Philadelphia convention had made "many sacrifices of opinion and fe
the South. His stated goal was to "forever repress the delusive and mis
notion that the [S]outh has not at all times had its full share of ben
the union."[113]

Ironically, the Fugitive Slave Clause, which was not controversial at the Philadelphia convention or for a couple of decades thereafter, provoked enormous controversy by the middle of the nineteenth century. Its enforcement regularly generated riots in northern communities in the 1840s and 1850s, as abolitionists sought to block the return of fugitive slaves to the South, and the federal government occasionally dispatched troops to enforce the federal Fugitive Slave Act. When southern states seceded from the union in 1860–61, near the top of their list of grievances was the charge that northern states had reneged on their constitutional obligation to return fugitive slaves to their owners.[114]

In addition to the Three-Fifths Clause, the Foreign Slave Trade Clause, and the Fugitive Slave Clause, the Constitution contained several indirect safeguards for slavery. As already noted, the ban on congressional export taxes was a concession to southern planters whose slaves primarily produced agricultural goods for export.[115]

Another indirect protection for slavery was the constitutional provision empowering the national government, at the request of state legislatures—or executives, if the legislatures could not be convened—to suppress "domestic violence." Whenever the delegates to the Philadelphia convention discussed this provision, they focused explicitly on revolts by debtors and taxpayers, such as Shays's Rebellion. But the possibility of a slave insurrection cannot have been far from their minds. Indeed, as we have seen, northern delegates frequently criticized the foreign slave trade as increasing the risk of slave insurrections, which northern states would have to contribute men and money to suppressing.[116]

Another implicit constitutional protection for slavery was the restriction of the national government to enumerated powers. It is likely that every delegate in Philadelphia believed that regulating a domestic institution such as slavery would exceed the delegated powers of Congress. Indeed, southern delegates felt so secure in the Constitution's explicit and implicit protections for slavery that they declined to endorse a small-state proposal for an unamendable constitutional guarantee that "no state shall without its consent be affected in its internal police."[117]

The most divisive political issue in the nation in the 1850s and the proximate cause of the Civil War was whether Congress possessed the constitutional authority to regulate slavery in federal territories. Article IV, Section 3, of the Constitution authorizes Congress to make "needful rules and regulations"

Michael Klarman, *The Framer's Coup* (Oxford, 2016).

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for the federal territories but does not say anything specifically about slavery. However, the issue of slavery in federal territories had arisen under the Articles of Confederation. Indeed, as was just noted, the Confederation Congress took action against slavery in federal territories at the very moment that the Constitutional Convention was sitting—in the form of the Northwest Ordinance. Such action can be considered part of the Founders' original understanding with regard to slavery.[118]

In 1784, congressional delegate Thomas Jefferson had proposed an ordinance to bar slavery from all territories held by the federal government—southern as well as northern—beginning in 1800. Most southern congressional delegates opposed this proposal—which northern delegates unanimously approved—and it was narrowly defeated, falling one delegation short of the number required to enact it. Yet even if Jefferson's proposal had passed Congress, it probably could not have been effectively implemented. By the mid-1780s, slave owners had taken many thousands of slaves across the Appalachian Mountains into what would become, in the 1790s, the states of Kentucky and Tennessee. North Carolina and Georgia probably would have refused to cede their western lands to Congress—and Virginia might have tried to rescind the cession it had already made of the land north of the Ohio River that would become the Northwest Territory—had Congress enacted Jefferson's ordinance. Indeed, just months after Jefferson's proposal, North Carolina explicitly conditioned cession of its western lands to Congress on slaves not being emancipated there. When North Carolina ultimately did cede its western lands to Congress in 1789, it reiterated that condition, and Congress acquiesced.[119]

In July 1787, at almost precisely the same moment that the Philadelphia convention tentatively agreed to the Three-Fifths Clause for apportioning representation in the House, the Confederation Congress sitting in New York City addressed the issue of slavery in the Northwest Territory—the region that would become, in the nineteenth century, the states of Ohio, Indiana, Illinois, Michigan, and Wisconsin. (By contrast, Jefferson's 1784 draft proposal had dealt with slavery in *all* federal territories.) Congress rarely enjoyed an operating quorum that summer, partly because so many delegates had been called away to the Philadelphia convention. In late May, Virginia congressional delegate William Grayson had told James Monroe that "the draft made from Congress on members for the convention has made [Congress] very thin and no business of course is going on here." Grayson predicted that Congress would remain inactive until the convention had completed its work, which he projected would take several months. Several other observers made similar predictions as to Congress's continued inactivity that summer.[120]

However, in early July, delegates from Georgia and North Carolina left the convention to travel to New York City, probably for the purpose of supplying Congress with a quorum that would enable passage of the Northwest Ordinance. One of the North Carolina delegates, William Blount, told his governor that he and Benjamin Hawkins, another member of the state's congressional delegation who happened to be in Philadelphia at the time, had received a letter from the secretary of Congress informing them that their presence was required for a quorum, which "was absolutely necessary for the great purpose of the union." Indeed, the arrival in New York of these delegates from the Philadelphia convention allowed Congress to meet and pass the ordinance organizing the Northwest Territory and prohibiting slavery there.[121]

Notably, the Northwest Ordinance passed Congress with only one dissenting voice (that of Abraham Yates of New York). Those southern delegates present unanimously supported it. There was an implicit quid pro quo: Barring slavery north of the Ohio River implied permitting it in the territories south of the river, which Congress later explicitly did. It is likely as well that some southern planters favored excluding slavery from the Northwest Territory to suppress economic competition. As Grayson told Monroe a few weeks after the ordinance passed, "The clause respecting slavery was agreed to by the southern members for the purpose of preventing tobacco and indigo from being made on the northwest side of the Ohio as well as for several other political reasons." In addition, as just noted, the Northwest Ordinance granted slave owners a right to the recovery of their escaped slaves—and perhaps there was an implicit understanding that the Constitution would also provide for such a right. It is even possible that the ordinance's ban on slavery was part of a package deal in which southerners received the Constitution's Three-Fifths Clause.[122]

Although the Northwest Ordinance's ban on slavery easily passed, most contemporaries agreed that Congress had no express power to enact it because the Articles made no provision for Congress's establishing governments for territories or prescribing the conditions for the admission of new states into the union (other than Canada or other "colon[ies]"). The Constitution, by contrast, directly addresses that gap in congressional power by granting Congress the explicit authority to "make all needful rules and regulations" for the territories. Once the Constitution was ratified, the first Congress promptly re-enacted the Northwest Ordinance. This time, nobody denied that Congress had the power to do so.[123]

However, over the decades, southerners began to distinguish between Congress's power to bar slavery in territories that existed within the United States in 1787 and in those that were subsequently acquired.* By the time

* The technical legal argument was that the Constitution did not contemplate the national government's acquiring territory beyond that already in its possession, or in the possession of

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Congress debated Missouri's admission to the union as a slave state in 1819–21. most southern statesmen took the position that Congress lacked the authority to bar slavery in federal territories acquired after the ratification of the Constitution—such as the territory purchased from Emperor Napoleon during the Jefferson administration in 1803 (the Louisiana Purchase). The Supreme Court ultimately vindicated the southerners' position in the infamous *Dred Scott* decision of 1857.[124]

The ban on slavery in the Northwest Territory would prove critical to the history of slavery in the United States. White southerners were the first to migrate in large numbers to the region north of the Ohio River, and they probably would have brought slaves with them had the law permitted them to do so. If slavery was economically viable in Missouri, where just over 15 percent of the population was held in bondage in 1820, it would have been equally so in at least the southern counties of Indiana and Illinois. For decades after the enactment of the Northwest Ordinance, land speculators tried to persuade Congress—and later the Illinois legislature—to permit slavery there. In 1824, an Illinois referendum on whether to permit slavery failed by just 54 to 46 percent. The Northwest Ordinance—not any "natural" geographic or climate-based limits on the spread of slavery—kept the institution out of Indiana and Illinois. Had they become slave states, the nation's political balance of power would have shifted in favor of the South, and the history of slavery in America might have turned out very differently.[125]

Slavery and Ratification

Slavery was frequently discussed in the debates over ratification of the Constitution. (The ratification debate in general is treated in chapter 6.) Because the ratifying contest was conducted independently in each state, supporters and opponents of the Constitution could make different—even contradictory—arguments in different parts of the nation.[126]

Some prominent southern opponents of ratification professed grave concern that the Constitution would threaten the survival of slavery. Patrick Henry, who claimed to abhor slavery but believed that "prudence forbids its

the states, in 1787. Thus, Congress's power over subsequently acquired territory, if any, derived not from its enumerated power to govern federal territories but from another of its enumerated powers—that of admitting new states into the union. Southerners then applied to this latter grant of power what had become by the early nineteenth century their typical strict constructionist approach to constitutional interpretation. They argued that the "new states" provision authorized Congress's doing only what was strictly necessary for admitting new states, which included appointing a territorial government but not regulating domestic institutions such as slavery.

abolition," wondered why "it was omitted [in the Constitution] to secure us that property in slaves which we held now," and he darkly hinted that the "omission was done with design." Henry warned the Virginia ratifying convention that because "[t]he majority of Congress is to the North, and the slaves are to the South," Congress might tax slavery out of existence or abolish slavery as a wartime conscription measure under the Necessary and Proper Clause. Mason likewise warned that nothing in the Constitution would "prevent the northern and eastern states from meddling with our whole property of that kind" or restrain Congress from imposing a tax on slaves so prohibitive as "might totally annihilate that kind of property."[127]

In the Deep South, some opponents of ratification objected to the constitutional provision authorizing Congress eventually to prohibit the foreign slave trade (whereas at the Virginia ratifying convention, Mason criticized the Constitution's failure to immediately abolish this "diabolical" trade). One of the leading opponents of ratification in South Carolina, former governor Rawlins Lowndes, criticized this provision on the grounds that slave labor was indispensable to South Carolina's economy. He warned that even during the twenty years in which Congress was forbidden from barring the foreign slave trade, South Carolina could be made to "pay for this indulgence" (by a tax not exceeding ten dollars per imported slave). Lowndes concluded: "Negroes were our wealth, our only natural resource; yet behold how our kind friends in the North were determined soon to tie up our hands, and drain us of what we had!"[128]

Some delegates to northern ratifying conventions expressed agreement that the Constitution threatened the survival of slavery, and they approved of it for this very reason. These northern Federalists argued that even though the Constitution protected slavery in the short term, it would eventually help to extinguish it—a position later embraced by Abraham Lincoln, who insisted that the Framers had "expected and intended that it [slavery] should be in the course of ultimate extinction." Thus, Thomas Dawes told the Massachusetts ratifying convention that "we may say that, although slavery is not smitten by an apoplexy, yet it has received a mortal wound, and will die of consumption." Another Massachusetts Federalist, writing pseudonymously, agreed that the Philadelphia convention "went as far as policy would warrant or practicability allow. The friends to liberty and humanity may look forward with satisfaction to the period, when slavery shall not exist in the United States."[129]

Such northerners especially celebrated the constitutional provision enabling Congress to bar the foreign slave trade after twenty years. At the Massachusetts ratifying convention, Federalists declared that "the step taken in this article towards the abolition of slavery was one of the beauties of the Constitution." James Wilson told the Pennsylvania convention that

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this provision laid "the foundation for banishing slavery out of this country," whereas under the Articles of Confederation, states could admit slaves "as long as they please." Even before 1808, Wilson noted, Congress was authorized to impose a tax on the importation of slaves, which would "operate as a partial prohibition." Finally, Wilson noted (accurately) that the twenty-year prohibition on Congress's barring the foreign slave trade did not apply to federal territories or newly created states, where he predicted (inaccurately) that "slaves will never be introduced."[130]

By contrast, other northerners believed that the Constitution had unduly entrenched slavery, and they opposed ratification for that reason. For example, Congregationalist theologian and abolitionist Samuel Hopkins asked in despair, "How does it appear in the sight of Heaven . . . that *these states*, who have been fighting for liberty and consider themselves as the highest and most noble example of zeal for it, cannot agree in any political constitution, unless it indulge and authorize them to enslave their fellow-men?" Antifederalist delegates at the Massachusetts ratifying convention objected that the Constitution made "merchandise of the bodies of men" and that "there was not even a proposition that the Negroes ever shall be free." Concurring in this assessment of the Constitution as a fundamentally proslavery document, one important group of later abolitionists denounced it as a "covenant with death" and an "agreement with hell."[131]

A few of these antislavery northerners complained specifically of the Fugitive Slave Clause and of the Constitution's possibly forcing them against their consciences to help suppress southern slave insurrections. Rhode Island Quaker Moses Brown objected that the Constitution "was designed to destroy the present asylum" that Massachusetts, which had abolished slavery, offered to escaped slaves. Pennsylvania Antifederalist Benjamin Workman, a math tutor at the University of Pennsylvania who wrote pseudonymously, protested that a Philadelphia Quaker, conscientiously opposed both to bearing arms and to slavery, could be forced under the Constitution to serve in the state militia and then ordered by Congress to participate in suppressing an insurrection of southern slaves "prompted by the love of sacred liberty."[132]

Yet most northerners who criticized the Constitution as overly protective of slavery focused on the Three-Fifths Clause and the twenty-year prohibition on Congress's banning the foreign slave trade. Melancton Smith of New York objected to the former provision on the grounds that the proper principle of representation was that "every free agent should be concerned in governing himself," yet "slaves have no will of their own." Why should "certain privileges" be conferred upon "those people who were so wicked as to keep slaves?" Another northerner wrote that in apportioning representation in Congress, slaves should be counted no more than "the beasts of the field or trees of the

forest." Moreover, antislavery northerners objected, the Three-Fifths Clause would simply give southerners an incentive to continue the foreign slave trade. Others argued that the ostensible quid pro quo for enhanced southern representation in Congress under the Three-Fifths Clause—that is, counting only three-fifths of the slaves for purposes of apportioning direct taxes—would prove worthless because direct taxes would never be imposed by the national government (a prediction that would be proved largely accurate by the course of events before the Civil War).[133]

The Foreign Slave Trade Clause elicited the most venomous attacks from those northerners who criticized the Constitution on slavery-related grounds. Dr. Benjamin Gale, a Connecticut Antifederalist, objected to the "sly, cunning, and artful" euphemism for slavery used in this provision to hide its offense against "the rights of human nature." A leading New Hampshire Antifederalist, Joshua Atherton, warned that the Constitution would make northerners "partakers in the sin and guilt of this abominable traffic, at least for a certain period, without any positive stipulation that it should even then be brought to an end." He objected to his state's "lend[ing] the aid of our ratification to this cruel and inhuman merchandise, not even for a day." The foreign slave trade, according to Atherton, involved "the most barbarous violation of the sacred laws of God and humanity." Three Massachusetts Antifederalists called it "monstrous indeed" for a government established to protect natural rights to become "an engine of rapine, robbery, and murder." Why should those who objected to Algerians' kidnapping and enslaving American sailors off the coast of Africa feel better about slave traders' capturing and enslaving Africans?[134]

In response to the argument that residents of South Carolina and Georgia had lost much of their property during the war when British troops seized their slaves or encouraged them to run away, Massachusetts Antifederalists observed that because slavery violated natural law, slave owners "lost no property because they never had any [in their slaves]," and, in any event, northerners had lost their own property during the war. Moreover, wartime losses did not give Americans "a right to make inroads upon another nation, pilfer and rob [it], in order to compensate ourselves." Another Massachusetts Antifederalist distinguished between the foreign slave trade under the British Empire, which Americans had possessed no power to control, and the Constitution's authorization of the continuation of the trade, which did indeed make them "partakers of each other's sins." Some antislavery northerners also argued that the Philadelphia convention had offered South Carolina and Georgia greater protection for slavery than was necessary to induce them to ratify the Constitution; the threat of economic boycotts would have sufficed to impel those states to remain in the union.[135]

Many southern supporters of the Constitution shared the view that it was strongly proslavery—but they extolled it for this reason. One of their arguments was that the Constitution secured southerners, as Charles Cotesworth Pinckney explained in South Carolina, "a right to recover our slaves in whatever part of America they may take refuge, which is a right we had not before." Madison made the same point at the Virginia ratifying convention—that the Constitution was a clear improvement upon the Articles in this regard.[136]

Southern Federalists also emphasized that the Constitution conferred upon Congress no power to interfere with slavery in the states. As Charles Cotesworth Pinckney explained in South Carolina, the South had "a security that the general government can never emancipate them [slaves], for no such authority is granted; and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution."* James Iredell, a prominent North Carolina Federalist, emphasized that Congress's power over slavery was limited to barring the foreign slave trade after twenty years; it had no authority to abolish slavery in the states. Southern statesmen would later treat the absence of an explicit congressional power over slavery—as contrasted with Congress's expressly delegated power over the foreign slave trade, beginning in 1808—as a sacred component of the original compact.[137]

Southern Federalists bragged of other protections afforded to slavery by the Constitution. In case of emergency, states would be authorized to call upon the federal government's assistance in suppressing slave insurrections. Moreover, the Constitution guaranteed that the representation of southern states in the House and the electoral college would reflect their slave populations. As Charles Cotesworth Pinckney explained, this meant that the northern states had "allowed us a representation for a species of property which they have not among them." The requirement that direct taxes, such as a tax on slaves, be apportioned according to population and the qualification that only three-fifths of the slaves count in calculating that population were, according to Madison, "an insuperable bar against disproportion." Finally, southern Federalists argued that the supermajority requirements imposed by Article V for enacting constitutional amendments protected southerners from having any antislavery amendments foisted upon them without their consent.[138]

To be sure, the Constitution empowered Congress eventually to end the foreign slave trade, which it could not do under the Articles. Yet this concession had been unavoidable, Charles Cotesworth Pinckney explained in the South

* Contrary to Pinckney's claim, and as we shall see in chapter 5, it was certainly not "admitted on all hands" that Congress was limited to expressly granted powers. Notwithstanding that misstatement, however, Pinckney was right that virtually nobody in 1787 thought that Congress possessed a general authority to emancipate slaves.

Carolina legislature, because of "the religious and political prejudices of the eastern and middle states and . . . the interested and inconsistent opinion of Virginia, who was warmly opposed to our importing more slaves." Moreover, Pinckney continued, opponents of the foreign slave trade at the Philadelphia convention had objected that slaves were "a dangerous species of property which an invading enemy could easily turn against ourselves" and that the Three-Fifths Clause would encourage the South to continue importing slaves. As Federalist David Ramsay of South Carolina observed, if northerners were "bound to protect us from domestic violence," they might reasonably believe that "we ought not to increase our exposure to that evil by an unlimited importation of slaves."[139]

Yet Pinckney also noted that the Constitution did not *require* Congress to abolish the foreign slave trade as soon as it was authorized to do so. By 1808, southern states might possess sufficient political power to block any congressional effort to end the foreign slave trade. Moreover, as Robert Barnwell of South Carolina noted, northern shippers, who would become the "carriers of America," might discover it to be in "their interest to encourage exportation to as great an extent as possible." Fearing that a ban on importing slaves might reduce southern exports, these shippers might prefer not to "dam up the sources from whence their profit is derived." Unless South Carolina itself chose to bar by state law the importation of additional slaves from Africa, Barnwell predicted, "the traffic for Negroes will continue forever."[140]

Charles Cotesworth Pinckney summed up his defense of the Constitution from the perspective of southern slave owners: "In short, considering all circumstances, we have made the best terms for the security of this species of property [slaves] it was in our power to make. We would have made better if we could; but, on the whole, I do not think them bad."[141]

The best evidence of whether contemporary actors believed that the Constitution securely protected the interests of slaveholders is not what was actually *said* in the ratifying debates. As we shall see in the next chapter, once someone had decided to support or oppose the Constitution, he generally made whatever arguments he thought would advance that cause, regardless of whether they had actually influenced his position. Thus, for example, although Patrick Henry warned Virginians that slavery would not be safe under the Constitution, his decision to oppose ratification was almost certainly more attributable to his resentment at northerners for being willing to sacrifice American navigation rights on the Mississippi River, which were important to the South.[142]

The best evidence of how contemporaries viewed the Constitution with regard to slavery lies rather in what was *not* said. In South Carolina and Georgia, which were the states most strongly committed to the indefinite

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perpetuation of slavery, very few voices criticized the Constitution as insufficiently protective of the institution. Georgia's convention unanimously ratified the Constitution, which would have been inconceivable had serious doubts existed about whether the safeguards for slavery were adequate. In South Carolina, nobody challenged Pinckney's statement that the southern delegates in Philadelphia had secured a good deal for slave owners. Opponents of ratification in South Carolina, of whom there were a great many, rarely argued that the Constitution inadequately protected slavery. Given the state economy's utter dependence on slavery, critics of the Constitution certainly would have emphasized this argument had it seemed even minimally convincing. Indeed, in South Carolina, the low-country planters, who had by far the greatest investment in slavery, were among the most fervent supporters of ratification in the nation.[143]

To have expected the Constitution to be less protective of slavery than it was probably would have been unrealistic. Because all the delegates to the Constitutional Convention wished to preserve the union, southerners enjoyed considerable bargaining power. When Mason declared at the Virginia ratifying convention that the delegates in Philadelphia should have barred the foreign slave trade even if doing so would have led Georgia and South Carolina to reject the Constitution, Madison responded that the consequences of such an action might have been "dreadful to them and to us." As "[g]reat as the evil" of the foreign slave trade was, "a dismemberment of the union would be worse." At the Pennsylvania ratifying convention, Thomas McKean, chief justice of the state supreme court, criticized those who protested against the Foreign Slave Trade Clause for not being "well acquainted with the business of [a] diplomatic body [such as the Philadelphia convention], or they would know that an agreement might be made that did not perfectly accord with the will and pleasure of any one person."[144]

At the New York ratifying convention, Melancton Smith, after criticizing the Three-Fifths Clause as "founded on unjust principles" and "utterly repugnant to his feelings," conceded that "it was the result of accommodation," which probably could not have been avoided "if we meant to be in union with the southern states." Hamilton concurred: The Three-Fifths Clause was "one result of the spirit of accommodation which governed the convention; and without this indulgence no union could possibly have been formed." Moreover, establishing a union without the participation of the Deep South states hardly would have improved the welfare of slaves residing in those states.[145]

To be sure, northern delegates had occasionally uttered their own threats to walk out of the convention over issues involving slavery. Those threats simply had not proved credible. In the end, the reason that the Constitution was proslavery was that southern delegates generally were more intent upon

protecting slavery than northern delegates were upon undermining it. In fact, most northern delegates cared far more about how southern slavery would affect the political power and economic interests of the North than they cared about eliminating the institution. Moreover, even those northerners who could be fairly characterized as antislavery believed in the sanctity of property rights. As Thomas Dawes observed at the Massachusetts ratifying convention, "It would not do to abolish slavery by an act of Congress, in a moment, and so destroy what our southern brethren consider as property."[146]

Antislavery northerners also worried about creating large free black populations. As Oliver Ellsworth, writing as "A Landholder," observed during the ratifying debates, "[A]ll good men wish the entire abolition of slavery as soon as it can take place with safety to the public." A Massachusetts Federalist argued that "even in this laudable pursuit" of emancipating slaves, "we ought to temper the feelings of humanity with political wisdom. Great numbers of slaves becoming citizens might be burdensome and dangerous to the public." A few years later, Vice President John Adams denied that "[j]ustice to the Negroes would require that they should . . . be abandoned by their masters and turned loose upon a world in which they have no capacity to procure even a subsistence" and would have to "live by violence or theft or fraud." Eventually, Adams thought, "the increasing population of the country shall have multiplied the whites to such a superiority of numbers that the blacks may be liberated by degrees, with the consent both of master and servant."[147]

Finally, the principle of state sovereignty enabled many antislavery northerners to reconcile themselves to the Constitution. At the Massachusetts ratifying convention, William Heath argued that because "[e]ach state is sovereign and independent to a certain degree" and thus free to regulate its "own internal affairs," joining a union with slaveholders did not make northerners "partakers of other men's sins." New Hampshire Antifederalist Joshua Atherton noted derisively that a commitment to federalism enabled supporters of ratification to simply wash their hands of slavery. Even northerners who could not countenance the Constitution's protection of the foreign slave trade did not "esteem [them]selves under any necessity to go . . . to the Carolinas to abolish the detestable custom of enslaving the Africans." In the end, very few northerners were sufficiently aggrieved by the Constitution's proslavery features to oppose its ratification on that basis.[148]