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**AFFIRMATIVE ACTION FOR THE MASTER CLASS:  
THE CREATION OF THE PROSLAVERY CONSTITUTION**

By

Paul Finkelman\*

At the turn of the Twentieth Century the great black scholar W.E.B. DuBois predicted that “the problem of the Twentieth Century is the problem of the color line.”<sup>1</sup> As we face the Twenty-First Century, it seems likely that the problem of the color line will remain. Race remains America’s greatest social problem, as it has since before the founding of the nation. Since 1776 Americans have repeatedly failed to implement our national credo, that all people “are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.”<sup>2</sup>

In sometimes aggressive, and sometime half-hearted ways, Americans have tried to solve the problem of racial inequality. Most recently the culture tried “affirmative action,” which was designed to affirmatively try to bring about equality of opportunity and even of outcome.<sup>3</sup> In the last decade courts have chipped away at affirmative action, and in many ways made it unusable as a tool to redress past and present discrimination.<sup>4</sup> Sometime in the early Twenty-First Century we are likely to see the end of affirmative action.

Whether the demise of affirmative action is good public policy or not is beyond the scope of this article. However, as we think about race, and its place in our society, it is

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<sup>1</sup> W.E.B. DUBOIS, *THE SOULS OF BLACK FOLKS* 13 (1904).

<sup>2</sup> DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

<sup>3</sup> See generally Paul Finkelman, *The Color of Law*, 87 NW. U. L. REV. 937 (1993) (reviewing ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992)) (describing the history of the use of race in American law); Paul Finkelman, *The Rise of the New Racism*, 15 YALE L. & POL’Y REV. 245 (1996) (reviewing DINESH D’SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* (1995)) (describing the recent conservative backlash to affirmative action and the attack on civil rights policy).

<sup>4</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 489 U.S. 469 (1989); *Adarand v. Peña*, 515 U.S. 200 (1995); *Hopwood v. Texas*, 78 F.3d 932 (5<sup>th</sup> Cir. 1996), *rev’g* 861 F. Supp. 551 (W.D. Tex. 1994), *reh’g denied*, 84 F.3d 720 (5<sup>th</sup> Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996); see generally AFFIRMATIVE ACTION AND THE CONSTITUTION VOLS. 1-3 (Gabriel J. Chin & Paul Finkelman eds., 1998).

useful to remember that when the United States began as a nation, it adopted an aggressive policy of affirmative action, written into the Constitution in many ways. That policy was designed to affirmatively protect slavery and slaveowners.

The Constitution of 1787 was a proslavery document, designed to prevent any national assault on slavery, while at the same time structured to protect the interests of slaveowners at the expense of African Americans and their antislavery white allies. To understand this earliest form of affirmative action, I begin with a view of the Constitution first articulated by the great abolitionist William Lloyd Garrison, and then turn to an examination of the Convention that wrote the Constitution and the document that convention produced.

### I. THE GARRISONIAN CONSTITUTION

William Lloyd Garrison, the great nineteenth century abolitionist, thought the Constitution was the result of a terrible bargain between freedom and slavery. The American states were, in Garrison's words, united by a "covenant with death" and "an agreement with Hell."<sup>5</sup> Garrison and his followers refused to participate in American electoral politics, because to do so they would have had to support "the present proslavery, war sanctioning Constitution of the United States."<sup>6</sup> Instead, under the slogan "No Union with Slaveholders," the Garrisonians repeatedly argued for a dissolution of the union.<sup>7</sup>

Part of the Garrisonians' opposition to continuing the Union stemmed from their desire to avoid the corruption that came from participating in a government created by the proslavery Constitution. But their position was also at least theoretically pragmatic. The Garrisonians were convinced that the legal protection of slavery in the Constitution made political activity futile, while support for the Constitution merely strengthened the stranglehold slavery had on America. In 1845, Wendell Phillips, Garrison's close friend and the most brilliant abolitionist speaker, pointed out that in the years since the adoption of the Constitution, Americans had witnessed "the slaves trebling in numbers--slaveholders monopolizing the offices and dictating the policy of the Government--prostituting the strength and influence of the Nation to the support of slavery here and elsewhere--trampling on the rights of the free States, and making the courts of the country their tools."<sup>8</sup> Phillips argued that this experience proved "that it is impossible

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<sup>5</sup> William Lloyd Garrison, *THE LIBERATOR*, May 6, 1842, at 3. *See also* JAMES BREWER STEWART, *HOLY WARRIORS: THE ABOLITIONISTS AND AMERICAN SLAVERY* 98-99 (1976).

<sup>6</sup> Letter from William Lloyd Garrison to Rev. Samuel J. May (July 17, 1845), *in* 3 *THE LETTERS OF WILLIAM LLOYD GARRISON*, at 303 (Walter M. Merrill, ed., 1973).

<sup>7</sup> WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 228-248 (1977) [hereinafter *SOURCES*].

<sup>8</sup> WENDELL PHILLIPS, *CAN ABOLITIONISTS VOTE OR TAKE OFFICE UNDER THE UNITED STATES CONSTITUTION* 3 (1845).

1999]

## AFFIRMATIVE ACTION FOR THE MASTER CLASS

for free and slave States to unite on any terms, without all becoming partners in the guilt and responsible for the sin of slavery.”<sup>9</sup>

The Garrisonians did not necessarily see the Constitution as the result of a deliberate conspiracy of evil men; rather, they understood it to be the consequence of political give-and-take at the Convention of 1787. Indeed, before the publication of Madison’s convention notes, the Garrisonians were not disunionist, and while unhappy with the Constitutional protections of slavery, were not yet ready to condemn the whole document. Some even argued that the Constitution favored liberty. However, the publication of *The Madison Papers*, which included Madison’s notes on the Convention, convinced Garrison and his followers that the Constitution was in fact proslavery. Rev. Samuel J. May, for example, recalled “the publication of the ‘Madison Papers’ . . . I confess, disconcerted me somewhat. I could not so easily maintain my ground in the discussions which afterwards agitated so seriously the Abolitionists themselves,—some maintaining that the Constitution was, and was intended to be, proslavery.”<sup>10</sup>

Thus, in his penetrating examination of the Convention, *The Constitution A Pro-Slavery Compact; or, Selections from the Madison Papers*, Wendell Phillips analyzed “that ‘compromise,’ which was made between slavery and freedom, in 1787; granting to the slaveholder distinct privileges and protection for his slave property, in return for certain commercial concessions on his part toward the North.”<sup>11</sup> Using Madison’s papers, Phillips argued that “the Nation at large were fully aware of this bargain at the time, and entered into it willingly and with open eyes.”<sup>12</sup> Phillips both exaggerated and understated the nature of the relationship between slavery and the Constitution. Certainly, some of those at the Convention “entered into” the bargain with great reservations, and many at the ratifying conventions may indeed not have seen the full extent of the “bargain.” On the other hand, the bargain involved more than commerce and slavery, it concerned the very creation of the Union itself.

Other nineteenth century antislavery thinkers disagreed with the Garrisonians. Salmon P. Chase, the most successful antebellum abolitionist politician, fought throughout the antebellum period to convince his colleagues, the judiciary, and northern voters that the Constitution was really antislavery.<sup>13</sup> Despite his creative attempts,

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<sup>9</sup> *Id.*

<sup>10</sup> SAMUEL J. MAY, SOME RECOLLECTIONS OF OUR ANTISLAVERY CONFLICT 143 (1869). May offered this confession after the Civil War was over, when he could “rejoice, therefore, with joy unspeakable that the question is at length practically settled . . .” *Id.* at 144.

<sup>11</sup> WENDELL PHILLIPS, THE CONSTITUTION: A PRO-SLAVERY COMPACT; OR, SELECTIONS FROM THE MADISON PAPERS 5 (2d. ed. 1845).

<sup>12</sup> *Id.* at 6.

<sup>13</sup> See generally ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 73-102 (1970); see also SALMON P. CHASE, AN ARGUMENT FOR THE DEFENDANT SUBMITTED TO THE SUPREME COURT OF THE UNITED STATES,

Chase's efforts failed. The United States Supreme Court almost always protected slavery in the cases it heard.<sup>14</sup> Likewise, almost all American presidents and their cabinet officers protected slavery in foreign and domestic politics. Perhaps most frustrating to the political abolitionists was the fact that some of their most brilliant allies in the crusade against slavery--the Garrisonians--agreed with their enemies on the meaning of the Constitution. Thus, one Ohio Liberty Party man ruefully noted after reading Wendell Phillips' pamphlet on the Constitution: "Garrison, Phillips, and Quincy; Calhoun, Rhett, and McDuffie; all harmoniously laboring to prevent such a construction of the Constitution as would abolish slavery."<sup>15</sup>

A careful reading of the Constitution reveals that the Garrisonians were correct: the national compact did favor slavery. A detailed examination of the Convention of 1787 explains how the Constitution evolved in this way. Both the text of the Constitution and the debates surrounding it help us understand that the "more perfect Union" created by this document was in fact fundamentally imperfect.

## II. SLAVERY IN THE CONSTITUTIONAL STRUCTURE

The word "slavery" appears in only one place in the Constitution--in the Thirteenth Amendment, where the institution is abolished. Throughout the main body of the Constitution, slaves are referred to as "other persons," "such persons," or in the singular as a "person held to Service or Labour." Why is this the case?

Throughout the debates the delegates talked about "blacks," "Negroes," and

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AT THE DECEMBER TERM, 1846, IN THE CASE OF WHARTON JONES VS. JOHN VAN ZANDT *photo. reprint* in FUGITIVE SLAVES AND AMERICAN COURTS: THE PAMPHLET LITERATURE, SERIES II, VOL. 1 at 341 (Paul Finkelman ed., Garland Publishing Co. 1988) (1847). This was Chase's written brief in *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847). Here Chase was unsuccessful in his attempt to persuade the Supreme Court to overturn the verdict against Van Zandt for helping a group of fugitive slaves claimed by Jones.

<sup>14</sup>See William M. Wiecek, *Slavery and Abolition Before The United States Supreme Court*, 65 J. AM. HIST. 34, 47-49 (1978-1979). Chase's only success before the Supreme Court was in *Norris v. Crocker*, which turned on a technical aspect of a statute 54 U.S. (13 How.) 429 (1851). See Paul Finkelman, *Fugitive Slaves, Midwestern Racial Tolerance, and the Value of Justice Delayed*, 78 IOWA L. REV. 89, 105-07 (1992). The only other antislavery success before the Supreme Court was in *United States v. Amistad*, which involved the illegal African slave trade and issues of international law. 40 U.S. (15 Pet.) 518 (1841). The Garrisonian analysis was not, of course, designed to give aid and comfort to defenders of slavery. The Garrisonians merely read the Constitution and the debates of the Convention and analyzed what they found. Similarly, an acceptance of the Garrisonian view of the Constitution--that it was a document which explicitly protected the institution of slavery--is not an endorsement of the Garrisonian cure: a rejection of political activity and disunion.

<sup>15</sup> Letter from George Bradburn to Gerritt Smith (Dec. 15, 1846) (Gerritt Smith Papers, box 4, on file at Syracuse University, Syracuse, New York).

1999] AFFIRMATIVE ACTION FOR THE MASTER CLASS

“slaves.” But the final document avoided these terms. The change in language was clearly designed to make the Constitution more palatable to the North. In a debate over representation, William Patterson of New Jersey pointed out that the Congress under the Articles of Confederation “had been ashamed to use the term ‘Slaves’ & had substituted a description.”<sup>16</sup> This shame over the word slave came up at the Convention during the debate over the African slave trade. The delegates from the Carolinas and Georgia vigorously demanded that the African trade remain open under the new Constitution. Gouverneur Morris of Pennsylvania, unable to contain his anger over this immoral compromise, suggested that the proposed clause read: the “Importation of slaves into N. Carolina, S-- Carolina & Georgia” shall not be prohibited.<sup>17</sup> Connecticut’s Roger Sherman, who voted with the deep South to allow the trade, objected, not only to the singling out of specific states, but also to the term slave. He declared he “liked a description better than the terms proposed, which had been declined by the old Congs & were not pleasing to some people.”<sup>18</sup> George Clymer of Pennsylvania “concurred with Mr. Sherman” on this issue.<sup>19</sup> In the North Carolina ratifying convention James Iredell, who had been a delegate in Philadelphia, explained that “[T]he word slave is not mentioned” because “[t]he northern delegates, owing to their particular scruples on the subject of slavery, did not choose the word slave to be mentioned.”<sup>20</sup> Thus, southerners avoided the term because they did not want unnecessarily to antagonize their colleagues from the North. As long as they were assured of protection for their institution, the southerners at the Convention were willing to do without the word “slave.”<sup>21</sup>

Despite the circumlocution, the Constitution directly sanctioned slavery in five provisions:<sup>22</sup>

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<sup>16</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 561 (Max Farrand ed. rev. ed. 1966) [hereinafter RECORDS].

<sup>17</sup> 2 *id.* at 415.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 176 (Jonathon Elliot ed., Burt Franklin 1987) (1888) [hereinafter DEBATES].

<sup>21</sup> STAUGHTON LYND, CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION: TEN ESSAYS 159-60 (1967).

<sup>22</sup> Curiously, Don Fehrenbacher finds that “only three [clauses of the Constitution] were directly and primarily concerned with the institution of slavery.” Fehrenbacher acknowledges only that other clauses “impinged upon slavery.” Fehrenbacher also asserts that “the Constitution had some bias toward freedom but was essentially open-ended with respect to slavery.” Fehrenbacher fails, however, to explain what part of the Constitution was profreedom, while at the same time ignoring many proslavery aspects of the Constitution. DON E. FEHRENBACHER, THE FEDERAL GOVERNMENT AND SLAVERY 3, 6 (1984). For an analysis of the Constitution closer to the one presented here, see SOURCES, *supra* note 7, at 62. Wiecek lists 11 separate clauses in the Constitution that “directly or indirectly accommodated the peculiar institution,” but makes no distinction between direct and indirect protections of

**Art. I, § 2, Cl. 3.** The three fifths clause provided for counting three-fifths of all slaves for purposes of representation in Congress. This clause also provided that, if any “direct tax” was levied on the states, it could be imposed only proportionately, according to population, and that only three-fifths of all slaves would be counted in assessing what each state’s contribution would be.

**Art. I, § 9, Cl. 1.** This clause prohibited Congress from banning the “Migration or Importation of such Persons as any of the States now existing shall think proper to admit” before the year 1808. Awkwardly phrased and designed to confuse readers, this clause prevented Congress from ending the African slave trade before 1808, but did not require Congress to ban the trade after that date. The clause was a significant exception to the general power granted to Congress to regulate all commerce.

**Art. I, § 9, Cl. 4.** This clause declared that any “capitation” or other “direct tax” had to take into account the three-fifths clause. It ensured that, if a head tax were ever levied, slaves would be taxed at three-fifths the rate of whites. The “direct tax” portion of this clause was redundant, because that was provided for in the three-fifths clause.

**Art. IV, § 2, Cl. 3.** The fugitive slave clause prohibited the states from emancipating fugitive slaves and required that runaways be returned to their owners “on demand.”

**Art.V.** This article prohibited any amendment of the slave importation or capitation clauses before 1808.

Taken together, these five provisions gave the South a strong claim to “special treatment” for its peculiar institution. The three-fifths clause also gave the South extra political muscle--in the House of Representatives and in the electoral college--to support that claim.

Numerous other clauses of the Constitution supplemented the five clauses that directly protected slavery. Some provisions that indirectly guarded slavery, such as the prohibition on taxing exports, were included primarily to protect the interests of slaveholders. Others, such as the guarantee of federal support to “suppress Insurrections” and the creation of the electoral college, were written with slavery in mind, although delegates also supported them for reasons having nothing to do with slavery. The most prominent indirect protections of slavery were:

**Art. I, § 8, Cl. 15.** The domestic insurrections clause empowered Congress to call

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slavery. *Id.* at 62-63.

1999] AFFIRMATIVE ACTION FOR THE MASTER CLASS

“forth the Militia” to “suppress Insurrections,” including slave rebellions.<sup>23</sup>

**Art. I, § 9, Cl. 5.** This clause prohibited federal taxes on exports and thus prevented an indirect tax on slavery by taxing the staple products of slave labor, such as tobacco, rice, and eventually cotton.

**Art. I, § 10, Cl. 2.** This clause prohibited the states from taxing exports or imports, thus preventing an indirect tax on the products of slave labor by a nonslaveholding state.<sup>24</sup> This was especially important to the slave states because almost all slave states produced export products-- tobacco, rice, and eventually cotton, were shipped out of Northern ports.

**Art. II, § 1, Cl. 2.** This clause provided for the indirect election of the president through an electoral college based on congressional representation. This provision incorporated the three-fifths clause into the electoral college and gave whites in slave states a disproportionate influence in the election of the president. This clause had a major impact on the politics of slavery as well as American history in general. Thomas Jefferson’s victory in the election of 1800 would be possible only because of the electoral votes the southern states gained on account of their slaves. Thus Jefferson, who spent most of his career either avoiding any conflict over slavery or protecting slavery, was elevated to the Presidency in part because of slavery.<sup>25</sup>

**Art. IV, § 3, Cl. 1.** This clause allowed for the admission of new states. The delegates to the Convention anticipated the admission of new slave states to the Union.

**Art. IV, § 4.** In the domestic violence provision of the guarantee clause the United States government promised to protect states from “domestic Violence,” including slave rebellions.

**Art. V.** By requiring a three-fourths majority of the states to ratify any amendment to the Constitution, this Article ensured that the slaveholding states would have a perpetual veto over any constitutional changes.<sup>26</sup>

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<sup>23</sup> Wendell Phillips considered this clause, and the clause in Art. IV, § 4, to be among the five key proslavery provisions of the Constitution. PHILLIPS, *supra* note 11, at 6.

<sup>24</sup> Although no slave state would have levied such a tax, a free state like New York, Massachusetts, or Pennsylvania might conceivably have taxed products produced in other states but exported through the harbors of New York, Boston, or Philadelphia.

<sup>25</sup> PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 105-37 (1996).

<sup>26</sup> Had all 15 slave states remained in the Union, they would to this day be able to prevent an amendment on any subject. In a 50-state union, it takes only 13 states to block any amendment.



Finally, some clauses did not inherently favor slavery, and were not necessarily considered to affect slavery when they were debated, but ultimately protected the institution when interpreted by the courts or implemented by Congress after the adoption of the Constitution. It would be wrong to argue that these illustrate the proslavery nature of the Constitutional Convention. However, these clauses do illustrate the way the Constitution set a proslavery tone, which led Congress and the Courts to interpret seemingly neutral clauses in favor of slavery. Such clauses also directly challenge William W. Freehling's argument that the Framers were inherently antislavery and that "The impact of the Founding Fathers on slavery . . . must be seen in the long run not in terms of what changed in the late eighteenth century but in terms of how the Revolutionary experience changed the whole of American antebellum history."<sup>27</sup> If we look at the "long run" impact of the Constitution on "American antebellum history" we find that the following clauses were used to protect slavery, not to harm it.

**Art. I, § 8, Cl. 4.** The naturalization clause allowed Congress to prohibit the naturalization of non-whites, even though it is likely that some of the new states, especially those which granted equality to blacks, would have also allowed foreign-born blacks to become citizens.

**Art. I, § 8, Cl. 17.** The federal district clause allowed Congress to regulate institutions, including slavery, in what became the national capital. Under this clause Congress allowed slavery in Washington, D.C. During the Convention southerners expressed fear that the national capital would be in the North.

**Art. III, § 2, Cl. 1.** The diversity jurisdiction clause limited the right to sue in federal courts to "Citizens of different States," rather than inhabitants. This clause allowed judges to deny slaves and free blacks access to federal courts.<sup>28</sup>

**Art. IV, § 1.** The full faith and credit clause required each state to grant legal recognition to the laws and judicial proceedings of other states, thus obligating free states to recognize laws creating and protecting slavery.

**Art. IV, § 2, Cl. 1.** The privileges and immunities clause required that states grant equal privileges and immunities to "citizens" of other states, while denying these protections to slaves and free blacks.<sup>29</sup>

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<sup>27</sup> William W. Freehling, *The Founding Fathers and Slavery*, 77 AMER. HIST. REV. 81, 82 (1972).

<sup>28</sup> The proslavery implications of this clause did not become fully apparent until the Supreme Court issued its opinion in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). There the Court held that even free blacks could not sue in diversity in federal courts.

<sup>29</sup> Throughout the antebellum period the slave states refused to grant privileges and immunities to free blacks from other states or countries. Most of the slave states prohibited

1999]

## AFFIRMATIVE ACTION FOR THE MASTER CLASS

**Art. IV, § 3, Cl. 2.** This clause allowed Congress the power to regulate the territories.

In 1820 Congress used this clause to limit slavery in the territories, but in *Dred Scott v. Sandford* the Supreme Court ruled that the clause authorized Congress to protect slavery in the territories, but not to ban the institution.<sup>30</sup>

Besides specific clauses of the Constitution, the structure of the entire document ensured against emancipation by the new federal government. Because the Constitution created a government of limited powers, Congress lacked the power to interfere in the domestic institutions of the states.<sup>31</sup> Thus, during the ratification debates only the most fearful southern antifederalists opposed the Constitution on the grounds that it threatened slavery. Most southerners, even those who opposed the Constitution for other reasons, agreed with General Charles Cotesworth Pinckney of South Carolina, who crowed to his state's house of representatives:

We have a security that the general government can never emancipate them, for no such authority is granted and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states.<sup>32</sup>

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free blacks from even entering their jurisdictions. In *Elkison v. Deliesseline*, 8 F. Cas. 493 (1823), Supreme Court Justice William Johnson refused to strike down such a law in South Carolina, although he believed it to be unconstitutional. For more on this problem, see PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 109 n.28 (1981); PAUL FINKELMAN, *SLAVERY IN THE COURTROOM* 256-63 (1985) (discussing *Elkison*); Paul Finkelman, *States' Rights North and South in Antebellum America*, in *AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH* 125-158 (Kermit L. Hall and James W. Ely, Jr., eds., 1989); *The Protection of Black Rights in Seward's New York*, 34 *CIV. WAR. HIST.* 211-234 (1988).

<sup>30</sup> 60 U.S. (19 How.) 393 (1857). In *Dred Scott*, Chief Justice Taney held unconstitutional the Missouri Compromise, which banned slavery in most of the western territories.

<sup>31</sup> Under various clauses of the Constitution the Congress might have protected, limited, or prohibited the interstate slave trade (Art. I, § 8, Cl. 3), slavery in the District of Columbia or on military bases (Art. I, § 8, Cl. 17), or slavery in the territories (Art. IV, § 3, Cl. 2). None of these clauses permitted Congress to touch slavery in the states. Some radical abolitionists argued that under the guarantee clause, Art. IV, § 4, Congress had the right to end slavery in the states. See SOURCES, *supra* note 7, at 269-271. The delegates in Philadelphia did not debate these clauses with slavery in mind, although, as will be shown in Part IV of this essay, the commerce clause was accepted as part of a bargain over the african slave trade.

<sup>32</sup> 4 *DEBATES*, *supra* note 20, at 286. Patrick Henry, using any argument he could find to oppose the Constitution, feared that, "[a]mong ten thousand *implied powers* which they may assume, they may, if we be engaged in war, liberate every one of your slaves if they please." 3 *id.* at 589. Ironically, the implied war powers of the president would be used to end slavery, but only after the South had renounced the Union.

The Constitution was not “essentially open-ended with respect to slavery,” as Don Fehrenbacher has argued.<sup>33</sup> Nor is it true, as Earl Maltz has argued, that “the Constitution . . . took no position on the basic institution of slavery.”<sup>34</sup> On the contrary, the Constitution provided enormous protections for the peculiar institution of the South at very little cost to that region. At the Virginia ratifying convention Edmund Randolph denied that the Constitution posed any threat at all to slavery. He challenged opponents of the Constitution to show, “*Where is the part that has a tendency to the abolition of slavery?*”<sup>35</sup> He answered his own question asserting, “Were it right here to mention what passed in [the Philadelphia] convention . . . I might tell you that *the Southern States, even South Carolina herself, conceived this property to be secure*” and that “there was not a member of the Virginia delegation who had the *smallest suspicion of the abolition of slavery.*”<sup>36</sup> South Carolinians, who had already ratified the Constitution, would have agreed with Randolph. In summing up the entire Constitution, General Charles Cotesworth Pinckney, who had been one of the ablest defenders of slavery at the Convention, proudly told the South Carolina House of Representatives: “In short, considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could; but on the whole, I do not think them bad.”<sup>37</sup>

General Pinckney had good reason to be proud of his role in Philadelphia. Throughout the Convention Pinckney and other delegates from the Deep South tenaciously fought to protect the interests of slaveholders. In these struggles they were usually successful.

When they arrived at the Convention the delegates probably did not think slavery would be a pressing issue. Rivalries between large and small states appeared to pose the greatest obstacle to a stronger Union. The nature of representation in Congress; the power of the national government to levy taxes, regulate commerce, and pay off the nation’s debts; the role of the states under a new constitution; and the power of the executive were on the agenda. Yet, as the delegates debated these issues, the importance of slavery--and the sectional differences it caused--became clear.<sup>38</sup>

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<sup>33</sup> FEHRENBACHER, *supra* note 22, at 6 n.2.

<sup>34</sup> Earl Maltz, *Slavery, Federalism, and the Structure of the Constitution*, 36 AM. J. LEGAL HIST. 466, 468 (1992). Maltz argues that because of its respect for federalism the Constitution did not affect slavery as it existed in the states. *Id.* However, the Constitution interfered with the power of the states in other areas, such as denying them the right to abridge contracts, coin money, set up their own foreign policy, or tax exports or imports. Surely it would not have been beyond the scope of the Constitution to allow Congress to regulate slavery in the states in a number of ways.

<sup>35</sup> 3 DEBATES, *supra* note 20, at 598.

<sup>36</sup> *Id.* at 599.

<sup>37</sup> 4 *id.* at 286.

<sup>38</sup> It is perhaps an exaggeration to assert, as Staughton Lynd has, that the “sectional conflict between North and South was the major tension in the Convention,” simply because

1999]

## AFFIRMATIVE ACTION FOR THE MASTER CLASS

Throughout the summer of 1787 slavery emerged to complicate almost every debate. Most important by far was the way slavery figured in the lengthy debate over representation.

## III. SLAVERY AND CONGRESSIONAL REPRESENTATION

On May 29, Governor Edmund Randolph of Virginia submitted the series of resolutions known as the Virginia Plan to the Convention. Randolph introduced these resolutions in response to the “crisis” of the nation “and the necessity of preventing the fulfilment[sic] of the prophecies of the American downfall[sic].”<sup>39</sup> This plan would create an entirely new form of government in the United States. The power of the central government would be vastly enhanced at the expense of the states. The new Congress would have greater powers to tax, to secure the nation “against foreign invasion,” to settle disagreements between states, and to regulate commerce.<sup>40</sup>

Randolph’s plan called for a radical restructuring of the American government by making population the basis for representation in the national Congress. Under the Articles of Confederation, each state had one vote in Congress. By changing the basis of representation to population, Randolph’s plan immediately created tensions between the large and small states at the Convention. But the plan also raised the dilemma of whether slaves would be counted for the purposes of determining how many representatives each state would get in the new Congress. This dilemma of how to count slaves, or whether to count them at all, would trouble the delegates throughout the Convention.

Virginia was the most populous state in the nation, and thus Randolph had a vested interest in basing Congressional representation on population. But how that population would be counted greatly affected the potential representation of Virginia and the rest of the South. Virginia’s white population, as the 1790 census would reveal, was only slightly larger than Pennsylvania’s. If representation were based solely on free persons, the North would overwhelm the South.<sup>41</sup> But if slaves were counted equally with free

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there were so many other “major” tensions. LYND, *supra* note 21, at 159-60. It is clear, however, that sectional conflicts and the role of slavery in the new nation caused as much tension as any other individual issue.

<sup>39</sup> 1 RECORDS, *supra* note 16, at 18.

<sup>40</sup> *Id.*

<sup>41</sup> In the first Congress the North had 35 representatives and the South had 30. However, after the first federal census the original northern states had 55 members of Congress, the southern states had only 44. Had slaves not been counted for congressional representation, the South’s members of the House after 1790 would have been only about 34. In this article I consider the North to be those states which ended slavery before the beginning of the Civil War and the South to include those states which retained slavery until the War. Thus, I consider Delaware to be a southern state, but not New Jersey or New York, although neither

persons, the Virginia delegation would be overwhelmingly larger than the delegation of any other state, and the South would have more members of Congress than the North. The Virginians, of course, realized that the northern states were unlikely to embrace enthusiastically a system of government that counted slaves for purposes of representation. Thus, Randolph's plan hedged the issue, declaring "that the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases."<sup>42</sup> Randolph's avoidance of the term "slaves" by referring to "Quotas of contribution" indicates the sensitivity of the subject.

Squabbling over slavery began in earnest the next day, May 30. James Madison moved to delete the term "free inhabitants" from the Virginia Plan because he felt the phrase "might occasion debates which would divert" attention "from the general question whether the principle of representation should be changed" from states to population.<sup>43</sup> Madison understood that an early debate on the role of slavery in the Union might destroy the Convention before it got started. But his proposal would have left representation based solely on "Quotas of contribution," and this was also unacceptable to most delegates. Madison himself agreed "that some better rule ought to be found."<sup>44</sup> Alexander Hamilton then proposed that representation be based solely on the number of "free inhabitants" in each state.<sup>45</sup> This proposal was also too volatile and the delegates quickly tabled it. Other attempts at compromise failed. Finally, the Delaware delegates helped put a temporary end to this divisive discussion by telling the Convention that they "were restrained by their commission from assenting to any change on the rule of suffrage," and if the body endorsed any change in representation, they would be forced to leave the Convention. The Convention, having successfully postponed this acrimonious debate, adjourned for the day.<sup>46</sup>

The Convention intermittently debated representation for the next two weeks, but it was not until June 11 that the issue of slavery reemerged to complicate the debate. On that day the Convention considered for the first time, and also approved provisionally,

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had taken steps to end slavery before the Convention. New York passed its gradual emancipation act in 1799, New Jersey in 1804.

<sup>42</sup> 1 RECORDS, *supra* note 16, at 20. In 1790 Virginia had a free population of 454,983. The next largest free populations were Pennsylvania, 430,630; Massachusetts, 378,693; and New York, 318,824. Virginia also had 292,627 slaves, whereas the entire North had only 40,089 slaves.

<sup>43</sup> *Id.* at 36.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 37-38. It seems likely that the Delaware delegation exaggerated the constraints on their commission in a shrewd attempt to avoid a potentially catastrophic debate over slavery and representation. When the Convention did in fact adopt representation based on population, the Delaware delegates remained and did not threaten to leave.

1999] AFFIRMATIVE ACTION FOR THE MASTER CLASS  
 the three-fifths clause. Over the next three months the Convention would, on a number of occasions, redebate and reconsider the three-fifths clause before finally adopting it.<sup>47</sup>

The evolution of the three-fifths clause during the Convention shows that the clause was not essentially a compromise over taxation and representation, as historians have traditionally claimed, and as the structure of Article I, § 2, Cl. 3 implies.<sup>48</sup> Rather, it began as a compromise between those who wanted to count slaves fully for purposes of representation and those who did not want to count slaves at all. Thus, on this crucial question the slave states won a critical victory without making any important concessions.

On June 11, Roger Sherman of Connecticut proposed that representation be based on the “numbers of free inhabitants” in each state.<sup>49</sup> John Rutledge and Pierce Butler of South Carolina objected, arguing for representation according to “quotas of contribution,” which had become a euphemism for counting slaves in a formula for representation.<sup>50</sup> James Wilson and Charles Pinckney, the younger cousin of General Charles Cotesworth Pinckney, skillfully headed off the Rutledge-Butler proposal.

Wilson proposed and Pinckney seconded, a motion that ultimately became the three-fifths clause. Here for the first time was an example of cooperation between the North and the South over slavery. Significantly, Wilson was known to dislike slavery and came from a state, Pennsylvania, which had already adopted a gradual emancipation

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<sup>47</sup> Approval by the Convention did not mean permanent adoption, for until June 20 the Convention debated the proposed Constitution as a Committee of the Whole, which allowed for full discussion without binding the delegates to any final resolution of an issue. Anything approved by the Convention as a Committee of the Whole would have to be voted on again when the Convention was in regular session. Furthermore, under the standing rules of the Convention, delegates were free to ask for a reconsideration of decisions on one day’s notice. Finally, all clauses of the new Constitution were eventually sent to two drafting committees, the Committee of Detail and the Committee of Style. The reports of these committees were also subject to full debate and amendment by the entire Convention.

<sup>48</sup> Historians presenting the traditional view include FRANCIS NEWTON THORPE, *THE STORY OF THE CONSTITUTION OF THE UNITED STATES* 131 (1891); MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 108 (1913); CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 290-291, 584-586 (1928); CLINTON ROSSITER, *1787: THE GRAND CONVENTION* 173, 188-189 (1966).

<sup>49</sup> 1 RECORDS, *supra* note 16, at 196.

<sup>50</sup> *Id.* This motion by Sherman somewhat undermines the traditional notion of a split between the “small” and “large” state over representation. Sherman, from the small state of Connecticut, was willing to accept population as a basis for representation in the lower house of the legislature, as long as slaves were not counted, and provided that there was equality in the upper house. A week earlier George Mason of Virginia had suggested the importance of sectionalism in a long speech arguing for an executive “vested in three persons, one chosen from the Northern, one from the Middle, and one from the Southern States” *Id.* at 112-13.

scheme. Nevertheless, harmony at the Convention was more important to Wilson than the place of slavery in the new nation. By teaming up, the nominally antislavery Pennsylvanian and the rabidly proslavery Carolinian may have hoped to undercut the antislavery sentiments of other northern delegates while also satisfying the demands of the proslavery delegates like Butler and Rutledge.<sup>51</sup>

Most delegates seemed to accept this proposal. However, Elbridge Gerry of Massachusetts was unwilling to compromise. With some irony he protested, “Blacks are property, and are used to the southward as horses and cattle to the northward; and why should their representation be increased to the southward on account of the number of slaves, than horses or oxen to the north?”<sup>52</sup> Gerry believed this would be an appropriate rule for taxation, but not for representation, because under it four southern voters would have more political power than ten northern voters.<sup>53</sup> He also argued that this clause would degrade freemen in the North by equating them with slaves.<sup>54</sup> He wondered “Are we to enter into a Compact with Slaves?”<sup>55</sup> No other northerner opposed representation for slaves at this time, and the Convention sitting as a Committee of the Whole voted in favor of the three-fifths clause.

Thus, with little debate the Convention initially accepted the three-fifths clause as a basis for representation. The clause, which would give the South enormous political leverage in the nation, was accepted without any quid pro quo from the South. Application of the clause to taxation would not come until later in the Convention. Indeed, there was no reason in mid-June to believe it would ever be applied to taxation. A brief history of the three-fifths ratio, prior to 1787, bears this out.

The ratio of three slaves to five free persons was first proposed in the Congress in 1783 as part of an overall program for the national government to raise revenue from the states. The ratio was controversial. Southerners thought it overvalued slaves, and northerners thought it undervalued them. Delegates from Virginia and South Carolina, the states with the most slaves, wanted taxation based on land values. Congress initially rejected and then later resurrected the entire package, which called for taxation based on population. Congress then sent the package to the states as an amendment to the Articles of Confederation. However, this amendment failed to achieve the necessary unanimous support of all the states, and thus was not added to Articles of

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<sup>51</sup> For a more complete discussion of Wilson’s position on slavery, see Paul Finkelman, *Slavery, The Pennsylvania Delegation, and the Peculiar Institution: The Two Faces of the Keystone State*, 112 PA. MAG. HIST. AND BIOGRAPY, 49 (1988).

<sup>52</sup> 1 RECORDS, *supra* note 16, at 206.

<sup>53</sup> *Id.* at 205-06.

<sup>54</sup> *Id.*

<sup>55</sup> SUPPLEMENT TO MAX FARRAND’S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 69-70 (James H. Hutson ed., 1987) [hereinafter SUPPLEMENT].

1999] AFFIRMATIVE ACTION FOR THE MASTER CLASS  
Confederation.<sup>56</sup>

This history of the three-fifths clause shows there is little substance to the traditional view that the three-fifths clause “was a legacy from the Congress of 1783” or that “most northern delegates must have realized even before they arrived in Philadelphia that it would be the minimum price of southern acceptance of any new constitution.” The only useful legacy of the Congress of 1783 was the numerical ratio itself, which Congress had applied only to taxation.<sup>57</sup> The application of the ratio to representation was an entirely new concept.

The meaning of the three-fifths clause to the delegates in Philadelphia was clear in the report of the Committee of the Whole on June 13, which stated that representation would be “in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years and three fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes in each State.”<sup>58</sup> The phrasing of the term “white and other free citizens and inhabitants” clearly implied that the “other persons” were neither white nor free.<sup>59</sup> By mid-June a majority in the Convention had accepted the principle that representation in the national Congress would be based on population and that three-fifths of the slave population would be added to the free population in determining representation. However, a minority of the delegates, led by those from New Jersey, were still unhappy with this plan.

On June 15 New Jersey delegate William Paterson introduced what is commonly known as the New Jersey Plan. The plan rejected congressional representation based on population and, instead, retained the system of representation then in force under the Articles of Confederation: that the states would have an equal number of delegates in

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<sup>56</sup> The debate over the three-fifths ratio in the Congress is in 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 948-952 (Worthington Chauncey Ford et. al., eds. 1922) (debates of Mar. 28 - Apr. 1, 1783). See also 24 *id.* at 214-216, 223-24.

<sup>57</sup> ROSSITER, *supra* note 48, at 173; DONALD L. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820 156-158 (1971). Max Farrand adopted a similar analysis arguing that “one finds references in contemporary writings to the ‘Federal ratio,’ as if it were well understood what was meant by that term.” FARRAND, *supra* note 48, at 108. It is probably true that many of the delegates at the Convention accepted the ratio of three to five as a proper one for determining the value of slaves in society, but this does not mean that they agreed the ratio ought to be applied to representation.

<sup>58</sup> 1 RECORDS, *supra* note 16, at 227.

<sup>59</sup> *Id.* The final draft of the Constitution would omit the word “white,” thus leading the antislavery radical Lysander Spooner to argue that the “other persons” referred to resident aliens. LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 94 (1845). Spooner’s argument seems more polemical than serious. Whatever strength it had lay in the ambiguity of the wording of the Constitution, which avoided such terms as “slave,” “white,” and “black.”



the Congress. For the next fifteen days the Convention debated, without any reference to slavery, whether representation in Congress would be based on population. In most of the votes on this issue the South (except Delaware) supported population-based representation. These votes were predicated on the assumption that the three-fifths clause, which had already been accepted, would be part of the basis of representation. The southern delegates also expected their region to grow faster than the North, and thus representation based on population would help them in the long run. But, even if whites did not move south, slaves could still be imported. Southerners, confident that a growing slave population would augment their representation in Congress, consistently supported population as the basis of that representation.<sup>60</sup>

By June 30 the Convention was at a standstill. The states in favor of population-based representation had enough votes to adopt their scheme. But if they were unable to persuade the delegates from the smaller states to acquiesce on this point, the Convention itself would fail. In the middle of this debate Madison offered a new mode of analysis for the delegates. He argued:

[t]hat the States were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from (the effects of) their having or not having slaves. These two causes concurred in forming the great division of interests in the U. States. It did not lie between the large and small States: it lay between the Northern and Southern, and if any defensive power were necessary, it ought to be mutually given to these two interests.<sup>61</sup>

So Madison proposed two branches of Congress, one in which slaves would be counted equally with free people to determine how many representatives each state would have, and one in which slaves would not be counted at all. Under this arrangement, “the Southern Scale would have the advantage in one House, and the Northern in the other.”<sup>62</sup> Madison made this proposal despite his reluctance to “urge any diversity of interests on an occasion when it is but too apt to arise of itself. . . .”<sup>63</sup>

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<sup>60</sup> See generally LYND, *supra* note 21, at 185-213. Gunning Bedford of Delaware observed in the debates of June 30 that Georgia, “[t]hough a small State at present,” was “actuated by the prospect of soon being a great one. S. Carolina is actuated both by present interest and future prospects.” 1 RECORDS, *supra* note 16, at 491. North Carolina had “the same motives of present and future interest.” *Id.*

<sup>61</sup> 1 RECORDS, *supra* note 16, at 486.

<sup>62</sup> *Id.* at 487.

<sup>63</sup> *Id.* The day before, June 29, Alexander Hamilton had made a similar observation. Hamilton, not surprisingly perhaps, saw the issue solely in economic terms. “The only considerable distinction of interests, lay between the carrying and non-carrying States, which divide instead of uniting the largest States” *Id.* at 466.

1999]

## AFFIRMATIVE ACTION FOR THE MASTER CLASS

The Convention ignored Madison's proposal. He may have offered it simply to divert attention from the heated debate between the large and small states. If this was indeed his goal, he was not immediately successful. The small states, led by Delaware, continued to express fear that they would be swallowed up by larger states if representation in the Congress were based solely on population.<sup>64</sup>

Subsequent debates, however, reveal the validity of Madison's analysis that sectionalism--caused by slavery--was a major cause of division within the Convention and the nation. Indeed, slavery continued to complicate the Convention debates long after the division between large and small states had evaporated. On July 2, Charles Pinckney argued that there was "a solid distinction as to interest between the southern and northern states."<sup>65</sup> Pinckney noted that the Carolinas and Georgia "in their Rice and Indigo had a peculiar interest which might be sacrificed" if they did not have sufficient power in any new Congress.<sup>66</sup> Immediately after this speech the Convention accepted a proposal by General Charles Cotesworth Pinckney to send the entire question of representation to a committee of one delegate from each state. The Convention then adjourned until July 5.

On July 5 the committee proposed what historians have since called the Great Compromise. Under this plan representation in the lower house of the legislature would be based on population, and in the upper house the states would have an equal vote.<sup>67</sup> The three-fifths clause was a part of this proposal.

On July 6 the Convention once again approved the concept of representation based on population for the lower house of the Congress. The Convention then chose a five-

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<sup>64</sup> As if to directly refute Madison's sectional arguments, Delaware's Gunning Bedford argued that his state had little in common with "South Carolina, puffed up with the possession of her wealth and negroes," or Georgia and North Carolina. All three states had "an eye" on "future wealth and greatness," which was predicated on slavery, and thus they were "united with the great states" against the smaller states like Delaware. *Id.* at 500. Nevertheless, Delaware would remain a slave state until the adoption of the Thirteenth Amendment. New Jersey, which also opposed representation based on population, might also be considered a slave state. At this time New Jersey had taken no steps to end slavery. New Jersey would be the last northern state to pass a gradual emancipation statute, not doing so until 1804. See generally ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* (1967). In the Virginia ratifying convention James Madison asserted that New York and New Jersey would "probably, oppose any attempts to annihilate this species of property." 3 DEBATES, *supra* note 20, at 459. However, as William Paterson's subsequent antis lavery statements suggest, the New Jersey delegates were even more offended by counting slaves for purposes of representation than they were fearful of population-based representation.

<sup>65</sup> 1 RECORDS, *supra* note 16, at 516.

<sup>66</sup> *Id.* at 510.

<sup>67</sup> *Id.* at 526.

man committee to redraft the clause. In the absence of a census this committee would also have to recommend to the Convention the number of representatives that each state would get in the First Congress. Before the Convention adjourned for the day, Charles Pinckney again raised sectional issues connected to slavery, arguing that “blacks ought to stand on an equality with whites,” but he “w[oul]d.... agree to the ratio settled by Congs.”<sup>68</sup>

Pinckney’s argument here was doubly significant. First, in a debate that had nothing to do with slavery per se, Pinckney raised the issue, as if to warn the Convention not to forget the special needs of the South. Second, Pinckney made it clear that he (and presumably other southerners) thought that the three-fifths rule for counting slaves was a great concession.

On July 9 the committee of five reported its recommendations. Committee member Gouverneur Morris admitted that the allocations in the report were “little more than a guess.”<sup>69</sup> A number of delegates were dissatisfied with these guesses, because in allocating representation for the first congress the committee had taken into account “the number of blacks and whites.”<sup>70</sup> This action led William Paterson to register a protest--only the second so far in the Convention--against the three-fifths clause. This was the beginning of a four-day debate over slavery and representation. Paterson declared he regarded

negroes slaves in no light but as property. They are no free agents, have no personal liberty, no faculty of acquiring property, but on the contrary are themselves property, and like other property entirely at the will of the Master.<sup>71</sup>

Paterson pointedly asked, “Has a man in Virga. a number of votes in proportion to the number of his slaves?”<sup>72</sup> He noted that slaves were not counted in allocating representation in southern state legislatures, and asked, “[W]hy should they be represented in the Genl. Gov’t[?]”<sup>73</sup> Finally, Paterson argued that counting slaves for purposes of representation encouraged the slave trade.<sup>74</sup>

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<sup>68</sup> *Id.* at 542.

<sup>69</sup> *Id.* at 560.

<sup>70</sup> 1 RECORDS, *supra* note 16, at 559.

<sup>71</sup> *Id.* at 561.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* Paterson’s animosity towards counting slaves is indicated in an analysis of state population, *reprinted in* 1 RECORDS, *supra* note 16, at 572-73. Paterson tried to estimate the population of each state and the numbers of slaves that would augment representation. For the Deep South he noted, “In the lower States the acc[oun]ts are not to be depended on.” *Id.* at 572. Paterson was of course correct about the allocation of representation in the slave states. No slave state at this time based

1999]

## AFFIRMATIVE ACTION FOR THE MASTER CLASS

In response, Madison once again proposed that representation in one house of the legislature be based on total population and the other on only the free population. Pierce Butler again argued for wealth as a basis for representation.<sup>75</sup> This proposal, of course, meant that slaves would be counted equally with whites. Rufus King of Massachusetts gave unexpected support to Butler by warning that the South would not unite with the rest of the country “unless some respect were paid to their superior wealth.”<sup>76</sup> Furthermore, King reminded his northern colleagues that, if they expected “preferential distinctions in Commerce,” they should be willing to give up something.<sup>77</sup> At least at this point in the Convention, King was willing to accept the three-fifths ratio for representation. Here was the beginning of a major compromise between the deep South and the commercially oriented states of the North. At the moment, King and other northerners were offering the three-fifths clause to the South, but the South offered no concession in return.

This debate resulted in the appointment of yet another committee to come up with a new proposal for representation in the first congress. This committee reported its deliberations the next day, July 10, and the Convention debated them. Like the previous committee, this one had to calculate representation in the First Congress without the benefit of a census. This allocation, which was later written into the Constitution, gave the North thirty-five seats in Congress while giving the South 30.<sup>78</sup> Not surprisingly, some delegates objected to the apportionment for their states. More important, though, was the sectional animosity that these allocations stimulated.

Almost immediately John Rutledge and Charles Cotesworth Pinckney of South Carolina moved to reduce New Hampshire’s representatives from three to two. Although on the previous day Rufus King had supported Pierce Butler’s demand for more southern representation, he now defended the committee’s apportionment, warning that the New England states would not accept any reduction in their representation. King also endorsed Madison’s analysis of sectionalism, arguing that “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.”<sup>79</sup> King nevertheless continued to seek compromise and explicitly recognized the need “for the security of

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representation solely on population. In Virginia, for example, each county had two representative in the lower house of the state legislature. In South Carolina the representatives per parish varied, but the allocations were not based on slave population. In 1808, when South Carolina did go to a population-based system, the representatives were allocated according to “the whole number of white inhabitants in the State.”

<sup>75</sup> *Id.* at 562.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> 1 RECORDS, *supra* note 16, at 563. *See also* U.S. CONSTITUTION, Art. I, § 2, Cl. 3.

<sup>79</sup> 1 RECORDS, *supra* note 16, at 566.

the Southern” interests.<sup>80</sup> For this reason he acquiesced to the three-fifths rule and was even willing to consider “a still greater security” for the South, although he admitted he did not know what that might be.<sup>81</sup> But he also asserted that “[n]o principle would justify giving” the South “a majority” in Congress.<sup>82</sup>

Charles Cotesworth Pinckney responded that the South did not require “a majority of representatives, but [he] wished them to have something like an equality.”<sup>83</sup> Otherwise, Congress would pass commercial regulations favorable to the North, and the southern states would “be nothing more than overseers for the Northern States.”<sup>84</sup> Hugh Williamson of North Carolina agreed, arguing that under the present system the North would get a majority in Congress which it would never relinquish, and thus “the Southn. Interest must be extremely endangered.”<sup>85</sup>

Gouverneur Morris of Pennsylvania, who was emerging as the Convention’s most vocal opponent of concessions to slavery, became the first delegate to challenge the assumption that the South was richer than the North and therefore deserved greater representation in Congress. He also argued that, in time of emergency, northerners would have to “spill their blood.”<sup>86</sup> Madison’s notes unfortunately do not contain the full text of Morris’s statement. But the implications are clear. Northerners would have to “spill their blood” because there were more free people in the North than in the South and because slavery made the South an unreliable ally in wartime.

After various unsuccessful attempts to reduce representation for some northern states or increase representation for some southern states, the Convention adopted an apportionment scheme for representation in the First Congress by a vote of nine to two. The negative votes did not come from the smallest states, but from the most southern, South Carolina and Georgia.<sup>87</sup> The delegates from these two states made their point: they must have protection for slavery or they would oppose the Constitution.

The next day, July 11, the Convention debated the provision for a census to determine future representation in Congress. Hugh Williamson of North Carolina amended the provision under consideration to explicitly include the three-fifths clause for counting slaves. Still dissatisfied with the three-fifths clause, Butler and Charles Cotesworth Pinckney of South Carolina “insisted that blacks be included in the rule of

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> 1 RECORDS, *supra* note 16, at 567.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 570.

1999]

## AFFIRMATIVE ACTION FOR THE MASTER CLASS

Representation, *equally* with the Whites,” and moved to delete the three-fifths clause.<sup>88</sup>

Butler argued that “the labour of a slave in S. Carola. was as productive and valuable as that of a freeman in Massachusetts,” and since the national government “was instituted principally for the protection of property,” slaves should be counted fully for representation.<sup>89</sup> The Convention quickly rejected the Butler-Pinckney proposal.

The defeat of the Butler-Pinckney resolution did not end the debate over slavery and representation. A motion to require Congress to take a census of all “free inhabitants” passed on a slim six-to-four vote, with four slave states voting no. The Convention then began debating the motion to count three-fifths of all slaves. King and Gorham of Massachusetts expressed reservations, and Sherman of Connecticut urged conciliation.

James “ of Pennsylvania, who had initially proposed the three-fifths clause, supported it on pragmatic grounds. Admitting he “did not well see on what principle the admission of blacks in the proportion of three fifths could be explained.”<sup>90</sup> He asked, if slaves were citizens “why are they not admitted on an equality with White Citizens?”<sup>91</sup> But, if slaves were “admitted as property” it was reasonable to ask, “[T]hen why is not other property admitted into the computation?”<sup>92</sup> But Wilson argued that these logical inconsistencies “must be overruled by the necessity of compromise.”<sup>93</sup> Gouverneur Morris, also representing Pennsylvania, was not so willing to sacrifice principle. Having been “reduced to the dilemma of doing injustice to the Southern States or to human nature,” Morris chose the former, asserting that he “could never agree to give such encouragement to the slave trade” by allowing the slave states “a representation for their negroes.”<sup>94</sup> The three-fifths clause then failed, by a vote of four to six. However, this defeat was not solely the result of Morris’s arguments in favor of principle: two slave states opposed the measure as well as three northern states.<sup>95</sup>

The next day, July 12, the three-fifths clause was back on the floor, directly tied to taxation for the first time. The debate was the most divisive yet on slavery. Six southerners, representing Virginia, North Carolina, and South Carolina, addressed the

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<sup>88</sup> 1 RECORDS, *supra* note 16, at 580.

<sup>89</sup> *Id.* at 580-581.

<sup>90</sup> *Id.* at 587.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> 1 RECORDS, *supra* note 16, at 587.

<sup>94</sup> *Id.* at 588.

<sup>95</sup> *Id.* South Carolina apparently opposed the three-fifths clause because the state was holding out for full representation for slaves. Maryland opposed the clause because of its current wording. Thus, even though the three-fifths clause had been defeated, it seemed that a majority in favor of it could be found. Delaware, also a slave state, voted no, but this was because that state consistently opposed any representation scheme based on population.

issue. Their collective demand was clear: either give the South substantial representation for its slave population, or the South would oppose the Constitution. Randolph, who had so far avoided the debates over slavery, “lamented that such a species of property existed,” but nevertheless “urged strenuously that express security ought to be provided for including slaves in the ratio of Representation.”<sup>96</sup> Meanwhile, the South Carolinians, as might be expected, demanded full representation for slaves, declaring themselves willing, even eager, to be taxed fully for their slaves in return for full representation for their slaves.<sup>97</sup> William R. Davie of North Carolina, had been virtually silent throughout the Convention, now declared “it was high time now to speak out.”<sup>98</sup> Davie warned that North Carolina would “never confederate” unless slaves were counted, at the very least, under a three-fifths ratio.<sup>99</sup> Davie threatened that if some representation for slaves was not adopted, “the business [of the convention] was at an end.”<sup>100</sup>

Only Gouverneur Morris was prepared to call Davie’s bluff. Morris warned that Pennsylvania would “never agree to a representation of Negroes,” but he also agreed that it was “vain for the Eastern states to insist on what the Southn States will never agree to.”<sup>101</sup> As much as Morris wished “to form a compact for the good of America,” he seemed ready to risk failure on the issue of slave representation.<sup>102</sup> Although no other northern delegate was willing to join Morris on this issue, Oliver Ellsworth and William Samuel Johnson of Connecticut strongly supported southern interests, foreshadowing an emerging compromise between New England and the South over slavery and commerce. After a heated debate, the Convention finally adopted the three-fifths clause by a vote of six to two, with two states divided.<sup>103</sup>

After more than a month and a half of anguished argument, the Convention had finally resolved the issue of representation for what would become the House of Representatives. Throughout, slavery had constantly confused the issue and thwarted compromise. Sectional interests caused by slavery had emerged as a major threat to the Union. At this juncture in the Convention the smaller states still feared the larger ones;

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<sup>96</sup> *Id.* at 594.

<sup>97</sup> *Id.*

<sup>98</sup> 1 RECORDS, *supra* note 16, at 593.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> 1 RECORDS, *supra* note 16, at 597. The two divided delegations were Massachusetts and South Carolina. In the former delegation some members apparently opposed this concession to the South. In the latter, some members apparently were holding out for full representation for slaves. In this debate Pierce Butler had argued for full representation for blacks. *Id.* at 592. The two negative votes came from Delaware and New Jersey, states which had consistently opposed population-based representation.

1999]

## AFFIRMATIVE ACTION FOR THE MASTER CLASS

however, the northern and southern states had also come to openly distrust each other. In the last debate over representation, General Charles Cotesworth Pinckney declared he was “alarmed” over statements about slavery by northern delegates.<sup>104</sup> His alarm would soon spread to other southern delegates.

No sooner had the Convention laid to rest the issue of representation than it re-emerged as part of the debate over taxation. On July 13 Elbridge Gerry proposed that, until an actual census could be taken, taxation would be based on the initial representation in the House. This seemingly reasonable proposal set the stage for a partial reopening of the debate over representation.

Reviving an earlier proposal, Hugh Williamson of North Carolina tried to cut New Hampshire’s representation in the House of Representatives from three to two. Williamson argued that because New Hampshire had not yet sent any delegates to the Convention, it was unfair to force the state to pay taxes on the basis of three representatives. This explanation fooled no one, and Williamson’s maneuver failed. Next, Read of Delaware expressed the fear that Gerry’s motion was a plot by the larger states to tax the smaller ones. This led Madison to reiterate his belief that “the difference of interest in the U. States lay not between the large and small, but the N. and Southn. States.”<sup>105</sup> Madison supported Gerry’s motion “because it tended to moderate the views both of the opponents and advocates for rating very high, the negroes.” After three votes Gerry’s motion passed. The Convention had deepened its commitment to the three-fifths clause, both for representation and for taxation.<sup>106</sup>

With the sense of the Convention on this issue apparently clear, Randolph moved to bring language previously used in the working document into conformity with the three-fifths clause. Earlier in the Convention the body declared that representation would be based on “wealth.” Randolph now proposed substituting the wording of the three-fifths clause for the word “wealth.”<sup>107</sup> This opened the way for yet one more debate over the three-fifths clause. This debate revealed the deep animosities that had developed between some northern and southern delegates.

Gouverneur Morris began by mocking the attempt to replace the word “wealth” with the three-fifths clause. If slaves were “property,” then “the word wealth was right, and striking it out would produce the very inconsistency which it was meant to get rid

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 601.

<sup>106</sup> *Id.* at 602. Gouverneur Morris would later argue that the application of the three-fifths clause to direct taxes was inserted “as a bridge to assist” the Convention “over a certain gulph” caused by slavery. Once the Convention had passed this point, Morris was ready to abandon direct taxation based on the three-fifths clause. 2 RECORDS, *supra* note 16, at 106.

<sup>107</sup> 1 RECORDS, *supra* note 16, at 603.



## AKRON LAW REVIEW

[Vol. 32:3

of.”<sup>108</sup> Morris then launched into a full scale attack on southern demands. In the process he suggested that a peaceful end to the Convention, and the Union itself, might be in order. Morris asserted that, until this point in the Convention, he had believed that the distinction between northern and southern states was “heretical.”<sup>109</sup> Somewhat disingenuously, he declared that he “still thought the [sectional] distinction groundless.”<sup>110</sup> But he saw that it was “persisted in; and that the Southn. Gentleman will not be satisfied unless they see the way open to their gaining a majority in the public Councils.”<sup>111</sup> The North naturally demanded “some defence” against this. Morris thus concluded:

[E]ither this distinction is fictitious or real: if fictitious let it be dismissed and let us proceed with due confidence. If it be real, instead of attempting to blend incompatible things, let us at once take a friendly leave of each other. There can be no end of demands for security if every particular interest is to be entitled to it.<sup>112</sup>

Morris argued that the North had as much to fear from the South as the South had to fear from the North.<sup>113</sup>

South Carolina’s Pierce Butler responded with equal candor: “The security the Southn. States want is that their negroes may not be taken from them which some gentlemen within or without doors, have a very good mind to do.”<sup>114</sup> For the rest of the Convention Butler and his southern colleagues would remain vigilant in protecting this interest.

By Saturday the fourteenth, sectional tempers had cooled. The Convention now reconsidered the makeup of what would ultimately become the Senate. The small states again reiterated their fears that the large states would overwhelm them in a legislature based entirely on population. Delegates from New Jersey and Connecticut made it clear that they would not support the emerging Constitution unless there was state equality in at least one branch of the legislature. Charles Pinckney once again proposed that representation in both houses of the legislature be based on population. In supporting this motion Madison yet again argued that “the real difference of interests lay, not between the large and small but between the N. and Southn. States. The institution of slavery and its consequences formed the line of discrimination.”<sup>115</sup> Madison seemed particularly worried that state equality would give the North a perpetual majority in one

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<sup>108</sup> *Id.* at 604.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> 1 RECORDS, *supra* note 16, at 604.

<sup>113</sup> *Id.* at 603-604.

<sup>114</sup> *Id.* at 605.

<sup>115</sup> 2 RECORDS, *supra* note 16, at 10.

1999] AFFIRMATIVE ACTION FOR THE MASTER CLASS  
 branch of the legislature.<sup>116</sup>

Over Madison's protests, the equality of the states in the Senate remained part of the Constitution. On the final vote on this issue, three of the four negative votes came from the South.<sup>117</sup> This vote indicates that Madison's sense of sectional division was at least as important as the division between large and small states.

On July 16, when debate resumed over the powers of Congress, Butler and Rutledge opposed giving Congress the power to legislate where the states were "incompetent."<sup>118</sup> The southerners feared this "vague" and, therefore, dangerous power, and thus four slave states supported a futile attempt to recommit this clause.<sup>119</sup> This debate illustrates that sectional fears, more than rivalries between large and small states, had emerged as the major problem for the Convention. Butler and Rutledge, after all, were fearful of what a Congress dominated by the North might do. Any vagueness in language might be used to harm slavery.<sup>120</sup>

The irony of the shifting sentiments of the Carolinians became clearer a day later, when Gunning Bedford offered compromise language for this clause. Bedford, of Delaware, had up to this time vociferously represented the needs, and fears, of the small states. During the debates over representation he had emphatically told his fellow delegates, "I do not gentlemen, trust you."<sup>121</sup> Bedford was probably as jealous of state power, and as fearful of national power, as any man at the Convention. Yet, on this issue he was not fearful and was willing to compromise, because even he saw nothing dangerous in the proposed clause, especially if it contained his compromise language. Bedford's amendment did not mollify the delegates from South Carolina and Georgia, however, who remained opposed to allowing the national government to legislate for the "general interest of the Union."<sup>122</sup> These Deep South delegates no doubt suspected that such language might somehow be used to harm slavery. Legislating for the "general interest" of the Union, they feared, might some day threaten the particular interest of slavery.

#### IV. SLAVERY AND THE EXECUTIVE BRANCH

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<sup>116</sup> *Id.* at 9-10.

<sup>117</sup> *Id.* at 13. The negative votes were from Virginia, South Carolina, Georgia, and Pennsylvania. *Id.* at 15.

<sup>118</sup> *Id.* at 17.

<sup>119</sup> 2 RECORDS, *supra* note 16, at 17.

<sup>120</sup> *Id.* The recommittal vote ended in a tie (and thus lost). The only northern state to vote for it was Connecticut, which almost always voted with the Deep South on issues concerning slavery. The only Deep South state to oppose the recommittal was North Carolina. *Id.*

<sup>121</sup> 1 RECORDS, *supra* note 16, at 500.

<sup>122</sup> 2 *id.* at 27.

The Convention was deeply divided over how the nation's chief executive should be chosen. Slavery complicated the debates on this questions and partially affected their outcome. On July 17 the Convention considered, and rejected by wide margins, election by the Congress, direct election by the people, and election by the state legislatures. Significantly, the most vocal opposition to election by the people came from three southerners: Charles Pinckney, George Mason, and Hugh Williamson. While Pinckney and Mason argued against the competence of the "people,"<sup>123</sup> Williamson was more open about the reasons for southern opposition. He noted Virginia would not be able to elect her leaders president because "[h]er slaves will have no suffrage."<sup>124</sup> The same of course would be true for the rest of the South.

For James Madison the debate over the presidency was particularly difficult. Because he believed that "concepts of right and justice were paramount expressions of majority rule,"<sup>125</sup> Madison instinctively favored election of the president by the people. He told the Convention that "the people at large" were "the fittest" to choose the president.<sup>126</sup> But "one difficulty . . . of a serious nature" made election by the people impossible.<sup>127</sup> Madison noted that the "right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes."<sup>128</sup> In order to guarantee that the nonvoting slaves could nevertheless influence the presidential election, Madison favored the creation of the electoral college.<sup>129</sup> Under this system each state was given a number of electors equal to its total congressional and senatorial representation. This meant that the three-fifths clause would help determine the outcome of presidential elections.<sup>130</sup>

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<sup>123</sup> *Id.* at 30-31.

<sup>124</sup> *Id.* at 32. Roger Sherman, who virtually always voted with the South on important matters, also opposed direct election of the president. *Id.* at 29.

<sup>125</sup> RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 181 (1971). Madison did not have unlimited faith in the people, as his essay "Vices of the Political System of the United States" indicates and indeed, he had some sympathies for the indirect election of officials because such a system limited the power of the people. *Id.* at 186-189. However, this is not the position he took in the Convention, where he argued for the theoretical value of direct election, but in the end opposed it, at least in part because of slavery. 2 RECORDS, *supra* note 16, at 56-57.

<sup>126</sup> 2 RECORDS, *supra* note 16, at 56.

<sup>127</sup> *Id.* at 57.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* The acceptance of the electoral college based on the House of Representatives took place on July 20, the day after Madison's speech. *Id.* at 64. On July 25 the Convention reconsidered this vote. Once again Madison argued that the North would have an advantage in a popular election, although here Madison did not specifically mention slavery. 2 RECORDS, *supra* note 16, at 111.

<sup>130</sup> Ironically, this antidemocratic system which Madison ultimately supported subsequently had a major impact on his career. Thomas Jefferson's victory in the election of 1800, and Madison's elevation to the position of secretary of state and heir apparent, would

1999]

## AFFIRMATIVE ACTION FOR THE MASTER CLASS

Thus, the fundamentally antidemocratic electoral college developed, at least in part, to protect the interests of slavery.

## V. COMMERCE AND SLAVERY: THE DIRTY COMPROMISE

By late July, the Convention had hammered out the basic outline of the Constitution. On July 23 the Convention agreed to send the draft of the Constitution to a Committee of Detail. At this juncture General Charles Cotesworth Pinckney “reminded the Convention that if the Committee should fail to insert some security to the Southern States agst. an emancipation of slaves, and taxes on exports, he shd. be bound by duty to his State to vote agst. their Report.”<sup>131</sup> This protest must have surprised the Convention. In the previous nine days the subject of slavery had not been directly debated; and where it had come up at all, such as in the discussion of the election of the president, the South had had its way. Now, just as the work of many weeks was about to go to a committee for what many hoped was a final redrafting, Pinckney raised new demands for the protection for slavery.

Pinckney’s outburst provoked no immediate reaction. The Convention remained in session for three more days, redebating how the executive should be chosen and numerous minor details. Finally, on July 26 the Convention adjourned until August 6, to allow the Committee of Detail to put the Convention’s work into some coherent form. This five-man committee included two southerners, Rutledge and Randolph, while a third member, Oliver Ellsworth of Connecticut, came from a state which had consistently supported southern interests in the Convention.

The report of the Committee of Detail contained a number of provisions aimed at the protection of slavery.<sup>132</sup> The new Congress could not interfere with the African slave trade and would need a two-thirds majority to pass navigation acts.<sup>133</sup> The new government would be obligated to provide military support to suppress rebellions and insurrections in the states.<sup>134</sup> Although Clause IV provided for representation based on

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be possible only because of the electoral votes the southern states gained on account of their slaves. LYND, *supra* note 21, at 178. Many northerners believed the outcome of the 1812 election would have been different if it were not for the three-fifths clause, although this is probably not the case. However, without the three-fifths clause John Quincy Adams might have had more electoral votes than Andrew Jackson and might have been elected outright in 1824. ROBINSON, *supra* note 57, at 405.

<sup>131</sup> 2 RECORDS, *supra* note 16, at 95.

<sup>132</sup> *Id.* at 177-189. In the reproduced version, all references to numbered sections are to those of the printed report. That report goes up to Art. XXII because there are two articles numbered VI.

<sup>133</sup> *Id.* at 183.

<sup>134</sup> 2 RECORDS, *supra* note 16, at 182.

“the number of inhabitants, according to the provisions herein after made,”<sup>135</sup> no such provisions were in fact in this draft. Thus, the committee report implied that the slaves would be counted equally with all other “inhabitants” when determining representation in Congress. The three-fifths clause was in the Committee report, but applied only to “direct” taxes and “capitation” taxes, and not to representation.<sup>136</sup> The committee report also prohibited taxation of both exports and imported slaves.<sup>137</sup> With the exception of a clause allowing Congress to regulate commerce by a simple majority,<sup>138</sup> the draft Constitution seemed to give the South everything it wanted. The Committee of Detail appeared to have taken to heart Pinckney’s demand for “some security to the Southern States.”<sup>139</sup>

On August 7 the Convention began to debate the committee report. On the next day yet another debate over the three-fifths clause took place. Hugh Williamson moved to clarify the status of this clause by replacing the phrase “the provisions herein after made” with a direct reference to the three-fifths provision.<sup>140</sup> After the Convention adopted Williamson’s motion, Rufus King protested that counting slaves for representation “was a most grating circumstance,” especially because the draft of the Constitution also prohibited Congress from banning the slave trade or even taxing the produce of slave labor.<sup>141</sup> He thought that some provision ought to be made for ending the slave trade, but at minimum he argued that “either slaves should not be represented, or exports should be taxable.”<sup>142</sup>

Roger Sherman, who would prove to be one of the Deep South’s most vocal northern ally,<sup>143</sup> agreed with King that the slave trade was “iniquitous” but believed that this issue should not be raised in connection with the question of representation, which had “been [s]ettled after much difficulty and deliberation.”<sup>144</sup> Madison, Ellsworth, and Sherman then tried to discuss other topics, but Gouverneur Morris would not let the slavery issue drop. He moved to insert the word “free” in front of the word “inhabitants” in the clause directing how representation would be determined. Believing

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<sup>135</sup> *Id.* at 178.

<sup>136</sup> *Id.* at 182-83.

<sup>137</sup> *Id.* at 183.

<sup>138</sup> *Id.* at 181.

<sup>139</sup> 2 RECORDS, *supra* note 16, at 95.

<sup>140</sup> *Id.* at 219.

<sup>141</sup> *Id.* at 220.

<sup>142</sup> *Id.*

<sup>143</sup> Ironically, Sherman's grandson, Roger Sherman Baldwin, would be the lead attorney in *United States v. Amistad*, 40 U.S. (15 Pet.) 518 (1841), which was one of the few antislavery victories in the U.S. Supreme Court in the antebellum period. See generally HOWARD JONES, *MUTINY ON THE AMISTAD: THE SAGA OF A SLAVE REVOLT AND ITS IMPACT ON AMERICAN ABOLITION, LAW, AND DIPLOMACY* (1987).

<sup>144</sup> *Id.* at 220-21.

1999] AFFIRMATIVE ACTION FOR THE MASTER CLASS  
 that “[m]uch. . . would depend on this point,” Morris said that he could “never . . . concur in upholding domestic slavery,” which was “the curse of heaven on the States where it prevailed.”<sup>145</sup> Morris compared the “rich and noble cultivation” of the middle states with “the misery and poverty which overspread the barren wastes of Va., Maryd. and the other states having slaves” and concluded that counting slaves for representation

when fairly explained comes to this: that the inhabitant of Georgia and S.C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections and dam[n]s them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the rights of mankind, than the Citizen of Pa. or N. Jersey who views with a laudable horror, so nefarious a practice.<sup>146</sup>

According to Morris, the draft Constitution compelled the North “to march their militia for the defense of the S. States; for their defense agst. those very slaves of whom they complain.”<sup>147</sup> Furthermore, the government lacked the power to levy a tax on imported slaves or on the goods they produced. Worst of all, counting slaves for representation encouraged the South to import more of them. Morris scoffed at the idea that there could ever be a direct tax, such as the three-fifths clause allowed, because it was “idle to suppose that the Genl. Govt. can stretch its hand directly into the pockets of the people scattered over so vast a Country.”<sup>148</sup> Thus the South would get extra representation in Congress for its slaves and have to pay nothing in return. Morris declared he “would sooner submit himself to a tax for paying for all the Negroes in the U. States than saddle posterity with such a Constitution.”<sup>149</sup>

For the first time in the Convention, two northerners--King and Morris--had denounced slavery in the same debate. A third, Jonathan Dayton of New Jersey, joined them by seconding Morris’s motion. Curiously, no one responded in kind to these attacks. Roger Sherman calmly answered his northern neighbors, declaring he saw no “insuperable objections” to “the admission of the Negroes into the ratio of representation.”<sup>150</sup> He argued “It was the freemen of the Southn. 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.”<sup>151</sup> This response reflected claims made by delegates from South Carolina since the beginning of the Convention, that wealth as well as population had to be represented in the Congress. James Wilson added that the

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<sup>145</sup> 2 RECORDS, *supra* note 16, at 221.

<sup>146</sup> *Id.* at 221-22.

<sup>147</sup> *Id.* at 222.

<sup>148</sup> *Id.* at 223.

<sup>149</sup> *Id.* at 223.

<sup>150</sup> 2 RECORDS, *supra* note 16, at 223.

<sup>151</sup> *Id.*

objections by Morris and King were premature. Charles Pinckney merely indicated that he would reply “if the occasion were a proper one.”<sup>152</sup> The Convention then overwhelmingly rejected Morris’s amendment.<sup>153</sup>

For the South this debate, along with the vote that followed it, was a major victory. The debate exposed many of the weaknesses of slavery; some delegates had made powerful moral and practical arguments against the institution. Yet, all the northern states except New Jersey voted with the South.

In the following week the Convention managed to avoid rancorous debates over slavery, even though sectional distrust sometimes appeared.<sup>154</sup> This period of calm ended on August 16, when the Convention began another debate over the powers of Congress. During a routine discussion of the power of Congress to levy taxes and duties, George Mason raised the issue of the power of Congress to tax exports. A part of the draft Constitution that had not yet been debated specifically prohibited Congress from taxing exports. Mason wanted to debate the issue out of order. He did not want to give Congress the right to levy any tax without simultaneously adopting a corresponding prohibition on export taxes. Mason “was unwilling to trust to its being done in a future article” and “professed his jealousy for the productions of the Southern or as he called them, the staple States.”<sup>155</sup> Sherman and Rutledge quickly reassured Mason that such a provision could be dealt with later. Mason could not, however, have been totally reassured when Gouverneur Morris declared that a prohibition on taxing exports was “radically objectionable.”<sup>156</sup> A number of other delegates then debated this issue. With the exception of Madison, all the southerners opposed taxing exports; all of the northerners, except those from Connecticut and Massachusetts, favored the idea.<sup>157</sup> The Convention then postponed the question of taxing exports.

This short debate gave hints of a developing bargain between New Englanders and delegates from the Deep South. In reassuring Mason, South Carolina’s John Rutledge noted that he would vote for the commerce clause as it stood, but only “on condition

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> For example, North Carolina’s Richard Spaight expressed fear that the capital would always remain in New York City, “especially if the Presidt. should be a Northern Man.” *Id.* at 261. In debates over qualifications for officeholding, clear sectional differences emerged. Southerners usually favored property qualifications and strict residency, or even nativity qualifications. Northerners did not. *See id.* at 248-49, 267-72. Ellsworth of Connecticut argued that a meaningful property qualification in the South would preclude almost all northerners from holding office, and a fair qualification in the North would be meaningless in the South, where the delegates presumed there was more wealth. *Id.* at 249.

<sup>155</sup> *Id.* at 305-06.

<sup>156</sup> *Id.* at 306.

<sup>157</sup> 2 RECORDS, *supra* note 16, at 306-08.

1999] AFFIRMATIVE ACTION FOR THE MASTER CLASS  
 that the subsequent part relating to negroes should also be agreed to.”<sup>158</sup> Rutledge clearly equated an export tax with an attack on slavery. Delegates from Connecticut and Massachusetts indicated some support for Rutledge’s position. What should be called the “dirty compromise” of the Convention was taking shape. The South Carolina delegation would support the commerce clause if New England would support prohibition on export taxes and protection for the slave trade. This understanding solidified during the next two weeks.

On August 21, the New England states joined the five slave states south of Delaware on three crucial votes. On the first vote all three New England states voted to defeat an amendment to the draft Constitution that would have allowed Congress, by a simple majority vote, to tax exports in order to raise money to support the national government.<sup>159</sup> During the debate over this motion, Connecticut’s Ellsworth argued against taxing exports because such taxes would unfairly hurt the South which produced major export crops such as “Tobo. rice and indigo.”<sup>160</sup> Ellsworth believed “a tax on these alone would be partial and unjust.”<sup>161</sup> Next, in a key five-to-six vote Connecticut joined the five slave states to defeat a proposal, made by James Madison, to allow taxes on exports by a two-thirds vote of Congress.<sup>162</sup> On the final vote, to absolutely ban all export taxes, Massachusetts joined Connecticut, and the measure to prohibit export taxes, favored by the South, passed seven to four.<sup>163</sup> During the debate the Virginia delegation was divided, three to two, with James Madison and George Washington unsuccessfully favoring Congressional power to tax exports.<sup>164</sup>

The Convention then debated a motion by Luther Martin to allow an import tax on slaves. Martin represented Maryland, a slave state, but one with a surplus of slaves, a fact that helps explain his opposition to the African trade. Rutledge opposed Martin’s motion with a two-pronged attack. He first told the Convention that the “true question at present is whether the Southn. States shall or shall not be parties to the Union.”<sup>165</sup> The implied threat of secession was clear. He then told the northern delegates that, if they would “consult their interest,” they would “not oppose the increase of [s]laves which will increase the commodities of which they will become the carriers.”<sup>166</sup> Ellsworth of Connecticut agreed, refusing to debate the “morality or wisdom of slavery” and simply asserting that “[w]hat enriches a part enriches the whole.”<sup>167</sup> The

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<sup>158</sup> *Id.* at 306.

<sup>159</sup> *Id.* at 363.

<sup>160</sup> *Id.* at 360.

<sup>161</sup> *Id.*

<sup>162</sup> 2 RECORDS, *supra* note 16, at 363.

<sup>163</sup> *Id.* at 363.

<sup>164</sup> *Id.* at 363-64.

<sup>165</sup> *Id.* at 364.

<sup>166</sup> *Id.*

<sup>167</sup> 2 RECORDS, *supra* note 16, at 364.



alliance for profit between the Deep South and New England was now fully developed. Charles Pinckney then reaffirmed that South Carolina would “never receive the plan if it prohibits the slave trade.”<sup>168</sup> Shrewdly, Pinckney equated a tax on imported slaves with a prohibition on the trade itself. On this note the Convention retired for the day.

Roger Sherman opened debate the next day by adopting a familiar pose. He declared his personal disapproval of slavery but refused to condemn it in other parts of the nation. He then argued against a prohibition of the slave trade. First, he asserted that “the public good did not require” an end to the trade.<sup>169</sup> Noting that the states already had the right to import slaves, Sherman saw no point in taking a right away from the states unnecessarily because “it was expedient to have as few objections as possible” to the new Constitution.<sup>170</sup> Here Sherman assumed it was necessary to defuse southern opposition to the Constitution, which might result from a ban on the slave trade, but he did not think it necessary to placate those who might oppose the Constitution if it allowed the slave trade to continue. Sherman was prepared to appease those who supported the slave trade, but he apparently was unconcerned about the strong opposition to the slave trade in his own region. Next, Sherman observed that “the abolition of slavery seemed to be going on in the U.S.”<sup>171</sup> If left alone, the “good sense of the several States” would soon put an end to all slavery in the country.<sup>172</sup> In making this argument Sherman either confused the abolition of the slave trade with the abolition of slavery itself, or he foolishly believed that because New England and Pennsylvania had begun to abolish slavery, the rest of the nation would soon follow. Finally, revealing his priorities, Sherman urged the delegates to hurry and finish their business, noting, no doubt, that they had been in session for almost three months.<sup>173</sup>

George Mason of Virginia responded to Sherman with a fierce attack on the “infernal trafic[sic]” in slaves, which he blamed on “the avarice of British Merchants.”<sup>174</sup>

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 369.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> 2 RECORDS, *supra* note 16, at 370.

<sup>173</sup> *Id.* During the ratification process proponents of the Constitution would similarly confuse the power to end “the slave trade” after 1808, which Congress had, with congressional power to end the slavery itself, which Congress clearly did not have. James Wilson, for example, told the Pennsylvania ratifying convention that after “the lapse of a few years . . . Congress will have power to exterminate slavery from within our borders.” 2 DEBATES, *supra* note 20, at 484. Since Wilson attended all the debates over this clause, it is impossible to accept this statement as his understanding of the slave trade clause. More likely, he simply made this argument to win support for the Constitution. In New Hampshire a supporter of the Constitution also argued that the slave trade clause gave Congress the power to end slavery. He was quickly disabused of this notion by Joshua Atherton. *Id.* at 203.

<sup>174</sup> 2 RECORDS, *supra* note 16, at 370.

1999] AFFIRMATIVE ACTION FOR THE MASTER CLASS

Reflecting the sectional hostilities at the Convention, as well as trying to lay blame on anyone but Virginians for the problem of slavery, Mason then “lamented” that his “Eastern brethren had from a lust of gain embarked in this nefarious traffic.”<sup>175</sup> Mason leveled some of the strongest criticism of slavery yet heard at the Convention, declaring it an “evil” system which produced “the most pernicious effect on manners.”<sup>176</sup> He declared that “[e]very master of slaves is born a petty tyrant” and warned that slavery would “bring the judgment of heaven on a Country” and ultimately produce “national calamities.”<sup>177</sup> Despite this apparent attack on the whole institution, Mason ended his speech by demanding only that the national government “have power to prevent the increase of slavery” by prohibiting the African trade.<sup>178</sup> As Peter Wallenstein has argued, “Whatever his occasional rhetoric, George Mason was--if one must choose--proslavery, not antislavery. He acted in behalf of Virginia slaveholders, not Virginia slaves,” when he opposed a continuation of the African trade.<sup>179</sup>

Others at the Convention understood this quite well. Mason failed to say that Virginia, like Maryland, had a surplus of slaves and did not need the African slave trade any longer. But James McHenry candidly wrote in his private notes: “That the population or increase of slaves in Virginia exceeded their calls for their services,” and thus a prohibition of the slave trade “would be a monopoly” in Virginia’s “favor.”<sup>180</sup> Under such conditions “Virginia etc would make their own terms for such [slaves] as they might sell.”<sup>181</sup> The “etc” no doubt included McHenry’s own state of Maryland.

Oliver Ellsworth of Connecticut, adopting the same pose as Sherman, answered Mason. Because “he had never owned a slave,” Ellsworth declared he “could not judge of the effects of slavery on character.”<sup>182</sup> However, if slavery were as wrong as Mason had suggested, merely ending the trade was insufficient. Ellsworth, of course, knew that the Virginians opposed allowing the national government to abolish slavery. Therefore, since there were many slaves in Virginia and Maryland and fewer in the Deep South, any prohibition on the trade would be “unjust towards S. Carolina and Georgia.”<sup>183</sup> So Ellsworth urged the Convention not to “intermeddle” in the affairs of other states.<sup>184</sup> The Convention had now witnessed the unusual phenomenon of a New

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Peter Wallenstein, *Flawed Keepers of the Flame: The Interpreters of George Mason*, 102 VA. MAG. HIST. AND BIOGRAPHY 229, 253 (1994). This article describes scholarly and popular misunderstandings of Mason’s views on slavery.

<sup>180</sup> 2 RECORDS, *supra* note 16, at 378.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 370-71.

<sup>183</sup> *Id.* at 371.

<sup>184</sup> *Id.*

Englander defending the slave trade against the attacks of a Virginian.

The Carolinians were of course quite capable of defending their own institution. Charles Pinckney, citing ancient Rome and Greece, declared that slavery was “justified by the example of all the world.”<sup>185</sup> He warned that any prohibition of the slave trade would “produce serious objections to the Constitution which he wished to see adopted.”<sup>186</sup> His cousin, General Pinckney, also declared his support for the Constitution, but noted that his “personal influence . . . would be of no avail towards obtaining the assent” of his home state.<sup>187</sup> He believed Virginia’s opposition to the trade was more pecuniary than moral. Virginia would “gain by stopping the importations” because “[h]er slaves will rise in value, and she has more than she wants.”<sup>188</sup> Prohibiting the trade would force South Carolina and Georgia “to confederate” on “unequal terms.”<sup>189</sup> While Virginia might gain, the nation as a whole would not. More slaves would produce more goods, and that result would help not only the South but also states involved in “the carrying trade.”<sup>190</sup> Seeing the slave trade solely as an economic issue, Pinckney thought it “reasonable” that imported slaves be taxed.<sup>191</sup> But a prohibition of the slave trade would be “an exclusion of S. Carola from the Union.”<sup>192</sup> As he had made clear at the beginning of his speech, “S. Carolina and Georgia cannot do without slaves.”<sup>193</sup> Rutledge and Butler added similar sentiments, as did Abraham Baldwin of Georgia and Williamson of North Carolina.<sup>194</sup>

New England accents now supported the Southern drawls. Gerry of Massachusetts offered some conciliatory remarks, and Sherman, ever the ally of the South, declared that “it was better to let the S. States import slaves than to part with them, if they made that a sine qua non.”<sup>195</sup> However, in what may have been an attempt to give his remarks an antislavery tone, he argued that taxing imported slaves was morally wrong, because that “implied they were *property*.”<sup>196</sup> This position undoubtedly pleased Sherman’s southern allies, who did not want to pay taxes on any slaves they imported. Sherman’s speech also underscored the profound support that the Carolinians and Georgians found among some New Englanders.

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<sup>185</sup> 2 RECORDS, *supra* note 16, at 371.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> 2 RECORDS, *supra* note 16, at 371.

<sup>191</sup> *Id.* at 371-72.

<sup>192</sup> *Id.* at 372.

<sup>193</sup> *Id.* at 371.

<sup>194</sup> *Id.* at 372-74.

<sup>195</sup> 2 RECORDS, *supra* note 16, at 374.

<sup>196</sup> *Id.*

1999]

## AFFIRMATIVE ACTION FOR THE MASTER CLASS

The reasons for cooperation between New England and the Deep South on this issue were now clear. New Englanders, involved in the “carrying trade,” would profit from transporting rice and other products produced by slave labor. And the South Carolinians seemed willing to support the New Englanders’ demands for Congressional power to regulate all commerce. In return, New Englanders would support the right of the Carolinas and Georgia to import the slaves they could not “do without.”

On the other side of the issue only John Langdon of New Hampshire and John Dickinson of Delaware vigorously opposed allowing the slave trade to continue. Dickinson argued that the trade was “inadmissible on every principle of honor and safety.”<sup>197</sup> Furthermore, he was prepared to call the Carolinians’ bluff on the question of Union, doubting the Deep South would reject the Constitution if the trade were prohibited. James Wilson was also skeptical of southern threats, but he did not offer any strong rebuttal. Nor did Rufus King, who only pointed out that prohibiting a tax on imported Africans was an “inequality that could not fail to strike the commercial sagacity of the Northern and middle States.”<sup>198</sup>

The most surprising contribution to this debate came from Gouverneur Morris of Pennsylvania, who had previously been the most consistent opponent of slavery at the Convention. He suggested that the subject of commercial regulation acts and the slave trade be sent to committee. “These things may form a bargain among the Northern and Southern States,” he shrewdly noted. The Convention quickly accepted his suggestion.<sup>199</sup>

Two days later, on August 25, the committee reported a compromise proposal; on the twenty-sixth the Convention began to debate it. The committee proposed that Congress be barred from prohibiting the African slave trade until 1800, but that in the meantime a reasonable tax could be levied on imported slaves.<sup>200</sup> General Charles C. Pinckney immediately urged that the date be changed to 1808,<sup>201</sup> which would be twenty years after the Constitution was ratified. Gorham of Massachusetts seconded this motion. Madison complained that this provision was “dishonorable to the National

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<sup>197</sup> *Id.* at 372.

<sup>198</sup> *Id.* at 373. Wilson’s position here must be contrasted with the position he took in the state ratifying convention. *See supra* text accompanying notes 90-91. Nathaniel Gorham of Massachusetts also registered his opposition to the slave trade, but only after the issue was recommitted.

<sup>199</sup> 2 RECORDS, *supra* note 16, at 374. McHenry’s notes on this debate are quite revealing. Although not attributing remarks to any particular delegate, McHenry’s notes make clear that part of the conflict between Virginia and the deep South on the issue was economic. Virginia had surplus slaves to sell, and the value of those slaves would be undermined by the African trade. *Id.* at 378.

<sup>200</sup> *Id.* at 396.

<sup>201</sup> *Id.* at 415.

character” and to the Constitution and the “[t]wenty years will produce all the mischief that can be apprehended from the liberty to import slaves.”<sup>202</sup> Nevertheless, the delegates accepted Pinckney’s change by a seven-to-four vote. Three New England states, Maryland, and the three Deep South states supported Pinckney’s motion.<sup>203</sup>

Gouverneur Morris, still resisting a continuation of the slave trade, then proposed that the clause specifically declare that the “importation of slaves” be limited to the Carolinas and Georgia. Morris wanted it known “that this part of the Constitution was a compliance with those States.”<sup>204</sup> Having made this motion only to embarrass supporters of the trade, Morris withdrew it. By a seven-to-four vote the Convention then adopted the slave trade provision. The three New England states once again joined Maryland and the Deep South to allow the slave trade to continue for twenty years.<sup>205</sup> This vote formed a key component of the “dirty compromise.”

On August 28 the Convention debated what would become the privileges and immunities clause of the Constitution. Charles Cotesworth Pinckney “seemed to wish some provision should be included in favor of property in slaves,” but he did not press the point, and the Convention accepted the clause with only South Carolina voting no.<sup>206</sup> Pinckney’s concern was apparently over the right of masters to travel from state to state with their slaves. In fact, those states which had already passed gradual emancipation statutes, like Pennsylvania, had made provisions for slave transit. Perhaps for this reason, other southern delegates did not share Pinckney’s concern. This seems to have been the only time during the Convention when southerners perceived a threat to slavery, but were unable to muster the votes, or perhaps their own energies, to head

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<sup>202</sup> *Id.* at 415.

<sup>203</sup> 2 RECORDS, *supra* note 16, at 415.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 416. The Convention then changed the wording of the tax provision of the clause, limiting the tax on slaves to ten dollars. *Id.* at 417. Walter Berns argues that the term “migration” in the slave trade clause referred to the interstate slave trade, and that the term “importation” referred to the African slave trade. Walter Berns, *The Constitution and the Migration of Slaves*, 78 YALE L.J. 198 (1968). If this analysis were correct, then it would appear that the delegates from the Deep South were willing to allow Congress to prohibit the domestic slave trade as well as the African slave trade after 1808. This analysis defies all understanding of the Convention. Berns, moreover, provides no evidence that anyone at the Constitutional Convention or in any of the state ratifying conventions believed this. As William Wiecek more accurately argues, the term “migration” was “potentially a weapon in the hands of moderate abolitionists” of the mid-nineteenth century. SOURCES, *supra* note 7, at 75. But certainly no one in the Convention saw it that way. More importantly, in the nineteenth century only a few radical opponents of slavery thought the clause could be used this way. At no time before 1861 did any President, leader of Congress, or a majority in either house of Congress accept this analysis.

<sup>206</sup> 2 RECORDS, *supra* note 16, at 443.

1999]  
it off.<sup>207</sup>

AFFIRMATIVE ACTION FOR THE MASTER CLASS

The Convention immediately turned to the fugitives from justice clause. Butler and Charles Pinckney attempted to amend this provision “to require fugitive slaves and servants to be delivered up like criminals.”<sup>208</sup> Roger Sherman sarcastically countered that he “saw no more propriety in the public seizing and surrendering a slave or servant, than a horse.”<sup>209</sup> James Wilson objected that this would cost the free states money. Significantly, this opposition came from two delegates who usually sided with the South. Butler wisely “withdrew his proposition in order that some particular provision might be made apart from this article.”<sup>210</sup>

The next day, the debates over commerce, the slave trade, and fugitive slaves were all joined to complete the “dirty compromise.” In a debate over the commerce clause Charles Pinckney, the younger and more impetuous of the two cousins, moved that a two-thirds majority be required for all commercial regulations. He argued that “[t]he power of regulating commerce was a pure concession on the part of the S. States” and that therefore the two-thirds requirement was reasonable.<sup>211</sup>

General C. C. Pinckney agreed that “it was the true interest of the S. States to have no regulation of commerce.”<sup>212</sup> But, in one of the most revealing statements of the Convention, he explained his support for a clause requiring only a simple majority for passage of commercial legislation. Pinckney said he took this position because of “their [‘the Eastern states’] liberal conduct towards the views of South Carolina.”<sup>213</sup> The “views of South Carolina” concerned the slave trade. In the margins of his notes Madison made this clear. Madison wrote that Pinckney

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<sup>207</sup> *Id.* See generally PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981).

<sup>208</sup> 2 RECORDS, *supra* note 16, at 443.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* James Hutson has found a draft of the fugitive slave clause in the Pierce Butler papers that is not in Butler’s handwriting and concluded that this unknown “author would seem to challenge Butler for the dubious honor of being the father of the fugitive slave clause.” *Pierce Butler’s Records of the Federal Constitutional Convention*, 37 THE QJ. LIBR. OF CONGRESS 64, 68 (1980). The draft of the bill is reprinted in SUPPLEMENT, *supra* note 55, at 246. Butler was not one of the great minds of the Convention, and it is certainly likely that he collaborated in drafting the provision with someone else, especially Charles Pinckney. It seems clear, however, that Butler was the delegate who actually introduced, and pushed for, the fugitive slave provision at the Convention. In any event, the idea for the Fugitive Slave Clause probably came from the Northwest Ordinance, which the Congress, sitting in New York, had passed in July. The Ordinance contained the first national fugitive slave provision.

<sup>211</sup> 2 RECORDS, *supra* note 16, at 449.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 449.

meant the permission to import slaves. An understanding on the two subjects of *navigation* and *slavery*, had taken place between those parts of the Union, which explains the vote on the Motion depending, as well as the language of Genl. Pinckney and others.<sup>214</sup>

Other delegates confirm this analysis. Luther Martin later reported that

the *eastern* States, notwithstanding their *aversion to slavery*, were very willing to indulge the southern States, at least with a temporary liberty to prosecute the *slave trade*, provided the southern States would in their turn gratify them, by laying no *restriction on navigation acts*; and after a very little time, the committee by a great majority, agreed on a report, by which the general government was to be prohibited from preventing the importation of slaves for a limited time, and the restrictive clause relative to navigation acts was to be omitted.<sup>215</sup>

Subsequent debate confirmed that New Englanders and South Carolinians had indeed struck a bargain. Butler, for example, declared that the interests of the southern and eastern states were “as different as the interests of Russia and Turkey.”<sup>216</sup> Nevertheless, he was “desirous of conciliating the affections of the East” and so opposed the two-thirds requirement.<sup>217</sup> The Virginians, who had opposed the slave trade provisions, now supported the demand for a two-thirds requirement for commercial legislation. But they were in the minority. South Carolina joined all the northern states to defeat the motion to require a two-thirds vote to regulate commerce. The Convention then adopted the clause allowing a simply majority to regulate commerce.<sup>218</sup>

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<sup>214</sup> *Id.*

<sup>215</sup> Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia*, in 2 THE COMPLETE ANTI-FEDERALIST 61 (Herbert J. Storing ed., 1981). Martin, who later opposed the Constitution, made this point in his letter to the Maryland ratifying convention. He had been on the committee that drafted the compromise over commerce and the slave trade.

<sup>216</sup> 2 RECORDS, *supra* note 16, at 451.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 451-53. Other scholars have noted this compromise as well, but most have done so approvingly. Charles Warren believed that slavery was relatively insignificant in the making of the Constitution. Arguing that the morality of the slave trade was unimportant, he wrote that “historians have underestimated the importance of the concession made on commerce by the South.” He approvingly quoted George Ticknor Curtis: “The just and candid voice of History has also to thank the Southern statesmen who consented to this arrangement for having clothed a majority of the two Houses with a full commercial power.” WARREN, *supra* note 48, at 585 n.2 (quoting CURTIS, 2 HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 306-307 (1858)). Curtis was a northern ally of the South—a doughface in the language of antebellum America—

1999]

## AFFIRMATIVE ACTION FOR THE MASTER CLASS

Immediately after this vote, Butler reintroduced the fugitive slave clause. Without debate or recorded vote, it too passed.<sup>219</sup> The last bargain over slavery had been made. The northerners who had opposed the fugitive slave provision only a day before were now silent.

The debates of late August reveal how willing the northern delegates--especially the New Englanders--were to support slavery and the demands of the Deep South. Some years ago William W. Freehling argued the slave trade clause was adopted to “lure Georgia and South Carolina into the Union.”<sup>220</sup> The Convention debates, however, suggest that the Deep South did not need to be lured into the Union; the delegates from the Carolinas and Georgia were already deeply committed to the Constitution by the time the slave trade debate occurred. Moreover, the South had already won major concessions on the three-fifths clause and the prohibition on taxing exports. These were permanent features of the Constitution, unlike the slave trade provision, which would lapse in twenty years. Although some southerners talked of not joining the Union unless the slave trade were allowed, it seems unlikely they would have risked going it alone over a temporary right of importation.<sup>221</sup>

This prospect is even more unlikely because at the time of the Convention none of these states was actively importing slaves from Africa. This fact cuts against Professor Earl Maltz’s recent contention that giving Congress the “authority to ban the importation of new slaves” would “have done serious damage to the economies of a number of southern states.”<sup>222</sup> From 1787 until 1803 South Carolina did not import any slaves from Africa.<sup>223</sup> From 1803 to 1808 South Carolina imported about 45,000 new

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and his history clearly reflected his political biases. Warren’s analysis follows Max Farrand, *Compromises of the Constitution*, 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1903, at 73-84 (1904). The historiography of this issue is discussed in LYND, *supra* note 21, at 153-83.

<sup>219</sup> 2 RECORDS, *supra* note 16, at 453-54.

<sup>220</sup> Freehling, *supra* note 27, at 84.

<sup>221</sup> Freehling has recently reiterated his position, calling mine “cynical.” Freehling writes that “I believe Carolinians meant their ultimatum--and that the majority of convention delegates so believed too.” WILLIAM W. FREEHLING, 1 THE ROAD TO DISUNION: SECESSIONISTS AT BAY, 1776-1854, at 584, n.30 (1990). However, Freehling seems to hedge a little, by also noting that Jefferson was “not present to cave in when South Carolina threatened not to join the Union if the Constitutional Convention of 1787 empowered Congress to end the African slave trade immediately.” *Id.* at 135. It strikes me that “cave in” is much more on the mark, and implies that there might have been greater room for tough negotiation or actually opposition to this position.

<sup>222</sup> Maltz, *supra* note 34, at 469.

<sup>223</sup> DICTIONARY OF AFRO-AMERICAN SLAVERY 699, 701 (Randall M. Miller and John David Smith eds., 1988).



slaves.<sup>224</sup> These importations created enormous human tragedies for the individual victims of the trade--and they doubtless provided huge profits to individual importers and purchasers--but these importations did not dramatically affect the economy of South Carolina or the deep south.

The arguments of Freehling and Maltz rest on the assumption that the states of the Deep South would have rejected the Constitution over the right to import slaves in the future when they in fact were not currently importing them. Furthermore, even without constitutional protection for the slave trade, importations from Africa would have been legal until the Congress actually took the time, and mustered the votes, to prohibit them. At no time did the Convention consider a clause flatly prohibiting the trade; the entire debate was over whether the Constitution would explicitly protect the trade. Earl Maltz writes that “under the Articles of Confederation, no federal action against the slave trade was possible; if this is the appropriate starting point then even a delayed grant of authority over the importation of slaves must be considered anti-slavery and nationalistic.”<sup>225</sup> However, this analysis ignores the fact that the slave trade clause is a specific exception to the general rule giving Congress complete power to regulate all commerce but slave importation. In essence, the Convention granted Congress the general power to regulate all international commerce except the African slave trade. It is not surprising that the South Carolina delegation considered this a great victory for their special interest in slave importations.

However one views the African trade, it is hard to see how anyone could assert that the fugitive slave clause was also a “lure.”<sup>226</sup> Added at the last possible moment, without any serious debate or discussion, this clause was a boon to the South without any quid pro quo for the North. On this vote the northern delegates either did not understand the importance of the issue or were too tired to fight it.

The August debates also reveal that the northern delegates could have had no illusions about the nature of the covenant they were forming with the South. The northern delegates could not have forgotten General C. C. Pinckney’s earlier assertion that “S. Carolina and Georgia cannot do without slaves.”<sup>227</sup> While the “Fathers liked to call [slavery] temporary,” the evidence of the Convention shows they should have known better.<sup>228</sup> Throughout the Convention the delegates from the slave states made no attempt to hide the fact that they believed slavery would be a permanent part of their culture and society. No one who attended the Philadelphia Convention could have believed that slavery was “temporary” in the South.

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<sup>224</sup> *Id.* Over 100,000 slaves were brought from Africa between adoption of the Constitution and 1808. *Id.* at 678.

<sup>225</sup> Maltz, *supra* note 34, at 469.

<sup>226</sup> Freehling, *supra* note 27, at 84.

<sup>227</sup> 2 RECORDS, *supra* note 16, at 371.

<sup>228</sup> Freehling, *supra* note 27, at 84.

1999]

## AFFIRMATIVE ACTION FOR THE MASTER CLASS

## VI. TOWARD SECTIONAL HARMONY

With the adoption of the commerce clause and the fugitive slave clause, the issues of immediate concern to slaveowners seemed to be settled. However, on August 30 the debate over the domestic violence clause of what became Article IV of the Constitution led to renewed conflicts over slavery. Dickinson of Delaware attempted to delete the limitation that permitted the national government to intervene to prevent violence only “on the application” of a state legislature.<sup>229</sup> This change would have allowed the national government, and not the states, to determine when intervention was necessary.

The Convention quickly defeated this motion, with the five slave states voting no, apparently because they did not want the national government to interfere in their domestic affairs.<sup>230</sup> However, on a vote to change the wording of the clause from “domestic violence” to “insurrections,” the four slave states south of Virginia voted yes, but the motion lost five to six.<sup>231</sup> Fear of slave insurrections no doubt motivated the South to wish for explicit protection on this matter.

The Convention now turned to the numerous proposals which had been tabled throughout the summer. North-South cooperation was quite evident through the next two weeks. Motions introduced by a delegate from one section were often seconded by one from the other. Although some patterns of sectional voting can be found in these debates, they are rare and may be more coincidental than significant.<sup>232</sup> Some delegates, particularly Mason of Virginia, raised sectional fears. But by this time Mason was so clearly opposed to the Constitution that he was apparently willing to make any argument to derail the work of the Convention.<sup>233</sup>

Even on that divisive issue--the slave trade--the sectional compromise held. On September 10, the last day of debate before the Constitution went to a final Committee of Style, John Rutledge of South Carolina noted his opposition to the amendment procedure because “the articles relating to slaves might be altered by the [s]tates not

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<sup>229</sup> 2 RECORDS, *supra* note 16, at 466.

<sup>230</sup> *Id.* at 467.

<sup>231</sup> *Id.* The vote on the Dickinson motion was three to eight. The three yes votes came from the middle states, New Jersey, Pennsylvania, and Delaware. *Id.* Delaware was also a slave state, and would remain one until the adoption of the Thirteenth Amendment in 1865. But, by this time in the Convention, it was clear that Delaware did not think of itself as a slave state.

<sup>232</sup> For example, in a vote to limit the president’s treaty power, Maryland, South Carolina, and Georgia voted yes, and the other states present voted no. *Id.* at 541.

<sup>233</sup> 2 RECORDS, *supra* note 16, at 537-38, 541-542, 543. On Aug. 31 he had declared “that he would sooner chop off his right hand than put it to the Constitution.” *Id.* at 479. Ultimately, he refused to sign the Constitution. On Sept. 12 Mason would use sectional arguments in an attempt to create a stronger prohibition on states levying an export tax. *Id.* at 588-89, 631.

interested in that property and prejudiced against it.”<sup>234</sup> At Rutledge’s insistence the Convention added a clause forbidding any amendment of the slave trade provision and the capitation tax provision before 1808.<sup>235</sup> As they had throughout the Convention, the delegates from the deep South left almost nothing to chance in their zeal to protect slavery.

Emerging from the Committee of Style on September 14, the penultimate version of the Constitution produced further debate on issues relating to slavery and sectionalism. On September 15 an attempt to increase the representation of North Carolina in the First Congress failed, on a strictly sectional vote.<sup>236</sup> Similarly, the Convention rejected an attempt to change the clause on export taxes to make it yet more favorable to the South.<sup>237</sup> Here, however, Maryland and South Carolina joined the North in defeating the measure.<sup>238</sup> The Convention’s last substantive action on slavery-related matters concerned the fugitive slave clause. The Committee of Style had reported the clause with the language “No person legally held to service or labour in one state, escaping into another, shall ... be discharged from such service or labour . . . .”<sup>239</sup> The Convention substituted the term “under the laws thereof” after the word state for the term “legally.” The delegates made this change “in compliance with the wish of some who thought the term [legal] equivocal, and favoring the idea that slavery was legal in a moral view.”<sup>240</sup> This was a minor victory for those who were squeamish about slavery, but it had no practical effect.

## VII. THE PROSLAVERY COMPACT

This final compromise over the wording of the fugitive slave clause was an entirely appropriate way to end discussion of slavery at the Convention. Throughout the Convention the delegates had fought over the place of slavery in the Constitution. A few delegates had expressed moral qualms over slavery, but most of the criticism had been political and economic. Northerners opposed representation for slavery because it would give the South a political advantage; Virginians opposed the slave trade, at least

<sup>234</sup> *Id.* at 559.

<sup>235</sup> 2 RECORDS, *supra* note 16, at 559.

<sup>236</sup> *Id.* at 623-24.

<sup>237</sup> *Id.* at 624.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 601-02.

<sup>240</sup> 2 RECORDS, *supra* note 16, at 628. There is no indication who requested this change. A similar change of wording was made in the three-fifths clause at the suggestion of Edmund Randolph, changing the word “servitude” to “service” for describing indentured whites. Randolph argued that the original term “being thought to express the condition of slaves” would be inappropriate, while the new term described “the obligations of free persons.” *Id.* at 607. There was also a little more discussion about the amendment clause as it affected the slave trade, but nothing resulted from this. *Id.* at 629.

1999] AFFIRMATIVE ACTION FOR THE MASTER CLASS

in part, because it would undermine the value of their excess slaves. The initial reaction to the fugitive slave clause typified this. When Pierce Butler and Charles Pinckney first proposed it, James Wilson complained, “This would oblige the Executive of the State to do it, at the public expence.”<sup>241</sup> The costs Wilson worried about were more financial than moral.

The word “slavery” was never mentioned in the Constitution, yet its presence was felt everywhere. The new wording of the fugitive slave clause was characteristic. Fugitive slaves were called “persons owing service or Labour,” and the word “legally” was omitted so as not to offend northern sensibilities. Northern delegates could return home asserting that the Constitution did not recognize the legality of slavery. In the most technical linguistic sense they were perhaps right. Southerners, on the other hand, could tell their neighbors, as General Charles Cotesworth Pinckney told his, “We have obtained a right to recover our slaves in whatever part of America they may take refuge, which is a right we had not before.”<sup>242</sup>

Indeed, the slave states had obtained significant concessions at the Convention. Through the three-fifths clause they gained extra representation in Congress. Through the electoral college their votes for president were far more potent than the votes of northerners. The prohibition on export taxes favored the products of slave labor. The slave trade clause guaranteed their right to import new slaves for at least twenty years. The domestic violence clause guaranteed them federal aid if they should need it to suppress a slave rebellion. The limited nature of federal power and the cumbersome amendment process guaranteed that, as long as they remained in the Union, their system of labor and race relations would remain free from national interference. On every issue at the Convention, slaveowners had won major concessions from the rest of the nation, and with the exception of the commerce clause they had given up very little to win these concessions. The northern delegates had been eager for a stronger Union with a national court system and a unified commercial system. Although some had expressed concern over the justice or safety of slavery, in the end they were able to justify their compromises and ignore their qualms.

At the close of the Convention two delegates, Elbridge Gerry of Massachusetts and George Mason of Virginia, explained why they could not sign the document they had helped create. Both had a plethora of objections that included slavery-related issues. But their objections were not grounded in moral or philosophical opposition to slavery; rather, like the arguments of those delegates who ultimately supported the compromises over slavery, the objections of Gerry and Mason were practical and political. Gerry objected to the three-fifths clause because it gave the South too much political power, at the expense of New England.<sup>243</sup> Mason opposed allowing the slave trade to continue,

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<sup>241</sup> *Id.* at 443.

<sup>242</sup> 4 DEBATES, *supra* note 20, at 286.

<sup>243</sup> 2 RECORDS, *supra* note 16, at 633.

because “such importations render the United States weaker, more vulnerable, and less capable of defence.”<sup>244</sup>

During the ratification struggles others would take more principled stands against the compromises over slavery. A New Yorker complained that the Constitution condoned “drenching the bowels of Africa in gore, for the sake of enslaving its free-born innocent inhabitants.”<sup>245</sup> In New Hampshire, Joshua Atherton opposed ratification because it would make all Americans “*consenters to, and partakers in, the sin and guilt of this abominable traffic.*”<sup>246</sup> A Virginian thought the slave trade provision was an “excellent clause” for “an Algerian constitution: but not so well calculated (I hope) for the latitude of America.”<sup>247</sup>

It was more than just the slave trade that northern antifederalists feared. Three opponents of the Constitution in Massachusetts noted that the Constitution bound the states together as a “whole” and “the states” were “under obligation . . . reciprocally to aid each other in defence[sic] and support of every thing to which they are entitled thereby, right or wrong.”<sup>248</sup> Thus, they might be called to suppress a slave revolt or in some other way defend the institution. They could not predict how slavery might entangle them in the future, but they did know that “this lust for slavery, [was] portentous of much evil in America, for the cry of innocent blood, . . . hath undoubtedly reached to the Heavens, to which that cry is always directed, and will draw down upon them vengeance adequate to the enormity of the crime.”<sup>249</sup>

The events of 1861-1865 would prove the three Massachusetts antifederalists of 1788 correct. Only after a civil war of unparalleled bloodshed and three constitutional amendments could the Union be made more perfect, by finally expunging slavery from the Constitution.

The task of overcoming this history and heritage, however, remains before us, nearly a century and a half after the end of slavery. How we solve the problem of slavery, and its legacy of race discrimination is the problem of the twenty-first century.

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<sup>244</sup> *Id.* at 640.

<sup>245</sup> Letters from a Countryman from Dutchess County (Jan. 22, 1788), in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 215, at 62.

<sup>246</sup> 2 DEBATES, *supra* note 20, at 203.

<sup>247</sup> *Essays by Republicus* (Mar. 12, 1788), in 5 COMPLETE ANTI-FEDERALIST, *supra* note 215, at 169.

<sup>248</sup> *Consider Arms, Malichi Maynard, and Samuel Field, “Reasons for Dissent,”* in 4 COMPLETE ANTI-FEDERALIST, *supra* note 215, at 262-63.

<sup>249</sup> *Id.*