin, *An Anxious Pursuit: Agricultural Innovation and Modernity in the Lower South, 1730–1815* (Chapel Hill: University of North Carolina Press, 1993).

5. MacLeod, *Slavery, Race*; Nash, *Race and Revolution*; Robert Parkinson, "Enemies of the State: The Revolutionary War and Race in the New American Nation" (Ph.D. diss., University of Virginia, 2005); Joanne Pope Melish, *Disowning Slavery: Gradual Emancipation and "Race" in New England, 1780–1860* (Ithaca, N.Y.: Cornell University Press, 1998); John Wood Sweet, *Bodies Politic: Negotiating Race in the American North, 1730–1830* (Baltimore: Johns Hopkins University Press, 2003).

6. Freehling, *Reintegration of American History*, 13.

7. Davis, *Inhuman Bondage*, 145.

8. T. G. Burnard, "'Prodigious Riches': The Wealth of Jamaica before the American Revolution," *Economic History Review,* n.s., 54, no. 3 (2001): 520, table 5; Jacob M. Price, "The Imperial Economy, 1770–1776," in vol. 2 of *The Oxford History of the British Empire*, ed. P. J. Marshall (Oxford: Oxford University Press, 1998), 100, table 4.1.

9. Burnard, "Prodigious Riches," 521.

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

11. Quoted in Davis, *Slavery in Revolution*, 61.

12. For import restrictions, see Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (Chicago: University of Chicago Press, 1967), 91; W. E. Burghardt Du Bois, *The Suppression of the African Slave Trade* (1896; repr., Baton Rouge: Louisiana State University Press, 1969), 13–14; on slave property classification, see Thomas D. Morris, *Southern Slavery and the Law, 1619–1860* (Chapel Hill: University of North Carolina Press, 1996), 61–71; on punishments, see Edmund S. Morgan, *American Slavery—American Freedom* (1975; repr., New York: W. W. Norton, 1995), 314. British efforts to regulate slavery do not alter the fact that the empire had a generally pluralistic legal character.

13. Marcus W. Jernegan, "Slavery and Conversion in the Colonies," *American Historical Review* 21 (1916): 504–27. The text of the opinion—often called the *Yorke-Talbot Opinion*, after its authors—is found in *Knight v. Wedderburn*, 8 Fac. Dec. 5, Mor. 14545 (Scot. Ct. Sess. 1778).

14. *An Act for the More Easy Recovery of Debts in His Majesty's Plantations and Colonies in America*, 5 Geo. 2 chap. 7 (1731/32). See Claire Priest, "Creating an American Property Law: Alienability and Its Limits in American History," *Harvard Law Review* 120 (2006): 385, 423–25, 435–36 (quotations at 385, 424).

15. *Pearne v. Lisle*, Amb. 75, 27 E.R. 47 (1749).

16. Charles Viner, *A General Abridgement of Law and Equity* (Aldershot, 1746), 1:240, par. 13.

17. In 2006 dollars, using 1775 male slave prices derived from David Eltis and David Richardson, "Prices of African Slaves Newly Arrived in the Americas, 1673–1865: New Evidence on Long-Run Trends and Regional Differentials," in *Slavery in the Development of the Americas*, ed. David Eltis, Frank D. Lewis, and Kenneth L. Sokoloff (Cambridge: Cambridge University Press, 2004), 181–218, figure 2(a) (figure at 192). For consistent prices, see Peter C. Mancall, Joshua L. Rosenbloom, and Thomas Weiss, "Slave Prices and the South Carolina Economy, 1722–1809," *Journal of Economic History* 61, no. 3 (2001): 616–39. Conversion calculators available at Samuel S. Williamson and Lawrence H. Officer, Measuring Worth, http://www.measuringworth.com.

18. Eltis and Richardson, "Prices of African Slaves," 191–92.

19. Population data here and in subsequent paragraphs are taken (or derived) from table 1 in Berlin, *Many Thousands Gone*, 369–71, unless otherwise stated.

20. These colonies had 87 percent of total mainland slave population. Ibid.

21. Data based on Alice Hanson Jones, *Wealth of a Nation to Be: The American Colonies on the Eve of the Revolution* (New York: Columbia University Press, 1980), 310, table 9.3.

22. Eltis, Lewis, and Sokoloff, *Slavery in the Americas*, 10, table 2. Some estimates of this disparity are far higher—between five and eight times during 1755–75. Gavin Wright, *Slavery and American Economic Development* (Baton Rouge: Louisiana State University Press, 2006), 16.

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

24. Berlin, *Many Thousands Gone*, table 1.

25. Jones, *Wealth of a Nation*, 310, table 9.3.

26. Ibid., 104, table 4.8; 310, table 9.3, on slaveholding and wealth distribution. On intraregional slave distribution, see Christopher Hanes, "Turnover Cost and the Distribution of Slave Labor in Anglo-America," *Journal of Economic History* 56, no. 2 (1996): 307–29; and Berlin, *Many Thousands Gone*, chaps. 7, 9–10.

27. Zilversmit, *First Emancipation*, 4–5. Throughout chapters 1 and 2, I have relied significantly on Arthur Zilversmit's excellent research and appraisals of the early history of abolition.

28. Wright, *Slavery and Development*, 30 (quoting John J. McCusker and Russell R. Menard, *The Economy of British North America, 1607–1689* [Chapel Hill: University of North Carolina Press, 1985]).

29. For the legal foundations of American slavery see William M. Wiecek, "The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British

America," *William and Mary Quarterly*, 3d ser., 34, no. 2 (1977): 260, 261–62; and Sally E. Hadden, "The Fragmented Laws of Slavery in the Colonial and Revolutionary Eras," in vol. 1 of *The Cambridge History of Law in America*, ed. Michael Grossberg and Christopher Tomlins (Cambridge: Cambridge University Press, 2008), 253–87. "Classical" chattel slavery is an "ideal type" of legal regime where a slave was deemed property that could be sold, bequeathed, and physically injured or destroyed with nearly complete impunity by an owner. Slavery in Virginia approached this ideal type; see A. L. Higginbotham, *In the Matter of Color: Race and the American Legal Process, the Colonial Period* (New York: Oxford University Press, 1978), 53–58. The extent to which each colony's slavery regime incorporated "classical" chattel slavery is uncertain. See appendix A.

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

31. Works that explore slavery's social-control functions include Melish, *Disowning Slavery*; Sweet, *Bodies Politic*; Berlin, *Many Thousands Gone*; Jordan, *White over Black*; and Zilversmit, *First Emancipation*.

32. Edmund S. Morgan, *American Slavery—American Freedom*, passim.

33. See Zilversmit, *First Emancipation*, 16–18, for manumission's dependence on poor-law requirements. For background on colonial manumission, see Sweet, *Bodies Politic*, 232.

34. William P. Quigley, "Reluctant Charity: Poor Laws in the Original Thirteen States," *University of Richmond Law Review* 31 (1997): 116, 122; William P. Quigley, "Work or Starve: Regulation of the Poor in Colonial America," *University of San Francisco Law Revew* 31 (fall 1996): 35–83.

35. Richard Starke, *The Office and Authority of a Justice of Peace Explained and Digested, Under Proper Titles. To Which Are Added, Full and Correct Precedents of all Kinds of Process Necessary to be used by Magistrates, in which also the Duty of Sheriffs, and other publick Officers, is properly discussed*. (Williamsburg, Va.: Purdie and Dixon, 1774); see title "Slaves."

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

37. William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765; facsimile ed., Chicago: University of Chicago Press, 1979), 3:4–5.

38. Under the reasoning of a 1749 decision by Lord Hardwicke, Lord Chancellor of England, a colonial slaveowner had a common-law right to seek damages from anyone in any colony who unlawfully withheld a slave from him, in an action of trover. *Pearne v. Lisle*, Amb. 75, 27 E.R. 47 (1749). Slaveowners also had a right (in an action of replevin) to compel the return of a specific slave. Replevin rights would probably also have existed under the laws of all colonies by virtue of British policy, though evidence is limited. See, e.g., *Abbot v. Abbot*, 1 Va. Col. Dec. R21 (Va. Gen. Ct. 1729) (tro-

ver action for "negroes" permitted); *Bates v. Gordon*, 3 Call 555 (Va. 1790) (approving judgment for slaves); *Margaret v. Muzzy* (Middlesex Inf. Ct., Cambridge, Mass., 1768) (freedom of slave tried in replevin action), in *The Legal Papers of John Adams*, ed. L. Kinvin Wroth and Hiller B. Zobel (Cambridge, Mass.: Harvard University Press, 1965), 2:58–59, cited in Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780–1861* (Baltimore: Johns Hopkins University Press, 1974), 12.

39. *An Act Concerning Slaves, & c.* (1694), in *The Grants, Concessions, and Original Constitutions of the Province of New-Jersey* (London, 1758), 340–42, Evans no. 8205.

40. *An Act Concerning Servants and Slaves*, Acts of Virginia, 4 Anne (1705), chap. 49, sec. 37, in *The Statutes at Large . . . of Virginia . . .* , ed. William Waller Hening (New York: Samuel Pleasants, 1812), 3:460–61; Shaw-Shoemaker no. 19121, 227. See the outlawry discussion in Thomas D. Morris, *Southern Slavery and the Law*, 286–88.

41. *An Act Concerning Servants and Slaves*, Laws of North Carolina 1774, chap. 24, sec. 47 (originally enacted 1741), in *Laws of the State of North Carolina* (Edenton, N.C.: Hodge and Wills, 1791), 94.

42. The standard treatment of the law of fugitive slavery is Paul Finkelman, *An Imperfect Union: Slavery, Federalism and Comity* (Chapel Hill: University of North Carolina Press, 1981).

43. North Carolina officials who captured runaway slaves were required to advertise them in major newspapers in other "Provinces" so they could be recovered by their owners. Laws of North Carolina 1774, chap. 24, sec. 39 (originally enacted 1741), *Laws of North Carolina*, 92.

44. George Washington advertised in 1761 in Maryland for four escaped slaves. *Papers of George Washington*, ed. W. W. Abbot (Charlottesville: University Press of Virginia, 1990), Col. Ser., 7:65–66, August 11, 1761, cited in Henry Wiencek, *An Imperfect God: George Washington, His Slaves, and the Creation of America* (New York: Farrar, Strauss and Giroux, 2003), 99 n. 30.

45. Berlin, *Generations of Captivity*, 44.

46. For classic descriptions of the rise in antislavery sentiment, see the works of David Brion Davis, particularly *Slavery in Revolution* and *The Problem of Slavery in Western Culture* (1966; repr., Oxford: Oxford University Press, 1988). For a recent account of British abolitionism, see Christopher Leslie Brown, *Moral Capital: Foundations of British Abolitionism* (Chapel Hill: University of North Carolina Press, 2006).

47. *John Randall v. Matthew Robinson* (R.I. Sup. Ct. 1769–74) (King's County), October 1769, B:217; October 1772, B:352–53; October 1773, B:383; October 1774, B:414–15 and files, Rhode Island Judicial Records Center, Providence; Rhode Island General Assembly Petition files, vol. 14, March 1770; vol. 15, August 1773; vol. 15–2, August 1774, Rhode Island State Archives, Providence. For Sweet's discussion see *Bodies Politic*, 239.

48. Marchant attacked court rulings requiring the case to be resolved on the basis of a jury special verdict (one limited to finding only the facts of the case), a procedure that took the case's dispositive legal issues away from the jury.

49. Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven:

Yale University Press, 1975), 46. Cover's conclusion is supported by Emily Blanck, "Revolutionizing Slavery: The Legal Culture of Slavery in Revolutionary Massachusetts and South Carolina" (Ph.D. diss., Emory, 2003), chap. 4.

50. Sweet, *Bodies Politic*, 235–39.

51. Law notes, Papers of James Wilson, HSP, Philadelphia.

52. *Howell v. Netherland*, 1770 Va. Lexis 1, Jeff. 90 (Va. 1770).

53. *Robin v. Hardaway*, 1772 Va. Lexis 1, Jeff. 109 (Va. 1772) (because Native Americans had not been explicitly included in the 1705 slave code, they were not slaves). Natural-law principles were employed in argument by both counsel. Cover, *Justice Accused*, 19, 21–22.

54. The court determined that the Africans had been illegally taken "contrary to law and right." *Order on Habeas Corpus* (R.I. State Jud. Archives) (R.I. Sup. Ct. September 1773, Newport), 79.

55. Lawrence M. Friedman, *A History of American Law*, 3d ed. (New York: Simon and Schuster, 2005), 154.

56. Zilversmit, *First Emancipation*, 48.

57. Ibid., 90; Board of Trade and Plantations (U.K.), *Journals of the Board of Trade and Plantations*, vol. 13, *January 1768–December 1775* (1937), 393–96 (May 1774) (Institute of Historical Research and History of Parliament Trust, British History Online, http://www.british-history.ac.uk (Economic History), accessed August 14, 2009, vol. 81, fol. 51).

58. Zilversmit, *First Emancipation*, 49.

59. Eleutheros, *New York Journal*, February 18, 1773, 861.

60. MacLeod, *Slavery, Race*, 31.

61. J. Kent McGaughy, *Richard Henry Lee of Virginia: Portrait of an American Revolutionary* (Lanham, Md.: Rowman and Littlefield, 2004), 45.

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

63. George III, King of Great Britain, "Instructions to Lieutenant Governor William Nelson" (1770), MSS 3195, Small Special Collections Library, University of Virginia, Charlottesville.

64. Wolf, *Race and Liberty*, 21.

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

66. *Somerset v. Stewart*, Lofft 1, 98 E.R. 499 (1772); another report is Thomas B. Howell, ed., *A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors from the Earliest Period to the Year 1783, with notes and other Illustrations* (London: R. Bagshaw, 1814), 20:1. For leading analyses, see James Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill: University of North Carolina Press, 2004); William M. Wiecek, "*Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World," *University of Chicago Law Review* 42 (1974): 86–146. For recent discussion see George Van Cleve, "Somerset's Case and Its Antecedents in Imperial Perspective," *Law and History Review* 24 (2006): 601–45.

67. *Yorke-Talbot Opinion* (1729); *Pearne v. Lisle*, Amb. 75, 27 E.R. 47 (1749).

68. Transcript of Judgement, *General Evening Post* (London), June 21–23, 1772.

69. Van Cleve, "Somerset's Case," 643.

70. For the debate over whether colonies possessed English rights, see Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, Mass.: Harvard University Press, 2004); John Phillip Reid, *Constitutional History of the American Revolution*, 4 vols. (Madison: University of Wisconsin Press, 1986–93); and Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill: University of North Carolina Press, 2005), 20–32.

71. Defense counsel in *Somerset* used this adverse consequence to defend their position to Lord Mansfield, giving Virginia as an example. Howell, *State Trials*, 20:70. Mansfield's decision confirmed the correctness of the slaveholders' conclusion.

72. Van Cleve, "Somerset's Case," 636, 643 n. 200.

73. Ibid., 642–45.

74. Ibid., 642–45, 619–21.

75. See Patricia Bradley, *Slavery, Propaganda and the American Revolution* (Jackson: University of Mississippi Press, 1998), 66–80; and Patricia Bradley, "Slavery in Colonial Newspapers: The Somerset Case," *Journalism History* 12, no. 1 (1985): 2–7. Bradley suggests that some American newspapers may have manipulated their *Somerset* coverage, either to present British "liberty" favorably (Tory) or to play on American racial fears of British policy (Patriot). Readers in major towns could probably have received a balanced, complete description of the *Somerset* arguments and decision by looking at more than one paper, however.

76. *Caesar v. Greenleaf* (Essex Inf. Ct., Newburyport, Mass., 1774), in Wroth and Zobel, *Legal Papers of John Adams*, 2:64–67.

77. *Pennsylvania Packet*, August 8, 1774, quoted in part in Zilversmit, *First Emancipation*, 97 (emphasis original).

78. Finkelman, *Imperfect Union*, 39.

79. Slave flight related to *Somerset* occurred in England as well. See Oldham, *English Common Law*, 320–21. For a recent treatment of *Somerset* and its consequences for slaves in particular, see Douglas R. Egerton, *Death or Liberty: African Americans and Revolutionary America* (Oxford: Oxford University Press, 2009), 41–64, which came to hand after this book was completed. I thank John Craig Hammond for this reference.

80. Wiecek, *Antislavery Constitutionalism*, 44. For the broader reaction to *Somerset* in Massachusetts, see Thea K. Hunter, "Publishing Freedom, Winning Arguments: *Somerset*, Natural Rights and Massachusetts Freedom Cases, 1772–1836" (Ph.D. diss., Columbia University, 2005).

81. Hunter, "Publishing Freedom," 131–32.

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

83. Wiecek, *Antislavery Constitutionalism*, 34–44; Van Cleve, "Somerset's Case," 602.

84. "A Pennsylvanian" [Benjamin Rush], *An Address to the Inhabitants of the British*

Settlements in America, upon Slave-Keeping, 2d ed. (Philadelphia: John Dunlap, 1773), 19, 49.

85. Anthony Benezet to Samuel Allinson, October 30, 1772, Allinson Papers, Haverford College Quaker Collection, Haverford, Pa.

86. The correspondence of Peleg Clarke, a Newport, Rhode Island, slave-ship captain, contains no references to *Somerset* during the period 1771–74. Clarke and his correspondents in England and the West Indies believed that African slave prices and American molasses prices then had the largest impact on the trade. Peleg Clarke, Letterbook, 1771–1782, Newport Historical Society, Newport, R.I.

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

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

89. "A Back Settler," *Some Fugitive Thoughts on a Letter Signed Freeman, Addressed to the Deputies Assembled at the High Court of Congress in Philadelphia*, 25, Evans no. 13630, quoted in Jack P. Greene, "'Slavery or Independence': Some Reflections on the Relationship among Liberty, Black Bondage, and Equality in Revolutionary South Carolina," *South Carolina Historical Magazine* 80 (1979): 206.

90. *Virginia Gazette* (Rind), November 12, 1772.

91. *Virginia Gazette* (Purdie and Dixon), August 20, 1772.

92. *New York Journal or the General Advertiser*, August 27, 1772; *Boston Post-Boy*, September 7, 1772. Slaveowners had another reason to be concerned about British policy as expressed in *Somerset*—it might affect their ability to travel freely with their slaves. Finkelman, *Imperfect Union*, 38–39.

93. Henry Marchant, *Diary*, Papers of Henry Marchant, Rhode Island Historical Society, Providence (citations are to the typescript version, American Philosophical Society), 1:123.

94. Ibid.

95. Blackstone, *Commentaries*, 1:104–5, 123. The *Somerset* decision resulted in part from Mansfield's effort to avoid the political implications of directly applying this principle to slavery. See Van Cleve, "Somerset's Case," 605–6, 612, 639–40.

96. Imperial slavery had historically typically been subject to Privy Council control. See Jonathan Bush, "The British Constitution and the Creation of American Slavery," in *Slavery and the Law*, ed. Paul Finkelman (Madison, Wis.: Madison House, 1997), 379–418. But the clear implication of Mansfield's decision in *Somerset* was that Parliament could intervene to control colonial slavery if it chose to do so.

97. For Parliament's action, see House of Commons, *Journal* 33:789 (May 25, 1772); *London Morning Chronicle*, May 26, 1772.

98. TJ to Edward Coles, August 25, 1814, *TJ Writings*, 1343–46.

99. McGaughy, *Richard Henry Lee*, 78.

100. Ibid., 63.

101. For Henry's vociferous attack on the Constitution's failure to protect slavery sufficiently against control by the new federal government, see chapter 4.

102. Landon Carter to GW, October 31, 1776–November 2, 1776, *GW Dig. Ed.* (GW Print Ed., Rev. War Ser., 7:64).

103. Zilversmit, *First Emancipation*, 91–92.

104. Elias Boudinot to Samuel Allinson, July 29?, 1774, Allinson Papers.

105. Zilversmit, *First Emancipation*, 91. The proposal's racially discriminatory testimonial limitation meant that blacks would often be at the mercy of whites who abused them, unless other white citizens came to their aid, which depended on the level of support for slavery and racism within a particular community. Sweet, *Bodies Politic*, 237–38.

106. Zilversmit, *First Emancipation*, 91–92.

107. *An Act Prohibiting the Importation of Negroes into This Colony*, Rhode Island Session Laws, June 1774 (Newport, R.I.: Solomon Southwick, 1774), 48–50, Evans no. 13568.

108. Sweet, *Bodies Politic*, 244. The statute attempted to address slave-trade concerns of abolitionists without ending the slave trade or slavery. Ibid., 244–45.

109. Rhode Island Session Laws, June 1774, 49.

110. The statute was "a direct attempt to insure" that *Somerset* would not apply in Rhode Island. Finkelman, *Imperfect Union*, 43.

111. Connecticut also adopted an import ban in 1774. It declared that slave imports were "injurious to the poor and inconvenient," apparent references to labor market competition and poor relief. *An Act for prohibiting the Importation of Indian, Negro, or Molatto Slaves,* Connecticut Session Laws, October 1774 (New-London: Timothy Green, 1774), 403, Evans no. 13209. The Continental Association agreed to support a voluntary import ban in all states as an economic sanction against England; postwar efforts to convert that ban into Confederation law failed.

112. In 1779, Rhode Island banned the sale of resident slaves outside the state, though it did not enact gradual abolition legislation until 1784. *An Act Prohibiting Slaves Being Sold out of the State against Their Consent*, Rhode Island Session Laws, October 1779 (Providence: Bennett Wheeler, 1782), 6–7, Evans no. 16492.

113. Burnard, "Prodigious Riches," 520, table 5 (wealth); Price, "Imperial Economy," 100, table 4.1 (population).

114. The division of the empire also correspondingly reduced the political strength of the British West Indian lobby; see Andrew J. O'Shaughnessy, *An Empire Divided: The American Revolution and the British Caribbean* (Philadelphia: University of Pennsylvania Press, 2000), xii.

115. See Cassandra Pybus, "Jefferson's Faulty Math: The Question of Slave Defections in the American Revolution," *William and Mary Quarterly* 62, no. 2 (2005): 243–64. Ira Berlin's analysis appears to suggest that fugitives or freed slaves were about 5–6 percent of Southern slaves. Berlin, *Generations of Captivity*, 112, 126, 273–74. For a far higher estimate, see Frey, *Water from the Rock*, 211.

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

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

118. James Madison to William Bradford, Jr., June 19, 1775, *JM Papers*, 1:151.

119. Wiecek, *Antislavery Constitutionalism*, 55 (South Carolina slave-control concerns); Edgar J. McManus, *A History of Negro Slavery in New York* (Syracuse, N.Y.: Syracuse University Press, 1966), 155–56 (New York control problems).

120. Davis, *Slavery in Western Culture*, 3, quoting James Boswell, *The Life of Samuel Johnson* (New York: Modern Library, n.d.), 747–48.

121. For a thoughtful analysis, see Klinkner with Smith, *Unsteady March*, 12–24.

122. Davis, *Slavery in Revolution*, 77–78.

123. Ibid., 286; and see chapters 2–4 of this work.

124. Jack P. Greene, "Slavery or Independence."

125. Ralph Ketcham, *James Madison: A Biography* (Charlottesville: University Press of Virginia, 1990), 71–72.

126. See essays by Richard Tuck, "Grotius and Selden"; James Tully, "Locke"; and Noel Malcolm, "Hobbes and Spinoza"; in *The Cambridge History of Political Thought, 1450–1700*, ed. J. H. Burns assisted by Mark Goldie (Cambridge: Cambridge University Press, 1991), 499–529, 615–56, 530–45.

127. "A Back Settler," *Some Fugitive Thoughts*, 4.

128. James W. Ceaser's study of natural rights in American political development finds that there were two "basic types of natural rights," "collective rights" and "individual rights." Jeffersonians tended to place as much emphasis on collective rights as on individual rights, while Federalists emphasized individual rights. He notes Daniel Rodgers's conclusion that the Jeffersonian emphasis on collective rights began "well before slavery became a major issue of public discussion." James W. Ceaser, *Nature and History in American Political Development: A Debate* (Cambridge, Mass.: Harvard University Press, 2006), 29–30. For the social-contract concept in America, see Mark Hulliung, *The Social Contract in America from the Revolution to the Present Age* (Lawrence: University Press of Kansas, 2007). For a general account of the evolution of the relationship between natural rights and positive law in early American legal thought, see G. Edward White, *The Marshall Court and Cultural Change, 1815–1835*, abridged ed. (Oxford: Oxford University Press, 1991), chaps. 9–10.

129. For surveys of antislavery thought, see Davis, *Slavery in Western Culture*, 291–482; James G. Basker, ed., *Early American Abolitionists: A Collection of Anti-Slavery Writings, 1760–1820* (New York: Gilder Lehrman Institute, 2005).

130. See, e.g., Davis, *Slavery in Revolution*, 82–83, 264, 303–5; Jordan, *White over Black*, 310–11; and Davis essay in Bender, *Antislavery Debate*.

131. See the essays in Bender, *Antislavery Debate*; Peter S. Onuf and Ari Helo, "Jefferson, Morality, and the Problem of Slavery," *William and Mary Quarterly* 60, no. 3 (2003): 583–614; Mason, *Slavery in Early Republic*, 11–12.

132. See Chaplin, *Anxious Pursuit*, 23–65 and passim.

133. For discussion see Jordan, *White over Black*, 300–301, 309–10; St. George Tucker to Dr. Jeremy Belknap, June 29, 1795, MSL, 405–6.

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

135. Einhorn, *American Taxation, American Slavery*, 118–38; Merrill Jensen, *The Articles of Confederation* (Madison: University of Wisconsin Press, 1962),146–48; Rakove, *Beginnings of National Politics*; Wiecek, *Antislavery Constitutionalism*.

136. Robinson, *Slavery in Politics*, 131–67; Wiecek, *Antislavery Constitutionalism*, chap. 2.

137. Finkelman, *Imperfect Union*, 31–32; Wiecek, *Antislavery Constitutionalism*, 59, 78.

138. For Massachusetts fugitive slavery see, especially, Blanck, "Revolutionizing Slavery."

139. Wiecek, *Antislavery Constitutionalism*, 16–17, 57–60.

140. Ibid., 59.

141. Einhorn, *American Taxation, American Slavery*, 117–32.

142. *TJ Papers*, 1:320–21.

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

144. *JCC*, 6:1080.

145. Wiencek, *Imperfect God*, 215.

146. Sweet, *Bodies Politic*, 115.

147. Einhorn, *American Taxation, American Slavery*, 118–38.

148. Burke's Notes of Debates February 25, 1777, *LDCC*, 6:360 (parentheses omitted).

149. Burke's reliance on *Somerset* conceded that each state had plenary authority to control (or abolish) slavery except as limited by the Articles.

150. *JCC*, 5:546–54, July 12, 1776.

151. Jensen, *Articles of Confederation*, 139.

152. Ibid., 177–78.

153. Wiecek, *Antislavery Constitutionalism*, 59.

154. *Opinion of C. J. Holt and Nine Judges*, U.K. National Archives, Colonial Ser. 137/2 (1689).

155. See the 1779 Rhode Island prohibition statute, note 112 above.

156. Several committee proposals related to congressional privileges. Remaining articles largely concerned interstate legal disputes, and were intended to create binding confederal law.

157. As noted, earlier historians have generally concluded that it was uncertain

whether the Articles protected slaveowners against fugitive slavery: the P&I clause "might have been construed" to apply to slave property (Wiecek, *Antislavery Constitutionalism*, 59); "it is difficult to determine" how the clause applied to slaves (Finkelman, *Imperfect Union*, 31–32). An exception is Alfred W. Blumrosen and Ruth G. Blumrosen, *Slave Nation* (Naperville, Ill.: Sourcebooks, 2005), 145–55, which argues on grounds different than those presented here that the P&I clause was intended to reject the *Somerset* decision and protect slaveowner property.

158. For a discussion of outlawry statutes aimed at runaway slaves, see Thomas D. Morris, *Southern Slavery and the Law*, 286–87. For slave outlawry compensation orders, see Virginia House of Burgesses, *Journals* (November 1769 sess.), 13–14.

159. *JCC*, 9:907–25, November 15, 1777 (emphasis mine).

160. Charles Warren, *The Making of the Constitution* (Boston: Little, Brown and Co., 1928), 561.

161. *Paris Peace Treaty of 1783*, art. 7, Yale University, Avalon Project, http://www.yale.edu/lawweb/avalon/diplomacy/britain/paris.htm.

162. The drafts reviewed are in the National Archives. Partially legible or illegible versions can be found in *Papers of the Continental Congress, 1774–1789* (Washington, D.C.: National Archives and Records Service, General Services Administration, 1971), roll 61, M247.

163. On June 25, 1778, South Carolina delegates moved unsuccessfully to amend this part of the P&I clause to limit it to "white" inhabitants. Efforts by South Carolina to amend the P&I clause to deny protection to free blacks were also defeated. *JCC*, 11:652–53. These efforts were pointless unless the state believed it would be legally bound by the Articles.

164. *Papers of the Continental Congress*, roll 61, M247.

165. Ibid.

166. Informal comparison of its handwriting with that of approximately twenty-five other delegates suggests that the proposal's author was Thomas Burke of North Carolina, who represented a substantial slaveowner constituency and understood *Somerset's* implications for local authority over slavery.

167. *Papers of the Continental Congress*, roll 61, M247 (partially illegible separate sheet following committee report language; separate handwritten version of committee proviso language).

168. The 1774 Rhode Island import-ban statute explicitly protected importers for the purpose of reexport against the effects of the statute.

169. *Affa Hall et al. v. Commonwealth* (Mass. 1783), Supreme Judicial Court Record Books, Massachusetts Archives, Boston, reel 18, 177–78 (August 26, 1783). Historians generally conclude that Massachusetts had judicially abolished slavery by 1783 (see chapter 2). In any event, Justice Cushing's ruling would have accorded with a narrow reading of the decision in *Somerset*, because Cushing held that slave status alone could not justify confinement, just as Mansfield had held there.

170. Emily Blanck, "Seventeen Eighty-Three: The Turning Point in the Law of Slavery and Freedom in Massachusetts," *New England Quarterly* 75, no. 1 (2002): 31–38,

36. Blanck asserts that the Articles were not drafted to cover this case, but recognizes that courts could have applied the Articles provision to cover it. Ibid., 38.

CHAPTER TWO

1. By then, the slave population had grown to almost nine hundred thousand, nearly doubling from 1770 levels. Figures taken or interpolated from Berlin, *Many Thousands Gone*, 369–71, table 1.

2. Wright, *Slavery and Development*, 17.

3. TJ to Richard Price, August 7, 1785, *TJ Papers*, 8:356–57.

4. See Berlin, *Many Thousands Gone*, 228–39, 369–71.

5. In Massachusetts, where slavery was abolished through judicial action, in theory no compensation was provided to slaveowners.

6. The Northern states engaged in abolition all barred slave imports, and by the mid-1790s had barred participation in the slave trade by their citizens. Most Northern states required slaveowners in many cases to provide poor-relief assistance for indigent and former slaves.

7. On legal issues regarding slave transit and protection of fugitive slaves, extensive use has been made here of the work of Paul Finkelman, particularly his comprehensive survey of the law in this area. Finkelman, *Imperfect Union*. The early history of the fugitive-slave issue for Massachusetts is analyzed in Blanck, "Seventeen Eighty-Three."

8. See, e.g., Gary B. Nash and Jean R. Soderlund, *Freedom by Degrees: Emancipation in Pennsylvania and Its Aftermath* (Oxford: Oxford University Press, 1991); David N. Gellman, *Emancipating New York: The Politics of Slavery and Freedom, 1777–1827* (Baton Rouge: Louisiana State University Press, 2006); the essays in Basker, *Early American Abolitionists*; and the classic studies by David Brion Davis. Some recent historians have placed abolition in the context of northern race relations. John Wood Sweet argues that abolition took place in a northern society that was already strongly influenced by racial beliefs, and that those beliefs limited abolition's potential to alter the socioeconomic situation of free blacks. Sweet, *Bodies Politic*. Joanne Pope Melish concludes that abolition held out to whites the promise of "black removal" to create a white republic. Melish, *Disowning Slavery*. And see the seminal work of Leon Litwack, *North of Slavery: The Negro in the Free States, 1790–1860* (Chicago: University of Chicago Press, 1961).

9. William W. Freehling, "The Founding Fathers, Conditional Antislavery and the Nonradicalism of the American Revolution," chap. 2 of *Reintegration of American History*, 17.

10. Gellman, *Emancipating New York*, 1–5, 170–79.

11. The proportions of nonslaveholding households, and nonslaveholding eligible voters, in the New England states in 1780 would have been nearly as high as they were in Pennsylvania, and in some cases higher. See appendix B.

12. *An Act for the Gradual Abolition of Slavery* (March 1, 1780), Session Laws (Penn-

sylvania), 1780 (Philadelphia: John Dunlap, 1780), chap. 146, Evans no. 16930. For a history of abolition in Pennsylvania, see Nash and Soderlund, *Freedom by Degrees*, 111, passim. Zilversmit also provides an excellent account in *First Emancipation*, 124–37.

13. Zilversmit, *First Emancipation*, 133–37.

14. Letter from Washington, Pennsylvania, Abolition Society to Pennsylvania Abolition Society, February 17, 1789, *Papers of the Pennsylvania Abolition Society*, HSP, Philadelphia (Committee of Correspondence). And see generally, Nash and Soderlund, *Freedom by Degrees*.

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

16. Nash and Soderlund, *Freedom by Degrees*,18, table 1–4.

17. Ibid., 103.

18. *Pennsylvania Packet*, March 7, 1779.

19. Nash and Soderlund, *Freedom by Degrees*, 103.

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

21. Ibid.

22. Robinson, *Slavery in Politics*, 24.

23. Blanck, "Revolutionizing Slavery"; Blanck, "Seventeen Eighty-Three"; Higginbotham, *In the Matter of Color*, 91–98, and sources cited therein.

24. *Commonwealth v. Jennison* (Mass. 1783), Supreme Judicial Court Record, Worcester Session, 1783, fol. 85. Blanck, "Seventeen Eighty-Three," 25–31. The prosecution against Jennison followed several years of inconclusive civil litigation related to the same transactions and occurrences.

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

26. The 1783 legislation is described in Robinson, *Slavery in Politics*, 26–28. For background on Massachusetts slavery's history, see *The Inhabitants of Wichendon, Plaintiffs in Error v. The Inhabitants of Hatfield*, 4 Mass. 123, 1808 Mass. Lexis 29, Tyng 123 (Mass. 1808).

27. There were still some slaves living in Massachusetts in 1790. Blanck, "Seventeen Eighty-Three," 30; Sweet, *Bodies Politic*, 248–49.

28. Blanck, "Revolutionizing Slavery," chap. 3.

29. Cover, *Justice Accused*, 21.

30. Hunter, "Publishing Freedom."

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

32. Robinson, *Slavery in Politics*, 28–29.

33. James Winthrop to Dr. Jeremy Belknap, March 4, 1795, MSL, 389–90. Arthur Zilversmit and Donald Robinson conclude that the court's decision in *Jennison* probably reached a result that the constitution's drafters never intended. Zilversmit, *First Emancipation*, 112–13, 115; Robinson, *Slavery in Politics*, 26–27.

34. The New York Assembly had proposed to deny outright to blacks, or to permit to them only on a highly discriminatory basis, various civil rights, including testimony, jury service, racial intermarriage, and officeholding. The senate objected to all of these proposals except black disfranchisement. McManus, *Slavery in New York*, 162–65.

35. One historian thought the council's actions "disingenuous." MacLeod, *Slavery, Race*, 142 n. 105.

36. Zilversmit, *First Emancipation*, 148–49 (quotation at 149).

37. McManus, *Slavery in New York*, 172–73.

38. Shane White, *Somewhat More Independent*, 36.

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

40. William Miller, "The Effects of the American Revolution on Indentured Servitude," *Pennsylvania History* 7, no. 3 (1940): 136.

41. Wright, *Slavery and Development*, 33.

42. Robert J. Steinfeld, *The Invention of Free Labor* (Chapel Hill: University of North Carolina Press, 1991), 129–35.

43. Berlin, *Many Thousands Gone*, 228–55.

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

45. John Adams to Dr. Jeremy Belknap, October 23, 1795, MSL, 416.

46. Melish, *Disowning Slavery*, passim; Sweet, *Bodies Politic*; Gellman, *Emancipating New York*, 1–5, 170–79.

47. Robert William Fogel and Stanley L. Engerman, "Philanthropy at Bargain Prices: Notes on the Economics of Gradual Emancipation," *Journal of Legal Studies* 3, no. 2 (1974): 377–401.

48. Ibid., 378 n. 6; Robinson, *Slavery in Politics*, 37; Melish, *Disowning Slavery*, 52–53.

49. Some contemporaries rejected the idea that states had the power to abolish slavery. "Impartial" asserted that because slaves were property, the New Jersey legislature had no power to take them at all. *New Jersey Gazette*, January 10, 1781. Today, one might conceive of abolition legislation as an exercise of state police powers, but contemporaries rarely did, since unlike classic public nuisances or practices generally regarded as social evils, it concerned a form of property that had historically been deemed lawful. Hence contemporary legal (as opposed to moral) attacks on slavery were usually based on the idea that it was not possible to obtain a valid vested right in slaves, which implied that if that contention were rejected, compensation would be required.

50. Charles W. McCurdy, *The Anti-Rent Era in New York Law and Politics, 1839–1865* (Chapel Hill: University of North Carolina Press, 2001), 104–27.

51. For the British practice, see Blackstone, *Commentaries*, 1:135.

52. William W. Fisher III, "The Law of the Land: An Intellectual History of

American Property Doctrine, 1776–1880" (Ph.D. diss., Harvard University, 1991), 39–44, 294–96, 314–15. For an argument that American law was "strongly weighted against compensation" as "was its constitutional theory" as of the late eighteenth century, see Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass.: Harvard University Press, 1977), 63–65.

53. "A Friend to Justice," *New Jersey Gazette*, November 8, 1780. The writer attacked the idea that anyone could ever obtain a vested right in slave property "by the laws of the land." There was no statute establishing slavery in New Jersey, and even if there were, "the validity of a law for such a purpose might very justly perhaps be called in question, as being repugnant to the laws of God and nature."

54. New York's 1817 statute nominally departed from this scheme by freeing slaves who were alive in 1799 by 1827, but it was generally understood that owners would effectively have received compensation for such adult slaves by then.

55. Melish, *Disowning Slavery*, 57–59.

56. Ibid., 57–73.

57. *Hudgins v. Wright*, 11 Va. (1 Hen. & Munf.) 134 (Va. Sup. Ct. App. 1806); *Negro Flora v. Joseph Graisberry* (Pa. High Court of Errors and Appeals 1802). The *Graisberry* case is unreported, and its records reportedly lost. However, the issue in the case—the constitutionality of slavery in Pennsylvania under the 1790 Constitution—and the court's unanimous decision that slavery was constitutional (despite a constitutional "free and equal" clause) are reported in *Gazette of the United States* (Philadelphia), January 30, 1802, and *The Oracle of Dauphin and Harrisburgh Advertiser*, February 8, 1802. The case background is discussed in Edward Raymond Turner, "The Abolition of Slavery in Pennsylvania," *Pennsylvania Magazine of History and Biography* 36, no. 2 (1912): 138–39.

58. Copies or summaries of these opinions are found in Papers of William Rawle, HSP, Philadelphia, box 4.

59. Coxe did not equate "positive law" with a statute expressly authorizing slavery, but seemed to include in that concept statutes premised on the existence of slavery, or long-standing customs recognizing it.

60. Miers Fisher, *Opinion of Miers Fisher . . . on Constitutionality of Slavery in Pennsylvania*, Rawle Papers, box 4, Rawle Legal Papers.

61. Ibid.

62. Ibid.

63. Rawle and Fisher both thought that Massachusetts had judicially abolished slavery based on a constitutional provision similar to Pennsylvania's "free and equal" language. Rawle argued also that the United States Constitution did not bar the abolition of slavery by Pennsylvania.

64. *Negro Flora v. Joseph Graisberry* (Pa. High Court of Errors and Appeals 1802). See note 57.

65. For a thoughtful analysis of the history of natural-law thought and early American slavery, see G. Edward White, *Marshall Court*, 674–740. Historian William Fisher points to examples of "natural law" reasoning in the analogous area of early American eminent-domain law, where courts sometimes suggested that they would

require compensation for property takings even if no statute or constitutional provision required it. But the Chase/Iredell colloquy in *Calder v. Bull*, 3 U.S. (Dall.) 386 (1798), discussed by Fisher, indicates that even by then there were profound disagreements on the Supreme Court about the validity of the "higher law" approach in light of republican principles. Fisher, "Law of the Land," 288–94.

66. Cover, *Justice Accused*, 62–67.

67. Fogel and Engerman, "Philanthropy," 401.

68. Ibid., 392–93.

69. Turner, "Abolition in Pennsylvania," 137.

70. *An Act Prohibiting Slaves Being Sold out of the State against Their Consent,* Rhode Island Session Laws, October 1779, 6–7.

71. Oldham, *English Common Law*, 99.

72. Turner, "Abolition in Pennsylvania," 137–38.

73. See *Jack v. Barnibus McShean*, PAS ACM, 1785–86, 45–47, 65, 68; *Sam v. Elliott*, PAS ACM, June 20, 1786, 78; *Fanney Murphrey v. Thos. Landrop*, PAS ACM, June 20, 1786, 78; *Case of Charles Logan*, PAS ACM, April 15, 1788. The substantial amount of slaveowner conduct documented in PAS files that was not merely illegal, but knowingly illegal, and the 1788 amendments to the act, both strongly suggest that various slaveowners transferred or sold slaves out-of-state if it was to their advantage to do so, and faced little prospect of public retribution in return. Nash and Soderlund conclude, however, that slave sales out of Pennsylvania were only one reason for the decline in slave population in Pennsylvania in the last third of the eighteenth century, and that other factors were more important. Nash and Soderlund, *Freedom by Degrees*, 75.

74. *An Act to Explain and Amend an Act, Entitled, "An Act for the Gradual Abolition of Slavery,"* Session Laws (Pennsylvania), February 1788 (Philadelphia: T. Bradford, 1788), chap. 149, secs. 3, 5.

75. Ibid., sec. 7, interpreted in *Respublica v. Richards*, 2 U.S. (Dall.) 224 (Sup. Ct. Pa. 1795).

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

77. Turner, "Abolition in Pennsylvania," 137–38.

78. Eberly, "Pennsylvania Abolition Society," 52.

79. *Sam, late with Stephen Garard (Girard)*, PAS ACM, 1787.

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

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

82. *Patty and Fanney with William Height*, PAS ACM, February 21, 1794. In *Jack v. Barnibus McShean*, PAS ACM, 1785–86, 45–47, 65, 68, McShean sent a child out of state to evade a writ seeking his freedom; the child was returned the next year after further court action. In *Cate v. Cooke*, PAS ACM, 1785, 32, Cate had been declared free by a court, but was nonetheless sold as a slave and then confined to the workhouse by her

owner. The PAS intervened and obtained her freedom, but declined to sue for false imprisonment damages, though the court held that it could, showing PAS sensitivity to the limits of its public support.

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

84. Eberly, "Pennsylvania Abolition Society," 57.

85. *Respublica v. Gaoler of Philadelphia County* 1 Yeates 368 (Pa. 1794), discussed in Steinfeld, *Invention of Free Labor*, 140.

86. This issue was pending before the Pennsylvania Supreme Court as early as 1789. Fisher-Tilghman opinion, PAS Legal Records, January 7, 1789. See also *Charity and Deborah Pero v. Mary Burris*, PAS ACM, July 1794, 311. The PAS also asserted that a former slave's status as a free person did not change once she left Pennsylvania. Between 1785 and 1794, the PAS litigated a series of reenslavement cases in an effort to vindicate this principle. *Florah and her daughter*, PAS ACM, June 20, 1785; *Tom in Burlington Prison*, PAS ACM, July 31, 1793; *Harry v. Benjamin Gibbs*, PAS ACM, May 26, 1794; *Mulatto Sall v. Doctor Baker*, PAS ACM, 1785, 31; *Case of Dinah*, PAS ACM, January 29, 1794.

87. *Pirate, alias Belt v. Dalby*, 1 U.S. (Dall.) 167 (Pa. 1786). The case is also sometimes referred to as *Belt v. Dalby* or *Pirate v. Dalby*. For a leading analysis, see Finkelman, *Imperfect Union*, 50–52.

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

89. For the view that the court did base its conclusion on the six-month provision of the Pennsylvania abolition statute, see Finkelman, *Imperfect Union*, 50.

90. George Washington to Robert Morris, April 12, 1786, *GW Dig. Ed.* (GW Print Ed., Confed. Ser., 4:15–17).

91. Newman, *Transformation of American Abolitionism*, 72–73, and chap. 3.

92. *Respublica v. Blackmore*, 2 Yeates 234 (Pa. 1797).

93. For additional information on PAS successes, see Newman, *Transformation of American Abolitionism*, chap. 3; Eberly, "Pennsylvania Abolition Society."

94. *Bill, late with Jonas Philips*, PAS ACM, February 2, 1791.

95. *Respublica v. Richards*, 2 U.S. (Dall.) 224 (Pa. 1795); PAS ACM, June 18, 1794.

96. *Dinah late with Andrew Buskirk*, PAS ACM, December 19, 1793, 273.

97. *Kidnapping (report of Amer Bailey)*, PAS ACM, December 17, 1794.

98. *Case of Azar v. St. Victor*, PAS ACM, August 26, 1794.

99. Cited in Pennsylvania General Assembly, *Report of the Committee appointed in the Senate of Pennsylvania to investigate the cause of an increased number of slaves being returned for that Commonwealth, by the census of 1830, over that of 1820* (Harrisburg: Henry Welsh, 1833), 5, referring to *Miller v. Dwilling*, 14 Serg. & Rawle 442 (Pa. 1826) (quotation in committee report).

100. Ibid., 6.

101. Sweet, *Bodies Politic*, 252.

102. *An Act Directing the Process in Habeas Corpus,* Massachusetts Session Laws, 1785, chap. 39; *An Act Establishing the Right to, and the Form of the Writ de Homine Replegiando, or Writ for Replevying a Man*, Massachusetts Session Laws, 1787, chap. 8; and *An Act to Prevent the Slave-Trade, and for Granting Relief to the Families of Such Unhappy Persons as May Be Kidnapped or Decoyed Away from This Commonwealth*, Massachusetts Session Laws, 1788, chap. 11; in *The perpetual laws, of the commonwealth of Massachusetts: from the establishment of its constitution to the first session of the General Court, A.D. 1788* (Worcester: Isaiah Thomas, 1788), 149–52, 153–56, 355–57, Evans no. 21245.

103. Zilversmit, *First Emancipation*, 115; Sweet, *Bodies Politic*, 248–49.

104. David Menschel, "Abolition without Deliverance: The Law of Connecticut Slavery, 1784–1848," *Yale Law Journal* 111 (2001): 209.

105. Ibid., 211–12.

106. *State v. Beach*, 2 Kirby 20, 1786 Conn. Lexis 104 (Conn. Super. Ct. 1786).

107. Leo Hirsch, Jr., "The Slave in New York," *Journal of Negro History* 16 (1931): 383–414.

108. *Laws of the State of New-York, Passed by the Legislature of the Said State at Their Eleventh Session* (1788) (New York: Samuel and John Loudon, printers to the State, 1788), chap. 40.

109. McManus, *Slavery in New York*, 170, 175–77.

110. Fogel and Engerman, "Philanthropy," 393.

111. Claudia D. Goldin, "The Economics of Emancipation," *Journal of Economic History* 33, no. 1 (1973): 70.

112. Fogel and Engerman, "Philanthropy," 393.

113. The status of northern free blacks after abolition was contested as well. John Wood Sweet concludes that "many citizens of the United States feared that freed slaves would overrun their communities with thievery, idleness, and debauchery, destroying civil life." Sweet, *Bodies Politic*, 249. Such fears of social disruption played a part in legislation on abolition and related subjects such as black civil rights. Melish reaches a similar conclusion. She argues that slavery was "a form of social control." Gradual abolition statutes maintained socioeconomic dependence for most blacks, denied political representation because blacks were intended to continue as dependent parts of white families, and their provisions regarding children were intended to provide social control and limit poor relief, not to provide for future citizenship. Melish, *Disowning Slavery*, 63–64, 75–79. Some recent historians conclude that Northern states expanded black freedoms after the Revolution, particularly the right to vote. Klinkner and Smith, *Unsteady March*, 19–30. But evidence on the relationship between formal civil rights afforded to free blacks and their practical ability to exercise those rights in Northern states without fear of reprisal in the late eighteenth and early nineteenth centuries is limited, so systematic conclusions on this point await further research.

114. Finkelman, *Slavery and the Founders*, 103. This was the case under the laws of Pennsylvania, Rhode Island, Connecticut, and Massachusetts. If New Hampshire and Vermont were exceptions to the rule that fugitive slaves were not freed by gradual

abolition laws, those exceptions provided little or no practical comfort to most fugitives. See Zilversmit, *First Emancipation*, 116–17.

115. Wiecek, *Antislavery Constitutionalism*, 78. As chapter 1 shows, the states had agreed in the Articles of Confederation that they would protect slaveowner interests in fugitive slaves.

116. The Rhode Island legislature apparently wanted to deter abolitionist activity. See Sweet, *Bodies Politic*, 243–55. The law also provided that any person who brought in slaves when she settled in Rhode Island must take them out again if she left, together with "all such as shall be born from" the slaves while in the state.

117. The statute also provided rewards for "taking up runaway" "negroe" and "mulatto" slaves and penalties for activities protecting fugitives.

118. Sweet, *Bodies Politic*, 249.

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

120. *An Act concerning Indian, Molatto, and Negro Servants and Slaves,* in *Acts and Laws of the State of Connecticut in America* (New London, 1784), 233–35.

121. Blanck, "Seventeen Eighty-Three," 32–42.

122. *An Act for Suppressing and Punishing of Rogues, Vagabonds, Common Beggars . . .* , in *The perpetual laws, of the commonwealth of Massachusetts: from the establishment of its constitution to the first session of the General Court, A.D. 1788* (Worcester: Isaiah Thomas, 1788), 347–49; George H. Moore, *Notes on the History of Slavery in Massachusetts* (1866; repr., New York: Negro Universities Press, 1968), 228–29.

123. *Inhabitants of Wichendon* (Mass. 1808). See also cases cited in vol. 2 of Nathan Dane, *A General Digest and Abridgement of American Law* (Boston: Cummings, Hilliard and Co., 1823), chap. 53, 411–13.

124. *Laws of New-York* (1785), chap. 68; *Laws of New-York* (1788), chap. 40.

125. Blanck, "Seventeen Eighty-Three," 36.

126. Thomas D. Morris, *Free Men All*, 4, citing *Respublica v. Richards*, 2 U.S. (Dall.) 224 (Pa. 1795).

127. *Glen v. Hodges*, 9 Johns 67 (N.Y. 1812).

128. See, for example, proposals by Thomas Jefferson in his *Notes on Virginia*, James Madison's similar approach, and the 1790 proposal by Fernando Fairfax, the latter two of which are described in Jordan, *White over Black*, 552–54. Many of these proposals reflected fairly broadly held southern opinions on matters of race. See Jack P. Greene, "Slavery or Independence."

129. Lacy K. Ford, *Deliver Us from Evil: The Slavery Question in the Old South* (Oxford: Oxford University Press, 2009), 37.

130. Ibid., 36.

131. JM to Robert Pleasants, October 30, 1791, *JM Papers*, 14:117, quoted in Davis, *Slavery in Revolution*, 196.

132. Lacy K. Ford, *Deliver Us from Evil*, 17.

133. Ira Berlin has described the large postrevolutionary economic changes in the slave states that altered the conditions for slaves, sometimes in ways that benefited them. Berlin, *Many Thousands Gone*, chaps. 10–12.

134. William W. Fisher III, "Ideology and Imagery in the Law of Slavery," *Chicago-Kent Law Review* 68 (1993): 1051–83; Thomas D. Morris, *Southern Slavery and the Law*, chaps. 7–8.

135. The Virginia 1782 manumission law permitted manumission of slaves under age forty-five without legislative approval and without requiring free blacks to leave the state. *An Act to Authorize the Manumission of Slaves*, May 1782, in *The Statutes at Large . . . of Virginia . . .* , ed. William Waller Hening (Richmond: Samuel Pleasants, 1823), 11:39–41. For legal issues related to manumission and contrasting positions taken by different state courts on the implementation of manumission laws, see Thomas D. Morris, *Southern Slavery and the Law*, part 4; Cover, *Justice Accused*. After the Revolution, small numbers of slaves were freed by slave state legislatures in return for assistance provided to the American cause.

136. For an excellent discussion of this issue, see Jenny Bourne Wahl, *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery* (Cambridge: Cambridge University Press, 1998), 160–63.

137. Davis, *Slavery in Revolution*, 197; John E. Selby, *The Revolution in Virginia, 1775–1783* (Charlottesville: University of Virginia Press, 1988), 322, quoted in review by E. Wayne Carp, *William and Mary Quarterly*, 3d ser., 46, no. 3 (1989): 618–19.

138. McManus, *Slavery in New York*, 145–49; Berlin, *Many Thousands Gone*, 279–85, 331–32; Frank D. Lewis, "The Transition from Slavery to Freedom through Manumission: A Life-Cycle Approach Applied to the United States and Guadeloupe," in Eltis, Lewis, and Sokoloff, *Slavery in the Americas*, 150–80.

139. Berlin, *Many Thousands Gone*, 279–85.

140. Wolf, *Race and Liberty*.

141. Ibid., xi.

142. Ibid.

143. Newman, *Transformation of American Abolitionism*, 33.

144. Peter S. Onuf, "Domesticating the Captive Nation: Thomas Jefferson and the Problem of Slavery," in *Jefferson, Lincoln, and Wilson and the American Dilemma of Race and Democracy*, ed. Thomas J. Knock and John Milton Cooper, Jr. (Charlottesville: University of Virginia Press, 2010).

145. Peter Minor (Petersburg, Virginia) to John Minor, September 25, 1783, Minor and Wilson Papers, Small Special Collections Library, University of Virginia, Charlottesville. I thank Ezra Kidane for this reference.

146. Robert McColley, *Slavery and Jeffersonian Virginia* (Urbana: University of Illinois Press, 1978), 158–61.

147. MacLeod, *Slavery, Race*, 124; Newman, *Transformation of American Abolitionism*, 34–35.

148. MacLeod, *Slavery, Race*, 124.

149. Newman, *Transformation of American Abolitionism*, 34.

150. Based on data from Berlin, *Many Thousands Gone*, 372–73, table 2. These statistics exclude Delaware and Maryland, which were clearly atypical. Free-black populations there grew at a much higher rate than those in the remaining slave states below Pennsylvania. It appears that there were more manumissions in those states primarily because their proximity to free jurisdictions made slave flight much easier, so masters in those states needed to provide additional incentives to retain slaves' labor. Freehling, *Reintegration of American History*, 19. In Delaware, in addition to religious and Revolution principles, changes in the state's economy disfavoring slavery were "at the core" of voluntary manumission. Patience Essah, *A House Divided: Slavery and Emancipation in Delaware, 1638–1865* (Charlottesville: University of Virginia Press, 1996), 36–38 (quotation at 37).

151. For an analysis suggesting that Virginia proslavery sentiment was widespread at the turn of the century, see Gordon Finnie, "The Antislavery Movement in the Upper South before 1840," *Journal of Southern History* 35, no. 3 (1969): 319–42.

152. Jordan, *White over Black*, 574–81.

153. Ibid., 576–77.

154. Like many other Virginians, Tazewell opposed slave imports to Virginia. In the early 1800s, he discovered that profitable slave-smuggling enterprises were operating in Virginia, and sought to have Congress act against them. Norma Lois Peterson, *Littleton Waller Tazewell* (Charlottesville: University Press of Virginia, 1983), 31–32.

155. Ibid., 150–51.

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

CHAPTER THREE

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

2. Robert William Fogel, *Without Consent or Contract: The Rise and Fall of American Slavery*, (1989; repr., New York: W. W. Norton and Co., 1994), 33. The relationship between population growth and slave imports during this period remains controversial. See discussion in James A. McMillin, *The Final Victims: Foreign Slave Trade to North America, 1783–1810* (Columbia: University of South Carolina Press, 2004), 13–17.

3. Philip D. Morgan, "The Poor: Slaves in Early America," in Eltis, Lewis, and Sokoloff, *Slavery in the Americas*, 302.

4. Ibid.

5. Wolf, *Race and Liberty*, 6 n. 6.

6. For the leading history of issues related to slavery, state and federal taxation, and politics, see Einhorn, *American Taxation, American Slavery*.

7. Joseph DeLaplaine to Philadelphia Friends Meeting for Sufferings, New York, 10th (?) mo. 1785, Society of Friends, Miscellaneous Documents, Papers of the Phila-

delphia Meeting for Sufferings, Friends Historical Library, Swarthmore College, Swarthmore, Pa.

8. TJ to James Madison, September 1, 1785, *TJ Papers*, 8:460–61.

9. TJ to GW, December 4, 1788, *TJ Writings*, 929–35, 930.

10. Hendrickson, *Peace Pact*, 226; and see the detailed discussion in Einhorn, *American Taxation, American Slavery*, 118–38; Jack R. Pole, *Political Representation in England and the Origins of the American Republic* (1966; Berkeley: University of California Press, 1971), 349n; and E. James Ferguson, *The Power of the Purse: A History of American Public Finance, 1776–1790* (Chapel Hill: University of North Carolina Press, 1961), 165.

11. New Hampshire and Rhode Island were the exceptions. John P. Kaminski, *James Madison: Champion of Liberty and Justice* (Madison, Wis.: Parallel Press, 2006), 35 n. 39. Some historians say that only nine states adopted the amendment. Fehrenbacher, *Slaveholding Republic*, 25.

12. See William Grayson to James Monroe, May 29, 1787, Farrand, 3:30.

13. Historians point to different causes for this reevaluation. Some emphasize the central role of the 1786 congressional debate over the Jay-Gardoqui or "Spanish treaty" negotiations, which made undeniable the existence of stark sectional discord and created a sense that the Confederation government could cause affirmative damage to sectional interests and national unity. See discussions in Richard B. Morris, *The Forging of the Union* (New York: Harper and Row, 1987), 232–44; William Winslow Crosskey and William Jeffrey, Jr., *Politics and the Constitution in the History of the United States* (Chicago: University of Chicago Press, 1980), 3:285–314, 353; and Rakove, *Original Meanings*, 43. Others point to disputes over territory that were largely irresolvable by the Confederation as sources of discord between the states that threatened to cause permanent divisions. Onuf, *Origins of the Federal Republic*. For a recent alternative view of the politics that led to the Constitution, see Calvin H. Johnson, *Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution* (Cambridge: Cambridge University Press, 2005).

14. Hendrickson, *Peace Pact*, 7. Edmund Randolph thought the result would be "anarchy"; others such as David Ramsay in South Carolina foresaw the possible creation of a monarchy or regional confederacies. David Ramsay to Thomas Jefferson, April 7, 1787, *TJ Papers*, 11:279–80.

15. John Ferling, *A Leap in the Dark: The Struggle to Create the American Republic* (Oxford: Oxford University Press, 2003), 298–301; TJ to John Adams, November 13, 1787, *TJ Writings*, 912–14.

16. Benjamin Lincoln to Rufus King, February 11, 1786, *LCRK*, 1:157–58.

17. *JCC*, 26:270–71. I thank Randall Lewis for this reference and background. TJ to James Madison, September 1, 1785, *TJ Papers*, 8:460–61. For the importance of the Constitution's grant of congressional power to create "general retaliatory laws" in foreign trade to Massachusetts, see remarks of Nathaniel Gorham to the Massachusetts ratifying convention. *DHRC*, 6:1353–54 (January 25, 1788).

18. William Grayson to James Madison, May 28, 1786, *LDCC*, 23:320.

19. Benjamin Lincoln to Rufus King, February 11, 1786, *LCRK*, 1:159.

20. See Gorham's lecture to southern delegates at a critical point during the debate over commerce powers, Farrand, 2:453 (August 29, 1787).

21. David Brian Robertson, *Constitution and America's Destiny*, 61–62.

22. For background on the Spanish treaty negotiations, see Richard B. Morris, *Forging of the Union*, 232–44, and citations in chapter 4 of this work.

23. Charles Thomson's Notes, August 16, 1786, *LDCC*, 23:486.

24. Elbridge Gerry, Samuel Holten, and Rufus King to Governor [James] Bowdoin, September 3, 1785, *LCRK*, 1:60: "[S]uch a measure would produce thro'out the Union, an exertion of the friends of an Aristocracy to send members who would promote a change of Government."

25. Edwin J. Perkins, *American Public Finance and Financial Services, 1700–1815* (Columbus: Ohio State University Press, 1994), 59, table 5.1.

26. Benjamin Franklin declined to present an anti-slave-trade memorial prepared by the PAS to the Convention, despite the fact that he was president of the PAS at the time.

27. Crosskey and Jeffrey, *Politics and the Constitution*, 3:233.

28. Ibid., 3:226. The proposal was adopted and then withdrawn.

29. Fehrenbacher, *Slaveholding Republic*, 25.

30. Madison to TJ, March 19, 1787, *LDCC*, 24:153.

31. Pierce Butler to Weedon Butler, May 5, 1788, Farrand, 3:301–4.

32. C. C. Pinckney, Farrand, 2:449 (August 29, 1787).

33. GW to Bushrod Washington, November 9, 1787, *GW Dig. Ed.* (GW Print Ed., Confed. Ser., 5:421–26; emphasis original).

34. George Washington was apparently willing to accept the closure of the Mississippi; he thought that it would be divisive to create an interest in Mississippi navigation on the part of westerners. Crosskey and Jeffrey, *Politics and the Constitution*, 3:288.

35. TJ to James Madison, January 30, 1787, *TJ Writings*, 881–84, 882.

36. Farrand, 2:452.

37. Farrand, 2:449.

38. John Rutledge, Farrand, 2:452.

39. Beeman, *Plain, Honest Men*, 187, 383–84.

40. David Brian Robertson, *Constitution and America's Destiny*.

41. For Edling's illuminating analysis of the fiscal-military issues involved in creation of the Constitution, and their later history, see Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (Oxford: Oxford University Press, 2003). Anti-Federalists centered their opposition to the new government on its tax authority, often giving as a principal reason that broad tax powers would enable it to create a powerful standing army. On taxation issues during ratification, see Frederick Arthur Baldwin Dalzell, "Taxation with Representation: Federal Revenue in the Early Republic" (Ph.D. diss., Harvard University, 1993).

42. TJ to George Washington, December 4, 1788, *TJ Writings*, 930.

43. Robinson, *Slavery in Politics*, 210.

44. TJ to Samuel Kercheval, July 12, 1816, *TJ Writings*, 1396. In a later letter, how-

ever, Jefferson defended the continued use of the three-fifths clause in the Constitution on the ground that it was part of the original compromise. Peter S. Onuf, *Jefferson's Empire: The Language of American Nationhood* (Charlottesville: University of Virginia Press, 2000), 121; TJ to Samuel Kercheval, September 5, 1816, in *The Writings of Thomas Jefferson*, ed. Andrew A. Lipscomb and Albert Ellery Bergh (Washington, D.C.: Thomas Jefferson Memorial Association of the United States, 1905), 15:72–73.

45. TJ to John Adams, October 28, 1813, *TJ Writings*, 1306.

46. Einhorn, *American Taxation, American Slavery*, 251.

47. For a thoughtful history of representation, see Pole, *Political Representation*.

48. For an authoritative account of the Convention, see Beeman, *Plain, Honest Men*.

49. Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (1969; repr., Chapel Hill: University of North Carolina Press, 1998), 214–22, cited in Rakove, *Original Meanings*, 41 n. 13.

50. The term "three-fifths clause" refers to a key part of art. 1, sec. 2 of the Constitution as adopted. That section provided essentially that in determining the allocation of representation in the House of Representatives, representation for each state should be based on its proportionate share of total population as defined there. Both total population and state population were to be counted by adding to the free-inhabitant population three-fifths of the slave population. The same system was used as part of the basis for calculating state electoral votes in electing a president.

51. There has been considerable writing about representation and the three-fifths clause. See, e.g., Graber, *Dred Scott*, 92–93, 101–2, 111–16; Einhorn, *American Taxation, American Slavery*, 138–45 and chap. 5; Finkelman, "Slavery and the Constitutional Convention"; Wiecek, *Antislavery Constitutionalism*, chap. 3 and sources cited 65 n. 10; Hendrickson, *Peace Pact*, 227–28; Robinson, *Slavery in Politics*, chap. 5; and Howard A. Ohline, "Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States Constitution," *William and Mary Quarterly*, 3d ser., 28 (1971): 563–84.

52. Finkelman, *Slavery and the Founders*, 12–13.

53. Einhorn, *American Taxation, American Slavery*, 165–69; Farrand, 1:595, 2:106, 223, 607.

54. Farrand, 2:223.

55. Hendrickson, *Peace Pact*, 227.

56. Einhorn, *American Taxation, American Slavery*, 164.

57. Farrand, 1:580, 583, 587; Hendrickson, *Peace Pact*, 227.

58. Farrand, 1:605.

59. Graber, *Dred Scott*, 91–93.

60. Farrand, 1:566.

61. The Constitution consisted of a series of agreements about protection or control of the future political economies of such vested interests; see Matson and Onuf, *Union of Interests*.

62. See, e.g., Drew R. McCoy, "James Madison and Visions of American Nationality in the Confederation Period: A Regional Perspective," in Beeman, Botein, and Carter, *Beyond Confederation*, 226–58.

63. In any event, not all leaders envisioned the nation's future settlement patterns in the same way in the 1780s. Congressman David Howell of Rhode Island in 1785 defended the proposed use of the "three fifths" rule for determining state quotas of contribution (taxation shares) in the Confederation because the West would eventually be settled by whites who did not have slaves, and their settlements would outnumber the slave states in population: "even the ratio of the States, in which the blacks are numerous, to the aggregate of the U. States will gradually diminish as the tide of population rolls westward & new States arise peopled from Europe where the Slavery of the blacks is unknown, or from the northern States where it is reprobated." David Howell to William Greene, August 23, 1785, *LDCC*, 22:587–88.

64. Madison to TJ, March 19, 1787, *LDCC*, 24:151–55. Madison repeated these predictions to Governor Randolph of Virginia, April 8, 1787, *LDCC*, 24:208–10; and to GW, April 16, 1787, *LDCC*, 24:228–32.

65. Rakove, *Original Meanings*, 92–93.

66. Hendrickson, *Peace Pact*, 227.

67. Farrand, 1:486. One analysis of the creation of equal state representation argues that it occurred because delegates realized that an equitable division of public lands could not otherwise occur; see Matson and Onuf, *Union of Interests*, 105–12. Other historians conclude that the small states obtained equal representation in part because of their strategic location and in part because some of the large states realized that the small states would probably be useful allies. It may have been James Madison's impolitic candor about the political effects of differing regional economic interests that led to this realization. See Rakove, *Original Meanings*, 69; Farrand, 1:604.

68. Randolph, July 9, 1787, Farrand, 1:561; George Mason, July 11, 1787, Farrand, 1:578.

69. General C. C. Pinckney, July 10, 1787, Farrand, 1:566–67.

70. The decision about whether to import a slave was extraordinarily unlikely to be affected at all by the possibility that the voting strength of a given jurisdiction would be increased by imports. In today's dollars, "buying a vote" in the House by importing thirty thousand slaves would have cost well in excess of $100 million (today's dollars).

71. Farrand, 1:476, 486.

72. See Roger Sherman's remarks, August 8, 1787, Farrand, 2:220–21, 223.

73. Farrand, 2:220–21.

74. Farrand, 2:223.

75. The path of Convention consideration of House representation was tortuous, but as Paul Finkelman notes, it is a mistake to infer from this that the likely outcome was not fairly clear from the outset. Finkelman, *Slavery and the Founders*, 12–13. The Convention had voted early in its deliberations by a large margin in favor of the use of the three-fifths ratio as a basis for proportional representation in the House (Wilson proposal of June 11, 1787; the vote was 9–2, Farrand, 1:193). The maneuvering that occurred in the Convention before the three-fifths clause was adopted is best understood as a series of experiments by both sides testing the strength of all viable

alternatives sufficiently to confirm that a permanent slave representation compromise was unavoidable.

76. Farrand, 1:587.

77. July 10, 1787, Farrand, 1:566.

78. Randolph, July 12, 1787, Farrand, 1:594.

79. Pinckney, July 12, 1787, Farrand, 1:593–94.

80. James Madison to Thomas Jefferson, March 19, 1787, *LDCC*, 24:152.

81. Madison to Washington, April 16, 1787, *LDCC*, 24:228–32.

82. McCoy, "James Madison and American Nationality."

83. Pole, *Political Representation*, 194.

84. As discussed in chapter 4, slave states also accepted several broadly worded constitutional provisions that were silent on slavery but would later form the basis of arguments that Congress could control matters such as western slavery.

85. G. Morris, July 13, 1787, Farrand, 1:603–4.

86. G. Morris, July 10, 1787, Farrand,1:567.

87. Farrand, 1:576, 2:3. Similarly, efforts by South Carolina representatives to gain full representation for their slave population predictably failed by a large margin (Pinckney-Butler motion, July 11, 3–7; July 13, Pinckney motion, 2–8). Farrand, 1:581, 596.

88. Article 5 provided that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

89. Farrand, 2:454 (August 29). The vote was 9–2.

90. For a discussion of the view that the Constitution was "intended to secure bisectional agreements," see Graber, *Dred Scott*, 92.

91. The change from prior law regarding slavery proposed in the Committee of Detail report had to do with federal protection against slave insurrections. That proposal was couched in general terms that would have applied equally to protection of states in the case of future events like Shays's rebellion. When the argument was later made that this provision gave costly special protection to slaveowners, Southern representatives quickly said that they would be willing to pay such costs, or to have slave rebellions excluded (Farrand, 2:364). Their response supports the conclusion that rebellion protection was not a core interest of theirs in the new Constitution. It is quite striking that Northern delegates did not accept the southern offer to exclude slave rebellions from the domestic-violence guarantee; a plausible inference is that their complaints on that score were pretextual and sought bargaining leverage on other issues.

92. Robinson, *Slavery in Politics*, 218.

93. Farrand, 2:220.

94. King's position was remarkable for another reason. He had been a leader in the Continental Congress from 1785 onward in opposing the westward expansion of slavery into new territories. But at the Convention, King and other Northern delegates did not make any specific proposals for limitations on the westward expansion of slavery. In his August 8 speech, King sought to draw the line on the expansion of slave *supply* through imports (as opposed to imposing limits on slave labor demand by

limiting expansion), but only if and to the extent it had adverse effects on Northern interests from the point of view of balancing slavery's costs to the Northern states and the revenues it brought to the new government. See chapters 4–6 for discussion of western-expansion issues.

95. Gouverneur Morris, August 8, 1787, Farrand, 2:221–23.

96. Sherman, August 8, 1787, Farrand, 2:223.

97. This bargaining's significance for slavery is discussed in chapter 4.

98. Pole, *Political Representation*, 350.

99. Ibid.

100. July 13, Farrand, 1:605–6 (emphasis original).

101. Finkelman, "Slavery and the Constitutional Convention"; Hendrickson, *Peace Pact*, 240–41; Rakove, *Original Meanings*, 58.

102. Fehrenbacher, *Slaveholding Republic*, 47. The Constitution's slave-trade provision was "open-ended"—it made a clear grant of power but made it subject to future political action. Other provisions of the Constitution such as the commerce clause were seen (by some only) as ambiguous in their application to slavery—not "open-ended"—but few early American political leaders, especially after 1790, regarded them as conferring congressional authority to regulate or abolish existing slavery. See chapter 5.

103. On this general issue, see Matson and Onuf, *Union of Interests*, 118–19.

104. GW to Bushrod Washington, November 9, 1787, *GW Dig. Ed.* (GW Print Ed., Confed. Ser., 5:421–26).

105. Consider Arms, Malachi Maynard, and Samuel Field, *Northampton Hampshire Gazette*, April 9 and 16, 1788, *DHRC*, 7:1733–43; response by "Philanthrop," *Northampton Hampshire Gazette*, April 23, 1788, *DHRC*, 7:1744.

106. See remarks of Mr. Nasson, Massachusetts convention debate, January 17, 1788, *DHRC*, 6:1239, 1242–43; "The Republican Federalist V," *Massachusetts Centinel*, January 19, 1788, *DHRC*, 5:749–50.

107. "The Republican Federalist V," *DHRC*, 5:747–52.

108. "Brutus III," *New York Journal*, November 15, 1787 (repr. Boston *Independent Chronicle*, December 13, 1787), *DHRC*, 14:119–24; "The Republican Federalist V," *DHRC*, 5:749–50.

109. Massachusetts ratification convention debates, January 17, 1788, *DHRC*, 6:1236.

110. *Federalist*, 295–99.

111. For Gerry's defense, see *DHRC*, 6:1265–70. For an astute criticism of Gerry's actions, see "A Spectator," *Massachusetts Centinel*, February 2, 1788, *DHRC*, 6:1271–76.

112. *DHRC*, 6:1273.

113. Thomas Dawes, *DHRC*, 6:1244–45.

114. Davis, *Slavery in Revolution*, 324.

115. *DHRC*, 6:1247.

116. *DHRC*, 2:417.

117. In Massachusetts, the Constitution was ratified by a 187–168 vote, or 53 percent. In New York, it was ratified by a 30–27 vote, or 53 percent. In Virginia, it was

ratified by an equally slim margin. A loss in any one of these three states would probably have forced a second convention and significant concessions to Anti-Federalists.

118. See, e.g., the New York amendments, Elliot, 1:327–31; the Massachusetts amendments, *DHRC*, 6:1469–71; and the report of the Pennsylvania minority, *DHRC*, 2:617–40. Some proposed Northern state amendments did seek to limit congressional power to impose direct taxes, but these proposals were not accompanied by any suggested changes in slave representation.

119. John Ferling, *Adams vs. Jefferson: The Tumultuous Election of 1800* (Oxford: Oxford University Press, 2004), 168–69.

120. Garry Wills, *"Negro President": Jefferson and the Slave Power* (Boston: Houghton Mifflin and Co., 2003), 5.

121. Graber, *Dred Scott*, 115–16.

122. Freehling, *Road to Disunion*, 146–48.

123. Ferling, *Adams vs. Jefferson*, 168–69.

124. Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York: W. W. Norton and Co., 2005), 98, 822 nn. 57–58.

125. On the size of the premium over time, see Richards, *Slave Power*, 56–57; and sources cited in chapter 6 of this book.

126. I am indebted to Howard Ohline's "Republicanism and Slavery" for this line of thought.

CHAPTER FOUR

1. For useful perspective on thought about economic development in framing the Constitution, see Matson and Onuf, *Union of Interests*, especially 113–20.

2. On such insulation as a principle of northern antislavery opinion, see Mason, *Slavery in Early Republic*, 6–7.

3. Hendrickson, *Peace Pact*, 229.

4. Nathan Dane to Rufus King, June 19, 1787, *LDCC*, 24:335–36.

5. For an excellent treatment of slavery, taxation, and the Constitution, see Einhorn, *American Taxation, American Slavery*, 138–83.

6. For export and import taxation issues, see Matson and Onuf, *Union of Interests*, 113–20. On export taxation, see also Earl M. Maltz, "The Idea of the Proslavery Constitution," *Journal of the Early Republic* 17, no. 1 (1997): 37–61; and Fehrenbacher, *Slaveholding Republic*, 45–46. Import taxes permitted by the Constitution on slaves were limited to at most 5 percent of the current price of slaves, a far cry from the prohibitory duties that Pennsylvania and other states had sought to impose on imports prior to the Revolution. See Edward Rutledge to South Carolina convention, Elliot, 4:277.

7. Numerous historians have concluded that such an accommodation occurred. See Finkelman, "Slavery and the Constitutional Convention," 218–20, and sources cited in n. 92 of that essay. For additional support, see Matson and Onuf, *Union of Interests*; Hendrickson, *Peace Pact*, 237; David Brian Robertson, *Constitution and America's*

Destiny, 180–81; Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Ithaca, N.Y.: Cornell University Press, 1995), 174.

8. Committee of Detail Report, art. 7, sec. 4.

9. Farrand, 2:364.

10. Ibid.

11. Ibid.

12. See Matson and Onuf, *Union of Interests*, 101–23.

13. Robinson, *Slavery in Politics*, 224.

14. Farrand, 2:369.

15. Farrand, 2:370.

16. Farrand, 2:372.

17. Farrand, 2:373.

18. Ibid.

19. Farrand, 2:415.

20. Madison's personal sympathy for the abolition of slavery was clear. He referred to the slave trade as "barbarism" in *Federalist* 42. For Madison's view of slavery, see Banning, *Sacred Fire of Liberty*, 83. Banning notes that "through forty years of active public service, [Madison] refused to risk his usefulness in other urgent causes by identifying with the more outspoken, active critics of the institution." In that respect, Madison and Jefferson were quite alike.

21. Philip D. Morgan, "Slaves in Early America," 300–303. Drew McCoy argues that the fundamental underpinning of Convention negotiations was a set of shared demographic expectations about national population growth that, it was thought, would inevitably shift power to the south and west. He argues that such expectations—not divisions over slavery—account for divisions at the Convention, and that concentration on slavery is "anachronistic and misplaced emphasis" on a single issue. McCoy, "James Madison and American Nationality," 229. McCoy argues that because of mistaken assumptions about demography, "ratification took place under generally false expectations." Ibid., 230. As was true of the politics of the three-fifths clause, for this chapter's purposes McCoy's argument is largely beside the point. Delegates' correct understandings about other demographic realities influenced constitutional decisions, including sectional economic-development bargains analyzed in this chapter, that foreseeably fostered slavery's expansion.

22. Fogel, *Without Consent or Contract*, 116–17.

23. Jefferson, *Notes on Virginia*, query 8, *TJ Writings*, 209–14. Although *Notes* was not published in English until 1787, numerous copies had been circulated well before then by Jefferson to various United States and foreign correspondents.

24. Ibid., 214.

25. John Adams to TJ, May 22, 1785, in *The Adams-Jefferson Letters*, ed. Lester J. Cappon (Chapel Hill: University of North Carolina Press, 1959), 21–22; Ketcham, *James Madison*, 150; TJ to JM, May 11, 1785, and September 1, 1785, *TJ Papers*, 8:147–48, 460–64.

26. Thomson to TJ, November 2, 1785, *TJ Papers*, 9:9–10. During the 1790 congressional debate over slavery, Congressman William L. Smith of South Carolina ar-

gued that limiting slave imports would not stop the growth of slavery, because of the effects of natural population reproduction. *Daily Advertiser* (N.Y.), March 22, 1790. In the mid-1790s, prominent Virginia judge and antislavery advocate St. George Tucker wrote that even massive investments in colonization to remove blacks from slave states would not successfully diminish black populations because slave population growth would outstrip colonization removals. Benjamin Franklin's views on black population increase were mistaken, he said, and populations of "the negroes, whose fertility and increase is immense," would grow faster than white population. St. George Tucker to Dr. Henry Belknap, June 29, 1795, MSL, 407–8, 419.

27. See table 3.1, particularly Brearley estimates; and see Pinckney estimates provided to South Carolina ratification convention, Elliot, 4:283. The size and growth of slave populations were also directly relevant to the debates over the three-fifths clause. Delegates who chose to inquire could have obtained extensive data about the history of slave imports, about which the slave states had compiled data because they commonly taxed such imports and negotiated continental taxation issues using such data.

28. Historian Allan Kulikoff estimates that during the period from 1790 to 1810, the Deep South slave states imported more than ninety thousand slaves—or almost half their total imports—from the Chesapeake. Allan Kulikoff, "Uprooted Peoples: Black Imports in the Age of the American Revolution, 1790–1820," in *Slavery and Freedom in the American Revolution*, ed. Ira Berlin and Ronald Hoffman (Charlottesville: University Press of Virginia , 1983), 149, 152, cited in Anderson, Rawley, and Tollison, "Rent Seeking," 89 n. 16.

29. Farrand, 2:371.

30. Economic historians confirm Ellsworth's position. They conclude that as a major Virginia slaveowner, George Mason would have personally benefited from a ban on slave imports. Anderson, Rawley, and Tollison, "Rent Seeking," 91–92.

31. JM to the Virginia ratification convention, *DHRC*, 10:1339.

32. Historians disagree on how many slaves were imported into the United States during 1780–1810. Robert Fogel concludes that some 290,000 slaves were imported during that period, almost as many slaves as had been imported in the preceding 160 years. Fogel, *Without Consent or Contract*, 32–33. Other estimates are lower, some very significantly. James McMillin concludes that about 200,000 slaves were imported during that period. McMillin, *Final Victims*, 29, table 6. Allan Kulikoff estimated imports at about 113,000 during that period. Ibid., 17. McMillin's work is challenged by David Eltis, who argues that McMillin's data overstates imports. David Eltis, "The Final Victims: Foreign Slave Trade to America, 1783–1810," *Journal of Social History* 40, no. 1 (2006): 237 (book review). I have used McMillin's data solely as a midrange between conflicting estimates.

33. Farrand, 2:415. It would also have been impossible to add the remarkable provision making the slave-trade protection provision unamendable until 1808. U.S. Constitution, art. 5.

34. Farrand, 2:450.

35. See statements by delegates Madison, C. C. Pinckney, and Butler, Farrand,

2:449, 452. Pinckney and other Federalists made the same argument to the South Carolina ratifying convention. Elliot, 4:283–84.

36. See statements by Edmund Randolph, Farrand, 1:594; C. C. Pinckney, Farrand, 1:593–94; and discussion of the mandatory census for reapportionment in chapter 3.

37. South Carolina House of Representatives debate, January 17, 1788, Elliot, 4:285–86.

38. Ibid., 4:296–97.

39. "Civis" [David Ramsay], "Address to the Freemen of South Carolina on the Subject of the Foederal Constitution," 10, Evans no. 21414, quoted in Du Bois, *Suppression of the African Slave Trade*, 64–65.

40. There, Northern states had argued that the country could give up Mississippi River navigation rights for twenty-five to thirty years without facing any real consequences, while the Southern states insisted that giving up those rights for a generation would be tantamount to giving them up permanently. Richard B. Morris, *Forging of the Union*, 232–44.

41. *Federalist* 38, 204.

42. McCoy, "James Madison and American Nationality," 231.

43. Ibid.

44. Banning, *Sacred Fire of Liberty*, 67–68.

45. Peter S. Onuf, *Statehood and Union* (Bloomington: Indiana University Press, 1987), 46.

46. Jefferson's later complaints that if only one ill New Jersey representative had supported him, he would have won the slavery-ban vote, although technically accurate, were misleading. They ignored the political reality that any congressional decision to bar slavery in new territories would have been so unpopular that it would not have survived efforts to reverse it. Fehrenbacher, *Slaveholding Republic*, 27. Jefferson's proposed ban would not have taken effect until 1800. By then many territories would have been settled by slaveowners.

47. Richard B. Morris, *Forging of the Union*, 227. The ordinance's provision that the territory north of the Ohio be divided into ten states was seen as politically destabilizing, and other provisions were attacked from various quarters. Onuf, *Statehood and Union*, 49–50.

48. Robert Ernst, *Rufus King: American Federalist* (Chapel Hill: University of North Carolina Press, 1968), 55.

49. The treaty negotiations centered on whether Spain would open its markets to United States products, particularly New England exports such as fish, in return for an agreement that United States citizens would not navigate the Mississippi River to export goods for somewhere between twenty-five and thirty years. The agreement would have been very beneficial to New England, but would have severely hampered western expansion from southern states. The negotiations are often referred to as the Jay-Gardoqui negotiations, after the principal United States and Spanish diplomats. Accounts of the negotiations are found in Richard B. Morris, *Forging of the Union*, 232–44; McCoy, "James Madison and American Nationality," 239–44; Banning, *Sacred*

Fire of Liberty, 66–75, 254–58; Lynd, "Compromise of 1787"; and Thomas A. Bailey, *A Diplomatic History of the American People*, 8th ed. (New York: Meredith Corp., 1969), 61–62.

50. *An Act for the Government of the Territory of the United States North West of the River Ohio*, *JCC*, 32:334–43 (July 13, 1787). Onuf's *Statehood and Union* is the leading history of the significance and broad implications of the ordinance, and reprints its full text.

51. For a discussion of the legislative history of the Northwest Ordinance, see Paul Finkelman, "Slavery and the Northwest Ordinance: A Study in Ambiguity," *Journal of the Early Republic* 6 (1986): 343–69. Finkelman argues that the ordinance "may have strengthened slavery in the south"; that it did not "immediately or directly affect slavery" in the Northwest Territory; that it was "not abolitionist" in the nineteenth-century usage of that term and was only barely "antislavery." Ibid., 344. See also Denis P. Duffy, "The Northwest Ordinance as a Constitutional Document," *Columbia Law Review* 95, no. 4 (1995): 929–68. As Onuf's and Lynd's work on the Northwest Ordinance shows, it was based to some extent on expectations that it would create shared sectional or national benefits. But other anticipated benefits of the ordinance were redistributive—viz., the generation of wealth by one region that would reduce fiscal burdens on another, or even the creation of a defense shield against foreign foes or Native Americans formed by settlers of one region that would also protect citizens of another. See William Grayson to James Monroe, August 8, 1787, *LDCC*, 24:393.

52. This was due in part to the destabilizing impact that these new states could otherwise have had on the regional balance of congressional voting strength. See Rufus King, Farrand, 1:541.

53. The slavery prohibition in the ordinance was not foreseen as having any adverse impact on slavery or western settlement by the South. Indeed, some prominent southern politicians saw the slavery ban of article 6 as affirmatively protecting markets for southern slave products against competition. William Grayson to James Monroe, August 8, 1787, *LDCC*, 24:393–96. Richard Henry Lee was mentioned by both Nathan Dane and Ohio Company agent Manasseh Cutler "as a particularly warm supporter" of the ordinance, which should end any argument about whether the slavery ban was seen as a threatening concession by Virginia interests. Lynd, "Compromise of 1787," 232.

54. For leading treatments of slavery and the Northwest Ordinance of 1787, see Onuf, *Statehood and Union*; Lynd, *Class Conflict*, 185–216; Finkelman, *Slavery and the Founders*, 37–57; Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (1978; repr., New York: Oxford University Press, 2001).

55. Text of the 1784 Virginia cession is in Clarence Edwin Carter, ed., *The Territorial Papers of the United States* (Washington, D.C.: Government Printing Office, 1934), 2:6–9. The cession was modified to conform to the Northwest Ordinance by act of the Virginia legislature passed December 30, 1788; see ibid., 172–73. For the 1784 North Carolina land cession, see Walter Clark, ed., *The State Records of North Carolina* (Raleigh, N.C.: P. M. Hale, 1905), 24:561–63.

56. See Grayson to Monroe, August 8, 1787, *LDCC*, 24:393–96.

57. The ordinance can be read to permit states formed from the territory to disre-

gard the slavery prohibition of article 6, though northern representatives quite probably did not intend that result.

58. *Federalist* 38 (Northwest Ordinance's major provisions lacked "the least colour of constitutional authority"), 205.

59. After a lengthy excoriation of the Confederation for acting beyond its authority on the ordinance, Madison added a disclaimer saying that he had no objections to its substance.

60. Farrand, 2:148. The Randolph/Rutledge draft was a full conceptual draft of the Constitution prepared by two of the five members of the Committee of Detail who represented slave states. The draft was in the hand of Edmund Randolph, with handwritten emendations by John Rutledge. See *Farr. Supp*., 183 n. 1.

61. Congress's power was nominal because under the Constitution's sectional representation structure, as long as Washington (or any other slave state leader) was president, Northern states would not have had sufficient political strength to adopt slavery restrictions for territories south of the Ohio over southern objections, since they could not override a veto.

62. In his recent book on the Constitutional Convention, historian Richard Beeman also reaches this conclusion. Beeman, *Plain, Honest Men*, 217.

63. Bailey, *Diplomatic History*, 62.

64. Ibid.

65. *Mr. Charles Pi[n]ckney's Speech, in Answer to Mr. Jay, August 16, 1786* (New York, 1786), Library of Congress, Evans no. 19926.

66. Quoted in Richard B. Morris, *Forging of the Union*, 240.

67. Lynd, "Compromise of 1787," 233.

68. Lynd, "Compromise of 1787," 235; Banning, *Sacred Fire of Liberty*, 268. McCoy says that "[b]y the spring of 1787 . . . the negotiations effectively collapsed." McCoy, "James Madison and American Nationality," 239.

69. Madison to TJ, March 19, 1787, *LDCC*, 24:151–55.

70. Madison to TJ, April 23, 1787, *LDCC*, 24:249–52. When Congress did achieve a quorum in mid-1787, composed mostly of Madison's southern-state allies, no definitive action was taken on the Jay-Gardoqui issue. As late as the Virginia ratifying convention in 1788, Madison was unable to point to a solid list of states that would support the southern position.

71. Nathan Dane to Rufus King, July 5, 1787, *LDCC*, 24:347–48.

72. Madison to GW, October 14, 1787, *LDCC*, 24:479. On October 11, 1787, Richard Henry Lee had written to Washington that it was a "signal misfortune that we have not been able to get a sufficient number of the States together to produce a conclusion on the Spanish treaty," indicating that Lee thought the treaty was still an open issue. Richard Henry Lee to GW, October 11, 1787, *LDCC*, 24:477–78.

73. GW to Madison, October 22, 1787, *GW Dig. Ed.* (GW Print Ed., Confed. Ser., 5:385–86; emphasis original).

74. Madison to GW, October 28, 1787, *LDCC*, 24:530.

75. Banning, *Sacred Fire of Liberty*, 268.

76. Carter, *Territorial Papers*, 2:172–73.

77. Hugh Williamson to Samuel Johnston, September 17, 1788, *LDCC*, 25:376–77 (emphasis original).

78. Benjamin Hawkins to Richard Caswell, July 10, 1787, *LDCC*, 24:351, quoted in Lynd, "Compromise of 1787," 233.

79. Pinckney, *Answer to Jay*.

80. Lynd, "Compromise of 1787," 237. Lynd relies on the testimony of a number of participants—especially William Grayson of Virginia and Nathan Dane of Massachusetts—who were not Convention delegates and were Anti-Federalist opponents of Madison and King on the Constitution, so that significant information about the Philadelphia negotiations was unavailable to them. Lynd's analysis is criticized in James H. Hutson, "Riddles of the Federal Constitutional Convention," *William and Mary Quarterly*, 3d ser., 44, no. 2 (1987): 411–23.

81. Certain other possible motives for passage of the 1787 ordinance during the Convention can also be excluded. As Lynd concluded, inclusion of the fugitive slave clause in the Constitution had relatively little to do with the South's willingness in 1787 to accede to the passage of the Northwest Ordinance. Edward Coles was mistaken in his recollection many years later that bargaining over the fugitive slave clause had been the source of the political accommodation represented by the contemporaneous passage of the Northwest Ordinance and the Constitution. Lynd, "Compromise of 1787," 228, 246. The political dynamics underlying the three-fifths clause strongly support the conclusion that it would have been adopted even if the Northwest Ordinance had not been. See chapter 3.

82. Although the Confederation was essentially insolvent by 1787, its financial situation had been the same for several years prior to that, and the states had not acted. The Confederation was nevertheless able to borrow substantial amounts of money in the Netherlands in 1787 and 1788. Ferguson, *Power of the Purse*, 238.

83. The ordinance of 1787 included a fairly liberal automatic population-based mechanism for new-state admission. As Lynd concludes, this liberal admission standard for statehood was a northern concession. But this was not a southern motive for passing the ordinance in mid-1787, because the Constitution's new-states provision (art. 4, sec. 3) negated any benefit from the provision, since it was not incorporated in (or grandfathered by) the Constitution.

84. Efforts were made to "water down" the requirements for ratifying a treaty. On motions regarding senate voting requirements for treaty ratification, other than the Wilson motion, Virginia and Massachusetts split. Farrand, 2:547–49.

85. See, e.g., *DHRC*, 10:1191–92, 1235–38 (Grayson); *DHRC*, 10:1229–35 (Monroe).

86. *DHRC*, 10:1259.

87. Madison's remarks on that point acknowledged that the ability to create an effective military force was one of the Southern states' main interests in obtaining the Constitution. *DHRC*, 10:1208–9, 1225, 1242. This point was also made by General Pinckney in the South Carolina ratification convention. Elliot, 4:283–84.

88. *DHRC*, 10:1242.

89. *DHRC*, 10:1243.

90. *DHRC*, 10:1248–49.

91. Under Chief Justice John Marshall's view, the territories were outside the Constitution, and Congress's authority over territories—at least those acquired from a foreign government—would have been plenary even if there had not been any territories clause in the Constitution. *American Insurance Company and the Ocean Insurance Company v. 356 Bales of Cotton (David Canter, Claimant)*, 26 U.S. (1 Pet.) 511 (1828).

92. See, e.g., Robinson, *Slavery in Politics*, 159, 224; Maltz, "Slavery, Federalism."

93. Graber, *Dred Scott*, 95–96.

94. Hendrickson, *Peace Pact*, 229.

95. Paul Finkelman, "Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision," *Civil War History* 25, no. 1 (1979): 13.

96. Wiecek, *Antislavery Constitutionalism*, 79.

97. Fehrenbacher, *Slaveholding Republic*, 44.

98. Ernst, *Rufus King*, 55.

99. Article 6 provided: "There shall be neither Slavery nor involuntary Servitude in the said territory otherwise than in the punishment of crimes, whereof the party shall have been duly convicted; provided always that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid." *JCC*, 32:334–43, July 13, 1787.

100. For bound labor, this meant property's functional equivalent, contractual specific performance and servitude-extension penalties. From the perspective of Northern states (then engaged in abolition and major bound-labor reforms), the nominal protection of owners' interests in reclaiming bound laborers would have been largely pretextual, rather than a significant factor in obtaining support for the clause. Limited available data suggest that indentured servitude was not a major part of the northern labor economy by the last half of the eighteenth century, and that it was in sharp decline during the last part of the century. Richard B. Morris, *Government and Labor in Early America* (New York: Columbia University Press, 1946); Abbot Emerson Smith, *Colonists in Bondage: White Servitude and Convict Labor in America, 1607–1776* (New York: W. W. Norton and Co., 1971); Steinfeld, *Invention of Free Labor*; David W. Galenson, *White Servitude in Colonial America* (Cambridge: Cambridge University Press, 1981).

101. *Somerset* is discussed in chapter 1.

102. On the ordinance's ambiguity, see Finkelman, "Slavery and the Northwest Ordinance."

103. Farrand, 2:443. Charles Warren concluded that General Pinckney was "undoubtedly" referring to the protection provided for slave property by the Articles P&I clause proviso analyzed in chapter 1. Warren, *Making of the Constitution*, 561.

104. *Farr. Supp.*, 271.

105. The drafting history is discussed in Finkelman, "Slavery and the Constitutional Convention," 219–24.

106. Farrand, 2:446. As proposed, the clause provided that fugitives "shall be delivered up to the person justly claiming their service or labor." Ibid. The amendment

was revised by the Committee of Style in its report of September 12, 1787, to drop the original proposal's reference to "justly claiming" and replace it with "claim."

107. Farrand, 2:628.

108. Elliot, 4:176.

109. The fugitive slave clause (art. 4, sec. 2, cl. 3) provided: "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."

110. Harold Horowitz, "Choice of Law Decisions Involving Slavery: 'Interest Analysis' in the Early Nineteenth Century," *UCLA Law Review* 17 (1970): 587–601.

111. Fehrenbacher, *Slaveholding Republic*, 44.

112. *Farr. Supp.*, 246.

113. For the history of the 1793 act, see chapter 5.

114. Accordingly, the clause became a significant means that Federalists in states such as South Carolina and Virginia used to defend the position that the Constitution sufficiently protected slavery against vigorous southern Anti-Federalist charges that it did not provide enough protection. See remarks of James Madison to the Virginia ratifying convention, June 17, 1788: "this is a better security than any that now exists," Elliot, 3:453; remarks of James Iredell, North Carolina convention, Elliot, 4:176.

115. James Madison withheld publication of his notes until after his death. They first appeared in 1841. As early as February 1799, Jefferson and Madison had consulted about whether to publish Madison's notes, and decided not to publish them. Farrand, 3:381. Writing to Jefferson before their meeting, Madison referred to the "Despotism at present exercised over the rules of construction" (interpretations of the Constitution that Madison disliked) as a problem to be considered in determining whether to publish the notes. Ibid.

116. *DHRC*, 5:1354.

117. See letters from James Pemberton to Moses Brown, November 16, 1787, and Benjamin Rush to Jeremy Belknap, February 28, 1788, repr. John P. Kaminski, ed., *A Necessary Evil? Slavery and the Debate over the Constitution* (Madison, Wis.: Madison House, 1995), 128–29, 146–47.

118. Similar conclusions about the relative unimportance of slavery in the ratification debates are reached by Robinson, *Slavery in Politics*, 235–40; Graber, *Dred Scott*, 111; Jordan, *White over Black*, 325; Fehrenbacher, *Slaveholding Republic*, 38; and Ohline, "Republicanism and Slavery," 582–84 (three-fifths clause). For an important statement of an alternative view see Waldstreicher, *Slavery's Constitution*.

119. The ratification debate on the three-fifths clause issue was discussed in chapter 3. Southern Federalists argued that the fugitive slave clause showed that the Constitution accepted the idea that slaves were property, and that it conferred no power on the federal government to abolish slavery. Edmund Randolph to Virginia Convention, *DHRC*, 10:1483–84.

120. *DHRC*, 4:287.

121. Letter to Massachusetts *Centinel* from "his correspondent at New-York," December 7, 1787, *DHRC*, 4:290.

122. "Landholder VI" [Oliver Ellsworth], *DHRC*, 14:398–404. He portrayed Mason's attacks on the commerce-power provision of the Constitution as based on Mason's desire for a two-thirds regional veto on the commerce power. Mason broadcast his attack alleging a sectional bargain in Virginia. Mason told Jefferson before the Virginia ratifying convention that the compromise on the slave-trade clause was the key compromise in the Convention. Mason to Jefferson, May 26, 1788, Farrand, 3:304–5. He repeated his attack in the Virginia convention. Luther Martin of Maryland made similar allegations during Maryland ratification. Farrand, 3:210–11; Eliga H. Gould, "Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772," *William and Mary Quarterly*, 3d ser., 60, no. 3 (2003): 471–510.

123. Madison to GW, December 20, 1787, *GW Dig. Ed.* (GW Print Ed., Confed. Ser., 5:499–501).

124. Southern Federalists portrayed the slave importation limitation as the result of a bargain. See, e.g., General Pinckney's remarks to South Carolina House of Representatives, Elliot, 4: 285–86; Pierce Butler letter to Weedon Butler, May 5, 1788, Farrand, 3:301–4.

125. For alternative views, see Richards, *Slave Power*, 55–56; Finkelman, "Slavery and the Constitutional Convention."

126. However, such threats did provide a useful basis for defending the compromise to antislavery advocates. The threat of defection became the basis of an argument defending the slave-import provision made by "One of the People Called Quakers in the State of Virginia," *Virginia Independent Chronicle*, March 12, 1788, *DHRC*, 8:482–83. James Madison told the Virginia convention that the loss of the Deep South was a risk Virginia could not afford to take, as it might lead to foreign alliances with them. *DHRC*, 10:1339.

127. "Connecticut Landholder" [Oliver Ellsworth], quoted in Adelos, *Northampton Hampshire Gazette*, February 6, 1788, *DHRC*, 5:871–73 (quotation at 872).

128. "Mark Antony," *Boston Independent Chronicle*, January 10, 1788, *DHRC*, 5:672–77 (quotation at 676).

129. Consider Arms et al., *Northampton Hampshire Gazette*, April 9 and 16, 1788, *DHRC*, 7:1733–43.

130. Massachusetts ratification debate, January 25, 1788, *DHRC*, 6:1354, 1356.

131. "Landholder VI" [Oliver Ellsworth], *Connecticut Courant*, December 10, 1787, *DHRC*, 14:398–404. This essay was reprinted twenty-one times within two months from New Hampshire to South Carolina. Ibid., 398–99.

132. "Philanthrop," *Northampton Hampshire Gazette*, April 23, 1788, *DHRC*, 7:1745.

133. "Mark Antony," *Boston Independent Chronicle*, January 10, 1788, *DHRC*, 5:676.

134. *DHRC*, 6:1370.

135. "Landholder VI" [Oliver Ellsworth], *Connecticut Courant*, December 10, 1787, *DHRC*, 14:398–404. In contrast to his remarks to the Philadelphia Convention that southern slavery should be left alone by the Constitution because it contributed to na-

tional wealth, Ellsworth wrote that "all good men wish the entire abolition of slavery, as soon as it can take place with safety to the public, and for the lasting good of the present race of slaves."

136. Graber, *Dred Scott*, 95.

137. Pennsylvania ratification debate, December 3–4, 1787, *DHRC*, 2:463. Don Fehrenbacher concludes that there was a conflict between Northern and Southern ratifying conventions on slavery that revealed "strong disagreement about the intent of the Constitution with respect to slavery and the place of slavery in the new political order." Fehrenbacher, *Slaveholding Republic*, 38.

138. Graber, *Dred Scott*, 66.

139. James Madison to Robert Walsh, November 27, 1819, Farrand, 3:436.

140. Charles Thomson to Thomas Jefferson, November 2, 1785, *LDCC*, 22:716–17.

141. Graber, *Dred Scott*, 105.

142. See chapter 2. For a very similar conclusion on this point, see Mason, *Slavery in Early Republic*, 26–27.

143. For an excellent discussion of contemporaries' views on federal power over the domestic slave trade, see Davis, *Slavery in Revolution*, 128 n. 33.

144. Graber, *Dred Scott*, 103–4. That proposal would potentially have limited numerous federal powers, including commerce, taxation, and judicial authorities, and both slave state representatives and others opposed it. James Madison made unsuccessful proposals for a veto over state laws, which it is suggested would have given "Congress the power to emancipate all slaves." Ibid., 94. But even assuming a "veto" could trump existing law, there is no historical evidence that Madison intended that the veto would confer such a power over slavery, or that the Convention would have adopted it (or that the Constitution would have been ratified) if others had believed Madison's proposal could have that effect.

145. Ibid., 95.

146. Louis-Guillaume Otto, French chargé d'affaires, to the secretary of state of France for foreign affairs, Comte de Montmorin, April 10, 1787, Farrand, 3:16 (author's translation).

147. GW to Dr. David Stuart, October 17, 1787, *GW Dig. Ed.* (GW Print Ed., Confed. Ser., 5:379–80).

148. Robinson, *Slavery in Politics*, 246. "He that hath a wife and children hath given hostages to fortune; for they are impediments to great enterprises, either of virtue or mischief." Francis Bacon, "Of Marriage and Single Life," in *Essays and New Atlantis*, ed. Gordon S. Haight (New York: Walter J. Black, 1942), 29.

CHAPTER FIVE

1. David Stuart to GW, March 15, 1790, and June 2, 1790, *GW Dig. Ed.* (GW Print Ed., Pres. Ser., 5:236, 459 [quotation at 459]).

2. "Virginia," *Gazette of the United States* (N.Y.), March 27, 1790 (from *Virginia Independent Chronicle*).

3. "A Citizen of the Union," *New York Journal and Weekly Register*, March 18, 1790.

4. GW to David Stuart, March 28, 1790, in Jared Sparks, *The Writings of George Washington: Being His Correspondence, Addresses, Messages, and Other Papers, Official, and Private* (Boston: American Stationers' Co., 1836), 10:85. A more recent version says the memorial "has at length been put to sleep, from which it is not [illegible] it will awake before the year 1808." *GW Dig. Ed.* (GW Print Ed., Pres. Ser., 5:286–88 [quotation at 288]).

5. GW to David Stuart, June 15, 1790, *GW Dig. Ed.* (GW Print Ed., Pres. Ser., 5:523–25 [quotation at 525]).

6. See, e.g., John Craig Hammond, *Slavery, Freedom*, 3–7; Fehrenbacher, *Dred Scott*; Jordan, *White over Black*; Davis, *Slavery in Revolution*.

7. Mason, *Slavery in Early Republic*, 25.

8. For the ineffectiveness of the enforcement of the federal Slave Trade Act of 1794 (1 *Stat.* 347), see McMillin, *Final Victims*, 43; Robert H. Gudmestad, "A Troublesome Commerce: The Interstate Slave Trade, 1808–1840" (Ph.D. diss., Louisiana State Univerity, 1999), 1:11–12. The PAS had some success in slave-trade enforcement. Richard Newman concludes that the PAS prosecuted dozens of violations between 1794 and 1808. Newman, *Transformation of American Abolitionism*, 74–75. PAS enforcement occurred mostly in northern states where the trade had little impact, and its efforts were dwarfed by the size of imports during this period. Don Fehrenbacher also argues that antislavery groups had some success in enforcing the 1794 act, but concedes that the traffic "increased sharply after it became illegal under federal law." Fehrenbacher, *Slaveholding Republic*, 140–42 (quotation at 140).

9. *An Act for the Organization of Orleans Territory and the Louisiana District,* March 26, 1804, 2 *Stat.* 283 (8th Cong., 1st sess.).

10. Don E. Fehrenbacher, *Sectional Crisis and Southern Constitutionalism* (Baton Rouge: Louisiana State University Press, 1980), 12–13.

11. Finkelman, "Slavery and the Northwest Ordinance"; Fehrenbacher, *Dred Scott*, 85.

12. John Craig Hammond, *Slavery, Freedom*, introduction and chap. 5.

13. Berlin, *Many Thousands Gone*, table 1; U.S. Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1957* (Washington, D.C.: Government Printing Office, 1961), Series A 95–122, pp. 11–12; Series A 123–80, pp. 12–13.

14. For an account of South Carolina's actions, see Jed Handelsman Shugerman, "The Louisiana Purchase and South Carolina's Reopening of the Slave Trade in 1803," *Journal of the Early Republic* 22, no. 2 (2002): 263–90.

15. Robinson, *Slavery in Politics*, chap. 7. Although framed differently, this appears to be Davis's view as well. Davis, *Slavery in Revolution*, 306–42.

16. John Craig Hammond argues that fears of frontier disloyalty and rebellion against national authority, combined with the lack of any meaningful administrative structure supporting that authority, forced the fledgling federal government to defer to local opinion on matters such as slavery. Hammond, *Slavery, Freedom*, passim.

17. Fehrenbacher, *Dred Scott*, 85.

18. Mason, *Slavery in Early Republic*, 15–16.

19. In order to win, any Northern politician would quite probably need at least some Southern state support, and vice versa. Because it was widely understood that in slave states, an antislavery record would be the political "kiss of death," prominent northern politicians of both parties who sought the presidency, such as John Adams, Rufus King, and Aaron Burr, needed to avoid support for aggressive federal action against slavery. To garner Northern state support, southern politicians with presidential aspirations like Thomas Jefferson and James Madison sought to position themselves on slavery so that they were, or appeared to be, willing to support certain narrow kinds of antislavery action, but only those forms that were acceptable to their southern constituencies. Such calculations led Thomas Jefferson's South Carolina supporters during the election of 1800 to make authorized statements disclaiming any desire on Jefferson's part to use federal power against slavery.

20. Onuf, *Jefferson's Empire*, 115.

21. David Brion Davis describes it as a "critical setback" for the abolition movement. Davis, *Slavery in Revolution*, 330. Joseph Ellis argues that the debate raised grave questions about whether abolition had already become politically impossible by 1790. Joseph Ellis, *Founding Brothers: The Revolutionary Generation* (New York: Alfred A. Knopf, 2000), chap. 3. Gary Nash argues that the debate was the "moment of truth" that proved that the North was politically unwilling to pursue abolition. Nash, *Race and Revolution*, 38–42 (quotation at 38). Accounts of this debate include Robinson, *Slavery in Politics*, 302–12; Richard S. Newman, "Prelude to the Gag Rule: Southern Reaction to Antislavery Petitions in the First Congress," *Journal of the Early Republic* 16, no. 4 (1996): 571–99; Fehrenbacher, *Slaveholding Republic*, 138–39; Howard A. Ohline, "Slavery, Economics, and Congressional Politics, 1790," *Journal of Southern History* 46 (1980): 335–60; Nash, *Race and Revolution*, 38–42; Du Bois, *Suppression of the African Slave Trade*, 75–80. See also David P. Currie, "The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791," *University of Chicago Law Review* 61, no. 3 (1994): 775–865.

22. See Fehrenbacher, *Slaveholding Republic*, 38; and discussion in chapter 4.

23. The PAS had planned to petition the 1787 convention, but Benjamin Franklin declined to offer that petition. Tench Coxe's March 31, 1790, letter to James Madison refers only to the slave trade. There is other evidence that the planned 1787 PAS petition was limited to the slave trade. A copy of the proposed 1787 petition was published in the newspaper during the 1790 debate in the *Federal Gazette and Philadelphia Evening Post*, February 23, 1790, and it concluded: "[T]he Society implore the present Convention to make the suppression of the African slave trade in the United States a part of their deliberations." Franklin's 1790 petition was far broader than the 1787 proposal. It is fair to conclude that Franklin thought that Congress could still combat slavery, even after adoption of the Constitution, and that he wanted to ignite the strongest possible debate.

24. *AC*, 1:1224–25, February 11, 1790 (1st Cong., 2d sess.).

25. *AC*, 1:1240, February 12, 1790 (1st Cong., 2d sess.).

26. Letter from PAS Acting Committee to London Society for Effecting the Abolition of the Slave Trade, February 28, 1790, PAS Acting Committee Correspondence, HSP, Philadelphia.

27. This timing—and the debate's outcome—led Quakers to conclude that political bargains on the debt-assumption issue affected the outcome on the slavery petitions, a view advocated also by some historians. Ohline, "Slavery, Economics." But the outcome of the slavery debate was regarded as an authoritative precedent by exceptionally capable antislavery lawyers such as Daniel Webster as late as 1833. Ellis, *Founding Brothers*, 118. This suggests that it was unlikely that the outcome was based on a one-issue political trade.

28. Quakers believed that Pennsylvania slave-trade interests had decided to shift their trading to New York in order to escape Pennsylvania prohibitions. A New York legislature committee responded that although it "agree[d] in sentiment" with the Quakers, the slave trade had been made an exclusively federal issue by the Constitution, so New York could not act. "Report of the New York legislative committee on Quaker slave trade petition," *Pennsylvania Mercury, and Universal Advertiser*, February 9, 1790.

29. Gerry assumed a valuation for southern slaves an order of magnitude lower than their actual valuation. Ellis, *Founding Brothers*, 106–7. Gerry also claimed that Massachusetts had liberated "between twenty and thirty thousand slaves" in one day when it adopted its 1780 constitution (Massachusetts had fewer than 5,000 slaves by then). *New York Daily Gazette*, March 20, 1790. A southern congressman responded that Gerry's argument on the ease of abolition could only be regarded as "a piece of pleasantry." Ibid.

30. *Freeman's Journal or North American Intelligencer* (Philadelphia), February 24, 1790; *Gazette of the United States* (N.Y.), February 17, 1790, repr. *Doc. Hist. FFC*, 12:304–5; *Federal Gazette and Philadelphia Evening Post*, February 20, 1790, reprinted in part *without source* in Elliot 4:408 (first published 1830). In the *Annals of Congress*, after the introduction of the Franklin antislavery petition, Madison is reported to have claimed different authority for Congress: "He admitted, that Congress is restricted by the Constitution from taking measures to abolish the slave trade; yet there are a variety of ways by which it could countenance the abolition, and regulations might be made in relation to the introduction of them [slaves] into the new States to be formed out of the Western Territory." *AC*, 1:1246, February 12, 1790 (1st Cong., 2d sess.).

31. *AC*, 1:354, May 13, 1789 (1st Cong., 1st sess.).

32. Under the Constitution, recorded votes by yeas and nays could be demanded by "one fifth of those Present" in either house, which meant that where political circumstances made it desirable, it was comparatively easy to compel recorded votes to require congressmen to take a public stand on an issue. All votes against referral came from slave state representatives, and all but one came from below the Mason-Dixon line. The Virginia delegation voted 7–2 for referral. *AC*, 1:1247, February 15, 1790 (1st Cong., 2d sess.). For political reasons, both Madison and Representative Page of Virginia later sought to explain their support for referral on slave-trade-opposition

grounds. For Page's defensive election speech, see *Virginia Independent Chronicle*, August 11, 1790, repr. *Doc. Hist. FFC*, 12:778–79.

33. Ernst, *Rufus King*, 171; Ohline, "Slavery, Economics," 344.

34. Edward S. Maclay, ed., *The Journal of William Maclay, United States Senator from Pennsylvania, 1789–1791* (New York, 1890), online at Library of Congress, American Memory, http://memory.loc.gov/ammem/amlaw/lwmj.html, 196.

35. John Adams to Thomas Crafts, May 25, 1790, Adams Papers, Massachusetts Historical Society, Boston, quoted in Ohline, "Slavery, Economics," 344.

36. House of Representatives, *Journal*, March 5, 1790, repr., *Doc. Hist. FFC*, 3:316. A contemporary reported that when the subject of the "southwestern frontiers" was taken up that day, the galleries were shut. *Doc. Hist. FFC*, 12:639. This House action is not recorded in its journal.

37. The report also concluded that (1) Congress could not dictate to the states how slaves were to be treated regarding education, adequacy of food or clothing, reenslavement of "free negroes," or in any other respect; and (2) Congress had power to tax imported slaves up to $10/slave.

38. See appendix D (emphasis mine).

39. James Jackson (Ga.), *AC*, 1:1500, March 16, 1790; *Pennsylvania Packet and Daily Advertiser*, March 23, 1790.

40. William L. Smith (S.C.), *AC*, 1:1505, March 17, 1790.

41. *An Act to Establish an Uniform Rule of Naturalization* (March 26, 1790), 1 *Stat.* 103, 1st Cong., 2d sess.; Robinson, *Slavery in Politics*, 253.

42. William L. Smith, *AC*, 1:1508–9, March 17, 1790.

43. William L. Smith, *New York Daily Advertiser*, March 22, 1790. See chapter 4.

44. *New York Daily Gazette*, March 20, 1790 (Jackson, Ga.), repr. *Doc. Hist. FFC*, 12:823.

45. Abraham Baldwin (Ga.), *New York Daily Gazette*, March 20, 1790, repr. *Doc. Hist. FFC*, 12:773–76 (quotations at 775–76). Baldwin's speech was not printed in subsequent published reports of congressional debates such as the *Annals of Congress*.

46. Ibid.

47. Ellis, *Founding Brothers*, 97; Robinson, *Slavery in Politics*, 309.

48. Thomas Scott (Pa.), *New York Daily Gazette*, March 20, 1790, quoted in Ellis, *Founding Brothers*, 112.

49. *New York Daily Advertiser*, March 24, 1790 (March 22 debate).

50. *New York Daily Gazette*, March 20, 1790.

51. *New York Daily Advertiser*, March 25, 1790, repr. *Doc. Hist. FFC*, 12:809.

52. Ohline, "Slavery, Economics," 351.

53. James Madison to Robert Pleasants, October 30, 1791, *JM Papers*, 14:117.

54. Gaillard Hunt, ed., *The Writings of James Madison . . .* (New York: G. P. Putnam's Sons, 1906), 6:8–9.

55. Jefferson had arrived to assume his duties as secretary of state on March 21, late in the debate, and reported "immediately" to Washington. Dumas Malone, *Jefferson and His Time*, vol. 2 (Boston: Little, Brown and Co., 1951), 255.

56. Ohline, "Slavery, Economics," 351. For the text of the final House action,

see appendix D. The House also agreed to broaden the statement that Congress had no power to interfere in the treatment of slaves, so that it was all-encompassing (and elided the question of control over free blacks).

57. The House action provided that Congress could restrain United States citizens from "carrying on the African trade for the purpose of supplying foreigners with slaves" and could regulate slave conditions during their importation by United States citizens.

58. Some historians argue that the Northwest Ordinance was the origin of the "equal footing" concept (Currie, "Constitution in Congress"), but "equal footing" language appeared in Jefferson's ordinance of 1784 (see Onuf, *Statehood and Union*, 46–48, for text), and its precise origins are uncertain. See discussion in chapter 4.

59. The House action thus might have raised doubts about the constitutionality of article 6, the slavery bar of the Northwest Ordinance, as it applied to slavery in new states created from within the territory. But Madison had already ignored the legal fiction created to authorize the Northwest Ordinance under the Constitution when it was ratified by Congress in 1789. The ordinance ratification statute, August 7, 1789, 1 *Stat*. 50, 1st Cong., 1st sess., recited that it was adopted so that the ordinance "may continue to have full effect." Madison had already argued, correctly, that the Continental Congress lacked any authority to adopt the ordinance in the first place (see chapter 4); if so, it could not be "continued" in force.

60. Freehling, *Road to Disunion*, 1:121–43.

61. For a similar conclusion, see Newman, "Prelude to the Gag Rule," 597.

62. PAS to London Society, February 28, 1790, PAS ACM.

63. PAS to London Society, April 2, 1790, PAS ACM.

64. PAS to Amis des Noirs, August 30, 1790, PAS ACM.

65. *Federal Gazette and Philadelphia Evening Post*, March 31, 1790 (March 26, 1790 debate; see House of Representatives, *Journal*, repr. *Doc. Hist. FFC*, 3:344–45).

66. Newman, *Transformation of American Abolitionism*, 49.

67. Quoted in Davis, *Slavery in Revolution*, 316.

68. Washington's action was consistent with his position on the 1786 Pennsylvania slavery case, *Pirate v. Dalby*. Randolph thought that Congress had power to legislate on the issue, but opposed legislation or presidential action as premature. Presidential Communication no. 22, 2d Cong., 1st sess., October 27, 1791, item 8, in United States Congress, *American State Papers*, Class X: Miscellaneous, vol. 1 (Washington, D.C.: Gales and Seaton, 1834), 41–42.

69. *An Act Respecting Fugitives from Justice, and Persons Escaping from the Service of their Masters*, February 12, 1793, 1 *Stat*. 302 (1845) (the "act of 1793"), 2d Cong., 2d sess.

70. Paul Finkelman, "The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793," *Journal of Southern History* 56, no. 3 (1990): 413–15, 418.

71. The congressional debate over the National Bank was full of arguments that there was no constitutional authority for its creation. That constitutional question was deemed so important that Washington required written opinions from his cabinet on it.

72. Finkelman, "Fugitive Slave Act of 1793," 416–17.

73. Ibid., 420.

74. House of Representatives, *Journal*, 2d Cong., 2d sess., February 5, 1793, 1:690; Senate, *Journal*, 2d Cong., 2d sess., January 18, 1793, 1:472.

75. All such newspapers contained in the America's Historical Newspapers database (Chester, Pa.: Readex Microprint Corp., 2004–, http://infoweb.newsbank.com/db=EANX) were searched for the period 1793–94, and no significant public debate over the act was found.

76. For such arguments, see *Jack v. Martin*, 12 Wend. 311 (N.Y. 1834), aff'd 14 Wend. 507 (N.Y. 1835).

77. *Glen v. Hodges*, 9 Johns 67 (N.Y. 1812).

78. Dane, *Digest and Abridgement*, vol. 2, chap. 53, art. 3, sec. 35.

79. Fogel, *Without Consent or Contract*, 39.

80. For those legislative efforts, see Robinson, *Slavery in Politics*, 290–93.

81. Ellis, *Founding Brothers*, 103; Jordan, *White over Black*, 315–16, 347.

82. The Tucker-Massachusetts correspondence is reprinted in MSL.

83. My discussion of the Tucker-Massachusetts correspondence is indebted to the discussion in Jordan, *White over Black*, 555–61; see also Newman, *Transformation of American Abolitionism*, 36–37.

84. TJ to Richard Price, August 7, 1785, *TJ Papers*, 8:356.

85. MSL, 390, 393, 391.

86. Ibid., 406. See discussion in Jordan, *White over Black*, 555–56, which emphasizes the political importance of racial fears, including those brought on by the Santo Domingo rebellion, to Tucker's analysis.

87. Tucker to Belknap, June 29, 1795, MSL, 407; see discussion in Jordan, *White over Black*, 556–57.

88. MSL, 419. Thomas Jefferson had expressed similar views about black population increase by the early 1780s (see chapter 4).

89. MSL, 408.

90. MSL, 412.

91. MSL, 408.

92. Tucker's plan assumed that compensation must be provided to Virginia slaveholders for their slaves. None of the Massachusetts correspondents questioned the necessity of such compensation, although several believed that Massachusetts had abolished slavery without compensating slaveholders. Tucker assumed that slaveholder compensation would take the form of continued forced servitude of slaves and their children for several generations. He estimated that it would require perhaps 100 years to provide full compensation under his plan.

93. Tucker to Belknap, August 13, 1797, MSL, 428.

94. TJ to St. George Tucker, August 28, 1797, in Paul Leicester Ford, *The Writings of Thomas Jefferson* (New York: G. P. Putnam's Sons, 1896), 7:168; quoted in part in Robinson, *Slavery in Politics*, 97.

95. *Act of May 26, 1790*, 1 *Stat*. 123, 1st Cong., 2d sess.

96. Fehrenbacher, *Dred Scott*, 87. For the view that the framers themselves, however, "had no conscious intentions with respect to slavery in new territories acquired by the United States," see Graber, *Dred Scott*, 73.

97. *An Act for the Admission of the State of Vermont into this Union* (February 18, 1791), 1 *Stat*. 191, 1st Cong., 3d sess.

98. *An Act Declaring the Consent of Congress, That a New State Be Formed within the Jurisdiction of the Commonwealth of Virginia, and Admitted into this Union, by the Name of Kentucky* (February 4, 1791), 1 *Stat*. 189, 1st Cong., 3d sess.; *Act of February 25, 1791*, 1 *Stat*. 191, 1st Cong., 3d sess.

99. John Craig Hammond, *Slavery, Freedom*, 11–12.

100. *AC*, 4:1306–7, May 5, 1796 (4th Cong., 1st sess.); *Act of May 26, 1790*, 1 *Stat*. 123, 1st Cong., 2d sess.

101. *AC*, 4:1328–9, May 6, 1796 (4th Cong., 1st sess.).

102. *AC*, 4:1308–9, May 5, 1796 (4th Cong., 1st sess.). Without the voting premium created by the three-fifths clause, Tennessee would not have been admitted in 1796 to contribute to Jefferson's vote in the first place. The largely sectional House vote on admission, 41–35, meant that the state's admission would have been rejected if the slave state representation had been reduced by elimination of the three-fifths clause premium.

103. Ferling, *Adams vs. Jefferson*, 93.

104. The administration supported permitting Mississippi territorial slavery, even though administration officials included opponents of slavery such as Secretary of State Timothy Pickering. John Craig Hammond, *Slavery, Freedom*, 23, 28–29.

105. Fehrenbacher, *Dred Scott*, 89.

106. Robinson, *Slavery in Politics*, 391.

107. Adam Rothman, *Slave Country: American Expansion and the Origins of the Deep South* (Cambridge, Mass.: Harvard University Press, 2005), 25.

108. Du Bois, *Suppression of the African Slave Trade*, 88.

109. Adam Rothman, "The Expansion of Slavery in the Deep South, 1790–1820" (Ph.D. diss., Columbia University, 2000), 46; see also Rothman, *Slave Country*, 26.

110. *Act of April 7, 1798*, 1 *Stat*. 549–51, 5th Cong., 2d sess.

111. For accounts of the Louisiana Purchase and slavery, see John Craig Hammond, *Slavery, Freedom*, 30–54; Robinson, *Slavery in Politics*, 392–400; Fehrenbacher, *Slaveholding Republic*, 259–90; Rothman, *Slave Country*, 26–34; Peter J. Kastor, *The Nation's Crucible: The Louisiana Purchase and the Creation of America* (New Haven: Yale University Press, 2004). On the constitutional issues raised by the Louisiana Purchase, see Everett S. Brown, *The Constitutional History of the Louisiana Purchase* (1920; repr., Clifton, N.J.: Augustus M. Kelley, 1972); Gary Lawson and Guy Seidman, "The First 'Incorporation' Debate," in *The Louisiana Purchase and American Expansion*, ed. Sanford Levinson and Bartholomew H. Sparrow (Lanham, Md.: Rowman and Littlefield, 2005), 19–40. On the broader historical ramifications of the purchase, see Peter S. Onuf, "'The Strongest Government on Earth': Jefferson's Republicanism, the Expansion of the Union, and the New Nation's Destiny," in Levinson and Sparrow, *Louisiana Purchase and American Expansion*, 41–68.

112. TJ to Robert Livingston, April 18, 1802, in Paul Leicester Ford, *Writings of Thomas Jefferson* (New York: C. P. Putnam's Sons, 1897), 8:143–47. Although Jefferson

undoubtedly regarded a British alliance as a last resort, and may have intended Livingston to convey his remarks to the French for bargaining purposes, he simultaneously conveyed to Livingston his willingness fundamentally to alter United States policy if necessary to end French control of New Orleans. He emphasized his earnestness by instructing Livingston to use a special, unusually complex cipher to communicate further with him on the issue.

113. *Charleston Courier*, January 11, 1803, quoted in Shugerman, "South Carolina's Reopening of the Slave Trade," 272.

114. For an excellent account of the Republican philosophy underlying the acquisition of Louisiana and American expansion during this period generally, see Onuf, "Expanding Union."

115. Ibid.

116. The residents of the purchased territory that ultimately became Louisiana (roughly 15,000 whites) were probably incapable of mounting a successful military rebellion against the United States without foreign assistance. France's desperate financial condition made it unlikely that France would have supported them. The Spanish government, an empire "on its last legs," had already indicated its strong inclination to decline further American territorial expansion in the area in the Pinckney treaty, and by its cession of Louisiana to France. Wilentz, *American Democracy*, 108; Bailey, *Diplomatic History*, 113. Spain chose not to oppose the French sale to the United States, despite its actual possession of the territory. A recent historian concludes that "after 1803 the Spanish posed no threat to the United States. They were helpless to prevent the crumbling of their tenuous foothold in North America . . . France, had retreated from North America." Kagan, *Dangerous Nation* (New York: Alfred A. Knopf, 2006), 135. Britain had agreed to abandon important mainland interests in Jay's treaty. Britain was willing enough to leave the scene that British bankers were permitted to float the massive bond issue that financed the American purchase of Louisiana. Bailey, *Diplomatic History*, 108 n. 9. For general European withdrawal, see J. H. Elliott, *Empires of the Atlantic World: Britain and Spain in America, 1492–1830* (New Haven: Yale University Press, 2006), 399–400; Kagan, *Dangerous Nation*, 135.

117. "Memorial on Louisiana," *Charleston Times*, July 18, 1803, quoted in Shugerman, "South Carolina's Reopening of the Slave Trade," 272–73.

118. Tench Coxe to Robert Livingston, June 10, 1802, Papers of Tench Coxe, HSP, Philadelphia, discussed in Rothman, "Expansion of Slavery," 37–39.

119. Onuf, "Expanding Union."

120. *Charleston Courier*, January 15, 1803, quoted in Shugerman, "South Carolina's Reopening of the Slave Trade," 272.

121. Ibid., 274–80. In his classic work, W. E. B. Du Bois concluded that the Louisiana Purchase was one of the causes of the reopening of the trade. Du Bois, *Suppression of the African Slave Trade*, 84–85.

122. Everett S. Brown, *Constitutional History*, 68–69.

123. Ibid., 69, quoting *AC*, 8:54–56.

124. Rufus King to Timothy Pickering, November 4, 1803, *LCRK*, 4:324. King

had had second thoughts about the three-fifths clause since playing a key role in its adoption at the Convention and defending it during ratification. He abandoned even his 1803 position that "taxation and representation are inseparable" during the Missouri controversy.

125. Howard A. Ohline, "Politics and Slavery: The Issue of Slavery in National Politics, 1787–1815" (Ph.D. diss., University of Oklahoma, 1969), 355.

126. Onuf, "Expanding Union," 79.

127. *AC*, 8:73, November 3, 1803 (8th Cong, 1st sess.).

128. Robinson, *Slavery in Politics*, 395. The House implementation vote was 90–25.

129. Bailey, *Diplomatic History*, 112, 114.

130. John Craig Hammond, *Slavery, Freedom*, 32–36.

131. See Robinson, *Slavery in Politics*, 392–400; and the Plumer Memorandum (Everett S. Brown, *Constitutional History*, appendix). See also Ohline, "Politics and Slavery," 353–98.

132. Robinson, *Slavery in Politics*, 396.

133. Senator Jackson described Jefferson's position on Indian land exchange as a "favorite measure of the President's—he has assured me so." Everett S. Brown, *Constitutional History*, 233.

134. Everett S. Brown, *Constitutional History*, 97, quoting TJ to Albert Gallatin, November 9, 1803.

135. Freehling, "Louisiana Purchase," 68, 72.

136. On Jefferson's conception of America as a white republic, see Peter S. Onuf, "Thomas Jefferson, Race, and National Identity," in *Mind of Thomas Jefferson*, 205–12.

137. *Columbian Centinel*, August 17, 1803 (reprinted from Utica *Patriot*), quoted in Shugerman, "South Carolina's Reopening of the Slave Trade," 273–74.

138. Everett S. Brown, *Constitutional History*, appendix, 215.

139. Similar sharp divisions occurred in the Northern congressional delegations during the February 1804 efforts to impose a $10/slave tax on imported slaves after South Carolina's 1803 reopening of the slave trade, and in the 1805 vote to require gradual abolition in the District of Columbia.

140. Kastor, *Nation's Crucible*, 51.

141. Rothman, "Expansion of Slavery," 50, 52–53.

142. Ibid., 42.

143. January 31, 1804, in Everett S. Brown, *Constitutional History*, 223.

144. The House adopted an amendment to prevent the introduction of any slaves into Louisiana, but it was rejected in the House-Senate conference. The House divided 40–36. Ohline, "Politics and Slavery," 380.

145. TJ to De Witt Clinton, December 2, 1803, in Paul Leicester Ford, *Writings of Thomas Jefferson*, 7:283.

146. According to Senator Plumer's notes, most Senate Democrats supported denying free blacks the right to serve on juries.

147. Robinson, *Slavery in Politics*, 397.

148. *AC*, 8:1198–99, March 16, 1804 (8th Cong., 1st sess.).

149. John Craig Hammond, *Slavery, Freedom*, 46–51.

150. Everett S. Brown, ed., *William Plumer's Memorandum of Proceedings in the United States Senate, 1803–1807* (New York: Macmillan Co., 1923), 222–24.

151. *AC*, 8:1016, January 25, 1805 (8th Cong., 2d sess.).

152. Quakers tried to preserve the restrictions of the 1804 legislation by a memorial to Congress. A motion to refer it to the Senate committee managing the Louisiana bill lost on a 14–14 vote. Everett S. Brown, *Plumer's Memorandum*, 250–51, discussed in Ohline, "Politics and Slavery," 386–87.

153. *An Act Further Providing for the Government of the Territory of Orleans* (March 2, 1805), 2 *Stat*. 322, 8th Cong., 2d sess.; *An Act Further Providing for the Government of the District of Louisiana* (March 3, 1805), 2 *Stat*. 331, 8th Cong., 2d sess.; Fehrenbacher, *Slaveholding Republic*, 260.

154. [William Griffith], *Address of the President of the New Jersey Society, for Promoting the Abolition of Slavery, to the General Meeting at Trenton* (Trenton, N.J.: Sherman and Mershon, 1804), quoted in Davis, *Slavery in Revolution*, 315.

CHAPTER SIX

1. *An Act to Authorize the People of the Missouri Territory to Form a Constitution and State Government . . .* (March 6, 1820), 3 *Stat*. 545–48, 16th Cong., 1st sess.; Glover Moore, *The Missouri Controversy, 1819–1821* (1953; repr., Gloucester, Mass.: Peter Smith, 1967), 88–89, 100.

2. PAS, Petition to Congress, April 13, 1820, Gilder Lehrman Collection, NYHS, New York, GLC 00777. This was the same way northern leader Rufus King characterized the outcome. See Rufus King to Robert Troup, February 29, 1820, *LCRK*, 6:284–86.

3. Rufus King to John A. King, February 6, 1820, *LCRK*, 6:267.

4. *Resolution Providing for the Admission of the State of Missouri into the Union, on a Certain Condition* (March 2, 1821), 3 *Stat*. 645, 16th Cong., 2d sess.; Glover Moore, *Missouri Controversy*, 155.

5. Thanks to Patrick Griffin for his insight that the result resembled a "compact," which as used here means an agreement not governed by a rule of law agreed to by the parties.

6. King played a leading but troubled role during the controversy, unable to dispel persistent doubts about whether he had ulterior motives even while advancing apparently sincere claims against slavery. Some contemporaries saw King's positions during the controversy as inconsistent with his actions at the Philadelphia Convention and during ratification. Others King needed as allies believed him to be a "cunning," ambitious opportunist. Other leaders, such as Martin Van Buren and John Quincy Adams, seem to have thought King's political judgment was sometimes flawed. For background, see Ernst, *Rufus King,* and this chapter.

7. Glover Moore's study has been the standard treatment of the Missouri compromises. There are extensive analyses of the Missouri controversy and its background in important works by John Craig Hammond (*Slavery, Freedom*) and Matthew Mason

(*Slavery in Early Republic*). A recent study is Forbes, *Compromise*. Other significant treatments of the Missouri controversy include Freehling, *Road to Disunion*; Onuf, *Jefferson's Empire*, chap. 4; Onuf, "Origins of American Sectionalism"; Wiecek, *Antislavery Constitutionalism*, 106–25; Peter B. Knupfer, *The Union as It Is: Constitutional Unionism and Sectional Compromise, 1787–1861* (Chapel Hill: University of North Carolina Press, 1991), 86–118; Richards, *Slave Power*; William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* (Ithaca, N.Y.: Cornell University Press, 1972), 141–50; David Brion Davis, *Challenging the Boundaries of Slavery* (Cambridge, Mass.: Harvard University Press, 2003), chap. 2; Fehrenbacher, *Sectional Crisis and Southern Constitutionalism*, 9–24; Albert F. Simpson, "The Political Significance of Slave Representation, 1787–1821," *Journal of Southern History* 7, no. 3 (1941): 315–42; and Andrew Lenner, *The Federal Principle in American Politics, 1790–1833* (Lanham, Md.: Rowman and Littlefield, 2001). For a helpful review of the historiography, see Joshua Michael Zeitz, "The Missouri Compromise Reconsidered: Antislavery Rhetoric and the Emergence of the Free Labor Synthesis," *Journal of the Early Republic* 20 (2000): 448–49.

8. Included in this group are historians who argue that Missouri was a sectional controversy where economic conflict or a struggle for political power was the primary force or a significant factor motivating the adversaries. In this group would fall works by Moore, Simpson, and Zeitz cited in note 7.

9. In this group would fall works by Forbes, Mason, Hammond, and Richards cited in note 7. Others see it as a chapter in the history of American disputes over the meanings of federalism and union. In this category would fall works by Knupfer and Lenner cited in note 7.

10. Onuf, "Origins of American Sectionalism," 12, 13, 26–27, 30.

11. John Randolph to Harmanus Bleecker, October 10, 1818, Papers of John Randolph of Roanoke, Small Special Collections Library, University of Virginia, Charlottesville.

12. Rufus King to Christopher Gore, November 5, 1816, *LCRK* 6:34.

13. *St. Louis Enquirer*, October 30, 1819, quoted in Glover Moore, *Missouri Controversy*, 271.

14. Campbell Gibson and Kay Jung, "Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origins, 1970 to 1990, for the United States, Regions, Divisions and States," Working Paper Series no. 56 (Washington, D.C.: U.S. Bureau of the Census, 2002), table F-1, accessed September 4, 2007, at http://www.census.gov/population/www/documentation/twps0056.html.

15. Data are taken from U.S. Bureau of the Census, *Historical Statistics to 1970*. See also Robinson, *Slavery in Politics*, 404, table 4.

16. Berlin, *Many Thousands Gone*; Kulikoff, "Uprooted Peoples"; Rothman, *Slave Country*.

17. Robinson, *Slavery in Politics*, 342–44. Tallmadge's assertion: *AC*, 15:1210, February 16, 1819. The files of federal district judge Matthias B. Tallmadge of New York (James Tallmadge's brother) contain records of a number of illegal slave-trade and slave-smuggling cases. Papers of Matthias B. Tallmadge , NYHS, New York.

18. Kenneth C. Martis and Gregory A. Elmes, *The Historical Atlas of State Power in Congress, 1790–1990* (Washington, D.C.: Congressional Quarterly, 1993), 48, table 2–12. Political scientists agree that slave state representation in the House in 1820 was approximately eighteen seats higher than it would have been without the three-fifths clause—or about 8 percent of the total House seats and almost 20 percent of total slave state representation. Statistics computed or extracted from ibid., 46–48; and Leonard L. Richards, *The Slave Power*, 56–57. As of 1820, it seems likely that there were several Senate seats held by slave states, particularly in the West, whose existence was attributable to the demographic effects of permitting the slave trade to continue through 1808 and smuggling thereafter.

19. Barry Weingast, "The Political Foundations of Democracy and the Rule of Law," *American Political Science Review* 91, no. 2 (1997): 259; Robinson, *Slavery in Politics*, 405.

20. These debates have been thoroughly considered in an illuminating analysis by John Craig Hammond, *Slavery, Freedom*.

21. Even in the Northwest Territory, efforts might be made to "turn back the clock" in some of those states by legalizing slavery where it had previously been illegal. Antislavery forces were concerned that this might occur in Ohio, Indiana, and Illinois. Ibid., chaps. 4–6.

22. Historian Matthew Mason provides a perceptive analysis of efforts after 1810 by northern states to strengthen state-law protections for slaves and free blacks. Very often such northern legislation was based on a determination to protect northern states against "encroachment from the slave states." Mason, *Slavery in Early Republic*, 130–43 (quotation at 143). Mason also analyzes several issues addressed by Congress after 1815, such as fugitive slave law and slave-trade prohibition amendments, and shows that slavery caused growing northern anger and political resentment. Ibid., chaps. 5–6. For Congress's efforts to resolve these specific issues (or sidestep them), see Robinson, *Slavery in Politics*, 342–44; Thomas D. Morris, *Free Men All*.

23. Mason, *Slavery in Early Republic*, 145.

24. In Illinois, pro- and antislavery forces were far more evenly matched than was generally the case in the West. This division strongly influenced the politics of the Missouri controversy. See Mason, *Slavery in Early Republic*, 149–55, 182–84.

25. Ibid., 150. The Illinois Constitution banned importation of new slaves and freed afterborn slave children, but it explicitly permitted the continued use of slave labor imported from Missouri through 1825 to work southern Illinois salt mines, and grandfathered agreements for involuntary servitude in Illinois. Lifetime involuntary-servitude "agreements" had been widely used in both Illinois and Indiana to create de facto slavery. Wright, *Slavery and Development*, 42. In 1821, the Indiana Supreme Court declared such involuntary-servitude agreements void under Indiana law, even if entered into without coercion, in *Case of Mary Clark, a Woman of Color*, 1 Blackf. 122 (Ind. 1821), a triumph for free-labor ideology discussed in Steinfeld, *Invention of Free Labor*, 144–46.

26. Tallmadge's challenge lost in the House, 117–34. *AC*, 15:306–11, November 23, 1818 (15th Cong., 1st sess.).

27. *AC*, 16:128, January 17, 1820.

28. Forbes, *Compromise*, 43.

29. The slave-import restriction had considerably more Senate support than did the abolition requirement from the outset of the controversy.

30. Glover Moore, *Missouri Controversy*, 60; Mason, *Slavery in Early Republic*, 147–49, 184.

31. *AC*, 15:1172, February 15, 1819.

32. Glover Moore, *Missouri Controversy*, 62.

33. *AC*, 15:1223, February 17, 1819.

34. *AC*, 15:1176, February 15, 1819.

35. *AC*, 16:336, February 1, 1820.

36. *Niles Weekly Register*, August 14, 1819.

37. *AC*, 16:151–52, January 17, 1820.

38. *AC*, 15:1188, February 15, 1819.

39. *AC*, 16:222, 225, January 20, 1820.

40. Glover Moore, *Missouri Controversy*, 49.

41. Rufus King countered southern exclusion arguments with the politically unpersuasive response that only slaves, and not slaveowners, were being excluded from Missouri by a restriction. Rufus King, *Substance of Two Speeches . . . on the Subject of the Missouri Bill* (New York: Kirk and Mercein, 1819), 28–29. By 1820, Taylor was attempting to deflect arguments about regional exclusion from slavery restriction by contending that barring slavery would not exclude the "middling class of emigrants" from the south. *AC*, 16:954, January 27, 1820.

42. *AC*, 15:1174–75, February 15, 1819.

43. Ibid., 1175.

44. *AC*, 15:1184, February 15, 1819.

45. *AC*, 16:337, February 1, 1820.

46. *AC*, 16:156, January 17, 1820.

47. Taylor argued that declines in slave prices resulting from Missouri restriction were merely "incidental" to restriction. *AC*, 15:1175–76, February 15, 1819. Other northern congressmen argued that such declines were a positive good.

48. *AC*, 15:1175, February 15, 1819.

49. Several slaveholding-state representatives in the House, and some senators, denied diffusion would increase slave population, as did Thomas Jefferson, but their arguments were internally inconsistent.

50. *AC*, 16:208, January 20, 1820.

51. Between 1790 and 1820, the economy of the slave south had been transformed, so that some subregions became large net exporters of slaves, while others became large net importers. Permitting slavery expansion would thus help to maintain or increase slave prices in the exporting states. Existing slaveholders could also seek higher returns in new, more productive geographic areas if they chose. New territories would benefit from increasing demand for agricultural land and encouragement of export-oriented agricultural development.

52. *AC*, 16:188–90, January 19, 1820.

53. A common explanation offered for that earlier failure is that antislavery forces had not experienced the failure of 1808 slave-import restrictions to prevent slave smuggling, and learned only after 1808 that controlling slave supply was insufficient to stem expansion. Mason, *Slavery in Early Republic*, 132; Robinson, *Slavery in Politics*, 406. But it was well understood by the 1790s that slave populations would expand even without imports. Antislavery forces also had considerable experience with slavery and abolition law enforcement from 1780 onward. The legal files of the PAS and those of United States district judge Matthias B. Tallmadge of New York document that antislavery forces had been fighting illegal foreign slave smuggling and trading since the 1790s. These circumstances strongly suggested that the exceptionally high profitability of slavery, together with widespread white racism, severely corrupted public willingness to observe and enforce laws against slave imports and kidnapping. Such laws were likely to be only partially enforced unless reinforced by limits on demand for slaves. Northern abolitionists were aware of systematic state-law violations involving slave and free-black smuggling and kidnapping by slaveowners in the 1780–1810 period (especially after 1800), and repeatedly sought to tighten state laws in response. Northern representatives thus had reason to understand by the time of the Louisiana Purchase that the continued profitability of slavery meant that an import cutoff alone would not end illegal smuggling or, in any event, end the expansion of slavery.

54. King, *Two Speeches*, 10–11.

55. Rufus King to Richard Peters, Jr., November 30, 1819, *LCRK*, 6:236.

56. *AC*, 16:155, January 17, 1820.

57. *AC*, 16:966–67, January 27, 1820.

58. *AC*, 16:1014–15, January 27, 1820.

59. *AC*, 16:333, February 1, 1820.

60. Papers of Rufus King, NYHS, New York, box 81, folder 1. It is uncertain whether King delivered this part of his speech to the Senate, but he addressed this issue in his 1819 published speech.

61. *AC*, 16:189, January 19, 1820.

62. For opposing views on the "deeper game" issue, see Glover Moore, *Missouri Controversy*, 106, 183; Forbes, *Compromise*, passim.

63. Rufus King to Christopher Gore, February 11, 1819, *LCRK*, 6:211–12 (quotation at 212).

64. William Tudor to Joseph Hopkinson, November 8, 1819, Papers of Joseph Hopkinson, HSP, Philadelphia, quoted in Glover Moore, *Missouri Controversy*, 74.

65. Rufus King to John A. King, February 6, 1820, *LCRK*, 6:267.

66. Rufus King to Jeremiah Mason (of New Hampshire), May 4, 1820, *LCRK*, 6:336.

67. *AC*, 16:337, February 1, 1820.

68. Glover Moore, *Missouri Controversy*, 160–61.

69. Ibid., 161.

70. *AC*, 16:110, January 14, 1820.

71. The Missouri controversy also involved hard-knuckle politics. There were allegations, many of them discussed in Forbes, *Compromise*, that southern politicians

and northern economic interests intervened in elections and through financial support depending on positions taken by northern politicians on Missouri slavery restriction. But the available evidence supports the view that the key northern politicians whose defection from the northern coalition is analyzed in this chapter were not motivated by political pressure or economic bribery.

72. Forbes, *Compromise*, 75–81.

73. Jonathan Roberts to Matthew Roberts, February 16, 1820, Papers of Jonathan Roberts, HSP, Philadelphia.

74. Recall that the Tallmadge amendment as originally proposed had two elements: a prohibition on imports of slaves to Missouri, and a requirement that Missouri free all afterborn (postnati) slave children once they reached the age of twenty-five.

75. Jonathan Roberts to Matthew Roberts, January 27, 1820, Roberts Papers.

76. Jonathan Roberts to Matthew Roberts, February 25, 1820, Roberts Papers.

77. Memoirs of Jonathan Roberts, HSP, Philadelphia, 135.

78. Jonathan Roberts to Matthew Roberts, February 21, 1820, Roberts Papers.

79. Jonathan Roberts to Tench Coxe, November 15, 1820, Coxe Papers.

80. Forbes, *Compromise*, 82.

81. Ibid., 45.

82. John Tyler to Spencer Roane, February 14, 1820, Gilder Lehrman Collection, GLC03670.

83. *City Gazette and Commercial Advertiser* (Charleston), March 10, 1820, quoted in Glover Moore, *Missouri Controversy*, 114–15.

84. *Columbian Centinel* (Boston), April 1, 1820, quoted in Glover Moore, *Missouri Controversy*, 115.

85. Letter draft, March 3, 1820, King Papers (unpublished).

86. James Monroe to Andrew Jackson, May 23, 1820, quoted in Glover Moore, *Missouri Controversy*, 345–46.

87. *Argus of Western America* (Frankfort, Ky.), March 9, December 7, 1820, quoted in Glover Moore, *Missouri Controversy,* 344.

88. Robert V. Remini, *Henry Clay: Statesman for the Union* (New York: W. W. Norton and Co., 1991), 190. The Missouri compromise made "the acquisition of Texas" "essential to the hopes and needs of southern expansionists." Ibid., 193.

89. Abner Lacock to James Monroe, January 30, 1820, quoted in Glover Moore, *Missouri Controversy*, 127.

90. Glover Moore, *Missouri Controversy*, 127.

91. For an argument that sectional balance-of-power concerns driven by desire to maintain slave state dominance were central to the Missouri controversy, see the essay by Eric S. Steinhart, "Introduction: 'Papers Relative to the Restriction of Slavery by Rufus King and John Jay,'" in Basker, *Early American Abolitionists*, 319–23.

92. Northern antislavery forces sought the compromise's reopening, not just Federalists. For example, Ohio newspaper editor James Wilson, a vigorous advocate of reopening, was an ardent Republican. The northern majority hoped to better the outcome. This conclusion is supported by Moore's excellent analysis of the voting patterns in the House and Senate, *Missouri Controversy*, 107–12.

93. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), is usually regarded as the Court's first decision establishing its right of judicial review of the constitutionality of acts of Congress. The Court had endorsed a nationalist view of the constitution in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

94. The Court's decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), generated a bitter, fairly widespread states' rights debate, but to my knowledge was cited once in two years of Missouri debate.

95. For a good general history of *McCulloch*, including the challenges to the Court's authority by Virginians such as Virginia chief justice Spencer Roane, see Mark R. Killenbeck, *M'Culloch v. Maryland: Securing a Nation* (Lawrence: University Press of Kansas, 2006).

96. *AC*, 16:949–50, January 27, 1820. Representative Lowndes about a year later offered precisely the same sort of proposal for court intervention to resolve the narrower constitutional issue raised by the second round of the Missouri controversy, Missouri's claim that it had the right to exclude free blacks. That proposal was quickly rejected by Northern congressmen, who claimed that Congress needed to decide the issue.

97. During the period from 1806 to 1813, the Supreme Court decided four petitions for slave freedom. In each case, the Court decided in favor of the slaveowner. For details, see Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University Press, 2001).

98. On Marshall's position on slavery, see ibid., 414, 416, 434.

99. For the view that Marshall opposed restriction, see Lyon G. Tyler, "Missouri Compromise. Letters to James Barbour, Senator of Virginia in the Congress of the United States," *William and Mary Quarterly* 10, no. 1 (1901): 6; Glover Moore, *Missouri Controversy*, 234; Forbes, *Compromise*, 93. For a superb analysis of Marshall's skills as a judicial politician, see Michael J. Klarman, "How Great Were the 'Great' Marshall Court Decisions?" *Virginia Law Review* 87 (2001): 1111–84.

100. John Marshall to Joseph Story, September 26, 1823, in Charles F. Hobson, ed., *The Papers of John Marshall* (Chapel Hill: University of North Carolina Press, 1998), 9:338.

101. Gerald T. Dunne, *Justice Joseph Story and the Rise of the Supreme Court* (New York: Simon and Schuster, 1970), 194–95; William W. Story, *Life and Letters of Joseph Story* (Boston: Charles C. Little and James Brown, 1851), 1:339–40.

102. Compare Story's decision in *La Jeune Eugenie*, 26 F. Cas. 832 (No. 15,551)(C.C. Mass. 1822) with the Court's decision in *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

103. King's notes on admission of new states, King Papers, box 81, folders 1, 6. King thought, however, that federal courts could intervene to protect people who were enslaved under a state law enacted in violation of a congressional restriction against slavery in a new state. King, *Two Speeches*, 18–19.

104. The uncertainty about what position the Supreme Court would take on the constitutionality of restriction was the result of the conflict between the Court's record on "economic nationalism" issues like the constitutionality of the National Bank and its uncertain position on slavery. See G. Edward White, *Marshall Court*, 675–82.

105. U.S. Constitution, art. 4, sec. 3.

106. *AC*, 16:275–95, January 27, 1820 (Senators Ruggles and Trimble).

107. *AC*, 16:1101, February 4, 1820.

108. Congressman Phillip Barbour had argued earlier that the Northwest Ordinance was "utterly void" because it violated the Virginia cession's requirement that states formed from that cession must be admitted to the Union on an equal footing, and could not bind new states there. *AC*, 15:1187, February 15, 1819. Senator James Barbour of Virginia pointed out that some people believed that Virginia's consent to the Northwest Ordinance's slavery provision had been coerced, because it had been based on a political deal to end the dispute over the Spanish treaty (discussed in chapter 4). *AC*, 16:332, February 1, 1820.

109. See the excellent analysis of Jefferson's thought on expansion and the Missouri controversy in Onuf, *Jefferson's Empire*, 109–46.

110. For northern arguments on republicanism and slavery, see Wiecek, *Guarantee Clause*, 141–50.

111. Meigs had been recruited to run for Congress by Van Buren. Henry Meigs to Josiah Meigs, August 22, 1819, Papers of Henry Meigs, NYHS, New York.

112. *AC*, 16:945, January 26, 1820.

113. *AC*, 16:943, January 26, 1820.

114. Henry Meigs to Josiah Meigs, July 11, 1820, May 6, 1821, Meigs Papers. Josiah Meigs reference: see *Dictionary of American Biography*.

115. Henry Meigs to Josiah Meigs, May 6, 1821, Meigs Papers. Meigs described Rufus King as an "aristo fed." Henry Meigs to Josiah Meigs, May 20, 1819, Meigs Papers.

116. *AC*, 16:946, January 26, 1820.

117. Henry Baldwin to John Gilmore, February 12, 1820, Papers of Henry Baldwin, Society Small Collection, HSP, Philadelphia. Baldwin also explained that he had been told by (Major) William Jackson, secretary of the Philadelphia Convention, that the Convention had actually broken up over slavery. Only Washington's personal intervention had persuaded the delegates to remain together. They had agreed as a result that Congress would never interfere with slavery except to control the slave trade and the migration of imported slaves. Baldwin believed that the South would break up the Union over Missouri because southerners thought that restriction violated this agreement, and would be the precedent for further congressional action against slavery.

118. Baldwin Papers.

119. Henry Baldwin to John Gilmore, February 12, 1820, Baldwin Papers.

120. Ibid.

121. *AC*, 15:1215, February 16, 1819.

122. *AC*, 15:1232–33, February 17, 1819.

123. For analyses suggesting that opposition to the three-fifths clause was a dominant or major factor in the Missouri controversy, see Simpson, "Political Significance of Slave Representation"; Wiecek, *Antislavery Constitutionalism*, 106–8.

124. Mason, *Slavery in Early Republic*, 65.

125. For Madison's response, see James Madison to James Monroe, February 23,

1820, Library of Congress, American Memory, http://memory.loc.gov/ammem/collections/madison_papers/.

126. King, *Two Speeches*, 21–22.

127. Rufus King to Timothy Pickering, November 4, 1803, *LCRK*, 4:324.

128. King's and Roberts's reasoning on this issue was similar to the "states' rights" reasoning employed by the slave states, but privileged the position of the original states. The three-fifths clause was a concession by Northern states that weakened their political power; any extension of the clause that weakened their power further was inconsistent with constitutional intent. King speech to Senate, February 11, 1820, *LCRK*, 6:276.

129. *AC*, 16:190, January 19, 1820.

130. Congressman John Holmes's Letter to the People of Maine on the Missouri Compromise, reprinted in part in Noble E. Cunningham, Jr., *The Early Republic, 1789–1828* (Columbia: University of South Carolina Press, 1968), 116.

131. See the discussion in G. Edward White, *Marshall Court*, comparing the contracts clause and slavery cases.

132. Forbes, *Compromise*, 76.

133. *AC*, 16:120–27, January 17, 1820. The parallel with earlier American forms of covenant theology is a striking one.

134. America had honored its covenant with God in the Northwest Ordinance. *AC*, 16:123, January 17, 1820.

135. *AC*, 16:338, February 1, 1820.

136. *AC*, 15:1192, February 15, 1819.

137. *AC*, 15:1206, February 16, 1819.

138. *AC*, 16:1396, February 17, 1820, quoted in Wiecek, *Antislavery Constitutionalism*, 120.

139. *AC*, 16:281, January 27, 1820.

140. *AC*, 16:127, January 17, 1820.

141. Quotations are from a newly discovered report of King's speech contained in Richard Peters, Jr., to Roberts Vaux, February 12, 1820, Papers of Roberts Vaux, HSP, Philadelphia. Richard Peters, Jr., later became the reporter of the United States Supreme Court.

142. King's proposal referred to the former English legal institution of "villenage." Villeins were persons subjected to an onerous form of forced servitude, but one regarded as less onerous than slavery in some respects. *Villeins regardant* were villeins who were legally tied to the land they worked.

143. Rufus King to John A. King, February 11, 1820, *LCRK*, 6:269–70.

144. Rufus King to Christopher Gore, February 17, 1820, *LCRK*, 6:276–77.

145. Peters to Vaux, February 12, 1820, Vaux Papers.

146. Hulliung, *Social Contract in America*, passim.

147. The quotation is from Wiecek, *Antislavery Constitutionalism*, 120.

148. John W. Walker to Charles Tait, February 11, 1820, quoted in Wiecek, *Antislavery Constitutionalism*, 120–21.

149. *AC*, 16:382, February 11, 1820.

150. *AC*, 16:383, February 11, 1820.

151. Ibid.

152. Rufus King to unnamed recipient, March 3, 1820, King Papers (unpublished).

153. *AC*, 16:385–86, February 11, 1820.

154. *AC*, 16:388, February 11, 1820.

155. *AC*, 16:391, February 15, 1820.

156. *AC*, 16:403–5, February 15, 1820.

157. *AC*, 16:405–6, February 15, 1820.

158. *AC*, 16:419, February 16, 1820, quoted in part in Wiecek, *Antislavery Constitutionalism*, 121.

159. *AC*, 16:412, February 16, 1820. Pinkney's attack on the position that republican governments could not legally authorize slavery was scathing: "no eccentricity in argument can be more trying to human patience" than that argument, which wholly ignored the history of the Constitution's formation.

160. G. Edward White, *Marshall Court*, 702. White argues that the Court's decisions on this point in the slavery context contradicted its treatment of natural law in the property context.

161. Congressional debate on that issue resulted in a further compromise that allowed President Monroe to make the final decision about Missouri admission, because Congress could not agree. *Resolution Providing for the Admission of the State of Missouri into the Union, on a Certain Condition*, 3 *Stat*. 645, 16th Cong., 2d sess.

162. *Albany Argus*, June 6, 1820. I thank Philip Lampi, American Antiquarian Society, for providing this source.

163. Dixon Ryan Fox, "The Negro Vote in Old New York," *Political Science Quarterly* 32, no. 2 (1917): 252–75.

164. De Witt Clinton, address to New York legislature, January 5, 1819, in De Witt Clinton, *The Speeches of Governor Clinton before the Legislature of New-York* (New York, 1823), 23.

165. Ibid., 48–49.

166. "Wilberforce," Broadside Collection no. 113 (1820), NYHS.

167. Craig Hanyan and Mary L. Hanyan, *De Witt Clinton and the Rise of the People's Men* (Montreal: McGill–Queen's University Press, 1996), 11.

168. Martin Van Buren to Rufus King, March 23, 1820, *LCRK*, 6:322.

169. King's papers suggest that he suspected that Tompkins and other Bucktails had reached a modus vivendi with the South on Missouri.

170. Forbes, *Compromise*, 138 and passim.

171. Van Buren to King, January 19, 1820, *LCRK*, 6:252–53.

172. For an analysis that reaches a similar conclusion on this point using somewhat different reasoning, see Richard H. Brown, "The Missouri Crisis, Slavery, and the Politics of Jacksonianism," *South Atlantic Quarterly* 65 (1966): 55–72. Brown also concludes that Van Buren's motives for a southern alliance included a commitment to Jeffersonian republicanism. Ibid., 63. I thank Sean Nalty for bringing this source to my attention.

173. Fox, "Negro Vote," 257–58; Glover Moore, *Missouri Controversy*, 181–83.

174. Henry Meigs to Josiah Meigs, May 6, 1821, Meigs Papers. Storrs was subsequently reelected to Congress, as were some other "doughface" congressmen.

175. Rufus King to unknown, November 24, 1820, *LCRK*, 6:360; Rufus King to Charles A. King, December 10(?), 1820, King Papers (unpublished); Rufus King to John King, December 1, 1820, King Papers (unpublished). In part, King's view appears to have been that the fight over free-black exclusion was simply a rematch on Missouri admission with restriction, which was a lost cause.

176. Clinton, *Speeches*, 30.

177. Oliver Wolcott to Rufus King, December 25, 1820, King Papers (unpublished).

178. Mason, *Slavery in Early Republic*, 151.

179. Ibid., 152.

180. Ibid.

181. *Western Herald and Steubenville Gazette*, July 3, 1819.

182. Ibid. By March 1820, the Ohio free-black settlement was in need of relief, and the *Western Herald* supported it. Ibid., March 25, 1820.

183. *Niles Weekly Register*, August 14, 1819.

184. *Western Herald and Steubenville Gazette*, July 3, 1819.

185. Mason, *Slavery in Early Republic*, 153.

186. Ibid.

187. *AC*, 16:217, January 20, 1820.

188. *AC*, 16:254, January 25, 1820.

189. Quoted in Mason, *Slavery in Early Republic*, 183.

190. Jabez D. Hammond, *The History of Political Parties in the State of New-York* (Albany: C. Van Benthuysen, 1842; facsim. repr., Ann Arbor, Mich.: University Microfilms International, 1981).

191. Ibid., 2:18; Fox, "Negro Vote."

192. Jabez D. Hammond, *Political Parties in New-York*, 2:18.

193. Ibid., 16–17.

194. White suffrage at the gubernatorial and senatorial level was increased 158 percent. Hanyan and Hanyan, *De Witt Clinton*, 14.

195. John A. King to Rufus King, October 3, 1821, King Papers (unpublished).

196. *AC*, 16:229, January 20, 1820.

197. John W. Taylor to TJ, January 30, 1821; TJ to John W. Taylor, February 13, 1821, Taylor Papers.

198. *AC*, 16:228, January 20, 1820.

199. *LCRK*, 6: 300, quoting John Quincy Adams, *Memoirs*, 5:206.

CONCLUSION

1. For a similar conclusion, see Richard H. Brown, "Missouri Crisis."

2. TJ to Congressman John Holmes, April 22, 1820, available at Library of Congress, American Memory, http://memory.loc.gov/ammem/collections/jefferson_papers/.

APPENDIX A

1. In Virginia, causing the death of a slave through manslaughter was not punishable as late as 1774. Slaves had only recently been held to be "Subjects of the Realm," so that owners could be punished for mutilating them without court permission. Starke, *Justice of the Peace*, 326.

2. Slaves were prosecuted criminally without juries in summary proceedings in which the rules of evidence could be disregarded, and defendants' confessions (even if obtained by torture) were admissible. Fisher, "Ideology and Imagery."

3. William Waller Hening, *The New Virginia Justice, Comprising the Office and Authority of a Justice of the Peace, In the Commonwealth of Virginia. Together with a Variety of Useful Precedents Adapted to the Laws Now in Force* (Richmond, Va.: T. Nicolson, 1795), 416.

4. The American foreign slave trade may have been quite profitable, judging from the remarkably high insurance premiums often paid to cover slave-trading voyages. One 1785/86 slave voyage insurance policy proposed for issuance by a Newport, Rhode Island, insurer called for a premium of 11 percent of ship and cargo value, which would have been acceptable only if insureds expected to make a very large profit from the voyage. The policies specifically insured against shipboard slave insurrections. Samuel Sanford Papers, Newport Historical Society, Newport, R.I.

5. Apprentices and indentured servants were deemed free persons for many purposes. But during servitude, many rights of free people were denied to bound servants to minimize the cost of their labor.

6. For laws applicable to runaway servants and their enforcement in various colonies, see Richard B. Morris, *Government and Labor*, 415ff., 429, 434–61; and Smith, *Colonists in Bondage*.

7. For comparison of slaveowner rights to masters' rights regarding indentured servants, see Steinfeld, *Invention of Free Labor*, 32.

8. Wahl, *Bondsman's Burden*, 158; Fogel, *Without Consent or Contract*, 189–93.

9. Berlin, *Many Thousands Gone*, 270.

10. Blanck, "Revolutionizing Slavery," 150.

11. See, e.g., McManus, *Slavery in New York*, 93; Lorenzo J. Greene, *The Negro in Colonial New England, 1620–1776* (New York: Columbia University Press, 1942), 130–43.

APPENDIX B

1. Nash and Soderlund, *Freedom by Degrees*, 16.

BIBLIOGRAPHY

This bibliography provides information for all sources cited, except those previously listed in the Abbreviations section. To assist research, it also includes some sources that were consulted but not cited. It is organized as follows.

The first six sections provide data on primary source materials. Printed primary sources include books, pamphlets, speeches, and essays; statutes; reported judicial decisions; and historical periodicals, in that order.

Both historical periodicals, cited by specific date, and several periodicals consulted but not cited are included. Where an entire year of available issues of a periodical was reviewed but not cited, only the year is given. The list of historical periodicals does not include cited newspaper or magazine articles that are reprinted in collections of primary source documents, the most notable of which are *Doc. Hist. FFC* and *DHRC*. Nor does it include the results of database searches for newspaper articles. Relevant British, colonial, Confederation, state, and United States judicial decisions and statutes are included. Legal materials are in chronological order, except for state statutes, and all court decisions, which are in alphabetical order.

Manuscript primary source materials appear next. They include collections of papers and documents, unreported judicial decisions, reports of legal disputes, opinions, and instructions. For some judicial decisions, multiple reports of such decisions are available; more than one significant report may be cited for completeness.

Secondary source materials are presented next in the following order: books, book sections, works in periodicals, and dissertations and theses.

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