The Slaveholding Republic: An Account of The United States Government's Relations to Slavery

DON E. FEHRENBACHER

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An Account of the United States Government's Relations to Slavery

completed and edited by

Ward M. McAfee

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For Ruth, Susan, and David

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PREFACE

Only days before Don Fehrenbacher died, he wrote me of his plans to finish his book, *The Slaveholding Republic*, a project he had been working on for many years: "After nearly five years of concentrating on other things, I am once again giving primary emphasis to work on my book about the federal government and slavery." This news came in the form of a handwritten Christmas note. When I heard of his death, I left the card with its message on my windowsill, in direct eyesight above my computer, the place of my work hours. It remains there as of this writing. Many months after his death, when the task of finishing the manuscript was given to me by Virginia Fehrenbacher, the card took on new meaning—a daily reminder to complete this last effort of a fondly remembered former mentor and great historian.

The thesis that he had carefully developed in the uncompleted work was straightforward: The framers of the Constitution had not intended to make slavery a national institution supported by the Union's fundamental law. Yet, over time, the antebellum federal government adopted the position that slavery was a national institution fully protected by the Constitution. Not all Americans acquiesced in this new understanding, leading to a sectionalization of politics that produced a bloody conflagration that in turn destroyed the slaveholding republic.

Don Fehrenbacher's account begins with two separate unsuccessful claims for reimbursement of injured or lost slave property made to Congress in 1828 and 1848 as a way of introducing the issue of whether or not the Constitution was universally regarded in the antebellum period as a proslavery instrument. These examples show that before the Civil

War no unanimity existed in Congress on this matter. Systematically, Professor Fehrenbacher then analyzes key constitutional provisions relating to slavery—the three-fifths clause, the slave importation clause, and the fugitive slave clause—to show that they were not intended to make the Constitution a proslavery compact. In the process, he challenges beliefs to the contrary promulgated by William Lloyd Garrison and his followers during the antebellum period and continued by many leading scholars and constitutional authorities after the Civil War, even up to our own time.

Professor Fehrenbacher argues that the Constitution was neither proslavery nor antislavery in its intent. He portrays the founders as achieving as neutral a position as they could on this subject, leaving its final resolution to later generations. In this his last manuscript, he takes the perspective of Abraham Lincoln, to whom this Pulitzer-Prize-winning historian dedicated a lifetime of study. Lincoln did not see the Constitution as a Garrisonian "agreement with hell," but rather believed that the fundamental law had been established upon a cultural assumption that slavery would remain only temporarily in a land primarily dedicated to liberty. In seeking high office, Lincoln sought to reverse a long habit that had formed after the adoption of the Constitution—the federal government's effective subservience to the slaveholding interest. This practice, Lincoln saw, had not been mandated by the Constitution itself. He and his Republican party sought to redeem for the United States the original ideals upon which it had pledged its sacred honor in the Declaration of Independence.

The part of the manuscript that Professor Fehrenbacher finished shows that relative southern political unity regarding the slavery issue helped define the national capital established in the District of Columbia as effectively proslavery in purpose and tone. Racial anxieties, northern fears of disunion, and American devotion to the principle of local self-determination contributed to this identification of slavery with the nation's symbolic center throughout the antebellum period. Indeed, the entire process of the capital's selection clearly reveals the lack of any original intent to wed the nation's destiny to the institution of slavery.

In foreign affairs, the federal government's attachment to slavery was more immediate and, in this case, intentional. In the story of Washington, D.C., federal acquiescence happened largely due to drift and inattention to the enduring importance of the matter. By contrast, in its handling of foreign relations, the federal government actively supported the institution of slavery

from the very outset of the nation's existence. In ongoing negotiations with Great Britain, the United States government especially defined itself as an agent for the slaveholding interest. Challenged by England's growing commitment to the antislavery cause, American governmental officials invariably reacted as proslavery spokesmen. In domestic affairs, Americans openly disagreed regarding the desirability of slavery's expansion and perpetuation. However, in foreign affairs, American diplomats, whether from the North or the South, maintained a unanimity in favor of guarding slavery from foreign harm, even to the extent of claiming it as a constitutionally recognized national institution.

Don Fehrenbacher challenges W. E. B. Du Bois's thesis that slave importations to the United States made a mockery of the federal ban of 1808. He shows that DuBois blurred two distinctly different issues: (1) illegal slave importations, and (2) American complicity in the international maritime slave trade. In fact, the federal government was extraordinarily successful in suppressing the first of these two matters and negligent concerning the latter. Strident American nationalism and southern sensitivity over Great Britain's antislavery agenda were both instrumental in bringing about relative American inactivity in suppressing the international maritime slave trade. Racism and a domestically produced surplus of slave labor were both key in winning intersectional support for minimizing illegal slave importations. The activity of some southern extremists to reopen the importation of slaves on the eve of the Civil War was not a serious effort.

Although not authorized to do so by a strict constructionist reading of the Constitution's fugitive slave clause, Congress enacted the first Fugitive Slave Act in 1793. Northern states blocked effective enforcement of the federal law, leading to a southern outcry for more stringent legislation. The sectional crisis precipitated by California provided the opportunity for passage of a harsher Fugitive Slave Act, which became part of the Compromise of 1850. As northern civil disobedience obstructed the effectiveness of the new law, southerners became convinced that the constitutional covenant holding the Union together was broken, despite the fact that the federal government had effectively become an agent of the slaveholding interest in addressing the South's concerns.

Don Fehrenbacher wrote beginnings to both the chapters "Slavery in the Federal Territories" and "The Republican Revolution." The very clear thesis provided by him in the bulk of the manuscript that he had completed, and

these direction finders to the final two chapters, enabled me to compose an ending to his work that he might have written somewhat differently had he lived, but which nonetheless is harmonious with his overall theme.

In the chapter on the territorial controversy, I emphasize the familiar theme that during the Missouri Crisis of 1819–21, constitutional interpretations were introduced by antislavery northerners challenging the republic's proslavery course. Over time, both sides in the struggle sought to constitutionalize their positions, with John C. Calhoun arguing that property rights were constitutionally protected in the western territories and Justice John McLean holding that the natural condition of the territories was free soil. Lewis Cass's theory of popular sovereignty, which was an attempt to cut a middle path between these two extremes, was also cast as a constitutional imperative. Northern antipathy to the Dred Scott decision left the issue to be decided in the political arena and eventually on the battlefield. In writing the bulk of this chapter, I was fortunately guided by a lifetime of Don Fehrenbacher's writings on this particular topic.

The Slaveholding Republic helps the modern reader see why Abraham Lincoln's election was such a shock to the South of his time. Modern Americans have come to appreciate that Lincoln and his Republicans had no immediate intent to destroy slavery in the states where it existed. From this perspective, the southern decision to secede too easily appears as either most premature or highly irrational. Indeed, it is this modern view that makes this book necessary. *The Slaveholding Republic* emphasizes the striking novelty of the Lincoln administration's restrictive attitude toward slavery. It seeks to reconstruct a sense of that novelty as it was appreciated at the time, especially in the South. With the coming of the Civil War, Lincoln's approach, which seems exceedingly cautious by modern standards, quickly evolved into what Professor Fehrenbacher termed the "Republican Revolution," which ended the anomaly of the United States as a "slaveholding republic." Appreciation of this emphasis can occur only after a careful review of the generations-long antebellum context of the federal government actively serving the slaveholding interest. This latter subject is therefore the primary focus of the book.

In the chapter "The Republican Revolution," the behaviors of southern seceders and Republicans are analyzed to explain why each side was resolute in its march toward sectional confrontation. This account challenges the currently fashionable portrait of a passive, vacillating Abraham Lincoln. After Lincoln's death, the subsequent failure of the Republican Revolution stemmed from the white majority's deep-seated racism, which kept the caste

spirit of the slaveholding republic alive even after its formal demise. While the U.S. Supreme Court ultimately provided the necessary constitutional rationale for stalling the advance of the Republican Revolution, general white attitudes were more a determinant of the final result.

In closing the work, I attempt to follow the same format that Don Fehrenbacher had used in his introductory chapter. By highlighting several unrelated incidents, one in 1883 and others in 1890, I explore constitutional understandings pertinent not only for the closing of this account but also for our own time.

I thank Virginia Fehrenbacher for giving me the opportunity to complete her husband's last creative effort. I also credit both California State University, San Bernardino, colleagues Kent Schofield and Kathryn Green for their helpful comments concerning the manuscript and the CSUSB history department for temporarily releasing me from teaching duties in order to complete this work. Charles Lofgren of Claremont McKenna College, also a former student of Don Fehrenbacher, made helpful suggestions as well. Larry Gleason, Don Fehrenbacher's son-in-law, working with Quyen Nguyen, helped translate the manuscript from one computer system to another. Numerous reference librarians provided invaluable assistance. Primary among these are Chuck Eckman, Eric Heath, and Betty Lum at Stanford, and Jill Vassilakos-Long and Lisa Bartle at CSU, San Bernardino. Both Esther Eastman of Los Angeles Law Library and Arthur Buell of CSU, Stanislaus, were also of great help in insuring the accuracy of several troublesome endnotes. Bernice Lincoln and Lois McAfee provided invaluable assistance with proofreading. Virginia Fehrenbacher herself contributed most of all, reading the manuscript multiple times and overseeing all editorial changes. And, above all, I wish to thank Don Fehrenbacher for almost four decades of kind acts and assistance towards me. Carl Degler, a longtime colleague of Professor Fehrenbacher, perhaps best summarized my own recollection of the man in comments that he made in one of the many obituaries celebrating Don's life: "I knew Don as a person of strong convictions and gentle manner, a man of integrity and honest expression even in the face of disagreement. His historical achievements reflected his character."

San Bernardino, California
April 2000

WARD M. MCAFEE

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The Slaveholding Republic

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Introduction

During the spring of 1828, Congress passed the "tariff of abominations," thereby adding to the excitement and confusion of the presidential contest between the incumbent John Quincy Adams and his opponent, Andrew Jackson. Partisan and sectional feeling ran high on the tariff question, but slavery did not become a prominent campaign issue. In the history of the slavery controversy, 1828 is part of an ostensibly quiet decade extending from the end of the Missouri controversy to Nat Turner's uprising and the emergence of Garrisonian abolitionism. Yet, as it happened, the House of Representatives began the year 1828 with a protracted debate that raised disturbing questions about the nature of slavery and its place in the design of the federal union.

The often heated discussion ran on through most of January and into February. At least thirty-five congressmen took part, and many of them spoke more than once. The specific matter at issue dated back thirteen years to General Jackson's famous defense of New Orleans against British assault in January 1815. A slave named Warwick, who had been impressed into military service, suffered two serious wounds from enemy fire. His owner, Marigny D'Auterive, filed a claim against the United States for $239 to cover medical expenses, loss of the slave's time while recuperating, and the depreciation of his value as property. D'Auterive also asked payment of $855 for ninety-five cords of wood and military use of a cart with horse and driver. From its Committee on Claims, the House had previously received an adverse report on the subject without taking any action. In December 1827, the committee reversed itself to the extent of reporting a

bill for payment of the $855, but it again recommended that there be no reimbursement for the wounded Warwick. Citing earlier dispositions of similar claims, the report declared that slaves were "not put on the footing of property, and paid for, when lost to the owner in the public service."[1] That statement was what provoked the debate.

"Slaves not property! What are they then?" demanded Edward Livingston, member of a distinguished New York family who had moved to Louisiana and would in a few years become Jackson's secretary of state. "If not property," he thundered, "they are free . . . , we have no right to their service. If they are not property, the whole foundation on which the Constitution of this Union rests is shaken." Chairman Elisha Whittlesey of Ohio hastened to explain. His committee had not denied that slaves were property. Its report stated only that in circumstances such as those of the D'Auterive claim, slaves had never been treated as property by the federal government.[2] William McCoy, a member of the committee from western Virginia, joined Whittlesey in defending the report. They were dealing with a "delicate subject," he said, and it was not in the interest of the southern states to press the theoretical issue raised by Livingston. Slaves under the laws of certain states might be property "in the most complete sense of that term," but those were not the laws of the federal government, which, in dealing with slaves, "considered them as something more than property."[3]

Most southern congressmen were unhappy with such subtleties, however. Even those venturing to condemn "slavery in the abstract" nevertheless insisted that American slaves had always been recognized as property "in its full meaning, and without any qualification."[4] The laws of a southern state, said one, "secure to her citizens as completely their right to their slaves as they do to their carts and horses."[5] Another echoed him with the flat pronouncement: "If the State of Louisiana declares that slaves are property, this House must recognize them as such."[6] An Alabama member warned that rejection of the D'Auterive claim would be widely interpreted as acquiescence in the contention that slaves were not property under federal law. He called for action that would fully confirm the property rights of southern slaveholders and thus "settle the question forever."[7]

On the other hand, James Hamilton of South Carolina objected even to discussion of an issue that Congress, he said, had no power to settle.[8] Virginia's brilliant eccentric, John Randolph, emphatically agreed, declaring, "This is a question the United States Government has nothing to do with. It never had, and it never can have; for the moment it lays their unhallowed

hands upon the ark of that question, it ceases to be a Government."[9] No less vehement was William Drayton, a mild-mannered but eloquent South Carolinian who would later emerge as one of the state's leading Unionists during the Nullification crisis. "I never will enter into a formal discussion, in this House, whether slaves are property," he intoned.

> I will not, in the most indirect manner, suffer an inference to be drawn from any word, or deed of mine, which, by the most strained construction, could be tortured into the semblance of an admission that the Congress of the United States has the shadow of a right to sit in judgment upon this question. If it were to assume this right, the Union would be no more. . . . Much as we love our country, we would rather see our cities in flames, our plains drenched in blood—rather endure all the calamities of civil war, than parley for an instant upon the right of any power than our own to interfere with the regulation of our slaves.[10]

Edward Everett of Massachusetts, classical scholar and conservative politician, adopted the southern point of view, maintaining that property in slaves was protected beyond any question by the just compensation clause of the Fifth Amendment.[11] Joining him was a Pennsylvanian, George Kremer, who exclaimed, "I, for one, am willing to declare, before the whole world, that I believe a slave is as much the property of his master as any thing else that he owns."[12] For the most part, however, northerners participating in the debate were disposed to contest the absolute claims of southern spokesmen. None among them espoused abolitionist principles, to be sure, and none denied that slaves were property within the jurisdiction of a slaveholding state. Instead, they sought to occupy middle ground by distinguishing state law from federal law where slavery was concerned. That strategy enabled them to reaffirm the security of slavery as a state institution, while at the same time rejecting southern efforts to define the United States unconditionally as a slaveholding republic.

The northern argument, though it varied from speaker to speaker, was fairly well summed up in one sentence by John C. Clark of New York. "I am led to the conclusion," he declared, "that slaves, for certain purposes, are persons; that their masters have in them only a qualified property; that Government, in cases of high necessity, growing out of a state of war, has a right to impress them into its military service, without the liability of being justly called on for indemnification."[13] A few northerners pressed the argument to the point of denying that the Constitution contained any

recognition of slaves as property. One of them was Tristram Burges of Rhode Island, who said:

> Before we can adopt the amendment, we must first enact that persons may be property and then, that the man Warwick was the property of the claimant. In the States, such persons may be property or not, just as State laws enact: for we have no jurisdiction over the question. In this Legislature, gentlemen represent them as persons: and he, who comes here, because they are persons, cannot . . . vote that they are mere property. Our Constitution admits no representation of property; persons alone are represented. He, therefore, who votes that his constituents are property, votes to vacate his own seat on this floor.[14]

Such a reading of the Constitution could not fail to annoy and alarm the many southerners who in 1828 were already deeply concerned about the constitutional defenses of their section. One member asserted that slavery was "as much a part of the Constitution as the great right of representation." The highest judicial authority in the land, he said, had already decided that a slave was "legitimate chattel and nothing but a chattel."[15] Another speaker, responding to northern emphasis on the humanness of slaves, declared: "In the eye of the law and the Constitution, a slave is no more a 'reasonable being' than a horse or the table which stands before me. The slave is unknown to the law or the constitution, except as the property of the master."[16]

Southerners were obviously at a disadvantage in arguing their case from the text of the Constitution, which referred to slaves only as "persons" and never as "property." They occupied firmer ground when they cited the record of government practice as an authoritative guide to the established meaning of the Constitution. Among their prime exhibits were the treaties of peace with Britain in 1783 and 1815, both of which contained clauses making provision for certain slaves and "other property."[17] It was also pointed out that a direct tax on property levied by Congress in 1813 had specifically included slaves.[18] Perhaps most telling was the evidence set forth by Thomas R. Mitchell of South Carolina showing that federal courts habitually treated slaves as nothing other than "goods, wares, and merchandise" because, he said, they were required to do so by the Judiciary Act of 1789.[19] Northern congressmen could mount only weak rebuttals to this general line of argument.[20]

As the debate continued, sectional antagonism bubbled up frequently through the crust of formal courtesy. Burges, in the course of a long and florid speech, demanded to know why southerners introduced the question of

slavery and then threatened disunion if it were discussed.[21] Hamilton responded with personal animosity, deriding Burges's grandiloquence and reminding him of Rhode Island's prominent part in the African slave trade.[22] William S. Archer of Virginia had earlier acknowledged a southern sensitivity "amounting, it might be, to ferocity," on the subject of slavery. "There is a belief . . . in all the slaveholding States," he said, "that a fanatical spirit exists in many of the nonslaveholding States, which would interfere, and interfere fatally, in this matter."[23] Beyond the halls of Congress, the D'Auterive controversy stirred up considerable excitement, especially in South Carolina, where Judge William Harper gloomily remarked that no other recent sectional quarrel had "done as much mischief, as . . . this trifling claim."[24]

On January 23, after nearly three weeks of oratory, the House at last began to move toward a decision. By a vote of 96 to 92, it approved an amendment authorizing payment of D'Auterive for his slave.[25] The roll call proved to be a sectional confrontation, for the amendment was supported by 92 percent of all southerners and opposed by 81 percent of all northerners. A total of 161 out of 188 congressmen voted with their respective sections. Of course the alignment also reflected partisanship in an election year when party strength was, to a considerable extent, sectionally concentrated. Supporters of Jackson tended to favor the amendment and supporters of Adams tended to oppose it. But the delegations from Pennsylvania, New York, and the three states of the Old Northwest, all of which gave electoral majorities to Jackson in 1828, nevertheless voted 55 to 12 against the amendment. Thus, in transacting some trivial legislative business that had come to be invested with symbolic importance, the House displayed a degree of sectional division usually associated with the 1850s.

Not until two weeks later did the D'Auterive bill come up for final action. Then, just as the vote was about to be taken, Charles Miner of Pennsylvania reopened the discussion. Miner, a weekly newspaper publisher and probably the most outspoken critic of slavery in Congress, had remained silent throughout the long debate but could restrain himself no longer. He held the floor for at least an hour and recapitulated most of the arguments already made against reimbursement. Declaring that the real question before the House was one of vast importance, he stated it as follows: "In what relation do slaves stand to this Government, and what obligations and duties spring from that relation?" The answer, he said, had to be drawn from the Constitution, and in that "manual and textbook" by which Congress must be guided, the African was invariably dealt with as a person rather than as property.[26]

With other speakers following Miner, the debate continued through the day until the House at last gave up the struggle. John W. Taylor of New York, who had been one of the antislavery leaders in the Missouri controversy of 1819–21, moved to recommit the bill. Again the vote was close, but the motion carried, 82 to 79, and that proved to be the end of the contest.[27] Two years later, Congress did finally pass an act paying Marigny D'Auterive $855 for the firewood and the use of his cart, horse, and driver, but he never received compensation for his wounded slave.[28]

The fundamental questions raised by the D'Auterive claim lost none of their thorniness in the decades that followed. Twenty years later, for instance, at the time of another presidential campaign, a slaveholder's claim against the United States once again set the House of Representatives to arguing whether or not slaves were property under federal law. In this instance, the petition for reimbursement was associated with a dramatic event of the second Seminole War in Florida.

Shortly before Christmas in 1835, Major Francis L. Dade started out from Fort Brooke (Tampa) with about 110 men to reinforce the garrison at Fort King, located a hundred miles to the north. Accompanying the expedition was a slave named Lewis, who had been hired from his owner, the widow of one Antonio Pacheco, to serve as guide and interpreter. By December 28, the column had reached the vicinity of Wahoo Swamp, some thirty-five miles from its destination. Then suddenly, the Seminoles launched an attack that wiped out almost the entire command. Lewis survived the "Dade massacre" and was carried off by the victors, either as a captive or as one who had been their secret ally all along. Thereafter, he apparently took part in several Indian raids on Florida settlements. In 1837, he fell into army hands and was claimed by an agent of the Pacheco estate, but the commanding officer decided instead to rid Florida of this dangerous troublemaker. He sent Lewis to join Seminoles being removed to the Indian country west of Arkansas. The Pacheco heirs, thus deprived of a slave valued at $1,000, sought recompense from the federal government.[29]

Although the Pacheco claim had already been presented unsuccessfully to three previous Congresses, its supporters did not give up, and in February 1848, the House committee on military affairs reported a bill for payment. The committee revealed itself, however, to be sharply divided along both party and sectional lines. A report accompanying the bill, endorsed only by the five southerners who composed the Democratic majority, was devoted largely to an extensive argument against the "pernicious doctrine" that slaves

were not recognized as property by the Constitution. The four Whigs on the committee, all northerners, submitted a minority report in which they rejected the argument and insisted that Congress had never, "upon examination or discussion of this subject, admitted slaves to be *property*."[30]

The Pacheco debate, unlike the D'Auterive controversy, took place in the midst of a major sectional crisis over slavery—more particularly, a crisis over the status of the institution in the vast area recently conquered from Mexico. With congressional attention centered on the issue of slavery extension in its various aspects, the House did not get around to considering the Pacheco claim until the second session of the Thirtieth Congress in December 1848. Then the hall echoed with many of the arguments heard twenty years earlier. Again the more militant northerners, relying heavily on the language of the Constitution, maintained that there was no right of property in slaves under federal law. Again southerners pointed to the record of government practice as conclusive evidence to the contrary. Again debate extended over many days, and a minor piece of legislative business became emblematically significant. Thus, Joshua R. Giddings of Ohio, maintaining that the people of the free states were determined not to be involved in the guilt of slavery, warned his northern colleagues: "If we pass this bill, we shall give our most solemn sanction to that institution." Whereas Richard K. Meade of Virginia declared, "Reject it, and no slaveholder [can] longer look to Congress for protection, or to the Constitution as the broad panoply under which all may rest in safety."[31]

Debate ended on January 6, and the House proceeded to a final vote. The roll call proved to be defective, but after two days of doubt, the clerk announced that the bill had been defeated, 90 to 89.[32] At this point, the Pacheco claim may have been favorably affected by new developments in the larger sectional conflict. From the beginning of the session, antislavery forces in the chamber had been on the offensive. Already the House had emphatically reasserted the free-soil principle of the Wilmot Proviso, and on December 21, by a 98 to 88 vote, it approved an aggressively worded resolution calling for abolition of the slave trade in the District of Columbia.[33] Anger erupted throughout the slaveholding states, and a caucus of southerners in Congress entrusted to John C. Calhoun the task of drafting a southern manifesto.[34] In this atmosphere of tension, the antislavery attack lost some of its momentum. On January 10, the House voted to reconsider the slave-trade resolution and then took no further action, thus in effect rescinding it.[35] On January 19, the House also reconsidered the Pacheco bill, then passed it by a

vote of 101 to 95.[36] Every southern vote was affirmative, and every negative vote was northern, but twenty-six northerners voted with the South. The sectional alignment resembled that in the D'Auterive roll call, except that southern solidarity had increased from 92 percent to 100 percent, while northern solidarity remained at about 80 percent. The bill then went to the Senate, where, with only a few weeks left in the session, it got no further than a favorable committee report.[37] Mrs. Pacheco, like Marigny D'Auterive, never obtained reimbursement for her slave.

The D'Auterive and Pacheco controversies are minor but illuminating episodes in the great American struggle over slavery. Introduction of African slavery into the British North American colonies had been essentially an unmeditated action. By the time of the Revolution there was in each colony an accumulated body of slave law that did not so much establish slavery as acknowledge its presence, sanction it, and regulate its conduct. After the achievement of independence, slavery remained what it had been before—an institution historically antecedent to the laws governing it and legally the creature of local authority. The framers of the Constitution, dealing with slavery as an incidental but troublesome circumstance, ended by extending it a kind of shamefaced recognition that included a measure of protection, but they contributed little to defining its national status.

Yet that was to be the fundamental issue in the sectional conflict—the persistent, unresolvable issue that arose in the first Congress under the Constitution and disrupted the Union seventy years later. Charles Miner stated it simply and clearly during the D'Auterive debate: "*In what relation do slaves stand to this Government?*"

The traditional answer, which has been labeled the "federal consensus," dated from the earliest years of the Republic.[38] That is, southerners were accustomed to maintaining and northerners to agreeing that, with a few exceptions specified in the Constitution, slavery was a state responsibility wholly beyond the reach of federal power. "Slavery," said William Drayton in his D'Auterive speech, "is a municipal institution, as unconnected with any control of the United States, as our corporations, our colleges, or our public charities."[39] John Randolph told his fellow congressmen that the national government had no more to do with slavery than "the Khan of Tartary."[40] Even discussion of slavery in Congress constituted intolerable intervention, some southerners argued, for discussion implied a power to act, and in any case it had a subversive effect on slaves, inspiring them with the hope of emancipation.[41] During the Pacheco debate, an angry Richard K. Meade

warned northern congressmen that they must cease talking about slavery in order to preserve "the bonds of fraternity" between North and South. Otherwise, he said, the time would come "when no southern man could sleep in his bed without a guard at his door."[42]

As the D'Auterive and Pacheco controversies illustrated, however, the federal consensus did not always suit the particular desires and purposes of the slaveholding interest, which often required some kind of action by the federal government, rather than its adherence to the principle of laissez-faire. Consequently, southerners came to rely more and more upon a proslavery modification of the federal consensus first enunciated in 1800 by Henry Lee of Virginia and written into American constitutional law fifty-seven years later by Chief Justice Roger B. Taney. Congress, according to this revised version, had no authority over slavery *except the authority to protect it*.[43] In addition, the characterization of slavery as strictly a municipal institution proved troublesome for the South because it lent support to the antislavery argument that the institution existed legally only where it had been established by positive law. Thus, during the D'Auterive debate, Samuel C. Allen of Massachusetts maintained that slaves were not property outside those jurisdictions defining them as such.[44] The theoretical question became critically important with respect to the territorial expansion of the 1840s, and southerners began to develop the counterargument that abolition was municipal and slavery prescriptively universal, except where it was prohibited by the law of a sovereign state.[45] What this amounted to, as William Lowndes Yancey intimated in 1845, was a redefinition of slavery converting it into a national institution.[46] These two southern revisions of the federal consensus were combined and given classic expression by Robert Toombs of Georgia when he wrote in 1856, "Congress has no power to limit, restrain, or in any manner to impair slavery, but on the contrary, it is bound to protect and maintain it in the States where it exists, and wherever else the flag floats and its jurisdiction is paramount."[47]

Most northerners meanwhile continued to acknowledge that southern slavery was a state institution wholly immune from federal interference. Even Free Soilers and Republicans did so in emphatic terms, while at the same time asserting the constitutional authority and moral responsibility of Congress to exclude slavery from the western territories. The federal consensus thus remained operative, and in 1861 it even received the formal approval of Congress as a constitutional amendment.[48] But in the sectional struggle this acknowledgment came to be more or less beside the point. The crisis of

the Union arose over conflicting sectional *revisions and extensions* of the federal consensus—all having to do with the relation of slavery to the central government.

Argument about slavery and the federal government almost always turned into argument about slavery and the intent of the Constitution. On that question the antebellum South was virtually a unit. Few southerners would have disagreed with the governor of Maryland who declared in a message to the state legislature: "The Constitution of the United States recognizes, without limitation, the institution of domestic slavery, guarantees its existence, and vindicates the right of the owner to the possession and service of the slave."[49] In the free states, on the other hand, there was much diversity of opinion. One large group, for instance, held that the Constitution was intrinsically a charter of freedom that made a few necessary concessions to slavery but pointed toward ultimate elimination of the institution. Most striking, however, was the position taken in the 1840s by William Lloyd Garrison and his wing of the abolitionist movement. The Garrisonians had come to agree completely with the southern view of the Constitution as a proslavery document.[50]

The Garrisonian interpretation, although it was too extreme for most opponents of slavery in the 1840s, retained a surprising vitality and had more adherents in the late twentieth century than ever before. During observance of the bicentennial of the Constitution in 1987, Justice Thurgood Marshall made a public attack upon the celebration in which he disparaged the achievements of the Constitutional Convention and said that he did not "find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound." According to Marshall, the original Constitution was defective because it excluded women and Negroes from the right of suffrage, and, most egregiously, it perpetuated and reinforced the institution of slavery. The men of 1787 actually contributed little, he maintained, to the modern American constitutional system, with its "respect for individual freedoms and human rights."[51]

The only thing unusual about this neo-Garrisonian indictment was its source. Many of Marshall's contemporaries, white and black, shared his perception of the Constitution as a proslavery document. According to a law professor at Syracuse University, for instance, it was "permeated" with slavery, containing no less than nine clauses that "directly protected or referred to it."[52] A federal district judge in Detroit wrote to the *New York Times* that the Founding Fathers, "to our everlasting shame," expressly rejected the principle that slavery was "incompatible with the common-law principles of justice."[53]

Several scholars declared that the framers "intentionally excluded" blacks from constitutional guarantees and, indeed, placed them "outside the community of human beings."[54] A professor at Ohio State University went so far as to assert that the Constitution "directly promoted the Jim Crow codes subsequently passed by states and cities."[55] Some critics, Marshall included, even suggested that the tragedy of the Civil War must be attributed in no small part to the mistakes of the Constitutional Convention with respect to slavery.[56]

There were many dissenting responses to Marshall's speech in 1987, and similarly, there were many abolitionists in the 1840s (including Frederick Douglass) who disagreed with Garrisonian constitutional doctrine. Some went to the opposite extreme and maintained that the Constitution, if properly construed, made slavery unlawful or proscribable everywhere in the nation. The Garrisonians brushed aside such doctrine as a flight from reality and pointed to the record of the federal government as proof of the Constitution's proslavery character. "If the unanimous, concurrent, unbroken practice of every department of the Government, judicial, legislative, and executive, and the acquiescence of the whole people for fifty years do not prove which is the true construction," wrote Wendell Phillips, "then how and where can such a question be settled?"[57] A black abolitionist pointed out, however, that this line of reasoning treated implementation of the document as part of the document itself.[58] By equating the Constitution written in 1787 with the Constitution operating in the 1840s, Phillips and other Garrisonians were, in effect, holding the framers responsible not only for the original document but for all the gloss that it had acquired over more than half a century.

Thus, while federal practice in regard to slavery was guided and limited by the Constitution, conversely, the understood intent of the Constitution in regard to slavery was shaped by federal practice, which thereby had a permanent effect on the reputation of the Founding Fathers. In addition, the actual conduct of the federal government with respect to slavery from 1789 to 1860 was the standard against which southerners measured the seriousness of the threat posed by a victorious Republican party. And at the same time, the question of how the federal government *ought to act* with respect to slavery never ceased to be the essential issue in the sectional conflict. Yet the story of the federal government's involvement with slavery has been told only in bits and pieces. Most of it lies below the surface of conventional textbook history, like a submerged mountain range with just a few visible peaks rising above the waves. The story begins with one revolution that secured national independence and ends with another that heralded a "new birth of freedom."

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Slavery and the Founding of the Republic

Of the two documents that formally established the United States as a separate nation, one, the Declaration of Independence, made no direct reference to African slavery but embraced principles plainly inimical to the institution; whereas the other, the treaty of peace with Great Britain, contained a clause dealing explicitly and perfunctorily with slaves as a form of property. This inconsistency manifested at the founding was eloquently expressive of the degree to which the reach of American ideals habitually extended beyond the grasp of day-to-day practice where slavery was concerned.

Slavery at the time of the Revolution was firmly established in the five southernmost states from Maryland to Georgia, and it was more than a trivial presence in most of the others. Slaves numbered about half a million in 1780, constituting a little more than one-sixth of the national population. In the South, two persons out of every five were slaves. As a racial caste system, slavery was the most distinctive element in the southern social order. The slave production of staple crops dominated southern agriculture and eminently suited the development of a national market economy. Furthermore, slaveholders played such a vigorous part in the expansion of the American frontier that their slaves already comprised about one-sixth of the population living in Kentucky and the Southwest. Even before the great stimulus resulting from the growth of the cotton industry, slavery was by several standards a flourishing institution, integral to the prosperity of the nation. But at the same time, slavery was an institution under severe scrutiny, both as a matter of conscience and as a

matter of public interest. Many Americans found it difficult to square slaveholding with the principles of Christianity, and many were troubled by the contrast between the celebration of human freedom in the Declaration of Independence and the presence of human servitude throughout so much of the Republic. For a revolutionary people, the logic of circumstance was inexorable, as a Pennsylvanian confided to his journal while traveling through Maryland in 1777. "It is astonishing," he wrote, "that men who feel the value and importance of liberty . . . should keep such numbers of the human species in a state of so absolute vassalage. Every argument which can be urged in favor of our own liberties will certainly operate with equal force in favor of that of the Negroes; nor can we with any propriety contend for the one while we withhold the other."[1]

Formation of an American government preceded the Declaration of Independence and may be said to have begun with the First Continental Congress, which met in Philadelphia from September 5 to October 26, 1774. A major achievement of the Congress was its adoption of the "Association," a program of economic sanctions aimed at suspending virtually all commercial intercourse with Great Britain. One article of the agreement called for an end to the importation of slaves after December 1 of the same year. "We will wholly discontinue the slave trade," it declared, "and will neither be concerned in it ourselves, nor will we hire our vessels, nor sell our commodities or manufactures to those who are concerned with it."[2] This emphatic wording undoubtedly reflected a certain amount of moral revulsion against the slave trade, but the article won general approval primarily as part of a strategy of vigorous resistance to British authority. The ban was reaffirmed (though in vaguer terms) by the Second Continental Congress when it resolved on April 6, 1776, "that no slaves be imported into any of the thirteen United Colonies."[3] Thus the first American governmental body organized at the national level embraced a policy disfavoring slavery to the extent of restricting its growth.

The Articles of Association were essentially hortatory, with execution depending upon local committees. It appears that the slave-trade provision was enforced about as well as other parts of the program.[4] Soon, however, when the quarrel between Britain and her colonies erupted into armed conflict, the war itself served as an effective deterrent to the importation of slaves, and enforcement ceased to be a matter of concern. Never again did the Continental Congress make any effort to curb American participation in the African slave trade. Once it came to have no direct bearing on the struggle with Britain, the problem was left entirely in the hands of the states.

It is well known that if Thomas Jefferson had had his way, the detailed indictment of George III in the Declaration of Independence would have included a paragraph blaming the British crown for the introduction of slavery into the American colonies and for the continuation of the slave trade. Jefferson's draft read in part:

> He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating & carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither. . . . Determined to keep open a market where men should be bought & sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce.[5]

Congress struck out the entire passage, thus leaving a document that exalted liberty and equality but said nothing about the presence of slavery in the new nation. Jefferson later asserted that the deletion was made "in complaisance to South Carolinia and Georgia," who wanted the slave trade continued, and also to oblige certain northerners who were sensitive about their section's participation in the trade.[6] His statement seems open to question in view of the fact that just three months earlier the same Congress had voted for cessation of the slave trade. The explanation favored by some historians is that the delegates rejected the overwrought passage simply because they found it too far removed from the truth.[7] But one should also note that Jefferson's paragraph may have been especially disturbing to many southerners because, unlike the earlier resolutions of Congress on the subject, it was written in a tone of moral denunciation that could easily extend beyond the slave trade to the institution of slavery itself. In any case, despite the deletion of this one explicit reference to slavery, the general principles enunciated in the Declaration were such an obvious reproach to the institution that it could only be met by denying that the words "all men are created equal" really meant what they said.[8]

With the ending of the war there came a revival of American maritime trade, including the slave trade. New England continued to provide most of the nation's slave-trading ships, while Georgia and the Carolinas continued to receive most of the imported Africans. At the same time, however, an organized antislavery movement was emerging in both Britain and the United States, concentrating its attention upon abolition of the transatlantic slave

trade. The idea that Congress should lead the attack upon the trade was pressed by certain Quaker groups without success. Petitioners in 1783 did manage to inspire a favorable committee report recommending that the states be called upon to pass laws prohibiting the slave trade in accordance with the policy set forth in the old Articles of Association, but the proposal was rejected.[9] This action did not mean that Congress favored continuation of the slave trade. It reflected instead the feeling of members that they had more pressing matters to consider and ought not to spend time on a problem obviously beyond the reach of their vested legislative power.[10] It was therefore without exhortation from Congress that state after state passed prohibitory or restrictive legislation until by the late 1780s only Georgia had failed to lay any restraint upon the traffic.[11]

There can be little doubt that in the Continental Congress and elsewhere, antislavery sentiment was often muffled in the interest of national unity. During the summer of 1777, for example, two Massachusetts Revolutionary leaders, James Warren and John Adams, exchanged letters about a legislative proposal to abolish slavery in that state. Warren reported from Boston that the measure had been ordered to lie on the table lest it should have "a bad effect on the Union of the Colonies." Adams, a member of Congress, applauded the decision. "The Bill for freeing the Negroes, I hope will sleep for a Time," he declared. "We have Causes enough of Jealousy, Discord and Division, and this Bill will certainly add to the Number."[12] For the same reason, Adams had already taken a dim view of enlisting blacks in the armed forces. To Jonathan Dickinson Sergeant of New Jersey, who had drafted a plan for raising a black military unit to serve as a home guard, Adams wrote: "Your Negro Battallion will never do. S. Carolina would run out of their Wits at the least Hint of such a Measure."[13]

Nevertheless, the military struggle with Britain, while it mooted the slave-trade question, made Negro enlistment a recurring issue and one of considerable importance to the American cause. There were slaves and free blacks in the colonial forces that fought at Bunker Hill on June 17, 1775, and George Washington arrived in Cambridge two weeks later to take command of an army that had a sprinkling of color. On July 10, after a council of war, his headquarters issued an order forbidding the recruitment of British deserters, vagabonds, and Negroes.[14] In Congress, a motion calling for the discharge of all blacks serving in the Continental Army was defeated, but by mid-November, the policy of allowing no more black enlistments had congressional approval and seemed firmly established.[15] Meanwhile, however, Lord Dun-

more, the royal governor of Virginia, had inaugurated a British policy of offering freedom to slaves willing to bear arms for the king. News of Dunmore's proclamation alarmed Washington. He reversed himself to the extent of authorizing the reenlistment of free black soldiers, who, he feared, might otherwise go over to the British side.[16] Congress approved, resolving on January 16, 1776, "That the free negroes who have served faithfully in the army at Cambridge, may be re-enlisted therein, but no others."[17] Still officially barred were new black recruits and all slaves, even those who had already "served faithfully."

Influenced, no doubt, by the action of Congress and the army command, several northern states took steps to exclude blacks from their militia service, but some recruiting officers went on signing them up anyhow, and eventually the pressure for more troops inspired a change of attitude throughout most of the country. By 1778, free blacks were entering service from Virginia northward, slaves and servants were sometimes being accepted as military substitutes for their masters, and Rhode Island, apparently with Washington's approval, had taken the lead in legislation encouraging and underwriting the enlistment of slaves to fill the state's continental quota.[18] In such circumstances, the question of congressional policy on the subject was bound to be reviewed.

In September of 1778, Benedict Arnold, then the commander at Philadelphia, proposed a joint expedition with French naval forces to take possession of Barbados and Bermuda. One feature of his plan was: "To engage in the marine service of the united states about 5 or 6 hundred black and Mulatto Slaves who are employed as mariners in coasting vessels, by giving to them the pay and privileges of American Seamen, and assuring them of the[ir] freedom after the war, or three years Service." Congress seems to have looked favorably on the project, but the French minister to the United States did not, and nothing further came of Arnold's proposal.[19] Another six months passed before military recruitment of slaves received formal congressional approval.

During those six months, the British launched their southern strategy by capturing Savannah and moving toward the Carolinas. The southern states lacked sufficient manpower to resist the offensive, and no sizable force could be sent to their aid from the North. The desperate circumstances lent credibility to a plan for recruiting black troops developed by John Laurens, a young South Carolinian serving on Washington's staff, and sponsored in Congress by his distinguished father, Henry Laurens. On March 29, 1779, after a favorable committee report, it was resolved that South Carolina and Georgia be

urged to "take measures immediately for raising three thousand able-bodied negroes." Congress undertook to pay the owners of such enlisted slaves at a rate not exceeding $1,000 per man, and the resolution also provided: "That every negro who shall well and faithfully serve as a soldier to the end of the present war, and shall then return his arms, be emancipated and receive the sum of fifty dollars."[20]

Thus, for the first time in American history, the central government proposed military recruitment of slaves and offered to finance their manumission. More than eighty years would pass before Congress embraced any such policy again. Of course the Laurens plan required the cooperation of South Carolina and Georgia, and that was not forthcoming. Few southerners were willing to run the risk of placing guns in the hands of slaves. The Virginia government refused to do so, and it is not surprising that a similar attitude prevailed farther south.[21] "We are much disgusted here at the Congress recommending us to arm our Slaves," wrote one South Carolinian. "It was received with great resentment, as a very dangerous and impolitic Step."[22] Washington lent the proposal no open support and privately expressed a fear that arming some slaves would produce "much discontent" among those remaining in servitude.[23] On the other hand, first General Benjamin Lincoln and then General Nathaniel Greene, as American commanders in the southern theater, strongly urged that the critical need for more soldiers be met by enlisting slaves, but they were no more successful than Congress in swaying the legislatures of South Carolina and Georgia.[24]

The Second Continental Congress, after more than a year of organizing and directing American military resistance to Britain, acquired a second great responsibility in July 1776—that of establishing a permanent frame of government for the new United States of America. Richard Henry Lee's famous resolution of June 7 declaring "That these United Colonies are, and of right ought to be, free and independent States" was accompanied by another directing "That a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation."[25] Formation of an American union had been extensively discussed before Lee offered his resolution, and the principal organizational problem had been obvious ever since the opening session of the First Continental Congress, when Patrick Henry rose to declare that "it would be great injustice if a little Colony should have the same weight in the councils of America as a great one."[26] Virginia in 1774 had at least ten times the population of Delaware or Georgia. Yet conti-

nental unity was plainly more imperative than equitable representation, which, in any case, would have been difficult to define and administer. So this first Congress, while disclaiming any intention of setting a precedent for future congresses, decided that each colony should have one vote.[27] Despite much dissatisfaction in the more populous states, that simple solution lasted fifteen years.

Fair or unfair, state equality in congressional voting was feasible; state equality in the requisition of money and troops was not. In July of 1775, for instance, the Second Continental Congress determined that the responsibility for redeeming its bills of credit should be distributed among the states according to "the number of Inhabitants, of all ages, including negroes and mulattoes."[28] That provision, which of course displeased southerners, illustrated the fact that in any apportionment according to population, the question of whether to include slaves was bound to arise.

The actions taken in 1774 and 1775 became precedents in the summer of 1776 when a committee headed by John Dickinson set to work framing articles of confederation. In its draft submitted on July 12, the committee proposed to continue the rule of one vote per state in Congress and to apportion the expenses of the central government among the states according to their total populations.[29] The first of these provisions survived repeated attacks from representatives of the large states and was retained in the revised document finally approved by Congress on November 15, 1777. Thus the subject of slavery never entered into the decision on representation in the framing of the Articles of Confederation. But it was a different story when the delegates came to decide how the financial burden should be shared.

Americans generally agreed that taxes should be proportionate to wealth, but the task of calculating the total wealth of each state seemed so formidable that there was a strong disposition to settle for the simpler alternative of counting the producers of wealth. The proposal of the Dickinson committee reflected the judgment that population as a whole constituted the best available indicator of wealth. It was first challenged by Samuel Chase of Maryland, who on July 30 moved an amendment apportioning the government's expenses among the states according to their *white* populations only. He regarded the number of inhabitants as a "tolerably good criterion of property" but insisted that slaves were property like cattle and ought not to be counted as part of the population. John Adams responded that if the number of people was to be taken as an index of wealth, slaves must be included in the enumeration because all workers, whether freemen or slaves, were equally

producers. Benjamin Harrison of Virginia denied that slave labor was as productive as free labor and suggested that "two slaves should be counted as one freeman." There, one might say, was the origin of the notorious three-fifths compromise.[30]

James Wilson of Pennsylvania also complained that Chase's amendment would stimulate the further importation of slaves, while at one point in the discussion, Thomas Lynch of South Carolina gave vent to the same menacing impatience that was expressed by some southerners during the D'Auterive and Pacheco controversies many years later. According to notes taken by Adams at the time, Lynch said: "If it is debated, whether [our] slaves are [our] property, there is an end of the confederation."[31]

The Chase amendment, which had obviously aroused strong sectional feelings about slavery, was defeated on August 1, with the seven northern states united against five southern states and only the Georgia delegation divided.[32] The issue remained unresolved until October of the following year, when the original recommendation of the Dickinson committee was discarded in favor of a somewhat less controversial but also less workable plan. First, Congress rejected a proposal that would have made almost all private property, including slaves, the basis for apportioning national expenses among the states. Then the delegates, with only the four New England states opposed, voted that such expenses should be allocated according to the estimated value of land and improvements.[33] The southern states had won their battle to exclude slaves, whether considered as persons or as property, from the calculation of how much a state must contribute to the support of the central government. Furthermore, slaves were excluded from consideration in another respect. One clause untouched by revision provided that state quotas for the land forces should be set "in proportion to the number of white inhabitants." By this rule, Massachusetts would be expected to furnish about the same number of troops as Virginia.[34] Thus the Articles of Confederation, though free of any direct reference to the institution of slavery, contained two significant concessions to the states with large slave populations.

Ratification of the Articles was largely achieved during the year 1778, but a number of state legislatures instructed their delegates in Congress to request amendments of the document before giving it formal approval. Among the proposals offered, Connecticut moved that in Article 8, the basis for allocation of common expenses be changed from lands and improvements back to total population, as the Dickinson committee's draft had provided; and three northern states sought to have troop requisitions apportioned among

the states according to their total populations, rather than their white populations.[35] These and all other proposed changes were defeated because a majority in Congress feared that opening the door to even one amendment, however meritorious, would invite too much delay in the achievement of confederation.[36] Delay nevertheless ensued, as Maryland alone for more than two years refused to ratify the Articles until states claiming western lands agreed to cede them to the central government. Consequently, it was March 1, 1781, when this, the first constitution of the United States, finally went into effect.

The Confederation Congress, functioning in about the same way as its predecessor, the Second Continental Congress, presided over the achievement of American independence by virtue of military success against British forces and the treaty of peace signed in 1783. Among the many problems of the new government during the period of transition from war to peace, none was more pressing than that of revenue. Congress had no power to lay taxes or to enforce its requisitions upon the states. Furthermore, it became increasingly apparent that the apportionment of expenses according to land values, as provided for in Article 8, was never going to work. "The rule is good and plain but the question is extremely difficult," wrote the North Carolina delegates to the governor of their state.

> How shall the value be fixed? Let the appropriated Lands and their improvements be valued by the Inhabitants of the respective States and we have great reason to believe, from proofs before us, that the valuation would be unequal. . . . It is presumed that the valuation would be more uniform and just if it was made by a set of Commissioners who should view all the lands and buildings in the United States. But there is reason to believe that such process . . . would be perpetual and it would be an even chance which would come first, the fixing the Quotas or the Day of Judgment.[37]

In 1783, another attempt was made to base apportionment on population rather than land value. Northerners desiring the change recognized that they would have to make some kind of concession on slavery. A committee headed by Nathaniel Gorham of Massachusetts recommended an amendment of Article 8 whereby expenses would be apportioned among the states according to their total populations, but excluding slaves of certain ages (left unspecified).[38] There was general agreement, however, that it would be better to set a fixed ratio of slave population to free population.[39] On March 28, the

committee accordingly reported a proposal that "two blacks be rated as equal to one freeman." That proportion, which had been suggested originally by Benjamin Harrison back in 1776, was satisfactory to most southerners, although a number of them still preferred the land-value basis, and some argued that 3 to 1 or 4 to 1 would be a fairer representation of the slave's productive value. On the other side, several New England delegates spoke out in favor of a four-to-three ratio. Then a move to equate three slaves with two free persons was brought to a vote and defeated, Massachusetts joining the southern states in opposition. After further discussion, James Madison, offered "proof of the sincerity of his professions of liberality" by proposing that slaves be rated at five to three. James Wilson said that he would "sacrifice his opinion to this compromise," and it passed by a vote of seven states to two, with one delegation divided. Almost immediately that decision was reversed as South Carolina deserted to the opposition, leaving only a minority of six states supporting the proposition.[40] But four days later, enough members changed their minds to produce an eight-state majority in its favor. On April 18, when the final vote was taken on the amendment to Article 8 as part of a broader revenue plan, the majority had increased to nine, with New York divided and only Rhode Island opposed.[41] "Those who voted differently from their former votes," Madison observed, "were influenced by the conviction of the necessity of the change & despair on both sides of a more favorable rate of the Slaves."[42]

The "three-fifths compromise," or "federal ratio," as it came to be called, had resulted from the determination of Congress that population instead of land ought to be the basis for allocating the expenses of the Confederation. It was the ultimate product of bargaining between northerners who wanted slaves wholly included in the calculation and southerners who wanted them wholly excluded. The proposal to split the difference evenly by counting two slaves as one free person was acceptable to the South but not to the North. In the final negotiations, accordingly, the three-fifths compromise emerged as an accommodation between the one-half compromise favored by southerners and the two-thirds compromise sought by northerners. Although racial preconceptions were always a factor in any discussion of slavery, the fraction "three-fifths" had no racial meaning. It did not represent a perception of blacks as three-fifths human. It was not intended to denote the slave's dual legal status as both person and property. Instead, it reflected a double judgment, together with a qualification insisted upon by southerners and reluctantly acquiesced in by northerners, namely: that taxation should be

proportionate to wealth, that population was the best available index of wealth, and that slaves, because they were less productive than free persons, ought to be counted only fractionally as indicators of wealth. The fraction finally chosen, as Madison explained to a fellow Virginian, was simply "a compromise between the wide opinions & demands of the Southern & other States."[43]

Despite strong urging from Congress, the proposed amendment of Article 8 never went into effect because four states failed to ratify it.[44] The three-fifths compromise nevertheless remained in men's minds as an example of successful sectional accommodation on a difficult issue. Meanwhile, as the new nation struggled with various postwar problems, slavery continued to impinge now and then upon the shaping of public policy. For example, Congress in 1784 asked to be vested with certain powers over foreign trade in order to strengthen its hand in the negotiation of commercial treaties. The Georgia legislature somewhat tardily approved the exercise of such power, but with the proviso "that it do not extend to prohibit the importation of negroes."[45] Here was a plain signal that the spirit of the Revolution had not produced a consensus in favor of abolishing the African slave trade.

In addition, the Confederation Congress approved the treaty of peace with Great Britain, one clause of which provided that British forces were to withdraw from the United States without "carrying away any negroes or other property of the American inhabitants." The clause had been added belatedly to the text of the treaty at the instance of Henry Laurens, the only southern member of the American peace delegation.[46] Thus, almost casually, in the founding document that confirmed American independence, Negro slaves were recognized as property by the United States government. From 1783 onward, Congress repeatedly instructed its diplomatic emissaries abroad to seek satisfaction for the thousands of slaves carried off in disregard of the treaty.[47] When nothing came of these efforts, some southerners began to suspect that their case suffered from a lack of enthusiasm on the part of the two northerners most responsible for pressing it—John Jay, secretary of foreign affairs, and John Adams, the first American minister to Britain.[48] Jay, in a report to Congress on October 13, 1786, revealed the ambivalence and discomfort of a man whose heart was with the opponents of slavery but whose official duties required him to act virtually as a slaveholders' agent.

The report was perhaps the strongest official expression of antislavery sentiment to be heard from any person holding high executive office in the United States government down until the time of the Lincoln administration.

"Whether men can be so degraded as under any circumstances to be with propriety denominated Goods and Chattels . . . is a question," Jay declared, "on which opinions are unfortunately various, even in Countries professing Christianity and respect for the rights of mankind." Nevertheless, as the treaty article confirmed, both American law and British practice recognized that man might have property in man. Jay was most concerned about those slaves who, responding to promises of freedom and protection, had fled from their masters and found refuge within British lines. The mere flight of such slaves, he maintained, did not extinguish their owners' title, and they could not be claimed by the British as booty of war because "they *were received, not taken* by the enemy." On the other hand, it would have been "cruelly perfidious," in Jay's view, if the slaves had been delivered up to their former bondage and to the severe punishments probably awaiting them. The result was a "painful dilemma." By agreeing to the treaty, "Britain bound herself to do great wrong to these Slaves; and yet by not executing it she would do great wrong to their Masters." The remedy was simple enough, however. Having kept faith with the slaves by carrying them away, the British should do justice to their masters by paying the full value for them. "In this way," Jay observed, "neither could have just cause to complain; for although no price can compensate a Man for bondage for life, yet every Master may be compensated for a runaway Slave."[49] The logic of his argument seemed impeccable, but British officials remained unresponsive, and the problem of the carried-away slaves continued to haunt Anglo-American relations for many years.

At the same time that the Confederation Congress was addressing violations of the peace treaty, it confronted the problem of slavery in the territories. The American territorial system came into existence in the 1780s as states with claims to western lands began ceding them to the United States. When the critical cession by Virginia was completed in 1784, Congress took steps to provide a frame of government for the new national domain. A committee headed by Jefferson submitted its plan for establishing at least fourteen new states in the transappalachian region. The proposed ordinance included several specific restrictions, one of which declared: "That after the year 1800 of the Christian era, there shall be neither slavery nor involuntary servitude in any of the said states, otherwise than in punishment of crimes, whereof the party shall have been duly convicted to have been personally guilty."[50]

Of course this attempt to ban slavery throughout the entire American West, as it then existed, was unacceptable to most of the southern members.

A North Carolinian moved to strike the clause, which meant that it would be retained only if seven states gave it their support. A total of fourteen delegates from the seven northern states voted unanimously for retention, but New Jersey had only one man present and so, according to the rules of Congress, its vote did not count. Nine delegates from four southern states voted 7 to 2 against retention. Jefferson's two colleagues outvoted him in the Virginia delegation, and the two North Carolina members were divided. The vote of six states to three in favor of the antislavery provision was not enough to prevent its excision, and the Ordinance of 1784, as finally enacted, therefore contained no mention of slavery.[51] In a letter written some two years later, Jefferson lamented that the voice of a single additional supporter "would have prevented this abominable crime from spreading itself across the country."[52] He was no doubt at least partly mistaken, however. Insofar as the ordinance applied to the region south of the Ohio River, where slaveholders were already well established and where no land had as yet been ceded to the United States, southern opposition probably would have prevented effective enforcement of the antislavery clause and perhaps even forced its repeal.[53]

In 1785, a congressional committee led by Rufus King of Massachusetts renewed the proposal to prohibit slavery after 1800 in all the new states created by the Ordinance of 1784, having added a provision for the recovery of fugitive slaves escaping into that region.[54] A preliminary vote indicated that northerners once again were unanimously in favor of such action and that they had the support of a few members from the upper South.[55] The King resolution never came to a final vote, however, perhaps because of a growing realization that the ordinance itself would have to be remodeled before it could be put into operation. Congress assigned the task of revision to a committee headed by Jefferson's friend James Monroe, who presented its recommendation on May 10, 1786. This document, which was in a sense the first draft of the famous Northwest Ordinance, laid out a two-stage plan of territorial government leading eventually to statehood. It said nothing about slavery. During the year that followed, the Monroe draft was debated, recommitted, redrafted, and debated again, without restoration of the antislavery clause. Congress still had the revised plan under consideration when the members of the Constitutional Convention assembled at Philadelphia in May of 1787.[56]

From 1774 until 1787, the Continental Congress and the Confederation Congress had periodically engaged in discussions and made decisions touching the institution of slavery, but never in the way of confronting it directly as a national problem. Always the concern with slavery had been incidental or

auxiliary to some matter or purpose generally considered to be of greater immediate importance. Thus Congress took an interest in closing down the African slave trade only as part of the prerevolutionary struggle with Britain; it endorsed a plan for the enlistment and eventual manumission of several thousand slaves only because of a desperate need for more troops; it fashioned the three-fifths compromise only to facilitate the quest for a stable national revenue. The fundamental question of the future of slavery in a nation formally dedicated to universal freedom was simply not on the national agenda, and only a few people wanted to have it put there.[57] Of course Jefferson and several other members of Congress had sought to define the future of slavery at least with respect to its extension into new western states. But that effort had failed and, in the spring of 1787, seemed unlikely to be renewed with any hope of success.

In 1787, when Benjamin Franklin, at the age of eighty-one, served as a delegate to the Constitutional Convention, he was also elected president of the reorganized Pennsylvania Society for Promoting the Abolition of Slavery. The society requested him to deliver a memorial to the Convention urging that it devote some attention to the African slave trade, but Franklin refrained from mixing his two roles. He did not present the memorial, and, in fact, there is no record of his having said anything about slavery during the proceedings of the Convention.[58] By this time, a number of antislavery societies had been established in the United States, and their cause appeared to be prospering. Most notably, abolition had begun in the northern states and was expected to prevail eventually at least as far south as Delaware.[59] In addition, Virginia and Maryland had revised their laws to facilitate private manumission, and every state except Georgia had in some way proscribed, inhibited, or suspended the importation of slaves. All of these antislavery gains resulted from the action of state governments, dealing with what almost everyone considered to be exclusively a state problem. Neither Franklin nor any of the other delegates gathering in Philadelphia conceived of slavery as a problem waiting to be addressed by national authority. Certainly they did not think of themselves as having been empowered and charged to settle the destiny of the institution. Yet slavery, though not on the Convention's agenda, intruded frequently on its deliberations and profoundly affected several of its most important decisions. With at least half of the delegates owning slaves, the Convention, viewed as an entity, was bound to have mixed feelings on the subject. "Intent of the framers" in regard to slavery is an abstraction linking

the multiplicity of individual attitudes with the unity of the Constitution. Nevertheless, a good many delegates, including some of the slaveholders, seem to have believed or hoped that somehow in the flow of time, slavery would disappear. The imprint of that expectation is visible in the document that they finally approved.

The Convention of 1787, although ostensibly called to find ways of improving the Articles of Confederation, quickly displayed a strong disposition to draft a whole new constitution for the United States. Most of the delegates were in general agreement that their primary purpose was to strengthen the national government by adding to its list of specific *powers* and by investing it with the *power* to govern effectively. But in addition, delegates from some of larger states were determined to bring about a more equitable allocation of national power by substituting proportional representation for state equality in the national legislature. Thus the "Virginia plan," which launched the work of the Convention, called for a national legislature of two houses, with representation in both apportioned among the states according to free population or contributions to the national treasury.[60] Delegates from several of the smaller states countered with the "New Jersey plan," proposing to retain the existing governmental structure of a unicameral legislature in which each state had one vote.[61] This, the most critical issue before the Convention, was resolved after much debate by the "great compromise" of July 16, which balanced state equality in one branch of Congress with representation based on population in the other.[62]

Any discussion of proportional representation necessarily raised the question of slavery and how it fitted into the emerging new design of the federal republic. In the apportionment of congressional seats among the states, were slaves to be counted as part of the population represented? This was plainly a sectional issue, but it proved to be one on which the sectional lines were never very clearly drawn in the Convention because of various complications, such as the preference of some delegates for apportionment based on wealth. If slaves were to be counted as free persons were, Virginia would have about 17 percent of the seats in the House of Representatives; if not, her share would be reduced to about 12 percent. But even 12 percent would be an improvement over the state's representation under the Articles of Confederation, which was less than 8 percent of the total. Thus, to Madison and other Virginians, as the Virginia plan itself indicated, proportional representation seemed more important than slave representation. Similarly, Pennsylvania stood to gain so much from proportional representation that its delegation

(except Gouverneur Morris) tended to be conciliatory on the question of slave representation.

Since the question of counting or not counting slaves obviously had to be settled if proportional representation was to be installed, the thoughts of some delegates naturally turned to the formula approved by Congress in 1783 as a basis for distributing the expenses of the Confederation. It was James Wilson of Pennsylvania, a man of antislavery principles, who on June 11 proposed that the federal ratio be applied to the problem of representation. The Convention, sitting as a committee of the whole, promptly approved.[63] Four days later, William Paterson counterattacked by presenting the New Jersey plan, which, while clinging to the already rejected principle of complete state equality, also contained a proposal to use the federal ratio for its original purpose, that is, in the allocation of financial requisitions.[64] With these moves, the groundwork was laid for double employment of the three-fifths ratio in the Constitution.

Wilson embraced the federal ratio as strategy calculated to help secure proportional representation in both houses of Congress, which he, along with Madison, ardently supported. For Wilson at this point, the ratio was not so much a sectional compromise as it was a familiar, ready-at-hand means of clearing away a troublesome obstacle. Madison at first likewise regarded the slavery question as an impediment to the replacement of state equality with proportional representation. But at the end of June, in his desire to minimize the continuing rivalry between large states and small states, he ventured to exploit the slavery question by portraying the United States as a nation divided primarily into slaveholding and nonslaveholding sections. He suggested in place of the three-fifths compromise that legislative seats be apportioned in one house according to free inhabitants and in the other according to total population. "By this arrangement," he said, "the Southern scale would have the advantage in one House, and the Northern in the other."[65]

Hard though they tried, Madison, Wilson, and the other advocates of proportional representation were unable to hold all the ground that they had won on June 11. The opposition crystallized June 29 in a motion calling for state equality in one house of Congress. At first, the motion failed by a vote of 5 to 5, but it was incorporated in the recommendation of a committee reporting on July 5 and tentatively approved by the Convention two days later.[66] From then on, the central feature of the great compromise was substantially in place, but there followed a bitter struggle over the manner of installing proportional representation in the other house. The main issue was not the

three-fifths ratio but rather the more general question of whether the Constitution should contain *any* specific rule of apportionment. Gouverneur Morris, who feared the potential power of new western states and thought that representation should reflect property as well as population, wanted periodic reapportionment left to the discretion of Congress. He won a temporary victory on July 9 when the Convention, while still considering the initial quota of seats that it proposed to specify in the Constitution, accepted a clause authorizing Congress in certain circumstances to revise the quota "upon the principles of . . . wealth and number of inhabitants."[67] That would have eliminated the need for the three-fifths compromise in the Constitution, leaving the whole question of slave representation to legislative disposal. Many delegates were unwilling to settle for such a vague arrangement, however, and soon the Convention resumed its efforts to draft a constitutional rule of proportional representation, which meant that it must either reaffirm its approval of the three-fifths compromise or design an acceptable alternative.

At this point, there occurred some spirited exchanges concerning slavery, set off on July 11 by a South Carolina effort to scrap the federal ratio and base legislative apportionment on total population. Pierce Butler, in offering the motion, reversed earlier assertions about the low productivity of slave labor made by southerners when the subject had been allocation of national expenses, rather than representation. He now argued that slaves were equal to freemen as producers of wealth and consequently ought to be represented equally in a government "instituted primarily for the protection of property." Delegates from Massachusetts, Virginia, and North Carolina responded adversely, indicating their continued adherence to the three-fifths compromise. Butler's proposal was defeated, 7 to 3, and when renewed the next day by Charles Pinckney, it failed again, receiving only the votes of South Carolina and Georgia.[68]

From the opposite extreme, Gouverneur Morris declared that any representation of slaves at all would be unacceptable to the people of Pennsylvania. He attacked the three-fifths ratio as an encouragement to the slave trade and as having no basis in logic.[69] Morris's principal concern, however, was not slavery but preservation of his July 9 victory. And, indeed, the argument over slavery and the three-fifths clause, which ran intermittently for three days, was never clear-cut, but always mixed with collateral questions: whether wealth as well as people should be represented, whether population was the best available index of wealth, whether apportionment should be defined in the Constitution or left to the legislature.[70]

Morris's colleague James Wilson acknowledged that applying the three-fifths ratio to representation was hard to justify because it rested on no principle. If slaves were counted as persons, why not as whole persons? If they were counted as property, why should not other property be included in the computation? Yet these were difficulties, Wilson said, that "must be overruled by the necessity of compromise."[71] And Wilson's mood was the one that prevailed. On July 11, to be sure, the Convention voted 6 to 4 against incorporating the three-fifths ratio in a proposed national census, but the issue was somewhat confused and the division was not sectional. The negative votes came from Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, and South Carolina.[72] The Convention reversed itself the next day and endorsed the ratio by a vote of 6 to 2, with only New Jersey and Delaware opposed, while Massachusetts and South Carolina were divided.[73] In still another vote on July 13, the ratio was implicitly approved, 9 to 0, and then the Convention adopted it as part of the great compromise on July 16.[74]

By then, the three-fifths compromise had been carefully and somewhat absurdly camouflaged in the hope of making it more palatable to certain delegates. For one thing, the approved text no longer specified the three-fifths ratio but referred instead to the "ratio recommended by Congress in their Resolution of April 18, 1783." In addition, the only thing said about the apportionment of legislative seats was that "representation ought to be proportioned according to direct Taxation," after which the ratio of 1783 was applied explicitly just to direct taxation.[75] This linkage and the accompanying subterfuge, proposed by Morris and Wilson, respectively, on July 12,[76] may have had some effect on that day's voting, but the odds were always heavily in favor of the three-fifths compromise from the moment that the Convention began to move toward proportional representation in at least one branch of the national legislature. Probably the only viable alternative was Morris's proposal to leave apportionment largely in the hands of Congress, but a majority of delegates proved to be unwilling to do so. As early as June 11, the federal ratio won overwhelming approval in the committee of the whole. Opposition to it in the votes and speeches of July 11–13 sprang from mixed purposes. Feelings about slavery mingled with economic considerations, with rivalry over the geographic allocation of national power, and with a general recognition of the urgent need for compromise. South Carolina's aggressive effort to secure full representation for slaves was emphatically rejected. As for apportionment based solely on free population, no northerner at this time even ventured to propose it, and when Morris did so several weeks later, his

motion failed, 10 votes to 1.[77] There was, moreover, no haggling over the fraction itself. That battle had been fought out four years earlier. One can scarcely overstate the importance of the fact that in the three-fifths ratio delegates had available a packaged compromise already ratified by eleven of the thirteen states. The ratio had become, as Rufus King later observed, "the language of all America."[78]

If the Convention's first struggle over slavery pertained to the structuring of Congress, the second such conflict grew out of the empowerment of Congress. Delegates were generally agreed that substantial control of foreign and interstate commerce must be delegated to the national government, and the first proposal along those lines was made as early as June 15 in the New Jersey plan. To no one's surprise, then, the draft constitution submitted by the Committee of Detail on August 6 contained a clause authorizing Congress to "regulate commerce with foreign nations, and among the several States." But many southerners believed that such power in the hands of the central government, if unrestricted, would be used primarily to benefit northern commerce at southern expense. Delegates from the lower South also feared that the power would be used to outlaw the African slave trade. The Committee of Detail responded sympathetically to southern apprehensions. Made up of three northerners and only two southerners, but apparently dominated in this instance by its chairman, John Rutledge of South Carolina, the committee proposed a number of glaringly sectional limitations on the commerce power and the taxing power. There was to be no tax on exports, nor any capitation tax unless apportioned in accordance with the three-fifths compromise; a two-thirds majority would be required for passage of navigation acts; and Congress was never to prohibit the importation of slaves or lay any tax upon such importation.[79]

This prosouthern package so angered Rufus King and Gouverneur Morris that on August 8 they renewed their attacks upon the three-fifths compromise, an issue supposedly settled. Morris delivered one of the Convention's strongest denunciations of slavery, calling it "a nefarious institution" and "the curse of heaven" on the states wherein it prevailed. In a concluding gust of rhetoric, he declared that he would rather be taxed to pay for all the slaves in the country than "saddle posterity with such a Constitution."[80] The prosouthern clauses did not come up for discussion until some two weeks later, by which time the commerce clause itself had been approved without opposition.[81] First to be considered was the prohibition of taxes on exports. That restriction passed, 7 to 4, with the five southern states united in

its support.[82] The South was sharply divided, however, on the subject of slave importation. In the case of Maryland and Virginia, morality blended with economic interest to produce a strong desire for cessation of the trade. George Mason most eloquently condemned the "infernal traffic" and echoed the language of Morris in warning that slavery brought "the judgment of Heaven on a country." But it was Maryland's garrulous maverick Luther Martin who proposed an amendment eliminating the exemption of the slave trade from national control. Such a concession to slavery in the Constitution, he said, would be "inconsistent with the principles of the Revolution and dishonorable to the American character."[83]

The debate that followed Martin's motion began late on August 21 and extended over much of the following day. Madison, whose record is of course incomplete, noted down remarks by seventeen men, five of whom spoke more than once. Delegates from Georgia and the Carolinas insisted emphatically that their states would not ratify a Constitution in which the importation of slaves was made subject to congressional control. Charles C. Pinckney charged that Virginia, with a surplus of slaves, stood to profit from an increase in their value if importation were forbidden. A rejection of the slave-trade clause, he warned, would be the equivalent of "an exclusion of South Carolina from the Union." The most striking feature of the debate was the staunch support given the lower South by Connecticut delegates Oliver Ellsworth and Roger Sherman. In their view, the Committee of Detail's recommendations constituted a necessary compromise that ought to be accepted as written. Predicting that slavery would eventually disappear without intervention by the central government, they argued that it was better "to let the Southern States import slaves than to part with them, if they made that a sine qua non." The South Carolinians nevertheless concluded that they must yield some ground or risk total defeat. They accordingly proposed commitment of the slave-trade clause, with a view to allowing taxation of imported slaves. Some northerners wanted more than that, however, and in the end it was decided that the slave-trade clause, together with the restriction on capitation taxes and the section requiring a two-thirds vote for navigation acts, should be submitted to a committee of eleven.[84]

The committee, headed by New Jersey's vigorous and liberal-minded governor, William Livingston, reported on August 24. It proposed to retain the restriction on capitation taxes, a superfluous provision already covered in the apportionment of representation and direct taxes. Otherwise, the committee recommended that the slave trade be shielded from congressional