**THE FIRST FEDERAL HUMAN RIGHTS LEGISLATION: SUPPRESSING THE AFRICAN SLAVE TRADE[*]**

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The following article is essentially historical. I am investigating how the United States prohibited American participation in the African slave trade and later the importation of new slaves from Africa into the United States. There are many reasons for such work. It is commonplace to assert that those who fail to study history are doomed to repeat it or that "history repeats itself." Most lawyers and policy-makers are well aware that history shapes the present and drives the future. Our collective and individual actions, in part, are determined by past events. Law itself is a historically focused discipline, where old cases, precedents, and the intentions of legislators and constitutional framers are invoked in arguments about how laws and constitutions should be interpreted and implemented. Thus, for all these reasons, legal history is important, indeed compelling, for lawyers, judges, and legal scholars.

This article also offers another use for history. Today, America grapples with problems of human trafficking and conflicts arising from competing claims of domestic policy,

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domestic law, and international law surrounding human rights. This article examines America's first venture into this arena: the suppression of the African slave trade in the nineteenth century. There were two parts to this. First, in a series of laws passed between 1794 and 1803, the United States prohibited Americans from working on slavers, investing in slave trade ventures, or even building ships for the trade.[1] Starting in 1807 the United States banned all imports of African slaves *into* the United States.[2] After 1807, Congress passed a number of laws to make the ban on importing slaves more effective.[3]

There are many parallels between the slave trade and human trafficking, and of course some significant differences. We cannot simply "plug in" a nineteenth century solution to a twenty-first century problem. But, we can learn from the complexity of ending the slave trade as we deal with modern issues. The most important lesson to be learned is one of persistence. As this article shows, the suppression of the African slave trade was not accomplished with one statute or even two or three. Congress had to return to the question of how to end the African slave trade a number of times to finally achieve a successful legislative solution. This kind of social change through legislation takes time and a willingness to return to the problem, over and over again, in order to retool the solution. Even then, as the story of how the United States ended its involvement in the African slave trade demonstrates, legislation may not fully solve a problem that is complicated by competing laws and by domestic and international economic interests that may undermine the legislation. Indeed, because slavery itself was legal in the United States until 1865, there was always a market for some illegally imported slaves and there was even domestic law that might protect the property interest in these slaves once they were brought into the United States. Thus, the illegal slave trade to the United States only ended when slavery itself ended, which took a civil war and a constitutional amendment. Similarly, enforcement of the ban on American participation in the African trade was complicated by the failure of other jurisdictions -- most notably Spanish Cuba -- to cooperate in ending the international slave trade. Thus, even

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[1] *See* Act of Mar. 22, 1794, ch.11, 1 Stat. 347; Act of May 10, 1800, ch. 51, 2 Stat. 70; Act of Feb. 28, 1803, ch. 10, 2 Stat. 205 (1803).

[2] Act of Mar. 2, 1807, ch. 22, 2 Stat. 426.

[3] Act of Apr. 20, 1818, ch. 91, 3 Stat. 450; Act of March 3, 1819, ch. 101, 3 Stat. 532; Act of May 15, 1820, ch. 113, 3 Stat. 600; Act of Jan. 30, 1823, ch. 7, 3 Stat. 721.

when it was no longer easy or safe to bring new slaves to the United States, some American traders brought their illegal cargoes to Cuba. The last few cases to reach American courts involved U.S. citizens violating American law by trying to bring slaves to Cuba.[4] Similarly, the end of human trafficking is not likely to come about until the multiple demands for trafficking victims also come to an end, other nations cooperate in the suppression of trafficking, and there is an end to the desire of people to come to the United States (or other western countries) in violation of immigration laws.[5] However, strong legislation, rigorously enforced, can limit the problem, just as such legislation and enforcement virtually eliminated the illegal slave trade into the United States.

## I. SLAVERY

To understand the complexity of ending American involvement in the African slave trade, we must first understand the underlying institutional support for slavery. Slavery has existed in almost every known human culture.[6] Slavery came to the new world with the first Spanish explorers. They brought slavery with them when they came to the New World, and ironically, the first slaves in the transatlantic slave trade were brought *from* the Americas, as Christopher Columbus returned to Spain with Carib Indians, whom he gave to the Spanish court.[7] By the 1520s, however, Spain was importing Africans to the New World to work in mines and emerging sugar plantations. The Portuguese soon brought Africans to Brazil, and the French and

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[4] The Slavers, 69 U.S. 350, 355-56 (1865).

[5] The role of the victims in modern trafficking makes the problem quite different than the African slave trade. While no Africans voluntarily sought to be transported to the New World as slaves, huge numbers of people from all over the world are willing to take great risks to come to the United States, Britain, and other western countries, and are thus made vulnerable to being trafficked.

[6] *See* 2 THE MACMILLAN ENCYCLOPEDIA OF WORLD SLAVERY (Paul Finkelman & Joseph C. Miller eds. 1998) (providing short discussions of slavery in specific world cultures); *see generally* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY (1982).

[7] 2 MACMILLAN ENCYCLOPEDIA OF WORLD SLAVERY, *supra* note 6, at 53-53, 421-22. However, the Spanish did not *introduce* slavery into the New World. Pre-Columbian Cultures from Tupinamba in present day Brazil to the Tlingit and Nootka, in present-day Oregon, Washington, and British Columbia, and the Aleuts in Alaska practiced slavery. The Inca, Aztec, Zapotec, and Maya, in present day Peru, Mexico, and Central America, all practiced slavery. The Maya in Tabasco gave the Spanish conquistador Hernán Cortés a number of slaves as a gift when he landed on the coast of Mexico.

Dutch brought slaves to their New World colonies as well. All of these nations had a Roman law culture and were thus easily able to integrate slavery into their existing legal and political cultures.[8] The British were the last to adopt slavery, in part because they had no history of slavery in their culture and no ready-made legal system that could support slavery.[9] Thus, slavery grew slowly in the British colonies with the first legal recognition of the institution around 1660[10] and full-blown slavery not emerging until the 1690s.[11]

By the time of the American Revolution, slavery was a profitable institution in all of the American colonies. Slaves were most common in the Southern colonies, but slavery could be found in every one of the thirteen colonies in 1775 and the thirteen new states in 1776. There had been some religious opposition to slavery in the late seventeenth and early eighteenth centuries,[12] and, in the mid-eighteenth century, Quakers and Methodists found slavery to be inconsistent with their notions of Christianity.[13] But, most Americans had few qualms about holding Africans in bondage. The British Empire was a hierarchical society with a King on top and, at least in theory, serfs on the bottom.[14] Slavery was a new status added to the hierarchy. African slaves were different; they did not look like Englishmen or other Europeans, they came from an exotic, barely comprehensible world (Africa), they arrived without knowing any English, and, of course, they were not Christians. They also arrived in the New World already enslaved and in chains. Moreover, owning slaves was profitable.

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[8] *See generally* ALAN WATSON, SLAVE LAW IN THE AMERICAS (1989).
[9] *See Id*. at 63-82.
[10]*See* PAUL FINKELMAN, THE LAW OF FREEDOM AND BONDAGE: A CASEBOOK 15 (1986).
[11] *See id* at 18; *See also* EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA (1975).
[12] *See Resolutions on Slavery of the Germantown Mennonites*, (1688), *reprinted in*, DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY at 21-22 (Melvin I. Urofsky and Paul Finkelman ed., 2008); *see also* SAMUEL SEWELL, THE SELLING OF JOSEPH (Boston, Green and Allen, 1700).
[13] DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 330-32, 483-93, 383-88 (1966); *see also* JOHN WOOLMAN, SOME CONSIDERATIONS ON THE KEEPING OF NEGROES) (Grossman Publishers 1970) (1754).
[14] 2 MACMILLAN ENCYCLOPEDIA OF WORLD SLAVERY, *supra* note 6 at 574-75. There were no more serfs by this time, but the status existed in law, serving to remind Englishmen everywhere the range of statuses available in their culture. "By the end of the fifteenth century, serf-like manorial dues were nearly gone" and serfdom disappeared.

Thus, on the eve of the Revolution, slavery was thoroughly embedded into American culture, although it was most important in the South, where the vast majority of the imported slaves were destined. Despite the opposition to slavery from members of minority faiths with little political power, such as Methodists, Baptists, and Quakers, in the half century before the Revolution, the few successful limitations on the trade had been based on local economic conditions or concerns for public safety caused by fears that the presence of *too many* new slaves from Africa would lead to rebellions. Thus, at various times, some of the colonies tried to slow down or stop the importation of Africans because they feared slave revolts or they were uncomfortable with the vast flow of capital out of the colonies and back to England, where most of the slave traders originated.

During the Revolution, all of the new states stopped the trade. Most northerners believed the trade was an abomination. The southern states ended the trade as part of the general ban on importations from England and also because they feared that newly imported slaves might revolt. In the wake of the Revolution, none of the states reopened the trade mostly for economic reasons. However by this time attitudes towards slavery had begun to shift. In 1780 and 1783, Massachusetts and New Hampshire ended slavery in their new constitutions. In the *Quock Walker* cases, the Massachusetts courts interpreted the first clause of the new state constitution –"All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness" – to have ended slavery in the Commonwealth.[15] In New Hampshire the institution simply faded away after the state adopted its 1783 Constitution, which provided that "all men are born equally free and independent."[16] Pennsylvania (1780), Connecticut (1784), and Rhode Island (1784) passed gradual abolition acts, which put slavery in those states on

[15] MASS. CONST., pt. 1, Art. 1; Commonwealth v. Jennison (1785) *reprinted* in FINKELMAN, THE LAW OF FREEDOM AND BONDAGE, *supra* note 10, at 36.
[16] N.H. CONST. pt. I, art. 1, § 1 *reprinted in* FINKELMAN, THE LAW OF FREEDOM AND BONDAGE, *supra* note 10, at 41.

the road to its ultimate extinction.[17] In other states, organized opposition to slavery emerged.

When the Constitutional Convention met, slavery was legal in all but two states, while three others were in the process of ending slavery.[18] The African trade was shut down. The upper South states—Maryland and Virginia—had a surplus of slaves and had no intention of reopening the trade.[19] Further south, there was a shortage of slaves because so many had escaped during the War.[20] When the Convention considered giving the new Congress the power to regulate all foreign commerce, the delegations from Georgia and the Carolinas responded by insisting on specific protections for their right to import slaves in the future.[21] Charles Pinckney of South Carolina told the Convention that he could never support the Constitution if it allowed Congress to interfere with the slave trade,[22] while his more famous cousin, General Charles Cotesworth Pinckney, declared, "S. Carolina and Georgia cannot do without slaves."[23] In what can properly be called the "dirty compromise" at the Constitutional Convention,[24] a majority of the New England delegates joined most of the southern delegates, voting to protect the slave trade until *at least* 1808.[25] The next day, the South Carolina delegation supported the regulation of commerce by a simple majority in Congress. In this debate, General Pinckney asserted that "it was the true interest of the S[outhern] States to have no regulation of commerce."[26] But, in one of the most revealing statements of the Convention, he explained his support for a clause requiring only a simple majority for passage of commercial legislation. Pinckney said he took this position because of "their [the Eastern States'] liberal conduct

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[17] *See* ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH (1967); *see also* PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981).
[18] *Id.*
[19] *See* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 25 (2nd ed.) (2001).
[20] *See e.g.,* BENJAMIN QUARLES, THE NEGRO AND THE AMERICAN REVOLUTION 116-33 (1961) (noting at 119, that tens of thousands of slaves escaped with the British).
[21] *Id*. at 25-32.
[22] THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 364 (Max Farrand ed., Yale University Press rev. ed. 1966) [hereinafter FARRAND].
[23] *Id.* at 371-75.
[24] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 22-32.
[25] *See* FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 30.
[26] 2 FARRAND, *supra* note 22 at 449-52.

towards the views of South Carolina."[27] Similarly, South Carolina's Pierce Butler noted that the interests of the Southern and New England states were "as different as the interests of Russia and Turkey,"[28] but, he was "desirous of conciliating the affections of the East" and also he voted for the commerce clause.[29]

Thus, the Convention protected the African slave trade from Congressional abolition for at least twenty years. Until 1808, or until Congress acted after 1808, the states would be free to import slaves if they wished. The South Carolinians may have assumed that by 1808 the Deep South would have the political power to prevent an end to the trade, but it would not work out that way. In 1807, the U.S. Congress passed legislation, effective on January 1, 1808, which ended all importations of slaves into the United States.[30] Even before that date, Congress had passed a series of laws that prevented Americans from participating in the trade as sailors, ship captains, ship owners, ship builders, or investors in slave trading ventures.[31] The recent bicentennial of closing the trade to the United States provides an appropriate moment to examine how the United States withdrew from this form of commerce. It also helps us better understand how legislation can protect human rights in both the domestic and international arenas.

At one level, the tale is inspiring. This was the first time in history that a slaveholding nation both prohibited its own citizens from participating in the international slave trade and then voluntarily ceased to import new slaves. At another level, this is a cautionary, but nevertheless instructive, tale about how to use law to effectuate social change. Starting in 1794, the United States passed a series of laws to prevent Americans from participating in the trade.[32] These laws did not stop the importation of new slaves to the United States by traders from other countries, but only prohibited Americans from being involved in capturing and bringing slaves from Africa to anywhere in the Americas. This was a significant commitment to a moral principle, and one that

[27] 2 FARRAND, *supra* note 22 at 449-52.
[28] 2 FARRAND, *supra* note 22 at 451.
[29] 2 FARRAND, *supra* note 22 at 451.
[30] Act of Mar. 2, 1807, ch. 22, 2 Stat. 426 (prohibiting the importation of slaves).
[31] *See* Act of Mar. 22, 1794, ch.11, 1 Stat. 347; Act of May 10, 1800, ch. 51, 2 Stat. 70; Act of Feb. 28, 1803, ch. 10, 2 Stat. 205 (1803).
[32] *See* Act of Mar. 22, 1794, ch.11, 1 Stat. 347; Act of May 10, 1800, ch. 51, 2 Stat. 70; Act of Feb. 28, 1803, ch. 10, 2 Stat. 205 (1803).

prevented some Americans from profiting from this horrible, but nonetheless lucrative, commerce. In 1807 the United States banned the further importation of slaves into the nation. After the 1807 law went into effect, the United States passed a handful of other statutes to strengthen the ban and make it more effective.[33] Congress did not figure out how to fully ban the trade on its first try, or even the second or third tries. But, by building on each legislative attempt, it eventually closed the trade to all but the most intrepid smugglers.

## II. THE SLAVE TRADE AND MODERN HUMAN TRAFFICKING: A FEW COMPARISONS

Before turning to the history of the suppression of the African slave trade, it is important to understand some of the differences and similarities between the African slave trade and modern human trafficking. Such a comparison helps illustrate the difficulties, then and now, of applying human rights law to trafficking issues.

The most obvious difference between then and now centers on the legality of slavery. Before the Civil War, slavery was legal in all of the southern states. Until the American Revolution the slave trade was legal in all of the colonies, although a few colonies occasionally and temporarily stopped it with taxes and other regulations. All of the states voluntarily banned the trade during the War. After the Revolution South Carolina, North Carolina and Georgia reopened the trade. There was an active slave trade into South Carolina and Georgia until the federal ban went into effect in 1808. Thus, there was a long heritage of a legal slave trade in the Georgia and the Carolinas, and many African born slaves living there in the early nineteenth century, which made suppression of illegal importations problematic.

After 1808 it was illegal to bring new slaves into the United States, but there was still an active interstate slave trade. Thus, if slaves were smuggled into the nation, it was relatively easy, at least in the early nineteenth century, to integrate them into the existing slave system. Once slaves were smuggled into the American South, they could easily be merged into the existing

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[33] Act of Apr. 20, 1818, ch. 91, 3 Stat. 450; Act of March 3, 1819, ch. 101, 3 Stat. 532; ; Act of May 15, 1820, ch. 113, 3 Stat. 600; Act of Jan. 30, 1823, ch. 7, 3 Stat. 721.

slave population, and it would be almost impossible for law enforcement agents to prove that the slave had been illegally imported.

Smuggling free people, on the other hand, is not legal. Nor is it legal to hold people against their will in the modern United States (unlike before the Civil War, when it was legal to hold slaves in bondage against their will.) Thus, for trafficked people, their very presence in the country and the circumstance of their forced labor make them the obvious victims of illegal transportation and importation.[34] Their undocumented status, when discovered, could immediately lead to an investigation of how they came to the United States. Slaves, of course, had no documentation, and once a slave was illegally sold into the United States it was extremely difficult to prove that person was not legally here. This was especially true in the first decade or so after the closing of the trade, when it would have been easy to claim that a person who appeared to have been born in Africa had been brought in before the closing of the trade.

Similarly, slaves performed work that was legal, and thus, a smuggled slave was not the obvious victim of illegal activity. This is not true for people working in locked sweatshops or in the illegal sex trade. They are, by definition, being deprived of their rights. However, this is not true for trafficked workers who are employed in legal occupations---farm workers, restaurant employees, meat packers, domestic servants,[35] or those in the legal pornography and adult entertainment industry. They are not noticeably different than legal, voluntary workers in those jobs. Thus, some victims of modern trafficking are similar to victims of the illegal slave trade of the early eighteenth century in that they are involved in perfectly legal jobs.

Illegally imported slaves were brought to the United States on ships that had to cross a vast expanse of ocean to land surreptitiously on the American coast, away from a normal port of entry. Detection was difficult, but the importation process was

[34] A more complicated problem emerges when people are willingly trafficked into the United States in order to avoid immigration laws.

[35] *See* United States v. Mussry, 726 F.2d 1448 (9th Cir. 1984) (allowing the prosecution for enslavement of persons who had enticed Indonesian aliens to the United States, then seized their passports and return airline tickets, and told the Indonesians that they would suffer terrible penalties if they tried to escape. The Indonesians were then "sold" to wealthy families as domestic servants.).

also expensive and difficult. Modern traffickers use boats, planes, cars, and even foot traffic to bring people into the United States. Sometimes they are legally brought in on tourist visas and then forced into illegal working conditions. Stopping this transit is even more difficult than stopping the African slave trade; it is complicated by the fact that many people who are trafficked voluntarily agree to come to the United States in hopes of remaining here. As such, they are vulnerable to traffickers. Furthermore, they are afraid that if they are discovered they will be forced to return to their home countries where conditions may be dreadful and dangerous. Thus, unlike illegally imported African slaves, some victims of international trafficking are complicitous with the traffickers, even if they understand that they may face exploitation and semi-slavery for a period of time when they come to the United States.[36] These trafficked persons are not expecting a lifetime of slavery---as African slaves were---but only temporary servitude and exploitation in return for the possibility of remaining in the United States.

Thus, while there are many parallels between the suppression of the African trade and the suppression of modern human trafficking, there are also many differences. Most trafficked persons are not held in lifetime servitude as slaves, as Africans were in the nineteenth century. Their exploitation is vicious, and sometimes even lethal, but it often holds the promise of life in the United States as free people, albeit undocumented immigrants. With these caveats in mind, I now turn to the suppression of the African slave trade in the nineteenth century.

## III. EARLY REGULATION OF THE SLAVE TRADE

Before the American Revolution, both the colonies and Great Britain regulated the African slave trade to what became the United States. The British government gave special protection to the Royal African Company, which brought more slaves to the American colonies than any other single entity.[37] The slave trade

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[36] Some are also fearful that if they complain to authorities there will be retaliation against their families back home.

[37] *See* W.E.B. DU BOIS, THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA, 1683-1870, 2 (Henry Louis Gates, Jr. ed., Oxford University Press 2007) (King Charles II and other royal family members invested in the Royal African Company (RAC). The investors not only provided the RAC with "the protection of royal privileges," but also allowed the RAC to develop a monopoly on the

was an important part of Britain's mercantile policy. Britain collected taxes on imported slaves while merchants in the metropolis profited from the trade. Investors in the Royal African Company reached the highest echelons of British society and included members of the royal family.

In the colonies, the slave trade was a source of labor, profits, and local tax revenues. However, for both economic and prudential reasons, colonial governments occasionally sought to limit importations. In 1698, for example, the South Carolina legislature concluded "the great number of negroes which of late have been imported into this Collony [sic] may endanger the safety thereof."[38] This law did not limit the trade, but rather, it was designed to encourage the importation of white servants. It had virtually no impact on the growth of the black population, which by 1708 exceeded the white population.[39]

Facing a black majority in 1717, the state legislature implemented a tax of £40 per slave, which virtually shut down the trade, but two years later, it reduced the tax to £10 for every new slave brought from Africa, and the trade boomed.[40] In 1740, in response to the Stono Rebellion of 1739, South Carolina passed a new tax law that was designed to gradually slow importations.[41] For the first fifteen months after the law was adopted, South Carolinians would pay £10 for every slave imported into the

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early phase of the slave trade by providing the RAC with significant financing. This monopoly effectively ended in 1698.); *see also* Joseph C. Miller, *Royal African Company*, *in* 2 MACMILLAN ENCYCLOPEDIA OF WORLD SLAVERY, *supra* note 6 at 780-781.

[38] Act of Oct. 8, 1698, 2 STAT. S.C. 153 (1698) (incentivizing the importation of white slaves).

[39] *See generally* PETER H. WOOD, BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION (Alfred A. Knopf 1974) (discussing statistics on the growth of the white and slave populations in colonial South Carolina).

[40] Act of Dec. 11, 1717, 7 STAT S.C. 388, 39; *see also* DU BOIS, *supra* note 37, at 6; *see also* Act of March 20, 1719, 3 STAT. S.C. 56 (imposing a £10 duty on imports and exports, including slaves); *see also* WOOD, *supra* note 39.

[41] Act of Apr. 5, 1740, 3 STAT. S.C. 556 (1740) (imposing a tax on purchasers for the importation of slaves).

colony.[42] Then, for a three-year period, there would be a tax of £100 on each adult slave imported from Africa.[43] The law recited the "very dangerous consequence to the peace and safety" of the colony from the "barbarous and savage disposition" of Africans.[44]

However, the legislature apparently was unwilling to end importations immediately, perhaps for fear that it would be unfair to slavers already on the way to South Carolina as well as to masters who desperately needed more slaves. A fifteen-month moratorium on the £100 tax allowed for an orderly transition away from massive importations into the colony. In any event, the law expired in 1744, and the colonists could once again import slaves without facing prohibitive duties.[45] In 1760, South Carolina banned the trade outright because the colonists feared the growing number of African-born slaves, but royal authorities disallowed this law.[46] In 1764, the colony levied a new tax of £100 per head on imported slaves because, as the legislature noted, the growing number of African-born slaves "may prove of the most dangerous consequence."[47] However, as it had done in 1740, the legislature delayed the start of this duty, this time for just over sixteen months.[48] The law was to be in force only until 1767, but the trade was not resumed, apparently because of the growing tension between the colonies and Britain.[49] Indeed, the trade into South Carolina would not reopen until after the Revolution.

The use of tax policy to regulate and even stop the trade suggests that the South Carolinians wanted to avoid any moral issues that might have arisen with a debate over absolutely closing the trade. In addition, by using an economic tool to regulate an economic activity, the South Carolina government was able to enlist the only bureaucracy available—the tax collectors and regulators of the colony's ports—to limit the trade. The tax policy may also have made enforcement easier because juries sympathetic to slavery might have been unwilling to convict illegal traders if the only sanction had been criminal penalties.

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[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] DU BOIS, *supra* note 37, at 7.
[47] Act of Aug. 25, 1764, 4 STAT. S.C. 187 (laying an additional duty upon all Negroes imported into South Carolina).
[48] *Id.*
[49] *See* DU BOIS, *supra* note 37, at 7.

Shortly before the Revolution, Virginia also tried to ban the trade, not for prudential reasons but to prevent the outflow of capital from the colony. Virginians attempted to use prohibitive taxes to discourage the trade, but the Crown overruled this law because the trade was vital to the British economy and the Royal Africa Company had powerful patrons in the government.[50] In his *Summary View of the Rights of British America* (1774), Thomas Jefferson disingenuously asserted that Virginians favored the "abolition of domestic slavery" and that as the first step towards this end "it is necessary to exclude all further importations from Africa."[51] He complained, however, that, "our repeated attempts to effect this by … imposing duties which might amount to a prohibition, have been hitherto defeated by his majesty's negative."[52] There is, in fact, no evidence that any substantial number of white Virginians opposed slavery at this time.[53] In his first draft of the Declaration of Independence, Jefferson condemned the Crown in more forceful language, asserting that the King had "waged cruel war against human nature itself, violating it's most sacred rights of life & liberty" by perpetuating the African slave trade.[54] Calling the African trade "piratical warfare," Jefferson asserted that a "CHRISTIAN king of Great Britain" was so "determined to keep open a market where MEN" were bought and sold that he used his "negative" to suppress "every legislative attempt to prohibit or to restrain this execrable commerce."[55]

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[50] 5 ACTS OF THE PRIVY COUNCIL OF ENGLAND; COLONIAL SERIES 398-399 (JAMES MUNRO, ED., 6 July 1774) (London, HMO, 1912).

[51] 1 THOMAS JEFFERSON, *Summary View of the Rights of British America Draft of Instructions to the Virginia Delegates in the Continental Congress (MS Text of* A Summary View*, &c.)*, *in* THE PAPERS OF THOMAS JEFFERSON 121*,* 130 (Julian Boyd ed., 1950; THOMAS JEFFERSON, *Autobiography of Thomas Jefferson* (1821), *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 239*,* 248 (Adrienne Koch and William Peden eds., Franklin Library 1982) (1944).

[52] *Autobiography of Thomas Jefferson* (1821), *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON*, supra* note 48, at 239, 248.

[53] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 121.

[54] 1 THOMAS JEFFERSON, *III. Jefferson's "original Rough draught" of the Declaration of Independence*, *in* THE PAPERS OF THOMAS JEFFERSON 423, 426 (Julian Boyd ed., 1950).

[55] *Id.*

The Continental Congress removed Jefferson's tirade from the draft of the Declaration, in part because it simply did not ring true.[56] White Virginians, for the most part, had been willing and eager purchasers of slaves. Nor is there any evidence that either Jefferson, or any of the other leaders of Virginia, had any interest in actually ending slavery. Virginia's attempt to ban the trade was purely economic and not based on any moral opposition to slavery.[57] Similarly, the Crown's refusal to allow them to limit or end the trade was economic. Before the Revolution, most slaves came on English ships, and even those on American ships were usually purchased from agents of the Royal African Company stationed on the west coast of Africa. In passing this law Virginia was trying to stem the flow of capital from the colony to the mother country, even though later Jefferson claimed the motivations were antislavery.

During the Revolution, all of the new states banned or suspended the trade. This ban was part of the general non-imporation movement at the beginning of the Revolution. In some of the northern colonies, abolition of the trade had a moral as well as an economic basis. Opposition to slavery was growing, and during or immediately after the Revolution, five states either ended slavery outright (Massachusetts[58] and New Hampshire),[59] or passed gradual abolition acts (Pennsylvania, Rhode Island, and Connecticut) that led to a relatively speedy end to slavery.[60] New York and New Jersey would not take steps to end slavery until 1799 and 1804, but there was little demand for African imports in those state states, and some significant antislavery sentiment.[61] Thus, in the northern states, a ban on the trade was consistent with economic conditions and growing opposition to slavery itself. In the Southern states, where slavery was central to the economy, opposition to the trade was economic and political but not

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[56] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 116.

[57] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 116.

[58] The Massachusetts Constitution declared that all people were born "free and equal," which the Commonwealth's courts interpreted to having ended slavery there. *See* reference to MASS. CONST. in text at *supra* note 12.

[59] ZILVERSMIT, *supra* note 17, at 103-104 and 117.

[60] ZILVERSMIT, *supra* note 17, at 108; *see also* FINKELMAN, *supra* note 17, at 43-44 (explaining that the Canadian province of Upper Canada (Ontario) would also put and end to slavery); *see also* THE STATUTES OF THE PROVINCE OF UPPER CANADA, "Ch. VII - "An Act to prevent the further introduction of slaves, and to limit the Term of Contracts for servitude within this Province," 2nd Sess. of the 1st Provincial Parliament, 41 Act (1793).

[61] ZILVERSMIT, *supra* note 17, at 108; *see also* FINKELMAN, *supra* note 17, at 43-44.

essentially moral. After the Revolution, South Carolina reopened the trade, but then suspended it in 1785 because of an ongoing, statewide depression.[62] Similarly, North Carolina levied a prohibitive tax on imported slaves and then in 1794, banned the trade altogether.[63] The trade remained open in Georgia in 1787, but in 1793, in response to massive slave rebellions in Haiti, Georgia also banned the trade.[64] Thus, in 1787, when the Constitutional Convention met in Philadelphia, only Georgia was importing slaves.

The Revolution brought freedom to slaves who joined the armies or escaped in the chaos of war. Thousands of slaves left South Carolina and Georgia when the British army evacuated those states. Some of these people remained free while others ended up as slaves in the British Caribbean. At the end of the war, leaders in the Deep South fully expected to reopen the trade at some point. Although in 1787, when the Constitutional Convention met in Philadelphia, only Georgia had reopened it.[65] With the expectation of reopening the trade, the delegates from the Deep South jealously guarded their right to import slaves.

## IV. THE SLAVE TRADE ISSUE AT THE CONSTITUTIONAL CONVENTION

A major reason for calling the Convention was to give the new national government the power to regulate international and domestic commerce.[66] All of the delegates understood that the national government had to have some power over international and domestic commerce, but they disagreed on the scope of that power.[67] Most northern delegates favored a strong national commerce power that would stimulate foreign trade, help defend

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[62] Act of March 28, 1787, ch. 7, 1787 S.C. Acts. 430; *see also* DONALD ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765–1820, 318-19 (1967).
[63] An Act Against West Indian Slaves, ch. 1, 1795 N.C. Sess. Laws 786, *reprinted in* DU BOIS, *supra* note 37, at 236 app. B.
[64] Act of Dec. 19, 1793, 1793 Ga. Laws 442, *in* MARBURY & CRAWFORD, DIGEST 442, *reprinted in* DU BOIS, *supra* note 37 at 236 app. B; DONALD ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765–1820, 298-99 (1971).
[65] ROBINSON, *supra* note 64, at 295–99.
[66] MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 91 (2002); *see also* FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 10.
[67] *See* FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 22-32.

domestic commercial markets from foreign competition, and help protect the northern maritime industry.[68] Southern delegates feared that this power would be used to adversely affect their economic interests, because their states produced raw materials and agricultural commodities for export, were dependent on imports, and had no local shipping industry of their own.[69]

Slavery was at the heart of these southern fears because the South's economy was based on agricultural products produced by slaves. Southern delegates at the Convention envisioned an aggressive commercial North that would undermine their economy through export taxes and other commercial regulations. While there were no calls in the North at this time to interfere with slavery in the South, southern delegates nevertheless feared that Northerners would, in fact, turn on the institution, using the tax and commerce powers to attack slavery. No Northerners at the convention even suggested that the national government should be able to regulate slavery or touch slavery in the states. But some Southerners feared this would happen in a stronger national government. In one debate, South Carolina's Pierce Butler blurted out, "The security the Southn. States want is that their negroes may not be taken from them which some gentlemen within or without doors, have a very good mind to do."[70]

In addition to fearing that taxation or commercial regulation might indirectly harm slavery, delegates from the Carolinas and Georgia also worried that if the new Congress could regulate commerce, it would immediately ban the African slave trade. No Northerner ever raised this issue, but the delegates from South Carolina did so on their own when the Convention debated the powers of Congress over what the delegates called Navigation Acts, -- known as the Commerce Power today.[71] Their fear was quite simple. They assumed that if Congress had plenary power to regulate international commerce, a majority of Congressmen and Senators would immediately vote to close the African slave trade.[72]

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[68] *See* FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 22-32.
[69] *See* FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 22-32.
[70] *See* 1 FARRAND, *supra* note 22.
[71] *See* FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 30-31.
[72] *See* FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 30-31.

In the wake of the Revolution, opposition to the trade was strong for a variety of reasons. Some Americans found slavery deeply immoral, while others saw it as a fundamental violation of the principles of the Revolution.[73] By the time of the Convention, Pennsylvania and all the New England states had either ended slavery outright, or were in the process of doing so through gradual abolition acts.[74] Delegates from the Deep South presumed these states would also oppose a continuation of the trade. In addition, the South Carolinians feared that once the Constitution was in place, members of Congress from other slave states, like New York, New Jersey, Maryland, and Virginia, would support a ban.[75] Thus, the delegates from the Deep South were worried that if Congress had the power to regulate all international commerce, it would immediately ban the African trade.

These fears were also not unreasonable due to the fact that many Americans -- including many Virginians -- made a distinction between slavery and the African trade.[76] Thus, the South Carolinians and Georgians could not expect their fellow slave owners in the upper South, as well as in New York and New Jersey, to vote with them against a law that would ban the trade. Some Americans who were comfortable with, or at least resigned to, the continuation of slavery nevertheless believed that the African trade was particularly immoral and pernicious.[77] Many people who could justify—or at least rationalize—holding people in bondage, who were born to that condition, saw no good reason for bringing more slaves to the nation. Other Americans, particularly in the South, who had no strong moral feelings against the trade or even slavery, nevertheless believed that slavery was an inherent threat to society and the further importation of African slaves would only exacerbate an already dangerous situation. Having just fought a revolution for their own liberty, many Americans worried that slaves might soon follow the example of their masters. Finally, many slave owners in Virginia

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[73] HUGH THOMAS, THE SLAVE TRADE: THE HISTORY OF THE ATLANTIC SLAVE TRADE 479-480 (Simon & Schuster 1997); *see generally* DAVIS, *supra* note 13.
[74] FINKELMAN, AN IMPERFECT UNION, *supra* note 17, at 41-45 (1981); *see generally* ZILVERSMIT, *supra* note 17.
[75] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 17, 32.
[76] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 31 -32.
[77] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 32; *see* 2 FARRAND, *supra* note 22, at 370 (reproducing the speech by George Mason attacking the slave trade); *see generally* Peter Wallenstein, *Flawed Keepers of the Flame: The Interpreters of George Mason*, 102 VA. MAG. OF HIST. AND BIOGRAPHY 229-260 (1994).

and Maryland opposed the African trade for narrow economic reasons; they had more slaves than they needed and knew that if the trade ended, their surplus slaves would be more valuable.[78]

At the Convention, the delegates from South Carolina, supported by other Southerners, insisted on explicit protection for the African trade in the Constitution.[79] In fact, the debates over this issue were among the most intense and heated at the Convention. These debates were not part of the disagreements over slave representation that led to the three-fifths clause, but they were influenced by the adoption of that clause.[80] Once the Convention agreed to count slaves for purposes of representation in Congress, the status of African slave trade became more important. A continuation of the African trade would not only lead to an increase of slaves and human misery in the new nation, but it would also strengthen the South in Congress, giving more political power to the supporters of bondage.[81] This prospect led Gouverneur Morris, who represented Pennsylvania, to denounce the immorality of the clauses supporting slavery, especially to protect the slave trade. His analysis of the cost of the slave trade was clear, "when fairly explained comes to this: that the inhabitant of Georgia and S.C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & dam(n)s them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the rights of mankind, than the Citizen of Pa. or N. Jersey who views with a laudable horror, so nefarious a practice."[82] Despite the attempts of Morris and a few others to raise the moral question of slavery, most of the delegates focused on compromise and economic necessity.[83]

In August, the Convention debated the Commerce Clause, which would give Congress the power to regulate international and interstate commerce by a simple majority.[84] Before that

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[78] *See*, *e.g.*, 2 FARRAND*, supra* note 22, at 371 (demonstrating that in the 1780's and 1790's, Thomas Jefferson sold more than 80 slaves to raise money to pay his debts and buy the many things he imported from France).
[79] 2 FARRAND*, supra* note 22, at 210, 364-365, 370, 373.
[80] 2 FARRAND, *supra* note 22, at 106, 215-25, 369-375.
[81] 2 FARRAND, *supra* note 22, at 220-23.
[82] 2 FARRAND, *supra* note 22, at 220-23.
[83] 2 FARRAND, *supra* note 22, at 210-213, 221, 253-254; *see also* 1 FARRAND, *supra* note 22, at 637, 640.
[84] 2 FARRAND, *supra* note 22, at 305.

debate could begin, the South Carolina delegation insisted on protection for the African slave trade, as well as a ban on export taxes.[85] Southerners believed that export taxes could be used to tax the commodities produced by slave labor, such as tobacco and rice, and thus, indirectly harm slavery.[86] South Carolina's John Rutledge noted that he would vote for the Commerce Clause as it stood, but only "on condition that the subsequent part relating to negroes should also be agreed to."[87] Delegates from Connecticut and Massachusetts indicated some support for Rutledge's position. What should be called the "dirty compromise" of the Convention was taking shape.[88] The South Carolina delegation would support the Commerce Clause if New England would support prohibition on export taxes and protection for the African slave trade.[89] This understanding solidified in late August.

On August 21, the New England states joined the five slave states south of Delaware on three crucial votes.[90] On the first of these, all three New England states voted to defeat an amendment to the draft Constitution that would have allowed Congress, by a simple majority, to tax exports in order to raise money to support the national government.[91] During the debate over this motion, Connecticut's Oliver Ellsworth—a future chief justice of the U.S. Supreme Court—argued against taxing exports because such taxes would unfairly hurt the South, which produced most of the nation's major export crops such as "[t]ob[acco,] rice and indigo"[92], and thus "a tax on these alone would be partial & unjust."[93] On the second vote, with a key five-to-six outcome, Connecticut joined the five slave states to defeat a proposal, made by James Madison, to allow taxes on exports by a two-thirds majority of Congress.[94] On the final vote, to absolutely ban all export taxes, Massachusetts joined Connecticut, and the measure to prohibit export taxes favored by the South, passed seven to

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[85] 2 FARRAND, *supra* note 22, at 305-306.
[86] 2 FARRAND, *supra* note 22, at 360.
[87] 2 FARRAND, *supra* note 22, at 306; *see also* Paul Finkelman, *Garrison's Constitution: The Covenant with Death and How It Was Made, pt. 2*, 32 PROLOGUE (Winter 2000) *available at* http://www.archives.gov/publications/prologue/2000/winter/garrisons-constitution-2.html.
[88] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 25.
[89] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 25.
[90] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 25.
[91] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 25.
[92] 2 FARRAND, *supra* note 22, at 360.
[93] 2 FARRAND, *supra* note 22, at 360.
[94] 2 FARRAND, *supra* note 22, at 363.

four.[95] During the debate, the Virginia delegation was divided, three to two, with James Madison and George Washington unsuccessfully favoring congressional power to tax exports.[96] The Convention then debated a motion by Luther Martin to allow a tax on imported slaves.[97] Martin represented Maryland, a slave state with a surplus of slaves, a fact that helps explain his opposition to the African trade. Rutledge opposed Martin's motion with a two-pronged attack. He first told the Convention that "[t]he true question at present is whether the Southn. States shall or shall not be parties to the Union."[98] The implied threat of secession was clear. He then told the northern delegates, if they would "consult their interest, they will not oppose the increase of Slaves which will increase the commodities of which they will become the carriers."[99] Ellsworth of Connecticut agreed, refusing to debate the "morality or wisdom of slavery," by simply asserting, "[w]hat enriches a part enriches the whole."[100] The alliance for profit between the Deep South and New England was now fully developed.[101] It is important to understand that this alliance was not driven by New England's involvement in the trade. At this time, all of the New England states had banned the African trade and prohibited their citizens from participating in it.[102] New England's support for this alliance was driven by trade and commerce that would involve the products of slave labor, not the bodies of slaves themselves.

Encouraged by the support from Connecticut, Charles Pinckney reaffirmed that South Carolina would "never receive the plan if it prohibits the slave trade."[103] Shrewdly, Pinckney equated a tax on imported slaves with a prohibition on the trade itself. This was part of the South Carolinians' political strategy of constantly exaggerating any threat to slavery combined with constantly making persistent blustering threats to oppose the Constitution if they did not get their way on slavery-related issues.

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[95] 2 FARRAND, *supra* note 22, at 363-64.
[96] 2 FARRAND, *supra* note 22, at 363-64.
[97] 2 FARRAND, *supra* note 22, at 364.
[98] 2 FARRAND, *supra* note 22, at 364.
[99] 2 FARRAND, *supra* note 22, at 364.
[100] 2 FARRAND, *supra* note 22, at 364.
[101] 2 FARRAND, *supra* note 22, at 364.
[102] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 12 and 28.
[103] 2 FARRAND, *supra* note 22, at 364-65.

The next day, Connecticut's Roger Sherman declared his personal disapproval of slavery but refused to condemn it in other states of the nation. He then argued against a prohibition of the slave trade, asserting that "the public good did not require" an end to it.[104] In this debate, Sherman seemed to have accepted the hyperbolic claims of the South Carolina delegation that even a tax on the trade was the equivalent to an outright ban, since in fact, no delegate had actually suggested that the Convention insert anything in the Constitution to ban the trade. He also implicitly accepted the arguments coming from the Deep South that anything short of an explicit protection of the trade was the same thing as a ban. Sherman noted that under the Articles of Confederation, the existing framework for the national government, the states already had the right to import slaves. Thus, he saw no point in taking a right away from the states because "it was expedient to have as few objections as possible" to the new Constitution.[105] Here Sherman assumed it was necessary to defuse Southern opposition, which might result from the failure of the Convention to specifically protect the slave trade, but he did not think it necessary to placate those who might be against the Constitution if it had explicit protections for the slave trade. Sherman was prepared to appease those who supported it, but apparently was unconcerned about the strong opposition to the slave trade in his own region. Next, Sherman observed, "the abolition of slavery seemed to be going on in the U.S."[106] If left alone, "the good sense of the several States" would soon put an end to all slavery in the country.[107] In making this argument, Sherman seems to have confused the abolition of the slave trade with the abolition of slavery itself, or he foolishly believed that because some northern states were ending slavery, the rest of the nation would soon follow.[108] Finally, revealing his priorities, Sherman urged delegates to hurry and finish their business, noting, no doubt, that they had been in session for almost three months.[109]

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[104] 2 FARRAND, *supra* note 22, at 369.
[105] 2 FARRAND, *supra* note 22, at 369.
[106] 2 FARRAND, *supra* note 22, at 369.
[107] 2 FARRAND, *supra* note 22, at 369-70.
[108] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 26-27.
[109] 2 FARRAND, *supra* note 22, at 370.

George Mason of Virginia responded to Sherman with a fierce attack on the "infernal traffic" in slaves, which he blamed on "the avarice of British Merchants."[110] Reflecting the sectional hostilities at the Convention, as well as trying to lay blame on anyone but Virginians for the existence of slavery, Mason then "lamented" that his "Eastern brethren had from a lust of gain embarked in this nefarious traffic."[111] Mason leveled some of the strongest criticism of slavery yet heard at the Convention, declaring it an "evil" system that produced "the most pernicious effect on manners."[112] He declared that "[e]very master of slaves is born a petty tyrant" and warned that slavery would "bring the judgment of heaven on a Country" and ultimately produce "national calamities."[113] Despite this apparent attack on the whole institution, Mason ended his speech by demanding only that the national government "have power to prevent the increase of slavery" by prohibiting the African trade.[114] As historian Peter Wallenstein has argued, "Whatever his occasional rhetoric, George Mason was—if one must choose—proslavery, not antislavery. He acted [o]n behalf of Virginia slaveholders, not Virginia slaves," when he opposed a continuation of the African trade.[115]

Others at the Convention understood this quite well. Mason failed to say that Virginia, like Maryland, had a surplus of slaves and did not need the African slave trade any longer. But James McHenry candidly wrote in his private notes "[t]hat the population or increase of slaves in Virginia exceeded their calls for their services," and thus a prohibition of the slave trade "would be a monopoly" in Virginia's "favor."[116] Under such conditions "Virginia etc. would make their own terms for such [slaves] as they might sell."[117] The "etc" no doubt included McHenry's own state of Maryland.[118]

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[110] 2 FARRAND, *supra* note 22, at 370.
[111] 2 FARRAND, *supra* note 22, at 370
[112] 2 FARRAND, *supra* note 22, at 370; *see also* FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 27.
[113] 2 FARRAND, *supra* note 22, at 370.
[114] 2 FARRAND, *supra* note 22, at 370.
[115] *See* Peter Wallenstein, *Flawed Keepers of the Flame: The Interpreters of George Mason*, 102 VA MAG. OF HIST. AND BIOGRAPHY 253 (Apr. 1994) (describing scholarly and popular misunderstandings of Mason's views on slavery).
[116] 2 FARRAND, *supra* note 22, at 378.
[117] 2 FARRAND, *supra* note 22, at 378.
[118] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 27.

Oliver Ellsworth, adopting the same pose as his Connecticut colleague Roger Sherman, answered Mason. Because "he had never owned a slave," Ellsworth declared he "could not judge of the effects of slavery on character."[119] However, if slavery were as wrong as Mason had suggested, merely ending the trade was insufficient.[120] Ellsworth, of course, knew that the Virginians opposed allowing the national government to abolish slavery. Therefore, since there were many slaves in Virginia and Maryland and fewer in the Deep South, any prohibition on the trade would be "unjust towards S[outh] Carolina & Georgia."[121] So Ellsworth urged the Convention not to "intermeddle" in the affairs of other states.[122] The Convention had now witnessed the bizarre phenomenon of a New Englander defending the slave trade against the attacks of a Virginian. Once again, it is also important to understand that in this debate no one suggested that the Constitution interfere with slavery in the states or that it ban the trade. The South Carolinians had successfully turned the debate over giving Congress the *power* to regulate commerce into a debate over a ban on the slave trade, which ignored the fact that no one had suggested such a ban. In doing this, they were able to get New Englanders to defend their right to import slaves, thus setting the stage for an affirmative protection of the trade.

The Carolinians were, of course, quite capable of defending their own institution. Charles Pinckney, citing ancient Rome and Greece, declared that slavery was "justified by the example of all the world."[123] He warned that any prohibition of the slave trade would "produce serious objections to the Constitution which he wished to see adopted."[124] His older and more famous cousin, Gen. Charles Cotesworth Pinckney, also declared his support for the Constitution, but noted that his "personal influence . . . would be of no avail towards obtaining the assent" of his home state.[125] He believed Virginia's opposition to the trade was more pecuniary than moral. Virginia would "gain by stopping the importations"[126] because "[h]er slaves will rise in value, & she has more than she

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[119] 2 FARRAND, *supra* note 22, at 370-71.
[120] 2 FARRAND, *supra* note 22, at 371.
[121] 2 FARRAND, *supra* note 22, at 371.
[122] 2 FARRAND, *supra* note 22, at 371.
[123] 2 FARRAND, *supra* note 22, at 371.
[124] 2 FARRAND, *supra* note 22, at 371.
[125] 2 FARRAND, *supra* note 22, at 371.
[126] 2 FARRAND, *supra* note 22, at 371.

wants."[127] Prohibiting the trade would force South Carolina and Georgia "to confederate on such unequal terms."[128] While Virginia might gain, the nation as a whole would not. Appealing to the economic self-interest of the New Englanders, Pinckney argued that more slaves would produce more goods, and that result would help not only the South, but also states involved in "the carrying trade."[129] Furthermore, he declared, "[t]he more consumption also, and the more of this, the more of revenue for the common treasury."[130] Seeing the slave trade solely as an economic issue, Pinckney thought it "reasonable" that imported slaves be taxed.[131] But a prohibition of the slave trade would be "an exclusion of S. Carolina [sic] from the Union."[132] As he made clear at the beginning of his speech, "S[outh] Carolina [and] Georgia cannot do without slaves."[133] Rutledge and Pierce Butler added similar sentiments, as did Abraham Baldwin of Georgia and Hugh Williamson of North Carolina.[134] Significantly all of these southerners equated the lack of a specific protection for the African trade with "an exclusion" of the Deep South.

New England voices continued to support the Southern drawls. Elbridge Gerry of Massachusetts offered some conciliatory remarks, and Sherman, ever the ally of the South, declared that "it was better to let the S[outhern] States import slaves than to part with them, if they made that a *sine qua non*."[135] However, in what may have been an attempt to give his remarks an antislavery tone, he argued that taxing imported slaves was morally wrong, "because it implied they were *property*."[136] This position undoubtedly pleased Sherman's Deep South, who did not want to pay taxes on any slaves they imported. Sherman's speech also underscored the profound support that the Carolinians and Georgians found among some New Englanders.[137]

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[127] 2 FARRAND, *supra* note 22, at 371.
[128] 2 FARRAND, *supra* note 22, at 371.
[129] 2 FARRAND, *supra* note 22, at 371.
[130] 2 FARRAND, *supra* note 22, at 371.
[131] 2 FARRAND, *supra* note 22, at 371-2.
[132] 2 FARRAND, *supra* note 22, at 372.
[133] 2 FARRAND, *supra* note 22, at 371.
[134] 2 FARRAND, *supra* note 22, at 372-73; *see also* FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 28.
[135] 2 FARRAND, *supra* note 22, at 374, *italics added*, (defining the Latin term referring to an indispensible and essential action, condition, or ingredient).
[136] 2 FARRAND, *supra* note 22, at 374.
[137] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 28.

The reasons for cooperation between New England and the Deep South on this issue had thus become clear: New Englanders, engaged in the "carrying trade," would profit from transporting rice and other products that had been produced by slave laborers.[138] But the potential profits from a slight increase in the "carrying trade" for New Englanders were less important than the larger issue of Congress regulating commerce. Their demand for expansive congressional power to regulate commerce had achieved the willing support of the South Carolinians. In return, these New Englanders would support the right of the Carolinas and Georgia to import the slaves they could not do without.[139] On the other side of the issue, John Dickinson of Delaware vigorously opposed allowing the slave trade to continue. He argued that it was "inadmissible on every principle of honor & safety."[140] Furthermore, he was prepared to call the Carolinians' bluff on the question of union, doubting the Deep South would reject the Constitution if there was not explicit protection for the African slave trade.[141] James Wilson was also skeptical of Southern threats, but he did not offer any strong rebuttal.[142] Nor did Massachusetts's Rufus King offer a rebuttal; instead, he argued that prohibiting a tax on imported Africans was an "inequality that could not fail to strike the commercial sagacity of the Northn[ern and] middle States."[143] The most surprising contribution to this debate came from Gouverneur Morris, who represented Pennsylvania at the Convention.[144] Throughout the Convention, Morris was the most consistent opponent of slavery. He suggested

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[138] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 28 (Because all the New England states had criminalize participation in the trade by their citizens, or the use of their ports for slaving expeditions, there was no expectation that New England ships would be transporting slaves from Africa to the South.)

[139] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 28.

[140] 2 FARRAND, *supra* note 22, at 372.

[141].2 FARRAND, *supra* note 22, at 372-73.

[142] 2 FARRAND, *supra* note 22, at 373.

[143] 2 FARRAND, *supra* note 22, at 373.

[144] Morris was actually a wealthy New Yorker, whose family also had large landholdings in New Jersey. His grandfather, Lewis Morris, had been both Chief Justice of the New York colony and later the colonial governor of New Jersey. His half-brother, Lewis Morris the 3rd, was a signer of the Declaration of Independence. Gouverneur happened to be in Philadelphia when convention delegates were chosen, and against his personal wishes, the Pennsylvania Assembly elected him as a delegate.

that the subjects of commercial regulation and the African slave trade be sent to committee, shrewdly noting that "[t]hese things may form a bargain among the Northern & Southern States."[145] The Convention quickly accepted his suggestion.[146]

On August 25, the Convention considered a proposal that Congress be barred from prohibiting the African slave trade until the year 1800 but the Congress would nonetheless be allowed to levy a reasonable tax upon imported slaves.[147] South Carolina's General Pinckney immediately urged that the applicable year instead be 1808, twenty-years after ratification of the Constitution, a motion seconded by Nathaniel Gorham of Massachusetts.[148] In response, James Madison complained that the proposal was "dishonorable to the National character" and the Constitution, and that "[t]wenty years will produce all the mischief that can be apprehended from the liberty to import slaves."[149] Nevertheless, the delegates accepted Pinckney's 1808 date by a seven-to-four vote.[150] Three New England states, Maryland, and the three Deep South states supported Pinckney's motion.[151]

Gouverneur Morris, still resisting a continuation of the slave trade, then proposed that the clause specifically declare the "importation of slaves" was limited to the Carolinas and Georgia.[152] Morris wanted it known "that this part of the Constitution was a compliance with those States."[153] Yet, having made the motion in an effort to embarrass supporters of the slave trade, Morris then withdrew it.[154] By a seven-to-four vote, the Convention then adopted the slave trade provision.[155] The three New England states again joined Maryland and the Deep South in their push to permit the slave trade to continue for at least twenty years.[156] This vote was a key component of the "dirty compromise."

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[145] 2 FARRAND, *supra* note 22, at 374.
[146] 2 FARRAND, *supra* note 22, at 374.
[147] 2 FARRAND, *supra* note 22, at 408; *see also* FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 29-30.
[148] 2 FARRAND, *supra* note 22, at 415.
[149] 2 FARRAND, *supra* note 22, at 415.
[150] 2 FARRAND, *supra* note 22, at 416.
[151] 2 FARRAND, *supra* note 22, at 416.
[152] 2 FARRAND, *supra* note 22, at 415.
[153] 2 FARRAND, *supra* note 22, at 415.
[154] 2 FARRAND, *supra* note 22, at 416.
[155] 2 FARRAND, *supra* note 22, at 416.
[156] 2 FARRAND, *supra* note 22, at 416.

On August 29, the debates over commerce and the slave trade were joined, thus completing the "dirty compromise." In a debate over the commerce clause, Charles Pinckney, the younger and more impetuous of the two cousins, moved that the vote of a two-thirds majority be required for all acts of commercial regulation.[157] He argued that "[t]he power of regulating commerce was a pure concession on the part of the S. States," and that therefore a requirement of a two-thirds vote was reasonable.[158] His older cousin, General Charles Cotesworth Pinckney, agreed that "it was the true interest of the S. States to have no regulation of commerce."[159] Nevertheless he expressed his support for the simple majority clause, nodding approvingly at the eastern states' "liberal conduct towards the views of South Carolina" in regard to the slave trade.[160] These words were among the most revealing statements made at the Convention.

In the margins of his notes, Madison made the import of Pinckney's statement clear, writing that Pinckney "meant the permission to import slaves. An understanding on the two subjects of *navigation* and *slavery*, had taken place between those parts of the Union, which explains the vote on the Motion depending, as well as the language of Genl. Pinckney & others."[161] Other delegates confirmed Madison's conclusion. [162] Luther Martin, for example, later reported that:

> *the eastern* States, notwithstanding their *aversion to slavery*, were very willing to indulge the southern States, at least with a temporary liberty to prosecute the *slave trade*, provided the southern States would in their turn gratify them, by laying no *restriction* on *navigation acts;* and after a very little time, the committee by a great majority, agreed on a report, by which the general government was to be prohibited from preventing the importation of slaves for a limited time, and the restrictive clause relative to navigation acts was to be omitted.[163]

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[157] 2 FARRAND, *supra* note 22, at 449.
[158] 2 FARRAND, *supra* note 22, at 449.
[159] 2 FARRAND, *supra* note 22, at 449.
[160] 2 FARRAND, *supra* note 22, at 449.
[161] 2 FARRAND, *supra* note 22, at 449.
[162] 2 FARRAND, *supra* note 22, at 449–52.
[163] Luther Martin, *The Genuine Information Delivered to the Legislature of the State of*

Further debate confirmed that New Englanders and South Carolinians had indeed struck a bargain. Butler, for example, declared that the interests of the southern and eastern states were "as different as the interests of Russia and Turkey," yet because he was "desirous of conciliating the affections of the East," he opposed the two-thirds vote requirement.[164] Likewise, the Virginians, who had opposed the slave-trade provisions, now supported the demand for a two-thirds vote requirement for all legislation regulating commerce.[165]

However, the Virginians were in the minority. South Carolina joined all of the northern states and defeated the motion to require a two-thirds vote to regulate commerce.[166] The Convention subsequently adopted a clause permitting a simple majority to regulate commerce.[167]

The final text of the slave-trade provision was designed to obfuscate what the Convention had done. The clause read: "The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."[168]

It is important to understand that the clause did not require an end to the trade in 1808. Rather, it merely prevented Congress from ending the trade before that year. Ending the slave trade required passage of a bill through both houses of Congress and the signature of the President, a process that would provide supporters of the slave trade with at least three distinct opportunities to stop the bill and keep the slave trade alive and well. This is noteworthy, for at the time the Convention accepted this clause, almost every delegate assumed that the Deep South

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*Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia, in* 2 THE COMPLETE ANTI-FEDERALIST, 60–61 (Herbert J. Storing ed., 1981) [hereinafter STORING] (Martin, who later opposed the Constitution, made this point in his letter to the Maryland ratifying convention. He had been on the committee that drafted the compromise over commerce and the slave trade.).

[164] 1 FARRAND, *supra* note 22, at 451.

[165] 1 FARRAND, *supra* note 22, at 453.

[166] 1 FARRAND, *supra* note 22, at 453.

[167] 2 FARRAND, *supra* note 22, at 449–53.

[168] U.S. CONST. art. I, § 9, cl. 1.

and the southwest would grow faster than the rest of the nation, and that what is today Alabama and Mississippi would quickly become new states, while South Carolina and Georgia would experience booms in population.[169] Assuming the validity of these assumptions, by 1808 the states that most wanted to continue the slave trade would have had the political power and alliances to overcome any push to end the trade. Thus, the slave trade debate was seen in the Deep South as a major victory. South Carolina and Georgia had "bought" two decades to gain the strength to preserve the trade forever.

## V. THE SLAVE TRADE AND RATIFICATION

The slave-trade clause was a significant factor in the debates over ratification, but its impact was complicated. It was roundly condemned by opponents of the Constitution, both Northern and Southern. On the other hand, supporters of the Constitution—even those ambivalent or hostile to slavery—praised the clause, although for very different reasons.

Anti-federalists in the North and the upper South consistently hammered home the fundamental immorality of the clause. On the last day of the Convention, Virginia's George Mason—to no one's surprise—declared he would not sign the Constitution, citing the slave-trade clause as a major objection.[170] Mason was a man who owned many slaves, and one who would never emancipate any of them.[171] Nevertheless, he saw no reason to bring more slaves to the nation, because "such importations render the United States weaker, more vulnerable, and less capable of defence."[172] He did not add, but in the interests of total honesty could have added, that the slave trade would also

[169] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 205; *see e.g.* Benjamin Gale, Address at the Constitutional Convention (Nov. 12, 1787) *in* 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 423, 429 n. 7 (John P. Kaminski & Gaspare J. Saladino eds., 1986) (predicting the South would dominate Congress in the future).
[170] 2 FARRAND, *supra* note 22, at 640. Mason also specifically objected to the lack of a Bill of Rights.
[171] Wallenstein, *supra* note 34; John Michael Vlach, *Material Culture in the United States*, *in* 2 MACMILLAN ENCYCLOPEDIA OF WORLD SLAVERY, *supra* note 6, at 566.
[172] George Mason, *Objections to This Constitution of Government*, *in* 2 FARRAND, *supra* note 22, at 640.

diminish the value of the many slaves he already owned. Like other elite Virginians—George Washington being a major exception—Mason sold men "as you would do cattle at a market" to pay his debts and support his lifestyle.[173]

Many in the North, and some in the South, took a more principled stand against the Constitution and its slave-trade clause. A New Yorker complained that the Constitution condoned "drenching the bowels of Africa in gore, for the sake of enslaving its free-born innocent inhabitants. . ."[174] A correspondent for the *Philadelphia Independent Gazetteer* sarcastically noted that, "[a]mong the blessings of the new-proposed government" were the lack of a free press, the lack of a jury trial in civil case, and, "[a] Free importation of negroes for one and twenty years."[175] A Virginian thought the slave-trade provision was an "excellent clause" for "an Algerian constitution: but not so well calculated (I hope) for the latitude of America."[176]

Additionally, Northern anti-federalists feared more than just the slave trade. Three opponents of the Constitution in Massachusetts noted that it bound the states together as a "whole" and "the states" were "under obligation . . .reciprocally to aid each other in defence [sic] and support of everything to which they are entitled thereby, right or wrong."[177] Thus, they might be called to suppress a slave revolt or in some other way defend slavery as an institution. They could not predict how slavery might entangle them in the future, but they did know that "this lust for slavery,

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[173] JOHN C. MILLER, WOLF BY THE EARS: THOMAS JEFFERSON AND SLAVERY 107 (1977); *see also*, HENRY WIENCEK, AN IMPERFECT GOD: GEORGE WASHINGTON, HIS SLAVES, AND THE CREATION OF AMERICA 188 (2003); FRITZ HIRSHFELD, GEORGE WASHINGTON AND SLAVERY: A DOCUMENTARY PORTRAYAL 16 (1997) (quoting a letter from George Washington to Alexander Spotswood written Nov. 23, 1794) *in* THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 47 (John C. Fitzpatrick ed., 1931-44) (explaining he would *never* sell slaves, like cattle).

[174] *Letters from A Countryman from Dutchess County*, NEW YORK JOURNAL Jan. 22, 1788, *reprinted in* 6 STORING, *supra* note 163, at 62.

[175] *Blessings of the New Government*, PHILA. INDEP. GAZETTEER, Oct. 6, 1788, *reprinted in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, at 345-46 para. 136 (John P. Kaminski and Gaspare J. Saladino eds., 1981).

[176] *Essays by Republicus*, (LEXINGTON) KY. GAZETTE, Mar. 12, 1788, *reprinted in* 5 STORING, *supra* note 163, at 169.

[177] *Consider Arms, Malichi Maynard, and Samuel Field: Reasons for Dissent*, HAMPSHIRE GAZETTE, Apr. 9, 16, 1788, *reprinted in* 4 STORING, *supra* note 163, at 263.

[was] portentous of much evil in America, for the cry of innocent blood, . . . hath undoubtedly reached to the Heavens, to which that cry is always directed, and will draw down upon them vengeance adequate to the enormity of the crime."[178]

Northern supporters of the Constitution were at a rhetorical disadvantage in this debate, but they were nevertheless forced to engage the issue. In response, they developed three tactics. The first, and most honest response to the criticism of the slave-trade clause was the acknowledgement that Constitutional protection of the trade was politically necessary to secure the Deep South's support. These northern federalists accompanied this admission with the assertion that adoption of the clause was an improvement upon the existing state of affairs—otherwise the Articles of Confederation would have governed, granting the national government no power to regulate commerce, and thereby no power to eventually end the slave trade. These advocates of ratification thus argued that under the Constitutional system of government, it would be possible in the course of a *mere* twenty years to end the trade.[179] The best advocate of this position was Tench Coxe, who argued that the clause was a "clear implication" that the trade was "inconsistent with the disposition and the duties of the people of America," and that the "*temporary* reservation of any particular matter must ever be deemed as admission that it should be done away."[180] Coxe admitted that the clause had been included in the Constitution as a result of, "[r]egard [that] was necessarily paid to the peculiar situation of our southern fellow-citizens . . . ."[181]

Such arguments were entirely correct and undoubtedly provided cover for those who favored the Constitution but did not like the slave trade. However, it is hard to imagine the arguments persuaded very many people who were not already inclined to support the Constitution because "the arguments" did not answer the question of why the Convention so willingly suspended

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[178] *Id.*
[179] 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 598 (Jonathan Elliot, ed. 1891).
[180] TENCH COXE, AN AMERICAN CITIZEN IV: ON THE FEDERAL GOVERNMENT (Univ. of N. Carolina Press 1787), *reprinted in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 174, at 431.
[181] *Id.*

Congress's power to regulate commerce *only* for the African slave trade. Northern opponents of the Constitution were undoubtedly underwhelmed by the argument that their interests had to be sacrificed to placate the "peculiar situation" of Southerners.

A second argument was that the clause would *require* an end to the trade in 1808, and thus, this clause was actually anti-slavery. Just after the Convention ended, the *Pennsylvania Gazette* made this claim, arguing that the Constitution "provides an effectual check on the African trade, in the course of one and twenty years."[182] Rather than bemoaning the clause's waiting period, the *Gazette* bragged that this provision of the Constitution was "honorable to America," and made it "the first Christian power that has borne a testimony against a practice, that is alike disgraceful to religion, and repugnant to the true interests and happiness of Society."[183] Similarly, Benjamin Rush assured a private correspondent that in 1808 "there will be an end of the African trade in America."[184]

This argument was, of course, not correct. The clause clearly did not require, or even guarantee, an end to the trade. Because almost everyone at the Convention believed the South was growing faster than the North, South Carolina's delegation was counting on having enough political clout in 1808 to prevent an end to the trade. Optimistic supporters of the Constitution who opposed the trade hoped—correctly as it turned out—that in twenty years their side would have the votes to end the trade. But people like Rush were either themselves misled or willing to mislead others in asserting that the clause guaranteed an end to the trade in 1808.

Ironically, the federalist advocates of ratification, who supported this interpretation of the clause, may have been the first Americans to implement "popular constitutionalism" in the interpretation of the Constitution. By constantly asserting that the clause meant the trade would end in 1808, these supporters of the

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[182] PA. GAZETTE, Sept. 26, 1787, *reprinted in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 176, at 253-254.
[183] *Id*.
[184] Letter from Benjamin Rush to John Coakley Lettsom (Sept. 28, 1787), *in* 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 176, at 262.

Constitution helped turn their wishful thinking into a self-fulfilling prophecy. By the time the Constitution was ratified, many voters—perhaps a majority of them—believed that the Constitution mandated an end to the trade in 1808.

However, there were limits to how far popular constitutionalism might re-shape the document. The third variation of the Northern Federalists' argument on the trade illustrates such limitations. This was a thoroughly misleading, if not outright dishonest claim that the slave-trade clause would actually lead to an end to slavery itself, and not just the slave trade. However dishonest the argument, it was actually quite politically shrewd. Thus, in the Massachusetts ratifying Convention, Reverend Isaac Backus praised the clause for setting the stage to destroy slavery "with a . . . consumption."[185] The most important advocate of this position was James Wilson of Pennsylvania. He asserted at the Pennsylvania ratifying convention, "I consider this as laying the foundation for banishing slavery out of this country; and though the period is more distant than I could wish, yet it will produce the same kind, gradual change, which was pursued in Pennsylvania."[186] Under the Constitution, he also predicted that no new slave states would be admitted to the Union.[187] A day later he declared that this clause was a "lovely feature in the Constitution" that "would diffuse a beauty over its whole countenance."[188] In these speeches, Wilson made the subtle shift from the "trade" to slavery. Since most of his listeners were not as legally sophisticated as Wilson, he was able to fudge the issue. Thus he told the Pennsylvania ratifying convention that after "the lapse of a few years . . . Congress will have power to exterminate slavery from within our borders."[189] Since Wilson attended all the debates in the Convention over this clause, it is impossible to accept this statement as his understanding of the slave-trade clause. More likely, he simply made this argument to win support for the Constitution.

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[185] ISAAC BACKUS, Remarks at Mass. Convention (Feb. 1788), *in* 6 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1422 (John P. Kaminski & Gaspare J. Saladino eds., 2000).

[186] James Wilson, Speech on the Slave-Trade Clause (Dec. 3, 1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 463 (John P. Kaminski & Gaspare J. Saladino eds., 2000).

[187] *Id.*

[188] *Id.*

[189] *Id.*

Upper South supporters of the Constitution, like Edmund Randolph, argued that a ban on the trade was impossible under the Articles of Confederation, and thus, the Constitution – even if imperfect –was still a good bargain, because eventually the national government could end the trade.[190] In Virginia, where opposition to the slave trade was strong, this was probably the best face Federalists could put on this clause. Deep South supporters, like Charles Cotesworth Pinckney, simply bragged that they had won a great victory—as indeed they had—in protecting the trade for *at least* twenty years. In summing up the entire Constitution, General Pinckney, who had been one ablest defenders of slavery at the Convention, proudly told the South Carolina House of Representatives, "In short, considering all circumstances, we have made the best terms for the security of this species of property 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."[191] David Ramsey, writing as Civis, reminded South Carolinians that Congress could end the trade after 1808, but "it is probable that they will not" because "[t]he more rice we make, the more business will be for their shipping: their interest will coincide with ours."[192]

## VI. CONGRESSIONAL REGULATION

While Congress did not have the power to end the trade before 1808, it did have the power to regulate it, and starting in March 1794, it did just that.[193] The law prohibited ships leaving U.S. ports from trafficking in slaves to foreign countries.[194] Ships sailing from the United States to Africa, even if under a foreign registry, were required to "give bond with sufficient sureties, to the treasurer of the United States, that none of the natives of Africa, or any other foreign country or place, shall be taken on board . . . to be transported, or sold as slaves in any other foreign

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[190] EDMUND RANDOLPH, DEBATE ON DEFECTS IN THE CONSTITUTION (JUNE 24, 1788) [see page 586 of the source for the date of the debate], *reprinted in* 3 DEBATES IN THE SEVERAL STATE CONVENTIONS 598-99 (Jonathan Elliot ed., 1891).
[191] *Id.* at 286.
[192] David Ramsey, *To the Citizens of South Carolina*, CHARLESTON COLUMBIAN HERALD, Feb. 4, 1788, *in* 4 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 25 (John P. Kaminski & Gaspare J. Saladino eds., 1986).
[193] Act of March 22, 1794, ch. 11, 1 Stat. 347 (1794) (prohibiting the carrying of the slave trade from the United States to any foreign place or country).
[194] *Id.*

place, within nine months thereafter."[195] Penalties under the law, included fines ranging from $2,000 for outfitting a ship to $200 for each individual transported for the purpose of being sold into slavery. The Act provided that the actual ships involved in the trade could be confiscated and gave half of all fines to any informants, thus providing an incentive for mariners, dockworkers, and shipbuilders to monitor the activities of anyone they suspected of being involved in the illegal trade.[196]

In 1800, Congress amended the 1794 Act by dramatically increasing fines for illegal American participation in the trade and giving informants a right to the entire value of any ship condemned under the law.[197] In addition to not allowing American ships to participate in the trade, the new law prohibited any American from having any interest in a ship involved in the trade.[198] Thus, Americans could no longer invest in the trade, even if carried on legally by non-U.S. ships. If convicted of having an interest in the trade, an American was subject to a fine double the value of his investment in the vessel and also a forfeiture of money double the value of any slaves in which he had an interest.[199] The 1800 amendment explicitly prohibited any American citizen or resident alien from voluntarily serving "on board any foreign ship or vessel . . . employed in the slave trade."[200] It no longer mattered if the ship was a U.S. bottom or even if the ship left an American port. American sailors found on slave ships were now subject to a $2,000 fine.[201] The law authorized all "commissioned vessels of the United States, to seize and take any vessels employed" in the trade that violated the law, with the crew receiving half the value of the ship when it was sold.[202] This provided an enormous incentive for American ships to police the trade.

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[195] S.C. Acts of 1794, ch. 11, § 347 (1794) (prohibiting the carrying on of the slave trade from the United States to any foreign place or country).
[196] *Id.*
[197] Act of May 10, 1800, ch. 51, 2 Stat. 70 (1800).
[198] *Id.* at § 3, 2 Stat. at 70 -71.
[199] *Id.* at § 1, 2 Stat. at 70.
[200] *Id*. at § 2. 2 Stat. at 70.
[201] *Id*. at § 2, 2 Stat. at 71.
[202] *Id.* at § 4, 2 Stat. at 71.

In 1803, South Carolina reopened the trade.[203] Earlier that year Congress passed a new law to regulate the trade.[204] This Act provided new fines for people who brought slaves into states that banned the importation of slaves.[205] The law applied to a "negro, mulatto, or other person of colour" imported from Africa or the Caribbean.[206] The language prevented people from bringing in Africans who they claimed were not slaves, but rather servants or indentured servants.[207]

The Acts of 1794, 1800, and 1803 had been designed to limit American participation in the African trade but could not be used to stop the trade itself. Specifically, all of these laws passed before 1807 focused on ships, sailors, and investors.[208] None of the laws had any provision for what should happen to slaves illegally imported into the United States.[209] Indeed, while the 1794 law provided for the sale of a ship and its "tackle, furniture, apparel and other appurtenances" of a slave ship, it did not mention what should happen to any slaves on the ship.[210] Presumably, they too would be sold for the benefit of the United States, the informant, or any other claimant under the three laws.

## VII. Abolition of the Trade -- 1808

In his annual message to Congress in December 1806, Thomas Jefferson, who had long opposed the trade (but not slavery itself), reminded the nation that on January 1, 1808, the constitutional suspension of congressional power on this issue would finally expire.[211] He took a moment in his address to "congratulate" his

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[203] S.C. Acts of Dec. 17 1803, ch 7. § 449 (1803); *see also* Jed H. Shugerman, *The Louisiana Purchase and South Carolina's Reopening of the Slave Trade in 1803*, 22 J. EARLY REPUBLIC 263, 264 (Summer 2002).
[204] Act of Feb. 28, 1803, ch. 10, 2 Stat. 205 (1803).
[205] *Id.*
[206] *Id.* at § 1, 2 Stat. at 205.
[207] *See id.*
[208] *See* Act of Mar. 22, 1794, ch. 11, 1 Stat 347 (1794); *see also* Act of May 10, 1800, ch. 51, 2 Stat. 70; *see also* Act of Feb. 28, 1803, ch. 10, 2 Stat. 205 (1803).
[209] Act of March 22, 1794, ch. 11, 1 Stat 347 (1794).
[210] *Id.* at § 1, 1 Stat. at 349.
[211] Thomas Jefferson, *Sixth Annual Message*, *Dec. 2, 1806, in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 396 (James D. Richardson ed.,1897) *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=29448&st=&st1=).

> [f]ellow citizens, on the approach of the period at which you may interpose your authority constitutionally to withdraw the citizens of the United States from all further participation in those violations of human rights which have been so long continued on the unoffending inhabitants of Africa, and which the morality, the reputation, and the best [interests] of our country have long been eager to proscribe."[212]

He noted that any law passed by Congress could not take effect until January 1, 1808, but he urged Congress to act quickly "to prevent by timely notice expeditions which cannot be completed before that day."[213] Congress readily complied with legislation to absolutely ban all importation of slaves after January 1, 1808.[214] The 1807 Act was a comprehensive attempt to close the African trade, and by passing the law in March of 1807, Congress gave all international slave traders nine months to finish any on-going commerce with United States.[215]

The ten sections of the 1807 Act were designed to eliminate all importation of slaves into the United States. Beginning on January 1, 1808, it would "not be lawful to import or bring into the United States or the territories thereof from any foreign kingdom, place, or country, any negro, mulatto, or person of colour, with intent to hold, sell, or dispose of such [person] . . . as a slave, or to be held to service or labour."[216]

Penalties for participating in the trade varied. The 1807 Act provided an enormous penalty—$20,000—for anyone building a ship, or outfitting an existing ship, to be used in the trade.[217] American citizens participating in the trade were subject to fines of up to $10,000 and jail terms of between five and ten years.[218] Ships of any nation found in American ports or hovering off the American coast with slaves on them could be seized and forfeited, with the captain facing a $10,000 fine and up to four years in

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[212] *Id.*
[213] *Id.*
[214] Act of Mar. 2, 1807, ch. 22, 2 Stat. 426 (1807) (prohibiting the importation of slaves).
[215] *Id*. at § 1, 2 Stat. at 426.
[216] *Id.* at § 1, 2 Stat. at 426.
[217] *Id*. § 3, 2 Stat. at 426.
[218] *Id*. § 5, 2 Stat. at 429.

prison.[219] Any American who purchased illegally imported slaves would lose the slaves and be fined $800 for every slave purchased.[220] The law allowed the U.S. Navy to interdict ships involved in the illegal trade.[221] It required ships legally transporting slaves within the United States, from one Southern port to another, to register their cargo with port authorities before commencing their voyage.[222] This Act was designed to further prevent the illegal importation of slaves.[223]

The Act of 1807 certainly had teeth to it. Fines under the statute were enormous, and the potential jail time was surely enough to discourage most slave smugglers. Moreover, for the Jefferson Administration, which never much liked federal power, this act constituted a huge grant of power to the national government. Had Congress provided sufficient funding to enforce the law, it would have surely closed the trade. Funding the suppression of the trade, however, would be problematic until the Civil War.[224]

There was one other problem with the 1808 law: the disposition of illegally imported slaves. Logically, the slaves should have been either freed in the United States or sent back to Africa. After all, one of the goals of the law was to end the importation of new slaves from Africa.[225] President Jefferson and his Congressional allies rejected both possible options.[226] Jefferson was deeply hostile to the presence of free blacks in the United States.[227] In a letter to Edward Coles, shortly after he left office, he referred to them as "pests" to society.[228] Thus, his administration had no interest in allowing illegally imported

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[219] *Id*. § 3 2 Stat. at 426-27.
[220] *Id.* § 6, 2 Stat. at 427.
[221] *Id.* § 7 2 Stat., at 428.
[222] *Id.*
[223] *Id.* pmbl., 2 Stat. at 426.
[224] DU BOIS, *supra* note 37, at 75-82 (discussing the unwillingness of states to actually enforce the act).
[225] Act of Mar. 2, 1807, ch. 22, 2 Stat. 426 (1807) (prohibiting the importation of slaves).
[226] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at ch. 5-7 (2001).
[227] FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at ch. 6-7; *see also* THOMAS JEFFERSON, *Letter to Edward Coles*, *Aug. 25, 1814*, *in* THE PORTABLE JEFFERSON 544, 546 (Merrill D. Peterson ed., 1975).
[228] THOMAS JEFFERSON, *Letter to Edward Coles*, *Aug. 25, 1814*, *in* THE PORTABLE JEFFERSON 544, 546 (Merrill D. Peterson ed., 1975).

Africans to remain in the United States as free people. Nor was the deeply parsimonious Jefferson likely to support spending any money on returning the hapless Africans to their homeland. They may have been illegally seized as slaves, and illegally brought to America, but that did not mean they should be freed and sent home, especially at government expense.

So, what would the nation do with slaves illegally brought to its shores? Reflecting Jefferson's state rights ideology, his hatred of free blacks, and his desire to avoid spending money unless absolutely necessary,[229] the 1807 act provided that any slaves illegally found in the United States would be treated according to the law of the state in which they were found—or brought to.[230] In practice, this meant that the unfortunate Africans illegally taken to the United States would not become free, but instead they would become slaves in some southern state. Furthermore, the states where they were captured would actually profit from the illegal trade by selling them.[231] This aspect of the Act of 1807 illustrates that the Jefferson Administration was not anti-slavery and that it had few concerns about the immorality of actually enslaving free-born Africans. Such confiscations had the triple advantage of discouraging slave smugglers (who would, after all, lose all their cargo), enriching the Southern states (which would profit from the sale of the illegally imported slaves), and also giving individual Southerners the opportunity to acquire new slaves.

Under the Act of 1807, the United States would gain money from the sale of confiscated ships and the large fines imposed on anyone involved in the trade.[232] People informing on those who violated the law, as well as the crews of naval ships that seized traders, would also share in the proceeds for the sale of seized ships.[233] Southern states would have the proceeds from the sale of illegally imported slaves, and southern slave-owners would have access to a few more slaves. Anticipating the logic of Chief Justice Taney's decision in *Dred Scott v. Sandford*, the Africans

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[229] *See* FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 19, at 147-153.
[230] Act of Mar. 2, 1807, ch. 22, 2 Stat. 426 (1807) (prohibiting the importation of slaves).
[231] *Id* § 6, 2 Stat., at 427.
[232] Act of Mar. 2, 1807, ch. 22, 2 Stat. 426 (prohibiting the importation of slaves).
[233] *Id*. § 7, 2 Stat., at 428.

themselves would "have no rights" and remain slaves.[234] In sum, the Act of 1807 provided heavy penalties—great disincentives—for slave traders but ignored the slaves themselves. The Africans were treated like merchandise to be transferred from the smuggler to some owner who could get clear titles to them. The 1807 Act sought to end the trade, but it did nothing to undermine the legitimacy of holding men and women in bondage. In that respect, it truly represented the ideology of the president who signed it into law.

In 1818, Congress passed an elaborate new act—technically, an amendment to the Act of 1807, but really more like a new statute.[235] The new law tinkered with the penalties for various offenses. For example, the maximum fine for fitting out a ship was reduced to $5000, and the jail time was reduced to no more than seven years.[236] The reduction in penalties probably did not reflect any sense that the trade was less heinous. Rather, it suggested that the original penalties were probably out of line with standards for punishments at the time. The most significant change in the law was the standard by which courts would judge those charged under the 1818 Act. The new law shifted the burden of proof from the prosecution to the defendant.[237] The new law required the defendant "prove that the negro, mulatto, or person of color, which he or they shall be charged with having brought into the United States, or with purchasing . . . was brought into the United States at least five years previous to the commencement of such prosecution."[238] This section of the law created a statute of limitations of five years on the law banning the trade, but it also made prosecutions easier within those five years.[239] Under this law, anyone in possession of an African-born slave might have to prove how he came into possession of that slave, demonstrating

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[234] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407-8 (1857), *superseded by Constitutional Amendment*, U.S. Const. amends. XIII-XIV, (1868).
[235] Act of Apr. 20, 1818, ch. 91, 3 Stat 450 (1818) (adding to the act prohibiting the importation of slaves).
[236] *Id*. § 3, 3 Stat., at 451
[237] *Id*. § 8, 3 Stat., at 452.
[238] *Id*.
[239] *Id*.

the slave was in the United States at least five years prior to any prosecution.[240] The "Africanness" of the slave would be prima facie evidence against an owner, who could rebut it only by producing contrary evidence.[241]

In 1819, Congress dramatically changed the regulation of the trade.[242] First, it authorized the president to send "armed vessels of the United States, to be employed to cruise on any of the coasts of the United States . . . or of the coast of Africa" to interdict slave traders.[243] This was the beginning of what became known as the African Squadron, which patrolled the waters off the coast of Africa in an attempt to stop the trade at its source.[244] The 1819 Act also provided that illegally imported slaves be returned to Africa rather than be sold in the United States.[245] This provision was directly tied to the creation of the African Squadron. The act authorized the president to appoint agents to receive rescued Africans and return them to the continent of their birth.[246] Shortly after the adoption of the 1819 Act, the United States used Liberia as a destination for Africans taken off of intercepted ships.[247] American ships could now seize slave ships off the coast of Africa and immediately return the slaves to Africa, rather than taking them back to the United States to be sold, as was required in the 1807 Act. The law provided an economic incentive for sailors on these ships; the U.S. government promised a $25 bounty, to be shared by the crew of the interdicting vessel, for every slave rescued from traders.[248] The Act also provided a bounty of $50 per slave to any informant whose information led to the recovery of illegally imported slaves.[249]

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[240] *Id.*
[241] *Id.*
[242] Act of Mar. 3, 1819, ch. 101, 3 Stat. 532 (an addition to the act prohibiting the importation of slaves).
[243] *Id.* § 1, 3 Stat., at 533.
[244] HOWARD JONES, TO THE WEBSTER-ASHBURTON TREATY: A STUDY IN ANGLO-AMERICAN RELATIONS, 1783-1843, at 144 (1977).
[245] Act of Mar. 3, 1819, § 1, ch. 101, 3 Stat. 532 (1819) (an addition to the act prohibiting the importation of slaves).
[246] *Id.*
[247] Renee C. Redman, *Liberia*, *in* 2 MACMILLAN ENCYCLOPEDIA OF WORLD SLAVERY, *supra* note 6, at 525-26; *see generally* TOM W. SHICK, BEYOND THE PROMISED LAND: A HISTORY OF AFRO-AMERICAN SETTLER SOCIETY IN NINETEENTH CENTURY LIBERIA (1980).
[248] Act of Mar. 3, 1819, § 3, ch. 101, 3 Stat. 532 (1819) (adding to the act prohibiting the importation of slaves).
[249] *Id.* § 4.

This act changed the direction of the suppression of the trade. The focus was now in part on the injustice of enslaving someone who deserved to be free. The law now implicitly condemned American slavery itself. If it was wrong—unlawful—to enslave an African after 1819, why, someone might ask, was it not wrong to enslave one before 1808? And if the original enslavement was morally wrong, then what was the basis for holding the descendants of that person in slavery? The act also took the United States out of the business of marketing slaves. Before 1819, confiscated slaves were sold under the laws of the states where they ended up.[250] Naval crews and informants were in part compensated from the sale of these slaves.[251] Under this new law, taxpayers compensated naval crews and informants through bounties, and the Africans went home.[252] This was a dramatic change in American policy. For the first time in the nation's history, the United States was willing to spend money to help Africans gain their liberty.

The final substantive statute to regulate the trade was passed in 1820, with the unlikely title "An Act to continue in force 'An act to protect the commerce of the United States, and to punish the crime of piracy,' and also to make further provisions for punishing the crime of piracy."[253] The key elements of the law were two sections declaring that any American citizen engaging in the African slave trade "shall be adjudged a pirate; and on conviction thereof before the circuit court of the United States for the district into which shall be brought or found, shall suffer death."[254] The same language was applied to non-Americans found on board slave ships owned or commissioned by Americans.[255] The statute provided that this penalty was to be in force for only two years but, on January 3, 1823, Congress made it a permanent statute.[256] This was a dramatic and important change in U.S. policy.

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[250] *See* An Act to Prohibit the Importation of Slaves, ch. 22, 2 Stat 426 (1807); *see also* Act of Apr. 20, 1818, ch. 91, 3 Stat 450 (1818).
[251] Act of Apr. 20, 1818, ch. 91, 3 Stat., at 450, 451 (1818).
[252] Act of Mar. 3, 1819, ch. 101, 3 Stat. 532 (1819).
[253] Act of May 15, 1820, ch 113, 3 Stat. 600 (1820).
[254] *Id* at 601.
[255] *Id.*§ 3, 3 Stat., at 601.
[256] Act of Jan. 30,1823, ch. 7, 3 Stat. 721 (1823).

After 1820, participation in the African slave trade was considered the most heinous crime on the high seas— a form of piracy—punished by death.[257] Never before had the United States taken such a stand against any aspect of slavery. Enforcement would be a challenge. The Atlantic Ocean was vast, and the African Squadron was always too small.[258] Jurors sympathetic to slavery would try slavers captured in or near southern ports. Additionally, these jurors might also not always be hostile to the illegal importation of slaves. Until the Lincoln Administration actually enforced the law to its fullest, no slave trader would be executed.[259] But, the 1820 law was somewhat effective in curbing the trade. Few sailors were willing to risk their lives for the relatively paltry earnings on board a slave ship. The high cost of failure—confiscation of a ship, large fines, jail time for the owner, and possibly death for the captain and crew—surely discouraged most would-be traders. Incentives for informing on Americans who bought illegally imported slaves were high. At $50 a slave, an informant could make $5,000 for tipping off authorities that a mere one hundred Africans had been secretly and illegally landed.[260] At $25 a slave, the crews of the African Squadron had a strong incentive for acting "above and beyond" the call of duty.[261] Even in cases where the slavers were not executed, ships were seized and forfeited, making the business very expensive and not very profitable.[262]

In spite of this system of both incentives to help catch slave smugglers and disincentives to stop smuggling slaves, some slaves were smuggled into the United States after 1820. But, the risks were high and the numbers were relatively few. In an eight-year period, from 1800 until December 31, 1807, more than forty thousand Africans were forcibly but legally brought into the country.[263] After 1820, it is unlikely that more than ten thousand

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[257] Act of May 15, 1820, ch. 113, 3 Stat. 600 (1820); Act of Jan. 30, 1823, ch. 7, 3 Stat. 721 (1823).

[258] *See* JONES, *supra* note 245, at 144-145 (discussing reasons for the African Squadron's failure to effectively combat the slave trade); *see also* DU BOIS, *supra* note 37, at 141-49.

[259] S*ee* United States v. Gordon, 25 F. Cas. 1364 (1861), *aff'd*, *ex parte,* Gordon, 66 U.S. 503 (1862) (The only slave trader ever hanged under the law was Nathaniel Gordon.).

[260] Act of Mar. 3, 1819, ch. 101, 3 Stat. 532, 534 (1819).

[261] Act of March 3, 1819, ch. 101, §§ 3-4, 3 Stat. 532, 534 (1819).

[262] *See e.g.* The Slavers, 69 U.S. 350, 355-56 (1865) (upholding forfeiture of the vessel *The Kate*).

[263] Shugerman, *supra* note 204, at 273-74.

illegal Africans were successfully landed in the United States.[264] It may have even been a tenth of that. American-born slaves would be shipped south in large numbers, as the internal slave trade replaced the African trade and hundreds of thousands of African-American slaves were uprooted and moved further south and further west.[265] The cost of ending that domestic slave trade -- the American Civil War -- would be much higher than ending the African trade. But, the moral issue was set in 1819 and 1820 when the United States finally stated, in unequivocal terms, that enslaving people was a "wrong" and those who engaged in the African trade were no better than common pirates.[266] And, like common pirates, they deserved to be hanged.[267]

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[264] Sean Kelley, *Blackbirders and Bozales: African-Born Slaves on the Lower Brazos River of Texas in the Nineteenth Century*, 54 CIVIL WAR HIST. 407, 408 (2008).
[265] MICHAEL TADMAN, SPECULATORS AND SLAVES: MASTERS, TRADERS, AND SLAVES IN THE OLD SOUTH 225-27 app. 1 (1996).
[266] Act of March 3, 1819, ch. 101, 3 Stat. 532 (1819); Act of May 15, 1820, ch. 113, 3 Stat. 600 (1820); Act of Jan 30, 1823, ch. 7, 3 Stat. 721 (1823).
[267] *See* United States v. Gordon, 25 F. Cas. 1364 (1861) (Slave trader, Nathanial Gordon, was hanged.), *aff'd sub nom. Ex parte Gordon,* 66 U.S. 503 (1861) (Gordon submitted a writ of prohibition application and certiorari, but the Supreme Court affirmed his sentence to death.).