Sean Wilentz, No Property in Man: Slavery and Antislavery at the Nation's Founding (Harvard, 2018)

The first incitement over slavery came in the House in May 1789, two months into Congress's very first session, and it was relatively mild. Nearing the end of a debate over import duties, the Virginia representative Josiah Parker rankled the Lower South by proposing a tax on imports of slaves at ten dollars per head, the full rate specified in the Constitution. Parker's proposal wound up going nowhere, as would every subsequent effort to tax the Atlantic slave trade, but it elicited three notable responses. The ever-contentious James Jackson of Georgia, who praised slavery as a benevolent institution, reasonably depicted the proposal as an attack on slavery as well as the slave trade, then denounced any duty on slave imports as "the most odious tax Congress could impose."[3] Jackson could not dispute the constitutionality of the duty, but he called it nevertheless an oppressive intrusion on the slaveholders' peculiar form of property.

The other two responses came from former delegates to the Federal Convention. James Madison, now a Virginia congressman, eloquently defended Parker's proposal as a partial fulfillment of the Federal Convention's intention to express "the sense of America" on the trade's inhumanity. "It is to be hoped," he declared, "that by expressing a national disapprobation of this trade, we may destroy it, and save ourselves from reproaches, and our posterity the imbecility ever attendant on a country filled with slaves." For decades to come, antislavery advocates would base the legitimacy of their cause on the framers' supposed hostility to slavery as well as the slave trade. The Connecticut congressman Roger Sherman, meanwhile, taking up a standing concern of his, opposed the bill and objected to "the insertion of human beings as an article of duty among goods, wares, and merchandise." The Federal Convention, he said, had drawn a clear distinction—"the constitution does not consider these persons as a species of property; it speaks of them as persons"—so he preferred that any duty on slaves be considered independently. Whatever their views of the slave trade and federal authority, everyone could agree that the framers had categorically refused to validate property in man.[4]

A year later, the well-plotted Quaker and abolitionist petition effort involving Benjamin Franklin caught Congress and the nation by surprise, reaching the House in the midst of a momentous struggle over Treasury Secretary Alexander Hamilton's plans to finance the public credit. As it happened, the protracted House debate over the petitions would also have far-reaching implications.

The petitioners—two groups of Quakers from the Middle States as well as Franklin and the Pennsylvania Abolition Society—worded their appeals carefully: rather than bid Congress to abolish slavery and the slave trade summarily, or to enact any other specific legislation, they asked representatives to do all they could within the limits of their constitutional authority. The PAS petition, by far the most sweeping of the three, asked the House and Senate to pay "serious attention to the subject of slavery" and "step to the very verge of the powers vested in you" to abolish the institution itself, pointing to the powers implied by the Constitution's promise to pursue the general welfare and blessings of liberty. The petitioners requested that Congress lay aside its pressing

business and ascertain what the PAS confidently called the federal government's "many important and salutary powers" over the Atlantic slave trade and (in the PAS petition's case) domestic slavery itself.[5]

Lower South members in the House reacted swiftly and vehemently. Apart from the ten-dollar import duty, they asserted, the Constitution expressly barred Congress from taking any action connected to the slave trade prior to 1808, as well as any action, at any time, interfering with slavery or geared toward its abolition. The petitions were blatantly unconstitutional, the South Carolina grandee and lawyer William Loughton Smith declaimed; as Congress had no right to interfere with slavery, he said, the petitions amounted to "an attack upon the palladium of the property of our country." The House had no lawful option, Smith contended, but to reject them out of hand, thereby affirming the Constitution's compromises over slavery and protecting the slaveholders' property rights. "Perhaps the petitioners . . . did not think their object unconstitutional," he remarked acidly, "but now that they are told that it is they will be satisfied with the answer, and press it no further." Behind the dismissive rebuttals were dark and definitive threats. Were the House to shirk its obligation and as much as refer the petitions to a committee, the South Carolinian Aedanus Burke declared, it would "blow the trumpet of sedition in the Southern states." Slaveholders, James Jackson vowed, "will never suffer themselves to be divested of their property without a struggle."[6]

The intensity of the conflict stemmed from the contradictory outcomes of the ratification debates and the lack of any clear, authoritative statement about the new government's powers over slavery. Organized abolitionists and Quakers were making good on antislavery Federalists' assurances during the ratification debates and asking Congress to determine the full extent of its implied powers over both slavery and the slave trade. The Lower South, understandably, was appalled, given

all that Charles Cotesworth Pinckney and the other southern Federalists had said in 1787 and 1788 about the Constitution placing slavery and, for a time, the Atlantic slave trade off-limits. Now, though, abruptly, in the second session of the very first Congress, self-confident northern Quakers and abolitionists led by the famous Franklin were petitioning the House and Senate to do everything in their power to destroy slavery as well as the slave trade. If Congress even entertained the antislavery petitions, the proslavery men concluded, it would prove that the Anti-Federalists had been correct all along and that the Constitution was a treacherous sham.

The rest of the House recoiled at the Lower South's vitriol. A few speakers expressed dismay at the southerners' apparent devotion to slavery, but most focused on the flimsiness of their constitutional arguments. Insofar as the petitions asked Congress to act within its constitutional powers, some speakers pointed out, it was nonsensical to dismiss them as unconstitutional. (To the southerners, the petitioners' claim that any such powers might exist was the true absurdity.) Other speakers directly confronted the implication that Congress lacked any authority whatsoever over either slavery or, until 1808, the slave trade. The Lower Southerners seemed to assume that because the Constitution precluded federal interference with slavery in the existing slaveholding states it barred any interferenee at all. To the contrary, members instructed them, Congress had ample authority, as Elbridge Gerry put it, "to intermeddle in the business," beginning with its stipulated power to regulate (though not abolish) the Atlantic slave trade. Gerry offered the hypothetical example of a plan whereby the government would purchase every slave in the Union and compensate the masters with proceeds from the sale of public lands in the West. Gerry could no more envisage a summary, involuntary, uncompensated national emancipation than most antislavery northerners could. Still,

he insisted that Congress could, if it so chose, take discrete actions to end slavery as well as the slave trade, which was heresy to the Lower South slaveholders.[7]

James Madison went even further in sketching out Congress's powers, albeit in somewhat contradictory ways. Two years earlier, during ratification, Madison had placated fractious Virginia slaveholders by portraying the Constitution as a bulwark for their property in slaves. Now, however, exasperated by the Lower South slaveholders' aggressiveness, and happy to pursue additional restrictions on the slave trade, he allowed that aspects of the antislavery petitions might be unconstitutional, but that was no reason to dismiss them. He then calmly alluded to "a variety of ways" whereby Congress could "countenance" the Atlantic slave trade's restriction, including direct if limited supervision of slavery itself. Madison's view proceeded from his assurance that the federal government enjoyed explicit control over governing the western territories. At the Federal Convention, he had been the first to propose that the Constitution authorize Congress "to institute temporary Governments" in the territories before they became states.[8]

Because the Constitution had not validated property in man, it followed that Congress could deal with slavery in the territories as it saw fit. Accordingly, Madison postulated a law that would reduce the slave trade by limiting the introduction of slaves to the western Georgia cession lands, where, he said, "Congress have certainly the power to regulate the subject of slavery." That power, he said, refuted the claim "that Congress cannot constitutionally interfere in the business in any degree whatever."[9] Rendering the federal government powerless over slavery where it existed, it turned out, did not strip it of implied powers over the international slave trade or, for that matter, over slavery itself in the national territories.

The Lower South representatives, who left Madison's claims unanswered, could take comfort when the Senate brusquely rejected the antislavery petitions, virtually ensuring that no new federal law would come of the petition campaign.[10] But the Senate's rejection also focused public attention more sharply on the struggle inside the House, where, despite the three-fifths clause, the Lower South was badly outnumbered. ("Alass—how weak a resistance against the whole house," the South Carolinian Smith wrote to a friend.)[11] By a vote of 43 to 11, the House approved sending the petitions to a special committee. Virtually every northerner and large majorities from the Upper South voted aye.[12] Here was the Lower South's nightmare from the convention come to life: isolated and outmanned, their representatives could not prevent Congress from looking into the abolition of slavery as well as the slave trade. But the Lower South congressmen, possibly relieved by the Senate vote, did not blow the trumpet of sedition as they had threatened; instead they refused further cooperation in the matter and regrouped. As a result, the House special committee appointed to consider the petitions consisted of six northerners and a Virginian. To all appearances, James Pemberton of the PAS observed, the group was "favorable to the cause of humanity," and he and his associates, including the untiring Quaker abolitionist Warner Mifflin, worked closely with the members behind the scenes, at one point commenting on a draft of the report.[13] Yet the committee's chairman, Abiel Foster of New Hampshire, also expressed privately his concerns about further provoking the sullen slaveholders. Pemberton began to fear that Foster might persuade the members to "appease the South."[14]

The Foster committee's report, delivered three weeks later, appeared at first glance to smother the petitioners' demands, chiefly by acknowledging that Congress was powerless to end the Atlantic slave trade before 1808. Yet in its quiet way, the report was also explosive; indeed,