

**The Fateful Compromise on Slavery
in the Federal Convention of 1787**

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The founding of the United States of America under a written constitution was a monumental event in human history. Never before had a group of people come together to voluntarily design and agree upon the structure of their own government. To be sure, not everyone had a say in the ratification of the new Constitution. The number of eligible voters was but a fraction of the total population of the several States. Forty-two of these were the representatives of each state (except for Rhode Island) sent to Philadelphia to discuss revising the Articles of Confederation. From May 25th, 1787 through September 17th, 1787, these representatives engaged in the project of crafting the Constitution. In the end, three refused to sign the document, largely because it lacked a Bill of Rights. All of the states eventually ratified the Constitution, and the familiar Bill of Rights was introduced and ratified by December 15th, 1791. There have been seventeen amendments since the Bill of Rights. The Constitution was not perfect when it was first ratified and it is not perfect now, despite twenty-seven amendments, yet it has lasted longer than any other written form of government (though the US is certainly not the longest lived government in history). One of the flaws in the Constitution helped bring about one of the most catastrophic events in our country's history: the attempted secession of the southern slave-holding states, popularly known as the Civil War. This flaw in the Constitution was the embodiment of a fateful compromise over the issue of slavery between the northern and southern states. Why was this compromise seen as necessary and how did it come about? Moreover, was the "Civil War" prefigured in the slavery compromise? This essay attempts to answer these questions through an examination of the treasure trove that is James Madison's detailed *Notes of the Debates of the Federal Convention of 1787*.

The slavery compromise-flaw in the Constitution was given form in three separate places in the document. Let us have a look at the clauses:

Art. I, Sec. 2, Para. 3: 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 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.

Art. I, Sec. 9, Para. 1: The 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, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

Art. IV, Sec. 2, Para. 3: 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.

“Three fifths of all other Persons” is political code for black people held as slaves in the South. This first clause, the so-called “three-fifths compromise,” insured that every “five slaves counted as three free persons for both political representation and direct taxes.”¹ Slaves, of course, were not themselves represented in the South, unless you count their masters as such, and could not become representatives.

The second clause, as well as the third, together with the decision to enable Congress to regulate commerce by majority vote rather than two-thirds, became known as the “dirty compromise.”² The second clause prevented Congress from banning the importation of slaves (i.e., from ending the international slave trade to the US) for twenty years until 1808, upon which time they promptly did so. The final clause, which became

¹ Leonard L. Richards, *Shays's Rebellion: The American Revolution's Final Battle*, (Philadelphia: University of Pennsylvania Press, 2002), p. 137.

² *Ibid.*

known as the “fugitive slave clause,” supported the Fugitive Slave Laws, obligating northern states to assist in the support of the South’s institution of slavery by hunting down and returning runaway slaves to their masters.

By examining Madison’s notes on the Federal Convention we can gain some measure of understanding as to why and how these compromises were made and the above quoted clauses found their way into the final draft of the Constitution. On the second day of the Convention, after the procedural rules had been decided upon, Edmund Randolph of Virginia presented what is known as the Virginia Plan to the other delegates. There is no hint in it of the issue of slavery or any of the compromises that would later be made concerning it, except very obliquely in the second resolution regarding the apportionment of the National Legislature; in which two options for proportional representation are offered: “the Quotas of contribution” and “the number of free inhabitants.”³

The “three fifths of all other persons” clause appears to have been first introduced into the debates on Monday, June 11th by James Wilson of Pennsylvania and seconded by Charles Pinckney of South Carolina. Wilson proposed the “three-fifths clause” in regards to representation, arguing that it was already “the rule in the Act of Congress agreed to by eleven States [under the Articles of Confederation], for apportioning quotas of revenue on the States[.]”⁴ Elbridge Gerry of Massachusetts, however, immediately dissented. He “thought property not the rule of representation. Why then should the blacks, who were property in the South, be in the rule of representation more than the

³ James Madison, *Notes of Debates in the Federal Convention of 1787*, with an introduction by Adrienne Koch, (New York: W. W. Norton & Company, 1966), p. 30.

⁴ *Ibid.*, p. 103.

Cattle & horses of the North.”⁵ Yet Wilson’s motion passed overwhelmingly, without further debate, nine states to two: Massachusetts, Connecticut, New York, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Georgia voted in the affirmative; only New Jersey and Delaware dissented.

We next see the “three-fifths clause,” on June 13th, in the “Report of the Committee of the Whole on Mr. Randolph’s Propositions.” As a result of other committee deliberations, it was now in proposition seven, which dealt with the first branch of the National Legislature (eventually to become the House of Representatives). The New Jersey Plan was proposed two days later, following a one-day recess which that state’s delegation had requested to devise it. The New Jersey Plan, in contrast to the Virginia Plan, was an attempt to strengthen the Articles of Confederation rather than replace it. It retained the three-fifths clause for the purpose of requisitioning revenue only. It also introduced, for the first time, the “supremacy clause,” and introduced a proposition allowing the Legislature “to pass Acts for the regulation of trade & commerce[.]”⁶ The New Jersey Plan was ultimately rejected, for the most part, with a few exceptions being, e.g., the “supremacy clause” and the power to regulate commerce and trade.

The slavery issue did not come up again until about two weeks later on June 30th. Up until this point, the debate had been framed primarily as a tug-of-war between the large states and the small states. On this day, James Madison made the prescient observation that the main division of interests was in fact between the northern states and the southern states. The states “were divided into different interests not by their size, but

⁵ Ibid.

⁶ Ibid., p. 120 and 119, respectively.

by other circumstances; the most material of which resulted partly from climate, but principally from the effects of their having or not having slaves.”⁷ Rather than balancing the interests of the large and small states, by filling the 1st branch of the legislature through proportional representation and the 2nd branch through equal state representation (which would later become known as the “Great Compromise”), as he was loath carry over the equal state representation of the Articles of Confederation; Madison proposed that one branch should count slaves as three-fifths and the other not count them at all, so that the North and the South would be able to balance each other by each dominating one branch. However, he recognized that the inequality of the two branches would destroy that equilibrium of interests, and he was reluctant to encourage divisiveness that was all too likely to arise on its own.⁸

Later, on July 6th, Pinckney mentioned that he “thought the blacks ought to stand on an equality with the whites: But would agree to the ratio settled by Congress,”⁹ namely three-fifths. This was seemingly a weak attempt on his part to strengthen the position of the South. It appears to have been merely an attempt to test the waters or to strengthen the hand of the South by proposing a more extreme alternative, and was not taken up by the other delegates or pursued further by him.

On July 9th, William Patterson of New Jersey took up the issue of slavery and representation once more. He preferred representation based on numbers rather than wealth and was, unsurprisingly, firmly against counting slaves even fractionally, unable to see them in any

⁷ Ibid., p. 224; see also p. 295.

⁸ Ibid., p. 225.

⁹ Ibid., p. 248.

light but as property. They are no free agents, have no personal liberty, no faculty of acquiring property, but on the contrary are themselves property, & like other property entirely at the will of the Master. Has a man in Virginia a number of votes in proportion to the number of his slaves? And if Negroes are not represented in the States to which they belong, why should they be represented in the General Government. 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 should they be represented.¹⁰

Patterson “was also against such an indirect encouragement of the slave trade” and noted that Congress had been too ashamed to use the term “slaves” in the Articles of Confederation, having substituted a description instead.¹¹ Madison then reiterated his proposal, noted above, with the modification of counting slaves as whole persons for proportioning representation in the 2nd branch. Rufus King of Massachusetts responded by pointing out that 11 “out of 13 of the States had agreed to consider Slaves in the apportionment of taxation; and taxation and Representation ought to go together.”¹² The “three-fifths clause” remained. The following day, however, resulted in some tweaking of the number of representatives proportioned to each state in an attempt to balance representation between the North and South.

On July 11th, Pierce Butler and General Pinckney of South Carolina jockeyed for more power for the South. They moved to count blacks as whole persons for representation but still count them as three-fifths for taxation. George Mason of Virginia recognized the economic value of the slaves and their potential value as soldiers, but nevertheless could not regard them as equal to freemen. Butler’s and Pinckney’s motion was soundly defeated, with only Delaware, South Carolina, and Georgia voting in its

¹⁰ Ibid., p. 259.

¹¹ Ibid.

favor.¹³ While debate over the “three-fifths clause” continued sporadically, it did not differ in kind to the foregoing and the clause continued to withstand challenge. It was widely regarded by the delegates as a reasonable compromise between the two extremes.

An event transpired on July 13th that would alter and amplify the North-South dynamic in the Convention. The Continental Congress, under the Articles of Confederation, passed the Northwest Ordinance. The Northwest Ordinance created the Northwest Territory, the first organized territory of the United States, and banned slavery within it and any states arising out of it. This mapped the future westward expansion of the United States, creating a geographical dividing line between free states and slave states, between the North and the South. National politics between the North and the South would be flavored by the tension of maintaining a balance between the two in the House of Representatives, a balance which collapsed following the Mexican-American War (1846-48).

President James Polk fought hard “to preserve national unity in the face of intense divisive pressures imposed by the proponents of slavery.”¹⁴ Ultimately, however, his aggressive war against Mexico (1846-48) in pursuit of “Manifest Destiny” opened up new territory that the North was able to close off from the expansion of slavery, thus ensuring that the South’s interests would be frustrated by the North’s stronger position in Congress. Tellingly for future events, Gouverneur Morris of Pennsylvania, over fifty years earlier on July 13th, mentioned that he thought the distinction between the North and the

¹² Ibid., p. 260.

¹³ Ibid., pp. 268-69.

¹⁴ John Seigenthaler, *James K. Polk*, The American Presidents series, Arthur M. Schlesinger, Jr., General Editor, (New York: Henry Hold and Company, 2003), p. 150.

South groundless, but if it were “real, instead of attempting to blend incompatible things, let us at once take a friendly leave of each other.”¹⁵

By August 8th, the delegates in the Convention had no doubt heard of the Northwest Ordinance. Moreover, by this time, the first rough draft of the Constitution had been drawn up, the powers and structure of the government were more fully defined. At this point, discussion was ranging over commerce and trade. King raised fresh objections to the admission of slaves into the rule of representation. It had been decided by the Convention that the Legislature would be unable to tax exports or ban the importation of slaves. He argued that if slaves are to be imported, shouldn't exports produced by their labor be taxed to generate revenue to contribute to the security of the Union? “He never could agree to let them be imported without limitation & then be represented in the National Legislature. [...] At all events, either slaves should not be represented, or exports should be taxable.”¹⁶ Roger Sherman of Connecticut remarked that he regarded the slave trade as iniquitous and, in any event, he was against altering a provision (the “three-fifths clause”) that had been settled on with such difficulty and deliberation. Gouverneur Morris echoed Sherman, regarding slavery as a nefarious institution. Morris demanded, “Upon what principle is it that the slaves shall be computed in the representation? Are they men? Then make them Citizens and let them vote.”¹⁷ The issue of slavery constituted not merely economic and political divisions, but cultural and moral ones as well.¹⁸ Some, at least, in the North, recognized slavery as a violation of the principles human equality embodied in the Declaration of Independence. Presciently,

¹⁵ Ibid., pp. 285-86.

¹⁶ Ibid., p. 410.

¹⁷ Ibid., p. 411.

¹⁸ See pp. 409-413.

Morris argued that direct taxation is not of equal importance to representation, “for direct taxes would only be levied four times in the next seventy-two years, while the larger voice that southern slave masters obtained in the House and the electoral college had enormous impact, affecting not only scores of congressional decisions but virtually every aspect of the nation’s political fabric.”¹⁹

The issue of slave importation was raised once again on August 21st by Luther Martin of Maryland. He saw the “three-fifths clause” as an encouragement to the slave trade. He too recognized slavery as being “inconsistent with the principles of the revolution and dishonorable to the American character[.]”²⁰ Primarily to address the former point, he proposed that either a prohibition or tax on the importation of slaves be allowed. Oliver Ellsworth of Connecticut took a position not unsympathetic to that of others in the Convention, that of State’s rights: “The morality or wisdom of slavery are considerations belonging to the States themselves.”²¹ Pinckney, however, argued that South Carolina would never agree to prohibiting the slave trade. Sherman observed “that the abolition of Slavery seemed to be going on in the U.S. & that the good sense of the several States would probably by degrees compleat it.”²² He and others failed to see, however, how the compromises made over slavery would serve to artificially support the institution in the South. Mason noted that slavery “discourages arts & manufactures,”²³ a sound economic theory that would recur in later arguments over the decades. General Pinckney thought it reasonable put a duty on slave imports as with other imports, but

¹⁹ Richards, p. 136.

²⁰ Madison, p. 502; Abraham Baldwin of GA regarded slaves as animals, however (see p. 506).

²¹ Ibid., p. 503.

²² Ibid.

²³ Ibid., p. 504.

would not countenance prohibiting importation altogether. Some in the North, like Sherman, were opposed to putting a tax on slaves because it implied they were property.

What would become Art. I, Sec. 9, Para. 1, came out of a special Committee of Eleven on August 24th – to which what was then Art. VII, Sec. 4 had been referred – much as it appears now. A compromise had been made to allow the imposition of duties on imported slaves and to delay the ability to impose a prohibition on their importation until 1800.²⁴ The clause was held off for reconsideration until the following day whereupon the date was changed from 1800 to the final version of 1808 and the duty was set at ten dollars for each slave imported. There was little debate on the clause aside from this, except for the usual as to whether men should be viewed as property and whether a duty would discourage the slave trade. In general, it seemed to be recognized that this compromise was necessary in order to keep Georgia and South Carolina in the Union.²⁵

On August 28th, General Pinckney, Pinckney, and Butler pushed for greater recognition of property in slaves. The latter two wished “to require fugitive slaves...be delivered up like criminals”²⁶ in what was then Article XV. Wilson rightly saw that this “would oblige the Executive of the State to do it at the public expence.”²⁷ The proposition was withdrawn, but only “²⁸ in order that some particular provision might be made apart from this article.” Indeed, the provision was brought up again the very next day, right after the navigation acts and regulation of commerce clauses were revisited. General Pinckney proposed the two-thirds requirement for both Houses and pointed out that the South had no need to regulate commerce (at least at the time). He recognized the strong

²⁴ Ibid., p. 522.

²⁵ Ibid., pp. 530-32.

²⁶ Ibid., p. 545.

²⁷ Ibid.

interest the other states had in being able to regulate commerce in order to protect their young and growing industries. A two-thirds requirement would make regulating commerce exceedingly hard and give the minority group in Congress disproportionate leverage. On the other hand, a mere majority vote requirement would eventually give the Northern states power over commerce that could be injurious to the South. After some discussion back and forth, the two-thirds provision was dropped unanimously and without a formal vote. Immediately after, the familiar “fugitive slave clause” was agreed to, also unanimously and also without a formal vote.²⁹

Many in the North held slavery to be immoral and, consequently to have a negative impact culturally on those who practiced it. While the moral and cultural divisions between the North and the South certainly grew more distinct over time, particularly as slavery gradually became completely abolished in the North and the abolitionist movement grew, the politico-economic divisions grew more pronounced as well. The North increasingly became an industrial and commercial sector, while the South remained agricultural. The tension of balancing the power and interests of the two sides was ever-present in the politics leading up to the “Civil War.” The election of John Quincy Adams to the presidency in 1824 with the alleged aid of the so-called “corrupt bargain” with Henry Clay – which made possible the Tariff of Abominations, the rise of the Democratic Party, the subsequent victory of Andrew Jackson over Adams in 1828 – and Adams’s famous career as an abolitionist Congressman afterward, helped to further polarize the country.³⁰

²⁸ Ibid., p. 546.

²⁹ Ibid., pp. 547-552, especially 547, 548, & 552.

³⁰ Robert V. Remini, *John Quincy Adams*, The American Presidents series, Arthur M. Schlesinger, Jr., General Editor, (New York: Henry Hold and Company, 2002).

The politico-economic divisions arising from the institution of slavery, rather than a moral aversion to the institution, turned out to be the major contributing factor in bringing about the attempted secession of the South and the “Civil War.” The editor of Lincoln’s *Collected Works*, Roy Basler, commented that Lincoln barely mentioned slavery before 1954.³¹ Rather, Lincoln’s primary agenda was the Whig economic agenda – the “American System” of his political idol, Henry Clay: “My politics are short and sweet...I am in favor of a national bank...the internal improvement system and a high protective tariff.”³² The mercantilism of Lincoln and the North, which bore down hard on the South following the Mexican-American war and would continue to do so due to the prohibition on the importation of slaves and the North’s successful prohibition of the westward expansion of slavery, is what ultimately drove the South to secede. The overwhelming desire of Lincoln and other Northerners to preserve the Union at all costs, against the principles of the Revolution, insured the onset of the “Civil War.” But, as Madison’s *Notes* makes clear, this catastrophic event in American history was prefigured in the compromise over slavery made during the Federal Convention of 1787.

³¹ Roy P. Basler, ed., *Abraham Lincoln: His Speeches and Writings*, (New York: Da Capo Press, 1946), p. 23.

³² Thomas J. DiLorenzo, *The Real Lincoln: A New Look as Abraham Lincoln, His Agenda, and an Unnecessary War*, (New York: Three Rivers Press, 2003 [2002]), pp. 54-55.