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# The American Suppression of the African Slave Trade: Lessons on Legal Change, Social Policy, and Legislation

Paul Finkelman

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**THE AMERICAN SUPPRESSION OF THE AFRICAN SLAVE  
TRADE: LESSONS ON LEGAL CHANGE, SOCIAL POLICY,  
AND LEGISLATION**

*Paul Finkelman*\*

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## I. INTRODUCTION

In 1807 the United States Congress passed legislation, which became effective on January 1, 1808, to end all importations of slaves into the United States.<sup>1</sup> Even before that date, Congress had passed a series of laws that prevented Americans from participating in the trade as sailors, ship captains, ship owners, ship builders, or investors in slave trading ventures.<sup>2</sup> The bicentennial of the closing of the trade to the United States provides an appropriate moment to examine how the United States withdrew from this form of commerce.

At one level the tale is inspiring. This was the first time in history that a slaveholding society voluntarily ceased to import new slaves.<sup>3</sup> At another level, this is a cautionary, but nevertheless instructive, tale about how to use law to effectuate social change. Starting in 1794, the United States Congress passed a series of laws aimed at preventing Americans from participating in the trade.<sup>4</sup> After the 1807 law went into effect, the United States passed a handful of other laws to strengthen the ban and make it more effective.<sup>5</sup> In short, Congress did not successfully end the trade on its first try, or its second or even its third; but building on each legislative attempt, Congress eventually closed the trade to all but the most intrepid smugglers.<sup>6</sup>

Finally, an examination of the attempts to end the African Slave Trade may help policymakers and social activists deal with the modern problem of human trafficking. Modern human trafficking is not the same as the African trade, despite the use of the term “slavery” by activists who campaign against trafficking.<sup>7</sup> The often grotesque exploitation of people who have been trafficked in recent years is only

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1. An Act to Prohibit the Importation of Slaves, ch.22, 2 Stat. 426 (1807).

2. Act of March 22, 1794, ch.11, 1 Stat. 347 (1794); Act of May 10, 1800, ch. 51, 2 Stat. 70 (1800); Act of Feb. 28, 1803, ch. 10, 2 Stat. 205 (1803).

3. Great Britain passed legislation to ban the trade a few weeks after the United States did and that law went into effect a few months before the American law. An Act for the Abolition of the Slave Trade, 47 Geo III Sess. 1 c. 36. However, while Britain was heavily involved in the African trade to other places, no slaves were being imported into the British Isles. See James Walvin, *Great Britain, African Slavery*, in MACMILLAN ENCYCLOPEDIA OF WORLD SLAVERY, 176-77 (Paul Finkelman & Joseph C. Miller eds., 1998).

4. Act of March 22, 1794, ch.11, 1 Stat. 347 (1794); Act of May 10, 1800, ch. 51, 2 Stat. 70 (1800); Act of Feb. 28, 1803, ch. 10, 2 Stat. 205 (1803).

5. See *infra* Part VI(B)-(C).

6. See *infra* Part V.

7. Nancy G. Abudu et al., *Human Rights*, 42 INT'L LAW. 755, 775 (2008) (quoting U.S. Secretary of State, Condoleezza Rice: “[t]rafficking in persons is a modern-day form of slavery, a new type of global slave trade”).

superficially similar to slavery in the Americas in the 18<sup>th</sup> and 19<sup>th</sup> centuries. Three critical differences between then and now stand out.

First, the African slave trade was legal for more than 350 years in some Western countries, their American colonies, and the nations that emerged from those colonies. The African slave trade was legal in what became the United States for nearly 200 years—from the 1620s when African slaves began to arrive in the Dutch and British colonies until 1808 when the law banning the trade went into effect. Today, human trafficking is illegal everywhere in the world.<sup>8</sup> Similarly, the slave trade was legal in countries along the west coast of Africa, where most slaves were put on ships for the New World. Thus, the local governments in Africa supported the trade, participated in it, sanctioned it, taxed it, and profited from it in many ways. No modern nations sanction or support the trafficking of their own citizens or of non-citizens within their jurisdiction.

Second, even after the African slave trade was banned, slavery itself was still legal in the United States, most of the British New World colonies,<sup>9</sup> and in the Spanish colonies. Thus, if someone could successfully smuggle a slave into the United States—either from Africa or the Caribbean—that slave could, to some extent, disappear into the existing slave population. Trafficked persons are rarely held in legally sanctioned conditions upon arrival at their destination. Similarly, a slave illegally brought to the US would have no reason to know or believe that he or she had a legal claim to freedom and could ask for protection from the government. But, trafficked people are likely to know that they have a right to their freedom. Put simply, slavery was legal in the United States, even after importations were not; but trafficking in people has never been legal and the exploitation of trafficked people is equally against the law.

Finally, some people caught up in the web of modern trafficking voluntarily seek transportation to their destination, and may even be “willing victims” of trafficking because of their desperate desire to reach the United States, England, or some other western country.<sup>10</sup> These

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8. James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking”*, 49 VA. J. INT’L L. 1, 1 (2008); see also Jennifer S. Nam, *The Case of The Missing Case: Examining The Civil Right of Action For Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1657 (2007).

9. England did not end slavery in its New World colonies until 1833. See Howard Temperly, *Emancipation Act, British (1833)*, in MACMILLAN ENCYCLOPEDIA OF WORLD SLAVERY, *supra* note 3, at 293. Slavery remained legal in the United States until the ratification of the Thirteenth Amendment in 1865. See U.S. CONST. amend. XIII, § 1.

10. Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT’L L. J. 207, 218 (2007).

“willing victims” of trafficking are similar to some indentured servants of the seventeenth and early eighteenth centuries, who voluntarily agreed to a limited form of servitude in exchange for transportation to the American colonies, only to discover when they arrived that their new situation was horrendous and exploitative beyond anything they had expected.<sup>11</sup> However, no one in Africa ever voluntarily agreed to be transported to the Americas as a slave, and all slaves came to America under the most horrifying of conditions—almost always in chains.<sup>12</sup>

Yet, despite the many differences between the African slave trade and modern trafficking, those working to end trafficking may find both inspiration and tactical utility in examining how we came to abolish and suppress the African trade.

## II. COLONIAL REGULATIONS OF THE SLAVE TRADE

Before the American Revolution, both the colonies and Great Britain regulated the African slave trade to what later became the United States. In fact, the British government gave special protection to the Royal African Company, which brought more slaves to the American colonies than any other single entity.<sup>13</sup> Investors in the Royal African Company reached the highest echelons of British society, and included members of the Royal family.<sup>14</sup> Even after the demise of the Royal African Company in 1750, the slave trade continued to be an important part of Britain’s mercantile policy. Britain collected taxes on imported slaves while merchants in the metropolis made their fortunes.<sup>15</sup>

In the colonies the slave trade was a source of labor, profits, and local tax revenues. But for both economic and prudential reasons, colonial governments occasionally sought to limit importations. In 1698, for example, the South Carolina legislature concluded that “the great number of Negroes which of late have been imported into this

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11. See ABBOTT EMERSON SMITH, *COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA* 9-10, 253-54, 257, 259 (1947).

12. JOSEPH C. MILLER, *WAY OF DEATH: MERCHANT CAPITALISM AND THE ANGOLAN SLAVE TRADE, 1730-1830*, at 413 (1996) (describing the conditions aboard slave ships).

13. King Charles II and other royal family members invested in the Royal African Company (RAC). The investors not only provided the RAC with “the protection of royal privileges,” but also allowed the RAC to develop a monopoly on the early phase of the slave trade by providing the RAC with significant financing. This monopoly effectively ended in 1698. Joseph C. Miller, *Royal African Company*, in *MACMILLAN ENCYCLOPEDIA OF WORLD SLAVERY*, *supra* note 3, at 780-81.

14. *Id.*; HUGH THOMAS, *THE SLAVE TRADE: THE HISTORY OF THE ATLANTIC SLAVE TRADE, 1440-1870*, at 241 (1997). DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 131-32 (1966).

15. THOMAS, *supra* note 14; DAVIS, *supra* note 14.

Collony may endanger the safety thereof.”<sup>16</sup> This law did not limit the trade, but rather, was designed to encourage the importation of white servants.<sup>17</sup> It had virtually no impact on the growth of the black population, which by 1708 exceeded the white population.<sup>18</sup>

Fearful of its growing black majority, in 1717 South Carolina imposed a tax of £40 per slave, virtually shutting down the trade,<sup>19</sup> but two years later the legislature reduced the tax to £10 for every new slave brought from Africa,<sup>20</sup> and the trade boomed.<sup>21</sup> In 1740, in response to the Stono Rebellion of 1739, South Carolina passed a new tax law that was designed to end the trade in the near future.<sup>22</sup> For the first fifteen months after the law was adopted, South Carolinians would continue to pay the £10 duty for every slave imported into the colony.<sup>23</sup> Then, for a three-year period, the colony would impose a £100 tax on every adult slave imported from Africa, which would effectively end the trade.<sup>24</sup> The law recited the “very dangerous consequence to the peace and safety” of the colony from the “barbarous and savage disposition” of Africans.<sup>25</sup> Despite the “dangerous consequences” of importing new slaves, the legislature did not end importations immediately, possibly out of fear of unfairness to both slavers already on the way to South Carolina, and masters who desperately needed more slaves. This fifteen-month delay in implementing the £100 tax allowed for an orderly transition away from massive importations into the colony. In any event, the law expired in 1744 and the colonists could once again import slaves without facing prohibitive duties. In 1760, South Carolina attempted to ban the trade outright because the colonists feared the growing number of African-born slaves, but Royal authorities disallowed this law.<sup>26</sup> In 1764 the colony levied a new tax of £100 per

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16. Act of Oct. 8, 1698, ch. 197, 1698 S.C. Acts 153.

17. *Id.*

18. For statistics on the growth of the white and slave populations in colonial South Carolina see PETER WOOD, *BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION* 131-66 (1974).

19. Act of Dec. 11, 1717, ch. 388, 1714 S.C. Acts 368-70; *see also* W.E.B. DUBOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA 1638-1870*, at 17 (1896), *available at* <http://www2.hn.psu.edu/faculty/jmanis/webdubois/DuBoisSuppressionSlavetrade6x9.pdf>.

20. An Act for Laying an Imposition on Negroes, ch. 395, 3 S.C. Stat. 56-7 (1719).

21. *See generally* WOOD, *supra* note 18.

22. An Act for the Better Strengthening of this Province, ch.669, 1740 S.C. Acts 556-57.

23. *Id.* at 557.

24. *Id.*

25. *Id.* at 556.

26. DUBOIS, *supra* note 19, at 18.

head on imported slaves because, as the legislature noted, the growing number of African-born slaves “may prove of the most dangerous consequence.”<sup>27</sup> However, as it had done in 1740, the legislature delayed the start of this duty, this time for just over sixteen months.<sup>28</sup> The law was only in force until 1767, but the trade was not resumed after that, presumably because of the growing tension between the colonies and Britain.<sup>29</sup> This ended the trade there until after the Revolution, when South Carolina briefly resumed the trade.<sup>30</sup>

The use of tax policy to limit the slave trade suggests that the South Carolinians wanted to avoid any moral issues that might have arisen with a debate over absolutely closing the trade. In addition, by using an economic tool to regulate an economic activity, the South Carolina government enlisted the only bureaucracy available—the tax collectors and regulators of the colony’s ports—to limit the trade. The tax policy may also have made enforcement easier because juries or judges sympathetic to slavery might have been unwilling to convict someone on criminal charges for illegal importation, but enforcement of tax laws would have been seen as “neutral” on slavery.<sup>31</sup>

Shortly before the Revolution, Virginia also tried to curtail or ban the trade, not for prudential reasons but mostly to prevent the outflow of capital from the colony, although the law also had the benefit of raising the value of slaves already in the colony.<sup>32</sup> In 1769 Virginia raised the tax on slaves,<sup>33</sup> which led to more than seventy petitions from Liverpool and Lancaster merchants, who argued that the new tax law was to raise the value of those slaves already in the colony as well as those who would be born in the future.<sup>34</sup> This was a classic case of “self-dealing” because the Virginia lawmakers were also the largest slave-owners in the

27. Act of August 25, 1764, ch. 933, 1764 S.C. Acts 187-88.

28. *Id.*

29. DUBOIS, *supra* note 19, at 19.

30. Act of March 28, 1787, ch. 7, 1787 S.C. Acts. 430, reprinted in DuBois, *supra* note 19, at 229 app. A; Act of Dec. 17, 1803, ch. 7, 1803 S.C. Acts 449, reprinted in DUBOIS, *supra* note 19, at 240 app. B; DUBOIS, *supra* note 19, at 19; see generally Jed H. Shugerman, *The Louisiana Purchase and South Carolina’s Reopening of the Slave Trade in 1803*, 22 J. OF THE EARLY REPUBLIC 263 (2002).

31. There may be a lesson here for modern trafficking issues – that the tax structure and the pursuit of unpaid taxes on illegal earnings might be a useful way to fight trafficking because it would avoid many criminal “proof” issues while still getting at the traffickers.

32. Richard K. MacMaster, *Arthur Lee’s “Address on Slavery”: An Aspect of Virginia’s Struggle to End the Slave Trade, 1765-1774*, 80 THE VA. MAG. OF HIST. AND BIOGRAPHY 141, 148-49 (1972).

33. Act of June 1, 1770, ch. 7, 1770 Va. Acts 336.

34. MacMaster, *supra* note 32, at 148.

colony.<sup>35</sup> The Crown overruled this law, declaring it would not “approve so high a duty on the importation of a considerable article of British Commerce.”<sup>36</sup>

In 1772 Virginia passed yet another law, this time taxing slaves at a prohibitive level.<sup>37</sup> This statute was accompanied by a petition from the Virginia legislature to the King arguing that “[t]he importation of slaves into the colonies from the coast of Africa, hath long been considered as a trade of great inhumanity, and under its *present encouragement*, we have too much reason to fear [it] *will endanger the very existence* of your majesty’s American dominions.”<sup>38</sup> Thus, the Virginia legislators asked the King to “*remove all those restraints* on your majesty’s governors of this colony, *which inhibit their assenting to such laws as might check so very pernicious a commerce.*”<sup>39</sup>

The Royal Governor, Lord Dunmore, in fact signed this bill, believing it was in his power to do so. He urged the home government to allow it, arguing in favor of the law, not on economic or humanitarian grounds, but on public policy and prudential grounds. He noted that the majority of whites in the colony were

very anxious for an Act to lay an additional duty upon the importation of Slaves, in order to restrain the introduction of people, the Number of whom, already in the Colony, gives them Just cause to apprehend the most dangerous Consequence there from, and therefore makes it necessary that they should fall upon means, not only of preventing their increase, but, also of lessening their number, and the interest of the Country would Manifestly require the total expulsion of them.<sup>40</sup>

The slave trade was vital to the British economy and the slave trading interests had powerful patrons in the government. Thus, it is perhaps not surprising that the Royal Government overruled Governor

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35. *Id.* In many ways these laws and the British response prefigured American commerce clause jurisprudence, where the Supreme Court strikes down state laws that favor in-state producers or businesses. See *Gibbons v. Ogden*, 22 U.S. 1, 2 (1824) (striking down a New York law that forbade out-of-state competitors from landing passenger ships in New York state); see also, *Houston, E. & W.T.R. Co. v. U.S.*, 234 U.S. 342, 360 (1914) (striking down discriminatory freight rates that favored in-state shippers); see also, *Granholm v. Heald*, 544 U.S. 460, 465-66 (2005) (striking down laws favoring in-state wine producers over out-of-state producers).

36. *MacMaster*, *supra* note 32, at 149.

37. Act of Feb. 1777, ch. 22, 1777 Va. Acts 530.

38. The petition is quoted at length in ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES* 51-52 (1803).

39. *Id.*

40. Darold D. Wax, *Negro Import Duties in Colonial Virginia: A Study of British Commercial Policy and Local Public Policy*, 79 VA. MAG. OF HIST. AND BIOGRAPHY 29, 42 (1971) (quoting Lord Dunmore speaking to Lord Hillsborough, May 1, 1772).

Dunmore and voided the statute.<sup>41</sup> In his *Summary View of the Rights of British America* (1774), Thomas Jefferson asserted, somewhat disingenuously, that Virginians favored the “abolition of domestic slavery” and that as the first step towards this end “it is necessary to exclude all further importations from Africa.”<sup>42</sup> He complained, however, that “our repeated attempts to effect this . . . by imposing duties which might amount to a prohibition, have been hitherto defeated by his majesty’s negative.”<sup>43</sup> There is, in fact, no evidence that any substantial number of white Virginians opposed slavery at this time.<sup>44</sup> In his first draft of the Declaration of Independence, Thomas Jefferson condemned the Crown in more forceful language, asserting that the King had “waged cruel war against human nature itself, violating its most sacred rights of life and liberty,” by perpetuating the African slave trade.<sup>45</sup> Calling the African trade “piratical warfare,” Jefferson asserted that “the CHRISTIAN king of Great Britain” was so “determin[ed] to keep open a market where MEN” were bought and sold that he used his “negative” to suppress “every legislative attempt to prohibit or to restrain this execrable commerce.”<sup>46</sup>

The Continental Congress removed Jefferson’s tirade from the draft of the Declaration, in part because it simply did not ring true.<sup>47</sup> The colonists, for the most part, had been willing and eager purchasers of slaves, as the rapid growth of the slave population showed. Nor is there any evidence that either Jefferson or any of the other leaders of Virginia had any interest in actually ending slavery.<sup>48</sup> Virginia’s attempt to ban the trade was mostly economic and prudential, and not based on any moral opposition to slavery per se. Similarly, the Crown’s refusal to allow Virginia to limit or end the trade was economic.

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41. Earl John Murray Dunmore, Governor of Virginia, *A Proclamation for publishing the ratification of three acts of the Assembly, and the repeal of three other acts* (24 June 1773), in 6 EXECUTIVE JOURNALS OF THE COUNCIL OF COLONIAL VIRGINIA 651-52 (Benjamin J. Hillman ed., 1966). For a discussion of this source see Wax, *supra* note 40, at 42-44.

42. Thomas Jefferson, *Summary View of the Rights of British America*, in THE FOUNDER’S CONSTITUTION Ch. 14, Doc. 10 (Phillip B. Kurland & Ralph Lerner eds., 1987), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch14s10.html>.

43. *Id.*

44. See generally PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (2001).

45. See Jefferson’s “original Rough draught” of the Declaration of Independence, *reprinted in* THE PAPERS OF THOMAS JEFFERSON 423-27 (Julian Boyd ed., 1950).

46. Jefferson’s “Original Rough draught” of the Declaration of Independence, *supra* note 45.

47. FINKELMAN, *supra* note 44, at 140.

48. *Id.*

During the Revolution all of the new states banned or suspended the trade. In 1774, Virginia's emerging revolutionary government banned the trade as part of general non-importation resolutions<sup>49</sup> and in 1778 the legislature formally banned the trade.<sup>50</sup> Most slaves came on English ships, and even those on American ships were usually purchased from agents of the English traders stationed on the west coast of Africa. Thus, a ban on the trade was part of the general non-importation movement at the beginning of the Revolution.

In some of the northern colonies abolition of the trade had a moral as well as an economic basis.<sup>51</sup> Opposition to slavery was growing, and during or immediately after the Revolution, five states would either end slavery outright (Massachusetts and New Hampshire) or pass gradual abolition acts (Pennsylvania, Rhode Island, and Connecticut) that would lead to a relatively speedy end to slavery.<sup>52</sup> In those states, a ban on the trade was consistent with growing opposition to slavery itself.

In the remaining new states, where slavery was central to the economy, opposition to the trade was economic and political, but not essentially moral. After the Revolution, South Carolina reopened the trade, but then suspended it in 1787 because of an on-going depression in the state.<sup>53</sup> Similarly, North Carolina levied a prohibitive tax on imported slaves and then in 1794 banned the trade altogether.<sup>54</sup> The trade remained open in Georgia in 1787, but in the wake of the Haitian Revolution, that state would also ban the trade.<sup>55</sup> Thus, in 1787, when the Constitutional Convention met in Philadelphia, only Georgia and North Carolina allowed the importation of slaves.

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49. MacMaster, *supra* note 32, at 152.

50. Act of Oct. 5, 1778, ch. 1, 1778 Va. Acts 471.

51. ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: ABOLITION OF SLAVERY IN THE NORTH* 117, 201-08 (1967); DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION* 262-64 (1972); DONALD ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820*, at 295, 299 (1967); WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN THE UNITED STATES, 1765-1848*, at 42-51 (1978); *see generally* PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY: FEDERALISM, AND COMITY* (1981).

52. ZILVERSMIT, *supra* note 51, at 201-08; DAVIS, *supra* note 51; ROBINSON, *supra* note 51; WIECEK, *supra* note 51; FINKELMAN, *supra* note 51.

53. Act of March 28, 1787, ch. 7, 1787 S.C. Acts. 430; Shugerman, *supra* note 30.

54. An Act Against West Indian Slaves, ch. 1, 1795 N.C. Sess. Laws 786, *reprinted in* DUBOIS, *supra* note 19, at 237 app. B.

55. Act of Dec. 19, 1793, 1793 Ga. Laws 442, *in* MARBURY & CRAWFORD, *DIGEST* 442, *reprinted in* DUBOIS, *supra* note 19, at 236 app. B.

The Revolution brought freedom to slaves who joined the armies on both sides or escaped in the chaos of war.<sup>56</sup> Thousands of slaves left South Carolina and Georgia when the British Army evacuated those states.<sup>57</sup> Some of these people remained free, while others ended up as slaves in the British Caribbean.<sup>58</sup> At the end of the war, leaders in the Deep South fully expected to reopen the trade at some point to replenish their slaves, and thus at the Constitutional Convention they fought for continuing the slave trade.

In 1787, when the Constitutional Convention met in Philadelphia, there were virtually no slaves being imported into the nation, as only Georgia and North Carolina technically still allowed the African trade. But with the expectation of reopening the trade in the near future, the delegates from the Carolinas and Georgia jealously guarded their right to import slaves.<sup>59</sup> Thus, Charles Pinckney told the Convention that South Carolina would “never receive the plan if it prohibits the slave trade.”<sup>60</sup> His older cousin, General Charles Cotesworth Pinckney, explained why this was so, declaring “[S]outh Carolina and Georgia cannot do without slaves.”<sup>61</sup>

### III. THE SLAVE TRADE AT THE CONSTITUTIONAL CONVENTION

A major reason for calling the Philadelphia Convention was to give the new national government the power to regulate international and domestic commerce.<sup>62</sup> All of the delegates understood that the national government had to have some power over international and domestic commerce, but the delegates disagreed on the scope of that power.<sup>63</sup> Most northern delegates favored a strong national commerce power that would stimulate foreign trade, help defend domestic commercial markets from foreign competition, and help protect the northern maritime

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56. BENJAMIN QUARLES, *THE NEGRO IN THE AMERICAN REVOLUTION* 51-67 (1961); GRAHAM HODGES, *THE BLACK LOYALIST DIRECTORY: AFRICAN AMERICANS IN EXILE IN THE AGE OF THE AMERICAN REVOLUTION* xi-xxi (1996).

57. HODGES, *supra* note 56; SYLVIA FREY, *WATER FROM THE ROCK: BLACK RESISTANCE IN A REVOLUTIONARY AGE* 81-85, 108-109 (1991).

58. HODGES, *supra* note 56; JOHN W. PULIS, *MOVING ON: BLACK LOYALISTS IN THE AFRO-ATLANTIC WORLD* xv (1999).

59. ROBINSON, *supra* note 51, at 295-99.

60. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 364 (Max Farrand ed., 1966).

61. *Id.* at 371; FINKELMAN, *supra* note 44, at 28.

62. MELVIN I. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 91 (2002); *see also* FINKELMAN, *supra* note 44, at 10.

63. FINKELMAN, *supra* note 44, at 22-32.

industry.<sup>64</sup> Southern delegates feared that this power would be used to adversely affect their states, which produced raw materials for export, were dependent on imports, and had no local shipping industry.<sup>65</sup>

Slavery was at the heart of these southern fears because the South's economy was based on agricultural products produced by slaves. Southern delegates at the convention envisioned an aggressive commercial North that would undermine their economy through export taxes and other commercial regulations. While there was no significant antislavery movement in the North at this time, Southern delegates feared the North would soon turn on their institution, using tax and commerce powers to attack slavery. No northerners at the convention even suggested that the national government should be able to regulate slavery or touch slavery in the states. But some southerners feared this would happen in a stronger national government. Thus, in one debate, South Carolina's Pierce Butler blurted out: "[t]he security the South[ern] 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>66</sup>

In addition to fearing that taxation or commercial regulation might indirectly harm slavery, delegates from the Carolinas and Georgia also feared that if the new Congress could regulate commerce it would immediately ban the African slave trade. No northerner ever raised this issue. But, at the Convention, the delegates from South Carolina raised it on their own, when the Convention debated the powers of Congress over what the delegates called "navigation acts," and what is today known as the commerce power.<sup>67</sup> Their fear was quite simple: if Congress had plenary power to regulate international commerce, they assumed that a majority of Congress would immediately vote to close the African slave trade.<sup>68</sup>

In the wake of the Revolution, opposition to the trade was strong for a variety of reasons. Some Americans found slavery deeply immoral and a fundamental violation of the principles of the Revolution.<sup>69</sup> By the time of the Convention, Pennsylvania and all the New England states had either ended slavery outright or were in the process of ending

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64. *Id.*

65. *Id.*

66. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 605.

67. FINKELMAN, *supra* note 44, at 30-31.

68. *Id.* at 31-32.

69. THOMAS, *supra* note 14, at 479-80; *see generally* DAVIS, *supra* note 51.

slavery through gradual abolition acts.<sup>70</sup> Southerners presumed these states would also oppose a continuation of the trade. In addition, the South Carolinians feared that other slave states, like New York, New Jersey, Maryland, and Virginia, would support a ban on the trade.<sup>71</sup> These fears were not unreasonable, because many Americans made a distinction between slavery and the trade.<sup>72</sup>

Some Americans who were comfortable with, or at least resigned to, the continuation of slavery, nevertheless believed that the African trade was particularly immoral and pernicious.<sup>73</sup> Many people who could justify—or at least rationalize—holding people in bondage, who were born to that condition, saw no good reason for bringing more slaves to the nation. Other Americans, particularly southerners, who had no strong moral feelings about the trade, or even slavery, nevertheless believed that slavery was an inherent threat to the society, and continuing to import African slaves would only exacerbate an already dangerous situation. Having just fought a revolution for their own liberty, many Americans worried that slaves might soon follow the model of their masters. Finally, many slave owners in Virginia and Maryland opposed the African trade for narrowly economic reasons: they had more slaves than they needed, and knew that if the trade ended their surplus slaves would become more valuable.<sup>74</sup>

At the Constitutional Convention, the delegates from South Carolina, supported by other Southerners, insisted on explicit protection for the African trade in the Constitution.<sup>75</sup> The debates over this issue were among the most intense in the Convention. While these debates were not part of the debate over slave representation that led to the Three-Fifths Clause, they were influenced by that clause.<sup>76</sup> Once the Convention agreed to count slaves for purposes of representation in Congress, the status of the trade became more important. A continuation

70. FINKELMAN, *supra* note 51, at 41-45; ZILVERSMIT, *supra* note 51.

71. FINKELMAN, *supra* note 44, at 17, 32.

72. *See id.* at 31-32.

73. *Id.* at 23-24; *see* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 370 (reproducing speech by George Mason attacking the slave trade); *see also* Peter Wallenstein, *Flawed Keepers of the Flame: The Interpreters of George Mason*, 102 VA. MAG. OF HIST. AND BIOGRAPHY 229-60 (1994); *see also* DUBOIS, *supra* note 19, at 39-40.

74. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 371. For example, in the 1780s and 1790s Thomas Jefferson sold more than 80 slaves to raise money to pay his debts and buy the many things he imported from France. *See* FINKELMAN, *supra* note 44, at ch. 6-7.

75. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 210, 364-65, 370, 373.

76. *Id.* at 106, 215-25, 369-75.

of the trade would not only lead to an increase of slaves and human misery in the new nation, but it would also strengthen the South in Congress, giving more political power to the supporters of bondage. This prospect led Gouverneur Morris, who represented Pennsylvania at the Convention, to denounce the immorality of political compromises over slavery:

The admission of slaves into the 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 & 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>77</sup>

Despite the attempts of Morris and a few others to raise the moral question of slavery, most of the delegates focused on compromise and economic necessity.<sup>78</sup> In August, the Convention debated the Commerce Clause, which would give Congress the power to regulate international and interstate commerce by a simple majority.<sup>79</sup> Before that debate could take place, the South Carolina delegation insisted on protection for the African slave trade and a ban on export taxes.<sup>80</sup> Southerners believed that export taxes could be used to tax the commodities produced by slave labor, such as tobacco and rice, and thus indirectly harm slavery.<sup>81</sup> South Carolina's John Rutledge noted that he would vote for the Commerce Clause as it stood, but only "on [the] condition that the subsequent part relating to negroes should also be agreed to."<sup>82</sup> 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.<sup>83</sup> The South Carolina delegation would support the Commerce Clause if New England would support a

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77. *Id.* at 222.

78. *Id.* at 210-13, 221, 253-54, 334, 355-56; 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 66, at 637, 640.

79. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 305, 356.

80. *Id.* at 305-06.

81. *Id.* at 360.

82. *Id.* at 306; *see also* Paul Finkelman, *Garrison's Constitution: The Covenant with Death and How It Was Made, Part 2*, 32 PROLOGUE (Winter 2000) available at <http://www.archives.gov/publications/prologue/2000/winter/garrisons-constitution-2.html>; FINKELMAN, *supra* note 44, at 25.

83. FINKELMAN, *supra* note 44, at 25.

prohibition on export taxes and a protection for the slave trade.<sup>84</sup> This understanding solidified in late August.

On August 21, the New England states joined the five slave states south of Delaware on three crucial votes.<sup>85</sup> 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>86</sup> During the debate over this motion Connecticut's Oliver Ellsworth—a future Chief Justice of the United States Supreme Court—argued against taxing exports because such taxes would unfairly hurt the South which produced major export crops such as “[t]obacco, rice and indigo.”<sup>87</sup> Ellsworth believed “a tax on these alone would be partial and unjust.”<sup>88</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>89</sup> On the final vote, to absolutely ban all export taxes, Massachusetts joined Connecticut and the southern states in voting to prohibit export taxes, passing the measure seven-to-four.<sup>90</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>91</sup>

The Convention then debated a motion by Luther Martin to allow a tax on imported slaves.<sup>92</sup> 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 Southern States shall or shall not be parties to the Union.”<sup>93</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 Slaves which will increase the commodities of which they will become the carriers.”<sup>94</sup> Ellsworth of Connecticut

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84. *Id.*

85. *Id.*

86. *Id.*

87. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 360.

88. *Id.*

89. *Id.* at 363.

90. *Id.* at 363-64.

91. *Id.*; Finkelman, *supra* note 82 (citing STAUGHTON LYND, *The Abolitionist Critique of the Constitution, in CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION: TEN ESSAYS* 159-60 (1967)); FINKELMAN, *supra* note 44, at 26.

92. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 364.

93. *Id.*

94. *Id.*

agreed, refusing to debate the “morality or wisdom of slavery,” instead simply asserting, “[w]hat enriches a part enriches the whole.”<sup>95</sup> The alliance for profit between the Deep South and New England was now fully developed.<sup>96</sup> It is important to understand that this was not an alliance stimulated by New England’s involvement in the African slave trade itself. By 1787, all of the New England states had banned the trade and prohibited their citizens from participating in it.<sup>97</sup> The alliance was over trade and commerce that would involve the products of slave labor, and not the bodies of slaves themselves.

Despite the support from Connecticut, Charles Pinckney reaffirmed that South Carolina would “never receive the plan if it prohibits the slave trade.”<sup>98</sup> In a rhetorical slight-of-hand that none of the other delegates challenged, Pinckney equated taxing the African trade with a prohibition on the trade itself. This was part of the South Carolinians’ apparent tactic of constantly exaggerating any threat to slavery combined with persistent blustering threats to oppose the Constitution if they did not get their way on slavery-related issues.

The next day Roger Sherman, also of Connecticut, declared his personal disapproval of slavery but refused to condemn it in other parts of the nation. He opposed any prohibition of the trade, asserting that “the public good did not require” an end to the trade.<sup>99</sup> This was an odd argument to make, since no one at the Convention had ever suggested the Constitution ought to prohibit the trade. In this debate, Sherman apparently accepted the hyperbole of the South Carolina delegation that even a tax on the trade was the equivalent to an outright ban. Sherman also implicitly accepted the arguments coming from the Deep South that anything short of an explicit protection of the trade was the same thing as ban. Sherman noted that the states currently had the right to import slaves, and he opposed tampering with this right because “it was expedient to have as few objections as possible” to the new Constitution.<sup>100</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 in the North—even in his own state—who might oppose the Constitution if it allowed the slave trade to continue. Indeed, Sherman was prepared to

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95. *Id.*

96. *Id.*

97. FINKELMAN, *supra* note 44, at 12, 28.

98. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 364.

99. *Id.* at 369.

100. *Id.*

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>101</sup> He argued that if the Convention and the national government did nothing about the slave trade, the “good sense of the several States” would soon put an end to all slavery in the country.<sup>102</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.<sup>103</sup> 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>104</sup>

George Mason of Virginia responded to Sherman with a fierce attack on the “infernal traffic” in slaves, which he blamed on “the avarice of British Merchants.”<sup>105</sup> Reflecting the sectional hostilities at the Convention, as well as trying to lay blame on anyone but Virginians for the existence of slavery, Mason then “lamented” that his “[e]astern brethren had from a lust of gain embarked in this nefarious traffic.”<sup>106</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>107</sup> He declared that “every 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>108</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>109</sup> As historian Peter Wallenstein has argued, “[w]hatever his occasional rhetoric, George Mason was—if one must choose—proslavery, not antislavery. He acted on behalf of

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101. *Id.*

102. *Id.* at 370.

103. FINKELMAN, *supra* note 44, at 26-27.

104. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 370; *see also* FINKELMAN, *supra* note 44, at 27.

105. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 370.

106. *Id.* at 370; *see also* FINKELMAN, *supra* note 44, at 27.

107. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 370; *see also* FINKELMAN, *supra* note 44, at 27.

108. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 370.

109. *Id.*

Virginia slaveholders, not Virginia slaves,” when he opposed a continuation of the African trade.<sup>110</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: “[t]hat 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>111</sup> Under such conditions “Virginia etc would make their own terms for such [slaves] as they might sell.”<sup>112</sup> The “etc” no doubt included McHenry’s own state of Maryland.<sup>113</sup>

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>114</sup> But if slavery were as wrong as Mason had suggested, then logically, merely ending the trade was insufficient. But of course Ellsworth knew that the Virginians like Mason were not suggesting that the national government abolish slavery.<sup>115</sup> Therefore, since there were many slaves in Virginia and Maryland and fewer in the Deep South, Ellsworth argued that any prohibition on the trade would be “be unjust towards S. Carolina & Georgia.”<sup>116</sup> So Ellsworth urged the Convention not to “intermeddle” in the affairs of other states.<sup>117</sup>

The Convention had now witnessed the bizarre phenomenon of a New Englander defending the slave trade against the attacks of a Virginian. Once again, it is important to understand that in this debate, no one ever suggested that the Constitution interfere with slavery in the states or that it ban the trade. The South Carolinians had successfully altered the debate to one over a ban on the slave trade, which ignored the fact that no one had suggested such a ban. In doing this, they were able to get New Englanders to defend their right to import slaves, thus setting the stage for an affirmative protection for the trade.

The Carolinians were of course quite capable of defending their own institution. Charles Pinckney, citing ancient Rome and Greece,

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110. Wallenstein, *supra* note 73, at 253.

111. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 378 (McHenry notes).

112. *Id.*

113. FINKELMAN, *supra* note 44, at 27.

114. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 370-71.

115. FINKELMAN, *supra* note 44, at 27.

116. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 370-71.

117. *Id.* at 371.

declared that slavery was “justified by the example of all the world.”<sup>118</sup> He warned that any prohibition of the slave trade would “produce serious objections to the Constitution which he wished to see adopted.”<sup>119</sup> His older and more famous cousin, General Charles Cotesworth Pinckney, also declared his support for the Constitution, but noted that his “personal influence . . . would be of no avail towards obtaining the assent” of his home state.<sup>120</sup> He believed Virginia’s opposition to the trade was more pecuniary than moral. Virginia would “gain by stopping the importations” because “her slaves will rise in value, and she has more than she wants.”<sup>121</sup> Prohibiting the trade would force South Carolina and Georgia “to confederate” on “unequal terms.”<sup>122</sup> While Virginia might gain from the closing of the slave trade, Pinckney implied that the nation as a whole would not benefit from closing the trade. Pinckney argued that more slaves would produce more goods, and that result would help not only the South but also the North, where the states involved in “the carrying trade.”<sup>123</sup> Furthermore, he declared, “[t]he more consumption also, and the more of this, the more of revenue for the common treasury.”<sup>124</sup> Pinckney saw the slave trade solely as an economic issue, and therefore, thought it “reasonable” that imported slaves be taxed.<sup>125</sup> But a prohibition of the slave trade would be “an exclusion of S. Carolina from the Union.”<sup>126</sup> As he had made clear at the beginning of his speech, “S. Carolina and Georgia cannot do without slaves.”<sup>127</sup> Rutledge and Butler added similar sentiments, as did Abraham Baldwin of Georgia and Williamson of North Carolina.<sup>128</sup>

New England twangs now supported the Southern draws. Elbridge Gerry of Massachusetts offered some conciliatory remarks, and Sherman, ever the ally of the South, declared that “it was better to let the [Southern] States import slaves than to part with them, if they made that a sine qua non.”<sup>129</sup> But in what may have been an attempt to give his

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118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 372.

127. *Id.* at 371.

128. *Id.* at 372-74; FINKELMAN, *supra* note 44, at 28.

129. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 374.

remarks an antislavery tone, he argued that taxing imported slaves was morally wrong, because that “implied they were property.”<sup>130</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.<sup>131</sup>

Similarly, Rufus King of Massachusetts argued that “the subject should be considered in a political light only,”<sup>132</sup> implying that the moral questions should be ignored. He disagreed with Sherman on the taxation issue, however, arguing that an “exemption of slaves from duty whilst every other import was subjected to it, was an inequality that could not fail to strike the commercial sagacity of the Northn. & middle States.”<sup>133</sup>

These arguments illustrate the reasons for cooperation between New England and the Deep South on this issue. New Englanders, involved in the “carrying trade,” would profit from transporting rice and other products produced by slave labor.<sup>134</sup> 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.”<sup>135</sup>

On the other side of the issue, 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>136</sup> Furthermore, he was prepared to call the Carolinians’ bluff on the question of whether they would actually join the stronger Union under the new Constitution. Dickinson declared he “could not believe that the Southn. States would refuse to confederate”<sup>137</sup> over this issue, especially because Dickinson did not believe that the power to end trade would be “immediately exercised by the Genl. Government.”<sup>138</sup> James Wilson was also skeptical of southern threats, asserting that South

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130. *Id.*

131. FINKELMAN, *supra* note 44, at 28.

132. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 373.

133. *Id.*

134. FINKELMAN, *supra* note 44, at 28. It is important to understand that there was not an expectation that New England ships would be transporting slaves from Africa to South Carolina, because all of the New England states had prohibited their citizens from participating in the African trade.

135. *Id.*

136. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 372.

137. *Id.* at 372-73.

138. *Id.* at 373.

Carolina and Georgia would “never refuse to Unite because the importation might be prohibited,” since he expected these states would end the trade on their own.<sup>139</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.<sup>140</sup> He suggested that the subject of commercial regulation acts and the slave trade be sent to committee, because “[t]hese things may form a bargain among the Northern and Southern States.”<sup>141</sup> The Convention quickly accepted his suggestion.<sup>142</sup>

On August 25, the Convention considered a proposal 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>143</sup> South Carolina’s General Charles Cotesworth Pinckney immediately urged that the date be changed to 1808, which would be twenty years after the Constitution was ratified.<sup>144</sup> Nathaniel Gorham of Massachusetts seconded this motion.<sup>145</sup> James Madison, who owned slaves but abhorred the slave trade, complained that this provision was “dishonorable to the National character” and to the Constitution and that “twenty years will produce all the mischief that can be apprehended from the liberty to import slaves.”<sup>146</sup> Nevertheless, the delegates accepted Pinckney’s change by a seven-to-four vote.<sup>147</sup> Three New England states, Maryland, and the three Deep South states supported Pinckney’s motion.<sup>148</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.<sup>149</sup> Morris wanted it

139. *Id.* at 372.

140. FINKELMAN, *supra* note 44, at 29.

141. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 374.

142. *Id.*

143. *Id.* at 414; *see* FINKELMAN, *supra* note 44, at 29-30. The Committee reported the compromise proposal on the 24th, and the convention began to debate it on the 25th. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 400, 414.

144. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 415; FINKELMAN, *supra* note 44, at 29.

145. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 415.

146. *Id.* On Madison, *see generally* RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY (1990).

147. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 415.

148. *Id.*; FINKELMAN, *supra* note 44, at 29.

149. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 415; FINKELMAN, *supra* note 44, at 29.

known “that this part of the Constitution was a compliance with those States.”<sup>150</sup> Having made this motion only to embarrass supporters of the trade, Morris withdrew it.<sup>151</sup> By a seven-to-four vote the Convention then adopted the slave trade provision.<sup>152</sup> The three New England states once again joined Maryland and the Deep South to allow the slave trade to continue for twenty years.<sup>153</sup> This vote formed a key component of the “dirty compromise.”<sup>154</sup>

#### IV. UNDERSTANDING THE SLAVE TRADE CLAUSE

The final slave trade clause read:

The Migration or Importation of such Persons as any of the State now existing shall think proper to admit shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.<sup>155</sup>

The clause did not mention slaves or the trade, but everyone at the Convention knew that was what it was about. The wording of the clause was clearly designed to obfuscate what the Convention had done, and the Connecticut delegation was instrumental in this result.<sup>156</sup> This, however, did not fool anyone. Thus, an anonymous author in Connecticut asked: “why this sentence should be couched in this *blind mysterious form of words*, unless to avoid using the word *Negroes*, I must leave to those that drew it to explain.”<sup>157</sup> He concluded that “the seeming case taken to cover the true intent of this” clause was a sufficient reason to oppose the entire Constitution.<sup>158</sup> Similarly, in campaigning against the Constitution, the Connecticut politician

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150. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 415.

151. *Id.* at 416.

152. *Id.*

153. *Id.*

154. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 44, at 29.

155. U.S. CONST., art. I, § 9, cl. 1.

156. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 415; Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J.L. & HUMAN. 413, 425-26 (2001).

157. *Letter from Massachusetts*, CONNECTICUT JOURNAL, Oct. 24, 1787, in 3 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 378-79 (Merrill Jensen ed., 1978) [hereinafter DOCUMENTARY HISTORY OF THE RATIFICATION].

158. *Id.*

Benjamin Gale attacked the “artful language they use to cover their meaning” in the slave trade provision.<sup>159</sup> He asked:

Why all this sly cunning and artful mode of expression unless to cover from your observation and notice that *Negroes* was intended by the word *persons* . . . lest it should frighten people who may have some tender feelings and a just sense of the rights of human nature.<sup>160</sup>

It is important to understand that the clause did not require an end to the trade in 1808. It only prevented Congress from ending the trade before 1808. Moreover, when the Convention accepted this clause almost all the delegates assumed that the Deep South and the Southwest would grow faster than the rest of the nation.<sup>161</sup> The delegates assumed that what is now Alabama and Mississippi would become new states, and that South Carolina and especially Georgia would have much larger populations.<sup>162</sup> If these assumptions had been correct, then by 1808 the states that most wanted to continue the trade would have had enough political power, and enough allies, to prevent an end to the trade. Ending the trade would require that a bill pass both houses of Congress and be signed by the president. That process would give the supporters of the trade three opportunities to stop a bill, and keep the trade open. Thus, the slave trade debate was seen in the Deep South as a major victory. South Carolina and Georgia had bought two decades to gain the strength to preserve the trade forever.

## V. THE SLAVE TRADE AND RATIFICATION

The slave trade provision was a significant factor in the debates over ratification, but its impact was complicated. Opponents of the Constitution, in both the North and the South, roundly condemned the clause. On the other hand, supporters of the Constitution—even those who were ambivalent or hostile to slavery—praised the clause, although for very different reasons.

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159. Benjamin Gale, Address at the Constitutional Convention (Nov. 12, 1787), in DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 157, at 424.

160. *Id.* at 425.

161. FINKELMAN, *supra* note 44. See, e.g., Benjamin Gale, Address at the constitutional convention (Nov. 12, 1787), in DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 157, at 423, 429 n.7 (predicting the South would dominate Congress in the future).

162. This was made clear in the discussion over the allocation of members of Congress before there was a census. See FINKELMAN, *supra* note 44.

*A. Anti-Federalists and the Slave Trade Provision*

Anti-federalists in the North and the Upper South hammered home, again and again, the fundamental immorality of the clause. On the last day of the Convention, Virginia's George Mason, to no one's surprise, declared he would not sign the Constitution, citing the slave trade provisions as one of his major objections.<sup>163</sup> A man who owned many slaves, and who would never emancipate any of them,<sup>164</sup> Mason nevertheless saw no reason to add more slaves to the nation, because "such importations render the United States weaker, more vulnerable, and less capable of defense."<sup>165</sup> He did not add, but could have if he had been totally honest, that the slave trade would also diminish the value of the many slaves he already owned. Like other elite Virginians—George Washington being a major exception—Mason sold men "as you would do cattle at a market,"<sup>166</sup> to pay his debts and support his lifestyle.

Many in the North, and some in the South, took a more principled stand against the Constitution because of the slave trade provision. 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>167</sup> A correspondent in the *Philadelphia Independent Gazetteer* sarcastically noted that "[a]mong the blessings of the new-proposed government" were the lack of a free press, the lack of a jury trial in civil cases, and "[a] Free importation of negroes for one and twenty years."<sup>168</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>169</sup>

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163. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 637-40.

164. Wallenstein, *supra* note 73; John Michael Vlach, *Material Culture in the United States*, in MACMILLAN ENCYCLOPEDIA OF WORLD SLAVERY, *supra* note 3, at 566.

165. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 60, at 640.

166. Letter from George Washington to Alexander Spotswood (Nov. 23, 1794), in THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 47 (John C. Fitzpatrick ed., 1931-44) (explaining that he would sell slaves, like cattle). On Washington and slaveholding see HENRY WIENCEK, AN IMPERFECT GOD: GEORGE WASHINGTON, HIS SLAVES AND THE CREATION OF AMERICA 183-88 (2003); see also, FRITZ HIRSHFELD, GEORGE WASHINGTON AND SLAVERY: A DOCUMENTARY PORTRAYAL 16-17 (1997); JOHN C. MILLER, WOLF BY THE EARS: THOMAS JEFFERSON AND SLAVERY 107 (1977).

167. Letters from a Countryman from Dutchess County (Jan. 22, 1788), in 5 THE COMPLETE ANTI-FEDERALIST 62 (Herbert F. Storing ed., 1981).

168. *Blessings of the New Government*, PHILA. INDEP. GAZETTEER, Oct. 6, 1787, in DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 157, at 354-56.

169. Essay by Republicus (Mar. 12, 1788), in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 167, at 169.

A Connecticut anti-federalist made a more practical allusion to the problem of the African slave trade and the Algerian slavery. At the time, New England sailors worried about being captured along the Barbary Coast and sold into slavery in North Africa. He argued that the United States would

have no right to complain of the *Algerines*, who live on the coast of *Africa*, if they enslave the *Americans* whom they find sailing in those seas, if we will send our vessels across the *Atlantic*, of set design, to *purchase, kidnap, and decoy* the inhabitants of the more southern states of the globe.<sup>170</sup>

It was more than just the slave trade that northern anti-federalists 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 defense and support of every thing to which they are entitled thereby, right or wrong.”<sup>171</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>172</sup>

### *B Federalists and the Slave Trade Provision*

Northern supporters of the Constitution were at a rhetorical disadvantage in this debate, but they nevertheless had to engage the issue. They developed three tactics. The most honest response to the slave trade clause was to acknowledge that the Constitution protected the trade because it was necessary to secure the support of the Deep South, but that this clause was still an improvement over the current situation because under the Articles of Confederation, the national government had no power to regulate commerce.

These supporters of the Constitution argued that under the new system of government it would be possible, in *just* twenty years, to end

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170. *Letter from Massachusetts*, *supra* note 157, at 378-79.

171. See Arms, Milichi Maynard, and Samuel Field, *Reasons for Dissent*, in 4 THE COMPLETE ANTI-FEDERALIST 263 (Herbert J. Storing ed., 1981) *supra* note 167, at 263.

172. *Id.*

the trade.<sup>173</sup> For example, Tench Coxe, a Philadelphia businessman who was also active in the Pennsylvania Abolition Society, argued that the clause was a “clear implication” that the trade was “inconsistent with the disposition and the duties of the people of America,” and that the “*temporary* reservation of any particular matter must ever be deemed as admission that it should be done away.”<sup>174</sup> Coxe admitted that this clause was in the Constitution because in the Convention “regard was necessarily paid to the peculiar situation of our southern fellow-citizens.”<sup>175</sup> Similarly, an anonymous writer in New Jersey said that “the prospect of putting a stop to the abominable and accursed traffic, even at the period of twenty years, fills me with inexpressible joy.”<sup>176</sup> The wait was necessary because of the “critical situation of our Southern brethren,”<sup>177</sup> but in the meantime this author noted the states were free to end the trade according to their own “discretion and humanity.”<sup>178</sup>

Such arguments were entirely correct and doubtlessly provided cover for those who favored the Constitution but did not like the slave trade. It is hard to imagine that they persuaded very many people not already inclined to support the Constitution, because the arguments did not answer the question of why the Convention so willingly suspended its power to regulate commerce *only* for the African slave trade. Northern opponents of the Constitution doubtless were underwhelmed by the argument that their interests had to be sacrificed to placate the “peculiar situation” of Southerners.

A second argument was that the clause would require an end to the trade in twenty years, and thus this clause was actually antislavery. Just after the Convention ended, the *Pennsylvania Gazette* made this claim, arguing that the Constitution “provides an effectual check to the African trade, in the course of one and twenty years.”<sup>179</sup> Rather than bemoaning the law’s waiting period, the *Gazette* bragged that this clause was “honorable to America,” and made it “the first Christian power that has borne a testimony against a practice, that is alike disgraceful to religion,

173. 3 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 598 (1891).

174. Tench Coxe, *An American Citizen IV: On the Federal Government*, PA. GAZETTE, Oct. 24, 1787, reprinted in DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 157, at 431.

175. *Id.*

176. *Reply to George Mason’s Objections to the Constitution*, N.J. JOURNAL, Dec. 26 1787, reprinted in DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 157, at 160.

177. *Id.*

178. *Id.*

179. PA. GAZETTE, Sept. 26, 1787, reprinted in 13 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 157, at 253-54.

and repugnant to the true interests and happiness of Society.”<sup>180</sup> Similarly, Benjamin Rush assured a private correspondent that in 1808 “there will be an end of the African trade in America.”<sup>181</sup>

This argument was of course, not correct. The clause clearly did not require, or even guarantee, an end to the trade. South Carolina’s delegation was counting on having enough political clout, in 1808, to prevent an end to the trade. Optimistic supporters of the Constitution who opposed the trade hoped—correctly as it turned out—that in twenty years their side would have the votes to end the trade. But, people like Rush were either themselves misled, or willing to mislead others, in asserting that the clause guaranteed an end to the trade in 1808.

Ironically, the federalists who supported this interpretation of the clause may have been the first Americans to implement “popular constitutionalism” in the interpretation of the Constitution. They helped turn their wishful thinking into a self-fulfilling prophecy by constantly asserting that the clause meant the trade would end in 1808. By the time the Constitution was ratified, many voters—perhaps a majority of them—believed that the Constitution mandated an end to the trade, when it did not.

There were, however, limits to how far popular constitutionalism might reshape the document. The third variation of the northern federalists’ argument on the trade bears such limitations. This was a thoroughly misleading, if not outright dishonest, claim that the slave trade clause would actually lead to an end to slavery itself. However dishonest the argument was, it may have been politically shrewd. Thus, James Wilson of Pennsylvania asserted at the Pennsylvania ratifying convention: “I consider this as laying the foundation for banishing slavery out of this country; and though the period is more distant than I could wish, yet it will produce the same kind, gradual change, which was pursued in Pennsylvania.”<sup>182</sup> He also predicted that under the Constitution no new slave states would be admitted to the Union.<sup>183</sup> A day later he declared that this clause was a “lovely feature in the Constitution” that “would diffuse a beauty over its whole countenance.”<sup>184</sup> In these speeches, Wilson made the subtle shift from

180. *Id.*

181. Letter from Benjamin Rush to John Coakley Lettson (Sept. 28, 1787), *reprinted in* DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 157, at 262.

182. James Wilson, Remarks at the Penn. Convention (Dec. 3 1787), *in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 463 (Merrill Jensen ed., 1976).

183. *Id.*

184. *Id.* at 499.

the “trade” to slavery, and since most of his listeners were not as legally sophisticated as Wilson, he was able to fudge the issue. Thus, Wilson told the Pennsylvania ratifying convention that after “the lapse of a few years . . . Congress will have power to exterminate slavery from within our borders.”<sup>185</sup>

Since Wilson attended all the debates in the Convention 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. Supporters in other states made similar claims. For example, in Massachusetts, Rev. Isaac Backus said with “a door open” to abolish the slave trade “we cannot say that slavery is struck with apoplexy, yet we may hope it will die with a consumption.”<sup>186</sup> We cannot know if Backus honestly believed this was true, whether it was merely wishful thinking on his part, or whether he was intentionally trying to mislead voters. But clearly the Constitution did not empower the national government to end slavery, even after 1808.

Upper South supporters of the Constitution, like Edmund Randolph, also made the argument that a ban on the trade was impossible under the Articles, and thus the Constitution, even if imperfect, was still a good bargain.<sup>187</sup> Deep South supporters of the Constitution, like Charles Cotesworth Pinckney, simply bragged that they had won a great victory—as indeed they had—in protecting the trade for *at least* twenty years. 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>188</sup> David Ramsey, writing as *Civis*, reminded South Carolinians that a coalition of northern and upper south members of Congress could end the trade after 1808, but “it is probable that they will not” because “[t]he more rice we make, the more

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185. *Id.*

186. Isaac Backus, Remarks at Mass. Convention (Feb. 1788), in 6 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1422 (John P. Kaminski & Gaspare J. Saladino eds., 2000).

187. ELLIOT, *supra* note 173, at 598-99.

188. ELLIOT, *supra* note 173, at 286.

business will be for their shipping: their interest will coincide with ours.”<sup>189</sup>

## VI. REGULATING THE TRADE

While Congress did not have the power to end the trade before 1808, it did have the power to regulate the trade, and starting in 1794 Congress did just that.<sup>190</sup> In March, Congress prohibited the use of any U.S. port or shipyard for the purpose of fitting out or building any ship to be used in the trade.<sup>191</sup> The law also prohibited ships sailing from U.S. ports from trafficking in slaves to foreign countries.<sup>192</sup> Ships sailing from the United States to Africa, even if of foreign registry, were required to

give bond with sufficient sureties, to the treasurer of the United States, that none of the natives of Africa, or any other foreign country or place, shall be taken on board . . . to be transported, or sold as slaves in any other foreign place, within nine months thereafter.<sup>193</sup>

Penalties under the law included fines ranging from \$2,000 for outfitting a ship to \$200 for an individual working on such a ship.<sup>194</sup> The act provided that the actual ships involved in the trade could be confiscated.<sup>195</sup> The law gave half of all fines to any informants, thus providing an incentive for ship captains and mariners to monitor the activities of anyone they suspected of being involved in the illegal trade.<sup>196</sup>

In 1800, Congress amended the 1794 act by dramatically increasing fines for illegal American participation in the trade and giving informants a right to the entire value of any ship condemned under the law.<sup>197</sup> In addition to not allowing American ships to participate in the trade, the new law prohibited any American from having any interest in a ship involved in the trade.<sup>198</sup> Thus, Americans could no longer invest

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189. David Ramsey, “*To the Citizens of South Carolina*”, Charleston Columbian Herald, Feb. 4, 1788, in 4 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 25 (John P. Kaminski & Gaspare J. Saladino eds., 1986).

190. Act of March 22, 1794, ch.11, 1 Stat. 347 (1794).

191. *Id.*

192. *Id.*

193. *Id.* at 349.

194. *Id.*

195. *Id.*

196. *Id.*

197. Act of May 10, 1800, ch. 51, 2 Stat. 70 (1800).

198. *Id.*

in the trade, even if carried on legally by non-U.S. ships.<sup>199</sup> If convicted of having an interest in the trade, an American was subject to a fine that was double the value of his investment in the vessel and double the value of any slaves in which he had an interest.<sup>200</sup> The 1800 amendment explicitly prohibited any American citizen or resident alien from voluntarily serving “on board any foreign ship or vessel . . . employed in the slave trade.”<sup>201</sup> It no longer mattered if the ship was of U.S. register, or even if the ship left an American port.<sup>202</sup> American sailors found on slavers (ships that transported slaves) were now subject to a \$2,000 fine.<sup>203</sup> The law authorized all “commissioned vessels of the United States, to seize and take any vessel employed” in the trade contrary to the law, with the crew receiving half the value of the ship when it was sold.<sup>204</sup> This provided an enormous incentive for American ships to police the trade.

In 1803, South Carolina reopened the trade.<sup>205</sup> Earlier that year, probably in anticipation of South Carolina’s act, Congress passed a new law regulating the trade.<sup>206</sup> This act created new fines for people who brought slaves into states that banned the importation of slaves.<sup>207</sup> The law applied to any “negro, mulatto, or other person of color” imported from Africa or the Caribbean.<sup>208</sup> The language was apparently used to prevent people from claiming that illegally imported Africans found on their ships were not slaves but servants or indentured servants.<sup>209</sup>

The acts of 1794, 1800, and 1803 had been designed to limit American participation in the trade, but could not be used to stop the trade itself, because of Article I, Section 9 of the Constitution. Significantly, all of the laws passed before 1807 focused on ships, sailors, and investors.<sup>210</sup> None of the laws had contained any provision regarding what should happen to slaves illegally imported into the

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199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. Act of Dec 17, 1803, ch. 7, 1803 S.C. Acts 449; *see also* Shugerman, *supra* note 30, at 264-66.

206. Act of Feb. 28, 1803, ch. 10, 2 Stat. 205 (1803).

207. *Id.*

208. *Id.*

209. *Id.*

210. Act of March 22, 1794, ch.11, 1 Stat. 347 (1794); Act of May 10, 1800, ch. 51, 2 Stat. 70 (1800); Act of Feb. 28, 1803, ch. 10, 2 Stat. 205 (1803).

United States.<sup>211</sup> Indeed, while the 1794 law provided for the sale of a ship and its “tackle, furniture, apparel and other appurtenances”<sup>212</sup> of a slaver, it did not mention what should happen to any slaves or other cargo on the ship.<sup>213</sup> Presumably, they too would be sold for the benefit of the United States, the informant, or any other claimant under the three laws.

## VII. ABOLISHING THE TRADE

In his annual message to Congress in December of 1806, Thomas Jefferson, who had long opposed the trade (but not slavery itself) reminded the nation that on January 1, 1808 the Constitutional suspension of Congressional power on this issue would finally expire.<sup>214</sup> He took a moment in his address to “congratulate” his

fellow-citizens, on the approach of the period at which you may interpose your authority constitutionally to withdraw the citizens of the United States from all further participation in those violations of human rights which have been so long continued on the unoffending inhabitants of Africa, and which the morality, the reputation, and the best interests of our country have long been eager to proscribe.<sup>215</sup>

He also noted that any law passed by Congress could not take effect until January 1, 1808, but nonetheless he urged Congress to act quickly “to prevent by timely notice expeditions which can not be completed before that day.”<sup>216</sup> Congress readily complied with legislation to absolutely ban all importations of slaves after January 1, 1808.<sup>217</sup> The 1807 Act was a comprehensive attempt to close the African trade. By passing the law in March, Congress gave all slave traders nine months to close down their operations in the United States.

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211. *See, e.g.*, Act of March 22, 1794, ch.11, 1 Stat. 347 (1794).

212. *Id.*

213. *Id.*

214. Thomas Jefferson, “Sixth Annual Message” to the United States Congress (Dec. 2, 1806), in *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 396 (1897), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29448>.

215. *Id.*

216. *Id.*

217. An Act to Prohibit the Importation of Slaves, ch.22, 2 Stat. 426 (1807).

*A. The 1807 Act*

The ten sections of the 1807 Act were designed to eliminate all American participation in the trade. Section 1 set the tone.<sup>218</sup> After January 1, 1808 it would

not be lawful to import or bring into the United States or the territories thereof from any foreign kingdom, place, or country, any negro, mulatto, or person of colour, with intent to hold, sell, or dispose of such [person] . . . as a slave, or to be held to service or labour.<sup>219</sup>

The act provided an enormous penalty—up to \$20,000—for anyone building a ship for the trade or fitting out an existing ship to be used in the trade.<sup>220</sup>

Penalties for participating in the trade varied. American citizens participating in the trade were subject to fines of up to \$10,000 and jail terms of anywhere from five to ten years.<sup>221</sup> Ships of any nation found in American ports or hovering off the American coast with slaves on them could be seized and forfeited, with the captain facing a \$10,000 fine and up to four years in prison.<sup>222</sup> Any American who purchased an illegally imported slave would lose that slave and be fined \$800 for every slave purchased.<sup>223</sup> The law allowed the United States Navy to interdict ships involved in the illegal trade.<sup>224</sup> The law required ships legally transporting slaves within the United States, from one Southern slave port to another, to register their cargo with port authorities before commencing their voyage.<sup>225</sup> This section was designed to further prevent the illegal importation of slaves.

The law certainly had impressive penalties for those who were convicted of violating it. Fines under the statute were enormous, and the potential jail time was surely enough to discourage most slave smugglers.<sup>226</sup> Moreover, for the Jefferson administration, which never much liked federal power, this Act constituted a huge grant of power to the national government. Had Congress provided sufficient funding to enforce the law it would have surely closed the trade. Funding the

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218. *Id.* at 426.

219. *Id.*

220. *Id.*

221. *Id.* at 426-27.

222. *Id.* at 428.

223. *Id.* at 427.

224. *Id.*

225. *Id.* at 427-28.

226. *Id.*

suppression of the trade, would, however, be problematic until the Civil War.<sup>227</sup>

There was one other problem with the 1808 law: the disposition of illegally imported slaves. Logically, illegally imported slaves should have been either freed in the United States or sent back to Africa. After all, one of the goals of the law was to end the importation of new slaves from Africa. Given the views of President Jefferson, and many of the leaders of his party, neither option was possible.<sup>228</sup>

President Jefferson was deeply hostile to the presence of free blacks in the United States.<sup>229</sup> In a letter to Edward Coles, shortly after he left office, Jefferson referred to them as “pests” on society.<sup>230</sup> Thus, his administration had no interest in freeing Africans who were illegally imported into the nation. Nor was the deeply parsimonious Jefferson likely to support spending any money on returning the hapless Africans to their homeland. They may have been sold into an immoral form of commerce and illegally brought to America as slaves, but at least from Jefferson’s perspective, that did not mean they should be free.

So, what would the nation do with slaves illegally brought to its shores? Reflecting Jefferson’s states’ rights ideology, his hatred of free blacks,<sup>231</sup> and his refusal to spend money unless absolutely necessary, the law provided that any slaves illegally found in the United States would be treated according to the law of the state in which they were found—or brought to.<sup>232</sup> In practice, this meant the unfortunate Africans who were illegally taken to the United States would not become free, but instead would become slaves in some southern state.

Furthermore, the states where these illegally imported Africans were taken would actually profit from the illegal trade by selling the Africans. This aspect of the law illustrates that the Jefferson administration was not antislavery and that it had no concerns about the immorality of actually enslaving freeborn Africans. Such confiscations had the triple advantage of discouraging slave smugglers (who would lose all their cargo), enriching the Southern states which would profit from the sale of the illegally imported slaves, and also giving individual Southerners the opportunity to acquire new slaves.

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227. DUBOIS, *supra* note 19, at 29, 170.

228. FINKELMAN, *supra* note 44, at ch. 5-7.

229. *Id.* at ch. 6-7; *see also* Letter from Thomas Jefferson to Edward Coles (Aug. 25, 1814), available at <http://www.teachingamericanhistory.org/library/index.asp?document=307>.

230. Letter from Thomas Jefferson to Edward Coles, *supra* note 229.

231. *See generally* FINKELMAN, *supra* note 44, ch. 6-7.

232. An Act to Prohibit the Importation of Slaves, ch.22, 2 Stat. 426 (1807).

Under the law, the United States would gain money from the sale of confiscated ships and the large fines imposed on anyone involved in the trade.<sup>233</sup> People informing on those who violated the law, as well as the crews of naval ships that seized traders, would also share in the proceeds of the sale of ships that were seized.<sup>234</sup> Southern states would have the proceeds from the sale of illegally imported slaves, and Southern slave-owners would have access to a few more slaves. Anticipating the logic of Chief Justice Taney's decision in *Dred Scott v. Sandford* (1857),<sup>235</sup> the Africans themselves would "have no rights,"<sup>236</sup> and remain slaves. In sum, the act of 1807 provided heavy penalties—great disincentives—for slave traders, but ignored the slaves themselves. They were treated like merchandise to be transferred from the smuggler to some owner who could get a clear title to them. The 1807 Act sought to end the trade, but did nothing to undermine the legitimacy of holding men and women in bondage. In that respect it truly represented the ideology of the president who signed it into law.

#### B. *The 1818 Act*

In 1818, Congress passed an elaborate new act,<sup>237</sup> technically an amendment to the 1807 law, but really more like a new statute.<sup>238</sup> The new law tinkered with the penalties for various offenses.<sup>239</sup> For example, the maximum fine for fitting out a ship was reduced to \$5,000 and the jail time was reduced to no more than seven years.<sup>240</sup> The reduction in penalties probably did not reflect any sense that the trade was less heinous. Rather, the original penalties were probably out of line with standards for punishments at the time.

The most significant change in the law was the standard by which courts would judge those charged under the 1818 act. The new law shifted the burden of proof from the prosecution to the defendant.<sup>241</sup> The new law required that defendant "prove that the negro or mulatto, or person of colour, which he or they shall be charged with having brought into the United States, or with purchasing . . . was brought into the

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233. *Id.*

234. *Id.*

235. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

236. *Id.* at 404–05.

237. Act of Apr. 20, 1818, ch.91, 3 Stat. 450 (1818).

238. *Id.*

239. *Id.*

240. *Id.* at 451.

241. *Id.*

United States at least five years previous to the commencement of such prosecution.”<sup>242</sup> This section of the law created a statute of limitation of five years on the law banning the trade, but it also made prosecutions easier within those five years.<sup>243</sup> Under this law, anyone in possession of an African-born slave might have to prove how he came into possession of that slave, demonstrating the slave was in the United States at least five years before any prosecution.<sup>244</sup> The “African-ness” of a slave would be *prima facie* evidence against an owner, to be rebutted only by contrary evidence the owner had to produce.

### C. The 1819 Act

In 1819 Congress passed yet another Act to regulate the slave trade.<sup>245</sup> This law dramatically changed the regulation of the trade. First, it authorized the president to send “armed vessels of the United States, to be employed to cruise on any of the coasts of the United States . . . or the coast of Africa” to interdict slave traders.<sup>246</sup> This was the beginning of what would eventually become known as the African Squadron, which patrolled the waters off the coast of Africa in an attempt to stop the slave trade at its source.<sup>247</sup> The law also provided that illegally imported slaves be returned to Africa, rather than being sold in the United States.<sup>248</sup> The Act authorized the president to appoint agents to receive rescued Africans and return them to the continent of their birth.<sup>249</sup> Shortly after the adoption of this law, the United States would use Liberia as a destination for Africans taken off of intercepted ships.<sup>250</sup> American ships could now seize slavers off the coast of Africa and immediately return the slaves to Africa. The law provided an economic incentive for sailors on these ships. The United States government promised a \$25 bounty, to be shared by the crew of the interdicting vessel, for *every* slave rescued from traders.<sup>251</sup> The Act also

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242. *Id.* at 451.

243. *Id.*

244. *Id.*

245. Act of March 3, 1819, ch.101, 3 Stat. 532 (1819).

246. *Id.* at 532-33.

247. HOWARD JONES, TO THE WEBSTER-ASHBURTON TREATY: A STUDY IN ANGLO-AMERICAN RELATIONS, 1783-1843, at 144 (1977).

248. Act of March 3, 1819, ch.101, 3 Stat. 532, 533 (1819).

249. *Id.*

250. Renee C. Redman, *Liberia*, in MACMILLAN ENCYCLOPEDIA OF WORLD SLAVERY, *supra* note 3, at 525-26; *see generally* TOM W. SHICK, BEHOLD THE PROMISED LAND: A HISTORY OF AFRO-AMERICAN SETTLER SOCIETY IN NINETEENTH CENTURY LIBERIA (1980).

251. Act of March 3, 1819, ch.101, 3 Stat. 532, 533 (1819).

provided a bounty of \$50 per slave to any informant whose information led to the recovery of illegally imported slaves.<sup>252</sup>

This Act changed the direction of the suppression of the trade. The focus was now, in part, on the injustice of enslaving someone who deserved to be free. Anyone illegally enslaved would thus be set free. The law now implicitly condemned American slavery itself. If it was wrong—unlawful—to enslave an African after 1819, why, someone might ask, was it not wrong to enslave an African before 1808? And if the original enslavement was morally wrong, then what was the basis of holding the descendants of that person in slavery? Had such questions been raised, they might have led to a full-blown debate over slavery in the United States. However, no one in Congress seems to have been concerned about the political and moral implications of this aspect of the law.

The Act also took the United States out of the business of marketing slaves. Before 1819, confiscated slaves were sold under the laws of the states where they ended up.<sup>253</sup> Under the earlier laws, naval crews and informants were partially compensated from the sale of these slaves.<sup>254</sup> Now, the taxpayers compensated naval crews and informants through bounties and the Africans went home.<sup>255</sup> This was a dramatic change in American policy. For the first time in the nation's history, the United States was willing to spend money to help Africans gain their liberty.

#### *D. The Act of 1820*

The final substantive statute to regulate the trade was passed in 1820, with the unlikely title “An Act to continue in force ‘An act to protect the commerce of the United States, and to punish the crime of piracy,’ and also to make further provisions for punishing the crime of piracy.”<sup>256</sup> The key elements of the law were two sections declaring that any American citizen engaging in the African slave trade “shall be adjudged a pirate; and on conviction thereof before the circuit court of the United States for the district wherein he shall be brought or found, shall suffer death.”<sup>257</sup> The same language was applied to non-Americans

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252. *Id.* at 534.

253. *See* An Act to Prohibit the Importation of Slaves, ch.22, 2 Stat. 426 (1807); Act of Apr. 20, 1818, ch.91, 3 Stat. 450 (1818).

254. Act of Apr. 20, 1818, ch.91, 3 Stat. 450, 451 (1818).

255. Act of March 3, 1819, ch.101, 3 Stat. 532 (1819).

256. Act of May 15, 1820, ch.113, 3 Stat. 600 (1820).

257. *Id.*

found on board slavers owned or commissioned by Americans.<sup>258</sup> The statute provided that this penalty was to be in force for only two years, but on January 3, 1823 Congress made it a permanent statute.<sup>259</sup> This was a dramatic and important change in U.S. policy.

After 1820, participation in the African Slave Trade was to be considered the most heinous crime on the high seas—piracy—to be punished by death.<sup>260</sup> Never before had the United States taken such a stand against any aspect of slavery. Enforcement would be a challenge. The Atlantic Ocean was vast and the African Squadron was always too small.<sup>261</sup> Slavers captured in or near southern ports would be tried by jurors sympathetic to slavery. These jurors might also not always be hostile to the illegal import of slaves.<sup>262</sup> No slaver would actually be executed until the Lincoln Administration actually enforced the law to its fullest.<sup>263</sup> But the 1820 law was somewhat effective in curbing the trade. Few sailors were willing to risk their lives for the relatively paltry earnings on board a slaver. The high cost of failure—confiscation of a ship, large fines, jail time for the owner, and possibly execution for the captain and crew—surely discouraged most would-be traders.<sup>264</sup> Incentives for informing on Americans who bought illegally imported slaves were high.<sup>265</sup> At \$50.00 a slave, an informant could make \$5,000 for tipping off authorities that a mere one hundred Africans had been secretly and illegally landed.<sup>266</sup> At \$25.00 a slave, the crews of the African Squadron had a strong incentive for acting “above and beyond” the call of duty.<sup>267</sup> Even in cases where the slavers were not executed,

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258. *Id.*

259. Act of Jan. 30, 1823, ch.7, 3 Stat. 721 (1823).

260. Act of May 15, 1820, ch.113, 3 Stat. 600 (1820); Act of Jan. 30, 1823, ch.7, 3 Stat. 721 (1823).

261. See JONES, *supra* note 247, at 144-45 (discussing reasons for the African Squadron’s failure to effectively combat the slave trade); DUBOIS, *supra* note 19, at 141-49.

262. See, e.g., PAUL FINKELMAN, *SLAVERY IN THE COURTROOM* 212 (1985) (discussing numerous federal prosecutions of slavers).

263. The only slave trader ever hanged under the law was Nathaniel Gordon. See *United States v. Gordon*, 25 F. Cas. 1364 (1861), *affirmed, ex parte Gordon*, 66 U.S. 503 (1862).

264. See *id.*; see also Paul Finkelman, *Regulating the African Slave Trade*, 54 *CIVIL WAR HIST.* 379, 404-05 (2008).

265. See *An Act to Prohibit the Importation of Slaves*, ch.22, 2 Stat. 426 (1807); Act of Apr. 20, 1818, ch.91, 3 Stat. 450 (1818); Act of March 3, 1819, ch.101, 3 Stat. 532 (1819); Act of May 15, 1820, ch.113, 3 Stat. 600 (1820).

266. Act of March 3, 1819, ch.101, 3 Stat. 532, 534 (1819).

267. *Id.*

ships were seized and forfeited, making the business very expensive and not very profitable.<sup>268</sup>

To be sure, some slaves were smuggled into the United States after 1820. But the risks were high and the numbers were relatively few.<sup>269</sup> In an eight-year period from 1800 until December 31, 1807, about 40,000 Africans were forcibly brought into the country.<sup>270</sup> This was the last large importation of slaves into the United States. Between 1808, when the slave trade ban went into effect, and 1820, when slave trading was declared piracy, it is possible that as many as 10,000 slaves were smuggled into the United States.<sup>271</sup> After 1820 it is unlikely that more than 2,500 Africans were illegally brought to the United States, and it may have been less than that.<sup>272</sup> American-born slaves would be shipped to the Deep South and the Southwest in large numbers, as the internal slave trade replaced the African trade and hundreds of thousands of African-American slaves were uprooted and moved further south and further west.<sup>273</sup> The cost of ending that domestic trade—the American Civil War—would be infinitely higher than ending the African trade.<sup>274</sup> But, the moral issue was set in 1819 and 1820 when the United States finally stated, in unequivocal terms that enslaving people was a “wrong” and those who engaged in the African trade were no better than common pirates.<sup>275</sup> And, like common pirates, they deserved to be hanged.

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268. See, e.g., *The Slavers*, 69 U.S. 350, 355-56 (1865) (upholding forfeiture of the vessel *The Kate*).

269. Finkelman, *supra* note 264, at 404-05.

270. Shugerman, *supra* note 30 at 264.

271. Sean Kelley, *Blackbirders and Bozales: Africa-Born Slaves on the Lower Brazos River of Texas in the Nineteenth Century*, 54 *CIVIL WAR HIST.* 407, 408 (2008).

272. DAVID ELTIS, *ECONOMIC GROWTH AND THE ENDING OF THE TRANSATLANTIC SLAVE TRADE* 249 (1987); see also Kelley, *supra* note 271, at 407; Finkelman, *supra* note 264, at 404-05.

273. MICHAEL TADMAN, *SPECULATORS AND SLAVES: MASTERS, TRADERS, AND SLAVES IN THE OLD SOUTH* 225-27 app.1 (1996).

274. Beyond the billions spent on the Civil War itself, was, of course, the loss of about 650,000 soldiers who died in battle and the many others who were wounded and scarred from the war.

275. Act of March 3, 1819, ch.101, 3 Stat. 532 (1819); Act of May 15, 1820, ch.113, 3 Stat. 600 (1820); Act of Jan. 30, 1823, ch.7, 3 Stat. 721 (1823).

