

## Slavery and Constitutionalism

During the heated debate in the Constitutional Convention over proportional representation in the upper house of the Congress, James Madison tried to suggest that the real division in the Convention was not between the large and small states but between the slaveholding and the non-slaveholding states. Yet every delegate sensed that this was a tactical feint, designed by Madison to get the Convention off the large-small state division that was undermining his desperate effort to establish proportional representation in both houses.

It was a shrewd move, since Madison knew that slavery was a major problem for the Convention. The American Revolution had made it a problem for all Americans. Although some conscience-stricken Quakers began criticizing the institution in the middle decades of the eighteenth century, it was the Revolution that galvanized and organized their efforts and produced the first major solution to that problem. In fact, the Revolution created the first antislavery movement in the history of the world. In 1775 the first antislavery convention known to humanity met in Philadelphia at the very time the Second Continental Congress was contemplating a break from Great Britain. The Revolution and antislavery were entwined and developed together.<sup>1</sup>

Hereditary chattel slavery—one person owning the life and labor of another person and that person's progeny—is virtually incomprehensible to those living in the West today, even though as many as twenty-seven million people in the world may be presently enslaved.<sup>2</sup> In fact, slavery has existed in a variety of cultures for thousands of years, including those of the ancient Greeks and Romans, the medieval Koreans, the Pacific Northwest Indians, and the pre-Columbian Aztecs. The pre-Norman English practiced slavery, as did the ancient Vikings, the many ethnic groups of Africa, and the early Islamic Arabs; indeed, beginning in the 600s Muslims may have transported over the next twelve centuries as many sub-Saharan Africans to various parts of the Islamic world, from Spain to India, as were taken to the Western Hemisphere.<sup>3</sup>

Yet, as ubiquitous as slavery was in the ancient and pre-modern worlds, including the early Islamic world, there was nothing anywhere quite like the African plantation slavery that developed in the Americas. Between 1500 and the mid-nineteenth century, at least eleven or twelve million slaves were brought from Africa to the Americas. Much of the prosperity of the European colonies in the New World depended upon the labor of these millions of African slaves and their enslaved descendants. Slavery existed everywhere in the Americas, from the villages of French Canada to the sugar plantations of Portuguese Brazil.

Slavery in the British North American mainland differed greatly from the slavery in the rest of the New World. In the course of the seventeenth and eighteenth centuries the English mainland colonies imported three to four hundred thousand African slaves, a very small percentage of the millions that were brought to the Caribbean and South American colonies, where the mortality rates were horrendous. Far fewer slaves died prematurely in the North American mainland. In fact, by the late eighteenth century the slaves in most of

the English mainland colonies were reproducing at the same rates as whites, already among the most fertile peoples in the Western world.

Like people everywhere in premodern societies, most American colonists initially took slavery for granted, felt no guilt over it, and simply accepted it as the lowest and meanest rank in a complicated hierarchy of dependencies and statuses of unfreedom. By 1819 John Adams knew that slavery was no longer considered normal and acceptable in the way it had been before the Revolution. He recalled that in colonial Massachusetts sixty or so years earlier the owning of slaves "was not disgraceful," and "the best men in my Vicinity—thought it not inconsistent with their Characters."<sup>4</sup> With half of colonial society at any one moment legally unfree—that is, lacking the capacity to engage in civic life, to marry, to travel, to own property, and liable at any time to be bought and sold—the peculiar character of lifetime, hereditary black slavery was not always as obvious to colonial gentry elites as it would become during the Revolutionary movement.

To many slaveholders and other elites in the colonial period, black slavery often seemed indistinguishable from the unfreedom of white servitude. Bonded servants were everywhere in the colonies, especially in the middle and northern colonies. As late as 1759 Benjamin Franklin thought that indentured servants brought from Britain, Ireland, and Germany were performing most of the labor of the middle colonies. In fact, one-half to two-thirds of the white immigrants to the colonies came as indentured servants. Among these immigrants there were an estimated 50,000 British and Irish convicts and vagabonds shipped to America between 1718 and 1775 and bound over as servants for periods of seven or fourteen years, or in some cases even for life.<sup>5</sup>

Of course, white servitude was rarely for life and was never hereditary; nevertheless, bonded servitude in North America was a

much harsher, more brutal, and more humiliating status than it was in England. For that reason, colonial bonded servitude shared some of the dependent nature of black slavery—though not the blackness that English culture from the sixteenth century had associated with night, the devil, and evil.<sup>6</sup> Although white servants were members of their master's household and enjoyed some legal rights, their contracts were a kind of property that could be bought and sold. Colonial servants were not simply young people drawn from the lowest social ranks but, more commonly, indentured immigrants who had sold their labor in order to get to the New World. Precisely because these imported servants were expensive, their indentures or contracts were written, and their terms of service were longer than those of English servants—five to seven years rather than the yearlong oral agreements typical in England.<sup>7</sup>

Because labor was so valuable in America, the colonists enacted numerous laws designed to control the movement of white servants and to prevent runaways. There was nothing in England resembling the passes required in all the colonies for traveling servants. As expensive labor, most colonial servants or their contracts could be bought and sold, rented out, seized for the debts of their masters, and conveyed in wills to heirs. Colonial servants often belonged to their masters in ways that English servants did not. They could not marry, buy or sell property, or leave their households without their master's permission. Those convicted of crimes were often bound over for one or more years to their victims who could use or sell their labor.<sup>8</sup>

No wonder newly arriving Britons were astonished to see how ruthlessly Americans treated their white servants. "Generally speaking," said royal official William Eddis upon his introduction to Maryland society in 1769, "they groan beneath a burden worse than Egyptian bondage." Eddis even thought that black slaves were

better treated than white servants.<sup>9</sup> But in this cruel, premodern, pre-humanitarian world, better treatment of the lower orders was quite relative. Superiors took their often brutal and fierce treatment of inferiors as part of the nature of things and not something out of the ordinary—not in a society where the life of the lowly seemed cheap. Even the most liberal of masters could coolly and callously describe the savage punishments they inflicted on their black slaves. “I tumbled him into the Sellar,” wrote Virginia planter Landon Carter in his diary, “and there had him tied Neck and heels all night and this morning had him stripped and tied up to a limb.”<sup>10</sup> But whites among the mean and lowly could be treated harshly too. In the 1770s a drunken and abusive white servant being taken to Virginia was horsewhipped, put in irons and thumb-screwed, and then handcuffed and gagged for a night; he remained handcuffed for at least nine days.<sup>11</sup>

All those who were dependent and unfree had much in common. As late as the 1750s immigrant redemptioners, as one observer noted, were being bought in parcels at Philadelphia and driven in tens and twenties “like cattle to a Smithfield market and exposed to sale in public fairs as so many brute beasts.” Like black slaves, white servants too could be advertised for sale as “choice” and “well-disposed.”<sup>12</sup>

Because the subjugation of colonial servitude was so much harsher and more conspicuous than it was in England, it was sometimes difficult for colonial elites to perceive the distinctive peculiarity of black slavery. Slavery often seemed to be just another degree of unfreedom, another degree of labor, more severe and more abject, to be sure, but not in the eyes of many colonial gentry all that different from white servitude and white labor. Both kinds of servants shared the contempt in which manual labor traditionally was held, and both were plainly dependent in a world that valued

only independence. Slaves were often described simply as another kind of dependent in the patriarchal family composed of many dependents. “Next to our children and brethren by blood,” said Reverend Thomas Bacon of Maryland in 1743, “our servants, and especially our slaves, are certainly in the nearest relation to us. They are an immediate and necessary part of our households.” Thus, black slaves and white servants were often lumped together as dependents. William Byrd in his diary mentioned about fifty servants by name, but he rarely differentiated between black and white servants; when he did so, it was only to distinguish between two servants bearing the same name. In colonial Virginia black slaves and lowly whites mingled with one another in horse racing and cockfighting sites and in churches much more frequently than they would following the Revolution. Still, the existence of slavery and servitude everywhere bred a pervasive sense of hierarchy where some were free and independent and the rest were unfree and dependent.<sup>13</sup>

The Revolution changed everything: unfreedom could no longer be taken for granted as a normal part of a hierarchical society. Almost overnight black slavery and white servitude became conspicuous and reviled in ways that they had not been earlier. Under the pressure of the imperial debate the Revolutionaries tended to collapse the many degrees of dependency of the social hierarchy into two simple distinctions and thus brought into stark relief the anomalous nature of all dependencies. If a person wasn’t free and independent, then he had to be a servant or slave. Since the radical Whig writers, from whom the colonists drew many of their ideas, tended to divide society into just two parts, the “*Freemen*,” who in John Toland’s words, were “men of property, or persons that are able to live of themselves,” and the dependent, “those who cannot subsist in this independence, I call *Servants*,” it was natural during the imperial crisis for the colonists to apply this same dichotomy

to themselves.<sup>14</sup> If they were to accept the Stamp Act and other parliamentary legislation, they would become dependent on English whims and thus become slaves.

Suddenly the debate between Great Britain and its colonies made any form of dependency equal to slavery. "What is a slave," asked a New Jersey writer in 1765, "but one who depends upon the will of another for the enjoyment of his life and property?" "Liberty," said Stephen Hopkins of Rhode Island, quoting the seventeenth-century radical Whig Algernon Sidney, "solely consists in an independency upon the will of another; and by the name of slave, we understand a man who can neither dispose of his person or goods, but enjoys all at the will of his master." If Americans did not resist the Stamp Act, said Hopkins, slaves were precisely what they would become. In 1775 John Adams drew the ultimate conclusion and posed the social dichotomy about as starkly as possible. "There are," said Adams simply, "but two sorts of men in the world, freemen and slaves."<sup>15</sup>

This sharp dichotomy made white servitude impossible to sustain. If all dependencies, including servitude, were to be equated with slavery, then white male servants balked at their status and increasingly refused to enter into any indentures. They knew the difference between servitude and slavery. If they had to be servants, they wanted to be called "help," and they refused to call their employers "master" or "mistress." Instead, many substituted the term "boss," derived from the Dutch term for master. By 1775 in Philadelphia the proportion of the work force that was unfree—composed of servants and slaves—had already declined to 13 percent from the 40–50 percent that it had been at mid-century. By 1800 less than 2 percent of the city's labor force remained unfree. Before long, for all intents and purposes, indentured white servitude disappeared everywhere in America.<sup>16</sup>

The rapid decline of servitude made black slavery more conspicuous than it had been before—its visibility heightened by its black racial character. Suddenly, the only unfree people in the society were black slaves, and for many, including many of the slaves themselves, this was an anomaly that had to be dealt with. However deeply rooted and however racially prejudiced white Americans were, slavery could not remain immune to challenge in this new world that was celebrating freedom and independency as never before.

Although everyone knew that eliminating slavery would be far more difficult than ridding the country of servitude, there were moments of optimism, even in the South. For the first time in American history the owning of slaves was put on the defensive. The colonists didn't need Dr. Samuel Johnson's jibe in 1775—"how come we hear the loudest yelps for liberty from the drivers of Negroes?"—to remind them of the obvious contradiction between their libertarian rhetoric and their owning of slaves.<sup>17</sup> "The Colonists are by the law of nature free born," declared James Otis of Massachusetts in his 1764 pamphlet, "as indeed all men are, white or black." Otis went on to challenge the owning of slaves and the practice of the slave trade and to point out that "those who barter away other men's liberty will soon care little for their own."<sup>18</sup>

Not all Americans who criticized slavery were as frank and spirited as Otis, but everyone who thought himself enlightened became uneasy over slavery in his midst. Even some of the southern planters became troubled by their ownership of slaves. This was especially true in the colony of Virginia.

In 1766 a young Thomas Jefferson was elected to Virginia's House of Burgesses, where, as he says in his autobiography, he introduced a measure for the emancipation of slaves in the colony. His colleagues rejected the measure, but they did not reject Jefferson, who soon

became one of the most important members of the legislature. By the time he wrote his instructions to the Virginia delegation to the First Continental Congress, immediately published as *A Summary View of the Rights of British America* (1774), he openly voiced his opposition to the "infamous" slave trade and declared that "the abolition of domestic slavery is the great object of desire in these colonies where it was unhappily introduced in their infant state."<sup>19</sup>

Many of Jefferson's Virginia colleagues, equally uncomfortable with their slaveholding, were gradually coming to think differently about the future of the institution. They sensed that they had too many slaves already, and they thus became increasingly sympathetic to ending the despicable overseas slave trade. Tobacco had exhausted the soil, and many planters, including George Washington, had turned to growing wheat, which did not require the same human labor as tobacco production. Consequently, more and more slaveholders had begun hiring out their slaves to employers in Richmond and Norfolk. This suggested to many that slavery might eventually be replaced by wage labor. Some Virginians hoped that the impending break from Great Britain might allow them not only to end the slave trade but to end the colony's prohibition against manumissions.<sup>20</sup>

Although at least one historian has claimed that the Somerset decision of 1772 "caused a sensation in the colonies," prominent Virginian slaveholders paid little attention to it, even though the decision was soon published in a Virginia newspaper.<sup>21</sup> Landon Carter never mentioned the decision in his diary. Neither did Jefferson and Washington or their many correspondents allude to the Somerset case in their many exchanges of letters. The same was true of Virginia's leading Revolutionaries Richard Henry Lee, Edmund Pendleton, and George Mason; although all were substantial slaveholders, none commented on the Somerset decision in his letters.

James Somerset, a slave of Charles Steuart, a Virginia official, had run off when his master was visiting London. After being captured, Somerset, with the aid of Granville Sharp and other British abolitionists, sued for his freedom. Lord Mansfield, chief justice of the King's Bench, freed Somerset, stating that slavery required positive law for its existence, and since no such law existed in England, Somerset could not be enslaved.<sup>22</sup> This was a narrowly argued decision, and it had no application to the colonies; indeed, no colonial official in North America took notice of the decision.<sup>23</sup>

But black slaves were aware of the decision. Backed by anti-slavery advocates in the northern colonies, they picked it up and, especially in Massachusetts, sued for their freedom. In Virginia, however, there was little objection to the decision, which was not really contrary to the sentiments of many of Virginia's enlightened slaveholding planters. In fact, the article in the *Virginia Gazette* that announced the Somerset decision mocked the logic of color-based slavery, declaring that "if Negroes are to be slaves on Account of Colour, the next step will be to enslave every Mulatto in the Kingdom, then all the Portuguese, then the brown complexioned English, and so on till there be only one Free Man left, which will be the Man of the palest Complexion in the three Kingdoms."<sup>24</sup> At the time of the Revolution at least some Virginians did not believe that all blacks had to be slaves, and many others were anything but fearful of antislavery. In 1791 the board of visitors of the College of William and Mary, slaveholders all, awarded an honorary degree to Granville Sharp, the leading British abolitionist at the time.

All these developments in Virginia made the possibility of ending slavery seem increasingly realistic, which in turn led to the emergence of a growing number of antislavery societies in the Upper South—more even than in the North. If Virginians, dominating the North American colonies as they did, could conceive of an end to

slavery, or least an end of the dreadful slave trade, then many other Americans could see the possibility of entering a new enlightened antislavery era—an era that would coincide with their break from Great Britain.<sup>25</sup>

Nearly everywhere there was a mounting sense that slavery was on its last legs and was dying a natural death. On the eve of the Revolution Dr. Benjamin Rush of Pennsylvania believed that the desire to abolish the institution “prevails in our counsels and among the all ranks in every province.” With opposition to slavery growing throughout the Atlantic world, he predicted in 1774 that “there will be not a Negro slave in North America in 40 years.”<sup>26</sup>

Rush and the many others who made the same predictions could not, of course, have been more wrong. They lived with illusions, illusions fed by the anti-slave sentiments spreading in Virginia and elsewhere in the northern colonies. Far from dying, slavery was on the verge of its greatest expansion. There were more slaves in the United States at the end of the Revolutionary era than at the beginning.

Because Virginia possessed two hundred thousand slaves, over 40 percent of the nearly five hundred thousand African American slaves who existed in all the North American colonies, its influence dominated and skewed the attitudes of many other colonists. Farther south, there was another, much harsher reality.

Both South Carolina, with about seventy-five thousand slaves, and Georgia, with about twenty thousand, had no sense whatsoever of having too many slaves. For them slavery seemed to be just getting underway. Planters in these deep southern states had no interest whatsoever in manumitting their slaves and in fact were eager to expand the overseas importation of slaves. If only other Americans paid attention, they would have realized that the Carolinians and Georgians would brook no outside interference with their property

in slaves. Washington knew this, which is why he claimed that South Carolina and Georgia were the only really “Southern states” in the Union. Virginia, he said, was not part of the South at all, but was one of “the middle states,” not all that different from Pennsylvania, New Jersey, and New York.<sup>27</sup>

By the end of 1774 Virginia and the other colonies had already become independent in fact. Royal governors looked on in amazement as their authority slipped away, to be replaced from below by local governments composed of committees of various sorts. Lord Dunmore, royal governor of Virginia, like most royal governors, fled from the Revolutionary mobs to the safety of a British warship. He was desperate for military support to put down the rebels, and in early November 1775 he issued a proclamation promising freedom to fugitive servants and slaves who were willing to join His Majesty’s troops. In the following weeks hundreds of slaves fled to Dunmore’s Ethiopian Regiment. By the end of the Revolutionary War it is estimated that about twenty thousand black slaves joined the British side, with roughly twelve thousand coming from the South. It was one of the great liberations prior to the Civil War.<sup>28</sup>

Dunmore’s Proclamation infuriated the Virginia slaveholders and prompted those few Virginians who were still hesitant to finally join the rebel cause. Virginia was one of the most radical colonies, containing, except for the Anglican clergy, very few loyalists. Well before Dunmore’s Proclamation of November 1775, the colony was more than ready to break from Britain; fear of losing its slaves had nothing to do with its highly concerted move toward independence.<sup>29</sup>

The Continental Congress, which met in 1774, urged the colonies to abolish the slave trade. Jefferson believed that the British Crown was responsible for the slave trade, but in drafting the Declaration of Independence he discovered that blaming George

III for its horrors was too much for his colleagues in the Congress. South Carolina and Georgia objected to the accusation, he later explained, and even some northern delegates were "a little tender" on the issue, "for though their people have very few slaves themselves yet they had been pretty considerable carriers."<sup>30</sup>

With independence, nearly all the newly independent states, including Virginia, began moving against slavery, initiating what became the first great antislavery movement in world history. The desire to abolish slavery was not an incidental offshoot of the Revolution; it was not an unintended consequence of the contagion of liberty. It was part and parcel of the many enlightened reforms that were integral to the republican revolutions taking place in the new states. The abolition of slavery was as important as the other major reforms the states undertook: their disestablishment of the Church of England, their plans for public education, their changes in the laws of inheritance, and their codification of the common law, and their transformation of criminal punishment.

Of course, many of these enlightened plans and hopes went unfulfilled or were postponed for later generations to accomplish; that was certainly the fate of the many elaborate plans for creating systems of public education. But despite flying in the face of the rights of property that were sacred to the ideology of the Revolution, the abolition of slavery was remarkably successful, at least in the northern states.

Although nearly 90 percent of all the slaves lived in the South, northern colonists possessed nearly fifty thousand slaves, a not inconsequential number. In 1767 nearly 9 percent of the population of Philadelphia was enslaved. In the middle of the eighteenth century one out of every five families in Boston owned at least one slave. In 1760 black slaves made up nearly 8 percent of the population of Rhode Island, 7 percent of the population of New Jersey,

and 14 percent of the city of New York. It was not just the southern Revolutionary leaders—Washington, Jefferson, Madison, and so on—who owned slaves; so did many of the northern leaders—Boston's John Hancock, New York's Robert Livingston, and Philadelphia's John Dickinson were slaveholders. On the eve of the Revolution the mayor of Philadelphia possessed thirty-one slaves. Yet the northern colonies were not slave societies, like those of the South, and the slaves were recognized in law as human beings, not chattel, as they were in the southern courts.<sup>31</sup>

Although modern historians express frustration with the slowness and ragged nature of the Revolutionaries' struggles to end slavery in the states, the fact that it had been legal everywhere in colonial North America and had existed for millennia throughout the world make the scale and the unprecedented nature of the antislavery movements in the new republics look relatively impressive. Looking back from our present perspective, we find the states' antislavery efforts to be puny, partial, and disappointing, but from the perspective of colonial society in, say, 1720 when slavery existed everywhere without substantial challenge, the Revolutionary achievement that began a half century later appears extraordinary and exciting. This move to end slavery was brought about by the efforts of many blacks as well as whites.

As early as 1774 Rhode Island and Connecticut ended the importation of African slaves into their colonies. In the preamble to their law the Rhode Islanders declared that since "the inhabitants of America are generally engaged in the preservations of their own rights and liberties, among which that of personal freedom must be considered the greatest," it was obvious that "those who are desirous of enjoying all the advantages of liberty themselves should be willing to extend personal liberty to others."<sup>32</sup> Other states—Delaware, Virginia, Maryland, and South Carolina—soon followed

in abolishing the slave trade; South Carolina, however, only for a term of years.

With independence Americans began attacking slavery itself. In 1777 the people of Vermont, in hopes of soon joining the new United States as the fourteenth state, drew up a constitution. The first article of that constitution stated that because all men were "born equally free and independent," and possessed "certain natural, inherent, and unalienable rights, . . . therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave, or apprentice, after he arrives to the age of twenty-one years; nor female, in like manner, after she arrives to the age of eighteen years, unless they are bound by their own consent."<sup>33</sup>

This article of the Vermont constitution linked the abolition of slavery to the enlightened ideals of the Revolution as explicitly and as closely as one could imagine. It also revealed how Americans thought about slavery in relation to other forms of unfreedom existing in colonial America. Although the article was not rigidly enforced, and slavery and other forms of unfreedom continued to linger on in Vermont, it nevertheless represented a remarkable moment in the history of the New World.

In 1780 Pennsylvania passed an act for the gradual abolition of slavery, stating that "all Persons, as well Negroes, and Mulattos, as others, who shall be brought within this State, from and after the Passing of this Act, shall not be deemed and considered as Servants for Life or Slaves."<sup>34</sup> The statute did not, however, free the six thousand or so slaves already living in the state, and children born to slave mothers had to serve as indentured servants until age twenty-eight. The attorneys for the state's antislavery society often found it politically useful to identify the status of slaves with that of servants, "for there is no Difference or Distinction between Temporary

Servants—Whether White or Black—on Account of the length of time they have to serve."<sup>35</sup> By 1790 there were less than four thousand slaves left in the state, together with about ten thousand free blacks.

In Massachusetts free and enslaved blacks had been using the courts as early as 1764 to gain their freedom. Increasingly juries found against the masters and in favor of the slaves. In 1781 Chief Justice William Cushing of the state's supreme court told a jury that "the holding of Africans in perpetual servitude and sell and buy them as we do our horses and cattle" may have been countenanced by the laws of the province but "nowhere is it expressly enacted or established." With independence, he said, a "different idea has taken place with the people of America, more favorable to the natural rights of mankind." In a subsequent case in 1783 Cushing was more emphatic, declaring that by the new Massachusetts constitution of 1780, "slavery is . . . as effectively abolished as it can be by the granting of rights and privileges wholly incompatible and repugnant to its existence."<sup>36</sup>

Although Massachusetts used the courts to end slavery, Connecticut and Rhode Island passed laws gradually abolishing slavery in the way Vermont had, by making all children born after a certain date apprentices until age twenty-one in the case of males, and eighteen in the case of females. New Hampshire had so few slaves that slavery died away without the need for legislative or judicial action.

In the middle states of New York and New Jersey, abolition was much more difficult. In 1781 New York offered to pay slaveholders for assigning their slaves to the Revolutionary forces and the promise of freedom for the slaves at the end of the war. Although by the 1790s only one in three blacks in New York City was free, the state was slow to attack the institution. In 1799 the state legislature

declared that children of slaves born after July 4, 1799, would be legally free, but they would have to serve as indentured servants until age twenty-eight for males, and twenty-five for females. All the existing slaves in the state had their status redefined as indentured servitude for life.

New Jersey was the last northern state to abolish slavery. The law of 1804 freed all children of slaves born after July 4, 1804, with the children serving as apprentices until age twenty-five for males, and twenty-one for females. By 1830 two-thirds of the slaves still remaining in the North lived in New Jersey.

In 1787 the Confederation Congress became involved with slavery for the first time. It issued the Northwest Ordinance, which laid out a three-step process by which territories in the Northwest would become states that would be equal in all respects to the original states—an extraordinarily generous action and an important assertion of federal authority. In 1789 the new Congress elected under the Constitution renewed the document and made it part of national law. Article 6 of the Ordinance provided that “there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted.”<sup>37</sup> Abraham Lincoln later used the Ordinance to bolster his claim that the federal government had authority to forbid the extension of slavery into the territories. Indeed, as has been nicely pointed out, Lincoln put together a structure of “antislavery constitutionalism”; he joined the Ordinance with the Declaration of Independence and the Constitution into a bundle of founding texts “that convincingly positioned the antislavery argument within the boundaries of the American system.”<sup>38</sup>

By the early nineteenth century all the northern states had provided for the eventual end of slavery, and Congress had promised the creation of free states in the Northwest Territory. By 1790s the

number of free blacks in the northern states had increased from several hundred in the 1770s to over twenty-seven thousand. By 1810 there were well over one hundred thousand free blacks in the North. For a moment it looked as the institution of slavery might be rolled back everywhere.

The Upper South began to move against slavery, which reinforced the idea that the institution's days were numbered. In 1782 the Virginia legislature allowed individual slaveholders to manumit their slaves without legislative approval. Delaware and Maryland soon followed with similar laws. In Virginia and Maryland antislavery societies brought “freedom suits” in the state courts that led to some piecemeal emancipation. If the slaves could demonstrate to the courts that they had maternal Indian ancestors, they could be freed, and hearsay evidence was often enough to convince the courts. “Whole families,” recalled one sympathetic observer, “were often liberated by a single verdict, the fate of one relative deciding the fate of many.” By 1796 nearly thirty freedom suits were pending in Virginia courts.<sup>39</sup> Some slaves took advantage of the new liberal laws and worked to buy their own freedom. Of the slaves freed in Norfolk, Virginia, between 1791 and 1820, more than a third purchased themselves or were purchased by others, usually by their families. By 1790 the free black population in the Upper South had increased to over thirty thousand; by 1810 the free blacks in the area numbered over ninety-four thousand. The growing numbers of free blacks in the Upper South convinced many that the institution of slavery was indeed dying.

John Melish, a British traveler in the South in 1806, declared that nearly every person he met condemned slavery, generally expressing the opinion that it was “not only hurtful to public morals, but contrary to every maxim of sound policy.” Yet Melish realized that slavery in the southern states was “incorporated with

the whole system of civil society; its influence has extended through every branch of domestic economy; and to do it away must be a work of time." That was the hope of many—that time would end the institution.<sup>40</sup>

Although the Virginians' efforts to end slavery convinced many that the North and South were becoming more alike, other, more realistic observers knew better. Stephen Higginson, a worldly Boston merchant, was convinced in 1785 that "in their habits, manners and commercial Interests, the southern and northern States are not only very dissimilar, but in many instances directly opposed."<sup>41</sup> When the delegates to the Constitutional Convention gathered in Philadelphia in 1787 those differences quickly became apparent.

Although the northern delegates, even those seriously opposed to slavery, did not come to the Convention intending to use the framing of a new constitution as a means of abolishing slavery in the South, they certainly realized that the two sections had very different economic interests and therefore the allotment of power between the northern and southern states in the new government was important. Thus, when Madison at the outset of the Convention objected to a proposal to base representation in the House solely on "the number of free inhabitants," the northern delegates knew immediately that the southern states would want some kind of representation of their slaves in the new government. The debate over the allocation of representatives in the House consumed over six weeks of debate, from late May until mid-July.<sup>42</sup>

Essentially the delegates from the South sought to have wealth or property taken into account in representation in the proposed Congress; in fact, the members from the states of the Deep South wanted their slaves to count equally with whites in allotting representation. By contrast, northern delegates urged that slaves not count at all. Elbridge Gerry of Massachusetts argued that if blacks as

property in the South were to be counted for representation of the southern states, then the cattle and horses of the North should likewise be counted for representation of the northern states.

Although the delegates from the Upper South did not support South Carolina's position that slaves should be counted equally with whites for purposes of representation, they were not willing to have the slaves not count at all. As Madison later explained in *Federalist* No. 54, the Convention ended up treating the slaves "in the mixt character of persons and of property."<sup>43</sup> It fell back on a formula that the Congress had used in the Confederation period in apportioning requisitions on the states—applying it to representation as well as direct taxation: all the free white inhabitants plus three-fifths of all other persons. It seemed a necessary compromise to keep the states of the Deep South from leaving the Convention.

Thus was born the notorious three-fifths clause of the Constitution that became what many northerners came to believe was the source that allowed the "slave power" of the South to dominate the federal government in the antebellum period.<sup>44</sup> In 1820, during the debate over the admission of Missouri into the Union as a slave state, Rufus King, who had been a delegate from Massachusetts in the Convention, admitted in the United States Senate that "the disproportionate power and influence allowed to the slaveholding states was a necessary sacrifice to the establishment of the Constitution."<sup>45</sup>

The threat by South Carolina and Georgia to walk out of the Convention led to additional compromises with slavery. Although all the states except those of the Deep South were willing to end the international slave trade, the Convention had to agree to allow the continued importation of slaves for twenty years. "Great as the evil is," Madison later said in the Virginia ratifying convention, "a dismemberment of the Union would be worse."<sup>46</sup> The northern

states also had to accept a ban on Congress's ability to tax exports, the export trade of staples being crucial to the South. Some northern delegates wanted to call the South Carolinians' and Georgians' bluff—if indeed it was a bluff. But enough delegates believed that, since slavery was naturally dying, the issue was not worth risking a breakup of the Union and destroying the opportunity to frame a new constitution. Oliver Ellsworth of Connecticut thought the whole issue was irrelevant. He predicted that “as population increases, poor laborers will be so plentiful as to render slaves useless, and thus slavery in time will not be a speck in our country.”<sup>47</sup>

Many northerners agreed. Some even thought the Constitution worked to end slavery. Thomas Dawes Jr., a judge and a delegate from Boston to the Massachusetts ratifying convention, realized that Congress, he said, could not simply abolish slavery “in a moment, and so destroy what our Southern brethren consider as property.” But he believed that Congress’s ability in twenty years to abolish the slave trade, together with its immediate power to impose a duty of ten dollars on each imported slave, would eventually spell the end of slavery in the country. “As slavery is not smitten by an apoplexy” that would kill it quickly, “yet,” he said, “it has received a mortal wound and will die of consumption,” a slow but relentless mode of dying.<sup>48</sup> All these delusions about the impending end of slavery made compromising easier and prevented people from foreseeing their horrific future.

The final concession to the delegates from the Deep South had to do with the returning of fugitive slaves to their owners. Although the problem of returning escaped slaves in time became one of the rawest and most divisive issues dividing the North and South, it stirred very little controversy in the Convention, especially compared to the issues involving representation and the slave trade.

The problem arose only because the northern states had begun ending slavery, which meant that there were more and more free places to which the slaves could flee; that in itself was a measure of the success of the antislavery movement since 1776.

The southern slaveowners wanted to ensure that any slave fleeing to a free state would be returned to them. Apparently, southerners in the Confederation Congress, meeting in New York at the same time as the Philadelphia Convention, agreed to prohibit slavery in the Northwest Territory only if northerners guaranteed the lawful return of escaped slaves in both the Ordinance and the Constitution. At any rate, when the Fugitive Slave Clause (Article I, Section 2, Clause 3) was introduced in the Convention on August 29, 1787, no delegate voted against it. Within decades, this clause became the source of the bitterest northern opposition to the slaveholding South.<sup>49</sup>

Although the delegates had embedded all these protections for slavery in the Constitution, many of them, including Madison, did not want the Constitution explicitly to endorse slavery and to affirm in any way the notion that slaves were property. It would be wrong, Madison said in the Convention, “to admit in the Constitution the idea that there could be property in men.”<sup>50</sup> Consequently, the Convention was scrupulous in avoiding mention of “slaves,” “slavery,” or “Negroes” in the final draft of the Constitution. This decision seemed to suggest that the United States would eventually be without the shameful institution of slavery.

Some abolitionists like William Lloyd Garrison who later indicted the Constitution as a “covenant with death” and “an agreement with hell” had no awareness of the context in which the Constitution had been created decades earlier.<sup>51</sup> Unlike Lincoln, they appreciated neither the hopes of the framers nor the importance of the Constitution to the existence of the Union.<sup>52</sup>

Many in 1787 hoped that slavery would not long endure. Yet the explosive proslavery response by representatives from the Deep South to two petitions to Congress from the Pennsylvania Abolition Society in 1790 to end the slave trade and slavery itself should have indicated that the eradication of slavery was not going to be as inevitable as many had hoped. "Let me remind men who expect a general emancipation by law," warned one outraged South Carolinian congressman, "that this would never be submitted to by the Southern States without civil war!" South Carolina began planning to reopen its slave trade and to bring in more slaves than it had before.<sup>53</sup>

Despite the worrying behavior of the states of the Deep South, many leaders, including those in the Upper South, still remained confident of the future. They were willing to table the anti-slave petitions for the sake of the Union in the mistaken hope that the Revolutionary ideals of "humanity and freedom" were, as Madison put it in 1790, "secretly undermining the institution."<sup>54</sup> All the noise about slavery, said Madison, could only delay but not stop the inevitable march of progress.

By the 1790s, however, there were already signs that Virginia's earlier enthusiasm for limiting slavery was dissipating. Manumissions declined and the freedom suits stopped. The Virginian slaveholders who had migrated into Kentucky were determined to protect their property. Although slaves constituted only 16 percent of Kentucky's population, the minority of slaveholders were able to write into the state's 1792 constitution a provision declaring that "the legislature shall have no power to pass laws for the emancipation of slaves without the consent of their owners." It was the nation's first explicit constitutional protection of slavery and an ominous sign of what lay ahead.<sup>55</sup>

Probably nothing in the 1790s changed the atmosphere in the country more than the outbreak of a black slave rebellion in the

French colony of Saint Domingue. Most Americans, including slaves, knew what was happening on the island. Between 1791 and 1804 the American press carried ever more terrifying news of atrocities on Saint Domingue, frightening slaveholders everywhere. With slave rebellions breaking out in Puerto Rico, Venezuela, Curaçao, and Grenada, southerners increasingly realized, as Governor Charles Pinckney of South Carolina declared, "that the day will arrive when [the southern states] may be exposed to the same insurrection." As talk of slave insurrections in the United States increased, "the emancipation fume," as one Virginia slaveholder put it, "has long evaporated and not a word is said about it."<sup>56</sup> By the end of the 1790s whatever antislavery sentiments Virginia had once possessed were gone. In 1800 the conspiracy of the free black Gabriel to launch a black rebellion in Virginia guaranteed that the state's earlier anti-slave liberalism would never be revived.

By the early decades of the nineteenth century the two sections of North and South may have been both very American and very republican, both spouting a similar rhetoric of liberty and equal rights, but below the surface they were fast becoming very different places, with different economies, different cultures, and different ideals—the northern middle-class-dominated society coming to value common manual labor as a supreme human activity, the southern planter-dominated society continuing to think of labor in traditional terms as mean and despicable and fit only for slaves.<sup>57</sup>

Yet that northern middle-class society had little or no grounds for celebrating its progressiveness in opposing slavery. The freedom that the North's black slaves earned in the decades following the Revolution came with some perverse consequences. Freedom for black slaves did not give them equality. Indeed, emancipation aggravated racial bigotry and inequality. As long as slavery determined the status of blacks, whites did not have to think about

racial discrimination and racial equality. But once black slaves were freed, race became the principal determinant of their status. Republicanism implied equal citizenship, but unfortunately, few white Americans in the post-Revolutionary decades were prepared to grant equal rights to freed blacks. Consequently, racial prejudice and racial segregation spread everywhere in the new Republic. In 1829 William Lloyd Garrison believed that "the prejudices of the north are stronger than those of the south."<sup>58</sup>

As the poor white man gained the right to vote in the early nineteenth-century North, the free black man lost it. By the heyday of Jacksonian democracy, popular white majorities in state after state in the North had moved to eliminate the remaining property restrictions on white voters while at the same time taking away the franchise from black voters who in some cases had exercised it for decades. In some states, like Pennsylvania, black exclusion was the price paid for lower-class whites gaining the right to vote, universal suffrage having been opposed on the grounds that it would add too many blacks to the electorate. In other states, like New York, exclusion of blacks from the franchise was an effective way for Democratic Party majorities to eliminate once and for all blocs of black voters who too often had voted first for Federalist and then for Whig candidates. Some northern states even granted the suffrage to Irish immigrants who had not yet become citizens at the same time as they took the right to vote away from blacks born and bred in the United States. No state admitted to the Union after 1819 allowed blacks to vote. By 1840, 93 percent of northern free blacks lived in states that completely or practically excluded them from the suffrage and hence from participation in politics.<sup>59</sup>

Despite this resultant racial segregation and exclusion and despite the often sluggish and uneven character of the abolition in the North, we should not lose sight of the immensity of what the

Revolution accomplished. For the first time in the slaveholding societies of the New World, the institution of slavery was constitutionally challenged and abolished in the northern states. It was one thing for the imperial legislatures of France and Britain to abolish slavery as they did in 1794 and 1833 in their far-off slave-ridden Caribbean colonies; but it was quite another for slaveholding states themselves to abolish the institution. For all of its faults and failures, the abolition of slavery in the northern states in the post-Revolutionary years pointed the way toward the eventual elimination of the institution throughout not just the United States but the whole of the New World.