



THE CONSTITUTIONAL CONVENTION AND THE PECULIAR INSTITUTION

It is easy to envision the Constitution as a document that has been so hallowed by history and by the passage of time that it can barely be discussed. It simply exists, and always has. But in recent years, the academic debates of legal scholars and historians have made their way into public discourse and brought the Constitution along with them. As a result, the Constitution may be more actively debated and discussed in popular culture today than at any time since the contentious debates over its ratification. Many of those debates have focused on the wisdom of a modern nation allowing itself to be guided by historic principles. More specifically, many of those debates have questioned whether a document created and agreed upon by a culture that still permitted the enslavement of human beings can still guide a modern nation. This month's Liberty Matters considers this contemporary debate from a historical perspective. Many of the questions that we raise about the Constitution today were also actively discussed when it was being written, debated, and ratified. Our writers this month seek to ground and contextualize the contentious arguments over the Constitution today in those historical discussions, in the hopes of framing new questions, providing new arguments and perspectives, reviving forgotten ones, and reminding us all that no document—no matter how great and how historic—has ever been unquestioningly accepted.

THE CONSTITUTIONAL CONVENTION'S FORGOTTEN ABOLITIONIST

by Dennis C. Rasmussen

When contemplating the role that slavery played at the Constitutional Convention, our minds are naturally drawn to the shameful silences and dirty compromises that pervade the framers' approach to this issue. In this essay I propose to focus instead on one of the very few bright spots in the record, [Gouverneur Morris's](#) stunning antislavery speech of August 8.^[1] Although Morris is all but forgotten among the general public today, he was no minor figure in Philadelphia. In fact, he was arguably the Convention's dominant figure: Morris spoke more often, proposed more motions, and had more motions adopted than any other delegate, and at the end of the summer he composed the final draft of the [Constitution](#) itself, choosing the arrangement and much of the wording of its provisions, not to mention penning the famous preamble ("We the people of the United States ...")

nearly from scratch.^[2] Morris also happens to have been far and away the Convention's fiercest and most persistent critic of slavery.^[3]

"...ONE OF THE VERY FEW BRIGHT SPOTS IN THE RECORD, [GOUVERNEUR MORRIS'S](#) STUNNING ANTISLAVERY SPEECH OF AUGUST 8."

The single biggest and most enduring controversy over slavery at the Convention centered on whether and how enslaved people would be counted toward the apportionment of the House of Representatives. The details of this protracted and often bitter debate cannot be recounted here, but the contest came to a head, at least as far as Morris was concerned, in early August. On August 6 the Convention received its first full draft of a constitution, which had been composed by a five-member Committee of Detail over the previous two weeks. This constitution—which remained the delegates' working draft until Morris composed the final version of

the Constitution near the Convention's close—was conspicuously proslavery in a variety of ways. Among other things, it incorporated the now-notorious clause stipulating that three-fifths of the enslaved population would be counted for purposes of representation and taxation, as well as a provision guaranteeing that the overseas slave trade could not be prohibited, or even taxed, by Congress.



Gouverneur Morris

Two days later, when the delegates began to discuss the section of the draft constitution that addressed the apportionment of the House of Representatives, Morris launched into a tirade the likes of which the Convention had not yet seen, nor would see again. His speech has been described as “the most powerful antislavery speech of the entire convention”; “the Convention’s most eloquent and stinging denunciation of slavery”; “perhaps the most eloquent speech heard that summer in the Convention”; “the closest thing to an abolitionist sermon to be heard at the convention”; “the first abolitionist speech in American political life”; “one of the most eloquent condemnations of slavery ever written”; and “a prime example of what we mean when we say someone was on the right side of history.”^[4]

Morris began by moving that representation should be based entirely on the number of free inhabitants in each state, with no representation at all for enslaved people, declaring that “much ... would depend on this point. He never would concur in upholding domestic slavery.”^[5] Looking around at his fellow delegates,

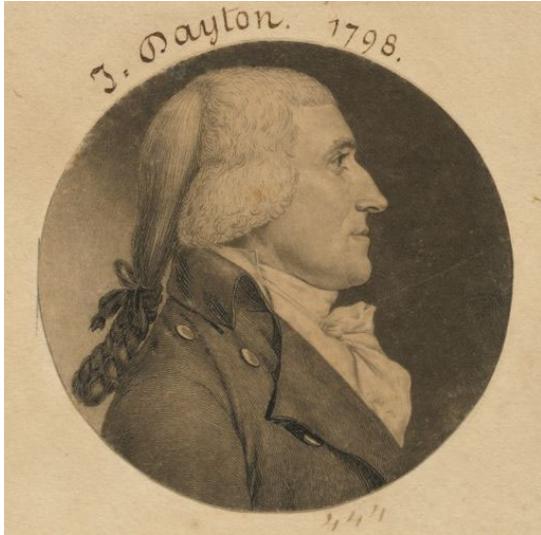
twenty-five of whom were themselves slaveholders, he proclaimed that slavery was “a nefarious institution” and “the curse of Heaven on the States where it prevailed.” Morris then took his colleagues on a virtual tour of the nation to prove the point:

Compare the free regions of the Middle States, where a rich and noble cultivation marks the prosperity and happiness of the people, with the misery and poverty which overspread the barren wastes of Virginia, Maryland, and the other States having slaves. Travel through the whole continent, and you behold the prospect continually varying with the appearance and disappearance of slavery. The moment you leave the Eastern States, and enter New York, the effects of the institution become visible. Passing through the Jerseys and entering Pennsylvania, every criterion of superior improvement witnesses the change. Proceed southwardly, and every step you take, through the great regions of slaves, presents a desert increasing with the increasing population of these wretched beings.

Morris insisted that there was no good reason why enslaved people should count toward the House apportionment at all, according to any ratio: “Are they men? Then make them citizens, and let them vote. Are they property? Why, then, is no other property included?” These questions were unanswerable, which is why the southern delegates scarcely even attempted to do so.

Morris then got to the true crux of the matter: “The admission of slaves into the representation, when fairly explained, comes to this,—that the inhabitant of Georgia and South Carolina who goes to the coast of Africa, and, in defiance of the most sacred laws of humanity, tears away his fellow creatures from their dearest connexions, and damns them to the most cruel bondage, shall have more votes in a government instituted for protection of the rights of mankind, than the citizen of Pennsylvania or New Jersey, who views with a laudable horror so nefarious a practice.” Giving the South extra representation on behalf of the people whom they had enslaved, he declared, would require “a sacrifice of every

principle of right, of every impulse of humanity.” Morris concluded his oration by declaring that “he would sooner submit himself to a tax for paying for all the negroes in the United States, than saddle posterity with ... a Constitution” that effectively rewarded the southern states for holding people in bondage. No speech that summer was more graphic in describing slavery’s evils, or more pointed about its utter incompatibility with the nation’s ideals.



Jonathan Dayton

Alas, Morris’s speech was all but ignored. Jonathan Dayton, the Convention’s youngest delegate, seconded Morris’s motion simply so that “his sentiments on the subject might appear, whatever might be the fate of the amendment.” As Dayton evidently anticipated, the motion quickly went down to a decisive defeat. The great compromiser from Connecticut, Roger Sherman, declared that the inclusion of enslaved people in the apportionment did not seem to him to be “liable to such insuperable objections,” and Morris’s Pennsylvania colleague [James Wilson](#) deemed the motion “premature.” Charles Pinckney of South Carolina, realizing that the motion had no chance of passing, merely remarked that he would respond to Morris’s charges more fully “if the occasion were a proper one.” The motion then lost by a vote of ten states to one, with Dayton’s New Jersey alone supporting it. The three-fifths clause would not be seriously challenged again at the Convention.

This clause gave the southern states thirteen extra representatives in the first Congress, thereby achieving its intended aim of bringing them close to parity with the North. It also, of course, gave the South an extra thirteen votes in the electoral college, since each state was allotted a number of electors equal to its number of members of Congress (in both the House and Senate). For the southern states, this was a gift that kept on giving. For the next seven decades, they would be rewarded with more political power for every human being whom they kept in bondage. As the number of enslaved people ballooned from around 700,000 to around four million over this period, so did the South’s extra clout. It is therefore appropriate that a recent book on the “slave power thesis”—that is, the idea that slaveholding southerners effectively controlled the reins of the federal government in antebellum America—contains a chapter titled “Morris’s Prophecy.”^[6]

Some scholars have actually criticized Morris for speaking out so forcefully against slavery, given the furious reaction that he provoked among defenders of the institution. One maintains that “Morris’s speeches—rousing as they were—did not affect the final outcome and ... threatened a break-up of the Convention in the process,” while another says that “Morris’s outburst may have been good for his psyche, but it only served to fan the fires among the more extreme proslavery delegates.”^[7] It is, however, difficult not to admire Morris’s moral clarity, regardless of how off-putting the other delegates may have found it. The debates over this issue would have been much flatter, and in retrospect much more shameful, if Morris had not spoken out as he did. Historians frequently remind us that it is unfair to judge figures of the past on the basis of today’s values, which is true, but Morris’s ringing denunciations of slavery make it harder to accept the idea that the framers, as creatures of their times, simply did not know any better. After all, Morris knew better, and he told them so.

Endnotes

[1] This essay draws in part on the more detailed discussion in my forthcoming book, *The Constitution’s Penman: Gouverneur Morris and the Creation of*

America's Basic Charter (University Press of Kansas, forthcoming in 2023).

[2] On the far-reaching implications of Morris's drafting of the Constitution, see William Michael Treanor, "The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution," *Michigan Law Review* 120 (2021).

[3] Morris had also opposed slavery as a member of the New York state constitutional convention in 1777, where he urged his fellow delegates to do everything that they could to ensure that "in future ages, every human being who breathes the air of this State, shall enjoy the privileges of a freeman." Gouverneur Morris, 17 April 1777, in *Journals of the Provincial Congress, Provincial Convention, and Committee of Safety and Council of Safety of the State of New-York, 1775–1776–1777* (Thurlow Weed, 1842), 1:887.

[4] See, respectively, Sean Wilentz, *No Property in Man: Slavery and Antislavery at the Nation's Founding* (Harvard University Press, 2018), 76; John Patrick Coby, "America's Machiavellian: Gouverneur Morris at the Constitutional Convention," *Review of Politics* 79 (2017), 648; Melanie Randolph Miller, *An Incautious Man: The Life of Gouverneur Morris* (Intercollegiate Studies Institute, 2008), 73; see also 78–79; Noah Feldman, *The Three Lives of James Madison: Genius, Partisan, President* (Random House, 2017), 158; David Stewart, *The Summer of 1787: The Men Who Invented the Constitution* (Simon & Schuster, 2007), 192; David Nichols, "Gouverneur Morris and the Creation of American Constitutionalism," in *Natural Right and Political Philosophy: Essays in Honor of Catherine Zuckert and Michael Zuckert*, ed. Ann Ward and Lee Ward (University of Notre Dame Press, 2013), 257; and John Dickerson, *The Hardest Job in the World: The American Presidency* (Random House, 2020), 447.

[5] Unless otherwise noted, all quotations in this essay are taken from Gouverneur Morris's August 8 speech as recorded in *Debates in the Federal Convention of 1787* by James Madison, a Member, ed. Gordon Lloyd (Ashbrook Center, 2014), 331-33.

[6] See Leonard Richards, *The Slave Power: The Free North and Southern Domination, 1780–1860* (Louisiana State University Press, 2000), chap. 2.

[7] Jack Heyburn, "Gouverneur Morris and James Wilson at the Constitutional Convention," *University of Pennsylvania Journal of Constitutional Law* 20 (2017), 190; and Richard Beeman, *Plain, Honest Men: The Making of the American Constitution* (Random House, 2009), 211.

BEYOND ANTISLAVERY AND PROSLAVERY AT THE CONSTITUTIONAL CONVENTION

by Christa Dierksheide

Scholars have long considered—and tried to explain—the complex legacy of the Founding era. Most recently, historians have tried to discern whether the Founding was an "antislavery" or "proslavery" moment. Those who have described the Founding in antislavery terms have delineated a narrative of the gradual expansion of rights between the [American Revolution](#) and Reconstruction that culminated in the inclusion of African Americans as equal citizens and in the fulfillment of the [Declaration's](#) original promise (Wilentz, 2019; Foner, 2019; Oakes, 2021; Masur, 2021). By contrast, those scholars who have identified the Founding as "proslavery," have articulated a different story, one that portends the expansion and entrenchment of race-based chattel slavery and the dismal failure of equal rights (Waldstreicher, 2010; Kendi, 2016).

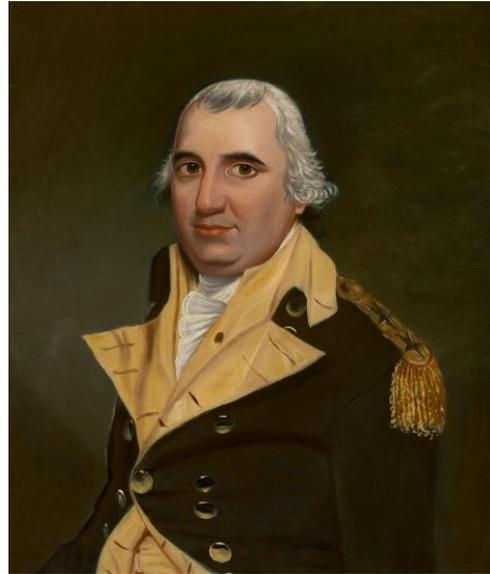
Perhaps unsurprisingly, understanding the original intent of the Framers of the [U.S. Constitution](#)—as a proslavery or antislavery document—has played a critical role in this debate. As Ibram X. Kendi has argued, the federal compromise "enshrined the power of slaveholders and racist ideas in the nation's founding document." Likewise, David Waldstreicher has maintained that the Framers created "a proslavery document, in intention and effect."



Constitutional Convention

The novel approach of proslavery delegates at the 1787 Convention was to turn the Somerset decision on its head—the status of an enslaved person no longer depended on the jurisdiction where that person was found, but rather on where that person originated. Linking status to origin allowed enslavers’ to imagine the U.S. federal union as a rapidly expanding system wherein slave property and the free movement of that property were safeguarded by law. Slaves’ origins—and their movement across jurisdictional boundaries—played key roles in both the slave trade clause and fugitive slave clause that delegates debated at the 1787 convention (Horowitz, 1970).

An array of seemingly antislavery and proslavery positions were staked out when delegates debated the slave trade in August of 1787. Luther Martin of Maryland asserted that the traffic “weakened” the union and was “inconsistent with the principles of the Revolution, and dishonorable to the American character.” Oliver Ellsworth of Connecticut thought that the “morality or wisdom of slavery are considerations belonging to the States themselves.” John Langdon of New Hampshire, on the other hand, was “strenuous for giving the power [to regulate the slave trade] to the General Government,” as he could not “leave it with the States, who could then go on with the traffic, without being restrained.” But General Charles Pinckney of South Carolina drew a line in the sand, saying that “South Carolina and Georgia cannot do without slaves.”



Charles Cotesworth Pinckney

That delegates defined enslaved people as “foreign” captives brought into the United States from Africa was critical to placing the trade—and its future abolition in 1808—under federal authority, thus dealing an apparent blow to South Carolina and Georgia slave owners. But creating a “foreign” trade also opened the door to a separate “domestic” trade in enslaved people. During the debate, Ellsworth, who “had never owned a slave,” sketched out the process by which a “foreign” trade with Africa might be superseded by a “domestic” trade between Upper and Lower South states. “As slaves multiply so fast in Virginia and Maryland that it is cheaper to raise than import them, whilst in the sickly rice swamps foreign supplies are necessary,” he noted, foreshadowing a commerce in enslaved people within the federal union. The clause’s focus on slaves’ origin also juxtaposed American-born and African-born slaves. This had important implications for western expansion—new territories and states increasingly permitted the immigration of “bona fide” settlers and their creolized slaves, but not traders and “foreign” slaves (Hammond, 2007).

Barely a month before the delegates assembled at Philadelphia, the establishment of a new antislavery jurisdiction, the Northwest Territory, shaped discussions about fugitive slaves. Article IV of the [Northwest Ordinance](#) outlawed slavery—“there shall be neither

slavery nor involuntary servitude”—while also protecting slaveholders’ property within that zone of freedom—“such fugitive may be lawfully reclaimed, and conveyed.” At the Convention, South Carolinian General Charles Pinckney and Virginian [George Mason](#) hoped that a provision for protecting the movement of property (especially in slaves) across state lines might be included in the new Privileges and Immunities clause, though it was not. Pinckney, along with fellow delegate Pierce Butler, eyed the Extradition clause instead, proposing “slaves and servants to be delivered up like criminals.”

But two delegates opposed Butler’s amendment. Roger Sherman of Connecticut “saw no more propriety in the public seizing and surrendering a slave or servant than a horse.” Likewise, [James Wilson](#) of Pennsylvania thought that the South Carolinians’ rider “would oblige the Executive of the State to do it at the public expense.” Faced with concerns over the role of the “public” in slave reclamation, Butler withdrew his proviso, opting for a different approach. Like the fugitives-from-justice clause, Butler’s new amendment hinged on the jurisdiction of origin. A person charged with “Treason, Felony, or other Crime” could not escape to safety in another state; s/he would be extradited to “the State having jurisdiction of the Crime.” Likewise, Butler proposed that “if any person bound to service or labor in any of the United States, shall escape into another State,” they would not be “discharged” from bondage but would rather be returned to an owner.

Though later edited out, Butler’s original phrases, “any person” and “any of the United States,” were critical—their capaciousness reflected Butler’s anxiety about the U.S. as a rapidly changing and dynamic union, one in which new jurisdictions were being added, and existing ones were being fundamentally altered. As Butler was undoubtedly aware, a federal system where slavery was based on local law would always pose a threat to the protection of enslavers’ human property, particularly across borders. At the same time, however, an expanding union of states where the movement of slave property was both surveilled and protected at the federal level offered unprecedented opportunities for the creation of

a settlers’ slave empire in the West (Van Cleve, 2010; Onuf, 2014).

As the Convention debates over the “foreign” slave trade and fugitive slaves made clear, the real issue at hand was not the antislavery or proslavery intentions of the Framers—it was forging a federal union that secured rights within states as well as across their borders. The same compromise that guaranteed citizenship to “free inhabitants” in any state in the union also guaranteed a right to slave property in any state in the union. Still, delegates faced a huge challenge in securing rights across such varied jurisdictions: free and slave, state and territory. But in 1787, lawmakers intended to correct the problems they had faced under the British Empire: jurisdictional controversies that threatened to undermine—or relinquish—property rights (Greene, 2011). Delegates hoped that a new emphasis on the “origin” of slave property would solve this issue and knit the union together, yet antipathies only intensified in the ensuing decades, culminating in a bloody war over slavery in 1861.

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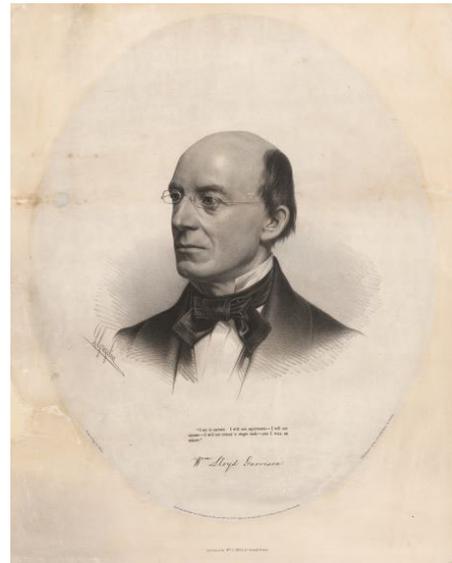
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William Lloyd Garrison

DISHONORABLE TO THE NATION": THE COMMITTEE OF DETAIL AND THE SLAVE TRADE

by Jason Ross

Nothing has brought more discredit on the [Constitution](#) or its framers than its treatment of slavery. Abolitionist [William Lloyd Garrison](#) spoke for all Americans in denouncing "the guilty compromise that was made at the formation of the Constitution." Garrison condemned the Constitution's clauses related to slavery as "concessions that were made to the South," denouncing the Constitution as a "bargain" between the sections, "made intelligently, deliberately, and with great unanimity," though it was "at war with the principles of morality," and "dishonorable to the nation." As justified as Garrison's moral critique may be, his claim understates the chaotic nature of the Convention which produced a Constitution nobody could have intended.

Its debate began with the [Virginia Plan](#) which said nothing about slavery, other than that "the rights of suffrage in the National Legislature ought to be proportioned to the quotas of contribution, or to the number of free inhabitants." The plan proposed a government grounded on the principle of proportional representation, advocated forcefully by [James Madison](#). Others followed Connecticut's [Roger Sherman](#)'s effort to retain the federal principle. The South Carolina delegation argued the principle of wealth (including wealth in the form of slaves) should be considered in allocating representation. The "ingenious theorist" planning a government "in his closet or his imagination" would not have attempted to combine these incompatible principles. Yet the Philadelphia Convention did. In a 5-4-1 vote, the Convention adopted the Connecticut Compromise establishing an upper house that granted equal representation to states and a lower house in which representation was based on population, allowing the Southern states to count three-fifths of their enslaved populations.

Having settled on a structure after six grueling weeks, weary delegates established a committee to fill in the details and draft a constitution. Though they did not know it at the time, this Committee of Detail would become the chief author of our nation's dishonor. Representatives were selected from the three most

populous states in terms of (white) population: Virginia, Pennsylvania, and Massachusetts. Virginia was represented by [Edmund Randolph](#) rather than by Madison; perhaps this acknowledged Randolph's status as the sitting governor of the state, or perhaps it reflected aversion to perceptions of Madison's inflexibility on the point of representation. [James Wilson](#) represented Pennsylvania and Nathaniel Gorham represented Massachusetts. Connecticut was chosen, likely in acknowledgement of its role in the Convention's "great compromise." It was represented by Oliver Ellsworth. Finally, in deference (or complaisance) to the southern states, South Carolina was chosen, represented by the formidable John Rutledge.



Gouverneur Morris

The Committee initiated a proposal, never before uttered in the Convention, that "No tax or duty shall be laid by the Legislature... on the migration or importation of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited." The Convention was thrown into convulsions. Rufus King of Massachusetts sought to revoke the three-fifths clause. [Gouverneur Morris](#) denounced slavery as "a nefarious institution... the curse of Heaven on the States where it prevailed." Luther Martin held "it was inconsistent with the principles of the Revolution, and dishonorable to the American character, to have such a feature in the Constitution."

Representatives of the Committee's Deep South-New England alliance defended their proposal. Rutledge

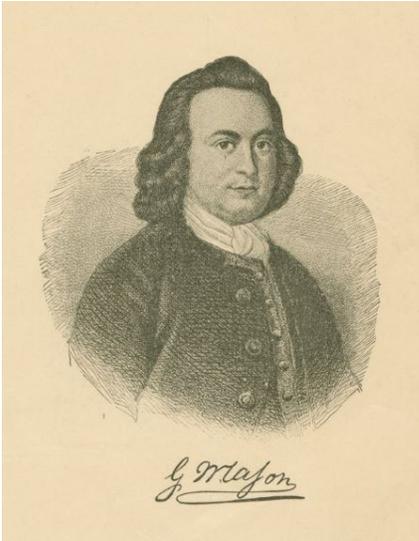
barked, "Religion and humanity had nothing to do with this question. Interest alone is the governing principle with nations." He renewed the South's regular resort to brinksmanship. "The true question at present is, whether the Southern States shall or shall not be parties to the Union." Ellsworth agreed. "The morality or wisdom of slavery are considerations belonging to the States themselves. What enriches a part enriches the whole."

[George Mason](#) exploded. Slavery weakened every nation where it had been tried." Taking on the mantle of an [Old Testament](#) prophet he proclaimed, "Every master of slaves is born a petty tyrant. They bring the judgment of Heaven on a country." Calling out Ellsworth, Mason "lamented that some of our Eastern brethren had, from a lust of gain, embarked in this nefarious traffic." Ellsworth snarled, "as he had never owned a slave, could not judge of the effects of slavery on character." Speaking to Mason's concern about slave revolts, Ellsworth retorted, "that will become a motive to kind treatment of the slaves." In effect, Mason had accused Ellsworth of being a profiteer from the slave trade; Ellsworth had accused Mason of being a petty tyrant and cruel master.

The Convention refused to accept the Committee of Detail's proposal as it stood. A separate committee returned with the proposal that Congress be given the power to banish the slave trade in 1800. When General Pinckney proposed this be extended to 1808 – seconded by Gorham who had served on the Committee of Detail – a disgusted Madison concurred with Martin, "Twenty years will produce all the mischief that can be apprehended from the liberty to import slaves. So long a term will be more dishonorable to the American character than to say nothing about it in the Constitution."

Mason refused to sign the Constitution. He circulated a list of objections. Among them, he observed, "The general Legislature is restrained from prohibiting the further Importation of Slaves for twenty odd Years." Ellsworth, infuriated, resumed his vicious personal attacks on Mason. Writing as "A Landholder," Ellsworth chastised Mason, alleging that Mason had revealed from the Convention "truths that would otherwise in all

probability have remained unknown to us all.” As “A Landholder,” Ellsworth decided to reveal some truths of his own, explaining, “It may be asked how I came by my information respecting Colonel Mason’s conduct in Convention, as the doors were shut? To this I answer, no delegate of the late Convention will contradict my assertions, as I have repeatedly heard them made by others in presence of several of them, who could not deny their truth.”



George Mason

Spilling his secret, Ellsworth insinuated that Mason had made a proposal regarding commercial regulation that was “unequal and partial in the extreme to the Southern States.” He claimed that it demonstrated Mason as “selfish” and judged that the “loss of this question determined Mr. Mason against the signing the doings of the Convention.” All of Mason's other rationalizations against ratification were “ex post facto.” Ellsworth once again attacked Mason’s character. “Mr. Mason has himself about three hundred slaves and lives in Virginia where it is found by prudent management they can breed and raise slaves faster than they want them for their own use, and could supply the deficiency in Georgia and South Carolina.” Dismissing Mason's critique of the slave trade, Ellsworth concluded, disingenuously, that the union was stuck with it. If Southern states continued to allow the importation of slaves during this interim period, “shall we refuse to confederate with them? Their consciences are

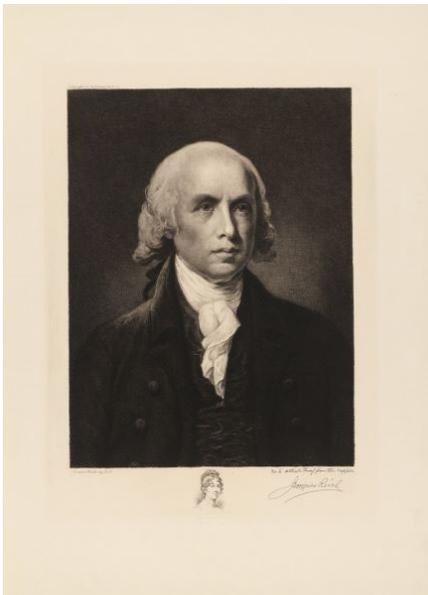
their own, though their wealth and strength are blended with ours.”

Ellsworth's public attack on Mason and his public revelations from behind the Convention's veil of secrecy threatened to throw the curtains wide open. But this was not the only such threat. Madison feared that [Elbridge Gerry](#) -- who had refused to sign the Constitution -- might take the occasion of being excluded from the Massachusetts ratifying convention “to insinuate that he could say much more, had he not been deprived of a hearing...” Luther Martin had left the Convention before its end but stayed long enough that he was able to detail the Convention’s ugly debate about the slave trade in his late November testimony to the Maryland legislature. Madison learned of Martin’s revelations no later than the end of January. The Convention’s veil of secrecy had been opened, and rumors about its most dishonorable moment were beginning to circulate.

As the Convention's delegates fed doubts about its credibility, another member of the Committee of Detail, [Edmund Randolph](#), publicly proposed the calling of a second convention. Though Randolph had refused to sign the Constitution, he wrote to Madison with concern that “the current sets violently against the new constitution.” Madison responded with uncharacteristic impatience. All but calling Randolph a dupe, Madison chided him about those “who have carried on their opposition under the respectability of your name.” Indeed, Madison hinted that Randolph’s clumsiness — undoubtedly going back to his role on the Committee of Detail — was at least partly responsible for the serious opposition to the Constitution that had arisen throughout the union.

Madison conceded Randolph's concern for popular participation in the drafting and ratification of the Constitution but countered, “there are subjects to which the capacities of the bulk of mankind are unequal, and on which they must and will be governed by those with whom they happen to have acquaintance and confidence. The proposed Constitution is of this description.” Exasperated by the struggles the union had experienced under the Articles and by the travails of the Convention,

and undoubtedly disillusioned by the residual impact of the Convention's bitter debates upon ratification, Madison was desperate. "[I]f a Government be ever adopted in America, it must result from a fortunate coincidence of leading opinions, and a general confidence of the people in those who may recommend it." He concluded, "The very attempt at a second Convention strikes at the confidence in the first; and the existence of a second by opposing influence to influence, would in a manner destroy an effectual confidence in either." If the Convention had produced a document that nobody could have intended, Madison was determined that a moment like this not be repeated.



James Madison

The day after his letter to Randolph, Madison published the first essay in the second phase of his contributions to *The Federalist*. To this point, Publius had run thirty-six essays. Just five of those were Madison's, and each was derivative of Madison's research and concerns from before the Convention. Though Madison's tenth *Federalist* essay is now famous, it made little impact on the ratification debate, and was largely forgotten until scholars were prompted to redeem it from insinuations made by Charles Beard in *An Economic Interpretation of the Constitution*.

As Madison began a new phase of [The Federalist](#), he saw his first task to be defending the reputation of the

Convention. Beginning [Federalist 37](#) he cautioned, "a faultless plan was not to be expected." The Convention faced a "novel undertaking." In addition to balancing energy and stability and partitioning power between the national and state governments, the Convention had to address the "interfering pretensions of the larger and smaller States." Finally, without explicitly addressing sectional division, Madison alluded to "[o]ther combinations, resulting from a difference of local position and policy," which further complicated their task. Referring to [Federalist 10](#) he explained, though a "variety of interests, for reasons sufficiently explained in a former paper, may have a salutary influence on the administration of the government when formed, every one must be sensible of the contrary influence, which must have been experienced in the task of forming it."

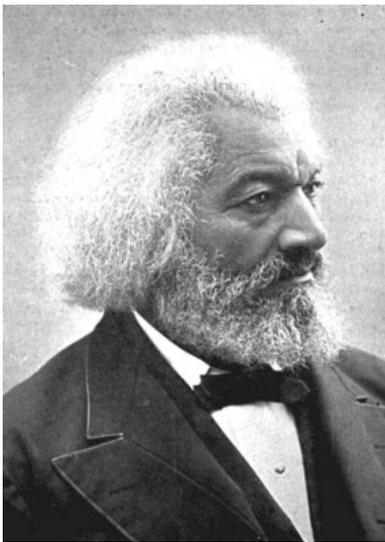
Madison tacitly revealed his judgment that the Convention had been rife with uncontrolled factions, and he was convinced the spirit of faction would be even more prominent in a second convention. Even so, the proposed Constitution was better than what came before, including with respect to the slave trade. He noted in [Federalist 42](#) that the power to prohibit the importation of slaves was "a great point gained in favor of humanity." Nevertheless he condemned the "barbarism" of that trade and singled out "the few States which continue the unnatural traffic, [against] the prohibitory example which has been given by so great a majority of the Union."

In his [Convention notes](#), Madison used a footnote to single out delegates from New England and South Carolina who had come to an "understanding" regarding the slave trade. He documented the sentiment within the Convention that this bargain was "dishonorable." Mary Sarah Bilder uses the similarity of Madison's judgment to Luther Martin's as reason to question the accuracy of Madison's memory. The more significant conclusion is that Madison documented this judgment for posterity. William Lloyd Garrison recovered this judgment from Madison's notes, and it reflects the judgment of the American people throughout our nation's history.

FREDERICK DOUGLASS’ “THE CONSTITUTION: IS IT PRO-SLAVERY OR ANTI- SLAVERY?”

by Brian Satterfield

If one had only contemporary popular discussion to go by, one could be forgiven for being unaware that the role of slavery in the Constitution has been discussed before. A case in point is the too little read speech of [Frederick Douglass](#) “The Constitution: Is it Pro-Slavery or Anti-Slavery?” given before the Scottish Anti-Slavery Society in Glasgow, Scotland on March 26, 1860. In his address, Douglass posed directly a question which had often gone unasked—largely because its answer was presumed to be self-evident: did the [Constitution](#) in fact recognize the legitimacy of slavery? Or in Douglass’ more precise formulation: “Does the United States Constitution guarantee to any class or description of people in that country the right to enslave, or hold as property, any other class or description of people in that country?” Abolitionists and Secessionists alike—just as popular opinion today—had presumed that the answer was a self-evident ‘yes!’, and that for that reason race-based slavery (and a fortiori white supremacy) were inextricably bound up with the country’s origins and founding framework.



Frederick Douglass

Douglass asked a second question as well, which made clear what was at stake in the first: “is the dissolution of the union between the slave and free States required by fidelity to the slaves, given the demands of just conscience” (emphasis added)? What, in effect, did the demands of “just conscience, as well as the humane and moral duty of “fidelity” to those now actually in the chains of slavery, require morally conscientious individuals to do? Was the only moral response—as his opponents, the Garrisonians, had maintained—to reject the country in toto—to “dissolve the union”—because that union’s foundations, in advancing the legal pretexts that had forged the chains of slavery, were irredeemably corrupt?

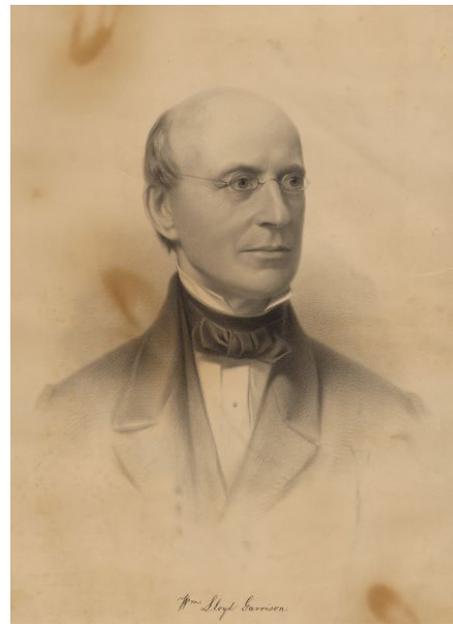
Douglass’ framing of this two part question as the “real and exact” one (and his impatient dismissal of others as so much “jumbling up” and “dust-throwing”) had a fraught pre-history. After his own escape from slavery, he had been welcomed by the Garrisonians, and, he tells us, at that time embraced their view of the country’s founding document as little more than an instrument of enslavement. For those who have not revisited William Lloyd Garrison’s words in the light of contemporary debates, it is worth reminding ourselves both how powerful (and how contemporary!) his searing indictment of the Constitution was:

There is much declamation about the sacredness of the compact which was formed between the free and slave states, on the adoption of the Constitution. A sacred compact, forsooth! We pronounce it the most bloody and heaven-daring arrangement ever made by men for the continuance and protection of a system of the most atrocious villany [sic] ever exhibited on earth. Yes—we recognize the compact, but with feelings of shame and indignation; and it will be held in everlasting infamy by the friends of justice and humanity throughout the world. It was a compact formed at the sacrifice of the bodies and souls of millions of our race, for the sake of achieving a political object—an unblushing and monstrous coalition to do evil

that good might come. Such a compact was, in the nature of things and according to the law of God, null and void from the beginning. No body of men ever had the right to guarantee the holding of human beings in bondage. Who or what were the framers of our government, that they should dare confirm and authorise such high-handed villany—such a flagrant robbery of the inalienable rights of man—such a glaring violation of all the precepts and injunctions of the gospel—such a savage war upon a sixth part of our whole population? —They were men, like ourselves—as fallible, as sinful, as weak, as ourselves. By the infamous bargain which they made between themselves, they virtually dethroned the Most High God, and trampled beneath their feet their own solemn and heaven-attested Declaration, that all men are created equal, and endowed by their Creator with certain inalienable rights — among which are life, liberty, and the pursuit of happiness. They had no lawful power to bind themselves, or their posterity, for one hour—for one moment — by such an unholy alliance. It was not valid then—it is not valid now. Still they persisted in maintaining it — and still do their successors, the people of Massachusetts, of New-England, and of the twelve free States, persist in maintaining it. A sacred compact! a sacred compact! What, then, is wicked and ignominious?

Far from being a “sacred compact,” the Constitution was a “bloody” and “heaven-daring” arrangement, whereby “fallible, weak, and sinful” men waged savage war against their fellow human beings, usurping a right they did not—could not—rightfully have, in order to rob these others of their inalienable rights, and instantiate a “system of the most atrocious villany [sic] ever exhibited on earth” (emphasis added) in order to lend the color of law to their wickedness. Whatever his previous views, by 1860 Douglass had come to a very different conclusion. Through his own reading and study, he tells us, he now believed the fault was not with the Constitution.

Because it is easy to miss, one point of deep agreement between Garrison and (as it will turn out), Douglass deserves to be highlighted: the question of whether the framers had in fact “trampled beneath their feet their own solemn and heaven-attested [Declaration](#), that all men are created equal and endowed by their Creator with certain inalienable rights—among which are life, liberty, and the pursuit of happiness.” Their apparent disagreement notwithstanding, Garrison and Douglass in fact agreed that the fundamental question regarding the Constitution was whether it betrayed the principle of human equality as enunciated in the Declaration. To Garrison, it was self-evident that it had; for Douglass, or at least the Douglass of 1860, it had not.



William Lloyd Garrison

Much, Douglass stressed, was at stake in understanding “fully and clearly” this “real question” because it had been so powerfully obscured by the “jumbling up” and “dust-throwing” of partisans. The question was not, Douglass wrote,

whether slavery existed in the United States at the time of the adoption of the Constitution;

whether slaveholders took part in the framing of the Constitution;

whether those slaveholders, in their hearts, intended to secure certain advantages in that instrument for slavery;

whether a pro-slavery interpretation has been put upon the Constitution by American Courts.

All of these things might, or might not, be true—but they were irrelevant. The "real and exact" question was whether the Constitution recognized a right to hold slaves. To answer this question, Douglass said, it was necessary to return to the text of the Constitution itself. And in the remainder of his address to the Scottish Anti-Slavery Society he provided an exegesis of the relevant clauses which continues to arrest for its cogency and force.



First reminding his Scottish audience that the American Constitution differed from the British in that it was a “written instrument,” he adduced a basic interpretational principle: “it should be borne in mind that the mere text, and only the text, and not any commentaries or creeds written by those who wished to give the text a meaning apart from its plain reading, was adopted as the Constitution of the United States.” Accordingly, Douglass argued, “the intentions of those who framed the Constitution, be they good or bad, for slavery or against slavery, are respected so far, and so far only, as we find those intentions plainly stated in the Constitution.”

Douglass’ principle is important because it pointed to what was at once the strongest and yet ultimately weak supposition of the Garrisonians and slavery apologists alike: that the practice of the founders could be read interchangeably with the text of the Constitution. As Douglass noted, however, practice is one thing, law

another. Many peoples have had good laws and bad practice. That his opponents were forced to resort to the founders’ practice and comments made in debate, suggested Douglass, revealed the ultimate weakness of their argument. It was a de facto admission that “the thing for which they are looking is not to be found where only it ought to be found, and that is the Constitution itself. If it is not there, it is nothing to the purpose, be it wheresoever else it may be.”

In the text of the Constitution itself, Douglass argued, his opponents had really only been able to adduce three provisions in order to impose upon the document a pro-slavery interpretation. Because his argument remains an exemplary model of exacting legal exegesis on this question, it is worth reviewing Douglass’ points in detail.

For Douglass, as for us, the most salient article was [Article 1 section 2](#) (the three-fifths clause”):

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

For contemporary critics (the charge goes back to Douglass’ time), this “three-fifths” clause is often casually summarized as though it equated American Africans with three-fifths of a human being. In fact, Douglass notes, the clause exists solely and exclusively for taxation and representational purposes. Douglass further observes—as he does repeatedly throughout his discussion—that there is no explicit mention, and certainly no endorsement, of “slaves” or “slavery.” On its face, the language of the clause applies to all unnaturalized citizens, i.e., resident aliens. Even supposing its primary intention concerned slaves, however, the clause was, Douglass argued, in fact a “downright disability” for slave holding states in that it deprived them of two-fifths of the representation that they would under normal counting procedures have had. Taking it at its worst, Douglass argued, it “leans to freedom.”

Second, Douglass took up [Article 1, section 9](#) (the “slave trade” clause):

Migration or importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight.

For Garrison and his fellow travelers, this clause was tantamount to a ratification of the slave trade. Even if that were true, Douglass argued, the article would have been a dead letter more than fifty years previous. But in fact, rather than guaranteeing the perpetuation of slavery, it looked to the abolition of the African slave-trade: “...it says to the slave States, the price you will have to pay for coming into the American Union is that the slave trade, which you would carry on indefinitely out of the Union, shall be put an end to in twenty years if you come into the Union.” It too, Douglass argued, tended to freedom, and showed that the “intentions of the framers of the Constitution were good, not bad.”



Abraham Lincoln

Third was the flash point of so many pre-civil war conflicts, the “fugitive slave clause,” [Article 4 section 2](#).

As read by abolitionists and slavery advocates alike (including [Lincoln](#)), the clause constituted a de jure recognition of a right to slavery:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Douglass’ response is both overwhelmingly brilliant and uncertainly convincing. Again observing that the text of the Constitution steadfastly avoided any explicit recognition of slaves or slavery, Douglass maintains that it might equally apply to indentured servants. Uncertain as this argument is, however, it is backed with a surprising piece of evidence that lends an unanticipated force to Douglass’ argument in its entirety: “the words employed in the first draft of the fugitive slave clause were such as applied to the condition of slaves, and expressly declared that persons held to “servitude” should be given up; but that the words “servitude” was struck from the provision, for the very reason that it applied to slaves....Mr. [Madison](#) declared that the word was struck out because the convention would not consent that the idea of property in men should be admitted into the Constitution.”

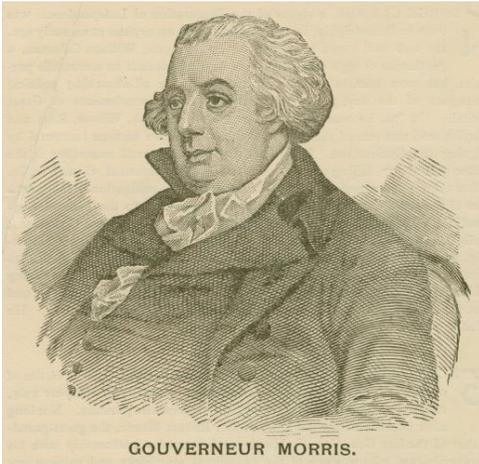
Space forces us to close, but it does not release us from the obligation of wrestling with Douglass’ argument. What, then, do we make of this remarkable man’s contention that the Constitution was not pro-slavery and—to say something, that Douglass never quite says—that it did not betray the principle of the Declaration? Taken as a whole, I find Douglass’ argument overwhelmingly persuasive, and what might have seemed an explicit authorization of slavery emerges under his exegesis as a deliberate and pervasive intent to avoid recognizing any “property in men.” That the framers compromised with a deep injustice as the necessary cost of an otherwise impossible union is scarcely to be denied. What Douglass shows us is that they were clearer-eyed

and harder headed than we might have suspected about refusing to enshrine those compromises as principle.

THE CONVENTION'S FORGOTTEN ABOLITIONIST, CONTINUED

by Dennis C. Rasmussen

I would like to begin by thanking the other contributors to this forum for their insightful essays, which for the most part focus on different topics than mine did—the overseas slave trade and the fugitive slave clause rather than the three-fifths compromise. I have no particular bones to pick with anything that the authors say, so I will instead use this space to try to complement their efforts by extending my analysis of [Gouverneur Morris's](#) contributions at the Constitutional Convention to include these other topics.



Gouverneur Morris

As Jason Ross details in his essay, as of late August the delegates had agreed to protect the overseas slave trade from a congressional ban until the year 1800. On August 25 the provision was extended for another eight years, thanks to a proposal by Charles Cotesworth Pinckney of South Carolina that was uniformly insisted upon by the delegates of the Deep South. As with the three-fifths compromise, Morris had evidently bitten his tongue

throughout much of the debate over this clause, but was ultimately unable to contain himself.

The clause as it then stood was worded in an extremely convoluted manner so as to avoid explicitly naming what it was really about: “The migration or importation of such persons as the several States, now existing, shall think proper to admit, shall not be prohibited by the Legislature prior to the year 1800 [now 1808].”^[1] Morris proposed that they stop beating around the bush and change the provision “at once” so that it would instead read: “The importation of slaves into North Carolina, South Carolina, and Georgia, shall not be prohibited, &c.” Not only would this wording avoid “ambiguity,” he suggested, it would also be “most fair” because it would make clear that “this part of the [Constitution](#) was a compliance with those States.” He cheekily added that if the change “should be objected to, by the members from those states, he should not urge it.”

Obviously, the aim of Morris’s deliberately impolitic suggestion was to shame the advocates of the slave trade. [George Mason](#) of Virginia, who had opposed that trade as fiercely as anyone, ingenuously objected that “naming North Carolina, South Carolina, and Georgia” within the clause might “give offence to the people of those States”—but of course that was the whole point. After a few other delegates protested, Morris withdrew his motion. He had underscored the fact that the overseas slave trade was so heinous that even its proponents were reluctant to admit what they were advocating, but he was ultimately powerless to prevent the inclusion of the clause within the Constitution. To his horror, the Deep South would have another two decades to continue kidnapping Africans with the full protection of the national government—a window, we now know, in which more enslaved people were imported into the United States than in any prior twenty-year period.^[2]

The final major provision related to slavery, the fugitive slave clause, was tacked onto the Constitution almost at the last minute, with next to no debate. As Christa Dierksheide’s essay notes, the idea of including such a clause was proposed by Pierce Butler of South Carolina on August 29, just a couple of weeks before the

Convention's close, and it passed without opposition. Apparently the antislavery delegates were too tired to commence yet another contest over slavery at this late date, or perhaps—even more disgracefully—they welcomed the idea of a fugitive slave clause because it would prevent an influx of runaways from inundating the North.

There is no record of Morris saying anything about this provision when it came to the Convention floor, but he did alter it in two small but important ways during the drafting process. First, Butler's version of the clause had described enslaved people as being "bound to service or labor," but Morris tweaked it so that it referred to them as "legally held to service or labor." The addition of the term "legally" was likely meant to avoid giving any kind of sanction to the then-common (though illegal) practice of capturing free Black people and enslaving them on the pretense that they were in fact runaways.



Pierce Butler

Second, Butler's version of the clause had stipulated that escaped slaves "shall be delivered up to the person justly claiming their service or labor." Morris changed this concluding phrase to read that escapees "shall be delivered up, on claim of the party to whom such service or labor may be due." With this shift in wording, he was able to dispose of the word "justly," thereby eliminating

any implication that holding a person in bondage could be just. As historian Sean Wilentz notes, by taking this small but deliberate step Morris and the Committee of Style ensured that "the fugitive slave clause did not acknowledge [the validity of] property in man, let alone slaveholders' rights to such property."^[3]

The final version of the clause stipulated that "no person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up, on claim of the party to whom such service or labor may be due." Like the other major constitutional provisions relating to slavery, this one studiously avoided the words "slave" and "slavery"—an omission that [Frederick Douglass](#) would later point out, and use to such good effect, as Brian Satterfield's essay highlights. As another scholar has noted, however, in the fugitive slave clause "harsh reality bled through the words 'held' and 'escaping': This was a clause about humans in bondage seeking liberation."^[4]

When it came to these two clauses, and especially the three-fifths clause, I have tried to show, Gouverneur Morris effectively served as the framers' conscience—even if that conscience was too often ignored.

Endnotes

[1] Unless otherwise noted, all quotations in this essay are taken from the relevant record in *Debates in the Federal Convention of 1787* by James Madison, a Member, ed. Gordon Lloyd (Ashbrook Center, 2014).

[2] See Sean Wilentz, *No Property in Man: Slavery and Antislavery at the Nation's Founding* (Harvard University Press, 2018), 59.

[3] *Ibid.*, 145; see also 110–111.

[4] Akhil Reed Amar, *America's Constitution: A Biography* (Random House, 2005), 257.

RESPONSE

by Christa Dierksheide

In light of my colleagues' excellent essays, most of which emphasize and highlight antislavery voices at the Philadelphia Convention or later antislavery interpretations of the [U.S. Constitution](#), I'd like to highlight the immediate context and challenges facing delegates in 1787. The first is the precariousness of "union." A confederacy of all 13 states was very much in doubt at the time, and hinged upon the protection of the free movement of people—and their property—in all member states. Second, the Constitution could not reflect the antislavery aspirations of delegates and still attract (or reassure) potential member states—it had to reflect the proslavery present of 1787: the transatlantic trade from Africa to the United States and the existence of slavery in 12 of 13 states. In other words, states' consent to join the union was contingent upon protections for slavery as it existed in 1787, not as it would exist—or end—in future time.

*David Ramsay*

In 1787, it was by no means certain that a federal union of 13 states would emerge as the outcome. Indeed, many political observers—both in the U.S. and in Europe—predicted that the United States would instead fracture into two or three separate confederacies. Many welcomed

this idea. The Boston Independent Chronicle declared that it was “time to form a new and stronger union”—the “five States of New-England.” A French official argued that it would be “impossible to unite under one head all the members of the confederation,” and suggested a Northern, Center, and Southern confederacy instead. An editorial in the New York Daily Advertiser queried whether “instead of attempting one general government for the whole community of the United States, would it not be preferable to distribute the States into three Republics.” South Carolinian [David Ramsay](#) declared that “my first wish is union” but “my second wish is to confoederate[sic]” with New England rather than North Carolina, Virginia, and Maryland. [Richard Price](#), the British reformer, was alarmed at the idea of separate confederacies, and urged U.S. lawmakers to establish “some general controuling[sic] power” and “to constitute a union which shall have weight and credit.” Otherwise, European leaders would conclude “that you are falling to pieces, and will soon repent of your independence.”

Before the invention of the cotton gin in 1793, the end of slavery appeared to be on the horizon. Tobacco was on the wane, and some Upper South planters and farmers concluded that wheat might be the new cash crop of choice. It seemed plausible that many areas of the post-Revolutionary South could function without slavery, leading some to forecast the institution's decline and eventual abolition. But even if they imagined an antislavery future for the United States, the reality of slavery that delegates faced in 1787 was far different. Transatlantic slaving was only accelerating at the time. Between 1783 and 1787, slave ships brought a staggering 8,041 African captives into three main U.S. ports—Charleston, Savannah, and Beaufort. Many of these slaving voyages began not in Britain or South Carolina, but rather in Rhode Island. And according to the first U.S. census taken in 1790, enslaved people were recorded in every state save Massachusetts. Vermont claimed the fewest slaves—a mere 16—while Virginia held the highest enslaved population, at 292,627. Meanwhile, South Carolina contained the largest percentage of enslaved people within its borders, at 43 percent.

Therefore, “union” would have to offer protections to slaveholders as well as merchants involved in the slave trade—not just in the South, but in the majority of the states in 1787.

Citations:

1. The Documentary History of the Ratification of the Constitution Digital Edition, ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan. Charlottesville: University of Virginia Press, 2009.
2. U.S. Federal Census, 1790.
3. Trans-Atlantic Slave Trade Database, slavevoyages.org.

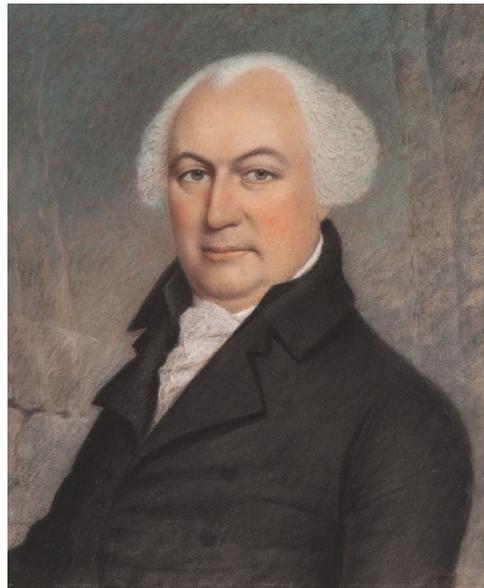
ANTISLAVERY AND PROSLAVERY PERSPECTIVES IN MADISON’S NOTES

by Jason Ross

Our understanding of the Convention’s treatment of slavery has come a long way since a century ago when Max Farrand, the editor of *The Records of the Federal Convention of 1787*, attempted to dismiss its significance. He [claimed](#) that historians had “greatly misrepresented” slavery’s significance as a topic of debate. This distortion, according to Farrand, resulted from the coincidence that [James Madison](#)’s notes from the Convention were published first in 1840, “just the time when the slavery question was becoming the all-absorbing topic in our national life.” Farrand was not surprised that “the historical writers of that time... should overemphasize the slavery questions in the Convention.” The historical writers of our time have rejected Farrand’s judgment that the debates about slavery were of secondary importance. Instead, we find ourselves asking whether it is conceivable that the Constitution was intended to be anything but proslavery.

Thus, while Dennis Rasmussen notes “our minds are naturally drawn to the shameful silences and dirty compromises that pervade the framers’ approach” to

slavery, he reminds us there were “a very few bright spots.” Focusing on [Gouverneur Morris](#)’s “stunning antislavery speech” of August 8, Rasmussen points out that the draft constitution prepared late in the Convention by the five-man Committee of Detail “was conspicuously proslavery.” Morris took this opportunity to denounce the institution of slavery, the South itself, and the slave trade. Slavery was “the curse of Heaven on the States where it prevailed.” The slave states were “barren wastes,” marked by “misery and poverty.” The slave trade was “nefarious” and “in defiance of the most sacred laws of humanity.”

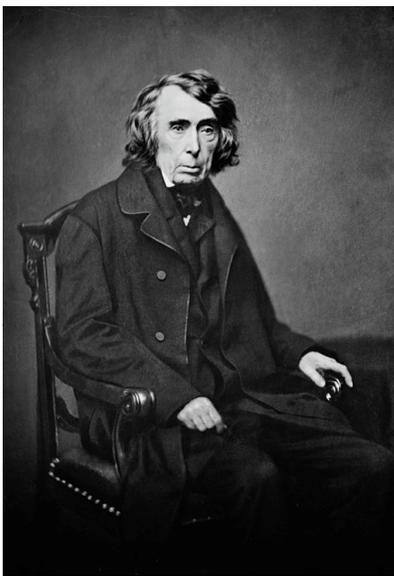


Gouverneur Morris

Rasmussen laments, “Alas, Morris’s speech was all but ignored.” But thankfully it was not ignored by all. Later in August as the Convention debated that portion of the Committee of Detail’s report which would have prohibited Congress from ever having power to ban the importation of slaves, [George Mason](#) returned to the exact same themes Morris raised. Like Morris, Mason believed slavery would “bring the judgment of Heaven on a country.” Like Morris, Mason held that “[s]lavery discourages arts and manufactures.” Like Morris, Mason called the slave trade “a nefarious traffic.” And while Rasmussen’s conclusion is corroborated by the absence of any record of Morris’s speech in fragmentary records kept for August 8 by James McHenry and Rufus King, we should be grateful that Morris’s speech was not

ignored by Madison, who recorded, in 630 vivid and uncompromising words, Morris's "ringing denunciations of slavery" in all of their "moral clarity."

Neither Morris's denunciation of slavery nor most of the details of the Convention's debates on slavery would be widely known until the 1840 publication of James Madison's *Debates in the Federal Convention of 1787*. By this time, [lines had been drawn](#) between those who claimed the [Constitution](#) was intended to be antislavery and those who claimed it was intended to be proslavery. The latter argument prevailed in the Taney Court's egregious 1842 decision *Prigg v. Pennsylvania*. Even though the attorney for Pennsylvania, Thomas Hambly, cited Madison's recently published *Debates* to claim that the drafting history of the fugitive slave clause indicated a concern for the due process rights of those alleged to have escaped from "service or labor," the Taney Court — now remembered as the [original originalists](#) — paid no attention to Madison's notes. Willfully ignoring the leading historical source of the framers' intent, [the Taney Court cynically held](#), "Historically, it is well known that the object of the clause was to secure to the citizens of the slave-holding states the complete right and title of ownership in their slaves, as property, in every State in the Union...."



Justice Roger B. Taney

The *Prigg* decision contributed to a schism in the [abolitionist movement](#). Brian Satterfield shows how William Lloyd Garrison accepted the claim that the Constitution was intended to be proslavery, and [Frederick Douglass](#) rejected it. Satterfield points out that, in an 1860 speech to the Scottish Anti-Slavery Society in Glasgow, Douglass (no doubt prompted by the Taney Court's 1857 decision *Dred Scott v. Sandford*) challenged the intent of the framers as a guide or controlling factor in the interpretation of the Constitution. "[T]he intentions of those who framed the Constitution, be they good or bad, for slavery or against slavery, are respected so far, and so far only, as we find those intentions plainly stated in the Constitution." (Here, of course, Douglass echoes [James Madison's paradoxical insistence](#) that "the legitimate meaning of the Instrument must be derived from the text itself" and not from the "intentions of the Body which planned & proposed the Constitution.")

Satterfield shows that Douglass found "the text of the Constitution steadfastly avoided any explicit recognition of slaves or slavery." The three-fifths clause, Douglass argued, was a "'downright disability' for slave holding states in that it deprived them of two-fifths of the representation that they would under normal counting procedures have had. Taking it at its worst, Douglass argued, it 'leans to freedom.'" The slave trade clause "tended to freedom, and showed that 'the intentions of the framers of the Constitution were good, not bad.'" Finally, Satterfield points out that in addressing the fugitive slave clause, Douglass went to Madison's notes to claim:

the words employed in the first draft of the fugitive slave clause were such as applied to the condition of slaves, and expressly declared that persons held to "servitude" should be given up; but that the words "servitude" was struck from the provision, for the very reason that it applied to slaves.... Mr. Madison declared that the word was struck out because the convention would not consent that the idea of property in men should be admitted into the Constitution.

In referring to the text of the Constitution, Douglass refused to accept that this public document bound Americans to be governed by any secret intent or private bargains struck behind closed doors at the Philadelphia Convention. Garrison, by contrast, had been shocked by revelations of a sectional bargain struck within the Convention regarding slavery, but he accepted the Taney Court's judgment that a sectional bargain should control the meaning of the Constitution. Garrison's sense of shock is shared by historians today. His critique of the framers was recovered (following Farrand's dismissal of it) and expanded in the late 1960s by Staughton Lynd who [speculated about a secret bargain](#) between the Federal Convention and the Confederation Congress. Subsequent scholars working in the Garrisonian vein have claimed his critique of the Constitution did not go far enough. William Wiecek [has argued](#) that at least nine or ten clauses directly protected or referred to slavery. Paul Finkelman [found](#) five clauses that "directly sanctioned slavery," seven more that "directly protected slavery," and another six that "ultimately protected [slavery] when interpreted by the courts or implemented by Congress..." totaling eighteen clauses tainted by slavery. David Waldstreicher [concluded](#), "The clauses that relate directly to slavery are not exceptions to the Constitution's remarkable combination of precision and vagueness: they epitomize those qualities."

In this way Christa Dierksheide attempts to go "beyond" the "binary" nature of the debate — "proslavery vs. antislavery or Northern vs. Southern." While she observes "[a]n array of seemingly antislavery and proslavery positions were staked out when delegates debated the slave trade in August of 1787," the salient fact was that "General Charles Pinckney of South Carolina drew a line in the sand, saying that 'South Carolina and Georgia cannot do without slaves.'" The Constitution allowed slaveholders "to imagine the U.S. federal union as a rapidly expanding system wherein slave property and the free movement of that property were safeguarded by law." Even Madison's recollection of a sectional "line of discrimination" between slave and free states "obfuscated the real issue at hand at the Convention — creating a continental 'union' that

guaranteed the protection of property rights, including federal recognition of those rights — both citizenship and slavery — across jurisdictional boundaries." Dierksheide points out that most Northern states "only pledged to end slavery gradually through state statutes. This meant that bondage did not actually end in the 'free states' until between 1827 and 1850." This view goes beyond the binary proslavery vs. antislavery debate by concluding the Constitution created a slaveholder's union through and through.

This symposium has identified multiple perspectives on the Convention's treatment of slavery — from Convention delegates who condemned slavery as an affront to God and the slave trade as "nefarious," to a former slave who insisted the Constitution was antislavery, to modern historians who insist that it is proslavery. Ultimately, these perspectives are all filtered through two people: William Lloyd Garrison and James Madison. To Madison, of course, we owe nearly everything we know about the Convention's antislavery and proslavery influences. From him we have learned the perspectives of those like Gouverneur Morris — and George Mason, and Luther Martin — who denounced slavery in the most strident terms as a moral evil and a sin. And from him we have learned about the "[dishonorable](#)" [bargain](#) by which seven states from New England and the Deep South — against the objections of New Jersey, Pennsylvania, Delaware, and Virginia (with New York and Rhode Island absent) — came to "[an understanding](#)" on the slave trade. To Garrison, prompted by the Taney Court, we owe the binary debate over whether the Constitution was proslavery or antislavery. To Garrison alone we owe the binary debate about [whether Madison's notes proved this](#) to be so.

Responding in his speech in Glasgow to this binary debate, Frederick Douglass [argued](#), "The fact that Mr. Madison can be cited on both sides of this question is another evidence of the folly and absurdity of making the secret intentions of the framers the criterion by which the Constitution is to be construed." Madison agreed. Still he ensured that Garrison's generation of Americans, and ours, had access to the secret intentions of the framers.

Though some of Madison's revelations show the honorable intentions of men like Gouverneur Morris, others reveal much that is dishonorable to the American character. We should ask why Madison intended for us to know these secrets.

RESPONSE

by Brian Satterfield

My thanks to Dr. Ross for his lively review of the proceedings of the Detail Committee, which presents us with a vivid reminder of just how large a role faction, self-interest, venality, and sheer contingency played in the constitutional convention.

That we should accept Garrison's interpretation and verdict on the episode—that it represents a corrupt bargain and enduring dishonor to the nation—is less certain.



William Lloyd Garrison

Garrison, it seems to me, characteristically refuses to come to terms with three considerations which complicate the moral calculus considerably. 1) No one in the constitutional convention, on any side of the issue, believed that any federal government they might bring into being would have the power to abolish slavery in the states where it already existed. If there was to be a union

at all (for reasons spelled out by [Hamilton](#) in the *Federalist*), it must include all the states, including the slaveholding states. 2) Any effort to go further in anti-slavery measures than the [Constitution](#) did would have rendered the ratification of the Constitution (and union) impossible. And 3) such measures as the convention did approve were envisioned by advocates and opponents alike as putting slavery on a course toward eventual extinction.

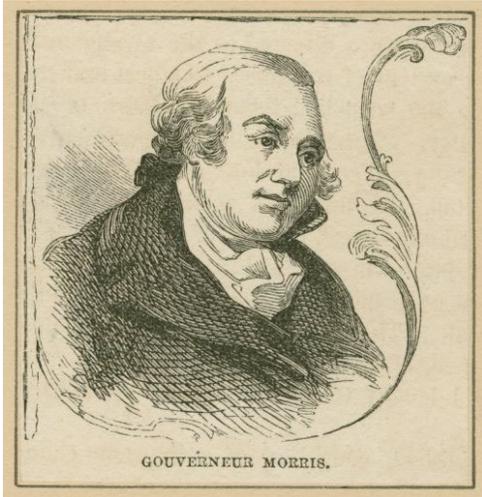
The moral question regarding honor or dishonor then strikes me as something like this: was there any real world course open to the framers that offered a greater likelihood of restraining and eventually eliminating slavery? Garrison's consistent, life-long hatred of slavery may evoke our admiration. But the consequence of Garrison's reasoning—as he and his critics knew—was a rejection of the United States in toto, a demand that morally conscientious individuals simply *withdraw*, secede on an individual basis from complicity in a corrupt union. Such purity may be flattering to moral vanity, but it is hardly a course calculated to bring any actual improvement in justice. And indeed, it can leave others to bear the costs of one's purity.

It was this not least which was responsible for [Frederick Douglass](#)' own white-hot exasperation with Garrison. Garrison would have purchased his purity at the cost of leaving the slave-holding states to their own devices. Is this, Douglass asked, what "fidelity" to those actually in slavery required?

Douglass is right, it seems to me, on another point: that the truth of the principles enshrined in the document is a separate question from the speeches and intentions of some of those present at the convention. Admittedly, the episode shows us that participants in the debate were fallible, often selfish, and short-sighted. If, however, the final document represented the best real world likelihood of seeing the principles in the [Declaration](#) realized in practice, and the ultimate elimination of slavery, then the question becomes, at the very least, more complicated.

Dr. Rasmussen: Gouverneur Morris: Abolitionist at the Convention

In the midst of the contemporary tendency to dismiss the founding in total as racist, Dr. Rasmussen’s picture reminds us that a stand against slavery could be made, and was, and deserves to be better known. That [Gouverneur Morris](#) “knew better and told them so” should serve to puncture any unreflective complacency that the central moral issue around slavery was somehow unknowable to eighteenth century Americans.



Gouverneur Morris

Though it’s worth noting that the point is also a double-edged one. If some of the framers were able to see the moral evil of slavery, are they not thereby more, not less, liable to moral judgment? In the case of Gouverneur Morris, if he knew (and the other framers ought to have known), that slavery was a “violation of the most sacred laws of humanity,” was not his acquiescence in signing the legal instrument that allowed and perpetuated that enslavement *that much more culpable?*

What the picture of Morris raises for me at least is a desire to understand his reasoning better. In effect, what set of considerations impelled him to sign the document despite understanding that it did far too little to curtail slavery? Was it a belief that the good of the union outweighed the evils of slavery? Or a judgment that the constitution represented the best hope of its eventual eradication?

STATES’ RIGHTS AND ANTI-SLAVERY? ANOTHER WAY TO LOOK AT THE ORIGINAL CONSTITUTION

by Hans Eicholz

Present day discussions of the framing of the [Constitution](#) have a tendency to interpret the document through the later events of the Civil War, Jim Crow, and modern conflicts over civil rights. That view has led to an unfortunate and largely unhistorical view that the advocates of national and more centralized government were always the principal sources of opposition to slavery. The reality is more complicated.

While the anti-slavery sentiments of such nationalists as [Alexander Hamilton](#) or [Gouverneur Morris](#) are important and well established, we shouldn’t lose sight of the fact that some of the strongest voices against the peculiar institution were themselves ardent proponents of decentralized and more polycentric forms of self-governance.



William Paterson

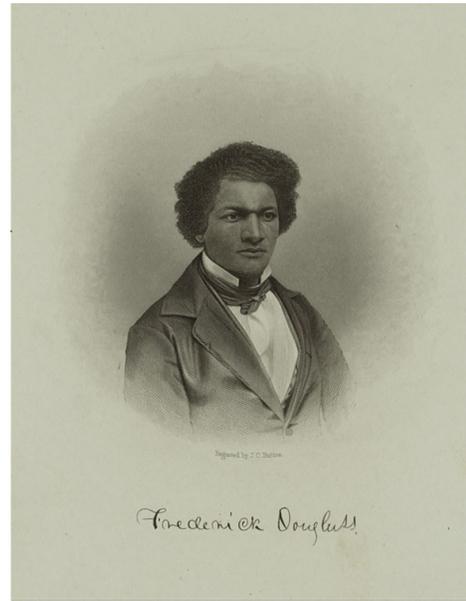
William Paterson of New Jersey, who presented the main alternative to the [Virginia Plan](#) as articulated and defended by [James Madison](#) and [Edmund Randolph](#), was actually earlier in articulating the position that Morris would subsequently develop with greater verve and passion:

[Patterson](#) asked:

Has a man in Virga. a number of votes in proportion to the number of his slaves? And if ... not represented in the States to which they belong, why should they be represented in the Genl. Govt. What is the true principle of Representation? It is an expedient by which an assembly of certain individuals chosen by the people is substituted in place of the inconvenient meeting of the people themselves. If such a meeting of the people was actually to take place, would the slaves vote? They would not. Why then shd. they be represented? He was also agst. such an indirect encouragement of the slave trade; observing that Congs. in their act relating to the change of the 8 art: of Confedn. had been ashamed to use the term 'slaves' and had substituted a description.

And it was none other than Luther Martin of Maryland, a dissenter from the Constitution, who insisted that both the fugitive slave clause and the 3/5ths compromise were "inconsistent with the principles of the Revolution and dishonorable to the American character." These voices should not be forgotten when considering Madison's characterization of the document as "partly federal" and "partly national."

To properly assess the various provisions that produced the checks and balances among state and national authorities in the Constitution, the subject of the [Fugitive Slave Clause of Article 4, Section 2](#) looms large as perhaps the single biggest conundrum. On its face, the provision appears to enlist the power of the national government in support of slavery by requiring the return of escaped slaves to their masters. Some later abolitionists, such as William Lloyd Garrison, would make this exhibit number one in their indictment of the document as a compact with the devil. But is that the whole story?



Frederick Douglass

[Fredrick Douglass](#)' counter to the Garrisonian argument has already been nicely developed, but there is a further point that is often not remembered. While Article 4, Section 2 called on the states to return those bound to labor in another state, "to be delivered up on claim of the Party to whom such Service or Labour be due," it *did not specify* how such claims were to be proven and processed, and this omission, if indeed it was one, became the basis for what were called Personal Liberty Laws.

It was right here, in the "partly federal" character of the reservation to the original jurisdiction of the states for the provision and enforcement of rights, that free states would pose a continuing challenge to the fashioning and enforcement of all subsequent national legislation to compel the re-enslavement of escaped bondsmen. As historian H. Robert Baker has pointed out,

["From 1780 through about 1820](#), anti-kidnapping laws and state *habeas corpus* procedure served both to protect free blacks in their liberty and regulate fugitive slave reclamation. From 1820 through 1842, several free states passed more robust personal liberty laws that regulated the process of fugitive slave removal." See also, [here](#).

Among the most famous examples of a state's rights action against the fugitive slave act of 1850, is that of the

Wisconsin Supreme Court in what came to be called the “Booth Cases” which extended from 1854 to 1858.



Sherman M. Booth

Sherman M. Booth was the editor of the *Milwaukee Free Democrat*, an abolitionist paper. In 1852 Federal Marshals were commissioned to retrieve a Joshua Glover who was suspected of being an escapee from bondage to a Bennami Garland of Missouri. Booth not only assisted Glover to escape detention while awaiting extradition, but also helped him to escape into Canada. This resulted in Booth’s arrest.

Booth’s lawyers then applied for a writ of *habeas corpus* first to a Milwaukee county court and then to Wisconsin Supreme Court Justice, Abram D. Smith. Smith would find the Fugitive Slave Law unconstitutional, agreeing with Booth’s attorneys that the Constitution did not authorize Congress to abrogate trial by jury and consign judicial powers to court commissioners. He then ordered Booth released.

The essential arguments were nicely summarized in the extended argument of Booth’s lawyers published as [*The Unconstitutionality of the Fugitive Slave Act in 1855*](#).

From the Wisconsin court, through various permutations, the issue eventually made its way to the US Supreme court where Justice Roger B. Taney would reverse the

Wisconsin decision, finding that state justices and courts had no jurisdiction to interfere in a federal case by *habeas corpus*. But the essential point is that the original clause regarding fugitives still had to be interpreted. As Booth’s lawyer’s noted, It was not simply a matter of making a claim and having it enforced:

[Here is a fact to be ascertained](#), before the fugitive can be legally delivered up, viz; that his service or labor is really due to the party who claims him. How is the fact to be ascertained? A claim is set up to the service of a person. He who makes the claim is denominated by the Constitution as a party. The claimant is one party, the person who resists the claim is another party. If he really owes the service according to the laws of the State from which he is alleged to have escaped and has in fact escaped, he must be delivered up. If the claim is unfounded, he cannot be delivered up. The Constitution itself has made up the issue, and arranged the parties to it. Can any proposition be plainer, than that here is suspended a legal right upon an issue of fact, which can only be determined by the constitutional judicial tribunals of the country?

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