

# The Constitution and the Migration of Slaves

Walter Berns†

Shortly after the adoption of the Constitution, the South came to see the power granted to Congress to regulate commerce as a major threat to its domestic tranquility, for this power extended, or might reasonably be seen to extend, to the regulation of the slave trade, domestic as well as foreign. The question of the extent of federal power over commerce was, in the minds of Southerners, simply coincident with the question of the extent of federal power over slavery.<sup>1</sup> As Charles Warren puts it,

the long-continued controversy as to whether Congress had exclusive or concurrent jurisdiction over commerce was not a conflict between theories of government, or between Nationalism and State-Rights, or between differing legal construction of the Constitution, but was simply the naked issue of State or Federal control of slavery.<sup>2</sup>

The friends of slavery had every reason to feel threatened by the commerce power. They had exacted a compromise at Philadelphia in 1787, according to which Congress was forbidden to abolish the slave trade for twenty years. But twenty years is not a long time in the affairs of nations—or institutions—and the day would inevitably come when Congress might exercise its power, with incalculable effect on the institution of slavery itself. Hence the very men who insisted on the right to buy and sell other men as articles of commerce denied that these other men were articles of commerce for purposes of the Constitution's commerce clause. In addition, to make doubly certain that Congress's power to regulate commerce would not threaten the existence of their "peculiar institution," Madison and others fostered what has become the traditional interpretation of the first clause of Article I, Section 9, denying all congressional power to regulate the internal slave trade, and leaving only importation from Africa to be prohibited after 1808.<sup>3</sup>

The clause in question reads as follows:

† Professor of Government, Cornell University. B.S. 1941, University of Iowa; M.A. 1951, Ph.D. 1953, University of Chicago.

1. C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 87-88 (1st ed. 1922).

2. *Id.*

3. That James Madison lent his authoritative voice to this interpretation may account for Joseph Story's adoption of the Southern reading of the clause in his influential *Commentaries on the Constitution*. J. STORY, *COMMENTARIES ON THE CONSTITUTION OF*

## The Constitution and the Migration of Slaves

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.

The controversy over the scope of this proscription centered about a dispute over the meaning of the phrase "such persons." If "such persons" referred exclusively to slaves, then Congress was limited in two respects by the clause: it could not before 1808 forbid the importation of slaves from abroad into the states originally existing and, secondly, could not until 1808 legislate so as to prevent the migration of slaves—that is, the movement of slaves—between or among the states originally existing, despite its expressly granted power over commerce among the states.

Such an interpretation could not be accepted by the South. If the clause were read as including a limitation on an underlying congressional power to regulate the movement of slaves between states, the removal of that limitation in 1808 would leave Congress free to stop not only the importation of slaves from abroad but all interstate traffic in them as well. The Southern response to this danger was to insist that the phrase "such persons" referred *not* to slaves alone, but to both slaves, who are "imported," and to white aliens, who "migrate," into the United States. Such a reading, by leaving no internal operation to the term "migration," restricted the limitation of the clause—and hence, by implication, the scope of the congressional power being limited—to entries into the United States from abroad. The question, and a great deal turned on the answer, is whether this Southern interpretation is a fair construction of the clause.<sup>4</sup>

### I.

The clause made its first appearance in the Constitutional Convention on August 6, in the Report of the Committee of Detail. At that

THE UNITED STATES § 223 (1847). Chancellor Kent's *Commentaries on American Law* had earlier taken the same position. 1 J. KENT, COMMENTARIES ON AMERICAN LAW 196 n. (1830).

4. Although the clause was discussed in dicta in a handful of cases, the Supreme Court was never called upon to interpret it directly. Marshall mentioned the clause in his opinion for the Court in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 216-17 (1824), where he accepted the Southern version of it; Taney, on the other hand, used it in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 411 (1857), to argue that "neither the description of persons therein referred to, nor their descendants," were embraced within the terms "citizens" or "the people of the United States." He thus assumed that the term "such persons" referred only to Negro slaves; either that or his argument would also exclude white immigrants from citizenship!

time it read as follows: "No tax or duty shall be laid by the Legislature on articles exported from any State; nor 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."<sup>5</sup> In this form the clause provoked an acrimonious debate concerning the whole subject of slavery. The South Carolinians and Georgians insisted that their states would never join the Union if the importation of slaves were forbidden; the others denounced "this infernal traffic" and the "pernicious effect on manners" caused by slavery. The debate was closed only when Gouverneur Morris proposed that "the whole subject" along with "the clause relating to taxes on exports & to a navigation act" be turned over to a committee. "These things," he said, "may form a bargain among the Northern & Southern States."<sup>6</sup>

This was precisely what happened. The Committee of Eleven, composed of one member from each state present, reported on August 24, recommending the elimination of the clause requiring a two-thirds majority for all "navigation acts" and the replacement of the absolute prohibition of laws forbidding the migration and importation of "such persons" by a provision forbidding such laws only until 1800.<sup>7</sup> The Southern states would not be able to protect themselves from laws favoring Northern shippers and discriminating against foreign shippers by rallying one-third plus one of the members of each house of Congress; nor, since navigation acts were acknowledged by everyone to be regulations of commerce, would they be able to protect the slave trade by this provision.<sup>8</sup> This was a concession to the Northern states. But the latter would not, even with a majority in each house, be able to ban "this infernal traffic" prior to 1800. This was the concession to the Southern states, specifically to South Carolina and Georgia who, alone at the time, insisted on importing further slaves. On the motion of General Pinckney, and over the objection of James Madison, who protested that "twenty years will produce all the mischief that can be ap-

5. 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 183 (rev. ed. 1937) [hereinafter cited as FARRAND].

6. *Id.* 374.

7. *Id.* 396, 408.

8. This aspect of the bargain was explained succinctly to Jefferson by George Mason in 1792. He could have agreed to the Constitution, he said, if various changes had not been made during the last two weeks of the convention. One of the changes to which he objected was the deletion of the two-thirds provision. Georgia and South Carolina, he then explained, knew that, with the power to regulate commerce, Congress, unless restrained in the Constitution, "would immediately suppress the importn. of slaves." They "therefore struck up a bargain with the 3. N. Engld. states, if they would join to admit slaves for some years, the 2 Southernmost states wd join in changing the clause which required 2/3 of the legislature in any vote." 3 *id.* 867.

## The Constitution and the Migration of Slaves

prehended from the liberty to import slaves," the prohibition was extended to 1808, and the compromise adopted by a vote of 7-4.<sup>9</sup>

Thus everyone, Southerner and Northerner, pro-slavery and anti-slavery, seems to have assumed from the beginning that the traffic in slaves was commerce and subject to Congress's power to regulate commerce. But the commerce power is not limited to foreign trade; on the contrary, Congress is expressly granted the power to regulate commerce "among the several states." Why, then, should it not follow that Congress had the power to regulate the domestic slave trade?

Quite apart from the logical extent of the commerce power, those who foresaw congressional abolition of slavery after 1808 must have assumed that control over internal commerce in slaves would be the instrument of that abolition.<sup>10</sup> Simple prohibition of importation could hardly have been expected to bring an end to the "peculiar institution." From the fragment preserved from the New Hampshire ratifying debate, for example, we learn that an "honorable member from Portsmouth boasted . . . 'that an end is then to be put to slavery.'" This led Joshua Atherton to reply *not* that no such power was granted to Congress but rather that in 1808 "Congress may be as much, or more, puzzled to put a stop to it then, than we are now." Thus although the clause by itself "has not secured its abolition," it empowers Congress, if it so desires, to legislate toward that end.<sup>11</sup>

Madison, as we shall see, took essentially the same position at the time of ratification. During the Missouri controversy some years later, however, he joined his colleagues from the South in insisting that Congress had no authority over the internal slave trade. The language of the clause, he wrote in 1819 in a letter to Robert Walsh, provided that "[C]ongress should not interfere until the year 1808; with an implication, that after that date, they might prohibit the importation of slaves

9. 2 *id.* 415.

10. At times, however, it was not at all clear just what *was* being assumed. James Wilson, speaking in 1787 to the Pennsylvania ratifying convention, argued that

. . . by this article, after the year 1808, the Congress will have power to prohibit such importation, notwithstanding the disposition of any state to the contrary. I consider this as laying the foundation for banishing slavery out of this country . . . and in the mean time, the *new* states which are to be formed will be under the control of Congress in this particular, and slaves will never be introduced amongst them.

2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 452 (1836) [hereinafter cited as ELLIOT]; 3 FARRAND 161. Wilson may have had nothing more than the commerce power in mind, but it is possible that he was thinking in terms of an independent power to prohibit slavery itself. Farrand goes on to quote him as saying that within a few years "Congress will have power to *exterminate* slavery within our borders." *Id.* 437.

11. 2 ELLIOTT 203.

into the States then existing, & previous thereto, into the States not then existing . . . ."<sup>12</sup>

But whatever may have been intended by the term "migration" or the term "persons," it is most certain, that they referred exclusively to a migration or importation from other countries into the U. States; and not to a removal, voluntary or involuntary, of slaves or freemen, from one to another part of the United States.<sup>13</sup>

Despite Madison's confidence, it is quite certain that the issue of Congress's power over the internal slave trade necessarily turned on the meaning accorded to the phrase "such persons." As pointed out above, if the phrase referred exclusively to slaves, Article I, Section 9 implied a congressional power to regulate the interstate slave trade.

It should be remembered that in its original version Article I, Section 9 provoked only a slave trade debate. Nor is there any doubt that in its amended version the clause was intended as a compromise between those who, in Madison's own words, wanted "an immediate and absolute stop to the [slave] trade" and those who "were not only averse to any interference on the subject," but went further to solemnly declare "that their constituents would never accede to a constitution containing such an article." Out of this conflict, Madison concludes, "grew the middle measure providing that Congress should not interfere until the year 1808 . . . ."<sup>14</sup> It would be odd indeed if in such circumstances the phrase "such persons" had been understood or intended to include white aliens as well as slaves.

Everyone knew why the term "such persons" was used instead of "slaves." Luther Martin, in his lengthy address to the Maryland legislature on the proposed constitution, was not speaking for himself alone when he said that the delegates to the convention "anxiously sought to avoid the admission of expressions which might be odious in the ears of Americans . . . ."<sup>15</sup> Madison, in the letter to Walsh quoted above, agreed: the convention, he said, "had scruples against admitting the term 'Slaves' into the Instrument."<sup>16</sup> Indeed, there is very little evidence contemporary with the writing and ratification of the Constitution to suggest that "such persons" was understood as anything more than a euphemism for "slaves." During the North Carolina debate, for example, Richard Spaight, who had been a delegate to the convention,

12. Letter from James Madison to Robert Walsh, Nov. 27, 1819. 3 FARRAND 436.

13. *Id.* 437.

14. *Id.* 436.

15. *Id.* 210.

16. Letter from James Madison to Robert Walsh, Nov. 27, 1819. 3 FARRAND 436.

## The Constitution and the Migration of Slaves

was asked to explain the clause in question. He responded, with no reference to free aliens, that “the Southern States, whose principal support depended on the labor of slaves, would not consent to the desire of the Northern States to exclude the importation of slaves absolutely . . . .”<sup>17</sup> Similarly Luther Martin, who had been a member of the Committee of Eleven that had effected the compromise, described the deliberations over the clause without reference to anything except the slave trade:

I found the *eastern* states, notwithstanding their *aversion to slavery*, were very willing to indulge the southern states at least with a temporary liberty to prosecute the *slave-trade*, provided the southern states would, in their turn, gratify them, by laying *no restriction on navigation acts* . . . .<sup>18</sup>

The only references to free aliens during the ratification debates were made by Wilson of Pennsylvania and Iredell and Galloway of North Carolina. Wilson, in response to an objection that the tax provision would inhibit the “introduction of white people from Europe,” pointed out that the tax might be laid on importation but not on migration, thus implying that migration referred to persons other than slaves.<sup>19</sup> Iredell made the same point during the North Carolina debates.<sup>20</sup> Against this must be put the testimony of Benjamin Rush, who assumed, and asserted that other anti-slavery men had also assumed, that after 1808 Congress would possess the authority to abolish slavery itself—presumably by prohibiting all commerce, both foreign and domestic, in slaves. Writing to Jeremy Belknap in 1788 he said:

There was a respectable representation of [Quakers] in our [the Pennsylvania] Convention, all of whom voted in favor of the new Constitution. They consider very wisely that the abolition of slavery in our country must be gradual in order to be effectual, and that the section of the Constitution which will put it in the power of Congress twenty years hence to restrain it altogether was a great

17. *Id.* 346.

18. *Id.* 210-11 (emphasis in original).

19. 2 ELLIOT 452-53. In the same speech, however, Wilson also expressed the view that after 1808 “Congress will have power to *exterminate* slavery within our borders,” 3 FARRAND 437, which seems to imply congressional power over the domestic as well as the foreign slave trade.

20. 4 ELLIOT 102. “The word *migration* refers to free persons; but the word *importation* refers to slaves because free people cannot be said to be imported.” Iredell was replying to James Galloway who, explaining that he wanted “this abominable trade put an end to,” did not, however, want the tax on importation “extended to all persons whatsoever.” The situation of North Carolina, he continued, required additional citizens; so instead of “laying a tax, we ought to give a bounty to encourage foreigners to come among us.” *Id.* 101.

point obtained from the Southern States. The appeals, therefore, that have been made to the humane & laudable prejudices of our Quakers by our anti-federal writers upon the subject of negro slavery, have been treated by that prudent society with silence and contempt.<sup>21</sup>

This opinion respecting the temporarily dormant powers of Congress was not confined to Rush. In the Pennsylvania ratifying convention Thomas McKean also referred to a power in Congress to abolish slavery:

In the first clause [of Article I, Section 9], there is a provision made for an event which must gratify the feelings of every friend to humanity. The abolition of slavery is put within the reach of the federal government.<sup>22</sup>

As early as October of 1787 Moses Brown of Rhode Island wrote to James Pendleton in Pennsylvania:

It seems to Exhibit a poor Example of Confidence in Congress the Southern States being not willing to Leave the Commerce in Men under [Congress's] Controul and Regulation as well as other matters . . . . [H]ad the period of 21 years been fixed for Abolishing Slavery *as some writers your way seem to represent*, it would have been doing something . . . .<sup>23</sup>

Nor were such opinions confined to private letters. Noah Webster wrote as follows in his tract written in defense of the proposed constitution:

The truth is, Congress cannot prohibit the importation of slaves, during that period; but the [state] laws against the importation into particular states, stand unrepealed. An immediate abolition of slavery would bring ruin upon the whites, and misery upon the blacks, in the Southern states. The Constitution has therefore wisely left each state to pursue its own measures, with respect to this article of legislation, during the period of twenty-one years.<sup>24</sup>

21. Letter from Benjamin Rush to Jeremy Belknap, Feb. 28, 1788. 3 BELKNAP PAPERS, 397 (Massachusetts Historical Society).

22. J. MCMASTER & F. STONE, PENNSYLVANIA AND THE FEDERAL CONSTITUTION 278 (Historical Society of Pennsylvania 1888). Statements such as McKean's may have accounted for the votes of the Quakers and for the failure of the antislavery anti-Federalists to mention Article I, Section 9 in their statement of reasons for opposing the Constitution. See *Dissent of the Minority in Pennsylvania Packet*, issue of December 12, 1787. This dissent was signed by 21 of the 23 who voted against ratification.

23. Letter from Moses Brown to James Pendleton, Oct. 27, 1787. PENDLETON PAPERS (Historical Society of Pennsylvania) (emphasis added).

24. A CITIZEN OF THE U.S., EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 40 (1787).

## The Constitution and the Migration of Slaves

Thus there is evidence that the anti-slavery men in the Northern states were assured by the Federalists that the bargain struck by them with the South was of limited duration, and that after 1808 Congress would possess the constitutional authority to act so as to abolish slavery. As Thomas Dawes said in the Massachusetts ratifying convention, in a few years slavery would be "abolished"; it would die not "of an apoplexy, but of a consumption," presumably at the hands of a Congress exercising control over the internal, as well as the external, commerce in slaves.<sup>25</sup>

The strongest argument in favor of the traditional interpretation of Article I, Section 9 (reading "such persons" as including white aliens, limiting the term "migration" to them, and hence denying congressional authority to regulate the domestic slave trade under the commerce clause) is that had the alternative interpretation suggested here been taken seriously, the anti-Federalists in the South would have pointed to the threat to the institution of slavery represented by the interstate commerce power in order to rally pro-slavery sentiment against the proposed constitution. They did not do so. But their silence on the point is not conclusive. It could mean, as the traditional account would have it, that it was generally assumed that the clause referred to free whites immigrating into the country, and therefore that no power over interstate movement of slaves was implied. On the other hand, particularly since almost all vocal Southern opinion in the Constitutional Convention and the ratification debates was ultimately opposed to slavery, it could mean that the South was willing to concede what the North was in time going to insist upon: a power to limit slavery to its present boundaries. There seemed to be an assumption that, as Zachariah Johnson put it during the ratifying debates in Virginia, whether emancipation came late or soon, it was certain to come.<sup>26</sup> Congressional power over the interstate slave trade would pose no threat to men with such expectations.

Nevertheless, it is surprising how little was said in the South concerning this clause, surprising because the clause obviously affected commerce in slaves in *some* manner and because, just as obviously, Congress was being given authority to regulate domestic as well as

25. 1788 DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS 302-03 (1856) (minutes of Judge Theophilus Parsons). This language was quoted several times in the course of the Massachusetts debates.

Not all Massachusetts delegates were opposed to slavery. Benjamin Randall responded to Dawes by saying that he was "sorry to hear it said that after 1808 negroes would be free." *Id.* 303.

26. 3 ELLIOT 648.



foreign commerce. Even in Virginia, where the debates were particularly thorough and extensive, only a handful of references to the clause were made. And is it not astonishing that in the South Carolina ratifying convention the clause was not mentioned, even in passing?

In the Virginia debates George Mason deplored the fact that the proposed constitution permitted the "nefarious" slave trade for another 20 years, as well as its failure to include a provision "securing to the Southern States [the slaves] they now possess"—which Lee of Westmoreland ridiculed as "two contradictory reasons" for opposing the Constitution.<sup>27</sup> Mason repeated these complaints four days later and was this time answered by Madison, who pointed out that however deplorable a temporary continuation of this "traffic" might be, the situation was at least an improvement because under the Articles of Confederation "it might be continued forever." He then went on to assure Mason that the "general government" would possess no power to "interpose with respect to the property in slaves now held by the states."<sup>28</sup> John Tyler, who like Mason later voted against ratification, followed by condemning the "impolicy, iniquity, and disgracefulness of this wicked traffic," and was answered by George Nicholas with much the same arguments that Madison had, a few minutes earlier, used against Mason.<sup>29</sup> In response to the fear that Congress would emancipate the slaves already held, Nicholas added that Congress "would only have a *general superintendency of trade*" after 1808. The Southern states, he said, had "insisted on this exception to that *general superintendency* for twenty years."<sup>30</sup> Shortly thereafter Governor Randolph, in an effort to meet the anti-Federalist argument concerning powers implied in the Constitution, used language suggesting, as had Nicholas, that Congress's powers after 1808 would extend to more than the mere importation of slaves:

But the insertion of the negative *restrictions* [in Article I, Section 9] has given cause of triumph, it seems, to gentlemen. They suppose that it demonstrates that Congress are to have powers by implication . . . I persuade myself that every exception here mentioned is an exception, not from general powers, but from the particular powers therein vested. To what power in the general government is the exception made respecting the importation of

27. *Id.* 269-73.

28. *Id.* 452-53.

29. *Id.* 454-56.

30. *Id.* 456 (emphasis added).

## The Constitution and the Migration of Slaves

negroes? . . . This is an exception from the power given them of regulating commerce.<sup>31</sup>

Except for a later speech by Randolph repeating what he had already said and a passing reference by Mason, these were the only references to the clause during the Virginia debates.

In the South Carolina debates, if we are to believe the official journal of the convention as well as the local newspapers at the time, nothing at all was said respecting this clause. Yet South Carolina even then was the state most closely associated with the cause of slavery. The convention debated the proposed constitution clause by clause, finishing its discussion of Article I, Section 8, on Friday, May 16, 1788. The following day, discussion began with Article I, Section 10. Nor, as the convention proceeded through to the end of the Constitution, did it return to the missing clause. Is it possible to believe that this was the only part of the Constitution that was of no interest to the South Carolina convention, the only clause that provoked neither debate nor acknowledgment? Yet, while it received some mention earlier in the legislature,<sup>32</sup> all the sources agree that it was ignored officially in the ratifying convention, and none of them provides any clue as to what was said unofficially, for example, on that Friday night.<sup>33</sup>

Aside from the remarks of Wilson, Iredell, and Galloway in the Pennsylvania and North Carolina ratifying debates,<sup>34</sup> the only other suggestion at this time that "such persons" might include persons other than slaves is to be found in an exchange between Gouverneur Morris and George Mason in the Constitutional Convention itself. The second part of the migration or importation provision as reported by the Committee of Eleven read as follows: ". . . but a tax or duty may be imposed on such migration or importation at a rate not exceeding the average of duties laid on imports." Morris pointed out "that as the clause now stands [*i.e.*, using the term "such persons" rather than "slaves"] it implies that the Legislature may tax freemen imported."<sup>35</sup> Mason

31. *Id.* 464 (emphasis added).

32. 4 ELLIOT 272-309.

33. Elliot prints only a few speeches from the South Carolina convention. I used xeroxed copies of the accounts in the South Carolina newspapers, the *City Gazette* and the *State Gazette*, and of the official Journal in the possession of the National Historical Publications Commission of the National Archives (Project: *Documentary History of the Ratification of the Constitution and the First Ten Amendments*). The first volume under this title will be published in 1969. I am grateful to the project's director, Professor Robert Cushman, my distinguished predecessor in constitutional law at Cornell, and to his associate, Leonard Rapport, for allowing me to consult their files of documents.

34. See p. 203 *supra*.

35. 2 FARRAND 417.

then replied that the "provision as it stands was necessary for the case of Convicts in order to prevent the introduction of them."<sup>36</sup> The outcome of this exchange was an amendment, adopted unanimously, to allow a tax or duty to be imposed only on the importation—and not on the migration—of "such persons."<sup>37</sup>

This exchange between Morris and Mason and the remarks of Wilson, Iredell, and Galloway are, to repeat, the only evidence contemporary with the adoption of the Constitution that the term "such persons" was meant to be anything but a euphemism for "slaves." On the other hand, the record is equally barren of any statement that the word "migration" was intended to refer to the domestic slave trade.<sup>38</sup> That is to say, no one expressly stated that after 1808 Congress would be empowered to forbid the migration of slaves even among the states originally existing.<sup>39</sup> As we have seen, however, a number of men

36. *Id.* Mason's defense of the provision, with its reference to convicts as being among the "such persons" the migration or importation of which Congress is forbidden to prohibit prior to 1808, is altogether confusing. How does the "provision . . . prevent the introduction" of convicts? As it stands, Congress is *forbidden* to prevent the introduction of them prior to 1808. Did Mason mean that the tax or duty would prevent their introduction? But no one looked upon the tax or duty as being capable of preventing the introduction of slaves. Why, then, would it have this effect on the introduction of convicts? And if the Convention was determined to exclude convicts, why wait until 1808 to do so, and why rely on a tax to be the means of discouraging their "migration" prior to 1808? If we are to believe that the word migration refers to convicts, as Mason might be understood to imply, furthermore, then the clause as finally adopted, with Mason's approval, provides no means whatever, prior to 1808, of preventing their "introduction"!

One possible explanation of Mason's confusing statement would go as follows: (1) it is not clear whether Congress can prohibit convicts and slaves from entering the country; (2) this clause, by placing a temporary limitation on Congress's commerce power, does make it clear that such a power exists, or will exist after 1808; (3) such a commerce power is necessary to enable Congress to prohibit excessive "migration" of convicts, although such "migration" should be permitted for a while in view of the need in certain areas for manpower. The trouble with this interpretation is that it assumes that by "provision" Mason was referring to the commerce clause, whereas the context indicates Article I, Section 9.

37. *Id.* The supporters of the usual view that "migration" refers to white aliens sometimes point to the fact that the tax or duty is allowed only on the "importation" (of slaves) and not on the "migration" (of white aliens). This proves nothing at all. Congress is forbidden by the fifth clause of the same Article I, Section 9 to lay any "Tax or Duty . . . on Articles exported from any State"—including, we suggest, slaves who migrate as articles of the interstate slave trade. Thus, in accordance with this policy or principle, the tax or duty could only be laid on importation from abroad.

38. It was not unusual, however, to use the word "migration" to mean internal movement. For example, Rawlins Lowndes so used it in the South Carolina ratification debates: "With respect to migration from the Eastern States to the Southern ones, [I] do not believe that people [will] ever flock here in such considerable numbers." 4 *ELLIS* 309. Indeed, Taney uses the word in that sense in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 422 (1857).

39. As has been suggested above, the absence from the record of any statement to the effect that Congress's power over the domestic slave trade was as extensive as its power over the foreign slave trade need not be taken as evidence for the contrary proposition. Everyone saw the importation and migration clause as a limitation on Congress's commerce powers. It was obvious. Was it not equally obvious that Congress's regulatory

## The Constitution and the Migration of Slaves

*did* say, in one way or another, that after 1808 Congress would be able to act as to abolish slavery or to bring about its abolition.<sup>40</sup>

Nor can the inconclusive nature of available evidence contemporaneous with the adoption of the Constitution be made up for by looking to later interpretations of the clause, however clear they may seem. Opinions expressed on the question of congressional power over commerce in slaves in the years following the establishment of the Government are inevitably colored by the writer's views on the increasingly sensitive slavery question, and are therefore suspect. This became clear as early as 1790 during the debate in the House of Representatives on the anti-slavery petitions presented by the Pennsylvania Quakers and by Benjamin Franklin's Society for Promoting the Abolition of Slavery.

powers extended to commerce "among the several states" as well as the commerce "with foreign nations"? If the power to prohibit the "importation" of slaves was admitted by everyone to be a regulation of commerce with foreign nations, what argument was needed to show that the power to prohibit the "migration" of slaves from state to state was a regulation of commerce among the several states? It was intended to restrict this power for twenty years, and are not the words used well adapted to that end: the temporary restriction on laws prohibiting "importation" expressing the exception to Congress's power to regulate foreign commerce, and the temporary restriction on laws prohibiting "migration" expressing the exception to Congress's power to regulate commerce among the states? As George Nicholas said in the Virginia debates, after 1803 Congress would have a "general superintendency of trade." § ELLIOT 456. And it was probably out of a concern for this employment of the commerce power that the later Madison, the states' rights Madison, argued that Congress's power to regulate commerce among the states was of less extent than its power to regulate foreign commerce. Discussing the interstate commerce power in a letter to Joseph C. Cabell on February 13, 1829, he wrote: "Being in the same terms with the power over foreign commerce, the same extent, if taken literally, would belong to it. Yet it is very certain that it grew out of the abuse of the power by the importing states in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged. And it will be safer to leave the power with this key to it, than to extend it all the qualities and incidental means belonging to the power over foreign commerce . . ." 4 LETTERS AND OTHERS WRITINGS OF JAMES MADISON 14-15 (1867).

40. Indeed, James Madison himself, contrary to what he was to say later, hinted as much in the First Congress during the debate on the first of the antislavery petitions presented by the Quakers:

He admitted, that Congress is restricted by the Constitution from taking measures to abolish the slave trade; yet there are a variety of ways by which it could countenance the abolition, and regulations might be made in relation to the introduction of them into the new States to be formed out of the Western Territory.

1 ANNALS OF CONG. 1246 (1790) [1789-1824]. The version of this speech printed in 4 ELLIOT 408 is even more suggestive:

He [Mr. Madison] entered into a critical review of the circumstances respecting the adoption of the Constitution; the ideas upon the limitation of the powers of Congress to interfere in the *regulation of the commerce in slaves*, and showing that they undeniably were not precluded from interposing in their importation; and generally, to regulate the *mode in which every species of business shall be transacted*. He adverted to the western country and the cession of Georgia, in which Congress have certainly the power to regulate the subject of slavery; which shows gentlemen are mistaken in supposing that Congress cannot constitutionally interfere in the business in any degree whatever. [Emphasis added.]

The petitions were referred to a special committee which reported in part as follows:

That, from the nature of the matters contained in these memorials, they were induced to examine the powers vested in Congress, under the present Constitution, relating to the Abolition of Slavery, and are clearly of opinion:

First, That the general government is expressly restrained from prohibiting the importation of such persons as any of the States now existing shall think proper to admit until the year 1808.

Secondly, That Congress, by a fair construction of the Constitution, are equally restrained from interfering in the emancipation of slaves, who already are, or who may, within the period mentioned [*i.e.*, prior to 1808], be imported into, or born within, any of the said States.<sup>41</sup>

Smith of South Carolina greeted this report, and not without reason, with the statement that it "appeared to hold out the idea that Congress might exercise the power of emancipating after the year 1808." Elias Boudinot of New Jersey admitted as much, saying that "Congress could not interfere in prohibiting the importation, or promoting the emancipation of them prior to that period."<sup>42</sup> Smith and his Southern colleagues therefore moved that the Report of the Special Committee be referred to the Committee of the Whole House, which in its report replaced the offensive second paragraph with a new one stating flatly that "Congress have no authority to interfere in the emancipation of slaves, or in the treatment of them within *any* of the States . . ."<sup>43</sup> The House, some of its members obviously being in a conciliatory mood, voted 29-25 to insert *both* reports in the Journal,<sup>44</sup> thereby acknowledging its indecision, or its inability to agree, on this matter of constitutional interpretation.

The same sort of disagreement occurred in 1798 during the debate on the alien part of the infamous Alien and Sedition Laws. Somewhat at a loss to explain where the Constitution authorized Congress to enact a law expelling aliens, one of the supporters of the Alien Friends bill, Samuel Sewell of Massachusetts, hit upon the commerce clause. Robert Williams of North Carolina then replied that he thought it "a curious idea, that all emigrants coming to this country should be

41. 2 ANNALS OF CONG. 1465 (1790) [1789-1824].

42. *Id.* 1504, 1517.

43. *Id.* 1524 (emphasis added).

44. *Id.* 1523. The vote was largely along North-South lines, 23 of the 29 members of the majority coming from the North, and five of the remaining six being Virginians, led by Madison.

## The Constitution and the Migration of Slaves

considered as articles of commerce." But even if it were granted, he continued, Congress's power is limited to "laying a tax of ten dollars upon their migration, as the migration cannot be prohibited till the year 1808." How, he asked, can "gentlemen . . . contend, from this clause of the Constitution, that Congress has a right to prevent the migration of foreigners, or remove them after they arrive"? If this could be done, then slaves "may also be sent out of the country," and the Southern states would never permit this.<sup>45</sup> The power to expel aliens conjured in the minds of the Southerners the prospect of a federal law expelling slaves. Abraham Baldwin of Georgia then took up the cause of the South, which led to an interesting exchange on the precise point of the meaning of the term "such persons." He thought Article I, Section 9, "forbidding Congress to prohibit the migration, etc., was directly opposed to the principle of this bill."

He recollected very well that when the 9th section . . . was under consideration in the Convention, the delegates from some of the Southern States insisted that the prohibition of the introduction of slaves should be left to the State Governments; it was found expedient to make this provision in the Constitution; there was an objection to the use of the word slaves, as Congress by none of their acts had ever acknowledged the existence of such a condition. It was at length settled on the words as they now stand, "that the migration or importation of such persons as the several states shall think proper to admit, should not be prohibited till the year 1808." It was observed by some gentlemen present that this expression would extend to other persons besides slaves, which was not denied, but this did not produce any alteration of it.<sup>46</sup>

This statement was hotly contradicted by the Speaker of the House, Jonathan Dayton of New Jersey, who happened to be the only member of the House who had been a delegate to the Constitutional Convention. Baldwin's words could only be ascribed "either to absolute forgetfulness, or to willful misrepresentation," he said, made "to suit the particular purposes of the opponents of the Alien bill." He insisted that "in the discussion of [Article I, Section 9's] merits, no question arose, or was agitated respecting the admission of foreigners, but on the contrary, that it was confined simply to slaves . . ." Everyone knew the reasons for changing the term. And

until the present debate arose, he had never heard that any one member supposed that the simple change of the term would en-

45. 8 ANNALS OF CONG. 1963 (1798) [1789-1824].

46. 8 ANNALS OF CONG. 1968-69 (1798) [1789-1824]; 3 FARRAND 376.

large the construction of this prohibitory provision, as it was now contended for. If it could have been conceived to be really liable to such interpretation, he was convinced that it would not have been adopted, for it would then carry with it a strong injunction upon Congress to prohibit the introduction of foreigners into the newly erected states immediately, and into the then existing states after the year 1808, as it undoubtedly does, that of slaves after that period.<sup>47</sup>

Since the records of the Convention are almost completely barren on this question, it is impossible to determine who, Baldwin or Dayton, is correct. As we saw above,<sup>48</sup> Gouverneur Morris had indeed raised a question concerning the meaning of the clause, but whether this gave rise to an agitation "respecting the admission of foreigners," we cannot know.

What we do know, however, is that Baldwin's version became the Southerners' version, the version insisted on by the friends of or apologists for slavery. And we do know that the number of these apologists increased with the passage of time, and that opinions on the constitutional question, including those offered by Jefferson and Madison, changed accordingly. Dayton and his friends were to hear this Southern argument many times in the years that followed, especially during the Missouri controversy in 1819-20, though perhaps nowhere in a more specious version than that put forward by Charles Pinckney in the House of Representatives on February 14, 1820.

The term, or word, migration, applies wholly to free whites . . . The reasons of its being adopted and used in the Constitution . . . were these; that the Constitution being a frame of government, consisting wholly of delegated powers, all power, not *expressly* delegated, being reserved to the people or the states, it was supposed, that, without some express grant to them of power on the subject, Congress would not be authorized ever to touch the question of migration hither, or emigration to this country, however pressing or urgent the necessity for such a measure might be; that they could derive no such power from the usages of nations, or even the laws of war; that the latter would only enable them to make prisoners of alien enemies, which would not be sufficient, as spies or other dangerous emigrants, who were not alien enemies, might enter the country for treasonable purposes, and do great injury . . .<sup>49</sup>

47. 8 ANNALS OF CONG. 1993 (1798) [1789-1824]; 3 FARRAND 377-78.

48. P. 207 *supra*.

49. 36 ANNALS OF CONG. 1316 (1820) [1789-1824]; 3 FARRAND 443 (emphasis added).

## The Constitution and the Migration of Slaves

In short, Article I, Section 9 had now become not a limitation on Congress's commerce powers, but a grant of power! Without the clause, its powers being limited to those "expressly delegated," Congress would not have been able to enact immigration laws! The article is a "negative pregnant, restraining for twenty years, and giving the power after." So pressing was the need to protect the country against these "spies or other dangerous emigrants" that the constitutional convention deliberately deprived Congress of all power to deal with them for twenty years! After this palpable nonsense, no one should be surprised to read Pinckney's conclusion that Congress's power to regulate commerce "between the States" was limited to "the commerce by water." Congress must be denied all power that touched the subject of slavery, and any argument, however specious, would be advanced in that cause.

To recapitulate briefly: the question of the extent of congressional power over slavery was intimately related to the meaning of the term "such persons" as it appears in the "migration or importation" clause in Article I, Section 9. We have seen that the term was a euphemism for slaves, adopted in order to avoid using "expressions which might be odious in the ears of Americans." A few men, with the exception of James Wilson all Southerners, used the term in a manner comprehending persons other than slaves—convicts, for example, or free whites. As to the clause as a whole, originally everyone saw it as a temporary restriction on Congress's power to regulate commerce—a power that extends to commerce among the states (and not merely by water) as well as to foreign commerce. It was also clear to everyone that slaves were capable of being articles of commerce. Thus, a number of men,<sup>50</sup> mostly Northerners but including James Madison, assumed that Congress, after 1808, would possess the authority, presumably derived from the power to regulate commerce, to abolish slavery, or to abolish slavery in some places, or to act in a manner calculated to have the effect of abolishing slavery. It is suggested, for example, that the antislavery Quakers of Pennsylvania would not have voted to ratify the Constitution without assurance that Congress would possess such a power; while, on the other hand, there were doubtless Southerners who would not have voted to ratify the Constitution unless they had believed that Congress would *not* possess such a power. The testimony of the men immediately concerned is thus not

50. Including, in one of its voices, a majority of the first House of Representatives. See p. 210 *supra*.



conclusive of the proper interpretation of Article I, Section 9. While the historical record demonstrates that the traditional reading of the clause can no longer be accepted without question, it is necessary to turn to a different mode of analysis to establish that the interpretation suggested here is more probably the originally intended meaning.

## II.

The clause in question reads: "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 . . ." At the very least this wording leaves Congress free, even before 1808, to prohibit the importation of slaves from abroad into a territory or a new state. Indeed, Congress exercised this power when organizing the Mississippi Territory, formed out of Georgia's western lands, and earlier when it re-enacted the law governing the Northwest Territory.<sup>51</sup> *Why*, it is natural to ask, *was this temporary restriction on the power of Congress itself restricted to the states originally existing?* It seems obvious that the purpose of the clause's particular wording was to enable Congress to prevent the spread of slavery beyond the boundaries of the existing slave states, without, at least for a time, encroaching on the established slave trade within them.<sup>52</sup> If the term "migration" were read as referring only to the immigration of free aliens from abroad and not to the interstate movement of slaves, however, as the South later insisted, this purpose could be defeated with ridiculous ease. Of what use is a power to prohibit the importation of slaves from abroad into newly created states or territories, if South Carolina or Georgia could import slaves and transport them with impunity into the same states or territories? If any force at all is to be accorded the limited congressional power to prohibit importation before 1808, the term "migration" must be read as referring to the internal movement of slaves. Only such an interpretation is consistent with the power Congress was given to prevent the spread of slavery. And only when, under increasing economic pressure from the North, the South became con-

51. See note 58 *infra*.

52. It should be remembered that at the time of the Constitutional Convention nearly everyone viewed slavery as an evil which must and would be abolished as soon as practicable. The general aversion on the part of the Convention to speaking or thinking of slavery as a permanent and viable institution was clearly illustrated by the delegates' refusal to permit the word "slave" to appear in the Constitution.

## The Constitution and the Migration of Slaves

cerned with the territorial expansion of slavery, did it become necessary to reinterpret "migration" so as to deny the existence of any congressional power over interstate traffic in slaves.

Madison, who was so emphatic on the lack of national power over the internal slave trade in his 1819 letter to Robert Walsh,<sup>53</sup> seems to have been of a different opinion at the time he, along with Hamilton and Jay, was urging the adoption of the new Constitution:

It were doubtless to be wished that the power of prohibiting the importation of slaves had not been postponed until the year 1808, or rather that it had been suffered to have immediate operation. But it is not difficult to account either for this restriction on the general government, or for the manner in which the whole clause is expressed. It ought to be considered as a great point gained in favor of humanity that a period of twenty years may terminate forever, *within these States*, a traffic which has so long and so loudly upbraided the barbarism of modern policy . . . .

Attempts have been made to pervert this clause into an objection against the Constitution by representing it on one side as a criminal toleration of an illicit practice, and on another as calculated to prevent *voluntary and beneficial emigration from Europe to America*. I mention these misconstructions not with a view to give them an answer, for they deserve none, but as specimens of the manner and spirit in which some have thought fit to conduct their opposition to the proposed government.<sup>54</sup>

Taking the phrase "within these states" at its face value, this 1788 opinion seems incompatible with what Madison wrote to Robert Walsh in 1819 during the Missouri dispute. It is difficult to see how Congress could have abolished the barbarous traffic (this "illicit practice") "within these States" unless it possessed a power over the movement of slaves from place to place "within these States," a power over the internal slave trade, and a power that was only temporarily and partially denied it by the clause in question. Until 1808 Congress was forbidden to prohibit the importation of slaves from abroad into the states then existing (but not into new states or territories) and the migration of slaves into or within the states then existing (but not into or within new states or territories). Migration, Madison is saying in 1788, is not to be understood as referring to "voluntary and beneficial emigrations from Europe to America"; the opponents of the new Constitution who have introduced this "misconstruction" into

53. Letter from James Madison to Robert Walsh, Nov. 27, 1819. 3 FARRAND 436.

54. THE FEDERALIST No. 42, at 272-73 (Mod. Lib. ed. 1937) (Madison) (emphasis added).

the debates do not even deserve an answer—in 1788. But by 1819, and in fact long before then, Madison had himself adopted this “perverted” view. Walsh taxed him with being inconsistent. He replied to Madison’s letter of November 27, 1819, pointing out that it was inconsistent with the views Madison had expressed in *Federalist 42*. Madison replied as follows:

It is far from my purpose to resume a subject on which I have, perhaps, already exceeded the proper limits. But, having spoken with so confident a recollection of the meaning attached by the convention to the term “migration,” which seems to be an important hinge to the argument, I may be permitted merely to remark . . . that a consistency of the passage cited from the *Federalist*, with my recollections, is preserved by the discriminating term “*beneficial*,” added to voluntary emigrations from Europe to America.<sup>55</sup>

It is difficult to understand how Madison thought this one word would save him. Why was it a misconstruction to say that Article I, Section 9 was “calculated to prevent voluntary and beneficial emigrations from Europe to America,” and why would it *not* have been a misconstruction to say the clause was “calculated to prevent voluntary . . . emigrations from Europe to America”? What difference is made by the adjective “beneficial”? For twenty years the clause will not prevent any kind of immigration into the original states; after twenty years—to assume with the 1820 Madison that “such persons” also refers to persons other than slaves—Congress would have the power to prevent the “migration” of every variety of European immigrant, beneficial as well as baneful.

Of course Madison may have meant that although after 1808 Congress would certainly have the power to forbid voluntary emigration into the states originally existing, it could be assumed that Congress would not exercise its power so as to exclude *beneficial* voluntary emigration. In other words, Madison could be saying that Congress can be trusted to use its authority to prohibit the “migration” only of those white persons we do not want and not to exclude those white persons, those beneficial immigrants, we are eager to admit. He did not say this, but such an interpretation allows us to make some sense of what he did say.

Some sense, yes, but not very much. For the fact is that whereas

55. Letter from Madison to Walsh, Jan. 11, 1820. 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 163-64 (1876); 3 FARRAND 438.

## The Constitution and the Migration of Slaves

under this interpretation Madison is saying that the clause reflects a trust in Congress wisely to exercise the power over immigration, the necessary implication of the fact that Congress was forbidden before 1808 to prohibit the migration of "such persons" is that the Founders were not willing to trust Congress with a power over migration into the original states! Not, that is, until 1808. Madison cannot have it both ways. Once committed to the position that "migration" refers to free aliens, he cannot escape self-contradiction.

Nor is this all. The original question still remains unanswered: why was Article I, Section 9's temporary restriction on the power of Congress itself restricted to the states originally existing? According to the latter-day Madisonian interpretation, although Congress would be forbidden until 1808 to prohibit the migration of free whites into the original states, it would not be forbidden during this period to prohibit their migration into the new states to be formed out of the Western Territories. Can this distinction be explained by any policy favored by the Southern, or even Northern, states in 1787? The difference with respect to the power over the importation of slaves is readily explained: South Carolina and Georgia wanted more slaves and hoped to import a sufficient number during the 20-year period of grace, while the Founders, conceding this to South Carolina and Georgia, limited the concession to them and the other original states in order to keep slaves out of the new states. That a similar distinction should have been made with respect to the migration of free whites is difficult to understand. Can it be argued that the original states also wanted to make certain that they would not be forbidden to admit beneficial white immigrants and, at the same time, that they were unconcerned about the migration of whites into the western lands? On the contrary, the record shows an intense concern with such migration. In the Virginia ratifying convention, for example, considerable time was spent discussing the question of the navigation of the Mississippi River. There was some fear that under the proposed constitution the new government might give up the right of free navigation which, the anti-Federalists argued, would jeopardize Virginia's policy of populating the western lands adjacent to the river. Under the Articles of Confederation, said William Grayson, people would continue to settle in these western lands, but deprive them of the hope and "privilege of navigating that river . . . and the emigration will cease." It is interesting that during this discussion no reference was made by Grayson or Patrick Henry or any of the other anti-Federalists to Article I, Section 9; yet if the Southern interpretation

of the clause is correct, Congress would have had the power to prohibit the migration of free whites into any part of the western lands lying outside the boundaries of the original states, both before and after 1808.<sup>56</sup> As General Heath said in the Massachusetts convention, the "migration or importation, etc., is confined to the states now *existing only*; new states cannot claim it."<sup>57</sup>

In short, if the term "such persons" was intended to cover free white immigrants as well as slaves, it does not appear to make any sense to distinguish, as the clause does, between the states originally existing and any new states that would be formed.

Quite apart from the internal logic of Article I, Section 9, moreover, there is legislative evidence that Congress considered itself empowered to deal with the internal movement of slaves into the territories and new states formed from them. General Heath, in the passage just cited, goes on to point out that the Continental Congress, "by their ordinance for erecting new states, some time since, declared that the new states shall be republican, and that there shall be no slavery in them." He was referring to the famous Northwest Ordinance of 1787, enacted by the Continental Congress while the new Constitution was being written in Philadelphia, which provided in its sixth article that there "shall be neither slavery nor involuntary servitude in the said territory . . . ." It is important to note here, for reasons that will soon become clear, that in one of the first statutes passed under the new Constitution, Congress re-enacted the Ordinance,<sup>58</sup> affirming its intention to follow the policy of the old Congress in keeping slavery out of the states to be formed from the western lands. Does this not indicate a belief that the national government possessed the authority to implement this policy? And is it not obvious that such a policy could have been defeated not only by the introduction of slaves from abroad, but also by the introduction of slaves from the states already existing? It was certainly obvious to the Congress that in 1804 enacted the law establishing the Territory of Orleans. In the tenth section of that statute Congress not only forbade the importation of slaves from abroad, but went on to add that it "shall not be lawful for any person or persons to import or bring into the said territory, *from any port or place within the limits of the United States . . . any slave or slaves, which shall*

56. 3 ELLIOT 349-65.

57. 2 ELLIOT 115.

58. Act of Aug. 7, 1789, ch. 8; 1 Stat. 50. The actual form of action taken was stated as a law "to adapt the [Ordinance] to the [new] Constitution of the United States."

## The Constitution and the Migration of Slaves

have been imported since the first day of May [1798], into any port or place within the limits of the United States . . . .”<sup>59</sup> This is a law regulating the movement of slaves *within* the United States. It does, at least as to slaves brought into the country after 1798, precisely what had to be done to enforce Congress’s powers under the commerce clause and Article I, Section 9. As has been pointed out above, no purpose would be served by prohibiting the importation of slaves from abroad if they could, prior to 1808, be imported into South Carolina and then sent on to a new state or territory. In 1804 Congress understood this very well, and sought to prevent it by exercising either its power over the “migration” of “such persons” into a new territory—a power derived from its general authority over commerce among the states and, even before 1808, not limited by Article I, Section 9—or its authority to “make all needful Rules and Regulations respecting the Territory . . . belonging to the United States . . . .”<sup>60</sup>

In his 1819 letter to Walsh, Madison slides over this aspect of the 1804 Act. Indeed, it might even be said that he actively misrepresents it, although he concedes implicitly that the power being exercised was the power to regulate commerce. Congress, he says, “lost no time in applying the prohibitory power to Louisiana, which having maritime ports, might be an inlet for slaves from abroad. But they forebore to extend the prohibition to the introduction of slaves from other parts of the Union.”<sup>61</sup> Not content with this flat misstatement of fact, Madison goes right on to deny that Congress, in any of the “Territorial governments created by them,” had ever forbidden the existence of slavery. This statement apparently caused him some uneasiness, for two pages later he refers to the Northwest Ordinance, a piece of legislation of which Walsh could not be presumed to be ignorant. But he says of the Ordinance that it “proceeded from the old Congress, acting, with the best intentions, but under a charter which contains no shadow of the authority exercised.” No mention whatever is made of the fact—and it must certainly have been known to him, for he was a member of the Congress that enacted the statute, and himself voted for it—that one of the first pieces of business in the new Congress,

59. Act of March 26, 1804, ch. 38; 2 Stat. 283, 286. Unfortunately the *Annals of Congress* do not record the debate, either in the House or the Senate, on this provision. It was adopted by a vote of 21-7. 13 ANNALS OF CONG. 242 (1804) [1789-1824]. A similar prohibition (“inhibiting” the admission of all slaves into Louisiana) was adopted by the House by a vote of 40-36. *Id.* 1186.

60. U.S. CONST. art. IV, § 3.

61. Letter to Robert Walsh, Nov. 27, 1819. 9 J. MADISON, WRITINGS 5 (G. Hunt ed. 1910).

acting under the authority of the new Constitution, was to re-enact this famous anti-slavery ordinance.<sup>62</sup>

Nor was this the only example of Madison's willingness to use specious arguments to support his Southern views on the slavery question. In this same letter to Walsh he asserts that nothing was said in the Constitutional Convention indicating an intention to prevent the spread of slavery, a statement that cannot be believed. He then added the following:

The case of the N. Western Territory was probably superseded by the provision against the importation of slaves by South Carolina and Georgia, which had not then passed laws prohibiting it. When the existence of slavery in that territory was precluded [by the Northwest Ordinance], the importation of slaves was rapidly going on, and the only mode of checking it was by narrowing the space open to them. It is not an unfair inference that the expedient would not have been undertaken, if the power afterward given to terminate the importation everywhere, had existed or been even anticipated.<sup>63</sup>

Consider first this last statement. Madison says that the provision prohibiting slavery in the Northwest Territory would not have been adopted had the Continental Congress anticipated the powers subsequently given to Congress in the new Constitution to forbid the importation of slaves. But when the new Congress re-enacted the Northwest Ordinance in 1789, they *did* know about this constitutional power and they did enact legislation designed to forbid slavery in the territories. Consider next the statement that the Northwest Ordinance prohibition was "probably superseded by the provision against importation by S. Carolina and Georgia . . ." What provision? Does he mean the act of Congress, effective January 1, 1808, forbidding all importation into the United States? But when it was enacted the only state permitting importation was South Carolina. So he must be referring to the Georgia statute of 1798 and the South Carolina statute of 1792 (repealed in 1803) forbidding importation from abroad, they being the only two states permitting importation at the time of the Northwest Ordinance.<sup>64</sup> Thus, these state laws superseded an act of Congress! This from the father of the Constitution whose supremacy clause states the opposite.

62. P. 218 *supra*.

63. Letter from James Madison to Robert Walsh, *supra* note 61, at 9-10.

64. W.E.B. DuBois, *THE SUPPRESSION OF THE AFRICAN SLAVE TRADE TO THE UNITED STATES OF AMERICA, 1638-1870*, at 70-93 (1896).

## The Constitution and the Migration of Slaves

Walsh certainly was not deceived by the misinformation supplied him by Madison. In an “able and eloquent” monograph published shortly thereafter, and apparently long since forgotten,<sup>65</sup> he developed at some length the argument advanced here respecting Congress’s power over the internal slave trade. To him

the whole text [of Article I, Section 9] bespeaks a compromise in which, on the one hand, the privilege of multiplying the race of slaves within their limits, either by importations from abroad or domestic migration is reluctantly yielded for a term to those southern states who made this compliance a *sine qua non* of their accession to the union; while, on the other hand, the power is conceded, by implication, to the federal government, of preventing at once the extension of slavery beyond the limits of the old states—of keeping the territory of the union, and the new states, free from the pestilence; and ultimately of suppressing altogether the diabolical trade in human flesh, whether *internal* or external.<sup>66</sup>

To him the words “such persons” refer “exclusively to negro slaves,” with the result that “migration” refers to the movement of slaves among the states and territories. Congress had to have this power, Walsh argues, because most of the territories and new states were, or would be,

*inland*, and slaves could not be imported into them, but through the old states; which last circumstance—owing to the facility of concealing beyond detection, the foreign origin of slaves introduced,—would render futile any prohibitory regulations as to mere importation.<sup>67</sup>

As to the failure of Congress to forbid slavery in the new states of Kentucky, Tennessee, Alabama, and Mississippi, this did not bespeak a lack of constitutional authority; it derived rather from the fact that the states of Virginia, North Carolina, South Carolina, and Georgia, who owned the lands out of which these new states were formed, had insisted, in the acts ceding the lands to the United States, that slavery be permitted in them. But in the Northwest Territory and the Orleans Territory, part of the purchase from Napoleon’s France, Congress

65. The words of praise are from 17 NILES’ REGISTER 307 (Jan. 8, 1820), noting the publication of the work. *The Dictionary of American Biography*, although it contains a sizeable article on Walsh, does not mention the monograph.

66. R. WALSH, ON THE SPIRIT OF THE FEDERAL CONSTITUTION, THE PRACTICE OF THE FEDERAL GOVERNMENT, AND THE OBLIGATIONS OF THE UNION, RESPECTING THE EXCLUSION OF SLAVERY FROM THE TERRITORIES AND NEW STATES 17-18 (1819).

67. *Id.* 20.



acted free of such inhibitions and was able to exercise fully the powers bestowed on it by the Constitution.

### III.

At the time of the Constitutional Convention the South, although determined not to be stripped of the immediate benefits of slaveholding by the Northern states, was not inclined to defend the virtue or permanence of its "peculiar institution." In *Federalist 42* the original Madison could look forward to the day when the barbarous slave trade would cease to exist *within* the United States, and men like Wilson openly proclaimed that the new Constitution laid the foundation "for banishing slavery . . . out of this country." But by the time of the Alien Act debates the Southerners, Madison among them, were denying congressional power over the internal slave trade; and in 1857 the Supreme Court of the United States, headed by a Southerner, found constitutional grounds for denying congressional power over slavery even in the territories, a power Congress had exercised from the very beginning.<sup>68</sup>

By 1857 most Southerners agreed with Lincoln that a house divided against itself on an issue as fundamental as slavery could not stand. Their solution, naturally enough, was to end the division by extending slavery throughout the nation. Lincoln warned of this in his debates with Douglas in 1858 when he showed how Taney's opinion in the *Dred Scott* case laid the foundation for a future decision prohibiting the states from excluding slavery from their limits.<sup>69</sup>

Jefferson and Madison, of course, never became advocates of slavery and did not espouse such a solution. Like most of their Southern colleagues during this early period, however, they were determined to keep the federal government from interfering with what to them was a purely local matter. To borrow a modern turn of phrase from another context, they were anti-antislavery men. Hence Jefferson's reaction to the Missouri controversy and specifically to the antislavery opposition to the admission of Missouri as a slave state. This was to him a Fed-

68. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

69. Harry V. Jaffa shows, contrary to some historians, that Lincoln was altogether correct in his reading of the *Dred Scott* opinions on this issue. See H. JAFFA, *CRISIS OF THE HOUSE DIVIDED* 441-44 (1959). Until the *Dred Scott* case the right to hold property in a slave was understood to derive from the laws of the states permitting slavery. In *Dred Scott*, however, the Court solemnly declared that "the right of property in a slave is distinctly and expressly affirmed in the *Constitution*"—a change of tremendous magnitude. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 451 (1857) (emphasis added).

## The Constitution and the Migration of Slaves

eralist plot, "a mere party trick," whereby the Federalists hoped to regain power by dividing the country along a geographical line that coincided with a division based on a moral principle. In proposing that Congress act to prevent slavery in Missouri, the antislavery people had sounded "a fire bell in the night" that awakened him, he said, and "filled [him] with terror." The regulation of "the condition of the different descriptions of men composing a State," and of their migration within the country was "the exclusive right of every State." For Congress to interfere would sound the "knell of the Union."<sup>70</sup> The antislavery people, and especially the new breed whose opposition to slavery was sparked by an evangelical fervor, must not be permitted to rule the country. To the same end, the powers of Congress must be confined within the narrowest of limits. Hence the assiduous effort of Southern judges, including Southern judges on the Supreme Court, to deny any power to Congress over persons as subjects of commerce.<sup>71</sup>

It is no doubt difficult to believe that men of the stature of Jefferson and Madison could have joined in a more or less deliberate campaign to distort the original meaning of the Constitution, and to do so on behalf of slavery. But consider Jefferson's words just quoted. In 1820 he was claiming that the regulation of "the condition of the different descriptions of men composing a state," and of their migration within the country, was "the exclusive right of every state." Yet as President he had approved the bill authorizing Ohio to adopt a state constitution and to enter the Union—*provided* "the same shall be republican, and not repugnant to the ordinance of the thirteenth of July [1787], between the original states, and the people and States of the territory northwest of the river Ohio."<sup>72</sup> Whatever the wishes of the people in the Ohio territory, they would not be permitted to enter the Union except as a free state: clearly Congress, in imposing such conditions upon Ohio's entry into the Union, had exercised a power over "the condition of the different descriptions of men composing a state." The antislavery provision of the 1787 Ordinance, moreover, had itself originated in a plan, drawn by Jefferson himself, to provide for the government of the new states to be formed out of the territories. This 1784 plan extended not merely to the territory north and west of the

70. T. JEFFERSON, *WORKS* (Ford ed. 1899) 157, 158, 162 (letters to John Holmes, April 22, 1820 and Charles Pinckney, Sept. 30, 1820).

71. *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837); *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 507 (1841) (Taney, C. J., concurring); *The Passenger Cases*, 48 U.S. (7 How.) 283, 464 (Taney, C. J., dissenting).

72. Act of April 30, 1802, § 5, ch. 40; 2 Stat. 173.

Ohio River, but "to all parts of the national domain," as Julian Boyd puts it, "those already acquired as well as those to be acquired in the future . . ."<sup>73</sup> This plan, which formed the basis of the 1784 ordinance for the temporary government of the Northwest Territory, provided that "after the year 1800 of the Christian era there shall be neither slavery nor involuntary servitude in any of the said states . . . ." Although this antislavery provision was dropped from the 1784 Ordinance on final passage,<sup>74</sup> it reappeared in a slightly altered version in the famous 1787 Ordinance.

In 1789, as we have seen, Madison asserted that the Continental Congress had had no authority to adopt such a provision;<sup>75</sup> in 1820 Jefferson claimed that the states themselves, and only the states, had any control of the subject; and in our own time Julian Boyd has written that "there was nothing in the Articles of Confederation to warrant the abolition of slavery . . . ."<sup>76</sup>

Yet the Continental Congress, working with a provision drawn by the earlier Jefferson, solemnly and officially forbade slavery not only in the territory but *in the states* to be formed out of the territory. Where did they think they got such authority? The final paragraph of Jefferson's 1784 plan reads as follows:

[T]he preceding articles shall be formed into a Charter of Compact, shall be duly executed by the President of the U.S. in Congress Assembled [,] shall be promulgated, and shall stand as fundamental constitutions between the thirteen original states, and those now newly described, unalterable but by the joint consent of the U.S. in Congress Assembled and of the particular state within which such alteration is proposed to be made.<sup>77</sup>

Thus, according to Jefferson in 1784 and the entire Continental Congress in 1787 (with the sole exception of Robert Yates of New York, who also refused to vote for the new Constitution) the power to prohibit slavery did not derive from a power to regulate commerce

73. 6 THE PAPERS OF THOMAS JEFFERSON 582 (J. Boyd ed. 1957).

74. Six states of the nine present voted in favor of it, one short of the requirement for passage. Of the 23 members voting, 16 voted in its favor. 26 JOURNAL OF THE CONTINENTAL CONGRESS 247 (G. Hunt ed. 1928).

75. Letter from James Madison to Robert Walsh, Nov. 27, 1819. 3 FARRAND 436.

76. 6 THE PAPERS OF THOMAS JEFFERSON, *supra* note 73, at 588. As to how the anti-slavery provision, deleted from the 1784 Ordinance was put back into the 1787 Ordinance, see J. BARRETT, EVOLUTION OF THE ORDINANCE OF 1787, at 69, 76 (1891).

77. This is the version of Jefferson's plan as it appears in the Report of the Committee (March 1, 1784). 6 THE PAPERS OF THOMAS JEFFERSON 605 (J. Boyd ed. 1957). Jefferson, along with Jeremiah Townley Chase and David Howell, was a member of this committee. The language in the Report was altered slightly on final passage. *Id.* 615. It appears, after further alteration, as Section 14 of the 1787 Ordinance.

## The Constitution and the Migration of Slaves

among the states (the Articles of Confederation bestowed no such power on Congress) or even from a power to govern the territories (in Jefferson's plan the prohibition of slavery extended to the states as well as the territories), but from a power to make a compact, in this case a compact between the original states and the new states—states not yet existing but “newly described.”

Whatever the status, or the legality, of such a compact and the powers derived from it,<sup>78</sup> the Continental Congress reasserted them in the 1787 Ordinance. The First Congress, acting under the new Constitution, implicitly asserted its power over slavery in the territories and in new states to be carved out of them when it re-enacted the 1787 Ordinance.<sup>79</sup> In 1802, when the Ohio bill was signed, Thomas Jefferson and Congress affirmed that power once again. Eighteen years later he claimed that such authority did not belong to the Government of the United States.

Such a denial of national authority is quite consistent with a principle long associated with Jefferson's name, but for Madison the theory of states' rights, which he espoused vigorously in the Virginia Resolutions of 1798 and implicitly throughout the later slavery debates, is directly and profoundly contrary to the principle of the large commercial republic on which his fame as a political thinker largely rests. In *Federalist 10* he explained the necessity for size in a popularly governed republic:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens . . . .<sup>80</sup>

78. In *Strader v. Graham*, 51 U.S. (10 How.) 82, 96 (1850), Chief Justice Taney went out of his way to say that the six articles of the Northwest Ordinance, “said to be perpetual as a compact, are not made a part of the new Constitution.” He cited *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845), and *Permoli v. The First Municipality*, 44 U.S. (3 How.) 588 (1845), but in none of the three cases was this question squarely before the Court.

79. Act of Aug. 7, 1789, ch. 8; 1 Stat. 50. See p. 218 *supra*. In addition to the amorphous compact theory of the Continental Congress, of course, the First Congress had Article IV, Section 3 (the power to make rules and regulations respecting the territories) and Article I, Section 8 (the commerce power) to rely on.

80. *THE FEDERALIST* No. 10, at 60-61 (Mod. Lib. ed. 1937) (Madison).

The *causes* of factions, those impassioned groups that pursue ends inimical to the common good, cannot be eliminated by any means consonant with republican principles. But their *effects* can be controlled. In size, both of population and territory, there is to be found a wholly republican remedy to the problem of republican, or popular government; for in a large republic there can be the variety of interests giving rise to the variety of factions needed to save the country from the oppressive rule of any one of them.

But size alone, Madison realized, will not necessarily produce the required diversity. It is "the possession of different degrees and kinds of property" that produces "a division of the society into different interests and parties."<sup>81</sup> What is called for is the promotion of these different kinds of property. And commerce and industry, Madison believed, breed this diversity of property and interests and help insure the necessary multiplicity of factions.<sup>82</sup> As Martin Diamond once said, "a large Saharan republic would be rent by the Marxist-like class struggle between date-pickers and oasis-landholders." Thus the rapid commercialization of the United States is one major premise on which Madison's famous argument rests. Yet within a very few years he took his stand with Virginia, whose economy rested on agriculture and the breeding of slaves to be used in agriculture elsewhere, against Hamilton, the great and consistent advocate of the large commercial republic.

The argument of *Federalist 10* has another premise, this one more explicitly stated. To the extent that localities are marked by simple economies rather than by "variety and complexity" (and this will be the case if they do not combine and permit the growth of a large mass market), factions will be able to gain local political control. Thus if the decisive political decisions are made in the localities where "factious leaders" are in control, the size and diversity of the whole will be of no avail. Size and diversity will solve the problem of faction, which is *the* problem of popular government, only if the decisive political decisions are made in the arena where faction does not command—in the counsels of the national government. That is to say, the solution to the problem of popular government requires *one* country with a government empowered to govern in all matters affecting the country

81. *Id.* 55.

82. Furthermore, as Madison asserts in *Federalist 10*, the representatives in Congress will be abler and more disinterested men; and precisely because of the great number and variety of interests they will be called upon to reconcile, they will be freer to ignore the demands of factions and to follow the rules of justice.

as a whole—"anything in the Constitution or Laws of any State to the contrary notwithstanding." Yet in connection with the Alien Act a decade later, when his Southern friends saw a threat to slavery,<sup>83</sup> Madison reacted by drafting the Virginia Resolutions, proclaiming the right of the "sovereign states" to exercise decisive political control. In short, he abandoned the large commercial republic solution and joined Jefferson, whose passion for the small agricultural republic is one of the commonplaces of American history.

It is possible, of course, that Madison had changed his mind; that he had become convinced that a commercial republic would lead to a vulgarization of humanity—that Rousseau was right in his criticism of Locke—and that the small, essentially rural, virtuous republic offered the only solution; that "moral and religious motives" could be relied on, or would have to be relied on because further reflection had convinced him of the inadequacy of the alternative. Or he may have been convinced by the policies of the Federalist administrations of Washington and Adams that, unless some radical changes were introduced into the constitutional system, there was a genuine danger of a centralized despotism, and that the most effective safeguard would be to shift the balance of power between the national government and that of the states. Such a shift, for such a reason, would only incidentally have the effect of leaving the states with complete authority to deal with the slavery problem. Whatever his reasons—and to account for them is a task for some future biographer—Madison turned his back on the republic that he, as much as any man, had brought into being. The later Madisonian republic, unlike the original, was no enemy to slavery, not even to its extension into the western lands.

Whether Congress, had it adhered to the original intent of Article I, Section 9, would have exercised its commerce powers to forbid the migration of slaves within the country after 1808 is, of course, a question we cannot answer. The early and almost unanimous embarrassment among Southerners concerning their "peculiar institution" soon gave way to praise of slavery as an institution beneficial alike to slaveholder and slave, a shift which was reflected in all national debates touching the issue and which produced, in time, such judicial decisions as *Dred Scott*. One cannot help wondering what the course of American history might have been if Madison and Jefferson had resolutely and

83. See p. 211 *supra*.

publicly maintained their early hopes that Congress could do something about the evils of slavery and that it would "countenance the abolition" of the slave trade and adopt regulations forbidding the introduction of slaves "into the new States to be formed out of the Western Territory."<sup>84</sup> Instead they chose to act in the manner that inspired men such as Calhoun. Similarly one cannot help wondering what the result might have been had all the states, Northern and Southern, been encouraged to approach one another in variety and complexity through the fostering of commerce in both regions. In *The Federalist* Madison had expressed the hope that with the passage of time and with an increase of commercial intercourse among the peoples of the various states, there would come a "general assimilation of their manners and laws."<sup>85</sup> But instead of fostering commercial policies which might have brought about a "general assimilation" characterized by antislavery "manners and laws," Madison and Jefferson denied the full scope of Congress's commercial powers, and Madison even vetoed the internal improvement bill designed to diversify the Southern economy.<sup>86</sup> In 1819, moreover, in his letter to Robert Walsh, Madison called for a "diffusion of the slaves" throughout the new states, arguing that this would facilitate their manumission and improve their "moral & physical condition." The more likely result, since the slave population was growing, would have been a "general assimilation of . . . manners and laws" quite the opposite of the sort he had originally hoped for. A civil war was required to prevent that.

84. See note 40 *supra*.

85. THE FEDERALIST No. 53, at 351 (Mod. Lib. ed. 1937) (Madison).

86. 2 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 584-85 (1900). The date of the veto was March 3, 1817.